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### Abandoned, Orphaned or Property for Ever?

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# Analysis

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## By-Election Records and Black Bin Bags: A Short Story about Democracy

A by-election for the UK Parliament was held in Glenrothes on 6 November 2008. The Labour candidate won a surprise victory, upsetting the SNPs predicted success in the seat. The SNP sought subsequently to access election records stored in accordance with the law in Kirkcaldy Sheriff Court and was told after considerable delay that they were missing.<sup>1</sup> Renovation work had been carried out in the Sheriff Court building and the documents, stored in black bin bags in its basement, had been lost. SNP MSP Tricia Marwick called for an independent inquiry by the Electoral Commission or the Sheriff Principal to investigate the loss.<sup>2</sup> Instead an internal inquiry was instituted by the Scottish Court Service: human error, it found, explained the loss.<sup>3</sup> The inquiry's account of mismanagement and mistakes provides a salutary reminder of the significance of election records. Such documents provide the principal recorded – and only original – source of data concerning the conduct of a poll. They also and more simply evidence the occurrence of an election. As Tricia Marwick observed, without the records “there is no evidence of either a fair or an unfair election and that undermines the confidence of everyone who took part”.<sup>4</sup> Our security in the integrity of the electoral process rests (rather insecurely at times, it seems) on the laws and routines governing the maintenance of the records of elections.<sup>5</sup>

### A. ELECTION RECORDS

Election records comprise sealed packets containing the ballot papers and the completed “corresponding numbers lists”, which note against each elector's number

1 The SNP requested the records on 19 November and was told on 30 January that they were missing. See “SNP demands inquiry into missing by-election record”, *Guardian* 3 Feb 2009; “By-election registers go missing”, *BBC News Online* 3 Feb 2009 (available at <http://news.bbc.co.uk/1/hi/scotland/7867022.stm>).

2 “SNP demands inquiry into missing Glenrothes by-election records”, *Telegraph* 3 Feb 2009.

3 B MacQueen, *Investigation into Missing Electoral Records from Kirkcaldy Sheriff Court* (2009) (available at [http://www.scotcourts.gov.uk/docs/report/Report\\_Investigation\\_into\\_Missing\\_Electoral\\_Register2009.pdf](http://www.scotcourts.gov.uk/docs/report/Report_Investigation_into_Missing_Electoral_Register2009.pdf)).

4 “SNP calls for probe over missing Glenrothes by-election record”, *Scotsman* 3 Feb 2009.

5 The loss of the Glenrothes documents followed a similar loss of marked registers in Woking after the 2005 general election: see Woking Borough Council, “New procedures to tighten up election security”, 20 Dec 2005 (available at <http://www.woking.gov.uk/news/archive?item=000043A7E311.C0A801C2.00007B2F.000D>).

in the register the number of the ballot paper issued to that person.<sup>6</sup> Also included (and similarly sealed) are copies of the electoral register marked to denote who voted in the election (the “marked register”).<sup>7</sup> It was the latter documents that were found to be missing from the Sheriff Court in Kirkcaldy. The Political Parties and Elections Act 2009 transfers responsibility for storage of those records from the sheriff clerk to the returning officer, who will retain them after the election.<sup>8</sup> This corresponds to the reform by the Electoral Administration Act 2006 of the storage regime in England and Wales, where the documents are now delivered by the presiding officer to the local authority’s electoral registration officer.<sup>9</sup> This role was previously performed by the Clerk of the Crown, whose surviving electoral functions include receiving the return of the writ and keeping a book of returned Members of Parliament.<sup>10</sup> The (now former) electoral roles of the sheriff clerk in Scottish constituencies date back to the Representation of the People (Scotland) Act 1832 (the Scottish corollary of the “Great Reform Act”) that instituted a system of electoral registration for which the sheriff was responsible until 1918.<sup>11</sup>

Safe storage of these documents is evidently vital to securing the secrecy of the ballot, as, combined, they can reveal how each elector voted: the corresponding numbers list provides a handy schedule of matching voter and ballot paper numbers, easily traced back to numbered voter names in the marked register.<sup>12</sup> Ballot papers and corresponding numbers lists may be accessed only on the authority of an order for production made by the House of Commons or by a court adjudicating on an election petition or trying an election offence.<sup>13</sup> This may be done to facilitate so-called “vote tracing”, carried out lawfully as part of a scrutiny of votes in the context of claims of electoral fraud.<sup>14</sup> Voters’ concerns about the implications of this lawful

6 “Corresponding number lists” were introduced by s 31(2) of the Electoral Administration Act 2006, and have replaced the system of noting elector numbers on ballot paper counterfoils.

7 Other retained documents are lists of certain categories of voter (those who required assistance to vote, or whose entry in the register was corrected after its publication). Also included are tendered ballot papers (cast by electors arriving at the poll to discover that a vote has been cast earlier in their name), ballot paper accounts (showing the total number of ballots entrusted to the presiding officer, accounted for as cast, unused, or spoilt papers), and certificates as to employment on duty on the day of poll.

8 Section 25. Election records pertaining to local government and European parliamentary elections are already stored by Scottish local authorities: see Scottish Local Government Elections Order 2007, SSI 2007/42, Sch 1 (the Scottish Local Government Elections Rules) r 45; European Parliamentary Elections Regulations 2004, SI 2004/293, r 59.

9 Electoral Administration Act 2006 s 41. It is the registration rather than the returning officer who retains records as only the former post is held in English constituencies by a local authority officer (returning officer roles are performed by the High Sheriff in county constituencies and the council chairman in boroughs).

10 Representation of the People Act 1983 Sch 1 (Parliamentary Elections Rules) rr 51-52.

11 The Representation of the People Act 1918 created a new post of “registration officer” held (and commonly still held) in Scotland by assessors appointed under the Lands Valuation (Scotland) Acts 1854, 1857 and 1859.

12 In fact the corresponding numbers list system makes this easier than searching through the stubs of separate ballot paper books for the notes of elector numbers jotted down on the counterfoils.

13 Representation of the People Act 1983 Sch 1 (Parliamentary Elections Rules) r 56.

14 This practice has grown in recent years reflecting the exponential growth of fraud surrounding on-demand postal voting. See e.g. the local election petitions in Birmingham (Bordesley Green

practice for the secrecy of their ballots are so evident and persistent that the Electoral Commission has been prompted to issue explicit advice to polling station staff about how to answer electors who query the need for their elector number to be recorded next to that of the ballot they receive.<sup>15</sup> Careful and secure storage of election documents is thus essential to reassure voters that the secrecy of their ballots can be protected against vote tracing, at least of the unlawful variety.<sup>16</sup>

Election records are held for one year before being destroyed.<sup>17</sup> During this time the public have rights of access to inspect those documents (excepting of course the ballot papers and the corresponding numbers lists).<sup>18</sup> The statutory regime entitles any person (not just registered electors) to make a written request to the holding authority (still the sheriff clerk in un-amended regulations) indicating the “purposes for which any information in the document will be used” and the date on which the person wishes to inspect the documents.<sup>19</sup> Thus there is no general entitlement to inspect the marked register freely as exists with the electoral register itself.<sup>20</sup> Where the request is to see the marked register, the requester must explain why access to the full unmarked register would not be sufficient.<sup>21</sup> Information obtained from inspecting the marked register may be used only for “permitted purposes”, which excludes any commercial use of the data.<sup>22</sup> Corresponding provisions regulate the supply of copies of the marked registers.<sup>23</sup>

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and Aston Wards) in 2004 and in Slough in 2007, and judgments thereon by Richard Mawrey QC, Election Commissioner. The full text of the Birmingham judgment (4 April 2005) (likening our democracy to a “banana republic”) is available at [http://www.hmcourts-service.gov.uk/cms/files/full\\_judgment\\_bordesley\\_green\\_aston\\_wards\\_election\\_10th\\_june\\_2004.pdf](http://www.hmcourts-service.gov.uk/cms/files/full_judgment_bordesley_green_aston_wards_election_10th_june_2004.pdf). The Slough case is *Simmons v Khan* [2008] EWHC B4 (QB) (criticising the “easy and effective opportunities for electoral fraud” attached to postal voting).

15 See Electoral Commission, *Handbook for Polling Station Staff* (2009) app 10 (available from <http://www.electoralcommission.org.uk/>).

16 The statutory stipulation of polling methods that facilitate the practice has been condemned by international election observers. The Government’s response to such criticism rather brazenly lauds the new local storage regime as “making it even more difficult than currently for any unscrupulous [central] Government systematically and illegally to examine them”: Department for Constitutional Affairs, *United Kingdom Government Response to the OSCE/ODIHR Assessment Mission Report on the UK General Election 5<sup>th</sup> May 2005* (2005, (available at [http://www.fco.gov.uk/resources/en/pdf/pdf14/fco\\_osce\\_ukelectionassessment](http://www.fco.gov.uk/resources/en/pdf/pdf14/fco_osce_ukelectionassessment)) para 21.

17 Representation of the People Act 1983 Sch 1 (Parliamentary Elections Rules) r 57.

18 Section 42(1)(a) of the Electoral Administration Act 2006 provides that “relevant election documents” (excluding ballot papers, corresponding numbers lists and certificates of employment on day of poll) are to be available for inspection by members of the public. Those rights are specified in the Representation of the People (Scotland) Regulations 2001, SI 2001/497 (as amended by the Representation of the People (Scotland) (Amendment) Regulations 2007, SI 2007/925, reg 47) regs 116-120.

19 2001 Regulations reg 118(2)(d).

20 Reg 43.

21 Reg 118(2)(c).

22 “Permitted purposes” are either “research purposes” (as defined by the Data Protection Act 1998 s 33) or “electoral purposes”: see reg 119 of the 2001 Regulations.

23 Reg 117; Representation of the People Act 1983 Sch 1 (Parliamentary Elections Rules) r 57 (as amended by Electoral Administration Act 2006 s 41).

## B. THE ELECTORAL REGISTER

These controls hamper public access to a vital democratic document, but perhaps we should be unsurprised, given the general failure of election law to safeguard the status of the electoral register as a deed created and maintained for exclusively democratic purposes. The Representation of the People Act 2000 instituted the creation of two versions of the electoral register: full and edited.<sup>24</sup> The aims of this regime have little to do with democracy and everything to do with the continuing use of the electoral register for commercial ends. Electors may opt in to the edited register, and thus be excluded from that version of the register sold freely to commercial concerns. The restrictions on access to and supply of the marked register simply echo the provisions regulating the supply, disclosure and use of information contained in the full register, aiming to protect the content of the full register from commercial misuse.<sup>25</sup> This, however, is only a partial affirmation of the democratic status of the full register: it is still sold to credit reference agencies. The register—in both edited and full versions—is thus licensed by election law for use as a commercially convenient marketing device.

Data protection concerns about the way in which the edited register is compiled and traded have led to pleas for its abolition.<sup>26</sup> Such calls for reform are very welcome, although are perhaps motivated by concerns that miss the point about the essentially public nature of the electoral register in all its incarnations. The edited register regime clearly undermines data protection policies, and raises particular concerns about the awareness of electors who need to opt in to rather than out of its protection from unrestricted commercial distribution of their details. More worrying from a democratic perspective is the lack of statutory protection of the integrity of the register itself, not just of the electors whose details are recorded in it.<sup>27</sup> There is no general rule of election law affirming the status of the electoral register as an exclusively democratic document, and plenty of provisions that subvert its standing as a civic deed. Election law should be reformed to secure the standing of the register in all its forms against the capacity of its commercial applications to undermine its fundamental democratic character. Such reform could also include a loosening of the restrictions on access to the marked register necessitated at present by the need to cut off attempts by commercial enterprises to subvert the prohibitions on access to the full register. Should the long-awaited consolidation of election legislation ever come to pass, a new Representation of the People Act could include a prominent declaration of the voter's right to scrutinise the marked register, expressing this upfront as an integral part of suffrage, a corollary of statutory entitlements to be

<sup>24</sup> Representation of the People Act 2000 s 9.

<sup>25</sup> 2001 Regulations regs 94-95.

<sup>26</sup> See e.g. R Thomas and M Walport, *Data Sharing Review Report* (2008, available at <http://www.justice.gov.uk/reviews/docs/data-sharing-review-report.pdf>) 5, 73. The review was undertaken at the request of the Government. The Electoral Commission also supports the abolition of the edited register.

<sup>27</sup> See H Lardy, "Democracy by default: the Representation of the People Act 2000" (2001) 64 MLR 63. The *Data Sharing Review* (n 26) 73 endorses the continued sale of the full register to credit reference agencies.

registered to and to cast a vote. This would be an improvement on the current statutory form of the access rights, buried deep in serial secondary enactments.

### C. CONCLUSION

Election records have a primal democratic significance that sits uneasily with photographs of ballot papers stored in black bin bags in the basement of a public building.<sup>28</sup> Such images are striking because they prompt us to associate ballots with household waste or other worthless or at least disposable goods. It is notable that the inquiry report observes that the Sheriff Court staff took much more care concerning the handling and storage of evidence than they demonstrated with respect to the electoral records.<sup>29</sup> Clearly the credentials of a democracy depend on grander themes than the nature of its laws and practices respecting its paper products, but those laws and practices should guarantee their respectful and secure handling. The inquiry report shows understanding of this, although the perception of the Scottish Court Service is that its failing represents a lapse in standards of “customer care” rather than a weakness with more profound and democratic implications.<sup>30</sup> Marked ballot papers and electoral registers are not like yesterday’s newspapers or receipts for used goods. They have value simply by being physical artefacts connected to the conduct of voting and polling. They evidence election events and offer confirmation that the mechanics of electoral democracy can be trusted to work.

Election law could even enhance the contribution such records make to our democracy by facilitating the open publication of the marked register, displaying without restriction to all interested observers the list of names of electors who chose to vote and those registered voters who did not take part in the poll. The decision not to vote is anyway already a matter of (partially open) public record, and could feasibly and defensibly be offered up to broader scrutiny in this way.<sup>31</sup> The law is correctly anxious (if insufficiently scrupulous) about protecting the secrecy of the ballot, but the same sort of privacy need not – indeed, ought not – to attach to the decision not to take part in an election.<sup>32</sup> Votes are properly secret. The act of voting

28 The photographs are contained in an appendix to MacQueen, *Investigation into Missing Electoral Records* (n 3).

29 MacQueen, *Investigation into Missing Electoral Records* (n 3) para 33.

30 This echoes the Electoral Commission’s view of voters as “consumers of electoral services”, voiced frequently in its reports on election law and policy.

31 An interesting online experiment in such publicity is the Who Voted? project, based at Stanford University, which makes voter lists (akin to UK marked registers) freely available for public inspection. See <http://www.whovoted.net/motivation.php>.

32 The Scottish Local Government (Elections) Act 2009 s 2 contains a curious provision forbidding election officials from publishing information that may disclose “whether or not a particular elector voted” (in the context of a scheme for publicising more information about voting patterns). However, interested electors may gain that information by accessing the marked register, as permitted by the Representation of the People (Post-Local Government Elections Supply and Inspection of Documents) (Scotland) Regulations 2007, SSI 2007/264. Corresponding rights of access to records of Holyrood elections are contained in the Scottish Parliament (Elections etc) Order 2007, SI 2007/937, Sch 2 (Scottish Parliamentary Election Rules) r 71.

is not. The integrity of our electoral process depends on more than assuring voters of the continuing secrecy of their ballots. It rests also on the law's capacity to realise and secure a distinction between the necessary privacy of electoral choice and the essential publicity of other aspects of elections. There are good reasons why ballots are secret, but the grounds for the legislative hampering of access to the marked register of electors are much less convincing, and stretch the notion of private voter choice beyond its legitimate reach. Allowing voters to browse the marked register in a public library may seem a radical proposition, but perhaps only because our present election law fails to characterise properly the distinction between the public and private aspects of voting, the civic and the personal.

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## The Sound of One Hand Clapping: The Gill Review's Faint Praise for Mediation

The long-awaited report of the Scottish Civil Courts Review, chaired by Lord Gill, was published in October 2009.<sup>1</sup> The array of ills it seeks to remedy is forcefully expressed: the service to the public is "slow, inefficient and expensive", procedures "antiquated" and remedies "inadequate".<sup>2</sup> Public confidence is so low that some businesses enter into contracts specifying English jurisdiction (perhaps the worst rebuke conceivable to Scottish lawyers). The case is thus made for radical change.

And change there is. The creation of a third tier of civil judiciary, the significant raising of the lower financial limit for Court of Session litigation<sup>3</sup> and two new courts (a sheriff appeal court and a national personal injuries court) are significant attempts to improve the performance of the civil court system. But what of alternatives to litigation? Neutral onlookers may have anticipated a significant role for alternative dispute resolution (ADR)<sup>4</sup> for three reasons:

- the Review's remit required it to have regard to "the role of mediation and other methods of dispute resolution in relation to court process";<sup>5</sup>

1 Report of the Scottish Civil Courts Review (2009, available at <http://www.scotcourts.gov.uk/civilcourtsreview/>). The main recommendations are summarised at 7-11 above.

2 Review (n 1) i.

3 From £5,000 to £150,000: Review (n 1) 21.

4 While the Review mentions "other forms of dispute resolution", it refers almost exclusively to mediation. With the exception of arbitration, there is little evidence of other forms of ADR in current use in Scotland.

5 Review (n 1) 1.

- in response to similar conditions in England and Wales, the Woolf Report and subsequent Civil Procedure Rules placed mediation at the heart of reform of the civil justice system;<sup>6</sup>
- the Business Experts and Law Forum Report of November 2008 recommended that the courts incorporate consideration of mediation into “standard case management processes”.<sup>7</sup>

This note examines the means available to civil justice systems to encourage the use of mediation, describes what the Review actually recommends, and hypothesises about the reasons for this choice.

### A. OPTIONS FOR ENCOURAGING THE USE OF MEDIATION

The Review starts positively enough: significant numbers of respondents thought mediation could help with the early resolution of disputes.<sup>8</sup> Noting that litigants tend to be more positive about mediation than the legal profession, it rehearses a number of reservations<sup>9</sup> (although none of the claimed benefits)<sup>10</sup> before declaring itself “satisfied” that mediation can help parties reach a negotiated settlement, “in many cases . . . the outcome most desired by all sides”.<sup>11</sup> Taking these sentiments at face value, how might the Review encourage greater use of mediation?

#### (1) Mandatory mediation

In many jurisdictions, policymakers have introduced an element of compulsion.<sup>12</sup> Generally the judge diverts the case to mediation at an early stage in the proceedings. If parties settle, no further judicial input is required. It takes little imagination

6 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995). See also S Roberts, “Settlement as civil justice” (2000) 63 MLR 739.

7 Report by the Business Experts and Law Forum (BELF) (2008, available at <http://www.scotland.gov.uk/Publications/2008/10/30105800/0>) para 3.2.1.

8 Review (n 1) 165.

9 It cites the constitutional right of access to the courts, the need for precedent, cost, and the belief that the system already encourages early settlement of disputes.

10 The BELF Report (n 7) cites speed, cost and self-determination. To these could be added confidentiality, the preservation of business relationships and the potential for creative solutions.

11 Review (n 1) 169.

12 See, in England: H Genn et al, *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure* (2007); in Canada: R G Hann et al, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months* (2001); in Italy: G De Palo and P Harley, “Mediation in Italy: exploring the contradictions” (2005) 21 *Negotiation Journal* 469; in Australia: D Spencer, “Mandatory mediation and neutral evaluation: a reality in New South Wales” (2000) 11 *Australasian Dispute Resolution Journal* 237; in Germany: K Funken, “Court-connected mediation in Japan and Germany” (2001) University of Queensland School of Law Working Paper No 867; in the USA: R Wissler, “The effectiveness of court-connected dispute resolution in civil cases” (2004) 22 *Conflict Resolution Quarterly* 55.

to see the attraction of such schemes where courts are overwhelmed by litigants and plagued by delays. Some studies characterise mandatory mediation as the necessary “kick-start” to introduce a new and unfamiliar process;<sup>13</sup> others are more sceptical.<sup>14</sup>

## (2) Costs sanctions

A more subtle form of encouragement sees the courts penalising those who unreasonably fail to consider mediation via costs awards. Closest to home, the English Civil Procedure Rules instruct the courts to take into account “the efforts made, if any, before and during the proceedings in order to try to resolve the dispute”.<sup>15</sup> A considerable body of case law has grown up in relation to these Rules, defining and limiting the extent to which an unreasonable refusal to mediate will affect costs.<sup>16</sup> Nonetheless, the threat of non-recovery of legal costs is significant.

## (3) Spelling it out

Another, less punitive, method of encouraging mediation is to require parties to narrate in their averments what steps they have taken to resolve their dispute. This variant also features in the English Rules where all of the pre-action protocols contain this or similar wording: “Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered”.<sup>17</sup>

## (4) Systemic support

Lastly, a civil justice system that seeks to support the use of mediation can take steps to enhance its credibility. Clarifying the position on confidentiality and the admissibility of evidence from mediation would help Scotland to comply with its obligations under the 2008 European Directive on cross border mediation.<sup>18</sup> A more forceful step would be to afford special status to mediation outcomes, rendering them more readily enforceable.<sup>19</sup>

13 C McEwan and R Maiman, “Small claims mediation in Maine: an empirical assessment” (1981) 33 *Maine L Rev* 237; Wissler (n 12); Hamm (n 12).

14 See Genn et al, *Twisting Arms* (n 12).

15 Civil Procedure Rules 1998, SI 1998/3132, r 44.5(3)(a)(ii).

16 See Genn et al, *Twisting Arms* (n 12) for a useful discussion of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 and related decisions.

17 Ministry of Justice, *Pre-action Protocol for Defamation* (2006, available at [http://www.justice.gov.uk/civil/procrules\\_fin/pdf/protocols/prot\\_def.pdf](http://www.justice.gov.uk/civil/procrules_fin/pdf/protocols/prot_def.pdf)) para 3.7.

18 Council Directive 2008/52 OJ 2008 L136/3.

19 As suggested by T Schultz, “Regulatory challenges posed by the enforcement of mediation outcomes” (2003, available at [www.online-adr.org/2ndUNECE\\_Talk.pdf](http://www.online-adr.org/2ndUNECE_Talk.pdf)).

## B. THE PUZZLE

Given its positive statements about mediation, one might imagine that the Review would opt for one or more of the above. It did not. Mandatory mediation was perhaps never likely. However, the Review specifically rejects both the second and third options and the fourth is not considered. What the Review does recommend is modest indeed: information on the Scottish Court Service website and leaflets, a small claims mediation service akin to the one recently piloted in England and Wales,<sup>20</sup> and a helpline.

Why such small beer? Given the Review's opening declaration that "minor modifications to the status quo are no longer an option",<sup>21</sup> why has it recommended just that for mediation? And what lies behind the assertion that these are not proper matters for the court to raise? Two significant factors may have contributed.

