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WELCOME TO CLARITY

Litigation in Scotland Update 2022

Introduction

Welcome to the 2022 edition of our annual Litigation in Scotland update.

2021 saw much more of a business as usual approach in the Scottish litigation scene albeit with significant use of virtual court hearings. While there are definite advantages to certain hearings being virtual, there is quite a lot of pushback about this becoming the default position for all hearings so further change is likely.

Although the ongoing UK wide restrictions on the use of insolvency processes are curtailing activity on that front for now there is a bubble waiting to burst. With corporate insolvencies likely to play a key part in 2022 we highlight the key differences between Scotland and England.

As is the case in England, building cladding issues are causing much consternation and we provide an update on the position from a Scottish perspective. We also look at two current problem areas for litigators in Scotland being the difficulties caused by recent decisions relating to prescription and the differing approaches taken by the judiciary in Scotland to the interpretation of commercial contracts.

On the regulatory front we look at the introduction of Local Place Plans to the planning process and how the alcohol licensing process operates in Scotland.

Finally, we take a look at the funding of litigation against public bodies in Scotland and the introduction to Scotland of qualified one-way cost shifting in personal injury claims.

If you would like more information on any of the topics covered in our report or you would like support with a Scottish legal matter then we would be very pleased to discuss this with you.

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“2021 saw much more of a business as usual approach in the Scottish litigation scene albeit with significant use of virtual court hearings”

Cladding Update from Scotland

Sandra Cassels provides an update on the cladding position in Scotland.

This article is intended to provide an overview of the approach to cladding in Scotland and addresses three discrete points namely:

1. Building Regulations
2. RICS Guidance
3. Rights of recourse for owners/government assistance

Building Regulations

The fatal Garnock Court tower block fire in 1999 contributed to the building standards system being established. The Building (Scotland) Regulations 2004 provide guidance as to what cladding can be used for any particular building. The Regulations are supplemented by annually updated Building Standards Technical Handbooks which provide guidance on achieving the standards set out in the Regulations.

The key requirement[1] is that buildings are designed to inhibit the spread of fire in cavities, on the external walls and between neighbouring buildings. This is more onerous than its English counterpart[2] which requires, *inter alia*, that the external walls "adequately resist" the spread of fire.

In addition to these robust requirements, fire resistance standards were introduced in October 2019 which require any Scottish building over 11 metres to have non-combustible cladding. Previously only buildings over 18 metres (the historic reach of firefighting equipment) were required to comply with this standard.

RICS Position

An EWS1 assessment is now required to value and lend against a property with cladding. The EWS1 confirms that a residential building's cladding has been assessed by a suitable expert and records whether the cladding is combustible and if so, if remedial work is necessary to reduce the fire risk.

RICS issued guidance in March 2021 intended to clarify what properties will require an EWS1[3]. This was likely prompted by the conflicting approaches taken by lenders as to whether properties required an EWS1 or not. From 5th April 2021 an EWS1 is required for:

- A 6+ storey building with cladding/curtain wall glazing and/or balconies stacked vertically above each other and the balustrades, decking or linking is constructed with combustible material.
- A five or six storey building where:
  - At least one quarter of the building elevation is covered in cladding, or
  - ACM, MCM or HPL panels have been installed, or
  - There are balconies meeting the same requirements as above.
- Buildings four or fewer storeys where ACM, MCM or HPL panels are installed.

Research by the Herald on Sunday[4] found that there are at least 974 buildings in Scotland requiring an EWS1. This figure includes over 200 council buildings, including schools, with HPL panels. In addition, 23 tower blocks have combustible ACM panels like those seen at Grenfell.

Government Assistance

Many owners have found their properties requiring expensive remedial work with no recourse to insurance policies or against the seller/developer/builder as the cladding was compliant with building regulations at the time of construction. On the face of it, owners will have to bear the cost of identifying and carrying out remedial work. With this in mind, both the UK and Scottish Governments announced plans to tackle unsafe cladding. As of January 2021, the Scottish Government had received £97.1 million from the UK Government to be applied to remedying the cladding problem which it is applying to safety assessments.

Safety Assessments

Obtaining an EWS1 can cost around £6,000 and there are few people qualified to provide this service. Accordingly, the Scottish Government are providing free safety assessments to properties with external cladding, known as the 'Single Building Assessment' ("SBA"). Inspections commenced in August 2021 on the 25 highest risk buildings.

The SBA comprises an external wall appraisal and broad fire risk assessment of the whole building (not solely focused on cladding). It is intended to provide a realistic view of how much work is required to make buildings safe. It is expected that buildings with safe cladding will be 'green lighted' to provide reassurance to owners and occupiers.

Government Guidance

The Scottish Government has published an Advice Note on fire risk posed by cladding in multi-storey residential buildings.[5] Part 1 contains general advice directed towards those responsible for fire safety such as owners and building managers, including a flowchart showing when an assessment or remedial work is required. Part 2 contains technical advice for those carrying out fire safety risk assessments.

What Next?

For owners and occupiers of potentially unsafe buildings in Scotland, it is positive that the necessary safety assessments will be funded by the Scottish Government however it remains to be seen who will fund remedial works. This is in contrast to the position in England & Wales where the UK Government has proposed to pay for the removal and replacement of unsafe cladding in England on high-rise residential buildings which exceed 18 metres.

There have been hints that the Scottish Government will look to developers/the construction industry to contribute to the cost of remedial works if these cannot be met by public funds. Given that housebuilders have already indicated that they will reduce construction, particularly affordable housing, due to the cost of building safety repairs it is highly unlikely that they will voluntarily contribute. In the absence of agreement, the Scottish Parliament would need to pass legislation requiring such payment. This is unlikely to be a popular policy and can expect to meet fierce resistance. In addition, such legislation would require to be carefully and narrowly drafted otherwise it is likely to result in costs being passed down the supply chain which will simply cause further economic difficulties for firms already struggling with the cost of materials and lack of labour following Brexit and the pandemic.

