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Payment of Another's Debt, Unjustified Enrichment and *ad hoc* Agency

*Laura J Macgregor and Niall R Whitty**

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A. INTRODUCTION

In 1822, discussing the question whether paying another's debt extinguishes it, Baron Hume suggested that "it may be very long before such a question come to trial".¹ Come to trial it eventually did in the Outer House case of *Whitbread Group Plc v Goldapple Ltd (No 2)*.² This article considers three important questions in Scots law raised directly or indirectly by that case, namely:

- (i) In what circumstances does Scots private law recognise the power of a third party to extinguish another's debt by making a payment to the creditor?
- (ii) Where a third party, not being the debtor's agent, has extinguished another's debt by an authorised or unauthorised payment, upon what ground, if any, is the third party entitled to claim reimbursement of his expenditure from the debtor?
- (iii) What are the implications for the law of agency of a new doctrine of *ad hoc* agency which has been developed by Lord Drummond Young in *Whitbread* as a solution to at least the first of the foregoing questions and applied by him in subsequent cases in other contexts?

(1) The *Whitbread* case

Whitbread concerned among other things the question of whether a payment to the landlord, Goldapple Ltd, of the rent of a public house in Edinburgh (the Hogshead, 30 Bread Street) by a person, Fairbar Ltd, other than the tenant, Whitbread Group Plc, was a valid payment of the rent due by the tenant and as such operated to prevent an irritancy of the lease for non-payment of rent. The quarterly payment of rent due on 10 May 2001 was not paid in time, because at the time the pursuers were involved in the transfer of the assets of their pub

¹ Baron David Hume, *Lectures 1786-1822* vol III (ed G C H Paton, Stair Society vol 15, 1952) 16.

² 2005 SLT 281.

and bars division to a third party, namely Fairbar Ltd, as part of an internal reorganisation within a group of companies.³

On 27 May Fairbar sent to Goldapple's bankers, the Royal Bank of Scotland, a cheque in favour of Goldapple, for the amount of rent due, for crediting to Goldapple's account. The cheque was cleared on 3 June and credited to Goldapple's account. On 31 May Goldapple's solicitors telephoned Whitbread's solicitors to inform them that the payment would be returned because it had been received from the third party Fairbar rather than the tenant, Whitbread. The judge found that the result of discussions between the parties' agents was an agreement that the Fairbar cheque should be returned by Goldapple and that thereafter Whitbread should be given an opportunity to make payment of the rent by another means. On Goldapple's instructions, RBS returned the payment to Fairbar, which received it on 11 June. When this cheque was repaid, Whitbread made another attempt to pay the rent, on 12 June, but failed because of a mistake in the account number. On 6 July Whitbread's new attempt to pay the rent (by CHAPS) also failed because by then Goldapple had instructed RBS not to accept it.

Meantime Goldapple began proceedings to irritate the lease by serving a pre-irritancy notice on 11 June and a notice of irritancy on 29 June, and by raising an action of declarator of irritancy on 6 July. Whitbread reacted by raising an action in the Court of Session of reduction of the two notices and declarator that the lease continued to exist. Lord Drummond Young rejected Goldapple's argument that Fairbar's payment of 27 May was not a valid payment of the rent due by Whitbread. He held that Fairbar had paid the money as an *ad hoc* agent for Whitbread.

Unfortunately, counsel omitted to cite to the court the main Scottish authorities which do and should govern the situation of payment of another's debt,⁴ so that Lord Drummond Young felt bound (in his words) "to go back to first principles".⁵ In his impressive judgment he developed a novel theory of *ad hoc* agency (which he defined as "an agency relationship that comes into existence for the purpose of a single transaction only")⁶ on which he has relied in subsequent cases unrelated to payment of another's debt.⁷ In *Whitbread* however he was

³ While the accounting and payment functions were being transferred, all payments were temporarily halted.

⁴ Para 10.

⁵ Para 11.

⁶ Para 13.

⁷ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197; *John Stirling t/a M & S Contracts v Westminster Properties Scotland Ltd* [2007] CSOH 117. These decisions are considered in Part C below.

misled by counsel's omission into thinking that this branch of Scots law was a *tabula rasa* and a golden opportunity to develop the law by building on these sources was missed.

(2) The factual circumstances held to raise an inference of *ad hoc* agency

From the following facts Lord Drummond Young inferred that Fairbar was acting as Whitbread's *ad hoc* agent.⁸ First, though Fairbar was in occupation, the obligation to pay the rent was Whitbread's, not Fairbar's. The tenant's interest had not been assigned, and could not be effectually assigned without Goldapple's consent as landlords. Second, the business transfer agreement between Whitbread and Fairbar specifically recognised that the obligation to pay the rent remained with Whitbread and obliged Fairbar to reimburse Whitbread for the rent.⁹ Third, the payment made on 27 May was clearly intended to discharge Whitbread's obligation to pay the rent.

Lord Drummond Young did not think that Fairbar had made the payment of 27 May "in its own right" because the business transfer agreement recognised that the obligation to pay rent remained Whitbread's. The use of a Fairbar cheque was administratively convenient, in that all debts of Whitbread's pubs and bars division payable after 10 May were paid using Fairbar cheques. The payments themselves were effected on Fairbar's behalf by employees of Whitbread. When the arrangements governing such payments were looked at in the light of the business transfer agreement, it was clear that the intention was that Fairbar funds should be used to pay a Whitbread debt. The judge deemed this to be wholly consistent with Fairbar's acting as agent for Whitbread in respect of such payment.

(3) The theory of *ad hoc* agency

Lord Drummond Young summarised his view of the law applicable as follows:¹⁰

[11] Although a number of authorities on the payment of debts were cited by counsel in the course of their arguments, none appeared to govern the present situation. In these

⁸ Para 19, head 1.

⁹ This agreement purported to transfer "the beneficial interest" of Whitbread in the relevant assets to Fairbar and to procure that "the legal interest" (sic) should be transferred in due course. Lord Drummond Young commented at para 18 that: "The distinction between legal and beneficial interest is a fundamental part of the English law of property, but it obviously forms no part of Scots law." He pointed out that there was no trust which alone in Scots law can create a beneficial interest. "Consequently the tenant's interest under the lease . . . was not transferred in any way by the business transfer agreement."

¹⁰ *Whitbread* at paras 11 to 15.

circumstances it is necessary to go back to first principles and analyse the requirements of a valid payment . . .

[12]. . . I am of opinion that the following principles are relevant to the Fairbar cheque of 27 May. First, it is necessary to keep in mind the elementary point that the purpose of payment is normally to discharge a debt, and nothing more. Consequently, there is generally no need to have regard to the wider context of the contract under which the debt arises; to do so would in my view introduce unnecessary complexity into what should be a very straightforward area of law. One exception exists, however; if the person paying the debt attempts to attach conditions to his payment, it may then be necessary to look at the wider contractual context.

[13] Secondly, it is common for payment to be made by someone other than the debtor in the relevant obligation. This is particularly true of members of a family where, for example, a husband may pay his wife's debt, or a wife her husband's. The same is true of groups of companies, where it is not unusual for one company in the group to pay a debt owed by another company to a person outside the group. The key to the analysis of such cases lies in my opinion in the concept of *ad hoc* agency, that is to say, an agency relationship that comes into existence for the purpose of a single transaction only. Where, accordingly, one person makes payment of another's debt, he normally does so as the agent of the debtor for the purpose of that particular transaction, namely the payment of the debt. That is in my opinion the natural inference from two facts, (i) the existence of a debt owed by the debtor and (ii) the fact that payment is made in order to discharge that particular debt. There is no reason to suppose from the mere fact of payment that the person making payment does so on his own behalf; he has no obligation to discharge. The obvious inference is accordingly that he makes payment on behalf of the debtor. That creates the relationship of *ad hoc* agency.

[14] Thirdly, if the correct analysis is *ad hoc* agency, payment by the agent discharges his principal's debt. That follows from ordinary principles of the law of agency. Fourthly, if the foregoing analysis is correct, there is no reason that the creditor should be entitled to refuse payment by an *ad hoc* agent, because the agent's act is attributed to his principal; the payment must therefore be treated by the law as made by the principal. The corollary of this proposition is that, if the creditor does in fact refuse payment made by an *ad hoc* agent, the debtor cannot be prejudiced by such refusal. What that means in practice is that the debtor must be given a further reasonable opportunity to pay the debt. That is of great importance in the present case. It is critical, however, that all that the *ad hoc* agent should do is pay the debtor; if he attempts to attach conditions to his payment, the creditor may be entitled to refuse the payment. Moreover, if the person making the payment purports to do so as principal rather than agent, the inference of agency is negated, and the creditor might be entitled to refuse payment.

[15] Fifthly, in some cases, of which the present is an example, the creditor may be concerned that by accepting payment from someone other than the debtor he may be regarded as recognising wider rights in the person who makes payment, by personal bar or otherwise. In the present case, the defenders and their legal advisers were concerned that they might, by accepting payment from Fairbar, be taken to recognise Fairbar as the tenant under the lease. On the analysis of *ad hoc* agency no such inference should be drawn, at least if the payment is unconditional and there is nothing in the way that payment is made to suggest that the person making payment is purporting to act as principal. Nevertheless, in such a case the creditor can protect himself by accepting payment but writing either to the person making payment or to

the debtor to negate any such inference from the acceptance of payment. In my opinion an acceptance of payment can be made conditional in this way, just as a payment itself may be conditional. If the other party rejects the condition, of course, the payment will be a nullity.

