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# Analysis

EdinLR Vol 16 pp 77-86

## Scottish Criminal Appeals and the Supreme Court: Quis Custodiet Ipsos Custodes?

This note comments upon the current proposals to amend the definition of a devolution issue in the Scotland Act 1998 and to provide for a new statutory right of appeal to the Supreme Court in Scottish criminal proceedings. Those proposals have given rise to considerable controversy in Scottish legal and political circles.

### A. BACKGROUND

The High Court of Justiciary was, and remains, the final court of appeal in Scottish criminal proceedings. The only exceptions to this are that certain questions can be referred or appealed to specialist courts for particular purposes. For example, questions about EU law can be referred to the ECJ. The Scotland Act 1998 provides another exception.

One of the fundamental features of that Act is that it imposes a legal or *vires* control upon the new devolved institutions. Any question as to whether there has been a breach of those controls, whether arising in civil or criminal proceedings, is made a constitutional or devolution issue which is capable of being appealed or referred to, originally, the Judicial Committee of the Privy Council and, now, the Supreme Court, as a constitutional matter.

Devolution issues are defined in effect as including the question whether the Lord Advocate has acted incompatibly with the ECHR or EU law in prosecuting any offence contrary to section 57(2) of the Scotland Act. The devolution issue procedure enabled the Supreme Court ultimately to determine such questions and in a few, but notorious, cases they did so by overturning the decisions of the High Court upon such issues, even those decisions of the High Court that no devolution issue had arisen.<sup>1</sup> Even although the Supreme Court also has the power to dispose of a case, it is important to emphasise that its jurisdiction is limited to determining the devolution issue and it cannot review the decisions of the High Court on matters of Scots criminal law.<sup>2</sup>

1 See e.g. *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13 and *Fraser v HM Advocate* [2011] UKSC 24, 2011 SLT 515.

2 See Lord Hope in *Fraser* at para 11.

Despite this, there has been considerable dissatisfaction among the Scottish judiciary and others with the way in which the devolution issue procedure was working in Scottish criminal proceedings, and critics saw this as an unwarranted interference by the Supreme Court in Scottish criminal law. This has now become a political issue which has been taken up the Scottish Nationalist Government and the Scottish Parliament, on the grounds that it is undermining the integrity of Scots criminal law.<sup>3</sup>

## B. ROADMAP OF THE PROPOSALS

In response to this dissatisfaction, the Advocate General appointed an Expert Group<sup>4</sup> to consider the issue. They recommended:

- that the Scotland Act 1998 should be amended to remove the acts of the Lord Advocate in prosecuting any offence, and as head of the system of prosecution and investigation of deaths, from the scope of section 57(2) and from giving rise to a devolution issue.<sup>5</sup> This will mean that any question which arises in civil or criminal proceedings as to whether any such act is incompatible with ECHR or EU law will no longer be subject to the special devolution procedure which enables the Advocate General to become a party in that procedure and for those questions to be ultimately determined by the Supreme Court; but
- that the Supreme Court should continue to have the jurisdiction to deal with such issues in Scottish criminal proceedings and that this should be re-defined in a new statutory right of appeal.<sup>6</sup>

Their recommendations are given effect to in clause 17 of the Scotland Bill which, at the time of writing, is awaiting the committee stage in the House of Lords.<sup>7</sup>

The Scottish Government appointed another group (referred to here as “the McCluskey Group”) to reconsider the matter.<sup>8</sup> That group agreed that questions regarding acts of the Lord Advocate should be removed from being devolution issues and that there should be a new statutory right of appeal to the Supreme Court but

<sup>3</sup> See, in this context, the debates in the Scottish Parliament on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill (Official Report, 27 Oct 2010) and the debate on motion S4M-01133 on “ensuring the integrity of Scots criminal law” (Official Report, 27 Oct 2011).

<sup>4</sup> See *Section 57(2) and Schedule 6 of the Scotland Act 1998 and the Role of the Lord Advocate* (2010), available at <http://www.oag.gov.uk/oag/225.html>. Subsequent references to the “Expert Group” are to this report. The Advocate General accepted the group’s recommendations: see “Devolution issues and acts of the Lord Advocate – Expert Group findings” available at <http://www.oag.gov.uk/oag/223.html>.

<sup>5</sup> Expert Group paras 4.18-4.22 and 5.4.

<sup>6</sup> Paras 4.8-4.17 and 5.3.

<sup>7</sup> HL Bill 79. See clause 17(2) and (4) and clause 17(3), which would insert a new section 98A into the Scotland Act 1998.

<sup>8</sup> The McCluskey Group was appointed by the First Minister. See *Final Report of Review Group: Examination of the Relationship Between the High Court of Justiciary and the Supreme Court in Criminal Cases* (2011), available at <http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf>. Subsequent references to the “McCluskey Report” are to this report.

thought, in particular, that any such appeal should only be competent where the High Court has granted a certificate that the case raises a point of law of general public importance.

The Scottish Parliament is currently considering whether to approve clause 17 for the purposes of a “Sewel motion”. In his evidence to the Scottish Parliament, the Lord Advocate provided an illustrative redraft of clause 17 which gives effect to the recommendations of the McCluskey Group.<sup>9</sup> However, this redraft goes even further and proposes that, not only acts of the Lord Advocate, but any question relating to ECHR or EU compatibility, including any such question involving an ASP, should no longer give rise to a devolution issue in Scottish criminal proceedings.

### C. ACTS OF THE LORD ADVOCATE AND DEVOLUTION ISSUES

The reasons given by the Expert Group and the McCluskey Group for their view that the acts of the Lord Advocate should no longer be subject to section 57(2) or give rise to devolution issues are unconvincing.

They considered that the existing procedure for dealing with devolution issues in criminal proceedings was “clumsy, bureaucratic and productive of delay” and that it created “a very serious problem for the Scottish court system and the work of the Lord Advocate and Advocate General, as well as for victims and witnesses”.<sup>10</sup> These criticisms may well be justified. However, those views were arrived at without reference to any evidence other than anecdote and they did not consider whether, or to what extent, they were due not to the statutory provisions in the Scotland Act, but to the devolution minute procedure introduced by the Act of Adjournal made by the Lord Justice General and other judges in the High Court.<sup>11</sup> Accordingly, they did not consider whether those criticisms could be remedied by an amendment of the Act of Adjournal, coupled, if need be, by minor amendments to the procedure in Schedule 6 to the Scotland Act 1998.

However, the main reason for their recommendations was that they considered that there was a “fundamental constitutional objection to the existing statutory framework” and that it was “constitutionally inept” to treat acts of the Lord Advocate as giving rise to devolution issues “because such acts fall within the retained functions of the Lord Advocate and have nothing to do with the devolution settlement”.<sup>12</sup>

The McCluskey Group developed this idea further, asserting that it was only “constitutional issues concerning the division of powers between different levels of legislature and administration within the United Kingdom, as distinct from human rights issues” which were “truly” devolution issues.<sup>13</sup> Although they stressed that they were only dealing with criminal proceedings, there appears to be no logical reason

9 See the letter from the Lord Advocate (dated 26 Oct 2011) which accompanies the agenda for the Scotland Bill Committee on 1 Nov 2011, available at [http://www.scottish.parliament.uk/S4\\_ScotlandBillCommittee/Meeting%20Papers/papers20111101.pdf](http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Meeting%20Papers/papers20111101.pdf).

10 Expert Group para 4.19.

11 Act of Adjournal (Criminal Procedure Rules) 1996, SI 1996/513 ch 40 (as inserted).

12 Expert Group para 5.1. See also Expert Group paras 4.20-4.22; McCluskey Group paras 13 and 28.

13 McCluskey Group para 17.

why this criticism could not apply equally to any incompatibility issue under the Scotland Act 1998.

It is the case that the Lord Advocate's retained functions are functions which were exercisable by him immediately before he ceased to be a Minister of the Crown and that they were not restricted to functions which were "exercisable within devolved competence" as were the other Ministerial functions which were transferred to Scottish Ministers on 1 July 1999.<sup>14</sup> The reason for this is obvious: it was intended that the Lord Advocate, when he became a member of the Scottish Executive, should continue to be able to prosecute offences irrespective of whether they related to devolved or reserved matters.

However, this does not mean that the Westminster Parliament could not, in making provision for the devolved constitution for Scotland, provide that the way in which the Lord Advocate exercised those retained functions should be subject to the same *vires* control in section 57(2) as were other members of the Scottish Executive<sup>15</sup> or that questions as to whether he had breached that requirement should give rise to a devolution issue.

Neither does it mean that it would somehow be "constitutionally inept" for the Westminster Parliament to provide for this. Both Groups appear to be taking a very narrow view as to what constitutes "constitutional or devolved issues". There appears to be no justification for taking the view that those issues should be confined to questions regarding devolved or reserved matters and could not include questions as to whether the Scottish Parliament, or any member of the Scottish Executive, including the Lord Advocate, has acted incompatibly with the ECHR or EU law. It is quite common in constitutions to include provisions requiring the State institutions to observe human rights and international law and the Commonwealth countries frequently make provision for questions regarding their breach to be referred to the Privy Council.

It is clear that the Scotland Act 1998 took the view that it was important to ensure that the devolved institutions established by that Act should observe human rights and EU law. They therefore subjected them to a *vires* control and made questions as to their breach a constitutional or devolution issue. There is absolutely nothing which is "constitutionally inept" about doing so or about subjecting these organs of the devolved State to a stricter control with regard to the observance of human rights than a local authority or other public authority under the Human Rights Act. These provisions were mirrored in the other devolved constitutions.<sup>16</sup> The reasons why the Westminster Parliament took this view doubtless included the need to protect the rights of all citizens in the UK by ensuring a uniform interpretation, application and observance of the ECHR and EU law by all the devolved institutions, and the need to protect the UK Government from court actions in Strasbourg or at Luxembourg arising from actions taken by those devolved institutions.

14 Scotland Act 1998 ss 52(6)(a) and 53(1).

15 Subject to section 57(3). This protected any of his retained functions conferred by a Westminster Act which required him to act incompatibly with the Convention rights.

16 Northern Ireland Act 1998 Sch 10 para 1; Government of Wales Act 2006 Sch 9 para 1.

In these circumstances, it is thought that both Groups have not given sufficient reasons to justify their view that acts of the Lord Advocate should no longer be subject to section 57(2) or give rise to devolution issues.

However, whatever the real reason may be, the Advocate General has agreed to give effect to the Expert Group's recommendations in clause 17. This has not only confirmed that the devolution issue procedure is discredited but has removed the only constitutional justification for referring such issues to the Supreme Court in criminal proceedings. The effect of this is to re-open the questions whether there should be the possibility of appealing or referring such incompatibility issues to that Court and, if so, under what conditions. This has simply opened up a Pandora's box of legal and political problems which can be manipulated to work against the interests of the UK Government.

#### **D. NEW STATUTORY RIGHT OF APPEAL**

The Expert Group considered that, in place of the devolution issue procedure, there should be a new statutory right of appeal to the Supreme Court from the decision of the High Court on compatibility issues in Scottish criminal proceedings "both for reasons of constitutional propriety and, more importantly, to ensure that fundamental rights enshrined in international obligations are secured in a consistent manner for all those who claim their protection in the United Kingdom".<sup>17</sup>

Their recommendations are given effect to in clause 17.<sup>18</sup> It provides for an appeal to be made to the Supreme Court on the grounds of a miscarriage of justice but only for the purpose of determining a "compatibility question" which is defined as a question whether an act, or failure to act, of the Lord Advocate in prosecuting any offence is compatible with any of the Convention rights or with EU law. Such an appeal could only be made with the permission (or leave) of the High Court or, failing which, with the permission (or leave) of the Supreme Court.

The McCluskey Group agreed that there should continue to be an appeal to the Supreme Court on compatibility issues but did not endorse the proposals in clause 17. That group thought that "the jurisdiction exercised by the Supreme Court in such cases [should] not go beyond what is necessary to ensure that Convention rights are defined and understood by courts in the same way throughout the United Kingdom".<sup>19</sup> What this entails is given effect to in the redrafted clause 17. It is proposed to concentrate upon two main issues.

##### **(1) Compatibility questions**

The McCluskey Group thought that clause 17 did not achieve what the Expert Group wanted<sup>20</sup> because it defines a "compatibility question" only in terms of the act or failure to act of the Lord Advocate as is the position at present under the devolution

<sup>17</sup> Expert Group paras 4.8-4.17 and 5.3.

<sup>18</sup> Clause 17(3), which would insert a new section 98A into the Scotland Act 1998.

<sup>19</sup> McCluskey Group para 10.

<sup>20</sup> Expert Group paras 4.28 and 4.31.

issue procedure.<sup>21</sup> They thought that an appeal to the Supreme Court should extend to any incompatibility issue arising from an act, or failure to act, of any public authority within the meaning of section 6 of the Human Rights Act 1998.<sup>22</sup>

This is given effect in the redrafted clause 17.<sup>23</sup> However, with destructive logic, the Lord Advocate states that, as a consequence, the definition of a devolution issue in the Scotland Act should be amended to exempt “any issue relating to ECHR or EU compatibility arising in criminal proceedings”.<sup>24</sup> Accordingly, the redrafted clause 17 exempts from that definition not only any question whether any function, or failure to act, is incompatible but also any question whether any ASP, or any provision in such an ASP, is incompatible.<sup>25</sup>

The extension to any function would include not only the acts of the Lord Advocate but also the acts of other Scottish Ministers, even although it is difficult to see how their acts could have any relevance to criminal proceedings. This casts in doubt the necessity for this extension.

