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LAWYERS

WELCOME TO CLARITY

Litigation in Scotland Update 2023

Introduction

Welcome to the 2023 edition of our annual Litigation in Scotland update.

Over the past year, substantive court hearings in the Court of Session and the Sheriff Courts have returned to being in person by default. 2022 also saw some key changes to the law of prescription come into force and two group proceedings actions being brought in the Court of Session. We look forward to seeing how these actions, using this relatively new procedure, progress through the court in 2023.

Scotland has now caught up with England on the class action front but, as a jurisdiction, Scotland is still able to offer some unique tools in the form of caveats and fast track enforcement. We look at these in more detail below and how they can protect parties from having interim orders made against them without their knowledge and allow parties to rely on registered documents for an enforcement action.

In terms of legal developments, the changes to the law of prescription introduced by the Prescription (Scotland) Act 2018 came into force in June and we consider the impact this will have in the context of latent defects in construction projects. We also discuss the Scottish Law Commission's recently published recommendations for the reform of the termination of commercial leases.

We highlight a recent case in the Court of Session which saw a challenge under the Environmental Impact Assessment Regulations as well as looking at the scope of directors' duties in light of a recent Supreme Court decision.

As we move into the post-pandemic world we look at what a human rights based approach in the Scottish and UK Government Covid-19 inquiries might look like. Finally, we review awards of damages to relatives following a wrongful death and compare the different approaches taken by Scottish and English courts.

If you would like more information about any of the topics discussed in our review or you would like support with a Scottish legal matter we would be delighted to hear from you.

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"Over the past year, substantive court hearings in the Court of Session and the Sheriff Courts have returned to being in person by default."

Advantages To Scottish Procedure: Early Warnings And Fast Track Enforcement

Nicola Ross discusses two court procedures unique to Scotland which can be beneficial to parties.

Scottish court procedure can often seem like a dark art to many practitioners located beyond Scotland. To be fair, sometimes that can be for good reason! However, there are ongoing efforts to modernise procedure, with small claims having recently undergone a huge revamp (to become "Simple Procedure") and there are currently new draft rules proposed for all actions where the sum sued for is over £5,000 which will have a significant impact on the way court actions run in Scotland.

But are there any areas where Scottish procedures are beneficial? We think the answer to that is yes. Two examples are set out below:

Early warning system - caveats

Caveats are documents which are lodged at court by businesses and individuals, amongst others. Their purpose is to provide early warning of certain court proceedings which have been raised against them. The sorts of things covered by caveats would be requests for interim orders like interim interdict (injunction) and applications for winding up or bankruptcy.

Having a caveat in place means that the party who lodged the caveat has the right to be heard in court before any decision is taken on whether the interim orders, or in the case of winding up or bankruptcy the initial orders, should be granted. Part of that right means being put on notice that the case has been raised, or the request made, and that early warning can often be used to find a solution with the other party and, if that's not possible, it means that the party with the caveat can put forward an argument regarding why the interim order sought shouldn't be made. This is an opportunity which is unique to Scotland and is really valuable. If all that wasn't good enough, lodging a caveat is low cost but the benefit it can bring is priceless.

"Lodging a caveat is low cost but the benefit it can bring is priceless."

We would advise all businesses with Scottish registered offices to have caveats lodged in order to give early notice of any attempt to have them put into liquidation. That advice applies equally to businesses which might be in a spot of financial difficulty and to those which are completely comfortable and that's because overlooking a small debt (of over £750) could, in theory, give rise to a liquidation petition. We would also advise any businesses or individuals with any hint of a dispute which could give rise to interim injunction, for example a restrictive covenant dispute or a shareholder dispute, to get caveats lodged. We would also advise lenders with floating charges who have ongoing facilities to have caveats lodged in respect of their borrowers - that way the lender gets notice of a liquidation petition and knows to stop advancing further sums.

Fast track enforcement - summary diligence

Another huge advantage of Scottish procedure is the ability to register certain documents and then use that registered document as the foundation for enforcement action, and in doing so completely removing the need to go through a court action to get a judgment. This is particularly effective tool for debt recovery.