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1 Part 2 of Schedule 5 to the Regulations
2 Part B of Schedule 1, Building Regulations 2010
3 www.rics.org/uk/news-insight/latest-news/press/press-releases/rics-makes-move-to-unlock-market-for-flat-owners/
4 www.scottishhousingnews.com/article/government-to-set-out-plan-to-address-cladding-crisis
5 Scottish Advice Note: Determining the fire risk posed by external wall systems in existing multi-storey residential buildings - gov.scot (www.gov.scot)

Prescription Cases Create Further Headaches for Scottish Lawyers

Ken Carruthers highlights the difficulties caused by recent Scottish decisions relating to prescription.

Few areas of legal practice cause the commercial litigator quite so much anxiety as ensuring court proceedings are raised on time before the right do so is lost through prescription. Until recently, the law in this area was believed to be reasonably well understood. An obligation to make reparation - for example, for breach of contract - is subject to a short negative prescription period of 5 years and the 5 year prescriptive clock starts to run from the date when the obligation to make reparation for loss, injury or damage becomes enforceable. If a breach is not relevantly acknowledged or proceedings raised within 5 years of this date the right to do so prescribes.

In many, perhaps most, cases it will be quite clear when the obligation to make reparation occurs and hence when the 5 year prescriptive clock begins to run. A breach of contract and the loss flowing from that may be entirely patent. What happens, however, where this is not the case and the apparent beneficiary of the service provided has no idea that a breach has occurred and that the obligation to make reparation has become enforceable?

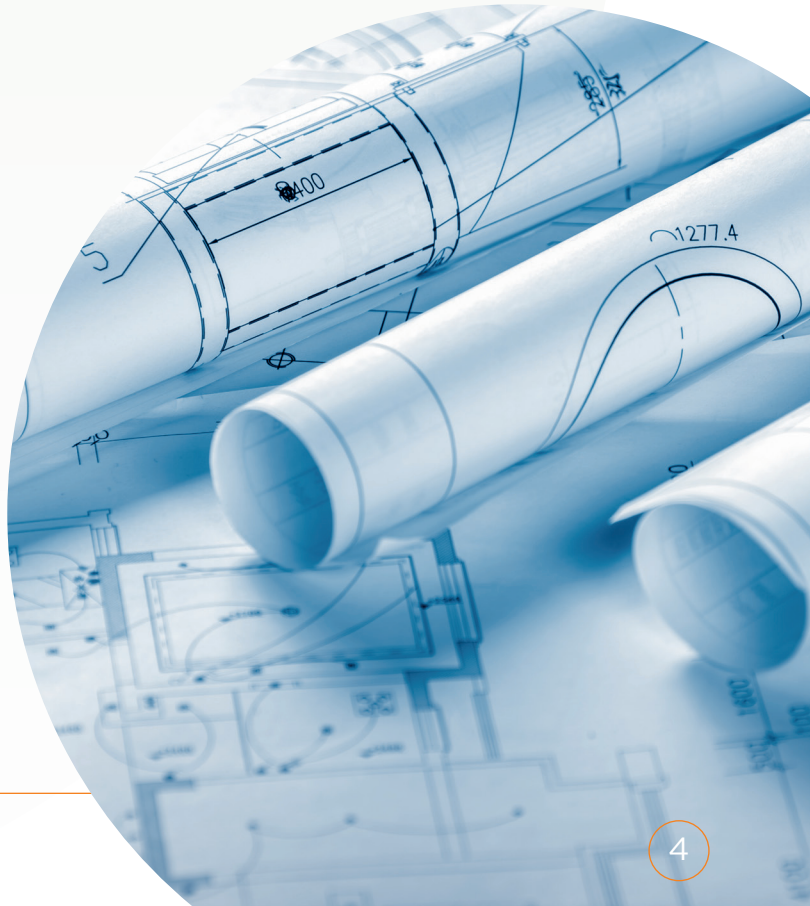
The conventional understanding was that this scenario was covered by Section 11(3) of the Prescription and Limitation (Scotland) Act 1973. This was believed to operate to postpone the commencement of the 5 year period until the creditor was aware, or could with reasonable diligence have become aware, that a breach of duty causing loss had occurred. This could mean that the clock only started to run on the claim a number of years after the breach causing the loss.

Most practitioners would recognise the equitable nature of Section 11(3) as it was conventionally understood to apply - how can a party be expected to take steps to seek reparation if they are not in fact aware, and could not with reasonable diligence, become aware that a breach of duty causing loss had occurred? Losing the right to seek reparation without knowing that the right in fact existed would be regarded by many as a particularly harsh application of the law.

Despite this belief, a number of recent Scottish decisions indicate that the position is far less clear than was previously thought to be the case and circumstances can arise where a claimant can find themselves having lost the right to seek redress without knowing that a right of action in fact existed. The most recent example is *WPH Developments Limited*.

The facts in WPH

In October 2012 WPH, the architect defender, prepared defective drawings for a housing development. The boundaries of various properties were incorrectly plotted on the development site. Land in the ownership of an adjoining proprietor was built upon as a consequence. In 2014, the neighbouring landowner's agent queried the location of the property boundaries and the Developer was asked to remove the encroaching walls which had been constructed in accordance with the architect's advice. Expenditure was incurred by the Developer in 2014 in remedying the problem. On 21 November 2018, the Developer raised proceedings seeking damages in the sum of £300,000 arising out of the architect's alleged negligent service.