### (1) Selective evidence

The Review had a huge task, and can hardly be blamed for failing to get to grips with the vast quantity of research on mediation.<sup>22</sup> Nor is it surprising that a small country like Scotland should peek over the border and use conveniently accessible data, particularly given the paucity of comparable home-grown research. Nonetheless, there is a glaring omission from Annex D ("Mediation and other forms of dispute resolution in other jurisdictions").<sup>23</sup> Only one study from the USA is cited, and then only to support the notion that mandatory mediation achieves a lower settlement rate. In fact the study (of US government involvement in mediation) also finds savings per case of \$10,735, eighty-eight hours of staff time and six months of litigation time; comparable outcomes for mediation and litigation; and, contrary to Scottish assumptions, greatest use and success in the area of tort.<sup>24</sup> None of these details was noted.

It is widely accepted that the modern ADR movement originated in the USA.<sup>25</sup> Even a cursory overview of recent research provides rich and detailed evidence about mediation in the civil justice context. For example, a 2004 review article by Roselle Wissler examines ten small claims, twenty-seven general civil court and fifteen

20 This scheme has an upper limit of £5,000, is staffed by civil servants and takes place over the phone in the majority of cases (87%). It is one element of a Ministry of Justice policy "to mainstream mediation into the work of the courts": Review (n 1) 307-308.

21 Review (n 1) 1.

22 A search of the US legal database HeinOnline, conducted as part of the research for this note, yielded 45,000 articles on mediation.

23 Review (n 1) 311-318.

24 L B Bingham, T Nabatchi, J M Senger and M S Jackman, "Dispute resolution and the vanishing trial: comparing federal government litigation and ADR outcomes" (2009) 24 *Ohio State Journal on Dispute Resolution* 225.

25 S Roberts and M Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (2005) 45.

appellate mediation studies.<sup>26</sup> Interesting findings that the Review might have noted include:

- mediation is enduringly popular with users, with most reported as “highly satisfied”,<sup>27</sup>
- compliance with mediated outcomes is high<sup>28</sup> (a finding replicated in Scotland),<sup>29</sup>
- the range of referral routes to mediation from outright compulsion, through judicial encouragement to voluntariness, had little impact on settlement rates.<sup>30</sup>

Recent literature is less concerned with whether ADR is appropriate than with how it is used: “No further research should be needed to persuade policymakers about the potential efficacy of court-connected mediation programs . . . If [they] have not yet been persuaded . . . , further studies are unlikely to convince them”.<sup>31</sup> However, rather than looking to the jurisdiction where mediation has been most thoroughly evaluated, the Review seems to have focussed on the most sceptical research available.

## (2) Influential voices

Credited as a “distinguished commentator”, Lord Rodger clearly struck a nerve when, in relation to whether the courts should be seen as a last resort, he accused the Review panel of wishing the answer to be yes.<sup>32</sup> He recently spoke approvingly of litigants who incurred hundreds of thousands of pounds in expenses in a dispute over a piece of farm equipment worth £3,000, and asserted that “the problem in Scotland is not that we have too many cases, but that we have too few”.<sup>33</sup> Whether the Review actually agrees with this, it would be difficult to ignore such an influential voice. He was trenchant: the court system is, he asserted, “the best vehicle for achieving justice” and without judicial determination “individuals and businesses will lack guidance on all kinds of everyday situations”.<sup>34</sup>

Roberts and Palmer, considering recent developments around the world, state that “[a]lternative dispute resolution, with its objective in ‘settlement’ and its principal institutional realisation in ‘mediation’, is now a virtually unremarkable feature of

26 Wissler (n 12).

27 Wissler (n 12) at 58, 65 and 74.

28 See also C McEwan and R Maiman, “Mediating in small claims court: achieving compliance through consent” (1984) 18 *Law and Society Review* 11.

29 Review (n 1) 300, referring to the Edinburgh In-Court Advice and Mediation Projects: “all the agreements were thought to have been honoured”.

30 Wissler (n 12) at 60, 69.

31 J Lande, “Focusing on program design issues in future research on court-connected mediation” (2004) 22 *Conflict Resolution Quarterly* 89, 97.

32 Lord Rodger of Earlsferry, “Civil justice: where next?” (2008) 53(8) *JLSS* 14. See Review (n 1) 169.

33 Rodger (n 32) at 16. Interestingly, the academic who coined the phrase “the vanishing trial” has recently acknowledged that the phenomenon seems to have little connection to ADR: M Galanter, “The vanishing trial: an examination of trials and related matters in federal and state courts” (2004) 1 *Journal of Empirical Legal Studies* 459 at 517.

34 Rodger (n 32) at 16.

disputing cultures almost anywhere we look”.<sup>35</sup> It seems that Lord Rodger fired a warning shot across the Review’s bows and said “Not here”.

Another commentator singled out for approval by the Review is Professor Dame Hazel Genn. Once favourable to mediation,<sup>36</sup> she seems to have turned against it of late.<sup>37</sup> In her 2008 Hamlyn Lecture in Edinburgh she drew on recent research into two London court-based mediation schemes, one voluntary, the other compulsory,<sup>38</sup> painting a sorry picture of court-linked mediation, with low settlement rates, high opt-out rates and declining user satisfaction. The Review specifically endorses her view that mediation should be a supplement rather than an alternative to the court system, and that without judges to back it up, mediation is “the sound of one hand clapping”. Furthermore, the movement towards ADR in England and Wales, aided and abetted by the UK Government and senior judiciary, is a “threat to civil justice”.<sup>39</sup>

It is worth saying a few words about this alleged threat. Both Lord Rodger and Professor Genn imply that if an attempt at mediation is interposed between citizen and court, fundamental rights are lost. But two points need to be made. First, an attempt at mediation is just that. No-one is compelled to settle, or even to complete mediation. If it is unsuccessful, no-one loses their right to a hearing. And the second implication of these assertions is this: the citizens of England, the USA, Germany, Canada, Australia and many others have already lost these rights, with the collusion of their judiciary. We are noted for ploughing our own furrow, but even the Scots may pause before reaching this conclusion.

Perhaps it is not just this writer who sees the stamp of law and lawyers on these assertions. For example, in Professor Genn’s research, when seeking the reasons for objections to mediation, nine pages were devoted to solicitors’ views, as against three to those of the parties themselves.<sup>40</sup> And this is one of the marks of the Review: while acknowledging that the legal profession has a more negative attitude towards mediation than those it serves, it seems to have been unable to set this aside in its recommendations. It speaks approvingly of those who least approve of mediation, while marginalising those who speak in its support.

### C. CONCLUSION: WHERE DOES THE REVIEW GET US?

One of the Review’s four remits was to consider the role of mediation and ADR in court processes,<sup>41</sup> yet its overview devotes only one of eighty-two paragraphs to the subject. In contrast to other Common Law jurisdictions, the Review seems to have set its face against significant judicial encouragement for mediated alternatives to litigation (although the familiar alternative, negotiated settlement, receives robust

<sup>35</sup> Roberts and Palmer, *Dispute Processes* (n 25) 359.

<sup>36</sup> H Genn, *Mediation in Action: Resolving Civil Disputes Without Trial* (1999).

<sup>37</sup> See C Irvine, “Mediation and social norms: a response to Dame Hazel Genn” (2009) 32 *Family Law* 352.

<sup>38</sup> Genn et al, *Twisting Arms* (n 12).

<sup>39</sup> *Review* (n 1) 170.

<sup>40</sup> Genn and others (n 12) 76-87.

<sup>41</sup> *Review* (n 1) 1.

support in the form of pre-action protocols backed by costs sanctions).<sup>42</sup> Two questions remain: what does this mean for the Scottish justice system, and what practical steps might policymakers take now?

The first consequence is straightforward: more of the same. Legal practitioners who already view mediation as useful and cost-effective will continue to recommend it to their clients. Those who view it with suspicion will take comfort from this Review, perhaps keeping their fingers crossed that another generation will pass before the matter is seriously considered again. The “astonishing reversal” across the Common Law world which sees “adjudication relegated to an auxiliary, fallback position” will not happen here. Scotland will continue to offer “the beautiful promise of an authoritative, third-party decision” for the foreseeable future.<sup>43</sup> Litigation, not mediation, will be the *lingua franca* in Scotland.

This in turn must affect the Scottish Government’s aspiration to develop a centre for dispute resolution. While arbitration will be underpinned by a new Act of Parliament,<sup>44</sup> it now looks unlikely that any other form of dispute resolution will gather the critical mass to present a significant attraction to business, or assist Scotland to become the “Switzerland of dispute resolution”.<sup>45</sup> The Business Experts and Law Forum Report, attempting to explain why businesses choose English rather than Scots law, points out that mediation “receives only *ad hoc* judicial support”.<sup>46</sup> The Review clearly intends this to continue. This is a worrying instance of the law and business going their separate ways.

So what might policymakers do? Mandatory mediation clearly has little support in this jurisdiction. Costs sanctions seem unlikely too. However, the idea that pleadings should set out what efforts have been made to resolve the dispute finds more favour. In the time available this writer could not examine all of the responses to the consultation, but it is striking that several of the larger law firms, as well as the Court of Session Rules Council, make such a recommendation. The Review rejects it but, as noted above, its selective use of evidence and clear discomfort with its remit in relation to mediation suggest that its conclusions should not necessarily be the last word.

Policymakers could also consider the fourth option suggested above to enhance the credibility of mediation. It may take legislation to clarify fully the issues concerning confidentiality and admissibility, but much could be achieved through the Rules of Court, in both the Sheriff Court and the Court of Session. Provisions affirming that mediation is a privileged forum for business negotiation would support the Government’s goal of putting Scotland on the dispute resolution map. It would also place it at a considerable advantage over England and Wales, as well as complying with the EU Directive.<sup>47</sup> Finally, the Scottish Government could make an ADR

<sup>42</sup> Review (n 1) 187.

<sup>43</sup> Roberts and Palmer, *Dispute Processes* (n 25) 4.

<sup>44</sup> The Arbitration (Scotland) Bill was introduced into the Scottish Parliament on 29 Jan 2009.

<sup>45</sup> BELF Report (n 7) 7.

<sup>46</sup> BELF Report (n 7) 6.

<sup>47</sup> See n 18 above. I am grateful to David Semple for his thoughts on this matter.

“pledge” like that made by the UK Government in 2001, which produced cost savings of £26.3million in 2007/8.<sup>48</sup>

The Gill Review lacks neither courage nor ideas, and its structural and procedural reforms will significantly rationalise a rather antiquated civil court system. However, when it comes to thinking beyond the confines of the courts, its writers seem to have been unable to transcend their professional background and instincts. If they have their way, we will continue for the foreseeable future to be the “Scotland of Dispute Resolution”, where litigation trumps all.

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## Acting on Behalf of a Non-Existent Principal

What is the legal effect of an agent purporting to contract on behalf of a non-existent principal? Is there simply no contract, or is the agent personally bound under that same contract with the contractual counterparty?<sup>1</sup> Those were the issues considered by Lord Hodge in *Halifax Life Limited v DLA Piper LLP*.<sup>2</sup>

The defenders, DLA Piper LLP, had issued an offer to purchase subjects at 227 West George Street, Glasgow. The purchaser was defined as “the Members of the 227 Syndicate”. The offer received an unqualified acceptance. Unfortunately, the 227 Syndicate did not exist and did not come into existence at any point following acceptance of the offer. The pursuers raised an action seeking (i) declarator that the defenders were personally liable to implement the contract and damages for breach of contract, and, in the alternative, (ii) damages for loss caused by negligent misrepresentation. Losses could be relevantly claimed, the pursuers argued, given that the subjects had eventually been sold to a different purchaser at a much reduced price.

The main, and ultimately successful, argument advanced by the defenders was that they could be liable only if the intention of both contracting parties as revealed in the contract was that, despite purporting to act on behalf of the syndicate, the defenders should be bound as principals.<sup>3</sup> Counsel for the pursuers, on the

<sup>48</sup> Ministry of Justice, *Annual Pledge Report 2007/8* (2009, available at <http://www.justice.gov.uk/publications/docs/alternative-dispute-resolution-07-08.pdf>).

<sup>1</sup> The contractual counterparty is referred to here as a “third party”, reflecting general agency law terminology.

<sup>2</sup> [2009] CSOH 74, 2009 GWD 19-306.

<sup>3</sup> Para 5.

other hand, had sought to establish a general rule that an agent acting on behalf of a non-existent principal was personally bound in a contract with the third party.

### A. THE COURT'S REASONING

Lord Hodge relied<sup>4</sup> on the following passage from the judgment of Oliver LJ in *Phonogram Ltd v Lane*:<sup>5</sup>

The question I think in each case is what is the real intent as revealed by the contract? Does the contract purport to be one which is directly between the supposed principal and the other party, or does it purport to be one between the agent himself – albeit acting for a supposed principal – and the other party? In other words, what you have to look at is whether the agent intended himself to be a party to the contract.

This passage had been approved relatively recently in three English cases,<sup>6</sup> and the approach was also consistent with a case from the High Court of Australia<sup>7</sup> and one from the Supreme Court of New Zealand.<sup>8</sup>

Much of Lord Hodge's judgment rests on an application of normal rules of interpretation, and particularly the use of surrounding circumstances as part of the interpretative process: "the court may have regard to the knowledge which would reasonably have been available to persons in the situation of the parties at the time of the contract".<sup>9</sup> Counsel for the pursuers had argued that DLA Piper's knowledge that their clients did not exist should form part of the factual matrix. Lord Hodge rejected this contention, explaining that "knowledge which was reasonably available only to the *soi disant* agent would not form part of the factual matrix which could assist the court in the construction of the contract".<sup>10</sup> This enabled Lord Hodge to focus almost exclusively on the terms of the missives, from which he concluded that there was no indication of an intention which differed from the normal intention of a solicitor to bind only his client.<sup>11</sup>

Scots authorities on this issue are few and far between. In *McMeekin v Easton*<sup>12</sup> a minister, a farmer, and a doctor, members of a congregation of the Reformed Presbyterian Church, granted the pursuer a promissory note "in the name and on behalf of" the congregation. The court held the individual defenders personally liable on the promissory note. Lord Hodge distinguished this case on the basis that it would

4 Para 12.

5 [1982] QB 938 at 945D-E.

6 *Cotronic (UK) Limited v Dezonie* [1991] BCC 200; *Badgerhill Properties Limited v Cottrell* [1991] BCC 463; *Coral (UK) Limited v Rechtman and Altro Mozart Food Handels GmbH* [1996] 1 Lloyd's Rep 235.

7 *Black v Smallwood* (1966) 117 CLR 52.

8 *Hawkes Bay Milk Corporation Ltd v Watson* [1974] 1 NZLR 236, in which Wild CJ quoted with approval from *Black v Smallwood* (1966) 117 CLR 52.

9 *Halifax Life Limited* at para 16.

10 Para 17.

11 Para 19.

12 (1889) 16 R 363.

have been apparent to all contracting parties that the church itself could not be bound, and thus that the agents were accepting personal liability and could thereafter seek relief from the congregation.<sup>13</sup>

The English case of *Kelner v Baxter*<sup>14</sup> might, like *McMeekin*, have supported the existence of a general rule that agents in this situation are personally bound. In *Kelner*, a promoter acting on behalf of a company which had not yet been incorporated was held personally bound in the contract with the third party. This common law rule is embodied in section 51(1) of the Companies Act 2006. Nor can the company, once formed, ratify the promoter's actions. Ratification is retrospective in nature, having the effect of binding the principal from the moment at which the agent purported to conclude the contract on the principal's behalf.<sup>15</sup> This is, of course, an insurmountable problem for an unincorporated company acting as principal – it lacks legal capacity at this crucial moment. The only solution in UK company law is for the company once incorporated to enter into a new contract on the same terms and conditions.<sup>16</sup>

The authorities relied on by Lord Hodge suggest that *Kelner* has been restrictively interpreted. In *Kelner*, it was obvious to both parties that the principal was not in existence, the principal being described in the contract as “the Proposed Gravesend Royal Hotel Company”.<sup>17</sup> Thus it is only where all parties are aware either of the non-existence of the principal or of the principal's lack of capacity (as was the case in *McMeekin*) that the agent will be personally bound. In a similar manner, section 51(1) of the Companies Act 2006 will be applied only according to its terms, i.e. only where the contract purports to be made “at a time when the company has not been formed”. It cannot be applied in order to bind an agent where, for example, the company had been formed but subsequently been struck off,<sup>18</sup> or where the name of an existing company had been mis-spelled in the contract.<sup>19</sup>

Lord Hodge's approach, based on established authority in England, Australia and New Zealand, focuses solely on intention to determine contractual relations. However, it seems important to consider the policy behind holding the agent liable.

13 *Halifax Life Limited* at para 11.

14 (1866) LR 2 CP 174.

15 This rule is often expressed using the maxim *omnis ratihabitio retrotrahitur et mandato priori aequiparatur*, which Trayner translates as: “Every ratification operates retrospectively, and is equivalent to a prior order or authority. To ratify or homologate that which has been done without authority has the same effect as if the act had been authorised at the time of its performance”: J Trayner, *Latin Maxims and Phrases*, 4<sup>th</sup> edn by A G M Duncan (1993) 421. See also L Macgregor, “Agency and mandate”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2002) para 61.

16 This is not the position in much of the rest of Europe and beyond: the company once formed can ratify the agent's actions: see D Busch and L Macgregor, “Comparative law evaluation”, in D Busch and L Macgregor (eds), *The Unauthorised Agent: Perspectives from European and Comparative Law* (2009) 435–438; D DeMott, “Ratification: useful but uneven”, *European Review of Private Law*, forthcoming.

17 An issue noted by the High Court of Australia in *Black v Smallwood* (1966) 117 CLR 52 at para 4.

18 *Cotronic (UK) Limited v Dezonie* [1991] BCC 200.

19 *Badgerhill Properties Ltd v Cottrell* [1991] BCC 463.

Clearly, at least part of the function of this rule is punishment of the agent. There is at least an argument that a solicitor who is sufficiently negligent as to omit to check whether his client exists ought to be bound in the contract he seeks to conclude. Otherwise, the innocent party has wasted time in negotiating missives which could never have come to fruition. Begg suggested that expenses are payable in a situation which may be analogous:<sup>20</sup>

Thus, a law agent carrying on legal proceedings in name of an insane person is regarded as acting without authority, and is consequently liable in expenses to the opposite party, unless fairly justified by the circumstances of the particular case.

A possible argument against holding the agent personally liable in contract is the fact that specific implement is probably impossible. Here, DLA Piper could not have sold the property, not being owners of it. But then actions of specific implement are rare, and an award of damages for breach of contract against a solicitors' firm which has acted in this way is arguably fair. It is interesting to note that DLA Piper appear to have provided no explanation for the failure to carry out the most basic checks on their client, a course of action which potentially breached both the Code of Conduct for Solicitors 2002 and the Money Laundering Regulations 2007.<sup>21</sup>

It is worth pointing out that two of the English cases approved by Lord Hodge differ from *Halifax Life Ltd* in what may be a significant respect: in both, another contracting party existed, and this company could implement the contract, leaving the third party satisfied.<sup>22</sup> In *Coral (UK) Ltd v Rechtman and Altro Mozart Foods Handels GmbH*, Potter J noted the willingness of another company within the group to perform, and suggested that there was "no reason of law or policy why the liability of a principal in respect of the contract should be imposed on Mr Rechtman [the agent]".<sup>23</sup> Clearly policy issues are being considered in this type of case. By contrast, in *Halifax Life Ltd* there was no company in the background to step forward to implement the missives relating to 227 West George Street.

## B. AN ALTERNATIVE ACTION

Where an agent acts in this way, an alternative action exists: as was recognised by both sides in this action, DLA Piper could have been sued for breach of warranty of

20 J H Begg, *A Treatise on the Law of Scotland Relating to Law Agents*, 2<sup>nd</sup> edn (1883) 73, relying on *Rankine v Corson* (1825) 4 S 127 (NS 128), *Lindsay v Watson* (1843) 5 D 1194, and *McCall v Sharp* (1862) 24 D 400.

21 SI 2007/2157. This was asserted by the pursuers in *Halifax Life Limited*: see para 3.

22 In *Coral (UK) Limited v Rechtman and Altro Mozart Food Handels GmbH* [1996] 1 Lloyd's Rep 235, another company within the company group had undertaken to implement the contract when it transpired that the company which was the ostensible contracting party had been incorrectly designated in the contract. In *Badgerhill Properties Ltd v Cottrell* [1991] BCC 463, reliance on a trading name rather than the actual company name enabled the court to find that a contract existed, this contract being possible to perform by a company in existence.

23 [1996] 1 Lloyd's Rep 235 at 239-240.

authority. This is an action available to a third party against an agent who mis-states the extent or existence of his authority. Although there are few Scottish cases on the action,<sup>24</sup> the following definition from England was approved by the Inner House in 1903:<sup>25</sup>

[W]here a person, by asserting the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.

Although the action can be either contractual or delictual in nature, it is usually contractual. The measure of damages is:<sup>26</sup>

what was lost by the party with whom the contract was made in consequence of not having the valid contract which the agent professed to make—that is, the difference between the profit which would have been made on the abortive contract and the best terms which could be obtained in the market when the misrepresentation was discovered.

This measure of damages would have allowed Halifax to recover the difference between the actual contract price and the price at which the premises were eventually sold. Recognising that certain of the pursuers' averments supported their alternative case of misrepresentation, and that they might wish to plead a case of breach of warranty of authority, the case was put out By Order by Lord Hodge. We may yet see a further reported episode in this dispute.

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<sup>24</sup> *Rederi Aktiebolaget Nordstjernen v Salvesen & Co* (1902) 10 SLT 44 (OH), (1903) 10 SLT 543 (IH), (1903) 6 F (HL) 101 (the requirements of the action were discussed here even though it was not, in fact, a relevant case); *Anderson v Croall & Sons* (1903) 6 F 153; *Irving v Burns* 1915 SC 260. And see also the comments of Lord MacKay in *Royal Bank of Scotland v Skinner* 1931 SLT 382. For analysis of the action, see L Macgregor, "Scots law" in Busch & Macgregor (eds), *The Unauthorised Agent* (n 16) 291.

<sup>25</sup> *Firbanks Exrs v Humphreys* (1886) 18 QBD 54 at 60 per Lord Esher MR, approved by the Inner House in *Rederi Aktiebolaget Nordstjernen v Salvesen & Co* (1903) 6 F 64 at 76 per Lord Moncreiff, delivering the opinion of the court, and by Lord Halsbury LC in the House of Lords (1903) 6 F (HL) 101 at 101. Lord Moncreiff also refers with approval to *Collen v Wright* (1857) 8 E & B 647 per Willes J at 657, in which the Court of the Exchequer Chamber affirmed the earlier decision of the Court of Queen's Bench, (1857) 7 E & B 301.