To be capable of registration the document must contain a clause confirming that the parties to the document "consent to registration for preservation and execution". If the document has that, and has been properly signed (and where relevant, Land and Buildings Transaction Tax paid), then it can be registered. If the document sets out details of sums owed by party A to party B, then the registered document can be used to seek recovery of the outstanding amount from party A in much the same way as you would use a judgment but without having been anywhere near a court therefore making a huge time saving compared to a court process. This process is known as "summary diligence".

We typically use summary diligence to recover sums due to clients in respect of rent arrears under leases, sums due under guarantees, and payments due under settlement agreements.

If you would like any more information about how these novel Scottish procedures can benefit you or your clients we would be more than happy to talk to you.

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Unfair Prejudice And Discretionary Decisions Of Directors

Richard McMeeken considers the scope of director's discretion and how this has been dealt with by the courts.

The duties incumbent on company directors are much talked about at the moment following the Supreme Court's judgment in **BTI 2014 LLC v Sequana SA and others [2022] UKSC 25** clarifying the existence and scope of the so-called "creditor duty", obliging company directors to consider the interests of the company's creditors as well as its members when insolvency threatens the company. However, the scope of directors' duties can be equally contentious in relation to the manner in which they are exercised as against the members themselves. This is a common theme in petitions under section 994 of the Companies Act 2006 in terms of which members of the company (usually, but not necessarily, minority members) can seek redress against the company and its directors for unfairly prejudicial treatment.

In the majority of cases under section 994, what is being complained of is a breach of the articles of association of the company. The directors being accused of acting outwith the bounds of the express authority given to them by the company's members. Typically, the members will only be able to complain of unfairness where there has been a breach of the express terms of the articles (see **O'Neill v Phillips [199] 1 WLR 1092 and Gray v Braid Logistics [2015] CSOH 146**). But the courts have developed section 994 in such a way that directors can be liable for unfairly prejudicial conduct even if they are acting within their strict legal powers. That development has come primarily as a result of the implication of terms.

The basis for implication is that the terms on which the members and directors agreed to do business together includes an agreement that the directors will perform their fiduciary duties, now found in sections 171-177 of the Companies Act 2006. Accordingly, non-compliance with these duties can found an unfair prejudice claim. Of particular interest are the duties found in sections 171 and 172 of the 2006 Act. Section 171 imposes a duty on the directors to act in accordance with the company's constitution and exercise the powers for the purposes for which they are conferred. Section 172 imposes a duty to act in good faith and in the interests of the company. Section 170 makes it clear that both duties are to be interpreted in accordance with common law principles and equity, the latter being more likely to be relevant in the context of actings by directors in a quasi-partnership (**Ebrahimi v Westbourne Galleries [1973] AC 360**).

> *"The courts have developed section 994 in such a way that directors can be liable for unfairly prejudicial conduct even if they are acting within their strict legal powers."*

Directors are, of course, in exercising their powers under the articles, fixed with significant discretion as to how to do so. That discretion is never absolute, even where the articles suggest otherwise. As the late Professor Dworkin observed, contractual discretion is "like a hole in a doughnut - it does not exist except as an area left open by a surrounding belt of restriction" (R Dworkin¸ Taking Rights Seriously, Harvard 1977). The limits of the discretion are best put by Rix LJ in the well-known **Socimer International Bank Ltd v Standard Bank London Ltd [2008] EWCA Civ 116** in which he said " a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused".

However, the court should be slow to interfere with the exercise of a director's discretion. Of course there

are cases in which irrationality can be objectively demonstrated (**Braganza v BP Shipping Ltd and another [2015] 1 WLR 1661**). But the prima facie assumption is that directors act in good faith and for proper purposes and the onus is on the petitioning member(s) to prove the contrary (**Village Cay Marina v Acland [1998] BCC 417**). Proving bad faith or that a director has acted for an improper purpose has been described by the courts as "a notoriously difficult task" and, as Bowen LJ put it (somewhat dramatically) in **Ex parte Hill (1883) 23** "...If we are to consider whether amongst all the shadows which pass across a man's mind, some view as well as the dominant view influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea". To put it more prosaically, directors will often act for a number of different purposes which may be a little hard to disentangle.

