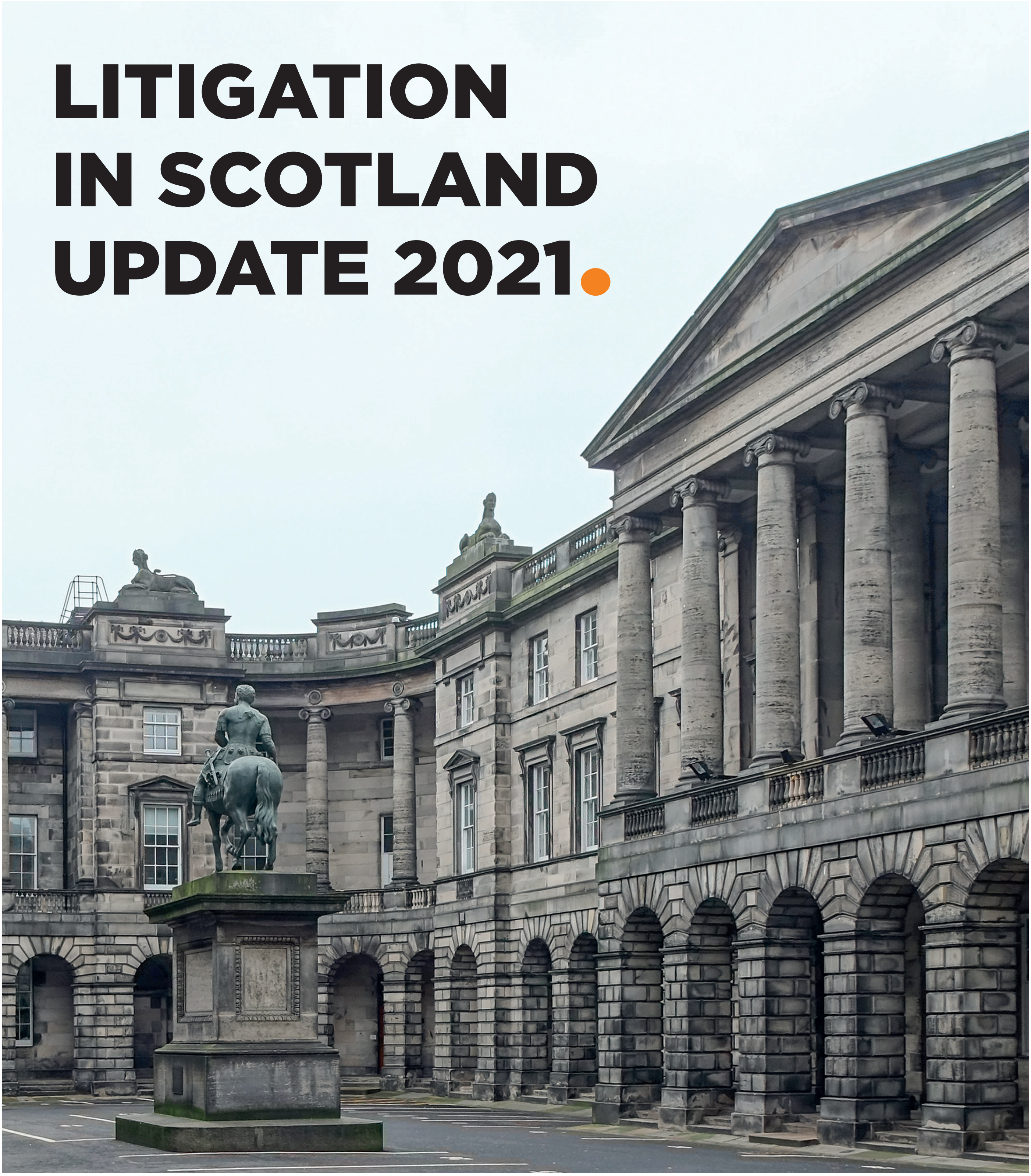
MORTON FRASER
LAWYERS

WELCOME TO CLARITY

LITIGATION IN SCOTLAND UPDATE 2021.



INTRODUCTION

WELCOME TO THE 2021 EDITION OF OUR ANNUAL LITIGATION IN SCOTLAND REPORT.

The coronavirus pandemic had a significant effect on the Scottish legal scene in 2020 with changes to insolvency law affecting the options open to creditors, litigation involving arguments around the law of frustration and issues arising in relation to occupier's' liability. Our litigators were also heavily involved with virtual court hearings and virtual mediations.

2020 saw the introduction to Scotland of success fee arrangements and we anticipate that this will make a significant difference, particularly for SMEs, when considering whether to pursue claims.

In our report, we also look at jurisdictional issues arising from statutory inquiries, the enforcement of adjudicators' decisions and when the permission of the court is required to challenge a planning decision.

If you would like more information on any of the topics covered in our report or support with a Scottish legal matter then please do not hesitate to contact us.

Innes Clark is a Partner and heads up our Litigation Division which is one of the largest and most experienced litigation teams in Scotland.
innes.clark@morton-fraser.com

> *"The coronavirus pandemic had a significant effect on the Scottish legal scene"*