<sup>26</sup> *Rederi Aktiebolaget Nordstjernen v Salvesen & Co* (1903) 6 F 64 at 75 per Lord Moncreiff, relying on *Simons v Patchett* (1857) 7 E & B 568 (erroneously cited as *Simons v Patchet* 7 E & B 586) and *Hughes v Graeme* (1864) 33 LJ QB 335.

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## Abandoned, Orphaned or Property for Ever? Copyright, Prescription and Personal Bar

While *Mitchell v Glasgow City Council*<sup>1</sup> may have been the last House of Lords decision in a Scottish appeal, it was not quite the final word from the House on Scots law. In the copyright case of *Fisher v Brooker*,<sup>2</sup> one of the final batch of decisions handed down by the House of Lords on 30 July 2009, Lord Hope of Craighead sent a characteristic “message to Scotland” on an apparent lacuna left by section 8 of the Prescription and Limitation (Scotland) Act 1973 on the extinction of rights of property which are not exercised or enforced for a period of twenty years.<sup>3</sup> While this does not apply to imprescriptible rights such as the ownership of land, the 1973 Act does not make clear whether or not it applies to the ownership of either corporeal moveables or incorporeals such as copyright. Lord Hope quotes, seemingly with approval, the views of commentators that the Act does apply to claims for the recovery of corporeal moveables based on ownership,<sup>4</sup> but also states that “there is much to be said for” the same commentators’ views that “section 8 of the 1973 Act should not be read as extending to the ownership of incorporeal property the duration of which has been prescribed by another enactment”.<sup>5</sup>

Copyright is a property right under the Copyright, Designs and Patents Act 1988, the duration of which is laid down by the same Act. Lord Hope’s view that this statutory term could not be abbreviated by the operation of prescription was reinforced by the express non-application of the equivalent English legislation (the Limitation Act 1980) to copyright.<sup>6</sup> “It would be anomalous,” suggested his Lordship, “if the period that section 12 of the 1988 Act prescribes for the duration of copyright throughout the United Kingdom (see section 157(1) of that Act) were to be subject to a provision about prescription that applies only to Scotland and the 1988 Act itself does not mention.”<sup>7</sup>

1 [2009] UKHL 11, 2009 SC (HL) 21; noted by P Webster, “*Mitchell v Glasgow City Council*: a foreseeable result?” (2009) 13 EdinLR 477.

2 [2009] UKHL 41, [2009] 1 WLR 1764.

3 Paras 3-4. Lord Neuberger, giving the main speech in the case, also refers to the Prescription and Limitation (Scotland) Act 1973 and the “considerable difficulties” with which it would have confronted the claimant (para 78).

4 Those cited are D Johnston, *Prescription and Limitation* (1999) para 7.08; W M Gordon, “Corporeal Moveable Property”, in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 18 (1993) para 567, and D M Walker, *Prescription and Limitation of Actions*, 5th edn (1996) 85.

5 Para 4.

6 Limitation Act 1980 s 39.

7 Para 4.

### A. THE LITIGATION

Lord Hope's reflections were prompted by the unusual facts of *Fisher v Brooker*, in which the claimant Matthew Fisher had succeeded in the lower courts in establishing that he was a joint author of the famous popular music work, "A Whiter Shade of Pale", recorded by the band Procul Harum and released in 1967. Fisher's contribution to the work was the composition of the organ solo at its outset and the organ melody which forms a counterpoint throughout most of the rest of the work. The other author of the music was Gary Brooker, like Fisher a member of Procul Harum at the time; the lyrics were written by the band's manager, Keith Reid. The copyrights in this work were however claimed by Brooker and Reid, and although Fisher from time to time made inquiries about his rights, he in effect let his claim to a share in the copyright (and the resultant royalties) lie dormant until 2005. At that point Fisher began serious moves to claim his entitlement, leading to the litigation of which the House of Lords' judgment was the climax.

Before Blackburne J at instance, Fisher's claims to the ownership of a copyright were successful. It was also held, however, that any rights to a share of the royalties more than six years before he began actively to make his claims were time-barred, while that specific period of inactivity meant that he must be also taken to have gratuitously licensed the exploitation of his contribution by the others involved. The judge further refused to grant Fisher an injunction against further exploitation of the work. But he held in Fisher's favour on an argument that the latter had lost his interest in the copyright as a result of estoppel, laches or acquiescence.<sup>8</sup> Overall, then, what this judgment gave Fisher was an enforceable interest in his copyright taking effect from 2005. But this was substantially over-turned by the Court of Appeal in a majority decision holding that it was unconscionable for Fisher to have revoked the implied licence in 2005 and that the defences of acquiescence and laches operated to prevent him exercising his rights as a joint owner of the copyright in "A Whiter Shade of Pale".<sup>9</sup>

The House of Lords in its turn unanimously reversed the Court of Appeal and more or less re-instated the first instance judgment. The main speech is by Lord Neuberger of Abbotsbury and is a detailed analysis of the application – or rather, non-application – of estoppel, acquiescence and laches to the facts of the case. This note will not pursue that analysis in any detail. Underlying much of the speech – and indeed those of the other Law Lords – is unease at the idea of a property right being undermined by equitable doctrines, and also the consideration that the parties seeking equity in this way had been substantially enriched for nearly forty years at the expense of the party against whom equity was being pleaded. Moreover, Fisher had asked the court to make declarations of right, not to grant him any equitable relief (such as an injunction) against which other equitable factors might be most relevant. Lord Hope perhaps expressed the concerns most lucidly, in language surely reflecting

<sup>8</sup> *Fisher v Brooker* [2006] EWHC 3239 Ch, [2007] FSR 12.

<sup>9</sup> *Fisher v Brooker* [2008] EWCA Civ 287, [2008] FSR 26.

his upbringing in Scots law:<sup>10</sup>

The law of property is concerned with rights in things. The distinction which exists between the exercise of rights and the obtaining of discretionary remedies is of fundamental importance in any legal system. There is no concept in our law that is more absolute than a right of property. Where it exists, it is for the owner to exercise it as he pleases. He does not need the permission of the court, nor is it subject to the exercise of the court's discretion. . . . These are rights which the court must respect and which it will enforce if it is asked to do so.

But this does not mean that the equitable considerations which underlie estoppel, laches and acquiescence – or personal bar in Scots law – have no role at all in relation to property rights. While it is, as Lord Hope says, “a very strong thing . . . to deny [a party] the opportunity of exercising his right of property”, it can be done in English law, as Lord Hope also notes, under the doctrines of proprietary estoppel.<sup>11</sup> But his Lordship does not take the opportunity to consider personal bar in Scots law in relation to property and copyright. It is however worth considering just what Scots law might have had to say on this in relation to Fisher's claims. After all, if it is anomalous for there to be different results in Scotland and England on the prescription and limitation point, the same must be true if that is also the effect of differences between personal bar and estoppel. And within Scots law itself we should also be mindful of Lord Deas' observation in 1877: “There must either be prescription or not. We are not to rear up new kinds of prescription under different names.”<sup>12</sup>

## B. PERSONAL BAR IN SCOTS LAW

Efforts here are much eased by the excellent book on personal bar by Elspeth Reid and John Blackie, published in 2006.<sup>13</sup> Reid and Blackie's great achievement is the identification and articulation of general principles of personal bar under which can be brought the multitude of terms and ideas previously rendering this area of law diffuse and difficult to understand – for example, laches, acquiescence, mora and taciturnity.<sup>14</sup> It is now clear that these words do not necessarily denote distinct concepts, each with its own particular legal consequences. Instead, they relate most to the distinct patterns of fact in which the general principles will apply.

The essence of when a person will be barred from exercising a right is where there is past inconsistent conduct with knowledge of the existence of the right, and it would be unfair if the right were now to be exercised. Unfairness can be indicated by any one of a number of different things, such as the blameworthiness of the rightholder's conduct, prejudice to the other party resulting from the inconsistent conduct of the rightholder, and the proportionality of the right barred to the inconsistency. Where the inconsistency lies in departing from past silence or inaction in relation to the right

<sup>10</sup> [2009] UKHL 41 at para 8.

<sup>11</sup> Para 7.

<sup>12</sup> *MacKenzie v Catton's Trs* (1877) 5 R 313 at 317.

<sup>13</sup> E C Reid and J W G Blackie, *Personal Bar* (2006).

<sup>14</sup> Note Lord Neuberger's doubts for English law as to the reality of distinctions between certain forms of proprietary estoppel, acquiescence and laches: *Fisher* at para 62.

in question, as in Fisher's case, indicators of unfairness must be "strongly present"<sup>15</sup> on the other side before bar will be established. A Scottish court might well therefore have shared the House of Lords' doubts about the unfairness to Brooker and his co-defendants in allowing Fisher now to assert his rights; but more emphasis might have been laid upon their past actions being the result of beliefs in entitlement to carry them out, and a consequent lack of reliance upon anything that Fisher had done or not done, rather than upon their enrichment at his expense.<sup>16</sup>

Personal bar can apply to property rights, as Reid and Blackie make clear, but they also note that, while it is used "sparingly" to prevent the exercise of personal rights, it is used "even more seldom" in respect of property.<sup>17</sup> Reid and Blackie devote a chapter to personal bar and property rights, discussing four types of case: allowing encroachment by permanent or quasi-permanent intrusion upon one's land, failure to enforce real burdens, failure to enforce a servitude or conduct suggesting there would be no challenge to a servitude, and failure to challenge interference with water rights.<sup>18</sup> But there is no suggestion that these are the only cases in which property rights may be subject to personal bar: what they have in common and makes them call out for particular treatment is their connection to land rights and the impact which the bar may or may not have as a practical as well as a legal matter upon the position of successors in title. Thus a property right like copyright may be subject to a bar against its owner enforcing his rights; but consistently with the view of the House of Lords in the *Fisher* case, it will need to be a very strong case indeed.

Perhaps the most powerful example of bar in relation to property comes from the concept of waiver, the abandonment of a right by a party, either permanently or temporarily.<sup>19</sup> The inconsistency lies in appearing to give up a right, then later asserting it. Waiver can be express and made in relation to real rights generally, or it may be implied, according to Reid and Blackie, in respect of corporeal moveables and land (including on registered titles).<sup>20</sup> There seems no reason in principle why waiver may not apply to incorporeals like copyright. Implied waiver "may sometimes be inferred from conduct suggesting that a right is not to be exercised, although this inference is not readily drawn".<sup>21</sup> It "tends to refer to passive conduct"<sup>22</sup> (such as that

15 Reid and Blackie, *Personal Bar* para 2.23.

16 See e.g. *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901 at 923 per the Lord President (Rodger), at 938 per Lord Nimmo Smith and at 943 per Lord Clarke. Space precludes discussion of the application of the law of unjustified enrichment in cases like *Fisher*, but see H L MacQueen, *Unjustified Enrichment Law Basics*, 2<sup>nd</sup> edn (2009) 47-50. Negative prescription applies to enrichment claims: see Prescription and Limitation (Scotland) Act 1973 Sch 1 para 1(b). Personal bar in enrichment cases is discussed in Reid & Blackie, *Personal Bar* ch 12.

17 Reid & Blackie, *Personal Bar* paras 2.05-2.06. The bar in property cases is however generally personal in effect: that is, it does not operate against the barred person's successors, a point of relevance for copyright, with its lengthy *post mortem auctoris* term for literary, dramatic, musical and artistic work as well as its general assignability (ibid para 5.03).

18 Chapter 6.

19 See in general Reid & Blackie, *Personal Bar* paras 3.08-3.48.

20 Paras 3.32-3.33.

21 Para 3.10.

22 Para 3.16.

of Fisher), while reliance by or prejudice to the other party may be relevant but is no more essential to the operation of the waiver than to other forms of personal bar. The idea that Fisher had impliedly waived his rights, at least for the period between 1967 and 2005, is possibly a better fit with the facts of his case than the concept actually used by the English courts to explain his inability to recover for the infringements of his rights by Brooker and others, namely an implied licence.<sup>23</sup> But this raises the difficulty of determining whether an implied waiver can ever be a temporary one: how can one determine the period of such a waiver from conduct? If the inference of abandonment can be drawn from the conduct in question, it will usually be difficult to avoid the further inference that the abandonment is permanent in effect. Reid and Blackie note however that:<sup>24</sup>

... in the case of rights arising sequentially, as for instance the right to periodic payments, waiver of the right to receive an individual payment on a past occasion or occasions does not necessarily signify waiver of all rights on all future occasions. . . . But in these contexts waiver is not temporary: the waiver is permanent in respect of the payments or the performance already dispensed with, and at the same time partial, in the sense that it extends only to some of the rights which have arisen.

If the flow of royalties under a copyright may be analogised with rights arising sequentially, then it would seem possible for Fisher's waiver to be seen as relating, not to his ownership of the copyright as such, but rather to his right to royalties as the occasion for them arose.

### C. CONCLUSION

The anomaly of a different result for Fisher in Scotland under the rules of personal bar thus seems, on balance, unlikely to have occurred, even if the reasoning by which the court would have reached its conclusion might have been slightly different. But the case also raises more general questions of policy in relation to copyright. Other forms of intellectual property differ from copyright in requiring registration for the existence of rights and in having "use it or lose it" provisions, meaning that non-use of the right by the owner for a period will cost the owner its rights or, in the case of patents, make them subject to a compulsory licence.<sup>25</sup> Such provisions are driven by the economic justification for intellectual property rights; they are granted to be used for the public benefit, not to be hoarded by the proprietor. Although copyright was once upon a time seen in similar terms, as an "exclusive privilege" granted by the state to promote the public good, that notion faded as ideas of the author's natural and proprietary entitlement took hold in the late eighteenth and nineteenth

<sup>23</sup> Cf *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901 at 924-925 per the Lord President (Rodger), at 939 per Lord Nimmo Smith and at 944 per Lord Clarke.

<sup>24</sup> Reid and Blackie, *Personal Bar* para 3.38 and see also para 3.37.

<sup>25</sup> Patents Act 1977 ss 48, 48A and 48B; Trade Marks Act 1994 s 46. Until 2001 an unused registered design could also be made the subject of a compulsory licence: Registered Designs Act 1949 s 10 (repealed).

centuries.<sup>26</sup> Yet the issue of unused copyrights and the public interest in their exploitation has returned to the fore in the twenty-first century. Major projects around the world for the digitisation of out-of-print materials to make them available once again by way of databases and the internet face copyright as a significant, possibly insuperable, stumbling block to their realisation. The difficulty is the identification of the current copyright owners from whom licences may be sought, leading to it being labelled the “orphan works” problem.<sup>27</sup> Its scale may be suggested by the British Library’s estimate that some 40% of its in-copyright stock is orphaned in this sense.<sup>28</sup> The ideas that a copyright might prescribe through non-exercise by its owner, or that a person who has failed to make his claims to copyright known might thereafter be barred from asserting them or from exercising remedies to enforce them against those who would suffer significant prejudice as a result, are not without merit, at least in such circumstances. “A Whiter Shade of Pale” is clearly not, and never has been, an orphan work; but the copyright dispute to which it gave rise may point others on the way to completing digital orphanages and providing access to the world’s abandoned cultural heritage.

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## Contribution and Indemnification: *Farstad Supply AS v Enviroco Ltd*

In July 2002, MV Far Service, an oil platform supply vessel owned by Farstad Supply AS (“the owner”), was seriously damaged by fire while berthed in Peterhead harbour. The vessel had been chartered to Asco UK Ltd (“the charterer”); Asco was, in addition, the base operator at the harbour. At the time, the vessel was undergoing work instructed by the charterer and carried out by Enviroco Ltd (“the service company”) to remove an accumulation of residue from one of its oil tanks.

<sup>26</sup> For Scottish aspects of these developments, see H L MacQueen, “Intellectual property and the common law c.1700-c.1850”, in L Bently, C Ng and G D’Agostino (eds), *The Common Law of Intellectual Property: Essays in Honour of David Vaver*, forthcoming.

<sup>27</sup> For a summary overview with further references see H L MacQueen, “‘Appropriate for the digital age?’ Copyright and the internet”, in L Edwards and C Waelde (eds), *Law and the Internet*, 3<sup>rd</sup> edn (2009) 190-191.

<sup>28</sup> *Intellectual Property: A Balance. The British Library Manifesto* (Sep 2006, available at <http://www.bl.uk/news/pdf/ipmanifesto.pdf>).

In due course, the owner sued the service company in negligence, contending that the service company's employees caused the fire by disconnecting their hosepipes following the extraction of the residue at a time when the vessel's engines had been started up so that she could move berth; in consequence, oil flowed out of pipes used in that process and ignited by coming into contact with the hot engines.<sup>1</sup>

The service company defended the action on the basis that the owner was contributorily negligent in that the master of the vessel (for whom the owner was responsible) started up the engines before the cleaning exercise was completed. The service company also contended that, by failing to direct and supervise the cleaning operation, and by giving an order to move the vessel before the cleaning operation had been completed, the charterer had breached duties owed to the owner *qua* charterer and base operator and materially contributed to the accident. In consequence, the service company contended that, in the event that it was found liable to pay damages to the owner, the charterer should be ordered to pay a contribution towards those damages in accordance with section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

#### A. THE CHARTER'S RISK ALLOCATION CLAUSE

Had matters rested there the case would have been played out along the familiar battle-lines of the law of negligence. However, the contractual relations between the owner and the charterer – and in particular, the question of how those relations interacted with the underlying law – intruded. The charter's risk allocation clause contained *inter alia* a provision in the following terms:<sup>2</sup>

... the Owner shall defend, indemnify and hold harmless the Charterer... from and against any and all claims, demands, liabilities, proceedings and causes of action resulting from loss or damage in relation to the Vessel... irrespective of the cause of loss or damage, including where such loss or damage is caused by [*sic*], or contributed to, by the negligence of the Charterer...

Such clauses are commonplace in contracts in the service sector of the upstream oil and gas industry. They are commonly referred to as indemnity clauses but, as we shall see in the following section, in *Farstad* it was argued that the legal effect of the particular wording used went beyond the mere provision of an indemnity. The owner accepted that the clause obliged it to indemnify the charterer, but contended that the service company could not recover a contribution from charterer under section 3(2) of the 1940 Act<sup>3</sup> on the basis that as a result of the contractual arrangement,

1 *Farstad Supply AS v Enviroco Ltd* [2009] CSIH 35, 2009 SC 489, reversing *Farstad Supply AS v Enviroco Ltd* [2008] CSOH 63, 2008 SLT 703. Unattributed paragraph numbers in subsequent footnotes refer to the Inner House's decision.

2 Para 3 per Lord Osborne.

3 Given the centrality of the wording of section 3(2) to the decision, it is worth setting out the provision: "Where any person has paid any damages or expenses in which he has been found liable in any [action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions],

the charterer was not a person from whom the owner could recover damages, if sued.

## B. THE COURT'S DECISION

At first instance Lord Hodge, inspired, at least in part, by a desire to give effect to what he perceived to be the owner and charterer's legitimate contractual intentions *quoad* the allocation of risk,<sup>4</sup> held that the clause, in using the words "defend, indemnity and hold harmless", went further than to provide a bare indemnity. In addition, it acted as a renunciation by the owner of "any right to claim damages from the third party [i.e. the charterer] in the circumstances which have arisen in this case".<sup>5</sup> In reaching this conclusion he founded upon an entry in *Black's Law Dictionary* and a *dictum* by Vice Chancellor Strine in *Majkowski v American Imaging Management Services LLC*<sup>6</sup> which, although somewhat equivocal,<sup>7</sup> suggested that "indemnify" and "hold harmless" are not synonyms, and that in particular "the word indemnify generally grants rights, and the phrase hold harmless generally limits liability".<sup>8</sup> As a result, the third party could not fall into the category of persons who "might also have been held liable in respect of the loss or damage on which the action was founded" under section 3(2) of the 1940 Act, and the service company's averments on contribution fell to be excluded from probation.<sup>9</sup>

In the Inner House, the majority (Lady Paton and Lord Carloway, Lord Osborne dissenting) concluded that the Lord Ordinary's reasoning was flawed. However, the majority judgments differ considerably in emphasis and approach, with Lord Carloway deciding the case primarily on the basis of statutory interpretation and Lady Paton primarily on the basis of contractual construction. Lord Carloway's analysis is predicated in particular upon the assertion that section 3(2) of the 1940 Act is based upon equitable considerations.<sup>10</sup> The particular potential inequity with which Lord Carloway was concerned was the risk that a person bearing "minimal responsibility for causing damage may require to bear all, or a substantial part of, the cost of that damage"<sup>11</sup> as a result of the legal effect of a contract to which he was not party. So far as the issue of contractual construction is concerned, while Lord Carloway ultimately came to the view that the clause in question was an indemnity clause and no more, he

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he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just."

4 *Farstad* (OH) at para 29.

5 *Farstad* (OH) at para 26.

6 913 A.2d 572 (Del Ch, 2006).

7 See per Lord Carloway at para 57. In fairness to Lord Hodge, it should be acknowledged that he recognised that the authorities upon which he was founding did not point wholly in one direction:

*Farstad* (OH) at para 24.

8 *Farstad* (OH) at para 24.

9 *Farstad* (OH) at para 26 read together with para 32.

10 Paras 45-55

11 Para 55.

was relatively unconcerned by that question, which he did not consider to be essential for him to answer.<sup>12</sup>

By contrast, while Lady Paton refers to the desirability of achieving a “broadly equitable” result,<sup>13</sup> her judgment is more concerned with ascertaining the true nature and effect of the contractual clause under discussion. Lady Paton considered that “clear and precise language is required to achieve an exclusion of liability” and thought that such language was not present in the instant case.<sup>14</sup> She read the expressions “indemnify” and “hold harmless” together as an undertaking on the part of the owner to take steps to ensure that the charterers were not “damaged, prejudiced, or made to suffer any loss or expense as a result of a liability on their part which has arisen in respect of loss or damage in relation to the vessel”.<sup>15</sup> On that basis, Lady Paton concluded that the clause in question was an indemnity clause.

### C. COMMENTARY

The use of indemnity clauses, as well as a range of other measures<sup>16</sup> also designed to superimpose upon the general law a privately ordered set of responsibilities for the occurrence of certain species of risk, is a well-established practice in the oil and gas industry.<sup>17</sup> Nothing said in *Farstad* is likely to change that because, as Lord Rodger noted in *Caledonia North Sea Limited v London Bridge Engineering Ltd*,<sup>18</sup> the practice is “fundamental to the economics” of oil and gas activities in the United Kingdom Continental Shelf. It would in any event be quite wrong to view *Farstad* as some kind of attack upon the use of risk allocation clauses: the Inner House’s decision supports the orthodox view, widely held within the oil and gas industry, that risk allocation clauses which use the wording under discussion operate as indemnity clauses, not exclusions of liability.