A good example of all of this in practice is the provision often found in the articles (particularly in smaller companies or quasi-partnerships) giving the directors an "absolute and unqualified right" to refuse to register a transfer of shares (as was the case in **Re Smith & Fawcett [1942] Ch 304**). How does the court approach the exercise of discretion under that sort of provision? Evidence would, of course, need to be led by the member as to why the decision was an unlawful exercise of discretion in breach of the director's fiduciary duties. But again, courts should be slow to interfere with a refusal under these provisions having careful regard to the purpose of the provision. It is often the case that the decision will benefit the director personally but that ought not to be determinative and is often incidental to the purpose for which the power to refuse was exercised. The reasons given for the refusal (which are mandatory under section 771 of the 2006 Act) may shed some light on the purpose for which the power was exercised or whether the decision was made in good faith. But judges have to be cautious before giving too much weight to the reasons. They are just part of the evidential material upon which the question before the court has to be answered. Bad reasons should not necessarily be equated with bad faith nor, in turn, with unfairly prejudicial treatment. Often a reason such as simply not wanting to transfer shares to a stranger will be sufficient justification in the case of a smaller company (**Charles Forte Investments Ltd v Amanda [1984] Ch 240**).

Ultimately, such cases raise difficult questions for the courts about the scope of a director's discretion, exercise of their fiduciary powers and the proper limits of the court's own discretion to interfere with the director's decision. Perhaps this coming year (either north or south of the border) the Supreme Court will provide guidance on that issue as well.

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Construction: Changes To The Scots Law Of Prescription And Latent Defects

Sandra Cassels discusses the recent changes to the law of prescription and their impact on latent defects in construction projects.

Historic position

The expiry of claims for damages in Scotland is regulated by the Prescription & Limitation (Scotland) Act 1973 ("the 1973 Act"). Section 6 of the 1973 Act provides that claims for damages prescribe after 5 years if a relevant claim has not been made and it has not been relevantly acknowledged.

Prior to the changes introduced by the new legislation, section 11(1) of the 1973 Act provided that such a claim became enforceable "on the date when the loss, injury or damage occurred". Section 11(3) provided that the five-year period can be delayed when the injured party "was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred."

> *"The purpose of this amendment is to balance the rights of parties following the string of court decisions restricting parties' ability to claim for loss or damage which was initially latent."*

Identifying when the prescriptive clock starts has been the subject of several court decisions, culminating in the 2017 Supreme Court decision, **Gordon's Trustees v Campbell Riddell Breeze Paterson LLP [2017] UKSC 75**. The Court said that where heads of loss include expenditure (e.g. consultant's fees), the clock starts running when that expenditure was incurred.

In Gordon's Trustees, the trustees had instructed their solicitor to serve notices to quit to recover possession of three fields. The tenants did not remove so proceedings were raised at the Land Court. Two of the notices were held to be ineffective by the Court. The Supreme Court considered that the trustees were aware of having suffered a loss when they didn't recover the fields at the date set out in the notices to quit thereby starting the prescriptive clock.

Changes to the law of prescription

The Prescription (Scotland) Act 2018 ("the 2018 Act") partially came into force in June 2022, making changes to sections 11 and 13 of the 1973 Act. The remainder of the provisions will come into force in February 2025.

Section 5 of the 2018 Act amends section 11(3) of the 1973 Act so that the prescriptive period does not now begin until the injured party is aware or could with reasonable diligence have been aware of certain facts, provided in section 11(3A), these being:

1. Loss, injury or damage had occurred;
2. That the loss, injury or damage was caused by another party's act or omission, and;
3. The identity of that party.