SUCCESS FEES IN SCOTLAND

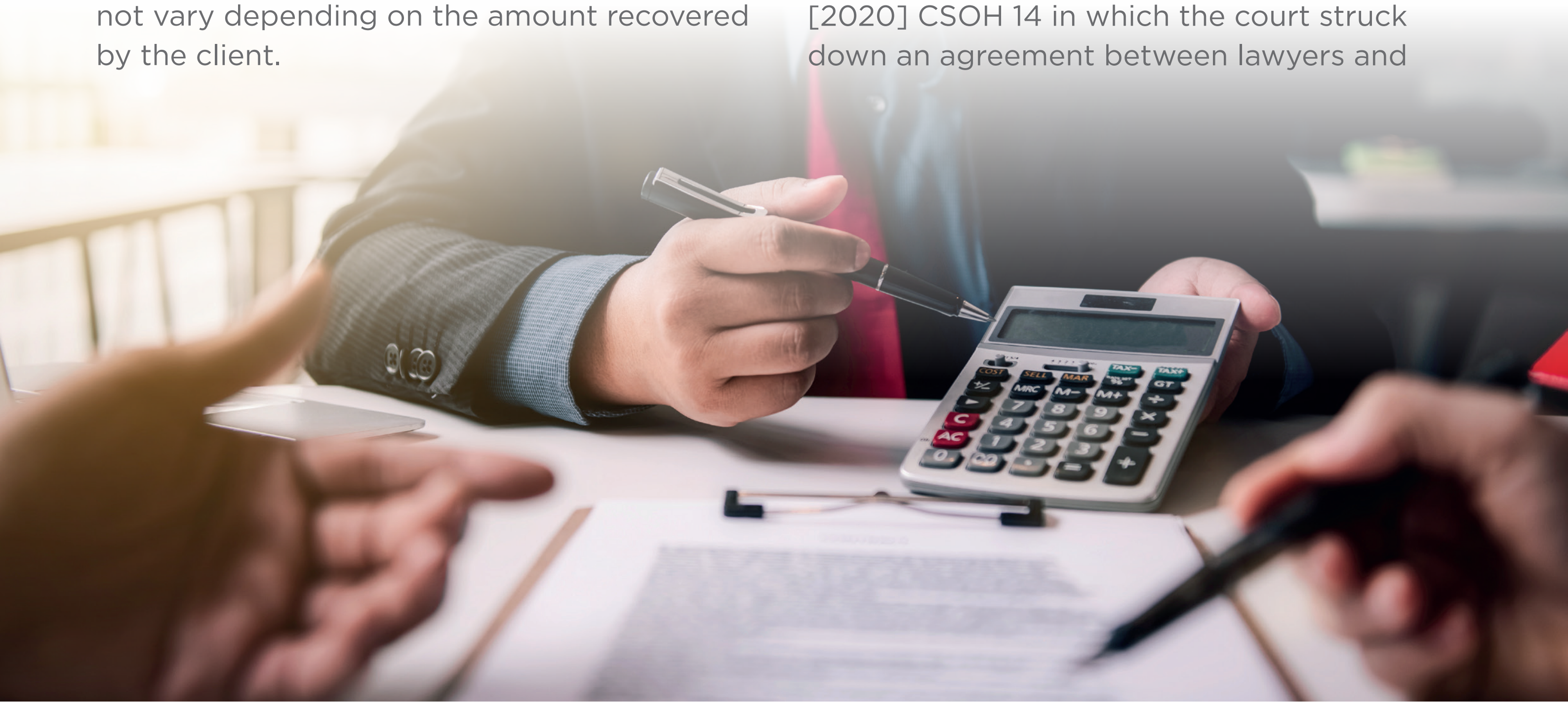
Richard McMeeken looks at the impact that success fees will have on the Scottish legal market.

IT IS USUALLY (BUT NOT ALWAYS) A TRUISM IN THE LEGAL PROFESSION THAT WHAT HAPPENS IN LONDON WILL EVENTUALLY HAPPEN IN EDINBURGH. The most recent example of this is in relation to the way in which lawyers north of the border are entitled to charge for their work. For some time now, English lawyers have been able to enter into damages based agreements or conditional fee agreements in terms of which they can share in their client's success in litigation. Until this year, the position has been quite different in Scotland.

In Scotland, speculative fee agreements have been permitted for centuries with the practice of "no win, no fee" cases being recognised by an Act of Sederunt of 19 December 1835 and the modern practice being regulated by section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and section 42 of the Rules of the Court of Session 1994. Speculative fees are based on either statutory scale fees or a solicitor's work in progress and can be increased by the court in appropriate cases. Crucially, however, speculative fees do not vary depending on the amount recovered by the client.

Traditionally, agreements which do vary depending on what has been recovered have been *pactum de quota litis* in Scotland. That principle covers any situation where there is an attempt by a lawyer to make an arrangement with their client whereby their remuneration is to vary in proportion to the amount recovered in the litigation. For the English lawyers reading this, it is a similar principle to champerty at common law which, although having very different legal foundations, has the same underlying policy considerations.

The rationale behind the prohibition has always been the proper administration of justice, with it being considered to be a potential conflict between the self-interest of the lawyer and their duties to the client and the court for a lawyer to enter into such an agreement (*Quantum Claims Compensation Specialists Ltd v Powell 1998 SC 316*). Very recently Lord Doherty reinforced the importance of the principle in *A & E Investments Inc and Robert Kidd v Levy & MacRae Solicitors and Jonathan Brown* [2020] CSOH 14 in which the court struck down an agreement between lawyers and



their client on the basis that it was *pactum de quota litis*.

However, change has already arrived. The Taylor Review on expenses and funding of civil litigation in Scotland considered that it was time to permit contingent fee arrangements in this jurisdiction subject to appropriate controls and caps on the amount of the fee. These changes just mirrored, or at least were similar to, changes which had already occurred in other common law jurisdictions such as England or South Africa. So, on 27 April 2020, the relevant provisions of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 came into force which permits success fee agreements in Scotland to much the same extent as they are permitted in England. For commercial cases, any success fee is capped at 50 per cent of damages.

For commercial business, this may prove to be a significant and very welcome change. The pandemic has hit some sectors of the economy very hard. Even in good times, small and medium sized businesses write off tens of millions of pounds of bad debt every year because they are either unable or unwilling to incur the legal costs involved in recovering that debt. While there are a lot of government measures currently in place to protect businesses from the worst effects of the pandemic these will not last forever and when they do the risk is that there will be a lot of businesses in Scotland with good claims and little money to pursue recovery.

From that perspective the introduction of success fee agreements in Scotland is timely. It will allow businesses to pursue debts they would have otherwise written off and reduce risk. Moreover, with the advent of success fee agreements has come an increasing willingness of legal funders and providers of ATE cover to offer products to clients in Scotland. The more competition, the more the cost of that sort of cover will come down and the more attractive it will be for businesses to take advantage of it. While it perhaps goes too far to say that litigation conducted on these arrangements will be risk free, the risk will be very significantly reduced and where the litigation is successful clients will have much more certainty about what they will be paying in legal fees.