However, what the case does do is provide a reminder of the dangers inherent in such a private re-ordering of risk. The interface between the privately ordered microcosm created by the contracting parties and the outside world needs to be carefully managed so as not to upset the expectations of either the contracting parties or others who interact with them. Moreover, even now, in the post-*Investors Compensation Scheme*<sup>19</sup> era, the courts often eye risk allocation clauses with a degree

12 Para 57.

13 Paras 42 and 43.

14 Para 39.

15 Para 40.

16 The industry makes extensive use of both simple and mutual indemnity clauses. Other risk allocation devices include exclusion clauses (for example, clauses which exclude liability for consequential loss), limitation of liability and sole remedy clauses.

17 The practice is, of course, also well established in other business sectors. The construction industry, for example, makes wide use of such clauses: see e.g. *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17, [2002] 1 WLR 1419.

18 *Caledonia North Sea Limited v London Bridge Engineering Ltd* 2000 SLT 1123 at 1150I per the Lord President (Rodger).

19 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

of suspicion;<sup>20</sup> while almost all the old intellectual baggage of legal interpretation has been discarded, the suitcase containing *contra proferentem* has survived the purge.<sup>21</sup>

As a result, the drafting of such clauses needs to be watertight. But what does being “watertight” mean? The dearth of litigation in the oil and gas industry has meant that the legal effect of even some extremely commonly used clauses has not been the subject of authoritative decision. In *Farstad*, “both counsel advised the court that the wording of Clause 33.5 had not been authoritatively construed in any reported case”.<sup>22</sup> In these circumstances, untested formulations of words come to be used routinely, with potentially dramatic consequences. Of the four judges to opine on the true meaning of the clause, two considered it an indemnity and two an exclusion clause. Thus the expression “hold harmless” which, one rather suspects, contractual draftsman commonly conjoin with “indemnify” on no more scientific a basis than “belt and braces”, came close to being held to alter fundamentally the apparent legal nature of one of the most commonly used risk-allocation devices in the oil and gas industry. The author understands that the case has been appealed to the Supreme Court. The oil and gas industry and its advisors and insurers will look on with great interest.

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## Access to Land and to Landownership

The Land Reform (Scotland) Act 2003 sets out to unlock land in Scotland for the people. In the context of the Act, “people” either means everyone<sup>1</sup> or is defined by reference to a statutory concept of community (based on postcode areas),<sup>2</sup> whilst the act of “unlocking” either allows physical access over another’s land or, in certain circumstances, the acquisition of ownership of another’s land. From the perspective of Scots land law, it is not an understatement to call this legislation radical. A body of case law on the Act is now beginning to form. 2009 brought further judicial interpretations, including the first consideration of the Act above sheriff court level.

<sup>20</sup> *Farstad* at para 39 per Lady Paton, discussed in B. above. Lady Paton restricted her comments to exclusion clauses proper.

<sup>21</sup> See E Peel, “Whither *contra proferentem*?”, in A Burrows and E Peel (eds), *Contract Terms* (2007) 53, especially 60-64.

<sup>22</sup> *Farstad* at para 38 per Lady Paton.

<sup>1</sup> Section 1(1).

<sup>2</sup> Sections 34 and 71.

### A. ACCESS TO LAND

Can an area of land be zoned by a landowner for different recreational pursuits, as part of a proactive land management plan, yet avoid falling foul of the 2003 Act? The Court of Session's judgment in *Tuley v Highland Council*<sup>3</sup> says that it can.

Part 1 of the Act enshrines what has come to be known as the "right to roam".<sup>4</sup> Section 1 confers the right to cross land and the further right to be on land for recreational purposes, educational activities, or to carry out an activity that can be undertaken "otherwise than commercially or for profit". Section 2 qualifies these rights by providing that they must be exercised responsibly. Certain land falls outwith the scope of the right irrespective of conduct.<sup>5</sup> There are therefore two means by which a purported access taker may not be entitled to access: with reference to the land in question (a "where" case) or with reference to that individual's conduct (a "how" case).

*Tuley* is not a "where" case. Far from arguing that their land was excluded, the owners positively encouraged people to spend leisure time on it.<sup>6</sup> But, wishing to prevent damage which certain users could cause, they erected a barrier to block equestrian access to a path, known as the red track, which was essentially an offshoot of a main access track. The landowners feared that unfettered equestrian access would (incrementally) damage the track and make it unsuitable even for pedestrian use, therefore negatively affecting the right to roam. This opinion was fortified by undisputed expert evidence as to the eroding effect of the persistent action of horses' hooves.<sup>7</sup>

What section 2 provides about responsible access is mirrored in section 3 for landowners, in their role as access facilitators. Owners must use, manage and otherwise conduct ownership of land in a way which, as respects access rights, is responsible. Would it be responsible for the landowners to take a pragmatic, wider view as regards the red track by preventing all equestrian access, "with the ancillary consequence of denying some responsible access"? Sheriff MacFadyen, whose words end the previous sentence,<sup>8</sup> thought not. An Extra Division of the Inner House disagreed.

3 [2009] CSIH 31A, 2009 SLT 616. The opinion of the Extra Division was delivered by Lord Eassie.

4 M M Combe, "No place like home: access rights over gardens" (2008) 12 EdinLR 463. "Right of responsible access" is more accurate than "right to roam", but the accepted terminology does not track the Act.

5 Section 6(1).

6 *Tuley* at para 8. The almost paradoxical background to the case has been commented on before: K G C Reid and G L Gretton, *Conveyancing 2007* (2008) 136. Indeed Graham Tuley has done far more to shape Scotland's natural landscape than most legal minds can ever hope to, both in terms of this case and previously in terms of the development of the Tree Tube or, alternatively, the Tuley Tube: see N Roe "Tubular dells" *The Times* 6 Dec 2003 and the educational "Designing tree tubes" page on Scottish Natural Heritage's website: [http://www.snh.org.uk/TeachingSpace/whattodo/schoolgrounds/Designing\\_tree\\_tubes.asp](http://www.snh.org.uk/TeachingSpace/whattodo/schoolgrounds/Designing_tree_tubes.asp).

7 One expert was involved in the case, but had the defender not conceded the veracity of that expert's evidence the pursuers held more experts in reserve: para 29.

8 2007 SLT (Sh Ct) 97 at para 120.

There are two “chapters”<sup>9</sup> to the *Tuley* judgment. The first relates to the expert evidence, elevated to crucial importance by both sides. The second concerns the proper interpretation of section 14(1), which prohibits certain actions which interfere with access rights. One thing the court took as a given is that it is not for the access taker or the landowner to decide what is “responsible”: it is for the court to decide this point.

The first chapter saw the appeal court “unable to accept the proposition that the pursuers acted prematurely and required to await the occurrence of actual damage” to the path, noting that “the contention that no preventative steps could be taken prior to the occurrence of damage raised difficult practical issues as to the extent of the predictable damage which the landowner must endure (without compensation) before he could take measures to prevent the occurrence of yet further damage”.<sup>10</sup> Therefore, the pursuers were “acting responsibly in preventing equestrian access (and also, incidentally, motorised access by motorcycles or ‘quad bikes’)”.<sup>11</sup>

This is a sensible approach. To provide otherwise would be akin to providing that the owner of a building cannot install a lock on a window to prevent theft until a theft has actually occurred.<sup>12</sup> *Tuley* seems to legitimise existing attempts to zone areas for certain uses, such as the “No Cycling” notices painted on the paths in Edinburgh’s Meadows and the “Horse Riders Please Use Tarmac Driveway Only” sign in Almondell and Calderwood Country Park.<sup>13</sup> No doubt similar attempts will follow.

Having decided chapter one as it did, the court noted it was not necessary to opine on chapter two,<sup>14</sup> but some observations were made nonetheless. Section 3(2)(b) states landowners are not to be taken as acting “responsibly” if they contravene section 14(1). Section 14(1) prohibits landowners from taking (or omitting to take) any action where the “purpose or main purpose” of such action (or omission) is the prevention or deterrence of the exercise of access rights. The landowners’ “genuine concern” for the state of the red track (and neighbouring paths), supported by expert evidence, was such as to satisfy the court that they were not in breach of section 14(1). As highlighted in a previous note, section 14(1) may have an important role to play in future, especially if a landowner decides to engage in a spot of landscaping.<sup>15</sup> *Tuley* could be authority for the proposition that landscaping for (genuine) aesthetic reasons, with the side-effect of restricting access, is acceptable.

9 *Tuley* at para 25.

10 Para 33.

11 Para 34. The observation here (and at para 37) regarding motorised access was not strictly necessary, as “being on or crossing land in or with a motorised vehicle or vessel (other than a vehicle or vessel which has been constructed or adapted for use by a person who has a disability and which is being used by such a person)” is deemed to be not responsible by section 9(f).

12 But the analogy is imperfect. Theft is inherently wrong, while as shown by the facts of *Tuley*, a small amount of riding may have amounted to responsible access.

13 This notice was met by the author on a cycle from Edinburgh to Glasgow. Another sign met on this journey proclaimed Blackridge a “Hand Gun Free Village”: the author was reassured.

14 *Tuley* at para 36.

15 Combe (n 4) at 467.

One final point worth noting is that the Inner House does not comment, except incidentally,<sup>16</sup> on the interaction of access takers among themselves, or indeed on the interaction of an access taker with someone not taking access by virtue of Part 1 (a prime example being an angler, who would have to take access with the landowner's permission, and would likely object to any disturbance caused by a kayaker).<sup>17</sup> While *Tuley* allows a landowner to herd access takers into compartments, no comment is made on what happens should a confrontation occur within or outwith those compartments.

### B. WHERE NEXT AFTER *TULEY*?

*Tuley* was applied in *Forbes v Fife Council*.<sup>18</sup> This involved a path (which was not a right of way) adjacent to (and fenced off from) the pursuers' rear garden, where certain users had been engaged in "antisocial behaviour". The path was co-owned by the pursuers and their neighbours, and the pursuers (and one set of neighbours, but not all co-owners) decided the best way to police the antisocial behaviour was to erect and lock gates at either end of the path.<sup>19</sup> Sheriff Holligan began by establishing the path itself was not subject to the heavily discussed "garden" exception in section 6(1)(b)(iv),<sup>20</sup> meaning this was a "how" rather than a "where" case. That the non-applicability of section 6(1)(b)(iv) could have opened up the operation of section 6(1)(c) (co-owned land used as a private garden) does not seem to have been discussed, perhaps because the path was subject to burdens in favour of neighbouring proprietors making it impossible to class the path as a private garden.<sup>21</sup>

After considering the exact nature of the landowners' appeal against the local authority's notice, the sheriff went on to consider whether the locking of the gates could, essentially, amount to responsible land management, i.e. was the "purpose or main purpose" of the obstruction to prevent antisocial behaviour, with the by-product of preventing access for all? Sheriff Holligan ruled that it was, but refined this conclusion to the effect that unfettered access should be allowed in daylight and asked parties to address him as to the final form of the interlocutor.<sup>22</sup>

Sheriff Holligan's approach is pragmatic and may well suit the facts of the dispute at issue, but there is room for other sheriffs to decide similar disputes differently. By accepting that blocking access to a path is a reasonable step for a landowner to take, all access takers are being treated as guilty without a chance to prove innocence.<sup>23</sup> If *Tuley* is applied in a wide-ranging manner, be that in complicated

16 *Tuley* at para 35.

17 Section 9(c) excludes "hunting, shooting or fishing".

18 2009 SLT (Sh Ct) 71. And see also *Aviemore Highland Resort Ltd v Cairngorms National Park Authority*, 2009 SLT (Sh Ct) 97.

19 See finding in fact 43 and para 14.

20 Paras 28-30. The exception is discussed more fully in *Combe* (n 4).

21 Finding in fact 6.

22 Paras 37-38.

23 An interdict against particular parties would be better targeted but, as the sheriff accepted (para 34), "the difficulties with that are almost too obvious to state".

cases involving expert evidence or more routine cases involving contrary evidence of warring neighbours, there is every chance of catching access takers who are responsible in the collateral damage precipitated by one or two individuals. Could it be an instance of a hard case making bad law?

Finally, as seen in *Tuley*, equestrian use is suited to some but not all terrain. Antisocial behaviour is not suited to any terrain, but the proximity to a dwelling in *Forbes* served to exacerbate the problems faced by some co-owners of the path. While *Tuley* shepherds equestrian users to more suitable land, *Forbes* may simply drive antisocial behaviour elsewhere.<sup>24</sup> The restriction of access rights on a case-by-case basis does not seem to be the answer to a wider societal problem.

### C. ACCESS TO LANDOWNERSHIP

Part 2 of the 2003 Act allows communities to acquire a right of pre-emption in registrable (rural) land.<sup>25</sup> To do this a community must incorporate a company limited by guarantee, with compliant constitutional documents, and this company must then register an interest in the Register of Community Interests in Land.<sup>26</sup> Once this is done, the landowner must not sell the land without first offering it to the community.

Residents of the Kinghorn area of Fife decided to make use of the 2003 Act's scheme, incorporating a company known as Kinghorn Community Land Association 2005 as their vehicle to do so (their second attempt at incorporating a compliant company).<sup>27</sup> The company has been responsible for nineteen of Fife's twenty-eight entries in the Register to date. Three such entries covered land owned by Jacqueline Hazle who challenged their validity before Sheriff Macnair at Kirkcaldy.<sup>28</sup> The challenge was based on a number of grounds, none of which involved human rights law despite earlier indications that they might.<sup>29</sup> Instead they were more mundane, being based on: grid references (or a lack thereof) in breach of subordinate legislation; a lack of community support; a failure by Ministers to address properly the criteria

24 As may indeed have happened when the local authority closed a nearby underpass: *Forbes*, finding in fact 37. Needless to say, it seems no notice was ever served by the local authority on the local authority to reopen this particular blocked route.

25 The most recent list of non-registrable settlements is found in The Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2009, SSI 2009/207.

26 See further M M Combe "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: a definitive answer to the Scottish Land Question?" 2006 JR 195.

27 A previous attempt saw Kinghorn Community Land Association incorporated at Companies House, but the Scottish Executive Environment and Rural Affairs Department felt this company's constitutional documents did not meet the requirements of s 34. In a bid to register an interest over land that was being marketed at Kinghorn Loch (not relevant to this note), where time pressures were apparently great, it was felt easier by the community to incorporate a new company rather than amend the original company's constitutional documents. As things transpired, the land was not acquired by the community. The community's account of this is available at <http://www.landreformact.com/docs/kinghorn.pdf>.

28 *Hazle v Lord Advocate*, Kirkcaldy Sheriff Court (ref B270/07), 16 Mar 2009.

29 See "Farmer to challenge land reform legislation", *Journal Online* 9 Aug 2007 (available at <http://www.journalonline.co.uk/news/1004410.aspx>).

for registration in section 38; and, in respect of each individual application, argument that Ministers' decisions were not rational.<sup>30</sup>

The first prong of the attack was that the maps accompanying the application should have contained OS grid references, as required by the Community Right to Buy (Specification of Plans) (Scotland) Regulations 2004,<sup>31</sup> but they did not. Sheriff Macnair held that this omission was not "a mere technicality or a procedural irregularity" and so was fatal to the applications.<sup>32</sup> This was in spite of the fact that the landowner knew where the land was<sup>33</sup> and, more strikingly, in spite of the fact that the application form itself contained a grid reference.<sup>34</sup> If Sheriff Macnair's strict approach is followed in future litigation, certain communities' already registered interests look very precarious indeed.

The landowner had less success with her second and third arguments, failing to convince the sheriff that the plan was insufficiently detailed to determine the boundaries of the relevant land, or that there was a lack of community support.<sup>35</sup>

The next argument turned on the application of section 38(1)(b). This prevents Ministers from allowing registration unless (i) the land has a substantial connection to a significant number of members of the community or (ii) it is "sufficiently near to land with which those members of the community have a substantial connection and .. its acquisition by the community is compatible with furthering the achievement of sustainable development".<sup>36</sup> Thus, limb (ii) allows communities to target land they may not otherwise be classed as having a substantial connection with, perhaps for example affording an island-based community the right to register an interest in a landing on the other side of a channel of water. Ministers accepted that the criteria in section 38(1) had been met,<sup>37</sup> but in the letter setting out their reasoning on section 38(1)(b) they did not distinguish which of its tests had been applied. For all three decisions Ministers' wording was as follows:<sup>38</sup>

As the land to be registered is within the boundary of the defined community, the criteria in section 38(1)(b), that the community has a substantial connection with the land or is sufficiently near to the land, are met.

Sheriff Macnair felt this failure to identify that limb (i) applied was crucial. While Ministers were not required to elucidate precisely which limb applied, where they

<sup>30</sup> *Hazle* at para 10.

<sup>31</sup> SSI 2004/231. The schedule is prescriptive: "maps, plans or drawings shall ... contain map grid reference numbers and sufficient surrounding details (fences, houses etc) to enable the position of the land to be fixed accurately".

<sup>32</sup> *Hazle* at para 13, with reference to *London & Clydeside Estates Limited v Aberdeen District Council* 1980 SC (HL) 1.

<sup>33</sup> Para 12.

<sup>34</sup> This addresses, to a certain degree, a key criticism of the sheriff, in that anyone looking at the total documentation on the Register of Community Interests in Land, available online, would be able to identify the land in question.

<sup>35</sup> Para 15.

<sup>36</sup> On the concept of sustainable development, see further Combe (n 26) at 219.

<sup>37</sup> E.g. public interest and sufficient local support.

<sup>38</sup> Letters from M H Rankeillor to R Brewster dated 7 Jun 2007, all available via [www.ros.gov.uk/rcil](http://www.ros.gov.uk/rcil), filed under Fife (CB00055, CB00057 and CB00060).

did not do so or where it was not apparent, Ministers would still have to cover limb (ii) and therefore be satisfied that the acquisition was “compatible with furthering the achievement of sustainable development”.<sup>39</sup> All the letters were silent on this point.

There is at least an argument that the application of limb (i) was implicit. In all cases the land was identified as being “within the boundary of the defined community”, and if land is “within” it cannot also be “sufficiently near”. The subsequent wording, no doubt standard,<sup>40</sup> served to muddy the waters. The concept of “sufficiently near”, or so the landowner argued, meant that sustainable development had also to be considered. Sheriff Macnair felt that Ministers had to “reach a conclusion as to the viability of the applicant’s proposals” but had failed to do so.<sup>41</sup>

The positioning of sustainable development in section 38(1)(b)(ii) is curious. A company’s status as a community body is already predicated on sustainable development,<sup>42</sup> while the ultimate exercise of the right to buy is only allowed if Ministers are satisfied that “what the community body proposes to do with the land is compatible with furthering the achievement of sustainable development”.<sup>43</sup> The scheme of the 2003 Act means that sustainable development had to be considered from the outset for “sufficiently near” land, but the point of having a sustainable development test in section 38(1)(b)(ii) is not immediately clear.<sup>44</sup>

In the event, the community suffered because of the *pro forma* wording adopted at a given time by Ministers. It is doubtful that Ministers expected their words to be deconstructed in a manner that occurred in *Hazle*. It is more doubtful still that the community would have thought this possible: are communities expected to pore over a Ministerial response to ensure compliance with the Act? This seems unrealistic. If Ministers’ words are indeed susceptible to being picked apart, communities could lose access to Part 2 of the Act through no fault of their own.

Finally, in respect of one of the applications by the community it was held that Ministers had acted unreasonably in the *Wednesbury* sense.<sup>45</sup> This proposal had been built around, amongst other things, attracting red squirrels to an area where grey squirrels were already established. The Ministers’ response had been to the effect

39 Para 19.

40 Other decisions, both before and since, have been careful to indicate which limb of s 38(b) applies, but the flawed Kinghorn wording has been used elsewhere.

41 Para 22.

42 Land Reform (Scotland) Act 2003 s 34(4), although the wording here is that Ministers must be satisfied a community’s main purpose is “consistent with furthering the achievement of sustainable development” rather than “compatible with furthering the achievement of sustainable development” (emphases added).

43 Section 51(3)(d).

44 Perhaps a test based on the characteristics of the “sufficiently near” land, as with the island/landing example, would be more appropriate. Another approach can also be found in Part 3 of the Act. Section 70(4) allows a crofting community body to purchase eligible additional land that is “contiguous” to eligible croft land that is being bought by that body. The case of *Scottish Ministers v Pairc Trust Limited and Others* 2007 SLR 166, which is otherwise on the validity of interposed leases, touches on the exact scope of what can form eligible additional land.

45 *Associated Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223: see *Hazle* at para 35.

that there was no evidence reds and greys could not integrate successfully, but this did not take account of the objections of the landowner, which included evidence that Ministers denied the existence of. Part 2 sees Ministers act in a quasi-judicial manner when dicing with people's property rights, but this is the first case to go as far as to note that such dicing can be judicially controlled.

A submission that the applications should be remitted to the Ministers if the appeals were successful on the merits was rejected. Another submission that conditions should be imposed<sup>46</sup> in order to maintain the status quo pending fresh applications was similarly rejected, leaving Ministers with no choice but to direct the deletion of the community interests.

Where can the community go next? There is nothing in law to stop re-applications, but there is also nothing to stop the landowner dealing with her land as she sees fit in the meantime. There may be an argument, based on the "offside goals" rule, that a landowner's dealings in the face of an imminent application are challengeable,<sup>47</sup> but such a challenge is by no means guaranteed to succeed.

While there may be nothing in law to stop further applications, a community could be forgiven for becoming thoroughly fed up with the whole process. The Kinghorn community has been active for some time, incorporating its first company on 15 December 2004. Some five years later, no land has been acquired by the community under the auspices of the Act. While the legislation may be radical in outlook, its application has not been. As previously noted, a restrictive approach to the Act's operation makes a challenging process more challenging still.<sup>48</sup> The experience at Kinghorn Loch does little to alter that view.

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## Non-Established Church Property in Scotland: A Further Case

The fissiparousness of the Presbyterian family of denominations is a byword. A fresh example is to be found in *Smith v Morrison*,<sup>1</sup> a further contribution to the catalogue of cases which the Free Church of Scotland has contributed to the law of trusts in Scotland.

<sup>46</sup> Under s 67(1)(b).

<sup>47</sup> Combe (n 26) at 207.

<sup>48</sup> M M Combe, "No place like *Holme*: community expectations and the right to buy" (2007) 11 EdinLR 109 at 116.

<sup>1</sup> [2009] CSOH 113.