The changes to section 11 do not apply to obligations which had expired prior to 1 June 2022 but otherwise apply retrospectively. The purpose of this amendment is to balance the rights of parties following the string of court decisions restricting parties' ability to claim for loss or damage which was initially latent.

English lawyers will be familiar with "standstill agreements". The changes introduced by section 13 of the 2018 Act mean that parties can now agree to extend the prescriptive period, on one occasion, by up to one year, after the clock has started.

The Building Safety Act 2022 ("the 2022 Act") introduces changes to the prescriptive period and extends liability for certain damages. Where a party has failed to comply with product requirements, made misleading statements to market the product

or has produced an inherently defective product ("Condition A") they are liable to a claim, if further specific conditions are met, namely:

A. In relation to construction products:

a. they are used in the course of the construction of, or otherwise in relation to, the building;

b. after completion, the building is unfit for habitation, and;

c. that the unfitness is caused in whole or part by Condition A or the use of the product.

B. In respect of cladding products:

a. After Condition A is met, the cladding product is attached to, or included in, the external wall of a relevant building in the course of the construction of, or otherwise in relation to, the building.

b. When those works are completed the building is unfit for habitation, AND

c. that the unfitness is caused in whole or part by Condition A or the use of the product.

The 2022 Act allows claims for personal injury, damage to property or economic loss in relation to defective construction and cladding products to be made within 15 years or, if the right of action arose before the 2022 Act was in effect, the period for defective cladding product claims is 30 years.

The effect

It is possible that cases such as **Midlothian Council v Raeburn Drilling & Geotechnical Ltd [2019] CSOH 29** would be decided differently as a result of the 2018 Act. Midlothian Council sued Raeburn for failing to advise them that a gas defence system was needed for a 64-house development on top of old coal workings. Raeburn were appointed in 2004. The development was completed in June 2009. The failure to install the system eventually rendered the properties uninhabitable but this was not discovered until 2013. The Council didn't sue Raeburn until 2016 at which time they were held to be out of time to make a claim, despite not knowing when they paid Raeburn that they were paying for ineffective advice.

Under the 2018 Act, the prescriptive period arguably did not commence when Raeburn were paid. Rather, the clock started in 2013 when Midlothian discovered that (1) the properties needed and did not have the gas defence system and (2) that this was due to Raeburn's failure to properly advise Midlothian.

The 2022 Act goes further; it imposes both a lengthy prescriptive period and introduces a wide scope of liability, meaning that claims may be brought where there is no contract between the injured party and the party being sued.

The impact of the changes introduced by the 2018 and 2022 Acts remains to be seen. A sensible approach for parties who manufacture construction and cladding products will be to keep records for longer and ensure regular performance testing. A concern for contractors and manufacturers alike will be that buildings completed for many years could now be subject to claims. Contractors may also require greater oversight of their supply chain to ensure that quality control is being maintained and that specified products are being used.

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Scottish Law Commission Proposes Important Changes To The Law Regulating Commercial Leases

Ken Carruthers considers the proposed changes to the termination of commercial leases in Scotland.

The Scottish Law Commission (SLC), the body in Scotland charged with proposing legal reform, has recently published a report making a number of important recommendations concerning the termination of leases. The report addresses, amongst other things, the law of tacit relocation and the related question of formal notices.

Leases in Scotland can continue automatically beyond the termination date, usually for a further year and on the same terms, where tacit relocation is found to apply. This can happen where neither landlord nor tenant gives a valid and timeous notice to quit before the lease termination date. Automatic continuation can apply also where, after the termination date has passed, the tenant remains in occupation and the landlord accepts rent or fails to take steps to remove the tenant. It is assumed, in these circumstances, that both parties are happy for the lease to continue essentially on the same terms and both are so bound usually for another year.

Overlooking the need to give proper notice to quit can give rise to serious consequences for both parties - the tenant is obliged to pay rent and other outgoings for a further year in circumstances where the decision to close or relocate may already have been made; the landlord's plans to redevelop the property may have to be deferred until the tenant can finally be removed a year or more after originally planned. Both, for their own reasons, may seek to exploit the silence of the other, most obviously where a landlord, with a decent tenant paying a generous rent and no new tenant waiting in the wings, will sit cross-fingered earnestly hoping that the tenant overlooks the need to serve a valid notice to quit to bring the lease to an end.

