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Litigation in Scotland Report 2024

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Introduction

Welcome to the 2024 edition of our annual Litigation in Scotland update. In addition to the key legal developments highlighted in our report, it has also been a very significant year for our firm.

On 1 November 2023, Morton Fraser LLP merged with MacRoberts LLP. The merger creates a new, top-tier independent firm in Scotland, Morton Fraser MacRoberts LLP (MFMac), which employs nearly 500 people, making it the joint-third largest independent firm in Scotland by number of solicitors. MFMac has one of the largest litigation and dispute resolution teams in Scotland with a wide range of specialist litigators.

In this year's Litigation in Scotland update, we discuss the progress of one of the first group proceedings to be raised in Scotland – the Kenyan tea pickers case. We also look at developments in the law of unjust enrichment following the Supreme Court decision in early 2023. We provide an overview of an unlawful means conspiracy case, and also look at the circumstances where the Scottish courts will wind up an overseas company.

In the property litigation sphere, we provide an update on where cladding claims stand in relation to both commercial and residential properties. In addition, Scottish planning practitioners continue to get to grips with the National Planning Framework 4 and we reflect on a shift in national policy towards a significantly more restrictive approach to the exceptional release of housing land on unallocated sites. Finally, we discuss the principles which underlie a trauma-informed approach in relation to personal injury.

If you would like more information about any of the topics discussed in our report, or if you would like to discuss a Scottish legal matter, we would be delighted to hear from you – so please do not hesitate to contact a member of our team.

Innes Clark is a Partner and Head of MFMac's Litigation Division, which is one of the largest and most experienced litigation teams in Scotland.

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> "MFMac has one of the largest litigation and dispute resolution teams in Scotland, with a wide range of specialist litigators."

Contents

Group Proceedings in Scotland: A Case Study

Jenny Dickson tracks the progress of one of the first group proceedings to be raised in Scotland, brought by a group of Kenyan tea farm workers.

Group proceedings (class actions in England and Wales) were first introduced to Scotland in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which came into force in July 2020.

Group proceedings are actions that involve two or more persons, each with separate claims, raising issues which are the same, similar or related to each other in terms of law or fact. Claimants must satisfy the court that there is a prima facie case; that proceeding as a group is more efficient than as separate claims; and there is a real prospect of success. One person must be authorised to act as the representative party for all other members of the group. Any person can apply to be a representative party, regardless of whether they are a member of the group.

The group proceedings litigation that we have seen so far in the Scottish courts has already demonstrated how complex legal arguments, which might not be feasible to run in a single claim, are more likely to be raised when the action involves multiple claimants.

Kenyan Tea Pickers: Background

In January 2022, a group of more than 700 Kenyan tea farm workers (now closer to 3,700) raised group proceedings in the Court of Session, seeking compensation against James Finlay (Kenya) Ltd ("JFKL") – a multinational tea and coffee producing company, registered in Scotland. The workers claimed to have suffered musculoskeletal injuries as a result of their working conditions in Kenya, when employed by JFKL. It was JFKL's Scottish domicile that gave the Scottish court jurisdiction to hear the claim.

The workers claim that they carried out repetitive manual tasks when harvesting tea on the plantations in Kenya; the baskets for carrying picked or clipped tea sometimes weighed around 20kg; they worked long hours and payment was dependent upon completing the work; they were not given breaks or training; and no risk assessments were performed.

The law firm acting for the Claimants applied to be the representative party. The court decided this was a potential conflict of interest given the financial interests of the firm may influence the decisions of the representative party. As both the legal advisors and the representative party should be "separate and distinct," independent Counsel was instead appointed as the representative.

Next, JFKL disputed the Claimants' right to raise the group proceeding, arguing there was insufficient factual similarity between the claims to satisfy the requirements of a group proceeding, and that "musculoskeletal injury arising from employment" was too wide a description to meet the relevant test of being "the same as, or similar or related to, each other". The argument was unsuccessful.

The parties then raised various arguments on jurisdiction. Despite JFKL having their registered office in Scotland, the defenders argued that the case ought to be heard in Kenya as the Scottish courts were not the most convenient forum for the dispute (a plea of *forum non conveniens*).

JFKL successfully sought an injunction in the courts of Kenya, which prevented the Claimants from continuing to pursue the group action in Scotland, whilst the Kenyan courts decided on whether the Scottish courts had jurisdiction. In response, the Claimants sought an anti-suit interdict in Scotland to prevent JFKL from continuing with its Kenyan application to decide on jurisdiction or raising any similar new proceedings. The anti-suit interdict was granted in Scotland. JFKL's conduct in raising the proceedings in Kenya was found to be unconscionable, vexatious or oppressive. The Kenyan anti-suit injunction meant that the group members were unable to continue their claim in Scotland, and there was also real doubt as to whether they would be able to bring claims for substantive damages in Kenya. JFKL would not be prejudiced to the same extent by the interdict in Scotland.