More importantly, however, is the position about ASPs. The proposal to exempt them has not been the subject of any consultation and no justification is put forward for it apart from the logic of attempting to prevent any incompatibility issue from arising as a devolution issue in criminal proceedings.

This proposal would create uncertainty. This is because it is not clear whether questions as to whether an ASP or any provision in an ASP is incompatible with the ECHR or with EU law would fall within the definition of a compatibility question within the meaning of the redrafted clause 17. This would seem to depend upon whether it can be said that, for the purposes of section 6 of the Human Rights Act, the Scottish Parliament is a public authority and the ASP is an “act” of that public authority. It may be implied that the Scottish Parliament is a public authority for this purpose because public authority is defined in section 6 as expressly excluding both Houses of Parliament but it does not exclude the Scottish Parliament. However, even although an ASP is regarded as subordinate legislation for the purposes of that Act, it would seem to be a rather strained interpretation of the word “act” to regard it as including an ASP which has been passed by that Parliament and received Royal Assent. It is certainly different from an act of a Minister making subordinate legislation.

The proposal would also create anomalies. The Lord Advocate states that any question about the compatibility of an ASP with the ECHR can always be raised in civil proceedings.<sup>26</sup> However, it is very doubtful whether a civil court would consider it appropriate, or even competent, to entertain such a question regarding the criminal law, particularly if there were pending criminal proceedings. There would

21 *McCluskey Group* paras 24, 27 and 28(a).

22 *McCluskey Group*, executive summary paras 3 and 4.

23 Inserting (by way of clause 17(8)) s 288ZA(1) into the Criminal Procedure (Scotland) Act 1995.

24 Scottish Government, “Submission from the Lord Advocate: UK Supreme Court Jurisdiction” (2011) para 12, available at [http://www.scottish.parliament.uk/S4\\_ScotlandBillCommittee/General%20Documents/Lord\\_Advocate.pdf](http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/General%20Documents/Lord_Advocate.pdf).

25 See the redrafted clause 17(3).

26 Scottish Government (n 24) para 13.

be uncertainty as to whether those criminal proceedings could proceed until a final determination is reached upon this question. It might, therefore, be expected that the civil courts would consider that this was a matter for the criminal courts.

Accordingly, if questions about the legislative competence of ASPs could not be raised as devolution issues in criminal proceedings, this would cause unnecessary damage to the devolution settlement by making inroads into the comprehensive nature of the *vires* control over the legislative competence of the Parliament. It would also appear to create uncertainties and anomalies.

## (2) The certification requirement

The McCluskey Group considered that an appeal should be competent only where the High Court has granted a certificate that the case raises a point of law of general public importance.<sup>27</sup> This would be in addition to the need to obtain leave to appeal. This is given effect in the redrafted clause 17.<sup>28</sup>

The main reasons which the McCluskey Group gave for this view were that this would bring the position in criminal proceedings in Scotland into line with that in the rest of the UK and preserve “the special constitutional and historical position of the High Court as the final court of criminal appeal in Scotland”.<sup>29</sup>

The introduction of a certification requirement in the redrafted clause 17 would not, of course, bring the position in Scotland into line with the rest of the UK because, in those other jurisdictions, the Supreme Court acts as the final court of general criminal appeal and there is no intention of this happening in Scotland. The Group thought that this was an irrelevant consideration because it merely reflected the traditional historical position.<sup>30</sup>

However, it is not completely irrelevant because it has a bearing upon whether the certification requirement is necessary. Where the Supreme Court acts as the final court of general criminal appeal, a certification requirement might well be considered to be necessary or desirable in order to act as a filter so as to restrict the number of appeals to those which genuinely raise a point of general public importance. But, even in those jurisdictions, no such certificate is required before an appeal on a devolution issue can be made to the Supreme Court in criminal proceedings.<sup>31</sup> This may be taken to imply that Parliament has decided that such issues already raise “a point of law of general public importance” which should be capable of being appealed to the Supreme Court without the need for such a certificate and the same view might equally be said to apply to clause 17.

The McCluskey Group argued that it is not every “incompatibility question” which could be regarded as raising a matter of general public importance<sup>32</sup> and pointed out

<sup>27</sup> McCluskey Group para 43.

<sup>28</sup> s 288ZA(3)(b) and (c) of the 1995 Act, which would be inserted by the redrafted clause 17(8).

<sup>29</sup> McCluskey Group para 41.

<sup>30</sup> McCluskey Group para 37.

<sup>31</sup> Northern Ireland Act 1998 Sch 10 paras 10, 20 and 31; Government of Wales Act 2006 Sch 9 paras 11, 21 and 28.

<sup>32</sup> McCluskey Group para 45.



that certification is still required in criminal proceedings in the rest of the UK when questions of incompatibility are raised under the Human Rights Act 1998.<sup>33</sup>

This is, of course, correct but it does not follow that certification is required to act as a filter to limit the appeals which can be made. Under the existing procedure for devolution issues and the procedure proposed in clause 17, an appeal to the Supreme Court can only be made if leave to appeal has been granted by the High Court or if leave is granted by the Supreme Court. The Supreme Court will only grant such leave if it considers that there is “an arguable point of law of general public importance which ought to be considered by the Supreme Court”.<sup>34</sup> It has rejected more applications for leave than it has granted.<sup>35</sup> It would, therefore, be both unnecessary and inappropriate to give the High Court the power to pre-empt the decision of the Supreme Court on such a matter.

The certification requirement has been criticised in England because it gives the Court of Appeal an absolute discretion to determine what appeals can be made to the Supreme Court or even whether any appeal is allowed at all.<sup>36</sup> This is because the English courts have held that no appeal can be made to the Supreme Court without such a certificate,<sup>37</sup> there is no appeal against a refusal to certify<sup>38</sup> and a refusal is not incompatible with articles 6 or 14 of the ECHR.<sup>39</sup> The Court of Appeal is not even required to give reasons for its decision.<sup>40</sup>

However, the McCluskey Group took the view that this was not an “undue power” to give to the High Court because it would need to justify any decision and develop a consistent jurisprudence as to what was a matter of “general public importance” and this would act as a sufficient constraint.<sup>41</sup> The redrafted clause 17 accordingly provides that the High Court must give reasons for its decision to grant or withhold any certificate but then emphasises that that decision is final.<sup>42</sup> However, if the High Court’s decisions are not subject to any review, this is hardly an effective constraint upon its discretion.

There must be serious concern at the way in which the High Court is likely to exercise such a power. This is particularly so in view of the various ways in which the High Court has attempted to avoid determining a devolution issue and so prevent

33 McCluskey Group para 37.

34 Supreme Court of the United Kingdom, *Practice Directions* para 3.3.3, available at <http://www.supremecourt.gov.uk/procedures/practice-directions.html>.

35 JUSTICE calculated that only 11 such applications had been granted either by the Judicial Committee of the Privy Council or by the Supreme Court since 1999. See JUSTICE, *The Supreme Court Review: Written Response of the Scottish Advisory Group to Justice* (2011) para 17, available at <http://www.scotland.gov.uk/Resource/Doc/254431/0120838.pdf>.

36 C J S Knight, “Second criminal appeals and the requirement of certification” (2011) 127 LQR 188. I am indebted to this article for the information about the position in England.

37 *Gelberg v Miller* [1961] 1 WLR 459.

38 *R v T* [2009] EWCA Crim 1035, [2009] 3 All ER 1002.

39 *R v Dunn* [2010] EWCA Crim 1823.

40 *R v Cooper* (1975) 61 Cr App R 215.

41 McCluskey Group para 45.

42 Section 288ZA(4) of the Criminal Procedure (Scotland) Act 1995, which would be inserted by the redrafted clause 17(8).

the Supreme Court from entertaining an appeal against their determination or even from considering whether leave should be granted.<sup>43</sup> The impression conveyed is that the High Court will do anything which, as the High Court itself put it, “might render competent an appeal to the [Supreme Court]”.<sup>44</sup>

In both *Cadder*<sup>45</sup> and *Fraser*,<sup>46</sup> the High Court refused a devolution minute to be received or to grant leave to appeal on the grounds that it had not determined a devolution issue. Given the reasons why it did so, it is highly likely that, if the certification requirement had been in force at that time, it would have refused to certify for similar reasons: in *Cadder*, the key point was that there had been a previous decision of 7 judges of the High Court which had held that there was no incompatibility and, in *Fraser*, even although the appellant argued that it raised a point of general public importance, the High Court saw no difference between the devolution issue and the appeal on the domestic law which had been refused. In both cases, the Supreme Court unanimously granted leave to appeal and upheld the appeals but, if the certification requirement had been in place, it would have been prevented from doing so.

The McCluskey Group thought that the certification requirement would restore the status of the High Court as the final court of criminal appeal in Scotland. They indicated that it would mean that it would only be in the exceptional case that a certificate would be granted and that “in the normal case” the High Court would be able to decide any incompatibility issues without the risk of having their decision appealed to, and overturned, by the Supreme Court.<sup>47</sup>

The Group took the view that there was no reason to doubt the competence of the High Court to determine those issues but, unfortunately, the evidence indicates that there is. The High Court appears to have had considerable difficulty in appreciating that amendments might require to be made to long established common law rules in criminal proceedings in order to comply with Convention rights. In both *Cadder* and *Fraser*,<sup>48</sup> it failed to give effect to what were clearly established Convention rights under article 6 because it thought that the common law was sufficient to ensure a fair trial. In view of this, there must be serious concern about what would happen if there was no appeal to the Supreme Court even “in the normal case”.

In these circumstances, there must be a considerable risk that, if a certification requirement was imposed, the High Court would exercise its discretion, not only to determine what issues can be appealed but even to prevent any issue at all from being appealed and thereby in effect render inoperative the appellate function of the Supreme Court.

To the extent that it refuses to grant a certificate, there must also be a considerable risk that this would be likely to result in Scottish criminal proceedings being left incompatible with the ECHR, leaving any victim the sole remedy, which is not

43 See e.g. *McDonald v HM Advocate* [2008] UKPC 46, 2010 SC (PC) 1.

44 *McDonald v HM Advocate* [2007] HCJAC 75, 2008 SLT 144.

45 *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13.

46 *Fraser v HM Advocate* [2011] UKSC 24, 2011 SLT 515.

47 McCluskey Group para 46.

48 See nn 45-46 above. See also *HM Advocate v McLean* [2009] HCJAC 97, 2010 SLT 73.

very effective, of going to Strasbourg and waiting over five years for a decision. As JUSTICE argued in a consultation response to the McCluskey Group, this would mean that “the people in Scotland are less likely to have their human rights protected or secured . . . in comparison to the rest of the UK”.<sup>49</sup>

The risk of this happening may be one of the reasons why the McCluskey Report recommended that the current powers of the Lord Advocate and Advocate General to require the High Court to refer devolution issues directly to the Supreme Court should be retained.<sup>50</sup> This is given effect to in the redrafted clause 17 but only where either Law Officer considers that the compatibility issue raises a point of general public importance which ought to be considered by the Supreme Court.<sup>51</sup> However, as the Advocate General tends not to intervene in criminal proceedings except at the Supreme Court level and as there is no provision which gives him a statutory right to be given intimation of any compatibility issue or to become a party to those proceedings, it must be questioned how effective this power to refer is likely to be in practice.

Accordingly, despite the safety net of the power to refer, it is hoped that the certificate requirement will not be welcomed by the UK Government or the Westminster Parliament. The people of Scotland are entitled to look to the UK Government to protect their human rights not only from the devolved Government but also from their own courts.

*Iain Jamieson*

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## A Perfectly Unreasonable Decision: *Jenkins v HM Advocate*

Under section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 a person may appeal against her conviction on the basis that the jury “returned a verdict which no reasonable jury, properly directed, could have returned”.<sup>1</sup> Historically, such appeals have tended to succeed only in unusual cases where the jury’s verdict was patently illogical.<sup>2</sup> Furthermore, in the one clear case where the appeal court simply disagreed

49 JUSTICE, *The Supreme Court Review* (n 35) para 20.

50 McCluskey Group para 47 and para 11 of the executive summary; Scottish Government (n 24) para 9.

51 Section 288ZB(4) and (5) of the Criminal Procedure (Scotland) Act 1995, as would be inserted by the redrafted clause 17(8).

1 For explanation of the legislative development of this ground of appeal, see F Leverick, “The return of the unreasonable jury: *Rooney v HM Advocate*” (2007) 11 EdinLR 426 at 426-427.

2 Consider, for example, a case where A1 is convicted of assisting A2 to commit an offence of which A2 is acquitted. For full references, see R W Renton and H H Brown, *Criminal Procedure According to the Law of Scotland*, 6<sup>th</sup> edn, by G H Gordon with C H W Gane (1996) para 29-20.1.

with the jury's view of the evidence – *E v HM Advocate*<sup>3</sup> – the appellant also managed to argue successfully that his representation at trial had been defective.<sup>4</sup> There was therefore a suspicion that the court only accepted the section 106(3)(b) argument because it was safe to do so, and that E's appeal might have failed had his defence been conducted properly.<sup>5</sup>

In *Jenkins v HM Advocate*<sup>6</sup> the appeal court has finally quashed a conviction *solely* on the basis that the jury's verdict was logically coherent yet unreasonable. The court nevertheless remains of the view that such appeals should only be granted in rare instances, raising afresh questions about the deference shown to the decisions of Scottish juries.