Richard McMeeken is a Partner and Solicitor Advocate specialising in commercial litigation.
richard.mcmeeken@morton-fraser.com

"It will allow businesses to pursue debts they would have otherwise written off and reduce risk."

INSOLVENCY LAW UPDATE

Nicola Ross looks at the significant changes to insolvency law which took place in Scotland in 2020.

THE LAST 12 MONTHS HAVE SEEN FRENETIC CHANGES IN THE FIELD OF INSOLVENCY LAW. Some of the changes in 2020 were already in the pipeline before we'd even heard of coronavirus but were accelerated by it, some were brought in purely in response to the pandemic and others had nothing to do with it at all.

CIGA

The majority of the changes to legislation apply UK wide and come from the most important piece of insolvency legislation that we've see in a generation - the Corporate Insolvency and Governance Act 2020 ("CIGA").

CIGA introduced a whole raft of measures, some of which are permanent and some of which are temporary.

Measures	Status
Moratorium process	Permanent
Restructuring plan (Part 26A, Companies Act 2006)	Permanent
Prohibition on termination of contracts for the supply of goods and services	Permanent
Return of Crown Preference from 1 December 2020 (introduced via Finance Act)	Permanent
Restrictions on use of statutory demands and winding up	Temporary - extended to 31 March 2021
Suspension of wrongful trading provisions	Temporary - ceased on 30 September. Recommenced on 26 November 2020 until 31 April 2021

These changes are hugely significant and even the temporary changes will have a long lasting impact. In Scotland, we have seen lots of creditors frustrated at their inability to take steps to recover sums owed from debtors via a statutory demand process since, without the teeth of a winding up petition behind them, they are of little force. A news release from the Insolvency Service showed that the year on year reduction in Scottish insolvencies is 43% (39% in England & Wales). The reduction in Scotland has been largely caused by far lower numbers of compulsory liquidations which surely must reflect the CIGA prohibition on creditors using winding up petitions against debtor companies. The feeling is that these well intentioned measures have saved businesses which needed to be saved but, in doing so, have saved businesses which were in deep financial trouble long before coronavirus.

Personal insolvency

There have also been distinct Scottish changes in the field of personal insolvency. For a time limited basis (currently until 31 March 2021), the general moratorium which is granted to a debtor on their application to stop debt enforcement steps being taken against them has been extended from a 6 week moratorium to a 6 month moratorium. Again, on a time limited basis, a debtor can apply for more than 1 moratorium in a 12 month period. Finally, and also on a time limited basis, the debt threshold for a creditor application for debtor's bankruptcy has been extended to £10,000 from a previous threshold of £3,000. That provision is due to come to an end in March 2021 but there is speculation that it may last longer.

Case law

The Scottish court also reached an important decision in the field of gratuitous alienations. This is where an asset is transferred for nothing, or not enough, in the 5 years preceding formal insolvency - similar to transactions at an undervalue in English law. If a challenge is successful, then the court can order that the transferred property is to be restored to the bankrupt's estate, or it can order "other redress" as appropriate. It is a complete defence to a claim that "adequate consideration" was made for the transfer and the point of contention in the case of *O'Boyle's Trustee v Brennan* [2020] CSIH 3 was whether adequate consideration had been given.

In that case, six months prior to his bankruptcy, Mr O'Boyle transferred £190,000 to Ms Brennan which Ms Brennan used to buy a property in her own name. Eight months after Mr O'Boyle's discharge from the bankruptcy process, Ms Brennan sold the property and paid the net sale proceeds of £197,000 directly to Mr O'Boyle. The trustee sought to challenge the original transfer of £190,000 to Ms Brennan as a gratuitous alienation but Ms Brennan claimed that the £197,000 paid directly to Mr O'Boyle - years after he made the payment of £190,000 to her - was adequate consideration.

The original court rejected that argument. On appeal, the Inner House came to the same conclusion. It held that, to be consideration, the payment must be the counterpart to the alienation (i.e. the *quid pro quo*). It also held that payment to a discharged debtor can't amount to consideration for a pre-bankruptcy alienation. The court was also asked to consider whether payment of the £190,000 back to the bankrupt estate produced an "unjust and anomalous result" since she'd already paid £197,000 to Mr O'Boyle and was now being asked to pay £190,000 to the bankrupt estate. That notion was also rejected and it was suggested - somewhat optimistically - that Ms Brennan could claim repayment from the debtor under the law of unjustified enrichment.

All in all, 2020 was a year of change. It's likely that 2021 will see lots more of the same.

Nicola Ross is a Partner specialising in commercial litigation.
nicola.ross@morton-fraser.com

COMMERCIAL LEASES IN SCOTLAND AND TERMINATION THROUGH FRUSTRATION

Ken Carruthers discusses a recent case where it was argued that the lease was frustrated due to the coronavirus situation.

THE CORONAVIRUS PANDEMIC HAS THROWN UP NO END OF INTERESTING AND CHALLENGING DISPUTES, not least in the area of landlord and tenant. Many commercial tenants have been keen to take advantage of government backed restrictions on the usual enforcement remedies normally available to landlords. On the other hand, the key priority for landlords has been to keep rental and other periodic payments flowing.

A recent dispute between international coffee shop operator, Caffe Nero, and landlord, Castle Crown Properties Limited, raised a number of points of interest to property litigators.

Scottish remedies against commercial tenants

Most Scottish commercial leases include a clause in which the tenant consents to the registration of the document "for preservation and execution". The second part of this formulation permits landlords to instruct sheriff officers to pursue a range of legal diligence, or recovery, procedures without the need for a court decree to be obtained. Summary diligence - including the arrestment of funds or goods, and the winding up of the tenant company - proceeds on the basis of the registered lease containing an execution clause. A relevant preliminary step is the service by Sheriff Officers - Scottish Bailiffs - of a formal Charge, essentially a demand for payment failing which diligence to pursue the debt will be carried out.

It was precisely in this context that this firm, acting for Castle Crown Properties Limited, recently secured a significant victory against Caffe Nero.