The argument on jurisdiction went to preliminary proof. The Court of Session found that the Scottish courts did have jurisdiction to hear the case and rejected JFKL's plea of *forum non conveniens*.

JFKL appealed the decision to the Inner House of the Court of Session in October 2023. The court held that the Scottish courts had jurisdiction but found it was not the most convenient forum and decided that the case should be heard in Kenya.

The Inner House ruled that the Kenyan workplace compensation scheme (known as WIBA) was the more suitable forum to rule on the dispute. It decided that the workers could make use of this free scheme and did not require the engagement of lawyers to do so. The Scottish proceedings were sisted (paused) pending resolution of the claims under WIBA in Kenya.

What next?

Whilst the representative party for the group members has the right to seek permission to appeal against this decision to the UK Supreme Court, for now, Kenya has been found to be the most appropriate forum for these claims, and the workers will require to seek redress there. If the claims are not determined under WIBA, or if there is excessive delay, the Scottish courts may be persuaded to recall the sist on the basis that substantive justice cannot be delivered in Kenya.

If this had been a single claim, it is unlikely to have proceeded as far or to have involved so many costly legal arguments. Group proceedings provide the opportunity for cases like this to proceed, and for all of these legal conundrums to be considered by the Scottish (and in this case, the Kenyan) courts.

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Contracts and Unjust Enrichment

Richard McMeeken considers recent developments in the law of unjust enrichment.

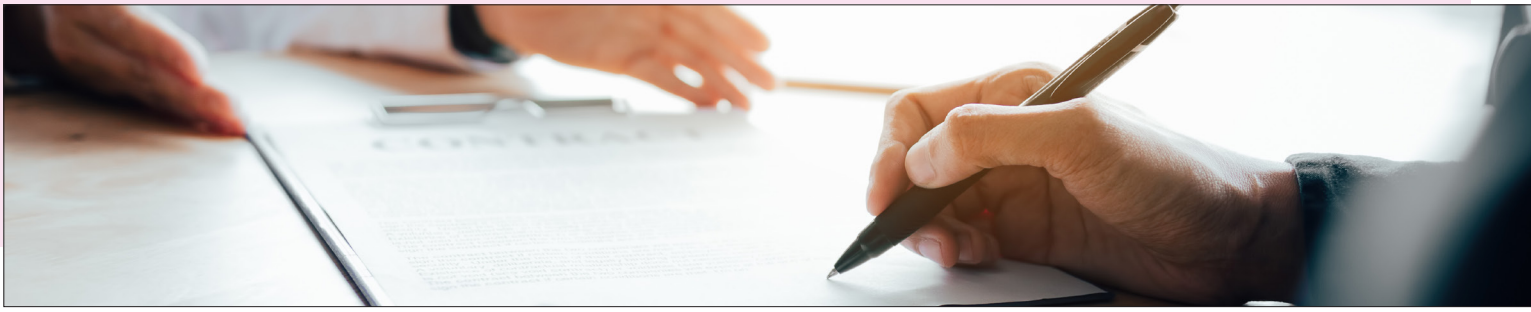
One area of law which causes Scots and English lawyers an equal amount of head-scratching is the law relating to unjust enrichment. In England, Lord Reed commented in *Benedetti v Sawiris* [2013] UKSC 50 that the law of unjust enrichment is "at an early stage in its development and… it remains to be seen whether we have found the most suitable analytical scheme". Other commentators, such as Professor Steve Hedley, have remarked that unjust enrichment is doctrinally incoherent because "stating it at a high level of abstraction, and then seeking to deduce the law from that abstraction, merely distracts us from the equities of the case we consider" (*Farewell to Unjustified Enrichment – A Common Law Response ELR Vol 20, Issue 3*).

In Scotland, much of the present law on unjust enrichment was articulated by Lord Rodger, particularly in *Shilliday v Smith* [1998] SC 725 in which he commented that "discussions of unjust enrichment are bedevilled by language which is often almost impenetrable", before providing helpful clarification on the operation of unjust enrichment in Scots law.

> "On both sides of the border, the general rule is that unjust enrichment should not be allowed to subvert the allocation of risk which the parties have contractually agreed."

One of the crucial issues in unjust enrichment is its interaction with contractual claims. On both sides of the border, the general rule is that unjust enrichment should not be allowed to subvert the allocation of risk which the parties have contractually agreed. So long as there is a contract, it is the contract which provides for any restitution to which a party is entitled. If there is no contract, or if the contract in question is void or voidable, then unjust enrichment can play a bigger role.