### A. THE FACTS

Jenkins had been involved in a “chaotic”,<sup>7</sup> “fast moving and confused”<sup>8</sup> altercation involving up to twenty persons from different families. He faced three charges: charge one included allegations of rioting and mobbing, property damage and various serious offences against the person; charge two was of the murder of a woman; and charge three concerned the assault with a knife of another woman.

The appeal concentrated on the utterly confused testimony of one witness, named Asken, whose mother's murder was the subject of charge two. At first, he described his mother's attacker to the police in broad terms, but doubted whether he could identify him. He confirmed in a later statement that although he had seen the assailant, he did not know him. Thereafter, Asken was shown a picture of some men from a social networking site and identified the appellant's nephew as his mother's assailant with “100%” certainty. At a subsequent Video Identification Parade Electronic Recording (“VIPER”), Asken again “showed interest” in the image of the appellant's nephew, but identified a police stand-in as either the perpetrator of the murder or a convincing lookalike. At a second VIPER, which included a picture of the appellant, Asken failed to make a positive identification (though he later claimed to have been sleep-deprived and “away with it” at the time). Subsequently, Asken had attended at the local Sheriff Court on an unrelated matter. There, the appellant was called in relation to a separate charge of breach of the peace. Asken recognised Jenkins (again with “100%” certainty) as the man who had stabbed his mother. By this stage, Asken knew that the appellant was in custody for the murder, and also knew his name.

At trial, Asken was the only witness to identify the appellant in relation to the murder, and he was asked by the Crown to perform a dock identification. The trial judge told the jury that they could only convict the appellant of charge two if they believed that the dock identification was credible and reliable. The appellant was

3 2002 JC 215.

4 The test for this sort of appeal is laid out in *Anderson v HM Advocate* 1996 JC 29.

5 See *Leverick* (n 1) at 428-429.

6 [2011] HCJAC 86.

7 Para 4. All references are to the opinion of the court, delivered by Lord Clarke.

8 Para 44.

convicted on all three charges, and appealed. His appeal in relation to charge one was refused and need not be considered here. Of more interest is the challenge to charge two on the basis that the verdict of guilty was one that no reasonable jury, properly directed, could have reached. In turn, this formed the basis for his appeal in relation to charge three, where the Crown case had relied on charge two as offering mutual corroboration of the offender's identity.

## B. DISPOSAL

Given Asken's evident uncertainty over the identity of his mother's attacker, the appeal court had little trouble in upholding Jenkins' appeal against conviction on charges two and three. In its decision the court distinguished between credibility and reliability:<sup>9</sup>

A witness may come across as entirely credible but, on reflection, be held to be unreliable. A person who is credible is one who is believed. A person who is reliable is one upon whom trust and confidence can be placed. Credibility may be judged on the moment, whereas reliability may be only capable of being addressed having regard to the person's "track record", so to speak. In a particular case, the advantage the jury has in seeing and hearing a witness may be reduced, or undermined, in approaching the evidence of the witness in the context of the case as a whole in a judicial manner.

This suggests that appeals under section 106(3)(b) of the 1995 Act will be more easily achieved where it is the *reliability* of a witness's testimony that is under consideration. It also coheres with the appeal court's previous reluctance to interfere with the jury's appraisal of a witness's *credibility*, normally justified on the basis that only the jury will see the witness give evidence.<sup>10</sup> Nevertheless, this rationalisation previously tended to concentrate on both the *credibility and reliability* of the witness. The distinction between the two in *Jenkins* may, therefore, indicate a relaxation in approach.

The court nevertheless cautioned that cases where the jury's appraisal of reliability will be so unreasonable as to secure an appeal will be "few and far between".<sup>11</sup> In *Jenkins*, the witness's identification of no fewer than three different people as his mother's attacker, combined with the Crown's heavy reliance on the final dock identification,<sup>12</sup> made this one of those "rare"<sup>13</sup> cases where the appeal had to succeed. The jury's dependence upon an unreliable piece of evidence had led them to an unreasonable verdict in relation to charge two (and consequently, as it founded upon charge two for mutual corroboration, charge three).

9 Para 42.

10 See, for instance, *Rubin v HM Advocate* 1984 SLT 369 at 371 per Lord Justice-General Emslie; *King v HM Advocate* 1999 JC 226 at 236-237 per Lord Justice-General Rodger; cf *E v HM Advocate* 2002 JC 215 at para 34 per Lord Justice-Clerk Gill.

11 Para 42.

12 Para 43.

13 Para 50.

### C. THE “TEST” FOR SECTION 106(3)(B) APPEALS

The court in *Jenkins* reaffirmed that for a jury verdict to be overturned on the basis that it was unreasonable the appellant must “meet a very high test”,<sup>14</sup> but what this standard is remains somewhat unclear. The obvious difficulty with the text of section 106(3)(b) is that it relies on the “open-textured” language of unreasonableness.<sup>15</sup> The appeal court has further complicated matters by concentrating, in the past, on the *reasonableness* of the jury in relation to the issue of *reasonable* doubt.<sup>16</sup> Reasonableness is not a terribly useful term unless content is given to it, and unless the factors employed in deciding whether something is reasonable (which will vary with context)<sup>17</sup> are elucidated.<sup>18</sup>

In fairness to the court in *Jenkins*, an attempt was made to give more substance to the notion of unreasonableness in section 106(3)(b). Reference was made to the interpretation of a provision in the Canadian Criminal Code which provides that a conviction may be quashed on the basis that the trial judge’s or jury’s verdict is “unreasonable or cannot be supported by the evidence”.<sup>19</sup> The Canadian courts have supported an interpretation of this section that relies on whether the jury performed its duties *judicially*,<sup>20</sup> and again the test of showing that the jury was unreasonable is viewed as “a difficult one to meet”.<sup>21</sup> The court in *Jenkins* echoes these sensibilities.<sup>22</sup>

A reasonable jury verdict is thus one that is reached judicially. However, what it means to act judicially is also rather opaque<sup>23</sup> and perhaps just as unhelpful as the notion of reasonableness. Again, the court in *Jenkins* refers to Canadian authority to explain the Scots position. In *R v Biniaris*, Arbour J suggested that:<sup>24</sup>

... acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction.

14 Para 42.

15 On “open-textured” language and its implications for the law, see H L A Hart, *The Concept of Law*, 2<sup>nd</sup> edn (1994) 124-136.

16 *King v HM Advocate* 1999 JC 226 at 229 per Lord Justice-General Rodger.

17 D N MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (2005) 164-165, 173.

18 Reasonableness is thus like fairness – see F Stark, “Moral legitimacy and disclosure appeals” (2010) 14 *EdinLR* 204 at 208.

19 Criminal Code of Canada s 686(1)(a)(i). This section applies both to verdicts of judges sitting alone and juries, but the approach taken in relation to the former is different, see *R v Beaudry* [2007] 1 SCR 192; *R v Sinclair* [2011] SCC 40.

20 This test comes originally from *Corbett v R* [1975] 2 SCR 275, and was clarified in *R v Yeves* [1987] 2 SCR 168 and *R v Biniaris* [2000] 1 SCR 381.

21 *R v Pittman* [2006] 1 SCR 381 at para 7 per Charron J.

22 Para 42.

23 M C Plaxton, “Thinking about appeals, authority and judicial power after *R v Sheppard*” (2002) 47 *Crim LQ* 59 at 61.

24 [2000] 1 SCR 381 at para 40.

This is still not a complete articulation of judicial decision-making because, as Arbour J continued (in a paragraph not quoted in *Jenkins*):<sup>25</sup>

... it is imperative that the reviewing court articulate as precisely as possible what features of the case suggest that the verdict reached by the jury was unreasonable... In some cases, the articulation of the grounds upon which an appellate court concludes that a conviction was unreasonable may elucidate previously unidentified dangers in evidence and give rise to additional warnings to the jury in subsequent cases.

The importance of such articulation should also be emphasised in the Scottish context, otherwise any argument based on section 106(3)(b) will remain difficult for future appellants and appeal courts to appraise other than in exceptional cases such as *E* and *Jenkins*. Furthermore, absent such guidance trial judges will be unable to predict with any accuracy which “additional warnings” will be appropriate in future cases. This is problematic because there is a significant distance between a decision that the court merely disagrees with<sup>26</sup> and a *Jenkins*-type situation. It would be useful for future trial judges and appellants to know which approach might be taken by the appeal court.

A further difficulty for trial judges is posed by the recent addition of section 97D of the 1995 Act.<sup>27</sup> This provides simply that “[a] judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.” So, although previously it might have been thought that trial judges could direct the jury to acquit in a case like *Jenkins*,<sup>28</sup> this is no longer possible. It is not clear what a trial judge should do if faced with such a situation, admittedly a problem if Arbour J’s logic is adopted in the Scottish context.<sup>29</sup> However, if the appeal court gave more indication of what might constitute unreasonableness for the purposes of section 106(3)(d), appellants would still be in a better position to assess their chances of successfully challenging the jury’s verdict.<sup>30</sup>

#### D. THE HUMAN RIGHTS DIMENSION

Although *Jenkins* does clarify some points, it remains the case that it is virtually impossible to overturn a jury’s verdict in Scotland. There might be good reasons for making this difficult,<sup>31</sup> but pursuing the present course does raise human rights

25 Para 41. This point is reinforced in para 42.

26 Where the appeal court should not interfere, see *E* at para 29 per Lord Justice-Clerk Gill. This seems appropriate: “unreasonableness” is not simply about differing opinions, as there might be more than one reasonable answer to a question (MacCormick (n 17) 169).

27 Inserted by the Criminal Justice and Licensing (Scotland) Act 2010. For analysis, see N W Orr, “No reasonable jury” 2011 SLT (News) 9.

28 See Sir Gerald Gordon’s commentary to *HM Advocate v G* 2010 SCCR 146 at 153.

29 The appeal court in *Jenkins* suggested that the jury should, with the benefit of hindsight, have had the concepts of reliability and credibility explained to them in more depth (para 49).

30 Or, alternatively, of attacking the trial judge’s directions to the jury on the basis that they underplayed an important aspect of the case, thus removing the need to attack the verdict itself.

31 See A Ashworth and M Redmayne, *The Criminal Process*, 4<sup>th</sup> edn (2010) 377-378.

concerns. The European Court of Human Rights has recently considered the Scottish jury system. In *Judge v United Kingdom*<sup>32</sup> the claimant—who had been convicted of serious sexual offences in the High Court of Justiciary—argued that his right to a fair trial had been breached because *inter alia* the jury that convicted him was not required to give reasons for its decision. In dealing with Judge’s case, the court seemed impressed with section 106(3)(b), noting that:<sup>33</sup>

... the appeal rights available under Scots law would have been sufficient to remedy any improper verdict by the jury. Under s 106(3)(b) ... the appeal court enjoys wide powers of review and can quash any conviction which amounts to a miscarriage of justice; in particular, *Ainsworth* and *Rooney*, make clear that the appeal court may quash or vary any jury verdict which is logically inconsistent or lacking in rationality.

It is not clear whether the court appreciated how rarely even logically incoherent convictions are overturned.<sup>34</sup> Given the language of “improper” verdicts and “logical inconsistency”, it is assumed that it did not. It appears that the jury’s decision must be *patently* unreasonable or illogical for the appeal court to interfere.

If the appeal court continues to allow section 106(3)(b) appeals only where the jury’s verdict is *patently* illogical or perverse, it is not unimaginable that a further Convention challenge about the role of juries in Scotland could be raised on the basis that the safeguard identified in *Judge* is too difficult to employ.<sup>35</sup> To quote from a Canadian judgment not cited in *Jenkins*,<sup>36</sup> “deference owed to a trial court’s findings of fact must not become a pretext for an appellate court to evade its responsibility to set aside an unreasonable verdict.” The Scottish appeal court should pay close attention to these words, or risk paying the price for its restrictive approach to section 106(3)(b) appeals in the Supreme Court or the European Court of Human Rights.

## E. CONCLUSION

After *E*, there was hope that the appeal court would more readily allow appeals based on section 106(3)(b).<sup>37</sup> This did not materialise and it may, therefore, be naive to see *Jenkins* as heralding a more liberal approach. The positive aspect of the decision is its consideration of Canadian jurisprudence and its attempt to elucidate the “judicial” test to be applied when considering factual determinations by the jury.<sup>38</sup> Even though the court felt it could have reached its conclusion on the basis of Scots

32 (2011) 52 EHRR SE17.

33 Para 38. The court is referring to *Ainsworth v HM Advocate* 1997 SLT 56 and *Rooney v HM Advocate* 2007 SCCR 49. Both involved juries reaching decisions on certain charges which were logically irreconcilable with their verdict in relation to other charges.

34 See P Duff, “The compatibility of jury verdicts with Article 6: *Taxquet v Belgium*” (2011) 15 EdinLR 246 at 250. For references, see Leverick (n 1).

35 Cf Duff (n 34) at 250.

36 *Beaudry* (n 19) at para 62 per Charron J.

