CONVEYANCING 2022

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PREFACE

This is the twenty-fourth annual update of new developments in the law of conveyancing. As in previous years, it is divided into five parts. There is, first, a brief description of all cases which have been reported, or appeared on the websites of the Scottish Courts (www.scotcourts.gov.uk) or of the Lands Tribunal for Scotland (www.lands-tribunal-scotland.org.uk/), or have otherwise come to our attention since *Conveyancing 2021*.

The next two parts summarise, respectively, statutory developments during 2022 and other material of interest to conveyancers. The fourth part is a detailed commentary on selected issues arising from the first three parts. Finally, in Part V, there are two tables. A cumulative table of decisions, usually by the Lands Tribunal, on the variation or discharge of title conditions covers all decisions since 2019; an earlier, cumulative table of all cases from 2004 to 2018 can be found at the end of *Conveyancing 2018*. This is followed by a cumulative table of appeals, designed to facilitate moving from one annual volume to the next.

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

We gratefully acknowledge help received from Alan Barr, Malcolm Combe, Denis Garrity, Karen Hamilton, Jonathan Hodge, Lynne Johnstone, Rebecca MacLeod and Roddy Paisley.

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14 March 2023

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MISSIVES OF SALE

(1) GWR Property Co Ltd v Forrest Outdoor Media Ltd [2022] CSOH 14, 2022 SCLR 57

GWR Property Co Ltd (the pursuer) held a lease of ground at Glasgow Airport. It contracted with Forrest Outdoor Media Ltd (the defender) whereby the latter would become sub-tenant, but the contract was subject to a suspensive condition, namely that certain 'Works', chiefly the erection by the pursuer of an 'advertising totem', would be carried out by the pursuer. (This term, hitherto unknown to us, is not explained in the case, but seems to mean an unsightly freestanding column displaying advertisements on digital screens.) The contract provided:

> 4.1 The Missives shall be suspensively conditional upon the Head Tenant giving notice to the Sub-Tenant that Completion (as defined in the Licence for Works) of the Works has occurred pursuant to the provisions of the Licence for Works.

Here the term 'the Works' seems to have meant the construction of the totem.

One of GWR's employees (and according to the pursuer one of its directors), a Mr Chandler, signed a completion certificate, whereupon GWR notified Forrest Outdoor that the suspensive condition had now been purified, and requiring payment of the grassum due under the missives, namely £480,00**0**. This Forrest Outdoor refused to do, arguing that the construction work had not been properly carried out. As noted in para 26 of the judgment, the alleged defects 'include problems with cladding, bracing, bolts, steel angles, nuts, Tek-screws, screen fixings, advertising displays, palisade fencing and street lighting, landscaping, plate edges and "numerous other incomplete, missing or defective works"'.

Forrest Outdoor served a counter-notice resiling from the missives. GWR then sued for performance. The defence to the action had three branches. We quote the Lord Ordinary, Lord Clark, at para 4:

> First, that the purported completion certificate was not issued in accordance with the express terms of the building contract, the licence for works or the missives and so it did not therefore purify the suspensive condition in clause 4.1 of the missives and fell to be reduced. Secondly, the missives contain the five implied terms set out below, and the purported completion certificate was issued in breach of those implied

> terms. Thirdly, the purported completion certificate was issued fraudulently and dishonestly by Mr Chandler and his knowledge can be attributed to the pursuer.

As to the third branch of the defence, the defender sought reduction of the completion certificate.

The five alleged implied terms, as put forward by the defender, were as follows (see para 5 of the judgment):

> (First) … that the Pursuer would act reasonably and honestly in relation to the purported purification of clause 4.1.
>
> (Second) … that, in respect of any certificate with contractual effect under the Missives, the Pursuer would not appoint a person with a direct or indirect conflict of interest in the issuing of such a certificate as the person required to issue it.
>
> (Third) esto a certificate granted by a person with such a conflict of interest can be valid at all (which is denied), … that the Pursuer will only seek to rely on a purported practical completion certificate issued by one of its employees, such as Mr Chandler, if it genuinely and honestly believes, and has a reasonable basis for so believing, that the said purported certificate had been properly issued by its employee and that the Works were, as a matter of objective fact, practically complete.
>
> (Fourth) … that the Pursuer will not seek to rely on a purported practical completion certificate issued by Mr Chandler without such a belief and such a basis.
>
> (Fifth) … that the Pursuer will not seek to rely on a purported certificate when it knows, or ought to know, that the Works are not, in fact, practically complete in accordance with the terms of the Licence for Works and that the purported certificate has not been properly issued.

The first two branches of the defence (interpretation, and implied terms) were rejected by the Lord Ordinary. The courts are reluctant – arguably too reluctant – to allow implied-in-fact terms in contracts. As to the third branch (reduction of the completion certificate on the basis of fraud) the Lord Ordinary allowed proof.

The missives contained procedures in clause 4.3 that could be invoked if Forrest Outdoor was not satisfied that completion had taken place. It is not clear whether these procedures were invoked, or, if not, why not.

We conclude with an observation about completion certificates. The defender was unhappy that the certificate had been signed by an employee (and perhaps director) of the pursuer. But such is the nature of a completion certificate today. It is issued by or on behalf of the person who carries out the works as authorised by the building warrant: see s 17 and in particular s 17(10) of the Building (Scotland) Act 2003, though the precise interpretation of that subsection is perhaps not wholly free from doubt. Thus a completion certificate is merely an *assertion* that the works have been done conform to warrant – an assertion made *by an interested party*. The 2003 Act has further provisions as to the submission of a completion certificate, once it is issued, to the 'verifier', who may or may not 'accept' it: s 18. If it is important to determine whether construction work has been carried out conform to warrant, a completion certificate, in itself, is not enough. For more on the system introduced by the 2003 Act, see *Conveyancing 2003* pp 85–88.

(2) Drysdale v Purvis
[2022] CSOH 66, 2022 GWD 30-435

Mr and Mrs Drysdale owned Cavelstone Farm, near Kinross. In 1995 Mr Drysdale was sequestrated. His trustee in sequestration, Mr Ferris, put the farm up for sale. Part was sold to Mr and Mrs Purvis. It seems, though this is not made quite clear in the judgment, that Mrs Drysdale co-operated, ie agreed to include her half-share in the sale. The remaining land was left unsold, and Mr and Mrs Drysdale retained it. What happened to the sequestration in relation to Mr Drysdale's half share of the retained property is unclear, but somehow it vanished from the scene. One possibility is that the sale of the rest of the land raised enough money to pay off all debts, and there are, indeed, some indications in the judgment to suggest that this is what happened: see eg paras 12 and 15.

It appears that the same law firm acted simultaneously for all five parties, ie (i) Mr Ferris, (ii) Mr Drysdale (iii) Mrs Drysdale, (iv) Mr Purvis and (v) Mrs Purvis. (For another case this year in which the same solicitor acted for all parties see *Thomson v Warwick* [2022] SC INV 31, 2023 GWD 1-7 (Case (22).)

Mr and Mrs Purvis took possession not only of the land specified in the missives and the disposition, which did not include the farm steading, but also of most of the steading. Over the years they expended significant amounts of money on it. No issue was raised about this. Mr and Mrs Drysdale and Mr and Mrs Purvis were friends, and indeed some of the fields that had been disponed to Mr and Mrs Purvis continued to be farmed by the Drysdales, rent-free. In other words, possession did not track what the missives and disposition said, Mr and Mrs Drysdale possessing some land that had been disponed, and Mr and Mrs Purvis possessing some land that had not been disponed.

Matters continued thus from 1995 until 2018, when Mr Drysdale had to go into a care home, and his affairs were taken over by his daughters, acting under power of attorney. (Mrs Drysdale had died in 2007. Presumably Mr Drysdale inherited her rights, though this is not made clear in the judgment.) Litigation followed between Mr Drysdale (but in effect his daughters) and Mr and Mrs Purvis. In addition a company called Cavelstone Farm Ltd was involved, a Purvis family company, to which they had disponed the land that they had bought.

The litigation involved three separate actions – one of them by Mr Drysdale (through his daughters) against Mr and Mrs Purvis and two by Mr and Mrs Purvis against Mr Drysdale:

- Mr Drysdale sought declarator that he was the owner of the area that Mr and Mrs Purvis had taken possession of but had not been included in the missives or disposition (ie most of the farm steading).
- Mr and Mrs Purvis sought rectification of both the missives and the disposition so as to make them include that disputed area, saying that its omission from the missives and disposition had been an error, those documents having failed to reflect the true agreement between the parties.
- Mr and Mrs Purvis asserted that there existed an unwritten agreement, entered into two or three years after the initial transaction, that when Mr

> Drysdale gave up farming, which eventually happened in 2018, he would dispone to them the remainder of the farm, at a price based on market value, but minus the sundry benefits that, it was envisaged, would over time be conferred on him by Mr and Mrs Purvis. These included, they averred, upgrade of a farm track, new vehicles, a new house, free electricity and heating oil and so on. The value of the residue of the land was, averred Mr and Mrs Purvis, £543,000, and their contributions over the years, they said, had a value (which fell to be deducted from that figure) of £352,868.

A conjoined proof was heard in respect of all three actions. After so many years there were difficulties in establishing what had happened in 1995. The law firm's file no longer existed. Mrs Drysdale was dead and Mr Drysdale no longer had the mental capacity to give evidence.

The Lord Ordinary (Lord Turnbull) rejected the first claim, made on behalf of Mr Drysdale and sustained the rectification case in favour of Mr and Mrs Purvis, as to which see Case (53) below. He also rejected the claim by Mr and Mrs Purvis for the purchase of the remainder of the property. In that connection the Lord Ordinary noted at para 114 that, although the alleged agreement was not in writing, it might be capable of being set up by actings in terms of s 1(3) and (4) of the Requirements of Writing (Scotland) Act 1995. He also accepted, on the evidence, that there had been an agreement as averred by Mr and Mrs Purvis (para 111):

> I am … satisfied that there were discussions about the sale of the remaining part of the farm to Mr and Mrs Purvis and that the two men agreed between themselves that the purchase price would be market value minus the cost of the work to be done for Mr Drysdale and of the facilities provided to him.

Nevertheless the third claim failed. 'The reality of the situation is that matters have drifted on for so long, without any reliable record of the works undertaken or services supplied being kept, and without any attempt being made to enforce the agreement entered into, that it is now impossible to ascertain the price to be paid in terms of the agreement' (para 119).

The Lord Ordinary added (para 121):

> That is not to say that Mr Purvis [and Mrs Purvis?] should be treated as having gifted all of the various benefits which were made available to Mr and Mrs Drysdale. There may well be other routes available through which he can receive recompense.

He did not develop this theme, understandably, for this was a matter for Mr and Mrs Purvis to take legal advice upon, but we would surmise that he had in mind the law of unjustified enrichment in general, and in particular the concept of *causa data causa non secuta*.

(3) CSG Commercial Ltd v AJ Capital Partners LLC [2022] CSOH 60, 2022 SLT 1345

The defender (a Tennessee company) bought three hotels from Macdonald Hotels Ltd (a Scottish company): Rusacks Hotel, St Andrews, the Marine Hotel, North

Berwick and the Randolph Hotel, Oxford, the total price being £91.2 million. The pursuer seems to have had something to do with the deal, though precisely what is uncertain. It sued for damages for breach of an alleged joint-venture agreement, though it later seems to have dropped this claim. It also sued for non-payment of a fee of £920,000, which it claimed as an 'introduction fee', calculated at 1% of the deal value (this percentage being said to be the 'industry standard'). The pursuer claimed that this fee had been a matter of agreement. There were also alternative conclusions for damages for misrepresentation, and for payment under the law of unjustified enrichment for the work the pursuer had allegedly carried out to assist the deal.

The pursuer's pleadings were in a number of respects problematic: the Lord Ordinary (Lord Braid) found himself 'floundering in vain' in trying to understand them (para 39). 'Tempted as I am to dismiss the entire action' said the Lord Ordinary at para 51, in the end he dismissed only most of it, allowing proof on the claim for an introduction fee, adding that 'beneath the muddy waters of the present pleadings there may be lurking the basis of a legally sound case based upon contract'. It may be added that a substantial portion of the judgment concerned questions as to whether the court had jurisdiction in the case.

TENEMENTS, DEVELOPMENTS AND FACTORS

(4) South Lanarkshire Council v Boyd [2022] CSIH 41, 2022 Hous LR 91

Question: if the owner of one or more units in a development acts as factor for the development as a whole, 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 pays the management costs?

In the present case, the South Lanarkshire 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, with his wife, the owner of one of those flats, their 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) a fee for property management. The cost of the former was divided among the owners or tenants of all 72 flats; the cost of the latter was divided among the owners of the 19 flats in private ownership alone. Furthermore, not all of the management related specifically to Rosebank Tower: as well as 'direct' costs there were 'shared' costs (eg for inspections and construction of works and home owners' enquiries) in respect of which the 19 owners at Rosebank Tower were charged a proportionate share of

the overall cost of managing all of the 8,518 properties that the Council factored. The total 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, he said, it was clear from the deed of conditions governing the development that all common charges, including the management fee, 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.

Mr Boyd's position was upheld first by the First-instance Tribunal and then, on appeal, by the Upper Tribunal: see [2021] UT 24 (*Conveyancing 2021* Case (2)). The Council appealed again, this time to the Inner House of the Court of Session, but the Inner House too has now found for Mr Boyd.

Clause 6(c) of the deed of conditions 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 the Property [ie Rosebank Tower]'. The management fee, therefore, was a 'common charge', and common charges were to be divided among all of the owners in Rosebank Tower. In the end, the Council limited its claim in respect of the management fee to direct costs (as opposed to shared costs). Nonetheless the Inner House held that not even this was recoverable.

The Council had placed some reliance on para (f) of the definition of 'common charges' in clause 1 of the deed of conditions: 'Any other expenses, however arising, in relation to the Property which in the opinion of the Factor should properly be borne by all the proprietors of dwellinghouses in the Property.' From this provision there was a necessary implication, said the Council, that the factor was entitled to obtain payment of charges which were not common charges from one or more proprietors if he was of the opinion that they were charges which should properly be borne only by those proprietors. This argument was firmly rejected by the court (para 17):

> Clause 1(6) defines 'Common Charges'. Clause 1(6)(f) is a residual provision. It specifies that other expenses in relation to the Property (ie expenses other than those described in clause 1(6)(a), (b), (c), (d) and (e)) are Common Charges if in the opinion of the Factor they should properly be borne by all of the proprietors of dwellinghouses in the Property. That is the sum and substance of what clause 1(6)(f) does.

(5) MXM Property Solutions Ltd v Mallick [2022] UT 24, 2022 Hous LR 82

A tenement is in need of repairs. The repairs are duly authorised and carried out in accordance with the deed of conditions (or, in the absence of title provisions, in accordance with the Tenement Management Scheme). One owner does not pay. How can payment be extracted? There are two main methods, one

direct and the other indirect. The direct method is to sue for the sum due. The indirect method is to register in the Land (or Sasine) Register a notice of potential liability for costs under ss 12(3) and 13 of the Tenements (Scotland) Act 2004. The latter brings no immediate benefit. But it means that if the defaulting owner comes to sell, the sale is likely to fall through unless the owner pays up; for if the owner/seller does not pay, the effect of the registered notice is to make the buyer jointly liable with the seller for the unpaid bills. No buyer is likely to accept that.

Which of the two methods should be used? As tenement owners are, naturally, reluctant to sue their neighbours, the indirect method has a certain attraction, particularly if it is thought likely that the defaulting owner will sell in the near future. But if the tenement is factored, so that any court proceedings will be raised, neutrally, by the factor, the direct method, too, has obvious appeal.

MXM Property Solutions Ltd v Mallick is a case where both methods were used. The flat was part of a building in a large, modern development in Glasgow known as Kingston Quay. A summary cause action, which ultimately settled, was used by the factor to recover sums then due. But subsequently there were further arrears of factoring charges, and a notice of potential liability for costs was registered against the flat with the intention of covering those arrears as well as the legal costs incurred in recovering the original debt by means of the summary cause action.

Ultimately, the flat-owner applied to the First-tier Tribunal ('FTT') for a determination that the factor had failed to comply with various duties under the Code of Conduct for Property Factors. In finding against the factor, the FTT held (i) that the notice of potential liability for costs had been incompetent in respect that it was not capable of covering either factoring charges or legal costs, and (ii) that, accordingly, the factor 'had abused its statutory entitlement to register the NOPL' with the result that compensation of £5,000 was due to the flat-owner due to the 'significant emotional impact' of the factor's conduct.

The factor appealed to the Upper Tribunal on this and certain other matters. The Upper Tribunal (Sheriff O'Carroll) allowed the appeal, set the decision of the FTT aside and remitted the case to a freshly constituted FTT. The reasoning was as follows.

In relation to (i), s 12(3) of the 2004 Act provided, in effect, that notices of potential liability for costs must concern 'relevant costs relating to any maintenance or other work'. 'Relevant costs' were defined in s 11(9)(a) as including 'the share of any costs for which the owner is liable by virtue of the management scheme which applies as respects the tenement', including costs due under real burdens, whether or not in a deed of conditions. As recovery of both the factoring charges and the legal costs was provided for in the deed of conditions, they were plainly 'relevant costs'. The only remaining question was whether they were 'relevant costs *relating to* any maintenance or other work'. In the opinion of the Upper Tribunal they were. 'Relating to' was a less exacting standard than the test of 'directly relating to' which had been used, wrongly, by the FTT. And, said the Upper Tribunal (at para 58):

> It is difficult to see why, for example, the administration costs (which might be encompassed by the term factoring costs) of instructing and supervising a contract for the maintenance of the common parts cannot be 'related to' the cost of doing that maintenance or work. Equally, it is difficult to see why the costs of pursuing homeowners for the recovery of their share of the maintenance, including legal costs, cannot be 'related to' that maintenance. The FTT has innovated on the legislation and has misconstrued it in my view.

In relation to (ii), there was no question of abuse in the use of the notice of potential liability for costs. On the contrary (para 55):

> Registering a NOPL in such a circumstance is not an abuse of the legislation: it is one anticipated effect of the legislation. One effect of the legislation is that although the NOPL itself (unlike for example an inhibition or standard security) has no direct effect on the right of the homeowner to sell his property, in practice it is not unlikely that a prospective buyer may require discharge of the NOPL before s/he will agree to completion of the sale. But anyone who believes they are owed money relating to maintenance or works, who seeks to protect their position by the registration of an NOPL before an anticipated sale cannot, without more, be said to be acting unlawfully or abusing its position.

One final point might be mentioned. Some of the charges due related to the flatted building in which the owner's flat was located, while others related to the common parts of the development as a whole. For this reason, the factor had registered two separate notices of potential liability for costs – one under the Tenements (Scotland) Act 2004, as already mentioned, and the other under the equivalent provisions (ss 10(2A) and 10A) of the Title Conditions (Scotland) Act 2003 which apply to non-tenemental property. This was said by the Upper Tribunal to be in order (at para 60), as indeed it was. But it is undeniably clumsy. In an ideal world, a single notice would have sufficed. Yet neither notice could do both jobs, for a notice under the 2004 Act can *only* cover tenements, and a notice under the 2003 Act is not able to cover tenements (see s 10(5)).

REAL BURDENS

(6) Castle Street (Dumbarton) Developments Ltd v Lidl Great Britain Ltd 2023 GWD 3-37, Lands Tribunal

Lidl Great Britain Ltd owned a site at Castle Street, Dumbarton. By disposition registered in the Land Register on 7 July 2021, Lidl disponed part of the site – some 0.78 hectares – to Castle Street (Dumbarton) Developments Ltd. The disposition purported to impose the following condition as a real burden:

> So long as the granter of this Disposition (or another member of the same group of companies) is either a proprietor of or occupies the whole or part of the Retained Property, no part of the Conveyed Property shall be occupied by either (a) any of Aldi, Farmfoods, Iceland, Home Bargains, Tesco, Asda, Sainsbury and/or Morrisons or (b) any operator whose convenience (food) offer accounts for 30% or more of the sales areas of their property on the Conveyed Property.

The present case was an application by Castle Street, under s 90(1)(a)(ii) of the Title Conditions (Scotland) Act 2003, asking the Lands Tribunal to pronounce on the validity of the condition as a real burden. It was held that the condition was not a valid real burden due to the absence of benefit to the benefited property (as was required by s 3(3) of the 2003 Act). See **Commentary** p 120.

(7) Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd 2022 GWD 30-439, Lands Tribunal

This was an application to the Lands Tribunal under s 90(1)(a)(ii) of the Title Conditions (Scotland) Act 2003 for a determination that maintenance burdens purporting to affect 28 Buchanan Street, Glasgow were invalid and unenforceable as real burdens. The applicant was the owner of the property. As 28 Buchanan Street was part of a tenement (Argyll Chambers), a finding of invalidity would result in maintenance being governed by the Tenement Management Scheme (set out in schedule 1 to the Tenements (Scotland) Act 2004) and not by the burdens in the titles. The application was opposed by the owners of five of the other units in the tenement.

The burdens in question were contained in a disposition of 1954 and, while the title to the property was now on the Land Register, it was accepted by all parties that recourse should be made to the original deed as well as to the burdens section of the title sheet: see **Commentary** p 117.

In support of its case that the burdens were invalid, the applicant argued: (i) that the burdened property – being the subjects conveyed by the 1954 disposition – was insufficiently described: see **Commentary** p 118; (ii) that the apportionment of liability for repairs, which was by assessed rental, was uncertain and unworkable in respect that the boundaries of the units had changed since 1954 and the valuation roll did not provide a ready answer as to the liability: see **Commentary** p 157; and (iii) that the burden as to decision-making by committee of management was inoperative in respect that it was not found in the titles of all of the units in the tenement: see **Commentary** p 156.

The application failed in respect of arguments (i) and (ii) but succeeded in respect of argument (iii).

The decision is currently under appeal.

(8) Inspire Scotland CC Ltd v Wilson 2023 SLT (Lands Tr) 15

A burden in a feu disposition from 1979 provided that: 'the feu shall be used only as private dwellinghouses each for the accommodation of one family only, and no trade or business shall be carried on in any of such buildings or on any part of the feu'. Was use as a residential care home for young persons a breach of this burden? Although without the benefit of full argument, the Lands Tribunal was inclined to the view that it was. See **Commentary** p 122.

[Another aspect of this case is digested as Case (15) below.]

(9) Rollo v Jamieson
2022 GWD 31-454, Lands Tribunal

Five adjacent plots were feued by the same superiors between 1970 and 1974. Similar or identical burdens were imposed in each feu charter. Among the burdens imposed was the following:

> And the ground on the feu not occupied by said buildings shall be exclusively for garden ground for planting or as ornamental ground and shall be dressed and maintained in good order accordingly unless a deviation from these provisions shall be authorised in writing by the Superiors.

In the course of an application to the Lands Tribunal for the variation of this burden in respect of one of the plots ('plot 5') it became necessary to determine whether the owners of the other plots had title to enforce. The Tribunal decided that they did. Its reasoning proceeded in two stages. First, '[f]or a burden such as this to be enforceable it has to satisfy the requirements of section 52 of the [Title Conditions (Scotland)] Act [2003]' (para 8). Second, the requirements of s 52 were satisfied in the present case because (i) each feu charter contained an obligation to repair the private access road by which the plots were reached, (ii) each feu charter contained the burden the variation of which was now being sought, and (iii) the feu charter of plot 5 required the feuar to pay a share in the cost of making up the road, along with the feuars of plots 1–4 (which plots had already been feued) (para 9).

In reaching this conclusion the Tribunal may not have had the benefit of full argument. At any rate, the reasoning seems questionable. In order for s 52 to apply, the feu charter of plot 5 would have required to give notice, expressly or by implication, of the existence of a 'common scheme' of real burdens which applied also to the other four plots. It seems unlikely that such notice was given. But even if it had been, s 52 would have been excluded by the closing words of the burden ('unless a deviation from these provisions shall be authorised in writing by the Superiors'). This is because s 52(2) provides that: 'Subsection (1) above applies only in so far as no provision to the contrary is impliedly (as for example by reservation of a right to vary or waive the real burdens) or expressly made in the deed.' The closing words of the burden are just such a 'reservation of a right to vary or waive'.

Section 52 is not, however, the only show in town. Despite the view apparently expressed by the Tribunal, a right to enforce can equally be conferred, in a situation such as this, by s 53 of the Title Conditions Act. The requirements for both provisions are explored in *Conveyancing 2019* pp 158–68. Like s 52, s 53 requires that there should be a 'common scheme' of real burdens for the five plots. In addition, the plots require to be 'related' – a mysterious concept the meaning of which is only partly illuminated by the non-exhaustive list of 'relatedness' factors given in s 53(2). It is just possible to argue that the plots in the present case were 'related' due to the shared maintenance obligation in respect of the private road. If so, s 53 would apply and the owners of the other plots would indeed have title to enforce the burden – though not for the reasons given by

the Lands Tribunal. But the question of whether shared maintenance obligations are sufficient to create 'relatedness' is controversial and has been the subject of two Tribunal decisions which are not easily reconciled: *Thomson's Exx* 2016 GWD 27-494 (*Conveyancing 2016* pp 120–26) and *O'Gorman v Love* 2019 SLT (Lands Tr) 1 (*Conveyancing 2019* pp 160–68).

[Another aspect of this case is digested as Case (14) below.]

SERVITUDES

(10) Pearce v Griffiths
28 October 2020, Stranraer Sheriff Court

To every thing there is a season, and the current season in servitudes is for implied ancillary rights. The subject was hardly known before the decision of the House of Lords in *Moncrieff v Jamieson* [2007] UKHL 42, 2008 SC (HL) 1, and some time then elapsed before that landmark decision spawned further litigation. Recent years have seen a growing number of cases on ancillary rights in servitudes. More indeed may be expected following the publication, in 2022, of Roderick Paisley's *Rights Ancillary to Servitudes*, a monumental and ground-breaking work which, over the course of two volumes and some 1600 pages, gives an authoritative and scholarly account of the law.

Pearce v Griffiths is typical of the kind of case which is now being litigated. The pursuers owned a bungalow near Newton Stewart known as 'Benmore'. This was built on land which at one time was part of Barrhill Farm, the property of the defenders (under title number WGN5960). Access to Benmore from the public road was by the farm road. In respect of that road, the split-off writ for Benmore, a disposition from 1969, granted:

> a heritable and irredeemable servitude right of access to and egress from said bungalow by the road leading to Barrhill Farm for all traffic, vehicular, pedestrian, or otherwise.

There was no dispute as to the servitude itself, and a declarator as to its existence was granted by the sheriff. Plainly, the pursuers, as the owners since 1989 of Benmore, were entitled to use the farm road to reach their property. What was in dispute was their use of an area which, at one point, separated the road from Benmore itself in order to turn vehicles on to the road. This area was not part of the road as such and so was not directly covered by the servitude. But, said the pursuers, the servitude must be read as including, by implication, a right of turning in the off-road area. Applying the two-part test set out in *Moncrieff v Jamieson*, such an ancillary right was both (i) necessary for the convenient and comfortable enjoyment of the servitude, and also (ii) within the reasonable contemplation of the parties when the servitude was created.

The defenders disagreed, and expressed their disagreement by blocking access to the area by means of a locked gate and parked vehicles. Hence the present litigation, in which one of the craves was for declarator of an ancillary

right of vehicular access over the area in question so as to turn vehicles in the course of exercising the servitude right of access.

The action failed on a preliminary point. According to its terms, the servitude was exercisable only over the farm road. The turning area was not part of that road. Hence, argued the defenders, there could be no question of ancillary rights. Such rights were, necessarily, confined to the servient tenement in the servitude, ie the farm road. Accepting the argument's premise, the pursuers sought to resist its conclusion by arguing in turn that, on a proper view of things, the servient tenement was not just the farm road but the farm in its entirety – some 5.56 hectares in all. Unsurprisingly, the sheriff (Anthony McGlennan) was unpersuaded. Hence the action was dismissed insofar as it concerned ancillary rights.

The decision is on much the same lines as the decisions in *Macallan v Arbuckle* 2022 GWD 10-159 (*Conveyancing 2019* pp 149–52) and *Macallan v Arbuckle (No 2)* [2022] SC DUN 5, 2022 GWD 10-160, [2022] SAC (Civ) 9, 2022 GWD 10-161 (*Conveyancing 2021* pp 8–10). There too an ancillary right in respect of an access servitude (to use the verge as passing places) was rejected on the basis that the exercise of such a right would be outside the servient tenement. *Macallan v Arbuckle* was not mentioned in the judgment given in *Pearce v Griffiths*.

Roderick Paisley has questioned this approach. The problem, in his view, goes back to *Moncrieff v Jamieson*: see *Rights Ancillary to Servitudes* vol I, pp 462–64. It is not true, as is commonly said and indeed was argued for the defenders in *Pearce v Griffiths*, that the ancillary right which was allowed in *Moncrieff* (a right of parking) was to be exercised *within* the servient tenement. Admittedly, on first creation of the servitude in 1973, no route was set for the access servitude so that, potentially, the whole land owned by the servient proprietor counted as the servient tenement. But a fixed route for the servitude was subsequently agreed. Thereafter, the servitude was confined to that route and the rest of the land was free of the servitude. As is clear from the site plan mainly relied on in *Moncrieff* (it is reproduced in *Rights Ancillary to Servitudes* vol II, p 925), the ancillary right to park was to be exercised, not on the route of the servitude, but on adjacent land. In other words, the ancillary right related to land outside the servient tenement.

In Professor Paisley's view, therefore, there is no reason why ancillary rights should not be exercisable beyond the servient tenement. Indeed he gives a number of examples where this must inevitably be so (*Rights Ancillary to Servitudes* vol I, p 472), such as the implied right to remove snow from a road over which there is an access servitude: for it would make no sense if the snow, having been carefully cleared, could only be re-deposited on the road itself rather than on the land immediately adjoining. In some cases, no doubt, ancillary rights are indeed confined to the servient tenement. That would be the case, says Professor Paisley, where the ancillary activity is so similar to the activity involved in the servitude that a claim that it can be exercised beyond the servient tenement 'is little more than an attempt to extend the geographic extent of the primary servitude' (*Rights Ancillary to Servitudes* vol I, p 473). And this, says Professor Paisley, is the true explanation of *Macallan v Arbuckle*, or

now of *Pearce v Griffiths*. To turn a car is to engage in the same activity (namely driving) as was contemplated by the servitude itself. Hence it was reasonable that it should be confined to the servient tenement.

(11) LPH Land Engineering Ltd v Paterson & Dewar Holdings Ltd 3 November 2022, Kirkcaldy Sheriff Court

This case too turned on ancillary rights. It concerned three commercial units at Methven Road, Kirkcaldy, each of which abutted a courtyard. One of the units was owned by the pursuer (title number FFE32705). The defender owned another of the units as well as the courtyard itself (respectively title numbers FFE129718 and FFE13055).

The pursuer's unit had a servitude right of access over the courtyard which was constituted in 1946. As given on the A (property) section of the title sheet, this conferred:

> a right of access and egress from the subjects in this Title by the entrance gate from Methven Road and over the courtyard tinted yellow on the said Plan in common with the proprietor of the subjects of which the subjects in this Title form part and the other proprietors of subjects adjoining said courtyard.

Although there was no mention of car-parking, the owners of all the units did in fact park vehicles on the courtyard and some 20 or so car-parking spaces – the exact number was disputed – were marked out on the ground. In 1995 the then owners of the units entered into an agreement with the owner of the courtyard by which each was allocated a certain number of car-parking spaces. In the case of the unit now belonging to the pursuer this was spaces 1–6. The agreement was not registered and the signatories to it no longer owned the units or courtyard. Parking was important to the pursuer: indeed until recently the unit had been used as a car-repair garage.

In this action the pursuer sought a declarator against the defender, as owner of the courtyard, that 'in exercise of rights accessory to the pursuer's express grant of a right of access to and egress … is entitled to park such vehicles as are necessary on the servient tenement, specifically on parking spaces numbered 1–6 as indicated on the 1995 plan'. In relation to the six parking spaces the pursuer thus claimed an exclusive right of parking.

The action was dismissed by the sheriff (Elizabeth Thomson McFarlane) on various grounds. First, the main question to be determined was whether the grant of an access servitude in 1946 included, by implication, a right of parking. That in turn, following *Moncrieff v Jamieson* [2007] UKHL 42, 2008 SC (HL) 1, involved an enquiry into whether such a right could be shown to be necessary for the convenient and comfortable use of the servitude and whether, in 1946, such a right was within the reasonable contemplation of the parties. Yet the necessary averments for this were lacking.

Secondly, the pursuer founded on the agreement reached in 1995, some 50 years after the original grant of servitude. It was hard to see why (p 15):

> I have some difficulty in accepting that a right ancillary to the express grant of access in 1946 could ever be established by reference to a contractual agreement made in

> 1995. The 1995 agreement does not assist the court in establishing as to what was the intention of the contracting parties in relation to the extent of the servitude in 1946, if that is what the pursuer is seeking to do.

Thirdly, in any event, none of this would justify an *exclusive* right of the kind being claimed by the pursuer (pp 15–16):

> [W]hilst it may be argued that there is an ancillary right to park in the courtyard, the pursuer seeks a much wider right and that is to park to the exclusion of all other proprietors on six parking spaces. The court cannot grant such a declarator as this would give the pursuer exclusive parking spaces to the exclusion of the other proprietors including the defender. That cannot be a servitude. This would be repugnant to the ownership of the burdened owner, the defender.

The last of these grounds can be questioned. Of course, it is true that a servitude, like a real burden, must not press so hard on the servient proprietor as to remove the substance of his ownership: see Title Conditions (Scotland) Act 2003 s 76(2). A servitude is a subordinate real right – a burden on ownership – and not a right of ownership itself. Yet it is unlikely that an exclusive right of car-parking crosses this line. In *Moncrieff v Jamieson* itself there was a strong expression of the view that it did not: for discussion, see *Conveyancing 2007* pp 109–10. And since *Moncrieff* was decided it has been held on two separate occasions that an exclusive right of parking is not repugnant with ownership. In the first case, *Johnson, Thomas and Thomas v Smith* [2016] SC GLA 50, 2016 GWD 25-456, the right in question was unlimited as to the number or type of vehicles and potentially covered, at all times, the whole of the servient tenement. Yet it was held not to be repugnant with ownership. See *Conveyancing 2016* pp 141–44. The second case is *Nash v Salty Dog Holidays Ltd*, noted immediately below.

One argument for the pursuer that might have been made with greater vigour was positive prescription. The agreement of 1995 had been followed up, it was said, by user for more than 20 years. Could a servitude of parking have been constituted by prescription? Admittedly, the origins of the user in agreement might have presented an obstacle. And in any case there was no crave in respect of prescriptive acquisition. Further, a mere ancillary right, said the sheriff (p 14), could not be created by prescription; only a servitude in its own right – though car-parking would presumably have qualified as such a servitude.

Another possible argument does not seem to have been put. Under the law at it was in 1995, a (positive) servitude could be created by unregistered writing, provided that the writing was followed by possession. The 1995 agreement was dismissed by the court as creating no more than a personal, contractual right. Might it in fact have created a real right of servitude?

(12) Nash v Salty Dog Holidays Ltd
21 October 2022, Elgin Sheriff Court

The first case to recognise parking as a freestanding servitude was *Johnson, Thomas and Thomas v Smith* [2016] SC GLA 50, 2016 GWD 25-456. *Nash v Salty Dog Holidays Ltd* is the second. The facts of the two cases are close.

The pursuers had owned 54 Harbour Street, Hopeman, near Elgin since 1994. There was no front garden but a small paved area lay between their house and the public road. Though they did not own this area, for 27 years the pursuers had used it to park two or three vehicles. The maximum capacity for parking was for four vehicles, depending on their size and on the way they were parked.

Next to the pursuers' property was a caravan park, now owned by the first defender. There was a history of tension between the parties, with the pursuers being unhappy about proposed development of the caravan park. Whether for this reason or another, the first defender acquired the disputed area on 14 February 2019, title being registered under title number MOR18831. Thereafter the first defender challenged the pursuers' right to park. At various times the first defender sought an annual payment, or proposed to dig the area up to prospect for minerals, or used the area to park a vehicle belonging to one of its directors.

On 25 June 2020 the pursuers obtained an interim interdict against the first defender in respect of the prevention or obstruction of their parking rights. The following year, on 28 May, the second defender acquired ownership from the first defender. The two defenders had a director in common; the consideration for the transfer was £1.

In the present action the pursuers sought (i) a declarator of the existence of a servitude of parking and (ii) interdict against its obstruction. Meanwhile, the pursuers had moved out of the house because of the problems with the defenders. A proof before answer was held during which evidence was led for the pursuers but not for the defenders.

The argument for the pursuers was that a servitude of parking had been created by positive prescription. For their part the defenders, seemingly, accepted that a servitude had been created in respect of the parking of two cars, but they challenged the pursuers' case on two grounds. First, the declarator sought was for an exclusive right of parking and not a right limited to two vehicles. Secondly, and relatedly, an exclusive right of parking was repugnant to their ownership of the paved area and so could not be created as a servitude.

The defenders failed on both points. On the first, the sheriff (Ian Hay Cruickshank) held that it was sufficient to seek declarator of a servitude of parking; as had been said in *Johnson, Thomas and Thomas v Smith*, there was no need to specify the number of vehicles. If a dispute later arose, it would be regulated by the general law of servitudes and in particular by the rule that a servitude must be exercised *civiliter*. In respect of the second point, the sheriff again followed the decision in *Johnson, Thomas and Thomas v Smith*. An exclusive right to park was not repugnant with ownership (para 41):

> The first defender, and now the second defender, can do anything with this area of ground which does not interfere with or restrict the servitude rights which have been established upon it. If, for any reason, the second defender is of the view that the servitude right of parking does not comply with *civiliter* use then they can apply for appropriate remedies which they have not sought to do in terms of the current action.

Decree was therefore granted.

ELECTRONIC COMMUNICATIONS CODE

(13) SSE Telecommunications Ltd v Montgomerie 2022 GWD 31-460, Lands Tribunal

One company (Scottish Hydro Electric Transmissions plc) held a wayleave over land at West Glenalmond Estate, Perthshire for the installation and maintenance of electric lines supported by pylons. A second company (SSE Telecommunications Ltd) had an agreement with the first company to hang overhead fibre-optic cables between the pylons. The second company applied to the Lands Tribunal for an order under para 20(2) of the Electronic Communications Code (which is set out in sch 3A of the Communications Act 2003) to the effect that access and other rights in respect of the land be granted by the owner of the land for the maintenance of the fibre-optic cables. In terms of para 9 of the Code, such code rights can only be conferred by the 'occupier of the land'.

At this stage of proceedings a preliminary issue required to be settled: who was the 'occupier of the land'? Normally this would be the land's owner, but in the present case it was argued for the owner that the true occupier was the first company, having regard to its physical presence (pylons and power-lines) and legal rights (arising under the wayleave). Hence, said the owner, the application to the Lands Tribunal was misconceived.

This argument was rejected by the Lands Tribunal. The only land which the first company could be said to occupy was the footprint of the pylons. In all other respects, the owner of the land was also the occupier. There was nothing in the wayleave to displace that conclusion.

VARIATION ETC OF TITLE CONDITIONS

(14) Rollo v Jamieson 2022 GWD 31-454, Lands Tribunal

Property A has a large garden. Planning permission is obtained for the erection of an additional building. But the additional building is contrary to a real burden in the title. The owner of property A applies to the Lands Tribunal for variation of the burden. The application is opposed by an immediate neighbour, the owner of property B. The result is a direct conflict between the development of property A (represented by factor (c) in s 100 of the Title Conditions (Scotland) Act 2003) and the amenity of property B (represented by factor (b)). This is a conflict played out many times in applications to the Lands Tribunal. The competing interests are hard to weigh. To some extent it is a matter of impression. In the first years after the Title Conditions Act, the Lands Tribunal tended to favour development over amenity and to grant this kind of application. But there has been a push-back in the last few years and a greater likelihood that such applications will be refused. That was the fate of the present application.

The application concerned Craiglunie Gardens, a five-house cul-de-sac in the village of Moulin, a mile or so from Pitlochry. The houses were reached

by a private road. One house (Bruadair) had a large expanse of garden ground between it and its immediate neighbour (Ardlui). Bruadair's owner obtained planning permission to build two semi-detached holiday 'lodges' in the garden. To do so would be contrary to a real burden imposed in the split-off feu charter of 1974 which prohibited additional buildings. Accordingly, the owner of Bruadair applied to the Lands Tribunal to have the burden varied. The application was opposed by the owners of Ardlui.

The purpose of the real burden, thought the Lands Tribunal, was to preserve the amenity of the neighbourhood (factor (f)). That, in essence, was the benefit conferred on the owners of Ardlui (factor (b)). And while the proposed new buildings would not affect Ardlui's view or (in the absence of expert evidence) its value, they would result in increased traffic, strangers coming and going and staying overnight, and a risk of anti-social behaviour. Set against this was the obvious benefit to the applicant in being able to build on her garden ground and to receive the rental income (factor (c)). There was nothing wrong with that (para 27):

> Some of Mr Gray's submissions [the agent for the respondent] come close to suggesting that there is something ignoble about what the applicant is doing but making use of one's property to generate capital or income is, of course, a perfectly natural and honourable thing to do: people do it all the time. In this case there is nothing opportunistic or underhand about what the applicant wishes to do: it is a perfectly proper aspiration and she is perfectly entitled to ask the Tribunal to permit it.

But the prospect of an income stream for the applicant must be set against the loss of amenity for the respondents. In the Tribunal's view it was amenity that had to prevail.

Of interest in the decision is the treatment of factor (g) (whether planning permission had been granted). Not only had the applicant obtained planning permission for the lodges but the view of the planning authority was that there would be no impact on the amenity of nearby residential properties. Yet, as the Tribunal made clear, this was of limited significance. The perspective of the Tribunal was (necessarily) different from that of the planning authority (para 36):

> It is important to explain, for the benefit of the applicant, that the Council's view as to amenity does not foreclose or pre-empt the Tribunal's consideration of that question. That is because of the different perspectives from which planners and the Tribunal have to approach that question, as set out in the immediately preceding paragraph. One of the factors purchasers of properties in Craiglunie Gardens would have had in mind when contracting to buy would have been the protection of amenity, and particularly the control of property and, therefore, population density which the condition now sought to be partially discharged offers. They also, of course, bought in the knowledge that an application might be made by another proprietor to have that condition varied or discharged and that such an application might be granted. But that would not be in the gift of the local authority but of this Tribunal, exercising its own jurisdiction and judgement. The point we make is simply that the grant of planning

permission does not make it almost inevitable that an application such as this will be granted. The Tribunal must take its own view and, in this case, our view is that granting the application would adversely affect the amenity of Craiglunie Gardens.

[Another aspect of this case is digested as Case (9) above.]

(15) Inspire Scotland CC Ltd v Wilson 2023 SLT (Lands Tr) 15

Quarrybrae Gardens, Uddingston, Lanarkshire, is part of a 1970's housing development. Real burdens are set out in a feu disposition which applies to the whole development. Burden (third) provides that: 'the feu shall be used only as private dwellinghouses each for the accommodation of one family only, and no trade or business shall be carried on in any of such buildings or on any part of the feu'. *Inspire Scotland CC Ltd v Wilson* was an application to vary this burden in respect of a detached house, 31 Quarrybrae Gardens, in order to allow the house to be used as supervised residential accommodation for up to three young persons aged under 22.

The application was opposed by 21 neighbours, two of whom visited other accommodation managed by the applicant and drew up a list of alleged problems and shortcomings. The applicant led evidence by, among others, the applicant's head of operations. In the event, the Tribunal generally preferred the evidence of the head of operations to the 'hearsay allegations' (para 70) of the neighbours.

The Tribunal did not find the application 'easy to determine' (para 88) but ultimately decided that it should be granted. Of the various factors set out in s 100 of the Title Conditions (Scotland) Act 2003, the Tribunal gave 'some weight' to the benefit which the burden conferred on the objecting neighbours (factor (b)): 'the fact that we cannot exclude the increased risk of anti-social behaviour, and thus there may be a need for neighbours to make official complaints, amounts to a potential loss of amenity in itself' (para 70).

In most applications, the counterweight (such as it is) to factor (b) is factor (c) (the extent to which the condition impedes the enjoyment of the burdened property). But here the 'normal' use of the house, as a single family home, was not impeded by the condition. Instead the counterweight lay in the strong public interest in providing accommodation for young persons who may have experienced significant trauma and can no longer be safely cared for by their families (factor (j): any other factor). Some 1,400 young people were currently being cared for in residential accommodation; and while it would be possible to find houses without the title restriction which was the subject of the present application, in a 'normal community' such as Quarrybrae Gardens, such title restrictions were common (para 78). This public interest was sufficiently strong to counterbalance factor (b) – as it had not been, it might be added, in the most recent comparable case, *Ballantyne Property Services Trs v Lawrence*, 31 October 2008, Lands Tribunal, discussed in *Conveyancing 2008* pp 96–97 (application refused for variation to allow a house to be used for occupancy by five students).

It was also relevant, said the Tribunal, to ask what burden (third) did *not* prevent. Even in its unvaried form the burden would allow uses of a kind which were similar to that proposed by the applicant, such as a family member requiring 24-hour care due to severe physical disability (para 71).

[Another aspect of this case is digested as Case (8) above.]

(16) BNP Paribas Depositary Services (Jersey) Ltd v Safeway Stores Ltd 2022 GWD 34-502, Lands Tribunal

Even more than in the previous case, considerations of public policy were decisive in determining the outcome. The application concerned a site in Crow Road, Glasgow, at Anniesland, which contained (i) a superstore originally operated by Safeway but now by Morrisons, and (ii) a small retail park. The latter was subject to a real burden in favour of the former preventing its use 'for the purpose of the retail sale of food and groceries'. The applicant owned the retail park. In recent years it had proved difficult or impossible to attract tenants other than supermarkets to the retail park. Since late 2019 only one-quarter of the retail park was occupied. Lidl had now shown willingness to open a shop but this would be contrary to the real burden. Hence this application for its discharge. The application was opposed by Safeway/Morrisons.

The Tribunal reviewed the application by reference to the statutory factors set out in s 100 of the Title Conditions (Scotland) Act 2003. The often crucial factors (b) (the extent to which the condition confers benefit) and (c) (the extent to which it impedes enjoyment) were in equal balance. Factor (a) (change in circumstances) was engaged by changes in the retail market, and especially the greater challenges facing the non-food retail letting sector. But what really mattered, taken under factor (j) (any other factor), was the public interest in competition in the retail food market (para 115):

> Turning to the second matter – the public interest – it is quite clear that it would best be served by discharging the condition and that really is the key to resolving how we weigh the respective benefit of the condition to the respondents and its detriment to the applicants. The arrival of a food retailer will give shoppers a choice. There is no suggestion that it would put this highly successful Morrisons store out of business, so the two could co-exist. That seems to have happened everywhere else where the choice between a Big Four store and a discount food retailer has been offered. Moreover, the evidence was that the Anniesland catchment area, notwithstanding that it has 29 other food retail outlets, is under-provided-for given its high population density and the socio-economic profile of that population.

This point was reinforced – perhaps even suggested – by the Groceries Market Investigation (Controlled Land) Order which was made in 2010 by the Competition Commission (now the Competition and Markets Authority) following a market investigation: see www.gov.uk/government/publications/groceries-market-investigation-controlled-land-order-2010. This applied to all of the large supermarket chains, including Morrisons, and would prevent for

the future a 'restrictive covenant' of the kind found in the real burden under review. As the Lands Tribunal explained (para 116):

> This view is underpinned when we have regard to the 2010 Order. Under that Order it would not now be permitted to enter into an agreement with a condition such as we have here. That is because Parliament has adjudged such conditions to be against the public interest. As we have already remarked, we regard this as a very persuasive factor in carrying out our assessment of reasonableness. None of the other sec 100 factors, nor any combination of them, outweighs it and we are therefore persuaded that, subject to the payment of appropriate compensation, the condition should be discharged.

The application for discharge of the burden was therefore granted.

That decision was made easier by the Tribunal's power to order the payment of compensation to Safeway/Morrisons as a condition of the discharge. In the end, after all, the dispute between the parties was a matter of money. Since the effect on Morrisons would be a reduction in sales, that reduction could be quantified and compensated. Much of the decision was taken up with a consideration of the evidence as to quantum. The discharge, it was agreed by the parties, would increase the value of the retail park by £5.28 million. But in matters of compensation the relevant figure was not the gain by the applicant but the loss by Morrisons: see s 90(7) of the Title Conditions Act. The Tribunal thus rejected the view put forward on behalf of Morrisons that compensation should be calculated in accordance with *Stokes v Cambridge Corporation* (1962) 13 P & CR 77 (typically used to assess compensation for compulsory purchase of ransom strips). The issue was not the enhanced value of the retail park but the value of the real burden which was being lost by Safeway/Morrisons. Its discharge involved the loss of protection against competition, a loss which fell to be measured by the impact on the store's trading performance (para 114). A capitalised figure for that loss was £1.8 million, and that was the amount of compensation that would be awarded.

(17) Smith v Lewis
2022 SLT (Lands Tr) 61

As originally constructed, the late-Victorian tenement at 1 and 2 Hayburn Crescent, Glasgow comprised six flats, of which two extended to two floors and were much larger than the others. Nonetheless, the maintenance arrangements in terms of the titles were for the proprietor of each flat to pay an equal – a one-sixth – share. Today there were seven flats, one of the double flats having been divided. As a result, there was uncertainty as to how liability for maintenance should be apportioned.

In this application under s 91 of the Title Conditions (Scotland) Act 2003, the proprietors of two of the flats sought to have the title provision varied so that maintenance costs were apportioned by floor area. This was opposed by the proprietors of one of the double flats, who stood to lose significantly by the proposed new arrangements. The application was granted. See **Commentary** p 161.

(18) Longstone (2) Ltd v Harkness
2022 SLT (Lands Tr) 74

A title condition was held to be a servitude rather than a real burden. Hence the 'sunset' rule, by which real burdens (but not servitudes) which are more than 100 years old can be unilaterally discharged by the burdened proprietor, was not available. See **Commentary** p 115.

(19) Nicol v Crowley (No 2)
2022 SLT (Lands Tr) 67

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

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

In an application to the Lands Tribunal, the applicant sought a variation of the route of the servitude to the line of the proposed new path. The respondent opposed the application. This was back in 2019: see 2019 GWD 40-646. The application was refused. The main problem was wheelie bins. The respondent had three, as well as two recycling bins. The only place they could be stored was on the concrete strip at the foot of the stairs to her flat. Even without the proposed change of route, these left little room for the respondent to take access to her stairs. The proposed rerouting of the path would have made things much worse creating 'a significant loss of amenity to No 19A' (para 49).

The applicant did not give up. Her plans were modified and a fresh application was made to the Lands Tribunal. Again this was opposed. As part of the customary site visit the members of the Tribunal, gamely, tested the manoeuvring of the wheelie bins against the revised width proposed by the applicant (seven feet) and the minimum width which the respondent regarded as sufficient (eight feet). In its earlier judgment the Tribunal had suggested that seven feet might be sufficient but, the Tribunal emphasised, this should not be construed 'as a bond which gives no jot of blood', particularly as there were now competing submissions as to width (para 31). Ultimately, the Tribunal concluded that seven feet 'does not give much room for comfort or error' (para 32):

> We also got the impression that a person walking with laden bags in each hand would have a little less than room for comfort in passing between the bins to one side and the corner of the building on the other. At this point it is necessary to address the stairs

> at something of an angle. We do not think that the 2.5m [eight feet] width proposed by the respondent would impinge upon the privacy of the lower window by causing a direct sightline … In conclusion we agree with the respondent that 2.5m would be an appropriate width for the ground strip access.

Subject to this and one or two other minor adjustments, the Tribunal was willing to grant the application.

(20) Smitton v Forbes
2022 GWD 28-406, Lands Tribunal

Access from a road ('the new road') to Forest Cottage, Inchmarlo, Banchory, Aberdeenshire lying to the south, was taken by a route which was largely or wholly through the ground attached to Forest Cottage. But this route had been used only since around 2001, when the road was built. Before that, access had been by a parallel private road ('the old road') some 10 metres to the south of the new road and running in front of Forest Cottage. In respect of that road, insofar as it bordered Forest Cottage, the owner of Forest Cottage had a servitude of access. Although the details were disputed, it seems that the owner of Forest Cottage had made little use of the old road since the new road was formed.

Immediately to the west of Forest Cottage lay another cottage (Bynach). The owners of Bynach owned both (i) the section of the old road fronting their cottage and Forest Cottage, and also (ii) the land at that point lying between the two roads. In respect of (i), this ownership was subject to the access servitude held by the owner of Forest Cottage.

The owners of Bynach wished to build a garage on the old road on ground which was subject to the servitude. In this application they sought discharge of the servitude, or at least its variation. The application was opposed by the owner of Forest Cottage.

As the Lands Tribunal noted, the most significant of the factors set out in s 100 of the Title Conditions (Scotland) Act 2003 was, in the present case, factor (a) (change in circumstances). A new road had been built. A new access to Forest Cottage had been created. And Forest Cottage itself had been rebuilt on a different site further to the south. On factor (b) (benefit to the benefited property), the servitude, although largely unused at present, might be needed in the future in the light of a proposed widening and realignment of the new road which (though the details were unclear) might make the current access to Forest Cottage awkward to use. On factor (c) (impediment of enjoyment of the burdened property), the servitude sterilised a significant amount of land which potentially could be put to a more useful purpose (including the erection of the proposed garage).

The result was a compromise. The Tribunal decided that the existing servitude (which ran from east to west) should be replaced by a different servitude, running north from Forest Cottage to the new road. In this way, the applicants could build their garage and the owner of Forest Cottage should have the possibility of an alternative means of access in the event that the current access became unsatisfactory.

ACCESS RIGHTS

(21) Gartmore House v Loch Lomond and The Trossachs National Park Authority [2022] CSOH 24, 2022 SLT 713 affd [2022] CSIH 56, 2023 GWD 2-18

This was a judicial review of the amendment of a core paths plan made under the Land Reform (Scotland) Act 2003. The petitioner was a charitable organisation which owned and ran a hotel and accommodation block near Gartmore in the Loch Lomond and The Trossachs National Park. The site hosted groups of children (including vulnerable children) and church groups who participated in recreational activities. The respondent was the local authority (within the meaning of the 2003 Act s 32) for the area in which the petitioner's property was situated. It therefore had the responsibility for the local core paths plan with the purpose 'of giving the public reasonable access throughout their area' (2003 Act s 17(1)). Where a route is on a core paths plan the public can be sure that access rights can exercised over it and that the exceptions in s 6 of the 2003 Act carving out certain land do not apply.

The core paths plan for the area was originally adopted in 2010. It did not include any routes within the petitioner's property. But between November 2018 and April 2019 the respondent carried out a formal public consultation on amendment of the plan. The revision added two new paths which crossed through the petitioner's property. The petitioner objected and its representations were passed to the Scottish Ministers who, under s 20A(5) of the 2003 Act, were required to arrange a public inquiry. A reporter was appointed. He recommended that the objection of the petitioner should be dismissed. In his view the exercise of access rights along the paths could be managed so that the groups staying at the property would not be adversely affected. In 2021 the Scottish Ministers accepted the recommendation and directed the respondent's board to adopt the plan.

The petitioner sought reduction of the revised plan and, if necessary, reduction of the Ministerial direction. It was argued that the plan and direction were unlawful on two grounds. The first was that the correct test for the addition of new paths under the 2003 Act had not been applied. The second was that the duties owed by the respondent and the Scottish Ministers under s 149 of the Equality Act 2010 had not been complied with. The Scottish Ministers entered the proceedings as an interested party. A preliminary point was raised by the respondent: since it was bound to comply with the direction made by the Scottish Ministers it had not made a decision amenable to judicial review.

The Lord Ordinary (Clark) dismissed the preliminary point without hesitation. Despite the direction, the respondent had still gone through a decision-making process with a paper setting out the revised plan being tabled and agreed at a meeting. That process was informed by the recommendation of the reporter which was being challenged on the basis that it was unlawful.

In relation to the first substantive ground of challenge, the petitioner argued that the reporter had applied a test of improving local access rather than giving 'reasonable access' as provided by s 17(1) of the 2003 Act (quoted above). Lord

Clark disagreed. In particular, the addition of the new paths reduced the need to use public roads (para 30). There did not have to be a change in circumstances in the neighbourhood for the plan to be revised (para 31). The reporter had not expressed himself too briefly and had given sufficient reasons for his decision (para 34).

The second ground was also unsuccessful. The reporter was held to have met the requirements of the 2010 Act. He had considered the impact of the revised plan on vulnerable groups staying at the property even although his report had not explicitly referred to the equality issues. The Scottish Ministers also had due regard to these when reading the report and accepting the reporter's recommendation.

An appeal to the Inner House failed, with the court upholding the decision of the Lord Ordinary on both grounds. For commentary on, respectively, the Outer House and Inner House decisions, see two articles by Malcolm M Combe: 'Core path plan amendment under the Land Reform (Scotland) Act 2003: an assessment of the Gartmore House Decision' (2022) 210 *Scottish Planning & Environmental Law* 35 and 'Core path plan amendment under the Land Reform (Scotland) Act 2003 revisited' (2022) 215 *Scottish Planning & Environmental Law* 1.

COMPETITION OF TITLE

(22) Thomson v Warwick [2022] SC INV 31, 2023 GWD 1-7

This was a case in which a disposition was reduced on grounds of facility and circumvention and also undue influence. The judgment, of Sheriff Sara Matheson, sitting in Inverness, runs to 111 pages in the pdf version. The proof itself lasted for 10 days, and a reference at para 68 of the sheriff's note to an item at 'page 1644 of the pursuers' productions' indicates the mass of documentary evidence presented to the court. It is a case full of human interest, a sad case, and a case in which some of those involved may perhaps have later wished that they had acted differently. It is a case which is about, among other things, the risks involved in acting for all parties, the risks surrounding the need to give appropriate advice, the risks where clients may have diminished capacity, and the need for proper file-keeping.

Lacking the novelist's pen, we can summarise the remarkable facts only in a pedestrian fashion – and, given the amount of evidence presented at proof, only in an abbreviated form. Logie Farm near Muir of Ord in Easter Ross was owned by three brothers, Hugh, Roddy and David McCulloch, who had inherited it from their father. All were bachelors, and had no near relatives. They had seldom ventured more than 20 miles from their farm. As they aged they began to find life more difficult. They became close to four people, who were the four defenders in this action, namely the Rev Ivan Warwick (a Church of Scotland minister), (ii) his wife Jocelyn Warwick, (iii) Douglas Stewart and (iv) his wife Marie Stewart. In 2013 all three brothers granted powers of attorney to Mr Warwick and Mr Stewart.

The following year they signed a disposition of Logie Farm in favour of the four defenders, two of whom, as already said, held power of attorney for all three brothers. The deed was gratuitous – for 'love favour and affection'. At the time the brothers were aged 84, 82 and 79 respectively and 'were of deteriorating health and susceptible to influence' (finding in fact-and-law 1). The solicitor involved was not their solicitor but a solicitor who acted for the disponees, Alasdair Fraser, who was the law agent for the four disponees. Thus in this transaction Mr Fraser acted for all seven parties to the deed: the three disponers and the four disponees, the latter, but not the former, being established clients. No conflict-of-interest letter was issued. The file was virtually devoid of notes or outgoing letters to the brothers – for whom he was acting, as well as acting for the four disponees. (Aspects of Mr Fraser's evidence were described by the sheriff as 'startling': see paras 148, 153 and 293 of the sheriff's note.) Following the disposition the disponees sold most of the farm.

Two of the brothers (Hugh and David) died, and the third, Roddy, now elderly, was subject to a guardianship order. The executors and guardian raised the present action to reduce the disposition on the ground that it had been obtained through facility and circumvention and/or undue influence. Given that the titles of the subsequent *bona fide* purchasers could not be challenged, the reduction would bite chiefly on the small parts of the farm still held by the disponees. For that reason the pursuers also sought payment from the defenders of the value of the property that had been sold on.

After proof, focusing in particular on the brothers' mental condition as they aged, and the conduct of the first and third defenders in relation to the brothers, the sheriff found that 'the disposition signed by the brothers was wrongfully impetrated by fraud, facility and circumvention on the part of the first and third defenders' and also that undue influence had been established. Decree reducing the disposition was pronounced and decree granted for payment of the value of the property that had been sold on: £390,000.

A number of other matters may be mentioned, some of fact and some of law. (i) In 2012 the three brothers sold 4½ acres of the farm to the four defenders for the sum of just £100. (ii) Soon after the powers of attorney had been granted, one of the attorneys, the third defender, signed a cheque (drawn on the brothers' joint bank account) in favour of the first defender (the other attorney) in the sum of £40,000. Whether the transactions just mentioned were lawful was not at issue in the present litigation. (iii) The third defender (Mrs Warwick) testified (see para 174 of the sheriff's note) that she 'did not find out that the farm had been disponed to her' until several months later. The implications of that statement are not discussed in the judgment. But, if we read it correctly, the suggestion seems to be that Mr Fraser was acting for her without her instructions. As well as questions of professional conduct, a property law question arises: a transfer needs the consent of both the transferor (*animus transferendi dominii*) and of the transferee (*animus acquirendi dominii*) and unless both are present a transfer cannot be valid. (iv) The same issue arises in fact in relation to the three disponers. The sheriff held it proved that 'the brothers did not understand the nature of the document which they were asked to sign' (para 283 of the note). That would

seem to mean that there was no *animus transferendi dominii* in which case the deed was void. (However, the pursuers' case as pled was that the deed was voidable rather than void.)

LAND REGISTRATION

(23) Wyllie v Wittmann
7 July 2022, Lands Tribunal

This is a later stage of a case first noted at 2020 GWD 29-380 (*Conveyancing 2020* Case (33)). Two properties, A and B, in different streets of Newton Mearns, backed on to each other. Property B lay immediately to the north of property A. A dispute arose as to the proper boundary line between them. Each property had a registered title (REN77893 and REN145574) and, on the cadastral map, the boundaries matched: there was neither overlap nor underlap. But, said the owners of property A, the boundary of property B had been drawn too far to the south and thus included a strip which was properly part of property A. They sought a ruling from the Lands Tribunal to that effect. First registration of property B had taken place in 2017.

A proof revealed a complex story, the details of which need not be gone into here. In essence, the Tribunal found that the disputed strip was not included in the split-off deed for property B (a feu disposition of 1958). That conclusion was fortified by the subsequent history of possession, for the strip, insofar as it had been possessed at all, had been possessed as part of property A. Probably the Keeper's mistake had been caused by the fact that the original boundary fence for property B had been on the 'wrong' side of the disputed strip. But, whatever the explanation, the title sheet for property B was inaccurate, and the strip now fell to be removed from it.

On behalf of the owners of property B an attempt was made to resist this conclusion by means of the following adventurous argument. (i) In achieving a perfect boundary between the two properties the Keeper had probably engaged in 'vector perfect mapping'. This was a computerised process which prevented small overlaps and underlaps with adjoining titles. (ii) The use of this technique had a statutory basis in s 30 ('Completion of registration of plot') of the Land Registration etc (Scotland) Act 2012 and in particular in s 30(2)(d), which empowered the Keeper to 'make such other changes to the cadastral map as are necessary or expedient'. (iii) In view of this statutory underpinning, the resulting entry could not, by definition, be inaccurate. If the Keeper's actions were to be challenged, it could only be by judicial review.

The argument came close to a revival of the Midas touch – the rule under the Land Registration (Scotland) Act 1979 s 3(1)(a) by which the mere act of registration produced a valid title regardless of the state of the underlying deeds. Yet one of the purposes of the 2012 Act had been to dispense with the Midas touch. Furthermore, if the argument was sound for para (d) of s 30(2), it would presumably also be sound for the other paragraphs of that subsection – paragraphs which provided the legislative basis for the administrative aspects

of first registration, such as the creation of a title sheet. That would amount to a remarkable extension of the Midas touch.

The argument was firmly and properly rejected by the Lands Tribunal (paras 65–67):

> As we observed at the hearing, this argument makes a bold proposition. The potential implications to the land registration system, should the argument be correct, are in inverse proportion to the amount of notice given of the point by the interested parties' written pleadings. In consequence we do not have the Keeper's comments upon the point, or indeed her comments upon the practice of vector perfect mapping. If correct, the argument would mean that some changes to the cadastral map by the Keeper would have the effect of creating an inviolable real right, at least as forceful as the Midas touch under s 3 of the 1979 Act.
>
> Section 3(1) of the 1979 Act provided that 'Registration shall have the effect of … vesting in the person registered as entitled to the registered interest in land a real right in and to the interest …' Thus registration, once accepted, at least in general terms cured defects in title. There is no equivalent provision under the 2012 Act. For example, s 50(2) provides 'Registration of a valid disposition transfers ownership.' This and other provisions are more qualified than the 1979 Act, in that transfer of ownership expressly requires a deed which is valid according to law. In other words the real right depends upon an underlying valid conveyance, whereas under the 1979 Act the real right depended upon the act of registration. So the idea that the Midas touch created by registration was continued by the 2012 Act, as floated by the interested parties, is misconceived.
>
> S 65 of the 2012 Act defines 'inaccuracy' widely: that is anything which 'wrongly depicts or shows what the position is in law or in fact …' On the other hand s 30 is a separate provision providing the means by which the Keeper is required to complete a registration. Subsection (2)(d) was intended to put an existing practice of the Keeper on a statutory footing, namely 'filling in gaps' or avoiding overlaps in the cadastral map. This is no doubt a sometimes useful and expedient practice and, it seems to us, is inherent in a map based system. However, the 2012 Act provides no comfort that such a practice might not result in an inaccuracy as so defined. There is no link between s 30 and s 65 so as to suggest that actions of the Keeper under s 30 cannot result in inaccuracy. There is nothing to suggest that lawful actions of the Keeper under s 30 in some way render the land register immune to rectification. The words of the statute simply do not bear the implication which the interested parties suggest. In our opinion the interested parties' position is untenable.

(24) MacKirdy v Keeper of the Registers of Scotland 2022 GWD 36-527, Lands Tribunal

The semi-detached villa, 36 Crichton Road, Isle of Bute, was divided in 1982 into two separate flats (upper and lower). Both were accessed by a driveway. The split-off disposition of the first flat to be disponed – the lower flat – gave rise to problems of interpretation, as to which see **Commentary** p 168. But as ultimately interpreted by the Lands Tribunal it conveyed a one-half *pro indiviso* share in the driveway. The disposition of the second (upper) flat was of whole subjects under exception of the first flat, and accordingly conveyed, likewise, a one-half share in the driveway.

The lower flat had yet to change hands and so continued to be held on a Sasine title. The upper flat was sold in 2005, the sale triggering first registration in the Land Register. Mistakenly, the title sheet for the flat showed the driveway as belonging exclusively to the upper flat. This was a (bijural) inaccuracy, of course; but because of the Midas touch which applied under the Land Registration (Scotland) Act 1979, the title sheet was the measure of the parties' rights. So, from 2005 onwards, the driveway belonged 100% to the proprietors of the upper flat.

The immediately subsequent history of the upper flat is not known, but in 2016 it was acquired by Karen Elizabeth McDonald. Meanwhile, the proprietor of the lower flat, Jean MacKirdy, having been alerted to the problem (how is unclear), applied to the Lands Tribunal under s 82 of the Land Registration etc (Scotland) Act 2012 to have the title sheet of the upper flat declared inaccurate in respect of the ownership of the driveway.

As usual in the case of registration errors made under the 1979 Act, the respective rights of the competing parties rested on the provisions which governed the transition from the 1979 Act to the 2012 Act. This is the first of a number of cases in 2022 in this category.