That rule was revisited in the recent Supreme Court decision in *Barton v Morris* [2023] UKSC 3 which concerned a straightforward contract. Mr Barton was a property developer who agreed with Foxpace Limited that, if he introduced Foxpace to a potential purchaser for a property called Nash House, who then went ahead and bought the house for £6.5 million, Foxpace would pay Mr Barton £1.2 million. The parties did not agree what would happen if the purchaser introduced by Mr Barton paid less than £6.5 million for the house. Mr Barton introduced a purchaser to Foxpace and the price was initially agreed at £6.5milllon. However, it transpired that the ability to develop the site might be compromised by the HS2 high-speed railway project and so the price was reduced to £6 million and the sale completed at that price. Foxpace refused to pay Mr Barton on the basis that the price of £6.5 million had not been achieved and Mr Barton sued Foxpace.



His claim was framed both in contract and unjust enrichment. The contractual claim was that, either as a consequence of default rules on implied terms (either in law or fact) he was still to be paid reasonable remuneration even if a price of £6.5 million was not achieved. By a majority of 3 to 2, the Supreme Court held against him on the contractual claim. However, his fallback position was that as the basis of the parties' agreement had been a sale at £6.5 million and that basis had failed, that brought the law on unjust enrichment into play. The court was unanimous in rejecting that argument but for very different reasons.

The majority relied on the *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149 line of authority but found that there was no failure of basis. All that had happened was that the parties had failed to provide for what happened below £6.5 million and that silence was determinative of both Mr Barton's contractual claim and any claim for unjust enrichment.

> "Ultimately in Barton, the application of unjust enrichment is not too severely tested but it is perhaps possible to detect varying degrees of enthusiasm for its application from the different justices."

In their dissenting judgments, Lord Leggatt and Lord Burrows rejected an analysis based on *Dargamo* as that related to a bilateral agreement whereas this case dealt with a unilateral one – Mr Barton was not under an obligation to do anything. Lord Leggatt held that where there was a contract, it was the law of contract alone which determined the point and that would be undercut if another set of principles (i.e. those relating to unjust enrichment) applied. Lord Burrows agreed but appeared to come very close to allowing Mr Barton's claim on the basis that, as the relevant obligation to pay was implied (at least in his view), it was perhaps artificial to say that the parties had themselves allocated the risks involved. He concluded that, had he not found for Mr Barton on implied terms, he would have done so for unjust enrichment.

Ultimately in *Barton*, the application of unjust enrichment is not too severely tested but it is perhaps possible to detect varying degrees of enthusiasm for its application from the different justices. Notably, Lord Burrows has, writing extra-judicially, defended the law of unjust enrichment against some of its critics and in an article in the Cambridge Law Journal in 2019 described it "not yet a glorious cruise-liner but… certainly not a disastrous shipwreck". It will be interesting to see in what direction it sails over the next few years.

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Loss by Unlawful Means: Is the Tide Turning?

Julie Hamilton provides an overview of an unlawful means conspiracy case which was heard in the Court of Session last year.

Unlawful means conspiracy cases may be increasing in England and Wales, but they are comparatively rare in Scotland. However, in May 2023, a judgment by Lord Sandison in the Commercial Court of the Court of Session caught the headlines, regarding a £400 million action involving offshore energy companies – *Moray Offshore Renewable Power Limited v Bluefloat Energy UK Holdings Limited* [2023] CSOH 29.

Background

ScotWind Leasing was a high-profile project launched in 2017 by Crown Estate Scotland (CES) with the purpose of granting lease options for offshore wind farms over parts of the Scottish seabed. This included the site NE6, which was bid for by Moray Offshore Renewable Power Limited (MORPL).

NE6 was won by a consortium of Bluefloat Energy UK Holdings Limited (BEUHL) alongside 10 other entities. MORPL considered some of the claims made by BEUHL's consortium in its successful bid as false and misleading, particularly claims about members of the consortium and certain of their employees' experience of developing a similar project previously. MORPL argued that BEUHL, along with other members of the consortium, had acted unlawfully by making false statements in their bid and in doing so had injured the interests of MORPL and other bidding parties. MORPL also argued that if it was not for the inaccurate statements of BEUHL, it would have been the successful bidder. BEUHL strongly denied that any claims made by it or its bidding partners in the bidding process were materially inaccurate and contested the action on all fronts.

The judge carefully analysed the arguments, but ultimately dismissed the action.

Intention to Cause Loss

In order to establish that the defender had caused the pursuer loss by unlawful means the pursuer would have to establish that the defender: (i) had an intention to cause economic harm to the pursuer (ii) by the use of unlawful means, which unlawful means (iii) affected CES's freedom to deal with the pursuer.

The court was satisfied that the "intention" element of the delict (tort) to cause loss by unlawful means was relevantly pled, because harm to the other bidders was the alleged means by which BEUHL had attempted to position itself as the successful bidder and not merely a foreseeable consequence of the alleged behaviour. Lord Sandison noted it was not necessary for there to be evidence that BEUHL knew of MORPL's bid specifically or the exact identities of those liable to be harmed by the alleged misrepresentation.

> "Unlawful means conspiracy cases may be increasing in England and Wales, but they are comparatively rare in Scotland."