37 Renton & Brown (n 2) para 29-20.1.

38 This is not the first time that Commonwealth experience in this area has been referred to, see *King* (n 10) at 230 per Lord Justice-General Rodger.



authority alone,<sup>39</sup> Canadian decisions – particularly those of the Supreme Court – are typically thorough in their analysis of both doctrinal and theoretical arguments, taking into consideration academic and empirical research, as well as previous case law. Furthermore, as noted above, the judgment in *Biniaris* is resolute in its belief that appellate courts should clearly set out their reasons for interfering in jury decisions for the benefit of future courts and appellants. The appeal court should aspire to this level of jurisprudential maturity.<sup>40</sup>

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(The author is grateful to Dr Fiona Leverick for comments on an earlier draft.)

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## At the Interface of Public and Private: *Docherty v Scottish Ministers*

There is no surer guarantee of frustration or even despair for the legal analyst than the invitation to swim out into the choppy waters at the confluence of public and private law. Of all the contents of our conceptual tool-kit, the supposed distinction between the two for analytical purposes is one of the most troublesome. It is a distinction which carries undertones of profound differences between state and non-state – although the systems of law in the United Kingdom (Scotland and England are not noticeably different in this respect), in institutional terms, tend to deny such a distinction. We have no explicit division between public law courts and private law courts. The “ordinary” courts have traditionally made little of the distinction in the organisation of their business. For some purposes, a public-private distinction has been expressly denied – most iconically in Scotland, in relation to the availability of judicial review, in *West v Secretary of State for Scotland*,<sup>1</sup> but the analytical basis of that denial has itself been challenged.<sup>2</sup> And distinctions with a public-private resonance have cropped up in areas such as the liability of the Crown to interdicts in circumstances where “public law proceedings” are involved.<sup>3</sup> In turn, that has reflected wider concerns about the

<sup>39</sup> Para 42.

<sup>40</sup> One recent source of hope is the excellent consideration of entrapment in *Jones and Doyle v HM Advocate* 2010 JC 255. See F Leverick and F Stark, “How do you solve a problem like entrapment? *Jones and Doyle v HM Advocate*” (2010) 14 EdinLR 467.

<sup>1</sup> 1992 SC 385.

<sup>2</sup> See e.g. Aileen McHarg, “Border disputes: the scope and purposes of judicial review”, in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006) 219.

<sup>3</sup> *Davidson v Scottish Ministers (No 1)* [2005] UKHL 74, 2006 SC (HL) 41 at para 53 per Lord Hope of Craighead.

basis for the delictual liability of public authorities in general.<sup>4</sup> In some circumstances, there is a substantive content to the public-private distinction. At other points, it is given a *merely* procedural status – raising questions about the choice of court and form of procedure to be adopted – which, despite their apparently ancillary character, may have sharp consequences for particular litigants. Overarching the whole area is a sense that it is one which has lacked comprehensive and systematic attention. Instead, we have seen sporadic legislative intervention followed by the inevitable ad hocery of judicial reaction as litigants opportunistically probe new remedial options.

### A. DOCHERTY V SCOTTISH MINISTERS

A recent arrival in this area has been *Docherty v Scottish Ministers*.<sup>5</sup> Although procedurally complex, the case – an appeal to the First Division from Glasgow Sheriff Court – involved an apparently straightforward claim for damages for breach of their Convention rights by some former prisoners. In this respect, it was a continuation of the “slopping out” saga.<sup>6</sup> The appellants were seeking a reversal of the sheriff’s decision that their claims were prescribed under the Prescription and Limitation (Scotland) Act 1973. In their cross appeal, however, the Scottish Ministers argued that the action was, in any event, incompetent. Relying on dicta of Lord Clarke in an Extra Division in *Ruddy v Chief Constable of Strathclyde*,<sup>7</sup> they claimed that, since the appellants’ case derived from an alleged breach of a Convention right, this was a question which had necessarily to be resolved by an application for judicial review rather than by ordinary action. They also argued that since, by a general concession made as early as September 2006 and repeated to the appellants in this case after the sheriff court judgment, they had acknowledged the breach of the appellants’ Convention rights, a declarator to that effect would, in any event, be unnecessary and inappropriate.

### B. THE OUTCOME

Both of these principal issues were resolved in the appellants’ favour. On the competency issue, the First Division overrode the argument that, in any case involving the testing of the limits of the powers of a public authority, it was essential to proceed by judicial review.<sup>8</sup> Such questions could quite competently be decided within the compass of an ordinary action and, relying on a formula developed by Lord

4 See e.g. the recent case of *Thomson v Scottish Ministers* [2011] CSOH 90, 2011 SLT 683.

5 [2011] CSIH 58.

6 The starting point had been the pursuer’s success in *Napier v Scottish Ministers* 2005 SC 307.

7 2011 SC 527.

8 The argument that an issue susceptible to judicial review must necessarily be tested in proceedings for judicial review rather than in an ordinary action has been quite widely invoked, but with differing effect. For general discussion, see e.g. C Himsforth in M Supperstone, J Goudie and P Walker (eds), *Judicial Review*, 4<sup>th</sup> edn (2010) at para 22.4.1. There have been recent manifestations of the difficulties caused in relation to the challenge of procurement procedures (see *Sidey Ltd v Clackmannanshire Council* [2010] CSIH 37, 2010 SLT 607) and of construction adjudication. In relation to the latter example, in particular, it has become quite acceptable for ordinary proceedings in the Court of Session to be launched in parallel

Clyde,<sup>9</sup> they held that the question of competency fell to be answered “essentially by identifying the issue which is raised in the case” and that it depended on a “proper understanding of what the action is truly about”.<sup>10</sup> Here the proceedings were “truly about” whether the appellants’ Convention rights had been infringed and whether, therefore, they should be awarded damages by way of just satisfaction. Such proceedings could be initiated by ordinary action.

There will be a regret in some quarters that the route to this result involved a deft distinguishing of *Ruddy*, rather than a challenge to the Extra Division’s decision and a confrontation with the argument, presented by the respondents in *Docherty*, that the First Division might itself be bound by the earlier decision of that other Division. Surely an implausible proposition and one whose status might usefully have been resolved by the court?

The question of whether the appellants’ case fell to be prescribed under the 1973 Act turned, for the court, on a quite straightforward interpretation of that Act’s own terms. The five-year prescription period under the Act applied to “any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation”<sup>11</sup> but, adopting the analysis of Lord Hope of Craighead and Lord Rodger of Earlsferry in *R v HM Advocate*,<sup>12</sup> not to actions to vindicate a Convention right which were instead actions to obtain a “public law remedy”.<sup>13</sup> Such actions were not, in the colourful language of Lord Bingham of Cornhill as he explained the principles of statutory interpretation in *R (Quintaville) v Health Secretary*,<sup>14</sup> another species of “dog” identified by the 1973 Act but were “cats” and not, therefore, regulated by it.<sup>15</sup> Even though the appellants’ case relied on events of many years earlier, the right to raise their action had not prescribed. The “public law” character of such human rights proceedings made them a class apart.

There is an intuitively compelling logic to the First Division’s decisions in *Docherty* on both the competency, in these circumstances, of an ordinary action and, once the notion of a “public law remedy” is accommodated and applied, the absence of prescription under the 1973 Act – even if, on the other hand, there has always been something rather unsophisticated and essentialist about Lord Clyde’s notion of a case being “truly about” one thing rather than another, and the consequences of the court’s interpretation of the Prescription Act is, in ways the court itself acknowledges, one which might have surprised the Act’s framers.

Nevertheless, the case makes an important contribution, within the constraints that the process of litigation imposes, to the rich mix of authority at the interface of

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with a petition for judicial review. See *Curot Contracts Ltd v Castle Inns (Stirling) Ltd* [2008] CSOH 179, 2009 SLT 62; *Barr Ltd v Klin Investment UK Ltd* [2009] CSOH 104 (and [2009] CSOH 103).

9 *McDonald v Secretary of State for Scotland (No 2)* 1996 SC 113 at 116-117.

10 Para 22.

11 Sch 1 para 1(d).

12 2003 SC (PC) 21 at paras 60 and 123.

13 [2011] CSIH 58 at paras 42-45.

14 [2003] 2 AC 687.

15 Para 8.

public and private.<sup>16</sup> In doing so, however, it exposes some of the uncertainties which continue to face litigants and which, in the interests of greater conceptual clarity and the avoidance of expense, cry out for systematic regulation.

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## Religion and Same-Sex Unions: The Scottish Government's Consultation on Registration of Civil Partnerships and Same-Sex Marriage

When the angels visited Sodom, looking for a man worthy of being saved from God's wrathful vengeance against the Cities of the Plain, they were taken in and offered food and shelter by Lot, a nephew of Abraham. And when the men of Sodom demanded of Lot that he give up the angels, "so that we can have sex with them",<sup>1</sup> Lot pleased the angels and God, and saved himself, by offering the mob his virgin daughters instead.<sup>2</sup> Perhaps it is not surprising, in light of this scriptural authority that it is better to yield up one's daughters than to endorse homosexual conduct, that some Christian bodies even today refuse to accept the moral equivalence of same-sex and opposite-sex relationships and are therefore strongly opposed to the legal recognition of same-sex unions.

Being entirely conscious of this opposition, the Scottish Government in its recent Consultation Paper,<sup>3</sup> which suggests allowing religious registration of civil partnership and opening marriage to same-sex couples, takes very great care to emphasise that no religious body will be required to be involved in the creation of relationships to which they have doctrinal objections. Unsurprisingly, this has not avoided strenuous opposition, particularly from the Roman Catholic Church in Scotland, which predicts apocalyptic consequences were the Scottish Government to go ahead with these proposals.<sup>4</sup>

<sup>16</sup> Since *Docherty* was decided, there has followed the huge contribution of the UK Supreme Court's decision in *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, especially as to the law of standing in "public law" cases of judicial review.

<sup>1</sup> In the unpoetic translation offered by the New International Bible.

<sup>2</sup> Genesis 19:5-8.

<sup>3</sup> Scottish Government, *The Registration of Civil Partnerships Same Sex Marriage, A Consultation* (2011), available at <http://www.scotland.gov.uk/Resource/Doc/357255/0120684.pdf>.

<sup>4</sup> "Bishop steps up attack on gay marriage", *The Herald* 8 Oct 2011; "Catholic Church Bishop calls gay marriage cultural vandalism", *Metro* 12 Sep 2011, in which the Bishop of Paisley is quoted as saying that

### A. CIVIL PARTNERSHIP

Civil partnership is an entirely secular institution, and there are presently rules not only against the involvement of religious officials in its creation but also against the use of religious premises.<sup>5</sup> This complete secularity was designed to emphasise civil partnership's separation from marriage, in the hope of neutralising the claim that the introduction of civil partnership constituted a governmental attack on marriage, often claimed to be the foundation of society. Fundamentalist Christians did not accept that this met their objections. The district registrar Lilian Ladele's refusal to register civil partnerships,<sup>6</sup> and Mr and Mrs Bull's refusal to allow civil partners a double bed in their hotel,<sup>7</sup> were both based on these individuals' belief in the sanctity of marriage and their understanding that civil partnership breached that sanctity. Legally, they were wrong and all three were found to be seeking to discriminate unlawfully.

Though the legal consequences of civil partnership are virtually the same as the consequences of marriage,<sup>8</sup> the means by which the two institutions are created are very different. In addition, since each institution is exclusively limited to particular gender-mixes, the choices available to same-sex couples are different from, and lesser than, the choices available to opposite-sex couples. Opposite-sex couples may choose religious ceremony or civil solemnisation; same-sex couples are limited to civil registration.<sup>9</sup> That difference in itself justifies a change in the law to accommodate those same-sex couples of faith who wish to have the same opportunity as their opposite-sex counterparts to have their religious community involved in the creation of their legal relationship. Some religious bodies (including Unitarians, Quakers, the Metropolitan Community Church and the Liberal Jewish Community)<sup>10</sup> have already indicated their desire to conduct civil partnership registrations.

The Consultation Paper therefore suggests that religious groups that are willing to become involved in the creation of civil partnerships be allowed to do so. However, in an attempt to minimise opposition, it emphasises that no religious body will be required, against its own wishes, to be so involved. Providing equality of choice is easy, even in the face of religious objection, for religious tolerance demands that the rejection by Religion A of civil partnership must not be allowed to prevent Religion B from choosing to be involved in the creation of civil partnership. It is rather less clear how to ensure that conservative religious organisations are shielded from existing equality legislation which, many fear, would force them against their will to offer services to same-sex couples contrary to their doctrinal beliefs. It will be recalled that the Roman Catholic Church sought, but were denied, an exemption from the requirements in the Adoption and Children (Scotland) Act 2007 for adoption

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opening marriage to same-sex couples would "shame Scotland in the eyes of the world". Countries as disparate as Canada, Spain, Iceland and Argentina seem to be living with such shame with phlegm.

5 Civil Partnership Act 2004 s 93(3).

6 *Ladele v Islington Borough Council* [2009] EWCA Civ 1357, [2010] 1 WLR 955.

7 *Hall and Preddy v Bull* [2011] EW Misc 2 (CC).