The possibility of a commercial lease extending beyond a defined termination date simply on the basis that neither party has given notice to the other that the lease is to end may seem anomalous to many non-Scottish practitioners. Matters are complicated further by legal uncertainties relating to whether or not properly informed parties should be permitted to "contract out" of the law of tacit relocation on the basis that neither party wants the lease to continue beyond the specified termination date. In the 21st century, if that is what commercial parties want why should Scots common law provide otherwise?

Review and revision of this area of Scots law is long overdue and the SLC's detailed review is to be welcomed. Whilst stopping short of the wholesale

abolition of the law of tacit relocation, a number of important recommendations are nonetheless made. Principal amongst the report's proposal for the introduction of a new statutory code more clearly setting out the circumstances in which leases continue automatically and how this can be avoided. Notices to quit containing certain essential requirements should still be required. The notice procedure was seen by many commentators as useful reminder to both landlord and tenant that the lease end date was approaching; either could continue to terminate by notice but in the absence of notice being given, the lease would continue for another year. But the report also recognised that contracting out should be permitted putting beyond doubt that leases will end on the termination date.

Comprehensive guidance is also proposed on the content and method of service of notices to quit, a fertile source of litigation between landlords and tenants in Scotland and what the report describes as the mini-industry which has grown up around seeking to discredit the validity of notices. Certain essential requirements are still required to be included in notices to be served by both landlords and tenants but a less strict or prescriptive approach is proposed, broadly informed by the "reasonable recipient" test. Adopting a more common-sense approach, minor inaccuracies or other drafting errors should hopefully no longer have the fatal consequences so dreaded by many property lawyers and professional indemnity insurers.

Reform along these lines will require to find space within the Scottish Government's legislative programme. It remains to be seen whether, if a new law as recommended is enacted, commercial parties elect simply to disapply any statutory assumptions about automatic continuation and instead decide that all commercial leases will automatically terminate, without the need for notices to quit, leaving parties free to negotiate short lease extensions if they wish as termination approaches.

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Environmental Impact Assessment Regulations: The Wildland Case

Douglas Milne highlights a recent case in the Court of Session which considered the application of the Environmental Impact Assessment Regulations.

An important part of the process for consenting development which is likely to have significant effects on the environment is Environmental Impact Assessment (EIA).

Over the years, there have been a significant number of challenges to the grant of consents, based on arguments around compliance with EIA law. The main principles of EIA law are therefore well established, and well known.

Morton Fraser has been involved in numerous EIA-challenges, most recently the judicial review brought by Wildland of Highland Council's decision to grant planning permission for the construction of a space port on the A'Mhòine peninsula in the north of Scotland (**Wildland Ltd v Highland Council [2021] CSOH 87**).

The Wildland case was brought on numerous grounds and was ultimately unsuccessful. This article highlights the grounds of challenge based on an alleged failure to comply with EIA law, which will be of interest to EIA practitioners across the UK.

The aim of EIA is to protect the environment by ensuring that a consenting authority, when deciding whether to grant consent for a project which is likely to have significant effects on the environment, does so in the full knowledge of the likely significant effects, and takes this into account in the decision-making process. The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (the "EIA Regulations") set out a procedure for identifying those projects which should be subject to an EIA, and for assessing, consulting and coming to a decision on those projects which are likely to have significant environmental effects.

The aim of EIA is also to ensure that the public are given early and effective opportunities to participate in the decision-making procedures.

Highland and Islands Enterprise's (HIE) planning application was accompanied by an Environmental Impact Assessment Report (EIA-R) which was required in terms of the EIA Regulations.

The EIA-R noted that measures would be required to

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control the public from entering the launch exclusion zone. Those measures were provided within a visitor management strategy.