Unlawful Means

MORPL required to demonstrate that BEUHL had gained by way of unlawful means or, alternatively, unlawful means conspiracy. These are remedies available in circumstances where harm occurs because of the actions of a third party. To succeed, MORPL required to demonstrate that the alleged exaggeration in the bidding process would be a wrong legally actionable by CES. MORPL's insistence on the actionable cause of action being breach of contract by BEUHL was found irrelevant by the judge, who found the statements in which the alleged misrepresentation had taken place did not amount to contractual terms.

Interestingly, he did comment that it might have been possible to plead a relevant case based on a "continuing responsibility" on the maker of a pre-contractual representation and the conclusion of a contract in reliance on it after a period of time (see *Cramaso LLP v Viscount Reidhaven's Trustees* [2014] UKSC 9).

Dealing

While the judge noted that in most circumstances it would be "very unusual" for an unfair business practice consisting of alleged false self-praise to impact the freedom of anyone to deal as they saw fit in the market, in the context of a bidding process with strictly defined evaluation rules, and a requirement to make the highest scorer the successful bidder, it would be possible to claim a distortion of the process affected the dealing freedom of CES.

Instrumentality and Causation

Had the court been favourable to the unlawful means arguments, a final difficulty for MORPL would be proving that the unlawful activity had caused loss. The judge commented that MORPL did not know and had not made much of an effort to find out whether BEUHL's actions had caused it to be unsuccessful in the bidding process. There may have been several bidders in the NE6 lease option and the pursuer may never have won, even if the defender had not acted as alleged, or another bidder may have won. This was "no more than an expedition based on hope".

> "A party wishing to proceed with an unlawful means claim should carefully consider the framing of legal arguments as well as how evidence of harm and loss will be demonstrated."

Comment

This case is an example of the difficulty of succeeding with an unlawful means claim, which requires both harm to a third party, which is actionable to that third party, and evidence of loss to the pursuer itself. A party wishing to proceed with such a claim should carefully consider the framing of the legal arguments as well as how evidence of harm and loss will be demonstrated.

Meantime, the tide may not be turning in unlawful means cases in Scotland. ■

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Winding-up an Overseas Company in Scotland

Nicola Ross discusses a case heard recently in the Inner House which considered the application of section 221 of the Insolvency Act 1986 in Scotland.

Can an English company successfully ask the Scottish Courts to wind up a company registered overseas?

Or to put it another way, can the Scottish courts wind up an overseas company? It might come as a surprise, but the answer is "yes". That "yes" comes with a caveat, so the full answer is really "yes, in the right circumstances".

What might constitute the "right circumstances" was clarified in the recent case of *Kingston Park House Limited v Granton Commercial Industrial Properties Limited* [2022] CSIH 59.

Background

The facts of the case are straightforward. Kingston Park House Limited ("Kingston"), a company registered in England and Wales, advanced a secured loan of £7 million to Granton Commercial Industrial Properties ("Granton"). Granton was registered in Jersey and its only substantial assets were plots of land in Edinburgh, Scotland. Granton defaulted on the loan and Kingston applied to the Court of Session in Edinburgh for a winding up order against Kingston – even though Granton was registered in Jersey – on the basis that Granton could not pay its debts as they fell due.

The classic ground for establishing jurisdiction for presentation of a winding-up petition is, of course, the location of the registered office. However, Granton was registered in Jersey so that was not an option here. Kingston instead relied upon section 221 of the Insolvency Act 1986 which gives the court a discretionary power to wind up "unregistered companies" – being companies which are registered overseas but have a place of business within the UK.

Three Core Requirements

Section 221 is supplemented by the English Court of Appeal case of *Re Latreefers Inc* [2000] B.C.C.174 (which was applied in Scotland by Lord Hodge in the case of *HSBC Bank plc* [2010] SLT 281) so that, following those decisions, there are "three core requirements" for section 221 to apply:

1. There must be a sufficient connection with Scotland which may, but does not necessarily have to, consist of assets within the jurisdiction.
2. There must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order.
3. One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction.

In this case, the application for the winding-up order was opposed by Granton, who argued that the test had not been satisfied. The judge, at first instance, disagreed and granted the winding-up order. Granton then appealed and the case was argued before the Inner House of the Court of Session. The Inner House dismissed the appeal, finding that the three core requirements had been met because:

1. There was unquestionably a sufficient connection with Scotland – Granton's only material assets were in Scotland;
2. The winding-up procedure could result in satisfaction of Kingston's debt and it was not for the court to compare possible outcomes from winding-up as against a security enforcement process ("calling up", as it is known in Scotland);
3. *(a)* Kingston would be subject to the jurisdiction of the Scottish courts in relation to insolvency law by virtue of section 426(1) of the Insolvency Act 1986 because that section allows an order of the Scottish courts in relation to insolvency law to be enforced in England as though it were an order of the English courts; and
   (b) Granton granted standard securities over Scottish properties, meaning they could raise or defend court proceedings in Scotland in connection with the securities, and so they were subject to the jurisdiction of the Scottish courts.