The legal issue

It was argued for the Developer that it was only in 2014 that they incurred a loss when they required to purchase extra land to relocate certain boundary walls which had been built in the wrong place. Further, they were not aware, and could not with reasonable diligence have become aware, that loss, injury or damage occurred before February 2014 when issues to do with the location of the boundaries were first raised by agents for the neighbour. Only then did the problem come to light. On this approach, the commencement of the 5 year clock was postponed until February 2014 which meant that proceedings raised in November 2018 were in time.

The Architect's position was that the claim against them *had* prescribed and could no longer be advanced. The erroneous drawings were instructed, paid for and supplied in 2012. The Developer incurred further loss when walls were built on the neighbour's land that year. The breach of duty and loss sustained accordingly occurred more than 5 years before the raising of proceedings on 21 November 2018. By that date the right of action had accordingly prescribed. This was despite the fact that, at the time, the Developer did not know, and could not reasonably know, that there was anything wrong with the drawings the architect had produced.

The legislative provisions

The case focusses on the proper meaning of Section 11(3) of the 1973 Act, the provision which, in certain circumstances, postpones the commencement of the 5 year prescriptive period. S11(3) provides that postponement can occur where the creditor was not aware, and could not with reasonable diligence have been aware that *loss, injury or damage caused as aforesaid* had occurred. The recent decisions have sought to shed light on how this operates in practice and, in particular, what caused as aforesaid means in this context.

Two possible interpretations of 11(3) are possible - either that the commencement of the prescriptive period is postponed until the party is aware of having sustained a loss, injury or damage, or the party needs also to be aware that the loss, injury or damage has been *caused* by act, neglect or default. In other words, is knowledge of the loss sufficient or is it necessary for the cause also to be known before the prescriptive clock begins ticking?

In considering this issue the court made reference to Lord Hodge's analysis in *Gordon's Trustees* and in the case of *Morrison* also. *Morrison* involved an explosion which damaged a building so the loss was obvious.

> *"Losing the right to seek reparation without knowing that the right in fact existed would be regarded by many as a particularly harsh application of the law."*

Dealing with less patent loss or damage in *Gordon's Trustees*, Lord Hodge said the following:-

"In Morrison v ICL this court did not have to address the question which this appeal raises, namely whether in S11(3) the creditor must be able to recognise that he has suffered some form of detriment before the prescriptive period begins. In Morrison v ICL property damage was manifest on the date of the explosion. But where a client of a professional adviser suffers financial loss by incurring expenditure in reliance on negligent professional advice, the client, when spending the money, will often be unaware that that expenditure amounts to loss or damage because of circumstances, existing at the date he or she spends the money, of which the client has no knowledge. A question which the current appeal raises is whether Section 11(3) starts the prescriptive clock when the creditor of the obligation is aware that he or she has spent money, but does not know that expenditure will be ineffective".

In the WPH decision, the court recorded that there can be no real doubt that the Supreme Court answered that question in the affirmative; incurring legal fees is in itself sufficient to start the prescriptive clock, notwithstanding that the advice given later turns out to be negligent.

On this basis, the Inner House decided in *WPH* that the developer's claim against the architect had prescribed. The 5 year prescriptive period began sometime in 2012 when negligent services were provided and paid for, not the later date when the mistake was highlighted. The result was that commencing the action in 2018 was too late.

A similar conclusion was reached in what many regard as another controversial decision - *Midlothian Council* - where an engineer failed to advise that a ground gas defence system was required to prevent noxious gas seeping up from coal strata into the houses built above. The engineer's services were provided in 2006. The housing scheme was built between December 2007 and June 2009. In September 2013 it became apparent for the first time that dangerous levels of toxic gas were present in the houses, which were subsequently demolished between May 2015 and June 2016. The Council sought to recover the substantial losses incurred. The court concluded that the loss was incurred between 2007 and 2009 - when the houses were built with the result that the duty to make reparation had been extinguished by June 2014. By September 2018, when the proceedings were raised, the obligation to make reparation had long since prescribed. The pursuers' argument that they were not aware until 7 September 2013 that there was a gas problem and hence the commencement of the prescriptive clock until then should be postponed was rejected. The loss, in terms of S11(3) of the 1973 Act, had occurred in 2009 and the clock accordingly started ticking then.

Where now?

The Supreme Court recognised in *Gordon's Trustees* that the approach taken by the court was harsh but it offers certainty - although this will be cold comfort to parties such as *WPH* or *Midlothian Council*. Recognising this dilemma, the Scottish Law Commission recommended that the five year prescriptive period should only begin to run when the creditor is first aware (1) that loss, injury or damage has occurred; (ii) that the loss injury or damage was caused by a person's act or omission; and (iii) of the identity of that person. That amendment has not yet come into effect.

In the meantime, both pursuers and defenders should pay particular attention to the Supreme Court's interpretation of relevant parts of the 1973 Act - a right to pursue what can look like a cast-iron case may be lost through prescription even if this appears unjust in the circumstances. At the same time, prescription can provide a lifeline to a defender despite negligent professional services having been delivered even where this is unknown, and could not with reasonable diligence have become known, to a party. Strange times indeed.

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Corporate Insolvency - is it all that different in Scotland?

Nicola Ross highlights the key differences between Scotland and England in relation to corporate insolvencies.

With the UK Government protections to prevent a flood of corporate insolvencies all now tailing off, will 2022 see the much talked about "tsunami" of insolvencies? Market views on that are mixed but it does seem certain that there will be at least a significant upturn in insolvencies compared to 2020 and 2021. With that in mind, it's worth considering the major differences between Scotland and England when it comes to corporate insolvencies.

1. There is no Official Receiver in Scotland

In England and Wales the Official Receiver, who is a Government civil servant, will take corporate insolvency appointments. That's not the case in Scotland, where in every corporate insolvency a qualified insolvency practitioner must have consented to act as administrator, liquidator or receiver (as appropriate). This means that there is no liquidator of last resort in Scotland, although it does also mean that there is no Official Receiver to take a percentage of the asset realisations.