8 The very minor differences are listed in the Consultation Paper (n 3) Annex B.

9 Civil marriage is "solemnised", civil partnership is "registered".

10 See "Faith groups unite to back gay weddings", *The Herald* 29 Sep 2011.

agencies to provide their services in a non-discriminatory manner, including to same-sex couples. The fear is that, by analogy with adoption, it will be considered unlawful under the Equality Act 2010 to refuse to offer civil partnership celebrations to same-sex couples. The adoption analogy, however, is misunderstood: religious adoption societies were *already* offering services otherwise provided by the state and the non-discrimination rules meant that if they wished to continue to do so they would have to do so without excluding same-sex couples. No religious body is *required* to offer adoption services in place of the state, though if it chooses to do so it must comply with the general law, including of course the Equality Act 2010. Similarly with civil partnership, no religious body is or can be *required* to offer to perform the state function of civil partnership registration and so their refusal to do so will not conflict with the non-discrimination rules to which they are bound. However, if a religious body did decide to offer civil partnership services, it could do so only in a non-discriminatory fashion. In other words, the fear of religious conservatives that the general prohibition on discrimination will require all religious bodies to engage with civil partnership is entirely unfounded. A change in the law that permitted religious groups to choose to conduct civil partnership registrations will not require all religious groups to do so, just as allowing an adoption society associated with a church to perform state functions in relation to adoption of children does not require all other churches to take on the provision of these functions.

The Government's proposals to allow religious bodies to be involved in the creation of civil partnership and the application of equality norms pose no threat, therefore, to religious bodies who continue to deny the validity of same-sex relationships.

## B. MARRIAGE

The same line of reasoning does not work in relation to marriage, however, because many religious bodies have already put themselves forward (in the case of the state church automatically so) to solemnise marriages, and presumably these bodies intend to continue to do so. It follows that if marriage is opened to same-sex couples any religious body that offers marriage services (as most of those who reject same-sex relationships do) might fear a discrimination claim under the Equality Act 2010 if it continues to offer these services to opposite-sex couples but refuses to offer them to same-sex couples. In fact, however, it has long been the case in Scotland that no religious celebrant may be required to solemnise a marriage contrary to his or her conscience. A minister or priest may refuse, for example, to marry a couple who are of different religions to each other. The Church of Scotland is not unlawfully discriminating on the basis of religion by offering marriage services only to (those who claim to be) Christians; so too, a minister or priest will be able to refuse to marry a couple on the ground of their sexual orientation.<sup>11</sup>

The real question is whether, in order to neutralise opposition (rather than actually to achieve any change in the law), a specific exemption from the Equality Act 2010 should be written into the legislation that opens marriage to same-sex couples. There

<sup>11</sup> Both situations are explicitly covered by the general exceptions to the equality rules, found in Sch 23 para 2 to the Equality Act 2010.

are grave dangers in doing so, because a provision exempting an individual or body from the rules against discrimination on the basis of sexual orientation gives out a clear and shameful message that the demands of dignity and equality are less strong if based on sexual orientation than if based on race, religion or gender. If the political decision is nevertheless made that an exempting provision should be included in the legislation in order to assuage the fears of religious bodies and individuals, the Scottish Government might care to ask these bodies whether they also want a statutory provision explicitly confirming their power to refuse to solemnise mixed-race or mixed-faith marriages.

### C. HIERARCHY AND INDIVIDUALS

Another question that is troubling the Scottish Government in its Consultation Paper is whether individual religious celebrants should be allowed to register civil partnerships or solemnise marriages between same-sex couples if they belong to an organisation opposed to same-sex unions. This is not a matter that the law need get involved in at all. If a religious celebrant breaks the rules of the religious organisation to which he or she belongs, then the disciplinary consequences of that breach are for the organisation to determine and not for the law to be concerned about (except insofar as internal disciplinary proceedings require to comply with the general law of the land, as the House of Lords affirmed in *Percy v Church of Scotland*).<sup>12</sup> There can, however, be no justification for a *legal* prohibition on individuals performing *legal* acts just because they belong to a body that rejects the validity of such acts. Were the Church of Scotland (say) to ban its ministers from entering into civil partnership, the law could not and should not take it upon itself to enforce that rule, by creating an incapacity (additional to age, forbidden degrees etc) based on the fact that one of the parties is a Church of Scotland minister. Similarly with acting as a celebrant: if a minister or priest belonging to an opposing church acts against the rules of the church he or she must expect internal disciplinary consequences, but it would be entirely wrong for the law to disentitle individuals from being authorised by the Registrar General<sup>13</sup> to celebrate particular marriages. And of course the marriage or civil partnership itself would remain in existence even if the celebrant's authorisation were questionable.<sup>14</sup>

### D. THE SOLUTION

Attempts to reassure conservative religious bodies that their religious freedoms will not be affected by the opening of marriage, or the religification of civil partnership, are probably futile. For it is not the structures of the law that, say, the Roman Catholic Church is objecting to, though these do provide a focus for their objections. The true objection is a more fundamental one: it is to the moral equivalence of same-sex and opposite-sex couples, an equivalence many churches vehemently deny. The law

<sup>12</sup> [2005] UKHL 73, 2006 SC (HL) 1.

<sup>13</sup> Under s 12 of the Marriage (Scotland) Act 1977.

<sup>14</sup> Marriage (Scotland) Act 1977 s 23A; Civil Partnership Act 2004 s 95A.

cannot, and probably should not attempt to, change the doctrinal understandings of such religious bodies – but nor may it reflect such understandings in its own rules.

In fact, the legal solution is easy. The problem lies in the use of the same word, marriage, to describe two entirely different things: on the one hand marriage as a relationship is a state institution that acts as the legal identifier for various legal rights and obligations; on the other hand marriage as an event is (sometimes) a sacrament, or a contract with God, a religious blessing of a life to be led together. It is the failure to differentiate between the two, exacerbated by the law permitting religious officials to perform the state function of bringing marriage (and, soon, civil partnership) into existence, that is the root of the difficulties. The solution lies in the complete secularisation of all legal relationships: instead of achieving equality by making civil partnership more like marriage, equality should be achieved by making marriage more like civil partnership. Virtually all of the problems discussed in the Consultation Paper would simply evaporate by requiring that the state function of bringing legal relationships into existence is carried out only by state officials (that is to say, in Scotland, District Registrars) applying universally applicable laws. This would leave religious bodies free to perform their sacraments according to whatever principles they wish (and to call them whatever they like).

In other words, I suggest that religious marriage be abolished, and religious civil partnership not be introduced. Religious freedom would be maintained by allowing any religious body to offer – or to withhold – a blessing to the relationship created by the state. I accept that there is little likelihood of the Scottish Government adopting this as a policy, or of conservative religious bodies supporting a reduction in their legal powers. Yet the problem arises only because religious bodies jealously guard their power to exercise state functions, while at the same time being unwilling to give effect to changes in state law. Secularisation would free religious bodies to develop their own practices according to their own doctrinal imperatives; and the law would be free – as it must be – to develop its structures and principles in a way that serves all its citizens, irrespective of their religious beliefs, or their sexual orientation.

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## Scottish Share Pledges in the Supreme Court

For the Scottish reader, the interesting aspect of *Farstad Supply A/S v Enviroco Ltd*,<sup>1</sup> is the applicable law. Like that well-known case on mutuality in contract law, *Bank*

<sup>1</sup> [2009] BCC 648 rev [2009] EWCA Civ 1399 affd [2011] UKSC 16, [2011] 1 WLR 921. For the High Court and Court of Appeal proceedings, see R G Anderson, “Subsidiaries and share pledges” 2010 SLT (News) 205.



of *East Asia v Scottish Enterprise*,<sup>2</sup> the proceedings were conducted through the English courts on the basis of Scots law. As foreign law, Scots law was a question of fact before the High Court and the Court of Appeal. The Supreme Court, by contrast, having judicial knowledge of all the laws of the United Kingdom, was able to consider Scots law as a matter of law rather than fact. An insight into the minds of the English judges is provided by the opening line of the leading opinion in the Supreme Court: “It is not often,” writes Lord Collins, “... that the question of the construction of a charterparty arises in the Chancery Division”.<sup>3</sup> The Guildhall, like the Strand, is indeed a different world.

### A. THE FACTS

In *Farstad* the Supreme Court was faced, for the second time, with the consequences of an explosion aboard a ship berthed in Peterhead harbour which left one man dead. The initial proceedings concerned issues of contribution, and were litigated to the Supreme Court via the Court of Session.<sup>4</sup> The proceedings with which this note is concerned arose in respect of a contractual provision – an indemnity – which was governed by English law and litigated through the English courts. Under the indemnity, the owners of the vessel agreed to indemnify the charterers and any “affiliates” of the charterers. The indemnity provision further defined “affiliate” by incorporating by reference the definition of “subsidiary” in the Companies Acts.<sup>5</sup> Enviroco, having incurred liabilities as a result of the explosion, sought indemnity: it was a subsidiary of the charterers and thus, it argued, an “affiliate” in terms of the indemnity provision.

Difficulty arose because Enviroco’s parent company, as part of its banking arrangements, had executed a package of security documents under Scots law. One of those documents was a share pledge, in terms of which the parent company had pledged its shares in Enviroco to a bank. In order to complete the pledge, the bank was entered in Enviroco’s register of members as holder of the shares.

### B. THE SUPREME COURT DECISION

In English law, as was pointed out at various stages in the litigation, it would be “highly unusual” to take security over shares by way of a legal mortgage, namely transfer of title to the shares to the security taker. In the ordinary course of things, security would be constituted by a fixed charge. To their credit, their Lordships made no attempt

<sup>2</sup> 1997 SLT 1213. In *Bank of East Asia*, the House of Lords had the assistance of Scottish counsel; the Supreme Court in *Farstad* did not.

<sup>3</sup> Para 1.

<sup>4</sup> [2009] CSIH 35, 2009 SC 489 rev [2010] UKSC 18, 2010 SC (UKSC) 87. See generally E J Russell, “Contribution causes confusion” 2010 SLT (News) 169 and G W Gordon, “Contribution and indemnification: *Farstad Supply AS v Enviroco Ltd*” (2010) 14 EdinLR 102.

<sup>5</sup> Companies Act 1985 s 736. The equivalent provision under the Companies Act 2006 is s 1159(1).

to impose the English law of equitable charges on Scots law. Indeed, Lord Collins recognises that:<sup>6</sup>

... under Scots law the only way in which a fixed security over shares can be taken is by fiduciary transfer of the shares to the creditor (*fiducia cum creditore*). The security is known as a share pledge, under which registration of the creditor as holder of the shares constitutes the security.

Not only was there no attempt to impose English law, Lord Collins' statement represents, in one respect, a reception of Civil Law principles, for the passage quoted contains the first reference in any modern Scottish case to the overarching Civilian principle of fiduciary transfer of title to the creditor (*fiducia cum creditore*).<sup>7</sup> Lord Rodger, by contrast, observed that<sup>8</sup> "[t]he security was to be created by transferring title in the shares to the Bank's nominees." Apparently oblivious to the subtleties of the *rechtswissenschaftliche Gretton-Theorie* (that only physical things, not rights, may be the objects of ownership),<sup>9</sup> he noted that the effect of this transfer of title "would give the Bank's nominees a real right in the shares in the event of [the security giver's] insolvency."<sup>10</sup>

The differing analyses of Lord Collins and Lord Rodger provide a curious and rare example of an English judge providing the better Civilian analysis: the effect of a pledge in Scots law is, as Lord Collins holds, a fiduciary transfer of the shares and not, as Lord Rodger appears to have it, a transfer of real rights in the shares. But it might also be fair to remark that it is unlikely that either judge was even aware of the controversy.

After some concerted reflection on the legislative history of the relevant provisions,<sup>11</sup> their Lordships in the Supreme Court came to the conclusion that, as a result of the share pledge, the company in which the shares were held could no longer be described as a "subsidiary" of the security giver.

### C. FARSTAD IN CONTEXT

*Farstad* was a "hard" case. Arguments could be made, with force, either way. What is of interest is the Supreme Court's preference for form over substance: for a legalistic

6 Para 6.

7 For *fiducia cum creditore* as a security device, see G L Gretton, "Financial collateral and the fundamentals of secured transactions" (2006) 10 EdinLR 209. For a South African perspective on the use of *fiducia cum creditore* for corporeal moveables (a structure difficult, but not impossible, in Scotland as a result of Sale of Goods Act 1979 s 62(4)), see C G van der Merwe and L Smith, "Financing the purchase of stock by the transfer of ownership as security: a simulated transaction?" (1999) 10 Stellenbosch LR 303; also C G van der Merwe, "Modern Application of the Roman Institution of *Fiducia Cum Creditore Contracta*", in L Vacca (ed) *La Garanzia nella prospettiva storico-comparatista* (2003) 327.

8 Para 62.

9 G L Gretton, "Ownership and its objects" (2007) 71 *Rabels Zeitschrift* 802. Subordinate real rights have two objects: they are held *over* the owner's right and *in* the physical thing. Personal rights, like real rights, are *held* rather than owned.

10 Para 62 (emphasis added).

11 The complex provisions cannot be set out here, but they are analysed in Anderson (n 1).

interpretation of the relevant provisions which was divined only after considerable research into the legislative history. Little heed was taken of the practical implications of the decision. Nor is *Farstad* an isolated case. Another recent example is *Royal Bank of Scotland v Wilson*,<sup>12</sup> where a practice that had been pursued for almost forty years by a considerable body of Scottish solicitors exercising ordinary care and skill<sup>13</sup> was dispatched as incompetent.