Outcome

Even though the court was satisfied that the three core requirements had been met and the winding up order ought to be made, the court was at pains to stress that the "three core requirements" are not to be applied as "hard-edged rules of law". Instead, "they are simply factors that may be relevant to the exercise of the court's discretion depending on the particular facts of the case".

Comment

In this case, the court took the view that "there are strong connections with Scotland. Winding-up here is entirely appropriate. It infringes no principle of international comity". Against a background of all material assets being in Scotland, that surely makes sense. The Scottish courts have shown in the past that they are happy to use section 221 of the Insolvency Act to wind up overseas companies in similar circumstances (e.g. the winding-up of the Scotsman Company (Edinburgh) Limited – registered in the British Virgin islands but its main asset was the iconic five-star Scotsman Hotel in Edinburgh). In light of the decision in *Kingston*, it is clear that position is not going to change and, by moving away from the three core requirements being thought of as hard and fast rules, the courts may, in fact, be more flexible than had previously been thought to be the case.

One thing to keep in mind, of course, is that companies registered in other parts of the UK would not count as "overseas" companies so there ought to be little risk of a Scottish court trying to wind up an English registered company! ■

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The Bankruptcy and Diligence (Scotland) Bill

Leon Breakey provides an overview of the changes to debt recovery processes proposed by the Bankruptcy and Diligence (Scotland) Bill.

The Bankruptcy and Diligence (Scotland) Bill was introduced on 27 April 2023. The Bill seeks to enact stakeholder-led recommendations to improve current insolvency solutions. In addition to making technical changes to bankruptcy legislation, the Bill is intended to aid those who face difficulties with debt and serious mental health issues.

Mental health moratorium

The first section of the Bill allows Scottish Ministers to establish a moratorium on debt recovery action by creditors against those who have a mental illness. The Bill does not specify how the moratorium would work in practice but it notes that regulations may set out the following:

- eligibility criteria;
- specific debts covered by the moratorium;
- duration of the moratorium; and
- activity of creditors allowed and prohibited throughout the moratorium.

The Law Society of Scotland ("LSS") submission to the *Bankruptcy and Dilligence (Scotland) Bill, Call for views (July 2023)* suggested that the regulations surrounding a mental health moratorium should avoid being too prescriptive. LSS noted that mental health conditions can be disabilities and also protected characteristics under the Equality Act 2010. Vulnerable debtors should therefore be safeguarded, although third party intervention and verification are advisable to strike a balance with the interests of creditors. LSS also recommended that trained debt advisors assist those struggling with debt.

> "Vulnerable debtors should be safeguarded, although third party intervention and verification are advisable to strike a balance with the interests of creditors."

Amendments to existing bankruptcy legislation

The Bill suggests the following small or technical amendments to the Bankruptcy (Scotland) Act 2016 (the "2016 Act").

Firstly, section 2 of the Bill attempts to set out clear processes for applying for recall of an award of sequestration (i.e. Scottish personal bankruptcy) and remove uncertainty in the functioning of the relevant sections of the 2016 Act.

Section 22 of the 2016 Act will be revised to provide that the Accountant in Bankruptcy ("AiB") should award sequestration if satisfied that the relevant criteria have been met if the application was made via the minimal asset process (a process which allows individuals with a low income to write off unsecured debts), in addition to full administration, which was already the case.

Section 98 of the 2016 Act deals with gratuitous alienations (which are similar to the English transactions at an undervalue). The Bill will make some minor technical corrections to this provision to preserve third party rights in situations where the third party entered into a transaction in good faith and for value.

Additionally, section 5 of the Bill sets out time frames for appeals in respect of decisions made by the AiB, including that an appeal to the Sheriff in relation to a decision made by the AiB should be made within 14 days.

Diligence

Diligence is the collective term for various processes of debt enforcement in Scotland. Sections 6 to 10 of the Bill put forward a variety of proposed amendments to the Scottish law of diligence.

In relation to arrestment, or the freezing of assets, the Bill proposes that a third party holding the assets should advise the relevant creditor of the existence and description of the assets.

Further, in circumstances where a creditor can order a debtor's employer to make pay deductions and transfer these to the creditor – known as an earnings arrestment – the Bill suggests that an employer should advise the creditor within 21 days whether the arrestment has been successful.

Provisions are also proposed to ensure that debtors are provided with debt advice and an information package.

Next Steps

The Bill is currently at stage 1 in the parliamentary process. This involves a review of the draft text by the relevant parliamentary committees and the taking of evidence from experts and other stakeholders. Stage 1 consideration of the Bill has now been extended to 23 February 2024. It is anticipated that the Bill will come into force in late 2024.

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National Planning Framework 4 and the Exceptional Release of Housing Land

Douglas Milne and Cameron Greig consider the recent planning appeal which demonstrates a shift in national policy.