The question arises whether the finding of *ad hoc* agency in *Whitbread* was on the one hand ultimately a fiction or whether on the other hand it was constituted by tacit agreement and represented commercial reality. We revert to that question in Part C below.

B. PAYMENT OF ANOTHER'S DEBT

(1) The Scottish sources on payment of another's debt

What are the sources on payment of another's debt in Scots law? The primary sources ought not to be in doubt. Under the fundamental institutional scheme of our system of private law, the power of a third party to extinguish another's debt by unauthorised payment is, logically enough, part of the law on extinction of obligations, and has been since Roman law.¹¹ The law governing the right of the third party to claim reimbursement of his expenditure from the debtor is more complex. Depending on the precise facts, one or more of a number of legal regimes can be involved including unjustified enrichment (recompense); *negotiorum gestio* (management of another's affairs); assignation *ex lege* of the debt to the third party; or subrogation of the third party to the creditor's rights; and so forth. On the facts of *Whitbread*, the principal contenders are unjustified enrichment or *negotiorum gestio*, whose different requirements are outlined below.¹²

The most recent Scottish research on the third party's power of payment is not to be found in texts on "extinction of obligations" (where one would naturally look for it) but in the linked context of unjustified enrichment and *negotiorum gestio*.¹³ The linkage arises because as Birks and Beatson once observed "the problems which arise in the law of restitution where one person pays another's debt cannot be solved in the absence of a stable analysis of the effects of such a payment on the relationship between the creditor and debtor".¹⁴ In other words, to evolve a set of principles on unjustified enrichment, or a *negotiorum gestor's* claim, for

11 J Inst 3.29. For the details of the Scots law see B (2) and (3) below.

12 B (4) and (5) below.

13 Discussion Paper on *Recovery of Benefits Conferred Under Error of Law* (Scot Law Com DP No 95, 1993) vol 2 paras 2.157 ff; N R Whitty, "Negotiorum gestio", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) esp at para 97; H L MacQueen, "Payment of another's debt", in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 458.

14 P Birks and J Beatson, "Unrequested payment of another's debt" (1976) 92 LQR 188 at 188.

payment of another's debt, one needs to know whether the unauthorised payment extinguishes the debt and thereby enriches the debtor.

This article does not consider (except incidentally) cases where the third party pays the creditor as a co-obligant or cautioner of the debtor thereby imposing an obligation of relief on the latter, or where an insurer of the creditor pays the creditor under a contract of indemnity and is subrogated to the creditor's action against the debtor. These involve distinct regimes with rules of their own rather than the general principles of unjustified enrichment¹⁵ and require separate treatment. Nor does this article consider the controversial issue whether payment by a bank of its customer's stopped cheque discharges the customer's debt.¹⁶ This is a special area of law since a bank pays its customer's cheque in order to implement its customer's mandate and not in order to pay any debt of its customer; for aught the bank knows or needs to know, there may be no debt.¹⁷ Finally the article does not deal with unauthorised performance of another's obligation *ad factum praestandum*, which requires extra safeguards for the creditor.

(2) The first main issue: the power of a third party to discharge another's debt

While there is a conflict of Scottish institutional authority on a third party's power to extinguish another's debt,¹⁸ the weight of Scottish authority favours the view (in consonance with the civilian tradition)¹⁹ that the payment of another's pecuniary debt discharges that debt if either the debtor or creditor agree and certain conditions safeguarding the creditor's autonomy are fulfilled.²⁰ Following Justinian's institutional scheme,²¹ Bankton, Hume and Bell, together with

15 See e.g. C Mitchell, "Claims in unjustified enrichment to recover money paid pursuant to a common liability" (2001) 5 EdinLR 186 at 197-207.

16 See e.g. R Evans-Jones, *Unjustified Enrichment*, vol 1 (2003) paras 8.60-8.61; H L MacQueen, "Payment of another's debt" in Johnston and Zimmermann (eds), *Unjustified Enrichment* (n 13) 458; C Hugo, "Payment" in H L MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006) 230 at 242-246.

17 For a classic exposition of this point see *Govender v Standard Bank of South Africa* 1984 (4) SA 392 (C) at 398-399 per Rose-Innes J. On the actual outcome cf *B & H Engineering v First National Bank of South Africa Ltd* 1995 (2) SA 279 (A); *Barclays Bank Ltd v Simms* [1980] 1 QB 677.

18 See the authorities cited at nn 22-26 below.

19 R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Traditions* (1990) 752; D 3.5.38; D 46.3.53; J Inst 3.29.

20 See Whitty (n 13) at para 97, cited by Lord President Rodger in *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1144L-1145A; *Norwich Union Fire Insurance Society Ltd v Ross* 1995 SLT (Sh Ct) 103, applying *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* 1988 SLT 874 at 878B-E per Lord Goff of Chieveley. See, however, the correction thereof by Lord Rodger of Earlsferry in *Caledonia North Sea Ltd* at 1144 and 1145.

21 J Inst 3.29 (*quibus modis obligatio tollitur*) (the modes by which an obligation is extinguished).

Rankine's edition of Erskine's *Principles*, all deal with the power to extinguish another's debt in passages on liberation from or extinction of obligations²² – precisely where one would naturally expect to find it. Expressly citing Justinian's *Institutes*,²³ Bankton²⁴ and Bell²⁵ state that a third party can by an unauthorised payment of another's debt extinguish that debt whether the debtor knows of it or not or (at least in some circumstances) even against his will. It is true that Kames and Hume took a different view,²⁶ but they did not cite any Scottish authority and have had no discernible influence on the development of this branch of law.

The most authoritative statement of the rule is that of Bell:²⁷

Payment, to the effect of extinguishing the obligation, may be made not only by the debtor himself, but by anyone acting for the debtor: or even by a stranger, where the debt is pecuniary, and due, and demanded;²⁸ or where any penal effect may arise from delay; or where the creditor has no interest in demanding performance by the proper debtor. The debtor cannot prevent any stranger from paying and demanding an assignation if the creditor chooses to grant it. But the creditor cannot be compelled to grant an assignation, unless the debtor shall consent, and the granting of the assignation shall not interfere with any other interest of the creditor himself.

This passage was applied by Lord Anderson in *Reid v Lord Ruthven*²⁹ although in that case the basis of the third party's power was said to be *negotiorum gestio*. Bell's rule is very relevant to the *Whitbread* case because it is (or was until that case) trite law that the general rules on extinction of obligations apply to payment of rent.³⁰ Bell's rule is followed by Rankine's editions of Erskine's *Principles*, a

22 Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights* (1751-1753; reprinted by the Stair Society, vols 41-43, 1993-1995) 1.24.1; Hume, *Lectures* vol III (n 1) ch 10; Bell, *Prin* § 557; J Erskine, *Principles of the Law of Scotland*, 21st edn by J Rankine (1911) 509. Kames is different because the scheme of his *Principles of Equity* (n 26) is not institutional.

23 J Inst 3.29 (R W Lee's translation): "Every obligation is determined by the performance of what is owed, or if some one with the consent of the creditor performs something else in its place. It makes no difference who performs, whether the debtor himself, or another on his behalf; for the debtor is released from his obligation if another person performs, whether the debtor knows of it or not, and even against his will".

24 Bankton, *Institute* (n 22) 1.24.2: "payment may be made for one that is ignorant of it, or even against his will, because he cannot hinder the creditor to take his payment where he can get it".

25 *Prin* § 557. The reference to Justinian's *Institutes* was inserted by Bell's editor (Sheriff W Guthrie) in the 8th (1885) and subsequent editions, and not by Bell himself who in the last edition which he edited personally (4th, 1839) relied on three Scots cases cited in n 46 below.

26 Henry Home, Lord Kames, *Principles of Equity*, 5th edn (1825) 330-331; Hume, *Lectures* vol III (n 1) 16-17, both analysed in the Scottish Law Commission's Discussion Paper on *Recovery of Benefits Conferred Under Error of Law* (n 13) vol 2 para 2.160.

27 Bell, *Prin* § 557.

28 Here, Bell cites J Inst 3.30; the correct reference is 3.29.

29 (1918) 55 S L Rep 616 at 618.

30 See e.g. J Rankine, *The Law of Leases in Scotland*, 3rd edn (1916) 315; G C H Paton and J G S Cameron, *Landlord and Tenant* (1967) 100; J Sinclair, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 13 (1992) para 229.

standard student text till the 1920s.³¹

Obligations may be dissolved by performance. . . The most usual case is an obligation for a sum of money which is extinguished by payment. Payment in full by the true debtor to the true creditor has that effect. Usually it is immaterial that the payment has been made by some one else than the true debtor, especially if a demand has been made, or a penalty would otherwise be incurred. But in exceptional cases the creditor may have an interest to enforce payment by the debtor himself.