The transitional provisions are set out in sch 4 paras 17–24 of the 2012 Act. In principle, one of the parties is entitled to the disputed property ('the mud') and the other to compensation from the Keeper ('the money'). But which receives what depends on whether, immediately before the day on which the 2012 Act came into force (8 December 2014), the Keeper could (if asked or so inclined) have rectified the inaccuracy. Rectification on 7 December 2014 would have been governed by the 1979 Act and, under s 9 of that Act, inaccuracies could be rectified except (subject to some qualifications) where to do so was to the prejudice of a proprietor in possession. The question therefore usually resolves – and resolved in the present case – into the question of whether, on 7 December 2014, the person registered in the Land Register as proprietor was in possession of the subjects which are in dispute. And matters are helped along by a presumption (in sch 4 para 18) that the registered proprietor was indeed in possession.

As of now the registered proprietor of 100% of the driveway was Ms McDonald. On 7 December 2014, however, it was a predecessor of Ms McDonald whose identity was unknown. Did that person possess the driveway on that day? If no, the missing half-share automatically returned to Mrs MacKirdy on 8 December 2014 and the title sheet to the upper flat was therefore inaccurate in showing the contrary. But if yes, the unknown predecessor got to keep the disputed property and the title sheet ceased to be inaccurate. Having lost the 'mud', Mrs MacKirdy would have to make do with the 'money', ie to compensation from the Keeper.

As matters turned out, nothing was known as to the state of possession on 7 December 2014. But even if some evidence had existed, it was not clear how a distinction could have been made between (i) possessory acts by the unknown predecessor in respect of 100% of the driveway, and (ii) possessory acts in respect of a half-share only. In the absence of contrary evidence, the issue was determined

by the statutory presumption. The unknown predecessor was the registered proprietor of 100% of the driveway. Therefore he or she was in possession of 100% of the driveway on 7 December 2014. The Lands Tribunal summarised the position in this way (para 84):

> We heard no evidence as to who that [predecessor] was nor any evidence as to the degree of possession then being exercised but by virtue of the presumption such a proprietor is to be taken as having been a proprietor in possession. The possession with which we are concerned is possession of the MacKirdy's one-half *pro indiviso* share of the driveway. It is hard to envisage what form possession of that share would take in circumstances in which the proprietors of Ravenswood [the upper flat] were entitled to use the driveway by virtue of their own share but as registered proprietors immediately prior to the designated day the owners of Ravenswood at that time, whomsoever they may have been, are deemed, by virtue of the presumption contained in para 18, to have been proprietors in possession.

(25) Sharp v Keeper of the Registers of Scotland 2022 GWD 26-376, Lands Tribunal

This was a straightforward example of the application of the transitional provisions in sch 4 of the Land Registration etc (Scotland) Act 2012. A property in Victoria Road, Brookfield, Johnstone, Renfrewshire, was split into two in 1991. The part sold became number 43 and the part retained became number 41. The split-off disposition resulted in first registration in the Land Register of number 43 under title number REN65026. In the disposition the subjects conveyed were described entirely by plan. The deed plan showed a boundary between numbers 41 and 43 which included a curved indent into number 43. This curved indent was not included in the Keeper's title plan, which showed instead a straight line. There was thus an obvious, if minor, inaccuracy in respect that the title sheet of number 43 included a small area which had not been conveyed in 1991 and which therefore should have formed part of number 41. The latter continued to be held by the original owners and hence on a Sasine title.

The discrepancy in the boundary remained in place and, presumably, unchallenged for 30 years. We do not know why the issue suddenly became contentious. But in any event the owners of number 41 made an application to the Lands Tribunal under s 82 of the 2012 Act, arguing that the title sheet of number 43 was inaccurate in respect of the absence of the curved indent.

The Lands Tribunal accepted that a 'bijural' inaccuracy had been created at the time of first registration in 1991. The fate of that inaccuracy was a matter for the transitional provisions in sch 4 of the 2012 Act. As the owners of number 41 had been in possession of the curved indent throughout, as evidenced by a fence, it followed that ownership of the indent, having passed to the proprietors of number 43 in 1991 due to the Midas touch, had reverted to the proprietors of number 41 on 8 December 2014 (sch 4 para 17). The Register was therefore inaccurate to that extent and now fell to be rectified.

An alternative analysis would have led to the same result. As the owners of number 41 remained in possession of the curved indent throughout, and as

they had a recorded title on which prescription could run, they would have reacquired the curved indent 10 years after the split-off, ie in 2001. Thereafter its presence in the title sheet of number 43 would have been an 'actual' rather than a 'bijural' inaccuracy, and hence capable of rectification.

[Another aspect of this case is digested as Case (56) below.]

(26) McMullen v Keeper of the Registers of Scotland 2022 GWD 23-327, Lands Tribunal

This was an application under s 82 of the Land Registration etc (Scotland) Act 2012 to determine the accuracy of the eastern boundary of 47 Lynallan Road, Harthill, Lanarkshire. The applicants had acquired number 47 in 1994 from a Mrs Blackhall. This was a split-off, and the disposition induced first registration. That process, the applicants argued, was blundered in respect that the resulting title plan (LAN100929) understated the extent of the ground lying immediately to the east of the house. A fence, which still existed, showed the true extent of the boundary, and the applicants had since built a garage between the house and the fence. But the title plan excluded both the fence and a strip of ground lying to the west of the fence on which part of the garage was built. That strip had instead been awarded to the neighbouring property, 42 Lynallan Road, following its first registration the following year (under LAN108347). Hence the title sheets were inaccurate to that extent.

The application was not opposed by the owner of number 42, and the Lands Tribunal held, without difficulty, that the Register was indeed inaccurate in the manner described by the applicants.

Four comments. First, inaccuracies made when registering under the Land Registration (Scotland) Act 1979 are often cured by the transitional provisions contained in sch 4 of the 2012 Act. But not in this case. The cure is available only where, immediately before the coming into force of the 2012 Act (8 December 2014), the Keeper (had she been asked or felt so inclined) would have been unable to rectify the inaccuracy. And that in turn depends, usually, on whether the registered proprietor was in possession of the disputed land – because, under s 9 of the 1979 Act, the Keeper was not normally able to rectify to the prejudice of a proprietor in possession. In the present case, the person registered as proprietor of the disputed strip – the owners of number 42 – were very clearly *not* in possession.

Secondly, and following on from the first point, ownership of the strip had changed over time. Included in the disposition of number 47, in 1994, the strip nonetheless remained the property of the disponer (Mrs Blackhall) because, in error, it was not included as part of the applicants' title on the Land Register. By a second error the strip was included in the title to number 42 on first registration in 1994 even although (presumably) the strip was not part of the subjects disponed. So matters rested until 8 December 2014. At that point, under the transitional provisions (2012 Act sch 4 para 17 ownership of the strip passed for the first time to the applicants as owners of number 47. Even so it was at risk of being lost by 'realignment': when, in 2015, number

42 was disponed to the current proprietors, the effect of s 86 of the 2012 Act might have been to confer ownership of the strip, notwithstanding the absence of ownership in the disponers. But s 86 requires possession to have been in the disponers, whereas possession remained throughout with the applicants. The upshot was (i) that the applicants had owned the strip since 8 December 2014, (ii) that the Register was accordingly inaccurate in failing to show their ownership, and consequently (iii) that it fell to be rectified so as to do so.

Thirdly, although s 82 refers only questions of the 'accuracy' of the Register to the Lands Tribunal, the applicants' pleadings referred throughout to their title as being 'manifestly inaccurate'. This was a misunderstanding. 'Manifest' inaccuracy is not a type of inaccuracy but an evidential standard. Further it is an evidential standard for the Keeper and not for the Lands Tribunal. The Keeper can only rectify an inaccuracy if the inaccuracy is 'manifest' (s 80). The Tribunal, in contrast, determines applications on the balance of probability. The link between the two was explained by the Tribunal (at para 21): 'If the [Tribunal's] finding is that the register is inaccurate, it will no doubt lead to the conclusion [by the Keeper] that the inaccuracy is "manifest".'

Fourthly, a second misunderstanding. Those who succeed in having the Register rectified can claim extra-judicial legal expenses from the Keeper under s 84 (but subject to s 85). The claim, however, must be made to the Keeper (with a right of appeal to the Lands Tribunal under s 103(1)), and can only be made once rectification has taken place. So in seeking an award under s 84 as part of the current application, the applicants were (i) claiming in the wrong forum, and, since no rectification had yet occurred, (ii) claiming prematurely. The claim was therefore rejected by the Tribunal.

(27) Grant v Keeper of the Registers of Scotland 25 July 2022, Lands Tribunal

This is a later stage of the application for registration reported at 2019 SLT (Lands Tr) 25 and 36 (*Conveyancing 2019* Cases (47) and (48)).

On first registration of the title to Victoria Cottage, Tillyfourie, Aberdeenshire, on 25 September 2014, the title sheet was made up to include an access road which bisected the garden of the cottage. This was a mistake. The access road was not included in the Sasine title.

In an application by the owner of the estate from which the cottage had originally been broken off, it was held by the Lands Tribunal that: (i) the inclusion of the road on the title sheet was an inaccuracy; (ii) although the registered proprietors of the cottage occupied the road on 7 December 2014 they did not possess it because, not yet having received their land certificate and not yet knowing its contents, they could not be said to have occupied (as was required) on the faith of the Register; (iii) accordingly, the effect of the transitional provisions in sch 4 to the Land Registration etc (Scotland) Act 2012 (para 17) was for the title sheet to remain inaccurate on the designated day (8 December 2014). Rectification could now proceed. See **Commentary** p 140.

(28) Stewart v Keeper of the Registers of Scotland 2022 GWD 28-405, Lands Tribunal

In a typical title dispute, the issue is whether a strip of ground found in the title sheet for property A should really be in the title sheet for neighbouring property B. The present case, however, is different. The Keeper, in error, included the same strip in *both* title sheets.

An issue of this kind has been litigated once before, in *BAM TCP Atlantic Square Ltd v British Telecommunications plc* [2020] CSOH 57, 2020 GWD 25-334, discussed in *Conveyancing 2020* pp 153–60. (On appeal, the First Division interpreted the titles in such a way as to avoid the overlap: see [2021] CSIH 44, 2022 SLT 972.) But the facts of the present case were more straightforward, and the resolution of the dispute correspondingly simpler.

A strip about three feet wide and running from a public road down to Loch Tay was included in the title sheets of two adjoining lodges (PTH12975 and PTH158). First registration in both cases occurred under the Land Registration (Scotland) Act 1979. When alerted to the overlap, earlier in 2022, the Keeper added a note to both title sheets stating that the competition of title represented a manifest inaccuracy but that what was needed to rectify the inaccuracy was not manifest. In other words: the Keeper accepted there was an error (as she was bound to), but was not in a position to decide to which of the two title sheets the strip of land properly belonged. The note was made under s 80(3) of the Land Registration etc (Scotland) Act 2012. In cases like this the Keeper – obviously – is unable to rectify the Register: s 80(2). Only the Lands Tribunal or court can resolve the underlying conflict of title.

This, then, was the background to the present application, which was made by the owners of one of the properties (property A). It was not opposed by the owners of the other property (property B).

In disputes of this kind, the usual task of the court or tribunal is to investigate the underlying Sasine title in order to determine whether the Keeper was in error in including the disputed area within the title sheet in question. But here the Keeper had included the strip of land in *both* title sheets and, by a quirk of the transitional provisions in sch 4 of the 2012 Act, this meant that it was possible to ignore the Sasine titles. Why? The reasoning was as follows. The presence of the disputed strip within the title sheet of property A was either accurate (if justified by the Sasine title) or inaccurate (if not so justified). If it was accurate, the strip was rightfully part of property A. If it was inaccurate, the strip was, equally, part of property A because: (i) immediately before the designated day on which the 2012 Act came into force (8 December 2014) the strip was, the Lands Tribunal found, possessed by the owners of property A; (ii) hence, had the Keeper been asked to rectify the inaccuracy at that time, she would have been unable to do so; (iii) hence, on the designated day the inaccuracy was cured and the inclusion of the strip within the title sheet of property A ceased to be an inaccuracy: 2012 Act sch 4 para 22. In the words of the Lands Tribunal (para 12):

> In these circumstances it is not necessary for us to analyse the underlying conveyancing for either title. The Keeper is unable to rectify the applicants' title even

if there had been grounds otherwise for doing so. The registered title of the applicants is, by operation of statute, accurate. It follows that the competing registration of the respondents' title to the disputed area is necessarily inaccurate.

It further followed, therefore, that the strip should now be removed from the title sheet of property B. Had possession been with property B and not with property A, the transitional provisions would have operated in favour of the former and the result would have been reversed.

(29) Connaughton v Keeper of the Registers of Scotland 12 January 2022, Lands Tribunal

This was an appeal against a presumed (though not actual) refusal by the Keeper to rectify the Land Register. As the appeal application was made on 17 September 2013, comfortably before the date (8 December 2014) on which the Land Registration etc (Scotland) Act 2012 came into force, the Lands Tribunal decided that the appeal should be determined under the Land Registration (Scotland) Act 1979 even although the actual hearing (due to illness and other factors) did not take place until December 2021. In reaching this view the Tribunal followed its earlier decision in *Wight v Keeper of the Registers of Scotland* 2015 SLT (Lands Tr) 195. Some of the difficulties arising out of this approach are discussed in *Conveyancing 2015* p 28–30, although none eventuated in the present case.

The dispute concerned a yard at the rear of the appellant's property in King Street, Crieff, Perthshire. Since 2010 this had been registered in the Land Register in the name of someone else. But the true title, the appellant argued, lay with her. She held her own property on a Sasine title, and the yard formed part of that title, at any rate by positive prescription. Hence the Land Register was inaccurate and fell to be rectified. After a proof this argument was rejected by the Lands Tribunal. The yard had not been possessed by the appellants. Hence it could not have been acquired by positive prescription. Hence the Land Register was not inaccurate in showing the yard as belonging to someone else.

[Another aspect of this case is digested as Case (55) below.]

(30) Toal v Keeper of the Registers of Scotland 2023 SLT (Lands Tr) 1

Ms Toal owned 34 Back Street, Tarbolton, Ayrshire. Mr and Mrs Frew owned the adjacent property, number 36. Both properties came to be on the Land Register. As shown on the cadastral map, the boundaries of each were, and always had been, indisputably correct. But on first registration of number 34, under the Land Registration (Scotland) Act 1979, the title plan depicted the house as being too small so that, instead of it running along the mutual boundary between the properties, there was a two-metre gap which appeared to be one-half of a driveway (the other half being, in due course, in the title plan for number 36). A dispute having arisen as to the ownership of the driveway, the Keeper requisitioned from OS a resurvey as a result of which the base map, and hence

the cadastral map, were 'corrected' (to use a neutral term). The correction involved repositioning the house so that it extended as far as the boundary.

Ms Toal appealed against the Keeper's intervention, arguing that (i) it amounted to rectification, and that (ii) if there was an inaccuracy in the title plan, it had been cured, in her favour, by the transitional provisions set out in sch 4 of the Land Registration etc (Scotland) Act 2012.

It was held (i) that the Keeper's intervention amounted to rectification, but (ii) that the title plan (cadastral map) had remained inaccurate notwithstanding the transitional provisions because Ms Toal had not been in possession of the half-driveway. Accordingly, the Keeper had been entitled to rectify the cadastral map. See **Commentary** p 209.

COMMERCIAL LEASES

(31) Rileys Sports Bars (2014) Ltd v CGW Snooker LLP [2022] CSOH 4, 2022 GWD 5-80

The pursuer was the tenant of licensed premises at 9 Bridge Place, Aberdeen. The defender was the landlord. The pursuer was in administration. It wanted to assign the lease to a new company known as WPC7 Ltd. Weight Partners Corporate Ltd, a private-equity business investor and parent company of both the pursuer and WPC7 Ltd, offered to act as a guarantor in respect of the prospective new tenant's obligations under the lease.

As is typical in commercial leases, there were provisions restricting assignation. The interaction of these was not straightforward. The tenant was forbidden from assigning 'to any assignee which in the Landlord's reasonable opinion is not of sufficient financial standing to enable it to comply with the Tenant's obligations under this Lease'. Counsel for the pursuer conceded that this allowed only consideration of the strength of the assignee's finances and not the third-party guarantee being offered. Separately, however, the lease provided that an assignation of the lease was 'allowed with the Landlord's consent, such consent not to be unreasonably withheld or delayed'. The Lord Ordinary (Braid) held that it was permissible for the landlord to consent to an assignation under this provision even where the 'sufficient financial standing' test under the earlier provision was not satisfied. What had happened here, however, was that the landlord had refused to give consent and rejected a subsequent call from the tenant to reconsider. The tenant (pursuer) argued that this was unreasonable.

Both parties agreed that the relevant governing principles were set out by Lord Drummond Young in *Burgerking Ltd v Rachel Charitable Trust Ltd* 2006 SLT 224 at para 16. These were summarised by Lord Braid (para 10) as:

> (1) a landlord may not refuse consent on grounds that are collateral to the landlord-tenant relationship; (2) the onus of proving that consent was unreasonably withheld is on the tenant; (3) the landlord's decision should be upheld if its conclusion might have been reached by a reasonable person in the circumstances of the case; (4) the

landlord need generally consider only its own interests; (5) the only reasons for refusal which are relevant are those which influenced the decision maker at the time; and (6) the issue is one of fact.

Having considered the correspondence between the parties as well as oral evidence, the court held that the defender had not acted unreasonably. There were clear doubts about the financial standing of WPC7 Ltd, even with the guarantee, and about its ability to perform the tenant's obligations under the lease.

A second aspect of the case concerned a minute of agreement dating from 2020 and in which the defender had agreed to contribute £425,000 to the cost of building works to the premises to be carried out by the pursuer. The minute provided that the pursuer was to 'use all reasonable endeavours' to complete the works by 21 January 2021 subject to extension for *force majeure* events. The works were not completed by that date.

The pursuer argued (i) that the defender was in breach of an obligation of good faith under a clause in the minute by not agreeing to the plans and specifications in respect of the works and (ii) that the pursuer was entitled to a 26-week extension to complete the works on the basis of a *force majeure* event, namely the Covid-19 lockdown imposed by 'decree of government'. It sought declarator on both matters. The defender's position was that it had valid grounds for not agreeing to the plans and specifications.

It was held that the pursuer could not 'use all reasonable endeavours' to complete the work by the required date if the plans and specifications had not yet been agreed. Without such agreement the date of 21 January 2021 became effectively meaningless. But, on the facts, the defender had not acted in bad faith. The court held that the granting of declarator that the pursuer was entitled to a *force majeure* extension would be of no practical benefit as the parties were still unable to agree the plans and specifications. Such an extension in any event would be from 21 January 2021 rather than the date of the interlocutor and therefore pointless given the period of time that had now passed. Both parties shared the responsibility for the work not taking place with neither having sought to use the dispute procedure in clause 9 of the minute.

(32) Tanner v E Moss Ltd [2022] CSOH 33, 2022 Hous LR 34

In 2003 the pursuer had granted a 15-year lease of a chemist's shop in Hamilton to the defender, a member of the Boots group of companies. When the lease came to an end in 2018, the defender left the property as a shell. The pursuer raised a commercial action against the defender for damages in relation to the removal of moveables and tenant's fixtures from the shop.

The background to the lease was that members of the Boots group had taken over the running of chemists' shops run by the pursuer's company, David Tanner Ltd. The company sold the Hamilton shop building to the pursuer (Mr Tanner) who then leased it to the defender. The pursuer also sold the share capital of the company to the defender. The moveable items in the shop continued to be owned by the company. As the company and its assets (other than the shop building)

now formed part of the Boots group, the Lord Ordinary (Ericht) held that the defender was entitled to remove those items at the end of the lease.

In relation to the tenant's fixtures it was held that there were no terms in the lease, or a subsequent licence for works, which excluded the defender's common law right to remove these. The next question was at what point this right could be exercised. The defender had stayed on in the premises unlawfully for nearly four months after the ish and paid the pursuer damages for this. The pursuer contended that the right to remove could only be exercised during the currency of the lease. The defender disagreed, arguing that it was entitled to remove such items within a reasonable period after the ish. It was able to point to remarks by Lord Avonside in *Cliffplant v Kinnaird* 1981 SC 9 at 27 and academic commentary to support this position. The pursuer, however, argued that these authorities had misunderstood the leading case of *Brand's Trs v Brand's Trs* (1876) 3 R (HL) 16 where a lease of a mine had expressly provided that the tenants did not need to leave at the ish and could take a reasonable time to close down their operations.

Lord Ericht, however, was unpersuaded. He stated (at para 44) that the 'general observations about English law made in the nineteenth century' by the judges in *Brand's Trs* and relied upon by the pursuer's counsel were not 'determinative of Scots law'. In his opinion the removal during the four months after the ish was within a reasonable period. A proof before answer was allowed as to which of the removed items were to be properly classed as tenant's fixtures.

(33) Samson v D C Watson & Sons (Fenton Barns) Ltd [2022] SAC (Civ) 4, 2022 SCLR 281

D C Watson & Sons (Fenton Barns) Ltd leased a storage unit in a building at the Turkeytorium, Fenton Barns Farm to Philip Samson. In 2016, a fire which was started deliberately in another storage unit resulted in the whole building being destroyed. Mr Samson lost assets which he valued at £300,000. He sought damages for that amount plus return of rent that he had paid in advance. In his action, he convened UK Insurance Ltd, the landlord's insurer. (Whether Mr Samson's action was funded by the insurer of his assets, if indeed he had insurance, is unclear).

Mr Samson contended 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 tenantable condition. He argued that these included an obligation on the landlord to comply with fire-safety legislation and that it had failed to do so. Further, he argued that if the building had been constructed with adequate fire resistance, there was a reasonable chance that his loss would have been less. Mr Samson argued separately that he had been induced to enter into the lease by the landlord's false and negligent representation that the unit was in a tenantable 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: see [2021] SC EDIN 3, 2021 GWD 4-54, *Conveyancing 2021* Case (29). Mr Samson subsequently appealed to

the Sheriff Appeal Court on three grounds: (i) the sheriff had taken an unduly restrictive approach in relation to the implied-in-law terms by determining that building standards and fire safety legislation was not relevant and by holding that these terms did not apply to other parts of the building in which the unit was situated; (ii) Mr Samson offered to prove that if the building had been constructed with reasonable fire resistance there would have been a reasonable chance that his loss would have been less; and (iii) the sheriff had been wrong to hold that because there was no crave directed against the landlord's insurer it should not have been convened in the action.

The Sheriff Appeal Court dismissed the appeal on all three grounds. On (i), while there was some authority that safety of the inhabitants was an aspect of whether a residential property is reasonably fit for the purposes of let, in commercial leases for the storage of goods there was nothing in earlier case law or textbooks to indicate that they must meet a certain safety standard (para 52). Further, it was clear, following *Golden Casket (Greenock) Ltd v BRS (Pickfords) Ltd* 1972 SLT 146, that the implied terms were restricted to the condition of the leased property itself and not wider subjects. We note in any event that commercial leases often specifically exclude the implied terms as to the condition of the property: see eg the Property Standardisation Group's style leases, https://psglegal.co.uk/leases-based-on-the-model-commercial-lease-mcl/.

On (ii), the object of the implied term being contended for by Mr Samson was the prevention of fire damage, not of a chance of fire damage. This seems a narrow distinction.

On (iii), while it was possible for a party to be convened 'for their interest' even although a crave was not directed against that party, 'given the stage of the procedure … and any interest by the insurers in entering the process' (para 58), the sheriff was entitled to hold as he did.

(34) Ventgrove Ltd v Kuehne + Nagel Ltd [2022] CSIH 40, 2022 SLT 1037, [2022] STC 1765

This was an appeal to the Inner House of the decision of the Lord Ordinary (Ericht) as to whether VAT was payable on a break clause: see [2021] CSOH 129, [2022] STC 344 (*Conveyancing 2021* Case (26)). The pursuer was the landlord of commercial premises on an industrial estate at Dyce. The ten-year lease to the defender which began in 2016 was constituted by missives of let and gave the tenant a break option. The parties agreed that this 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 pursuer had opted to charge VAT on the rental income. Its position was that this tax was chargeable on the sum payable under the break option. The defender therefore had to have paid the relevant amount of VAT – which it had not. The pursuer sought declarator that the break option had not been validly exercised.

The Lord Ordinary found for the defender. He concluded that HMRC's policy, as set out in *Lloyds Bank plc v Customs and Excise Commissioners* (1996) VAT Decision No 14181, was that the exercise of an option to terminate provided for in the lease was not within the scope of VAT. In doing so he distinguished two cases from the European Court of Justice in which VAT had been payable in respect of payments to end contracts early: *MEO – Servicos de Comunicacoes e Multimedia SA v Autoridade Tributaria e Aduaneira* (C-295/17) EU:C:2018:942, [2019] BVC 14 and *Vodafone Portugal – Comunicacoes Pessoais SA v Autoridade Tributaria e Aduaneira* (C-43/19) EU:C:2020:465, [2020] STC 1975.

The Inner House allowed the appeal. It held that the payment was consideration for a taxable supply of land and therefore chargeable to VAT. The Lord Ordinary had wrongly distinguished the European cases. These both concerned the situation where a party was exercising a contractual right to bring the contract to an end by the making of a payment which would not be due if the contract had continued for its originally agreed period. The correct approach to deciding the case was to apply the relevant statutory provisions as interpreted by authoritative case law (para 48) and not to rely on HMRC policy. See **Commentary** p 230.

(35) 24 Drury Street Ltd v Brightcrew (Management) Ltd [2022] SAC (Civ) 34, 2023 GWD 1-10

An irritancy notice in respect of a commercial lease was held to be valid despite the fact it did not provide a date by which the tenant required to pay the rent arrears. See **Commentary** p 163.

(36) Hingston v Craigellen Assets Ltd [2022] SC STO 35, 2022 GWD 37-542

This case demonstrates the difficulties that can happen when a business entity changes in nature. In 2009 the pursuers, Ian Hingston, Graeme Murray and Louise Sutherland, were partners in the firm of Graeme Murray & Co and entered into a lease with the defender of commercial premises at 10–12 Chapel Street, Aberdeen. As is typical practice in leases to partnerships, the pursuers were made jointly and severally liable as individuals with the firm for its obligations under the lease.

The firm was sequestrated in 2016. It was then dissolved and its assets bought by the first pursuer, Mr Hingston. He apparently used these to set up a company, Hingston's Law Limited ('HLL') Mr Hingston was the sole director and shareholder of HLL. The second and third pursuers were employees of the company. HLL occupied the lease premises and, according to the pursuers, performed the lease's obligations including the payment of rent and insurance premiums.

The lease contained a break option exercisable with effect from either 24 November 2014 or 24 November 2019. Six months' written notice by the tenant was required. In 2019 written notice was given to the landlord in the following terms:

> Considering that the said Firm of Graeme Murray & Co ceased to trade with the event of the sequestration of Graeme Bruce Murray on 8th December 2016 and our client, Hingston's Law Limited, occupied the Premises in good faith, and to trade therefrom from and after that date, assuming that the same terms as the Lease were in effect, and that no formal agreement has been entered in to between you, the Landlord, and our said client to this effect, on behalf of and as instructed by our said client, we hereby serve notice terminating the Lease with effect from the 8th December 2019.

The document was signed by a director of the Grant Smith Law Practice. Under the signature the following was typed: 'Grant Smith Law Practice Limited Agents for and on behalf of Hingston's Law Limited.'

The pursuers sought declarator that the lease had been terminated by the exercise of the break option. The defender's case was that the action should be dismissed as irrelevant on consideration of the pursuer's pleadings in relation to (i) the notice and (ii) alleged personal bar on the part of the defender. The case was heard by Sheriff Gordon Lamont at Stornoway. It is not clear why this was the forum when the premises were in Aberdeen as was the defender's registered office.

In relation to (i) the sheriff held that the ordinary principles of the construction of commercial contracts were applicable to the requirements under the lease for the notice to be validly given. In *Hoe International Ltd v Andersen* [2017] CSIH 9, 2017 SC 313 the Inner House observed (at para 22) that a notice under a break clause had 'more drastic' consequences than some other types of leases notice. Accordingly, strict compliance with what the lease demanded was needed. In an earlier case, *Ben Cleuch Estates Ltd v Scottish Enterprise* [2008] CSIH 1, 2008 SC 252, the Inner House had held that a notice sent on behalf of another person could not be regarded as notice by the tenant. This, said the sheriff, was the situation here. HLL was not the tenant. Rather, the tenants were the pursuers: Mr Hingston, Mr Murray and Ms Sutherland as individuals (the firm of Graeme Murray & Co now being dissolved). The notice was therefore invalid. The sheriff observed (para 26):

> If notices from third parties who were not party to the contact were to be considered relevant when considering break clauses then this leads to a considerable degree of ambiguity and uncertainty in the commercial world. A contracting party in receipt of such a notice would be left wondering whether this could have any impact on their contractual relationship. That is an absurd result.

This view having been taken, the court did not need to reach a conclusion on the related question of whether the notice as drafted would have enabled a reasonable recipient to have understood it, given its shortcomings. As can be seen, it contained no reference to the break clause, and it referred to 8 December 2019 rather than 24 November 2019. The sheriff expressed the view that he would have allowed a proof on the matter.

On (ii) the pursuers had argued that the defender was personally barred from questioning the validity of the termination notice. The parties here were agreed on the general principles governing this area of law as set out in E C Reid and J W G Blackie, *Personal Bar* (2006) ch 2. There required to be inconsistent behaviour

on the part of the defender which made it unfair for it to deny the validity of the break notice and to insist that the pursuers (as individuals) were obliged to continue to perform the lease obligations. The behaviour averred to be relevant here was the defender's conduct in renegotiating the lease, offering to draw up a schedule of dilapidations, and seeking to arrange for a prospective new tenant to see the premises. In the view of the sheriff these averments were sufficient for there to be a proof before answer.

The decision shows the problems that can be caused by (i) having informal arrangements when a partnership which is the tenant under a lease ceases to exist but one or more of the partners continues in occupation, and (ii) not following notice provisions as carefully as possible. If the pursuers do not succeed in relation to the personal bar element of the case they will continue to be liable for the lease obligations until the originally agreed ish.

(37) Golden Lane Securities Ltd v Scarborough [2022] CSOH 76, 2022 GWD 35-518

This case concerned how much rent was payable in relation to a grazing lease of part of the Cabrach Estate near Huntly. Agricultural leases are generally outwith the scope of these volumes, but the dispute here was a factual one and did not involve the agricultural holdings legislation.

For many years, the defender had entered into annual written grazing agreements in respect of land owned by the pursuer. In 2015 the Scottish Government introduced the 'Basic Payment Scheme' ('BPS') which provided grants to farmers and other agricultural businesses. It was possible for recipients (such as the defender) to transfer the grant money to others under certain conditions. On 26 March 2015 the pursuer held meetings with its grazier tenants including the defender. Although nothing was recorded in writing, the pursuer's position was that the defender had agreed that he would (i) pay as rent 50% of all but one of the grants he received, and (ii) transfer his entitlement to any further grants under the BPS when he left the land. In late 2019 the defender decided to stop grazing on the estate and proceeded to sell his BPS grant entitlements on the open market.

The pursuer raised an action for damages in respect of (i) the rent which it averred that the defender had agreed to pay and (ii) the future grant entitlements. The defender's position was that he had agreed to pay only 50% of the basic payments he had received under the BPS and had not agreed to any transfer on leaving. The court heard evidence over several days from 11 witnesses as to what had been agreed between the parties. Having carefully assessed this, it found for the pursuer and granted decree.

(38) Bank of New York Mellon (International) Ltd v Cine-UK Ltd [2022] EWCA Civ 1021, [2023] L & TR 2

This English case concerned whether tenants under two commercial leases could stop paying rent during a period in 2020 when the Covid-19

lockdown regulations prevented them from trading. The leases concerned cinemas in different cities (Bristol and London) but were in standard form. Both contained a clause suspending the obligation to pay rent in the event of the premises being destroyed or damaged by specified risks making them unfit for occupation or use. The landlords held insurance policies which covered loss of rent as a result of interruption to business caused by infectious disease and the tenants were required by the leases to pay a proportion of the premiums.

Summary judgment was obtained by the landlords when they raised proceedings to recover the unpaid rent, it being held that the tenants had no defence.

The tenants appealed. One tenant argued that the clause suspending the obligation to pay rent applied. Both contended that there were implied terms in the leases that the rent was not payable when the premises could not be lawfully used as a cinema. Furthermore there was a failure of basis for rent to be due during that period and therefore payment to the landlords amounted to unjust enrichment.

The Court of Appeal had no hesitation in dismissing the argument in relation to the rent suspension clause. It was clearly limited to cases of physical damage to the premises. The terms of the insurance clause were not relevant to interpreting it. Moreover, when correctly interpreted the insurance policy only covered the situation where the tenant was entitled not to pay the rent, whether under an express provision of the lease or otherwise. This was not the situation here.

The tenants' argument on implied terms was similarly unsuccessful. The requirements for implication were that business efficacy required the term or that it was obvious that it was needed. See *Yoo Design Services Ltd v Iliv Realty Pte Ltd* [2021] EWCA Civ 560. Neither was satisfied here. The rent suspension clause agreed by the parties showed that they had considered the issue of the tenants being unable to use the premises, and the clause had been restricted to cases of physical damage. There accordingly had been a deliberate allocation of risk. In any event the implied term being argued for – that the rent was suspended where the premises could not be used with levels of attendance commensurate with those anticipated by the parties when they entered in the lease – was unworkable. There was no evidence of what the relevant levels were.

Finally, the unjust enrichment argument also failed. In the view of the Court of Appeal the leases contained a carefully constructed regime for the allocation of risk. Payment of rent could only be suspended in terms of the express clause. There was no gap here to be filled by an unjust enrichment claim.

The case shows an unwillingness to give a wide reading of an express term of the lease or to go beyond it by implying an additional term. This in turn reinforces the importance of the wording negotiated and agreed upon by the parties.

RESIDENTIAL LEASES

(39) Linden v MacPherson [2022] UT 5, 2022 GWD 14-220

This appeal concerned a claim by the former landlords of a lease of a flat for unpaid rent from the former tenants. The amount due depended on two questions: (i) when the lease had come to an end; and (ii) how much rent had abated due to the property being in a state of disrepair.

On (i) the Upper Tribunal concluded that there had been clear agreement between the parties that the lease was at an end as soon as the tenants found alternative accommodation. In this regard, the following evidence was noted (para 9):

> On 28 November 2020, Anne Linden [one of the former tenants] messaged the respondent [the former landlord] saying 'if we find somewhere before [end of April] are you happy for us to move ASAP. The date on the notice is 2 May.' The reply from the respondent was a thumbs up emoji, indicating unqualified agreement.

It is good to see that emojis are within judicial knowledge. As a result of the agreement, there was no requirement for a notice period. The date that the lease came to an end was held on the facts to be 22 March 2021, when the former tenants vacated the property.

In relation to (ii) the Upper Tribunal accepted the decision of the First-tier Tribunal that an abatement of £100 per month was appropriate. This reduced the rent from £850 to £750 per month as of 15 December 2020. The amount due for the period from then to 22 March 2021 was £2,447.25. The former tenants had been withholding £300 rent per month since 15 December 2020. The total sum paid by them between 15 December 2020 and 22 March 2021 was £1,921.50. There was thus a shortfall due of £525.76 in unpaid rent but, as the former landlord was holding a deposit of £800, ultimately he owed the former tenants £324.24.

(40) Zhao v Dunbar [2022] UT 25, 2022 GWD 30-442

A former tenant under a residential lease appealed against a decision of the First-tier Tribunal in relation to entitlement to damages for the property being partly uninhabitable. Fungal mould had been discovered in July 2020 and was reported to the former landlord. An inspection revealed this to be caused by dry rot. As a result of remedial works it was not possible to use a bedroom and staircase between August and October 2020. The former tenant thereafter left the property. She sought £4,000 in compensation from the landlord.

There were five heads of claim: (1) a rent rebate of £1,500 for the three-month notice period, on the basis that the tenancy should have been terminated immediately by the former landlord; (2) a refund of three months' rent of £1,500 as the building and flat were not 'liveable' in terms of safety and security; (3) emergency accommodation of £300; (4) losses for impact on the former tenant's (a) physical and mental health, (b) safety and security, and (c) time spent dealing

with her claim; and (5) taxi costs of £95. No medical certificate was produced in respect of (4)(a).

The First-tier Tribunal had found that the former tenant was only entitled to £700. This was made up of a £375 rent abatement in respect of the part of the property which could not be used and £325 of compensation for the emergency accommodation and travel costs (heads of claim (1), (3) and (5)).

The Upper Tribunal allowed the appeal but only as regards one part. It was held that the former tenant was entitled to an additional amount of £330 in respect of the inconvenience caused by her being unable to occupy the whole property (head of claim (4)(b)). No medical or other expert evidence was necessary to establish this.

Head of claim (2) in respect of 'liveability' was not well-founded. What the law required was that the tenant had possession of the whole property and rent abatement was the remedy when a landlord breached that obligation.

In respect of head of claim (4)(a) there was no medical evidence to substantiate the claim. The Upper Tribunal did not accept that, even during lockdown, it was not possible to instruct a medical report, but even if such report had confirmed injury it would probably have not been sufficient to show causation. As regards head of claim (4)(c) there was nothing to suggest the former landlord had put the former tenant to unnecessary or unreasonable expense and therefore no award was made on this ground.

(41) Rafique v Morgan
[2022] UT 7, 2022 GWD 15-230

This case considered whether, in seeking the termination of a private residential tenancy, the ground of eviction relied on (in this case, rent arrears of three or more consecutive months) must exist as at the date of service of the notice to leave.

A notice, set out in the required form under the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017, SSI 2017/297, sch 5, had been served on the tenant on 30 December 2020. It stated that an application for an eviction order would not be submitted to the First-tier Tribunal prior to 6 July 2021. The ground of eviction was described in handwriting as follows: 'Over 3 months rent arrears, ongoing lack of contact and no repayment plan set up.' But there was a problem. The precise statutory ground as per the Private Housing (Tenancies) (Scotland) Act 2016 sch 3 para 12 was that there required to be three or more *consecutive* months of arrears. The landlords' position was that it was competent to serve the notice prior to this being satisfied on the basis that the First-tier Tribunal would only consider the application once it had been satisfied. The First-tier Tribunal disagreed under reference to the previous decision of *Majid v Gaffney* [2019] UT 59.

The landlords appealed to the Upper Tribunal. They argued that the meaning of the relevant statutory provisions – 2016 Act ss 52(5)(a) and 62(1)(c) – was unclear. Recourse could therefore be made under *Pepper v Hart* [1993] AC 593 to the parliamentary debates. The Upper Tribunal held that the provisions were clear. The eviction ground had to be satisfied at the time of serving notice. Moreover,

the passage on which the landlords relied from the parliamentary debates did not, when properly read, support their position.

(42) Floyd v Gettka [2022] UT 12, 2022 GWD 18-267

The payment of premiums by tenants to landlords in residential leases is generally prohibited. Section 82 of the Rent (Scotland) Act 1984 provides:

> (1) Any person who, as a condition of the grant, renewal or continuance of a protected tenancy, requires the payment of any premium or the making of any loan (whether secured or unsecured) shall be guilty of an offence under this section.
>
> (2) Any person who, in connection with the grant, renewal or continuance of a protected tenancy, receives any premium shall be guilty of an offence under this section.

In this case, the Upper Tribunal had previously held that the payment of £1,399.13 by the tenant to the landlord in respect of council tax liability was not a breach of s 82(1). The statutory responsibility to pay the tax rested on the landlord because the property, being tenanted, was in multiple occupancy and the tenant was only entitled to occupy part of it: Local Government Finance Act 1992 s 76 and the Council Tax (Liability of Owners) (Scotland) Regulations 1992, SI 1992/1331, sch 1 para 3. The Upper Tribunal, on an application by the tenant to review its decision, concluded it had erred in not considering whether s 82(2) had been breached. Its terms are wider than s 82(1) as the House of Lords had found in *Farrell v Alexander* [1977] AC 59, a decision on the equivalent English legislation. A subsequent Scottish Government Policy Note of October 2012 on the Rent (Scotland) Act 1984 (Premiums) Regulations 2012, SSI 2012/329, was not of assistance in interpreting the provision as its meaning was clear.

On the facts it was held that the tenant's payment contravened s 82(2) and he was entitled to the return of the money. A further appeal, to the Court of Session, by the landlord was refused at [2022] UT 13.

The effect of the decision is that where a landlord of a residential property is liable for council tax the liability may not be passed on to the tenant. But ordinarily it is tenants who are responsible for payment. The facts here of a multiple-occupancy property with the tenant only entitled to occupy part of it are relatively unusual.

(43) Pearson v Aird 2022 GWD 38-553, FTT

Samuel Pearson was the former tenant of a residential lease at 54 Ladywell Avenue, Dundee. The former landlord was John Aird. At the outset of the lease Mr Pearson had handed over a deposit of £200. But Mr Aird did not lodge the deposit in an approved tenancy deposit scheme. Nor did he provide Mr Pearson with the prescribed information in relation to this, all in terms of the Housing (Scotland) Act 2006 Part 4 (ss 120–123) and the Tenancy Deposit Schemes

(Scotland) Regulations 2011, SSI 2011/176 (summarised in *Conveyancing 2011* pp 55–56). When Mr Aird did not return the deposit at the end of the lease, Mr Pearson applied to the First-tier Tribunal under reg 9 of the 2011 Regulations. He sought an order against Mr Aird for £600, being three times the value of the original deposit. This is the maximum that the Tribunal is allowed to award in such circumstances under reg 10 of the 2011 Regulations.

Mr Aird's evidence to the Tribunal was to the effect that his practice was to let tenants decide whether their deposit should go into an approved scheme or not. Many of his tenants were students and only stayed for a few months. The approved scheme process was time-consuming and, if his tenants opted out of it, he would charge a lower figure as a deposit. He thought that this was permissible under the 2011 Regulations. The deposit had not been returned to Mr Pearson because the property needed some work done to it before it could be re-let.

The Tribunal held that Mr Aird's understanding of the 2011 Regulations was flawed – lodging of the deposit in an approved scheme is mandatory – but it 'found his submissions that he believed he was doing the right thing to be credible' (para 27). It said that he 'would benefit from taking some independent legal advice regarding tenancy deposits to ensure compliance in future' (para 29). In the circumstances, it concluded that ordering him to pay Mr Pearson £400 (double the original deposit) was appropriate.

(44) Devine v Bailo
[2022] UT 14, 2022 GWD 20-280

This was an appeal to the Upper Tribunal by a landlord on the procedure which the First-tier Tribunal had adopted in relation to a tenant's application that his tenancy deposit of £350 had not been paid into an approved scheme under the Tenancy Deposit Schemes (Scotland) Regulations 2011, SSI 2011/176. The landlord had sought an in-person hearing. He provided reasons for this, in particular that this would allow the First-tier Tribunal better to assess the demeanour of witnesses. The First-tier Tribunal decided, however, to proceed by telephone conference in order to avoid delay in the circumstances of the Covid-19 pandemic. The tenant was agreeable to this. The landlord did not attend the telephone conference. The First-tier Tribunal ordered that the landlord pay the tenant £700.

On appeal, the Upper Tribunal considered the overriding objective set out in regs 2 and 3 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, SSI 2017/328, namely to deal with the proceedings justly. In this regard it concluded that the First-tier Tribunal had given insufficient consideration to the landlord's reasons for seeking an in-person hearing and quashed its decision.

(45) Arshad v Khawaja
[2022] UT 21, 2022 Hous LR 68

This was an appeal by a landlord of a decision of the First-tier Tribunal that he had failed to comply with a repairing standard enforcement order under s 26(1)

of the Housing (Scotland) Act 2006 and the subsequent imposition of a rent relief order.

The lease was a short assured tenancy. The enforcement order had required the landlord to obtain a dampness report and undertake various damp-proofing works. Although both landlord and tenant agreed that major work was required, the landlord's position was that it was necessary for the tenant to move out before this could be done. The First-tier Tribunal held that this did not excuse the failure of the landlord to deliver the dampness report within the specified time.

Before the Upper Tribunal the landlord argued that his contractors had carried out most of the necessary works. They would not, however, do those relating to dampness as this would be harmful to the tenant's health and safety if he remained in residence. The landlord stated that he had asked the tenant to move out on three separate occasions and offered him alternative accommodation, although no written evidence of this was produced. The tenant's position was that if the landlord could not have met the tenant's costs for alternative accommodation or arranged such accommodation for him then the landlord could have sought eviction under sch 5 para 6 of the Housing (Scotland) Act 1988. This allowed for (at the time) compulsory removal to carry out substantial works subject to paying the tenant's expenses. As an alternative, sch 5 para 9 enabled removal subject to alternative accommodation being provided.

The appeal was refused. First, the Upper Tribunal disallowed an attempt by the landlord to lodge new evidence in the form of an email from a specialist contractor on the basis that there was no reason why this could have not been obtained before the First-tier Tribunal hearing. Secondly, the First-tier Tribunal had erred in determining that the statutory test under s 26(3)(b) of the 2006 Act required the landlord to make 'serious efforts' to provide alternative accommodation. What the provision expressly demanded was for 'reasonable steps' to be taken by the landlord to procure access to carry out the works where these could endanger the tenant. This meant reaching agreement with the tenant as to leaving the property, or invoking sch 5 para 6 or 9. As the landlord had not done either the appeal failed, despite the error in law by the First-tier Tribunal. Thirdly, the First-tier Tribunal had been correct to impose a rent relief order reducing the rent by 90% until the repairing standard enforcement order had been complied with.

A further appeal to the Court of Session was refused at [2022] UT 22.

(46) Umali Ltd v Sneddon [2022] UT 27, 2022 GWD 34-504

A landlord appealed against a decision of the First-tier Tribunal in respect of a compensation order against the tenants for repairs to the leased property and other losses. While ordering the tenants to pay £4,338.60 to the landlord, the First-tier Tribunal refused a claim for £950 in respect of a replacement door. This had been damaged by police officers executing a search warrant relating to suspected possession of drugs.

The Upper Tribunal allowed the appeal. It noted that as well as liability under the terms of a lease, at common law a tenant could be liable for damage caused as a result of fault or negligence. (No authority was cited for this proposition although it is correct: see eg *Mickel v McCoard* 1913 SC 896.) There required to be a causal link between the tenant's actings and the loss. Here, in the absence of contrary evidence to explain why the police obtained the search warrant, there was sufficient evidence for appropriate inferences to be drawn. The landlord had demonstrated a causal link that, on the balance of probability, there had been fault on the part of the tenants and they were therefore liable to the landlord for the cost of replacing the door.

(47) Two Rivers Housing v Sanders [2022] UKUT 79 (LC), [2022] 2 P & CR DG13

This English case concerned the interpretation of a condition in a lease requiring the tenant to contribute to repair costs. The property here was a one-bedroom flat on the first floor of a block containing four similar flats on a former local authority housing estate in Coleford, Gloucestershire. The costs related to work to a section of the roof of the building which covered a communal stairwell and first-floor landing providing access to the flat. The First-tier Tribunal held that the lease did not require the tenant to contribute towards the costs. The landlord appealed to the Upper Tribunal.

The lease provided that the tenant was granted a right of way over the stairway and landing 'subject to the payment of one half of the expense of maintaining and keeping the whole or any part or parts of such stairway and landing in repair'. The Upper Tribunal, refusing the appeal, held that on a proper construction this did not impose liability on the tenant to contribute to repairs to the roof. There were several reasons for this conclusion. These included, first, that as a matter of language the relevant clause was limited to the structures over which the tenant was entitled to pass and not the structures enclosing and covering these in respect of which the tenant had no access rights. Secondly, the landlord's comprehensive repairing obligation set out elsewhere in the lease was not subject to contribution from the tenant. Thirdly, the lease also granted the tenant an unqualified right of protection by the roof, again not subject to any contribution towards repairs. Fourthly, the plans appended to the lease were sufficiently detailed to show that the tenant had no access rights over the vertical structures of the stairway and landing or the roof. Fifthly, the roof was a single structure. There was nothing in the lease to indicate that repairs to parts of it were to be apportioned or any dispute mechanism for any failure to agree apportionment. Sixthly, other provisions in the lease in relation to contributions to costs indicated that the tenant did not have to pay for roof repairs. Seventhly, the part of the building in respect of which the roof had been repaired included store rooms to which the tenant had no access yet the landlord's position was that the tenant was nevertheless liable under the lease for half the costs. The case underlines the importance when drafting a lease of clear specification of the tenant's liabilities.

(48) Brem v Murray
[2022] EWHC 1479 (QB), [2022] L & TR 24, [2022] 2 P & CR DG24

In another case from England, a sub-tenant of a flat in Basildon claimed damages against the tenant for eviction by the over-landlord. The flat was above a hairdressing salon run by the tenant. He had his landlord's permission to use the flat and in 2016 entered into an agreement with the sub-tenant. This gave her the right to exclusive possession of the flat and the benefit of an implied covenant for quiet enjoyment. The sub-tenant paid rent to the tenant who then paid rent to his landlord.

In 2017 the sub-tenant served a notice on the over-landlord that the flat was in a dangerous condition. His response was to remove her belongings, change the locks and evict her. The sub-tenant sought damages against both the tenant (her immediate landlord) and the over-landlord for unlawful eviction under s 3 of the Protection from Eviction Act 1973.

At first instance a judge of the County Court found that the tenant had stood by and allowed the eviction to happen despite the implied covenant for quiet enjoyment. He held him jointly and severally liable with the over-landlord.

This decision was overturned on appeal by the High Court. It held, following *Kenny v Preen* [1963] 1 QB 499, that the implied covenant only protected the sub-tenant from eviction by the tenant and anyone claiming title to the property through him. For intrusions by others, including an over-landlord, the remedy lay in tort. The sub-tenant was entitled to damages for the unlawful eviction but only from the over-landlord.

In Scotland, it is a criminal offence to remove a residential tenant unlawfully without a court order: Rent (Scotland) Act 2004 s 22. There is also civil liability: Housing (Scotland) Act 1988 ss 36– 40 as amended by the Cost of Living (Tenant Protection) (Scotland) Act 2022 s 2 and sch 2 (on which see below p 205). For general discussion of the need for a court order to evict, see *Conveyancing 2019* pp 136–39.

(49) Sharma v Renfrewshire Council
[2022] UT 8, 2022 Hous LR 45

This was an unsuccessful challenge to a landlord's removal from Renfrewshire Council's Register of Private Landlords in accordance with s 89 of the Antisocial Behaviour etc (Scotland) Act 2004 on the basis that she was not a 'fit and proper' person. The appellant argued that the Council should have considered her likely future conduct in reaching the decision.

Both the First-tier Tribunal and Upper Tribunal dismissed this argument. It was held that the Council had given careful consideration to the issue of whether the appellant should be removed from the Register. Furthermore, the legislation was clear and there was no need to use guidance produced by government officials in 2017 in seeking to interpret it. In any event, the guidance did not

support the appellant's position that a 'forward looking' approach should be taken in relation to 'fit and proper'.

Finally, the appellant had made an unfocused argument stating that the Council required to act proportionately in terms of the European Convention on Human Rights as implemented by the Human Rights Act 1998. But, as the Upper Tribunal noted, there was no averment that the 2004 Act required to be read in a Convention-compliant manner or that if this was not possible a declaration of incompatibility should be issued. In any event, it was held that the Council's processes for reaching the decision satisfied any requirement of proportionality.

Whether the ECHR was engaged here seems doubtful. The appellant had suggested that the de-registration was the loss of a 'possession' within the meaning of article 1 protocol 1. But a registration is not a transferable asset such as land or moveable property. See also *Hughes v Glasgow City Council* [2021] UT 12, 2021 Hous LR 41, *Conveyancing 2021* Case (39).

(50) Countrywide Residential Lettings Ltd (t/a Slater Hogg & Howison) v Cowan [2022] UT 23, 2022 GWD 30-443

A letting agent appealed against a decision of the First-tier Tribunal which had found it in breach of the Letting Agent Code of Practice para 21 by failing to use reasonable care and skill when it did not check on a prospective tenant's right to reside in the United Kingdom. The tenant had subsequently failed to pay the rent and was evicted from the property. The First-tier Tribunal had held that it was reasonable for a prospective landlord to expect a letting agent to carry out a check on the right to reside of a prospective tenant who had recently moved to the country. It issued a letting agent enforcement order requiring the letting agent to pay the former landlord £7,302.

The Upper Tribunal allowed the appeal. It held that, normally for there to be a breach of para 21 in the failure to use reasonable care and skill, the former landlord would require to establish that: (i) the usual and normal practice of letting agents when dealing with proposed tenants from abroad was to make the checks that the respondent claimed were necessary; (ii) the letting agent did not follow that practice; (iii) the course taken by the letting agent was one that no professional person of ordinary skill would have taken if they had been acting with ordinary care. It referenced the leading case on professional negligence, *Hunter v Hanley* 1955 SC 200. The First-tier Tribunal did not have before it any evidence of what constituted reasonable care and skill in the relevant circumstances and therefore there was no basis for the conclusion that the required standard had not been met. It remained possible for the former landlord to bring a claim in the ordinary courts for professional negligence. We would observe, however, that such a claim would require the evidence whose omission caused the letting agent to be successful in the present appeal.

FAMILY PROPERTY

(51) King v Adam
[2022] SC KIL 43, 2023 GWD 1-17

A frequent source of litigation is where two parties live together, entangle their affairs, including property, and then break up acrimoniously, with property-related claims being made. If the relationship is one of marriage, the dispute can be handled within the framework of divorce law, but of course increasingly commonly nowadays the relationship has never been formalised. Those who wish to enjoy the blessings of divorce must first submit themselves to the miseries of marriage.

Often the law of unjustified enrichment is invoked in these non-divorce litigations, and the present case was yet another example. The facts have yet to be determined, since the present stage of the case was limited to a debate about the relevancy and specification of the pleadings. But it seems that Angela King and Yvonne Adam began to live together about 2005. In the words of the judgment (para 45): 'There was … only a friendship between the parties. They were not engaged to be married, nor had they agreed to a lifelong cohabiting relationship with each other.' Over the years they bought and sold various properties together and to some extent pooled their resources. The friendship eventually came to an end, and there was an action of division and sale of the property that they co-owned at 4 Hillmoss, Kilmaurs, Ayrshire. A solicitor was appointed by the court to carry out the sale, and, having done so, he deposited the net proceeds with the court, whereupon the parties disputed as to how the deposited money should be divided between them.

Sheriff George Jamieson's impressive judgment is of interest for experts in the law of unjustified enrichment, for two reasons. In the first place it was held that the branch of unjustified enrichment in Roman law known as the *condictio ob causam finitam*, forms part of Scots law, as has recently been argued by Professor Niall Whitty, whose views in the *Stair Memorial Encyclopaedia: Unjustified Enrichment Reissue* (2021) paras 340 ff are cited by the court with approval. In Whitty's words (para 337), the *condictio ob causam finitam* is 'a personal action to reverse a transfer made for a cause which was valid at the time of transfer but which later ceases to exist'. The classic example in Roman law was of the laundry which loses its customer's clothes and pays compensation for the loss, whereupon the clothes are found and recovered by the customer (*Digest* 12.7.2 (Ulpian)). A transfer (the payment of compensation) which was justified at the time it was made becomes unjustified when the clothes are found and the basis for compensation disappears. The laundry has thus a claim for the return of the money.

So far as we know, there were no laundries in *King v Adam*. But money, it was averred, had been given by the defender to the pursuer on the basis of a domestic arrangement which had now ceased to exist. As the sheriff explained (paras 45–47):

> The transfers were for the cause of the parties economically benefiting from living in the same house together. As soon as that state of affairs ceased to exist, so did

the reason for the transfers of the money. The defender accordingly submitted that in these circumstances the pursuer had been enriched at the defender's expense, there was no legal basis for that enrichment (the pursuer does not argue donation, or gift, or contract), and that it would be equitable to compel the pursuer to redress the enrichment. That being so, this case is one in which the defender has relevantly pled that she is entitled to have the unjustified enrichment redressed; also, that the circumstances of the case correspond to the *condictio ob causam finitam* and do not correspond to the *condictio causa data causa non secuta*.

The second issue concerned negative prescription. It was common ground that claims in unjustified enrichment prescribe after five years, and that the five-year period begins to run from the time when the claim is first enforceable: see Prescription and Limitation (Scotland) Act 1973 s 6 and sch 1 para 1(b). But when did the claim in the present case become enforceable? Was it when the parties bought the house together in 2014 (as argued by the pursuer), in which case the claim would have prescribed, or was it when the defender left the house in 2019 (as maintained by the defender)? Prior Outer House authority supported the earlier of those two dates: see *Virdee v Stewart* [2011] CSOH 50, 2011 GWD 12-271 (*Conveyancing 2011* p 45) and *Thomson v Mooney* [2012] CSOH 177, 2012 GWD 39-769 (*Conveyancing 2012* p 51, reversed on a different ground [2013] CSIH 115, 2014 Fam LR 15). But the sheriff decided in favour of the later date, preferring the view on that point of Professor Martin Hogg: 'Unjustified Enrichment Claims: When Does the Prescriptive Clock Begin to Run?' (2013) 17 *Edinburgh Law Review* 405 which had been critical of the Outer House cases. This conclusion followed from the very basis of the *condictio ob causam finitam*. The defender's claim arose, not when the money was advanced, but when the reason for the advance ceased. That occurred when the defender left the house.

SOLICITORS

(52) Discovery Land Company LLC v Jones
Southwark Crown Court 30 November 2022

What is being described in the media as 'the longest prison sentence ever imposed on a lawyer in the UK' has arisen from the sale of Taymouth Castle in Perthshire. A US company, Discovery Land Company LLC, incorporated in Arizona, wished to purchase the castle, seemingly through a special-purpose vehicle called 'Taymouth Castle DLC LLC', incorporated in the state of Delaware. It retained for this purpose Stephen David Jones of a London law firm called Jirehouse. Mr Jones had had a distinguished career, having worked, according to reports, for Slaughter & May, and for Freshfields Bruckhaus. How Mr Jones, an English solicitor, could handle conveyancing in Scotland is not clear to us. Possibly he was dual-qualified. Perhaps he used Scottish agents. Whatever the answers may be, he embezzled the purchase funds – $14.5 million – that had been remitted to him. Despite that, the US buyers eventually succeeded in buying the property, though to do so they had to find additional funds to replace what had been embezzled: see the *Dundee Courier* of 23 August 2019. Thereafter they did

what they could to recover the embezzled money: see eg *Discovery Land Company LLC v Jones* [2022] EWHC 1234 (Ch).

Most strangely, the Crown Prosecution Service decided not to prosecute. The US buyers then raised a private prosecution, and the result in Southwark Crown Court has been that Mr Jones has been sentenced to imprisonment for 12 years: see eg www.lawgazette.co.uk/news/solicitor-jailed-for-12-years-after-private-prosecution-for-fraud/5114472.article/ and www.scottishlegal.com/articles/lawyer-at-centre-of-ps13m-scottish-castle-fraud-jailed-for-12-years/. For an overview of Mr Jones's activities, including some unconnected with the Taymouth castle transactions, see an article invitingly headlined 'Is Stephen David Jones Britain's most corrupt lawyer?': www.thetimes.co.uk/article/meet-britains-most-corrupt-lawyer-stephen-david-jones-was-jailed-for-12-years-now-his-other-alleged-victims-are-speaking-out-7jw2vzn6t.

JUDICIAL RECTIFICATION

(53) Drysdale v Purvis [2022] CSOH 66, 2022 GWD 30-435

Section 8(1)(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 empowers a court to rectify – to correct errors in – a conveyancing or other document if satisfied that 'a document intended to express or give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made'. For rectification under this provision, therefore, the document must relate to 'an agreement', although not necessarily an agreement that is legally binding. And the relationship between document and agreement must either be that the document is 'intended to express' the agreement or alternatively that is intended to 'give effect' to it. The difference is important. In conveyancing terms, missives 'express' an agreement (ie they set out in a formal document that which has already been or is in the course of being agreed between the parties), whereas a disposition 'gives effect to' an agreement (ie it implements the missives). So far as rectification is concerned, prospects of success are much better in the second case than in the first. For if, say, missives provide for the sale of two fields and the disposition conveys three fields, it is usually a straightforward matter to show that the disposition is in error and should be rectified to bring it into line with the missives. But if it is the missives themselves that are said to be in error, the argument becomes much harder to run. For whereas behind the disposition stands the missives, there is (usually) nothing which stands behind the missives – and so nothing against which the terms of the missives can be measured. The result is often a crisis of evidence. As the Lord Ordinary (Turnbull) expressed the position in *Drysdale v Purvis* (at para 82):

> I accept that a high quality of evidence is required to persuade the court to grant rectification of written documents such as feature in this case and that the party bearing the burden of proof faces a stiff hurdle to overcome.

Drysdale is, nonetheless, a rare example of where that 'stiff hurdle' was overcome, and rectification of missives – and of the disposition that followed – was granted.

The facts of *Drysdale v Purvis* were disputed, and difficult to determine in view of the long passage of time. But, following a proof, the Lord Ordinary found the course of the transaction to have been as follows. On 7 August 1995 Mr and Purvis made a formal offer to buy part of Cavelstone Farm in Kinross, comprising (i) fields and (ii) part of the farm steading. Each of (i) and (ii) was shown on a separate plan referred to in the offer. The sellers were Mr and Mrs Drysdale. The same solicitors acted for both parties.

The offer having been made, the parties then entered into negotiations as to precisely what land should fall under (i). Their agreement in this respect was recorded in the qualified acceptance issued on 24 August. But by an unhappy mistake – described by the solicitor at the proof (para 29) as 'a catastrophic error on the part of his firm' – the subjects described in the qualified acceptance failed to include (ii). Missives were concluded of the basis of (i) only, a disposition was drawn up, and the transaction settled. The disposition followed the description in the concluded missives, so that once again subjects (ii) – the parts of the farm steading – were omitted.

No one seems to have spotted the mistake, either at the time or for many years thereafter. Mr and Mrs Purvis took possession of the parts of the steading they thought they had acquired, and over time carried out extensive improvements, including the replacement of roofs, the installation of flooring and electricity, and the erection of a substantial shed. No opposition to this was expressed by Mr and Mrs Drysdale, the sellers and now neighbours.

So matters continued for many years. It was only after Mrs Drysdale died and Mr Drysdale, much later, was admitted to a nursing home, that the true position was discovered. But by this time the parties were at loggerheads. Mr and Mrs Purvis maintained that they had bought the relevant parts of the steading; Mr Drysdale, now represented by his daughters acting under a power of attorney, said that the missives and disposition were definitive.

To break the impasse, Mr and Purvis sought rectification of the missives and disposition to the effect of adding in the parts of the steading which, they said, had been omitted in error. Following a proof, the Lord Ordinary was satisfied (a) that the common intention of the parties had been to include the steading in the sale, (b) that neither party had departed from that common intention prior to the conclusion of missives (thus distinguishing the facts from those of *Briggs of Burton plc v Doosan Babcock Ltd* [2020] CSOH 100, 2021 GWD 1-9 (*Conveyancing 2020* pp 53–54)), and (3) that accordingly 'both the missives and the disposition failed to express accurately that common intention which remained in place throughout' (para 81). Rectification was therefore granted.

On the evidence, there was the obvious difficulty that the documentation had been seen by both parties at the time without either raising any objections. Mr Purvis had seen the qualified acceptance. Mr and Mrs Drysdale had signed the disposition. In respect of the former, the Lord Ordinary said (at para 70):

> I accept the evidence of Mr Purvis who explained that he did not pay any real attention to the correspondence he received from Johnston & Herron. As he explained, with a certain sense of logic, he thought nothing could possibly go wrong if the same solicitor was acting for everyone.

In respect of the latter, the Lord Ordinary decided that the fact of the Drysdales having signed the disposition was outweighed by what happened next (para 68):

> Mr Purvis took possession of the larger part of the steading and proceeded to transform it. He did so with the knowledge and, at times, active participation of Mr Drysdale. He treated it as if it was his own, to the obvious knowledge of Mr and Mrs Drysdale. I do not accept that Mr Drysdale would simply have stood by and allowed Mr Purvis to occupy and build upon land and allow him to renovate buildings, which he believed to be his, over many years, without raising the matter with him. The evidence demonstrates that Mr Drysdale was the kind of man who would state his mind and was not slow to enter into disagreement with others. I am satisfied that if either Mr or Mrs Drysdale had any reason to think that the original agreement to include part of the steading in the sale had been departed from they would have voiced this understanding and raised it with Mr Purvis or with others.

Finally, a comment. The disputed events took place in 1995. From that time onwards, it would have been in the power of Mr and Mrs Purvis to seek rectification of the missives and disposition. They did not do so. Instead they allowed 25 years to pass before bringing the present action. Might their right to do so have been lost by negative prescription? See **Commentary** p 151. That possibility does not appear to have been raised in the case.

[Another aspect of this case is digested as Case (2) above.)]

BOUNDARIES AND POSITIVE PRESCRIPTION

(54) Dougherty v Taylor
[2022] SAC (Civ) 20, 2022 GWD 27-395

The pursuer owned the house at 110 Old Edinburgh Road, 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 lengthy boundary between their properties. At issue was an area which, at its widest, was less than a metre. Yet the dispute evidently aroused strong feelings, and the police were summoned on at least one occasion. The action was one of declarator in respect of 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 disponed were described both by a verbal account of the 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. The description in the A (property) section of the title sheet for number 110 was, as might be expected, simply 'Subjects cadastral unit INV34272 110 OLD EDINBURGH 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 GRS (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 registered deed underlying her title sheet; and in any event the necessary prescriptive period had not elapsed since the time of 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 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.

That settled, the result then came down to the evidence of possession. Here, following a proof, the spoils were divided: see [2021] SC INV 61, 2021 GWD 40-529 (*Conveyancing 2021* Case (59)). 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.

The pursuer appealed to the Sheriff Appeal Court. The dispute, she said, fell to be determined solely by the cadastral map. The pursuer (now appellant) had a registered title. Her rights – and hence the rights also of the defender (now respondent) – depended on the proper interpretation of that title.

It does not take much reflection to see what is wrong with this argument. The pursuer's title reached the Land Register by voluntary registration in 2015, presumably in the hope of ending the dispute. But, in any process of registration under the Land Registration etc (Scotland) Act 2012, the applicant for registration receives only that which is vouched for by the underlying deeds (as the defender pointed out). To put it another way: under the 2012 Act – unlike under the predecessor legislation of 1979 – there is no Midas touch. The pursuer could not improve her position by getting on to the Land Register. What she owned after registration was exactly the same as she owned when she still held on a Sasine title. In circumstances where the boundary was contested, registration was neither here nor there. The pursuer having been in control of the application for registration, her title sheet represented the pursuer's truth. It did not represent the defender's truth.

In the event, the appeal failed, although not on the ground just mentioned. The scale of the cadastral map was too small to yield a clear answer to the positioning of the boundary; and the Sheriff Appeal Court thought that the sheriff had been justified in rejecting the attempt by a surveyor engaged by the pursuer to explain what that boundary amounted to.

A final point. At para 36 the Sheriff Appeal Court said this:

> While a land certificate creates real rights, the underlying facts remain capable of challenge. If the challenge is successful, to the extent of showing manifest error, the Keeper is obliged to rectify the register (2012 Act section 80). Until the Keeper does so, however, the title remains as shown in the cadastral map. Unlike the Lands Tribunal, the sheriff court has no powers to compel rectification of the map.