This is not to say that we should criticise their Lordships for daring to doubt legal practice. As it happens, I think the decision in *Wilson* was correct. Their Lordships are primarily concerned with the law, not the view of the law as practitioners might wish it to be. But in cases of statutory interpretation, where a responsible body of opinion has developed about the interpretation of the provisions, I would merely observe that the Supreme Court, geographically divorced from Scotland as it is, may need to give counsel a better opportunity to address them on the implications of overturning an accepted view. I cannot improve on the observations of George Gretton and Kenneth Reid:<sup>14</sup>

... *error communis facit jus*, that is to say, an interpretation of the law that is universally shared is itself law even if it ought not to have been adopted in the first place. Like most such tags, it is less a rule than a thought for the day, but like other thoughts for the day it has some force... Might there not be a case for saying that the entrenched view, even if originally wrong, must now be considered right? An argument of that kind succeeded in, for example, *Rhone v Stephens*,<sup>15</sup> an English conveyancing case where the House of Lords decided not to overturn a long-established view of the law.

Moving forward, however, the signals from the Supreme Court are clear: practice cannot make or change law, nor can it even inform the interpretation of statutory provisions. On one view, therefore, lawyers must think for themselves and consider whether, in their own view, the responsible body of opinion is correct. On another view, however, and one which is more likely to prevail, the solicitor advising on how security over shares can be taken will continue to follow the responsible body of opinion. If the Supreme Court some years later decides that opinion was wrong, it is the client's problem, not the solicitor's. Such a situation is less than satisfactory. For, as solicitors well know, the majority of law actually practiced has hardly ever been the subject of a judicial decision that is helpful. Far less may there be any legislative basis for what they do. Instead much of what is practised is, as David Daube called it,

12 [2010] UKSC 50, 2011 SC (UKSC) 66. Another is *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13.

13 This is important because it means that solicitors who previously adhered to the view discredited by the Supreme Court cannot normally be considered to have been careless, far less negligent, see *Hunter v Hanley* 1955 SC 200. But there is an important caveat to the normal case, namely where the body of opinion is considered by the court not to withstand logical analysis, see *Bolitho v City and Hackney Health Authority* [1998] AC 232 at 242A per Lord Browne-Wilkinson. For an interesting Court of Session opinion (dealing primarily with causation in a case for allegedly negligent actuarial advice), see *Blower v Edwards and Scottish Widows plc* [2010] CSOH 34.

14 K G C Reid and G L Gretton, *Conveyancing 2010* (2011) 138. See also G L Gretton, "Upsetting the applecart: standard securities in the Supreme Court" (2011) 15 *EdinLR* 251.

15 [1994] 2 AC 310.

“law as self-understood”.<sup>16</sup> This important source of law – on reflection, perhaps *the* most important source – is too much neglected. It is, of course, right and proper that the Court of Session or the Supreme Court has the power to scrutinise and review the profession’s opinion of the law and, if necessary, to hold the prevailing view to be wrong. But consideration should be given to the reasons underlying that opinion and to whether it is justifiable. And where there are two possible interpretations of a statutory provision, that which is consistent with how it has always been interpreted should be preferred.

#### D. LEGISLATIVE REFORM

Their Lordships’ analysis in *Farstad* is, in my view, less persuasive than that provided by the deputy judge of the High Court (Gabriel Moss QC, hardly a novice in these matters). It is, however, difficult to fault the Supreme Court’s impeccable legal reasoning: the somewhat convoluted statutory provisions are the source of the problem. One is struck by their Lordships’ blunt acknowledgment that on their preferred interpretation “the legislation does lead to a result with is certainly odd and possibly absurd”.<sup>17</sup> It is questionable whether the Supreme Court would have accepted such a result in a corporate law case governed by English law.<sup>18</sup> Indeed, in cases where the English courts are perceived to have strayed too far – for instance, the decisions in *Powdrill v Watson*<sup>19</sup> and *Buchler v Talbot*<sup>20</sup> – legislative reform was swift. The outcry following the Court of Appeal’s decision in *Powdrill*, in particular, was such that Parliament acted “with almost unprecedented speed”: primary legislation reversing the decision was drafted, laid before Parliament, passed and given Royal Assent in little over a month from the Court of Appeal’s decision.<sup>21</sup>

Westminster is notoriously reluctant to legislate on Scots private law.<sup>22</sup> And yet, where private law touches on reserved matters – and company law is a reserved matter – the Scottish Parliament has no power to legislate at all.<sup>23</sup> Therefore, whereas Holyrood could provide a legislative solution to clarify the meaning of the legislation

16 D Daube, “Self-Understood in legal history” 1973 JR 126, recently reproduced in the United States at (1999) 2 Green Bag (2d) 413; and in German as “Das Selbstverständlich in der Rechtsgeschichte” (1973) 90 ZSS (RA) 1. This paper also has an unmistakable influence on the speech of his doctoral pupil, the late Lord Rodger of Earlsferry, in *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221 at para 129.

17 Para 47.

18 Indeed, in two recent corporate and financial cases the Supreme Court preferred substance to form: *Progress Property Co Ltd v Moore* [2010] UKSC 55, [2011] 1 WLR 1 (for capital maintenance purposes); and *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38 at para 107 per Lord Collins (on the “anti-deprivation” principle).

19 [1994] ICR 395 .

20 [2004] 2 AC 298. The decision, which turned on the peculiar characterisation of a floating charge under English law, was reversed by s 1282 of the Companies Act 2006, inserting s 176ZA into the Insolvency Act 1986.

21 *Powdrill v Watson* [1995] 2 AC 394 at 443 per Lord Browne-Wilkinson.

22 For instance, *Lee v Alexander* (1883) 10R (HL) 91 (followed in *Winston v Patrick* 1980 SC 246) had to wait over a century for its legislative quietus in the Contract (Scotland) Act 1997.

23 Scotland Act 1998 Sch 5 part II head C1.

on enforcement of standard securities,<sup>24</sup> in the case of rights in security in company shares there may be no practical legislative solution.<sup>25</sup>

*Enviroco* is, therefore, a rather unsatisfactory case for Scots lawyers and it highlights three general points: first, some of the difficulties arising from the present constitutional arrangements; secondly, the need for practitioners to remember that blindly following an irrational market practice is fraught with risk; thirdly, and perhaps most importantly, there are serious practical difficulties with the present law. The Scottish Law Commission's proposals for reform set out in its excellent Discussion Paper on *Moveable Transactions*<sup>26</sup> are thus, subject to issues of legislative competence, of considerable importance.

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## Long-Term Contracts, the Rules of Interpretation and “Equitable Adjustment”

In recent times there has been a wealth of analysis of the principles of interpretation of contract. Most of the cases in question, including the recent Scottish appeal to the Supreme Court, *Multi-Link Leisure Developments Ltd v North Lanarkshire Council*,<sup>1</sup> have concerned drafting errors. The controversial question tends to be the extent to which the court can either ignore words contained in the contract or read words into the contract in order for the contract to make sense.<sup>2</sup> A recent decision from the Outer House, *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc*,<sup>3</sup> sheds light on an issue which has not received much consideration. This is the way in which the rules of interpretation should be applied to a long-term contract which has, arguably, been affected by changed circumstances. Should the interpretative rules be amended to take into account unanticipated changes in circumstances which have an impact on the way the contract operates?

<sup>24</sup> As it happens, the Scottish Government's position is that no legislation is required.

<sup>25</sup> The Scottish Law Commission considers that law reforms which have only an “incidental” effect on company law are within the legislative competence of the Scottish Parliament, Scottish Law Commission, Discussion Paper on *Moveable Transactions* (Scot Law Com DP No 151, 2011) para 1.33.

<sup>26</sup> *Ibid.*

<sup>1</sup> [2010] UKSC 47, 2011 SC 53.

<sup>2</sup> See Lord Hope's explanation of this exercise in *Multi-Link* at para 11.

<sup>3</sup> [2011] CSOH 105. The outcome of an appeal to the Inner House was awaited at the time of writing.

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### A. THE FACTS

The pursuer is a charitable foundation, set up at the time of floatation of the TSB group in 1986 in order to preserve the bank's charitable status. The contract at issue is a Deed of Covenant in terms of which payments were made by defender to pursuer. It was entered into in 1997 and was to endure until terminated by the defenders by nine years' notice in writing. The dispute concerned the interpretation of the provision for payment in the Deed, and arose in the context of the defender's acquisition of HBOS in 2009. The fair value of the net assets acquired in this transaction was significantly in excess of the price paid, and the difference between these two values is known in accounting terminology as "negative goodwill."<sup>4</sup> A change in accounting practices meant that negative goodwill became included in audited accounts as part of pre-tax profits or losses, even though that figure was not subject to taxation, and this change had an impact on the sums payable under the Deed of Covenant. The defender argued that, at the time the Deed of Covenant was entered into, no-one could have contemplated that this change would occur and, therefore, it should not affect the level of payments to the pursuer from year to year. The pursuer argued that the defender should be held to a literal meaning of the Deed despite the fact that the change was not and could not have been anticipated when the contract was formed.

### B. THE STARTING POSITION IN THE INTERPRETATIVE EXERCISE

Lord Glennie tackled the parties' differing views on the appropriate starting position in the interpretative exercise. The pursuer argued that the court should start with the words used in the Deed, whilst the defender argued that one should look first to the relevant background knowledge available to the parties at the moment of formation of the contract. In contrast to other recent interpretation cases, Lord Glennie found that the words in question did indeed have a natural and ordinary meaning.<sup>5</sup> He explained his approach:<sup>6</sup>

On the basis of the words used, I should form, in the first instance at least, a provisional view as to what the parties must be taken to have intended. Where, as here, background or contextual information is to hand and is relied on by the parties, that provisional view must be assessed, or re-assessed, in light of that information, to see whether it makes sense, whether it requires some reconsideration.

This paragraph focuses on one of the essential questions in the interpretative exercise, namely whether it is possible to reach a conclusion purely by considering the drafting of the clause in question in its contractual context, or whether the literal wording should be interpreted in its wider context. This is, in essence, the difference between a literal and a contextual approach to the interpretation of contract. In a speech which has proved highly influential in Scotland, Lord Mustill put the case

4 Para 6.

5 Para 68.

6 Para 67.

for the literal approach: “The inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used.”<sup>7</sup> Lord Hoffmann, developing a highly contextual approach in a series of English appeals, doubted whether words could ever have a meaning outside their context.<sup>8</sup>

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract . . . The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

The Scottish courts have proved themselves to be remarkably resistant to the Hoffmann approach on this point.<sup>9</sup> In *Multi-Link* Lord Hope aligned himself with the Scottish approach, identifying the court’s task as being “. . . to ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context”.<sup>10</sup> Lord Hodge, on the other hand, has expressed the view that it is “a matter of choice whether a judge in his reasoning first analyses the background facts before considering the relevant contractual provision or looks first at the provision before testing his view of it against those facts”.<sup>11</sup> Lord Glennie’s “cross-check” approach offers a third possibility: a provisional view is reached on the words themselves, and that view is “assessed or re-assessed”<sup>12</sup> in the light of the available background information.<sup>13</sup>

. . . on the natural meaning of the words and expressions used in the Deed, the parties have settled upon a formula which plainly points, in the present circumstances, to the result for which the pursuer contends. But this is not the end of the matter. That construction must be cross-checked against the evidence the court has before it as to the circumstances in which the agreement in the Deed was made.

This author is probably not alone in being confused and frustrated by these contradictory statements. It is surely a matter of importance to identify the approach a court will adopt. Clients are likely to be puzzled if their advisers are unable to predict whether the court will seek to interpret on the basis of the words of the contract alone or will resort to background information. The law currently fails commercial parties placed in this situation.

7 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 384. This passage was most notably favoured by Lord Rodger in the leading Scottish case, *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657 at 661.

8 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913.

9 See the analysis by L Macgregor and C Lewis, “Interpretation” in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective* (2004) 66.

10 [2010] UKSC 47, 2011 SC (UKSC) 53 at para 11.

11 *Luminar Lava Ignite Ltd v Mama Group plc* [2010] CSIH 1, 2010 SC 310 at para 38.

12 *Lloyds TSB* at para 67.

13 Paras 72 and 73.

### C. CHANGE OF CIRCUMSTANCES AND INTERPRETATION

In relation to the alleged change of circumstances in *Lloyds* Lord Glennie explained the court's approach in some detail:<sup>14</sup>

... [the court] should ask what are the "purposes and values" expressed or implicit in the wording of the Deed, as understood in the context of the facts and matters in existence at the time it was entered into, and, having identified those purposes and values, attempt to reach an interpretation which applies the wording of the Deed to the changed circumstances in the manner most consistent with them."

In this case he held that the purpose of the Deed was to allow the pursuer to participate in the Group's trading profits.<sup>15</sup> Relying on the approach taken in two other cases,<sup>16</sup> and with this specific purposes in mind, Lord Glennie disregarded certain words in the definition of pre-tax profit and loss. He explained:<sup>17</sup>

This is not, to my mind, re-writing the contract so as to alter the bargain the parties have made. It simply recognises that to find a construction consistent with the parties' objectives may involve doing some slight violence to the wording of the contract or Deed... This may be necessary not only where something must have gone wrong in the drafting but also where, because of changed circumstances, the drafting gives a result which neither party could have intended.

The pursuer's claim failed and decree of absolvitor was granted.