Some modern treatments are skimpy or inadequate but not inconsistent with the foregoing.³² Oddly the rule and even the issue were overlooked by some important texts (including *Gloag, McBryde and Wilson on Debt*). It was however described by the Scottish Law Commission in 1993³³ and in the *Stair Memorial Encyclopaedia* section on *negotiorum gestio* in 1995.³⁴ It was ably discussed in an essay by Hector MacQueen published in 2002³⁵ and clearly stated in the context of Extinction of Obligations in the most recent edition of *Gloag and Henderson* in terms similar to that of Bell,³⁶ but culminating in the punch-line: “In sum, third-party performance can only be declined where both creditor and debtor object to it”.³⁷

It should not be thought that this rule is a relic of a bygone age. It is the general rule in civilian³⁸ and mixed³⁹ systems,⁴⁰ and in such European documents as the DCFR and PECL.⁴¹ As Lord President Rodger pointed out in the *Caledonia North Sea Ltd* case, under English law payment by “a volunteer” does not

31 Erskine, *Principles*, 21st edn (n 22) 509.

32 See e.g. C Sandeman, “Payment”, in *Encyclopaedia of the Laws of Scotland* vol 11 (1931) para 368: “a third party, on making payment of a debt, is entitled to demand from the creditor all the means at his disposal of obtaining relief from the true debtor”; D M Walker, *Principles of Scottish Private Law*, 1st edn (1970) vol 1 at 602: “If [the creditor] is pressing for payment, he is bound to accept payment on behalf of the debtor from any third party who has an interest to intervene”.

33 Scottish Law Commission, Discussion Paper on *Recovery of Benefits Conferred Under Error of Law* (n 13) vol 2 para 2.157 ff.

34 Whitty (n 13) para 97.

35 MacQueen (n 16). See also Hugo (n 16) at 242-246.

36 In a passage edited by Hector MacQueen. See W M Gloag and R C Henderson, *The Law of Scotland*, 12th edn (2007) para 3.22.

37 Ibid.

38 See e.g. in Germany, § 267 BGB; the French Code Civil art 1236; the Italian Codice Civile art 1180.

39 See e.g. F du Bois (ed), *Wille's Principles of South African Law*, 9th edn (2007) 817 (D Visser); Quebec Civil Code art 1555; Louisiana Civil Code art 1855.

40 D Friedmann and N Cohen, “Payment of another's debt”, in P Schlechtriem (ed), *Restitution – Unjust Enrichment and Negotiorum Gestio*, vol X ch 10 of *The International Encyclopaedia of Comparative Law* (1991) para 9. See also *ibid* para 3.

41 C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, full edition (2009) vol I, III.–2.107(1). See also O Lando and H Beale (eds), *Principles of European Contract Law*, parts I and II (2000) art 7:106, which is in similar terms but limited to contractual obligations. The notes to the article state that the Scottish law on performance without the debtor's consent is probably the same as the English. But now the notes to

discharge the debt unless adopted by the debtor.⁴² Famously, this is one of the fault-lines dividing the civil law and common law traditions.⁴³ There is no sign that the civilian and mixed systems wish to give this up; rather some English legal commentators argue that the English approach should be liberalised.⁴⁴

(3) Safeguards for creditor and debtor in cases of payment of another's pecuniary debt

(a) Safeguards for the creditor

As mentioned above, payment of another's debt is one of the rare categories of "imposed enrichment" in the civil law tradition generally and Scots law in particular. However, the contrast with the English law tradition shows that there must be strong policy reasons to outweigh the loss of individual autonomy involved and adequate control devices to guard against unjust obtruding of unwanted benefits and officious intermeddling. The need for safeguards is less strong in cases of payment of another's pecuniary debt than in performance of an obligation *ad factum praestandum* but safeguards are still necessary. In this article we are only concerned with pecuniary debts.⁴⁵ Bell's *Principles* § 557 does not uphold a completely unfettered power to discharge another's debt. On the contrary, in a masterpiece of compression, Bell lays down briefly four important requirements which have to be satisfied before a stranger's payment will extinguish another's debt namely:

- (i) where it is pecuniary, due and demanded;⁴⁶
- (ii) where any penal effect may arise from delay;
- (iii) where the creditor has no interest in demanding performance by the proper debtor; and

III.-2.107(1) in the DCFR full edition state (at note 4) that the Scots law is "probably" the same as many continental systems (citing Gloag and Henderson, *The Law of Scotland* (n 36) para 3.22) adding "although the Scottish law in this area is unclear".

42 *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1144L-1145A.

43 See e.g. Friedmann and Cohen (n 40).

44 See e.g. Birks and Beatson (n 14); D Friedmann, "Payment of Another's Debt" (1983) 99 LQR 534. Cf *Greenwood v Bennett* [1973] QB 195.

45 Stronger safeguards for the creditor apply in obligations *ad factum praestandum*. See e.g. *Transco plc v Glasgow City Council* 2005 SLT 958, discussed by N R Whitty, "*Transco plc v Glasgow City Council*: developing enrichment law after *Shilliday*" (2006) 10 EdinLR 113.

46 The word "pecuniary" is presumably not intended to mean that only money debts can be discharged by a third party's intervention. On performance of another's obligation *ad factum praestandum* see *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245; *Transco plc v Glasgow City Council* 2005 SLT 958 and Whitty (n 45) esp at 120-121. Cf *Lawrence Building Co Ltd v Lanark County Council* 1978 SC 30.

(iv) where either the creditor or debtor concurs, or at least does not object, to the third party's payment.

Multum in parvo.⁴⁷ These requirements are safeguards mainly for the creditor, and appear to be cumulative in the sense that all of them must be satisfied before the third party's payment will operate a discharge of the debt. In some cases the judges tend to conflate analysis of the power to pay another's debt, which concerns extinction of the debtor's obligation, with analysis of the payer's right to require an assignation of the debt, which concerns the third party's right of reimbursement from the debtor. It is the first aspect which concerns us here. It is well established that the right to demand an assignation on making payment of another's debt extends beyond the case of a cautioner or co-obligant with a right of relief to include a third party who acquires a right of recompense against the debtor on paying his debt without obligation to do so.⁴⁸ It is thought that the latter cases afford good authority for the existence of a third party's power to pay another's debt, though in some cases it is difficult to determine whether judicial dicta as to the limits of the right to demand an assignation are also intended to be limits on the third party's power to pay another's debt and vice versa.

The first safeguard for the creditor's autonomy is that the debt must be "pecuniary, due, and demanded". So for instance in *Smith v Gentles*⁴⁹ Lord Mackenzie referred to an unidentified earlier case where the Second Division:

... took this distinction – that a third party was not entitled to say to a creditor, here is payment of your debt, assign your security to me; but that, where the creditor chose to attempt to enforce payment by execution, he might then be compelled to assign his security to a third party paying the debt. A third party is not entitled to say to a creditor, I want an investment; give me yours – here is payment of your debt. While a creditor is content to retain his debt, he may do so; but where he seeks to enforce payment, it is a different case...

In *Whitbread*, the rent was indeed pecuniary, due and demanded.

The second of Bell's requirements safeguarding the creditor's autonomy is "where any penal effect may arise from delay". Such are cases where delay in payment will result in the execution of diligence or sequestration in bankruptcy

⁴⁷ All these requirements are present in the 4th edition of the *Principles* (1839) which cites only three scantily reported cases: *McGillivray v McArthur* (1826) 4 S 697; *Austin v Grant* (1827) 5 S 701 and *Rainnie v Milne* (1822) 1 S 355. See n 25 above.

⁴⁸ See e.g. *Smith v Gentle* (1844) 6 D 1164; *Cunningham's Trs v Hutton* (1847) 10 D 307; *Russell's Tr v Mudie* (1857) 20 D 125 (postponed bondholder); *Fleming v Burgess* (1867) 5 M 856; W M Gloag and J M Irvine, *Law of Rights in Security* (1897) 56-58.

⁴⁹ (1844) 6 D 1164.

or the enforcement of a hypothec⁵⁰ or voluntary security,⁵¹ or the lapse of an insurance policy through non-payment of premiums,⁵² or the incurring of remedies for breach of contract, and so forth. In *Whitbread*, the result of the landlord's refusal to accept the third party's tender of payment would have been as drastic a civil penalty as one can find in Scots private law, namely, irritancy of the lease. So this requirement was also well satisfied. There are precedents in old cases of 1744 and 1841 where it was held that a landlord was bound to accept a tender of arrears of rent by a third party and to grant a discharge on receiving payment of the arrears though he was not bound to assign his right of hypothec to the third party.⁵³

The third safeguard for the creditor's autonomy mentioned by Bell was "where the creditor has no interest in demanding performance by the proper debtor". In *Whitbread*, subject to one proviso, Goldapple had no interest in receiving the rent from Whitbread rather than from Fairbar other than the interest in irritating the lease and, as we know from the second requirement, that is not a legitimate interest which can be taken into account so as to bar discharge of the debt by the third party. The proviso is that the landlords Goldapple were concerned that they might, by accepting payment from Fairbar, be taken to recognise Fairbar as the tenant under the lease. Lord Drummond Young held that, under his theory of *ad hoc* agency, no such inference should be drawn, at least if the tender of payment is unconditional; that the creditor could protect himself by accepting payment subject to a condition (which could be notified in a letter to the third party or debtor) expressly negating such an inference; and that if the other party were to reject the condition attached by the creditor to his acceptance, the payment would be a nullity.⁵⁴ If the creditor were unjustifiably to refuse to accept the third party's tender of payment, the debtor could not be prejudiced thereby which would mean in practice that the debtor must be given a further

50 Cf *Guthrie and McConnachy v Smith* (1880) 8 R 107.

51 See e.g. *Tod v Dunlop* (1838) 1 D 231.

52 See e.g. *Brown v Meek's Trs* (1896) 4 SLT 46; *Wylie's Exix v McJannet* (1901) 4 F 195; *Edinburgh Life Assurance v Balderston* (1909) 2 SLT 323 (recompense); *Graham's Executors v Fletcher's Executors* (1870) 9 M 298 (*negotiorum gestio*).