The second of these four sentences is irreproachable. But the other three contain errors which, coming from an appeal court, ought not to stand uncorrected. First, the Land Register has long since ceased to use land certificates. The meaning intended here is presumably title sheet. A land certificate was an official copy of the title sheet. Second, a title sheet does not, of itself, create real rights. Certainly, registration is an indispensable step in the creation of many

real rights in land. But it is not a conclusive step. If the applicant for registration lacked entitlement to the right, registration does not repair the absence; instead, the registration is of no legal effect. Third, an entry on the Land Register which is inaccurate as to title but unrectified confers no rights (although the position can change, eventually, due either to positive prescription or realignment). So, while awaiting rectification, it is not the case that 'the title remains as shown on the cadastral map' or title sheet. If the Register is inaccurate in showing A as owner of plot B, then A does not own plot B, whatever the Register may say. And rectification, if and when it occurs, neither creates nor destroys any rights in plot B: it merely brings the Register into line with what was already the legal position. Finally, it is not correct to say that 'unlike the Lands Tribunal, the sheriff court has no powers to compel rectification of the map'. Both Tribunal and court have such powers (on which see Scottish Law Commission, *Report No 222 on Land Registration* (2010) para 18.18). But they are unlikely to be asked to use them. Their usual role is to settle the title dispute between the parties. Once that has been done, any inaccuracy in the Register becomes 'manifest' and so can and must be rectified by the Keeper under s 80 of the 2012 Act.

(55) Connaughton v Keeper of the Registers of Scotland 12 January 2022, Lands Tribunal

Mrs Connaughton owned a flat on a Sasine title (a disposition of 1987) above the shops at 7–11 King Street, Crieff. Until 1990 she had also owned the shops. She was in dispute with a neighbour, Mr Brock, as to the ownership of a derelict yard which lay behind the building in which she had the flat. The yard had been conveyed to Mr Brock by his father in 2009, inducing first registration in the Land Register in 2010. Mr Brock thus had a registered and guaranteed title to the yard.

Following a proof and a considerable amount of detective work, the Lands Tribunal found that, by long-standing right or at least by positive prescription, the yard had been acquired by Mr Brock's family in 1980. The only question to be decided, therefore, was whether Mrs Connaughton had subsequently acquired the yard by positive prescription. If so, Mrs Connaughton would become owner even in the face of a registered title in the Land Register. For, importantly, it is possible for a Land Register title to be defeated by a prescriptive title acquired on the basis of a Sasine deed.

Positive prescription, of course, requires a registered title followed by possession for a period of 10 years. Mrs Connaughton's case failed on possession. Neither side had made active use of the site since 1987. Before then, possession had been with the Brock family. Applying the tests laid down in *Hamilton v McIntosh Donald* 1994 SC 304, the Tribunal found that the 'sporadic and irregular' acts carried out on behalf of Mrs Connaughton did nothing to displace that possession (para 53):

> There is no suggestion that the appellant [Mrs Connaughton] has ever used the yard according to its nature ie for the purposes of storage, parking or even as a garden. So we do not think that the acts of the appellant can constitute possession as discussed under point 4 of *Hamilton v McIntosh Donald Ltd*.

Possession, it turned out, was 'the less difficult question'. Its insufficiency made it unnecessary to decide the rather harder question of whether Mrs Connaughton had a title which was sufficient for the purposes of prescription. There was no express mention of the yard in the disposition in her favour. The description read, simply:

> ALL and WHOLE those two shops and house above, forming numbers 7, 9 and 11 King Street, in the town of Crieff and county of Perth with the solum thereof and ground attached …

But might the closing words ('and ground attached') be a sufficient title for prescription? On the whole, the Lands Tribunal thought not (para 50):

> Counsel acknowledged that the relevant authorities, the most notable of which is *Auld v Hay* [(1880) 7 R 663], do not require a 'true' construction of a title for that title to be habile for prescriptive possession. The question is merely whether a title is capable of being construed in a certain way consistent with prescriptive possession. Here there is use of the words 'and ground attached' in the 1987 disposition. That description is potentially capable of comprising land adjoining the shops and house. Counsel conceded that the words would be apt to include the mutual passage or ground of about two feet in width adjoining the rear wall. We agree a more generous interpretation would seem to be required so as to include the yard as well. As we have indicated, there is no functional or design relationship between the yard and the shops and house. There is no direct access via a back door. Two ground floor windows are largely blocked in outlook by the intervening wall. In order to reach the yard one would have to leave via a front door on King Street and walk round the corner to the Bank Place access. The only other option would be to exit from a rear window and potentially move along the narrow passage until the wall ends where there is a space into the yard. So we cannot see how the yard is 'attached' to the house and shops in a particularly meaningful sense. So it is quite difficult to conclude that the appellant has a habile title to the yard based on the words of the 1987 disposition.

[Another aspect of this case is digested as Case (29) above.]

(56) Sharp v Keeper of the Registers of Scotland 2022 GWD 26-376, Lands Tribunal

A split-off disposition of 1991 described the subjects conveyed ('property B') by plan (only). A fence was then erected on the boundary with the property retained by the disponer ('property A'). This excluded a small area which had been included in the plan. Possession followed on both sides, for 30 years, on the basis of the fence rather than the plan. A real burden in the disposition referred to the fence as lying 'between' the respective properties. Taken together with the possession, was this reference sufficient to displace the deed plan and to fix the boundary as the line of the fence? Surely correctly, the Lands Tribunal said no. In reaching that view, the Tribunal relied on *Rivendale v Clark* [2015] CSIH 27, 2015 SC 558 (*Conveyancing 2015* pp 63–65), a case in which the importance of deed plans was emphasised.

This decision may not be the end of the matter. As the Tribunal noted (para 18), the possession of the excluded area by the proprietors of property A might have created a servitude of way in respect of that area by positive prescription. More than that, though, it probably led to the reacquisition of the area by positive prescription. Property A continued to be held on a Sasine title – a title that included property B; and there had been possession for more than the 10 years of positive prescription. So there seems no reason why prescription should not have run in favour of property A: see G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 8-33 and the authorities there cited.

[Another aspect of this case is digested as Case (25) above.]

INSOLVENCY

(57) Accountant in Bankruptcy v Allan [2022] SC DUN 17, 2022 SLT (Sh Ct) 170, 2022 SCLR 304, 2022 Fam LR 93

Mr and Mrs Allan co-owned a house at 63 Hawick Drive, Dundee. They parted and there was a divorce action. The court ordered Mrs Allan to transfer her half share in exchange for payment to her of £22,288.64. This sum was paid, being raised by a loan made jointly to Mr Allan and his new partner. A disposition by the former Mrs Allan was granted. It took the form of a disposition granted by both of the former spouses in favour of Mr Allan and his new partner. It was registered in the Land Register on 1 September 2017. At the same time a standard security by Mr Allan and his new partner in favour of Royal Bank of Scotland plc was registered. But Mr Allan was teetering on insolvency, and he was sequestrated with effect from 22 September 2017.

Mr Allan's trustee in sequestration took the view that a challengeable gratuitous alienation had taken place. Had the original court order been carried out according to its terms, Mr Allan would have received the former Mrs Allan's half share, and thus have become 100% owner. Instead, he had given up that share in favour of his new partner. She, said the trustee, had not given consideration for it. Therefore there had been an unlawful gratuitous alienation by an insolvent person, within the run-up period before sequestration. (The run-up period is either two years before sequestration, or five, depending on the circumstances: Bankruptcy (Scotland) Act 2016 s 98(4).)

The defence by the new partner was that her acquisition of the half share had not been gratuitous, in that she had jointly borrowed the sum needed to pay the former Mrs Allan. This defence seems to us not to be without merit; however, the sheriff (Gregor Murray) rejected it.

The technical form that the action took calls for some comment. It appears that the pursuer had two craves. The first was for the new partner to transfer her half share to the pursuer. (The judgment does not quote the terms of the crave, but the substance seems to have been as stated.) The second was for reduction of the disposition. The court granted both craves. At this point s 98(5) of the Bankruptcy (Scotland) Act 2016 must be quoted:

> On a challenge being brought … the court must grant decree –
> (a) of reduction, or
> (b) for such restoration of property to the debtor's estate, or such other redress, as may be appropriate.

The first crave – that the new partner should convey her half share to the trustee in sequestration – had s 98(5)(b) as its foundation. That should have sufficed. But the trustee also sought reduction of the disposition. (We will not pause to discuss the fact that (a) and (b) are linked by the word 'or'.) It is difficult to make sense of that. Dispositions are, indeed, often reduced on the ground that they are gratuitous alienations – where X, insolvent, gratuitously dispones property to Y. But there is no suggestion that the former Mrs Allan was insolvent, and even if she had been, any challenge would have been for her trustee in sequestration, not her former husband's trustee in sequestration. Moreover, the two craves – and the two branches of the decree – were inconsistent. The sheriff said (para 64) that: 'The effect of decree being granted in the second crave would be to place the title to Hawick Drive in the Pursuer's name.' But that would mean that the first crave would be impossible. The new partner could not dispone what she no longer owned: in the immortal words of Gnaeus Domitius Annius Ulpianus at D.3.4.7.1: *nemo plus juris ad alium transferre potest quam ipse haberet*.

However, this re-vesting in the former Mrs Allan could not, in fact, have been the consequence of the decree, because she was not called as a defender. As against her the decree was, therefore, a nullity.

It might also be mentioned, by way of footnote, that a decree which reduces a voidable disposition – even if it is, unlike the present case, fully valid – does not have real effect merely by its own force. To attain real effect it must be registered: Conveyancing (Scotland) Act 1924 s 46A.

TIMESHARES

(58) Club Los Claveles v First National Trustee Co Ltd [2022] CSIH 35, 2022 SC 251, 2022 SLT 1165, 2022 SCLR 424

This, a case about timeshare property, is a sequel to *Club Los Claveles v First National Trustee Co Ltd* [2020] CSIH 33, 2020 SC 504, 2020 SLT 880 (*Conveyancing 2020* Case (70)). The problem in this phase of the litigation was that the club's AGMs in 2017 and 2018 had been invalid and that since then there had been no AGMs at all, so that there was a question as to who now constituted the committee to act on behalf of the club. It was held that the committee as it existed prior to 2017 still had power to act. The case is likely to become a significant authority on the law of unincorporated associations.

PART II

STATUTORY DEVELOPMENTS

STATUTORY DEVELOPMENTS

Coronavirus (Recovery and Reform) (Scotland) Act 2022 (asp 8)

This Act, covering a wide range of topics, is in part designed to enact on a permanent basis changes which were introduced on a temporary basis during the Covid-19 crisis by the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No 2) Act 2020 (as to which see *Conveyancing 2020* pp 63–68). Only the topics of direct interest to property lawyers are covered here. All of the provisions discussed came into force on 1 October 2022 (s 59(1)), being the day after the final expiry of the two Coronavirus Acts (the expiry date having been postponed, yet again, by the **Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2022, SSI 2022/113**); certain transitional rules concerning the termination of residential tenancies can be found in s 48.

Land registration: digital submission service

Section 33 provides part of the legislative foundation for the digital submission service which, introduced as a temporary expedient when the offices of Registers of Scotland were shut during Covid (see *Conveyancing 2020* pp 78–79), is now being made permanent. Four subsections are added to s 21 of the Land Registration etc (Scotland) Act 2012 authorising the submission by electronic means of a copy of the deed which is to be registered. This makes permanent an amendment which had previously been made, on a temporary basis, by para 12 of sch 7 of the Coronavirus (Scotland) Act 2020. An equivalent change is made to s 6A of the Land Registers (Scotland) Act 1868. Section 33 should be read together with the **Registers of Scotland (Digital Registration, etc) Regulations 2022, SSI 2022/65**, reg 2 of which adds a new reg 7A to the Land Register Rules etc (Scotland) Regulations 2014, SSI 2014/150. This explains that, with some limited exceptions, submission by electronic means requires submission using the RoS computer system.

Notarised documents

Section 39 adds a new s 10A to the Requirements of Writing (Scotland) Act 1995. This re-enacts a temporary provision found in sch 4 para 9 of the Coronavirus (Scotland) (No 2) Act 2020. Although s 10A is, like its predecessor, opaquely worded, its effect appears to be that, where a document requires to be authenticated by a notary, solicitor or advocate, the notary, solicitor or advocate

does not need 'to be physically in the same place' as a person who signs the document, takes an oath, or makes an affirmation or declaration. This allows the process to be carried out using video technology. Examples of documents which are affected include the 'notarial' execution of deeds under s 9 of the 1995 Act, and continuing and welfare powers of attorney. The provision does not, however, apply to the ordinary witnessing of deeds. At the time of the earlier version of the provision, in 2020, the Law Society issued guidance on notarial acts using video technology; this is reproduced in *Conveyancing 2020* pp 66–68.

Eviction in residential leases

Sections 43–45 make permanent the changes to the eviction proceedings for private-sector residential tenancies which were originally made, on a temporary basis, by sch 1 paras 1, 3 and 5 of the Coronavirus (Scotland) Act 2020. This removes the mandatory grounds of eviction by changing the cases where the court 'must' grant decree in the landlord's favour to 'may' grant decree. This applies to tenancies under the Private Housing (Tenancies) (Scotland) Act 2016 (ie private residential tenancies), under the Housing (Scotland) Act 1988 (ie assured tenancies), and under the Rent (Scotland) Act 1984 (such as still exist). The grounds of eviction affected are: where the landlord intends to sell; where property is to be sold by a lender; where the landlord intends to refurbish; where the landlord intends to live in the property; where the landlord intends to use the property for non-residential purposes; where the property is required for religious purposes; where the tenant is not a qualifying employee; where the tenant is not in occupation; where there are rent arrears; and where the tenant is involved in criminal or antisocial behaviour. In all of these cases, eviction is now at the discretion of the court. Helpful background to this change can be found in an article by Malcolm Combe in the August 2022 issue of the *Journal of the Law Society of Scotland* (at p 20) and in a second article in the *Juridical Review*: 'Shifting grounds for private renters in Scotland: eviction after the Coronavirus (Recovery and Reform) (Scotland) Act 2022 and during the Cost of Living (Tenant Protection) (Scotland) Act 2022' 2022 *Juridical Review* 222.

Sections 46 and 47 introduce a 'pre-action protocol' in cases where the ground of eviction is rent arrears (of three or more consecutive months). This applies to private residential tenancies (amending the Private Housing (Tenancies) (Scotland) Act 2016 sch 3 para 12) and assured tenancies (amending the Housing (Scotland) Act 1988 s 18), and replaces the temporary provisions in sch 1 paras 4 and 5 of the Coronavirus (Scotland) (No 2) Act 2020. The protocol is not mandatory; but in considering whether it is reasonable to issue an eviction order against a tenant, the First-tier Tribunal is to consider the extent to which the landlord complied with the protocol. The protocol turns out not to be new. It amounts simply to the requirements already set out in the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020, SSI 2020/304, which applied during the Covid period but are now renamed as the 'pre-action protocol' (s 49). So far as concerns private residential tenancies, the protocol requires the following of the landlord (reg 4(2)–(4)):

(2) The provision by the landlord to the tenant of clear information relating to –
  (a) the terms of the tenancy agreement,
  (b) the amount of rent for which the tenant is in arrears,
  (c) the tenant's rights in relation to proceedings for eviction (including the pre-action requirements set out in this regulation), and
  (d) how the tenant may access information and advice on financial support and debt management.

(3) The making by the landlord of reasonable efforts to agree with the tenant a reasonable plan to make payments to the landlord of –
  (a) future payments of rent, and
  (b) the rent for which the tenant is in arrears.

(4) The reasonable consideration by the landlord of –
  (a) any steps being taken by the tenant which may affect the ability of the tenant to make payment to the landlord of the rent for which the tenant is in arrears within a reasonable time,
  (b) the extent to which the tenant has complied with the terms of any plan agreed to in accordance with paragraph (3), and
  (c) any changes to the tenant's circumstances which are likely to impact on the extent to which the tenant complies with the terms of a plan agreed to in accordance with paragraph (3).

These provisions in turn are loosely modelled on the pre-action requirements for enforcement of standard securities found in s 24A of the Conveyancing and Feudal Reform (Scotland) Act 1970.

The Scottish Government has published guidance for landlords on pre-action protocols and seeking repossession of private rented housing on the ground of rent arrears: www.gov.scot/publications/coronavirus-covid-19-guidance-for-private-landlords-on-seeking-repossession-of-private-rented-housing-on-rent-arrears-grounds/. More general guidance has also been published in view of the changes made by this Act and by the Cost of Living (Tenant Protection) (Scotland) Act 2022 (below). There is separate guidance for landlords (www.gov.scot/publications/private-residential-tenancies-landlords-guide/) and for tenants (www.gov.scot/publications/private-residential-tenancies-tenants-guide/, also in short form as www.gov.scot/publications/private-tenants-rights-summary/). A revised guide for tenants to the nine statutory terms in private residential tenancies has also been issued (www.gov.scot/publications/private-residential-tenancy-statutory-terms-supporting-notes-essential-housing-information/).

Cost of Living (Tenant Protection) (Scotland) Act 2022 (asp 10)

This 'emergency' Act imposes temporary restrictions on rent increases and evictions in residential tenancies. See p 194 below.

Economic Crime (Transparency and Enforcement) Act 2022 (c 10)

Part 1 of this Act established a Register of Overseas Entities with effect from 1 August 2022. See p 171 below.

Building Safety Act 2022 (c 30)

This is largely a measure for England and Wales only. But two sets of provisions which bear on property law apply to Scotland as well. Sections 136–145 require the setting up of a new homes ombudsman scheme with or without an accompanying code of practice on standards of conduct and quality of work; see p 99 below. And sections 146–151 create liability for defects in respect of cladding in external walls and of other construction products where they are installed in residential property; see p 100 below. So far, only the second of these has been brought into force.

Short-term lets

The delayed, and controversial, scheme for the licensing of short-term lets was finally enacted as the **Civic Government (Scotland) Act 1982 (Licensing of Short-Term Lets) Order 2022, SSI 2022/32,** and came into force on 1 March 2022. See p 124 below.

Private landlord registration: exemption for Ukraine lettings

The **Private Landlord Registration (Modification) (Scotland) Order 2022, SSI 2022/163,** adds a new exception – para (o) – to s 83(6) of the Antisocial Behaviour etc (Scotland) Act 2004. This removes the requirement for landlords to register in cases where a house is being used under an occupancy arrangement by a person who has permission to be in the UK in relation to the Homes for Ukraine Sponsorship Scheme.

Electronic documents

The main legislative basis of electronic documents is (i) the Requirements of Writing (Scotland) Act 1995 part 3 (ss 9A–9G) and (ii) the Electronic Documents (Scotland) Regulations 2014, SSI 2014/83. The latter has been amended from time to time, and important further amendments are now made by the **Registers of Scotland (Digital Registration etc) Regulations 2022, SSI 2022/65** regs 4–7. The amendments came into effect on 1 April 2022 or, in the case of the change made by reg 7 (allowing digital registration in the Books of Council and Session) on 1 October 2022. The main changes are set out below.

Execution

As with 'traditional' (ie paper) deeds and documents, there is a choice as to how e-documents are executed. Minimum execution – mere formal validity – is achieved in accordance with s 9B of the 1995 Act, but to achieve probativity it is necessary to comply with the more exacting rules in s 9C. Both require an electronic signature, and the type of signature needed is set out, respectively, in regs 2 and 3 of the 2014 Regulations. Hitherto this has been an 'advanced electronic signature' ('AES') in the first case and an AES certified by a qualified

certificate in the second. For details, see G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) paras 18–28 ff. The requirement for probative deeds (AES plus qualified certificate) amounts to what is more commonly known today as a 'qualified electronic signature' ('QES'). Regulation 3 is now amended so as to use the QES name – a rebranding exercise rather than a change of substance – and a definition of QES is inserted into reg 1(2). For more information on electronic signatures, see *Conveyancing 2021* pp 88–89. The signature available in association with the Law Society smartcard is a QES. Other providers offer a cloud-based QES. The Law Society maintains a non-exhaustive list of providers deemed to be offering a suitable product: see www.lawscot.org.uk/members/member-benefits/qualified-electronic-signatures/.

Annexations

'Annexations' – schedules, plans and the like – for paper deeds are a familiar part of legal practice, and are regulated by s 8 of the Requirements of Writing (Scotland) Act 1995. But what of annexations to e-documents? The idea is hard to grasp. Can there be a paper annexation to an electronic document? Probably, if unlikely in practice. Can there be an electronic annexation? The difficulty here is to distinguish between (i) the document proper and (ii) the annexation. With paper documents, the annexation is obvious because it is placed after the wet-ink signature on the document proper. But with electronic documents the distinction is less obvious.

Be that as it may, provision for annexations to electronic documents is made by reg 4 of the 2014 Regulations. As originally drafted, the provision caused some trouble because it was unclear whether, and if so how, it applied to e-documents not governed by the 1995 Act, ie documents in relation to matters for which no requirement of writing was imposed by s 1(2) of that Act. The position has now been corrected by inserting a new version of reg 4 into the 2014 Regulations. This provides separate rules for 1995 Act and non-1995 Act cases. In respect of the former, the rule (now set out in reg 4(2)) is substantially unchanged: the annexation must be (i) referred to in the main document, (ii) identified on its face as the annexation, and (iii) annexed prior to the (electronic) signing of document and annexation. In respect of the latter, only requirements (i) and (ii) are usually needed, although more is required where the annexation shows or describes land – something which will rarely occur in a non-1995 Act document given that most documents relating to land fall within the requirement of writing in s 1(2) of that Act.

Registration in the Books of Council and Session

A new reg 8 in the 2014 Regulations allows the registration of electronic documents in the Books of Council and Session. To be eligible the document must be in the form of a PDF and must be authenticated by a qualified electronic signature. This provision came into force on 1 October 2022. The development is welcome, particularly in the light of growing use of electronic signatures in missives of let and other documents. Registration in the Books of Council and

Session for execution (as well as preservation) is, of course, a necessary step if the deed is to be used for summary diligence.

Wright, Johnston & Mackenzie LLP was the first law firm to register a digital deed, duly signed with a QES. It is also possible to register mixed-format deeds: the procedure is set out at www.ros.gov.uk/about/news/2022/mixed-format-deeds.

Extracts: paper and electronic

New provision is made for extracts of deeds registered in the Books of Council and Session and Register of Sasines by the **Registers of Scotland (Information and Access, etc) Miscellaneous Amendment Order 2022, SSI 2022/232**, amending the Registers of Scotland (Information and Access) Order 2014, SSI 2014/189, by adding new arts 5 and 6. In the case of the Books of Council and Session, extracts are normally in paper form except where the document was itself electronic; but, on request, the Keeper may if she chooses issue an electronic extract in the first case and a paper extract in the second (2014 Order art 5). In the case of the Register of Sasines, paper extracts are the rule although, again, the Keeper may provide an electronic extract if this is requested (2014 Order art 6).

PART III

OTHER MATERIAL

OTHER MATERIAL

Bills in Parliament

Moveable Transactions (Scotland) Bill

On 25 May 2022 the Moveable Transactions (Scotland) Bill was introduced to the Scottish Parliament. It successfully completed its Stage 1 reading on 13 December 2022. The Bill is largely based on the draft Bill contained in the Scottish Law Commission's *Report No 249 on Moveable Transactions* (2017). It is expected to be passed in 2023 with most of its provisions coming into force in 2024.

The overall policy objective is to improve access to finance in Scotland by reforming the law of moveable property. Here Scots law can be truly regarded as world-trailing. It is arguably the most significant reform to moveable property law since the Sale of Goods Act 1893 and certainly since the Companies (Floating Charges) (Scotland) Act 1961.

Part 1 of the Bill, once enacted, will reform the law of assignation of claims. Broadly speaking a 'claim' is the right to the performance of an obligation, typically an obligation to pay money. Under the current law it is necessary to intimate the assignation to the debtor before the claim can transfer to the assignee. This is restrictive, as it frustrates the assignation of future claims, which are impossible where the debtor's identity is unknown. Moreover, the rules on intimation are cumbersome and expensive, particularly in bulk assignations. Under the Transmission of Moveable Property (Scotland) Act 1862 a copy of the assignation document has to be posted to the debtor or a notary sent round with it. There is no provision for electronic intimation. To avoid the rules on intimation, complex workarounds such as trusts and contracting under English law are used.

The Bill will modernise the rules on intimation and more importantly provide an alternative to it for transfer of the claim. In the future it will be possible to register the assignation document in a new Register of Assignations to be managed by the Keeper of the Registers of Scotland. Banks and finance institutions are expected to use the register widely in relation to invoice financing. But it will also be used for other types of transaction including assignation of rents, as 'claim' is defined widely to include monetary obligations in relation to land.

Where there is registration, intimation to the debtor is not needed for the purposes of transfer, although it will still be necessary if the assignee wants

to be paid directly, rather than leave the debtor to continue to pay the assignor (who would then pay the assignee). Debtors who pay the assignor in good faith because the assignation has been completed by registration rather than intimation will be discharged. Intimation will be necessary if the assignor subsequently becomes insolvent, for although the transfer is safe, due to registration, it will be necessary to ensure payment is made to the assignee and not to the (insolvent) assignor.

Part 2 of the Bill provides for the introduction of a new security to be known as a 'statutory pledge'. It will allow security to be created over corporeal moveable property without delivery to the creditor. Instead there will require to be registration of the document granting the security in a new Register of Statutory Pledges, also to be maintained by the Keeper. The statutory pledge will also be available in respect of intellectual property meaning that the current unsatisfactory workaround of transferring title to the creditor and then entering into licensing-back arrangements will no longer have to be used. The Scottish Law Commission had recommended that statutory pledges should also be available in respect of financial instruments, but the Scottish Government concluded that this would be outwith the legislative competence of the Scottish Parliament. Nevertheless, it will seek to take forward that reform by means of an order under s 104 of the Scotland Act 1998. This will require the agreement of the UK Government.

In line with the approach taken internationally, the Scottish Law Commission had recommended that the statutory pledge should be available to any person, but with specific protections for consumers. These included a minimum-value threshold designed to exclude household goods. Furthermore, the general protective regime in the Consumer Credit Act 1974 would automatically apply. In evidence given to the Delegated Powers and Law Reform Committee of the Scottish Parliament at Stage 1, Citizens' Advice Scotland, the Govan Law Centre and others contended that, because of the risk of sub-prime lending at excessive interest rates, the only way to protect consumers was to prohibit them from granting statutory pledges. The committee accepted this evidence and the Scottish Government subsequently announced its intention to amend the Bill at Stage 2 to restrict the grant of statutory pledges to businesses. This will create the anomalous position that consumers can enter into possessory pledge (pawn) and hire-purchase transactions, as well as grant standard securities over their houses, but not statutory pledges.

For a more detailed overview of the Bill as introduced, see A Steven, 'Getting it right over reform of moveables' (2022) 67 *Journal of the Law Society of Scotland* June/20.

Trusts and Succession (Scotland) Bill

This Bill was introduced to the Scottish Parliament on 22 November 2022. Despite the name, it is almost entirely about trusts. It implements the Scottish Law Commission's *Report No 239 on Trust Law* (2014). When enacted, it will

replace the Trusts (Scotland) Act 1921. But as well as covering the ground familiar from that Act, there are important innovations such as private purpose trusts and protectors. Not much of this bears directly on conveyancing but note should be taken of provisions on (i) the protection of those purchasing from trustees (s 39), (ii) the execution of deeds by trustees (ss 40 and 73, the latter amending the Requirements of Writing (Scotland) Act 1995), and (iii) completion of title by beneficiaries where a trustee or executor has died or become incapable (s 68).

Land registration

Completion of the Land Register

In a blog post dated 1 April 2022 the Keeper gave an update on completion of the Land Register while at the same time saying more about a change of thinking which has appeared on these pages before:

> In 2014, Scottish Ministers invited RoS and the public sector to accelerate completion of the land register with a target date of 2024. The intention behind a completed land register is to deliver two key benefits:
>
> 1. quick and efficient land and property transactions
> 2. data and insight to improve transparency and better answer the question 'who owns Scotland?'
>
> Since 2014 we have:
>
> - added 22.6% of Scotland's land mass to the land register;
> - engaged in a proactive programme of voluntary registration stakeholder engagement, which contributed to over 29,000 voluntary registrations being received;
> - completed Keeper Induced Registration (KIR) on over 124,000 addresses, including 89,439 local authority properties;
> - registered approximately 87% of all addresses which are likely to transact in Scotland.
>
> This equates to over 48% of Scotland's land mass, with around another 6% of land mass in the process of being registered. To achieve this progress, we relied on:
>
> 1. properties being bought and sold (market churn)
> 2. Keeper Induced Registration (KIR) (where I use my capacity as Keeper to add land and property to the register directly)
> 3. voluntary registration (VR) (where people and organisations, such as large landowners or the public sector, proactively apply to move their property from the Sasine to the Land Register)
>
> This has had good results and helped us make significant progress against our goals. However, each mechanism has its limits. The number of properties sold will depend on the rate of housing market activity. KIR only works on specific types of properties (mostly urban where we know a lot of information about the surrounding

properties, their boundaries and extents). While VR depends on having the time, money, resource, and inclination to apply. Looking ahead, projections suggest that we cannot expect all land and property in Scotland to transact before 2024 using these methods alone.

We need to ask ourselves; if land is unlikely to change hands, does it represent good value for money and the most effective use of RoS resources to attempt to accelerate registration so we can tick a box which says 100%? I believe the answer to that question is no. Let me tell you why. As I outlined above, there are two intended benefits of a completed land register, and we are confident that we can deliver both by the 2024 target. This means our customers and stakeholders will enjoy fast and efficient transactions and have easy access to enhanced data – without having to wait for all land and property in Scotland to transact. To me this represents a far better return on investment for public money.

To deliver the benefits of land register completion, we are now focusing on three complementary approaches.

Improving turnaround times and visibility of 'work in progress'

Our aim is to stabilise then reduce the volume of stock through despatching the majority of new applications within a reliable and consistent timeframe, this is currently set at 35 days to match our advance notice period. We will continue to complete registration of older cases as quickly as possible, prioritising those cases where customers request that they be expedited. We will also publish more information about our work in progress showing greater transparency and how close we are to reaching our targets. This will include what we have in stock as well as what is in the Land Register.

Functional Completion

Most properties likely to transact will be on the Land Register by the end of 2024. Any applications that come in after that date will be completed within a 35-day turnaround, unless a bespoke timeframe is agreed with the customer for the few remaining complex cases. This will provide a comparable service for customers, regardless of whether the land or property is already on the Land Register.

Unlocking Sasines

The information held within Sasines is not as accessible or map based, and it requires skilled Searchers to interpret. With this in mind, we will continue with our work to provide information on land and property which is unlikely to transact through matching spatial data to Sasines records. This supports greater accessibility, transparency and help to answer the question 'who owns Scotland?'.

Registration backlog

Despite what was said above, there continue to be serious concerns in the legal profession and elsewhere about the registration backlog from previous years. The raw data here can be found at www.ros.gov.uk/performance/open-casework/total-number-of-open-cases. As of 1 February 2023 the figures were:

Year	Applications received	Applications complete	Applications open	Percentage complete	Percentage open
2022	356,704	313,783	42,921	88%	12%
2021	380,205	347,698	32,507	91%	9%
2020	302,253	278,874	23,379	92%	8%
2019	393,947	371,861	22,086	94%	6%
2018	370,010	353,046	16,964	95%	5%
2017	379,604	375,974	3,630	99%	1%
Total	2,182,723	2,041,236	141,487	94%	6%

Discounting applications from 2022, this indicates that around 100,000 applications remain outstanding. The *Annual Report and Accounts 2021–22* (2022) pp 21–22 explains what is being done to push matters forwards:

> We are continuing to increase our operational capacity by recruiting and training additional registration caseworkers. We are also streamlining and improving the application process for customers, meaning we can reuse application data more easily at registration stage. This makes things quicker and less susceptible to transcription errors.
>
> We are rolling out new and improved tools to registration staff too, both for mapping and for populating title sheets, and we are increasing the rate of automation in the parts of the registration process where it is suitable. All of this taken together allows us to process applications more quickly, and therefore to process more applications overall.
>
> We are also tackling the problem from both ends. We have registration teams focussed on completing new applications and other teams focussed on older – and typically more complex – applications. While the improvements set out above will typically impact new and more straightforward applications, this will help us to complete these at the same rate but with fewer people. This means we can retrain some of our caseworkers to increase the speed at which we are processing the older cases, releasing the capacity we need to clear all the open cases.

Much the same ground was covered in a note by Chris Kerr of RoS, responding to questions by John Sinclair, and published in the August 2022 issue of the *Journal of the Law Society of Scotland* (at p 34). Meanwhile, RoS are continuing to reduce the impact of the backlog by (i) a policy of no outright rejection of applications after three months, and (ii) an expedite request service allowing applications to be prioritised on cause shown (1,192 applications in 2021/22).

On 16 May 2022 *Scottish Legal News* quoted an RoS spokesman as saying:

> Any open applications carry no risk to customers. Registration backdates to when we receive the application. Homeowners are not restricted from selling, remortgaging or making changes to their land or property whilst the application is open.

This provoked a spirited response from Iain McDonald of Gillespie Gifford & Brown LLP which appeared in *Scottish Legal News* the following day:

> I am involved in a transaction where, based on a clear plans report and ground plans, two plots were sold and the first deed was presented for registration on April 2021. The neighbour presented a deed with an overlap in July 2022 and got a title sheet promptly. The Keeper is now rejecting the 2021 deed. How can she do so when the above quote says the 2021 title registration is backdated to that date? This shows the RoS spokesman does not understand the system.

This point was also picked up by J Keith Robertson, a long-term critic of the backlog, in an article in the June/July issue of the *Scottish Law Gazette* (at p 45) and in a note contributed to the September issue of the *Journal of the Law Society of Scotland* (at p 34). There was also further and hostile correspondence in the *Journal* in March (p 6) and April (p 6) 2022.

How accurate is the Land Register?

In the five years from 2017 to 2021 inclusive there were 59,718 requests for rectification of the Land Register, according to a FoI response from RoS dated 17 February 2022. This is an average of just under 12,000 a year. The success rate was high, at 68%. Of the 40,592 rectifications made during this period, 15% (6,040) concerned the cadastral map and the remaining 85% (34,552) concerned title sheets.

No more legal reports

As of 1 July 2022 RoS ceased to provide legal reports, although continuing to process continuation requests for a further six months. As RoS point out, 'there is a healthy market of alternative suppliers'. RoS will continue to provide plans reports.

Discharges

The Digital Discharge Service has been incorporated into the Register Land and Property ('RLP') service, which can also be used for paper discharges of standard securities. According to the RoS website (www.ros.gov.uk/about/news/2022/rlp-now-supports-discharges):

> In RLP you can:
> - add the discharge to a case you've already created (eg for your security), or create a new case for the discharge if it's standalone
> - check which type of discharge is required for any given security before even creating a case
> - submit discharges separately from other deeds in your case
> - track the status of your discharge and see when it has been submitted and registered
> - save time by managing your discharge within RLP along with your other related deeds, and track the progress of the whole transaction in one case.

Death of the *a non domino* disposition

One effect of the Land Registration etc (Scotland) Act 2012 has been to stop almost completely the use of *a non domino* dispositions. Between 8 December 2014, when

the Act came into force, and 13 March 2022 (when RoS provided the information in response to an FoI request), only 53 applications for registration in respect of *a non domino* dispositions had been accepted – an average of just about seven a year although in the boom years of 2017 and 2018 there were twice that number. The reason is partly the complexity of the procedures introduced by ss 43–45 of the 2012 Act but mainly the requirement to notify the owner of the land in question who then has a veto on the application being accepted. For details, see *Conveyancing 2020* pp 161–70. In the case of those few applications which were accepted by the Keeper, the average time taken to process the application was just short of a year.

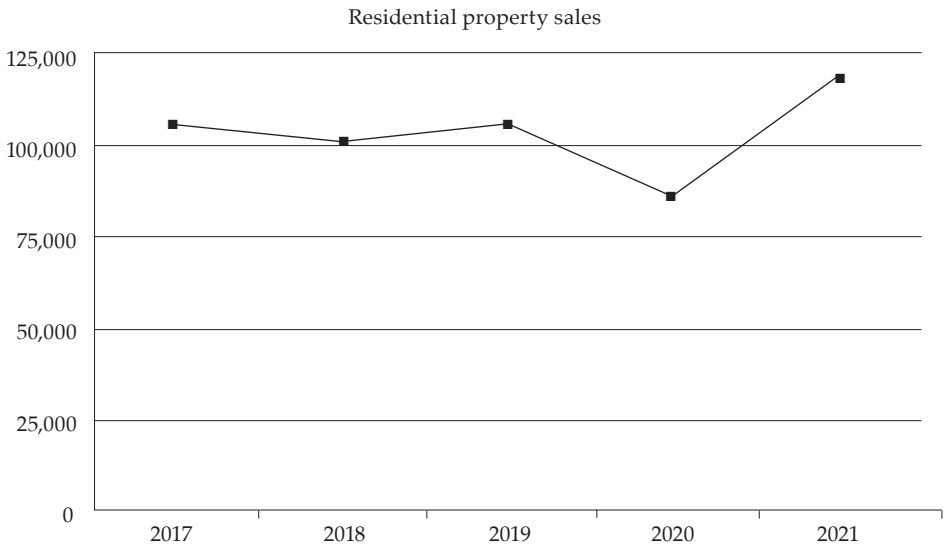
House prices and sale volumes

Since 1 April 2022, Registers of Scotland have been publishing their house price statistics on 'interactive tableau dashboards' (https://public.tableau.com/app/profile/registers.of.scotland).

Figures are given by area. The highest prices are in Edinburgh and East Lothian, and the lowest in Inverclyde. Overall, house prices have doubled since 2003–04.

The volume of residential property sales in 2021 was 117,370, the highest annual volume in the last 5 years (https://insideros.blog/2022/02/01/scotlands-housing-market-in-2021/):

Volume of residential property sales, by year, 2017 to 2021, Scotland



Despite the rising trend, the sales volume remains 26% below the peak reached in 2006–07.

A great deal of further information can be found in the annual *Property Market Report* prepared by Registers of Scotland and available at www.ros.gov.

uk/about/news/2022/property-market-report-2021-22-released. Also of value is the *Scottish Housing Market Review* issued annually by the Scottish Government. As well as house prices and sales volumes, this also covers lending, housing supply, and rents. The latest review is for the four quarters of 2021: www.gov.scot/publications/scottish-housing-market-review-2021/.

RCI: extension of the transitional period

The transitional period for registration in the Register of Persons Holding a Controlled Interest in Land, which had been due to expire on 1 April 2023, was extended for a further year, to 1 April 2024, by the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2023, SSI 2023/104. The significance of the transitional period is that the penalties for failure to register in the RCI do not apply: see *Conveyancing 2021* p 214. In effect, there is now an additional year in which to register in the RCI.

This development was the occasion for a strongly-worded statement from the Church of Scotland (24 January 2023: www.churchofscotland.org.uk/news-and-events/news/2023/articles/scottish-governments-new-land-register-to-cause-significant-difficulty-say-churches). The criticism is understandable. The need to register, congregation by congregation, in the RCI will cause a vast amount of work and trouble without, as far as we can see, giving rise to any measurable public benefit. Representations made by the Church of Scotland and other churches to the Scottish Government have had no effect. The Church put matters in this way:

> Churches have been engaging with the Scottish Government for many months and have proposed alternative arrangements to ensure that the policy aim of achieving transparency in this area is met whilst also recognising the unique legal structure of congregations and taking into account the reliance on local volunteers and the hugely disproportionate impact of the legislation on the churches. The Scottish Government have failed to recognise the position of the Churches and have not responded to the Church's constructive suggestions. The register will have impact particularly on the Church of Scotland, Scottish Episcopal Church, United Reformed Church and others due to the way they are structured internally and because of the number of churches, halls, manses and glebes which are covered by the legislation.

The Rev Fiona Smith, the Church's Principal Clerk, added:

> We've nothing against the principle of the register; indeed many Churches have been supportive of land reform and increased transparency for a very long time. It is the way the new register has been designed that will cause significant difficulty for Churches and congregations to comply. It is likely to cost tens if not hundreds of thousands of pounds in legal and administrative costs. It will require additional effort and energy from volunteers, which is going to make it harder for us to retain and recruit people. It imposes criminal penalties for a failure to provide information to the register, on people who will not know that they have this duty. Overall it is going to have a hugely detrimental impact on our ability to serve Scotland's

communities, and money that could be used for help with sustaining community and congregational life or to support people struggling against poverty will instead have to go on administration and legal advice.

Scottish Conveyancers Forum

The idea of a forum for those who practise residential conveyancing in Scotland has been in the air for a while. Now the idea has crystallised and the Scottish Conveyancers Forum is opening for business. As Ross Mackay explained in an article which appeared recently in the *Property Law Bulletin* (see (2022) 181 *Greens Property Law Bulletin* 1):

> Some years ago, The Law Society of Scotland formed a Working Party titled 'The Future of Conveyancing'. Amongst the discussions, there was a clear view that something had to be done to enhance and develop the overall brand of being a Scottish property lawyer focused on the residential sale/purchase sector. For various reasons, it was not possible to take that suggestion forward at that time nor later but like-minded firms have now come together to set up the Scottish Conveyancers Forum ('the Forum') to represent conveyancers/property lawyers to our clients; the rest of the profession; and the world in general as a clear and distinct sector of legal work … The Forum builds on (but does not replace) the success and efforts of the Edinburgh and Glasgow Conveyancers Forums … The objective is for the Forum's branding and marketing to be developed for the benefit of all its members (whoever they may be) as well as agreed protocols aimed at making the sale/purchase process more streamlined for the benefit of not just the profession but, of course, the home moving public – our clients.
>
> The members of the Forum believe that while we are all in our own way competitors and we all have our own marketing budgets, etc, there are benefits of having an overarching body which can represent our specific sector.
>
> The Forum aims to be the voice of residential property conveyancers/property lawyers in Scotland. It is a not-for-profit organisation that works collectively and proactively to improve the conveyancing process for the consumer and to formulate and implement best practice throughout the industry and thus improve the conveyancing process for the consumer and conveyancers generally … The Forum is looking to emulate the success that the Property Standardisation Group have had in commercial property in the residential field by agreeing protocols and styles which are not contentious but which individual firms do their own way. It is hoped that, like the PSG, this will result in a degree of standardisation which it is hoped will help firms avoid duplication of effort and to concentrate on the things that clients really care about including, speeding up the process, whilst benefiting firms by enabling transactions to be more efficient and thereby more profitable. There is also the added benefit of risk mitigation.
>
> A Steering Group has been formed and details of the Chair and other contact details will be available shortly. In the meantime, if you would like more information about the Forum or to apply for membership, please contact Ross Mackay – ross.mackay@coulters.io.

The very first act of the new Forum is described immediately below.

New edition of the Scottish Standard Clauses

Introduction

Hard on the heels of the fourth edition of the inestimable Scottish Standard Clauses, which came into operation on 1 March 2021, is a new, fifth edition, taking effect on 29 August 2022. On this occasion the work of revision has been carried out by the new Scottish Conveyancers Forum, using a working party drawn from various regional areas and convened by Ross Mackay. As always they are to be congratulated and thanked on their work.

The new edition is available at eg www.rfpg.org/post/scottish-standard-clauses-5th-ed.

Only fairly minor changes have been made of which the most important are mentioned below.

Clause 2.1

Japanese knotweed (*fallopia japonica*) makes an appearance – some would say an overdue appearance – among the perils which the seller assures us do not affect the property being sold. It has already featured in the law reports in England – see *National Rail Infrastructure Ltd v Williams* [2018] EWCA Civ 1514, [2018] 3 WLR 1105 (*Conveyancing 2018* p 82) – but not yet in Scotland.

Clause 8.5

A new clause 8.5 is added to clause 8 on building alterations:

> Without prejudice to the terms of the foregoing or Clause 34.3, the Seller warrants that they have carried out no additions or alterations to the Property requiring any local authority permission or warrant during their ownership of the Property.

This is presumably intended as a smoking-out clause because sellers often *will* have carried out alterations.

Clause 17.2

In the fourth edition of the Scottish Standard Clauses this read:

> The Seller will apply to the Keeper for an Advance Notice for the Disposition, *in the form adjusted with the Purchaser,* to be either (i) entered on the application record for the Property or (ii) recorded in the Register of Sasines no earlier than 10 working days prior to the Date of Entry. The cost of the Advance Notice for the Disposition will be met by the Seller.

In the new, fifth edition the italicised words ('in the form adjusted with the Purchaser') are replaced by 'utilising the details contained within that Disposition'. This reflects what has become the standard practice. The idea of adjustment between the parties, current when advance notices were first introduced in 2014, has been dropped. Instead, the seller takes the relevant details from the draft disposition.

One oddity of this clause, in both versions, is the prescribed timescale. The advance notice must be registered 'no earlier than 10 working days prior to the Date of Entry'. Seemingly, registration *after* the date of entry would comply with clause 17.2 although that cannot have been the intention.

Clause 18.1.7

This clause was first introduced in the last (fourth) edition. At that time it read:

> 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.

In response, we imagine, to our comments on this clause, in which we pointed out that realignment occurs automatically and cannot be applied for (*Conveyancing 2021* p 94), this has been altered in the new edition to read:

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

This is still not quite right. There cannot be 'proposals to realign' as such. Realignment is simply the automatic consequence of the registration of certain deeds in certain, rather limited, circumstances. Behind this comment lies a more fundamental point. Realignment exists purely for the benefit of purchasers. From the purchaser's point of view it is always a good thing and never a bad thing. The statutory provisions in question (ss 86–93 of the Land Registration etc (Scotland) Act 2012) protect purchasers against latent infirmities in the title of the seller and so allow them to rely unquestioningly on what they see on the Land Register. For the seller to warrant *against* them is to get things exactly the wrong way round. When the clause is next revised, the reference to realignment should simply be removed. Until then, however, it does no harm (or good).

Clause 18.2

Although previous editions of the Scottish Standard Clauses required the seller to pay the price on the date of entry (obviously), no provision was made as to *how* payment was to be made. The new edition opts for payment by electronic transfer. Details are in the new clause 18.2:

> 18.2.1. The Price will be paid by same day electronic transfer by the Purchaser's solicitors to the Seller's solicitors' clients' account in exchange for the items referred to in Clause 18.1. The transfer shall be at the Purchaser's expense.
>
> 18.2.2. A payment not made in accordance with the foregoing provision may be refused.
>
> 18.2.3. The Price will not be deemed paid until such time as same day credit on it is available to the Seller's solicitors in accordance with normal banking procedure.

Minor drafting changes

Finally, there are a number of minor drafting changes, some in response to comments of ours on the previous edition. One change, to the first line of clause

8.3, is a (belated) response to the view expressed by the Sheriff at Aberdeen in the case of *Cooper v Skene* (2 March 2016, unreported). The issue is explained in *Conveyancing* 2018 pp 139–40.

Law reform: Scottish Law Commission

Report on Aspects of Leases: Termination

In its final *Report on Aspects of Leases: Termination* (Scot Law Com No 260), published in October 2022, the Scottish Law Commission recommends reform of how commercial leases can be brought to an end. At the moment this area is inaccessible and often uncertain, being regulated partly by elderly legislation and partly by the common law. The Law Commission's report, together with a draft Leases (Automatic Continuation etc) (Scotland) Bill extending to 35 sections and two schedules, is therefore to be welcomed. For an overview by the lead Commissioner, David Bartos, see 'New lease of life for commercial lets' (2022) 67 *Journal of the Law Society of Scotland* Nov/46.

As the report's remit is confined to commercial leases (with the exception of *confusio*, discussed below), its first task is to define these. The draft Bill, by s 1, applies it to all leases except those expressly excepted. The list of exceptions is drawn from the existing legislation regulating agricultural and residential leases. The effect is that the reforms would apply to any lease which is not subject to the listed statutory regimes. In addition to typical commercial leases of retail and office premises, this would include fishing and forestry leases.

The report recommends reforms in relation to four main areas. First, the law on tacit relocation (literally, silent re-letting), the doctrine whereby a lease persists beyond its ish if the parties take no action, would be modernised and renamed 'automatic continuation'. The report (para 2.24) notes that no respondent to its consultation on an earlier version of the draft Bill 'expressed any difficulty' with the new name. Cf *Conveyancing 2021* pp 139–40. A second recommended terminology change is the replacement of 'ish' with 'termination date' (para 2.23). Under the proposed reform, automatic continuation would happen if either (i) a valid notice was not duly served by landlord or tenant on the other party, or (ii) the tenant left the leased property 'with the acquiescence of the landlord … in circumstances which indicate that both parties intend the lease to end' at the termination date (draft Bill s 3(1)). In addition, the lease document could expressly exclude automatic continuation (draft Bill s 4). For certain minor categories of lease (eg short-term fishing lets) no notice would be needed to prevent the lease continuing (draft Bill s 2(2)). Where automatic continuation applied, the periods of renewal would be the same as under the current law: one year for leases of a year or more, and the length of the lease if shorter than one year (draft Bill s 7).

Secondly, recommendations are made in relation to the notices preventing automatic continuation. The notice by the landlord would be a 'notice to quit' and the notice by the tenant a 'notice of intention to quit' (draft Bill ss 8 and 10). The Law Commission recommends that the decision of the Inner House in *Rockford Trilogy Ltd v NCR Ltd* [2021] CSIH 56, 2022 SC 90 (discussed in *Conveyancing*

2021 pp 135–41) should be reversed (paras 3.41–3.44). In that case the court held that an email from the tenant, saying that it would only stay subject to certain conditions, had excluded tacit relocation. In contrast, under the recommendations a notice of intention to quit would only prevent automatic continuation if the tenant unconditionally stated that it intended to leave on the termination date (draft Bill s 10(4)). The Commission further recommends that the present 40-day notice period should be increased. For leases of six months or more, three months' notice would be required, and for leases of three months to less than six months, one month's notice (draft Bill s 13). It would be possible to deliver the notice in person or by post, but it could be sent electronically only if the recipient expressly or impliedly agreed to this (draft Bill s 11). This again could mean the opposite result to that reached in the *Rockford Trilogy Ltd* case. Further, miscellaneous rules are proposed in relation to the notices, including where there are multiple landlords and tenants (draft Bill s 17) or sub-tenants (draft Bill s 21). There would also be a requirement for the parties to provide a UK address to which termination notices generally (thus including break-clause and irritancy notices) should be sent (draft Bill ss 28–29).

Thirdly, it is recommended that there should be an implied term in new leases that rent paid in advance must be returned to the tenant if the lease is terminated before the period to which the rent relates (draft Bill s 31). A typical example is where a break option is exercised. At present, there is no apportionment of the rent in this way unless there is an express clause in the lease.

Fourthly, the Commission makes recommendations on irritancy notices. These are discussed below (at p 167).

Finally, mention should be made of two areas on which the Law Commission had previously consulted but where no recommendations are made. The first is the repeal of the Tenancy of Shops (Scotland) Act 1949. This legislation gives the sheriff court the power to extend leases of retail premises and certain other types of property for up to a year, on application by the tenant. It is possible for the tenant to apply for subsequent extensions beyond that, each up to a year. The legislation was passed in the aftermath of World War II to protect small independent shop-holders but the small number of cases in recent years have usually involved companies with multiple outlets: see eg *Select Service Partner v Network Rail Infrastructure* 2015 SLT (Sh Ct) 116. Although there was universal support for the repeal of the legislation from the legal sector, perhaps inevitably there was opposition from the Federation of Small Businesses and, when the Commission carried out further consultation, retail groups. Possible ways forward are identified such as limiting the legislation to tenants with only one shop, but the Commission, understandably, concludes that it would need a 'full public consultation' (para 7.34) before it could make recommendations. It states that it has not been possible to do this and the issue must be left to the future.

The second area is *confusio*, the doctrine by which a lease may come to an end where the landlord acquires the tenant's right in the lease or the tenant becomes owner of the leased property. As noted above, this is the only part of the report dealing with leases generally and not just commercial leases. Although some would disagree, the present law is undoubtedly unclear. (The leading modern

account of *confusio* more generally in Scotland, but unfortunately not mentioned in the report, is R G Anderson, 'A Whimsical Subject: *Confusio*', in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) pp 31–45.) Agricultural property lawyers generally take the position that *confusio* brings the lease to an end. For commercial property lawyers, often dealing with long leases, this conclusion is unpalatable as it would lead to extinction of any standard securities over the tenancy. The Commission follows a similar approach to that on the Tenancy of Shops Act: the report makes tentative proposals but states that a 'full consultation' (para 8.23) would be needed before there can be any recommendations. We would observe, however, that there is a distinction between the two: the terms of the Tenancy of Shops Act are clear. The law of *confusio* is not, and so it would be more unsatisfactory if matters are left as they are. It is to be hoped that the Law Commission will continue its work in this area.

New project on tenements and compulsory owners' associations

At the Scottish Government's behest, the Scottish Law Commission has taken on a project on aspects of the law of the tenement. The project will consider the establishment, formation, and operation of compulsory owners' associations, together with the rights and responsibilities to be imposed on them. In 2022 the Commission held three seminars on comparative law in this area and the recordings of these can be viewed on the project page: www.scotlawcom.gov.uk/law-reform/law-reform-projects/tenement-law-compulsory-owners-associations/. A discussion paper is expected to be issued in autumn 2023, followed by a draft Bill in spring 2026.

Separately, the Scottish Parliament working group on tenement maintenance, whose April 2019 report (see *Conveyancing 2019* pp 101–02) provided the impetus for the Law Commission's project, has reconvened to consider how the report's other recommendations may best be taken forward.

Property factor enforcement orders

Most disputes between homeowners and property factors can be dealt with by the dispute-resolution procedure of the factor in question. But not all. So where a factor has (or is alleged to have) failed to comply with a contractual obligation or with the Property Factor Code of Conduct, it is always open to an owner to apply to the First-tier Tribunal. The statutory basis is ss 17–24 of the Property Factors (Scotland) Act 2011. Every year there is a steady stream of cases the decisions in which can be consulted on the Tribunal's website (www.housingandpropertychamber.scot/previous-tribunal-decisions). The result of a successful application is for the Tribunal to issue a 'property factor enforcement order' requiring the factor to take certain steps which may include the payment of money to the homeowner. What if the factor fails to comply? The order cannot be enforced by the homeowner, but default is both a criminal offence and also a ground for the factor being removed from the Register of Property Factors. Furthermore, the Tribunal must serve notice of the default on the Scottish

Ministers (s 23(2)). What then? On this the 2011 Act is silent. But a recent Freedom of Information request sheds some welcome light.

The response, by the Scottish Government, was issued on 10 August 2022 (www.gov.scot/publications/foi-202200310915/). The questions and answers were as follows:

1. On how many occasions has the First-tier Tribunal referred property factors who have not complied with a PFEO to Scottish Ministers since the Property Factors Act 2011 was introduced?

The process for monitoring compliance of a Property Factor Enforcement Order (PFEO) is one for the First-tier Tribunal for Scotland (Housing and Property Chamber) (First-tier Tribunal). However, if the First-tier Tribunal decide that a property factor has not complied with a PFEO they will issue a notice to Scottish Ministers under Section 23(2) of the Property Factors (Scotland) Act 2011 (the 2011 Act). I can confirm that since the 2011 Act came into force, Scottish Ministers have received notices on 58 occasions.

2. On how many occasions have Scottish Ministers *not* taken further action against property factors referred to it for failure to comply with a PFEO since 2011?

We have taken action on all 58 occasions where the First-tier Tribunal have served notice on the Scottish Ministers of a property factor's failure to comply with a PFEO. This action taken may include keeping the property factor on the register but continuing to monitor their compliance and encouraging them to comply with the code of conduct (the Code) … or removing the property factor from the register.

The Scottish Ministers have the power to remove a property factor from the register if they consider that the property factor is no longer a fit and proper person or where the property factor has failed to demonstrate compliance with either the property factor Code or any PFEO, or if the property factor has not included the property factor registered number in any document sent to a homeowner. In considering whether to remove a property factor from the register, Scottish Ministers will look at the specific findings of the First-tier Tribunal, the seriousness of the breaches, whether the property factor has taken steps to address the failures and if the factor has been found to have significantly or repeatedly failed to comply. Until such point in reached, property factors are encouraged to comply with the regime.

3. On how many occasions have Scottish Ministers fined or imposed further sanctions on property factors since the Property Factors Act 2011?

The 2011 Act does not provide Scottish Ministers with powers to fine property factors. A homeowner can apply to have their case considered by the First-tier Tribunal for a determination where they believe that their factor has failed to comply with the Code, or otherwise failed to carry out their property factor duties. It is the First-tier Tribunal that has the power to issue a legally binding PFEO if it finds in the homeowner's favour. As mentioned in the response to question 2, the Scottish Ministers also take steps to monitor and encourage compliance.

4. What recourse do homeowners have if a property factor does not comply with an enforcement order imposed by the FTT?

It is a criminal offence for a property factor to fail to comply with a PFEO and it is for the First-tier Tribunal to consider making a report to Police Scotland for prosecution in terms of section 24 of the 2011 Act. A homeowner can also report any criminality

to Police Scotland and homeowners may also have recourse through the Sheriff Court. Whilst it will not result in compliance with a PFEO, homeowners may decide to dismiss their factor and appoint another as long as a 'manager burden' is not in place. Further information can be found from the Under One Roof website at: https://underoneroof.scot/articles/1108/Owners_Associations/Property_Factors__Managers.

Land Rights and Responsibilities Statement: the revised version

Background

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 LRRS was published on 28 September 2017; it was reproduced in *Conveyancing 2017* pp 95–96 and comprised a 'Vision' and six 'Principles'. Scotland was apparently the first, and is still perhaps the only, country in the world to have such a document. 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/); see *Conveyancing 2021* pp 114–16. This asked whether changes might be needed, especially in the light of the increased emphasis in the last few years on climate change. The consultation closed on 28 January 2022 and an analysis of the 55 responses was published on 24 May 2022 (https://www.gov.scot/publications/review-land-rights-responsibilities-statement-analysis-consultation-responses/). The revised LRRS was published on 22 September 2022 together with (i) a *Report to Scottish Parliament*, which explains the changes that have been made, and (ii) revised *Advisory Notes* which gloss each of the constituent elements in the LRRS, explain what is being done to implement them, and give real-life examples: see www.gov.scot/publications/scottish-land-rights-responsibilities-statement-2022/.

As part of the revisions a new Principle – numbered as 5 – has been added. There is now a reference to 'a just transition to net zero' in both the Vision and Principle 1, and a reference to 'natural capital' in the Vision. Otherwise the revisions are minor. Only Principles 2 and 3 remain exactly the same.

For those in need of instruction, the meaning of these added terms is explained in the *Advisory Notes* at p 6:

> A just transition means reaching a nature-rich, net-zero future with a climate resilient economy in a way that is fair and tackles injustice and inequality. The process and

the outcome should both be fair, considering the impact on people and the sharing of any benefits that arise. The ways we own, manage and invest in natural capital and carbon play an important role in this. Natural capital is defined by the Scottish Forum on Natural Capital (https://naturalcapitalscotland.com/) as 'the stocks of natural assets which include geology, soil, air, water and all living things'. Land might be managed for natural capital to produce food, sequester carbon, reduce emissions or increase biodiversity, for example through planting trees or restoring peatland. Managing the living and non-living aspects of our land can help to deliver economic, social and environmental outcomes so responsible practice and alignment of local and national policies with the Land Rights and Responsibilities Statement is vital to ensure a sustainable and fair future for everyone.

The most recent attempt to value natural capital in Scotland gives a figure of £206 billion in 2018 (www.gov.scot/publications/scottish-natural-capital-accounts-2022/). The Scottish Land Commission produced advice to Scottish Ministers in 2022 on *Natural Capital and Land: Recommendations for a Just Transition*; for this paper and the commissioned research on which it was partly based, see p 96 below. Reference might also be made here to 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/.

The revised LRRS

As revised, the LRRS is as follows:

Vision

A Scotland with a strong and dynamic relationship between its land and people, where all land contributes to a modern, sustainable and successful country, supports a just transition to net zero, and where rights and responsibilities in relation to land and its natural capital 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, support a just transition to net zero, help achieve social justice and build a fairer society for the common good.
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 should contribute to wider public benefit, sustainable growth and a modern, successful country.

5. Land ownership, management and use should deliver a wide range of social, environmental, economic and cultural benefits.
6. There should be transparency about the ownership, use and management of land, and this information should be publicly available, clear and contain relevant detail.
7. There should be meaningful collaboration and community engagement in decisions about land.

Purpose

In introducing the revised version, and looking back on the first five years of the LRRS, Màiri McAllan MSP, the Minister for Environment and Land Reform, said that the LRRS had 'delivered culture change':

> It has helped, in many cases, to normalise proactive engagement with communities. It has also created the conditions for increasing numbers of land transfers and sales between landowners and community groups being taken forward through negotiation and not formally through land reform legislation.

As for the future, the *Advisory Notes* (at p 3) identified three aims for the LRRS:

> Firstly, to inform the development of Government policy and action in relation to land, whether that be in planning, housing provision, urban regeneration, farming, caring for the environment or any other Government activities that relate to land. The Statement interrelates with many existing strategies and policies, and it will help inform future iterations of Scotland's National Strategy for Economic Transformation, the Land Use Strategy, and the National Planning Framework.
>
> Secondly, to encourage and support others with significant responsibilities over land, such as local authorities and large private land owners, to consider how their decision-making powers could contribute to realising the vision in the Statement. Many of those who own and manage land in Scotland are already delivering significant benefits and working successfully with local communities but good practice is not yet universal. Decisions about land ownership, use and management can help address some key issues we face in the 21st century, such as housing shortages, inequality, and threats to the environment. Private land owners in this context include not only private individuals, but companies, trusts, non-governmental organisations, charities, and community land owners.
>
> Thirdly, to encourage all of us to recognise our responsibilities as well as our rights in relation to land. Decisions that we take as individuals, families, businesses and other groups can have a significant impact on the land and the rights of others who make use of land for legitimate reasons such as business or recreational purposes.

Land Use Strategy

Scotland's Third Land Use Strategy 2021–2026: Getting the best from our land was launched in 2021: see *Conveyancing 2021* pp 116–17. It comprises 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.

As ever, the relationship between the Land Use Strategy and the Land Rights and Responsibilities Statement is opaque.

There is a programme of annual progress reports on the Land Use Strategy of which the first on the new Strategy was published on 14 June 2022 (www.gov.scot/publications/scotlands-land-use-strategy-annual-progress-report-2021-2022/). It summarises a number of actions in the year 2021–22 that contributed towards sustainable land use, including: £22 million for peatland restoration; the distribution of £30 million to more than 600 rural businesses from the latest round of the Agri-Environmental Climate Scheme; the opening of the £50 million Vacant and Derelict Land Investment Programme to applications; and the creation of a network of 'Wee Forests' in towns and cities backed by £500,000 of funding from the Scottish Government.

Land reform (1): proposed new Bill

Background

One of the more important Scottish Government publications of 2022 was a discussion paper on proposals to be included in a new Land Reform Bill which is promised by the end of 2023. Published on 4 July 2022 in English and Gaelic (though not in Scots, as to which see www.gov.scot/publications/consultation-scots-government-commitments-tae-gaelic-scots-scots-langages-bill/), *Land Reform in a Net Zero Nation* (www.gov.scot/publications/land-reform-net-zero-nation-consultation-paper/) sets out a further programme of land reform for Scotland. Each reform proposal is followed by a section on 'Why we are proposing this'. But at a mere 41 pages, including the consultation questions, the paper is brief and short on detail. Notably absent is any weighing of the advantages and disadvantages of what is being proposed; for the most part, possible disadvantages simply go unmentioned. Unfortunately, this one-sidedness is likely to affect the quality and reliability of the consultation responses.

As to content, there is not much that will surprise anyone who has been following the work of the Scottish Land Commission in the past few years, and in particular the Land Commission's *Legislative Proposals to address the impact of Scotland's concentration of land ownership* which was published on 4 February 2021. (For background and for the Land Commission's paper itself, see *Conveyancing 2021* pp 108–14.) In relation to some at least of the proposals, the concern is expressed that aspects might be beyond the powers of the Scottish Parliament. This includes possible incompatibility with the ECHR. As the paper notes (p 18), 'it is imperative that any proposals are fully compliant with the European

Convention on Human Rights (ECHR). The ECHR requires a strong justification for interference with the rights it accords to property owners.' Nothing more, however, is said on this topic, although mention should be made of research commissioned from Dr Kirsteen Shields on how other countries, especially in Europe, have changed their laws as to land-ownership and the extent to which this complies with the right to property in Article 1 of the First Protocol of the ECHR: see *A Review of Evidence on Land Acquisition Powers and Land Ownership Restrictions in European Countries* (December 2022: available at www.gov.scot/publications/review-evidence-land-acquisition-powers-land-ownership-restrictions-european-countries/). This can usefully be read in conjunction with a paper written for the Scottish Land Commission by James Mure KC, *Balancing rights and interests in Scottish land reform* (www.landcommission.gov.scot/resources), which sets out the legal framework – including but not confined to the ECHR – within which land reform must operate.

A public-interest test for land transfers

For conveyancers, the most important of the Scottish Government's proposals is the suggestion that certain land transfers should be subject to a public interest test ('PIT'). This might lead to the transfer being blocked or only allowed to proceed subject to conditions such as that the land is sold in lots or offered to local community bodies. Most land, of course, would be unaffected. As the purpose of the proposal is to help redress the 'historically iniquitous patterns of land ownership' in Scotland (p ii), only 'large-scale landholdings' would be subject to the PIT. Defining such landholdings is difficult and, to some extent, arbitrary. Following the earlier work of the Scottish Land Commission, the new paper suggests that landholdings should be classified as 'largescale' if they satisfy one of the following criteria:

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

Only the first criterion contains an actual figure. Currently, the Land Register has 386 titles (out of 1.86 million) with a land area exceeding 3,000 hectares. Combined, these amount to 1.62 million hectares, equating to 20.2% of Scotland's land mass. But this number requires to be doubled, or more than doubled, because only around one-half of Scotland's land mass is currently on the Land Register.

Some details of the proposed PIT system are set out in part 7 (pp 18–25) of the paper. 'The purpose of the test would be to assess whether, at the point of

transfer of a large-scale landholding, a risk would arise from the creation or continuation of a situation in which excessive power acts against the public interest.' All types of transfer would be affected – sales, donations, transfers on death, indirect transfers by means of the transfer of shares in a company formed to hold land. The PIT would be applied not only to those proposing to acquire the land, as the Scottish Land Commission had suggested, but also to those proposing to dispose of it. This is a potentially radical shift of focus and one which may cause ECHR difficulties. In applying the PIT, past behaviour will be examined. So in the case of those disposing of land, the PIT would 'take into account any steps taken in the past (over a defined period – proposed to be 5 years) by a seller to diversify ownership, and/or who has used their Management Plans to engage with community bodies over opportunities to lease or acquire land'. And in the case of those seeking to acquire, account would be taken, not only of the amount of land already owned in the area but also of 'the outcome of any Land Rights and Responsibilities review [for which see below] that had previously been carried out in relation to land already held by the acquirer'. Beyond this, little detail is given of the PIT.

Community buy-outs are to be encouraged. So even where the land is not already subject to a pre-emptive right due to registration by a community body in the Register of Community Interests in Land, an owner wishing to dispose of land would be required to give notice to 'community bodies in the surrounding area which are compliant with Community Right to Buy requirements, and/or such other community bodies whose aims are social/community benefit (such as Registered Social Landlords)'; to identify such bodies a new register might be needed. Community bodies, once notified, would have, say, 30 days to indicate interest in the transfer.