2. There is no such thing as an LPA Receiver in Scotland

The appointment of a Law of Property Act Receiver, where a fixed charge security holder appoints someone to take control of the charged asset (usually to sell, or take control of the rents), is a powerful tool. Alas, it's a powerful tool which is not available in Scotland. We do not have LPA Receivers, nor anything equivalent. The only receiver recognised in Scotland is an Administrative Receiver under the Insolvency Act 1986.

3. The law on challengeable transactions is different

Just like in England and Wales, the Insolvency Act 1986 provisions mean that transactions that are entered into by a company before a formal insolvency process begins can be challenged in Scotland if they are detrimental to the company's creditors. However, there are some important differences in the law between both jurisdictions.

Gratuitous alienations/ transactions at an undervalue

In Scotland, we use the term "gratuitous alienation" to describe a transfer at an undervalue, i.e. where a company has transferred an asset to a third party and not been sufficiently compensated in return. But it's not just the terminology that's different.

- Challengeable period

The challengeable period in which a transaction entered into by the company can be attacked in Scotland is 2 years prior to formal insolvency if the transfer was to an unconnected third party and 5 years if the transfer was to a connected party, such as a director or a group company, or to an associate of a connected party (i.e. the director's spouse). In England and Wales the relevant period for both is 2 years, which is considerably different to Scotland for connected and associated parties.

- Available defences

The available defences are different too. In Scotland it doesn't matter if the company was acting in good faith when it transferred an asset for too little, what matters is the impact on the creditors. However, if

the transferee can show that (1) they paid adequate consideration for the asset, or (2) the company was balance sheet solvent either immediately before the transfer or at any time following the transfer, or (3) the transfer was a conventional gift or charitable donation which was reasonable to make, then the transfer will stand and will not be successfully challenged.

Unfair preference

Although the same term of unfair preference is used in both jurisdictions to describe the situation where a company has unfairly preferred one creditor (i.e. by paying a debt, or granting a security over old debt) to the detriment of the general body of creditors, the time periods for challenge and available defences are, again, different.

- Challengeable period

In Scotland, the relevant period for a potential challenge is 6 months prior to formal insolvency, regardless of whether or not the preferred creditor was connected to the company. That is in contrast to England and Wales where, although the relevant period for an unconnected creditor is also 6 months, the time period for a connected creditor is 2 years.

- Available defences

Once again, the intention of the company to prefer one creditor over the others isn't necessary to be successful in a challenge, so the absence of that intention is not a defence. Instead, if the creditor can show that (1) the transaction was in the ordinary course of trade or business, or (2) they received payment in cash for a debt which had become payable (unless collusive with the purpose of prejudicing the general body of creditors), or (3) the parties to the transaction undertook reciprocal obligations (unless collusive with the purpose of prejudicing the general body of creditors) then the challenge to the transaction as an unfair preference will not succeed.

Common law challenges

Although the use of the statutory challenges set out above is significantly more widespread, it is possible to challenge gratuitous alienations and unfair preferences at common law. In practice, that doesn't happen terribly often, largely due to the more significant evidential burden, but the benefit to the common law challenges is that the time limits set out above don't apply.

4. The underlying Insolvency Rules are not the same

As anyone dealing with insolvency cases will know, the provisions of the Insolvency Act 1986 only take you so far. Much of the technical detail comes from the underlying rules. There are different rules in Scotland - the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 and the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018. Although the technical detail of the rules is supposed to mostly mirror the rules which apply in England and Wales, there are still some differences there (such as approval of fees) and it's something to be alert to.

Summary

Although the underlying law comes from the same statute - the Insolvency Act 1986 - there are some significant differences in insolvency law between Scotland and England and Wales. Given that 2022 is almost certainly going to see an uptick of some size in the number of corporate insolvencies, it will be really important to keep those key differences in mind.

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Interpreting Commercial Contracts in Scotland

Richard McMeeken discusses the differing approaches taken by the judiciary in Scotland to the interpretation of commercial contracts.

The Scottish legal system can be a mystery to English lawyers and there are plenty aspects of Scots law which are (understandably) entirely alien to our friends south of the border. One area of practice on which Scots and English lawyers can agree is the principles applicable to the interpretation of commercial contracts. The Supreme Court's case law in this area *(Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services* [2017] UKSC 24) is applied in Scotland *(Hoe International v Andersen & others* 2017 SC 313; and *Ashtead Plant Hire v Granton Central Developments* 2020 SC 244) and, therefore, on the face of it, there is no difference in approach. The exercise is an objective one with the court seeking to understand what the parties meant by the language that they chose to use. The exercise is both textual, in that primacy is given to the natural and ordinary meaning of the words of the contract and, indeed, if the words are unambiguous, the court must apply them; and contextual, in that, where the words are ambiguous, the court can give greater weight to external factors such as the purpose of the agreement, the factual background and commercial common sense.

However, the weight given to different parts of the principled test can be very different depending on the constitution of the court and, in particular, some judges continue to give a weight to considerations of commercial common sense which can be difficult to reconcile with the warnings given by the Supreme Court in *Arnold*. In *Grove Investments Ltd v Cape Building Products* [2014] CSIH 43 the phrase "to pay the landlords the total value of the schedule of dilapidations" was interpreted as meaning that the landlords should only recover their actual loss, largely for reasons of commercial common sense. While *Grove* was pre-*Arnold*, it is cited with approval in the more recent case of *Ashtead* while, in *Hoe International*, the court questions whether the principles elucidated in *Arnold* are really of general applicability. Indeed, the court in *Grove* explains that because judges have considerable commercial experience, they "will usually be in a good position to decide what is commercially sensible".