The Free Church of Scotland came into being in 1843, when in what is now known as “The Disruption”, a significant minority of the ministers and elders of the then Church of Scotland withdrew from it following the refusal of the Peel government to alter the law that had been set out in a variety of cases. The seceders considered that it should be for the Church itself to deal with the membership of presbyteries and the process for the calling of a minister to a charge.<sup>2</sup> At that time, however, there was no question of property rights. The new “Free Church of Scotland” garnered its own funds and made no claim to the assets of the denomination which had been left. Matters were very different when, just over half a century later, a majority of the then Free Church chose to enter union with the United Presbyterian Church to form the United Free Church of Scotland. That majority had thought to bring the assets of the Free Church into the union but instead in 1904 the House of Lords held that a minority of the Free Church who had refused to enter the union was entitled to the assets of the Free Church since they remained true to the “original principles” of the trust(s) on which those assets were held, including the doctrine of predestination and the “Establishment Principle”.<sup>3</sup> The resultant position was unacceptable and in fact the assets were apportioned between the United Free and the Free Church by a Commission set up under the Churches (Scotland) Act 1905, but the basic law of trusts was not altered.

In 2000 a further division within the Free Church took place. The cause was a disciplinary process affecting a minister (one of the staff of the Free Church College who later was elected principal of the College). Following its own investigations and after a parallel case in the sheriff court, the Free Church Assembly had accepted there was insufficient evidence and had declared the matter closed and that no further action should be taken. It later indicated that further pursuit of the question would be contempt of the Assembly decision. Notwithstanding, some ministers and others wished the process continued, arguing that the process had not fully dealt with the matter and that to do otherwise was potentially to damage the work and witness of the Church. A Commission of Assembly considered their efforts to press the argument divisive and a potential breach of their ordination vows to be subject to the decisions of the Church. A disciplinary process was initiated against them. Those cited in the process then withdrew and formed the “Free Church Continuing” – the FCC. In 2001 the Free Church Continuing sought to argue its entitlement to the central assets of the Free Church on the grounds that it represented the true Free Church, and that the failure of the “other” Free Church and its Assembly properly to exercise its functions and in particular to recognise the right of continued protest meant that the “Free Church” was no longer true to its basic principles.<sup>4</sup>

<sup>2</sup> Lord Rodger of Earlsferry, *The Courts, The Church and The Constitution: Aspects of the Disruption of 1843* (2008); F Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (1980) 23-53.

<sup>3</sup> *Free Church of Scotland v Lord Overtoun* (1904) 7 F (HL) 1. Within the United Free Church adherence to either (Calvinistic) predestination or Arminian principles was lawful, and the notion that the state had a right and duty to maintain the Christian faith was not fundamental.

This action was unsuccessful, Lady Paton holding that no relevant case had been pled. No fundamental tenet of the Free Church had been departed from by either side. While the pursuers had not forfeited their rights in the Free Church assets, their failure to comply with the discipline and government of the Church meant there was no relevant case for apportionment of those assets.

The case just discussed had to do with the central assets of the Free Church. In *Smith v Morrison* the property at issue was the church and manse of the Strath Free Church in Broadford on the Isle of Skye. The minister and some of the congregation had joined the Free Church Continuing and continued to occupy the properties. The Free Church through its Moderator and Principal Clerk of the General Assembly sought a declarator as to the ownership of the property and interdict against the unlawful use of the property by the local FCC members. Three matters fell for consideration by Lord Uist: the title of the pursuers, a plea that all parties had not been called, and the relevancy of the action. After considering the terms of the feu charter of the property and discussing previous similar cases, Lord Uist upheld the title to sue. He further held that the plea of “all parties not called” was without merit.

It is the discussion of relevancy that may make this case of significance in the future. After the creation of the Free Church Continuing and the adherence of the Strath minister and some of the congregation to it, the remaining members of the congregation had united with the Free Church congregation at Sleat (also in Skye) to form a single congregation. The defenders therefore argued that the pursuers intended the property now to be held for a congregation which did not meet at Strath but at Sleat. They themselves continued to use the property for the purposes defined by the feu charter. However, Lord Uist considered that these arguments unfounded. The united Strath/Sleat congregation fulfilled the purposes of the charter. However, as Lord Uist pointed out after an extensive discussion of relevant ecclesiastical cases, when a group within an association leaves that association, the fact that they may still hold to the fundamental principles of the larger body does not entitle them to carry with them property which they may occupy if the original association still adheres to the same principles. The Free Church Continuing had set up a structure separate and distinct from the Free Church. That act of separation itself involved a loss of property rights. The Free Church Continuing was not the Free Church identified in the relevant feu charter. To hold otherwise would be to allow successive groups, while adhering to the fundamental principles of the Free Church, to leave that Church on whatever grounds they considered sufficient and carry with them property of which they had possession. Accordingly, Lord Uist concluded that there was nothing to go to proof and that the defences were irrelevant. Decree was granted for the Free Church.

In the end the decision in *Smith v Morrison* turned on an analysis of the terms of the trust set up by the relevant feu charter. It might be that a different decision would be arrived at were the relevant trust differently constituted. In the meantime we await

<sup>4</sup> *Free Church of Scotland (Continuing) v General Assembly of the Free Church of Scotland* [2005] CSOH 46, 2005 SC 396. The pursuers’ argument mirrored that in the 1904 case.

with interest other possible civil court judgments as to the ownership of ecclesiastical properties.<sup>5</sup>

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## Statutory Derivative Proceedings: The View from the Inner House

In an earlier note,<sup>1</sup> the author considered the decision of Lord Glennie in *Wishart, Ptr.*<sup>2</sup> This note examines the outcome of the subsequent appeal to the Inner House: *Wishart v Castlecroft Securities Ltd.*<sup>3</sup> While upholding Lord Glennie's decision that the shareholder's application for leave to raise statutory derivative proceedings should be granted, the judgment of the Inner House (delivered by Lord Reed) differs in a number of important respects.

### A. THE *EX PARTE* STAGE

Part 11 of the Companies Act 2006 is divided into provisions which apply to England and Wales<sup>4</sup> and provisions which apply to Scotland.<sup>5</sup> In terms of the Scottish procedure, Lord Glennie decided that a shareholder must first make an application for leave to raise derivative proceedings by presenting a petition to the Outer House of the Court of Session. The Inner House did not disturb Lord Glennie's judgment in relation to this point.

The application for leave procedure is split into two stages, one *ex parte*<sup>6</sup> and the other *inter partes*.<sup>7</sup> At the *ex parte* stage, the Outer House judge must refuse the application if the application and supporting evidence do not disclose a *prima facie* case for granting it.<sup>8</sup> Lord Glennie had decided that the effect of the statutory

5 F Cranmer, "Human sexuality and the Church of Scotland: *Aitken et al v Presbytery of Aberdeen*" (2009) 11 Ecclesiastical LJ 335.

1 D Cabrelli, "Statutory derivative proceedings in Scotland: a procedural impasse?" (2009) 13 EdinLR 511.

2 [2009] CSOH 20, 2009 SLT 376.

3 [2009] CSIH 65, 2009 SLT 812.

4 Companies Act 2006 ss 260-264.

5 Sections 265-269.

6 Section 266(2).

7 Section 266(4)-(5).

8 Section 266(3)(a).

provisions was such that the court was specifically required to be satisfied about two matters: first, that there had been a relevant act or omission by one or more directors of the company in terms of section 265(3) of the Act; and secondly, that the applicant had established wrongdoer control: that is, that the wrongdoer director had majority control over the shareholders of the company (directly or indirectly) which had been or would be exercised to prevent a proper action being brought against the wrongdoer.

On the latter point, the Inner House disagreed with Lord Glennie.<sup>9</sup> It is submitted that it was correct to do so for the reasons previously advanced by this author,<sup>10</sup> namely that Parliament had intended to remove the requirement to establish wrongdoer control which existed at common law.<sup>11</sup> In evaluating the criteria to be applied at the *ex parte* stage, Lord Reed took the position that the mandatory and discretionary criteria specified in the 2006 Act<sup>12</sup> ought to be taken into account, together with “any relevant circumstances”,<sup>13</sup> as the statutory language is non-exhaustive.<sup>14</sup> Having taken such criteria into account, if the court is of the view that the application for leave should not be refused, section 266(4) of the Act directs that the applicant is entitled to serve the application on the company (rather than the prospective defenders in the future derivative proceedings) and the court may make an order requiring evidence to be produced by the company.

It is submitted that the reasoning for this particular aspect of Lord Reed’s judgment is correct, since it rests on the proper statutory construction of sections 266(3) and 268(1) and (2) of the Act. Section 266(3) specifies the approach which the court should apply at the *ex parte* stage. Here, it is provided that “if it appears to the court that the application and the evidence produced by the applicant in support of it do not disclose a prima facie case for granting it, the Court... must refuse the application...”. Further, the relevant parts of section 268(1) and (2) stipulate that the court “must refuse leave to raise derivative proceedings... if satisfied...” and “[i]n considering whether to grant leave to raise derivative proceedings... , the court must take into account, in particular...” On the basis of this statutory language, it appears that the criteria in section 268(1) and (2) must be applied at both the *ex parte* and *inter partes* stages. If Parliament had intended otherwise, the wording of the statute could have easily reflected that fact. However, that is not the case.

## B. THE *INTER PARTES* STAGE

The application thus proceeds to the second stage, which entails an *inter partes* hearing. At this point, the court must again consider the mandatory and discretionary statutory criteria and grant, refuse or adjourn the application for leave to raise

<sup>9</sup> Para 38.

<sup>10</sup> Cabrelli (n 1).

<sup>11</sup> HC Deb 17 Oct 2006, col 832 (the Solicitor-General, Mike O’Brien MP).

<sup>12</sup> Sections 268(1)-(3).

<sup>13</sup> Para 33.

<sup>14</sup> Para 36.

separate derivative proceedings. Lord Reed's judgment is clear to the effect that the prospective defenders in the subsequent substantive derivative proceedings (that is, the director(s) and any third party against whom the substantive derivative proceedings would be directed) are disentitled from involvement in the *inter partes* hearing.<sup>15</sup> A number of reasons for this approach are advanced, not least of which is the contention that the application for leave proceedings are not concerned with the determination of their rights and obligations or any liability which might attach to them. Moreover, Lord Reed was concerned to avoid engagement with the full merits of the claim at the *inter partes* phase, since this would entail a "dress rehearsal", leading to wasteful duplication of evidence and costs.<sup>16</sup> Thus, the view was taken that affidavits and productions should be lodged and considered by the court.

With regard to the discretionary criteria which the court must take into account at both the *ex parte* and *inter partes* stages, Lord Reed made two interesting observations. First, section 268(2)(a) of the Act, setting out the first criterion which the court must consider, directs that the court should assess whether the petitioning member is acting in good faith. Whilst Lord Glennie's judgment that this was the case was not challenged on appeal, that conclusion had been reached without an evaluation of the member's subjective viewpoint or motivations. On this point, Lord Reed made the following remarks:<sup>17</sup>

[I]t is possible that, at least in certain circumstances, that provision might require the court to give consideration to the view which the petitioner might reasonably hold of the merits of the proposed proceedings. In that regard, we note the approach which has been adopted by the courts of other jurisdictions (notably in Canada and Australia) where similar provisions exist.

Bearing in mind that the *inter partes* stage is to be conducted by reference to affidavits and productions only, one does wonder whether this subjective assessment may prove to difficult to conduct in practice.

Secondly, section 268(2)(f) of the Act provides that the court must have regard to whether the cause of action is one which the member could pursue in his own right rather than on behalf of the company: that is, whether the claim could best be progressed as a personal action or as a section 994 unfair prejudice petition. Of particular note is the fact that Lord Reed was prepared to hold that Wishart should be given leave to raise substantive derivative proceedings notwithstanding that the allegations made might also form the basis for proceedings under section 994. To that extent, the Inner House's views differ from those of William Trower QC, who had ruled in *Franbar Holdings Ltd v Patel*<sup>18</sup> that the availability of section 994 proceedings disentitled the shareholder claimant from permission to continue

15 Paras 18-26.

16 Paras 27-28 and 39.

17 Para 36.

18 [2008] BCC 885.

derivative proceedings under the English regime. Lord Reed's arguments for such an approach are particularly cogent.<sup>19</sup>

[Section 994] proceedings would however constitute, at best, an indirect means of achieving what could be achieved directly by derivative proceedings; and they could not provide any remedy against [the third party]. The petitioner's complaint is that [the director] has acted unlawfully, with [the third party]'s knowing assistance; not that the Company's affairs have been mismanaged . . . we note that an order requiring [the petitioner's shares] to be bought out at the present time, when the commercial property market is depressed, would not be an attractive remedy. The order sought in the proposed derivative proceedings, that the properties in question be declared to be held by [the third party] upon a constructive trust for the Company, would in reality be a more valuable remedy, since the petitioner could then benefit from any rise in the value of his shareholding over the longer term, consequent upon a recovery in the market. Furthermore, any inquiry into whether there had been mismanagement, or into the price at which the petitioner should be bought out, would require the court to establish the truth or otherwise of the petitioner's allegations, and the value of any property held by [the third party] which had been acquired through [the director]'s breach of his duties to the Company: the same issues as would be raised more directly, and with the possibility of [the third party]'s participating in the action and being ordered to make restitution or to pay damages, if derivative proceedings were permitted. We also note that the Company does not appear to be deadlocked, and that it continues to trade. In these circumstances, the availability of an alternative remedy under section 994 does not appear to us to be a compelling consideration.

The above passage can be contrasted sharply with English cases concerning permission to continue, such as *Franbar Holdings* and *Mumbray v Lapper*.<sup>20</sup> In both cases, the availability of a section 994 unfair prejudice claim was deemed to bar the continuation of derivative proceedings. Lord Reed's passage captures expertly some of the circumstances in which it will be preferable for a shareholder to raise derivative proceedings than a section 994 petition.

### C. INDEMNIFICATION OF SHAREHOLDER EXPENSES

In its final report on *Shareholder Remedies*, the Law Commission declared that:<sup>21</sup>

... it is only right that the court should have power to grant an application by the shareholder for an indemnity out of the company's assets in respect of expenses incurred, or to be incurred, by him in relation to the action. This should not be confined to judicial expenses. The court should be able to make an award covering any and all expenses.

If adopted, this would have entitled a petitioning shareholder to the equivalent of the English *Wallersteiner* order.<sup>22</sup> The logic of such an order is predicated on the

<sup>19</sup> Para 46.

<sup>20</sup> [2005] BCC 990.

<sup>21</sup> Law Commission, Report on *Shareholder Remedies* (Law Com No 246, 1997) para 71. In preparing this Report the Law Commission was directed to consult the Scottish Law Commission, which in the event agreed with the content of the Report (para 1.24).

<sup>22</sup> *Wallersteiner v Moir (No 2)* [1975] QB 373.

derivative nature of the proceedings. Interestingly, this was an issue which was not taken forward and addressed in Part 11 of the Act,<sup>23</sup> perhaps because the Company Law Review Steering Group thought that legislative action was not required to achieve such an indemnification procedure.<sup>24</sup>

Lord Reed examined *Wallersteiner* and the history of costs indemnity orders in English law in detail,<sup>25</sup> noting that the matter was now specifically dealt with by rule 19.9E of the Civil Procedure Rules. Noting that the Court of Session had an inherent jurisdiction to deal with expenses and that a shareholder who is the pursuer in derivative proceedings is, for the purposes of expenses, in an analogous position to that of a trustee or an agent, the Inner House adopted the position that the court could, during the course of the leave proceedings, make an advance expenses indemnity order in respect of expenses incurred by the shareholder, or awarded against him, in the subsequent derivative proceedings. This was the case despite the fact that the antecedent leave proceedings would be inevitably separate from the substantive proceedings.

However, taking cognisance of the potential for abuse, Lord Reed recognised that the order should not be unconditional and that the court in the substantive derivative proceedings should have a right to modify such an order if an application is made by a shareholder that there has been a material change of circumstances. One might conjecture that the most straightforward situation where this might be relevant would be where the evidence revealed at the derivative proceedings was such as to discredit, seriously or incontrovertibly, the statement of facts in the petition considered in the leave proceedings, on the strength of which the court had granted the expenses indemnity order.

#### D. CONCLUSION

Lord Glennie's judgment furnished useful guidance in respect of a number of procedural and substantive uncertainties raised by sections 265 to 269 of the 2006 Act. The opinion of the Inner House has supplemented that judgment with further clarification. By taking the view that expenses indemnity orders are in principle available in the context of leave proceedings, the Inner House has given the statutory procedure slightly sharper teeth. Further, Lord Reed's outline of the types of circumstance in which the availability of a section 994 petition will be insufficient to disempower a petitioner from proceeding with substantive derivative proceedings is extremely significant. In adopting such an approach, one could argue that the Scottish courts may perhaps be forging a line of reasoning which draws a distinction between Scots and English law, since the English courts seem less prepared to grant

<sup>23</sup> This was noted before the Inner House by counsel for the respondent: see para 50.

<sup>24</sup> Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (2000, available at <http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/clr-review/page25086.html>) para 4.133.

<sup>25</sup> Paras 50-57.

a shareholder permission to continue derivative proceedings where a remedy under section 994 is *prima facie* available.

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## An Agent's Fiduciary Duties: Modern Law Placed in Historical Context

*Imageview Management Ltd v Jack*<sup>1</sup> provided the Court of Appeal in England with an important opportunity for analysis of an agent's fiduciary duties. In a clear and concise judgment, Lord Justice Jacob put the issue succinctly: "What if a footballer's agent, in negotiating for his client, makes a secret deal with the club for himself on the side?"<sup>2</sup>

### A. THE COURT'S REASONING

The footballer in question was Kelvin Jack, Trinidad and Tobago's international goalkeeper. He had instructed an agent, Berry, to act for him in a proposed move to Dundee United. Berry operated through a company known as Imageview Management Ltd. In the course of negotiations between Berry and Dundee United, and unknown to Jack, it was agreed that Dundee United would pay Imageview a fee of £3,000 for procuring for Jack a work permit. When Jack discovered what had taken place, he ceased paying commission to Imageview, and sought repayment of all commission already paid. When he asked Berry why the payment had been concealed from him, Berry replied that "it was none of your business."<sup>3</sup>

Berry was proved wrong. The Court of Appeal held that no further commission was payable, and, in addition, that all commission already paid to Imageview was to be refunded to Jack. This draconian remedy illustrates the seriousness with which the law regards breaches of fiduciary duties. In the words of Jacob LJ:<sup>4</sup>

The law imposes on agents high standards. Footballers' agents are not exempt from these. An agent's own personal interests come entirely second to the interest of his client. If you undertake to act for a man you must act 100 per cent, body and soul, for him. You must act as if you were him. You must not allow your own interest to get in the way without telling him. An undisclosed but realistic possibility of a conflict of interest is a breach of your duty of good faith to your client.

1 [2009] EWCA Civ 63, [2009] 1 Lloyd's Rep 436.

2 Para 1.

3 Para 2.

4 Para 6.

Jacob LJ drew on three significant cases on fiduciary duties: principally *Boston Sea Fishing v Ansell*,<sup>5</sup> but also *Andrews v Ramsay*<sup>6</sup> and *Rhodes v Macalister*.<sup>7</sup> He lamented the fact that, although the law in this area has been long-established, cases of agents either failing to understand the law or intentionally flouting it continue to arise.<sup>8</sup> Even where the agent honestly believes that what he is doing is legal, this makes no difference: the draconian remedy of repayment of all commission remains the standard remedy.<sup>9</sup> The severe remedy is often explained by the fact that it is inherent in the nature of fiduciary relationships that the beneficiary places his interests entirely in the hands of the fiduciary, and has little opportunity to exercise supervision. In the words of Getzler, “A dialectic is at work: the fiduciary can only serve the beneficiary if armed with extensive powers, and the beneficiary can only hold the fiduciary to account if the fiduciary is hemmed in by potent duties and remedies.”<sup>10</sup>

How should the agent have acted? He could, of course, have refused to enter into any sort of side deal with Dundee United. Another possibility was also open to him. In the words of Atkin LJ in *Rhodes*:<sup>11</sup>

The complete remedy is disclosure, and if an agent wishes to receive any kind of remuneration from the other side and wishes to test whether it is honest or not, he has simply to disclose the matter to his own employer and rest upon the consequences of that. If his employer consents to it, then he has performed everything that is required of an upright and responsible agent.

Thus, had Berry disclosed the payment of £3,000 to Jack, and had Jack consented to receipt by Berry of this sum, Berry would have been entitled to retain it.

This case was obviously one which caused the Court of Appeal no difficulty: the surreptitious nature of the agent’s activities left the judges in no doubt that repayment of the entire commission was the correct remedy. However, Jacob LJ took the opportunity to explore less clear cases, in which the agent may be permitted to retain some commission even though in breach of his fiduciary duty. Again, in the words of Atkin LJ:<sup>12</sup>

Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand, there

5 (1888) 39 Ch. 339.

6 [1903] 2 KB 635.

7 (1923) 29 Com Cas 19.

8 Para 8: “The law as to an agent’s duty of fidelity where there is a realistic possibility of a conflict of interest, goes back a long, long way. Sadly the courts have found it necessary to re-state it from time to time. I make no apology for doing so yet again.” See also the similar view of Mummery LJ at para 65.

9 *Boston Deep Sea Fishing v Ansell* (1888) LR 39 Ch D 339 at 368 per Fry LJ; *Imageview* at para 15 per Jacob LJ.

10 J Getzler, “Rumford Market and the genesis of fiduciary obligations”, in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) 577 at 581.

11 (1923) 29 Com Cas 19 at 29.

12 *Keppel v Wheeler* [1925] 1 KB 577 at 592. See also *Graham & Co v United Turkey Red Co* 1922 SC 533.

may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration; and as in this case it is found that the agents acted in good faith, and as the transaction was completed and the appellant has had the benefit of it, he must pay the commission.

Clearly, cases in which the agent is entitled to retain a proportion of his commission are likely to be rare. The onus will lie on the agent to establish his right to retain.

### B. *IMAGEVIEW* IN ITS HISTORICAL CONTEXT

The law in this area, as Jacob LJ said, goes back a “long, long way”.<sup>13</sup> It was shaped largely by two Scottish appeals to the House of Lords: *York Buildings Co v Mackenzie*<sup>14</sup> and *Aberdeen Railway Co v Blaikie*.<sup>15</sup> Both make interesting reading, not least because, in both, a House of Lords comprising only English judges overturned a decision of the Inner House. It would be wrong to characterise these cases as examples of the “purity” of Scots law being tainted by anglicised views. In *York Buildings* the Court of Session reached what seems, to modern eyes at least, a puzzling conclusion. An agent bought two lots of heritable property at a judicial auction notwithstanding the fact that he was the common agent acting in the ranking and sale. Further circumstances were relevant: there were unproven allegations that the agent had set the roup at a time when a potential purchaser could not attend, and the agent’s purchase proceeded with undue haste. The sale was confirmed by a decree of court, and the agent became infert, occupying the estate for at least eleven years, and making substantial improvements. When the appeal reached the Court of Session, the Court was highly divided, and changed its view twice between interlocutors. Eventually the Court held to its original view which was, in effect, that the sale was “unexceptional.”<sup>16</sup>

In *Aberdeen Railway Co v Blaikie* the railway company had entered into contracts to buy a large number of iron chairs from Messrs Blaikie, a partnership. Blaikie was both a director of the company and managing partner of the partnership. When the partnership sought to enforce the contract, this was resisted on the basis that Blaikie’s involvement in both business entities incapacitated him from entering into dealings between the company and his own firm. The Inner House saw no reason to refuse the action for implement.<sup>17</sup> This decision was overturned on appeal, Lord Chancellor Cranworth and Lord Brougham concluding that the fiduciary nature

<sup>13</sup> *Imageview* at para 8.