Other proposals

Whereas the PIT is transactional, seeking to control disposals and acquisitions, other proposals are directed at controlling existing land use and management. Two affect only largescale land-holdings, and also derive from the work of the Scottish Land Commission. First (pp 10–13), landowners would be placed under a legal obligation to comply with the Land Rights and Responsibilities Statement (for which see above) although, in acknowledgement of its highly general nature, the LRRS would be underpinned by statutory codes of practice or protocols on particular issues. Non-compliance would be reportable, although not by ordinary members of the public. Following an investigation this could result in a recommendation for mediation, in guidance as to compliance, or a direction to implement changes to operational or management practices. There might also be financial penalties including 'cross-compliance' penalties which would prevent the defaulting owner from accessing Scottish Government land-based subsidies.

Secondly (pp 14–17), owners of largescale land-holdings would be obliged to prepare and publish a management plan. This would, for example:

- demonstrate how the owner will implement the principles set out in the LRRS;

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

Enforcement would be by 'a range of cross compliance mechanisms'.

Two further proposals in the paper reflect concern that the profits from Scottish land are exported rather than staying at home. So a rule is suggested by which only those who are registered or liable to pay tax in the UK or the EU could (i) acquire largescale land-holdings in Scotland or (ii) have access to subsidies in relation to (any) land from the Scottish Government (pp 26–27 and 32–33). It is not clear why, following Brexit, the EU is included as well as the UK. The first proposal is a variant on an idea which was considered previously but rejected. In respect of the second, it is also suggested that land must be registered in the Land Register to be eligible for public funding.

On a quite different topic, and in order to address 'the twin crises of climate change and biodiversity', a new form of flexible tenancy is proposed for agricultural and small holdings (pp 28–30). Under a proposed 'Land Use Tenancy', tenants would be permitted to diversify into various other land-use activities such as woodland management, agroforestry, and peatland restoration. These could be new tenancies or be achieved by the conversion of existing tenancies.

Finally, the paper seeks views on two additional ideas, for possible inclusion in this or later legislation (p 34). One concerns taxation in the light of the recommendations made by the Scottish Land Commission in January 2022 (discussed at p 219 below). The other is about natural capital and community benefit. Natural capital is typically utilised by private investment. But, says the paper, such investment must be responsible and benefit the community. 'We are committed to the development of a high-integrity, values-led natural capital market where communities are empowered and benefit from investment. We would like to seek views on how we can maximise community benefits from investment in natural capital.'

Responses

The consultation closed on 30 October 2022 and a summary of the responses is awaited. In the meantime there has been some published commentary including from members of the legal profession. For example, writing in the August 2022 issue of the *Journal of the Law Society of Scotland* (p 5), Mike Blair observes, in the context of the proposed public-interest test for land transfers, that 'it is perhaps not unfair to say that the "public interest" is necessarily what the Government of

the day thinks it is'. The response by the Law Society of Scotland, summarised on p 39 of the October *Journal*, is cautiously supportive, but warns that the additional burdens might discourage investment in land in Scotland. In relation to the proposed public-interest test, the Law Society comments on the lack of detail and emphasises that a number of practicalities need to be thought through, including the interpretation of 'public interest', the process and length of time for a determination, the details of an appeal process, and the position of lenders.

Land reform (2): small landholdings

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

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

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

On 22 October 2022 the Scottish Government published a consultation paper on *Small Landholdings Modernisation* (www.gov.scot/publications/small-landholdings-modernisation-consultation/). This had already been anticipated at p 31 of the paper on *Land Reform in a Net Zero Nation* (above) and it followed on from a previous consultation in 2016 (www.gov.scot/publications/review-legislation-governing-small-landholdings-scotland/pages/1/). In the absence of modern legislation, small landholdings are thought to 'have fallen behind the

modernisation of crofting and tenant farming' (4). This is now to be put right. The main proposal is that small landholders should have an absolute right to buy their house and a pre-emptive right to buy the remainder of the landholding. But if, having bought, they resold quickly, a further payment would be due to the former landlord. Other proposals include a right to diversify activities on the landholding, and a widening of the right of inheritance and the right to assign. The consultation closed on 14 January 2023.

Land reform (3): natural capital and land

Much of the published output of the Scottish Land Commission (*Coimisean Fearainn na h-Alba*) in 2022 was about natural capital and land, and in particular about the effect on land and the land market in Scotland of carbon sequestration (by growing trees and by peatland restoration). As these topics stray a long way from conveyancing or the interests of most conveyancers, the treatment here will be relatively brief.

The Scottish Land Commission's own paper on the topic, in the form of advice to Scottish Ministers, was *Natural Capital and Land: Recommendations for a Just Transition* (June 2022). But this drew on four pieces of commissioned research: Jill Robbie and Giedre Jokubauskaite, *Carbon Markets, Public Interest and Landownership in Scotland: A discussion paper*; Sir Dieter Helm, *Natural capital, carbon offsetting and land use: A discussion paper*; R McMorran, J Glendinning and J Glass, *Rural Land Market Insights Report: A Report to the Scottish Land Commission*; and R McMorran, S Thomson and J Glendinning, *Rural Market Data Report: Analysis of land sales data and proposals for improving future reporting of land market transactions: A report to the Scottish Land Commission*. All publications by the Scottish Land Commission can be found at www.landcommission.gov.scot/resources.

'Natural capital', as Helm explains (pp 1–2):

> is all the capital assets that nature provides us for free. Planet earth is a wonderful cornucopia of resources which have been bequeathed to us. There are two sorts. Renewable natural capital is what nature keeps on giving us for free as long as it is not depleted below minimum thresholds. Fish are classic renewable natural capital: they go on reproducing so that in effect they can be consumed for ever, as long as they are not overfished to the point where they cannot sustain their breeding populations. Scotland has brought quite a lot of its renewable natural capital to the brink so that some risk becoming non-renewable.
>
> Non-renewable natural capital assets are those that can be used only once. The North Sea oil and gas are non-renewable natural capitals which cannot be reproduced by nature except over geological time. The Scottish economy has been heavily reliant on the non-renewable natural assets. Indeed, it was built upon them.

'In a sustainable economy', Helm says, 'natural capital is passed down through the generations, as a set of assets properly maintained'. Here Scotland's record is decidedly mixed:

> Scotland's natural capital has suffered, as has much of Europe's, from the impacts of the intensification of agriculture. But Scotland, as an economy overwhelmingly dependent on its natural capital, has its own particular long history of decline: the

> loss of the great native pine forests; the clearances and the sheep; the great deer and grouse shooting estates; the conifer plantations; and the use of pesticides and fertilisers on the arable lands to the east. To these pressures on the land, the modern ones include the development of marine aquaculture.
>
> The results have been the depopulation of the Highlands, the great wet desert that Fraser Darling described in the 1950s, and the loss of invertebrates, plant biodiversity as well as fish, birds and mammals in both the land and marine environments. Scotland's natural capital is a fraction of what it once was. Scotland has also used up a lot of its non-renewable natural capital, depleting its oil and gas reserves, its peat and its coal deposits.
>
> That this is not sustainable is at least widely understood. To the years of patient monitoring by conservation groups of biodiversity declines have now been added the concerns and impacts of climate change.

At present, the emphasis in respect of natural capital is on carbon offsetting through tree planting and peat restoration. This in turn produces 'carbon units' which can be sold commercially, in accordance with the (UK-wide) Woodland Carbon Code or Peatland Code, to those businesses which need or wish to offset their carbon emissions. Robbie and Jokubauskaite (pp 2–5) describe how this is done. Helm is cautious, sceptical even, about the overall benefits (pp 7 ff). But the Scottish Land Commission is more concerned with the effect on the land market and on local communities. Robbie and Jokubauskaite (p 6) set the scene thus:

> The rise of carbon markets in Scotland has been discussed significantly in the media, with the term 'green laird' being coined to denote people or bodies that are purchasing or investing in large areas of land for environmental purposes. High profile cases include BrewDog buying 9,300 acres of the Kinrara estate to create the Lost Forest and Shell spending £5 million to extend the Glengarry forest. This has led to a range of concerns including rapid large-scale land use change, environmental projects being used as 'green-washing' for unsustainable business practices, rising rural land prices, and the exclusion of communities from significant land use decisions.

'Trees', as Helm notes (p 10), 'are poor conventional investments, which have almost always required state support and subsidies when large-scale forestry takes place'. This is because of the interval of years or even decades between the initial capital outlay involved in purchase and planting, and the ultimate yield in the form of carbon offsetting, sale of the trees for timber, or both. But with the subsidies that currently exist, with high timber prices, and with the lure of carbon offsetting, the demand for land suitable for forestry is high and the supply is meagre. The result, as shown by the research commissioned by the Scottish Land Commission, has been a significant rise in land prices – though whether this is a temporary bubble or a long-term change is not yet clear. The market can also be hard to enter: in respect of estates, 64% of sales in 2021 took place off-market. All of this, the Land Commission fears (p 8), may increase the concentration of land ownership in a small number of (large) hands.

Against this background the Scottish Land Commission makes a number of proposals for reform, only some of which can be mentioned here. (i) There should be a mandatory requirement for prior notification of land sales above a

certain size threshold, thus giving an opportunity for interested individuals or community bodies to make an approach (p 10). (ii) Early consideration should be given to the regulation of the carbon and other natural capital markets (12). This might help to avoid current problems with: poor environmental outcomes as a result of insufficiently rigorous accreditation or unverified buyers; decision-making and benefit becoming detached from the underlying land asset; and inequitable distribution of benefits. (iii) The award of publicly-funded grants should be accompanied by more in the way of conditions, such as a requirement of community engagement and benefit or a clawback of a share in eventual profits (p 21).

In another publication from 2022, a brief 'protocol' on *Responsible Natural Capital and Carbon Management*, the Land Commission provides advice to landowners and managers in the spirit of the Land Rights and Responsibilities Statement. In this, the latest of a series of such protocols (see *Conveyancing 2020* p 113), there is a particular emphasis on community engagement, with landowners being enjoined, for example, to 'engage communities in decisions relating to land that may impact on them in good time for them to be able to influence the decisions made' and to establish 'a community benefit fund to provide direct financial returns to local communities'.

The last word should go to Helm (p 13):

> Rebuilding vibrant communities throughout Scotland, around great natural capital, should help to maintain and enhance social capital. It would be a tragedy if instead a rush for carbon offsets considered in isolation from the other natural capitals resulted in another clearance – this time with local people displaced for carbon harvests in dense single-species forests, following on from the displacement by sheep. The question the offset traders are interested in is how to maximise the carbon yield per hectare. The Scottish people should be more interested in the question of how to maximise the natural capital assets per ecosystem, including but not limited to carbon.

Community ownership of land

The latest figures on community ownership of land in Scotland, published on 27 September 2022 (www.gov.scot/publications/community-ownership-scotland-2021/), show that the number of 'assets' in community ownership in Scotland has increased from 663 in 2020 to 711 as at the end of 2021. This continues the trend of recent years, with just over half of all assets having been acquired by community bodies since 2010. The 711 assets are owned by 484 different community groups and cover an area of 211,998 hectares. More than half that area, however, consists of just four properties. By contrast, 65% of properties have an area of a hectare or less. Nearly 40% of properties are just land while around one-third are just buildings (the others being land *and* buildings).

Guidance on electricity wayleaves

Revised guidance has been issued on the procedure adopted by the Scottish Ministers in receiving and determining applications by network operators under

the Electricity Act 1989 for necessary wayleaves to retain or place electric lines on land: www.gov.scot/publications/necessary-wayleaves-scotland-guidance-applicants-landowners-occupiers-update-2022/.

The New Homes Quality Code and Ombudsman Service

A UK-wide New Homes Quality Board ('NHQB') (https://www.nhqb.org.uk/) was established in 2020 with the task of establishing a New Homes Quality Code and a New Homes Ombudsman Service. These, or some other like arrangements, may acquire a statutory basis in the form of ss 136–142 of the Building Safety Act 2022, although the provisions are not yet in force.

Developers of residential housing are invited to register with the NHQB and in the future may even be required to do so. Once registration is completed, anyone buying from the developer is covered by the new arrangements. A helpful summary is provided by Andrew Todd at p 34 of the March 2022 issue of the *Journal of the Law Society of Scotland*, and some implications for missives are explored in Duncan Moore, 'The New Homes Quality Code and missives: key thoughts for developers' (2022) 178 *Greens Property Law Bulletin* 7. But meanwhile other voluntary codes remain in operation, notably the Consumer Code for Home Builders. The result is a certain amount of confusion, charted by Noel Hunter in the October 2022 issue of the *Journal* (at p 34).

The New Homes Quality Code is in two parts: first, a statement of principles (with glosses) such as fairness, safety, quality and service, and then an account of the developer's obligations at each stage of the sales process. It is the latter which will be of most interest to developers and most use to those buying houses from them. Some examples illustrate. When selling, developers 'must make sure that the content of any sales and marketing material relating to the new home is not misleading. It must be clear, fair and written in plain language, and it must keep to all relevant codes of advertising and laws' (1.1). Developers must not use high-pressure selling techniques such as 'encouraging a customer to reserve or buy a new home by suggesting there are other people interested in the property or that the price will soon increase (if this is not true)' (1.3). Reservation agreements must have a cooling-off period of at least 14 days (2.3). In respect of contracts of sale (2.7):

> The developer must make sure that the terms of the contract of sale are clear, fair and written in plain language, and that they keep to all relevant legislation. The contract of sale must do the following.
>
> (a) Define the completion notice period (that is, the period from the date the notice to complete is served to the completion date).
> (b) Clearly set out the circumstances in which the customer can cancel the contract of sale. This might include, for example, if there is:
>
> - a change to the new home that the customer has not agreed to and which affects the size, value or appearance of the new home (including, the size and layout of the rooms); or
> - an excessive or unreasonable delay in completing the construction of the new home and sending the notice to complete to the customer.

(c) Clearly explain what will happen if the new home will not be ready for the sale to complete by the date the developer said it would be ready.
(d) Clearly explain how deposits will be protected.
(e) Make suitable arrangements to provide a two-year builders' liability period for the customer. This also applies to special purpose vehicles (SPVs) and other short-term trading arrangements which may be formed to build a specific new home or development.

The buyer must be given an opportunity to visit the house and to arrange for a pre-completion inspection (2.8). After completion, the developer is to provide 'a full and accessible after-sales service' for at least two years (3.1). In respect of snags (3.3):

> The developer must acknowledge any snags, issues or problems raised through the after-sales service as soon as possible. In most situations the developer should be able to settle an after-sales issue or problem within 30 days, unless there is a significant reason for a delay. If there is a delay, the developer should explain clearly to the customer the reasons for this, and should give them updates at least once a month until the matter is settled. If the customer is not satisfied with the after-sales service, they can make a formal complaint under the developer's complaints procedure.

The complaints procedure must include certain prescribed features (3.4). These include a letter if the complaint is not closed within eight weeks:

> The eight-week letter must include the following information.
> - A clear summary of what action has been taken to date.
> - Clear details of what is still outstanding, a reason why and the actions to be taken.
> - An idea of when the complaint will be settled.
> - How often the developer will give the customer updates (which must be at least every 28 days).

If defects are not dealt with under the complaints procedure, the buyer can refer matters to the New Homes Ombudsman Service. This is designed to provide a single portal for complaints, whether they relate to the quality of the house (a matter covered by the NHBC or other warranty provider) or the service provided by the developer.

Cladding of external walls in high-rise buildings

Building Safety Act 2022

The vexed issue of cladding of external walls was covered in *Conveyancing 2021* pp 95–99. A significant new development since is the passing and coming into force (on 28 June 2022) of ss 146–151 of the Building Safety Act 2022. Section 149 imposes liability for damages where a house or block of flats was made unfit for habitation due or partly due to the installation of defective cladding in an external wall prior to 28 June 2022. So this is a retrospective provision, designed to deal with the historic problem of dangerous cladding. A more general liability for the future, applying to all 'construction products', is imposed by s 148. Potentially liable under these provisions are (i) those who failed to comply with certain legislative requirements in respect of the cladding (or other products), (ii) those

who marketed or supplied a product and made a misleading statement in relation to it, and (iii) manufacturers of a product that is inherently defective. So liability is not circumscribed by contractual relations. In cases of breach, damages may be claimed for personal injury, damage to property, or economic loss. The normal periods of negative prescription are significantly extended by s 151.

As was noted at the meeting of the (Scottish) Building and Fire Safety Working Group on 8 June 2022, the Act also contains far-reaching measures which apply in England and Wales only. The minutes (www.gov.scot/publications/building-and-fire-safety-working-group-minutes-june-2022/) record the discussion in this way:

> Officials advised that the UK Government's Building Safety Act 2022 was passed through the UK parliament in April 2022. It is predominantly relevant to England with respect to the new regime of higher risk buildings. The act establishes a Building Safety Regulatory in England which the Health and Safety England (HSE) has been working on for a few years now. The Act should come into force next spring. This presents a challenge for SG and officials will continue to liaise with the UK Government and HSE … The Act also provides for a levy on the development of all residential buildings in England, unless exempted, to ensure the industry makes a contribution to fixing historical building safety defects. Discussion on the new levy was discussed, explaining originally that the Scottish and Welsh governments had sought a four nations approach before this was put in place and as a result their concerns regarding this have been raised to the UK Government. A Scottish alternative is now being explored as a matter of urgency

What that 'Scottish alternative' might be is touched on the ministerial statement mentioned below.

Separately, changes have been made to the Building (Scotland) Regulations 2004, SSI 2004/406, with effect from June 2022 in relation to cladding: see the Building (Scotland) Amendment Regulations 2022, SSI 2022/136, Part 2 (regs 2–6).

Ministerial statement

On 12 May 2022 the Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison MSP, made a statement on cladding to the Scottish Parliament (www.gov.scot/publications/update-cladding-remediation-programme-cabinet-secretarys-statement/). Three main topics were covered: (i) single building assessments; (ii) persuading developers to cover the cost of remediation work; and (iii) public funding.

The background to (i) lies in difficulties encountered with the EWS1 (the form certifying that external-wall materials are unlikely to support combustion). For reasons of professional indemnity cover, providers of EWS1 forms will only issue forms to single 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 single building assessment ('SBA') 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. And the idea is that it should be paid for from the public purse. The idea has now been piloted, as the ministerial statement records:

> Our initial approach for the SBA pilot involved giving grants to homeowners typically through an intermediary such as a property factor. While this has worked, it came at a high cost in terms of time and demands, particularly on homeowners. It was slower than we would like and is complex. The spend on surveys last year as part of the pilot amounted to £241,000. Through assessing the pilot we have concluded that this method requires to be changed as we scale up to a national programme … Therefore, I can inform Parliament that I have taken the decision to alter our method to allow us to scale up and expand the programme. Using powers and procurement tools available to the Scottish Government, we will now begin offering SBAs directly. This means, that it is the government which will take on the role of procuring surveyors and fire engineers to carry out assessments on behalf of buildings. This takes away the burden on homeowners or the need for factors to move beyond their traditional role managing common parts. This will remove several months from the process of completing a lengthy and technical application and simplify the commissioning of survey work. Importantly, this will also allow many more buildings to be brought into the programme at the same time, so allowing us to scale up our programme.
>
> As a result of this change, I can confirm every block in the Pilot which has not yet submitted a full application under the previous approach has been written to with the offer of a directly procured SBA. I can also confirm that from today we will begin writing to more than 80 unique blocks that submitted an expression of interest last year to invite them onto programme through a new simplified application process … From 2023 we will invite all remaining privately owned high-rise buildings – about another 100 buildings – into the survey programme. We will contact them shortly to explain the timescales and process.
>
> Our programme of surveys is important for today's homeowners and for tomorrow's too. As set out in our Programme for Government, by the end of this Parliament, we will introduce a Register of Safe Buildings.

As for the other matters, the Cabinet Secretary said that: 'It is my clear expectation that developers linked to buildings with problematic cladding will fund remediation where this is identified.' This should be a matter of voluntary agreement, although 'if required, I will make full use of the powers available to us to bring parties to the table, including if necessary, using legislation to do so.' Where a developer has gone out of business, the Scottish Government will step in, using its share, through Barnett consequentials, of money spent dealing with issues of cladding in England by the UK Government.

The Scottish Government has subsequently faced criticism on lack of progress: see 'Internal documents show cladding removal project in doubt' (31 October 2022, www.insider.co.uk/news/internal-documents-show-cladding-removal-28368044). In November 2022, in a response to a freedom of information request, it stated that it does not hold information on remediation work outside its SBA pilot. The 26 buildings included in that project were progressing through fire-risk assessments to see what work was required: www.gov.scot/publications/

foi-202200320849/. The Scottish Government's Cladding Stakeholder Group, which has representatives from numerous sectors, including the Law Society of Scotland, the Royal Institution of Chartered Surveyors and UK Finance, has expanded in size this year and normally meets on a monthly basis.

Shared equity schemes

After-sale procedures

On 24 August 2022, revised guidance was published (www.gov.scot/publications/sale-shared-equity-procedures-3/) on after-sale procedures in relation to the Scottish Government's various shared equity schemes. These are:

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

This replaces the guidance issued in 2019 (as to which see *Conveyancing 2019* p 105). The topics covered are: exercise of a golden share; change of owner; remortgage or additional loans; increase of stake; sales; subsequent securities; grant of a tenancy; expiry of 19 years/application of the 20-year security rule; corresponding with owners; valuations and letter of reliance; enforcement of primary-lender security/appointment of trustee; alterations; and death of the shared-equity owner.

Open Market Shared Equity Scheme

A buyer information leaflet for the Open Market Shared Equity Scheme has been made available at www.gov.scot/publications/open-market-shared-equity-scheme-buyer-information-leaflet-2/. As the leaflet explains:

> The Open Market Shared Equity Scheme helps first time buyers on low to moderate incomes to buy a home on the open market (within a certain price threshold) where this is sensible and sustainable for them to do so.
>
> Although the scheme is currently open to help all first time buyers, it is also open to priority group applicants which include social renters (in other words, people who rent a property from either a local authority or a housing association), disabled people, people aged 60 and over, members of the armed forces, veterans who have left the armed forces within the past two years, and widows, widowers and other partners of service personnel for up to two years after their partner has been killed whilst serving in the armed forces …
>
> Under the scheme you will be required to contribute between 60%–90% of the purchase price of a home with the Scottish Ministers providing assistance to fund the remaining amount. Although you will own the property outright, the interests of the Scottish Government will be secured by a standard security on your property.

Upon the occurrence of certain events in the future (for example when you sell your home) you will be required to repay funds to Scottish Ministers.

Updated area-based limits on the price of homes that can be bought under the scheme have also been published (www.gov.scot/publications/open-market-shared-equity-thresholds/). So for example in Glasgow the price limit for a four-room house is £115,000; in Aberdeen it is £135,000.

On 30 September 2022, the Scottish Government issued updated guidance for administering agents on the Open Market Shared Equity Scheme's administrative procedures: www.gov.scot/publications/open-market-shared-equity-scheme-administrative-procedures/.

Distribution of housing stock by tenure

The most recent housing statistics by tenure (www.gov.scot/publications/housing-statistics-stock-by-tenure/) show a long-term switch from social housing to the privately rented sector, and partly explains why the latter is becoming so highly regulated.

Year	Owner-occupied	Privately rented	Rented from housing associations	Rented from local authorities etc	Vacant
March 2001	59.3%	7.5%	6%	23.9%	3.4%
March 2010	60.7%	11.6%	11%	13%	3.8%
March 2020	58.2%	14.9%	11%	12%	3.8%

Private-sector rent statistics

Private sector rent statistics: 2010–2022, published on 29 November 2022 (www.gov.scot/publications/private-sector-rent-statistics-scotland-2010-2022/), gives both all-Scotland figures and figures by area. In respect of the year from 1 October 2021 to 30 September 2022:

- In the year to end September 2022, average 2-bedroom rents increased in 17 out of 18 areas of Scotland compared with the previous year. Increases in 7 of these areas were above the average 12-month UK CPI inflation rate of 7.6%, ranging from 7.7% in Greater Glasgow to 10.3% in South Lanarkshire. Meanwhile the average 2-bedroom rent in the Ayrshires decreased by 1.5%.
- These regional trends combine to show an estimated 6.2% annual increase in average 2-bedroom monthly rents at a Scotland level.
- Average rents increased at a Scotland level across all property size categories, with increases of 6.3%, 6.2%, 7.4%, 7.5% and 6.9% for 1 to 4 bedroom and 1 bedroom shared properties respectively.

Taking the 12-year period from 2010 to 2022:

- Lothian and Greater Glasgow have seen increases in average rents above the rate of inflation between 2010 and 2022 across all property sizes.

- East Dunbartonshire, Forth Valley and Fife have seen increases in average rents above the rate of inflation for all property sizes except 1-bedroom shared properties.
- The Ayrshires, Dumfries and Galloway, North Lanarkshire and West Dunbartonshire have seen increases in average rents of less than the rate of inflation across all property sizes between 2010 and 2022.

Vacant and Derelict Land Survey 2021

The Scottish Government conducts an annual survey of vacant and derelict land based on returns from local authorities. 'Vacant' land is land which is unused for the purposes for which it is held and is viewed as an appropriate site for development; the land must either have had prior development on it or preparatory work must have taken place in anticipation of future development. 'Derelict' land (and buildings) is land which has been so damaged by development that it is incapable of development for beneficial use without rehabilitation. The annual surveys are being watched with greater attention following the introduction of a community right to buy abandoned, neglected or detrimental land by s 74 of the Community Empowerment (Scotland) Act 2015, which came into force on 27 June 2018, and also in the light of the work of the Scottish Land Commission (for which see *Conveyancing 2020* pp 117–18).

Key findings from the 2021 survey (published on 24 May 2022: www.gov.scot/publications/scottish-vacant-derelict-land-survey-2021/) include:

- The amount of derelict and urban vacant land in Scotland decreased by 1,809 hectares (16%) from 11,268 hectares in 2020 to 9,459 hectares in 2021. The net decrease was driven by large formerly derelict sites; two derelict airfields sites were brought back into use for agriculture and 11 derelict former opencast coal sites became naturalised.
- Of the 9,459 hectares of derelict and urban vacant land recorded in the 2021 survey 1,898 hectares (20%) were classified as urban vacant and 7,561 hectares (80%) were classified as derelict.
- There has been a gradual downward trend in the area of derelict and urban vacant land since 2015. More than half (53%) of derelict and urban vacant land in Scotland is located in five authorities. North Lanarkshire has the largest area – 1,354 hectares, 14% of the Scotland total. Glasgow City has the largest area of the City Authorities – 880 hectares, 9% of the Scotland total.
- For those sites where the previous use is known, 24% of derelict and urban vacant land had been previously used for mineral activity (2,120 hectares), 22% for manufacturing (1,987 hectares) and a further 13% for defence (1,149 hectares). For urban vacant land, where previous use is known, manufacturing (16%, 262 hectares) had the largest area. For derelict land the largest area with a known use was for mineral activity (29%, 2,094 hectares).
- 7,316 hectares of derelict and urban vacant land, where the development potential was known, was reported to be developable, 77% of total area. 21% of all derelict and urban vacant land was considered developable in the short term – development within five years. 13% of all reported derelict and urban vacant land was considered uneconomic to develop and/or is viewed as suitable to reclaim for a 'soft' end use (i.e. non-built use).

- Overall in Scotland 27% of the population were estimated to live within 500 metres of a derelict site, though there were differences across the country. North Lanarkshire had the highest percentage with 74%. In *Na h-Eileanan Siar* none of the population lives within 500 metres of a derelict site.
- 966 hectares of land was reclaimed or brought back into use in 2021. An additional 1,019 hectares were recorded as naturalised. The largest area of land was brought back into use for agriculture at 600 hectares (three sites including two airfields). The most sites were brought back into use for residential purposes (116 sites). Where the source of funding was known, solely private sector funding was the source for the largest amount of derelict and urban vacant land brought back into use in 2021 at 113 hectares. 104 hectares of derelict and urban vacant land brought back into use in 2021 involved some form of public funding, either a full or partial contribution.
- Since its inception in 2005/06, the Scottish Government's Vacant and Derelict Land Fund has contributed (either fully or partially) to the reuse of 444 hectares (in total) of previously derelict and urban vacant land across Dundee City, Fife, Glasgow City, Highland, North Ayrshire, North Lanarkshire and South Lanarkshire.

For what purposes are these statistics used? The answer recently given by the Scottish Government is (www.gov.scot/publications/scottish-vacant-and-derelict-land-survey-uses-of-the-data/):

- to inform Scottish Government Development Planning process through identifying and maintaining a record of vacant and derelict land (VDL). This process will become more important once a stronger planning policy position on VDL is adopted within the National Planning Framework (NPF4)
- to provide local authorities with robust evidence to inform their Local Development Plan in terms of identifying the potential provision of land for the housing, environmental and regeneration components of the plan
- to allow the Scottish Land Commission to monitor its programme of land reform, both urban and rural land, in order to create a Scotland where land is owned and used in ways that are fair, responsible and productive
- to enable the Central Scotland Green Network to assess the extent of how much vacant and derelict land has been naturalised as part of its remit around developing natural climate change solutions, making liveable places, promoting health and wellbeing and supporting a green recovery
- to allow members of public to make enquiries about the availability of vacant and derelict land where they wish to find out more about it and/or make use of it
- to provide robust and cleaned shape files to the Improvement Service for upload onto their Spatial Hub which is an online resource that provides a single point of access to quality-assured Scottish local authority data, in a consistent format
- to provide researchers and the media with high quality data where they have an interest in the topic of vacant and derelict land
- to provide urban regeneration companies with details of vacant and derelict in their area which might be used for regeneration purposes and to map those sites alongside other geospatial data that are useful for regeneration.

KLTR and the ownerless property transfer scheme

When property – of any kind – ceases to have an owner, it falls to the Crown. And in Scotland such property is then administered on behalf of the Crown by

the King's and Lord Treasurer's Remembrancer ('KLTR': see www.kltr.gov.uk/). Most of the property is heritable and most falls to the Crown as a result of s 1012 of the Companies Act 2006 which vests in the Crown the property of dissolved companies. Acting through the KLTR the Crown can disclaim the property of dissolved companies provided this is done within three years after the property comes to the notice of the KLTR – or within one year in the event of an application to the KLTR to decide whether or not to disclaim (s 1013). What then? Presumably the property ceases to belong to the Crown. And in the absence of a provision providing for vesting in anyone else, it must be taken to be ownerless.

In the course of time such land might come to be acquired by positive prescription. It might even be acquired by the mere act of taking possession – but only if the doctrine of occupancy, which applies to ownerless moveable property, can be taken to apply to heritable property as well, which is uncertain. And finally there is a special provision in the Companies Act 2006: in terms of s 1021, on the application by a person with an interest in the property, the court may make an order for the vesting of the property in 'any persons entitled to it'. Despite all this, however, disclaiming causes serious problems in practice and makes it all too likely that the property will continue to lie abandoned and unused. It is a criticism of the KLTR that it has been too ready to disclaim.

This criticism is acknowledged by the KLTR in a new consultation paper: *Ownerless Property Transfer Scheme* (www.kltr.gov.uk/about/ownerless-property-transfer-scheme-opts-consultation/). But there are also good reasons for the KLTR's stance. As the paper explains, heritable property derived from dissolved companies may be 'highly problematic sites such as opencast coal mines, shale bings, harbours and landfill sites' (p 1). Such liability cannot readily be taken on by the KLTR which retains a reserve of only £3 million. So, historically, if a property was considered risky or of limited financial value, the KLTR would usually disclaim (p 3).

The consultation paper marks an important change of direction. Inspired partly by the work of the Scottish Land Commission on revitalising vacant and derelict land (for which see *Conveyancing 2020* pp 117–18), 'the KLTR has been developing its own processes to help unlock obstacles to tackling ownerless land' (p 1). In the last financial year alone the KLTR received around 190 referrals in respect of ownerless land. Under the proposed new scheme, to be known by the snappy name of the 'ownerless property transfer scheme' ('OPTS'), disclaiming would be less common. Instead, the KLTR would seek to pass the property on for the benefit of the community, usually at a nominal value (in effect on a cost-recovery basis, with the KLTR recovering professional costs only, such as legal and valuation fees).

The starting-point would be to pursue a transfer to a public body failing which to the local authority. The public body or local authority might in turn pass the property on to a suitable community body. But if no public body or local authority was inclined to accept the transfer, the KLTR would consider transferring the property directly to a community body deemed to be suitable by the local authority (or other public body). The KLTR would take a 'high-level approach' to this, relying on the local authority to determine whether the use proposed by

the community body would be in the public interest and also sustainable and realistic (p 19). If none of this could be done, the KLTR would follow its former practice of selling the property (if of value) or otherwise disclaiming it.

The potential liabilities involved in some properties might make them too risky for the KLTR to do other than disclaim. It would then be for the relevant local authority to consider acquisition by compulsory purchase or through s 1021 of the Companies Act 2006 (mentioned above), the latter procedure having already been used on a number of occasions by local authorities. But where the KLTR did take on the property and then subsequently transferred it, the KLTR would accept the risk of a claim from a dissolved company which had been restored to the Companies Register under s 1024 or s 1029 of the 2006 Act – something which is possible for a period of six years after dissolution. Such a claim is for the consideration paid for the transfer and not for the property itself (s 1034).

The consultation closed on 16 December 2022. The intention is that the new scheme should come into effect in the course of 2023.

Scottish Barony Register

An unofficial Scottish Barony Register (https://scottishbaronyregister.org/) was set up in 2004. This followed the severance of 'the dignity of barony' – including, most importantly, the right to use the name of 'baron' – from the land to which it had been previously attached, as a result of s 63(2) of the Abolition of Feudal Tenure etc (Scotland) Act 2000. For details, see K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003) para 14.5. Previously, a barony title could only be transferred as part of the land to which it was attached. Now, under s 63(2), it was to be transferred on its own, by assignation, as incorporeal property. But where was the assignation to be registered? Not in the Land or Sasine Register, as s 63(2) made clear. Hence the Scottish Barony Register. Although unofficial, it provides a convenient log of barony titles, and one that is recognised in the market, such as it is, for such titles (as to which see https://baronytitles.com/). It is thought that every transfer of the dignity of barony occurring since 2004 has been registered; the Register lists some 180 barony titles. Applications are accepted only from solicitors registered to practise in Scotland. A typical price for a title is around £100,000.

On 1 December 2020 Alastair Shepherd was appointed as 'custodian' of the Register, replacing Alistair Rennie who had been custodian since inception: see *Conveyancing 2020* p 104. Mr Shepherd intends to issue annual reports of which the first, for 2021, was published in the *Journal of the Law Society of Scotland* in February 2022 (p 6). The following is an extract:

> Eight 'new' (not previously known to the SBR) baronies were registered in 2021, and two baronies known to the SBR were registered following assignation. These include one 'Lordship' and one 'Earldom'. 2021 was a relatively quiet year, but not the quietest. A table of registrations per year shows a total of 215 since the SBR opened in late 2004, with annual totals ranging from four in 2006 to 26 in 2019, most years being in double figures …

Currently, a registration costs £700; a re-registration £350; a certificate of registration £100; and a letter of comfort £50. I do not intend to increase the fees in 2022 but will probably do so from 1 January 2023, and interested parties are therefore warned! Certificates of registration are issued to barons on request and payment of the appropriate fee, and have proved reasonably popular although not mentioned on the website.

Books

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Roderick R M Paisley, *Rights Ancillary to Servitudes* (W Green 2022; ISBN 9780414091887; £175)

Elspeth Christie Reid, *The Law of Delict in Scotland* (Edinburgh University Press 2022; ISBN 9781474416788; £295)

Kenneth G C Reid, George L Gretton and Andrew J M Steven, *Conveyancing 2021* (Edinburgh Legal Education Trust 2022; ISBN 9781739993900; £30)

Peter Webster, *Leasehold Conditions* (Edinburgh Legal Education Trust, Studies in Scots Law vol 12, 2022; ISBN 9781999611866; £30)

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David Bartos, 'New lease of life for commercial lets' (2022) 67 *Journal of the Law Society of Scotland* Nov/46 (introducing the Scottish Law Commission's *Report No 260 on Aspects of Leases: Termination*)

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Catherine Bury, 'Trees: it's not (all) about the money' (2022) 67 *Journal of the Law Society of Scotland* May/20 (considering aspects of the sale by farms of land for commercial forestry)

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Malcolm M Combe, 'Shifting grounds for private renters in Scotland: eviction after the Coronavirus (Recovery and Reform) (Scotland) Act 2022 and during the Cost of Living (Tenant Protection) (Scotland) Act 2022' 2022 *Juridical Review* 222

Malcolm Combe, 'Tenants' rights: the scales tip further' (2022) 67 *Journal of the Law Society of Scotland* Nov/28 (considering the Cost of Living (Tenant Protection) (Scotland) Act 2022)

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PART IV

COMMENTARY

COMMENTARY

REAL BURDENS[1]

Is it a real burden?

The Title Conditions (Scotland) Act 2003 applies to … title conditions, of course. And title conditions comprise real burdens, servitudes, and a few other things besides.[2] But we should not be misled. Mainly, the Title Conditions Act is about just *one* type of title condition: real burdens. And for that reason if no other it is important to be able to tell real burdens from servitudes (or other title conditions).

This is less easy than it sounds. Traditionally, there was no requirement for a deed creating servitudes or real burdens to use the actual name; and even today that remains the case for servitudes although not for real burdens where, since the Title Conditions Act came into force on 28 November 2004, it has been necessary to use the term 'real burden' (or some equivalent term such as 'community burden').[3] Of course, in practice the technical terms were and are very often used. But by no means always. And sometimes they are used incorrectly so that an obligation which is confidently declared to be, say, a real burden may turn out on closer inspection to be a servitude – or perhaps neither.

An additional difficulty is that, until the 2003 Act, servitudes and real burdens were to some extent overlapping categories. Roughly speaking, obligations which might run with the land fall into three broad classes:[4]

(i) obligations to do something (eg repair a roof);
(ii) obligations not to do something (eg no cats or snakes);
(iii) obligations to allow someone else to make limited use of the land (eg as a means of access).

Today the overlap has gone. Since the 2003 Act came into force, obligations of the first two classes can only be created as real burdens, and class (iii) obligations normally[5] only as (positive) servitudes. The former category of negative servitude, which also comprised class (ii) obligations, has been abolished.[6] Here words are

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1 This section is by Kenneth Reid.
2 See the definition in Title Conditions (Scotland) Act 2003 s 122(1).
3 TC(S)A 2003 s 4(2)(a), (3).
4 See in particular TC(S)A 2003 s 2.
5 There is an exception for 'ancillary burdens': see TC(S)A 2003 s 2(3), (4).
6 TC(S)A 2003 s 79.

not conclusive: in determining the type of obligation which is being created, the Act insists that 'regard shall be had to the effect of a provision rather than the way in which a provision is expressed'.[1]

As well as providing for the future, the 2003 Act also sought to rearrange the past. Pre-2004 obligations which, by the lights of the new rules, can be seen to have been misclassified were silently corrected. So all negative servitudes, being class (ii) obligations, were converted to real burdens on 28 November 2004 by legislative fiat.[2] Similarly, pre-2004 real burdens which consisted of class (iii) obligations – relatively speaking, there were not very many – were converted into servitudes.[3]

So there we have it. Today there is a clear line between real burdens and servitudes – at least in theory. But can we be confident that we can always tell the difference? Obligingly, a new case offers some practice. *Longstone (2) Ltd v Harkness*[4] concerned the use of the 'sunset' rule, that is to say, the rule by which real burdens which are more than 100 years old can be varied or discharged by the *burdened* proprietor alone, by service of a notice of termination – although subject to the possibility of the benefited proprietor seeking renewal of the burden in an application to the Lands Tribunal.[5] This convenient, and underused, procedure is available only for real burdens. The provision at issue in *Longstone (2)*, taken from a deed of 1899, was as follows (we have added lettering to make it easier to understand):

> [A] That the said Company shall not be at liberty to place any buildings or other erections upon the surface of the said piece of ground hereby conveyed [B] but that the said piece of ground shall remain free and open as an access common to us and our heirs and successors jointly with the other proprietors of the open court to which the said piece of ground leads [C] the same being reserved as a road or passage not less than twenty eight feet six inches wide and sixty feet or thereby in length from Manderston Street to the said open court under the bridge to be built as aforesaid across the said ground or passage with a clear headway under the said Bridge of not less than eighteen feet [D] and free ingress and egress to the remainder of our said property from Manderston Street under the foresaid Bridge and open space [E] and reserving to us jointly with the other proprietors of said open court the right of maintaining the existing gateway and enclosing the said access as heretofore.

The provision starts off like a real burden. There is to be no building on the land in question – a standard class (ii) obligation. And perhaps this part of the provision really can count as a real burden. But the rest crosses the line into servitudes. There is to be a right of 'access' (part B) or otherwise of 'free ingress and access' (part D). This is a servitude right of way.

The Lands Tribunal, at any rate, was in no doubt:[6]

1 TC(S)A 2003 s 2(5), although this rule concerns only the creation of real burdens.
2 TC(S)A 2003 s 80.
3 TC(S)A 2003 s 81.
4 2022 SLT (Lands Tr) 67. The Lands Tribunal comprised Lord Minginish.
5 TC(S)A 2003 ss 20–24 and 90(1)(b).
6 Paragraph 20.

> The question is as to what sort of burden we have here. In our view it is a servitude of access. Looking at its terms, we note first that the ground in question is to remain 'free and open as an access common to us and our heirs and successors'. Secondly, after the minimum dimensions of the road to be built under the bridge are narrated, it goes on to refer to 'free ingress and egress to the remainder of our said property from Manderston Street under the foresaid Bridge and open space'. It appears to us that the purpose of the prohibition of buildings is to keep the burdened area free for the purposes of access; the prohibition of building is incidental to the right of access being reserved.

Accordingly, the sunset-rule procedure was not available.

The deed, not the summary on the Land Register

Once properties are on the Land Register is it ever necessary to consult the original burdens writs? Usually the answer is no, for the account given of the burdens in the D (burdens) section of the title sheet can be taken as accurate, or at least as sufficiently accurate for most normal purposes. But where a fine reading of burdens is required – where the question is one of interpretation, or whether a condition was properly constituted as a real burden, or whether (for pre-2004 burdens) there are implied enforcement rights – it is often necessary and always advisable to look at the original deed. There can be little doubt that it is competent to do so.[1]

Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd[2] provides a useful illustration. The question before the Lands Tribunal was the validity of real burdens created in a disposition of 1954. These were reproduced in the title sheet, of course. But neither party to the litigation was satisfied with that. The Tribunal explained why not:[3]

> The title sheet in the land register does not quote the disposition in full. However parties agreed that we could look to the whole of the original deed, which was produced to us.[4] As we shall see, there are certain differences between the title sheet and the 1954 disposition which are notable.

So some caution is needed in respect of what the title sheet says. Admittedly, the Land Registration etc (Scotland) Act 2012 requires the Keeper to enter in the burdens section 'the terms of the title condition',[5] but its predecessor legislation of 1979 was more lax, allowing a mere 'summary of its terms'.[6] And even where the terms are set out in full, as they usually are, the burdens have been prised from the rest of the deed and may not be possible to understand properly except in the context of the whole.

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1 G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 14-12.
2 2022 GWD 30-439. The Lands Tribunal comprised R A Smith QC and C C Marwick FRICS.
3 Paragraph 6.
4 Citing *Willemse v French* [2011] CSOH 51, 2011 SC 576 per Lord Tyre at para 15.
5 Land Registration etc (Scotland) Act 2012 s 9(1)(a)(i).
6 Land Registration (Scotland) Act 1979 s 6(2).

Requirements of form: identifying the burdened property

In the creation of real burdens, the constitutive deed must nominate and identify the benefited and burdened properties.[1] And while it is the first of these which has caused most trouble in practice, difficulties can also arise in respect of the second. *Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd*[2] is an example.

The leading case is *Anderson v Dickie*, a decision of the House of Lords from 1915.[3] A disposition, granted some fifty years before the litigation, purported to impose real burdens on 'the ground occupied as a lawn between the ground feued by me to William Miller, merchant in Glasgow, and the present mansion-house of Eastwood Park'. Was this a sufficient description of the burdened property? The House of Lords held that it was not. Of course it was accepted that mere words, by themselves, could never give the full picture.[4] Extrinsic evidence would always be needed 'to apply a specific description to external facts' – for example, to identify on the ground a wall or other boundary feature referred to in the description. 'But', said the House of Lords, 'that does not displace the rule of law that there must be found within the title, to begin with, the clear expression in words of a specific burden imposed on a definite piece of land'. In *Anderson v Dickie* that 'clear expression in words' was found to be lacking.

In *Anderson v Dickie* the disposition sought to impose burdens on part only of the land being disponed. That is unusual. Typically, the burdened property is the whole subjects being conveyed.[5] And that in turn raises a new question. Is the descriptive standard the same for the conveyance of the subjects as it is for the imposition of real burdens? If so, a description which is sufficient to convey the subjects must also be sufficient for the purposes of creating real burdens. If not, the possibility arises that the conveyance may succeed but (if the descriptive standard is higher) the real burdens may fail, with the result that the property is disponed free from the burdens which both parties to the deed intended to impose.

The issue arose sharply in *Royal London Mutual Insurance Society*. The case concerned Argyll Chambers, 'a fine Edwardian Baroque building' comprising the Buchanan Street entrance to 'the renowned Argyll Arcade' in Glasgow (the other entrance being from Argyle Street).[6] Originally in single ownership, Argyll Chambers came later to be divided in a series of split-off dispositions. At issue in the present case was the validity of burdens in a split-off disposition of 1954. This disponed, and also sought to encumber with real burdens:[7]

1 Title Conditions (Scotland) Act 2003 s 4(2)(c). The previous law was the same.
2 2022 GWD 30-439.
3 1915 SC (HL) 79.
4 This and further passages from the case are taken from the speech by Lord Kinnear at 86.
5 At least where burdens are imposed in a conveyance as opposed to a deed of conditions.
6 Paragraph 2.
7 Quoted in para 7 of the Lands Tribunal's judgment. And the issue also arose in respect of the subjects (in the third place) disponed, but the questions raised were the same.

> (In the First Place) ALL and WHOLE the shop premises forming Number 28 Buchanan Street, and Number 36 Argyll Arcade, Glasgow at present occupied by us, and Number 36A (or 37) Argyll Arcade aforesaid at present occupied by George William Cathro and Others trading as The Iona Shop, situated on the ground floor of the building known as Argyll Chambers, forming Numbers 28, 30 and 32 Buchanan Street, and 34, 35, 36 and 36A (or 37) Argyll Arcade, Glasgow …

This was a 'general' (as opposed to a 'particular') description of the property in question; but a general description was usually sufficient to convey the subjects for the purposes of the Register of Sasines,[1] as was accepted to be the case here.[2] Furthermore, the property was now in the Land Register so that its boundaries were clear.[3]

But was the description sufficient for the purposes of imposing real burdens? The references to 'at present occupied by us' and 'at present occupied by George William Cathro and Others trading as The Iona Shop' contained an uncomfortable echo of 'the ground occupied as a lawn' which had been deemed insufficient in *Anderson v Dickie*. But the description in the present case was much fuller than in *Anderson*, so much so that the references to occupation could be seen as superfluous.[4] In all the circumstances, the Lands Tribunal was satisfied that the description was sufficient:[5]

> In this connection it is necessary to consider how the burdens were created. They were created by disposition by a disponer owning larger subjects to a disponee. The 1954 disposition placed burdens upon those parts of the Argyll Chambers which were being conveyed. The applicants are the successors in title to the 1954 disponees. So if the applicants seek to identify their burdened property, all they have to do is ascertain the property within their title lying within Argyll Chambers … [A]s a matter of logic, the land which was conveyed was the land which was burdened. So presumptively, land now comprised in title GLA205443 lying within the Chambers is the burdened land. There was no suggestion otherwise. So the applicants' position that a singular successor cannot identify the burdened land is somewhat unreal.

The Lands Tribunal, indeed, was prepared to go further. If a description was sufficient for the purposes of conveying the property it was sufficient also for the purposes of imposing real burdens:[6]

> If the descriptions are sufficient for the purposes of a general conveyance,[7] we do not see why they should fail for the purposes of imposing a burden … We could find nothing in the passages in the judgements referred to us which indicate that a higher

1 Paragraph 52, quoting J M Halliday, *Conveyancing Law and Practice*, 2nd edn, vol 2 (1997) para 33-07.
2 Paragraph 54: 'It was not suggested that the conveyance itself in 1954 was invalid on account of want of description'.
3 Under title number GLA205443.
4 Naturally, they are not included in the A (property) section of the title sheet.
5 Paragraph 51.
6 Paragraphs 53 and 54.
7 Here 'general conveyance' is not being used in its technical sense of a conveyance of a *universitas*, such as all the property of the disponer. The meaning intended is of a conveyance of specific property by means of a general description.

> degree of specification is required for identification of the burdened property than it is for the identification of the subjects conveyed by a disposition. We think this would be unlikely since, strictly speaking, the words of conveyance and the burdens clause are both part of the dispositive clause of a disposition

But while this may be accepted as a general principle, three observations may be made. First, the rule limiting or even excluding evidence extrinsic to the deed applies with greater force to real burdens than to other aspects of a disposition. The terms of a real burden must be set out within the four corners of the deed, and it is, usually,[1] impermissible to refer to other material (such as the grant of planning permission or an Act of Parliament) without reproducing the content of that material.[2] No such restriction applies to describing the subjects conveyed. So there are likely to be cases where a description which is sufficient to convey property is insufficient for the imposition of real burdens. But they will be rare.

Secondly, the issue is largely one for Sasine conveyances, and hence for older deeds. In the case of the Land Register, the land conveyed must be described either by title number (where the plot is already registered as such) or in a manner sufficiently detailed as to allow the Keeper to delineate the boundaries on the cadastral map (in first registrations or split-offs).[3] Either will be amply sufficient for the purposes of creating real burdens.

Thirdly, not all deeds which impose real burdens seek to convey property. Real burdens, after all, are commonly created in deeds of conditions.[4] The principle articulated in *Royal London Mutual Insurance Society* is pre-eminently a principle which applies to dispositions and other conveyances.

Requirements of content: praedial benefit

As well as requirements of form (such as identification of the benefited and burdened properties, just discussed), the law also insists on certain requirements of content. These can be found in s 3 of the Title Conditions (Scotland) Act 2003 although for the most part this simply enacts the rules developed at common law. Among the requirements of content – indeed listed at the very start of s 3 – is the so-called 'praedial' rule: a real burden must relate to property rather than merely to person. That is why it has the privilege of running with the land. And it must be praedial, so to speak, at both ends. So on the one hand a real burden

1 Although there can be exceptions, notably the exception set out in s 5 of the Title Conditions (Scotland) Act 2003 (which was prayed in aid in another part of this case: see p 158 below).

2 The leading case is *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788.

3 Land Registration etc (Scotland) Act 2012 ss 23(1)(c), 25(1)(b) and 26(1)(c).

4 But while a deed of conditions does not – indeed cannot – convey property, it does quite often contain a description (typically of common parts in a development) which is intended to be incorporated into the dispositions of individual units in the development. If so, the same description is likely be used for the burdened property in the real burdens. In recent years there has been a series of cases in which the description of common parts has been found to be inadequate. And while some have been decided in the context of a conveyance of property (eg *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2) and others in the context of the imposition of real burdens (eg *Duffus v Malcolm Allan Housebuilders Ltd* 2020 GWD 16-236), it will usually be the case that a failure in one of these contexts would also be a failure in the other.

must 'relate in some way to the burdened property'.[1] On the other hand it must 'be for the benefit' of the benefited property.[2] It is the second of these which was the subject of *Castle Street (Dumbarton) Developments Ltd v Lidl Great Britain Ltd*.[3]

This second leg of the praedial rule has sometimes caused difficulty. But much was clarified by a decision of the Inner House in 2014, *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd*,[4] and the following can now be regarded as settled.[5] (i) To benefit a property means, in a broad sense, to increase its value – typically by improving its attractiveness for residential or commercial use by restricting the use of neighbouring property. (ii) Benefit to a property necessarily benefits the person who owns or leases the property. But the converse need not be true: benefit to a person does not necessarily benefit the property which the person owns or leases. (iii) Benefit to a property and benefit only to a person are not always easy to tell apart. But if successive owners of the property will take benefit, then it is the property that is benefited and not merely the person who happens to be its owner when the purported real burden is first created.

The condition at issue in *Castle Street (Dumbarton) Developments Ltd v Lidl Great Britain Ltd* lay right on the cusp of the praedial and the personal. The facts were these. Lidl owned a site at Castle Street, Dumbarton. By disposition registered in the Land Register on 7 July 2021 Lidl disponed part of the site – some 0.78 hectares – to Castle Street (Dumbarton) Developments Ltd. The disposition sought to impose the following condition as a real burden:

> So long as the granter of this Disposition (or another member of the same group of companies) is either a proprietor of or occupies the whole or part of the Retained Property,[6] no part of the Conveyed Property[7] shall be occupied by either (a) any of Aldi, Farmfoods, Iceland, Home Bargains, Tesco, Asda, Sainsbury and/or Morrisons or (b) any operator whose convenience (food) offer accounts for 30% or more of the sales areas of their property on the Conveyed Property.

Was this a valid real burden? Within three months of the disposition being registered, the disponee, Castle Street, applied to the Lands Tribunal for a determination that it was not.

Although attack was possible on more than one ground,[8] the main issue was whether the condition conferred praedial benefit. And here the whole difficulty lay in the opening words: 'So long as the granter of this Disposition (or another member of the same group of companies) is either a proprietor of or occupies the whole or part of the Retained Property'. Remove these words and praedial benefit was assured. For a condition which restricted the sale of food on the Conveyed

1 Title Conditions (Scotland) Act 2003 s 3(1).
2 TC(S)A 2003 s 3(3).
3 2023 GWD 3-37, Lands Tribunal. The Tribunal comprised Lord Minginish and C Marwick FRICS.
4 [2014] CSIH 105, 2015 SC 339, discussed at *Conveyancing 2014* pp 117–24.
5 For the Lands Tribunal's own version of this, see para 56 of the judgment in *Castle Street (Dumbarton) Developments Ltd v Lidl Great Britain Ltd*.
6 Ie the part of the site retained by Lidl.
7 Ie the part of the site now being disponed to Castle Street.
8 Indeed it was attacked, unsuccessfully, (i) as breaching the four-corners-of-the-deed rule in respect of the meaning of (a) 'same group of companies' and (b) the brand names of supermarket chains, and (ii) as being an unreasonable restraint of trade, contrary to TC(S)A 2003 s 3(6).

Property conferred obvious economic benefit on the Retained Property, making it attractive to Lidl or to anyone else wishing to operate a supermarket without unwelcome competition from next-door.[1] But the additional words were there and could not be wished away. Were they fatal to the condition as a real burden? Was a condition so obviously designed for a particular person (Lidl Great Britain Ltd and other companies within the group) necessarily lacking in praedial benefit?

Presumptively, the answer appeared to be yes. For the trouble with the condition, as the Lands Tribunal pointed out, was that it was 'so tightly bound to Lidl as to be personal rather than praedial'.[2] Yet the position was not clearcut, for the condition was certainly capable of benefiting persons other than Lidl or its sister companies. Examples of situations in which the burden would remain live but with benefit accruing to others ('T') could include: (i) the lease of the Retained Property to T; (ii) sale and leaseback of the property such that T was the owner and Lidl the tenant; (iii) sale in part to T with the remainder continuing to be owned by Lidl. In their nature such arrangements would not, of course, last for ever. The point would come when Lidl neither owned nor occupied any part of the Retained Property. At that point the burden would come to an end. But real burdens need not last for ever, as the Tribunal acknowledged. Indeed s 7 of the Title Conditions Act expressly contemplates burdens with 'a duration of a specified period'. Overall, therefore, the argument that the condition was praedial carried a certain amount of weight.

But it was not enough to persuade the Lands Tribunal:[3]

> Whilst we have not found this an easy matter, we have come to the view that this burden is so inextricably tied to Lidl (meaning by that companies within the Lidl group) that it fails to meet these requirements [for praediality]. It does not run with the land, whomsoever its owners, tenants or occupiers might be from time to time. It is tied instead to Lidl's ownership or occupation of the Retained Property or any part thereof.

The condition accordingly failed as a real burden.[4] With this assessment it is difficult to quarrel.

Interpretation: private dwellinghouse for one family only

Finally and briefly, a question of interpretation. A restriction to use as a private dwellinghouse for one family only is a mainstay of deeds of conditions in housing estates. But what, precisely, is being restricted? The phrase has three separate

1 For as long as the Retained Property was not being used for a supermarket, this would be a future and not a present benefit. But it would be a benefit nonetheless. The Lands Tribunal (at para 60) was struck by the fact that the restriction on the Conveyed Property was to operate regardless of the use made of the Retained Property and saw this as a further reason for doubting the praedial nature of the restriction. In fact, such linkage would be unusual: there was none, for example, in *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd*.

2 Paragraph 57.

3 Paragraph 57.

4 To what extent that decision helped the disponee and applicant, Castle Street (Dumbarton) Developments Ltd, is open to question because the condition, having failed to become a real burden, would have continued to bind as a matter of contract: see TC(S)A 2003 s 61.

ideas. In order to be permitted, the use of the property must be (i) private, (ii) as a dwellinghouse, and (iii) by a single family. Failure in respect of any one of those results in a breach of the burden.

Although the restriction is a commonplace, case law on its meaning is sparse. The issue is, however, touched upon in one of the cases of 2022: *Inspire Scotland CC Ltd v Wilson*.[1] The case concerned a 1970's housing estate in Uddingston, Lanarkshire. The new owner of a house proposed to use it as a residential care home for young persons. It would be occupied by up to three such persons (not older than 21) supervised by two trained carers. The proposal did not attract the enthusiastic support of neighbours.

The case took the form of an application to the Lands Tribunal for variation of the use restriction – an application which was granted, albeit with a degree of hesitation.[2] But along the way the Tribunal considered whether the proposed use was in breach of the restriction at all – for if it was not, the Tribunal might have been tempted to refuse the application as unnecessary. Full argument was not heard, and the Tribunal's comments were brief and provisional.[3] Nonetheless they are of value.

Of the three constituent elements of the restriction – private, dwellinghouse, and one family – the first at least would not be breached by the proposed use. As was observed in the most significant previous decision on this wording, *Brown v Crum Ewing's Trs*,[4] a decision from 1918, the opposite of 'private' is 'public', and in that case as in this, 'the public, either general or local, have no access to it [the house], or control over it in any way'.[5]

Equally, the house would be being used as a dwellinghouse. In *Brown*, where the house was being used to accommodate 25 orphan children, the court had no hesitation in finding this requirement to have been met:[6]

> The children and the servants are there simply as dwellers or residents, and are not using the house in any way which is not characteristic of a dwelling-house. They are sheltered in it, and eat and sleep in it, and the children prepare their lessons and receive ordinary household training. And as the question is as to the mode in which the house is being used, I am unable to see how the mode of use complained of can be characterised otherwise than use as a dwelling-house.

But there was a problem. The premises would not be used *only* as a dwellinghouse; there was also to be the provision of care. That in itself would not be fatal because,

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1 2023 SLT (Lands Tr) 15.

2 See p 20 above.

3 The applicant had sought, by last-minute amendment, to invoke the Lands Tribunal's declaratory jurisdiction under s 90(1)(a)(ii) of the Title Conditions (Scotland) Act 2003 to determine a question as to the applicability or meaning of the burden. Had the amendment been allowed, there would have been a full hearing of argument. As it was, the Tribunal concluded 'that there is at the very least a colourable argument that the conditions would be infringed' (para 10).

4 1918 1 SLT 340.

5 At 342 per the Lord Ordinary (Lord Cullen). Compare the case of a house which is made available to the public at large on Airbnb or equivalent. Such a use has been held in England not to be 'private': *Triplerose Ltd v Beattie* [2020] UKUT 180 (LC), [2020] HLR 37, [2021] 1 P & CR 4, discussed in *Conveyancing 2020* pp 196–99.

6 At 342 per Lord Cullen.

where the main use complies with a use restriction, it is permissible to have an ancillary use which does not.[1] But was the provision of care merely ancillary? The Lands Tribunal thought probably not:[2]

> The provision of care is at the heart of the applicants' operation. The occupants will be the young persons and their carers. The latter would be working on a shift basis and being paid for doing so.

If that seems a rather narrow view of 'ancillary', the position was put beyond doubt by a consideration of the third constituent element. 'The members of the household, ie the several young persons and their carers, are not members of "one family only" by consanguinity, affinity or adoption in a conventional sense'.[3] It was in vain for the applicant company's counsel to argue that, today, 'families' could comprise a broader range of relationships than when the real burden was imposed in 1969.[4] Unsurprisingly, the Tribunal was 'not persuaded that the present setup proposed by the applicants can be regarded as a single family use in 2022 any more than it would have been in 1969'.[5]

REGULATION OF SHORT-TERM LETS[6]

Introduction

Recent years have seen significant growth in short-term lets in Scotland, as well as other parts of the world. The trend has been particularly noticeable in destinations popular with tourists, such as Edinburgh[7] and the Highlands. In the same way as the private hire-car market has been dominated by Uber, short-term lets are most commonly associated with the online platform Airbnb.[8] It is a trend which has become increasingly controversial.[9] While greater availability of tourist accommodation should attract increased numbers of tourists and thus bring economic benefit,[10] the downsides have been readily observed. Properties being used as short-term lets are unavailable as longer-term lets. This can deprive

1 G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 14-21. It has even been suggested that ancillary use is allowable in the face of a direct prohibition: see *Snowie v Museum Hall LLP* [2010] CSOH 107, 2010 SLT 971 and, for criticism, *Conveyancing 2010* pp 114–16.
2 Paragraph 10.
3 Paragraph 10.
4 Paragraph 79.
5 Paragraph 81.
6 This section is by Andrew Steven.
7 In Edinburgh the amount of self-catering, and bed and breakfast/guest house accommodation almost tripled between 2010 and 2021. See Scottish Government, *Short-term lets: licensing scheme and planning control area legislation, Business and Regulatory Impact Assessment* (November 2021, www.legislation.gov.uk/ssi/2022/32/pdfs/ssifia_20220032_en.pdf) p 6.
8 It has been asserted by those supporting control of short-term lets that there are at least 12,000 Airbnb lets in Edinburgh.
9 See eg Scottish Government, *Short-term lets – impact on communities: research* (October 2019, www.gov.scot/publications/research-impact-short-term-lets-communities-scotland/).
10 In Edinburgh in 2018 tourist spending accounted for more than 75% (£244m) of the total £320m generated in the capital. See G Mawdsley and A McNab, 'Whose legal problems are short term lets?' 2020 SLT (News) 1 citing a report from *The Scotsman* of 2 July 2019.

those who want to live and work in a community of possible accommodation. Tenement stairs where a flat's occupants are constantly changing may be noisier, subject to more litter and have less of a sense of community.[1] More tourists can result in traffic congestion, and higher demand for and impact on local services.

The Scottish Government launched a consultation on short-term lets in 2019,[2] which generated 1086 responses.[3] In January 2020, the Minister for Local Government, Housing and Planning (Kevin Stewart MSP) announced the policies which the Scottish Government intended to take forward.[4] First, there would be a licensing scheme for short-term lets introduced under the powers contained in the Civic Government (Scotland) Act 1982. Secondly, local authorities would be enabled to designate 'short-term let control areas' under the powers contained in amendments made to the Town and Country Planning (Scotland) Act 1997 by the Planning (Scotland) Act 2019. In these areas planning permission would be necessary if a property was to be used as a short-term let. Thirdly, consideration would be given to taxing short-term lets to ensure that these 'make an appropriate contribution to local communities and support local services'.[5] Furthermore, a separate visitor tax was also in development. There has been no legislative activity yet on taxation but there has been on the other two policies.[6]

Short-term let control areas

The planning policy was implemented by the Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021,[7] which were summarised in last year's volume.[8] They apply in association with s 26B of the Town and Country Planning (Scotland) Act 1997. Where a local authority designates a 'control area', the change of use of a dwellinghouse to a property used for short-term lets within that area is deemed to be a material change of use. This constitutes 'development'[9] and therefore requires planning permission. There are some exceptions, notably where 'all or part of the dwellinghouse is the only or principal home of the landlord or occupier'.[10] There requires to be public notification and

1 Private law restrictions such as real burdens may provide a remedy, but there are limitations. See M Combe, 'Land law responses to the sharing economy: short-term lets and title conditions' 2017 *Juridical Review* 219. See also *Conveyancing 2020* pp 196–99.

2 See *Conveyancing 2019* pp 104–05.

3 See Scottish Government, *Short-term Lets: Consultation on a Regulatory Framework for Scotland, Analysis of Consultation Reponses* (October 2019, www.gov.scot/publications/short-term-lets-consultation-regulatory-framework-scotland-analysis-consultation-responses/).

4 Scottish Parliament, *Official Report*, 8 January 2020, cols 36–39.

5 Scottish Parliament, *Official Report*, 8 January 2020, col 38.

6 For an overview, see C Loudon, 'Short term lets: a new dawn' (2022) 67 *Journal of the Law Society of Scotland* Oct/22.

7 SSI 2021/154.

8 *Conveyancing 2021* pp 86–87.

9 In terms of the Town and Country Planning (Scotland) Act 1997 s 26. See generally J Rowan Robinson, E Young, M Purdue and E Farquharson-Black, *Scottish Planning Law and Procedure* (2001) ch 5.

10 Town and Country Planning (Scotland) Act 1997 s 26B(3)(b).

consultation of the intention to introduce a control area followed by approval by the Scottish Ministers.[1]

The 2021 Regulations were subject to amendment regulations in 2022.[2] The principal purpose of these was to align some of the definitions in relation to short-term lets with those in the licensing legislation covered below.

In autumn 2021 the City of Edinburgh Council carried out a consultation on the designation of the entirety of the land within its local authority boundaries as a control area. Over 3,000 responses were received of which 85% supported this designation.[3] In February 2022 the Council's planning committee sought approval from the Scottish Ministers that this designation should proceed. This was granted in July 2022 and the designation came into effect on 5 September 2022.[4] The Council then undertook a consultation on a revision of its planning guidance which closed on 22 December 2022. This includes a provisional policy as follows:[5]

> If the property is accessed off a stair where there are other flats off that stair, it is very unlikely that a change of use will be supported. This is because it has been found that existing residents of flats within stairs are particularly affected by the pattern of activity which often results from STL. Guests of the short-term let properties can arrive late at night and make noise and cause disturbance in a way which residents of that stair would not, given they will know of the impacts that they have on one another and be able to manage those impacts in a neighbourly way. Examples of disturbance include bumping suitcases up stair and using washing machines in the middle of the night.

If that policy is approved it will make it very difficult in the future to obtain permission to change the use of a flat to short-term let accommodation.[6] With some existing properties inevitably to be withdrawn from the market over time,[7] a number as a result of the licensing requirements outlined below, a considerable impact on the availability of short-term lets in Edinburgh will be felt.

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1 Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021, SSI 2021/154, regs 4, 7 and 8. See also *Planning circular 01/2021: short-term let control areas* (www.gov.scot/publications/planning-circular-establishing-short-term-control-area/).

2 Town and Country Planning (Short-term Let Control Areas) (Scotland) Amendment Regulations 2022, SSI 2022/33.

3 See https://consultationhub.edinburgh.gov.uk/sfc/short-term-let-consultation/.

4 See www.edinburgh.gov.uk/planning-13/proposal-designate-short-term-let-control-area#:~:text=In%20July%202022%20Scottish%20Minister,effect%20on%205th%20September%202022.

5 See City of Edinburgh Council Planning Committee, *Proposed Changes to Short-Term Let Guidance* (31 August 2022, https://democracy.edinburgh.gov.uk/documents/s48369/7.4%20-%20Proposed%20Changes%20to%20Short-Term%20Let%20Guidance.pdf).