53 *A v B* (1744) Mor 6228 (landlord having a hypothec for rent arrears not bound to assign it to a third party creditor of the tenant executing a poinding of the tenant's goods but only to discharge the rent arrears on payment by the third party); *Graham v Gordon* (1841) 2 Rob 251, (1842) 4 D 903. Both cases are explained and applied in *Guthrie and McConnachy v Smith* (1880) 8 R 107 at 112-113 per Lord Mure; see also at 117 per Lord Shand. In *Wood v Northern Reversion Co* (1848) 11 D 254 Lord Fullerton (at 259) implied that if the interest due on a bond had been paid by any person acting in the name or on behalf of the debtor, the debt in regard to that interest would have been extinguished.

54 *Whitbread* at para 15.

reasonable opportunity to pay the debt, a matter of great importance where there are deadlines for payment as in the *Whitbread* case.⁵⁵

It is submitted that these just and practical rules, designed by Lord Drummond Young to strike a fair and reasonable balance between the interests of all the parties, could and should be seen as a manifestation of the third safeguard described in § 557 of Bell's *Principles* rather than of a new doctrine of *ad hoc* agency. This safeguard is very important in some commercial contexts, such as in a construction contract. Under the Joint Contracts Tribunal (JCT) forms, the effect of one of the standard clauses is to prohibit the employer from assigning the benefit (including the right to particular debts) to a third party.⁵⁶

Bell's fourth safeguard is that either the creditor or debtor concur, or at least do not object, to the third party's payment. In *Whitbread*, the debtor *Whitbread* concurred in the payment by the third party, *Fairbar*.

It follows that all the classic requirements of Bell's test were satisfied in that case so that the debt was extinguished by *Fairbar*'s payment on 27 May 2001. Accordingly it was at best unnecessary to develop a doctrine of *ad hoc* agency to reach the same result.

(b) Safeguards for the debtor

The main safeguards for the debtor arise on the assumption that he will become liable to reimburse the third party intervener. First, suppose the third party is not the debtor's friend but an enemy. If this vague objection constituted a serious risk, however, it would long ago have precluded the assignability of debts. But it does not have that effect⁵⁷ and accordingly the objection does not seem strong enough to require a safeguard. Secondly, suppose the debtor has a defence or counterclaim or a right to suspend contractual performance which he loses on payment of his debt. Where the debtor has a defence, he can resist the third party payer's claim for reimbursement (recompense) on the ground that he was not enriched by the payment. This might involve determining whether the defence is made out in proceedings in which the payer was not a party.⁵⁸ Where the

⁵⁵ Para 14.

⁵⁶ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 especially at 103H-109D per Lord Browne-Wilkinson. We are grateful to Lord Drummond Young for drawing this point to our attention. On the cross-border differences in the construction of clauses in contracts prohibiting assignation, see R G Anderson, *Assignation* (2008) para 11.44.

⁵⁷ Though it may affect the assignability of securities: see *Fleming v Burgess* (1867) 5 M 856 at 861 per Lord Neaves, stating that a creditor is not bound to assign a heritable security to anyone who tenders, adding: "Such a rule might result in great injustice to the debtor by giving a private enemy the power of acquiring a weapon to be used against him. . ."

⁵⁸ Cf J Beatson, *The Use and Abuse of Unjust Enrichment* (1991) 203.

debtor can plead a counterclaim against the original creditor, it must in principle still be pleadable in any enrichment-based proceedings by the third party for reimbursement so that the latter is to that extent subrogated to the position of the original creditor.⁵⁹ The procedural details of this require exploration. Finally, some authorities hold that a third party can discharge another's debt even against the debtor's express wishes and claim reimbursement.⁶⁰ In the South African *Taylam* case,⁶¹ a restaurateur who had paid a debt due by a previous owner of his restaurant to his wholesale supplier, in order to secure the continuation of supplies, was held entitled to recover the debt from the previous owner. The case is controversial⁶² but the result seems just in the particular circumstances.

(4) Second main issue: claims by third party payer against debtor under unjustified enrichment, *negotiorum gestio*, assignation or subrogation

Assuming that the third party's payment has discharged another's pecuniary debt without the debtor's authority, the main bases upon which the third party can claim reimbursement of his expenditure from the debtor are unjustified enrichment or *negotiorum gestio*.⁶³ These have different requirements.

In unjustified enrichment "the pursuers must show that the defenders have been enriched at their expense, that there is no legal justification for the enrichment and that it would be equitable to compel the defenders to redress the enrichment".⁶⁴ There are three elements in the cause of action: (1) the enrichment of the defender; (2) at the pursuer's expense; and (3) no legal justification for the enrichment. The fourth element is actually a defence under which the defender may escape decree if he establishes that it would be inequitable for the court to compel redress.⁶⁵ It is submitted that this test has superseded the older and less authoritative five-point *Varney* test of liability for recompense.⁶⁶ To continue to apply the latter test is a recipe for confusion and

⁵⁹ *Ibid.*

⁶⁰ J Inst 3.29; Bankton, *Institute* (n 22) 1.24.2; Bell, *Prin* § 557 ("The debtor cannot prevent any stranger from paying and demanding an assignation if the creditor chooses to grant it".)

⁶¹ *Standard Bank Financial Services Ltd v Taylam (Property) Ltd* 1979 (2) SA 383 (C).

⁶² See e.g. C J Maxwell, "The protesting dominus: a reconsideration in the light of German law" (2009) 20 Stellenbosch LR 517; D Visser, *Unjustified Enrichment* (2008) 584-587.

⁶³ Whitty (n 13) at para 97; *Graham's Executors v Fletcher's Executors* (1870) 9 M 298; *Reid v Lord Ruthven* (1918) 55 SLR 616 at 618 per Lord Anderson.

⁶⁴ *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 at 98H-I per Lord Hope of Craighead, quoting Lord Rodger in the same case (1996 SC 331 at 353D).

⁶⁵ *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd* 2001 SC 653 at 668I-669A per Lord Macfadyen.

⁶⁶ *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245. See e.g. the obiter dicta of Lord Hodge in *Macadam v Grandison* [2008] CSOH 53 at para 35 and *Robertson Construction Central Ltd v Glasgow Metro LLP* [2009] CSOH 71 at para 18. See also Whitty (n 45).

would be inconsistent with the decision in *Shilliday v Smith*⁶⁷ that recompense is merely a remedy and not a substantive cause of action. Payment of another's debt is one of three categories in which a claim lies for "imposed enrichment", the other two being the bona fide possessor's improvement of another's property and *negotiorum gestio*⁶⁸ though the latter is not always or even usually an enrichment claim.⁶⁹

The prerequisites for *negotiorum gestio* are that (1) the management must be of another's affairs; and (2) unauthorised; (3) the principal (*dominus negotii*) must be absent, or unaware of the management, or incapax; (4) the gestor must act to benefit the principal intending to donate his labour but to recover his expenses; and (5) the management must have been useful when originally carried out.⁷⁰ In *negotiorum gestio* the measure of the gestor's recovery is the amount of his expenses (if useful, at least initially) which may exceed the principal's enrichment. Payment of another's debt is one of the most common and characteristic types of *negotiorum gestio*.⁷¹

It seems that the remedy of assignation or subrogation may be available to a third party who pays another's debt, even though the third party is not a cautioner or co-obligant of the debtor. It has advantages for a third party because it may give the third party a security in ranking on the debtor's estate. This raises a notorious conundrum: how can the debt be discharged by the payment and at the same time be kept alive so as to be assignable either by writing or by operation of law? The theory stated by Bell for cautioners and co-obligants is as follows.⁷²

Payment made by one interested in the debt (as co-obligant or surety) will take away the right of the creditor but will not extinguish the debt of the principal obligant. The person so paying is entitled to an assignation, to the effect of operating his relief.

There is a view that this theory may also apply to payments by third parties who are not cautioners or co-obligants but "strangers" because in certain circumstances they are entitled to an assignation of the creditor's rights.⁷³ But that seems inconsistent with the third party's right of recourse against the debtor

67 1998 SC 725.

68 See e.g. Gloag and Henderson, *The Law of Scotland*, 12th edn (n 36) paras 25.16-25.19 and 25.24 ff.

69 On the limitation of *negotiorum gestio* to enrichment in cases of "impure *gestio*" see Whitty (n 13) paras 137-141.

70 Ibid para 95.

71 Ibid paras 97-98. On the question whether unjustified enrichment (recompense) is subsidiary to *negotiorum gestio* see Whitty (n 45) 128-129.

72 Bell, *Prin* § 558, approved in *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1144 per Lord President Rodger.

73 Bell, *Prin* § 558 cites *Guthrie and McConnachy v Smith* (1880) 8 R 107, which did not involve a cautioner or co-obligant. See Friedmann and Cohen (n 40) and Mitchell (n 15).

based on unjustified enrichment (recompense). As Friedmann and Cohen point out, “[c]onceptually the assignee, who becomes the new creditor, is the owner of the original debt, while the payor who, upon discharging the debt is entitled to reimbursement, becomes a new creditor and is the owner of a new debt”.⁷⁴ Various theories such as “reviving subrogation”, which lie outside this article, may be advanced.⁷⁵

The question of Whitbread’s recompense of Fairbar for paying Whitbread’s debt did not arise in the *Whitbread* case. One would hope that if that issue had arisen it would have been resolved by principles of unjustified enrichment rather than on the basis of an agent’s right to reimbursement from his principal under an implied contract of *ad hoc* agency.