The pursuit of Caffe Nero

Caffe Nero have over 630 outlets in the UK. Two such outlets are in Inverness and Edinburgh. On 26 March 2020, the Scottish Government passed the Health Protection (Coronavirus Restrictions) (Scotland) Regulations 2020. Designed to reduce the spread of Coronavirus, the effect of these was to restrict normal trading activities by Caffe Nero and many other national retailing and food and drink chains. The Regulations prevented the sale of food and drink for consumption on the premises. Caffe Nero required to suspend sit-in trade between late March and July 2020, although carry out trade was permitted. Turnover at Caffe Nero was hit but was not eliminated entirely and, by July 2020, something approaching business as usual resumed albeit footfall was still down.

Faced with these difficulties, Caffe Nero failed to pay the rent due on the August quarter date for the Inverness and Edinburgh properties let by our client. As both leases were registered we instructed sheriff officers to serve Charges with a view then to diligence being pursued to enforce payment. In response, Caffe Nero came up with a somewhat novel response. They argued that both leases had in fact been terminated through legal frustration. As the leases had fallen, there was in fact no proper basis upon which the Charges could be served or diligence relying upon the Charges pursued. Interim interdict against any further steps in diligence being taken by their Landlords was sought by Caffe Nero.

Legal frustration

Though rare, contracts both north and south of the border can be brought to an end where legal frustration applies. Frustration generally comes about as a consequence of a supervening event, beyond the control or responsibility of either party, which renders performance impossible or radically different to what the parties had originally anticipated. The classic cases tend to refer to abdications, deaths, wars and other events of national significance. The effect of frustration is to relieve both parties of performance.

Caffe Nero argued that the Government's new Regulations amounted to the total constructive destruction of the Inverness and Edinburgh premises. The effect of this was that the leases for those premises in fact fell on 26 March 2020 notwithstanding that Caffe Nero remained in occupation throughout the relevant period, it was permitted to offer a carryout service after 26 March, and had resumed full carry out and table service in July 2020. At no stage prior to the interdict hearing did Caffe Nero seek to argue that the leases had come to an end. Their conduct - remaining in occupation - in fact conveyed quite the opposite.

The Court's approach

Perhaps predictably, the Scottish judges who heard Nero's interim interdict applications were having none of this. Nero may have been faced with challenging trading conditions, but restrictions imposed by the Coronavirus Regulations applied for a relatively short period of time, did not entirely prohibit use being made of the premises and the restrictions were not sufficient to bring about the constructive total destruction of the premises - the test which the court applied. The user clause in the leases was relevant; carry out sales and the full range of other uses within class 1 of the Scottish Use Classes order were permitted. The Regulations related to the consumption of food and drink on the premises only; other uses contemplated by the user clause were unaffected.

> *“Though rare, contracts both north and south of the border can be brought to an end where legal frustration applies.”*

Lord Fairley, who heard the interdict application relating to the Edinburgh outlet, also saw an obvious flaw in Caffe Nero's argument. A finding that the leases had come to an end through frustration would allow pretty much every tenant and landlord under similar leases, for similar properties, throughout the country to walk resulting in a commercial car crash. This did not support a finding, at an interim hearing, that frustration applied in these circumstances.

Despite both interdict applications being rejected, Caffe Nero elected to appeal only one of the decisions to the Inner House of the Court of Session. That appeal has recently been abandoned, Caffe Nero instead seeking to negotiate a CVA regulating the number and the terms to be applied in the various leases in which they retain an interest. Seeking to maintain that their leases had been terminated through frustration whilst at the same time renegotiating the terms of those leases would have been an interesting point to explore before the Inner House!

Ken Carruthers is a Partner specialising in real estate litigation.
Kenneth.Carruthers@morton-fraser.com

STATUTORY INQUIRIES: INQUIRIES IN DIFFERENT JURISDICTIONS DEALING WITH SIMILAR SUBJECT MATTER

Jenny Dickson looks at inquiries in different jurisdictions with overlapping subject matter.

IN RECENT TIMES, WE HAVE SEEN AN INCREASE IN THE NUMBER AND SCOPE OF PUBLIC INQUIRIES. A day doesn't go by when the headlines don't include reference to the evidence in one of the current inquiries - Grenfell, Infected Blood, Child Abuse.
In 2020, we have represented clients at a number of high profile public inquiries.
One thing which the prevalence of inquiries highlights is the importance of taking into account the potential that your client may require to respond to more than one inquiry, covering similar subject matter. This is most likely when your client has operations throughout the UK and may be involved in inquiries in different jurisdictions.

Statutory inquiries are governed by the Inquiries Act 2005. They can be set up by the UK Government or by the Governments of the devolved nations, to investigate events which have or could cause public concern. Although different rules apply within the different UK jurisdictions, the substance of the Scottish rules is very similar to those applicable to inquiries in England and Wales. Despite the similarity of the rules, it would be a mistake to conclude that inquiries are similar in the different jurisdictions within the UK.

In this article we look at two examples where statutory inquiries have been set up by both the UK and Scottish Governments to investigate very similar issues: inquiries looking at the impact of infected blood and infected blood products, and inquiries into child abuse.

Infected Blood Inquiries

A Scottish public inquiry was announced in 2008. It is known as The Penrose Inquiry, as it was chaired by Lord Penrose. It is now closed, having delivered its final report in 2015. It is described as:

"the Scottish Public Inquiry into Hepatitis C/ HIV acquired infection from NHS treatment in Scotland with blood and blood products"

Subsequent to this, in 2017, the Infected Blood Inquiry was set up by the UK Government. It is described as:

"an independent public statutory Inquiry established to establish the circumstances in which men, women and children treated by the national Health Service in the United Kingdom were given infected blood and infected blood products, in particular since 1970"

It is clear that the inquiries both look at infections arising from treatment by the NHS with infected blood and blood products. The Penrose Inquiry had a focus on treatment within Scotland whereas the Infected Blood Inquiry is looking at treatment throughout the UK. Questions might be asked as to why the latter also needed to look at Scotland as surely this would be going over the same ground?

"The UK Infected Blood Inquiry is considering a wider range of diseases than the Scottish one did"

However, a deeper delve into the Terms of Reference of each inquiry makes clear that there are a number of important differences. The UK Infected Blood Inquiry is considering a wider range of diseases than the Scottish one did; it is not restricted to Hepatitis C and HIV. It also seeks to establish the number of patients infected, is considering consent to testing, and whether there have been any attempts to cover up information.