6 In contrast, in January 2023 the City of Edinburgh Council granted planning permission for the conversion of a former language school in a listed building on Albyn Place in the Edinburgh New Town into 20 holiday flats: see www.edinburghlive.co.uk/news/edinburgh-news/new-edinburgh-city-centre-short-25954442.

7 But this in turn may need planning permission on the basis that the change to residential or other use is a 'development'. Cf *Breachberry Ltd v Secretary of State for the Environment and Shepway District Council* [1985] JPL 180 (change from guest house to residential accommodation).

The Scottish Ministers have also approved the designation by Highland Council of its Badenoch and Strathspey ward as a control area.[1] We are unaware of any proposals for control areas by other local authorities.

Licensing of short-term lets: the legislative background

A false start

The first attempt at introducing a Licensing Order was short-lived.[2] The Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order, having been laid before the Scottish Parliament in December 2020, was withdrawn by the Scottish Government in February 2021. The reason given was opposition by some MSPs.[3] Between June and August 2021 the Scottish Government consulted on a revised draft of the Order.[4] Over 1,000 responses were received and there was substantial criticism from respondents. In October 2021 the Cabinet Secretary for Social Justice, Housing and Local Government set out a number of policy changes which were to be made.[5] These included removing 'overprovision' powers, simplifying publicity and notifications, reducing public liability insurance requirements, and facilitating home-share and bed-and-breakfast accommodation.

Meanwhile a stakeholder working group was established to consider draft guidance on the licensing scheme but had trouble reaching agreement, leading to the resignation of the main industry players – Association of Scotland's Self Caterers ('ASSC'), Airbnb, the Scottish B&B Association, and the UK Short Term Accommodation Association. The chief executive of ASSC, Fiona Campbell, stated:[6]

> Despite our best efforts, and those of our colleagues across Scottish tourism, this working group has been revealed as nothing but a sham and therefore we have decided to leave it. Throughout the entire process, while we have acted in good faith, this Government has continually shifted the goalposts and acted with cavalier disregard and indifference towards our sincere concerns and innovative ideas.

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1 See www.assc.co.uk/wp-content/uploads/2022/12/STL-270-001-Decision-letter.pdf. The housing campaign group, Living Rent, has submitted a petition to Highland Council effectively calling for further control areas: see 'Holiday lets are turbo charging the housing crisis in the Highlands', *Strathspey and Badenoch Herald*, 1 February 2023.

2 See further *Conveyancing 2021* pp 84–86. For a timeline of events, see www.gov.scot/publications/short-term-lets/#:~:text=New%20hosts%20are%20required%20to,an%20application%20for%20a%20licence.

3 See letter from the Minister for Local Government, Housing and Planning (Kevin Stewart MSP) to the Convener of the Scottish Parliament Local Government and Communities Committee (James Dornan MSP) dated 18 February 2021 (www.gov.scot/publications/short-term-lets-letter-from-housing-minister-to-committee/).

4 See https://consult.gov.scot/housing-and-social-justice/short-term-lets-draft-licensing-order-and-bria/.

5 Letter from the Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison MSP) to the Convener of the Scottish Parliament Local Government and Communities Committee (Ariane Burgess MSP) dated 7 October 2021 (www.gov.scot/publications/short-term-lets-licensing-order-update-letter-from-cabinet-secretary-lghp-committee/).

6 '"It's a sham": Tourist bosses quit SNP's Airbnb crackdown group', *The Herald*, 5 August 2021.

The Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022[1] was eventually laid before the Scottish Parliament on 23 November 2021.[2] It was approved on 19 January 2022 and came into force on 1 March 2022. The Scottish Government has published detailed guidance on the legislation, both for those engaging in short-term lets[3] and for licensing authorities (ie local authorities), letting agencies and platforms facilitating short-term lets.[4] This is essential reading for those advising in this area, as is the official 28-page *Policy Note* on the Licensing Order.[5] What follows is a detailed but not exhaustive account of the regime.[6]

Timings and delay

The 2022 Licensing Order makes provision for licensing applications to commence from 1 October 2022.[7] New hosts require a licence before commencing to operate. 'Host' is widely defined to mean 'a person who is the owner, tenant or person who otherwise exercises control over occupation and use, of the accommodation which is the subject of a short-term let'.[8] The term 'guest' is used for 'a person who occupies accommodation under a short-term let'.[9]

Under the original timetable, existing hosts were required to make an application by 1 April 2023, although they could continue to operate while the application was being determined.[10] On 7 December 2022, however, the Scottish Government announced that subordinate legislation would be laid before the Scottish Parliament in January 2023 to put the timetable back six months to 1 October 2023. The reason given was the cost of living

1 SSI 2022/32 (referred to in the text as 'the 2022 Licensing Order').

2 It was made under the powers conferred by ss 3A, 44(1)(b), 44(2)(a), (b), (d), and 136(2) of the Civic Government (Scotland) Act 1982, which enable licensing powers to be given to local authorities eg in relation to taxis, public entertainment venues and window cleaners. In contrast, HMO (homes-in-multiple-occupation) licences are regulated by the Housing (Scotland) Act 2006 Part 5 (ss 124–166).

3 Scottish Government, *Short Term Lets in Scotland Licensing Scheme: Part 1 Guidance for Hosts and Operators* (March 2022, www.gov.scot/publications/short-term-lets-scotland-licensing-scheme-part-1-guidance-hosts-operators-2/documents/).

4 Scottish Government, *Short Term Lets in Scotland Licensing Scheme: Part 2 Supplementary Guidance for Licensing Authorities, Letting Agencies and Platforms* (March 2022, www.gov.scot/publications/short-term-lets-scotland-licensing-scheme-part-2-supplementary-guidance-licensing-authorities-letting-agencies-platforms-2/documents/).

5 Scottish Government, *Policy Note: The Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order SSI 2022/32* (November 2021, www.legislation.gov.uk/ssi/2022/32/pdfs/ssipn_20220032_en.pdf).

6 On the general licensing scheme in the 1982 Act within which the short-term lets regime now sits, see A Hajducki and S Stuart, *Scottish Civic Government Licensing Law* (4th edn, 2016). See also K Clancy, *A Practical Guide to the Short-Term Letting Licensing Scheme in Scotland* (forthcoming, 2023).

7 Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022 art 4(2).

8 Licensing of Short-term Lets Order 2022 art 2(1). The Scottish Government's *Short Term Lets in Scotland Licensing Scheme: Part 1 Guidance for Hosts and Operators* also uses the term 'operator' but this is not in the Licensing Order itself and is apparently synonymous with 'host'.

9 Licensing of Short-term Lets Order 2022 art 2(1).

10 Licensing of Short-term Lets Order 2022 art 7.

crisis.[1] There had also been significant criticism of the likely impact of the 2022 Licensing Order on tourism and in particular on the Edinburgh Festivals.[2]

The meaning of 'short-term let'

The statutory definition

Only 'short-term lets' are subject to licensing. The definition is set out in art 3 of the 2022 Licensing Order as follows:

> 'short-term let' means the use of residential accommodation provided by a host in the course of business to a guest, where all of the following criteria are met[3] –
>
> (a) the guest does not use the accommodation as their only or principal home,
> (b) the short-term let is entered into for commercial consideration,
> (c) the guest is not –
> (i) an immediate family member of the host,
> (ii) sharing the accommodation with the host for the principal purpose of advancing the guest's education as part of an arrangement made or approved by a school, college, or further or higher educational institution, or
> (iii) an owner or part-owner of the accommodation,
> (d) the accommodation is not provided for the principal purpose of facilitating the provision of work or services by the guest to the host or to another member of the host's household,
> (e) the accommodation is not excluded accommodation (see schedule 1), and
> (f) the short-term let does not constitute an excluded tenancy (see schedule 1).

The first thing which stands out about this is that there is no time-limit for a short-term let. According to the official *Policy Note* prepared by the Scottish Government, the omission is deliberate, 'to avoid a loophole whereby lets longer than 28 days (for example in respect of a worker away from their principal home) might not be regulated'.[4] But it stretches the meaning of 'short-term let' beyond breaking point to apply it to an occupancy agreement of over a year. Doubtless, some such arrangements would constitute private residential tenancies and thus be excluded from the need for a short-term let licence on that ground,[5] but not all.[6]

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1 See www.gov.scot/publications/short-term-lets/#:~:text=New%20hosts%20are%20required%20to,an%20application%20for%20a%20licence. The postponement was described by Cammy Day, Leader of the City of Edinburgh Council and a Labour councillor, as 'shameful': see 'Clampdown on rentals will cost millions, warns Fringe', *The Scotsman*, 4 February 2023.

2 Before the extension was announced, Shona McCarthy, chief executive of the Edinburgh Fringe Society, described the licensing legislation as 'draconian'. See 'Reprieve for festivals over short-term lets', *The Times*, 9 December 2022.

3 The same definition is applied in relation to the control areas legislation (described above) by the Town and Country Planning (Short-term Let Control Areas) (Scotland) Amendment Regulations 2022, SSI 2022/33.

4 Scottish Government, *Policy Note* para 18.

5 See p 131 below.

6 On the thorny difference between leases and licences (in another sense of that word), see S M Norbash, *Leases and licences in Scots law: an historical-doctrinal analysis* (PhD thesis, University of Edinburgh, 2022, https://era.ed.ac.uk/handle/1842/39163).

Secondly, the provision of the accommodation must be 'in the course of a business'. Thus, where someone is away for a few days and allows a friend to stay in their house during that period, this arrangement will thankfully not necessitate a licence. But the relationship of the 'in the course of a business' requirement with another of the definitional elements of a short-term let is awkward, as we shall see shortly.

Thirdly, it does not matter whether the purpose of the let is work or leisure.[1] This is perhaps unsurprising given that short-term lets are not confined to tourists and it would add a dimension of complexity to restrict the definition to such lets.

Finally, apart from criterion (b), the six listed criteria are negative in character, and so have the effect of excepting things from the ambit of short-term lets. To these criteria we now turn.

Criterion (a): only or principal home

Use of the accommodation by the guest 'as their only or principal home' prevents the arrangement being classified as a short-term let. This will exclude many longer-term arrangements insofar as they are not excluded already by criterion (f) (excluded tenancies).

Criterion (b): commercial consideration

A short-term let must be 'entered into for commercial consideration'. This sits awkwardly with the 'in the course of a business' requirement mentioned earlier. 'Commercial consideration' is defined as including '(a) money [and] (b) a benefit in kind (such as provision of a service, or reciprocal use of accommodation'.[1] The official *Policy Note* states:[2]

> It is explicit that arrangements where one household swaps their home with another household, one form of home letting, would be within the scope of commercial consideration. Note that goods arranged to be exchanged in lieu of money, such as a case of wine, would count as commercial consideration. However, a modest gift provided by a friend as a 'thank you for having me' would not. The difference is in whether an agreement in the course of business has been made.

The first sentence is disconcerting. Take the following example. Alan, his wife Belle, and their two children Caroline and Desmond, who live in Ecclefechan swap houses for two weeks during the school holidays in July with Alan's former school friend Farquhar and his husband Gregory, who live in Helmsdale. Surely they do not require to apply for licences? On the basis that this arrangement is not in the course of a business, it would seem that they do not. But if the house swap is between two parties who are not friends, licences may be needed.[3] From our researches, house swaps are often arranged by joining a website on which the

1 Licensing of Short-term Lets Order 2022 art 2(1).
2 Scottish Government, *Policy Note* para 19.
3 See 'New rules curtail the joys of house swapping for us Scots', Letter, *The Guardian*, 11 January 2023. The writer (Rachel Davidson) states: 'I suspect that many people in Scotland are unaware of this new legislation, which will sadly greatly diminish the possibilities of home swapping here.'

properties are advertised.[1] Whether this amounts to providing accommodation by the owners as hosts in the course of a business seems doubtful. Therefore it is not clear what swaps will be covered.

Curiously, the provision does not spell out which of the parties is giving the commercial consideration. But presumably this must be the guest rather than the host. Where it is the host who is paying, criterion (d) (below) below may well exclude the arrangement assuming the guest is providing services.

Criterion (c): excluded categories of guest

There are three excluded categories of guest. The first – 'an immediate family member of the host' – covers parents, grandparents, grandchildren and siblings. It also covers a spouse or civil partner of the host, or a person living with the host as if they were married. The parents, grandparents etc of any spouse etc are also included.[2]

The justification for the second category – those principally staying because of studies – is said to be because 'the student is more like a family member than a guest'.[3]

The third – 'owner or part-owner of the accommodation' – is apparently aimed at owners of timeshares. But timeshares are often structured so that the property in question is owned by trustees or a company and not the person actually using the property.[4]

Criterion (d): guests who provide services

Also excluded from short-term lets are cases where the accommodation is provided 'for the principal purpose of facilitating the provision of work or services by the guest to the host or to another member of the host's household'. This is aimed at live-in-care arrangements and tied accommodation. It will also presumably cover house- and dog-sitters. But much will depend on the exact nature of what is agreed. If the work is ancillary to staying at the accommodation – the *Policy Note* gives the example of mowing the lawn while occupying the property for a week – a licence will be needed.[5]

Criterion (e): excluded accommodation

The types of accommodation listed in schedule 1 para 1 of the 2022 Licensing Order cannot be the subject of short-term lets. These are:

(a) an aparthotel,
(b) premises in respect of which a premises licence within the meaning of section 17 of the Licensing (Scotland) Act 2005 has effect and where the provision of accommodation is an activity listed in the operating plan as defined in section 20(4) of that Act,

1 See eg www.homelink.org.uk/ and www.lovehomeswap.com/.
2 Licensing of Short-term Lets Order 2022 arts 2(3), (4).
3 Scottish Government, *Policy Note* para 22.
4 G L Gretton and A J M Steven, *Property, Trusts and Succession* (4th edn, 2021) para 10.16.
5 Scottish Government, *Policy Note* para 25.

(c) a hotel which has planning permission granted for use as a hotel,
(d) a hostel,
(e) residential accommodation where personal care is provided to residents,
(f) a hospital or nursing home,
(g) a residential school, college or training centre,
(h) secure residential accommodation (including a prison, young offenders institution, detention centre, secure training centre, custody centre, short-term holding centre, secure hospital, secure local authority accommodation, or accommodation used as military barracks),
(i) a refuge,
(j) student accommodation,
(k) accommodation which otherwise requires a licence for use for hire for overnight stays,
(l) accommodation which is provided by the guest,
(m) accommodation which is capable, without modification, of transporting guests to another location,
(n) a bothy, or
(o) accommodation owned by an employer and provided to an employee in terms of a contract of employment or for the better performance of the employee's duties.

Many of the terms mentioned are the subject of specific definition.[1] For example, an 'aparthotel' is a residential building of serviced apartments owned by the same person, with a minimum of five of the apartments run as a single business. There must be a shared entrance for the apartments which is not used by any other flat or residential unit in the building. A 'bothy' is defined as a building of no more than two storeys with no key utilities and 100 metres or more from both the nearest public road and the nearest habitable building. 'Student accommodation' is 'residential accommodation which has been built or converted predominantly for the purpose of being provided to students'. Category (l) is aimed at tents brought along by the guest although the *Policy Note* records that in glamping 'the tent is normally fixed and provided by the host'.[2] This necessitates a licence unless it falls within category (k) because it is in a caravan site licensed under the Caravan Sites and Control of Development Act 1960.

Category (b) will normally exempt hotels because they will have a premises licence enabling them to sell alcohol. Bed-and-breakfasts and guest houses which hold such a licence will similarly be exempted,[3] but many will not do so and will therefore require a short-term let licence.

Criterion (f): excluded tenancies

None of the 14 types of tenancy listed in para 2 of schedule 1 can be short-term lets. This includes both private-sector and social-housing tenancies, as well as the main forms of agricultural tenancy, including crofts. Student residential

1 Licensing of Short-term Lets Order 2022 art 3(1).
2 Scottish Government, *Policy Note* para 42.
3 See www.mygov.scot/short-term-let-licences/accommodation-needing-short-term-let-licences.

tenancies, which essentially mean tenancies where the landlords are educational institutions, or of subjects which are purpose-built or converted by institutional providers of student accommodation, are also on the list.[1]

Summary table

There follows an attempt to set out typical examples of where short-term let licences are or are not generally required. In some cases the answer will depend on the precise facts.

Type of activity	Is a licence needed?
Offering accommodation via Airbnb or other short-term letting platform in the summer months	Yes
Offering accommodation via Airbnb or other short-term letting platform all year round	Yes
Glamping let	Yes, unless within a park with a caravan site licence
Taking in a lodger	Sometimes, eg not if the property is the lodger's only or principal home, or the lodger is a close relation
House-swap	Yes, if a commercial arrangement
Dog or house-sitting arrangement	No
Private residential tenancy	No
Student residential tenancy	No
Operating a hotel	No, if already licensed under the Licensing (Scotland) Act 2005
Operating a bed-and-breakfast	No, if already licensed under the Licensing (Scotland) Act 2005
Operating a care home	No
Timeshare arrangement	No

The four types of short-term let

For a number of purposes, including the category of licence sought and fees payable, the 2022 Licensing Order[2] distinguishes four types of short-term let.

1 'Student residential tenancy' is defined in the Licensing of Short-term Lets Order 2022 sch 1 para 3(1) under reference to para 5(2), (3) of sch 1 of the Private Housing (Tenancies) (Scotland) Act 2016.

2 Licensing of Short-term Lets Order 2022 art 5 and sch 2 insert relevant amendments into the Civic Government (Scotland) Act 1982.

These are:

(1) *Secondary letting*: where the accommodation is not, or not part of, the host's only or principal home.
(2) *Home letting:* where the accommodation is, or is part of, the host's only or principal home but the host will be absent during the let.
(3) *Home sharing*: where the accommodation is, or is part of, the host's only or principal home and the host will be present during the let.[1]
(4) *Home letting and home sharing*: a mix of (2) and (3) where the host may be present for some of the time.[2]

Applying for a licence

The Scottish Government's guidance for hosts of short-term lets contains advice in relation to making a licence application, including an applicant checklist.[3]

How many licences?

Accommodation that is on single premises only requires a single licence.[4] A bed-and-breakfast establishment is one example. The *Policy Note* gives another:[5]

> For example, a person intending to operate 30 yurts within the same field (premises) would only require a single licence. However, a person operating 15 yurts in one field at one end of the village and 15 yurts in another field at the other end of the village (two premises) would require two licences. The provision applies to accommodation with shared facilities (such as yurts) or stand-alone accommodation, such as park lodges, provided they are all on the same premises.

The application form

An application has to be made in writing to the local authority in which the relevant property is situated in such form as that authority requires and be signed by the applicant or that person's agent.[6] It must:

(1) Specify the type of short-term let licence being applied for, being one of (a) secondary letting, (b) home letting, (c) home sharing, or (d) home letting and home sharing.
(2) Where the applicant is a natural person, give the applicant's full name, address, and date and place of birth, and any other address held within the previous five years, email address and telephone number. The same details need to be given of any employee or agent who will be carrying

1 A bed-and-breakfast is an example, although as noted above it will not require a short-term let licence if already licensed under the Licensing (Scotland) Act 2005.
2 The first three types of short-term let are defined in the Civic Government (Scotland) Act 1982 sch 1 para 19A (inserted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 17).
3 Scottish Government, *Short Term Lets in Scotland Licensing Scheme: Part 1 Guidance for Hosts and Operators* Annex B.
4 Licensing of Short-term Lets Order 2022 art 4(3).
5 Scottish Government, *Policy Note* para 52.
6 Civic Government (Scotland) Act 1982 sch 1 para 1(1)(a), (b).

out the day-to-day management of the property if the applicant is not doing this.

(3) Where the application is made by or on behalf of a person other than a natural person, give (a) the full name of the person, (b) the address of its registered or principal office, (c) the names, private addresses and dates and places of birth of its directors, partners or other persons responsible for its management, and (d) the full name, address and date and place of birth of any employee or agent who is to carry on the day-to-day management of the short-term let.

(4) Where the applicant is not the owner of the property, give the owner's name and address, and include a declaration from the owner or a person authorised to act on behalf of the owner consenting to the application.

(5) Where the applicant is a co-owner of the property, give the name and address of the other co-owners and include a declaration from each other co-owner or a person authorised to act on their behalf consenting to the application.

(6) Give the address of the property and number of bedrooms.

(7) Give details of any other short-term let licence granted to the applicant.

As with other licensing applications under the 1982 Act, there is a 'fit and proper person' test.[1] This is a matter for the licensing authority to determine but the Scottish Government gives examples in its guidance including where the applicant has relevant convictions, is disqualified from being a private landlord, or has provided false or misleading information in a licence application.[2]

Temporary licence

It is also possible to apply for a temporary licence for not more than six weeks, unless the applicant has also applied for a permanent licence in which case a temporary licence may continue in effect until that application is determined.[3]

Fees

Fees in relation to licences are a matter for the relevant local authority as licensing authority. They require to be 'reasonable'.[4] In determining the level of fees the licensing authority requires to ensure that the amount recovered will meet its expenses in running the scheme.[5] Different fees can be set for different purposes, such as applications and the issuing of certified true copies.[6] The

1 CG(S)A 1982 sch 1 para 5(3).
2 Scottish Government, *Short Term Lets in Scotland Licensing Scheme: Part 1 Guidance for Hosts and Operators* paras 3.16–3.21.
3 CG(S)A 1982 sch 1 para 7.
4 CG(S)A 1982 sch 1 para 15(1) (substituted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 15).
5 CG(S)A 1982 sch 1 para 15(2)(a) (substituted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 15).
6 CG(S)A 1982 sch 1 para 15(2)(b) (substituted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 15).

licensing authority may take into account the following in setting fees:[1] (i) the size of the property; (ii) the number of bedrooms; (iii) the number of guests who can reside at the property; (iv) the type of short-term let; (v) the duration of the period for which the property is made available for use as a short-term let; and (vi) the extent to which the licence-holder has complied with the conditions of the licence.

Information on fee levels can be found on the website of the relevant local authority. For example, in Edinburgh the application fees in respect of a one-year secondary letting begin at £653 (maximum occupancy of one to three people) rising to an 'eye-watering'[2] £5,869 (maximum occupancy of 21 or more people).[3] In the Western Isles the maximum fee for a secondary letting is £400.[4] Predictably, the variation in fees has been dubbed a 'postcode lottery'.[5]

Determination of applications

Once the licensing authority receives the application, the procedure is similar to other licence applications under the 1982 Act. The application must be allotted a unique licensing number, which the applicant can use as a temporary licence number.[6] Its details must be entered into the licensing authority's register of licence applications.[7] Public notice must be given in a newspaper or newspapers circulating in the local area or on the licensing authority's website or other website constructed or maintained to publicise applications.[8] A site notice must also be displayed for 21 days.[9] There is a 28-day period for written objections to be made to the licensing authority,[10] which may decide to hold a hearing on the application.[11]

There are four grounds on which the application can be refused.[12] These are where:

(1) the applicant[13] is disqualified from holding a licence under the 1982 Act or is not a fit and proper person to hold a licence;
(2) the short-term let will be carried on by a person other than the applicant and if that person had applied the application would be refused;

1 CG(S)A 1982 sch 1 para 15(2)(c) (substituted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 15).
2 'Home-renters will be hit with "eye-watering" licensing fees', *The Times*, 31 October 2022.
3 See www.edinburgh.gov.uk/downloads/file/32054/short-term-let-licence-fees.
4 See www.cne-siar.gov.uk/business/consumers-and-the-environment/licensing/licences-and-permits/licensing-short-term-let-licensing/.
5 Miles Briggs MSP, quoted in 'Home-renters will be hit with "eye-watering" licensing fees', *The Times*, 31 October 2022.
6 CG(S)A 1982 sch 1 para 2(1A) (inserted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 7(a)).
7 CG(S)A 1982 sch 1 para 14(1)(a).
8 CG(S)A 1982 sch 1 para 2(8) (substituted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 7(c)).
9 CG(S)A 1982 sch 1 para 2(2), (3).
10 As to when this begins, see CG(S)A 1982 sch 1 para 3(1)(e).
11 CG(S)A 1982 sch 1 para 4(2).
12 CG(S)A 1982 sch 1 para 5(3).
13 Or in the case of corporate applicants, the directors etc.

(3) the property is not suitable or convenient to be the subject of a short-term let having regard to (i) its location, character or condition, (ii) the nature and extent of the proposed short-term let, (iii) the kind of persons likely to be in the property, (iv) the possibility of undue public nuisance, or (v) public order or public safety; or

(4) there is other good reason for refusing the application.

If granted the licence can have a maximum duration of three years.[1] Its details must be entered into the licensing authority's register of licence applications.[2] There is a limited right of appeal to the sheriff against the decision of the licensing authority.[3]

If a licence is refused, there may be a partial refund of the fee.[4]

Mandatory licence conditions

The holding of a licence for short-term lets is subject to a long list of conditions, set out in art 6 and sch 3 to the 2022 Licensing Order. These should be consulted in full but in summary are:

(1) *Agents*. Only a named licence-holder can carry out the day-to-day management of the let. If persons other than the applicant are going to be doing this they will need to be named on the licence application.[5]

(2) *Types of licence*. The licence-holder may only offer the type of short-term let for which that person holds a licence.

(3) *Fire safety*. Satisfactory detection equipment in respect of fire and carbon monoxide must be installed. Records have to be kept that upholstered items meet fire-safety regulations.

(4) *Gas safety*. An annual inspection is required of any gas-supply equipment. If this reveals that the required safety standard is not met, short-term letting is forbidden until the matter is remedied.

(5) *Electrical safety*. The licence-holder must ensure that electric equipment is in a reasonable state of repair and in proper and safe working order. There must be an electrical safety inspection at least every five years. An Electrical Installation Condition Report must be prepared thereafter on any fixed installations. A Portable Appliance Testing Report is required in relation to all moveable appliances to which the guest has access.

(6) *Water safety: private water supplies*. Where the property is served by a private water supply, there must be compliance with the Water Intended for Human Consumption (Private Supplies) (Scotland) Regulations 2017, SSI 2017/282.

1 CG(S)A 1982 sch 1 para 8(2).
2 CG(S)A 1982 sch 1 para 2(b). See further sch 1 para 2(c)–(m) (inserted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 13(a)).
3 CG(S)A 1982 sch 1 para 18.
4 Scottish Government, *Short Term Lets in Scotland Licensing Scheme: Part 1 Guidance for Hosts and Operators* para 3.26.
5 See Scottish Government, *Short Term Lets in Scotland Licensing Scheme: Part 1 Guidance for Hosts and Operators* paras 3.10–3.14.

(7) *Water safety: legionella*. The licence-holder is required to assess the risk from exposure to legionella within the property.

(8) *Safety and repair standards.* The licence-holder has to take all steps to ensure that the property is safe for residential use and where applicable meets the repairing standard in chapter 1 of part 1 of the Housing (Scotland) Act 2006.

(9) *Maximum occupancy.* The number of guests living in the property must not exceed the number permitted by the licence.

(10) *Display of information*. The following must be displayed within the property in a place accessible to guests: a certified true copy of the licence[1] and the licence conditions; fire, gas and electrical safety information; details of how to summon the assistance of the emergency services; and copies of safety reports.

(11) *Planning permission*. Where planning permission is needed because the property is in a short-term let control area, this must have been given or applied for.

(12) *Listings.* Any listing or advert for the short-term let must include the licence number and a valid Energy Performance Certificate rating. It must also be consistent with the terms of the short-term let licence.

(13) *Insurance*. There must be valid buildings insurance for the duration of the licence and valid public-liability insurance for the duration of each short-term let.

(14) *Fees.* Any fees due to the licensing authority must be paid on demand.

(15) *False or misleading information*. The licence-holder must not provide any false or misleading information to the licensing authority.

These conditions are onerous and will doubtless result in some short-term lets being removed from the market. They may be compared with the mandatory conditions for premises licences and occasional licences under the Licensing (Scotland) Act 2005.[2] In contrast, there are no mandatory conditions for HMO licences,[3] and the landlord of a private residential tenancy, while having to be registered with the local authority,[4] does not have to obtain a licence to grant such a tenancy. The licensing authority may impose additional conditions specific to the application.[5] But it may not set any limit on the number of nights in

1 On which see CG(S)A 1982 sch 1 para 14.

2 Licensing (Scotland) Act 2005 schs 3 and 4. See S J McGowan, *McGowan on Alcohol Licensing in Scotland* (2021) ch 15.

3 Under the Housing (Scotland) Act 2006 s 133 the local authority may impose 'such conditions as [it] thinks fit'. Before granting a licence it must consider certain factors including 'the safety and security of persons likely to occupy it'. See H(S)A 2006 s 131. See also Scottish Government, *Licensing of Houses in Multiple Occupation: Statutory Guidance for Local Authorities* (2012, www.gov.scot/publications/licensing-multiple-occupied-housing-statutory-guidance-for-scottish-local-authorities/).

4 Under the Antisocial Behaviour etc (Scotland) Act 2004 Part 8 (ss 82–101), discussed in *Conveyancing 2004* pp 92–95.

5 CG(S)A 1982 sch 1 para 5(1A).

the year that a property may be used as a secondary letting.[1] The policy reason for this is that, particularly in Edinburgh where festival and Hogmanay lets can generate substantial income, the result may be to leave the property unused for the rest of the year. This is undesirable given the limited housing stock.

Sanctions

Since 1 October 2022 it has been a criminal offence to commence operating a short-term let without holding a licence in the absence of a reasonable excuse.[2] The fine cannot exceed level 4 on the standard scale (currently £2,500). The Scottish Government intends to bring forward legislation to increase this to £50,000 in the present session of the Scottish Parliament (2021–26).[3] There are various other criminal offences including breaching licensing conditions and not notifying changes in circumstances.[4] Convicted individuals may also be disqualified from holding a licence for up to five years.[5] In addition, licensing authorities have various enforcement powers, including serving an enforcement notice where they consider that a condition of the licence has been or is likely to be breached.[6]

For existing hosts the transitional provisions mentioned above apply. Provided that a licence application is made by 1 October 2023 no offence is committed.[7]

Temporary exemptions

It is possible to apply to the licensing authority for a temporary exemption from the requirement to hold a short-term let licence.[8] The application may be in relation to a specified property or properties and for a specified period. That period may not exceed six weeks in any year. According to the Scottish Government *Policy Note*:[9]

> This power might be used where the licensing authority needs a significant amount of additional capacity over a short period. Examples include sports championship competitions and arts festivals, where a large number of performers and spectators need to be accommodated for a short period of time.

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1 CG(S)A 1982 s 3B(5A) and sch 1 para 5(2B) (inserted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 paras 2 and 9(a)).

2 CG(S)A 1982 s 7(1).

3 Scottish Government, *Short Term Lets in Scotland Licensing Scheme: Part 2 Supplementary Guidance for Licensing Authorities, Letting Agencies and Platforms* para 6.39. The policy here may be to mirror the maximum fine for failing to register as a landlord of private residential property under s 93 of the Antisocial Behaviour etc (Scotland) Act 2004, a suggestion made to us by Malcolm Combe.

4 CG(S)A 1982 s 7(2)–(10).

5 CG(S)A 1982 s 7(6)(b).

6 CG(S)A 1982 sch 1 para 10A (inserted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 11). See more generally Scottish Government, *Short Term Lets in Scotland Licensing Scheme: Part 2 Supplementary Guidance for Licensing Authorities, Letting Agencies and Platforms* paras 6.27–6.37.

7 Licensing of Short-term Lets Order 2022 art 7. This refers to 1 April 2023 but is to be amended to refer to 1 October 2023.

8 CG(S)A 1982 sch 1 para 1A (inserted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 6).

9 At para 72.

Licensing authorities were required by 1 October 2022 to publish a statement of policy in relation to temporary exemptions.[1] This must be kept under review and a new statement published every three years thereafter.[2] The City of Edinburgh Council has stated that it may grant temporary exemptions during the Edinburgh Festival Fringe and the Christmas and Hogmanay Festive period, as well as for major international and sporting events.[3] But these will still be subject to the mandatory licence conditions (above) as well as to 11 additional conditions.[4] The requirements for an exemption therefore seem to differ little from those for a full licence.[5] The fee for an exemption application begins at £250 (maximum occupancy by one to five people) rising to £600 (maximum occupancy by 11 or more people).

Impact

Both the controlled-area and the licensing regimes will have a significant effect on the short-term let market. While the former is restricted to designated areas following public consultation by a local authority, the latter has universal application across Scotland. Whether the level of regulation achieves the right balance between the interests of those wanting to offer short-term lets and the interests of their neighbours and the wider community remains to be seen. The fact that the Scottish Government is putting back the application of the licensing regime for existing hosts for six months perhaps suggests otherwise.[6]

SORTING MISTAKES ON THE LAND REGISTER[7]

First was best

First registration is an art, not a science. Reducing an unruly Sasine title to the bland uniformity of a title sheet is no easy matter. Mistakes can be made.

1 CG(S)A 1982 sch 1 para 1A(5) (inserted by the Licensing of Short-term Lets Order 2022 art 5 and sch 2 para 6).

2 CG(S)A 1982 sch 1 para 1A(5) and (6).

3 *City of Edinburgh Council Short Term Lets Licensing Policy* (www.edinburgh.gov.uk/downloads/file/32060/short-term-lets-policy) paras 4.24–4.30.

4 These include provision of emergency escape information, taking steps to prevent anti-social behaviour, and ensuring adequate arrangements for disposal of refuse.

5 The organisers of the Edinburgh Fringe Festival have said that, because of the temporary exemptions policy, the Fringe 'may shrink by a third by 2024' and that more than 700 jobs will be lost: see 'Clampdown on rentals will cost millions, warns Fringe', *The Scotsman*, 4 February 2023.

6 For a trenchant critique arguing that '[o]wners of holiday lets now face a series of obstacles that make the average challenge on I'm A Celebrity look like a walk in the park', see Gillian Bowditch, 'SNP uses sledgehammer to crack the Airbnb nut', *The Sunday Times*, 20 November 2022. Another commentator takes the view that the control-area regime is unnecessary because its aims can be achieved by existing planning law: see C Devlin, 'Short-term let control areas and licensing' (2022) 213 *Scottish Planning and Environmental Law* 107. Crowd-funding is also being sought in an attempt to challenge the City of Edinburgh Council's short-term lets licensing scheme by judicial review: see www.assc.co.uk/self-catering-operators-in-edinburgh-set-out-to-challenge-the-city-of-edinburgh-councils-short-term-let-scheme-with-a-judicial-review/.

7 This section is by Kenneth Reid. For a previous examination of some of the issues discussed here, see *Conveyancing 2019* pp 189–95.

Many, fortunately, do not matter or will never be uncovered. The title sheet will then be a new beginning, and lampshades can be made of the Sasine titles. But sometimes mistakes do matter, or at least matter to the owners concerned.[1] And often these are about boundaries.

For example: property A switches from the Sasine to the Land Register. The title plan for the property (cadastral unit) errs on the side of generosity. A strip of land is, or may be (for the truth is often murky or undiscoverable), taken from the neighbouring premises, property B the title to which is still, for the moment, languishing in the Sasine Register. Years pass. No one notices. On the ground all is as before. Then the owners of property B decide to sell, or find out for some other reason what has happened. A civil war may ensue in which no quarter can be given on either side.

This is mainly a transitional issue. Once all or most properties are on the Register – once boundaries are in elegant alignment on the cadastral map – the problem will largely go away. Future generations are unlikely to be much troubled on the subject. But the period of transition could be a long one and, judging by the caseload of the Lands Tribunal, we are right in the middle of it now. Many properties are already on the Land Register and have staked their claim as to boundaries. Others are about to enter the Register. But the more claims that have been staked, the more likely that those later properties will be disappointed. Decisions have been taken which cannot now easily be undone. And that two-metre strip along the boundary – of little financial value but on which both neighbours have set their hearts – has already been given away.

First, it turns out, was best. Those who were first to reach the Land Register are in a privileged position vis-à-vis their neighbours. The boundaries, now set out on the cadastral map and guaranteed by the Keeper, are as they would have wanted them. Their neighbours may take a different view.

Go back now to properties A and B. Property A was first on the Land Register. Its registered boundary with property B encroaches to the extent of two metres on land forming part of property B – or so the owners of property B now allege. What are these owners to do? They can point out the mistake, politely, to the owners of property A over a cup of coffee or glass of wine. The latter may then agree to a joint approach to the Keeper to put things right. How many happy endings of this kind occur is impossible to say because, by definition, they do not reach the law reports. But endings are often unhappy. The owners of property A drink the coffee (or wine) and explain, with increasing impatience, that their neighbours are mistaken in their views. Entirely mistaken. The position is as set out in the Land Register. And the Land Register is never wrong.

What then for the owners of property B? Should they just forget about it? That will often be good advice. After all, the strip is only two metres. What does it matter? But it may matter a great deal to the owners of property B, and of course it may be more than two metres.

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1 Around 12,000 applications for rectification of the Land Register are made each year: see p 78 above.

If they do wish to seek to reclaim the boundary strip, the owners of property B will almost certainly have to litigate. Of course, their first step should be to contact the Keeper, point out the mistake, and ask her to rectify the title to property A by removing the disputed strip. But the Keeper will usually refuse.[1] Not being a member of the judiciary, she is in no position to adjudicate on the competing claims of the parties. This is reflected in the legislation: s 80 of the Land Registration etc (Scotland) Act 2012 prevents rectification of alleged inaccuracies on the Register unless the inaccuracy is 'manifest' and what is needed by way of rectification is also 'manifest'.[2] A disputed claim to a boundary strip is not usually a manifest inaccuracy. It would normally become 'manifest' only if it is declared to be an inaccuracy by the Lands Tribunal or the ordinary courts.[3] So if the owners of property B wish to persevere with their claim, they must go to court – or, as almost always in practice, apply to the Lands Tribunal under s 82 of the 2012 Act for a determination as to the accuracy of the Register.

To achieve rectification, therefore, the owners of property B must persuade the Tribunal or court that the Register is inaccurate. Only then will the inaccuracy count as 'manifest' and only then will the Keeper agree to rectify. But the means of persuasion depend, crucially, on whether the alleged inaccuracy first entered the Register by a registration carried out (i) under the 2012 Act or (ii) under the predecessor legislation, the Land Registration (Scotland) Act of 1979. Prospects of success are higher under the former than under the latter. But in neither case are matters straightforward.

Inaccuracy made under the 2012 Act

We begin with (first) registrations which took place under the 2012 Act. Here the starting-date – the date on which the 2012 Act came fully into force – is the so-called 'designated day', 8 December 2014. So if first registration in respect of property A occurred on or after the designated day, the matter is governed by the 2012 Act.

In principle, the method of proceeding is straightforward. The question is: prior to registration, was the disputed strip properly part of property A or of property B? That in turn depends on an interrogation of the Sasine titles of both properties. This may yield a quick and obvious answer. But just as often the Sasine titles will be vague, unclear or even contradictory.[4] The location of

1 For a case where she did not refuse, but should have done, see *Aberdeen Endowments Trust v Whyte* 2021 GWD 32-426 (*Conveyancing 2021* pp 26–28).

2 For an example of the latter, see *Stewart v Keeper of the Registers of Scotland* 2022 GWD 28-405, summarised at p 34 above (same boundary strip included in the title sheets of two different properties).

3 The task of the Tribunal or court is not to determine whether an inaccuracy is manifest but rather to determine whether, on a balance of probabilities, there is an inaccuracy at all. If the determination is for the existence of an inaccuracy, that determination, of itself, makes the inaccuracy 'manifest' and will result in rectification. The potential confusions here are explained by the Lands Tribunal in another case from 2022, *McMullen v Keeper of the Registers of Scotland* 2022 GWD 23-327 (summarised at p 32 above).

4 An example from 2022 is *Wyllie v Wittmann*, 7 July 2022, Lands Tribunal (summarised at p 28 above).

ownership will then depend on the running of positive prescription and so on which set of owners (if either) had possession of the disputed strip. A lengthy proof may be needed. Only if the strip was properly part of property B will its inclusion in the title sheet of property A count as an inaccuracy.

There is also a potential complication. Inaccuracies can sometimes be 'cured' – that is to say, what was once an inaccuracy may, as a result of subsequent events, cease to be an inaccuracy. So even if it can be proved that the inclusion of the disputed strip in the title sheet of property A was an error at the time of first registration, and hence an inaccuracy, victory is not assured. There are two ways in which inaccuracies can be cured (in the sense given above). One is by positive prescription. The other is by realignment. More will be said about both later on. In the excitement of contesting the existence of an inaccuracy they are easily overlooked.

Inaccuracy made under the 1979 Act

The 1979 Act rules

Under the 2012 Act the Keeper always can – indeed always must – rectify an inaccuracy on the Register (though the requirement that it be 'manifest' presents an evidential threshold before which claims may stumble). By contrast, under the predecessor legislation of 1979 the Keeper's power to rectify was circumscribed. The whole system, indeed, was entirely different.

Under the 1979 Act the Keeper had a Midas touch: everything the Keeper registered turned to 'valid' even if the deed being registered was itself invalid in whole or in part.[1] But there was a catch. Although an invalid deed led to a valid title, the resulting entry on the Register counted as a (bijural) inaccuracy.[2] In principle, this could be rectified, and order restored. But rectification was not usually possible where this was to the prejudice of a proprietor in possession.[3] So if the owners of property A were in possession of the disputed strip, the strip could not be retrieved by the owners of property B by way of rectification. Instead (and assuming the inclusion of the strip with property A was indeed an inaccuracy), the latter were normally entitled to compensation ('indemnity') from the Keeper.[4]

The transitional provisions in the 2012 Act

When the 1979 Act gave way to the 2012 Act, the rules of the former were preserved, with adaptations, to deal with inaccuracies which had already

1 Land Registration (Scotland) Act 1979 s 3(1)(a).

2 'Bijural' because, while accurate according to the internal rules of the 1979 Act, the entry was inaccurate according to the ordinary rules of the law of property. The term only appears once in legislation: in the heading to the transitional provisions (paras 17–24) in sch 4 to the Land Registration etc (Scotland) Act 2012.

3 LR(S)A 1979 s 9(3)(a).

4 Under LR(S)A 1979 s 12(1)(b). This is the 'money or mud' principle: once an inaccuracy is established, one of the competing parties gets to keep the property ('the mud') while the other normally receives compensation for the value of the property lost ('the money'). Under registration of title, all shall have prizes.

occurred. This was done by the transitional provisions in schedule 4 of the 2012 Act.[1] It is these provisions that must be engaged with by anyone who, today, seeks to challenge a 1979 Act inaccuracy.

The transitional provisions work by considering the position of the parties immediately before the designated day (8 December 2014), ie on 7 December 2014. They ask: if on that day the Keeper had been requested (or felt inclined) to do so, would the Keeper have been able to rectify the inaccuracy in question? And, applying the 1979 Act regime, that in turn would have depended, usually,[2] on whether the person registered as proprietor of the disputed area was or was not in possession of the area on that day – whether or not, in other words, the person could take advantage of the protection for proprietors in possession (mentioned above). If rectification would have been possible, the challenger's property rights are restored, by force of statute, on the designated day itself.[3] So the owners of property B retrieve the disputed strip, and the owners of property A, having lost it, are normally compensated for their loss by the Keeper.[4] And as nothing changes on the Register itself, the Register remains inaccurate and now falls to be rectified.[5] If, conversely, the Keeper could not have rectified on 7 December 2014, the inaccuracy is, by force of statute, 'cured' on the designated day.[6] The challengers loses their claim for good, but are normally entitled to compensation from the Keeper for the value of the property lost.[7]

What does all of this mean for the challengers – for the owners of property B? First, they must establish before the Lands Tribunal (or court) that the inclusion of the disputed strip in the title sheet of property A was, at the time of first registration, a mistake and hence an inaccuracy.[8] So far this is just what is required of challenges to registrations under the 2012 Act. But now there is an extra step. It must also be established that, on 7 December 2014, the owners of property A were *not* in possession of the disputed strip. Proving a negative is difficult, but in practice is usually accomplished by proving a positive, namely that on 7 December 2014 the disputed strip was in the possession of the owners of property B. Evidence either way may be hard to come by for, unless a clear fence-line existed, the possession of marginal areas of land is not easy to demonstrate. In cases of doubt, it is the challengers who lose. This is not merely due to a failure to discharge the burden of proof which lies on any applicant to the Lands Tribunal (or pursuer in the ordinary courts). It is because statute so

1 More precisely, Land Registration etc (Scotland) Act 2012 sch 4 paras 17–24.

2 But not always. Rectification was possible even against a proprietor in possession if the inaccuracy had been caused wholly or substantially by the fraud or carelessness of that person: see LR(S)A 1979 s 9(3)(a)(iii). There were one or two other exceptions as well.

3 LR(S)A 2012 sch 4 para 17.

4 LR(S)A 2012 sch 4 para 19. Paragraph 20 lists some exceptions.

5 This is then an 'actual' rather than a 'bijural' inaccuracy, ie the Register is wrong both under the general law of property and under the 2012 Act. There are no bijural inaccuracies under the 2012 Act.

6 LR(S)A 2012 sch 4 para 22.

7 LR(S)A 2012 sch 4 paras 23 and 24.

8 By a quirk of the transitional provisions, this exercise is excused in a case where the disputed strip is included in the title sheets of *both* properties: see *Stewart v Keeper of the Registers of Scotland*, 9 August 2022, Lands Tribunal (summarised at p 34 above).

provides: in the absence of contrary evidence the person registered as proprietor is presumed to have been in possession on 7 December 2014.[1] And that person was the owner of property A.

The new cases

In 2022, the transitional provisions were considered by the Lands Tribunal in a number of cases. In one, there was no clear evidence of possession on 7 December 2014 and the statutory presumption in favour of the registered proprietor was applied. So the challenge failed.[2] In two others, the fence-line showed possession to have been with the challenger. So the challenge succeeded.[3] It is a fourth case, however, *Grant v Keeper of the Registers of Scotland*,[4] which raises the most interesting issues. It deserves separate treatment.

The *Grant* case

The facts

Victoria Cottage, Tillyfourie, Aberdeenshire, was broken off from the Monymusk Estate in 1955. As was clear from the plan attached to the 1955 disposition, the subjects disponed did not include the private road which – rather inconveniently – bisected the garden of the cottage. In 2014 Victoria Cottage was bought by Lewis Napier and Claire McAnespie. Despite careful enquiries (eg to the Estate, the Forestry Commission, and Scotways) they were unable to determine the ownership of the road.

Their purchase induced first registration. As the application for registration was made on 25 September 2014 – 10 weeks or so before the designated day – the ensuing registration was governed by the 1979 Act. The land certificate[5] was not issued until 13 June 2015, almost nine months after the date of application – a delay which turned out to be important, as we will see. But, at least at first, the arrival of the land certificate was the occasion for celebration rather than recrimination, because the road had been included as part of the subjects acquired. Naturally enough, the purchasers did not query this inclusion with the Keeper but were content to leave matters as they were. In a letter dated 6 July 2015 their solicitor explained the position in this way:[6]

> I have now received your Land Certificate from the Registers of Scotland, and enclose a copy for your information. You will see that the subjects now registered in your

1 LR(S)A 2012 sch 4 para 18. This double burden has something in common with what is sometimes seen as the *probatio diabolica* facing owners seeking the recovery of corporeal moveables from a stranger who is in possession; in addition to the normal burden on the pursuer, the owner must rebut the presumption of ownership which arises from the fact of possession: see K G C Reid, *The Law of Property in Scotland* (1996) para 150.

2 *MacKirdy v Keeper of the Registers of Scotland* 2022 GWD 36-527 (summarised at p 29 above).

3 *Sharp v Keeper of the Registers of Scotland* 2022 GWD 26-376 (summarised at p 31 above); *McMullen v Keeper of the Registers of Scotland* 2022 GWD 23-327 (summarised at p 32 above).

4 25 July 2022, Lands Tribunal. The Tribunal comprised Lord Minginish and A Oswald FRICS. For earlier stages in this Lands Tribunal application, see 2019 SLT (Lands Tr) 25 and 2019 SLT (Lands Tr) 36 (summarised in *Conveyancing 2019* pp 38–39).

5 ABN120098.

6 2019 SLT (Lands Tr) 25 at para 11.

> name include the 'Right of Way strip' for which we made numerous enquiries at the outset of your purchase. This is a better outcome than we could have expected.
>
> I am quite clear that the seller did not own this area and I suspect its inclusion is an error on the part of the Registers (not an unusual event).

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

Applying the transitional provisions

It was for Sir Archibald Grant, as the applicant and challenger, to go through the two-stage process described above. First, he had to show that the title sheet[1] for Victoria Cottage was inaccurate when it was issued by the Keeper. That was easy. The road was clearly excluded from the split-off disposition of 1955, which was the root of the title to the cottage.

Then he had to show that the registered owners (Mr Napier and Ms McAnespie) were *not* in possession on 7 December 2014. That was more difficult because even by then, only a few weeks after taking entry, the evidence was that the road – which, we believe, had long ceased to be used as such – was being treated in the same way as the rest of the property. As the Lands Tribunal was to conclude, Mr Napier and Ms McAnespie 'were exercising control over the disputed area and using it to more than a minimal extent'.[2] That might have seemed to be the end of the matter. Yet the Tribunal's ultimate decision was that Mr Napier and Ms McAnespie were *not* in possession.

Why not? Under the general law of property, possession requires two things. There must be physical control of the property, of course. But there must also be relevant intention. In the language of Roman law, there must be both *corpus* and *animus*.[3] Normally, in 1979 Act cases, *animus* is a given and the whole difficulty lies in determining whether there have been sufficient possessory acts to amount to *corpus*.[4] The *Grant* case was the other way around. Mr Napier and Ms McAnespie had the necessary physical control (*corpus*). But, said the Lands Tribunal, they fell fatally short on the *animus*.

In reaching this view, the Tribunal, naturally enough, placed reliance on one of the few cases on 1979 Act possession to have reached the Inner House, *Safeway Stores plc v Tesco Stores Ltd*.[5] In that case, Lord Hamilton characterised the necessary possession in this way:[6]

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1 And therefore land certificate.
2 Opinion of 25 July 2022 at para 34.
3 Ie body and mind.
4 As to which see eg the leading case of *Rivendale v Clark* [2015] CSIH 27, 2015 SC 558.
5 2004 SC 29. In relying on the remarks in *Safeway Stores plc v Tesco Stores Ltd*, the Tribunal was following the lead of an earlier Lands Tribunal decision, *Gray v Keeper of the Registers of Scotland* 2014 SLT (Lands Tr) 117.
6 Paragraph 77.

> In my view it is necessary, in the circumstances of this case, to make some attempt to divine what the legislature had in mind by a proprietor 'in possession' who *ex hypothesi* does not 'truly' have the right accorded to him on the register but whose possession (and registered proprietorship) is nonetheless, as a matter of policy, not to be disturbed. In my view the term 'in possession' in this statutory context imports some significant element of physical control, combined with the relevant intent; it suggests actual use or enjoyment, to a more than minimal extent, of the subjects in question as one's own. It is a 'proprietor' who has, on the faith of the register, had such enjoyment or use who is protected against rectification.

It is the final part of this passage which deals with intention. To qualify as a proprietor in possession, according to Lord Hamilton, the registered proprietor must both (i) exercise physical control 'as one's own' and also (ii) do so 'on the faith of the register'.

Although admittedly *obiter*,[1] Lord Hamilton's *dictum* was plainly deserving of serious consideration. For the Lands Tribunal it was seen as determinative of the case. Neither of Lord Hamilton's requirements was said to be satisfied. As to (i), the parties had controlled the road not *'as* their own' but, knowing that it was not theirs, only *'as if* it was their own'.[2] As to (ii), the parties on 7 December 2014 were still many months away from receiving their land certificate from the Keeper. Insofar as they were in a position to guess what it would contain, they would have guessed that it would not have included the road within their title. Of course, registration would ultimately be backdated to the date of the original application, which was 25 September 2004. That was the statutory rule.[3] But the parties could not have possessed on the faith of the Register on 7 December because, until they received the land certificate, they simply did not know what the Register would say.[4]

Possible criticisms

It is possible to take issue with the Tribunal's stance on both aspects of Lord Hamilton's *obiter dictum*. The distinction made between control *'as* their own' and *'as if* it was their own' does not come from Lord Hamilton. Nor does it exist in the general law of possession. Possession is not confined to those who know or believe themselves to be owners. All that matters is that they should hold the thing 'for themselves'.[5] Tenants are in possession of the subjects that they lease; otherwise, in the case of a short lease, they could never obtain a real right.[6] And even a thief possesses the car he has just stolen, for the whole point of the theft was to take the car *for himself*. In using the contested strip of road for their own benefit, therefore, Mr Napier and Ms McAnespie were certainly possessing the strip under the general law.

1 As the Tribunal noted at para 33.
2 Paragraph 27.
3 Land Registration (Scotland) Act 1979 s 4(3).
4 Paragraph 28.
5 The test is thus *animus sibi habendi* and not *animus domini*: see K G C Reid, *The Law of Property in Scotland* (1996) para 125.
6 Ie under the Leases Act 1449.

What then of the second aspect of the *obiter dictum*, that the registered proprietor must possess 'on the faith of the register'? If that is indeed what the 1979 Act required, then the Tribunal was correct to say that the registered proprietors did *not* possess. But was Lord Hamilton correct to impose this additional requirement – which he did with little in the way of reasoning and nothing in the way of authority? Like the Lands Tribunal we too have hitherto been inclined to say yes.[1] But a decision of a differently constituted Lands Tribunal, handed down only a few weeks before *Grant*, had not gone down this line, although the point had been argued.[2] And a close look at the facts and reasoning in *Grant* suggests a need for reconsideration. It now seems to us that there are three difficulties with Lord Hamilton's requirement, none of which can, we think, be satisfactorily answered.

The first concerns the purpose of possession. Although possession has always a core meaning in the law, it assumes so many different roles that its meaning is also driven by context and purpose. What, then, was the purpose of possession in the context of the 1979 Act? To this question the Lands Tribunal in *Grant* gave the following answer:[3]

> When the Land Register was introduced, by the 1979 Act, it was to provide certainty. People were to be able to conduct their affairs in reliance on what it said. Consistently with that, the purpose of sec 9(3) was to protect people who had done so (whether or not in good faith) but subsequently found the register changed to their disadvantage. That, to our mind, was the class of person intended to be protected and intended to be comprehended with the description of 'proprietor in possession'. There is simply no justification for extending the protection against change in the register to those who have not relied on it in the first place.

In a broad sense this is perfectly true. In the interests of certainty, those achieving registration were to be protected against rectification. But this broad principle is an uncertain guide to the purpose and meaning of 'possession' itself. Probably its purpose was more modest than the Tribunal appears to have envisaged. Here some background is needed. If a title sheet was found to be inaccurate, the 1979 Act would generally protect the position of both the registered proprietor and of the person entitled to found on the inaccuracy. One would be given the property and the other financial compensation for its value. The purpose of looking to possession was simply to allocate those awards – those prizes – in a manner which was regarded, rightly or wrongly, as just and economically efficient.[4] The principle was that possession, once taken, should not be disturbed.

1 *Conveyancing 2014* pp 164–65; K G C Reid and G L Gretton, *Land Registration* (2017) p 205.

2 *Toal v Keeper of the Registers of Scotland* 2023 SLT (Lands Tr) 1. The point was argued at para 51. In the event, the Tribunal decided that the registered proprietor had not been in possession, but this was due to shortcomings in *corpus* not in *animus*.

3 Paragraph 33.

4 On this whole issue the 2012 Act has taken a different approach. There is no Midas touch, and inaccuracies can usually be unscrambled. So if (as nearly occurred) the registration on the part of Mr Napier and Ms McAnespie had taken place on or after 8 December 2014, and hence under the 2012 Act, they would have acquired no right to the road, and Sir Archibald Grant would have been entitled to have their title sheet rectified. So the result of the case would have been the same, although it would not have turned on the issue of possession.

So a registered proprietor in possession could keep the property. But if the registered proprietor was not in possession, the property would be returned to the challenger, and the registered proprietor compensated with money. In the leading case of *Kaur v Singh*,[1] the policy was explained by Lord President Rodger in this way:

> The generally accepted justification for adopting this solution is conveniently stated in the passage quoted by the Lord Ordinary from Ruoff and Roper, *The Law and Practice of Registered Conveyancing* para 40-10: 'There is little doubt, however, that the principle behind the Land Registration Acts is that an innocent registered proprietor who is in physical occupation of the registered property should not be ousted from his enjoyment of it. Monetary compensation is of little comfort to a man who is thrown out of his home or ejected from his land, whilst it should normally be sufficient to recompense the owner of a property who has never occupied it.' Although that principle is not stated specifically in connexion with the 1979 Act, given the origins of the Scottish legislation, we have little doubt that the principle lies behind sec 9(3) also.

It is hard to see why this eminently practical test should have required more than possession in its normal sense. The key words in the passage just quoted are 'in physical occupation'. There was no reason for an additional requirement of possessing on the faith of the register.

The second difficulty can be dealt with much more briefly. As the Lands Tribunal acknowledged in the passage quoted earlier, there was no requirement under the 1979 Act that possession be in good faith. A proprietor who possessed in bad faith was equally protected against rectification. That being so, it seems odd to say that (i) a person 'possessed' if he knew he was registered as proprietor under the 1979 Act but also knew the registration to be wrong, but (ii) a person did not 'possess' if, in good faith, he believed himself to be proprietor but did not happen to have seen the title sheet or land certificate which set this out.[2] Yet that was the effect of Lord Hamilton's *obiter dictum*.

The final difficulty is a practical one. In *Grant* it took almost nine months from the application for registration to the issuing of a land certificate by the Keeper. Assume that this was typical of conditions in 2014,[3] and consider the practical implications. The transitional provisions in the 2012 Act require possession of the registered proprietor only on a particular day – on 7 December 2014. Now, (i) if a registered proprietor could be in possession only on the faith of an issued land certificate, and (ii) if, in 2014, it took nine months for a land certificate to be issued on first registration, then it follows that (iii) no one who had the misfortune to apply for first registration in the nine months prior to 7 December

1 1999 SC 180 at 189 G–H.

2 As it happens, Mr Napier and Ms McAnespie did not believe themselves to be proprietors of the road; but the general point remains.

3 On that topic, see the (not especially helpful) information collated in Registers of Scotland, *Annual Report and Accounts 2014–2015* (2015) 9. In *Toal v Keeper of the Registers of Scotland* 2023 SLT (Lands Tr) 1 the application for first registration was made on 4 September 2014 and the land certificate was issued on 9 March 2015, a delay of seven months.

2014 could ever be a proprietor in possession.[1] Such applicants would simply be denied the protection of the transitional provisions – and all because of a delay in registration which they did not want and over which they had no control. It is to be hoped that that is not the law.

Realignment and positive prescription

Thus far we have mentioned only the rules for rectification, and in most cases of mistakes on the Land Register it is those rules that will determine the outcome. But not always. For in some cases where rectification would otherwise have been allowed, the possibility may be removed either (i) by realignment or (ii) by positive prescription. Only a brief treatment is possible here.[2] As both require possession on the part of the registered proprietor, and as such possession (at least on 7 December 2014) will usually remove any right to rectify in respect of 1979 Act titles, as already discussed, realignment and prescription are likely to be important mainly in the context of 2012 Act titles.

Take the case of such a title and return to the example with which this section began: on first registration of property A, a strip of land is included from property B. Applying the rectification rules, the position under the 2012 Act is straightforward. The title sheet of property A is inaccurate. Despite what the title sheet says, the strip continues to be owned by the proprietor of property B and not by the proprietor of property A. Hence rectification is possible, even if a determination by the Lands Tribunal (or ordinary court) might be needed before the Keeper is satisfied that the inaccuracy is 'manifest'. Now suppose that, before rectification is sought, the owner of property A (Rona) dispones to someone else (Soay). Rona did not own the strip, despite its presence within her title sheet. Yet, following the transfer, ownership is nevertheless acquired by Soay by virtue of the realignment provision – s 86 – of the 2012 Act. This is a statutory exception to the *nemo plus* rule[3] – to the rule that no one can give what she does not have.

The policy behind realignment goes to the very heart of the system of land registration. If purchasers could not rely on the Land Register, they would need to look behind it, to the Sasine titles, just to make sure that the title sheet was correct – which would defeat the whole point of registration of title. Section 86 does, however, impose certain requirements. The disponer (Rona) must have been in possession at the time of transfer and have possessed the strip for at least a year. The disponee (Soay) must have been in good faith. The Keeper's warranty must apply – which it does not if the disputed strip was omitted from the deed inducing first registration and finished up in the title sheet only as a result of the Keeper's error.[4] There are other, minor, requirements. But assuming that all

1 That indeed is the position in which Mr Napier and Ms McAnespie found themselves.
2 For a detailed treatment, see K G C Reid and G L Gretton, *Land Registration* (2017) ch 12 (realignment) and ch 17 (prescription).
3 Ie the (common-sense) rule, from *Digest* 50.17.54 (Ulpian), *nemo plus iuris ad alium transferre potest quam ipse haberet* [no one can transfer a better right than they have].
4 LR(S)A 2012 s 86(3)(f) read with s 73(2)(h)(i).

requirements are met, Soay can rely on what the Register said, and what the Register said – falsely, as it happens – was that Rona owned the disputed strip. Hence, on registration of her disposition, Soay acquires ownership of the strip (as well as of property A in the strict sense). And as Soay (unlike Rona) now owns the strip, the title sheet of property A ceases to be inaccurate. The rights in the property have been 'realigned' with what is stated on the Register. Too late to retrieve the strip, the owners of property B must make do with compensation from the Keeper.[1]

Positive prescription, more obviously, has the same effect.[2] Suppose that, instead of disponing property A to Soay, Rona remains as owner. After 10 years the strip may become hers. Prescription requires a registered title followed by possession for 10 years.[3] And, counter-intuitively, the title in question is not the title sheet itself but the underlying disposition or other conveyance, just as with Sasine titles. It may be that (unlike the title sheet) this deed is not *habile* to include the strip. In that case prescription cannot run. But if the deed is capable of being read as including the strip, possession for 10 years does the rest.

JUDICIAL RECTIFICATION AND PRESCRIPTION[4]

Introduction

Conveyancing (and other) documents that fail to express the intentions of the parties can be judicially rectified so as to bring them into line with what was truly intended: Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8. There is quite a body of case law in this area, and all sorts of angles have been explored by the courts.[5] But at least one angle has not so far been explored. Is there a time limit? How far can you go back?

It is indeed true that, as time goes on, the likelihood that the question of rectification will arise will tend to diminish. There is more than one reason for this. Sometimes the deed in question has a time-limited scope anyway: for instance a defectively-expressed lease may have come to an end, or a defectively-expressed standard security may have been discharged following payment of the secured debt. Another important reason is that rectification is blocked if there is a transfer to a *bona fide* third party. To take a random illustration: Aeneas dispones to Beatrice and the intention of the parties is that certain servitudes and real burdens should be created over the property disponed. By mistake that does not happen. Three years later Beatrice dispones to Cordelia, who is in good faith. Rectification was possible while the property was still owned by Beatrice, but the Beatrice/Cordelia disposition, as a subsequent deed which carries forward

1 For compensation, see LR(S)A 2012 ss 94 and 95.
2 This is a change brought about by the 2012 Act. Until 8 December 2014, positive prescription could not operate on Land Register titles (except where the Keeper had excluded indemnity).
3 Prescription and Limitation (Scotland) Act 1973 s 1.
4 This section is by George Gretton.
5 As to which see G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) ch 21.

the earlier mistake, is immune to rectification by virtue of s 8(3A) of the 1985 Act.[1] This provides that:[2]

> If a document [such as the Beatrice/Cordelia disposition] is registered in the Land Register of Scotland in favour of a person acting in good faith then, unless the person [Cordelia in our example] consents to rectification of the document, it is not competent to order its rectification …[3]

As the years pass, the more likely it will be that such transfers will happen. So for these reasons applications for rectification of a document usually occur within just a few years. Nevertheless cases could happen when very many years pass and the issue still remains live. For instance in the example given, suppose that there was no transfer to Cordelia, but, instead, Beatrice continued as proprietrix. Would rectification still be competent after 5 years? Fifteen? Twenty-five?

In such a case the doctrine of personal bar could in some types of case step in to block the possibility of rectification. But leaving that possibility aside, might it be that eventually the law of prescription would come into play? It is a simple question. But there is no simple answer. The 1985 Act is silent.[4] It did not amend the Prescription and Limitation (Scotland) Act 1973. This is all the more noticeable in that legislation since 1973 has very often amended that Act.[5] The question of prescription has not been raised in any reported litigation – perhaps surprisingly, though, as already noted, the question of rectification tends to be relevant chiefly to newer deeds, so that prescription is not often an issue.

For property rights both types of prescription are potentially relevant, positive (which, by the running of time, eventually establishes a right) and negative (which, by the running of time, eventually extinguishes a right). Positive prescription establishes a right after a certain number of years of possession. The right established is normally the right of ownership,[6] for which the period is, of

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1 The Aeneas/Beatrice disposition would remain open to rectification, but since such a rectification would have no effect against Cordelia there would normally be little point in it.

2 This straightforward rule, introduced into the 1985 Act by the Land Registration etc (Scotland) Act 2012, replaced the convoluted and unworkable original rule. The latter does still exist, in s 9, for certain cases, but is nowadays almost never applicable because of s 9(2A).

3 An excursus. Suppose that the deed granted by Beatrice to Cordelia had been not a disposition but the grant of a subordinate real right such as a standard security. What then? The answer would be that the Aeneas/Beatrice disposition would be rectifiable but not the Beatrice/Cordelia standard security (assuming Cordelia to have been in good faith). Thus suppose that the disposition had conveyed four fields by mistake instead of three. Aeneas could recover ownership of the fourth – but it would still be subject to the standard security.

4 Nor did the Scottish Law Commission Report that led to these provisions in the 1985 Act discuss the issue: Scottish Law Commission, *Report No 79 on Rectification of Contractual and other Documents* (1983).

5 A pleasant quarter of an hour can be spent browsing the 1973 Act in its amended form. It is a spaghetti junction with road-signs pointing to such exotic destinations as the Merchant Shipping (Liner Conferences) Act 1982, the Management of Offenders etc (Scotland) Act 2005, the Criminal Injuries Compensation Act 1995, the Tenements (Scotland) Act 2004, the Automated and Electric Vehicles Act 2018, the Trade Secrets (Enforcement, etc) Regulations 2018, SI 2018/597, and many other irresistible enactments.

6 Prescription and Limitation (Scotland) Act 1973 s 1. For completeness it may be mentioned that s 1 refers only to land. The question of positive prescription in relation to corporeal moveables is unclear, a lack of clarity that is unfortunate for items that are valuable and (unlike most

course, ten years, but certain lesser rights, notably servitudes and public rights of way, can also be established by positive prescription, the period for these being 20 years.[1] For ownership to be established by possession a registered title is, of course, also necessary. As for negative prescription, that can extinguish a property right, if 20 years pass in which the right is 'unexercised or unenforced': s 8 of the 1973 Act.

Before looking in more detail at the prescription-versus-rectification issue, a few words should be said on the 2022 case that has prompted these reflections: *Drysdale v Purvis*.[2]

The *Drysdale* case

In 1995 part of Cavelstone Farm, near Kinross, was sold by Mr and Mrs Drysdale to Mr and Mrs Purvis. The missives and the disposition matched, but the buyers took possession not only of the ground as disponed, but also of some additional ground as well, namely the major part of the farm steading. There was thus a discrepancy between (i) the area acquired in terms of the missives and disposition, and (ii) the area acquired in terms of actual possession.