(5) Precedents where third party’s payment to creditor was reimbursed by debtor

Sometimes the third party’s purpose in paying another’s debt is to protect the interest of the debtor, sometimes to protect the third party’s own interest, and sometimes the motives are mixed. In *Whitbread*, Fairbar’s motives may well have been mixed. The results, however, are the same, as the following precedents (in all of which the third party is neither cautioner nor co-obligant and pays without contractual obligation or intention of donation) show.

(a) Third party’s payment of another’s debt to protect the debtor’s interest

In the following cases the primary aim of the payment was to protect the debtor’s interest. (a) The third party pays (or provides) aliment to an alimentary creditor and claims recompense under unjustified enrichment or reimbursement under *negotiorum gestio* from the alimentary debtor whose obligation of aliment he has discharged.⁷⁶ Before the advent of social security and the narrowing of the class of alimentary debtors, this was a common case. (b) The third party provides aliment for a pauper who is entitled to poor relief and recovers its cost from the liable poor law authority.⁷⁷ (c) The third party, the employer of a worker in a foreign country, on repatriating him, discharged his debts incurred there and claimed recompense

⁷⁴ Friedmann and Cohen (n 40) para 16.

⁷⁵ See Mitchell (n 15).

⁷⁶ *Reid v Robertson* (1868) 6 SL Rep 77; *Stevenson v McDonald’s Tr* 1923 SLT 451; *Mackenzie’s Tutrix v Mackenzie* 1928 SLT 649; Scottish Law Commission, *Aliment and Financial Provision* (Scot Law Com Consultative Memorandum No 22, 1976) para 2.80.

⁷⁷ *Howie v Kirk Session of Arbroath* (1800) Mor sv “Poor” App x 1; *Malvie v Mackenzie* (1859) 1 Guthrie 400. The factual situation is old but it illustrates the common law principle.

from him.⁷⁸ (d) The third parties pay back to the lender the amount of a loan due by their employee, recover some of the loan by deduction from his salary and then sue for the outstanding balance after the employee leaves their employment.⁷⁹ (e) A trustee who pays in a personal capacity from his own pocket premiums due upon the trust estate's insurance policy is entitled to recompense to the extent that the estate is *lucratus* by the trustee's expenditure. In this type of case the analogy of the trustee's lien under English law was rejected: "The only ground, according to our law, on which a trustee so acting can recover his advances, is that of recompense, which implies that his right to recover depends on his being able to show that the estate is *lucratus* by his expenditure".⁸⁰ Likewise a solicitor pays in a personal capacity from his own pocket premiums due upon his client's insurance policy.⁸¹ All these cases proceed on the premise that a third party can discharge another's debt by unauthorised payment.

(b) Third party's payment to protect his or her own interest

In the following cases the third party's unauthorised payment was made to protect his or her own interest. (a) There are cases where if the debt is not discharged, the third party may lose a proprietary or possessory right or expectancy, as where a wife recovers recompense in respect of premiums advanced by her to trustees to keep up an assurance policy on her husband's life, over which she has a *spes successionis*.⁸² (b) Then there is the case where a third party, the ordinary creditor of a tenant, tenders payment of the tenant's arrears of rent to the landlord (in order, for example, to disburden the tenancy of the landlord's hypothec prior to the creditor executing an ordinary poinding of the *invecta et illata*). The landlord is bound to grant a discharge on payment of the arrears though he is not bound to assign his right of hypothec to the creditor.⁸³ A classic case is where a sub-tenant pays the rent of the principal tenant in order to prevent his own consequential removing. (c) Likewise in the feudal system a

78 *Duncan v Motherwell Bridge and Engineering Co* 1952 SC 131 at 147, 157 and 159.

79 *Lanarkshire Health Board v Banafua* 1987 SLT 229 (where it seems to have been assumed that the contract of loan should be assigned from the original creditor to the pursuers).

80 *Brown v Meek's Trs* (1896) 4 SLT 46 at 46 per Lord Stormonth Darling (action of recompense dismissed as premature but otherwise *semble* competent and relevant). The trustee may have a possessory lien over the policy but only *quantum lucratus est* the trust estate; cf *Edinburgh Life Assurance v Balderston* (1909) 2 SLT 323 (analogy with *bona fide* possessor making mistaken improvements).

81 *Wylie's Executrix v McJannet* (1901) 4 F 195. See also *Graham's Executors v Fletcher's Executors* (1870) 9 M 298 (*negotiorum gestio*).

82 *Morgan v Morgan's JF* 1922 SLT 247, cited in *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245 at 248-249 per Lord Stott. See also *Brown v Meek's Trs* (1896) 4 SLT 46.

83 *A v B* (1744) Mor 6228; *Graham v Gordon* (1841) 2 Rob 251, (1842) 4 D 903; explained and applied in *Guthrie and McConnachy v Smith* (1880) 8 R 107 at 112-113 per Lord Mure.

third party was entitled to tender payment of a vassal's arrears of feuduty to the feudal superior and the superior was bound to grant a discharge of the arrears but was not bound to assign the superior's hypothec or other remedies to the third party.⁸⁴ (d) Where a life assurance policy insuring a husband's life for the benefit of his wife was purportedly assigned to two creditors of the husband in security of his debts to them, and it subsequently turned out that the assignation in security was void, it was held that the purported assignees were entitled, under the principle of recompense, to repayment, out of the policy proceeds, of the premiums which they had paid in good faith to keep the life policy in force. Lord Mackenzie drew an analogy with recompense for a *bona fide* possessor for improving another's property.⁸⁵ But the assignees' payment of premiums might have been characterised as payment of debts due by the trustees under the policy which, like a *bona fide* possessor's improvements, is a form of "imposed enrichment". Normally however the third party's payment is not mistaken. None of these cases assumes the existence of *ad hoc* agency.

C. **WHITBREAD AND RELATED ISSUES FROM THE PERSPECTIVE OF AGENCY LAW**

(1) ***Whitbread* as the first step in the creation of a new doctrine**

Whitbread is the first case in which the phrase "*ad hoc* agency" has been used: it is not a term of art in Scots agency law. In the two years following the case, Lord Drummond Young applied the same concept in two other cases: *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland*⁸⁶ and *John Stirling t/a M & S Contracts v Westminster Properties Scotland Ltd*.⁸⁷ Although the facts of each of the three cases differ, a common thread unites them. In each the problem facing the pursuer was caused by the doctrine of the separate legal personality of companies.

(a) *Laurence McIntosh Ltd*

In the first of these cases the pursuer, Laurence McIntosh Ltd, was a joinery business, which originally traded as a partnership called Laurence McIntosh & Sons. In 1998 the partnership had entered into a subcontract ("the Works Contract") with the principal contractor Balfour Beatty, in terms of which

84 *Guthrie and McConnachy v Smith* (1880) 8 R 107.

85 *Edinburgh Life Assurance Co v Balderston* (1909) 2 SLT 323 at 326.

86 [2006] CSOH 197.

87 [2007] CSOH 117.

McIntosh agreed to carry out joinery work in the refurbishment of the National Library of Scotland. Balfour Beatty in turn were employed by the Trustees of the National Library of Scotland under the main contract. After the Works Contract had been entered into, in 2000, a company called Laurence McIntosh Ltd was incorporated. The intention was that the company would take over the business of the partnership, and the company did indeed act as contracting party in new contracts. The rights and liabilities of the partnership, however, were not validly transferred to the new company. Rather, performance of most of their contracts being substantially completed, contractual counterparties were simply sent letters containing details of a new bank account in the name of Laurence McIntosh Ltd into which any payments under existing contracts were to be made.

A dispute arose in which Laurence McIntosh Ltd challenged various steps taken under the Works Contract and the Management Contract. When Laurence McIntosh Ltd raised an action against both Balfour Beatty and the Trustees of the National Library of Scotland, they faced a significant difficulty: because the newly incorporated company was not a party to the Works Contract, they had no title to sue under that contract. Realising that a significant error had occurred, an assignation transferring the whole right, title and interest in the Works Contract from the partnership to the new company was executed and intimated to Balfour Beatty. Its effect was purportedly backdated to April 2000. Significantly, the execution of this assignation post-dated the raising of the action by Laurence McIntosh Ltd.

Lord Drummond Young held that the assignation had not retrospectively cured the company's lack of title to sue.⁸⁸ All was not lost for the company, however. Lord Drummond Young applied his solution of *ad hoc* agency. This allowed him to treat the newly formed company as the agent of the partnership. All rights under the Works Contract therefore remained with the partnership. Acting as agent, the company had carried out a number of tasks for the partnership. The payments made under the Works Contract into the company's bank account had been received by the company acting as agent for the partnership. This being the case, those payments validly discharged the liability of the payers.⁸⁹ The company, acting as agent, had also presented the claim document under the Works Contract on behalf of the partnership.⁹⁰ Problems of title to sue were, in effect, overcome by using the concept of *ad hoc* agency.

⁸⁸ *McIntosh* at para 14, relying on *Symington v Campbell* (1894) 21 R 434 and *Bentley v Macfarlane* 1964 SC 76.

⁸⁹ Para 18.

⁹⁰ *Ibid*.