This result appears to be a fair one, at least to those who, like the current author, are untrained in accountancy practice. However, the method used here inevitably involves a high degree of discretion, and it will be difficult to set parameters to a judge's ability to do "slight violence" to contract drafting.

### D. EQUITABLE ADJUSTMENT

As an alternative to the case on construction, the defender argued that there was scope in Scots law for the idea of "equitable adjustment", thus seeking to resurrect an idea which, although long dormant, has a distinguished history. The idea was most notably discussed by Lord Cooper in a 1946 article<sup>18</sup> in which he suggested that the Scottish courts could equitably re-adjust relations between the parties following frustration of a contract. The benefits of this flexible approach were not lost on later Scottish writers. McBryde, for example, exhorted the Scots lawyer to "ignore dicta in English cases" and to "follow the approach of his predecessors."<sup>19</sup> Unsurprisingly,

14 Para 80.

15 Para 81.

16 *Debenhams Retail plc v Sun Alliance and London Assurance Co Ltd* [2005] EWCA Civ 868, [2006] 1 P&CR 8; *Lian Hwee Choo Phebe v Maxz Universal Development Group Ptd Ltd* [2009] SGCA 4.

17 *Lloyds TSB* at para 81.

18 "Frustration of contract in Scots law" (1946) 28 J of Comparative Legislation Pt III 1 (this was not, it appears, cited to the court).

19 W W McBryde, "Frustration of contract" 1980 JR 1 at 4. See also T B Smith, *Short Commentary on the Law of Scotland* (1962) 846-850; A D M Forte, "Economic frustration of commercial contracts: a



neither party in *Lloyds* sought to argue that the contract was frustrated. To do so would release the parties from the contract and cast them adrift on the unpredictable seas of enrichment law.<sup>20</sup> Rather, the defender submitted:<sup>21</sup>

... in circumstances not amounting to frustration, where performance of a provision in an ongoing contract would, as a result of unforeseen circumstances, no longer bear any realistic resemblance to the performance originally contemplated, and would produce a manifestly inequitable result, the courts would intervene.”

In support of this argument, the defender cited that old chestnut of a case, *Wilkie v Bethune*.<sup>22</sup> An agricultural labourer was entitled by contract to be paid partly in money and partly in potatoes. The 1846 potato crop failed leading to a dramatic price rise. The defender in *Lloyds* sought to rely on McBryde’s suggestion that *Wilkie* was an example of adjusting a contract to achieve a fair and equitable result. Indeed, the defender relied on a broad range of authorities, from Grotius<sup>23</sup> and Pufendorf,<sup>24</sup> to *Pole Properties Ltd v Feinberg*,<sup>25</sup> as well as a decision of the US District Court of Pennsylvania.<sup>26</sup>

Lord Glennie was not persuaded that the doctrine was part of Scots law<sup>27</sup> and characterised *Wilkie* (no doubt correctly) as an unhelpful authority.<sup>28</sup> He reasoned that if the doctrine was part of Scots law, it must also be part of English law and, indeed, other legal systems.<sup>29</sup> This seems an odd conclusion. Although Scots and English law tend to use the same English case to define frustration (*Davis Contractors Limited v Fareham UDC*)<sup>30</sup> this similarity masks historical and structural differences. As has already been noted, the law of unjustified enrichment may apply in order to resolve unfairness in the respective position of the parties following frustration of a contract. The applicable principles differ: English law applies a statute which has no application in Scotland, the Law Reform (Frustrated Contracts) Act 1943, and

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comparative analysis with particular reference to the United Kingdom” 1986 JR 1 at 12 and 17 and L Macgregor, “The effect of unexpected circumstances in contracts in Scots and Louisiana Law”, in V V Palmer and E C Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009) 244.

20 Scots law applies the *condictio causa data causa non secuta* in this context. The remedy applies where one party has given money or property (or, since *Shilliday v Smith* 1998 SC 725 widened the ambit of the *condictiones*, other forms of enrichment too) to another on the understanding that the other party will make a counter-performance. When the counter-performance does not materialise, the remedy is the return of the money or property (or, as *Shilliday* demonstrates, the monetary worth of enrichment conferred by some other means), see G MacCormack, “The *condictio causa data causa non secuta*” in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 253.

21 *Lloyds TSB* at para 85.

22 (1848) 11 D 132.

23 *De Jure Belli ac Pacis*, II.xvi.25.2.

24 *De Jure Naturae et Gentium* III.vi.6.

25 (1982) 43 P&CR 121.

26 *Aluminum Company of America v Essex Group Inc* 499 F Supp 53 (1980).

27 *Lloyds TSB* at para 89.

28 Para 90.

29 Para 90.

30 [1956] AC 696.

Scots law the *conductio causa data causa non secuta*. It is, therefore, likely that some concepts form part of one system and not the other.

Finally, Lord Glennie highlighted the lack of any history of applying this concept in contracts where a steep rise in the cost of performance has occurred.<sup>31</sup> This point can be discussed by analogy with cases involving extraordinary inflation. Whilst English authority confirms that “ordinary” inflation does not provide grounds for frustration,<sup>32</sup> modern writers are at least open to the possibility that “extraordinary” inflation could.<sup>33</sup> We should keep an open mind as to whether an extraordinarily large increase in the cost of performance of a long-term contract could amount to frustration. Comparative material on this point is instructive. In Germany, where currency devalued after the Second World War, the German courts were regularly called upon to consider this point.<sup>34</sup> The lack of discussion of the effect of extraordinary inflation can be explained by the fact that the United Kingdom has so far been lucky enough not to suffer from drastic currency devaluation.

For all these reasons the argument on equitable adjustment failed, which is perhaps not surprising given the lack of authority and the antiquity of that which was available. It is perhaps disappointing that little was made of Scottish academic commentary.

The Scottish Law Commission is currently subjecting the Scots law of contract to what it describes as a “health check”.<sup>35</sup> In particular, Scottish principles are being compared to the initiative known as the Draft Common Frame of Reference (DCFR).<sup>36</sup> The DCFR contains an idea of equitable adjustment.<sup>37</sup>

If, however, performance of a contractual obligation . . . becomes so onerous that it would be manifestly unjust to hold the debtor to the obligation, a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances: or (b) terminate the contract at a date and on terms to be determined by the court.

It remains to be seen whether the law of frustration will be considered as part of this project. Lord Glennie’s rejection of equitable adjustment seems unlikely to mark the end of the story, whether or not the case is appealed.

31 *Lloyds TSB* at para 91.

32 *British Movietone News Ltd v London and District Cinemas* [1952] AC 166; *Wates Ltd v Greater London Council* (1983) 25 BLR 1 (CA).

33 G H L Treitel, *Frustration and Force Majeure* (2004) para 6-045.

34 See the discussion in E Hondius and H C Grigoleit, *Unexpected Circumstances in European Contract Law* (2011) 218 *et seq*.

35 See <http://www.scotlawcom.gov.uk/law-reform-projects/contract-law-in-light-of-the-draft-common-frame-of-reference-dcf/>.

36 C Von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, outline edition, (2009). See also the author’s report on the DCFR prepared for the Scottish Government, available at [http://www.law.ed.ac.uk/file\\_download/publications/3\\_871\\_areportpreparedforthecivildivisionofthes.pdf](http://www.law.ed.ac.uk/file_download/publications/3_871_areportpreparedforthecivildivisionofthes.pdf).

37 DCFR III.-1:110(2).

### E. CONCLUSION

Lord Glennie's judgment in this case is succinct, clear and practically useful. He was evidently at pains to find the real purpose of this commercial contract and interpret it in the changed circumstances. Although his "cross-check" approach to interpretation is an attractive one his judgment alone can do little to dispel the gloom which currently surrounds the method to be applied by the courts in the interpretative exercise. It can be added to the myriad of others, all suggesting different starting positions for the interpretative exercise. His outright rejection of a concept of equitable adjustment is understandable given the limited authorities cited to him. Equitable adjustment may fare better should the case be appealed, which, on the basis of the sums involved in the dispute, seems likely.

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## Access Rights – A Letter from America

On 1 and 2 September 2011 the Rural Law Research Group at the University of Aberdeen hosted a conference on sustainable rural development, focussing on the cross-cutting sub-themes of sustainability, diversification and planning.<sup>1</sup> This was the second such conference (the first being held in 2009) at the university and it was heartening to note the continued spread of delegates and speakers bringing different backgrounds, techniques and perspectives to bear.

One particularly welcome perspective from overseas was provided by John Lovett, a professor of property law at Loyola University in New Orleans, Louisiana. He presented a paper on the right to roam (or, to be strictly correct, the right of responsible access) conferred on everyone by Part 1 of the Land Reform (Scotland) Act 2003.<sup>2</sup> As is now well known to Scots observers, this right allows people to be on<sup>3</sup> and cross<sup>4</sup> land in Scotland without a landowner's prior consent, subject to certain exceptions based on the characteristics of the land in question<sup>5</sup> or the conduct undertaken by the access taker.<sup>6</sup> What may not be known to many Scots observers is the interest non-Scots have in the new regime.

1 See [www.abdn.ac.uk/rural-law](http://www.abdn.ac.uk/rural-law).

2 All references are to this Act unless otherwise stated.

3 For recreation, education or to perform an activity that can be performed otherwise than commercially or for profit: s 1(2)(a) and s 1(3).

4 s 1(2)(b).

5 s 6. Thus, access through a building site or over a garden next to a dwelling is not allowed: see M M Combe, "No place like home: access rights over 'gardens'" (2008) 12 EdinLR 463.

6 s 9. Being on land in breach of an interdict or to poach would be prime examples of prohibited conduct.

### A. ACCESSIBLE SCHOLARSHIP

Louisiana and Scotland both fall within the bracket of what comparative lawyers term a “mixed legal system”.<sup>7</sup> This shared status is perhaps what encouraged Lovett to spend some time in Edinburgh as a McCormick Fellow. At the time of his visit, he had a wealth of property law reforms to spend time researching, courtesy of the Scottish Parliament’s active legislating in that field. It was fortunate, but probably not accidental, that it was the Land Reform (Scotland) Act 2003 in particular that caught his eye.<sup>8</sup>

The fruits of Lovett’s research have recently been published in the *Nebraska Law Review*.<sup>9</sup> The inevitable flow of judicial decisions interpreting the Act’s provisions will dictate this is not the last word on the right of responsible access,<sup>10</sup> but Lovett’s stellar study is certainly a complete, and largely complimentary, critique of the new Scottish regime. No indigenous analysis comes close in terms of depth of legal and theoretical analysis.

Before examining the Act and the underlying legal position, readers are introduced to the competing positions of “progressive or social obligation theorists” and “information or formal exclusion theorists”.<sup>11</sup> The progressive camp argue “that property law can and should embrace a social obligation norm designed to promote the end of human flourishing” and that the entitlements property law gives are important not because of their exclusionary power “but because of what they enable people (both owners and non-owners) to become and to do with their lives in practices of social cooperation”.<sup>12</sup> This is set against the exclusionary camp, or information theorists, who argue “that at the very core of any properly functioning private property regime is a robust commitment to protecting a property owner’s right to

7 Louisiana’s mix of French, Spanish and Anglo-American law can be contrasted with Scotland’s mix of Roman and English law. While no two mixed legal systems can ever be said to have an identical mix, the very fact of the mixture can lead to illuminating comparative studies, such as E C Reid and V V Palmer (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh Studies in Law No 6, 2009), which includes (at 30) an earlier comparative study by Lovett (“Title Conditions in Restraint of Trade”).

8 Interest is not restricted to transatlantic observers. See BBC News Online, “AMs call to end river ‘confusion’”, 15 Apr 2009, following a petition to “establish a statutory right of public access to and along non-tidal water in Wales, along the lines of the Land Reform (Scotland) Act 2003” (National Assembly for Wales, *Report of the Petitions Committee’s Short Inquiry into Access along Inland Water* (2009), available at [http://www.assemblywales.org/canoe\\_inquiry\\_report\\_with\\_cover\\_e.pdf](http://www.assemblywales.org/canoe_inquiry_report_with_cover_e.pdf)).

9 J A Lovett, “Progressive property in action: the Land Reform (Scotland) Act 2003” (2011) 89 *Nebraska LR* 739, available at <http://digitalcommons.unl.edu/nlr/vol89/iss4/5/>.

10 Although the article does consider all the key cases to date, namely: *Gloag v Perth and Kinross Council* 2007 SCLR 530; *Snowie v Stirling Council* 2008 SLT (Sh Ct) 61; *Tuley v The Highland Council* 2007 SLT (Sh Ct) 97, rev 2009 SLT 616; *Forbes v Fife Council* 2009 SLT (Sh Ct) 71; *Creelman v Argyll and Bute Council* 2009 SLT (Sh Ct) 165; and *Aviemore Highland Resort Ltd v Cairngorms National Park Authority* 2009 SLT (Sh Ct) 97. The only omission is *Caledonian Heritable Limited v East Lothian Council*, Haddington Sheriff Court, 28 Apr 2006 (available at [www.scotcourts.gov.uk/opinions/b401\\_05.html](http://www.scotcourts.gov.uk/opinions/b401_05.html)), a detailed interim ruling on, *inter alia*, the validity of a notice served by East Lothian Council under s 14(2). The dispute eventually settled out of court.

11 Further theories are discussed, but to discuss them here would be a disservice to both the original article and the theories presented by it.