Later – more than 20 years later – the buyers argued that both missives and disposition were inaccurate, in that they understated the area that was to be sold. The result, argued the buyers, was that the sellers still owned part of the property (the major part of the farm steading) that ought to have been included in the missives and the disposition. Since the sale in 1995, no subsequent third-party grantees seem to have been involved, thus simplifying the issues.

The buyers raised an action to rectify both the missives and the disposition. In the end they were successful, the evidence showing that at the time of the purchase, back in 1995, there had been a muddle, and that by mistake – a mistake noticed by neither the sellers nor the buyers – the plan failed to include the area in question.

It was not sought to be argued that the claim for rectification was barred by prescription. On these facts, the plea, had it been taken, would have been one of negative prescription. Positive prescription would not have been relevant. The Drysdales could not have asserted positive prescription to the part of the property in question because they were not in possession, and the buyers could not have asserted positive prescription because, whilst they had been in possession for more than ten years, they had no registered title.

Negative prescription in bar of rectification?

Can prescription make a difference in cases such as this? Beginning with negative prescription, might it cut off the possibility of rectification? Thus if in

moveables) long-lasting such as art and antiquities. Our law in this area compares unfavourably with all other legal systems that we know of. The Scottish Law Commission recommended reform – *Report No 228 on Prescription and Title to Moveable Property* (2012) – but unfortunately it remains unimplemented.

1 PL(S)A 1973 s 3. The legislation uses the terminology of 'possession' for these latter cases also.

2 [2022] CSOH 66, 2022 GWD 30-435.

the *Drysdale* case the sellers had pled negative prescription in bar of the buyers' claim for rectification, given that more than 20 years had passed, what would the court have decided? The relevant provision in the Prescription and Limitation (Scotland) Act 1973 is s 8:

> (1) If, after the date when any right to which this section applies has become exercisable or enforceable, the right has subsisted for a continuous period of twenty years unexercised or unenforced, and without any relevant claim in relation to it having been made, then as from the expiration of that period the right shall be extinguished
> (2) This section applies to any right relating to property, whether heritable or moveable, not being a right specified in Schedule 3 to this Act as an imprescriptible right or falling within section 6 or 7 of this Act as being a right correlative to an obligation to which either of those sections applies.[1]

Though there are no reported cases, the question as to whether this section might apply to rectification has been discussed in that most valuable work, *Prescription and Limitation* by David Johnston.[2] He writes:

> [R]ectification could be viewed as a procedure whereby a right relating to property is asserted. If that is correct, the right to seek rectification may prescribe under s 8 [of the 1973 Act]. But since ownership of land is an imprescriptible right, no lapse of time will ever bar a petition for rectification where it is simply a procedure directed at asserting ownership.

For 'imprescriptible right' Johnston footnotes schedule 3 para (a) of the 1973 Act, which says: 'The following are imprescriptible … (a) any real right of ownership in land.'

Johnston's language is understandably tentative on the general question of whether a right to rectify can negatively prescribe. We agree that there is at least a stateable argument that such is the case. For instance, if Penelope dispones part of her land to Eurymachus, and 21 years later she seeks rectification of the disposition on the ground that the real burdens in the deed were incomplete, then there is a stateable case that her claim is barred by the lapse of 20 years, in terms of s 8.

Johnston makes an exception where the aim of the rectification application is 'asserting ownership': in such a case, he says, negative prescription cannot operate. Thus suppose that Penelope dispones part of her land to Eurymachus and, 21 years later, seeks rectification on the ground that the disposition included a sliver of land that should not have been included. She seeks rectification of the disposition so that, following such rectification, the Land Register will restore her name as owner of the disputed sliver.[3] Johnston's position means, if

1 Sections 6 and 7 deal with the negative prescription of personal rights (and obligations), such as claims arising out of contract, delict and unjustified enrichment. Section 8, quoted in the text above, is about the negative prescription of property rights.

2 D Johnston, *Prescription and Limitation* (2nd edn, 2012) para 7.14(8).

3 Incidentally, where a registered deed is judicially rectified, the Keeper gives effect to the court's rectification decree by registration rather than by rectification: Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8A.

we understand it correctly, that she is not barred by negative prescription from seeking rectification because she is 'asserting ownership' with the consequence that schedule 3 para (a) of the 1973 Act is engaged. If that is the meaning, we incline to dissent.[1] What schedule 3 para (a) says is not that a claim to *acquire* ownership is imprescriptible but that an *actual* 'real right of ownership in land' is imprescriptible. And that is precisely what Penelope does not have. If she *had* 'a real right of ownership in [the sliver of] land', she would not be needing rectification in the first place. Her whole problem is that Eurymachus is the owner, and she is not.

There might be an argument that, in a case such as *Drysdale*, negative prescription would not run against the parties seeking rectification (the buyers) because they had all along been in possession of the disputed area, the idea being that the ongoing possession was in a sense an ongoing assertion of their right. That argument is perhaps attractive, but it would not be easy to bring it within the wording of s 8 of the 1973 Act, quoted above.

Hence it seems to us that on the facts of the *Drysdale* case a plea of negative prescription might have had some possibility of success.

Positive prescription in bar of rectification?

So much for the question of whether negative prescription might be pleadable in bar of rectification. What of positive prescription? This is not something that Johnston touches on, and, as we have said, there is no case law.

The governing provision is s 1 of the 1973 Prescription Act. This says that if someone possesses land for ten years and does so on the basis of a registered title then that title, at the end of the ten years, becomes 'exempt from challenge'. Cases in which positive prescription might potentially be pled in bar of a rectification action will be rare, but not impossible. Take the following. Tristan sells part of his land to Zuleika. The disposition is duly registered. Following settlement Zuleika takes possession, and a fence is erected to separate her land from Tristan's. The fence follows the boundary line as shown in the split-off disposition. Eleven years pass. A feud breaks out between them and Tristan re-examines the sale, and notices that the disposition was disconform to the missives, giving Zuleika more land than she should have received. He seeks rectification of the disposition. Could Zuleika plead positive prescription in her defence?

1 It may be that we have mistaken his meaning, and that in fact he would agree with our analysis. Later in the same paragraph he writes: 'The same will apply to actions of reduction: the right to pursue such an action can be lost, but not where it is simply a procedure for asserting ownership of land.' This rightly draws the distinction between reductions aimed at voidable deeds, on the one hand, and reductions aimed at void deeds, on the other. A reduction of a void deed is in substance declaratory: it does not actually *alter* the parties' property rights. By contrast the reduction of a voidable deed will, normally, lead to the alteration of the parties' property rights. So when Johnston says, in the passage quoted earlier, that if a rectification claim 'is simply a procedure directed at asserting ownership' then it is imprescriptible, he might be referring to a claim that is comparable to a declaratory reduction, ie a reduction that will not (unlike the *Drysdale* case and unlike the Penelope/Eurymachus example) lead to an actual alteration of the parties' property rights. But it is not easy to think of an example. At all events, if this is indeed Johnston's meaning, then the consequence is rather to reinforce the argument that rectification claims can potentially be met by a defence of negative prescription.

It would be difficult to give a wholly confident answer but on balance it seems that positive prescription would indeed be a valid defence to a rectification claim in this type of situation. Zuleika meets both the requirements for such a plea, namely (i) possession for ten years plus, and (ii) a registered title to the area in question. That being so the statute says that her title is 'exempt from challenge.'

Conclusions

As said earlier, the idea of prescription as a possible bar to rectification is largely unexplored. Probably negative prescription can be pled, but the law is by no means certain, and even if this view is correct there may exist qualifications and exceptions. As for positive prescription that too, we incline to think, and with somewhat less tentativeness, can be used as a defence to a rectification claim.

TENEMENTS[1]

Excluding the TMS

The Tenement Management Scheme ('TMS'), set out in schedule 1 to the Tenements (Scotland) Act 2004, applies to *all* tenements, old or new, large or small. It covers matters such as how decisions are to be made and on what topics, and how much each proprietor is to contribute to repairs and other common expenses. But the TMS is a default scheme. It applies only to the extent that the titles make no provision. If a title provision exists on a particular topic (such as liability for repairs), then the TMS is disapplied in relation to that topic and the title provision prevails. The result is that virtually all tenements are governed by a mixture of what the titles say and what the TMS says. It will be a rare title, even in modern times, that covers all of the ground of the TMS and hence excludes the TMS in its entirety.

What has been said so far is a slight over-simplification. A title provision will usually displace the TMS on the topic in question, but not always. Whether it actually does so is regulated by s 4 of the Act, and the terms of this important provision must always be borne in mind.

A helpful example of the interaction of title provisions and the TMS is provided by a case from 2022, *Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd*.[2] The titles to the flats and shops which comprised Argyll Chambers in Glasgow's Buchanan Street contained provisions about decision-making:

> … a committee of management shall be appointed by and from among the proprietors of the flats entering from number 34 Argyll Arcade and from the two shops forming (a) Number 36 Argyll Arcade and Number 28 Buchanan Street, and (b) Number 35 Argyll Arcade and Number 32 Buchanan Street (voting as hereinafter provided) and with such powers as a majority of the said proprietors may from time to time determine, each proprietor having one vote for each pound of assessed rental,

1 This section is by Kenneth Reid.
2 2022 GWD 30-439, a decision of the Lands Tribunal. The Tribunal comprised R A Smith QC and C C Marwick FRICS.

> provided, however, that the proprietors of the two shops forming (a) Number 36 Argyll Arcade and Number 28 Buchanan Street, and (b) Number 35 Argyll Arcade and Number 32 Buchanan Street shall each have no more than 100 votes in respect of these shops …

This was all well and good if somewhat complex. But there was a problem. The burden just quoted omitted one of the flats. In respect of that flat there was no provision for participating in the making of decisions. What then? Did the title provisions apply nonetheless, thus depriving the proprietor of the omitted flat with any say in repairs and other matters of administration? Or did the very fact of the omission mean that the relevant rule of the TMS (rule 2) applied, resulting in decisions by a simple majority of units in the building instead of the ornate voting scheme lovingly provided for in the title provisions? Was, in other words, a single omission fatal to the whole? Were the title provisions broken and unworkable?

The answer lay in s 4 of the 2004 Act, or more precisely in subsection (4) of that section. This provides that:

> Rule 2 of the Scheme shall apply unless –
> (a) a tenement burden[1] provides procedures for the making of decisions by the owners; and
> (b) the same such procedures apply as respects each flat.

The subsection sets out two requirements – (a) and (b). The first was plainly met, for a real burden did indeed provide procedures for the making of decisions. But the second requirement was not, because there was one flat within the building to which the procedures did not apply.

Seeking to avoid that conclusion, one of the parties (the respondents) argued that the titles to the units were at any rate consistent in excluding one of the flats from participation in decision-making. Hence, it was said, 'the same such procedures apply as respects each flat' within paragraph (b) of subsection (4).[2] Quite correctly, this argument was rejected by the Lands Tribunal:[3]

> We cannot accept the respondents' interpretation of section 4(4)(b) of the 2004 Act. As No 36A/ 37 does not have a seat on the committee or any vote it follows that there is a tenement burden providing procedures for the making of decisions by the owners but, contrary to sub-para (b), the same procedures do not apply as respects each flat. It seems to us that the provision is directed as respects each flat in the tenement, rather than the way in which the tenement burdens happen to have been promulgated. In effect there is a statutory requirement for all flats in the tenement to have a say in the procedures.

As, under the title provisions, one of the flats did not have a say in the procedures, the title provisions had failed to displace rule 2 of the 2004 Act. Hence decision-making was governed by the TMS and not by the titles.

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1 Ie a real burden affecting the tenement: see Tenements (Scotland) Act 2004 s 29(1).
2 The argument is summarised at para 42 of the Lands Tribunal's judgment.
3 Paragraph 73.

Apportionment of repairs (1): by rateable value/assessed rental

Rules of apportionment

The same case, *Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd*, raised another important question in respect of tenements. This is the way in which repairs and other expenses are apportioned among the owners of the flats.

Again, there is a default provision in the TMS – rule 4 – which, broadly speaking, provides either for equality of contribution or, in cases where the flats are of markedly different sizes (defined as being where the floor area of the largest flat is more than one-and-a-half times that of the smallest), for apportionment by floor area.[1] But rule 4 is usually displaced by the titles and so is not often encountered, at least in relation to the maintenance of roofs and other standard parts of the tenement in respect of which titles usually make provision.[2]

Title provisions concerning repairs come in various shapes and sizes. Some, echoing TMS rule 4, provide for equality of contribution. Others employ unequal fractions or percentages. Still others – typically Victorian flats – tie liability to feuduty; in such cases the Keeper is careful to include the relevant figure in title sheets notwithstanding the abolition of the feudal system. And, finally,[3] some titles use rateable value or, what comes to much the same thing, assessed rental.[4] The titles in *Royal London Mutual Insurance Society* were an example of the last of these, a disposition of 1954 providing that individual units were to be liable in respect of common repairs in the proportions that the assessed rental of each unit bore to the total assessed rental for the building.

Rateable value/assessed rental: four difficulties

This was perhaps a sub-optimal arrangement. For apportionment by rateable value (or assessed rental) can encounter four potential difficulties. The first concerns the rule that the terms of a real burden must be set out within the four corners of the deed.[5] An apportionment requiring recourse to the valuation roll is a clear breach of that rule. In principle, therefore, an apportionment by rateable value cannot be a real burden and so cannot bind successors. Today, however, this difficulty is disposed of by statute. In terms of s 5(2) of the Title Conditions (Scotland) Act 2003, and notwithstanding the four-corners rule, a

1 As to how floor area is measured for this purpose, see Tenements (Scotland) Act 2004 s 29(2).

2 Displacement is governed by T(S)A 2004 s 4(6). The title provisions must account for the entire costs of the repair in question.

3 This list is not, of course, exhaustive. Other methods of apportionment are sometimes found. The titles in the *Royal London Mutual Insurance Society* case provided an example we have not previously encountered: in respect of the common central-heating system, the proprietor of each flat was liable in 'the proportion which the total area of heating surface of the radiators forming part of said system and located in said subjects hereinbefore disponed bears to the total heating surface of all the radiators forming part of said system'.

4 In *Royal London Mutual Insurance Society* it was conceded that the reference to assessed rental was a reference to the assessed value of property appearing on the valuation roll: see para 65 of the Lands Tribunal's judgment. For the majority of properties, the assessed value (the 'net annual value') is also the rateable value: see eg www.saa.gov.uk/non-domestic-valuation/the-valuation-roll/.

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

real burden can apportion liability by reference to 'a public document (that is to say, an enactment or a public register or some record or roll to which the public readily has access)'.[1] The valuation roll is 'a public register' within this provision.[2]

Secondly, there is the problem of valuations becoming out of date. This is rarely an issue for tenements composed entirely of non-residential property because revaluations of commercial premises now occur at three-yearly intervals, the most recent revaluation having taken effect on 1 April 2023.[3] But for tenements where all or some of the flats are in residential use, the position is more fraught. The root of the problem lies in the abolition of domestic rates on 1 April 1989. Since then there has – obviously – been no revaluation of domestic properties. What figure, then, is to be attributed to such properties? The answer is to be found in legislation.[4] Where a tenement comprises or includes residential property, the valuation for the purposes of apportionment of liability – of *all* flats in the tenement, including non-residential flats – is taken to be the figure on the valuation roll immediately before 1 April 1989. And the assessor for each valuation area is under a statutory duty to retain a copy of the relevant valuation roll and to make it available for public inspection at the assessor's office during ordinary business hours.[5]

At first sight this preservation of antique valuations may seem an unsatisfactory rule. Yet usually it works well enough in practice; for, as long as flats remain substantially unchanged, the relative values today will not be much different from those set out in 1989, and it is relative and not absolute values that matter in the apportionment of liability.[6] But of course flats do not always remain unchanged, and the more the years pass the more likely change is to occur. A particular difficulty is a change from commercial to residential use, for the rateable value of the former is much higher than that of the latter. So if the shop or pub, once ubiquitous on the ground floor of Victorian tenements, is converted to residential use after 1989, the rateable value remains stuck at the higher (commercial) figure despite the fact that revaluation would have produced a lower (residential) figure. Relief may, however, be available from the Lands Tribunal. But first it is necessary to say something about the Tribunal's jurisdiction in such matters.

Any owner of property which is subject to real burdens can apply to the Tribunal for their variation or discharge. That is provided for in s 90 of the Title Conditions (Scotland) Act 2003. But such 'normal' variation or discharge naturally affects only the property of the applicant, and so is of limited use in a tenement where, ideally, it should be possible to make changes to the titles

1 For the background to this provision, see Scottish Law Commission, *Report No 181 on Real Burdens* (2000) paras 3.25 and 3.26.
2 As indeed was accepted in *Royal London Mutual Insurance Society* at para 65.
3 See p 228 below.
4 The current provision is s 111(1) of the Local Government Finance Act 1992.
5 Local Government Finance Act 1992 s 111(10), (10A). For contact details of the different assessors, see www.saa.gov.uk/assessors-links/.
6 For discussion, see Scottish Law Commission, *Report No 162 on the Law of the Tenement* (1998) para 5.62.

of every flat. That can indeed be done but under a different provision of the Act, s 91. Under s 91, variation or discharge of burdens in respect of all the flats in a tenement (or other 'community' such as a housing estate) can be granted by the Tribunal provided the application is made by the owners of at least a quarter of the flats in the building. So if the owners of a quarter of the flats can be persuaded to apply to the Lands Tribunal – or if the flat itself is one of no more than four in the tenement so that the owner can apply unilaterally – the Tribunal can grant a variation of the apportionment to remove the unfairness of a commercial rateable value applying to a flat which is now in residential use. In the two cases to have come before it so far, the Tribunal has shown itself inclined to grant such a variation.[1] We will meet s 91 again later in the context of a different case.

So much for the first two difficulties with apportionment by rateable value. A third potential difficulty is changes in the internal organisation of the building. Maintenance burdens are often quite elderly. What if the configuration of flats has changed since the burdens were first imposed? This was one of the issues which arose in *Royal London Mutual Insurance Society*, where the burdens dated from 1954. As the Lands Tribunal explained:[2]

> The question here comes to whether the clause is no longer workable. Any current unit of occupation on the roll may not equate to the particular premises as existing in 1954. The units may be larger or smaller, conjoined or divided. Dividing walls may have been erected or broken through. A unit currently possessed through a tenancy may not reflect the shape, size etc of a unit as it was owned in 1954. A unit may have been renumbered. This leads to the question whether such organic changes in the life of the building are important to the validity of the clause.

The Tribunal's conclusion, surely correctly, was that changes of this kind were not important. So long as each flat, original or reconfigured, appeared on the valuation roll, the sums could still be done and the cost of repairs could be apportioned among the proprietors.[3]

Finally, and relatedly, there is the difficulty of a flat which – whether as originally built or due to later change – extends into a different building. The rateable value will then be attributable in part to the flat as within the tenement and in part to the flat as within the other building. Does this make the maintenance burden unworkable – leading to its replacement by TMS rule 4? This issue too arose in *Royal London Mutual Insurance Society*. Properly determined to make the burden 'workable', if possible,[4] the Lands Tribunal thought that the rateable value in such cases could be apportioned. Nor was this an especially difficult task:[5]

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1 *Patterson v Drouet* 2013 GWD 3-99, discussed in *Conveyancing 2012* pp 137–42; *Bennett v Skene* 2019 GWD 11-155. The application is made under s 91 of the Title Conditions (Scotland) Act 2003.
2 Paragraph 66.
3 Paragraph 69: 'the exact boundaries of the parts lying within the tenement are not critical to the working of the clause, because we can infer the areas will always be subject to an "assessed rental" no matter within which part of the Chambers they are located'.
4 Paragraph 47.
5 Paragraph 71.

> In our experience this is the sort of calculation which property managers and surveyors with knowledge of valuation for rating often perform. So long as the basic valuation entry/entries are available on the roll, together with supplementary information on the ground as to the amount of floorspace for any unit, a fair apportionment can be made.

Apportionment of repairs (2): by fixed shares

The problem of internal reconfiguration

Apportionment by measures such as rateable value deal relatively easily with internal reconfiguration of the flats, as we have seen. Whether the same is true of apportionment by fixed shares was considered in another case from 2022: *Smith v Lewis*.[1]

This concerned a late-Victorian tenement at 1 and 2 Hayburn Crescent, Glasgow. As originally constructed, this comprised six flats, of which two extended to two floors and so were much larger than the others. Nonetheless, the maintenance arrangements were for the proprietor of each flat to pay an equal – a one-sixth – share. The relevant burden was set out in a deed of conditions from 1920. Having described the building as 'a tenement containing six flatted dwellinghouses', the deed of conditions, in condition (second), provided that:

> … all expenses and charges incurred for any work undertaken or services performed in terms of or in furtherance of the provisions herein contained and the remuneration (if any) of said Factor shall be payable by the Proprietors of the said houses whether consenters or not in the proportion of one sixth share thereof for each house owned by him …

Over time, both of the double flats were divided into separate flats though one was subsequently reunited. So there were now seven flats instead of the original six – all roughly the same size apart from the reunited double flat.

The owners of two of the flats applied to the Lands Tribunal under s 91 of the Title Conditions (Scotland) Act 2003 for variation of the apportionment of liability in the tenement. The proposal was to substitute for the provision just quoted the default rule in the Tenement Management Scheme by which – the flats being of significantly unequal size – liability is apportioned in accordance with floor area.[2] The application was opposed by the owners of the double flat, whose liability would be sharply increased by the proposed variation.

Applying the title provision

There was disagreement as to how the title provision was to be interpreted in the light of the new configuration. According to the applicants, the proprietor of each flat was still bound to pay a one-sixth share, resulting, very oddly, in a surplus

1 2022 SLT (Lands Tr) 61. The Tribunal comprised Lord Minginish and A Oswald FRICS.
2 Tenement Management Scheme r 4.2(b)(i). Floor area is calculated in accordance with s 29(2) of the Tenements (Scotland) Act 2004.

(because there were now seven flats, not six). According to the respondents, the proprietor of each flat was to pay a one-sixth share apart from the proprietors of the two flats carved out of what was originally a double flat who were liable for a one-twelfth share each.

The Lands Tribunal accepted the existence of the dispute without attempting to resolve it. The problem, thought the Tribunal, was intrinsic to the title provision itself; for it failed to 'say what is to happen if more flats are created'.[1] That in itself was a strong argument in favour of the variation sought by the applicants.

But all of this, as it happens, is mistaken. Where a property is divided, the fate of any affirmative real burden attaching to that property (such as a maintenance obligation) is governed by s 11 of the Title Conditions (Scotland) Act 2003. And, read with s 11, the maintenance provision for Hayburn Crescent provided a clear rule for the apportionment of liability notwithstanding the changed configuration of the flats. That rule was neither of the rules contended for by the parties. It seems that neither party may have found s 11: at any rate the provision was not mentioned in the Lands Tribunal's judgment.

Section 11, as far as relevant, is as follows:

> **11 Affirmative burdens: shared liability**
>
> (1) If a burdened property as respects which an affirmative burden is created is divided (whether before or after the appointed day) into two or more parts then, subject to subsections (2) and (4) below, the owners of the parts –
>
> (a) are severally liable in respect of the burden; and
>
> (b) as between (or among) themselves, are liable in the proportions which the areas of their respective parts bear to the area of the burdened property.
>
> …
>
> (3) In the application of subsection (1) above to parts which are flats in a tenement, the reference in paragraph (b) of that subsection to the areas of the respective parts shall be construed as a reference to the floor areas of the respective flats.
>
> (3A) For the purposes of subsection (3) above, the floor area of a flat is calculated by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat –
>
> (a) a balcony; and
>
> (b) except where it is used for any purpose other than storage, a loft or basement.

The main rule is in subsection (1) of s 11. Where a flat is divided, the proprietor of each part is, in a question with the other proprietors in the building, liable jointly and severally for the full amount due from the original flat. The idea is that division should not prejudice the other proprietors; after the division as before, they should be able to recover the full amount due from a single proprietor. It is then for the proprietors of the divided flat to recover, among themselves, the correct proportions due. As subsection (3) explains, this is done by floor area. Subsection (3A), adopting a provision found in the Tenements (Scotland) Act 2004, explains how floor area is to be calculated.

1 Paragraph 30.

Now, apply s 11 to the tenement at 1 and 2 Hayburn Crescent. In 1920 the deed of conditions imposed on the proprietors of each of 'the said houses'[1] liability 'in the proportion of one sixth share thereof for each house'. So the proprietor of each flat was liable for a one-sixth share. Five of the original six flats remained intact. So the proprietor of each remained liable for a one-sixth share. The sixth flat had been divided in two. In a question with the other proprietors in the tenement, the proprietor of each part – now itself a separate flat – was liable, jointly and severally, for a one-sixth share. In a question with each other, liability for the one-sixth share was apportioned according to floor area.

The variation

Given what has just been said, it is hard to see why a variation of the title provision was needed. Indeed, the whole purpose of s 11 was to make such a variation unnecessary by providing a clear and workable rule for cases of division.[2] But, as already mentioned, s 11 does not appear to have been before the Lands Tribunal; and, in its absence, the title provision did indeed seem unsatisfactory and in need of variation. The fact that the reconfiguration of flats engaged the first of the statutory factors set out in s 100 of the Title Conditions Act ('any change in circumstances since the title condition was created') was a further ground for variation.[3]

The only question then was whether the variation proposed by the applicants was reasonable. In its own terms it plainly was. And the fact that it was the rule adopted in the Tenement Management Scheme added strength to that view – 'a strong indicator of reasonableness', as the Tribunal put it.[4] So the variation was granted.

The result can nonetheless be questioned. The liability rule in the deed of conditions was, no doubt, less 'fair' than a rule of liability by floor area, in respect that the proprietors of the two double flats paid the same as the proprietors of the other, much smaller flats. But that was the rule which had stood for 100 years. And it was the rule on the basis of which each proprietor had bought his or her flat. If the rule was thought to be broken, following the division of one of the flats, it could easily have been repaired by a variation which retained the essence of the original rule. To do more than that – to rewrite the rule entirely in the interests of 'fairness' – lacked the justification of change of circumstances or any other of the statutory factors. It sets a potentially unhappy precedent.[5]

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1 The expression 'the said houses' referred back to 'a tenement containing six flatted dwellinghouses' which is found near the start of the deed of conditions.

2 For discussion of the background to s 11, see Scottish Law Commission, *Report No 181 on Real Burdens* (2000) para 4.58. Of course, the proprietors might themselves see this as a suitable moment to adjust the liability rules – as nearly happened in *McCabe v Killcross* 2013 SLT (Lands Tr) 48, discussed in *Conveyancing 2013* pp 15–16.

3 Paragraph 26.

4 Paragraph 33.

5 There is one previous case of which the same criticism could be made: *Gilfin Property Holdings Ltd v Beech* 2013 SLT (Lands Tr) 17, discussed in *Conveyancing 2013* pp 16–17.

IRRITANCY OF COMMERCIAL LEASES[1]

Introduction

Irritancy is a nuclear remedy. It enables a right to be brought to an end because of default by the right-holder (such as a tenant) in relation to an obligation. So severe are its consequences that irritancy is no longer competent for breach of a real burden.[2] The remedy, however, remains available in respect of agricultural and commercial leases[3] but is subject to restrictions.[4] The law only recognises one type of *legal* irritancy, that is to say a right to irritate implied into the lease. That is for non-payment of rent for two years.[5] Unsurprisingly, this is a dead-letter in practice as landlords will not allow rent arrears to build up for so long. Of far greater significance therefore is *conventional* irritancy, where an express clause in the lease authorises its early termination by the landlord because of certain breaches by the tenant.

Conventional irritancy clauses in respect of commercial leases are regulated by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.[6] The relevant provisions, which apply also where the landlord seeks to rescind the lease on the basis of material breach of contract, were based on recommendations of the Scottish Law Commission in a report[7] prompted by the House of Lords case of *Dorchester Studies (Glasgow) Ltd v Stone*.[8] The court highlighted unfairness in the common law, in particular that, in contrast with a legal irritancy, a conventional irritancy once incurred could not be purged (cured by performance of the relevant obligation, such as clearing rent arrears).

The 1985 Act draws a distinction between irritancy for monetary breaches (s 4) and for non-monetary breaches (s 5). In respect of the latter, irritancy is only permitted 'if in all the circumstances of the case a fair and reasonable landlord'[9] would have sought to exercise the remedy. As for the former, what is required is the sending of a warning notice.

2022 saw a new case in the Sheriff Appeal Court, *24 Drury Street Ltd v Brightcrew (Management) Ltd*,[10] on what information a s 4 notice must contain in relation to the period of time during which the breach can be remedied.

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1 This section is by Andrew Steven.

2 Abolition of Feudal Tenure etc (Scotland) Act 2000 s 53 and Title Conditions (Scotland) Act 2003 s 67. It is competent to have an irritancy clause in relation to an expressly created servitude whereby the servitude is forfeited in certain circumstances, but such clauses are rare in practice. See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 16.29.

3 For residential leases an irritancy clause is probably unenforceable unless it mirrors the limited statutory grounds for early termination: see *Royal Bank of Scotland v Boyle* 1999 Hous LR 63; L Richardson and C Anderson, *McAllister's Scottish Law of Leases* (5th edn, 2021) para 17.72.

4 For general accounts of the law, see R Rennie et al, *Leases* (2015) paras 17-27 to 17-49; *McAllister's Scottish Law of Leases* (5th edn, 2021) ch 5; A M Ismail, *A Practical Guide to Ending Commercial Leases in Scotland* (2021) chs 3 and 4.

5 For agricultural holdings the period is shorter at six months: see Agricultural Holdings (Scotland) Act 1991 s 20.

6 Agricultural and residential leases are excluded: Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 7.

7 Scottish Law Commission, *Report No 75 on Irritancies in Leases* (1983).

8 1975 SC (HL) 56.

9 Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 5(1).

10 [2022] SAC (Civ) 34, 2023 GWD 1-10.

Monetary breach: the warning notice and the time to remedy

Section 4(2)(a) of the 1985 Act provides that, if the landlord intends to irritate the lease for non-payment of rent or other monetary breach, notice must be served:

> (i) requiring the tenant to make payment of the sum which he has failed to pay together with any interest thereon in terms of the lease within the period specified in the notice; and
> (ii) stating that, if the tenant does not comply with the requirement mentioned in sub-paragraph (i) above, the lease may be terminated.

The 'period specified' is defined in s 4(3) as 'not less than … a period of 14 days immediately following the service of the notice' or any longer period expressly provided for in the lease. During the worst of the Covid-19 pandemic, the 14-day period was increased to a 14-week period.[1] This temporary rule ended on 31 March 2022,[2] but it was applicable to the notice served in *24 Drury Street Ltd v Brightcrew (Management) Ltd*.[3]

The pursuer was the landlord of premises at Renfield Street and Drury Street, Glasgow. The defender was the tenant. As of 13 November 2020 it was in rent arrears amounting to £63,166.67. On that date the landlord's solicitors served notice on the tenant which included the following wording:

> We hereby GIVE NOTICE on behalf of the Landlord that you are required to make payment of the arrears within 14 weeks of the day of service upon you of this Notice. If you fail to comply with the terms of this Notice, which is served in accordance with Clause 6(a) of the Lease and Sections 4 and 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, the Lease may be terminated.

Clause 6(a) of the lease authorised irritancy where rent 'is at any time in arrears' but required a 14-day warning notice first. This was doubtless influenced by the 1985 Act in its pre-Covid incarnation.

Fourteen weeks later no payment had been made and on 24 February 2021 the landlord's solicitors notified the tenant that the lease was now at an end. When the tenant refused to remove the landlord commenced proceedings in Glasgow Sheriff Court seeking declarator of irritancy and an order for removal. The tenant challenged the validity of the notice. Following a debate the sheriff found for the landlord on this aspect of the case, but allowed a proof before answer on whether the irritancy had been purged by the tenant[4] and whether the landlord had waived the right to irritate.

The tenant appealed to the Sheriff Appeal Court in relation to the validity issue, arguing that the notice was ineffective because it did not specify the date on which the 14-week period expired. This was said to be necessary in view of (i) a provision in the lease on deemed service, and (ii) the rules on computation of time in relation to the word 'within'.

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1 Coronavirus (Scotland) Act 2020 s 8 and sch 7 paras 6 and 7.
2 Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022, SSI 2022/64, reg 2.
3 [2022] SAC (Civ) 34, 2023 GWD 1-10.
4 On what basis is not stated in the decision of the Sheriff Appeal Court.

As regards (i), clause 8 of the lease provided that notices required to be in writing and were to be treated as served 48 hours after posting if served by recorded delivery post. In relation to (ii), what the tenant argued is not expressly set out by the Sheriff Appeal Court, but its decision states: 'We acknowledge that in the computation of time when something is specified to be done "within" a period it means that the first and last days are excluded (*Esson Properties Ltd v Dresser UK Ltd* 1997 SC 304).'[1] In fact the case cited does not deal with the expression 'within' but with the meaning of 'not less than'.

The appeal was dismissed by the Sheriff Appeal Court with 'no difficulty'[2] on the basis that there was no requirement either under the 1985 Act or the lease itself for the actual date on which the notice period expires to be stated. This can be contrasted with the decision of the Outer House in *Tawne Overseas Holdings Ltd v The firm of Newmiln Farms*.[3] There the wording of the notice was clearly invalid because it required payment within 14 days of the date of the notice rather than the date of its *service* as required by the 1985 Act. The Sheriff Appeal Court's decision is surely correct. Although specifying a specific date will make a warning notice simpler for the tenant to understand, this is not required as a matter of law.

The court went on to consider an apparent contradiction in the terms of the 1985 Act. While the tenant is to be given 'not less than'[4] the notice period to put right the arrears, this must be done 'within'[5] that period. The court considered that there was an 'underlying tension'[6] here, which could also be found in the preceding Scottish Law Commission report.[7] Nevertheless, the landlord had clearly complied with the statutory requirements. The court concluded:[8]

> Whether the potential inconsistency within the Act will be judicially resolved is a matter for another day – indeed it will arise only in the event that the tenant leaves payment of arrears until the very last moment.

In such circumstances, however, the landlord might well decide not to irritate and so the matter would not fall to be determined by a court.

The Sheriff Appeal Court's reference to 'very last moment' infers that, on one interpretation of the 1985 Act, the tenant by paying at that time would comply with the terms of the notice, thus preventing the landlord from irritating. On the contrary interpretation, the tenant would not. It is unfortunate that the court did not state when this 'very last moment' is. Presumably (under the post-Covid rule) it is exactly 14 days following service. Fifteen days would be too long but if the tenant paid 13 days after service then that would clearly comply with the notice. Hence, imagine that service was on Tuesday 3 January 2023. The first date not less than 14 days after that was Wednesday 18 January 2023 (the first

1 [2022] SAC (Civ) 34, 2023 GWD 1-10 at para 10.
2 Paragraph 10.
3 [2008] CSOH 12, 2008 Hous LR 18. See *Conveyancing 2008* pp 98–100.
4 Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 4(3).
5 Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 4(2)(a)(i).
6 Paragraph 11.
7 Scottish Law Commission, *Report on Irritancies in Leases* para 4.3.
8 Paragraph 13.

and last days not being counted). On the former interpretation, payment on that date would have precluded irritancy, but on the contrary interpretation, it would have been necessary to pay no later than Tuesday 17 January 2023.

Whether there is in fact an 'underlying tension' in the 1985 Act is questionable. The 'not less than' wording in s 4(3) seems properly to refer to the fixing of the end-date whereas it is the 'within' wording in s 4(2)(a) which sets out the period during which the tenant must pay. There is, however, an opportunity to put the matter beyond doubt in the coming years in legislation to reform irritancy law.

Reform

As mentioned above, the provisions in the 1985 Act were based on a report prepared by the Scottish Law Commission. Following criticism of the law on conventional irritancy by the House of Lords in *CIN Properties Ltd v Dollar Land (Cumbernauld) Ltd*,[1] the Law Commission conducted a further review of the area, resulting in its *Report on Irritancy in Leases of Land*.[2] This was published in 2003 and contained a number of recommendations for reform. These included abolishing legal irritancy and replacing the 1985 Act rules with a regime distinguishing between remediable and non-remediable breaches. In respect of the former, a warning notice period of 28 days was recommended. The apparent tension highlighted in *24 Drury Street Ltd* was not considered and the relevant provision in the draft Bill[3] appended to its report, just like s 4 of the 1985 Act, has both the 'within' and 'not less than' wording.

The 2003 Report was never implemented but the Law Commission has recently taken the opportunity to review it and irritancy law more generally in relation to commercial leases. Chapter 5 of its *Report on Aspects of Leases: Termination*,[4] published in October 2022, considers the subject. The Commission notes that the commercial property market has changed significantly since 2003. Landlords generally prefer to have a tenant in occupation even where it is paying only some rent or none at all, rather than having empty premises which incur increased liabilities.[5] It may be difficult to find a new tenant, particularly in retail given the increase in online shopping.[6] Having consulted on the matter, the Commission concludes that there 'does not appear to be any general appetite for comprehensive reform of the law … nor for the implementation of our 2003 recommendations in respect of commercial leases'.[7]

1 1992 SC (HL) 104. See also *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90.
2 Scottish Law Commission, *Report No 191 on Irritancy in Leases of Land* (2003).
3 Draft Leases (Scotland) Bill s 2.
4 Scottish Law Commission, *Report No 260 on Aspects of Leases: Termination* (2022). See also p 84 above.
5 *Report on Aspects of Leases: Termination* para 5.5.
6 In a report published in December 2022, Aberdeen was named as the city in the UK with the fifth most empty shops per head of population: see www.grampianonline.co.uk/news/aberdeen-near-top-of-uk-empty-shop-list-297576/. The City of Aberdeen has launched a £500,000 action plan to address the issue: see *The Press and Journal*, 14 December 2022.
7 *Report on Aspects of Leases: Termination* para 5.13.

But two limited reforms are nevertheless recommended by the 2022 Report, drawing on the 2003 Report.[1]

First, s 4 of the 1985 Act should be amended to allow service by sheriff officer, in addition to recorded delivery post.[2] The Commission decides against allowing service by private courier or email on the basis that these are less certain and less formal methods of transmission, but recommends that a provision in a lease requiring service by email *in addition to* service by recorded delivery post or sheriff officer should be enforceable.

Second, landlords serving warning notices for monetary breaches under s 4 of the 1985 Act should also have to serve a copy on 'qualifying heritable creditors'.[3] These are creditors who hold a standard security over the lease which was recorded or registered more than 10 days prior to the date of service on the tenant and who have a UK postal address known to the landlord or provided to the landlord as the address for service of such a copy. The scope of these provisions is therefore limited to long leases (over 20 years) as standard securities cannot be granted over short leases.

The effect of termination by irritancy or rescission for material breach is that heritable creditors become unsecured because the encumbered property is extinguished. The Law Commission therefore recommends that such qualifying heritable creditors should have the right to challenge the validity of the notice or, where no copy notice is served, to seek to have the irritancy declared invalid. They should also have the right to challenge any non-compliance with provisions of the lease in relation to irritancy and to argue – like a tenant under s 5 of the 1985 Act – that a fair and reasonable landlord would not have terminated the lease on the basis of material breach or irritancy, having regard to their (the creditor's) interests. There is a potential difficulty here in that, contrary to what the Commission says,[4] there is no provision for a warning notice under s 5. The creditor will therefore not be warned of the landlord's intention to terminate in such a way. This is something which should be considered as and when the Scottish Government seeks to implement the 2022 Report by introducing a Bill to the Scottish Parliament.

COMMON PROPERTY OR SERVITUDE?[5]

Three options

A driveway is to serve two separate properties (A and B). You are charged with doing the conveyancing. How should matters be arranged? Should the owner

1 In addition, a more general recommendation in relation to service of notices where landlords or tenants are not based in the UK would apply to irritancy notices: see *Report on Aspects of Leases: Termination* paras 5.21–5.23.

2 *Report on Aspects of Leases: Termination* paras 5.14–5.20. In *Kodak Processing Companies Ltd v Shoredale Ltd* [2009] CSIH 71, 2010 SC 113 it was held that service by sheriff officer is ineffective.

3 *Report on Aspects of Leases: Termination* paras 5.26–5.29.

4 *Report on Aspects of Leases: Termination* para 5.28.

5 This section is by Kenneth Reid.

of each property be given (i) common property, (ii) a servitude of access, or (iii) both?[1]

In a competition between (i) and (ii), common property will usually be the better solution. The trouble with servitude is that the proprietor of one of the properties must be given the upper hand. After all, *someone* has to own the driveway. Yet, to give ownership, say, to the proprietor of property A and a servitude to the owner of property B is to disadvantage the latter. Proprietor B has only a servitude and is restricted to whatever rights that servitude may be found to encompass. Proprietor A has a right to the driveway which is unlimited save for the servitude. The scope for dispute is obvious. Does, for example, the servitude extend to vehicles? If so, are there limits as to the number of vehicles that can use it? What about parking?

Of course, there may sometimes be good reasons for arranging matters in that way. For example, the driveway may be used predominantly for property A and hardly at all for property B. And common property is not necessarily immune from disagreement: it was not for nothing that the Romans referred to it as *mater rixarum*. Nonetheless, in most cases, most of the time, common property is a better arrangement than servitude.

But what of the third option? Is conferring *both* common property *and* a servitude the best of all possible worlds – or the worst? As a matter of law is it even possible? The issue has been considered in a new case, *MacKirdy v Keeper of the Registers of Scotland*.[2]

The new case

In simplified form, the facts of *MacKirdy* were these. A semi-detached house in Bute was being split into upper and lower flats. Both were served by the same driveway. The disposition of the lower flat granted both (a) one-half *pro indiviso* share in the driveway, and also (b) 'rights of access to and egress from, for both pedestrian and vehicular traffic, the area of ground hatched in red and marked "driveway" on the said plan'.

What was the effect? In the first place, said the Lands Tribunal, the disponees could not receive both ownership and a servitude in respect of the same thing. To 'both grant a real right of ownership and a servitude of access over that which is to be owned is, for obvious reasons, nonsensical'.[3] It is worth exploring why. Like other subordinate real rights, a servitude is a *ius in re aliena* – a right in the property of someone else. It cannot be a right in one's own property. If one already owns the property, there is nothing to be gained by having a servitude over it; and so any servitude is immediately extinguished by confusion.[4]

1 There is also a fourth possibility, which might be attractive if the driveway is wide: the driveway is sliced lengthways, with each party having sole ownership of one of the slices and a servitude of way over the other slice.

2 2022 GWD 36-527, Lands Tribunal. The Tribunal comprised Lord Minginish and A Oswald FRICS. For other aspects of the case, see p 29 above.

3 Paragraph 76.

4 To this there is now a statutory exception for servitudes constituted by dual registration: see Title Conditions (Scotland) Act 2003 s 75(2). But the servitude is suspended until such time as the same person ceases to own both the dominant and the servient tenements.

Res sua nemini servit.[1] That accounts for the servitude insofar as it is over the disponee's half-share in the driveway. But what of the half-share belonging to the owner of the *upper* flat? Is it possible to have a servitude over a *pro indiviso* share?[2] That may perhaps be doubted, although Cusine and Paisley do not rule it out.[3]

The first point led to a second. If the disponees could not have both common ownership and a servitude over the driveway, which right did they have? The answer was not in doubt. Viewed separately, the conferral of each right was equally valid. But the conferral of ownership was fatal to the grant of servitude. The servitude was stillborn. And so the right of the disponees in the driveway was one of common property. The reasoning of the Lands Tribunal was directed to the practicalities:[4]

> [W]here two apparently conflicting rights are granted in the same deed there is no basis for giving effect to the lesser right rather than the greater. As we have already said the right of ownership here included the right to use for access and the logical way to view things is to regard the purported additional grant of a servitude of access as superfluous.

Three further points seem worth making. The first concerns the irrelevance of intention. Deeds are to be interpreted by what they say and not by what they may or may not have been intended to say. In the present case, the disposition granted a right of common property. That grant must stand even 'although it may not have been the intention'.[5]

Secondly, extrinsic evidence. The disposition of the lower flat contained a mix-up of nomenclature such that it was possible to argue that the only right conferred was a right of servitude.[6] And that view of things was supported by the equivalent disposition of the upper flat, recorded only a week later. This referred to the servitude held by the lower flat in respect of the driveway but made no mention of the one-half share of ownership. Could the later disposition be used to help interpret the earlier disposition? The Lands Tribunal's answer was an unequivocal no. The disposition fell to be interpreted only 'in its terms'.[7]

In fact, the admissibility of extrinsic evidence is a difficult topic on which authority is scant and where the law is far from clear. Insofar as a rule exists, it seems to allow extrinsic evidence to explain a deed but not to modify its

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1 [No one can have a servitude over his own property.] See K G C Reid, *The Law of Property in Scotland* (1996) para 9(6); D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 2.07.

2 Title Conditions (Scotland) Act 2003 s 4(6) prevents a real burden from being created over a *pro indiviso* share.

3 Cusine and Paisley, *Servitudes and Rights of Way* para 4.11. See, however, *Clydesdale Bank plc v Davidson* 1998 SC (HL) 51 especially at 55 per Lord Hope.

4 Paragraph 78.

5 Paragraph 80.

6 The mix-up was that the grant of common property was in respect of 'the common path coloured red on the said plan', whereas the area coloured red on the plan was (and was marked) the 'driveway'.

7 Paragraph 79.

terms.[1] So for example such evidence can, we think, be used to resolve ambiguity. Indeed in a previous case the Lands Tribunal has itself so held.[2] But perhaps the view taken in the present case was that there was no ambiguity to resolve.

Thirdly, positive prescription. Although the disposition was found to have granted common property, the Tribunal also considered the position if, contrary to that view, it had granted no more than a servitude in respect of the driveway, but the driveway had then been used by the disponees of the lower flat for an extended period. If common property was not created by the original disposition could it have been subsequently created by positive prescription? Prescription requires both a plausible (*habile*) title and also possession for 10 years.[3] The wording of the disposition provided the title. But, while there was possession, such possession would naturally be attributed to the right which the disponees had (the servitude) rather than to the right which they would be seeking to acquire (a right of common property). The law here is long-established.[4] To qualify for the purposes of prescription, the possession must be unequivocally referable to the right which it is sought to acquire. Otherwise the person against whom prescription is being asserted would have no means of knowing of the assertion, and hence no reason to interrupt the possession. Indeed, if the possession being taken was consistent with the servitude, there was no legal basis on which it *could* be interrupted. Hence, said the Tribunal, prescription would not have run.[5]

REGISTER OF OVERSEAS ENTITIES[6]

Background

The launch of the Register of Overseas Entities ('ROE') is part of a wider programme by the UK government to combat money laundering and other economic crimes. Its origins lie in a commitment made by the then Prime Minister, David Cameron, to an anti-corruption summit held in May 2016, that a register would be set up to disclose the 'beneficial ownership' of UK property held by foreign companies. The model was the People with Significant Control ('PSC') register which went live at much the same time, following legislation in 2015,[7] and which is a requirement for all UK companies. To some extent, therefore, the idea was to bring overseas entities into line with the transparency rules which now applied to UK companies.

1 G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 11-28.
2 *Welsh v Keeper of the Registers of Scotland* 2010 GWD 23-443, discussed in *Conveyancing 2010* pp 156–59.
3 Prescription and Limitation (Scotland) Act 1973 s 1.
4 D Johnston, *Prescription and Limitation* (2nd edn, 2012) paras 18.24 and 18.25. The leading case is *Houstoun v Barr* 1911 SC 134.
5 Paragraphs 81 and 82.
6 This section is by Kenneth Reid.
7 Small Business, Enterprise and Employment Act 2015. This inserted a new Part 21A (ss 790A–790ZG) and sch 1A into the Companies Act 2006.

A draft Bill for an ROE was published in July 2018[1] and was scrutinised in detail by a Parliamentary Joint Committee.[2] A period of near-silence then followed, broken only by occasional assurances that legislation would be brought forward as and when parliamentary time allowed.

All of that changed on 24 February 2022 when Russia invaded Ukraine. Plausibly or not, the setting up of an ROE was seen as a key measure against dirty money from Russia and an important part of the UK's response to the invasion. A Bill was introduced to the House of Commons within a week of the invasion, on 1 March, and completed all of its parliamentary stages, in both Houses, on 14 March. Royal assent was given on the following day to what now became the Economic Crime (Transparency and Enforcement) Act 2022. More has since followed. On 22 September 2022, a second Bill, the Economic Crime and Corporate Transparency Bill, was introduced to the UK Parliament. If and when enacted it will make a number of changes to the 2022 Act, some of which are mentioned below. Meanwhile the very idea of public access to personal data concerning beneficial ownership of companies was struck at by a judgment of the Court of Justice of the EU on 22 November 2002.[3] Post-Brexit,[4] the UK will presumably ignore difficulties of this kind.[5]

The ROE is the subject of Part 1 of the Economic Crime (Transparency and Enforcement) Act 2022. Further detail is provided by two pieces of secondary legislation, the Register of Overseas Entities (Verification and Provision of Information) Regulations 2022[6] (as amended)[7] and the Register of Overseas Entities (Delivery, Protection and Trust Services) Regulations 2022,[8] the latter being passed just in time for the opening of the ROE on 1 August 2022. The legislation as it stands at present is complex and not always easy to understand, although some assistance is available from official publications, most notably a 53-page guide produced by the sponsoring department, the Department for Business, Energy and Industrial Strategy (now Business and Trade).[9]

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1 As to which see *Conveyancing 2018* pp 174–77.

2 Report of the House of Lords and House of Commons Joint Committee on the Draft Registration of Overseas Entities Bill (20 May 2019: HL Paper 358, HC 2009).

3 *WM and Sovim SA v Luxembourg Business Registers*, CJEU, Case C-601/20. This struck down an amendment made to art 30 of the Fourth Anti-Money Laundering Directive (Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015) by art 1(5)(c) of the Fifth Anti-Money Laundering Directive (Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018) which had required EU member states to provide access to personal data concerning beneficial ownership to any member of the general public. This was held to be contrary to arts 7 (respect for private and family life) and 8 (protection of personal data) of the EU Charter of Fundamental Rights (2012/C 326/02).

4 The EU Charter of Fundamental Rights now has no application in the UK: see European Union (Withdrawal) Act 2018 s 5(4).

5 For the view that unrestricted public access to transparency registers might be contrary to Art 8 of the ECHR (right to respect for private and family life), see Ross Caldwell, Jonathan Seddon and Sally Anthony, 'Transparency, human rights and the registers' (2023) 68 *Journal of the Law Society of Scotland* Jan/35.

6 SI 2022/725.

7 By the Register of Overseas Entities (Verification and Provision of Information) (Amendment) Regulations 2022, SI 2022/1389.

8 SI 2022/870.

9 Department for Business, Energy & Industrial Strategy ('BEIS'), *Guidance for the Registration*

The ROE has no direct connection with that other transparency register which has been troubling conveyancers, the Register of Persons Holding a Controlled Interest in Land ('RCI'). And the two registers are quite different as to purpose and scope. The ROE is a UK register; the RCI applies in Scotland only.[1] The ROE aims to deter economic crime; the purpose of the RCI is to disclose to the land reformer, to government agencies, or to the merely curious, who if anyone stands behind the person named as owner on the Land (or Sasine) Register. The RCI will become – is already – familiar to conveyancers; the ROE will rarely be encountered but when it is encountered will matter a very great deal. Failure to register in the RCI has no conveyancing implications; failure to register in the ROE prevents a title being registered in the Land Register and so brings the conveyancing transaction to a juddering halt.[2] Finally, there is some overlap between the registers, ie cases where it is necessary to register in both registers. The main case is where land in Scotland is owned by an overseas entity

The RCI was last year's news and was covered in detail in our annual volume for 2021.[3] We will not cover it again here, save incidentally. By contrast, the introduction of the ROE was one of the main legislative events of 2022. It will be considered in some detail in the pages that follow.

Overview

The Register of Overseas Entities is, as its name suggests, a register containing certain details about certain overseas entities.[4] An 'overseas entity' is 'a legal entity that is governed by the law of a country or territory outside the United Kingdom', a 'legal entity' being 'a body corporate, partnership or other entity that (in each case) is a legal person under the law by which it is governed'.[5] So, broadly speaking, the ROE is for foreign companies. This includes companies

of Overseas Entities on the UK Register of Overseas Entities: Technical guidance for registration and verification (August 2022; available at www.gov.uk/government/publications/register-of-overseas-entities-guidance-on-registration-and-verification). By contrast, the official Explanatory Notes on the Act are valueless.

1 The legislation is the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021, SSI 2021/85, as amended by the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2021, SSI 2021/495.

2 The RCI legislation does not amend the Land Registration etc (Scotland) Act 2012; the ROE legislation does, as will be seen.

3 *Conveyancing 2021* pp 209–53. In addition, much of value on the RCI can be found (i) in the Scottish Government's *Explanatory Document on the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021* (December 2020; available at www.gov.scot/publications/register-persons-holding-controlled-interest-land-explanatory-document/), prepared in accordance with s 42 of the Land Reform (Scotland) Act 2016; (ii) a paper by the Scottish Property Professional Support Lawyers Group (April 2022, available at www.lawscot.org.uk/members/journal/issues/vol-67-issue-04/register-of-controlled-interests-when-will-it-apply/); and (iii) on the website of Registers of Scotland: https://kb.ros.gov.uk/other-registration-types/rci. RoS now has a helpful electronic flowchart (https://rci.ros.gov.uk/who-needs-to-register) in order to check whether registration is needed in particular cases.

4 Economic Crime (Transparency and Enforcement) Act 2022 ('ECA 2022') s 3.

5 ECA 2022 s 2.

incorporated in the Channel Islands or the Isle of Man as these territories are not part of the UK.

There is a single register for the whole of the UK, maintained by Companies House in Cardiff. The ROE is electronic, public,[1] and (with some restrictions for reasons of privacy or personal safety)[2] fully searchable. Documents submitted for registration are to be in English, regardless of the language of the original.[3] On registration, each overseas entity is given an 'overseas entity ID', the importance of which is explained below. Entries in the ROE must be updated on an annual basis.[4]

It is for overseas entities to apply for registration, in practice acting through a professional adviser. The way in which applications are made can be left until later. But it should be said at once that, for reasons that will be explained, this work will rarely be carried out by solicitors, at least in Scotland. So, unlike with the RCI, property lawyers will not be much troubled by the mechanics of registration. At most they will need to advise their overseas clients of the need to make an application to the ROE.

Although the purpose of the ROE is to disclose the beneficial owners of overseas entities owning land in the UK, or holding land under a registered lease, it is not a formal requirement of registration either that the overseas entity owns (or leases) land or that it has beneficial owners in the sense meant by the legislation. Here there is an obvious contrast with the RCI, which permits – indeed requires – registration only by persons who own land (or hold it on long lease) and who are to some degree controlled by 'associates'. And whereas the RCI (despite its name) is a register organised by property as well as by person, with separate entries for each property,[5] the ROE is organised by person, and the property owned or leased plays little part. Originally indeed it was not even to be mentioned on the register, although that will change as the result of an amendment contained in the new Economic Crime and Corporate Transparency Bill which is currently before the UK Parliament.[6]

Nonetheless there is a close link between the ROE and land. No overseas entity is likely to register there unless it already owns or leases land in the UK or intends to do so in the near future. And, as explained below, the price of owning or leasing land will often be a requirement to register in the ROE.

Conveyancing implications

Introduction

There are two types of reason why registration might be needed in the ROE. One is transactional. The other is non-transactional and also transitional. The

1 ECA 2022 s 21.
2 ECA 2022 ss 22–25.
3 ECA 2022 s 19.
4 ECA 2022 s 7.
5 Or multiple entries if there is more than one recorded person.
6 Clause 153 of the Bill adds a new para 2(1)(j) to sch 1 of the ECA 2022 providing that the 'required information' on the ROE for an overseas entity is to include the title number in the Land Register of any land in Scotland which is owned or held on long lease.

transitional reason can be left until later; but, in brief, any overseas entity holding land or a long lease of land in Scotland had to apply for ROE registration by 31 January 2023 if the entity's title to the land (or lease) entered the Land Register between 8 December 2014 and 31 July 2022. Most conveyancers will not have been much interested or involved in that. What matters for conveyancers is the transactional case. That is the concern of the present section.

The new questions in the Land Register application form

A good way into the topic is to look at the questions now added to the application form for registration in the Land Register. Under the heading of 'Register of Overseas Entities', these are:

- Are any parties to the application an overseas entity in terms of Part 1 of the Economic Crime (Transparency and Enforcement) Act 2022?
- If yes, are any of those overseas entities subject to registration and updating requirements that, under Schedule 4 of that Act, must be complied with for acceptance of this application?
- If yes, has each of those overseas entities complied with those registration and updating requirements?
- If yes, please provide their Overseas identity IDs.

The first of these questions is straightforward and the answer will or should be obvious in all cases. If *either* party to the deed being presented for registration – whether granter or grantee – is an overseas entity, then the Economic Crime Act is potentially engaged.

The second question goes to the heart of the matter. The involvement of an overseas entity does not, of itself, engage the provisions of the Economic Crime Act. Sometimes it will, sometimes it will not. The important thing is to be able to distinguish the two situations – a task which the application form is happy to leave to the applicant and the applicant's solicitor. And that in turn requires a mastery of the relevant statutory provisions. Although the question refers to schedule 4 of the Act, the main effect of that schedule, for present purposes, is to insert a new schedule 1A into the Land Registration etc (Scotland) Act 2012. The provisions in schedule 1A are the provisions that really matter. All conveyancers need to know about them.

The third question follows on from the second. If the transaction falls within schedule 1A of the 2012 Act, then, for the deed to be registrable in the Land Register, the overseas entity must be registered in the ROE – and, where necessary, must have gone through the updating procedures (as to which see below). Conversely, if the transaction does not fall within schedule 1A, then there are no ROE implications.

As already mentioned, one consequence of ROE registration is for the overseas entity to be given an overseas entity ID.[1] The final question asks for that ID number. It is likely to become standard practice to include the ID number within the deed itself as part of the designation of the overseas entity. Of course, if the

1 ECA 2022 s 5.

transaction is untouched by the ROE – if, in other words, schedule 1A of the 2012 Act does *not* apply – then there is no ID number to be entered.

Once in a blue moon?

How common is it for transactions to involve an overseas entity? The answer, for most law firms, is likely to be: very uncommon. But it will occur. And the fact that it occurs infrequently only serves to increase the perils. Few conveyancers will deal sufficiently often with overseas entities to feel entirely at home with the law and the procedures.

Registers of Scotland provide annual statistics for ownership of land by country of origin, the most recent of which show the position as at 31 December 2021.[1] Not more than 4,000 titles on the Land Register were held by overseas entities, representing around 0.2% of all titles on the Register.[2] Of those, the large majority (90%) were ownership titles with the remainder being titles held on long lease.[3] Most were in urban areas. How often these titles change hands – the important question from a conveyancing point of view – is hard to say; there are no published statistics. Overseas companies owning land in Scotland were mainly incorporated in Jersey, Guernsey, the Isle of Man, and the British Virgin Islands.[4] For this the tax regimes of these territories may provide an explanation.

The meaning of 'registered overseas entity'

As already mentioned, it is the new schedule 1A to the Land Registration etc (Scotland) Act 2012 which sets out which conveyancing transactions do – and therefore, by implication, which do not – engage the ROE regime. A key term in the schedule is 'registered overseas entity'. Where schedule 1A applies, the Keeper must reject an application for registration unless the overseas entity is either a 'registered overseas entity' or an 'exempt overseas entity'.

We will come to 'exempt overseas entities' shortly. As for a 'registered overseas entity' this, you might imagine, means an overseas entity which is registered in the ROE. That indeed is true,[5] but it is only part of the truth. To explain why, it is necessary to say something about updating duties.

On updating, the ROE works in a different way from the RCI. An entry in the RCI falls to be updated only as and when something changes; but when something does change – for example, there is a new associate or a person

1 Available at www.ros.gov.uk/data-and-statistics/land-and-property-titles-by-country-of-origin.
2 Registers of Scotland, *Land and property titles in Scotland by country of origin as at 31 December 2021* (2022) para 4.1. This comprises (i) 3,192 titles in respect of limited companies plus (ii) a few hundred other titles which are mixed as to owner or held by limited partnerships. For the comparable figures in England and Wales, see Department for Business, Energy & Industrial Strategy, *A Register of Beneficial Owners of Overseas Companies and Other Legal Entities: Understanding the potential impacts of the proposed register through qualitative interviews with industry stakeholders* (2018; available at www.gov.uk/government/publications/a-register-of-beneficial-owners-of-overseas-companies-and-other-legal-entities-potential-impacts) 16–18.
3 Figure 7.
4 Paragraph 4.1.
5 Land Registration etc (Scotland) Act 2012 sch 1A para 9(1).

ceases to be an associate – the Keeper must be told within 60 days.[1] The rules for the ROE are different. Following the initial act of registration there is a requirement of updating on an annual basis. More precisely, the overseas entity must file a report disclosing the current position at the end of each 'update period' (generally a period of 12 months) and this must be done during the 14 days after the update period has finished.[2] We say more about this later. The important point, for present purposes, is that an overseas entity which fails to update ceases to be a 'registered overseas entity' for the purposes of schedule 1A of the 2012 Act, and remains 'unregistered' unless or until it remedies the default.[3]

This is easy to overlook, although the second and third questions on the application form for registration contain a useful prompt by referring to 'registration *and updating* requirements'. The issue is not yet a live one because the ROE is less than a year old. But, once the initial rush to register has come to an end, whether the entry has been updated on time will often be the main question.

'Registered overseas entity': the question of evidence

How is a party to a conveyancing transaction, or anyone else, to determine whether an overseas entity is 'registered' in the sense of schedule 1A? The answer is to make a search in the ROE. As the register is electronic and also open to the public, anyone is free to search the ROE for himself or herself,[4] but in practice solicitors are likely to rely, as usual, on professional searchers.

The meaning of 'exempt overseas entity'

The Keeper cannot reject an application for registration in the Land Register if the overseas entity is an 'exempt overseas entity'. An 'exempt overseas entity' is one which has been exempted by regulations made under s 34(6) of the Economic Crime Act. No such regulations have been made and we are not aware of any in the pipeline. So for the moment at least all references in schedule 1A to exempt overseas entities can be disregarded.

Effect on conveyancing transactions

The fact that a conveyancing transaction involves an overseas entity, whether as granter or grantee, does not of itself affect the transaction. The transaction is affected only if schedule 1A of the 2012 Act applies. But where schedule 1A

1 Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021 reg 12.

2 ECA 2012 s 7.

3 Land Registration etc (Scotland) Act 2012 sch 1A para 9(2), (3). If the amendment to sch 1A contained in the new Economic Crime and Corporate Transparency Bill is enacted, an overseas entity will also cease to be 'registered' for any period during which it fails to respond to a request by Companies House for information under (the proposed new) s 1092A of the Companies Act 2006: see cl 165(2) of the Bill, inserting a new para 9(2)–(4) into sch 1A of the 2012 Act.

4 At https://find-and-update.company-information.service.gov.uk/.

does apply – as very often it will – the Keeper must refuse the application for registration unless the overseas entity is a 'registered overseas entity' (or an 'exempt overseas entity') in the sense described above. In effect, the transaction cannot then proceed.

When, then, does schedule 1A apply?[1] Only certain deeds are affected, mainly dispositions, notices of title, long leases, and assignations of long leases. The emphasis, however, is on substance rather than on form, so that for example a minute of variation of lease which extends the subjects let will be treated as a new lease.[2]

In examining the rules it will be convenient to distinguish (i) cases where the overseas entity is the granter of the deed from (ii) cases where the overseas entity is the grantee. We begin with the second.

Overseas entity as grantee

In force from …

The provisions of schedule 1A of the 2012 Act which govern deeds granted *in favour of* an overseas entity came into force on 5 September 2022.[3]

Dispositions/notices of title

A disposition[4] in favour of an overseas entity cannot be registered in the Land Register unless the overseas entity is a 'registered overseas entity', that is to say, unless the overseas entity is registered in the ROE and the requirement of annual updating has been complied with.[5] The condition is also satisfied if the overseas entity is an 'exempt overseas entity', although no entities have yet been so designated. The Keeper here has no discretion: if the condition is not satisfied she *must* reject the application. The same is true if, instead of registering a disposition or other conveyance directly, the overseas entity presents a notice of title for registration.[6] As we have seen, the new questions on the application form for registration are designed to tease out the necessary information, and the applicant for registration must give its overseas entity ID.

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1 On this topic, Registers of Scotland have produced a helpful guide: see https://kb.ros.gov.uk/land-and-property-registration/about-register-of-overseas-entities.

2 On that topic, see Peter Webster, *Leasehold Conditions* (Studies in Scots Law vol 12, 2022) para 2-16.

3 Economic Crime (Transparency and Enforcement) Act 2022 (Commencement No 3) Regulations 2022, SI 2022/876, reg 4(c).

4 Including an *a non domino* disposition registered under s 43 of the Land Registration etc (Scotland) Act 2012: see sch 1A para 5.

5 LR(S)A 2012 sch 1A para 1. Paragraph 1(3) of sch 1A, hardly comprehensible at first reading, refers to the case where (i) an overseas entity has granted or assigned a lease over a plot of land which is still in the Register of Sasines, and (ii) as a result of the registration of the lease or assignation in the Land Register, there is automatic registration in the Land Register of the plot of land. On that topic, see K G C Reid and G L Gretton, *Land Registration* (2017) paras 7.10 and 7.11. That situation needs to be carved out of para 1 because of the way in which para 1(1)(b)(i) is worded.

6 LR(S)A 2012 sch 1A para 3.

It is not quite clear precisely when the condition of being a 'registered overseas entity' (or 'exempt overseas entity') must be satisfied. The provision says merely that:[1]

> The Keeper must reject the application unless the overseas entity is –
> (a) a registered overseas entity, or
> (b) an exempt overseas entity.

The point has some importance because an entity which is a 'registered overseas entity' one day can cease to be a 'registered overseas entity' the next day due to a failure to comply with the duty to update. Like a light operated by a switch, the status as 'registered overseas entity' can go off and on. A natural reading of the provision just quoted is to say that the overseas entity must be 'registered' as at the date on which the application is made. But what if an entity, properly 'registered' at that date, ceases to be so 'registered' at the date on which the Keeper makes her decision, having failed to comply with the timetable for updating the entry? Must the Keeper then reject the application? On the whole, we tend to think not, but the provision is unfortunately not clear.

The implications of the new requirements for conveyancers are fairly obvious. Those acting for an overseas-entity grantee must advise their client of the need to register in the ROE. Indeed, as ROE registration is a slow and cumbersome process, this advice should be given as soon as possible, preferably some months before the acquisition is due to take place. Registration can, and should, be done in advance of the acquisition: the ROE imposes no requirement that the overseas entity own land in the UK. An overseas entity will have to be careful about concluding missives, and committing to a fixed day for settlement, if there is doubt as to whether ROE registration will be completed by that day.

The need for an overseas-entity grantee to be registered in the ROE is of concern to the granter as well, partly to ensure the smooth-running of the transaction (the overseas entity is likely to seek to delay settlement if it has not yet managed to get on to the ROE) and partly because of the risk, no doubt remote, that the overseas entity has no intention of registering in the ROE and hence in the Land Register (thus leaving the granter as owner and subject to the liabilities that ownership carries). In these respects the granter/seller can be assisted by a suitable provision in missives, as we will see, although this is only of help if the contract is actually concluded.

Long leases and assignations of long leases

Identical rules apply in respect of long leases or assignations of long leases granted in favour of an overseas entity.[2] Both will be rare: only around one-tenth of titles registered in the Land Register in the name of an overseas company are leasehold titles.[3]

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1 LR(S)A 2012 sch 1A para 1(2).