(b) *John Stirling*

A year later, Lord Drummond Young decided the case of *John Stirling t/a M & S Contracts v Westminster Properties Scotland Ltd.*⁹¹ Stirling, a sole trader, entered into a construction contract with the defenders, in terms of which Stirling was to carry out refurbishment works at the defender's premises in St Annes. Shortly thereafter, a new company was formed: M & S Contracts Limited. Just as in *McIntosh* the intention was that the new company would take over the business of the partnership, so in *Stirling* the intention was that the new company would take over the business of the sole trader. Again, the sole trader's rights and liabilities under the construction contract were not validly transferred to the company. Many of the steps carried out under this contract were carried out in the name of the company. The company sought to refer the dispute to adjudication, but was forced to abandon this attempt when the defenders pointed out that it was not a party to the contract. The sole trader then sought to refer the dispute to adjudication.

The reported case is, in effect, an action by the sole trader seeking enforcement of the adjudicator's decision. Again, the concept of *ad hoc* agency was deployed to allow acts of the newly formed company (such as the writing of letters and submission of invoices) to be identified as acts on behalf of the sole trader. The fact that cheques had been paid into the company's bank account, and not that of the sole trader, was treated by Lord Drummond Young as a "matter of mere administrative convenience".⁹² It was held that a dispute or difference had indeed existed between the sole trader and the defenders prior to the service of the notice of adjudication. The defender's objections to the enforcement of the adjudicator's decision were therefore repelled.

(c) *Other possible uses of ad hoc agency*

In *McIntosh* and *Stirling*, the concept of *ad hoc* agency was deployed to overcome errors which had occurred at the time of incorporation of a partnership or sole trader business into a limited company. Lord Drummond Young offered his concept for use in other contexts such as group company situations:⁹³

Within groups of companies, it is relatively common to find one company performing tasks for another company within the group. This may take many different forms; for present purposes, an example that is relevant is that one company may perform debt collection functions on behalf of other companies within the group. In such a case,

91 [2007] CSOH 117.

92 Para 28.

93 *McIntosh* at para 16.

the debts do not become due to the debt-collecting company; they remain due to the original contracting party, but the debt-collecting company acts as an agent for the contracting party in obtaining payment of the debts... That will commonly involve payment of debts into a bank account in the name of the debt-collecting company; the latter company's function is merely that of an agent, and the underlying contractual structures are not affected.

The solution can be applied even more widely:⁹⁴

Arrangements of this nature are found not only within groups of companies... at the level of natural persons, they are frequently encountered within a family. Nor are *ad hoc* agency relationships confined to routine tasks such as the collection of debts; they may also extend to more complex matters such as conducting negotiations over the performance of a contract.

(2) Methods of creation of an agency relationship

Agency in Scots law may arise either expressly, through offer and acceptance, or by implication from facts where the agent begins to act on behalf of the principal and the principal does not object to this course of conduct.⁹⁵ In such situations, the facts provide the basis from which inferences of an intention to be bound can be made.⁹⁶ Those inferences relate to both principal and agent: in other words, it must be clear that both principal and agent possess the intention to be bound.⁹⁷ Stair emphasised the need for this "core" agreement in relation to the gratuitous contract of mandate,⁹⁸ and modern agency law does not differ in this respect. In the three cases under discussion here, the agency relationship is a type of implied agreement.⁹⁹ It is, however, easier to make inferences of consent necessary to

94 Ibid.

95 *Barnetson v Petersen Bros* (1902) 5 F 86; *Bell v Ogilvie* (1863) 2 M 336 at 340 per Lord Justice Clerk Inglis at 340.

96 *Barnetson v Petersen Brothers* (1902) 5 F 86 at 89 per Lord Trayner; *Bank of Scotland v McNeill* 1977 SLT (Sh Ct) 2 at 3 per Sheriff Principal Reid.

97 *Bank of Scotland v McNeill* 1977 SLT (Sh Ct) at 3 per Sheriff Principal Reid.

98 Stair, *Inst* 1.12.1 and 1.12.3.

99 See Lord Reed in *Ben Cleuch Estates Ltd v Scottish Enterprise* [2006] CSOH 35 at para 143: "An agency can arise from the course of conduct by the principal and agent, as a matter of implied agreement, where each has conducted itself towards the other in such a way that it is reasonable for the other to infer from that conduct consent to the agency." Forte and van Niekerk have suggested a non-consensual model for Scots law: see A D M Forte and J P van Niekerk, "Agency" in K Reid, R Zimmermann and D Visser (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2006) 246. Whilst examples of non-consensual agency undoubtedly exist (such as those created by sections 24 and 25(1) of the Sale of Goods Act 1979), Forte and van Niekerk's analysis fails to reflect the fact that, in the vast majority of cases, the agency relationship is based on consensus between principal and agent. Little evidence from Scottish case-law is provided by Forte and van Niekerk to support a non-consensual model. By contrast, Scottish cases in which the contractual (and therefore consensual) nature of agency is emphasised are not difficult

form a contract where the supposed principal and agent engage in a course of dealing.¹⁰⁰

In the three cases under discussion, there was, of course, no offer and acceptance between the so-called principal and agent, nor was there what could be described as a course of dealing. In *McIntosh* and *Stirling* the agent performed a number of acts in the context of a single construction transaction. In *Whitbread*, the agent paid (or made repeated attempts to pay) a particular debt. Lord Drummond Young recognised the limited nature of the purported agency relationship in *Whitbread*, describing it as “. . . an agency relationship that comes into existence for the purpose of a single transaction only”.¹⁰¹

Scots law does recognise agency relationships which are created for limited purposes: an agent may be a limited or special agent, instructed to carry out a particular act on behalf of a principal.¹⁰² Generally, where the agency relationship is implied, the standard of proof of agency is high. Agency must be established as a matter of fact supported by relevant averments, and there is certainly no presumption in favour of agency.¹⁰³ This approach to proof appears much stricter than Lord Drummond Young’s approach. In *Whitbread* he addressed the issue of the consent or intention of the parties as follows:¹⁰⁴

to find: see *Graham & Co v United Turkey Red Co* 1922 SC 533 at 546 per Lord Salvesen and at 549 per Lord Ormidale; *Lothian v Jenolite Ltd* 1969 SC 111 at 120 per Lord Milligan; *Trans Barwil Agencies (UK) Ltd v John S Braid & Co Ltd* 1988 SC 222 at 230 per Lord McCluskey; *Connolly v Brown* 2007 SLT 778 at para 54 per Lady Dorrian. A similar debate exists in South African law, with A J Kerr asserting a consensual analysis and J C De Wet and B P Wanda disputing Kerr’s view. See A J Kerr, *The Law of Agency*, 4th edn (2006) 5-10 for a useful summary of the debate. The debate cannot be fully analysed here. Drawing on the approach of the Scottish courts, it is assumed for the purposes of this article that agency in Scots law is consensual.

100 Bell, *Comm I*, 510 n 5; *Ben Cleuch Estates Ltd v Scottish Enterprise* [2006] CSOH 35 at para 143 per Lord Reed. Even in such cases, an inference is not easily made. There must be an actual course of dealing, not simply isolated incidents – see Lord Young’s judgment in *Morrison v Statter* (1885) 12 R 1152 – and the course of dealing must be consistent: see *Ferguson v Lillie & Stephen* (1864) 2 M 804 at 807 per the Lord Justice-Clerk (Inglis).

101 Para 13. Under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053 reg 2(1) commercial agents must have “continuing authority” to negotiate the sale or purchase of goods on behalf of the principal. Not having continuing authority, an *ad hoc* agent could not fall within the definition of a commercial agent.

102 Bell, *Comm I*, 507 and 512-515; W M Glog, *The Law of Contract*, 2nd edn (1929) 150; L Macgregor, “Agency and mandate”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2002) para 55.

103 *Eastern Marine Services (and Supplies) Ltd v Dickson Motors Ltd* 1981 SC 355 at 357-359 per Lord Grieve, an approach he later applied in *Sao Paulo Alparagatas SA v Standard Chartered Bank Ltd* 1985 SLT 433. Lord Grieve’s approach was applied by Sheriff Lothian in *Woodchester Equipment Leasing Ltd v Rafique and Sarwar* 1993 SLT (Sh Ct) 26 at 27 by Sheriff Principal Maguire; and in *Royal Bank of Scotland plc v Shanks* 1998 SLT 355 at 360 by Lord Penrose. Even where a course of dealing exists, the standard of proof is also relatively high: see *Morrison v Statter* (1885) 12 R 1152.

104 Para 19, head 3.

It is no doubt true that there was no actual intention on the part of the persons who issued the cheque that Fairbar should act as agent for Whitbread. Nevertheless, as the present case illustrates, the acts of large companies are frequently performed by the relatively junior employees acting under the corporate structures that have been set up to govern a multiplicity of transactions, with no regard to any particular transaction. In those circumstances it is in my opinion quite unrealistic to attempt to attribute a specific intention to any individual or group of individuals. The corporate intention must be determined objectively, by examining both the individual transaction and the corporate structures under which it was effected.

Lord Drummond Young's approach here is unusual. Actions are often used as evidence of the underlying agreement of the parties. Thus, in the context of a sale, payment of money or tendering of goods act as evidence of the underlying intention necessary to form a contract of sale. Yet here, Lord Drummond Young identifies payment itself as creating the contract of agency. Payment in itself does not create a contract of agency – it simply acts as evidence from which inferences of intention can be made.

Although the language used by Lord Drummond Young is suggestive of the idea of corporate attribution, i.e. that a person's intentions can be considered the intentions of a company,¹⁰⁵ he avoids identifying the specific person whose intention has this effect, and why those intentions should be attributed to Fairbar rather than Whitbread. Rather, he draws inferences from the circumstances as a whole. He explains:¹⁰⁶

Where . . . one person makes payment of another's debt, he normally does so as the agent of the debtor for the purpose of that particular transaction . . . That is in my opinion the natural inference from two facts (i) the existence of a debt owed by a debtor and (ii) the fact that payment is made in order to discharge that particular debt.