> *"One area of practice on which Scots and English lawyers can agree is the principles applicable to the interpretation of commercial contracts."*

While the court expressly says that it must be sensitive to the possibility of "trade offs and bad bargains", the broader sentiment seems out of tune with those expressed by the Supreme Court and other experienced commercial judges. In particular, Lord Reed in *Credential Bath Street v Venture Investment Placement* explains that a judge ought to guard "against excessive confidence that [his] view as to what might be commercially sensible necessarily coincides with the view of those actually involved in commercial contracts". Lord Neuberger warns of similar risks in *Skanska Rasleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 saying that "Judges are not always the most commercially-minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood".

Other judges have made the point extra-judicially. In his Harris Society Lecture in 2017 entitled *"A Question of Taste: The Supreme Court and the Interpretation of Contracts"*, Lord Sumption observed that "judges are not necessarily well-placed to determine what commercial sense requires" and that their "notions of commercial common sense tend to be moulded by their idea of fairness. But fairness has nothing to do with commercial contracts. The parties enter into them in a spirit of competitive co-operation, with a view to serving their own interest. Commercial parties can be most unfair and entirely unreasonable, if they can get away with it. The problem about measuring their intentions by a yardstick of commercial common sense is that in practice it transforms the judge from an interpreter into a kind of *amiable compositeur*. It becomes a means of saving one party from what has turned out to be a bad bargain. The question is no longer what the parties agreed. It is: "what would they have agreed if they were the objective, just and fair-minded people that in practice they are not". Lord Sumption was equally reluctant to speculate about where commercial common sense lay in practice (*Krys v KBC Partners LP* [2015] UKPC 46).

The problem with commercial common sense is that it can be used to support a great many arguments and even agreements drawn up by experienced lawyers may fail to properly reflect precisely what one or other party wanted. An approach which relies upon the primacy of the words leads to greater certainty for the parties to such a contract, but it is still the case, in Scotland at least, that the words are not always given the primacy they deserve and different judges apply the principled test very differently (see the difference between the recent decisions of Lady Wolffe in *Paterson v Angelline* (Scotland) *Limited* [2021] CSOH 101 and Lord Clark in *Scottishpower Energy Retail Limited v Equorium Property Company Limited* [2021] CSOH 98) or Lord Braid in *Dragados* (UK) *Limited v DC Eikefet Aggregate AS* [2021] CSOH 117).

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> *"The problem with commercial common sense is that it can be used to support a great many arguments"*

Planning Update: Local Place Plans

Douglas Milne discusses the introduction of Local Place Plans to Scottish planning law.

In October 2021 the Town and Country Planning (Local Place Plans) (Scotland) Regulations 2021 (the "LPP Regulations") were laid before the Scottish Parliament. The background to these regulations is found in Section 14 of the Planning (Scotland) Act 2019. This amended the Town and Country Planning (Scotland) Act 1997 to permit local communities to prepare "Local Place Plans".

Section 14 provides that before preparing a Local Development Plan, a planning authority are to publish *inter alia* (i) an invitation to local communities in their district to prepare Local Place Plans, and (ii) information on the manner and date by which the Local Place Plans are to be prepared in order to be taken into account in the preparation of the Local Development Plan.

A Local Place Plan is a plan prepared by a community body, that contains proposals as to the development or use of land, and it can identify land and buildings that the community body considers to be of particular significance to the area. The LPP Regulations set out that one of the matters to which a community body must have regard in preparing Local Place Plans is any locality plan published for the area. A locality plan is defined in S10(3) of the Community Empowerment (Scotland) Act 2015, which states that it is a plan setting out for the locality (a) the local outcomes to which priority is to be given, (b) a description of the proposed improvement in the achievement of the outcomes; and (c) the period within which the proposed improvement is to be achieved.

In general, the LPP Regulations set out the form and content of a Local Place Plan, and the steps required to be taken before submission of a Local Place Plan (notices are to be sent to each councillor for the local place plan area, the community council, and information on the date by which representations are to be made).

The LPP Regulations also set out that the information to be submitted with a local place plan includes:

- (If the Local Place Plan is submitted by a community body) a statement explaining how the community body, in preparing the Local Place Plan, has had regard to the Local Development Plan, the National Planning Framework and (if applicable) any locality plan for the local place plan area.
- A statement setting out why the community body considers that the Local Development Plan should be amended.
- A statement setting out the community body's view on the level and nature of support for the Local Place Plan and the basis on which the community body has reached that view (including a description of any consultation undertaken).

"Local Place Plans are to be prepared in order to be taken into account in the preparation of the Local Development Plan."

The LPP Regulations then contain rules relating to the keeping of a register of Local Place Plans, how Local Place Plans can be removed from the register, and how the map of registered Local Place Plans is to be made available for inspection by the public.

Subject to the Scottish Parliament's approval, the LPP Regulations will come into force on 22 January 2022. The point to note about Local Place Plans is that they can be taken into account in the preparation of the Local Development Plan. Local Place Plans can also contain a statement setting out why a community body considers that the Local Development Plan should be amended. Whilst there is no clarity in the LPP Regulations as to how amending a Local Development Plan would operate, the fact that Local Place Plans have to be taken into account in the creation or amendment of a Local Development Plan provides another avenue by which communities can have their views taken on board in planning decisions (as planning decisions are to make in accordance with the development plan, unless material considerations indicate otherwise). Local Place Plans can also contain statements as to the development or use of land (specific areas of land or particular buildings) and so can therefore allow community bodies a greater degree of influence over, for example, the refurbishment or re-development of locally important sites.

The concept of Local Place Plans is not dissimilar to the Neighbourhood Planning system which operates in England. The difference is that a Neighbourhood Plan forms part of the development plan: as set out above, Local Place Plans do not form part of the Local Development Plan but are to be taken account of.