12 Lovett (n 9) at 743-746.

exclude everyone else in the world from the thing or object of his ownership".<sup>13</sup> Communitarian human flourishing this is not. Property law's strength comes from rules that decide important questions for everyone from a rigid starting point. Scots observers are likely to find more in common with the latter camp.<sup>14</sup>

## B. ACCESS ANALYSED

With this exclusionary background, that Scotland introduced such a strong presumption in favour of access is startling,<sup>15</sup> but that shock is perhaps tempered by the long tradition of customary access and tolerance that took place in Scotland's hills and mountains in particular.<sup>16</sup> Lovett examines the pre-Act position, sympathetically considering the differing viewpoints as to what rights an access taker held,<sup>17</sup> before settling on the view that "the weight of authority is clearly against the access advocates".<sup>18</sup> That may be so, but Lovett postulates that even in the face of this weight of authority the "frequent assertions [of laymen and some lawyers], reiterated in the press, in conversation, and occasionally even in learned journals,<sup>19</sup> helped establish a kind of customary expectation of access, or perhaps an implicit social obligation norm imposed on landowners, that helped smooth the way for legislative action".<sup>20</sup>

After mapping the road to access reform in Scotland and England and Wales,<sup>21</sup> Lovett makes an instructive comparison of the legislative approaches north and south, covering where rights can be exercised, how those rights are exercised and how a landowner can obtain an exemption from access rights.<sup>22</sup> The paper then discusses

<sup>13</sup> Lovett (n 9) at 746-750.

<sup>14</sup> There seems to be a striking analogy with Erskine's classic model of Scots ownership (*Inst* II.1.1), quoted by Lovett (n 9) at 760-761, in that ownership "necessarily excludes every other person but the proprietor; for if another had a right to dispose of the subject, or so much as to use it, without his consent, it would not be his property, but common to him with that other. Property therefore implies a prohibition, that no person shall encroach upon the right of the proprietor and consequently every encroachment, though it should not be guarded against by statute, founds the proprietors in an action for damages."

<sup>15</sup> Looking again to Erskine, that exclusionary starting point is that a landowner can "possess the subject as his own; or, if it be possessed by another, to demand it from the possessor" (*Inst* III.1.2).

<sup>16</sup> On the non-2003 Act position as regards access to land, see R R M Paisley, *Access Rights and Rights of Way* (2006) at 40 and Lovett (n 9) at 753-766.

<sup>17</sup> And indeed still holds, for land in respect of which access rights are not exercisable under s 6.

<sup>18</sup> Lovett (n 9) at 760.

<sup>19</sup> See A Blackshaw, "Implied permission and the traditions of customary access" (1999) 3 *EdinLR* 368. Alan Blackshaw died in 2011, but before his passing he contributed one further article that remained consistent with his earlier views: "An historical approach to the new outdoor access legislation" (2008) 62 *Scottish Affairs* 1.

<sup>20</sup> Lovett (n 9) at 764.

<sup>21</sup> Culminating in the Countryside and Rights of Way Act 2000 and the Marine and Coastal Access Act 2009.

<sup>22</sup> The differences in the exemption regime are noteworthy. Section 55 of the Countryside and Rights of Way Act 2000 allows a landowner to unilaterally exempt his land for up to twenty-eight days in a calendar year, whereas section 11 of the Land Reform (Scotland) Act 2003 makes each local authority the referee of the exemption process, with a supplementary role for Scottish Ministers where an exemption of six or more days is sought.

what is probably of greatest interest to black-letter Scots lawyers: a study of the relevant case law. No attempt will be made to summarise the case law here, but two points made by Lovett are worth noting. The first is that an initial spate of litigation is not necessarily surprising in itself.<sup>23</sup> The second is that the decisions to date do not give any reason to be downbeat.<sup>24</sup> Some teething problems may have been apparent,<sup>25</sup> but the general approach of the Scottish courts to disputes under the Act escapes wide-ranging criticism. As such, Lovett portrays the Act, and its related challenges to established theories of property law, as something that might just be exportable to other legal systems without upsetting the doctrinal applecart.

### C. CONCLUSION

The concept of a book review is well known. The concept of an article review is not. Answering an article from a contrary position is a far more common sight than an article saying “I agree”: an “I agree” article could fall into the trap of being dull, plagiaristic or both. It is hoped this note is neither, serving instead as a signpost to a crucial piece of analysis that could have escaped a Scots readership.

Professor Lovett concluded his talk in Aberdeen by extolling the virtues of the Land Reform (Scotland) Act 2003 for being a visionary property reform that does not break a robust system. Information processing and social obligation theorists may not have featured prominently in the *travaux préparatoires* of the Land Reform (Scotland) Act 2003, but the legislation produced has certainly caught their attention. Lovett’s desire to showcase the Act to an American property law audience might have been to “alleviate the palpable shortage of new subjects of property law analysis”,<sup>26</sup> but this has the happy ancillary effect of providing a reference point for a Scots audience that is unlikely to be bettered in the immediate future. Followers of the Scottish diaspora, not to mention Scottish singing duo The Proclaimers, will know how welcome a letter from America can be. Lovett’s correspondence is gratefully received.

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23 Lovett (n 9) at 790: “Given the remarkable geographic reach of [the Act] and its reliance on several broad, open-textured standards to delimit private landowners’ ability to exclude and restrict public access, it is not surprising that Scottish courts would soon be called upon to interpret the Act and to begin to draw some of the boundaries that the Scottish Parliament declined to draw.”

24 Lovett (n 9) at 742: “Recent judicial decisions interpreting the Act . . . admittedly expose some of the information processing and uncertainty costs that are by-products of this kind of complex ‘governance’ based property law innovation. Yet the tests and methodologies developed by the Scottish courts so far are, though not perfect, generally reasonable and have largely succeeded in avoiding demoralizing results.”

25 Perhaps the most obvious of these being the tycoon cases of *Gloag* and *Snowie* (regarding sufficient adjacent land to enable persons dwelling nearby reasonable measures of privacy) and the equine barrier case of *Tuley*, discussed in M M Combe, “Access to land and to landownership” (2010) 14 EdinLR 106. (For case citations, see n 10 above.)

26 Lovett (n 9) at 741.

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## The 20 Year Rules and the McLetchie Amendment

Two 20 year rules were introduced by the Land Tenure Reform (Scotland) Act 1974. That Act was the first step in the abolition of the feudal system. Its framers thought that if the creation of new feudalties were prohibited, builders and developers would not bother to feu plots and the feudal system would wither on the vine. That of course proved not to be the case.

The framers of the 1974 legislation were aware of the English experience. The feudal system's days were numbered in England when Edward I prohibited further subinfeudation.<sup>1</sup> Effectively, what happened in England over the centuries was that leasehold tenure became the way in which the use of land was controlled. So great was the fear in Scotland of complex schemes to impose periodical payments akin to feu duties that two provisions were introduced in 1974 to prevent this in the case of private dwellinghouses.<sup>2</sup>

### A. RULE 1. THE RESTRICTION ON LEASES

Section 8 of the 1974 Act provided that in any lease for a period in excess, or potentially in excess, of 20 years there should be implied a condition that no part of the property be used as, or as part of, a private dwellinghouse. It was however provided that this would not prevent the creation of protected or statutory tenancies<sup>3</sup> or (after amendment) Scottish Secure Tenancies<sup>4</sup> where many tenancies do run for more than twenty years.<sup>5</sup> However, the statutory provision falls short of rendering a lease which contravenes the 20 year rule void. The only effect of contravention is to permit the landlord to give notice to the tenant to terminate the use within twenty eight days.<sup>6</sup> Only if the tenant refuses to obtemper the notice can the landlord then raise an action of removing. Moreover if the landlord has consented to use as a private dwellinghouse expressly or impliedly then the court cannot pronounce a decree of removing and the only sanction is that the lease then becomes a lease for 20 years from the date notice was given or, if the original lease had less than 20 years to run, a lease for the remainder of its original term. Accordingly, it would be fair to say that the provision relating to long leases was not a prohibition as such. One wonders how many private landlords would want to terminate a lease of a dwellinghouse if the occupier was a good tenant paying a reasonable rent.

1 Statute Quia Emptores 1290 (18 Edw I c 1).

2 Land Tenure Reform (Scotland) Act 1974 ss 8-11.

3 Under the Rent (Scotland) Act 1984.

4 Under the Housing (Scotland) Act 2001.

5 Land Tenure Reform (Scotland) Act 1974 s 8(7). There is some doubt as to the correct interpretation of this provision. See A McAllister, *Scottish Law of Leases*, 3<sup>rd</sup> edn (2002) para 7.39.

6 Land Tenure Reform (Scotland) Act 1974 s 9(1).

Even before the most recent amendment<sup>7</sup> it had been found necessary to make exceptions to the rule. It does not apply to agricultural holdings whether short or limited duration tenancies or ordinary holdings, smallholdings and crofts. More recently,<sup>8</sup> the application of the so called prohibition has been disapplied to a long lease executed after the 1<sup>st</sup> March 2011 where the tenant is a social landlord,<sup>9</sup> a body connected with a social landlord,<sup>10</sup> or a rural housing body.<sup>11</sup>

## B. RULE 2. THE RIGHT OF REDEMPTION

The framers of the 1974 legislation were also concerned that ingenious conveyancers would circumvent the provisions relating to leases of private dwellinghouses by means of a standard security. The feared scenario was that a developer might sell a new house and then take back a standard security from the purchaser for the full price or a substantial part of the price subject to periodic repayment. The statutory provision<sup>12</sup> creates a statutory right of redemption at any time after 20 years following the execution of the security. There is also a statutory restriction on the imposition of penalty clauses for early redemption.<sup>13</sup> Effectively, the second 20 year rule is a backup to the first rule because the right of ownership subject to the standard security would look very much like a long lease. Again it has been necessary to make exceptions. The statutory right to redeem does not apply where a social landlord, a body connected to a social landlord or a rural housing body has renounced the statutory right to redeem.<sup>14</sup> These public bodies can borrow on the security of their housing stock on a long term basis. The statutory restriction in the second 20 year rule would obviously not be attractive to financial institutions.

## C. THE McLETCHE AMENDMENT

The amendments introduced by the Private Rented Housing (Scotland) Act 2011 relate to public sector housing. They have no application to the private renting sector. The amendment is simple. It is effected by way of an enabling provision added to sections 8(3A) and 11(3A) of the 1974 Act.<sup>15</sup> The effect of the amendment is that Scottish Ministers can by order made by Statutory Instrument add other bodies who will be exempt from the two 20 year rules. Scottish Ministers will have the power to place conditions or restrictions on any such exempted bodies. The purpose of

<sup>7</sup> These provisions have become known in practice as the “McLetchie Amendment”, as they originate in amendments made to the Private Rented Housing (Scotland) Act 2011 by David McLetchie during its passage through the Scottish Parliament.

<sup>8</sup> Land Tenure Reform (Scotland) Act 1974 s 11, as inserted by the Housing (Scotland) Act 2010 s 138.

<sup>9</sup> Within the meaning of the Housing (Scotland) Act 2010 s 615.

<sup>10</sup> Within the meaning of the Housing (Scotland) Act 2010 s 164.

<sup>11</sup> Within the meaning of Title Conditions (Scotland) Act 2003 s 122(1).

<sup>12</sup> Land Tenure Reform (Scotland) Act 1974 s 11.

<sup>13</sup> Land Tenure Reform (Scotland) Act 1974 s 11(4).

<sup>14</sup> Land Tenure Reform (Scotland) Act 1974 s 11(3A), as inserted by the Housing (Scotland) Act 2010 s 139.

<sup>15</sup> Private Rented Housing (Scotland) Act 2011 ss 36-37.



the amendment is to allow private sector funding for social housing where social landlords have an interest which falls short of being either the landlord or a subsidiary of the landlord. There can be joint ventures or other complex schemes involving the funding or provision of what is essentially social housing. There have been, for example, questions over student accommodation provided by private landlords. Other problems have also arisen in relation to shared equity schemes. An obvious example would be where a private builder sells a house on the basis that the purchaser is to acquire only a certain percentage of the equity. The usual format is that the purchaser grants a standard security for the equity share. Although people do tend to remove well before 20 years the possibility does exist that a purchaser could demand a discharge of the standard security after 20 years. Difficult questions would then arise in relation to the amount required to redeem. Plainly an arrangement whereby the developer only conveys a 70% *pro indiviso* share but leases the remaining 30% would be affected by the 20 year rule relating to leasing of private dwellinghouses.

#### D. CONCLUSION

The policy reasons for allowing further exceptions to the two 20 year rules were set out in an article by Len Freedman and myself,<sup>16</sup> although this article was published before the amendments introduced by the Private Rented Housing (Scotland) Act 2011. There is of course a broader question as to whether or not these two 20 year rules are still necessary following the complete abolition of the feudal system and the blanket prohibition of leases of all types in excess of 175 years.<sup>17</sup>

There will always be arguments concerning the wisdom of giving government blanket powers to amend legislation. There will also be those who have concerns that more exceptions will weaken the two rules to such an extent that they become meaningless. One has to wonder however why these rules are still necessary at all given the blanket prohibition of all leases in excess of 175 years.

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<sup>16</sup> L Freedman and R Rennie, "An idea whose time has gone" (2008) 53 JLS Sep/68.

<sup>17</sup> Abolition of Feudal Tenure etc (Scotland) Act 2000 s 67.