There are parties who gave evidence to the Penrose Inquiry in Scotland, who will now give evidence to the UK Infected Blood Inquiry. Given the wider Terms of Reference, the relevant evidence will also be wider.

Child Abuse Inquiries

The UK Government set up the Independent Inquiry into Child Sexual Abuse to determine whether state and non-state institutions have taken seriously their duty of care to protect children from sexual abuse within England and Wales. The Scottish Child Abuse Inquiry was set up in 2015 to investigate the abuse to children in Scotland. Rather than there being a jurisdictional overlap, as with the infected blood inquiries, each child abuse inquiry is investigating matters within distinct and separate jurisdictions. There will be organisations operating throughout the UK who require to respond to both inquiries. Indeed, we act for such clients in Scotland.

At first glance both inquires appear to have a similar focus - the abuse of children. A closer look at their Terms of Reference reveals some differences in scope. The key differences are:

	Independent Inquiry into Child Sexual Abuse	Scottish Child Abuse Inquiry
Type of abuse covered	sexual abuse	abuse generally - not limited to sexual abuse.
Geographical scope	England and Wales. Material relevant to the devolved administrations or allegations relating to Overseas Territories or Crown Dependencies, will be referred on.	Scotland
Setting for abuse	Institutions - either state or non-state.	Abuse of children in care - not limited to those in institutions so can, for example, include children who were abused in foster care or at boarding schools.

Why are the differences in the scope of inquiries significant?

These examples show that just because an inquiry is taking place within one UK jurisdiction at one time, it does not mean that a similar inquiry could not subsequently start in another UK jurisdiction at a later date. Any later inquiry could have a different scope.

Consistency of approach is important, as is keeping records of all information available and produced to any inquiry in case it is also relevant to a subsequent inquiry. When representing clients in inquiries, even if the Terms of Reference specifically exclude other jurisdictions within the UK, a prudent lawyer would have one eye on that jurisdiction, mindful that their clients may require to respond to a similar inquiry there at a later date.

Jenny Dickson is a Partner and Solicitor Advocate in the litigation and dispute resolution team.
jenny.dickson@morton-fraser.com

ENFORCING ADJUDICATOR'S DECISIONS IN SCOTLAND - THE DIFFERENCES

Sandra Cassels discusses the different adjudication enforcement regimes that apply in Scotland.

THE POSITION ON ENFORCEMENT OF AN ADJUDICATOR'S DECISION IN SCOTLAND IS NOT IDENTICAL TO ENGLAND AND WALES. There are key differences that parties to an adjudication should be aware of.

In Scotland, there are two ways in which an adjudicator's decision may be enforced. The most practical option available to a party is to raise a court action. The most suitable forum for raising an action of this kind is in the Commercial Court which seeks to determine the enforcement of adjudications as quickly as possible so that the parties get the most benefit from the adjudicator's decision. A party may lodge a motion for summary decree in order to seek an expedient result.

The second option available to a party wishing to enforce is to register the adjudicator's decision in the Books of Council and Session. The parties will need to submit the decision to the Registers of Scotland along with the appropriate fee. They can then request an extract of the decision be registered in the Books of Council and Session. The extract has the same effect as a court order would. The difficulty with this method of enforcement lies in its practical application. In order for the decision to be registered both parties must give their consent. It is very unlikely, of course, that a party would consent to the decision being registered when it is against their interests. It is therefore more effective for a party who wishes to enforce to raise a court action.

> *"The party who wishes to enforce the adjudicator's decision may not always be successful."*

The party who wishes to enforce the adjudicator's decision may not always be successful. As applies across the UK, there are two ways by which a party may seek to challenge the enforcement of an adjudicator's decision:

Firstly, a party may argue that the adjudicator lacks jurisdiction. There are numerous grounds on which a party may argue this.

These include: that there is no contract in the dispute; that the contract in dispute was not in fact a construction contract as referred to under the Construction Act; that the adjudicator's appointment did not comply with the relevant rules; that the dispute had not crystallised; that the dispute that the adjudicator ruled on was in effect the same as a dispute that had already been determined by an adjudicator; and that the adjudicator did not comply with the required timeframe and failed to give a decision within the time allowed. If a party wishes to rely on a defence of lack of jurisdiction they must have already brought the issue to the attention of the adjudicator.

> *"Alternatively, a party wishing to challenge the enforcement of an adjudicator's decision can argue that the decision has breached the rules of natural justice."*

Alternatively, a party wishing to challenge the enforcement of an adjudicator's decision can argue that the decision has breached the rules of natural justice. For example, a party could argue that the adjudicator did not take the party's submissions into account or did not give them enough time to prepare for the adjudication and submit evidence in their support.

A further defence available to parties in Scotland is the principle of "balancing accounts" in insolvency. This is an equitable principle which extends the compensation of debts during insolvency and allows a creditor to set off both liquid or illiquid debts against an insolvent company's claim. The Scottish courts have made clear that for this defence to apply there has to be more than balance sheet insolvency.

There must be either a formal insolvency event or "clear or uncontested evidence" of insolvency. If the party is not actually insolvent then the court will consider whether it is in the interests of justice to enforce the adjudicator's decision.

If this defence is successful, the courts will refuse to enforce an adjudicator's decision. This is unlike the position in England where a stay of execution of the enforcement of the decision may be granted. When enforcing an adjudicator's decision in Scotland it is therefore important to remember that the Scottish courts will either enforce the decision or they will not.

An interesting footnote to conclude this discussion is a recent development in the Scottish courts. The Inner House of the Court of Session upheld an earlier decision of the Scottish Commercial Court and found that an adjudicator's decision can be partially enforced. The case was Dickie & Moore Ltd v Trustees of the Lauren McLeish Discretionary Trust and the Inner House determined that although some parts of the adjudicator's decision were invalid, this did not invalidate the whole decision. The parts of the adjudicator's decision that were valid could still be enforced. Before the judgment in this case the possibility of partial enforcement was an area of difference between Scotland and England. This has now changed with the Court considering that it would be more beneficial to the parties in an adjudication if there was coherence between Scotland and England.