<sup>14</sup> (1795) 3 Pat App 378.

<sup>15</sup> (1854) 1 Macq 461.

<sup>16</sup> (1795) 3 Pat App 378 at 379. The Court of Session was split 4:4 at the hearing which resulted in the first interlocutor. The second interlocutor reduced the first, and the third reinstated the first. Lord Monboddoo (and possibly other judges) changed his mind between hearings. Lord Monboddoo heard the appeal despite acting as judge at the initial roup at which the agent’s questionable conduct occurred. Far from considering himself disqualified to participate in the appeal, he provided the Court of Session with factual details of the way in which the roup was conducted whilst delivering his own judgment: see 381.

<sup>17</sup> (1851) 14 D 66.

of the director's duty left him unable to conclude a contract of this type.<sup>18</sup> Lord Chancellor Cranworth relied on a passage from the Digest in order to reach his decision: "A tutor cannot buy a thing belonging to his ward; this rule extends to other persons with similar responsibilities, that is, curators, procurators, and those who conduct another's affairs."<sup>19</sup> This link with Roman law put down roots, the Digest passage being referred to in later Scottish cases, including one decided the year after *Blaikie*, and one eight years later.<sup>20</sup> Stair had expressed a similar view, although limiting his comments to the tutor/pupil context: "Tutors and their factors are presumed to do that for the behoof of the pupil which they ought to do; and though it be done *priore nomine*, it accresceth to the pupil."<sup>21</sup>

The two cases might be considered examples of a rare phenomenon: Scottish appeals becoming leading authorities in English law.<sup>22</sup> Surprisingly, a further case can be added to this class: *McPherson's Trustees v Watt*.<sup>23</sup> At issue was the behaviour of an Aberdeen solicitor, Watt, who, without disclosing these significant details to his client, had arranged for four of the houses owned by the client to be sold to Watt's brother, having agreed with his brother that two of the houses would eventually be sold on to Watt himself. The Court of Session decision, which had exonerated the solicitor on somewhat technical grounds,<sup>24</sup> was overturned by the House of Lords. It seems that, during the course of the nineteenth century, the Court of Session did not treat such conduct on the part of agents with the seriousness it deserved.

### C. CONCLUSION

The developments narrated here challenge pre-conceptions which we may hold about the way in which Scots law develops. In two leading cases, it was the House of Lords (comprising only English judges), not the Court of Session, which put Scots law on a firmer and fairer footing. In clear speeches, the conduct of the agents in question suffered trenchant criticism. Intriguingly, the influential solution adopted by the House of Lords in *Blaikie* is, essentially, a Civilian one, influenced by Roman law, and consistent with Stair's view. The House of Lords rescued Scots law from the muddle created by the Court of Session. The speeches have stood the test of

18 (1854) 1 Macq 461.

19 At 474. See D.18.1.34.7: "Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores, et qui negotia aliena gerunt." The translation in the text is from A Watson (ed), *The Digest of Justinian* (1998).

20 *Cochran v Black* (1855) 17 D 321 at 337 per Lord Cowan; *Perston v Perston* (1863) 1 M 245 at 249 per Lord Neaves and at 252 per Lord Cowan.

21 Stair, *Inst* 1.6.17, relying on *Edmiston v Edmiston* (1635) Mor 16264. See also Erskine, *Inst* 3.3.35: "A mandatory, being in truth a trustee, is obliged to communicate to the mandant the benefit or ease allowed to him in any purchase which is naturally connected with the subject of the mandate", relying on *Wright v Wright* (1712) Mor 16193.

22 *Blaikie* has exerted influence beyond the UK. See e.g. the South African case of *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-180 per Innes CJ.

23 (1877) 5 R (HL) 9.

24 The Court of Session held that the solicitor's status as agent for the trustees in the sales had not been proved. Lord Shand dissented.

time, a fact underlined by the use of *Blaikie* as a major point of reference by the Inner House in a recent case on the fiduciary duties of a company director.<sup>25</sup> Now, the Court of Appeal in England has reaffirmed the legal principles with clarity and force. *Imageview* will no doubt become a point of reference in future Scottish cases on fiduciary duties, and it is perhaps pleasing that its factual context is Scottish, and not English, football.

All three cases provide food for thought for those analysing the way in which mixed legal systems such as Scots law develop.<sup>26</sup> The influences brought to bear on any legal system are often difficult to pinpoint. When influences can be identified, the manner in which they are applied, and the particular context, can be surprising.

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## *CG v Glasgow City Council:* Hope for Historic Child Abuse Victims?

In *CG v Glasgow City Council* Lord Malcolm, considering a claim for damages based on allegations of historic child abuse, noted that:<sup>1</sup>

In *Hoare* Baroness Hale observed that “the abuse itself is the reason why so many victims do not come forward until many years after the event”, and that the English legislation does not recognise “the reality of many sexual abuse cases”. If I am correct in [my] analysis, a similar comment cannot be levelled at the Scottish legislation.

Lady Hale identified the problem as lying in the “resistance to stale claims” which is embodied in the legislation on limitation. *J v Fife Council*,<sup>2</sup> where the defenders did not plead time bar, is thus far the only reported Scottish case where damages were awarded for historic child abuse.

Both jurisdictions have struggled to balance the right of the pursuer to reparation for wrongs committed against him with the requirements of the limitation statutes. There is an emerging divergence between the jurisdictions on the means by which this tension can be resolved. In England this has been achieved by a liberal interpretation of section 33 of the Limitation Act 1980, which provides a discretionary

<sup>25</sup> *Commonwealth Oil & Gas Ltd v Baxter* [2009] CSIH 75.

<sup>26</sup> See most recently V V Palmer and E C Reid (eds), *Mixed Jurisdictions Compared: Private Law in Scotland and Louisiana* (2009).

<sup>1</sup> [2009] CSOH 34, 2009 Rep LR 74 at para 33, citing *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844 at para 54.

<sup>2</sup> 2007 SLT 85.

power to disapply the primary limitation period if it is equitable so to do. This is the same test as appears in section 19A of the Prescription and Limitation (Scotland) Act 1973. Attempts to invoke this provision in cases of historic child abuse in Scotland have proved unsuccessful, as the litigation in *B v Murray (No 2)*<sup>3</sup> demonstrates. In Scotland attention is now focussed on section 17, which determines the date on which the triennium (after which an action for damages cannot be brought) commences.

In *GC*, Lord Malcolm analysed the differences in wording and structure between section 17 and the corresponding English provision (section 14 of the 1980 Act). He demonstrated that, unlike section 14 as interpreted in *Hoare*, section 17 contains a subjective test of the “date of knowledge” which is capable of being postponed by the psychological effects of abuse. This offers distinct advantages to pursuers when compared to section 19A. First, section 14 gives a right to bring proceedings as opposed to an appeal to the “unfettered” discretion of the judge under section 19A. Secondly, the prejudice to the defenders occasioned by the passage of time, which has been fatal to attempts to persuade courts to exercise the section 19A discretion,<sup>4</sup> is not a factor of any relevance in the application of section 17.

#### A. THE STATUTES COMPARED

The crux of Lord Malcolm’s opinion rests in his comparison of the relevant statutes in the context of the decision in *Hoare*. It is therefore instructive to examine the English approach first. Section 14 of the Limitation Act 1980 reads as follows (the “date of knowledge” being the date on which the limitation period commences, if such date is later than the date on which the cause of action accrued):<sup>5</sup>

- (1) . . . references to a person’s date of knowledge are references to the date upon which he first had knowledge of the following facts:
  - (a) that the injury was significant; and
  - (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
  - (c) the identity of the defendant; and
  - (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of the action against the defendant . . .
- (2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question could reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
- (3) For the purposes of this section a person’s knowledge includes knowledge which he might reasonably have been expected to acquire –
  - (a) from facts observable or ascertainable by him; or
  - (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek . .

3 2005 SLT 982 (OH); [2007] CSIH 39, 2007 SC 688 (IH); [2008] UKHL 32, 2008 SC (HL) 146.

4 See below.

5 Limitation Act 1980 s 11(4).

In *Hoare* the majority of the House of Lords (Lady Hale dissenting on this point only) held that section 14(2) required an impersonal and objective assessment of seriousness and that the effect of section 14(3) was that the test which had to be applied was an objective one, taking no account of the particular circumstances of the individual plaintiff.<sup>6</sup>

[T]he test itself is an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would “reasonably” have done so. You ask what the claimant knew about the injury he had suffered, you add any knowledge about the injury which may be imputed to him under section 14(3) and you then ask whether a *reasonable person* with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

It was against that analysis that Lord Malcolm considered the differences between the Scottish and English legislation. Section 17(2) of the 1973 Act provides that actions for personal injuries not resulting in death must be brought within a period of three years from either the date of injury or, if later, the date:

on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of the following facts –

- (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
- (ii) that the injuries were attributable in whole or in part to an act or omission;
- (iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

Lord Malcolm noted that a distinction between the two statutes arises from the requirement in the Scottish Act to consider when the pursuer became aware of the statutory facts and when it would be reasonably practicable for him in all the circumstances to be aware. The former test – actual knowledge – is demonstrably subjective. The more significant issue is whether reasonable practicability imports the perspective of the “reasonable person” free of the psychological manifestations of past abuse in a fashion similar to section 14(3) of the 1980 Act. He was clear that it did not.<sup>7</sup>

The equivalent Scottish test resolves the issue in a different way, namely by reference to when it would have been reasonably practicable for the pursuer to become aware that his injuries were sufficiently serious to justify proceedings. In my view, the Scottish test does not raise issues of constructive or imputed knowledge, nor does it create a subjective/objective dichotomy. It simply requires a consideration of whether and when there were reasonably practicable steps available to the particular pursuer, whether by seeking advice or otherwise,

<sup>6</sup> *Hoare* at para 34 per Lord Hoffmann (emphasis added).

<sup>7</sup> *CG* at para 29 (Lord Malcolm’s emphasis).

which, if taken, would have alerted him to the statutory facts. It does not tell the court to proceed by reference to a hypothetical reasonable claimant as opposed to the actual pursuer in the case. On the contrary, section 17(2)(b) asks whether “it would have been reasonably practicable for him in all the circumstances to become aware of all of the following facts . . .”

The particular vulnerabilities of pursuers in cases of this nature can therefore postpone the running of the limitation clock against them. This is significant in allowing for reparation for the abuse and its effects. The number of historic child abuse claims suggests that abuse was endemic in some institutions and it is therefore entirely plausible that it was treated by pursuers as normal until it emerged as the cause of adult psychological dysfunction.

More particularly, there is an advantage to the Scottish pursuer relying on section 17 when compared with the English claimant dependent upon the court’s discretion. In England, section 33 of the 1980 Act requires the court to exercise its discretion having regard *inter alia* to the prejudice caused to the defendant by the delay. Section 19A of the 1973 Act operates in a similar fashion, although (unlike the 1980 Act) without reference to a statutory checklist.<sup>8</sup> Previous Scottish historic abuse actions have failed on the basis of prejudice to the defenders. In *B v Murray (No 2)* Lord Drummond Young found that prejudice by the loss of witnesses and records resulting from the passage of time was sufficient to justify dismissing the claims:<sup>9</sup>

These authorities make it clear that actual prejudice, *even of a fairly limited nature*, will usually be sufficient to preclude any extension of the limitation period. In the present case I am of opinion that actual prejudice to the defenders has been shown. I consider such prejudice to be clear, and also to be serious. In these circumstances I am of opinion that the existence of such prejudice is *by itself* a sufficient reason for not allowing the actions to be brought under s 19A.

The loss of evidence by the defenders is a characteristic of historic abuse cases, and is typically fatal to any attempt to plead section 19A. It is not, however, a relevant factor under section 17, so that claims within that section, as now explained by Lord Malcolm, will survive even if the section 19A discretion would not have been exercised. This would not have benefitted the actual pursuer in *B v Murray* whose claim had previously been dismissed on the basis of section 17.<sup>10</sup>

## B. CONCLUSION

In Scotland, the paramount importance attached, under section 19A, to the prejudice to defenders occasioned by the delay in bringing the action has effectively prevented claims in respect of historic child abuse. This contrasts with the interpretation in England of the corresponding section 33 of the 1980 Act which emerges from *Hoare*. By locating consideration of the effects of abuse upon the individual pursuer in

<sup>8</sup> Limitation Act 1980 s 33(3).

<sup>9</sup> 2005 SLT 982 at para 124 (emphasis added). This passage was cited with approval in the Inner House: 2007 SC 688 at para 59 per Lord President Hamilton.

<sup>10</sup> 2004 SLT 967.

section 17, Lord Malcolm has now provided a route for such claims to proceed in which the interests of defenders are of secondary importance. This greatly strengthens the position of claimants and recognises, as section 19A has not, the reality of most child abuse cases.

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## Rape and Other Things: Sexual Offences and People with Mental Disorder

The case of *R v Cooper (Gary Anthony)*<sup>1</sup> deserves consideration if for no other reason than it was the last criminal appeal to be decided by the House of Lords.<sup>2</sup> But it also highlights some important issues, in both Scots and English law, about defining and distinguishing different sexual offences.

Part 1 of the Sexual Offences Act 2003 creates a variety of offences.<sup>3</sup> These include rape, defined as the penile penetration of the complainant's vagina, anus or mouth where the complainant did not consent to the penetration and the accused did not reasonably believe that the complainant consented. In *Cooper* the complainant was a 28 year old woman who suffered from various mental disorders, including schizo-affective disorder (which from time to time could cause delusions and severe mood disturbances) and an emotionally unstable personality disorder (which could adversely affect her ability to interact with other people, her thought processes and her thinking style). She had left a meeting with a psychiatrist in a distressed and agitated state. Later that day, she met the accused and told him that she had been in a hospital for nine years and she had to leave town because people were after her. The accused took her to a house and gave her crack. He asked her to give him a "blow job", and proceeded to penetrate her mouth with his penis. The woman, in her evidence, accepted that she understood what a "blow job" was but stated that she was too frightened to resist or respond as she believed that people using crack were crazy and could kill.

The accused was originally charged with rape, but this was later replaced with a charge under section 30 of the 2003 Act. That provision makes it an offence for someone to engage in sexual activity with another person where that person is unable to refuse because of a mental disorder and the accused knew or reasonably could

1 [2009] UKHL 42, [2009] 1 WLR 1786.

2 But it was not the last decision of the House on a point of criminal law: see *R (Purdy) v DPP* [2009] UKHL 45, [2009] 3 WLR 403.

3 Part 1 of the 2003 Act does not apply in Scotland.

be expected to know of the disorder. The idea of being unable to refuse is further defined as either lacking the capacity to choose whether to agree to the sexual contact or being unable to communicate such a choice.

The accused was convicted of this offence, but appealed successfully to the Court of Appeal, where it was held that the trial judge had misdirected the jury. The judge had said that the complainant would have been unable to refuse sexual activity if she had lacked the capacity to choose whether to agree to it for any reason, such as an irrational fear or confusion of mind arising from her mental disorder, or if through her mental disorder she was unable to communicate such a choice to the accused, even though she was physically able to communicate with him. The Court of Appeal held that section 30 involved not merely a complainant being unable to choose to refuse sexual activity, but being unable to choose to agree to it. Furthermore, the test was the same under criminal and civil law. They applied common law authorities on the test for capacity to consent and held that the effect of a mental disorder necessarily had to be severe before the person was unable to choose whether to submit to sexual activity. An irrational fear that prevented the exercise of choice could not be equated with lack of capacity to choose. Furthermore, any lack of capacity to agree to sexual contact had to be general in nature: a lack of capacity to choose to agree could not be “person specific” or even “situation specific”. In addition, the reference in section 30 to inability to communicate was to be read as limited to physical inability.

#### A. THE LORDS’ DECISION

The judges in the House of Lords had little difficulty in pointing out the weaknesses in this reasoning. In the first place, the statutory provisions were concerned with inability to communicate a choice because of, or for a reason relating to, a mental disorder. Furthermore, the reliance on the common law was unsound. The 2003 Act itself set out the guiding principles for interpreting section 30. The terms of that provision made plain that someone could lack capacity to make an autonomous choice even though (as in the present case) she might have sufficient understanding of the nature and consequences of what was being done. In addition, the Act gave no support to the notion that capacity to choose related to a general type of act. Section 30 expressly refers to capacity to choose to agree to “the” sexual touching; that is, the specific sexual act. As Baroness Hale put it:<sup>4</sup>

... it is difficult to think of an activity which is more person- and situation-specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so.

#### B. DISCUSSION

In assessing the issues the courts were dealing with in *Cooper*, an important starting-point is the general problem of applying the law on sexual offences to situations

<sup>4</sup> *Cooper* at para 27.

involving a complainant with mental disorder. This problem was once expressed by the Law Reform Commission of Victoria in the following terms:<sup>5</sup>

The law must balance between two competing interests – protecting people with impaired mental functioning from sexual exploitation, and giving maximum recognition to their sexual rights. The difficulty for the legal system in striking an appropriate balance between these interests is compounded by the considerable diversity of people with mental impairment in terms of extent of impairment, living circumstances, and sexual interests and knowledge.

The emphasis of the House of Lords in stressing that capacity must relate to specific sexual acts rather than sexual acts in general is a far better attempt to strike this balance than that of the Court of Appeal. Insofar as someone with a mental disorder actually chooses to do a sexual act at a particular time with a particular other person, the law should respect his or her sexual autonomy. And if such a person does not choose to do such a sexual act, as a consequence of his or her mental disorder, again respect for sexual autonomy requires that the law should criminalise the ensuing sexual conduct.<sup>6</sup>

But a major issue here is how the law should criminalise conduct which involves someone having sex with a person whose mental disorder prevents them from choosing to engage in that conduct. This in turn involves the related concepts of differentiating criminal offences and fair labelling.<sup>7</sup>

The crux of this problem in *Cooper* is that on the approach of the House of Lords the accused in that case had committed rape: that is, he had penile-penetrative sex with the complainant knowing (because he knew of her mental condition) that she did not consent. But this is not the conduct which section 30 criminalises. Rather, the offence under that provision is having sex with a person who is unable to refuse because of a mental disorder and knowing of that mental disorder. This does not involve any issue of lack of consent by the complainant or of the accused knowing of the lack of consent. Is anything gained by having this offence, one different from rape? The wrong of the conduct must be the same. Having sex with someone who does not consent to it is wrong, no matter the cause of the lack of consent, and whether or not the lack of consent is due to a mental disorder.

5 Law Reform Commission of Victoria, *Sexual Offences against People with Impaired Mental Functioning* (Report No 15, 1988) 3. These words have become the classic statement of the issues and have been quoted by *inter alia* the Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000) para 4.1.3, and by the Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Scot Law Com No 209, 2007) para 4.88 n 102.

6 This was a point emphasised by Baroness Hale (see *Cooper* at para 27): “This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the [ECHR]. The object of the 2003 Act was to get away from the previous ‘status’-based approach which assumed that all ‘defectives’ lacked capacity, and thus denied them the possibility of making autonomous choices, while failing to protect those whose mental disorder deprived them of autonomy in other ways.”

7 For comprehensive discussion of the issues involved, see J Chalmers and F Leverick, “Fair labelling in criminal law” (2008) 72 MLR 217.

This situation is different from that of the rape of a child, and English law does have a separate offence of rape of a child under the age of 13.<sup>8</sup> But the reason for this separate offence is that the age of the victim in the rape of a child imports an additional element to the wrong involved.

The same argument could be made about rape of a person with a mental disorder. There could be a separate offence of having sex with a mentally disordered person when that person did not consent to it. But that is not what section 30 criminalises, and for good reason. In the case of a young child the law takes the view that the child lacks capacity to consent to sexual activity. The same cannot be said about persons with a mental disorder. Indeed the whole point of *Cooper* is that it simply cannot be said that all people with any mental disorder lack capacity to consent to sexual activity. The focus is always on a particular person at a particular time in respect of a particular act.

In the House of Lords Baroness Hale expressed some puzzlement on why the charge of rape against the accused was replaced with one under section 30. On the facts of this case the *actus reus* was identical. However, the *mens rea* differed. For section 30 the Crown would have to show that the accused knew or should reasonably have known that the complainant had a mental disorder and therefore was *likely* to be unable to refuse. This imposed a lesser proof than that required for rape, namely that the accused did not reasonably believe that the complainant consented. But the distinction is fine, especially given the House of Lords' own interpretation of inability to refuse being very specific to the actual *actus reus*. Furthermore, making easier an element of the proof by the Crown of the accused's guilt is hardly a good basis for making separate offences (in effect labelling rape as something other than rape). It should rather be a consequence of some principled separation out of the offences.

### C. THE SCOTTISH POSITION

There is, under Scots law, an offence which at first glance looks like section 30 of the Sexual Offences Act 2003. Section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003 makes it an offence for someone to engage in a sexual act with a mentally disordered person if at the time of the act the mentally disordered person (a) does not consent to the act or (b) was by reason of the mental disorder incapable of consenting to it. Subsections (3) and (4) provide definitions of "not consenting" and of "being incapable of consent". The offence is separate from rape, but it is clear that its basis is the lack of consent by the mentally disordered person, who at the relevant time did not, or could not, give consent to the sexual activity.

This provision was based on a recommendation in a report by an expert committee (the Millan Committee) which examined the law on mental disorder.<sup>9</sup> The committee's justification for having a separate offence relating

<sup>8</sup> Sexual Offences Act 2003 s 5.

<sup>9</sup> Scottish Executive, *Review of the Mental Health (Scotland) Act 1984* (2001).

to mentally disordered victims was essentially pragmatic, and stemmed from the inadequacies of the definition of consent used in the general Scots law of sexual offences. The Committee accepted that rather than a separate offence.<sup>10</sup>

An alternative approach to the special offences discussed above would be to redefine consent generally in relation to sexual behaviour to something closer to 'free agreement'. This approach could avoid the need for special offences to protect people with mental disorders, by bringing abuse of this group within the definition of generally applicable crimes such as rape.