These inferences were sufficient, in his view, to indicate that a relationship of agency was created: "The obvious inference is accordingly that he makes payment on behalf of the debtor. That *creates* the relationship of *ad hoc* agency."¹⁰⁷

In *Whitbread* several unsuccessful attempts were made to pay the rent. One such attempt involved the tendering of a Fairbar cheque which was cashed but the sums ultimately re-credited, the landlords seeking to avoid the implication of consent to an assignation. The intention was, clearly, that Fairbar funds should be used to pay a Whitbread debt.¹⁰⁸ In a system such as Scots law where all individuals have by law a legal power to pay another's debt (subject to safeguards

¹⁰⁵ As explored by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

¹⁰⁶ *Whitbread* at para 13.

¹⁰⁷ Para 13, emphasis added.

¹⁰⁸ See A (2) above.

for the parties), it cannot be said that such a payment necessarily creates a relationship of *ad hoc* agency. It seems, therefore, that recourse to *ad hoc* agency was unnecessary in this case.

The objective approach to the ascertainment of intention is again emphasised by Lord Drummond Young in *McIntosh*:¹⁰⁹

...I am of opinion that a reasonable man in the position of either the first or the second defenders would construe the claim document as being presented through the company but acting as agent for the true contracting party, the partnership. As a matter of commercial reality, that would plainly be a sensible way to proceed, avoiding the need for a formal assignation but permitting the active trading entity, the company, to progress matters on behalf of the true contracting party.

That would indeed have been “a sensible approach”, but sensible approaches are not always taken! The directors of Laurence McIntosh Ltd would no doubt have been surprised had it been suggested to them that they were in fact acting as agents for a partnership which, although not dissolved, was inactive, all trading functions having been transferred to the newly formed company. The use of *ad hoc* agency here provided an escape route, bypassing the formal requirements of assignation. A solution which bypasses entirely the requirements of assignation, an important part of the law of obligations, is highly questionable.

The objective perspective applied by Lord Drummond Young allowed him to omit consideration of actual intention. As such, there was no need for him to address the issue of whether both principal and agent exhibited the consent necessary to establish agency. Rather than agency being the most likely interpretation of the facts, it was only one of a number of factual possibilities. It seems highly likely that none of the actors involved had addressed their minds to the possibility of agency. In *McIntosh* and *Stirling*, for example, the various actors seem to have been unaware of the legal consequences of incorporation of a company. Alternatively, they may have been aware but unwilling to devote the time necessary in order properly to deal with the legal consequences of incorporation.

Ad hoc agency operates in these cases as a “get out of jail free” card, available to parties who have failed properly to regulate their legal affairs. What is of greater concern is the effect this line of cases may have on the general principles of agency law. Were these cases to be used generally as precedents, it could threaten the previously established rules for formation of the agency relationship, undermining the role of consent in that relationship. One might also

109 Para 18. Later in his judgment (para 19) he construes a letter as being sent by the company Laurence McIntosh Ltd on behalf of the partnership Laurence McIntosh and Sons, commenting “...commercially, that is the obvious and rational interpretation of what happened”.

question whether this goal of protecting the uninformed is worth the concomitant distortion of agency principles.

(3) The agent's authority

Once an agency relationship is constituted, the agent must act within the confines of his or her authority. The consequences of an agent stepping outside the boundaries of authority are serious, for example, the agent is unable to conclude a contract on the principal's behalf.¹¹⁰ In none of these three cases was there an express grant of authority, so only implied authority could have been available to the agent in each case. Of the several types of implied authority¹¹¹ the one which seems most appropriate in these circumstances is that which arises because it is necessary to achieve the object of the agency.¹¹² In *Stirling*, John Stirling was both the sole trader and the sole director of the company. The use of *ad hoc* agency involves considering Stirling as granting authority, in effect, to himself. In *McIntosh*, the same parties were both partners in the partnership and directors of the company. Again, principal and agent are, in effect, the same parties. This reasoning is highly artificial and could only be justified by regarding it as a by-product of separate personality.

Reading Lord Drummond Young's judgments in *McIntosh* and *Stirling* together, there appear to be limits to the scope of *ad hoc* agency which have an impact on the issue of authority. In *McIntosh* Lord Drummond Young held that various activities had been performed by the company as agent on behalf of the partnership. These included payments,¹¹³ and also the presentation of a claim document under the Works Contract.¹¹⁴ In this case, there is no indication that the scope of *ad hoc* agency is limited. This can be contrasted with *Stirling*, where he indicated that *ad hoc* agency:¹¹⁵

... applies to correspondence, invoices, contractual notices and the like, where no special formality is expected; where, however, matters enter a formal process such as litigation or adjudication, formality is expected and the correct party must be named.

He returns to this issue later in his judgment where he discusses a letter giving notice of an intention to refer a dispute to adjudication:¹¹⁶

110 *Morrison v Statter* (1885) 12 R 1152 at 1154 per Lord Young.

111 Macgregor (n 102) para 50.

112 Ibid. See also *Park v Mood* 1919 SLT 170.

113 Para 15.

114 Para 18.

115 Para 16.

116 Para 20.

This letter is, I think, in a different position from earlier correspondence. It is a notice of intention to refer a dispute to adjudication. Adjudication is a form of provisional dispute resolution, and the letter is, accordingly similar in its import to a solicitor's letter written prior to litigation. At this stage, and in any subsequent adjudication or court proceedings, I am of the opinion that an analysis in terms of *ad hoc* agency is not an appropriate inference. When litigation or adjudication is threatened, the communing between the parties take on a formal aspect, and precision is required in the name of the party making the claim.

It is difficult to reconcile Lord Drummond Young's approaches in *McIntosh* and *Stirling*. Arguably, the presentation of the claim document under the Works Contract in *McIntosh* was a step involving formality, and yet the issue of whether it was, as a result, outside the scope of *ad hoc* agency did not arise. The exact parameters of this limitation in scope may have to be formulated in future cases. The practical result is that the *ad hoc* agent's authority is more limited than the normal agent's authority. It seems that *ad hoc* agency is indeed a new and different species of agency.

(4) Acting on behalf of a non-existent principal

In *McIntosh*, Lord Drummond Young's solution involved treating the newly formed company as the agent of a partnership which, although not dissolved, was inactive. Partnerships which exist under the Partnership Act 1890 do not, of course, require to be registered before they can in law be considered created. Cases such as *Khan v Miah*¹¹⁷ suggest that the partnership is created when the parties embark on the commercial activity in question. It is relatively common for such partnerships to cease trading and yet not be dissolved. Had the partnership been dissolved, this would have led to a more intractable problem. That problem will be analysed here given that it may have a significant impact on the use of *ad hoc* agency in future. To recap, the partnership in *McIntosh* had not been dissolved and was thus theoretically able to provide instructions to an agent.

Had the partnership been dissolved, *ad hoc* agency would have involved the company as agent acting on behalf of a non-existent principal. The effects of acting on behalf of a non-existent principal are not fully developed in Scots law. Certainly, an agent in this situation cannot conclude a contract on the principal's behalf and may, in fact, bind himself.¹¹⁸ Nor can a non-existent business entity ratify: ratification is itself a unilateral juridical act on the part of the principal,

¹¹⁷ [2000] 1 WLR 2123.

¹¹⁸ Macgregor (n 102) para 165; J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 528-529; and see also *McMeekin v Easton* (1889) 16 R 363, although in a recent case Lord Hodge held that a solicitor who concluded missives on behalf of a non-existent client was not personally bound under the missives: *Halifax v DLA Piper* [2009] CSOH 74. See also Companies Act 2006 s 51, which prevents

who by the hypothesis does not exist and therefore cannot have legal capacity. As a result, *ad hoc* agency is an inappropriate remedy to use where the partnership has been dissolved to make way for a newly incorporated company: agency principles do not allow an agent to act on behalf of a non-existent principal.

The Partnership Act 1890 tempers the otherwise significant difficulties caused by the fact that partnerships are contracts involving *delectus personae*. In theory, a partnership is dissolved each time an individual partner leaves the partnership or dies.¹¹⁹ Not surprisingly, this common law position is almost always amended in a written partnership agreement, thus allowing the partnership to continue to trade notwithstanding changes in its membership. Where there is no written partnership agreement section 38 of the 1890 Act comes into play, providing partners with limited authority following dissolution of the partnership "... to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise". There is at least an argument that a newly formed company could benefit from these residual powers available to partners as agents involved in winding-up the non-existent partnership.

Although section 38 has been in force for over one hundred years, its parameters are not at all clear. A natural interpretation of the section limits the partners' authority to completing unfinished transactions, but not entering into new transactions. This interpretation was recently confirmed by Lord Reed, although he suggested that Scots law could be contrasted with English law in this respect.¹²⁰ So *ad hoc* agency may be unnecessary in cases where a company has been incorporated to perform the functions of a dissolved partnership. Section 38 of the 1890 Act arguably already provides a solution. Much would depend on the facts of the case, for example, the timing of the dissolution of the original partnership. The longer the time which has elapsed between dissolution and the exercise by the partners of their purported powers, the less likely those powers

promoters concluding binding contracts on behalf of unincorporated companies. The promoter is personally bound under any purported contracts. In the UK, the company, once formed, cannot ratify the actions of the promoter, *Kelner v Baxter* (1866-1867) LR 2 CP 174. Interestingly, the United Kingdom approach to this question is more strict than that which applies in most other countries both within and outwith Europe. See D Busch and L Macgregor, "Comparative law evaluation" in Busch and Macgregor (eds), *The Unauthorised Agent: Perspectives from European and Comparative Law* (2009) 385 at 435-438; and D DeMott, "Ratification: useful but uneven" (2009) 17 ERPL 987.