Further differences between Neighbourhood Plans and Local Places Plans are that a Neighbourhood Plan can be put to a local referendum, and that Neighbourhood Plans are incentivised as communities can benefit from 25% of the Community Infrastructure Levy arising from development in their area. The provisions for Local Place Plans in Scotland are not as wide-reaching.

If you require further information on planning reform in Scotland, please contact Morton Fraser's planning team.

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"Local Place Plans can also contain a statement setting out why a community body considers that the Local Development Plan should be amended."

Licensing in Scotland

David Hossack discusses the regulation of the sale of alcohol in Scotland.

We are often asked about the system for the regulation of the sale of alcohol in Scotland and it is suggested that this bears a close relationship with that in England and Wales. Yes, there are similarities but also significant differences. So how is the sale of alcohol regulated in Scotland?

The Licensing (Scotland) Act of 2005 is the key piece of legislation and underpinning that Act are five licensing objectives, which are enshrined in the law to guide Licensing Boards in the exercise of their functions at all times. These objectives are:-

1. The prevention of crime and disorder;
2. Securing public safety;
3. Preventing public nuisance;
4. Protecting and improving public health; and
5. Protecting children from harm.

A Premises Licence is required for every establishment from which alcohol is to be sold or supplied. Each Premises Licence is tailored to fit the business operation being carried on from a particular premises, and is granted in perpetuity, provided there is no change to the manner of operation of the premises. Premises Licences can be held either by an individual, a company or a partnership, and will be based on an approved operating plan.

The operating plan needs to detail all activities to be carried on in the premises which are to be licensed. This covers not only the sale of alcohol but also all other commercial or leisure activities which may be carried on within the building. It will require to state whether or not alcohol is being served on or off sale. There must also be a layout plan which sets out the areas to be licensed and includes detailed information on fire protection and areas where children and young persons are not permitted. Unlike in England, where only the drinking areas are licensed, the usual approach is that the whole building is licensed.

In order to allow alcohol to be sold from the premises there must be a named Premises Manager. That Premises Manager must be the holder of a Personal Licence obtained in Scotland. An English Personal Licence is not sufficient for these purposes. Premises can only have one Premises Manager and an individual cannot be Premises Manager for more than one establishment.

"If seeking to obtain a new licence for premises which have yet to be constructed or converted for the sale of alcohol, a Provisional Premises Licence application can be made."

have yet to be constructed or converted for the sale of alcohol, a Provisional Premises Licence application can be made. To make such an application a detailed layout plan and operating plan are required together with a certificate of suitability from the Planning department of the Local Authority. If granted, the licence has to be "confirmed" prior to it being ready to be operated and, for this to be done, certificates of suitability from Building Control and Environmental Services are required. If there are any changes to the layout or Operating Plan these must be approved by a variation application prior to the confirmation of the licence. If, however, the premises are ready to be used, a full licence application can be made. For this to be done certificates of suitability from Planning, Building Control and Environmental Services are required. For grant of either a Provisional or full licence application there is a requirement for a hearing before the relevant Licensing Board. Once the licence is granted an annual fee is payable to the Licensing Board.

Although a Premises Licence is, in theory, granted in perpetuity, any change to the business operation carried on from a particular premises, or to its layout, will require the approval of the Licensing Board. Certain changes, known as minor variations, can be dealt with administratively by Licensing Boards, without any need for a hearing. Such minor variations include the substitution of a new Premises Manager and a change to the layout plan, which does not increase the capacity of the premises. If a variation is not categorised as "minor", a full variation application will require to be made, which will require to be advertised and formally considered at a Licensing Board hearing. This process is almost as cumbersome as applying for a new licence, and not one which the majority of licence holders will wish to undertake lightly.

"Although a Premises Licence is, in theory, granted in perpetuity, any change to the business operation carried on from a particular premises, or to its layout, will require the approval of the Licensing Board."

The primary means by which a Premises Licence can be transferred to another individual or corporate entity is at the instigation of the existing licence holder. In some circumstances though, an application for the transfer of a Premises Licence may be made by someone other than the Premises Licence holder. Only certain designated categories of person can apply for such transfers, and such transfer applications must be made within 28 days of a specified event, failing which the licence "ceases to have effect". These specified events include death, insolvency and business transfer.

Finally, whilst the law is the same throughout Scotland and the intention was that implementation would be uniform, the reality is that different Licensing Boards operate the legislation in accordance with their own procedures and policies. Each Licensing Board is required to have a policy setting out their approach to licensing. So not only is it necessary to appreciate that the regime in Scotland is different from that in England and Wales but also there are significant differences in approach throughout Scotland.

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Funding of Litigation Against Public Bodies in Scotland

Jenny Dickson discusses how a case relating to beaver protection involved the use of crowdfunding and a protective expenses order to fund the litigation.

One Scottish case which captured the headlines in 2021 was the battle to save the beavers. An environmental charity, Trees For Life, challenged the issuing of licences to kill beavers. The case was a judicial review, brought against both the Scottish Ministers and NatureScot, the organisation with responsibility for certain licensing decisions, including licenses for the killing of beavers. The popular press reported on the challenge of preserving beavers while also ensuring that agricultural land is not damaged by them. As lawyers, there is another interesting aspect to this case: the funding of the litigation.

Trees for Life raised money for their judicial review through crowdfunding. They were very successful, building up a fund of £60,000 for the litigation. However, that amount was not nearly sufficient when the potential adverse costs they could be obliged to meet, if unsuccessful in their case, was estimated at £200,000. They successfully argued that exposure to the other side's costs would be objectively unreasonable and prohibitively expensive. As a result of this, they obtained a protective expenses order.

What is a protective expenses order (PEO)?