2 LR(S)A 2012 sch 1A paras 1 and 3 read with the definition of 'qualifying registrable deed' in para 9(1).

3 Registers of Scotland, *Land and property titles in Scotland by country of origin as at 31 December 2021* (2022) figure 7.

Other deeds

No other deeds granted in favour of overseas entities fall within schedule 1A of the 2012 Act. So for example if a client takes a loan from a bank incorporated in the Republic of Ireland, the resulting standard security in favour of the bank will not be covered by schedule 1A and there will be no requirement that the bank is registered with the ROE.

Overseas entity as one only of the grantees

A cautious view is that the provisions of schedule 1A apply even if an overseas entity is only one of two or more grantees. As a matter of legal policy that ought certainly to be so. The provisions themselves, however, are not as clear as might be wished. In relation to leases and assignations of leases, they refer to the overseas entity becoming '*the* tenant under a registered lease',[1] which rather suggests that the overseas entity must be the sole tenant. The corresponding provision for dispositions, however, is more equivocal: shorn of an article, definite or indefinite, it simply requires that the overseas entity 'be entered as proprietor in the proprietorship section',[2] a formulation which seems to allow for '*a* proprietor' and not inevitably for '*the* proprietor'.

Voluntary first registration

Finally, the same rules apply in respect of an application for voluntary first registration in respect of a plot of land. If the owner/applicant is an overseas entity, an application for voluntary registration must be refused unless the overseas entity is a 'registered overseas entity' (or an 'exempt overseas entity').[3] The need for ROE registration is likely to act as a strong disincentive to proceed with voluntary registration.

Overseas entity as granter

In force from …

The provisions of schedule 1A of the 2012 Act which govern deeds granted *by* an overseas entity came into force on 1 February 2023.[4] This was to allow overseas entities which owned or leased land to register with the ROE, something which (as already mentioned) had to be done by 31 January 2023 in cases where the land (or lease) was acquired between 8 December 2014 and 31 July 2022. We say more about the transitional registration requirements at the end of this section.

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1 LR(S)A 2012 sch 1A paras 1(1)(b)(ii) and 3(1)(b)(ii).
2 LR(S)A 2012 sch 1A paras 1(1)(b)(i) and 3(1)(b)(i).
3 LR(S)A 2012 sch 1A para 6. Applications for voluntary registration are made under s 27.
4 Economic Crime (Transparency and Enforcement) Act 2022 (Commencement No 3) Regulations 2022, SI 2022/876, reg 4(c) read with the Economic Crime (Transparency and Enforcement) Act 2022 sch 4 para 11. The provisions were thus suspended during the so-called 'transitional period' (1 August 2022 to 31 January 2023).

Only land acquired or leased on or after 8 December 2014

Importantly, land which the granter acquired or leased before 8 December 2014 is unaffected by schedule 1A, with the minor exception of where (due for example to APR or voluntary registration) a previously Sasine title entered the Land Register on or after that date. And even land acquired or leased on or after 8 December 2014 would escape the legislation in the unlikely event that title was not completed by registration in the Land Register. Such registration is a pre-requisite for the ROE regime to apply. Thus suppose that a company incorporated in Jersey buys land in March 2023, does not trouble to register its title in the Land Register, and sells the land a month later. Neither the purchase nor the sale transaction is subject to schedule 1A of the 2012 Act and there is no need for the company to register in the ROE.

Dispositions/notices of title

Subject to the rule as to date of acquisition, just discussed, a disposition granted by an overseas entity cannot be registered in the Land Register unless the overseas entity is a 'registered overseas entity' or (although none exists at present) an 'exempt overseas entity'.[1] If the condition is not satisfied, the Keeper must reject the application. The condition must be met not, as might be expected, as at the date on which the application for registration is made, but 'as at the date of delivery of the deed'. So if the granter qualifies as 'registered' on the date of delivery, the Keeper must accept the application even if, due to a later failure to comply with the timetable for updating the information on the ROE, the granter has ceased to count as 'registered'. If, on the other hand, the granter is not 'registered' at the time of delivery but is 'registered' before the application to the Land Register is made, the Keeper must reject the application – unless the disposition has meanwhile been redelivered. None of this seems terribly sensible.

The same rule applies where, for whatever reason, the ultimate registration is of a notice of title rather than of the underlying disposition or other conveyance.[2] But in that case the relevant date on which the granter/overseas entity requires to be 'registered' is the date of the grantee's application for registration in the Land Register.

All of this has implications for those advising the parties. A law firm acting for the purchaser (or gratuitous grantee) will need to ensure that the seller/granter is already registered in the ROE and will remain a 'registered overseas entity' on the projected date of delivery of the disposition. To avoid unpleasant surprises, the position should be checked as early on in the transaction as possible. A search in the ROE will provide the necessary information. Assuming ROE registration to have occurred, the only issue to consider is whether the annual updating requirement has been complied with – an issue which cannot arise before 1 August 2023 (ie one year after the ROE first opened its doors) at the earliest.

1 LR(S)A 2012 sch 1A para 2.
2 LR(S)A 2012 sch 1A para 4.

In practice it is highly probable that the overseas entity will already have registered in the ROE because (i) for entities which acquired the land between 8 December 2012 and 31 July 2022, the deadline under the transitional rules for ROE registration expired the day before the provisions being considered here came into force, on 1 February 2023 (see above), and (ii) for entities which acquired the land on or after 5 September 2022, ROE registration was already a prerequisite of registration in the Land Register (as we have just seen). That only leaves unaccounted for (iii) land acquired between 1 August and 4 September 2022.[1]

Those acting for the seller/granter also have an interest in ensuring that their client is registered in the ROE and that the registration is up-to-date and will remain so until the transaction is settled. For not only will this assist the smooth-running of the transaction, it will also avoid the criminal liability which attaches to an overseas entity which has the temerity to deliver a disposition at a time when it is not 'registered'.[2] The latter is a serious matter with a maximum penalty of five years' imprisonment or a fine or both – a penalty which is visited not just on the overseas entity but on every officer of the entity who is in default.[3] Draconian penalties are indeed a feature of the legislation, although to what extent they will turn out to be enforceable against people who, in most cases, will not be resident in the UK must be a matter of conjecture.

Long leases and assignations of long leases

Identical rules apply in respect of long leases or assignations of long leases granted by an overseas entity.[4] A speciality applying to leases (and other bilateral deeds) is that the deed is considered to be granted as at the date of delivery even if only executed, at that time, by the overseas entity[5] – although why the date of *granting* is thought to be of significance is a mystery which we have yet to unravel.

Standard securities

Identical rules also apply in respect of standard securities granted by an overseas entity.[6] This may be contrasted with where a standard security is granted *in favour of* an overseas entity, a transaction which (as we have seen) does not engage any of the provisions of schedule 1A of the 2012 Act and so does not require ROE registration.

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1 Why land acquired during this brief window should be exempt from a registration requirement is unclear.

2 LR(S)A 2012 s 112A. Again, this provision did not come into operation until 1 February 2023: see ECA 2012 sch 4 para 11.

3 The validity of the delivered deed is not, however, affected: see LR(S)A 2012 s 112A(4).

4 LR(S)A 2012 sch 1A paras 2 and 4 read with the definition of 'qualifying registrable deed' in para 9(1).

5 LR(S)A 2012 sch 1A para 8.

6 LR(S)A 2012 sch 1A paras 2 and 4.

Other deeds

No other deeds granted by overseas entities fall within schedule 1A of the 2012 Act. So for example, there are no ROE implications in a case where an overseas entity grants a deed of conditions or a deed of servitude or a short lease.

Overseas entity as one only of the granters

Does schedule 1A strike if the land is co-owned and only *one* of the co-owners (and granters of the deed) is an overseas entity? In policy terms the answer ought to be yes. But the relevant provisions, which apply only where '*the* granter of the deed is an overseas entity' (and not '*a* granter'),[1] rather suggests the contrary. Nonetheless, the path of prudence would be to ensure that the overseas entity is registered in the ROE.

Some exceptions

There are a number of exceptions, that is to say, cases in which the Keeper can accept the application for registration in the Land Register despite the overseas-entity granter being neither 'registered' nor 'exempt'.[2] The list has a rather random feel about it, and some at least of the exceptions refer to situations which will rarely if ever apply. Some too would not appear to engage the relevant provisions at all because the granter of the deed is not an overseas entity. For what it is worth, the list is:

(a) where the application for registration in the Land Register[3] is made in pursuance of a statutory obligation or court order, or in respect of a transfer that occurs by operation of law;[4]
(b) where the application is made in pursuance of a contract entered into before the later of (i) 5 September 2022 and (ii) the date on which the granter's interest was registered in the Land Register;
(c) where the application is made in pursuance of the exercise of a power of sale or lease by the creditor in a standard security that was registered on or after 8 December 2014;
(d) where the application is made in pursuance of the exercise of a community right to buy;[5]
(e) where the Scottish Ministers consent to the registration of the deed; or
(f) where the deed is granted by an insolvency practitioner of a kind specified in regulations in circumstances specified in regulations.

1 LR(S)A 2012 sch 1A paras 2(1)(b) and 4(1)(b).
2 LR(S)A 2012 sch 1A paras 2(2)–(5), 4(2)–(5) and 7.
3 It seems a little odd that here, and in many of the other cases, the exception is defined by reference to the cause of the application as opposed to the cause of the deed which is being presented for registration. The focus seems to be in the wrong place.
4 The reference to a transfer occurring by operation of law is hard to understand given that paras 2 and 4 are limited to cases involving specified deeds (dispositions, long leases, assignations of long leases, and standard securities).
5 More precisely, a right to buy conferred by parts 2 (community right to buy), 3 (crofting community right to buy) or 3A (community right to buy abandoned, neglected or detrimental land) of the Land Reform (Scotland) Act 2003 or part 5 of the Land Reform (Scotland) Act 2016 (right to buy land to further sustainable development).

Exception (f) depends on regulations which have yet to be made by Scottish Ministers. Regulations can also be made to amplify exception (e), although the exception is self-standing.[1] Under this exception, Scottish Ministers can consent to the registration of a particular deed where they are satisfied both (i) that at the time of the deed's delivery the grantee did not know and could not reasonably have been expected to know of the Keeper's duty to reject the application, and also (ii) that in all the circumstances it would be unjust for the deed not to be registered. The first of these conditions is puzzling. Given that most or all grantees will engage a solicitor for the transaction, it is hard to think of circumstances where a grantee neither knew nor ought reasonably to have known of the rejection rule.

A new clause in missives?

Is a new clause needed in missives? Maybe not. Anyone buying from an overseas entity is already protected by the standard clauses found in most missives. So, for example, a title offered by an overseas entity where the entity was neither 'registered' in the ROE nor 'exempt' might be a good title but it could not be said to be a marketable one.[2] And any disposition which was granted by such an overseas entity would breach the requirement to provide 'such documents and evidence as the Keeper may require to enable the Keeper to update the Title Sheet of the Property to disclose the Purchaser or their nominees as the registered proprietor of the Property' if an application to register the disposition was one which, under schedule 1A of the 2012 Act, the Keeper was bound to refuse.[3] Furthermore, advance warning of the seller's status would be provided by the seller's response to clause 19.5 of the Scottish Standard Clauses or equivalent ('The Seller is not a corporate body registered in any jurisdiction outwith the United Kingdom').

Buyers from an overseas entity, therefore, have a reasonable level of protection. Those selling to an overseas entity, however, are not similarly protected by current missives. Yet they too will want to know the purchaser's status as an overseas entity, and they too will want to ensure that the entity is either 'registered' or 'exempt' so that the transaction proceeds smoothly and they are not left with the property on their hands because the purchaser is unable to register its title in the Land Register. And even for those buying from an overseas entity, a bespoke clause would provide clearer rules and avoid possible arguments about the extent of the seller's obligations.

At least one bespoke clause is already in circulation.[4] The Property Standardisation Group, diligent and generous as always, has wrestled long

1 It is set out in LR(S)A 2012 sch 1A para 7.
2 It would thus be in breach of, for example, clause 18.1(i) of the Scottish Standard Clauses (5th edn, 2022) – to say nothing of the common law obligation in the same terms.
3 See eg Scottish Standard Clauses cl 18.1.2.2.
4 The sudden introduction of the ROE probably came too late to be taken into account in the latest (fifth) revision of the Scottish Standard Clauses, which came into effect on 29 August 2022.

and hard with the legislation and added a clause to its Offer to Sell.[1] Although the clause seems capable of improvement, as all clauses are, the PSG clause is a valuable first attempt to get to grips with the issues.[2] With some hesitation we offer a clause of our own. It is designed to fit into the Scottish Standard Clauses but could easily be adapted for other styles of offer. The footnote references explain the reasons for particular choices of words. The clause is:

OVERSEAS ENTITIES

1. Where the Seller is or includes[3] an overseas entity whose title to the Property was registered in the Land Register on or after 8 December 2014,[4] the overseas entity warrants that –
   (a) it is a registered overseas entity[5] or exempt overseas entity[6] as at the date of this offer,[7] and
   (b) it will be a registered overseas entity or exempt overseas entity as at the date of delivery of the Disposition.[8]
2. Where the Purchaser is or includes an overseas entity, the overseas entity warrants that it is a registered overseas entity or exempt overseas entity as at the date of this offer.[9]
3. In either case, the overseas entity will obtain at its own expense and exhibit or deliver to the Purchaser or Seller (as the case may be) –

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1 See www.psglegal.co.uk/. The clause comes right at the end of the Offer, supplemented by the list of definitions found right at the start of the Offer, in cl 1.1. An equivalent clause has also been added to the Offer to Grant a Lease. The PSG also provides admirably succinct Guidance Notes on the ROE.

2 The clause requires the overseas entity to confirm that it is fully registered in the ROE but without indicating the date or dates on which this is to be true – a potentially important omission because an overseas entity which is fully registered one day can be unregistered the next due to a failure to update. The confirmation extends to a statement that 'the information held in the ROE for the Seller is correct, complete and up to date', although it is hard to see why any of that matters from the purchaser's point of view. In particular, an overseas entity can be fully registered within the legislation even although the information on the ROE is incorrect or out-of-date, provided that the annual timetable for updating is complied with.

3 The ROE rules may apply where the overseas entity is only one of the owners (see above): hence 'includes' as well as 'is'.

4 Property registered before that date is excluded from the ROE regime.

5 'Registered overseas entity': the status is acquired on registration in the ROE but it is lost for any period during which the overseas entity has defaulted in the annual obligation to update: see LR(S)A 2012 sch 1A para 9(1)–(3). The Keeper must refuse the application for registration if the entity is not a 'registered overseas entity' in this sense.

6 'Exempt overseas entity': this is future-proofing; at the time of writing no overseas entities had been exempted.

7 'As at the date of this offer': a smoking-out provision: the purchaser will wish to know the position as soon as possible.

8 'As at the date of delivery of the Disposition': this is the crucial date; it is only where the overseas entity is neither 'registered' nor 'exempt' at this date that the Keeper must reject the application: see LR(S)A 2012 sch 1A paras 2(1)(c) and 4(1)(c).

9 'As at the date of this offer': a smoking-out provision: the seller will wish to know the position as soon as possible. The clause might have gone on to require the overseas entity to be 'registered' or 'exempt' as at the date of the purchaser's application for registration, being the point in time which actually matters (or so it appears) under LR(S)A 2012 sch 1A para 1. But this would add nothing: the purchaser could avoid default merely by delaying the application for registration.

(a) not later than the conclusion of the Missives,[1] a search in the Register of Overseas Entities against the overseas entity, and
(b) as close as practicable to settlement, an updated search.

4. The following terms used in this clause have the meaning given by schedule 1A paragraph 9 of the 2012 Act:[2] 'exempt overseas entity'; 'overseas entity'; 'Register of Overseas Entities'; and 'registered overseas entity'.[3]

Double registration: the ROE and the RCI

The double-registration requirement

The ROE is not alone in covering overseas entities. They are also targeted by the Register of Persons Holding a Controlled Interest in Land ('RCI'), being one of the five categories set out in schedule 1 of the RCI Regulations 2021 in respect of which registration is potentially needed.[4] More precisely, an overseas entity owning land in Scotland which has 'associates' (roughly the equivalent of the 'beneficial owners' of the ROE) must register details of those associates in the RCI. Registration in the ROE does not absolve the overseas entity from this requirement. That may eventually change, because the Scottish Government's policy as to the RCI is not to require registration of entities which are subject to other transparency regimes.[5] But for the moment registration in both registers is needed. Other examples of double registration are conceivable, for example where an overseas entity owns land in trust, trusts being another of the categories where RCI registration is potentially required.[6]

Meaning of 'beneficial owner'/'associate'

In registering an overseas entity in either register it is necessary to identify and name any 'beneficial owners' (ROE) or 'associates' (RCI). These different terms largely carry the same meaning. Indeed the rather extensive legislative provisions on this topic are similar or sometimes identical as between the two registers.[7] This is not because one set of legislation has copied from the other but because they have a common source in the equivalent provisions in the Companies Act 2006 about the PSC register

1 'Not later than the conclusion of the Missives': the other party will wish to know the position as soon as possible.
2 So far as the Scottish Standard Clauses are concerned, a bare reference to 'the 2012 Act' is sufficient because the term is defined in the interpretation clause. If this clause is being used in other contexts it may be necessary to give the name of the Act in full.
3 Of course it would be possible to give the definitions in full in the clause or elsewhere in the offer; but this would be to allocate a disproportionate amount of space to a clause which will rarely be needed.
4 Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021 ('RCI Regulations 2021') sch 1 part 5.
5 Such entities are listed in sch 2 of the RCI Regulations 2021. On this topic, see *Conveyancing 2021* pp 242–44.
6 RCI Regulations 2021 sch 1 part 3.
7 The legislative provisions are ECA 2022 sch 2 and the RCI Regulations 2021 sch 1 part 5 (paras 12–25).

for companies.[1] Many provisions are copied word for word from the 2006 Act.

For the purposes of the ROE, a person is a 'beneficial owner' of an overseas entity if the person satisfies any one of the following five conditions, namely that the person[2] –

- holds, directly or indirectly, more than 25% of the shares in the overseas entity;[3]
- holds, directly or indirectly, more than 25% of the voting rights;[4]
- holds, directly or indirectly, the right to appoint or remove a majority of the board of directors;[5]
- has the right to exercise, or actually exercises, significant influence or control over the overseas entity;[6] or
- has the right to exercise, or actually exercises, significant interest or control over the activities of an entity which is not a legal person (such as a trust or unincorporated association) where that entity satisfies any of the previous four conditions.

The definition of 'associate' for the purposes of the RCI is substantially the same but with the omission of the first of the five conditions.[7] Each definition has a number of exceptions which need not concern us here.[8]

The inclusion of 'indirect' holdings is designed to catch the case where, rather than a person holding the right in question, the person has a majority stake in a different overseas entity (or, in the case of the ROE, in any legal entity), and that entity either holds the right or is part of a chain of connected entities which ends with an entity which holds the right.[9] In that case the person is said to hold the right 'indirectly' and so is a beneficial owner/associate.[10]

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1 Companies Act 2006 sch 1A. These provisions in turn owe something to the Fourth Anti-Money Laundering Directive (Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015).

2 ECA 2022 sch 2 para 6.

3 On calculating shareholdings for this purpose, see ECA 2022 sch 2 para 13.

4 On the meaning of 'voting rights', see ECA 2022 sch 2 para 14; RCI Regulations 2021 sch 1 para 20.

5 On the meaning of appointment or removal of a majority of the board of directors, see ECA 2022 sch 2 paras 16 and 17; RCI Regulations 2021 sch 1 para 21.

6 For the RCI, the RCI Regulations 2021 sch 1 para 15 gives examples of significant interest and control. For discussion in the context of the ROE, see BEIS, *Guidance for the Registration of Overseas Entities* paras 6.1–6.8.

7 RCI Regulations 2021 sch 1 para 12. The omission is less important than it might seem because a person who holds more than 25% of the voting rights will also often hold more than 25% of the shares.

8 In particular: ECA 2022 sch 2 paras 8 and 9; RCI Regulations 2021 sch 1 para 13.

9 ECA 2022 sch 2 para 18; RCI Regulations 2021 sch 1 para 22. 'Majority stake' is defined as including eg the case where someone holds a majority of the voting rights in the entity in question.

10 A helpful worked example is given as diagram 11 in para 145 of the Scottish Government's *Explanatory Document on the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021*.

A number of anti-avoidance provisions in the legislation deal with, for example, people working in concert ('joint arrangements') or those who control a right without, in a formal sense, holding it.[1]

What if there are no beneficial owners? In that case registration in the ROE (but not the RCI) is still required, but the application for registration must identify, instead, the 'managing officers', that is to say, the directors, secretary and managers or equivalent.[2]

The registration process

The first pre-registration requirement: 'reasonable steps' to identify beneficial owners

Before an application for registration in the ROE can be made, the overseas entity must comply with two pre-registration requirements. The first is to take 'reasonable steps' (i) to identify any beneficial owners,[3] and (ii) to obtain in respect of such owners the 'required information',[4] which includes, where the beneficial owner is an individual, the owner's name, date of birth, nationality, and usual residential address.[5] The 'reasonable steps' must include the giving of an 'information notice' to any person known or reasonably believed to be a beneficial owner, asking the person to confirm or deny such a status and, if the status is confirmed, to confirm and if necessary supply the 'required information'.[6] Information notices can also be sent to anyone else believed to hold relevant information.[7] Responses to an information notice must be made within a month.[8] It is a criminal offence to fail to respond or to give false information.[9]

The second pre-registration requirement: verification of the information

The information having been gathered, it must then be independently verified.[10] This second pre-registration requirement reflects a concern that overseas entities might, knowingly or otherwise, be economical with the truth. Verifiers are drawn from persons or bodies supervised in the UK under the Money Laundering Regulations and include independent legal professionals, auditors, insolvency practitioners, external accountants, credit institutions and finance institutions.[11] So solicitors, if they wish, can act as verifiers (or 'UK-regulated

1 ECA 2022 sch 2 paras 12 and 20; RCI Regulations 2021 sch 1 paras 18, 19 and 23.
2 ECA 2022 ss 4(2) and 44(1).
3 Strictly '*registrable* beneficial owners', that is to say, beneficial owners who are not exempt (see ECA 2022 sch 2).
4 The 'required information' is set out exhaustively in ECA 2022 sch 1.
5 ECA 2022 s 12.
6 ECA 2022 s 12(3), (4).
7 ECA 2022 s 13.
8 ECA 2022 ss 12(5) and 13(3).
9 ECA 2022 s 15.
10 ECA 2012 s 16.
11 Register of Overseas Entities (Verification and Provision of Information) Regulations 2022, SI 2022/725, reg 3, referring to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, regs 3 (definition of 'relevant person') and 8.

agents' as they are sometimes called). An 'agent assurance code' is needed from Companies House.[1] A non-exhaustive list of verifiers has been made available by Companies House.[2]

In relation to beneficial owners, what requires to be verified is the information that the overseas entity will go on to provide in its application to the ROE, namely (i) the 'required information' about each beneficial owner, and (ii) the basis on which such persons are said to be beneficial owners.[3] There is no requirement to verify the number of beneficial owners claimed to exist. If there are no beneficial owners, then the verifier must instead verify the corresponding information as to each managing officer of the overseas entity. In all cases the 'required information' in respect of the entity itself must also be verified.[4]

Verification can be arduous, even perilous. To 'verify' in the sense of the legislation is to 'verify on the basis of documents or information in either case obtained from a reliable source which is independent of the person whose identity is being verified'.[5] The expectation is that the overseas entity will provide the necessary documents, although in some cases there will be a need for further enquiry. The Department of Business, Energy and Industrial Strategy has issued a guide to verification which is helpful yet also intimidating in its investigatory zeal.[6] Verifiers are expected to be 'sceptical, but not forensic'.[7] The risk-based approach familiar from the Money Laundering Regulations does not apply. Instead, verifiers 'must be confident they've seen documents and/or information from reliable, independent sources to verify each piece of relevant information'.[8] The guidance finishes with a table of the documentation appropriate to the verification of different kinds of information.

The application for registration

The pre-registration requirements having been satisfied, the overseas entity can proceed to apply for registration. Applications are made electronically.[9] Unlike the RCI, a fee is charged, which has been set at £100. The information that must accompany the application is, by and large, the information that was subject to the verification process.[10] On completion of registration the overseas entity is issued with an 'overseas entity ID'.[11]

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1 For details, and information on how to obtain a code, see www.gov.uk/guidance/agent-assurance-codes#how-to-use-the-code.
2 www.gov.uk/government/publications/find-a-uk-regulated-agent-to-verify-information-for-an-overseas-entity.
3 SI 2022/725 regs 5(2) and 6(1); BEIS, *Guidance for the Registration of Overseas Entities* para 13.30.
4 As to which see ECA sch 2 para 2.
5 SI 2022/725 reg 6(6)(b).
6 BEIS, *Guidance for the Registration of Overseas Entities*. The guidance on verification is on pp 29–54.
7 BEIS, *Guidance* para 13.57.
8 BEIS, *Guidance* para 13.12.
9 Register of Overseas Entities (Delivery, Protection and Trust Services) Regulations 2022, SI 2022/870. Applications can be made at www.gov.uk/guidance/register-an-overseas-entity. The same website also contains useful practical information as to the information that needs to accompany the application.
10 For full details, see ECA 2022 s 4.
11 ECA 2022 s 5.

The resulting entry for the overseas entity on the ROE is available for public inspection.[1] But certain information, for example full dates of birth and home addresses, is not publicly available.[2] And as with the security-declaration procedure in the RCI,[3] those beneficial owners or managing officers who believe themselves 'at serious risk of being subjected to violence or intimidation' may request the registrar to withdraw information about them from public view.[4]

Annual updating

The information on the ROE must be updated, on an annual basis, during the 14 days following the expiry of each successive 'update period' – an unexpectedly narrow window in which to act.[5] Update periods occur at 12-monthly intervals, so that the first update period ends precisely 12 months after the original date of registration.[6] The information provided must relate to the position at the end of the update period in question.[7] Updating is needed even where nothing has changed, but in such a case it is sufficient to confirm the information previously provided.[8] Where new information needs to be submitted, typically because of a change in beneficial ownership, the usual pre-registration requirements (taking 'reasonable steps' to identify the beneficial owners, and verification of the resulting information) must be undertaken – and presumably will have to be started well before the end of the update period in order to comply with the 14-day window.[9] Late submission results in a daily default fine until such time as the updating information is delivered to the registrar.[10] As with all daily default fines – and this is only one of a number in the ROE legislation – the amount due can quickly mount up.

Who will act for the overseas entity?

Registration in the ROE will often go hand-in-hand with the acquisition of land for which a conveyancing solicitor will be engaged. Conveyancers will happily attend to registration in the Land Register, of course. But should they also act for the overseas entity in relation to registration in the ROE? The answer, in almost every case, is likely to be no. The main obstacle lies in the rigours of the verification process. And while it is possible for a solicitor to attend to the registration on the basis that someone else carries out the verification, the expectation, and probably the reality, is that the verifier will also take

1 ECA 2022 s 21. This can be done at https://find-and-update.company-information.service.gov.uk/.
2 ECA 2022 ss 22–25. Clause 157 of the Economic Crime and Corporate Transparency Bill, currently before the UK Parliament, will if enacted replace ss 22–24 with a new s 22 and s 23.
3 As to which see the RCI Regulations 2021 regs 16–18.
4 SI 2022/870 reg 7.
5 ECA 2022 s 7(1).
6 Although it is possible to opt for a shorter (but not a longer) period: see ECA 2022 s 7(9), (10).
7 Except that where a person has become or ceased to be a beneficial owner, the information should relate to the time when this occurred: see ECA 2022 s 7(6), (7).
8 ECA 2022 s 7(8).
9 ECA 2022 ss 12(1)(b) and 16(1)(b).
10 ECA 2022 s 8.

responsibility for ROE registration.[1] Indeed a solicitor who registered without at the same time verifying would, in effect, be underwriting the work of the verifier, for, under the Act, a person who 'without reasonable excuse' delivers to the registrar 'any document that is misleading, false or deceptive in a material particular' commits a criminal offence and is liable to a fine not exceeding level 5 on the standard scale (currently £5,000).[2]

The Law Society of England and Wales has been vocal in its discouragement of acting as a verifier, and hence of acting more generally in the registration process. 'In the main', the Law Society says, 'only a small number of specialist and probably large international firms and external accountants will have the appropriate expertise to supply the verification requested.'[3] Others should take evasive action. The following gives the flavour of the Law Society's advice:[4]

> We have expressed significant concerns to BEIS as to the expectations which may be placed on members to verify the accuracy of information placed onto the ROE. Members who get this wrong will leave themselves open to criminal prosecution and may be professionally negligent. There is a real risk that members may mistakenly interpret what is required for verification under the ROE as being identical to what is required for anti-money laundering compliance client due diligence (CDD) purposes. Verification is a very different process from CDD. Members should exercise extreme caution.
>
> We anticipate that many firms will conclude that they are unable or unwilling to conduct ROE verification. This may arise for a number of reasons, including:
>
> - the availability of appropriately experienced and jurisdictionally competent advisers
> - knowledge of the structure and nature of ownership
> - an absence of availability of reliable and independent sources of information, and
> - if verifiers feel they cannot verify the accuracy of certain facts.
>
> Extra caution should be exercised if a solicitor is requested to conduct a ROE analysis or to carry out ROE verification for persons who are not existing clients, and/or in circumstances where they do or did not have a major role in the underlying transaction.

Particular difficulties may surround the verification of the status of persons as beneficial owners. You, the solicitor, should not 'carry out verification of the underlying legal analysis', the Law Society emphasises, 'unless you have a competent understanding for that jurisdiction of corporate structures and trust law, including share ownership, voting control, board composition, the terms

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1 *Companies House Guidance: Register an overseas entity and tell us about its beneficial owners* (www.gov.uk/guidance/register-an-overseas-entity): 'It's quicker and easier for an overseas entity to be registered by the same UK-regulated agent that carried out its verification checks.'

2 ECA 2022 s 32.

3 Law Society of England and Wales, *Interim Note for real estate/property lawyers: new register of overseas entities* (www.lawsociety.org.uk/topics/property/register-of-overseas-entities-coming-into-force-on-1-august-how-property-lawyers-can-comply) p 4.

4 Law Society of England and Wales: *Law Society guidance for solicitors concerning verification* (29 July 2022; available at www.lawsociety.org.uk/topics/property/register-of-overseas-entities-what-solicitors-should-know-about-verification#full-guidance) paras 1.5–1.7.

on which trust property is held and the underlying law'.[1] In Scotland few law firms will be able to assemble the necessary expertise, and even those which can may well be reluctant to take on this kind of work.[2]

But that does not mean that solicitors should do nothing about clients who require to interact with the ROE. Clients will need to be advised on the legal requirements, including what an overseas entity must do in order to register, the need to update the register on an annual basis, and the impact on conveyancing transactions. The consequences for lenders seeking security are of obvious importance. As with so much else, much will depend on what is put in a letter of engagement or terms of business, and it should be made clear exactly on what a solicitor will advise.[3]

Transitional provisions

Introduction

Finally, something should be said about the transitional provisions. The legislation imposed two requirements as to registration (or equivalent) in the ROE both of which required to be completed during the 'transitional period', which ran from 1 August 2022 to 31 January 2023.[4] Neither was connected to a transaction in relation to land.

Reaching backwards: acquisitions between 8 December 2014 and 31 July 2022

The first requirement affected overseas entities which *already* owned or leased land in Scotland on 1 August 2022, the day on which the Economic Crime (Transparency and Enforcement) Act 2022 came into force.[5] Registration of the overseas entity was required, thus allowing the ROE to capture 'static' landholdings and not only those that (as described above) became subject to a transaction. In this there was some resemblance to the RCI. But by contrast with the RCI, the retrospective reach of the ROE was limited by time, catching only titles which were registered in the Land Register on or after 8 December 2014. Land acquired by an overseas entity before that date was (and is) unaffected by the ROE unless – for example by voluntary first registration or the operation of KIR or APR[6] – the entry on the Land Register was made after that date. So only

1 *Law Society guidance for solicitors concerning verification* p 14.

2 This is so even though a note issued on 1 August 2022 by John Sinclair, the convener the Property Law Committee of the Law Society of Scotland, was less discouraging than the Law Society in England and Wales: see www.lawscot.org.uk/news-and-events/blogs-opinions/register-of-overseas-entities-opens/.

3 See also in this connection a note by Matthew Thomson of the Master Policy team at Lockton which appeared in the October 2022 issue of the *Journal of the Law Society of Scotland* (at p 44).

4 For the meaning of 'transitional period', see ECA 2022 s 41(10).

5 ECA 2022 sch 4 para 10. For definitions of 'the commencement date', 'pre-commencement period' and 'transitional period', see para 12.

6 Oddly, there is no requirement to register in the ROE in respect of KIR or APR which occurs on or after 1 August 2022: see in particular Land Registration etc (Scotland) Act 2012 sch 1A para 1(3).

titles which were registered in the Land Register between 8 December 2014 and 31 July 2022 were subject to a requirement for the overseas-entity owner (or lessee) to register in the ROE. All Sasine titles were unaffected.

Like all fixed dates this had an arbitrary feel to it. Why go back eight years but not 10 – or 20? For land in England and Wales the corresponding period was 23 years; for Northern Ireland there was no retrospective period at all. The significance of 8 December 2014 was, presumably, that it was the date on which the Land Registration etc (Scotland) Act 2012 came into force, thus marking the point at which all future dispositions of land and assignations of lease had to be registered in the Land Register. So, neatly enough, the rule affected only land on the Land Register and not land which was still found in the Register of Sasines.[1] In addition, we understand that Registers of Scotland had reliable data from 8 December 2014 onwards as to what land had been registered in the name of overseas entities – data which were important for monitoring and for allowing Companies House to notify the entities in question as to the need for ROE registration. It should not, however, be assumed that the 8 December 2014 barrier will remain in place for ever and it would be no surprise if it came to be extended backwards or even removed altogether.

As matters stood, however, the rule was this. Where on 1 August 2022 land was owned or leased by an overseas entity, and the relevant entry on the Land Register had been made on or after 8 December 2014, the overseas entity had six months (ie until 31 January 2023) in which to register or apply for registration in the ROE.[2] Notices were sent by Companies House to affected overseas entities in August 2022 drawing attention to the requirement to register.[3] To what extent these were complied with we do not know. Failure to register was a criminal offence on the part both of the overseas entity and of each of its officers, and could lead to imprisonment for up to two years or a fine or both.

Bailing out: disposals between 28 February 2022 and 31 January 2023

Faced with the prospect of compulsory registration and the consequent public exposure of beneficial ownership, overseas entities might have been tempted to vote with their feet and dispose of their land in the UK; for as long as the land was disposed of by 31 January 2023 the need for registration disappeared. But the legislation anticipated this move. All disposals between the day on which the Bill was published (28 February 2022) and the end of the transitional period (31 January 2023)[4] required to be notified to the ROE together with the same

1 As is made clear by ECA 2022 sch 4 para 10(1).

2 ECA 2022 sch 4 para 10.

3 BEIS, *Guidance for the Registration of Overseas Entities* para 9.2. The power to send such a notice is conferred by ECA 2022 s 34. A notice can only be served in respect of land acquired or leased on or after 8 December 2014: see s 34(1)(a). Oddly, the overseas entity has six months *from the date of the notice* to register even although that must always take matters beyond the deadline of 31 January 2023. How these competing deadlines are to be reconciled is unclear.

4 As the end-date indicates, this is a transitional rule. From 1 February 2023 any overseas entity still holding land acquired or leased on or after 8 December 2014 should have become registered in the ROE; further, as we have seen, overseas entities have been unable to dispose of such land since 1 February 2023 without first having become registered.

information as to beneficial owners as was needed for regular registration.[1] So if this was not actual registration in the ROE it was at any rate quasi-registration; and as with regular registration, the information submitted was available for public inspection.[2] The requirement applied not just to dispositions and assignations of long leases but also to the grant of a standard security or a new lease.[3] The quasi-registration – or actual registration if preferred instead – had to be carried out before 31 January 2023. Again there were criminal sanctions, including a daily default fine.[4]

COST OF LIVING (TENANT PROTECTION) (SCOTLAND) ACT 2022[5]

From one crisis to the next

The Covid-19 crisis dominated life in 2020 and 2021. The legal implications were significant with emergency legislation being passed in many jurisdictions. Courts have required to consider the applicability of general legal concepts such as frustration of contract.[6] The impact was felt too in relation to property law, notably in the area of leases.[7] The Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No 2) Act 2020 introduced a number of protections for tenants. These included the extension of the notice period for monetary irritancy in commercial leases and making all the grounds of removal of tenants in residential leases discretionary where some were previously mandatory.[8] Some of these changes have now been made permanent by the Coronavirus (Recovery and Reform) (Scotland) Act 2022.[9]

In early 2022, with a milder Covid-19 strain beginning to dominate and the beneficial effects of mass vaccination being widely felt, there was optimism

1 ECA 2022 s 42. This applies only to land acquired or leased on or after 8 December 2014, but without the cut-off date of 31 July 2022: see s 42(6) incorporating the definition of 'relevant disposition' from s 41(4)(b). In principle, therefore, it could apply to land acquired or leased after the commencement of the legislation on 1 August 2022, but no such land or lease can be acquired on or after 5 September 2022 without the overseas entity having first been registered in the ROE. For details see above.

2 Register of Overseas Entities (Verification and Provision of Information) Regulations 2022 reg 10.

3 ECA 2022 s 42(6) incorporating the definition of 'relevant disposition of land' in s 41(4)(b) and thus also the definition of 'qualifying registrable deed' in s 41(8).

4 ECA 2022 s 42(2)–(5).

5 This section is by Andrew Steven.

6 See eg E Hondius, M Santos Silva, A Nicolussi, P Salvador Coderch, C Wendehorst and F Zoll (eds), *Coronavirus and the Law in Europe* (2021), including a chapter on contract law in Scotland by Hector MacQueen.

7 See Z-Z Temmers Boggenpoel, E van der Sijde, M Ts'episo Tlale and S Mahomedy (eds), *Property and Pandemics: Property Law Responses to Covid-19* (2021), including a chapter by Malcolm Combe on the impact on residential leases in Scotland.

8 See *Conveyancing 2020* pp 63–65 and *Conveyancing 2021* p 77. For a fuller discussion, see Combe's chapter referred to in the previous footnote.

9 See p 65 above. See further M Combe, 'Ending private tenancies post-COVID' (2022) 67 *Journal of the Law Society of Scotland* Aug/20, and M Combe, 'Shifting grounds for private renters in Scotland: eviction after the Coronavirus (Recovery and Reform) (Scotland) Act 2022 and during the Cost of Living (Tenant Protection) (Scotland) Act 2022' 2022 *Juridical Review* 222.

for the future. Alas this was short-lived. On 24 February 2022 Russian forces commenced an invasion of Ukraine. This led to widespread international sanctions. But Russia is a leading oil and gas supplier to many European countries. The risk of supplies being restricted or even ended altogether led to increases in energy prices across the European Continent, driving inflation upwards.

In the UK this was only part of the story. Brexit has led to labour shortages with some foreign workers leaving as well as some imported goods costing more. Increases in council tax and national insurance have also contributed to inflation. On 6 September 2022 Liz Truss became UK Prime Minister with an agenda of tax cuts. Two days later Queen Elizabeth II died and the period of mourning meant that the mini-budget to implement this agenda had to wait until 23 September. The financial markets reacted badly following its delivery on the basis that the cuts had not been costed. This forced the Bank of England to raise interest rates once again. The mini-budget effectively had to be reversed. Ms Truss resigned on 25 October 2022. By that time it was generally accepted that the UK had moved from a Coronavirus crisis to a cost-of-living crisis.

The impact on tenants

Scottish Government housing statistics show that the increase in inflation has had a significant effect on residential tenants.[1] In the private sector in the year ending September 2022 there was an estimated 6.3% annual increase in average one-bedroom monthly rents. For two-bedrooms the figure was 6.2%, for three-bedrooms it was 7.4% and for four bedrooms it was 7.5%.

Further statistics show that since 2006/2007, private-sector tenants have spent on average 26% of their income on housing.[2] This compares with 24% in the social-rented sector. In contrast, for owner-occupiers with mortgage funding the figure fell from 12% in 2006–07 to 7% in 2019–20. In 2019, 60% of social-rented households and 38% of private-sector tenants had a net income of £20,000 or less. This compared to 14% of households which bought with a mortgage and 41% of owner-occupier households with no mortgage.[3] Other figures illustrate that households which rent are more likely to be financially vulnerable or in fuel – or more general – poverty.[4] In recent years both private and social rent levels have been higher in Scotland than in England,[5] for reasons which are unclear. The First-tier Tribunal (Housing and Property Chamber), which considers private-sector rent eviction cases, has reported that numbers have almost doubled from early 2019 levels.[6]

1 Scottish Government, *Private sector rent statistics: 2010–2022* (29 November 2022, www.gov.scot/publications/private-sector-rent-statistics-scotland-2010-2022/). See also p 104 above.
2 Scottish Government, *Cost of Living – Key Statistics* (November 2022, www.gov.scot/publications/cost-living-bill-key-statistics/) p 1.
3 Scottish Government, *Cost of Living – Key Statistics* p 2.
4 Scottish Government, *Cost of Living – Key Statistics* pp 3–5.
5 Scottish Government, *Cost of Living – Key Statistics* pp 6–7.
6 Scottish Government, *Cost of Living – Key Statistics* p 8.

The economic challenges for tenants and households more generally are shown in other research prepared by the Scottish Government.[1] Despite the UK Government's cap of £2,500 on typical household energy bills, the increase in what will have to be paid remains substantial and is calculated as being, on average, an eye-watering 140% since October 2020.[2] Annual inflation figures as of August 2022 were 13% for food, 12% for transport and 8% for clothing.[3] In real terms, as of May to July 2022, total pay had fallen by 2.6% and regular pay by 2.8%.[4]

It is against this concerning background that the Scottish Government brought forward emergency legislation in the form of the Cost of Living (Tenant Protection) (Scotland) Act 2022.[5]

Overview

There are five headline points about the legislation, all of which are covered in more detail later. First, the legislation is temporary. Its provisions were set to last initially until 31 March 2023 but the legislation confers powers to bring that date forward or put it back in respect of individual provisions. As we will see later, these powers have been exercised. Secondly, the legislation is confined to residential tenancies. It covers both the social-housing and private sectors. There are also special rules for student lets. Thirdly, a rent cap is introduced, although it is not absolute. Fourthly, provision is made for a moratorium on evictions. Again this is not absolute. Fifthly, rent-adjudication procedures are introduced for private-residential tenancies, and for assured and short assured tenancies.

There is a significant amount of material on the legislation on the Scottish Government website, including advice both to landlords and tenants.[6]

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1 See also House of Commons Library, *Research Briefing on Housing and the cost-of-living* (December 2022, https://researchbriefings.files.parliament.uk/documents/CBP-9622/CBP-9622.pdf).

2 Scottish Government, *Cost of Living Bill – Economic Background* (November 2022, www.gov.scot/publications/cost-living-bill-economic-background/) p 1. The figure reduces to 102% if the winter 2022/23 energy bills support scheme is factored in.

3 Scottish Government, *Cost of Living Bill – Economic Background* p 4.

4 Scottish Government, *Cost of Living Bill – Economic Background* p 5. See also Scottish Government, *Cost of Living Bill – Summaries of Research Evidence* (November 2022, www.gov.scot/publications/cost-living-bill-summaries-research-evidence/documents/).

5 See M Combe, 'Tenants' rights: the scales tip further' (2022) 67 *Journal of the Law Society of Scotland* Nov/28; K Donnelly, 'Cost of Living (Tenant Protection) (Scotland) Act 2022' (2022) 181 *Green's Property Law Bulletin* 2; K Berry, *The Cost of Living (Tenant Protection) (Scotland) Act 2022: rent freeze and evictions pause* (SPICe Briefing, November 2022, https://sp-bpr-en-prod-cdnep.azureedge.net/published/2022/11/24/32898e7d-9d42-4996-b7b5-94fd972980b5/SB%2022-65.pdf).

6 See in particular www.gov.scot/publications/cost-of-living-bill-overview/; www.gov.scot/publications/cost-of-living-rent-and-eviction/; https://rentersrights.campaign.gov.scot/; www.gov.scot/publications/rent-cap-private-landlord-guidance/. See also the following papers by provided by the Scottish Parliamentary Information Centre: https://spice-spotlight.scot/2022/09/21/the-scottish-governments-planned-rent-freeze-background/; https:/spice-spotlight.scot/2022/09/21/the-scottish-governments-planned-evictions-moratorium-background-information/.

Parliamentary passage

The Bill that was to become the Cost of Living (Tenant Protection) (Scotland) Act 2022 was introduced to the Scottish Parliament on 3 October 2022, completed its first stage on 4 October and its second stage on 5 October. Since the Parliament agreed that it was an emergency Bill,[1] it was considered by the whole Parliament rather than a committee. The Bill was passed following its third stage on 6 October. It had been opposed throughout by the Scottish Conservatives on the basis that it was unfair to landlords and would result in fewer properties being available to rent in the private sector.[2]

Progress then slowed with the Bill not receiving royal assent until 27 October, the first time that the new King had been called upon to carry out that task in relation to an Act of the Scottish Parliament. The Act came into force the next day.[3]

Structure

The legislation extends to 14 sections divided across four parts. There are also three schedules. Part 1 contains the main protections for tenants provided by the legislation, namely the rent cap (s 1 but with the detail set out in schedule 1) and the eviction moratorium (s 2 but with the detail set out in schedule 2). Part 2 (ss 3–9) has supporting provisions. These include: a requirement that appropriate information and advice is given to tenants (s 3), a requirement that the Scottish Ministers have regard to the importance of communicating in an inclusive way and to opportunities to advance equality and non-discrimination (s 4), and provisions as to suspension and expiry of the legislation (ss 6–8). Part 3 introduces the rent-adjudication provisions (s 10 but with the detail set out in schedule 3) as well as dealing with their expiry (s 11). Part 4 (ss 12–14) is a general part conferring the power to make ancillary provisions, dealing with commencement, and giving the short title.

A temporary measure

The key provisions in Part 1 of the 2022 Act (the rent cap and eviction moratorium) were originally due to expire at the end of 31 March 2023.[4] But there are powers in the legislation to bring this date forward *and* to put it back in respect of the application of the provisions to different types of lease.[5]

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1 In proposing that the Bill be considered as an emergency Bill the Minister for Parliamentary Business (George Adam MSP) stated: 'It is imperative that the bill is treated urgently so that it can be ensured that important protections are in place for people who rent their homes before cost rises impact their finances by the end of October this year.' See Scottish Parliament, *Official Report*, 4 October 2022, col 3.

2 Scottish Parliament, *Official Report*, 6 October 2022, col 104 (Edward Mountain MSP).

3 Cost of Living (Tenant Protection) (Scotland) Act 2022 s 13(1).

4 CL(TP)(S)A 2022 s 7(1).

5 CL(TP)(S)A 2022 s 7(2).

Any bringing-forward of expiry can be done by regulations in respect of any of the provisions in Part 1.[1] This regulation-making power must be exercised as soon as reasonably practicable by the Scottish Ministers where they 'consider that any provision of Part 1 is no longer necessary or proportionate in connection with the cost of living'.[2] The expression 'cost of living' is undefined. If the Scottish Ministers consider that the provisions may need to be revived, the regulations will merely suspend them;[3] if not, they will cause them to expire. There are ancillary regulation-making powers.[4] Unless the regulations alter the text of an Act, they are subject to the negative procedure.[5]

Any putting-back of expiry is also by regulations. In the first instance this can be to 30 September 2023 and thereafter to 31 March 2024.[6] Such regulations are subject to the affirmative procedure,[7] and a statement of the reasons why the Scottish Ministers are making these must be laid before the Parliament.[8] Once again there are ancillary regulation-making powers.[9]

The 2022 Act imposes periodic reporting requirements on the Scottish Ministers while Part 1 remains in force.[10] The first period ended on 31 December 2022,[11] and the first report was published on 12 January 2023.[12] Reports are required every three months thereafter up to 31 December 2023.[13] The purpose of the reports is to review the operation of the legislation to consider whether it remains 'necessary and proportionate in connection with the cost of living'.[14] The Scottish Ministers are required to consult with stakeholders before issuing a report.[15] These include persons representing landlords and tenants' interests, as well as local authorities. The report must include a summary of how these parties' views were taken into account.[16] This provision has the whiff of ensuring proportionality in relation to the ECHR.[17]

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1 CL(TP)(S)A 2022 s 8(1). As mentioned at p 201 below, this has been done in relation to the social housing rent cap by the Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023, SSI 2023/8, reg 2.

2 CL(TP)(S)A 2022 s 8(2).

3 As mentioned at p 203 below, this has been done in relation to the student residential tenancies rent cap by the Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023, SSI 2023/8, reg 3.

4 CL(TP)(S)A 2022 s 8(3), (4).

5 CL(TP)(S)A 2022 s 8(5).

6 CL(TP)(S)A 2022 s 7(3).

7 CL(TP)(S)A 2022 s 7(5).

8 CL(TP)(S)A 2022 s 7(6).

9 CL(TP)(S)A 2022 s 7(7)–(9).

10 CL(TP)(S)A 2022 s 9.

11 CL(TP)(S)A 2022 s 9(6)(a).

12 See www.gov.scot/publications/cost-living-tenant-protection-scotland-act-2022-first-report-scottish-parliament/.

13 CL(TP)(S)A 2022 s 9(6)(b).

14 CL(TP)(S)A 2022 s 9(1)(a).

15 CL(TP)(S)A 2022 s 9(3).

16 CL(TP)(S)A 2022 s 9(4).

17 Although they are not explicitly mentioned in the Scottish Government's *Policy Memorandum* accompanying the Bill, which became the 2022 Act, in justifying proportionality. See p 206 below.

Following the publication of the first report, regulations were approved by the Scottish Parliament extending most of the 2022 Act until 30 September 2023 on the basis that the cost of living crisis was continuing.[1]

Residential tenancies

The 2022 Act is restricted to residential tenancies falling under various statutory regimes of which there are five:

(i) Private residential tenancies, as regulated by the Private Housing (Tenancies) (Scotland) Act 2016. Since 1 December 2017 this has been the standard form of private-sector tenancy.

(ii) Student residential tenancies.[2] Broadly speaking, these are student lets by educational institutions, or institutional providers of purpose-built or converted accommodation for students, which are excluded from the definition of a private residential tenancy.

(iii) Scottish secure tenancies and short Scottish secure tenancies, as governed by the Housing (Scotland) Act 2001. This is the social-housing sector.

(iv) Assured and short assured tenancies, as regulated by the Housing (Scotland) Act 1988. These have been impermissible since the private residential tenancy was introduced and are increasingly unusual.

(v) Regulated tenancies, as provided for by the Rent (Scotland) Act 1984. These must have commenced before 1 January 1989 and will therefore be rare indeed.

All other leases are excluded.

The 2022 Act provisions apply to differing combinations of the categories. The rent cap (schedule 1) originally applied to categories (i) to (iv) but, as described below, has been suspended for category (ii) and brought to an end for category (iii). Category (v) is excluded presumably because of its existing tighter controls on rent variation. The eviction moratorium (schedule 2) applies to all five categories. The rent-adjudication procedures (schedule 3) are restricted to categories (i) and (iii), which are both private-sector.

Rent cap

General

As noted above, the detailed provision in relation to the rent cap is to be found in schedule 1 of the Cost of Living (Tenant Protection) (Scotland) Act 2022. This is the lengthiest schedule and makes significant amendments to existing

1 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023, SSI 2023/82, reg 2. See also Scottish Government, *Proposed extension of the Cost of Living (Tenant Protection) (Scotland) Act 2022: Statement of Reasons* (January 2022, www.gov.scot/publications/proposed-extension-cost-living-tenant-protection-scotland-act-2022-statement-reasons/documents/).

2 As defined by the CL(TP)(S)A 2022 sch 1 para 4(7) and sch 2 para 1(10) under reference to the Private Housing (Tenancies) (Scotland) Act 2016 sch 1 para 5(2), (3).

legislation, beginning with private residential tenancies (PRTs) before applying the same framework to the other categories. We concentrate on PRTs given their importance, but comment on the provisions affecting other tenancies where these are different.

Despite enactment in late October of 2022 the rent cap provisions are backdated to 6 September.[1] This was the date on which the Scottish Government's Programme for Government 2023–24 was published, giving notice that this legislation would be passed.[2] The effect is that a rent increase instigated by a landlord prior to 6 September 2022 is not subject to the new regime.

Oddly,[3] schedule 1 amends the 2016 Act to enable rent *increases* to be allowed *twice* in a 12-month period if the Scottish Ministers make regulations to that effect.[4] The ordinary position prior to this amendment was that only *one* increase within such a period was permissible. But, as we shall see below, the reasons why rent may be increased when the 2022 Act is in force are strictly limited.

The permitted rate

A new section 21A is inserted into the Private Housing (Tenancies) (Scotland) Act 2016. This provides that from 6 September 2022 'a landlord under a private residential tenancy may not increase the rent payable under the tenancy by more than the permitted rate'.[5] The 'permitted rate' was originally set at 0% but for private-sector tenancies was increased by regulations to 3% with effect from 1 April 2023.[6]

In respect of leases in the social-housing sector the Scottish Ministers were required to consider whether the original 0% rate should be retained or increased in their first report on the operation of the legislation (for the period ending 31 December 2022).[7] At the time the 2022 Act was passed the Scottish Federation of Housing Associations condemned the rent cap[8] but in December 2022 it announced that it had reached agreement with the Scottish Government on expected rent increases from 1 April 2023.[9] These would be kept 'well below

1 CL(TP)(S)A 2022 s 1 and sch 1 paras 1(2), 1(5), 2(2)(i), 2(3) and 3(2).
2 Scottish Government, *A Stronger and More Resilient Scotland: The Programme for Government 2022–23* (September 2022, www.gov.scot/programme-for-government/) pp 24 and 31.
3 As also noted by Malcolm Combe in 'Tenants' rights: the scales tip further' (2022) 67 *Journal of the Law Society of Scotland* Nov/28.
4 Private Housing (Tenancies) (Scotland) Act 2016 s 19(4) (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(4)).
5 PH(T)(S)A 2016 Act s 21A(1) (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(5)).
6 PH(T)(S)A 2016 s 21A(2), (3) (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(5)); Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023, SSI 2023/82, regs 3 and 4. See also Private Residential Tenancies and Assured Tenancies (Prescribed Notices and Forms) (Temporary Modifications) (Scotland) Regulations 2023, SSI 2023/58.
7 CL(TP)(S)A 2022 s 9(7).
8 It stated on 6 October 2022 that 'a rent freeze in the social housing sector is unnecessary and, indeed, likely to be counterproductive': see www.sfha.co.uk/our-work/media/sub-category/press-release-subcategory/media-article/sfha-comment-on-passing-of-cost-of-living-protection-of-tenants-scotland-bill.
9 See www.sfha.co.uk/news/news-category/news-article/sfha-and-scottish-government-reach-agreement-on-rent.

inflation'.[1] The Minister for Zero Carbon Buildings, Active Travel and Tenants' Rights (Patrick Harvie MSP), in a written answer in the Scottish Parliament, stated: 'we anticipate that the first statutory report on the [2022 Act] due by 14 January will formally confirm our intentions to expire the social rented sector rent cap provisions from March 2023'.[2] This is exactly what happened with the decision being given effect to by statutory instrument in January 2023.[3] The date of expiry was 26 February 2023 in advance of the new financial year which began in April 2023.

The 2022 Act goes on to limit the operation of the rent-variation provisions in the 2016 Act to the extent that these would enable the rent to be increased beyond the permitted rate.[4] But it also deletes provisions whereby a rent officer can set the rent by reference to the open market rent.[5] This means, paradoxically, that in legislation aimed at helping tenants the possibility of a rent decrease is removed.[6]

A porous cap

As noted earlier, the rent cap is not absolute. A new Chapter 2A (ss 33A– 33G) is inserted into the Private Housing (Tenancies) (Scotland) Act 2016 in terms of which a landlord can apply to 'the relevant officer to increase the rent payable under the tenancy by more than the permitted rate to recover up to 50% of the increase in any prescribed property costs that the landlord has incurred during the relevant period'.[7] The 'relevant period' is the six months preceding the application.[8] The definition of 'prescribed property costs' is as follows:

(a) interest payable in respect of a mortgage or standard security relating to the let property,
(b) a premium payable in respect of insurance (other than general building and contents insurance) relating to the let property and the offering of the property for let,
(c) service charges relating to the let property that are paid for by the landlord but the payment of which the tenant is responsible for (in whole or in part) in accordance with the terms of the tenancy.

The drafting of (a) is mysterious. In relation to land, 'mortgage' is a term of art of English law and not Scottish law. Is the 'or' meant to be conjunctive or disjunctive? If the latter, when could there be a mortgage without a standard security or vice versa?

A guidance document for landlords provides gloss on the three types of prescribed property costs.[9] As regards (a), it gives the examples of the interest

1 See 'Protection for tenants extended', www.gov.scot/news/protections-for-tenants-extended/.
2 Scottish Parliament, Written answer S6W–13389 (20 December 2022).
3 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023, SSI 2023/8, reg 2.
4 CL(TP)(S)A 2022 s 1 and sch 1 para 1(6)–(17).
5 PH(T)(S)A 2016 ss 25(1) and 32.
6 A point highlighted by Combe in 'Tenants' rights: the scales tip further'.
7 PH(T)(S)A 2016 s 33A(1) (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(17)).
8 PH(T)(S)A 2016 s 33A(6) (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(17)).
9 Scottish Government, *Rent cap: private landlord guidance* (October 2022, www.gov.scot/publications/rent-cap-private-landlord-guidance/).

on a variable-rate mortgage being increased or a fixed-rate mortgage coming to an end. For (b), it is stressed that general buildings and contents insurance is excluded. The examples given are cover for loss of rent, liability insurance, and unoccupied property cover. In relation to (c), costs such as the cleaning, heating and lighting of common areas are included, as are factoring fees relating to the leased property always provided that the tenant is obliged to pay for these under the lease.

Evidence has to be adduced of the costs in the application.[1] Detailed notice of the application must also be given to the tenant, with the required information including: the proposed rent, the fact that it would constitute an increase of more than the permitted rate, and a description of the costs.[2] The guidance document helpfully provides a template letter to the tenant as well as a template application form to the rent officer, and those advising landlords should use these.

The rent officer is entitled to increase the rent in terms of the application if satisfied that the prescribed property costs have gone up during the relevant period and that the proposed increase amounts to not more than 50% of those costs.[3] The maximum by which the rent can be increased was originally 3%,[4] but the Scottish Ministers increased it to 6% by regulations with effect from 1 April 2023.[5] The 50% figure can also be changed by regulations.[6] The determination by the rent officer can be appealed by either the landlord or tenant to the First-tier Tribunal.[7]

As of 31 December 2022, Rent Service Scotland, which manages the rent increase applications, had only received 12 applications (10 of which were valid).[8]

The 2022 Act also suspends the provisions in the 2016 Act on rent officers' duties to provide information on open-market rent determinations and on rent pressure zones as these are not needed while the 2022 Act applies.[9]

Tenancies other than PRTs

The provisions on permitted rent increase as a result of prescribed property costs are replicated in relation to assured and short assured tenancies.[10]

For the social-housing tenancies the provisions are markedly shorter as the rent variation provisions in the relevant legislation are less extensive.[11] The landlord is not given the right to increase the rent because of prescribed property

1 PH(T)(S)A 2016 s 33A(2)(a) (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(17)).
2 PH(T)(S)A 2016 s 33A(3) (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(17)).
3 PH(T)(S)A 2016 s 33B(1) (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(17)).
4 PH(T)(S)A 2016 s 33B(2) (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(17)).
5 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023, SSI 2023/82, reg 4.
6 PH(T)(S)A 2016 s 33F (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(17)).
7 PH(T)(S)A 2016 ss 33C–33E (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 1(17)).
8 Scottish Government, *Proposed extension of the Cost of Living (Tenant Protection) (Scotland) Act 2022: Statement of Reasons* (January 2022) p 25.
9 CL(TP)(S)A 2022 s 1 and sch 1 para 1(18), (19).
10 CL(TP)(S)A 2022 s 1 and sch 1 para 2.
11 Housing (Scotland) Act 2001 s 24A (inserted by CL(TP)(S)A 2022 s 1 and sch 1 para 3).

costs. As mentioned above, however, the rent cap for social-housing tenancies ended on 26 February 2023.

Equivalent provisions deal with student residential tenancies,[1] but these have now been suspended with effect from 17 January 2023.[2] The reason given by the Minister is that they had 'limited impact on annual rents set on the basis of an academic year'.[3] Whether the suspension is lifted in advance of academic year 2023–24 remains to be seen. But that would have no impact on the rent set for a new tenancy. Under the provisions, there is no right to a rent increase for prescribed property costs, although 'any sums payable by the tenant under the tenancy in connection with excessive use of any utilities'[4] are carved out of the definition of 'rent' and hence are not subject to the cap. 'Excessive use' is undefined and there is nothing on the matter in the explanatory notes accompanying the Bill which became the 2022 Act. To what extent landlords in such tenancies may attempt to use this exception is uncertain but the issue is an academic one for as long as the provisions remain suspended.

Eviction moratorium

Timings

The other main protection for tenants in the Cost of Living (Tenant Protection) (Scotland) Act 2022 is a moratorium on evictions. The details can be found in schedule 2. As for the rent-cap provisions, there are timing issues to be considered. The moratorium applies to decrees for removing granted in proceedings raised (i) on or after 28 October 2022 or (ii) before that date where the eviction notice was served on or after 6 September.[5] But it ceases to have effect on the *earlier* of (iii) six months after the decree was granted, or (iv) the expiry or suspension of the moratorium provision.[6] This means that it is possible for removing to be effected even if the 2022 Act is still in force provided that six months have elapsed since the making of the court order.

Exceptions: (a) existing grounds

Just as the rent cap is porous, so too the eviction moratorium has exceptions, ie cases where, on certain grounds, eviction will continue to be available. These comprise some of the existing grounds for eviction as well as some new grounds. For private residential tenancies ('PRTs') the list of existing grounds is as follows:

- ground 2 (property to be sold by lender)
- ground 8 (tenancy entered into to provide an employee with a home and the tenant is now not an employee)

1 CL(TP)(S)A 2022 s 1 and sch 1 para 4.
2 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023, SSI 2023/8, reg 3.
3 See 'Protection for tenants extended', www.gov.scot/news/protections-for-tenants-extended/.
4 CL(TP)(S)A 2022 s 1 and sch 1 para 4(7).
5 CL(TP)(S)A 2022 s 2 and sch 2 para 1(1), (2).
6 CL(TP)(S)A 2022 s 2 and sch 2 para 1(3).

- ground 10 (tenant not occupying property)
- ground 13 (criminal behaviour by tenant)
- ground 14 (anti-social behaviour by tenant)
- ground 15 (association by tenant with person who has a relevant conviction or who has engaged in relevant anti-social behaviour).[1]

Thus, despite the moratorium, eviction can be obtained on any of these grounds where the First-tier Tribunal considers it reasonable so to do. In contrast, the moratorium applies to the other existing grounds in the Private Housing (Tenancies) (Scotland) Act 2016 such as ground 5 (member of the landlord's family intends to live in the property) and ground 7 (property required for religious purposes).

Equivalent provision is made for the other types of residential tenancy, with similar grounds of eviction continuing to apply notwithstanding the moratorium.[2]

Exceptions: (b) new grounds

There are three new grounds on which eviction can be obtained for PRTs although in reality these are merely restricted versions of existing grounds.[3]

The first is that the landlord intends to sell the property to alleviate financial hardship.[4] Prior to the 2022 Act coming into force it was a ground for recovery simply that the landlord intended to sell the property.[5] For the landlord to persuade the First-tier Tribunal that it would be reasonable to issue an eviction order on the revised version of the ground, appropriate evidence will need to be adduced. The 2022 Act provides a non-exhaustive list of such evidence. It includes a letter of advice from an approved money adviser, local authority debt advice service, independent financial adviser or chartered accountant, or a letter of engagement from a solicitor concerning the sale of the let property.[6]

The second new ground is that the landlord intends to live in the property to alleviate financial hardship.[7] Previously, poverty on the part of the landlord was not required to justify evicting the tenant to let the landlord move in.[8] There is a similar non-exhaustive list of evidence of financial hardship as for the first new ground.[9]

The third new ground is the tenant being in substantial rent arrears.[10] This doubles the length of time of non-payment of rent as a ground of eviction from

1 CL(TP)(S)A 2022 s 2 and sch 2 para 1(5)(a).
2 CL(TP)(S)A 2022 s 2 and sch 2 para 1(5)(b)–(d).
3 Described colourfully by Malcolm Combe in 'Tenants' rights: the scales tip further' (2022) 67 *Journal of the Law Society of Scotland* Nov/28 as 'existing grounds on steroids'.
4 Private Housing (Tenancies) (Scotland) Act 2016 sch 3 para 1A (inserted by CL(TP)(S)A 2022 s 2 and sch 2 para 4(3)).
5 PH(T)(S)A 2016 sch 3 para 1.
6 PH(T)(S)A 2016 sch 3 para 1A(3) (inserted by CL(TP)(S)A 2022 s 2 and sch 2 para 4(3)).
7 PH(T)(S)A 2016 sch 3 para 4A (inserted by CL(TP)(S)A 2022 s 2 and sch 2 para 4(3)).
8 PH(T)(S)A 2016 sch 3 para 4.
9 PH(T)(S)A 2016 sch 3 para 4A(4) (inserted by CL(TP)(S)A 2022 s 2 and sch 2 para 4(3)).
10 PH(T)(S)A 2016 sch 3 para 12A (inserted by CL(TP)(S)A 2022 s 2 and sch 2 para 4(3)).

three months to six months.[1] In deciding whether it is reasonable to issue an eviction order under this ground the First-tier Tribunal has to take account of whether the arrears have been contributed to by a failure to receive a relevant social security payment and whether the landlord has complied with the pre-action protocol prescribed by the Scottish Ministers.[2]

For other standard types of private-sector tenancy, similar versions of the second and third new grounds are introduced.[3] In respect of student residential tenancies, there are two new grounds of eviction in relation to (i) criminality and (ii) anti-social behaviour.[4] For social-housing tenancies the existing ground of eviction for rent arrears is amended to provide for a minimum amount of arrears of £2,250.[5] The Scottish Tenants' Organisation, however, has described this as a 'massive loophole' on the basis that average household rent arrears 'are believed to be running at over £4000'.[6]

In the light of these changes to eviction grounds, the prescribed notices which must be sent by landlords to tenants in respect of PRTs and assured tenancies before proceedings can be commenced at the First-tier Tribunal have been updated by regulations.[7] The notices direct tenants to the Scottish Government website for '[f]urther information on the emergency measures introduced by the [2022 Act]'.[8]

Unlawful eviction

The Cost of Living (Tenant Protection) (Scotland) Act 2022 also amends the provisions on unlawful eviction in the Housing (Scotland) Act 1988. These had previously set the measure of damages payable by the landlord as the difference in value of the property with and without the tenant in occupation.[9] In practice, however, this apparently often resulted in a nil valuation, with the tenant out-

1 PH(T)(S)A 2016 sch 3 para 12A(2)(b) (inserted by CL(TP)(S)A 2022 s 2 and sch 2 para 4(3)). Cf PH(T)(S)A 2016 sch 3 para 12(2).

2 PH(T)(S)A 2016 sch 3 para 12A(3) (inserted by CL(TP)(S)A 2022 s 2 and sch 2 para 4(3)). The protocol is set out in the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020, SSI 2020/304, as continued in force by the Coronavirus (Recovery and Reform) (Scotland) Act 2022 s 49. See p 66 above.