Sandra Cassels is a contentious construction Partner. She is a fellow of the Institute of Arbitrators (FCIArb) and former chairperson of the Scottish Branch of the Chartered Institute of Arbitrators and a member of the Scottish Arbitration Centre's Arbitral Appointments Committee.
Sandra.cassels@morton-fraser.com

WHEN IS THE PERMISSION OF THE COURT REQUIRED TO CHALLENGE A PLANNING DECISION?

Douglas Milne looks at the circumstances where the permission of the court is required to challenge a planning decision

THERE ARE TWO PROCEDURES AVAILABLE TO A PARTY WHO SEEKS TO CHALLENGE A PLANNING decision in Scotland by way of an application to the Court. Both routes involve an application to Scotland's Supreme Court, the Court of Session in Edinburgh.

A challenge to a decision of a local planning authority is taken by way of a petition for judicial review.

A challenge to a decision by the Scottish Ministers (for example, following an appeal to Ministers against a refusal by the local planning authority) is taken by way of an application for statutory review.

This broadly reflects the position in England, with Government planning decisions also being subject to a statutory review procedure.

However, in England, both procedures – judicial review and statutory review – require the High Court to have granted permission before the application can proceed. The position is different in Scotland.

In Scotland, the procedural rules regarding judicial review were changed quite significantly in 2015.

Since 2015, in addition to introducing a three-month time limit from the date of the decision within which the petition for judicial review must be lodged with the Court, a challenge can only proceed if the applicant [section 27B of the Court of Session Act 1988]:

"can demonstrate sufficient interest in the subject matter of the application"; and

"the challenge has a real prospect of success".

Before 2015, permission was not required to proceed with a petition for judicial review. Also, there was no strict time limit within which a petition had to be lodged with the Court.

Some key differences remain in planning challenges between Scotland and England.

Unlike in England, Scotland still has no equivalent permission requirement for an application for statutory review.

Further, the statutory provisions in England regarding permission to proceed with an application for judicial review are more detailed than in Scotland.

> *"Some key differences remain in planning challenges between Scotland and England."*

Section 31 of the (English) Senior Courts Act 1981 contains a provision which is not repeated in the Scottish legislation. The 1981 Act provides that when considering whether to grant permission to make an application for judicial review, the High Court:

"may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

… must consider that question if the defendant asks it to do so".

and

"If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave".

The 1981 Act allows the court to disregard this requirement to refuse to grant leave for reasons of exceptional public interest.

In Scotland, while the Court of Session can refuse to grant relief despite grounds for judicial review having been established following a full hearing on the merits of the application, the Court of Session Act 1988 does not contain a statutory direction to refuse permission to proceed on this basis.

However, this would not prevent the Scottish Court from refusing to grant permission on the basis that there is no real prospect of success of the Court being persuaded to grant relief for this reason.

Although the Scottish test in judicial review of there being "a real prospect of success" might be thought to be a higher bar than that in England of there being "an arguable case", in practice the test in both jurisdictions appears to be one of whether a case is arguable in the sense that it gives rise to a realistic prospect of a successful review.

The English Civil Procedure Rules provide a helpful commentary which could fairly be said to reflect practice in Scotland as well as in England:

"Permission will be given where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with the parties and all the relevant evidence… The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that permission is required is designed to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending although misconceived". [the White Book's 2018 commentary, 54.4.2]

In practice, the requirement in Scotland to obtain permission has been a low threshold for challengers to meet.

Douglas Milne is a Partner specialising in planning law.
douglas.milne@morton-fraser.com

OCCUPIERS' LIABILITY IN SCOTLAND: WHO HAS CONTROL OF THE PREMISES?

Jennifer Thomson discusses a recent appeal in Scotland looking at the important question of who is in control of the premises.

EVERYONE'S WORLD WAS TURNED UPSIDE DOWN IN 2020, with unpredictable events throughout the year. The uncertainty has impacted on the work of personal injury lawyers. While the country has been in lockdown with fewer cars on the roads and many employees no longer attending at their places of work, you might have thought that the volume of personal injury claims would reduce. We have though seen an increase in all types of personal injury cases, particularly Occupiers' Liability. The closure of many workplaces and commercial premises, and then the reopening of these premises under the COVID19 restrictions, has resulted in many legal questions arising and a large number of potential claims.

The law on Occupiers' Liability is different in Scotland to that in England and Wales. In Scotland, the Occupiers' Liability (Scotland) Act 1960 applies. Like the legislative provisions applicable south of the border, the 1960 Act is brief. It is wonderful in its simplicity. An occupier requires to take reasonable care to ensure that a person will not suffer injury or damage by reason of any danger on the premises. The inclusion of reference to a "danger" is, of course, slightly different to the position in England.

No matter how simply a provision in legislation is expressed, there is always scope for lawyers to differ in their interpretation of it. Despite this legislation seeing its 60th birthday in 2020, we are still arguing over its meaning. Generally, an occupier is considered to be the party who is in control of the premises. A decision this year from the Sheriff Appeal Court considered the question of who is in control.

The case was *Andrew Wright v National Galleries of Scotland* [2020] SAC (Civ) 6. It was an appeal against the Sheriff's decision that the Defender was not liable for the accident. The accident had occurred when the Pursuer was delivering milk to the Scottish National Portrait Gallery in Edinburgh. This was a task which the Pursuer had done many times previously. He normally gained access via a rear fire exit to the Gallery. Shortly prior to his accident, the arrangements changed and he was to make deliveries via the main front entrance. The Pursuer was allowed access by the Gallery attendants who were on duty. He pushed the milk which was held in a wheeled cage in front of him, down a corridor to the kitchen. He did not see a step down. At this step, the cage suddenly dropped down causing him to fall forward and he was injured.

The Pursuer raised his claim based on various grounds, including Occupiers' Liability. The Gallery argued that they were not the occupiers; they did not have control of the entire premises. A catering company had control of the café and kitchen area. There were various findings in fact, which included that the Gallery was responsible for security of the premises. The Gallery's night attendants provided the Pursuer with access. The Gallery's employees had complete control of all areas within the Gallery, including the kitchen and the corridor where the accident took place. Regardless of the fact that the catering company may well also occupy that area, the Gallery had overall control of the area. It is possible for two entities to be occupiers at the same time. Each has a duty of care towards persons coming onto the premises lawfully. The café was closed and no employees of the catering company were present when the accident occurred.