A PEO protects a party to legal proceedings by either capping their potential liability for adverse costs or relieving them of any liability. PEOs enable cases of general public interest to be advanced, by removing some of the financial burden. The Rules of the Court of Session contain provision for PEOs in environmental cases. The background to these can be found in the Aarhus Convention, which sets out that signatory states must ensure access to environmental justice. In Scotland, it is implemented by 58A of the Rules of the Court of Session. Its terms are similar, but not identical, to the equivalent provision in the English Civil Procedure Rules. For example, for some PEOs under Rule 58A, the applicant requires to demonstrate that they have sufficient interest in the subject matter of the proceedings.

If the court action is not an Aarhus Convention claim, a PEO can still be sought under the common law. An example of this was the *Keatings* case in 2020 which sought declarator that the Scottish Parliament can legislate for an independence referendum. In that case the pursuer sought a PEO under common law. His application was refused. One criterion considered was whether it was just and reasonable to grant the PEO, considering the financial resource of the parties. Although Mr Keatings is a man of modest means, he had access to considerable potential funding through his social media account and ability to crowdfund. The court was also not satisfied that he would discontinue proceedings if the PEO was not granted. It considered the possibility that there would be a further round of crowdfunding, to enable the court action to proceed.

Crowdfunding

Both the cases we consider here raised some funds through crowdfunding. It is an increasingly popular method of funding litigation in Scotland against public bodies. Donors are attracted by a shared interest in the outcome of the case, or the public or political interest which is being advanced.

Litigants can fund their own legal expenses, as well as potential adverse costs, this way. They may do it by raising sufficient funds for the entire litigation at the outset, or in stages. If ultimately successful in the litigation, they may recover costs from the other party. Normally, the crowdfunding arrangement would stipulate that those costs are not to be returned to each of the individual donors. That means the litigant may have a financial interest in the case and this argument was considered in the *Keatings* application for a PEO. Litigants using crowdfunding need to take care to ensure the terms on which they set up the arrangement are suited to their needs. Equally, public bodies should consider those same terms to ensure they understand any implications of the funding on the litigation itself, including on arguments for supplementary financial support through a PEO.

Funding: what next for litigation against public bodies?

We live in an era where litigation is used both to challenge decisions of public bodies and to drive political agendas. The courts play a vital role in ensuring that decisions can be challenged but litigation is expensive, and it can often be difficult for parties to pursue their cases.

We have now seen a number of cases funded through multiple sources, including crowdfunding and PEOs. The *Keatings* case provided some guidance as to how the court would apply the common law test for PEOs, and of the potential interaction between crowdfunding and PEOs. The popularity of these funding options may see new types of legal challenge to public bodies with cases concerning issues of interest to donors more likely to attract crowdfunding.

The judicial review against the Scottish Ministers and NatureScot was ultimately successful. The beavers were given reprieve from the licences to cull them, and they live on to fight another day. And with these funding options, so too will many other potential litigants in future cases against public bodies.

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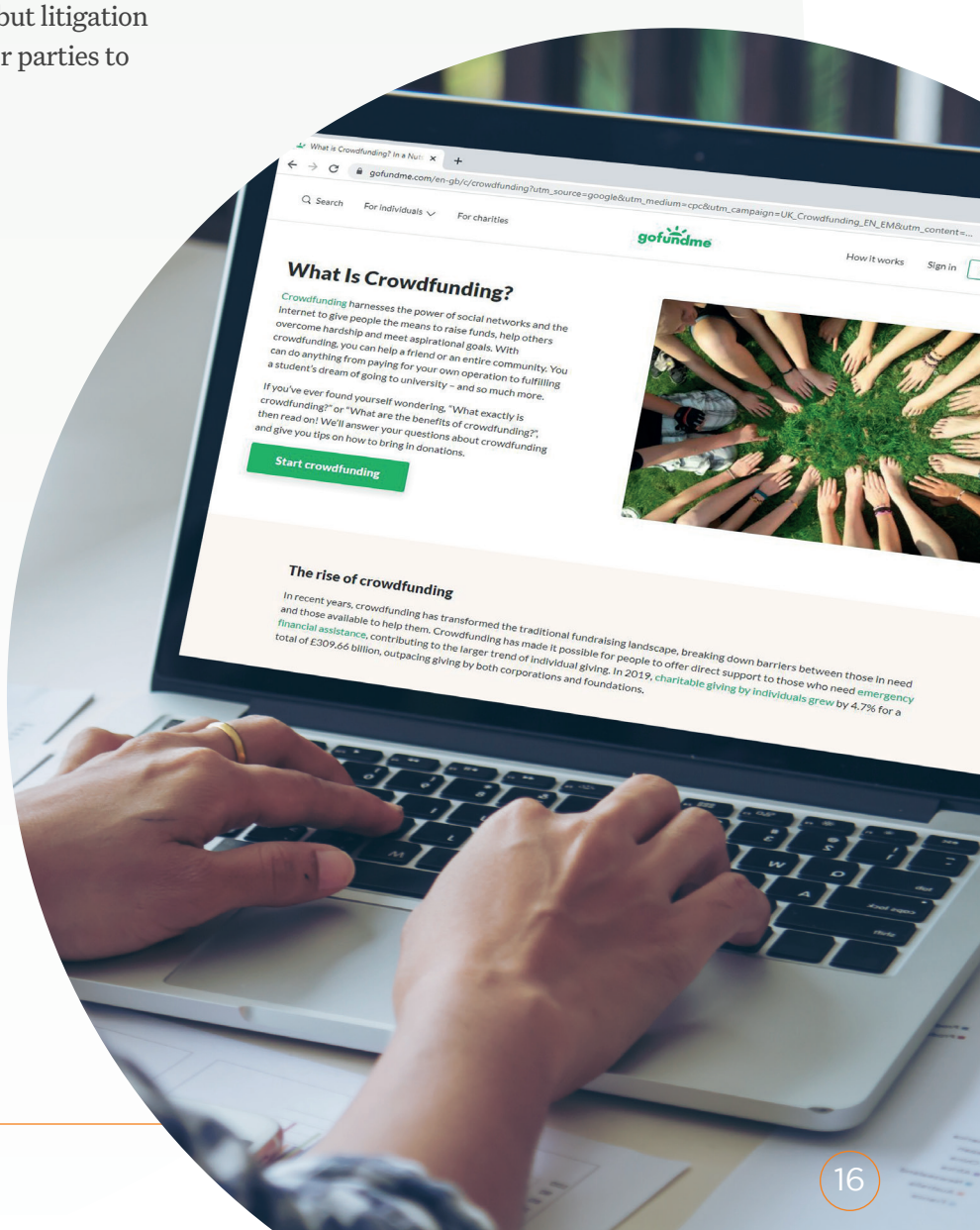
> *“The courts play a vital role in ensuring that decisions can be challenged but litigation is expensive, and it can often be difficult for parties to pursue their cases.”*