In Scotland, as in the rest of the home nations, housing has continued to be a high-profile and contentious planning topic. This is particularly so as practitioners begin to get to grips with the new national planning framework in Scotland, National Planning Framework 4 ("NPF4").

In the planning world before NPF4, local development plans essentially offered a route towards development consent for housing on unallocated sites in circumstances where a shortfall against the five-year effective housing land supply could be established. In such circumstances, the presumption in favour of sustainable development in Scottish Planning Policy became a significant material consideration which could only be overcome where adverse impacts demonstrably outweighed the benefits. This became known as the 'tilted balance', with an established shortfall effectively tilting the balance of decision-making in favour of granting consent for housing development on unallocated sites.

> "NPF4 and the existing local development plans take quite different approaches to the release of housing land on unallocated sites."

The adoption of NPF4 in February 2023 superseded Scottish Planning Policy and introduced a new approach to the exceptional release of housing land on unallocated sites. This new approach is contained in Policy 16(f) which provides a release mechanism for unallocated sites "in limited circumstances". NPF4 is now part of the statutory development plan and accordingly sits alongside the existing local development plans prepared by local authorities. However, NPF4 and the existing local development plans take quite different approaches to the release of housing land on unallocated sites.

The transitional arrangements for the adoption of NPF4 provide that "in the event of any incompatibility between a provision of the National Planning Framework and a provision of a local development plan, whichever of them is later in date is to prevail". The question of how to reconcile these approaches to the exceptional release of housing land for unallocated sites and whether or not an incompatibility exists between NPF4 and existing local development plans has accordingly been the subject of much debate in the various housing applications and appeals which have followed the adoption of NPF4.

In April 2023, the Scottish Ministers called-in (i.e. recalled) one such planning appeal (for a proposed housing development on an unallocated site at Mossend, West Calder) for determination on the basis that "the appeal raises national issues in terms of the application of National Planning Framework 4". At the same time, numerous other live planning appeals for housing on unallocated sites were sisted (paused) pending the outcome of the Mossend Appeal.

The Scottish Ministers issued their decision in the Mossend Appeal in July 2023. The Ministers decided to dismiss the appeal and refuse planning permission for the development. They concluded that Policy 16(f) of NPF4 is incompatible with the relevant housing release policy in the West Lothian Local Development Plan (Policy HOU2) with the consequence that Policy 16(f) of NPF4 prevails and must be applied.

> "For developers, it is more important than ever to ensure that sites are allocated in the new local development plans which are being prepared."

The Ministers acknowledged that there are aspects of Policy 16(f) which cannot be satisfied until the concept of 'the deliverable housing land pipeline', introduced by Policy 16(f), is established. However, Ministers were nonetheless of the view that Policy 16(f) has effect from the date NPF4 is adopted and that this new approach to the exceptional release of housing land is the one to be followed.

As such, Ministers found that the requirement to maintain a five-year effective housing land supply and the housing land requirements established in local development plans "have no residual role". Likewise, Ministers found that the concept of the tilted balance "no longer has any effect".

In short, this decision indicates that NPF4 has shifted national policy towards a significantly more restrictive approach to the exceptional release of housing land on unallocated sites, at least in the short term until deliverable housing land pipelines are established and 'new-style' NPF4-compliant local development plans are brought forward. For developers, it is more important than ever to ensure that sites are allocated in the new local development plans which are being prepared.

This is not the end of the story: the Scottish Ministers decision has itself been appealed to the Court of Session. The Court's decision will be keenly awaited by local authorities and developers alike. ■

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An Update on Cladding Claims in Scotland

Ken Carruthers and Julie Scott-Gilroy provide an update on claims relating to cladding for residential and commercial properties.

Post-Grenfell claims relating to cladding continue to appear and to generate a degree of controversy amongst property owners, developers and design team professionals alike. One consequence of this is the emergence of legislation from the Scottish Parliament which attempts to address some of the issues arising relating to unsafe cladding on residential properties.

Unlike the position in England, all property owners in Scotland are freeholders. Only occasionally are management companies in place able to coordinate remedial cladding works. This means that material works usually require the consent of each owner in a multi-owned and occupied property.

This raises the important question of what happens when consent cannot be obtained?