The EIA-R further noted that unless there was mitigation, there would be likely to be significant effects on ornithological interests during the construction and operational phases of the development.

Wildland objected to the application, as did Scottish Natural Heritage ("SNH") and the Royal Society for the Protection of Birds Scotland.

HIE provided the local planning authority and SNH with a document which set out the detail of how visitors would be handled. SNH then withdrew its objection. SNH were satisfied that their concerns could be addressed with appropriate mitigation.

Planning permission was subsequently granted subject to numerous conditions, including a condition to deal with the visitor management strategy. This specific condition required that "no later than six months prior to the first launch from the site, a visitor management plan ("VMP") shall be submitted to and approved in writing by the Planning Authority in consultation with SNH, Transport Scotland, and emergency services". The second part dealt with implementation and review of the VMP.

Wildland brought proceedings in the Court of Session for Judicial Review. As regards the EIA challenge, the Court was not persuaded that the planning authority had erred in law. In the Court's view this was not a case where there had been salami-slicing of a project which ought to have been assessed as a single development. On the contrary, the Court found that there was a rational justification for not identifying the proposed location of visitor facilities and for not applying for permission to develop them at this initial stage. Development of the visitor facilities will require a further application for planning permission. At that stage the cumulative environmental impact of the visitor facilities will require to be assessed.

As regards the specifics of EIA law, the EIA Regulations require publication of "additional (environmental) information" submitted during the consent process. But this requirement does not necessarily apply to all information which is submitted: the EIA Regulations refer to "substantive information about a matter to be included in the [EIA-R] ...".

During the consideration of the planning application, SNH requested HIE to work through various scenarios, setting out the detail of how visitors and protestors would be handled. It also asked how the launch exclusion zone and surrounding area would be policed and how protestors would be removed. As a result, HIE provided the planning authority and SNH with a document titled "VMS [Visitor Management Strategy] Clarifications – Scenario Planning" ("VMSC").

Wildland argued that the VMSC had been "additional information" within the meaning of the Regulations that should have been published.

However the Court found that it was open to the planning authority to decide that certain information which had been provided during the consenting process - that is the VMSC - provided clarifications, did not change the scope of the development, and did not alter the conclusions of the EIA-R. It was open to the planning authority to conclude that the VMSC was not additional information and that it did not require to be published.

To succeed in an EIA challenge can be difficult, and this case is a recent example from Scotland of the approach that the Court takes to the application of the Regulations.

The Court's Opinion in the Wildland case can be found **here**.

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A Human Rights Based Approach To The Covid-19 Inquiries

Jenny Dickson considers what a human rights based approach in the Scottish and UK Covid-19 Inquiries may look like.

Both the Scottish and the UK Governments have established public inquiries to examine the handling of the Covid-19 pandemic. The inquiries are underway, both considering a wide range of aspects of the pandemic, as set out in their Terms of Reference.

Last year, the Scottish Government appointed a new Chair to the Scottish Covid-19 Inquiry, Lord Brailsford. In doing so, they took the opportunity to re-emphasise the importance of the Inquiry taking a human rights based approach. The Terms of Reference were amended, and the Scottish Government referred to "reflecting the commitment that the Inquiry take a person-centred, human rights based approach".

What is meant by a "human rights based approach"? There are likely two aspects to this approach: the what and the how.

What will the Scottish Inquiry consider?

The Terms of Reference are wide. The Scottish Inquiry will consider many aspects of the handling of the pandemic, including planning in advance, lockdowns, vaccination strategy, PPE provision, care in nursing homes, education and financial support. It will "consider the impacts of the strategic elements of handling of the pandemic on the exercise of Convention rights (as defined in section 1 of the Human Rights Act 1998)".

What the Scottish Inquiry considers within these categories is likely to touch on human rights. Article 2 of the European Convention of Human Rights (ECHR) provides for the right to life. The Inquiry will likely wish to consider whether decisions taken by the State and public bodies breached Article 2. For example, this may be considered in the context of decisions regarding the discharge of patients with Covid-19 from hospitals to care homes.