119 See Law Commission and Scottish Law Commission, Report on *Partnership Law* (Law Com No 283; Scot Law Com No 192, 2003) para 2.8.

120 *Duncan & Anor v MFV Marigold PD145 and anor* [2006] CSOH 128, 2006 SLT 975 at paras 44 and 66. For English law see *Re Bourne* [1906] 2 Ch 427; *Don King Productions Inc v Warren* [2000] Ch 291. Further recent analysis of section 38 was provided in *Balmer v HM Advocate* 2008 SLT 799, where the Crown unsuccessfully attempted to use section 38 as a method of extending the life of a partnership so that indictments could be served on the partners of the now dissolved partnership.

are to fall within the ambit of section 38: according to Lord Reed the powers exist for a “temporary” period only.¹²¹

Ad hoc agency seems therefore to pose further problems. In *Stirling* and *McIntosh* the principal and agent were, in effect, the same parties. This results in highly artificial reasoning when analysing the agent’s authority: in effect, the parties provide themselves with authority. Looking into the future, *ad hoc* agency cannot be used where a partnership has been dissolved in order to incorporate a company given that the principal is non-existent. Section 38 arguably provides a more appropriate solution in such cases.

(5) Implications for the wider law of agency

In order to be commercially useful, agency as a concept sometimes elides established rules of the law of contract. An example is the concept of the undisclosed principal, which flouts fundamental rules of formation of contract.¹²² The ability to act on behalf of an undisclosed principal is often justified by reference to its commercial utility.¹²³ It is undoubtedly useful for agency to be created easily, with little formality, through an implication from facts and circumstances. It is for consideration however whether the *Whitbread*, *McIntosh* and *Stirling* judgments take matters too far, setting the bar for implication of an agency relationship at too low a level.

This is not the first time that agency law has been used as a tool to solve problems inherent in other areas of law. Examples include the use of Himalaya clauses¹²⁴ prior to the enactment of the Unfair Contract Terms Act 1977. Agency reasoning was deployed in order to protect stevedores who were not immediate parties to a contract containing an exemption clause and therefore could not be protected by its terms. The stevedore was characterised as a principal benefiting from a clause entered into by a supposed agent on its behalf. In such cases, the problem was too rigid adherence to the doctrine of privity of contract. An escape route was required, and that was found through the law of agency. This escape route was rendered obsolete when specific legislation in the form of the 1977 Act was enacted to fill the lacuna in the law.

121 *Duncan v MFV Marigold PD145* [2006] CSOH 128, 2006 SLT 975 at para 43.

122 Macgregor (n 102) paras 147-164.

123 F M B Reynolds, *Bowstead & Reynolds on Agency*, 19th edn (2010) para 8-071; G H L Fridman, *Agency*, 7th edn (1996) 254.

124 See *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 474 per Lord Reid, the name of the clause being taken from the name of the ship in *Adler v Dickson* [1955] 1 QB 158. The Privy Council confirmed the validity of such clauses in *The Eurymedon (New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd)* [1975] AC 154. The history of this area of law is usefully summarised in E Macdonald, *Exemption Clauses and Unfair Terms* (2006) 287-290.

In the three cases under discussion, it is the doctrine of the separate legal personality of companies which caused what were perceived to be unfair consequences. An “escape route” from that doctrine already exists however. Under the doctrine of piercing or lifting the corporate veil the UK courts developed a number of exceptions to the concept of separate legal personality.¹²⁵ Some of these have been disapproved¹²⁶ or marginalised¹²⁷ but the judgment of the Court of Appeal delivered by Slade LJ in the leading English case of *Adams v Cape Industries Plc*¹²⁸ suggests that there are still two bases, one general and the other particular, for piercing the corporate veil. The general exception was described in the *Wolfson* case¹²⁹ by Lord Keith as “the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts”. In none of the three *ad hoc* agency cases under discussion was the company concerned a mere sham or façade.

Under the particular or “agency” exception, which was adumbrated in the *Smith, Stone and Knight* case in 1939,¹³⁰ the veil may be pierced where the company is in reality completely and utterly under the control of a parent company or some other person and cannot be said to be carrying on its own business separately from its parent company or the business of that other person. It has been observed that despite the sporadic application of the case, the weight of authority in the UK and Australia “does not provide strong support for using the decision for veil piercing” though it is otherwise in Canada.¹³¹ It is clear that in the *Whitbread* case, the acts of Fairbar Ltd and Whitbread Group plc were closely entwined but the *Smith, Stone and Knight* case was not relied on. In the *McIntosh* and *Stirling* cases, the lack of title to sue stemmed from a botched transition from partnership or sole trader to corporate status.

Though the judgments in the three *ad hoc* agency cases were not characterised by counsel or judge as a piercing of the corporate veil, it may be that that was their true effect. Yet such an expansion of the piercing the veil doctrine runs counter to the recent tendency of UK courts (in e.g. *Wolfson* and *Adams*) to limit the

125 See the valuable overview in M Moore, “‘A temple built on faulty foundations’: piercing the corporate veil and the legacy of *Salomon v Salomon*” [2006] JBL 180.

126 See e.g. the “interests of justice” exception in *Creasey v Breachwood Motors* [1993] BCLC 480, overruled in *Ord v Belhaven Pubs* [1998] BCLC 447.

127 See e.g. the “single economic unit” exception in *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 WLR 852.

128 [1990] Ch 433.

129 *Wolfson v Strathclyde Regional Council* 1978 SC (HL) 90 at 96

130 *Smith, Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116.

131 See A Hargovan and J Harris, “Piercing the corporate veil in Canada: a comparative analysis” [2007] Company Lawyer 58 which also argues that “the use of so-called ‘agency principles’ to pierce the corporate veil has little to do with traditional agency law”.

doctrine to cases where special circumstances exist indicating that the company concerned is a sham. Given that the lengthy Companies Act 2006 has not expanded the categories in which lifting the veil is possible, is *ad hoc* agency actually needed in order to supplement or extend the existing doctrine of lifting the veil?

How should one evaluate the effect which the new doctrine of *ad hoc* agency might have on the law of agency? The parties who ultimately benefited from the new doctrine may not have fully understood the implications of incorporation. There is no reason to suppose, however, that the businesses in question lacked legal advice. If they received negligent advice from their solicitors (as was argued in *McIntosh*),¹³² then they are likely to have a relevant claim against their solicitors in negligence. Additionally, one might argue that the separate legal personality of a company is hardly novel, and its implications are known to many non-legally qualified business persons. Looking at matters from the opposite perspective, there is no doubt that the contractual counterparties, Balfour Beatty and Westminster, sought to take advantage of a mistake which had been made. Whether that mistake was excusable is less clear. The facts of *McIntosh* and *Stirling* do not seem to amount to a pressing case for the development of a new doctrine. In the case of *Whitbread*, as has been argued in Part B of this article, a solution was already in existence but was not used.

As is often the case, the “quick-fix” solution may have unforeseen and undesirable results. Some of those results have been explored above, and others may arise. One such issue is the extent of the *ad hoc* agent’s fiduciary duties. Decided case-law suggests that an agent who, because of the limited nature of his authority, is classed as a limited rather than a general agent, has limited fiduciary duties. Is an *ad hoc* agent a limited agent, and thus able to benefit from limited fiduciary duties? In the cases under discussion, the companies were related, and it is unlikely that principal and agent would enter into a dispute of this type. However, Lord Drummond Young offered his solution for use in wider contexts. These potential problems would have to be fully considered before the concept could be deployed more broadly across commercial law.

D. CONCLUSION

In summary, we conclude that the new doctrine of *ad hoc* agency, which has not yet “caught on”,¹³³ should (to change the metaphor) be nipped in the bud

¹³² Para 5.

¹³³ Apart from the three cases decided by Lord Drummond Young discussed above, at the time of writing the doctrine of *ad hoc* agency has been referred to in only one other case and then only in passing references: see *Fleming Builders Ltd v Hives* [2008] CSOH 103 at paras 102 and 106 per Lord Menzies.

before it does. In its origins it was unnecessary because of the existing general rule empowering a third party to pay another's debt subject to safeguards for the parties, especially the creditor's autonomy. Moreover there are rules requiring the debtor to recompense a third party payer on the basis of unjustified enrichment or *negotiorum gestio* and there is no need to treat the debtor as a principal bound by an implied contract of agency to reimburse the third party as his *ad hoc* agent. From its origins in *Whitbread*, the concept of *ad hoc* agency has been applied in order to assist a party who has failed to take the necessary steps in order to transfer its legal rights on incorporation as a company. It is unclear whether these cases involved an injustice requiring the introduction of a novel agency doctrine. That doctrine is open to criticism on various grounds outlined above including the creation of unnecessary conceptual difficulties such as doubts about, firstly, the formation of the agency contract, and secondly the scope of the *ad hoc* agent's authority; problems concerning the non-existent principal; and inconsistency with the recent case-law on piercing the corporate veil.