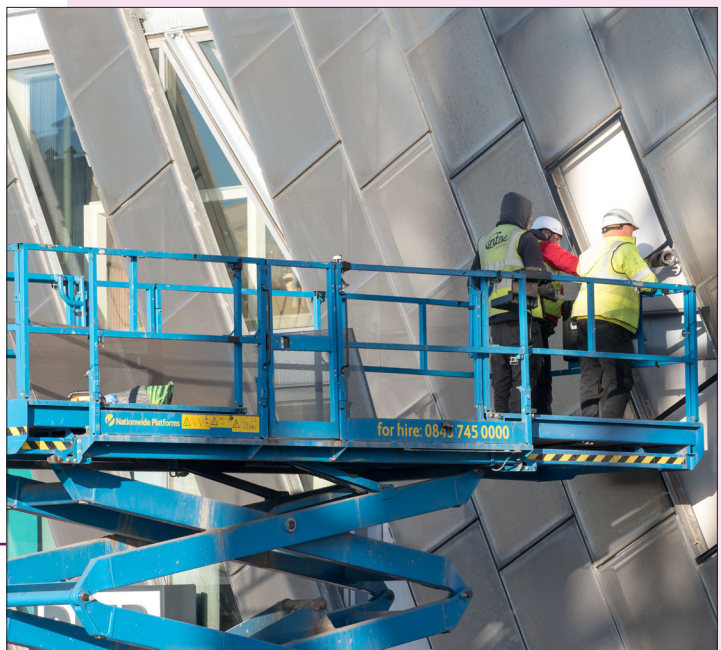
On 2 November 2023, the Scottish Government introduced the Housing (Cladding Remediation) Bill, which gives the Scottish Government power to assess the safety of clad residential buildings built between 1 June 1992 and 1 June 2022, and to arrange remediation works where this is found to be necessary. This includes where owner consent cannot be obtained where, for example, consent is refused or the owner is uncontactable. The effect is to avoid unsafe properties being left in limbo where consent for repair works cannot be obtained.

The Bill also introduces a Cladding Assurance Register. This is intended to provide both residents and purchasers with reassurance that remediation works have been carried out or the building is otherwise safe. The Bill also enables the Scottish Government to establish a Responsible Developer's Scheme to support engagement with developers and encourage them to pay for and carry out remediation works.

> The proposed Responsible Developer's Scheme is similar to the Responsible Actor Schemes operating in England.

In situations where owner consent cannot be obtained, the Scottish Ministers can, amongst other things, arrange for the remediation work to be undertaken and billed to owners. Ministers also have the power to evacuate buildings where the cladding constitutes a substantial risk to life or where the occupants are endangered due to the nature of the work to be carried out.

The proposed Responsible Developer's Scheme is similar to the Responsible Actor Schemes operating in England, but details of the Scheme have still to be published and it is not clear if the Scheme will be a mirror image of the one running in England.



On the commercial side, we continue to see various claims against professional designers. A common legal difficulty relates to the law of prescription. Claims often relate to schemes designed and built many years ago. The right to pursue a claim typically prescribes five years after the right to raise the claim arises and difficulties still exist in identifying when the prescription clock starts to run.

The Prescription & Limitation (Scotland) Act 2018 was supposed to bring much needed clarity and provides that the prescriptive period will not commence until the date the pursuer (claimant) is aware of *(i)* the loss; *(ii)* the act or omission that caused the loss; and *(iii)* the identity of the person who caused the loss.

It remains to be seen how the new provisions will operate in practice.

> “To hold the contractor or design team liable, it remains necessary, in our view, to demonstrate fault on the part of the material specifier when the cladding or other building materials were first selected.”

Further innovation is reflected in the provisions of the Building Safety Act 2022 relating to claims concerning cladding and construction products. The Act extends the limitation period for liability for construction products to 15 years from the date the relevant works were completed. The period has been extended further to 30 years for cladding products, or 15 years for cladding products if the right of action accrued on or after the commencement date. Both arrangements amend the normal rules of prescription set out in the Prescriptions and Limitation (Scotland) Act 1973.

To hold the contractor or design team liable, it remains necessary, in our view, to demonstrate fault on the part of the material specifier when the cladding or other building materials were first selected. Building regulations are commonly updated, and liability on the part of the contractor or the design team should not arise for the cost of replacement cladding now considered to be unsafe if it can be established that the material was fully compliant at the date of specification and construction of the building in question. Any attempt to impose liability retrospectively should be challenged. ■

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The Importance of Trauma-Informed Practice in Personal Injury Law

Nicola Edgar provides an overview of the Victims, Witnesses and Justice Reform (Scotland) Bill, introduced in the Scottish Parliament, which will put trauma-informed practice on a statutory footing.

Trauma-awareness and trauma-informed practice are gaining momentum in Scotland and have become a focus for the development of future procedures and practice, with significant work being done to entrench these values in law to ensure our justice system is fair and fit for purpose. It has been recognised that an understanding of these principles is important for those who are in contact with individuals involved in litigation, such as witnesses to a distressing incident or those pursuing a personal injury claim after being a victim of crime.

Equally as important is for lawyers to have self-awareness of the impact that conducting litigation may have on themselves, given the risks of vicarious trauma.

The Legislation

In April 2023, the Victims, Witnesses, and Justice Reform (Scotland) Bill was introduced in the Scottish Parliament. The aim of the Bill is to ensure victims are treated with compassion and their voices are heard. The Bill is controversial in parts, mainly due to the proposed abolition of the 'not proven' verdict and the introduction of a power to enable judge-only trials in sexual offence cases on a pilot basis. There are significant changes proposed in the Bill which seek to embed trauma-informed practice in both criminal and civil courts. The Bill remains at the consultation stage; it is, though, clear that our justice system is moving towards a trauma-informed approach.