How will the Scottish Inquiry be run?

A human rights based approach will also impact how the Scottish Inquiry is run. An easy way of understanding how the Scottish Inquiry might be impacted is to consider previous Inquiries. The Equality and Human Rights Commission (EHRC) made legal submissions to the Grenfell Inquiry. They have also published a number of papers about that Inquiry, which assist with the public's understanding of the Inquiry process and its impact on equality and human rights.

The EHRC commented on a number of practical and procedural aspects of the Grenfell Inquiry, raising concerns about some aspects of the handling of the Inquiry. Like Covid-19, at the Grenfell Inquiry there were bereaved families who wished to participate in the process. The EHRC commented that bereaved families should be able to take an active role in any Inquiry. This includes having a chance to contribute to the scope of the Inquiry, access to the venue in which the evidence is being heard, and an opportunity to question witnesses and participants. It goes further than simply being heard. This may be an indication of some of the ways in which the Scottish Inquiry will deliver a human rights based approach through the processes it applies. However, ensuring that the bereaved families are involved poses quite different challenges for both Covid-19 Inquiries than it has done for previous public Inquiries. The number of families is vast, and they come from a range of groups with different experiences. It will be challenging for both Covid-19 Inquiries to interact effectively with the bereaved relatives, and it will be of vital importance to the success of the Inquiries that this is done well.

To the extent that the Scottish Inquiry considers the circumstances in which many individuals died during the pandemic, it could be said that the Inquiry itself is based on human rights law. Part of the Article 2 right to life is the procedural obligation on the State to carry out an effective investigation into alleged breaches of its substantive limb, i.e. to review where actions of the State may have led to lives being lost. This was considered in the case of **Armani da Silva v the United Kingdom [2016] 63 E.H.R.R. 12**. The

judgment set out, "those responsible for carrying out the investigation must be independent from those implicated in the events; the investigation must be "adequate"; its conclusions must be based on thorough, objective and impartial analysis of all relevant elements; it must be sufficiently accessible to the victim's family and open to public scrutiny; and it must be carried out promptly and with reasonable expedition."

When setting out how it will operate, the UK Covid-19 Inquiry does not refer explicitly to taking a human rights based approach but all indications are that it will do so. It will listen to the experiences of bereaved families, and will produce its reports in a timely manner.

Equality Act 2010

Both Covid-19 Inquiries will consider the impact of the pandemic on all society. Early evidence indicates that it was disproportionately detrimental to the vulnerable, including those in poverty, the elderly and those with disabilities. The Equality Act 2010 legally protects people from discrimination in the workplace and in wider society. The Inquiries will need to ensure they prioritise non-discrimination and consider the impact on different groups. The Terms of Reference for the UK Covid-19 Inquiry refer specifically to considering those with protected characteristics under the Equality Act 2010, as well as other categories of people.

Should human rights be considered at all public inquiries?

Public inquiries are convened by a government body to look into matters of public concern. Given that definition, many public inquiries consider the circumstances of multiple fatalities - the Grenfell fire, Manchester Arena bombing, treatment of patients under the Mid Staffordshire NHS Foundation Trust. They consider the treatment of individuals, which by their nature engage consideration of human rights. As can be seen from the EHRC's comments on the Grenfell Inquiry, often more can be done to achieve a true human rights based approach - both in terms of the subject matter considered by public inquiries and the process they follow.

We watch with interest to see how the Scottish Covid-19 Inquiry delivers on its commitment to taking a human rights based approach.

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Bereavement Damages: A Postcode Lottery

Nicola Edgar compares the approaches to awards for damages following wrongful death between Scotland and the rest of the UK.

For a number of years in Scotland, the appropriate level of damages which should be awarded to relatives following the wrongful death of a loved one has been the subject of much discussion and comment. A recent English High Court decision highlighted the huge disparity in the sums awarded to claimants in Scotland, compared to those living in the rest of the United Kingdom.

Loss of society - who has a right to claim in Scotland?