That is the very outcome which will take place once the Sexual Offences (Scotland) Act 2009 comes into force.<sup>11</sup> The 2009 Act defines a range of crimes which are based on the complainer's lack of consent.<sup>12</sup> The Act provides for a consent model, containing a general definition of consent in section 12 ("free agreement") and also a list of particular circumstances in which consent in this sense is absent (sections 13-14).

The 2009 Act repeals section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003, but includes a provision copied from part of that section. Section 17 of the 2009 Act sets out a test for determining when such a person is incapable of consenting to sexual conduct.<sup>13</sup> However, this provision does not create a separate offence. It is expressly linked to the general sexual offences, which are defined in terms of lack of consent and it functions to supplement the consent model in some (but not all) cases where the complainer has a mental disorder.

As under the current law, the 2009 Act also provides for an offence of sexual abuse of trust of a mentally disordered person.<sup>14</sup> Abuse of trust offences do not involve lack of consent on the part of the mentally disordered person, and so do not occupy the space where offences such as rape, in which lack of consent is the key element, should be. The wrong in the breach of trust offence is not that the complainer did not consent to sexual activity. It is instead that although the complainer did consent, the sexual conduct occurred between parties in a relationship where even consenting activity is not appropriate.

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<sup>10</sup> Para 21.55.

<sup>11</sup> This will probably be in late 2010.

<sup>12</sup> Sexual Offences (Scotland) Act 2009 ss 1-9.

<sup>13</sup> Section 17(2).

<sup>14</sup> Section 46. In English law, similar offences are found in the Sexual Offences Act 2003.

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## Breach of the Peace Revisited (Again)

In *Smith v Donnelly*,<sup>1</sup> it was held that breach of the peace requires “conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community”.<sup>2</sup> The latter part of this definition appears logically to exclude breaches of the peace in “private” circumstances. Nevertheless, this issue has proved contentious<sup>3</sup> and was recently considered by a Full Bench in *Harris v HM Advocate*.<sup>4</sup> This note considers that decision, arguing that more remains to be done to clarify the boundaries of “private” breaches of the peace.

### A. THE FACTS IN *HARRIS*

Harris was charged with breach of the peace in relation to comments made, on separate occasions, to two police officers. He had told both officers that he possessed personal information about them and, in one conversation, advised them to “stay away” from him and his bank manager. Importantly, nobody other than the accused and one of the police officers had been engaged in conversation at any one time. These exchanges were, in this respect, “private”.<sup>5</sup>

At trial, the sheriff repelled Harris’s plea to the relevancy of the charges against him. Allowing the accused’s appeal against this decision, a Full Bench has now decided that breach of the peace requires “at least a public element”.<sup>6</sup> This meant overruling the earlier case of *Young v Heatly*,<sup>7</sup> which stood for the proposition that breaches of the peace could be committed in private.<sup>8</sup>

### B. “PRIVATE” BREACHES OF THE PEACE

The accused in *Young* was a depute headmaster who had made improper suggestions to four male pupils aged between sixteen and seventeen. These remarks were made in

1 2002 JC 65.

2 Para 17 per Lord Coulsfield. This definition was affirmed by a Full Bench in *Jones v Carnegie* 2004 JC 136 and applied in *Paterson v HM Advocate* [2008] HCJAC 18, 2008 JC 327, where it was decided that the sheriff had misdirected the jury in failing to refer to both elements of the *Smith* test in his definition of breach of the peace. The decision in *Paterson* was challenged unsuccessfully by the Crown in *Harris*.

3 For discussion of this area of the law, see M Plaxton, “*Macdonald v HM Advocate*: privately breaching the peace” (2008) 13 EdinLR 476 at 481.

4 [2009] HCJAC 80. The opinion of the court was delivered by the Lord Justice-General (Hamilton).

5 As Plaxton points out, this is a peculiar conception of “private”: Plaxton (n 3) at 478.

6 *Harris* at para 22. The same view is expressed again at para 24.

7 1959 JC 66.

8 *Young* is also relevant in that a breach of the peace was held to have occurred even though the complainers were not, themselves, alarmed. This objective element was maintained by the court in *Smith*.

the accused's study, with no one else present. The appeal court held that the "private" nature of the encounter, and the absence of alarm on the complainers' part, did not preclude guilt. Breach of the peace could be inferred from the "flagrant" nature of the accused's conduct.<sup>9</sup>

As Gordon has suggested, the court in *Young* appears to have punished the accused's immoral behaviour<sup>10</sup> and used breach of the peace as a means to this end. This has made it "difficult to assess [that decision's] value as an authority".<sup>11</sup> A number of factors suggest that the appeal court has, for some time, had similar reservations about the correctness of the decision in *Young*.

First, the court subsequently took steps to qualify the rule regarding "private" breaches of the peace. The leading case is *McDougall v Dochree*,<sup>12</sup> where the accused used a "peep hole" in a toilet cubicle to spy on women in the solarium next door. The court found that, because of a gap between the bottom of the cubicle door and the floor, the "alleged conduct was discoverable by anyone who became suspicious"<sup>13</sup> (which in fact happened) and so the accused's conduct could be regarded as a breach of the peace. Following *Dochree*, then, the crucial matter was whether a member of the public could have reasonably been expected to discover the accused's conduct. This is a much narrower approach than that adopted in *Young*.

Secondly, despite the approach in *Dochree* being affirmed in *Smith*<sup>14</sup> and by a Full Bench in *Jones v Carnegie*,<sup>15</sup> the court did not endorse *Young* in those cases: the court in *Smith* was insufficiently large to overrule it<sup>16</sup> and *Jones v Carnegie* concerned public conduct only.<sup>17</sup> Thirdly, Lord Marnoch recently argued in his dissent in *Macdonald v HM Advocate*<sup>18</sup> that *Young* might need to be "formally reviewed by a larger court" in the future.<sup>19</sup> Once again, the court was too small to depart from the rule in *Young*.

Given these doubts, it is unsurprising that the court in *Harris* overruled *Young*. What is more surprising is that the judges suggested no fewer than six grounds for deciding to do so.<sup>20</sup>

9 *Young* at 70 per the Lord Justice-General (Clyde).

10 G H Gordon, *The Criminal Law of Scotland*, 3<sup>rd</sup> edn by M G A Christie, vol 1 (2000) para 41.10. See, further: M G A Christie, *Breach of the Peace* (1990) paras 2.41-2.43; Anon, "Breach of the peace" 1959 SLT (News) 229 at 232.

11 G H Gordon, *The Criminal Law of Scotland*, 2<sup>nd</sup> edn (1978) para 41.10. This statement does not appear in the latest edition of the work, which suggests that the decision in *Smith* was interpreted as casting doubt upon the reliability of *Young* (see Gordon, *Criminal Law* (n 10) para 41.10).

12 1992 JC 159.

13 *Dochree* at 159 per the Lord Justice-Clerk (Ross). Cf *Thompson v MacPhail* 1989 SLT 637.

14 *Smith* at para 20 per Lord Coulsfield. The court did, in this "somewhat obscure" passage, urge caution where the conduct takes place in "private"—a fact acknowledged by the court in *Harris* at para 19.

15 2004 JC 136 at para 12 per the Lord Justice-General (Cullen).

16 *Harris* at para 19.

17 Para 21.

18 [2008] HCJAC 5, 2008 JC 262.

19 Para 5.

20 *Harris* at para 17.

### C. DEPARTING FROM *YOUNG*

The court's reasoning in *Harris* comprises two main parts. First, the court noted that the law on breach of the peace had moved on substantially since *Young* was decided.<sup>21</sup> The offence is apparently no longer one lacking in "sharply defined"<sup>22</sup> boundaries.<sup>23</sup>

Second, the court presented five examples of how the decision in *Young* was based on a misreading of earlier authorities. The most significant of these errors came about through the reliance on White's report of the decision in *Ferguson v Carnochan* rather than the official report.<sup>24</sup> While White's report refers to the apprehension of "mischief . . . to the persons who are misconducting [sic] themselves or others",<sup>25</sup> the official report refers to the "reasonable apprehension . . . that some mischief may result to the public peace".<sup>26</sup>

The emphasis of these statements is clearly different,<sup>27</sup> sounding a cautionary note to those who seek to rely on unofficial reports of older cases. The court in *Young* was clearly misled by the report upon which it relied. Accordingly, its decision had to be overruled: "absent a public element, [a breach of the peace] is not committed".<sup>28</sup>

What does this "public element" consist of? The court in *Harris* felt it was "unnecessary . . . to seek to give definitive guidance as to what public element would be sufficient". Despite this unhelpful statement, the judges were clear that the rule in *Dochree* regarding "discoverability" of "private" acts still represents the law.<sup>29</sup> This means that a breach of the peace will still be committed where there is a reasonable chance that the accused's (objectively) alarming conduct would be discovered by a member of the public.

As Michael Plaxton has noted, the law following *Dochree* was premised upon a peculiar, technical definition of "private" conduct.<sup>30</sup> Now, following *Harris*, breach of the peace is to be determined by the presence of an equally technical description of a "public element". Neither seems particularly satisfactory as they both incorporate a reliance on a reasonable risk of discovery. This is problematic because reasonableness is a necessarily subjective concept which has no *inherent* content. Accordingly, there is still little certainty regarding the boundaries of breach of the peace. This makes future appeals regarding the scope of the offence inevitable.

### D. DOES *HARRIS* LEAVE A GAP IN THE LAW?

Another issue which was not addressed satisfactorily by the court in *Harris* concerns the consequences of overruling *Young*: is there now a gap in the law? Clearly, one

<sup>21</sup> Para 17.

<sup>22</sup> *Young* at 70 per the Lord Justice-General (Clyde).

<sup>23</sup> *Harris* at para 17.

<sup>24</sup> (1889) 2 White 278, (1889) 16 R (J) 93.

<sup>25</sup> At 282.

<sup>26</sup> At 94-95.

<sup>27</sup> See, similarly, Christie, *Breach of the Peace* (n 10) 106-108.

<sup>28</sup> *Harris* at para 24.

<sup>29</sup> Para 25.

<sup>30</sup> Plaxton (n 3) at 479.

might argue, certain private acts are necessarily the concern of the law. Sexual intercourse is (usually) inherently private, but the law is nevertheless interested where one party does not consent.<sup>31</sup> Domestic abuse is likely to happen in private, but is incontrovertibly of concern to the criminal law.<sup>32</sup> Are private threats to police officers or inappropriate suggestions to schoolchildren also appropriate targets for criminal liability?

Answering this question requires a consideration of what makes certain intrusions by the law into otherwise private acts legitimate. As Marshall and Duff have explained, it is the public nature of wrongs such as rape and domestic abuse which allows the law to intervene.<sup>33</sup> By this, it is not meant that these wrongs are perpetrated in public or directly against the polity: “[w]e should interpret a ‘public’ wrong... as one that properly *concerns* the public, i.e. the polity as a whole”.<sup>34</sup>

The point of *Harris* is not that the public has *no* interest in acts such as those carried out by the accused. Making threats to police officers is clearly a wrong with which the public should be concerned. Such behaviour does not, however, fall within the realm of breach of the peace. In *Harris* the court noted that the Crown had other offences potentially open to it: attempting to pervert the course of justice and the common law of threats.<sup>35</sup> Admittedly, *Young* is a more difficult case, as it is hard to see what alternative charge would be available. The accused simply made indecent comments to complainers of at least sixteen years of age who appear to have been neither vulnerable nor in physical danger.

If there is a gap in the law here – if a wrong with which the public ought to be concerned is not open to being confronted – then it is for Parliament to act. It is not for the courts to stretch the concept of breach of the peace to accommodate cases where criminalisation either is or appears necessary. This is perhaps the most important point of *Harris*: it reaffirms that breach of the peace is no longer a “catch-all” offence.<sup>36</sup> In future the police and Crown Office must think more carefully about the crimes with which they charge or indict suspects. That is, surely, a good thing in itself.

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*The author is grateful to Sharon Cowan and Shona Wilson for their comments on earlier drafts.*

31 *Lord Advocate’s Reference (No 1 of 2001)* 2002 SLT 466; Sexual Offences (Scotland) Act 2009 s 1.

32 R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) 141.

33 S E Marshall and R A Duff, “Criminalization and sharing wrongs” (1998) 11 *Canadian Journal of Law and Jurisprudence* 7.

34 Duff, *Answering for Crime* (n 32) 141 (emphasis added).

35 *Harris* at para 26.

36 For an eye-opening discussion of the range of conduct charged as breach of the peace prior to *Smith*, see P R Ferguson, “Breach of the peace and the European Convention on Human Rights” (2001) 5 *EdinLR* 145 at 145-146.

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## Conflict of Discourses: Medical Experts and the Restriction of Mentally Disordered Offenders

*Scottish Ministers v The Mental Health Tribunal for Scotland*<sup>1</sup> was an appeal by the Scottish Ministers against a decision by the Mental Health Tribunal for Scotland to revoke a restriction order imposed on the patient JK in 1970. Following a conviction for breach of the peace, he was detained under section 55 of the Mental Health (Scotland) Act 1960. In addition, the court imposed a restriction order without limit of time, the relevant statutory test being that, having regard to the nature of the offence with which JK was charged, his antecedents and the risk that as a result of his mental disorder he would commit offences if set at large, such an order was necessary for the protection of the public.<sup>2</sup>

Subsequent to the 1960 Act, there have been various statutory provisions dealing with mentally disordered offenders.<sup>3</sup> The current law provides for a compulsion order authorising the detention of a convicted person with a mental disorder in hospital,<sup>4</sup> and allows the court to impose a restriction order for the person to be detained without limit of time.<sup>5</sup> Patients can continue to be detained on the grounds of public safety, even where their mental disorder is no longer treatable.<sup>6</sup> Since the Mental Health (Care and Treatment) (Scotland) Act 2003, compulsion orders are supervised by the Responsible Medical Officer (RMO) and last for six months. Restriction orders, imposed by the court at sentencing, continue a compulsion order without limit of time. Both are reviewed by the RMO, Scottish Ministers and the Mental Health Tribunal for Scotland (MHTS). Whereas only Scottish Ministers could revoke restriction orders in the past, this can now only be done by the MHTS.<sup>7</sup>

### A. THE TRIBUNAL'S DECISION

In July 2007 the MHTS heard an application by patient JK to revoke the restriction order imposed upon him in 1970. Present were JK, his advocacy worker, his RMO (Dr Dewar), and a representative of the Scottish Ministers. The MHTS considered

1 [2009] CSIH 9, 2009 SLT 273. The opinion of the court, an Extra Division, was delivered by Lord Wheatley.

2 Mental Health (Scotland) Act 1960 s 60.

3 Mental Health (Scotland) Act 1984; Criminal Procedure (Scotland) Act 1995; Mental Health (Public Safety and Appeals) (Scotland) Act 1999; Mental Health (Care and Treatment) (Scotland) Act 2003.

4 Criminal Procedure Scotland Act 1995 s 57A.

5 s 59(1).

6 Mental Health (Public Safety and Appeals) (Scotland) Act 1999 s 1. See C Connelly and N Hodelet, "Treatability and the release of restricted patients" (2000) 5 SLPQ 409.

7 Mental Health (Care and Treatment) (Scotland) Act 2003 s 193.

a report by Dr Clark, a consultant forensic psychiatrist, instructed on behalf of JK. At the time of the hearing, JK was 56 years old and suffering from an organic psychosis related to an inoperable brain tumour. This caused behavioural difficulties. His dangerous behaviour included fashioning weapons which he used to attack staff. As a result nursing staff had, at times, to observe him from arm's length. He had a history of poor compliance with medication. The tribunal heard evidence from Dr Dewar that the compulsion order should remain in place and that, as the serious harm test in section 193(5)(b)(i) of the 2003 Act had been met, the restriction order should also remain in place. However, he disagreed with the statement in the CORO 1 form<sup>8</sup> that he was "satisfied that as a result of the patient's mental disorder it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital whether or not for medical treatment".<sup>9</sup> In evidence he explained that this reflected his general ethical concerns that it would be wrong to detain an untreatable patient in hospital purely on public safety grounds. He considered that the serious harm test did not apply when the patient *was* receiving treatment, but only where there was an immediate and grave threat were the patient to be released. Dr Clark's written evidence was that, given the patient was to remain in a secure setting, he did not present any undue risk that the restriction order would help prevent.

The tribunal continued the compulsion order but revoked the restriction order on the basis that it was not necessary to protect any other persons from serious harm for the patient to be detained in hospital (the serious harm test), nor did it continue to be necessary for the patient to be subjected to the restriction order (the continued necessity test).

## B. THE APPEAL

The Scottish Ministers appealed against the decision to revoke the restriction order. The grounds of appeal were, first, that the tribunal's decision was vitiated by errors of law; secondly, that the tribunal exercised its discretion unreasonably by failing to deal properly with the evidence before it; and thirdly, that the tribunal's decision was unsupported by the evidence.

In allowing the appeal on the first ground, the Inner House held that the tribunal had erred in its application of the legislation. Under section 193(2) of the 2003 Act, the tribunal cannot make an order where it is satisfied that the patient has a mental disorder and that, as a result, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment. It is only if it is not so satisfied that it may go on to consider the other options open to it (revocation and variation of orders and conditional discharge). The court concluded that the tribunal was required to reach a clear and reasoned view in respect of the two questions posed by section 193(2) and had failed to do so. On the face of it, both tests in section 193(2) were clearly satisfied; and, given that the serious

<sup>8</sup> The document completed by RMOs and submitted to MHTS on a regular basis which keeps compulsion orders and restriction orders under review.

<sup>9</sup> Para 13.

harm test was met, the court did not understand why the tribunal had come to the opposite view in applying the identical test under section 193(5)(b)(i) (revoking the restriction order).

The matter was remitted back to a new tribunal to be heard afresh. The court also stated that, in considering whether to revoke a restriction order under section 193(5), a tribunal must consider both the serious harm test and the continued necessity test, that the serious harm test<sup>10</sup> is whether the restriction order is necessary to protect the public from a risk of serious harm rather than a serious risk of harm, and that the tribunal should properly have considered whether:<sup>11</sup>

standing the patient's mental disorder, it was necessary for him to be detained in order to protect any other person from the risk of serious harm; and that means that the protection had to be directed at the risk, whether serious or not, so long as it was real; that the harm that was put at risk had to be serious; and that the harm that needed to be protected against did not have to be confined to physical harm to a person.

In respect of the continued necessity test<sup>12</sup> the court, whilst acknowledging that the 2003 Act provides no guidance on how the test should be assessed, was not satisfied that the tribunal had focussed on the relevant principles. The court stated that the tribunal should consider the nature of the offence, the antecedents of the patient, and the risk that the patient would commit further offences if at large.<sup>13</sup> However, it was not inevitable that the tribunal would find them of significance to the revocation of the order. Cognisance should be paid to matters in contemplation at the time of the original order and in particular to the three matters described in section 60 of the 1960 Act,<sup>14</sup> albeit that these might be rejected as no longer relevant.

No decision was made on the other grounds of appeal as the principal concern was the proper interpretation of the legislation, raised in the first ground.

### C. DISCUSSION

Detention of non-treatable offenders on the grounds of public safety continues to raise ethical issues amongst psychiatrists since detention takes place in a hospital setting. Interpretation of statements in the CORO 1 form (by either RMOs or the tribunal) is not uniform. In JK's case, it appears that the RMO's ethical views (conveyed in the CORO 1 documentation by means of an agree or disagree tick box, but later clarified in oral evidence) were interpreted by the tribunal as meaning that the patient should not remain subject to a restriction order, despite the RMO's clear oral evidence to the contrary. It seems the written evidence of the independent psychiatrist was preferred, although the tribunal stated it did not reach its decision on his evidence alone.

<sup>10</sup> Section 195(5)(b)(i).

<sup>11</sup> Para 38. The court referred to Mustill LJ in *R v Birch* (1989) 11 Cr App R (S) 202 at 213, discussing the similar position in England.

<sup>12</sup> Section 195(5)(b)(ii).

<sup>13</sup> Para 39.

<sup>14</sup> For which see the text at n 2 above.

This case highlights a tension in the treatment of mentally disordered offenders in judicial processes. In court, psychiatric evidence should be given no greater weight than other evidence when determining insanity or a plea in bar of trial. Neither a jury nor a judge is bound by the evidence of the expert witnesses. In mental health tribunals, psychiatric evidence is generally the only evidence, and tribunals may have to choose between conflicting psychiatric evidence and at the same time wrestle with how that evidence “fits” with what is new legislation. When the opinion of experts is central to a judicial hearing but the decision-makers can choose to ignore the expert opinion, this raises questions as to who is more “expert” in interpreting legislation that is applied daily in hospitals (but not in courts). The creation of the MHTS and the inclusion of medical and general members (who have direct experience of mental illness either professionally or personally) are clearly attempts to address these tensions. However, this decision suggests that clarification of both the content of experts’ evidence and the decision-making of the MHTS is needed.

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## *Glor v Switzerland*: Article 14 ECHR, Disability and Non-Discrimination

The decision of the European Court of Human Rights in *Glor v Switzerland*,<sup>1</sup> which has significant implications for persons with physical and mental disabilities,<sup>2</sup> is to be welcomed. Sven Glor, a Swiss national, suffered from diabetes and was declared unfit for Swiss military service, despite his expressed willingness to engage in it.<sup>3</sup> According to Swiss case law, persons not engaging in military service but assessed as being at least 40% disabled were not liable to pay the substantial military-service tax.<sup>4</sup> Mr Glor was assessed as falling below this threshold. His appeal against this, claiming

1 App No 13444/04, 30 Apr 2009.

2 See Mental Disability Advocacy Center, “Three disability ‘firsts’ in a European Court of Human Rights case”, 2 Jun 2009 (available at <http://www.mdac.info/en/node/187>).

3 His type of diabetes did not, however, prevent him from working as a lorry driver.

4 € 477 per year for the duration of the compulsory service period (at least eight years).

discriminatory treatment, was dismissed by the Swiss Federal Court. It held that the authorities had applied the provisions relating to the tax appropriately with a view to ensuring equality between persons undertaking military service and those exempt from it.