Whether specialising in advising claimants or defenders, it will be important for those practicing in Scotland to understand the specific practice and procedures in place to ensure cases are properly handled and clients and witnesses receive appropriate advice. This clearly goes beyond personal injury law and will be relevant to other areas of litigation.

What is Trauma-Informed Practice?

A trauma-informed approach does no further harm to those who have suffered trauma, supports their recovery by recognising the impact of that trauma and prevents any re-traumatisation through the legal process. This practice is the most effective way to work with people impacted by trauma and will ensure you secure better evidence and greater engagement from your client, which will ultimately allow you to do a better job whilst also providing better client care. In addition, trauma-informed practice will mitigate the impact of vicarious trauma on solicitors, which may lead to a burnout.

> "Trauma-informed practice is the most effective way to work with people impacted by trauma and will ensure solicitors secure better evidence and greater engagement from their client."

How do you practice in a Trauma-Informed way?

For those who specialise in advising claimants, it is not about being more caring and it does not mean you have to act like a therapist. Whilst empathy is a crucial element of trauma-informed practice, boundaries remain vital and it is important to know what you can and cannot take on.

Trauma-informed principles allow for the development of trauma-informed relationships which should provide your client with **Safety**, **Trust**, **Choice**, **Collaboration** and **Empowerment**. Your client should feel safe throughout their case, both on a practical and emotional level. Trust can be built on good communication, predictability and consistency. Choice and control are not characteristics of trauma and so it is important to allow this where possible, whether that be over where a meeting takes place or how a statement is taken. Collaboration is crucial so your client understands the process and, if the outcome is not what they had hoped for, they are better placed to accept this. Finally, empowerment is important, particularly for victims of crime, who should be in a position to positively reflect on having taken action, regardless of the outcome.

Nicola Edgar is a Partner and is certified as a trauma-informed lawyer and accredited specialist in personal injury law.

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How to protect yourself from Vicarious Trauma?

For those of us who practice personal injury law, on whichever side of the fence you sit, it is crucial to protect your own wellbeing by recognising the impact of trauma. In this line of work, you are inevitably exposed to information about traumatic incidents, for example fatal accidents or historic sexual abuse. In order to properly represent your client, you may have to consider detailed statements or graphic photographs. The British Medical Association has detailed job characteristics which fuel vicarious trauma and these include the cumulative impact of trauma stories and the ethical pressure of maintaining confidentiality. Signs you are suffering from vicarious trauma include experiencing lingering feelings of anger about a client's situation, pessimism, and distancing and detachment from clients or colleagues.

It is important to be able to recognise these signs either in yourself or others. The support which can be provided within teams and by organisations to mitigate the impact of vicarious trauma is vital. Given the greater understanding of the impact of trauma, there is an obligation on all of us to consider what can be done to protect clients, colleagues and – depending on the type of law you specialise in – yourself.

What's Next?

Funding has been provided for NHS Education for Scotland to collaborate with various justice organisations to develop a framework to provide specific guidance for staff working in the justice sector in Scotland. This was launched in May 2023 and focused mainly on the criminal justice system. It is, though, hoped that further funding will be provided to support the development of specific guidance for the civil system. It is a positive step in Scotland that that this training is being provided and trauma-informed principles are on their way to being enshrined in law.

MFMac's Litigation Team

MFMac has one of the largest and most experienced litigation teams in Scotland. In recent years, we have achieved success in some of the highest profile cases before the Courts and Tribunals.

We are committed to providing our valued clients with high-quality, strategic and commercially sensible legal advice. Our clients include leading national businesses, public sector organisations and high-net-worth private individuals and entrepreneurs.

We deal with a wide variety of commercial disputes, including general commercial litigation, real estate litigation, professional negligence, personal injury, employment disputes and inquiry work.

MFMac's litigation team tailors its approach to cases depending on the nature of the dispute, and we have vast experience of dealing with actions at all levels of the Scottish court system.

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

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

> "We are committed to providing our valued clients with high-quality, strategic and commercially sensible advice."

MFMac's Scots Counsel Services

With offices in Edinburgh and Glasgow and a long and distinguished history at the heart of the legal community in Scotland, MFMac regularly works with English, Irish and international law firms on high-value and complex cross-border transactions and disputes.

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

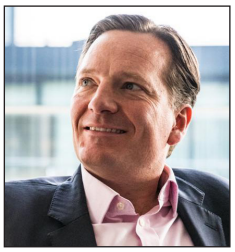
MFMac's Scots Counsel services are focused on providing solutions for you and your clients in a number of areas, including, but not limited to:

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

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

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

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



For further information on our Scots Counsel services, please contact **Ross Caldwell**.

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Thank you

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