In terms of section 4(3) of the Damages (Scotland) Act 2011, close relatives of an individual who has died as a result of negligence can claim damages for loss of society. The damages are intended to compensate family members for the distress, anxiety, grief and sorrow caused by the wrongful death of their loved one, together with the loss of their guidance. Relatives entitled to make a claim include the deceased's spouse, civil partner or cohabitee, as well as their parents, children, grandchildren and siblings. This also includes anyone accepted and treated as one of those relatives by the deceased.

The Court considers each case on its own facts and circumstances. Evidence will be heard on the family dynamics to understand the various connections and the strength of the relationships. In this way, the Courts take a modern approach, disregarding any preconceived notions of a standard nuclear family and half, step and adopted relatives all have a right to claim.

Bereavement damages in England, Wales and Northern Ireland

This can be compared to the situation in the rest of the UK, where there is separate legislation which provides for bereavement damages. In England & Wales, the Fatal Accidents Act 1976 restricts the categories of relatives entitled to make a claim to the spouse or civil partner of the deceased, a cohabitee (provided they had lived with the deceased for two years), and the parents of unmarried children under 18. If the child's parents are unmarried, only the mother of the deceased child is entitled to damages. In Northern Ireland, under the Fatal Accidents (Northern Ireland) Order 1977, these categories are further restricted to exclude cohabitees.

The value of the claim

In England and Wales, each relative is entitled to claim £15,120, whilst the sum in Northern Ireland is £15,100. This is in stark contrast to the position in Scotland, where there is no statutory limit on the sum which can be awarded.

In Scotland, the recent judgment of **Robert McArthur & Ors v Timberbush Tours Limited & Anr [2021] CSOH 75** provides guidance on the levels of award for these types of claim. Michael McArthur, aged 26, fell from a cherry picker and sustained fatal injuries. Claims were brought for loss of society by Michael's parents, step-sister and step-father. The Court heard evidence of the close and loving connection between Michael and his family. Lord Armstrong awarded his parents £100,000 each, his step-sister (who was 12 years old when the accident occurred) £45,000 and his step-father £70,000. The Court acknowledged the realities of the dynamics of modern families. Michael's mother had remarried, and the deceased enjoyed close relationships with both his father and step-father.

None of these relatives would have been entitled to bereavement damages in England and Wales, given that parents are only entitled to damages if their child is under 18 and siblings do not qualify.

Nevertheless, living in England does not necessarily exclude claimants from awards of damages at this level, as is shown in the recent High Court decision of **Haggerty-Garton and Others v Imperial Chemical Industries Limited [2021] EWHC 2924 (QB)**. This case was the first time an English Court applied Scots law in quantifying damages. Mr Haggerty died as a result of mesothelioma,

caused by exposure to asbestos whilst working in Scotland in the late 1970s. Claims were brought by the deceased's widow, children, step-children, sister and grandchild. Given the exposure took place in Scotland, it was agreed Scots law applied and the family were entitled to make claims for loss of society. The blood relatives' claims were settled in advance of the trial, with his daughters receiving £50,000 each and his sisters and grandchild receiving £18,000 each. The widow and three stepchildren's claims proceeded to trial, and the Court heard evidence about the closeness of the relationships. Whilst the deceased had only entered into a relationship with the widow shortly before his diagnosis, the Court found that they would have stayed together for the rest of their lives. The widow was awarded £115,000, two step-children £40,000 and the third step-child £35,000, given his relationship was deemed to not be as close.

If this case had been governed by English law, only the widow would have been entitled to bereavement damages of £15,120.

Time for change?

The Association of Personal Injury Lawyers is campaigning to change the law in England, Wales and Northern Ireland to bring it in line with the position in Scotland. They are pushing for change in respect of both extending the categories of relatives entitled to claim bereavement damages and the level of damages awarded. Until then, solicitors elsewhere in the UK should consider whether their clients would be entitled to have their damages calculated under the Scottish system. From the claimants' perspective, no amount of damages will ever bring back their loved ones. At the same time, receiving a more substantial sum serves as an acknowledgement of their loss.

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