Mr Glor applied to the European Court of Human Rights. Relying on articles 14 (prohibition of discrimination in the enjoyment of rights) and 8 (respect for private and family life) ECHR, he claimed that he had been discriminated against. Article 14 states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Thus, state authorities must not discriminate on the basis of any grounds identified in, or found by the Court to fall within the remit of, article 14 when ensuring ECHR rights are respected, unless such discrimination can be objectively and reasonably justified.<sup>5</sup> Unlike the other rights in the Convention, article 14 cannot be relied on alone but must be applied alongside such rights.<sup>6</sup>

#### A. THE COURT'S RULING

The Court ruled that there had been a violation of article 14 in conjunction with article 8. In line with previous decisions, it affirmed that the term "private life" in article 8 includes personal (physical and psychological) integrity<sup>7</sup> and, in the present case, considered that this encompassed the exemption tax, thus engaging the article.<sup>8</sup> It considered that the Swiss authorities had treated persons in similar situations differently in two ways given that, first, Mr Glor was liable for the exemption tax whereas those suffering from more severe disability were not; and secondly, under Swiss law, conscientious objectors could perform an alternative public service, thus avoiding the tax, whereas Mr Glor had not been permitted to do this.<sup>9</sup>

The Court did not agree with the Swiss Government that the exemption tax, as a substitute for performing military service, was in the public interest and so could justify the discriminatory action.<sup>10</sup> Mr Glor's disqualification from military service was something over which he had no control and the deterrent effect of the tax

<sup>5</sup> See *Religionsgemeinschaft der Zeugen Jehovas v Austria* (2009) 48 EHRR 17 at para 87.

<sup>6</sup> Often referred to as the "ambit" requirement. The UK has not ratified art 1 of Protocol 12 to the ECHR, which contains a stand-alone non-discrimination right.

<sup>7</sup> *X and Y v The Netherlands* (1985) 8 EHRR 235; *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112 at para 26; *Pretty v United Kingdom* (2002) 35 EHRR 1; App No 55525/00 *Hadri-Vionnet v Switzerland* 14 Feb 2008 at para 51.

<sup>8</sup> Para 54.

<sup>9</sup> Para 80.

<sup>10</sup> Paras 85-87 and 96.

and income generated from it were unlikely to be significant.<sup>11</sup> Moreover, the Court considered that, in assessing the level of Mr Glor's disability, insufficient regard had been had to his personal circumstances when the Swiss authorities had compared his situation with a Swiss Federal Court case relating to an amputee.<sup>12</sup> The Court also noted that persons with low incomes who were assessed as falling below the 40% disability threshold were not exempt from the tax.<sup>13</sup>

In addition, the Court was not convinced that Mr Glor should have been excluded entirely from the armed forces. It suggested that he might, for example, be offered an alternative form of service requiring less physical effort and compatible with his level of disability.<sup>14</sup> This is the first time the Court has raised the issue of "reasonable accommodation" in connection with the ECHR. The Court also specifically referred,<sup>15</sup> for the first time, to the UN Convention on the Rights of Persons with Disabilities (the UN Disability Rights Convention) as the basis of a European and universal consensus on the need to prevent discriminatory treatment of persons with disabilities.<sup>16</sup>

## B. THE SIGNIFICANCE OF THE CASE

A detailed discussion of all the issues raised by *Glor* is beyond the scope of this note.<sup>17</sup> The significance of the above aspects of the ruling can, however, be summarised as follows.

### (1) Expanding the scope of article 14

For some time it appeared that the Court had consigned article 14 to the shadows. The Court has found discrimination to exist by reference to other articles such as articles 3<sup>18</sup> or 8.<sup>19</sup> In recent years, however, the Court has interpreted the link between other ECHR rights and article 14 quite widely. It has, for example, stressed the autonomy of article 14 so that it may be violated even where the other ECHR right has not been.<sup>20</sup> Consequently, article 14 may be violated in situations which go beyond

11 Paras 89. The Court noted that there were sufficient people who were fit enough for military service in Switzerland. It also observed that a tax of this nature was not levied in most countries (para 83).

12 Paras 90-91.

13 Para 93.

14 Paras 94-95.

15 Para 53.

16 Convention on the Rights of Persons with Disabilities (adopted 13 Dec 2006, entered into force 3 May 2008), A/RES/61/106.

17 See R O'Connell, "Cinderella comes to the ball: Art 14 and the right to non-discrimination in the ECHR" (2009) 29 LS 211 for a comprehensive discussion on the recent development of the Court's case law on article 14.

18 *Price v United Kingdom* (2002) 34 EHRR 53.

19 *Goodwin v United Kingdom* (2002) 35 EHRR 18.

20 See, for example, *Belgian Linguistic Case* (1979-80) 1 EHRR 252 at 283. In this case no violation of art 2 of Protocol 1 ECHR (the right to education) was found because the article does not provide a guarantee to provide a particular type of educational establishment. However, the Court considered that once such an establishment has been set up a state cannot stipulate entry requirements that are discriminatory. See also *Petrovic v Austria* (2001) 33 EHRR 14.

the limited number of rights contained in the ECHR. This has included situations where socio-economic rights are arguably more applicable and where discrimination is often experienced, for example, social security matters<sup>21</sup> and, in some situations, the right to work.<sup>22</sup> Moreover, there are indications of a shift in approach, from considering whether similarly placed people or situations are treated differently – thus whether the law is making distinctions (and whether this is justified) – to considering whether the effect of the law is discriminatory.<sup>23</sup> This provides a more comprehensive guarantee of non-discrimination in that it encompasses not only direct discrimination but also discrimination that is indirect<sup>24</sup> or covert.<sup>25</sup> It also appears to be, in effect, the approach adopted in *Glor*.

## (2) “Other status” and disability

The list of grounds upon which claims on discrimination may be founded is not closed given article 14’s inclusion of the words “other status”. This has been broadly interpreted by the Court<sup>26</sup> to include widely defined personal characteristics.<sup>27</sup> Any distinction made on the basis of these grounds must be justified as being proportionate and employed for a legitimate purpose,<sup>28</sup> with varying degrees of latitude afforded to State authorities.<sup>29</sup> Article 14 does not specifically mention discrimination on the basis of physical or mental disability, and the Court had not previously included this within the “other status” category although it was not difficult to infer, from the article and related case law, that it would be.<sup>30</sup> *Glor* confirms this reading.

21 See *Gaygusuz v Austria* (1996) 23 EHRR 364; *Stec v United Kingdom* (2005) 41 EHRR SE18 at paras 47-65; *Stec v United Kingdom* (2006) 43 EHRR 47; App No 77782/01 *Luczak v Poland* 27 Nov 2007 at paras 46-60, extending the ambit of property rights in art 1 of Protocol 1 ECHR to social security matters.

22 See *Sidabras v Lithuania* (2006) 42 EHRR 6 at paras 38-63.

23 In other words, from a formal to a substantive theory of equality. See O’Connell (n 17) at 211-214.

24 *Thlimmenos v Greece* (2001) 31 EHRR 15; *Jordan v United Kingdom* (2003) 37 EHRR 2; *DH v Czech Republic* (2006) 43 EHRR 41; *Adami v Malta* (2007) 44 EHRR 3.

25 *Baczowski v Poland* (2009) 48 EHRR 19, concerning arts 11 and 14.

26 *Sutherland v United Kingdom* (1997) 24 EHRR CD22; *Salguero da Silva Mouta v Portugal* (2001) 31 EHRR 10; *EB v France* (2004) 38 EHRR 21; *M v Serbia* [2007] 1 FCR 760; App No 30658/05 *Beian v Romania* 6 Dec 2007; *Paulik v Slovakia* (2008) 46 EHRR 10; *Carson v United Kingdom* (2009) 48 EHRR 41.

27 *Carson v United Kingdom* (2009) 48 EHRR 41. Arguably, this is similar to the approach which the UK courts appear to be moving towards: see *R (RJM) v Secretary of State for Work and Pensions* [2007] EWCA Civ 614, [2007] 1 WLR 3067; *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434.

28 *Religionsgemeinschaft der Zeugen Jehovas v Austria* (2009) 28 EHRR 17 at para 87.

29 The Court had tended to afford to national authorities a wide margin of appreciation regarding art 14, particularly where national security, public morality and taxation were concerned, and where no common standard existed across Europe (see e.g. *Burden v United Kingdom* (2008) 47 EHRR 38; *Carson v United Kingdom* (2009) 48 EHRR 41). However, this no longer seems to be the case where distinctions are made on the basis of sexual orientation in child adoption cases (see *Frette v France* (2004) 38 EHRR 21; *EB v France* (2008) 47 EHRR 21).

30 See e.g. P Bartlett, O Lewis and O Thorold, *Mental Disability and the European Convention on Human Rights* (2007) 20.

### (3) Reasonable accommodation

The Court's suggestion that an alternative form of service be offered to Mr Glor reflects to some extent the requirement for reasonable accommodation in article 2 of the UN Disability Rights Convention.<sup>31</sup> The duty to provide reasonable accommodation in employment is recognised under EU law.<sup>32</sup> It had not, however, been previously acknowledged as having a place within the ECHR, although the Court was arguably moving towards this position.<sup>33</sup> Rulings such as, for example, *Botta*,<sup>34</sup> *Zehnalová and Zehnal*,<sup>35</sup> *Marzari*<sup>36</sup> and *Sentges*<sup>37</sup> involved articles 8 and 14 and disabled persons, and indicated that a positive obligation exists to observe article 8 where there is a direct and immediate link between measures sought by applicants and their private and family life. Positive discrimination to correct factual inequalities, where this can be reasonably and objectively justified, has also been permitted.<sup>38</sup> In addition, it was held in *Thlimmenos*<sup>39</sup> that article 14 may be violated not only when persons in analogous situations are treated differently without reasonable and objective justification but also when persons in significantly different situations are not, without reasonable and objective justification, treated differently.<sup>40</sup> Thus, failing to make an exception to a general rule may result in a violation of article 14<sup>41</sup> and, indeed, a failure to institute positive discrimination may amount to a violation of article 14 in conjunction with another ECHR right.<sup>42</sup>

The preceding case law is not specifically mentioned in *Glor* in the context of reasonable accommodation. However, in suggesting that the alternative arrangements for employment with the armed forces be made for Mr Glor, the Court may have been influenced by this. Whether this will ultimately extend to other civil and socio-economic rights remains to be seen.

### (4) The UN Disability Rights Convention

In referring to the UN Disability Rights Convention the Court has acknowledged its significance regarding equality and discrimination.<sup>43</sup> The UK has now ratified

31 See also arts 5(3) (equality and discrimination), 14(2) (liberty), 24(2)(c), (5) (education) and 27(1)(i) (employment), all of which refer to the requirement for reasonable accommodation.

32 Council Directive 2000/78 OJ 2000 L 303/16, art 5 and preamble.

33 O De Schutter, "Reasonable accommodations and positive obligations in the European Convention on Human Rights", in A Lawson and C Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (2005) 35, 61. See also O'Connell (n 17).

34 *Botta v Italy* (1998) 26 EHRR 241 at paras 34 and 35.

35 App No 38621/97 *Zehnalová and Zehnal v Czech Republic* 14 May 2002.

36 *Marzari v Italy* (1999) 28 EHRR CD175.

37 App No 27677/02 *Sentges v Netherlands* 8 Jul 2003.

38 *Stec v United Kingdom* (2006) 43 EHRR 47 at paras 51-66; *DH v Czech Republic* (2008) 47 EHRR 3 at para 175. See also App No 42949/98 *Runkee v United Kingdom* 5 Oct 2007 at para 40.

39 *Thlimmenos v Greece* (2001) 31 EHRR 15.

40 *Thlimmenos* at para 44.

41 *Thlimmenos* at paras 47 and 48.

42 See e.g. *Belgian Linguistic Case* (1979-80) 1 EHRR 252 at para 10; *Thlimmenos* at para 44; *Stec v United Kingdom* (2006) 43 EHRR 47 at para 51; *DH v Czech Republic* (2008) 47 EHRR 3 at para 175.

43 See Mental Disability Advocacy Center (n 2). Switzerland has yet to sign the Convention.

the Convention and its Optional Protocol,<sup>44</sup> but international treaties require incorporation into law before their provisions are legally enforceable at national level. The *Glor* ruling indicates, however, that its provisions will be likely to influence Strasbourg interpretation of ECHR rights when considering cases concerning disabled persons.

### C. CONCLUSION

Only time will reveal the extent to which case law will assist in ensuring that ECHR and other rights may be enjoyed without discrimination on the basis of disability. It is now clear, however, that, in the absence of reasonable and objective justification, those suffering from a mental or physical disability may enjoy the broadly interpreted ECHR right to private and family life without discrimination. Moreover, the likelihood of the far-reaching provisions of the UN Convention informing interpretations of ECHR rights and the fact that articles 8 and 14 appear to impose an obligation to make reasonable accommodation for disabled persons, in the area of employment at least, are both of importance.

*Glor* has serious implications in terms of the care and treatment of disabled persons both within and outside institutions and in terms of their social inclusion. Its findings should inform law and policy regarding disability and discrimination.<sup>45</sup>

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## Judicial Review of the Damages (Asbestos-related Conditions) (Scotland) Act 2009

In *AXA General Insurance Ltd, Ptrs*,<sup>1</sup> a decision by Lord Glennie, a host of insurance companies sought judicial review of the Damages (Asbestos-related Conditions) (Scotland) Act 2009. They did so on the grounds that section 1 of the Act, in making asbestos-related pleural plaques actionable harm for the purposes of an action for damages for personal injuries, was *inter alia* (i) irrational and arbitrary (ii) in contravention of article 6 of the European Convention on Human Rights.

<sup>44</sup> The UK ratified the Convention on 8 June 2009 and its Optional Protocol on 7 Aug 2009.

<sup>45</sup> An Equality Bill is currently progressing through Westminster. In *R (N) v Secretary of State for Health, R (E) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ 795, the Court of Appeal, while making no reference to *Glor*, acknowledged that “other status” in art 14 of the ECHR included “mental disorder”.

<sup>1</sup> [2009] CSOH 57.

Pleural plaques are localised scars (fibrosis) made up of collagen fibre which form inside the diaphragm and are associated with asbestos exposure causing mesothelioma cancer. In effect, the Act reversed the House of Lords' decision in *Rothwell v Chemical & Insulating Co Ltd*,<sup>2</sup> where it was held that pleural plaques, although indicative of the extent to which an individual had been exposed to asbestos, could not fairly be described as a disease or an impairment of physical condition for the purposes of an action for damages. Lord Hoffmann affirmed the trial judge's finding that the plaques affected neither life expectancy nor lung function.<sup>3</sup> Moreover, the plaques caused no pain or discomfort and thus, in Lord Glennie's characterisation of *Rothwell*, "could not suffice, by themselves, to make negligent exposure to asbestos actionable".<sup>4</sup> His Lordship noted that the petitioner insurance companies were "likely to have to meet substantial awards of damages in pleural plaque cases should the Act come into force".<sup>5</sup>

The finding in *Rothwell* was somewhat at odds with an established practice in the insurance industry of settling claims for damages in cases where asbestos exposure had led to diagnosis of asymptomatic plural plaques. This practice recognised the strong likelihood that a worker who had been exposed to asbestos and who had plaques would develop asbestos-related cancer. The medical literature affirms that although "pleural plaque is benign (non-cancerous), cannot become malignant and is not necessarily a sign of an asbestos lung disease. . . many people who develop pleural plaques also develop asbestosis, malignant mesothelioma and other asbestos-related diseases".<sup>6</sup>

Some 600 pursuers before the Court of Session in Scotland awaited and doubtless were disappointed by the Law Lords' decision in *Rothwell*. On 23 June 2008, just over eight months later, the Scottish Ministers introduced the Bill which became the 2009 Act into Parliament. Lord Glennie candidly observes that the legislation was introduced "with the stated objective of preventing the decision of the House of Lords in *Rothwell*, which was an English case, from having effect in Scotland".<sup>7</sup>

#### A. LORD GLENNIE'S OPINION

The first argument dealt with by Lord Glennie was an ingenious one and it concerned whether the Act contravened the European Convention on Human Rights. In essence it ran as follows: the Parliament, in legislating, had effectively ruled in favour of the 600 cases awaiting judgment. Accordingly, the cases had not and would not be decided by an independent tribunal but by "legislative fiat".<sup>8</sup> Lord Glennie had to

<sup>2</sup> [2007] UKHL 39, [2008] 1 AC 281. See J Thomson, "A paradigm of orthodoxy" (2008) 12 EdinLR 259.

<sup>3</sup> *Rothwell* at para 11.

<sup>4</sup> *Axa General Insurance* at para 5.

<sup>5</sup> Para 10. The Act came into force on 17 June 2009: see Damages (Asbestos-related Conditions) (Scotland) Act 2009, SSI 2009/172. The principal provisions of the Act (except those relating to limitation) are, by virtue of s 4(2), "to be treated for all purposes as having always had effect".

<sup>6</sup> "Pleural plaques", available at <http://www.allaboutmalignantmesothelioma.com/pleural-plaque.htm>.

<sup>7</sup> Para 7.

<sup>8</sup> Para 11.

decide whether interdicting the Scottish Ministers against bringing the Act into force was justified by a *prima facie* case on the petitioners' part. Lord Glennie held that the petitioners' arguments – to be more fully developed at a first hearing – amounted to a *prima facie* case, albeit not one that that was particularly strong.

As to the argument that the Act was challengeable because it was irrational, unreasonable in the *Wednesbury*<sup>9</sup> sense and arbitrary, Lord Glennie found it was not necessary to reach a conclusion, because this argument was based on the same facts as the cause of action concerning the ECHR and, as a common law challenge, could not be stronger than the challenge based upon Convention rights.<sup>10</sup> Noting that claims might be sisted, probably of consent, while the legality of the Act remained under challenge, he held that there was a legitimate interest of the claimants in seeing the Act on the statute book, even if they would not see immediate resolution of their actions on the strength of it.<sup>11</sup> Accordingly, the motion for interim interdict was refused.

## B. WIDER SIGNIFICANCE

Further proceedings notwithstanding, Lord Glennie's decision and the role of the Parliament together constitute a promising departure in the way asbestos-related claims are managed in Scotland. The significance of the decision, however, does not end there. There are sufficient indications in the *Axa* judgment that, as a matter of principle, it is unlikely that there will be a subsequent ruling in favour of the insurers' position.

Lord Glennie's ruling, by acknowledging that the insurers had only a slender *prima facie* case, is a clear affirmation of reform in asbestos-related disease compensation and the prerogative of the Scottish Parliament to play a role in it. Scotland is not, perhaps, entirely alone in this matter.<sup>12</sup> It remains to be seen the extent to which Scotland's lead will trigger a more widely recognised exception to causation requirements in mesothelioma cases.

It is significant that, while the 2009 Act was criticised in *Axa* on the grounds of retrospectivity, there was no argument that it improperly defeated causation. Defeating causation is the business of the Act and it means that insurance companies will presumably be forced back to their practice of settling with claimants before debilitating diseases completely destroy their ability to enjoy their compensation. Thus causation of disease – at least in this case – is being withdrawn from the province

9 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

10 Para 14.

11 Para 18.

12 See the Northern Irish case of *Bittles v Harland and Wolffe plc* [2000] NIJB 209. Cf, however, the Irish case of *Fletcher v Commissioner of Public Works* [2003] IESC 13 and, in Australia, *Maddalena v CSR* [2002] WADC 260 where, at para 49, the primary judge rejected the contention that the applicant's symptoms of pain, breathlessness, lethargy and depression were the result of pleural disease or pleural plaques caused by exposure at work to asbestos dust. Although on appeal the case was sent back by the High Court for retrial, pleural plaques were not in argument (*CSR Ltd v Della Maddalena* [2006] HCA 1).

of the common law, and the 2009 Act invites consideration of how many other diseases of indeterminate causation will be thus identified and made the subject of statutory intervention. While the law must strike a balance between causation of disease on the one hand and considerations of insurable risk and premium inflation on the other, mesothelioma is quite obviously becoming a case apart because of its latency and the role of pleural plaques in indicating likelihood of contraction. The message from the 2009 Act is that latency is not acceptable as a reason to delay compensation.

### C. RECENT ASBESTOS MEASURES BEFORE THE SCOTTISH PARLIAMENT

The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007<sup>13</sup> was enacted to alleviate the position of mesothelioma sufferers and their families. Under section 1(2) of the Damages (Scotland) Act 1976, the immediate family of an injured person was prevented from claiming damages on the death of that person if the deceased had already settled in full a claim prior to death for damages for his or her own loss. Thus, mesothelioma sufferers faced the dilemma of either pursuing their damages claim now or of leaving a claim, for a higher amount, to their executor and relatives. In practice, the majority of sufferers chose the latter course.<sup>14</sup> The 2007 Act amends the 1976 Act so that liability to pay damages for what was formerly termed “loss of society”<sup>15</sup> arises even though the liability to the deceased or the deceased’s executor has been discharged.

Of course, the 2009 Act is only part of a broader move by the Scottish parliament to counter the common law when it comes to asbestos issues. In *Barker v Corus*<sup>16</sup> the claimants had contracted mesothelioma after having working for a range of different employers, each one of which had negligently exposed its workers to asbestos. Mesothelioma can be caused by a single exposure, but the more a worker is exposed the greater the likelihood of contracting the disease. As it is latent for a long period it can take between twenty-five and fifty years until it manifests itself. In many cases it is virtually impossible to deduce with any certainty which employer actually caused the disease, although every one of them materially increases the risk of contraction. In *Barker v Corus* some of the employers had become insolvent, and the question was whether this put the case outside the principle in *Fairchild v Glenhaven Funeral Services Ltd*<sup>17</sup> where all of the employers were solvent and where it was held by the House of Lords that all were jointly and severally liable for the damage. In *Barker*, a new principle emerged, namely that of proportionate liability. If three employers

13 See J Chalmers, “The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007” (2007) 11 EdinLR 407.

14 See para 8 of the Policy Memorandum accompanying the Bill.

15 Damages (Scotland) Act 1976 s 1(4).

16 [2006] UKHL 20, [2006] 2 AC 572. See J Thomson, “*Barker v Corus: Fairchild* chickens come home to roost” (2006) 10 EdinLR 421; M A Hogg, “Re-establishing orthodoxy in the realm of causation” (2007) 11 Edin LR 8.

17 [2002] UKHL 22, [2003] 1 AC 32. See J Thomson, “The raising of Lazarus: the resurrection of *McGhee v National Coal Board*” (2003) 7 EdinLR 80.

were involved in a claim and one went insolvent, all that would be available in damages would be based on the two remaining and available one-third shares. In proposing a Member's Bill which ran out of Parliamentary time but was later taken up by the Scottish Executive and became the 2007 Act, Des McNulty MSP argued that the House of Lords' judgment in *Barker v Corus* (from which Lord Rodger of Earlsferry had dissented) was "contrary to accepted principles of Scots Law".<sup>18</sup>

#### D. CONCLUSION

It is unsurprising that this recent activity, reasserting the distinctiveness of the Scottish legal system, should come in an era marked by the political resurgence of the Scottish National Party. It is undoubtedly an issue in which the compassion of the Scottish legal position compares favourably with that of the House of Lords in its two most recent asbestos-related cases, where, on the issues of causation (*Rothwell*) and apportionment of loss (*Barker*), insurers and employers (respectively) were the undoubted winners.

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<sup>18</sup> See Hogg (n 16) at 29.