Qualified One Way Cost Shifting

Personal injury specialist **Nicola Edgar** highlights the introduction to Scotland of qualified one way cost shifting.

Qualified One Way Cost Shifting (QOCS) came into force in Scotland on 30 June 2021 fundamentally changing the rules on how expenses are dealt with in personal injury proceedings in Scottish courts. The traditional principle that the loser pays the winner's legal costs no longer always applies. The new rules provide that if the Claimant is not successful, they will not be responsible for the Defender's costs and the Defender will have to pay their own legal costs, even if they successfully defend the case. Whilst similar rules have been in place in England and Wales since 2013, there are fundamental differences in how the Scottish system will operate which will lead to differences in the approaches between our respective jurisdictions.

The aim of the new rules is to widen access to justice for those bringing personal injury claims as the one way costs shift provides protection for Claimants against an adverse award of expenses if their claim fails. QOCS is one of a package of reforms to Scottish civil procedure following recommendations made in Sheriff Principal Taylor's 2013 review of expenses and funding of civil litigation in Scotland. The rules were set out in Section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 and implemented by Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Qualified One Way Cost Shifting) 2021.

The exceptions

The Court has discretion to disapply QOCS protection when proceedings are not conducted in an appropriate manner. Section 8(4) of the 2018 Act sets out three scenarios which the Court may consider in this context. They are where the Claimant or his legal representative:-

(a) makes a fraudulent representation or otherwise acts *fraudulently* in connection with the claim or proceedings;

(b) behaves in a manner which is *manifestly unreasonable* in connection with the claim or proceedings; or

(c) otherwise, conducts the proceedings in a manner that the Court considers amounts to an *abuse of process*.

"Fraudulently", "manifestly unreasonable" or "abuse of process" are not defined and so it is likely there will be litigation over the next few years to establish the parameters of these concepts.

The Act of Sederunt created three additional exceptions where QOCS protection can be lost:- (1) the Claimant fails to obtain an award of damages equal to or greater than the sum offered by way of a tender lodged process; (2) there is an unreasonable delay by the Claimant in accepting a tender; and (3) the Claimant abandons the action.

There is a further exception in Sheriff Court cases where the Defender has applied for summary decree against the Claimant and the court has granted Decree of Absolvitor or Dismissal.

Differences between Scotland and England

Despite the differences between the jurisdictions it is interesting for Scottish practitioners to look at what has happened in England and Wales to predict what may happen over the next few years.

In terms of tenders, which are the Scottish equivalent to Part 36 offers, costs protection for the Defenders is maintained where a reasonable offer is made and refused or accepted late by the Claimant. In that situation the Claimant may have to pay the Defender's costs from the date the offer was made, however, these are capped at 75% of the damages awarded. The only limit which applies in England & Wales is the total damages and interest awarded to the Claimant.

In considering whether a Claimant has acted fraudulently, the test the courts apply is *"fundamental dishonesty"*. This is an established concept in English law, albeit it has proven difficult for Defendants to prove a Claimant has met the test. Often examples of this provided in case law are extreme and show extensive deception is required before the court would make such a ruling, such as in *Walkden v Drayton Manor Park Ltd* [2021] EWHC 2056 (QB). For an effective QOCS regime in Scotland, Defenders would argue that there must be disincentives against poor litigation conduct and so decisions on the Scottish concepts of acting fraudulently, behaving in a manner which is manifestly unreasonable or conducting proceedings in a manner which amounts to an abuse of process will be interesting to see.

When QOCS was implemented in England and Wales, fixed recoverable costs were introduced for a range of moderate value injury claims but there are no similar proposals for Scotland. Also, the recoverability between parties of conditional fee agreements, success fees and ATE insurance premiums were removed, but these have never been recoverable in Scotland and so that has not changed with the introduction of QOCS.

Implications of the new rules

We expect there will be an initial increase in litigation as there are a number of issues requiring judicial determination. The concepts of what is deemed "appropriate behaviour" will no doubt be the subject of court action and we will be closely monitoring any decisions relating to this.

Whilst there has been speculation that QOCS will open the floodgates to high numbers of more speculative claims and those with more questionable merit, we consider this unlikely and understand there were similar unfounded concerns when QOCS were introduced in England. Whilst there may be an initial spike in litigation, this should settle down once the judiciary have clarified these uncertainties and provided guidance on appropriate behaviour.

QOCS addresses the inequality of arms between parties in these types of claims where a private individual is often raising an action against a corporate Defender, with far greater resources at its disposal. The new rules focus on the behaviour of the Claimant in the course of the litigation and it will be interesting to review any judgments on what is deemed inappropriate conduct, particularly when there is often no means to raise concerns in relation to unreasonable behaviour on the part of the Defender. In our view, the new rules bring about positive change and will result in greater access to justice given the lower risks of expenses for Claimants.

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

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