Importantly, the Gallery was in full control of the arrangements to use the front door. They were therefore responsible for ensuring that the pedestrian route the Pursuer took through the building was safe. If the Defenders had considered this route more carefully, they would have realised that the Pursuer had to negotiate a step. The Appeal Court therefore held that the Gallery was liable for the Pursuer's accident.

This is a useful Scottish decision for its discussion of the definition of control which a party may have, and how that establishes whether that party is an occupier. This is particularly relevant to questions we have been asked many times in 2020. We have a number of clients who are concerned about changes which have been made to their premises as a result of the COVID19 lockdown. Some clients have offices which are currently closed. They do not have staff manning the office and checking it remains safe. Rural clients are seeing greater numbers of visitors to their land, with individuals having spent more time enjoying their more local surroundings in 2020. Clients who own land, particularly those in rural locations, are concerned about the potential increase in accidents on that land.

For all these various questions which arise in the COVID19 era, it is useful to have the clarity of cases like this Appeal Court decision, setting out when a party is considered to be an occupier and what level of control of the premises may be considered relevant.

Jennifer Thomson is a Senior Associate specialising in reparation.
jennifer.thomson@morton-fraser.com

REFLECTIONS ON ONLINE MEDIATION

Accredited mediator **David Hossack** considers whether virtual mediation should become the norm.

HAVING BEEN A MEDIATOR SINCE 2004, I was a firm believer that a key element of the process was having the parties in the same room. Over the years I have been sceptical when the topic of online dispute resolution was raised.

In March last year when everything changed, the question of what would happen with dispute resolution loomed large. Courts and Tribunals largely functioned on the basis of all of the relevant personnel being in the Court room and that stopped. Over the months since, there has been an evolution with virtual hearings, hybrid hearings and socially distant hearings. Is this better than what was in place before? Few would argue that it is, albeit there will be lessons to be learned and positives to be taken. What will happen when the world returns to more of a normality? Will Courts return to the pre-March situation? I doubt that there will be a complete return but suspect that many aspects of the pre-covid justice system will be as before. There will though be a significant backlog in all areas: criminal trials, civil claims and employment tribunal cases and that is without the disputes that may flow from all that happened in 2020.

So what of mediation? From early on in lockdown, mediation started happening online via Zoom and other platforms. I was sceptical on the basis that surely the key magical ingredient of being in "the room" would be missing. So nearly a year down the line from starting on that process am I of the same view? Not at all. Whilst I would still prefer to be in the same place as all the other participants (I still think that it is not possible to build the same rapport with parties online), my experience is that the case for online mediation is unassailable.

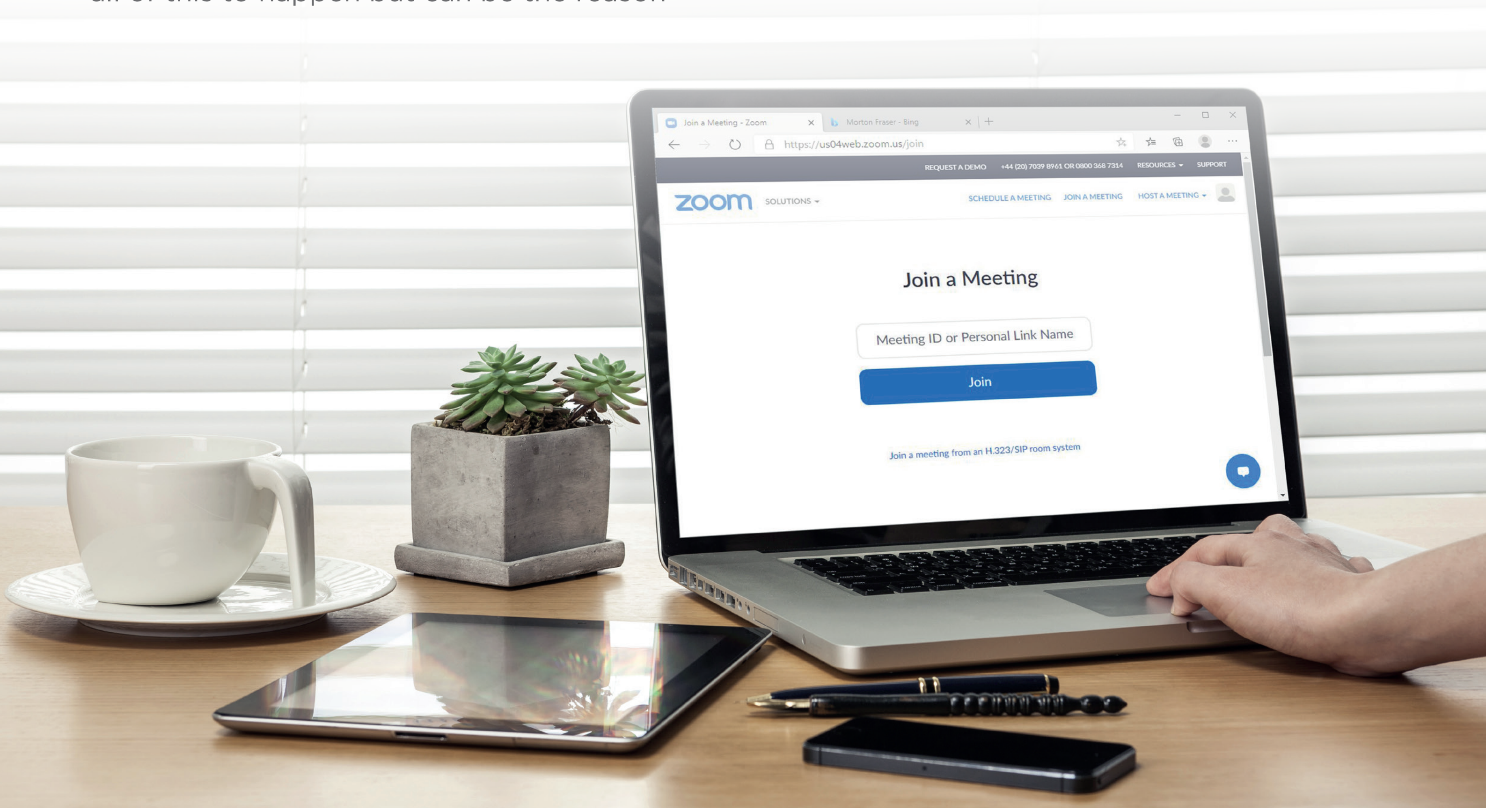
> *"The absence of the frisson of being in the same place can lead to a more forthright discussion."*