3 CL(TP)(S)A 2022 s 2 and sch 2 paras 5 and 6.

4 CL(TP)(S)A 2022 s 2 and sch 2 paras 2 and 3.

5 CL(TP)(S)A 2022 s 2 and sch 2 para 1(5)(b)(i).

6 'Thousands at risk over Scots eviction ban loopholes', *The Herald,* 25 January 2023.

7 Assured Tenancies and Private Residential Tenancies (Prescribed Notices and Forms) (Miscellaneous Temporary Modifications) (Scotland) Regulations, SSI 2022/307. These regulations were subject to the negative procedure which requires statutory instruments to be laid at least 28 days before they come into force. Yet they came into force on 28 November 2022, the day they were laid. The Delegated Powers and Law Reform Committee of the Scottish Parliament accepted the Scottish Government's explanation for not complying with the requirement, namely the urgency of the situation. See Delegated Powers and Law Reform Committee, *Subordinate Legislation considered by the Delegated Powers and Law Reform Committee on 8 November 2022* (9 November 2022, https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2022/11/9/7f13c70a-e9dc-4b08-b7f0-51ce6683aa68/DPLRS062022R56.pdf).

8 See https://rentersrights.campaign.gov.scot/.

9 Housing (Scotland) Act 1988 s 37(1) prior to amendment by the CL(TP)(S)A 2022.

of-pocket in respect of a valuation report.[1] Instead the 2022 Act now requires the First-tier Tribunal to award damages of not less than three months' rent and not more than three years' rent.[2] It is likely that this change will be put on a longer-term footing and it has already been extended until 30 September 2023.[3]

Rent adjudication

Schedule 3 is the shortest of the three schedules to the 2022 Act. It makes changes to the rent-adjudication provisions for private residential tenancies and assured tenancies by giving the Scottish Ministers regulation-making powers to be exercised on or in anticipation of the rent cap provisions expiring.[4] In particular the regulations may end the possibility of the First-tier Tribunal in an appeal fixing a rent higher than the landlord had initially requested. In response, landlords might be tempted to request a higher figure than they might otherwise have done.[5]

A human rights challenge?

It was reported in October 2022 that four groups representing landlords were obtaining senior counsel's opinion on whether the Cost of Living (Tenant Protection) (Scotland) Act 2022 breached the European Convention on Human Rights and was thus outwith the legislative competence of the Scottish Parliament.[6] The groups were: the Scottish Association of Landlords, Propertymark, the National Residential Landlords Association, and Scottish Land and Estates. Following the Scottish Government's announcement in January 2023 that it intended to extend the rent cap for private-sector tenancies and the eviction moratorium until 30 September 2023, it was reported that a petition for judicial review of the legislation had been lodged at the Court of Session.[7]

The relevant part of the ECHR is article 1 protocol 1, which protects the peaceful enjoyment of possessions.[8] Both the rented property itself and the rent qualify as 'possessions' for this purpose following the wide interpretation of

1 See 'Unlawful eviction: law lacking', Viewpoint (2022) 67 *Journal of the Law Society of Scotland* Nov/6.

2 Housing (Scotland) Act 1988 s 37(1) (inserted by CL(TP)(S)A 2022 s 2 and sch 2 para 7(4)).

3 Cost of Living (Tenant Protection) (Scotland) Act 2022 (Amendment of Expiry Dates and Rent Cap Modification) Regulations 2023, SSI 2023/82, reg 2.

4 CL(TP)(S)A 2022 s 10 and sch 3 paras 1 and 2.

5 See Combe in 'Tenants' rights: the scales tip further' (2022) 67 *Journal of the Law Society of Scotland* Nov/28.

6 Scotland Act 1998 s 29(1), (2). The instructed counsel was Lord Davidson of Glen Clova KC, a former Advocate General for Scotland: see 'Landlords and country estate owners take legal action over Scotland's rent freeze and eviction ban', *The Herald*, 13 October 2022.

7 See 'Scotland rent cap: Landlords in legal challenge over freeze', *The Herald,* 20 January 2023; 'Legal case against rent control and eviction ban moves forward', *Scottish Housing News,* 20 January 2023.

8 Article 6 (right to a fair hearing) is also relevant to the provisions on damages for unlawful evictions. See Scottish Government, *Cost of Living (Tenant Protection) (Scotland) Bill Policy Memorandum* (www.parliament.scot/-/media/files/legislation/bills/s6-bills/cost-of-living-tenant-protection-scotland-bill/introduced/policy-memorandum-accessible.pdf) paras 76–78.

that provision by the European Court of Human Rights in Strasbourg and the domestic courts.[1]

But the protection is far from absolute. The 'deprivation' of possessions is permissible 'if it is in the public interest and subject to the conditions provided by law and by the general principles of international law'. Normally compensation is expected to be payable. Further, the 'control' of the use of property is justifiable 'in accordance with the general interest'.

Arguably, the rent cap and eviction moratorium in the 2022 Act amount to 'control' rather than 'deprivation' as they restrict rather than remove the landlord's rights, but it is impossible to be certain. In this regard, the Outer House has stated that the 'categorisation of the interference as either expropriation or control is not critical. The correct focus is on whether the interference imposes a disproportionate and excessive burden on the person affected'.[2]

For the interference to breach article 1 protocol 1, one or more of the following criteria would have to be satisfied.[3] Doubtless in expectation of a challenge, these are all considered in the Scottish Government's *Policy Memorandum* which accompanied the Bill that became the 2022 Act.[4]

First, the interference must lack a basis in law and not meet the test of legal certainty. Clearly there is a basis in law here – the 2022 Act itself – which is in detailed terms. A successful challenge on this ground is unlikely.

Secondly, there will be breach where the interference fails to pursue a legitimate objective. It is difficult to argue that protection of tenants from the cost of living crisis is illegitimate.[5]

Thirdly, the interference must lack proportionality, that is to say not strike a fair balance between individual and collective interests. This without doubt is the most fruitful ground for challenge, and is apparently the basis of the judicial review petition. But the Scottish Government's position is that a number of aspects of the 2022 Act ensure proportionality, in particular its temporary nature, the fact that neither the rent cap nor the eviction moratorium are absolute, and the regulation-making power to vary the terms of these. Successful challenges to Acts of the Scottish Parliament on the basis of the ECHR have been rare.[6] *Philip v Scottish Ministers*[7] is a relevant precedent in which it was

1 On rent, see *Hughes v Glasgow City Council* [2021] UT 12, 2021 Hous LR 41.

2 *Salmon Net Fishing Association of Scotland v Lord Advocate* [2020] CSOH 11, 2020 GWD 5-71 at para 52 per Lord Pentland.

3 J Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* (4th edn, 2017) para 8.06. See further *Recovery of Medical Costs for Asbestosis Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] AC 1016 at para 45 per Lord Mance.

4 Scottish Government, *Cost of Living (Tenant Protection) (Scotland) Bill Policy Memorandum* paras 71–80.

5 That protection of tenants is a legitimate objective is well-established in Strasbourg case law. See European Court of Human Rights, *Guide on Article 1 of Protocol No 1 to the European Convention on Human Rights* (August 2022, www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf) pp 57–60. In addition, Combe has highlighted the winter restrictions in France on tenant evictions: see M Combe, 'Shifting grounds for private renters in Scotland: eviction after the Coronavirus (Recovery and Reform) (Scotland) Act 2022 and during the Cost of Living (Tenant Protection) (Scotland) Act 2022' 2022 *Juridical Review* 222 at 227.

6 The leading example is *Salvesen v Riddell* [2013] UKSC 22, 2013 SC (UKSC) 236.

7 [2021] CSOH 32, 2021 GWD 12-160.

held that temporary pandemic restrictions preventing public worship were disproportionate.

In December 2022 it was reported that a survey of letting agents 'found a surge in landlords planning to sell properties because of their own cost increases'.[1] 68% of those surveyed had been contacted by landlords who wanted to sell as a result of the rent cap and 83% reported that their customer landlords intended to raise rents as soon as the restrictions had been lifted. In respect of purpose-built student accommodation, one solicitor, prior to the changes made in early 2023, commented on the 2022 Act in the following terms:[2]

> The feedback is stark. While some investors pause for reflection, many owners of existing rental properties are already leaving the market, and pipeline new build projects are being abandoned where the measures are seen as a significant threat. Whatever your view, there is no question that this Act puts Scotland's purpose-built rental sector at a clear disadvantage.

Such evidence will doubtless assist the proportionality challenge. It also appears that the groups petitioning for judicial review will found on the fact that the rent cap moratorium has now been lifted in the social housing sector.[3] But it remains difficult to predict whether the challenge to the legislation will succeed.

Conclusion

The Cost of Living (Tenant Protection) (Scotland) Act 2022 may be short-lived. But, as we have seen, most of its provisions have already been extended beyond the initial expiry date of 31 March 2023. Moreover, the experience with a number of tenant-protection measures in the pandemic crisis legislation is that they have become permanent. It is foreseeable that something similar may happen with this cost-of-living crisis legislation. There is also support within the Scottish Parliament for further reform in the shape of fair rents legislation.[4] Nevertheless, should clear evidence arise of new tenant-protection laws markedly lowering the availability of rental accommodation, reconsideration will be necessary.[5]

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1 'Landlords set to sell after rent freeze', *The Times,* 17 December 2022.

2 M McLean, 'A perfect storm in Scotland', *The Estates Gazette,* 29 October 2022, p 39.

3 John Blackwood, chief executive of the Scottish Association of Landlords, one of the groups petitioning for judicial review, has stated: 'While the Scottish Government sees fit to raise council and housing association tenants' rents, so social landlords can do repairs and improvements, they fail to realise that private landlords are faced with similar financial pressures': see 'Legal case against rent control and eviction ban moves forward' *Scottish Housing News,* 20 January 2023.

4 See Scottish Parliament, *Official Report*, 24 November 2022, col 8 (Mercedes Villalba MSP), highlighted in M Combe, 'Tenants' rights in Scotland: what do recent reforms mean for Scotland's renters?' (14 December 2022, www.strath.ac.uk/humanities/lawschool/blog/tenantsrightsinscotlandwhatdorecentreformsmeanforscotlandsprivaterenters/).

5 According to one report, there have been 29% fewer properties available on the rental market since the 2022 Act came into force: see 'Rent freeze U-turn still leaves investors with more questions than answers', *The Herald,* 31 January 2023.

THE LAND REGISTER AND THE SHRUNKEN HOUSE[1]

The *Toal* case

The decision of the Lands Tribunal in *Toal v Keeper of the Registers of Scotland*[2] is remarkable both on its facts and on some of the legal argument that was deployed by the different parties. The case concerned two adjacent properties in Tarbolton in Ayrshire, numbers 34 and 36 Back Street. Back Street leads in a northerly direction out of James Street (which runs on a roughly east–west axis). Number 36 is on the west side of Back Street at the junction with James Street. Number 34 lies immediately to the north. A driveway, around two metres in width, gives access to number 36 from Back Street. The driveway lies between the house at number 36 and the house at number 34. It was this driveway which was the focus of the litigation.

At the time of the Tribunal application, Mr and Mrs Frew had owned and lived in number 36 since 1994. Their neighbour at number 34, Ms Toal, acquired her property in 2014. The acquisition triggered first registration in the Land Register.[3] When the land certificate became available, in March of 2015, the title plan showed a two-metre gap between her house and the southern boundary (ie the boundary with number 36). As this matched up with the driveway belonging to number 36 and lying immediately adjacent, the strong impression given was of a single driveway one-half of which formed part of number 36 and one-half of number 34. But this was a mistake.[4] There was no gap between the house at number 34 and the southern boundary. The house extended right to the boundary. On the OS map, and hence on the title plan, the house had simply been shown as smaller than it really was.

The error caused difficulties between the parties. Mr and Mrs Frew maintained they were sole owners of the driveway, as indeed they had been since 1994. Ms Toal, naturally enough, thought that half of the driveway was hers. As the Frews still held on a Sasine title, they applied for voluntary registration in the Land Register, but the resulting title sheet,[5] although recording accurately the extent of their own property, did nothing to dispel the impression as to the shared ownership of the driveway. What was needed was rectification of the title sheet for number 34. In the end, having obtained a survey of their own, the Frews applied to the Keeper for such a rectification. This set in train a resurvey of the base map, which corrected the error both on the OS map and on the cadastral map itself. The house at number 34, enlarged to its proper size, now extended to the southern boundary. The apparent driveway disappeared.

Ms Toal appealed to the Lands Tribunal against the Keeper's actions. Before examining the basis of that appeal it is necessary to consider an important

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1 This section is by Kenneth Reid.
2 2023 SLT (Lands Tr) 1. The Tribunal comprised R A Smith QC and C C Marwick.
3 Under title number AYR10004.
4 No information is available as to how the property was described in the disposition in favour of Ms Toal.
5 AYR104095.

preliminary matter and one which was strongly contested. Prior to the Keeper's intervention, was the title sheet to number 34 inaccurate in the sense of s 80 of the Land Registration etc (Scotland) Act 2012? And, if so, did the Keeper's intervention amount to rectification of that inaccuracy?

An inaccuracy? A rectification?

At this point the precise nature of the original error becomes important. There was nothing wrong with the title extent of either property. In that respect the title sheets were beyond reproach. So Ms Toal did indeed own the precise area tinted pink on the cadastral map in relation to her property; the location of her boundary with Mr and Mrs Frew was not in dispute. The error, rather, was that the house was shown as smaller than it really was, thus giving a false impression as to the ownership of the driveway. Instead of a four-metre driveway, one-half of which was in each property, there was in fact only a two-metre driveway which was located solely within number 36.

According to the Keeper, there had been no inaccuracy on the Register, and hence her intervention had not amounted to rectification.[1] So far as the cadastral map was concerned, a distinction fell to be made between 'title data' and 'geographical data'. Viewed strictly, only the former was part of the cadastral map, and so only the former could be inaccurate in terms of the 2012 Act. Geographical data, although included on the map, were not necessary for the plotting of the title and hence were not, in law, a part of the map. In the present case, the title data had been correct: the boundaries were shown in the right place. It was only the depicting of the house that was wrong, and that depicting was geographical data and not title data.

As the cadastral map had thus, in the Keeper's view, been correct in respect of 34 Back Street, there could be no question of rectification. All that the Keeper had done was to update the geographical data in response to an updating of the underlying OS map. This she was allowed to do. Indeed s 11(7) of the 2012 Act positively required her to 'make any changes to the register which are necessary in consequence of the updating'.

Was this argument correct? It is hard to find a basis in the 2012 Act for a distinction between title data and geographical data.[2] And if something appears on the cadastral map, the natural conclusion is that it is part of the map – in the same way that information, of any kind, which is found on the title sheet is part of the title sheet. A distinction between title data and geographical data was in any event a porous one, as the Lands Tribunal pointed out:[3]

> [T]he reality is that the boundaries on the cadastral map cannot be interpreted without the OS data. The cadastral map in any given case is not, as it were, a pink shape floating on an empty sea. It has to be given context and reference points, and this can only

1 The arguments are summarised at para 1 and paras 37–47 of the Tribunal's decision.
2 The Keeper made reference to s 11(1)(a), which defines the cadastral map as 'the totality of registered geospatial data'; but geographical data is geospatial data.
3 Paragraph 54.

> be done by details from the OS map … So we cannot accept the Keeper's position that the cadastral map provides title data without reference to geographical data.

But if all data in the cadastral map are to be considered a part of that map, it can hardly be doubted that the map had been inaccurate in its depiction of the house. In terms of s 65(2) of the 2012 Act:

> The cadastral map is inaccurate in so far as it –
> (a) wrongly depicts or shows what the position is in law or in fact,
> (b) omits anything required, by or under an enactment, to be depicted or shown on it, or
> (c) depicts or shows anything the depiction or showing of which is not expressly or impliedly permitted by or under an enactment.

To depict the house as lying two metres from the southern boundary was to make a depiction which was 'wrong' within paragraph (a) of s 65(2). The conclusion can hardly be avoided, therefore, that the cadastral map was inaccurate. This, therefore, was the view reached by the Lands Tribunal.[1]

That having been determined, the status of the Keeper's intervention became clear. If the cadastral map was inaccurate, it could only be corrected by rectification.[2] So in altering the cadastral map, following the updating of the OS map, the Keeper was rectifying the Register, as the Lands Tribunal correctly held.[3]

This is not to say that changes made to the cadastral map are always rectifications of that map and hence of the Register. On the contrary, the Keeper is always free to *add to* the cadastral map, whether in response to the updating of the OS map or for some other reason;[4] and, as already mentioned, the Keeper is positively bound to make changes where these are 'necessary' in consequence of OS updating (which seems to refer to changes affecting the depiction, as opposed to the location, of a boundary).[5] But these are not the correcting of mistakes: they are the addition of new data or the refining of data which already exist. Where a mistake is corrected, the correction is properly characterised as rectification.

Admittedly, it may not matter very much, conceptual tidiness aside, whether a change made by the Keeper is characterised as rectification or as something

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1 Paragraph 57. This conclusion is also supported by s 65(3) of the 2012 Act: 'The cadastral map is not inaccurate in so far as it does not depict something correctly by reason only of an inexactness in the base map which is within the published accuracy tolerances relevant to the scale of the map involved.' This implies that where an incorrect depiction is *not* within the tolerances – as was accepted to be the case in *Toal* – then this is considered to be an inaccuracy.

2 To this principle there is or appears to be one exception. Minor typographical errors can be corrected under reg 17 of the Land Register Rules etc (Scotland) Regulations 2014, SSI 2014/150. For discussion, see K G C Reid and G L Gretton, *Land Registration* (2017) para 11.5.

3 Paragraph 59.

4 See in particular Land Registration etc (Scotland) Act 2012 s 11(1)(a), (4). This is not rectification under s 65(2)(b) because the data, previously omitted but now added, were not data 'required, by or under an enactment, to be depicted or shown'.

5 LR(S)A 2012 s 11(7); the ambit of the provision is so explained in Scottish Law Commission, *Report No 222 on Land Registration* (2010) para 5.10.

else. For, under the 2012 Act at least, not much turns on the distinction. Where the Register contains an inaccuracy, the Keeper can always – indeed must always – rectify it, provided only that the inaccuracy is manifest and that the steps needed to correct it are likewise manifest.[1] The OS updating in the present case revealed a manifest inaccuracy. Furthermore, and by contrast with the position under the Land Registration (Scotland) Act 1979,[2] rectification (or its refusal) is not a trigger for the payment of compensation by the Keeper. Compensation under the 2012 Act is restricted to breaches of the Keeper's warranty,[3] and that warranty, set out in s 73 of the Act, is concerned with matters of title (and so not with matters of geography of the kind that went awry in *Toal*). Rectification, it is true, is a prerequisite for a claim under the Keeper's warranty;[4] but it is not the *ground* of the claim.

Matters were otherwise under the 1979 Act. Even where the Register was inaccurate, the Keeper could not usually rectify to the prejudice of a proprietor in possession.[5] That, in essence, was the basis of Ms Toal's appeal in the present case.

The basis of the appeal

As first registration of 34 Back Street took place on 4 September 2014, the registration process fell, if only just, under the 1979 Act. In appealing against the Keeper's decision to rectify the cadastral map in respect of number 34, Ms Toal's case rested entirely on that Act. In fleshed-out form, the argument made on her behalf had seven steps.[6] (i) On first registration, the title plan (ie the cadastral map insofar as it applied to number 34) included within its boundaries one-half of the driveway. (ii) Consequently, owing to the Keeper's Midas touch, which applied under the 1979 Act (but not the 2012 Act),[7] Ms Toal became owner of the half-driveway on 4 September 2014. (iii) She took possession of the half-driveway and was in possession on 7 December 2014, immediately before the designated day (8 December 2014) on which the 2012 Act replaced the 1979 Act. (iv) Her ownership of the half-driveway was an error – a (bijural) inaccuracy on the Register.[8] (v) Had the Keeper been asked (or minded) to rectify that inaccuracy on 7 December 2014 the Keeper would have been unable to do so. This was because Ms Toal was both the registered proprietor of the half-driveway and in possession of it.[9] (vi) Consequently, in terms of the transitional provisions governing the shift from the 1979 Act to the 2012 Act, the inaccuracy ceased to be such on the

1 LR(S)A 2012 s 80(1), (2).
2 Land Registration (Scotland) Act 1979 s 12(1).
3 At least in general. There is a separate compensation scheme in respect of realignment (LR(S)A 2012 ss 94 and 95) but that is a special situation and one which had no equivalent under the 1979 Act.
4 LR(S)A 2012 s 77(2).
5 LR(S)A 1979 s 9(3)(a).
6 Summarised in paras 1 and 31–36 of the Tribunal's decision.
7 LR(S)A 1979 s 3(1)(a).
8 Here we put words into the mouth of the appellant, although her case depended on this proposition.
9 LR(S)A 1979 s 9(3)(a).

designated day.[1] (vii) As the presence of the half-driveway in Ms Toal's title had ceased to be an inaccuracy, there was nothing now for the Keeper to rectify. The Keeper's attempt to rectify, argued Mrs Toal, was therefore misconceived and could not take effect.

The validity of this argument turned crucially on two of the seven steps – that the title plan included half of the driveway (step (i)) and that Ms Toal was in possession of the half-driveway on 7 December 2014 (step (iii)). Lose on either of these points and the appeal as a whole was lost. The Tribunal found step (i) to be well-founded and step (iii) – following a proof – not.[2] Hence the appeal failed. We express no views as to step (iii). But we do not think that step (i) can be correct. No part of the driveway was included within the title plan for number 34.[3]

Why did the Lands Tribunal hold the contrary? The Tribunal's explanation was as follows:[4]

> As is normal, the Keeper has included a large amount of ordnance survey information on the cadastral map. The obvious points of reference are the buildings on either side of the driveway, Nos 34 and 36. The shape of the building at No 34 in particular gives something of a dominant context. We accept that after detailed analysis, it can be ascertained that there is something very wrong with the unamended plan. There is no midway 'feature' implied by the black line running equidistant along the driveway. If scaled, the width between the apparent gable walls of the two properties is more like 4 metres, not the circa 2 metres stated in the 1994 assignation. But looking at the unamended plan for ourselves, we cannot interpret the south gable of No 34 to be anywhere other than it seems to be shown. The obvious conclusion to be deduced is that the cadastral map shows the appellant's title as comprising the 'phantom strip' comprising half the driveway. We are driven to the conclusion that this is the most reasonable, or in any event the least unreasonable, interpretation of the cadastral map.

Now it is certainly true that, at first glance – indeed at much more than first glance – half the driveway did appear to fall within the title plan. Ms Toal, naturally, thought so, though she did not buy the property on that basis, because the land certificate was not issued until many months after she settled the transaction and moved in. But the question to be determined was not the location of this or that internal geographical feature (such as the house), but the position of the boundaries. The crucial southern boundary of number 34 could be calculated, beyond all doubt, by measuring its distance on the plan from the public road (James Street). As so measured it excluded all of the driveway. That this was so is presupposed by the manner in which rectification was carried out. No

1 LR(S)A 2012 sch 4 para 22. For a discussion of the transitional provisions, which often play a critical role in cases such as this, see pp 143–44 above.

2 The decision on possession was due to the absence of sufficient physical acts. The Tribunal did not take the point, which was to prove decisive in a Tribunal decision handed down only a few weeks later, *Grant v Keeper of the Registers of Scotland*, 25 July 2022, that, as no land certificate had yet been issued on 7 December 2014, Ms Toal could not have possessed on the faith of the Register. The point had, however, been raised on behalf of Mr and Mrs Frew: see para 51. The decision in *Grant* on this point seems doubtful: see pp 147 above.

3 The same view is taken in Craig Anderson, 'Toal v Keeper of the Registers of Scotland' 2023 SLT (News) 10 at 11–12.

4 Paragraph 56.

change was made to the boundaries. The only change was to the depiction of the house. If, on first registration in 2014, these boundaries had included half of the driveway, they would continue to include the half-driveway today; for after rectification, as before, Ms Toal owned precisely the same plot of land.

If that is correct, then the appellant's case fell at the first hurdle. The half-driveway was not included in the title plan: the inaccuracy, such as it was, lay in the depiction of the house. Ms Toal had neither gained land by the initial registration, nor lost land by the subsequent rectification. As the inaccuracy was an 'actual' inaccuracy (ie an inaccuracy in the normal sense of the word) rather than a 'bijural' inaccuracy (ie an inaccuracy created by the Midas touch),[1] it was not cured – indeed not affected in any way – by the transitional provisions in the 2012 Act.[2] Having been wrong from the outset, the title plan remained wrong until such time as the Keeper rectified it. Whether Ms Toal was or was not in possession of the half-driveway – a driveway which remained the property of Mr and Mrs Frew throughout – was, quite simply, beside the point.

PROPERTY TAXES IN SCOTLAND[3]

Overview

Introduction

In 2022, Scottish property taxes as such were an area of relative calm, at least until the end of the year. This was in contrast to the position for taxes affecting the UK as a whole, which for the most part still include Scotland. Driven by a series of different operators, 2022 was a rollercoaster of tax policy. The continuing impacts of Brexit and vast public spending driven by Covid-19 were joined, following the invasion of Ukraine by Russia, by new economic demands from a very old enemy, inflation. This derived to a significant extent from energy price rises, driven in part by sanctions on, and reduced supplies from, Russia. All of those shocks seem bound to continue to influence tax and other economic policies for all legislatures throughout 2023 – and well beyond.

As will be seen, the divergence between Holyrood and Westminster taxes to the extent that the former are devolved continues to grow with, in very broad terms, Scottish taxes being somewhat higher (but via a slightly more progressive structure) than their rUK equivalents. Differing tax policies will doubtless play a large part in another continuing saga, that of demands by the Scottish

1 For the difference between 'bijural' and 'actual' inaccuracies, see Reid and Gretton, *Land Registration* para 2.8. The distinction applied only to the 1979 Act. All inaccuracies under the 2012 Act are 'actual'.

2 The transitional provisions in LR(S)A 2012 sch 4 paras 17–24 are headed 'bijural inaccuracies'. Drilling down into the two operative provisions shows that this must be so. Thus (i) para 17 could not apply to actual inaccuracies because no rights in land are affected by their rectification, while (ii) para 22 would make little sense because actual inaccuracies could always be rectified (as, to do so, did not involve the loss of rights).

3 This section is by Alan Barr of the University of Edinburgh and Brodies LLP.

Government for a second independence referendum. The refusal by the Supreme Court to sanction such a course[1] is far from an end to that story.

In other litigation, there were rather more decisions on tax from the Scottish First-tier Tribunal than in some earlier years, including one exposing the anomalies of the additional dwelling supplement to land and buildings transaction tax; and in the Upper Tribunal a further development in a long dispute on Scottish landfill tax.

The 2022 tax story at Westminster included nothing which was formally termed a Budget, but whatever the name given to the policy announcements, substantial (if sometimes ephemeral) tax developments featured throughout. It is fair to say that the overall process was confusing, with immediate and future changes announced and altered on a number of occasions and by different Chancellors.

The Spring Statement

The process started with a Spring Statement, delivered by Chancellor Rishi Sunak (whatever happened to him?).[2] Its principal tax feature was (from April 2023) a rise in the main National Insurance threshold for employees to the same level as the income tax personal allowance, with an increase in the upper threshold at which the main rates cease to apply aligned with the rUK higher-rate tax threshold. This took effect from 6 July 2022, along with an equivalent rise in the thresholds for the self-employed based on the part of the tax year affected. There was also an announcement in the Spring Statement that the basic rate of rUK income tax would be cut to 19% – but not until April 2024.

The Growth Plan 2022

A new Prime Minister (Liz Truss) and Chancellor (Kwasi Kwarteng) then produced on 23 September 2022 what was informally termed a mini-Budget, but which was actually named 'The Growth Plan 2022'.[3] This included proposals for substantial tax cuts of various types. Those affecting National Insurance were among the few to survive later changes in policy; from November 2022, the temporary increase in National Insurance rates of 1.25 % was reversed and the Social Care Levy due to be introduced at the same level from April 2023 was cancelled. The increases in NIC thresholds announced in the Spring Statement were preserved.

In the Growth Plan, there were proposals to bring forward the cut in the basic rate of income tax to April 2023; to abolish entirely the additional rate of income tax (45% in rUK, but which applies to Scottish taxpayers in respect of income other than from earnings and property); to reverse increases of 1.25% in

1 *Reference by the Lord Advocate of Devolution Issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31, 2022 SLT 1325.

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1062708/Spring_Statement_2022_Print.pdf.

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1105989/CCS207_CCS0822746402-001_SECURE_HMT_Autumn_Statement_2022_BOOK_Web_Accessible.pdf.

dividend tax rates (and abolish the highest rate of dividend taxation); to cancel an increase in corporation tax from 19% to 25% which had been planned for April 2023; and to abolish the raft of legislation against disguised employment, generally referred to by the banner name of IR35. The Growth Plan included a number of other measures which would have required substantial further borrowing, and/or which were considered radical (such as the abolition of a cap on bonuses payable to bankers).

One measure first announced in the Growth Plan which survived later reversals was the abolition of the Office of Tax Simplification (supposedly with all tax proposals from the Treasury, HMRC or otherwise now to be driven by a simplifying agenda). The closure was confirmed in November 2022.[1] It will take effect from the date of royal assent of the Finance Act 2023. The decision is perhaps a little surprising, given the endorsement given by the Treasury in a recent report on the first five years of the OTS's existence.[2] Among its final reports were a number on capital gains tax and inheritance tax, which may, to the extent unimplemented thus far, yet find legislative action from a future Government.[3]

The Autumn Statement

The backlash against most of the substantive measures announced in the Growth Plan started almost immediately. The abolition of the highest rates of income tax (additional rate) and dividend tax was reversed in early October 2022.[4] A further change of Prime Minister and Chancellor swiftly followed; and nearly as swiftly a further fiscal event, this time in the form of an Autumn Statement, was delivered by Jeremy Hunt on 17 October 2022.[5] This was supported, as the Growth Plan had not been, by analysis from the Office of Budget Responsibility. The Autumn Statement proceeded to reverse, or confirm the reversal of, most of the tax measures announced in the Growth Plan, but also went somewhat further in announcing a number of tax increases, and measures involving the freezing of allowances and thresholds which will, if implemented, be the equivalent of tax increases because of the effects of 'fiscal drag'. This pulls more taxpayers into higher rates, the drag being particularly swift and severe in times of high inflation.

There is to be no (imminent) reduction in the rUK basic rate of income tax from April 2023 – it is to remain at 20%. The existence and level of the general additional rate of tax was confirmed at 45%, but with a substantial reduction in

1 www.gov.uk/government/news/update-on-the-closure-of-the-office-of-tax-simplification#:~:text=As%20announced%20in%20the%20The,Bill%202023%20receives%20Royal%20Assen.

2 See HM Treasury, *2021 Review of the Office of Tax Simplification: Final Report* (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1039595/HMT_Review_of_OTS_Report_FINAL.pdf).

3 See *Conveyancing 2021* pp 194–95 for discussion of those reports.

4 www.bbc.co.uk/news/uk-63114279.

5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118417/CCS1022065440-001_SECURE_HMT_Autumn_Statement_November_2022_Web_accessible__1_.pdf.

the threshold for that tax from £150,000 to £125,140. The apparently odd level is connected to an existing and continuing rule that the personal allowance for income tax is withdrawn at the rate of £1 for every £2 of income above £100,000; £25,140 is twice the personal allowance, so the mythical taxpayer on an income of exactly £125,140 would lose the entirety of his or her personal allowance but not suffer tax at 45% (higher if a Scottish taxpayer – see below) until further income above that figure was received.

The rUK threshold for higher rate tax (40% at £50,270) had already been announced as fixed until April 2026 and this was extended until April 2028. The same time period for freezing the level of the personal allowance (£12,570) was also announced. Of course, there will be at least one UK general election before this time period expires.

The tax-free allowance for dividends (which is given in addition to the general personal allowance), and which is £2,000 in 2022–23 is to drop to £1,000 from 6 April 2023 and to £500 from 6 April 2024. The special rates of tax on dividends (8.75% (basic), 33.75% (higher) and 39.35% (additional)), which had all risen by 1.25% in 2022–23, connected with the intended introduction of the specific Health and Social Care Levy which will not now go ahead), are to be maintained at these higher levels from April 2023.

It was confirmed that the increase in the corporation tax rate from 19% to 25%, for which there had been proposals for reversal earlier in 2022, would now go ahead from April 2023. This rate will apply for profits above £250,000; companies with profits below £50,000 will continue to pay tax at 19%, with a marginal relief for profits between those figures.

Returning to the freezer, the inheritance tax threshold, which has been fixed at £325,000 since 2009, is to remain at that level until April 2028, with the residential nil-rate band also frozen at £175,000 until that date. This still means that a well-organised married or civil-partnered couple can pass on to descendants up to £1 million without inheritance tax.

There were rumours, as there have been for many years, of increases in the capital gains tax rates. These were not borne out; but the CGT annual allowance is to be reduced from £12,300 to £6,000 from April 2023, and halved again from that figure to £3,000 from April 2024. As well as raising significant sums, these reductions will increase the compliance burden for individuals considerably, as a CGT liability demands a return even from the majority of taxpayers who do not have to complete a tax return every year. This change, coupled with the reduction in the dividend allowance mentioned above, will increase the overall compliance burden for many taxpayers considerably.

The Scottish Budget

Moving to the purely Scottish position, the Autumn Statement's timing allowed the Scottish Budget to take account of its changes and proposals in what has become the Scottish Budget's normal December time slot. But that return to stability would not be matched by the stability that the Scottish Government had hoped for in its tax policy emerging from the pandemic.

In its *Programme for Government 2021–22,* the Scottish Government had aspired to maintain the then-current rates of income tax and land and buildings transaction tax for the term of the Scottish Parliament.[1] This was repeated in the Scottish Budget for 2022–23, delivered in December 2021,[2] while the successor *Programme for Government 2022–23* contained almost no mention of taxation at all.[3] While this aspiration for stability was able to be met for mainstream LBTT rates and thresholds, circumstances have changed in Scotland as in most of the rest of the world; and that brought the perceived need for tax changes.

The changes made derived to some extent from the Scottish Government publication, *A Framework for Tax 2021*.[4] This was discussed in some detail last year.[5] At least some aspects of that document were reflected in the Scottish Budget for 2023–24 which was delivered on 15 December 2022;[6] and by that time, it could be said with reasonable certainty that the proposals in the last of the UK fiscal events, the Autumn Statement, would actually be enacted to take effect in 2023–24. While timing in the macro sense was back to normal, the actual delivery of the Budget was delayed from its appointed hour by another phenomenon that has become endemic in tax policy – actual or alleged leaks of that policy before its presentation to Parliament. There were a number of accurate (as it turned out) predictions of what would be said. The Presiding Officer wished to investigate but after those investigations, she allowed John Swinney (standing in for Kate Forbes, the Cabinet Secretary for Finance and the Economy, on maternity leave) to proceed.

What followed was a Budget which was said to raise about £1 billion more than would have been the case if rUK decisions had been replicated. This involved increased divergence between income tax rates for Scottish taxpayers on earned and property income as compared to the rest of the UK. Greater progressivity is seen as a distinctive feature and principle of the Scottish tax system and this was reflected particularly in the income tax changes, dealt with below. There was in addition a rather unexpected change to additional dwelling supplement in land and buildings transaction tax, also dealt with below.

Changes in other devolved taxes were more pedestrian and further implementation of devolved taxes in relation to aggregates levy, air departure tax (the anticipated Scottish replacement for air passenger duty) and value added tax was only marginally advanced.

1 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, 114.

2 See *Scottish Budget: 2022–23* (www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2021/01/scottish-budget-2021-22/documents/scottish-budget-2021-22/scottish-budget-2021-22/govscot%3Adocument/scottish-budget-2021-22.pdf) pp 45–48.

3 See *A stronger and more resilient Scotland: the Programme for Government 2022 to 2023* (www.gov.scot/publications/stronger-more-resilient-scotland-programme-government-2022-23/documents/). This *Programme for Government* was, for reasons unknown, about a third of the length of most of its predecessors.

4 16 December 2021, www.gov.scot/publications/framework-tax-2021/.

5 See *Conveyancing 2021* pp 192–23.

6 *Scottish Budget: 2023–24* (www.gov.scot/publications/scottish-budget-2023-24/documents/).

The Scottish Land Commission's Advice

The Scottish Land Commission has continued to give advice to Scottish Ministers on the role that is – and could be – played by taxation in relation to Scottish Government policy. A paper was published in January 2022: *Land Reform and Taxation: Advice to Scottish Ministers*.[1] It notes that the restricted scope of devolved tax powers – particularly in view of the non-devolved parts of income tax and the completely undevolved capital taxes – limits the use of taxation as a lever in relation to land reform. Here the priorities are said to include diversification of land ownership, town centre regeneration, making a just transition to net zero, and supporting active farming.

The Land Commission considers that land value should play a greater role in the tax base and recommends (i) that all land is brought on to the valuation roll, and (ii) 'a consistent and comprehensive cadastral approach which would enable the integration of information on land ownership, use and value, building on the current work of Registers of Scotland'. It is considered that further use can be made of land and buildings transaction tax in relation to land reform; and there is a recommendation that there are opportunities on a UK basis to explore a more progressive approach to the use of tax reliefs and exemptions in relation to land use.

Non-domestic rates are considered a powerful tool in relation to the economic recovery of town centres, by use of reliefs to incentivise re-use of vacant and derelict sites, and the imposition of rates on derelict sites to discourage them being allowed to fall into further disrepair.

Consideration is also given to the role of taxation in securing a balance between public and private benefit from future carbon values. In relation to farming, where tax policy has been to support active farming through reliefs and exemptions, more consideration should be given to encouraging the letting of land and new entrants to farming. This is in contrast to arguments in the other direction in relation to agricultural property relief from inheritance tax for let land – the lack of any devolved powers in relation to that tax is recognised in the mention of possible income tax relief in the context of letting land. The Scottish Government's commitment to public engagement on local taxation is recognised and encouraged.

While the limited nature of devolved taxes may restrict some of the Scottish Government's ambitions in this area, there appears to be scope for a growing overlap between policies on taxation and those on land reform.

Land and buildings transaction tax

Rates of basic LBTT

In December 2022, the Scottish Budget confirmed that rates and bands of basic LBTT for residential and non-residential transactions would be left unchanged,[2]

1 www.landcommission.gov.scot/downloads/61efa506191e2_Land%20Reform%20and%20Taxation%20-%20Advice%20to%20Scottish%20Ministers.pdf.

2 *Scottish Budget: 2023–24* pp 22–23.

which confirmed earlier statements that this would be the intention for the current term of the Scottish Parliament.[1]

This means that the 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%

Non-residential/mixed rates for purchases are as follows:

Consideration	Rate
Up to £150,000	Nil
£150,001–£250,000	1%
Over £250,000	5%

For leases, the rates remain:

NPV of rent payable*	Rate
Up to £150,000	Nil
£150,000–£2m	1%
Over £2m	2%

* LBTT on lease premiums is payable at the same rates and bands as non-residential conveyances.

Additional dwelling supplement

The importance of additional dwelling supplement ('ADS') to Scottish Government finances has been evident since its introduction; to an extent much greater than was anticipated, it has produced very large revenues. In recent months, between a quarter and a fifth of residential transactions reported to Revenue Scotland involved the payment of ADS, and a similar proportion of overall residential receipts were from the supplement.[2] Nonetheless it was a surprise that the Scottish Budget increased the rate of the ADS from 4% to 6%,[3] taking effect from 16 December 2022.[4] This means that the rate of ADS has

1 See for example *Scottish Budget: 2022–23* p 19.

2 See for most recent figures https://revenue.scot/news-publications/publications/statistics/monthly-lbtt-statistics#:~:text=A%20total%20of%2011%2C120%20notifiable,660%20fewer%20than%20November%20202 p 1.

3 *Scottish Budget: 2023–24* pp 22–23.

4 The change was implemented immediately after the Scottish Budget by the Land and Buildings Transaction Tax (Additional Amount: Transactions Relating to Second Homes etc) (Scotland) Amendment Order 2022, SSI 2022/375.

doubled since it was introduced in 2016. The proportion of residential LBTT deriving from ADS is anticipated to rise to some 30%.[1]

There is a limited transitional relief, in that the new 6% rate does not apply to transactions where a contract was entered into prior to 16 December 2022. As is usual for the transitional rules for LBTT and ADS rate changes, it seems that it does not matter if a pre-16 December contract is conditional, or if it is varied or assigned (although Revenue Scotland may dispute this).

As was discussed in some detail in last year's volume,[2] there is an ongoing consultation on additional dwelling supplement, and on some aspects in particular. The main areas for discussion are: timelines for replacing a main residence (which does not attract ADS or allows for its repayment); alleviating the position for separating couples and those inheriting dwellings (or shares of dwellings); joint (common) buyers or existing owners; transactions involving local authority purchasers; and whether there should be an 'exceptional circumstances' provision. The Scottish Government's response to the consultation, along with draft legislation for intended changes, appeared in February 2023,[3] although further consultation on that draft legislation may mean there will be delay in implementing changes widely considered to be necessary. It may be that the increase in the rate of ADS encourages the Scottish Government to be more generous than they might have been in possible reforms to the substantive rules.

The last vestiges of a small change made in response to Covid-19 remain relevant until 24 March 2023. Those who purchased a new main residence between 24 September 2018 and 24 March 2020 have 36 months (as compared to the normal 18) to dispose of their previous main residence.[4]

Litigation on ADS

In 2022 there was something of a return to reported cases of the First-tier Tribunal on LBTT, but on a very limited range of issues, for the most part involving ADS.

Perhaps the most egregious example so far of the failings of the current legislation can be found in the case of *Crawford and Scott v Revenue Scotland*.[5] On 17 December 2019 Dr Crawford and Ms Scott purchased a property in Edinburgh. They were neither married nor cohabitants, an important factor in what follows. Prior to the purchase, both had owned and lived in their own properties, each as their own main residence. On the date of the purchase, Dr Crawford completed the sale of his property. Because Ms Scott was a joint purchaser with Dr Crawford, additional dwelling supplement was paid on the date of the purchase, as on that date she owned another dwelling, in the form of her former main residence. She

1 See figures at *Scottish Budget: 2023–24* p 24.
2 See *Conveyancing 2021* pp 197–99.
3 See https://www.gov.scot/publications/land-buildings-transaction-tax-additional-dwelling-supplement-proposed-amendments-additional-dwelling-supplement-legislation/documents/.
4 Coronavirus (Scotland) (No 2) Act 2020 sch 4 para 6(3), inserting sch 2A para 8B into the Land and Buildings Transaction Tax (Scotland) Act 2013 for a temporary period. 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).
5 [2022] FTSTC 3, 2022 GWD 21-299. The title page of the case, incorrectly, has only 'Dr C Ewan H Crawford' as the Appellant.

then sold her property on 5 February 2021, well within the 18-month period from the date of purchase of their joint property. Perhaps unsurprisingly to anyone with some knowledge of the tax, a repayment claim for the ADS paid was then made. This was rejected on the basis that where there were two buyers, all of the repayment conditions must be met by all of the buyers; this could not be the case, because Ms Scott's property had never been the main residence of Dr Crawford.

Dr Crawford and Ms Scott relied (again understandably) on what was then Example 71 of Revenue Scotland Guidance on ADS. This is (or was) in the following terms:

> Jim and William are purchasing a dwelling jointly which is intended to be their main residence. They each already own a dwelling, which they (separately) used as a main residence. Neither old main residence was sold at the time of purchase. Upon purchase, as they will each be deemed to own three dwellings and they will not (yet) have replaced their main residence, the ADS will apply. Jim then sells his previous main residence 5 months later. But they will not yet be able to claim a repayment of ADS, as the joint buyers have not replaced their main residence. William then sells his old house 13 months later. At this point, Jim and William will be eligible to claim a repayment of the ADS they paid.
>
> It will not be possible for Jim and William to amend the original LBTT Return made for their next main residence transaction because the 12-month amendment period will have ended. Jim and William or their solicitor can, however, write to Revenue Scotland to make a claim for the repayment of the ADS paid. Any claim would need to be made within 5 years of the filing date of their original LBTT Return.

Revenue Scotland pointed out that in this example, *both* main residences were sold after the date of purchase. They said that only when both properties were sold after the date of purchase could repayment be made.

Dr Crawford and Ms Scott appealed, but their appeal was rejected by the Tribunal. The introduction of a legislative relaxation of the very strict rules where joint buyers are involved[1] was of no assistance to them, specifically because they were not cohabitants – in such cases, the disposal of one property in which both have resided prior to the new purchase will allow repayment. So it was the failure of the parties to reside together prior to their purchase that was ultimately fatal to their case. The Tribunal could not consider whether the legislation was fair; but they did think the result was within the policy intended by the Scottish Government in its introduction of the legislation and even in the relaxation just mentioned. A more robust purposive interpretation of the legislation might have produced a different result.

The Tribunal went out of its way to point out that the situation would have been different if Dr Crawford had sold his property the day after settlement of the purchase transaction. The Tribunal also pointed out that the result would have been different if the parties had cohabited. It is also true that ADS would not have been payable in the first place if both parties had disposed of their previous main residences on or before the day of purchase. It could be added that it seems that Dr Crawford would have qualified not to pay ADS (given that

1 See Land and Buildings Transaction Tax (Scotland) Act 2013 sch 2A para 8A.

the couple were accepted as not being cohabitants) if he had bought the property in his own, single name, even if he had transferred it into joint names the day after his purchase.

The decision seems unfortunate, even if it is technically correct. Here everyone involved had disposed of anything that could conceivably have been their main residence within the time limits generally allowed – and yet ADS was payable and not available for repayment. What the case illustrates is the need in some cases for serious planning in advance of any purchase where any other dwelling is owned by any of the purchasers. ADS is a tax with notably complex rules, but leaving things until after the purchase (as turned out to be the case here) may well be too late.

The rules requiring actual residence in an owned property in order to avoid ADS on the replacement of a main residence have been addressed in two recent cases, those of *Christie v Revenue Scotland*[1] and *Mohammed v Revenue Scotland*.[2] In each, it was accepted that the taxpayers had purchased properties intending to reside in them; but in each, employment and other circumstances had prevented residence in the relevant property. It is a requirement for replacement of a main residence that the taxpayer resided in it in the 18 months before settlement of the purchase of their new main residence. In the case of Dr Christie, he simply could not do so, because as a member of the Armed Forces, he had to go where he was sent and resided in Army and other accommodation. The Tribunal commented on the unfairness of the situation, but could do nothing about it:[3]

> This is a very sad case and we have considerable sympathy for Dr Christie. As a serving officer he must follow orders and he had no choice about being posted abroad and immediately thereafter to Scotland. Consequently, he simply could not occupy his one and only home in the UK. Contrary to his expectation, it was not possible for the first property to be his only or main residence at any point. We accept his argument that he feels that he has been discriminated against. However, military service and employment are not protected characteristics in terms of the Equality Act 2010.

A similar decision was reached in the case of *Mohammed*, whose job requirements meant that he could not live in his property prior to his new purchase. No repayment was available when he sold that property, although the sale was within the time limits after his purchase.

In these cases and in a number of others, the Tribunal has emphasised, with more or less reluctance, that it has no jurisdiction to consider whether the legislation is fair – it can merely apply it as it stands. Thus in *Robertson v Revenue Scotland*,[4] the taxpayer bought a new house fully intending to sell his existing main residence and qualify for repayment. The pandemic and lockdowns intervened; and it was accepted that the taxpayer was driven into selling the house he had bought, rather than his original residence. That does not fall

1 [2022] FTSTC 2, 2022 GWD 21-300.
2 [2022] FTSTC 4, 2022 GWD 21-301.
3 *Christie v Revenue Scotland* at para 26.
4 [2022] FTSTC 6, 2022 GWD 24-344.

within the rules allowing repayment,[1] an application for which was rejected. The Tribunal could not assist his position.

The same conclusion was reached in *Pattisson v Revenue Scotland*[2] where, after purchasing a new property in Scotland, the taxpayers could not sell their property in Southampton within the requisite 18 months, due to the exigencies of the pandemic and lockdown. The same type of exigency prevented the taxpayer in *Meng Choo Tan v Revenue Scotland*[3] from occupying as a (main) residence a newly purchased property on which she paid ADS, which meant that she could not reclaim ADS on the later sale of her previous residence.

Scottish income tax

Tax rates

While income tax is not of specific relevance to the taxation of land, income from land is one of the categories of income for Scottish taxpayers which is affected by the differing rates (and thresholds) applied to Scottish taxpayers (although not, perhaps ironically, to other taxpayers with income from Scottish land). For 2022–23 the following rates and thresholds were confirmed.[4]

Bands	Band name	Rate
Over £12,570–£14,732*	Starter Rate	19%
Over £14,732–£25,668	Scottish Basic Rate	20%
Over £25,668–£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.

Turning to 2023–24, the Scottish Budget brought changes both expected (in the wake of the UK Autumn Statement) and unexpected.[5] With regard to income tax, the first announcement made derived directly from its UK equivalent – the lowering of the threshold for the highest rate of tax (in Scotland termed the 'Top Rate') from £150,000 to £125,140. Other thresholds are to remain unchanged.

1 See Land and Buildings Transaction Tax (Scotland) Act 2013 sch 2A para 8(1)(a).
2 [2022] FSTC 7, 2022 GWD 26-382. A similar decision was reached in *Yuill v Revenue Scotland* [2022] FSTC 8, 2022 GWD 37-546.
3 [2022] FSTC 10.
4 See Scottish Rate Resolution, 2 February 2022 (www.scottishparliament.tv/meeting/scottish-government-debate-scottish-rate-resolution-february-2-2022).
5 *Scottish Budget: 2023–24* pp 20–22, confirmed by Scottish Rate Resolution 9 February 2023: see www.parlamaid-alba.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-09-02-2023?meeting=14141&iob=128127.

But there was then an announcement that the Top Rate itself and the rate below that, the Scottish Higher Rate, would each be increased by 1%, to 47% and 42% respectively, with other rates maintained. Without actual hypothecation, the 1% increase was stated to be intended for use to increase further the NHS spending increase which would reach Scotland by means of the Barnett formula. The announcement on rates and thresholds, coupled with the 5-rate structure already in place for taxable income above the personal allowance, produces the following table of tax rates on earned and property income for Scottish taxpayers for 2023–24:

Bands	Band name	Rate
Over £12,570–£14,732*	Starter Rate	19%
Over £14,732–£25,668	Scottish Basic Rate	20%
Over £25,668–£43,662	Intermediate Rate	21%
Over £43,662–£125,140	Scottish Higher Rate	42%
Above £125,140**	Top Rate	47%

* Assumes individuals are in receipt of the standard UK personal allowance.
** Those earning more than £100,000 will see their personal allowance reduced by £1 for every £2 earned over £100,000, as in the rest of the UK.

Anomalies at the margins

As is the case throughout the UK, but with a particular emphasis applicable in Scotland, this structure produces some anomalous (for which read 'very high') marginal rates. In particular, NIC thresholds and the reduction in the main rates of NICs which takes place when income exceeds certain levels are now tied to the rUK higher-rate income tax threshold (confirmed in the Autumn Statement, purportedly for the next several years until April 2028, at £50,270). This means that an employee with earnings between the Scottish Higher Rate threshold of £43,662 and the rUK Higher Rate Threshold of £50,270 will suffer a marginal income tax and NI rate of 54% on that slice of income – and a combination of fiscal drag and high inflation are pulling ever more taxpayers into that bracket. Unlike the UK Autumn Statement, the Scottish Budget contained no announcement about freezing thresholds for future years, but increases at the rate of inflation seem unlikely.

A second marginal anomaly, but one better known throughout the UK (although of slightly lesser effect in rUK than in Scotland), occurs when income rises above £100,000 and the withdrawal of the personal allowance is implemented. For Scottish taxpayers with earned/property income above that level, the slice of income between £100,000 and £125,140 will now be subject to income tax at an eye-watering marginal rate of 63% – with 2% NICs payable in addition.

Whether such anomalies – and perhaps more pertinently the differential of 2% now to be applicable between the rUK Additional Rate of 45% and the Scottish Top Rate of 47% – will drive more Scottish taxpayers to attempt to lose their status as such remains to be seen. For those wishing to do so, it must be remembered that the status of 'Scottish taxpayer' derives from factors much more commonly found in considerations of domicile than those encountered when considering a taxpayer's residence. The course may be available to some Scottish taxpayers, but it is far from an open road. In the meantime, those earning more than £43,662 as Scottish taxpayers from employers who have comparable English-based employees will see somewhat increased differences in what they take home. Whether that is balanced or indeed outweighed by differential Scottish Government spending decisions will depend very much on personal and family circumstances.

Other Scottish property taxes

Scottish landfill tax

Rates of Scottish landfill tax for 2022–23 were set by the Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2022[1] at £96.60 per tonne (standard rate) and £3.15 (lower rate). The corresponding rates for 2023–24 were set out in the Scottish Budget in December 2022 at £102.20 (standard) and £3.25 (lower), maintaining consistency with landfill charges in the rest of the UK and discouraging 'waste tourism'.[2] The credit rate for the Scottish Landfill Communities Fund (SLCF) will be maintained at 5.6%, the same as in the previous year and intended to ensure that site operators can contribute to community and environmental projects to a greater degree than rUK counterparts.[3]

In addition, an Order was passed in an attempt further to clarify and confirm when a taxable disposal has been made.[4] It is provided that any use of material in a landfill 'cell' is taxable, unless specifically excluded in the Order or otherwise exempted from the tax. Certain definitions are also amended.

This change followed consultation and may have been influenced by the progress of important litigation on the subject, which reached the Upper Tribunal in 2022, in the form of *Barr Environmental Ltd v Revenue Scotland*.[5] This case concerned what disposals into sites should be taxable, notably on material contributing to the structure of the site itself. Tax and penalties of nearly £100 million are in dispute – considerably in excess of the total anticipated revenue from Scottish landfill tax for 2023–24. Such anticipated receipts are on a steep downward trend, the policy intention of the tax, of course, being to reduce or remove entirely the activity which is being taxed. The parties to the litigation have met with mixed success at this point, although the taxpayers have succeeded

1 SSI 2022/46.
2 *Scottish Budget: 2023–24* pp 24–25.
3 *Scottish Budget: 2023–24* pp 24–25.
4 See the Scottish Landfill Tax (Prescribed Landfill Site Activities) Amendment Order 2022, SSI 2022/233.
5 [2022] UT 11, 2022 SLT (Tr) 77. See *Conveyancing 2021* p 202 for brief discussion of the first-instance decision.

on the more demanding aspects on which they had been assessed – and just as important financially, the penalties in relation to the relevant tax. But one can expect there to be further appeals, perhaps from both sides.

There was a further appeal on Scottish landfill tax in 2022, with rather less (but still a significant sum) at stake, again including substantial penalties: *Patersons of Greenoakhill Ltd v Revenue Scotland*.[1] The issue was again dependent on the nature of the material disposed of and the rates applicable to that material. The taxpayers failed in their appeal for the most part, but primarily because in a self-assessed tax they could not produce sufficient and conclusive evidence from their records as to the nature of the material – this despite the written evidence in the case running to more than 4,000 pages.

Aggregates levy

Provision was made as long ago as the Scotland Act 2016 for the devolution of aggregates levy to Scotland, but a combination of litigation on the UK version of the tax and a range of consultations, including a UK-wide review in 2020, has delayed the process. Consultation continued in Scotland in 2022,[2] and it seems that it will be some time yet before any distinctive Scottish legislation is in effect. Issues of tax competition with the rest of the UK are bound to have some influence on the process, but it is hoped to introduce a Bill in the current session of the Scottish Parliament.[3]

Non-domestic (business) rates (and council tax)

The basic rate poundage having been set at 49.8p for 2022–23,[4] a number of sets of Regulations in 2022 continued and clarified various reliefs in relation to non-domestic rates, including those relating to Covid.[5]

Announcements on business rates formed a substantial part of the Scottish Budget 2023–24, reflecting the large total receipts from this tax.[6] The rules are fixed at the Scottish national level, but local authorities retain the revenue raised in their areas. Probably the most important announcement with the widest effect was a further freezing of Basic Property Rate poundage at its current level of 49.8p, stated to be the lowest poundage in the UK, for the fifth successive year. The Large Business Supplement has been re-named the Higher Property Rate and is set at 52.4p; the threshold of property values to which this rate applies has been raised from £95,000 to £100,000. The Intermediate Property Rate was

1 [2022] FTSTC 9.

2 See *Breaking New Ground? Developing a Scottish tax to replace the UK Aggregates Levy: consultation* (www.gov.scot/publications/breaking-new-ground-developing-scottish-tax-replace-uk-aggregates-levy-consultation/). See also *Encouraging sustainable construction: Consultation on devolved tax to support Scotland's circular economy* (www.gov.scot/news/encouraging-sustainable-construction/).

3 *Scottish Budget: 2023–24* p 28.

4 Non-Domestic Rate (Scotland) Order 2022, SSI 2022/36.

5 See Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2022, SSI 2022/47; Non-Domestic Rates (Relief for New and Improved Properties) (Scotland) Regulations 2022, SSI 2022/49; Non-Domestic Rating (Unoccupied Property) (Scotland) Amendment Regulations 2022, SSI 2022/51.

6 *Scottish Budget: 2023–24* pp 25–28.

set at 51.1p and applies to properties with a rateable value of between £51,001 and £100,000.

A previous announcement that the next non-domestic property revaluation will take effect on 1 April 2023, based on rental values as at 1 April 2022, was confirmed;[1] draft values were published on 30 November 2022. The 2023 revaluation implements the recommendation of the independent Barclay Review of non-domestic rates to move to three-yearly revaluations. In anticipation, the Business Growth Accelerator has been updated to account for the revaluation, and properties in receipt of this relief on 31 March 2023 will continue to be eligible for an equivalent percentage of relief on the new rateable value. In addition, a Revaluation Transitional Relief will cap increases until the next revaluation in 2026.

Another relief, Fresh Start Relief, is expanded by raising the rateable value threshold below which properties qualify for the relief from £95,000 to £100,000; and properties already in receipt of Fresh Start Relief on 31 March 2023 will also continue receiving relief for the remaining duration of the relief, even if their new rateable value is above that threshold. Eligibility is also to be extended in the Small Business Bonus Scheme (SBBS) relief; and it is stated that 100,000 properties will be taken out of rates liability completely. Adjustments are made to the thresholds for this relief which applies on a tapering basis; and the upper threshold at which properties can qualify at all is being raised from £18,000 to £20,000.

There are, however, moves in the other direction. Car parks, car spaces, advertisements and betting shops will be excluded from eligibility for SBBS from 1 April 2023. Various transitional provisions are to be introduced to protect properties that lose or have reductions which lose their eligibility for SBBS, or to delay the implementation of loss of relief.

A number of more specific reliefs are to be introduced or extended. These include an exemption for prescribed plant and machinery used in onsite renewable energy generation and storage, from 1 April 2023 until 31 March 2035. Day Nursery Relief, which was due to end on 30 June 2023, has been extended indefinitely. Enterprise Areas Relief will be extended by one year to 31 March 2024. All the other existing NDR reliefs will be maintained in 2023–24. Empty Property Relief is being devolved to local authorities on 1 April 2023 and new powers are to be given to attack rates avoidance.

Council tax remains the responsibility of local authorities and received only a passing mention in the Scottish Budget.[2]

UK taxes on land

Capital gains tax

The phased reduction of the annual exempt amount for capital gains tax from its current £12,300 (2022–23) to £3,000 (2024–25)[3] was mentioned above. This will of

1 See the Valuation Timetable (Scotland) Order 2022, SSI 2022/368.
2 *Scottish Budget: 2023–24* p 28.
3 *Autumn Statement 2022* para 5.21.

course bring more disposals into the charge to tax; and, coupled with the need to report chargeable disposals of residential property within 60 days of settlement,[1] it may increase considerably the need for swift compliance following a sale or gift. However, the need for reporting where there is no tax payable has been reduced somewhat: this will no longer be required where disposal proceeds are less than £50,000.[2]

Some significant changes are to be made in relation to capital gains tax for separating or divorcing couples.[3] At present, transfers between such partners are only treated as made on a no gain/no loss basis if made in the same year as separation. That is to be extended until the end of the third year of assessment after the year of separation. In a further important relaxation of the rules, a partner who leaves the matrimonial home but retains ownership in whole or in part will be given the option of claiming principal private residence relief for the period after leaving.

An anomaly is to be corrected in relation to exchanges of interests in land, where such exchanges by individual owners can currently qualify for rollover relief or principal private residence relief.[4] It is to be clarified that the reliefs will be available where title is held by limited liability or Scottish partnerships.[5]

Annual tax on enveloped dwellings

In relation to the annual tax on enveloped dwellings ('ATED'), there were increases by CPI inflation from September 2021 in the amounts chargeable for 2022–23.[6] There will be a similar indexation rise for 2023–24.[7]

Residential property developer tax

Legislation was included in the Finance Act 2022[8] for the introduction of this tax, loosely connected with the costs of remediating dangerous cladding on tall buildings. It took effect for those companies affected for accounting periods commencing on or after 1 April 2022, at the rate of 4% on the profits of the largest residential property developers on profits above £25 million.

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1 See Finance Act 2019 sch 2 para 3(1)(b), as amended by Finance Act 2022 s 23(2).

2 See Finance Bill 2022–23 cl 8(7), amending Taxes Management Act 1970 s 8C(1)(b). This figure was previously tied to a multiple of four times the annual exempt amount.

3 The legislation will be included in Finance Bill 2022–23 but will take effect from 6 April 2023. Draft legislation and explanatory material can be found at www.gov.uk/government/publications/capital-gains-tax-transfers-of-assets-between-spouses-and-civil-partners-in-the-process-of-separating.

4 See Taxation of Chargeable Gains Act 1992 ss 248A, 248E.

5 See www.gov.uk/government/publications/capital-gains-tax-disposals-of-land-and-residences-for-limited-liability-partnerships-and-scottish-partnerships/capital-gains-tax-allowing-relief-on-disposals-of-joint-interests-in-land-and-private-residences-for-limited-liability-partnerships-and-scottish-part#detailed-proposal. Legislation will be included in Finance Bill 2022–23.

6 Annual Tax on Enveloped Dwellings (Indexation of Annual Chargeable Amounts) Order 2022, SI 2022/399.

7 See *Autumn Statement 2022* para 5.24.

8 Finance Act 2022 ss 32–52 and schs 7–9.

Value added tax

VAT assignment under the Scotland Act 2016 allows for the first 10 pence of standard rate VAT receipts and the first 2.5 pence of reduced-rate VAT receipts raised in Scotland to be assigned to the Scottish Government. It has proved very difficult to establish exactly (or even approximately) what should be assigned, there being no separate Scottish VAT returns from which to make the estimates. If this is to be carried through, a model based on expenditure may be used, but implementation has been further delayed pending discussions between the respective Governments as part of the wider Framework Review.[1]

While we do not usually cover the often substantial volume of VAT litigation in these volumes, even litigation directly affecting Scottish taxpayers, we mention again the case of *Ventgrove Ltd v Kuehne + Nagel Ltd*.[2] This concerned a lease with 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 paid £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. The Inner House has now reversed the decision at first instance,[3] holding (after considering *inter alia* the submissions of HMRC as an intervenor in the litigation) that VAT *was* properly due on the termination payment and that, as it had not been tendered with the notice of termination, the lease had not been properly terminated. The court reached that conclusion based on the application of what was said to be binding case law on the issue, rather than on the differing guidance issued by HMRC on various occasions.

1 *Scottish Budget: 2023–24* p 28.
2 See also pp 39–40 above.
3 [2021] CSIH 40, 2022 SLT 1037, [2022] STC 1765. The first-instance decision was [2021] CSOH 129, [2022] STC 346: see *Conveyancing 2021* pp 35 and 205.

PART V

TABLES

TABLES

CUMULATIVE TABLE OF DECISIONS ON VARIATION OR DISCHARGE OF TITLE CONDITIONS

This table lists all decisions since 1 January 2019 on opposed applications under the Title Conditions (Scotland) Act 2003 for variation or discharge of title conditions. Decisions on expenses are omitted. A table of decisions prior to that date can be found at the end of *Conveyancing 2018*. Note that the full opinions in Lands Tribunal cases are usually available at http://www.lands-tribunal-scotland.org.uk/.

Restriction on building

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Toomey v Smith 2020 GWD 10-146	1995 disposition. No building without consent.	None.	Granted.
Christie v Carroll 2020 GWD 31-401	1882 disposition. No building. Servitude of recreational use.	Erection of a house.	Refused.
Anderson v Morton 27 July 2020 and 26 April 2021, Lands Tribunal	1964 deed of alteration. Only five houses.	Erection of a sixth house.	Granted.
Rollo v Jamieson 2022 GWD 31-454	1974 feu charter. No additional buildings.	Erection of two holiday lodges.	Refused.
Smith v Lewis 2022 GWD 36-528	1920 deed of conditions.	Substitution of floor area for equality of contribution.	Granted.

Restriction on use

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Inspire Scotland CC Ltd v Wilson 2023 SLT (Lands Tr) 15	1969 feu disposition. Buildings to be used as private dwellinghouses for one family only.	Use of house as a care facility for young persons	Granted.
BNP Paribas Depositary Services (Jersey) Ltd v Safeway Stores Ltd 2022 GWD 34-502	1993 deed of condition. Prohibition of retail sale of food and groceries.	Leasing the premises to a discount supermarket.	Granted subject to payment of £1.8 million in compensation.

Applications for variation of community burdens (s 91)

Name of case	*Burden*	*Applicant's project in breach of burden*	*Application granted or refused*
Smith v Lewis 2022 GWD 36-528	1920 deed of conditions.	Substitution of floor area for equality of contribution.	Granted.

Servitudes

Name of case	*Servitude*	*Applicant's project in breach of servitude*	*Application granted or refused*
Leehand Properties Ltd 2019 GWD 29-468	1994 feu disposition. Pedestrian right of way.	Building houses on site of the projected route.	Granted (unopposed).
Nicol v Crowley, 2019 GWD 40-646; 2022 GWD 24-337	1973 disposition. Pedestrian right of way.	Rerouting of path as part of garden redesign.	Refused but later granted (opposed).
Mahoney v Cumming 2019 GWD 32-506	1907 feu charter. Pedestrian right of way.	Blocking of route to increase privacy.	Refused (opposed).
Thomson v Savage [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).

Name of case	*Servitude*	*Applicant's project in breach of servitude*	*Application granted or refused*
Pallot v Carter 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.
Smitton v Forbes 2022 GWD 28-406	Servitude of access.	Erection of a garage.	Granted in part (opposed).

CUMULATIVE TABLE OF APPEALS

A table at the end of *Conveyancing 2008* listed all cases digested in *Conveyancing 1999* and later annual volumes in respect of which an appeal was subsequently heard, and gave the result of the appeal. A second table, at the end of *Conveyancing 2018*, covered the years from 2009 to 2018. This is a continuation of the tables, covering the years from 2019 onwards.

Anderson v Wilson

[2018] CSOH 5, 2018 GWD 4-62, 2018 Case (39) *affd* [2019] CSIH 4, 2019 SC 271, 2019 SLT 185, 2019 Case (44)

Ardnamurchan Estates Ltd v Macgregor

14 June 2019, Fort William Sheriff Court, 2019 Case (76) *rev* [2020] SAC (Civ) 2, 2020 SC (SAC) 1, 2020 SLT (Sh Ct) 49, 2020 SCLR 408, 2020 Case (65)

Ashtead Plant Hire Company Ltd v Granton Central Developments Ltd

[2019] CSOH 7, 2019 Hous LR *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

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