So what are the advantages? The first by a country mile is the convenience for the parties. They do not have to come to the mediation but it comes to them. Last year I mediated in a dispute where the parties were 400 miles apart so to attend in one physical location would not have been easy. Using the online process geography was irrelevant. Secondly, being in their own chosen surroundings can allow the parties to be more comfortable with the process. My experience is that there has been a more direct, assured and considered approach to the process by the participants than where the parties are in the same room. The absence of the frisson of being in the same place can lead to a more forthright discussion. I have found that interruptions by parties are much less online than in person. With a lot of work and social lives being conducted on Zoom, it has become common experience that talking over one another does not work and in the mediation setting, it has led to a better quality of listening. I would also suggest that it is less of an event than a mediation in person. The "in person" mediation tends to involve a great deal of organisation to get the parties together for a defined period. That takes time and effort with the mediation process often defined by the time that has been set aside. Conversely, online mediation is simple to arrange and easy to continue. Another significant factor is cost: on all sides expense can be less.

What of disadvantages? As I have said there is a significant element of the human interaction that can be lacking but with skilful interaction by the mediator you can almost get there. Building rapport with the parties is not quite the same but it is possible and given that, setting aside covid, a great deal of human life is lived on digital platforms that may be good enough. Technology allows all of this to happen but can be the reason it fails both in terms of connection issues and the ability of parties to use technology. Dealing with the technology failure scenario, the mediator should always have a plan B to continue by telephone or to reconvene. It is also relevant to mention fatigue. Hour upon hour on screen does not work well and for a mediation is not productive. I suggest that a mediation session be relatively short in duration with breaks built in for the parties.

Although life will, hopefully, largely return to normal later this year, because of the experiences we had during 2020 certain things will be different and we should ensure that they are better. There is much to be said for online mediation to be the first option going forward. For reasons of convenience, cost and time it makes eminent sense. Whilst mediators will argue, with some justification, that something is lost in virtual mediation the gain is greater.

David Hossack is a Partner in the litigation and dispute resolution team. He is accredited as a commercial mediator by the Law Society of Scotland.
david.hossack@morton-fraser.com



OUR LITIGATION TEAM

WE HAVE ONE OF THE LARGEST AND MOST EXPERIENCED LITIGATION TEAMS in Scotland with a team of over 80, including 60 lawyers. In recent years, we have achieved success for our clients in some of the highest profile cases before the Courts and Tribunals.

Clarity is at the heart of everything we do and we provide clients with high quality, strategic and commercially sensible advice. Our client base includes leading national businesses, the public sector and high-net worth private individuals and entrepreneurs. We operate cross-sector dealing with a variety of commercial disputes, including: general commercial litigation, real estate litigation, professional negligence, personal injury, employment disputes and inquiry work.

Our litigation team tailors its approach to cases depending on the nature of the dispute and has vast experience dealing with actions at all levels of the Scottish court system.

Our team is also regularly involved in various forms of alternative dispute resolution, including mediation, arbitration and adjudication. Our broad experience gives us the insight our clients need to ensure the successful resolution of any dispute.

We recognise that funding a litigation can be a challenge and we offer a variety of options for our clients in appropriate cases including hourly rates, fixed fees and success fee agreements. We also work with litigation funders in certain cases to provide cover for our clients' costs and insurance cover for adverse costs, providing clients with the clarity and certainty they need before embarking on litigation.

For more information on our litigation and dispute resolution services click here.

“Clarity is at the heart of everything we do and we provide clients with high quality, strategic and commercially sensible advice.”

OUR SCOTS COUNSEL SERVICES

WE ARE A SCOTTISH BASED LEGAL PRACTICE WITH OFFICES IN EDINBURGH AND GLASGOW, and a long and distinguished history at the heart of the legal community in Scotland. We regularly work with English, Irish and international law firms on high value and complex cross-border transactions and disputes.

Law firms acting as lead counsel for key clients in cross-border transactions or litigation matters have a number of commercial issues to consider when choosing firms to partner with in other jurisdictions. Here at Morton Fraser, we understand that it is vital that you and your business can engage with a law firm in Scotland on behalf of your clients which understands the challenges you face, the pressures you are under and the commercial factors which need to be considered in terms of your own business interests.

Our Scots Counsel services are focused on providing solutions for you and your clients in the following areas:

- Litigation & Disputes
- Banking & Finance
- Corporate
- Insolvency & Restructuring
- Private Client
- Real Estate

We frequently act alongside law firms based in the City of London and other major financial and commercial centres. Our legal specialists include a number of lawyers who have practised in the City of London for well-regarded City and international law firms. We therefore have an inherent understanding of the challenges faced by lead counsel on cross-border international transactions under demanding time pressures.

When partnering with lead counsel law firms, our primary focus is to work seamlessly with you to ensure a collaborative approach throughout so that together we deliver results on time, on budget and in a manner that reflects the commercial requirements of your client.

We are therefore the natural choice for you and your clients, regardless of the size or complexity of the relevant transaction or dispute, or the technical difficulty of the Scots law advice required.

For further information please contact **Ross Caldwell** at ross.caldwell@morton-fraser.com

Named as the only Scottish law firm in the Sunday Times Top 100 Best Companies to Work For 2019

Morton Fraser is a growing Scottish independent law firm, delivering clear advice to businesses, the public sector, individuals and families.

MAKE CONTACT

For any of these services please contact us.

Edinburgh: 0131 247 1000

Glasgow: 0141 274 1100

info@morton-fraser.com