MFMac

MORTON
FRASER
MACROBERTS

LLP

Litigation in Scotland Report

2025

www.mfmac.com

"MFMac has a strong team, with efficient preparation, strong legal knowledge and the ability to call on other specialist teams within the firm. They're very organised and quick to respond."

CHAMBERS UK

Introduction

Welcome to the 2025 edition of our annual Litigation in Scotland Report.

In this year's Litigation in Scotland Report, we look at some of the most interesting cases across our practice areas including an unlawful means conspiracy case that raised questions of jurisdiction, the first decision from the Court of Session on housing policies in National Planning Framework 4, and the Supreme Court's welcome judgment on secondary victim claims in the context of clinical negligence.

In the insolvency sphere, we highlight the key differences between insolvency practices in Scotland and England and also consider the issues that can arise if an English debtor owns heritable property in Scotland.

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

We also look forward to the year ahead and highlight the areas where we expect recent growth trends to continue, including competition litigation and judicial reviews.

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

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

Contents

Competition Litigation in Scotland: What can we expect in 2025?

Richard McMeeken and **Robin Mackintosh** discuss the growth of competition litigation and highlight elements of litigation in Scotland that can come into play in competition actions.

Competition law has featured prominently in the news, legislative agendas and policy discussions in the past year, as lawmakers and regulators respond to a range of modern challenges through the use of traditional enforcement tools (such as merger control) and through more innovative means of oversight (such as the new digital markets regime). For a number of reasons, competition litigation has flourished, and we expect that it will continue to do so in 2025.

The stakes are high when it comes to complying with this quickly developing regime. The financial and other consequences of regulatory enforcement mean that complex disputes between government and business are prominent. Private competition litigation has also grown, partly due to the growth of group actions in the UK and as the claimant/pursuer-friendly regime set out in the Consumer Rights Act 2015 starts to bear fruit. *Merricks v Mastercard* confirmed that the door is open to litigation being pursued by millions of people despite the complex legal and economic challenges posed by large and diverse claimant classes. Meanwhile, last year the Competition Appeal Tribunal (CAT) authorised its first settlement in opt-out collective proceedings – it is a pre-condition for approval that a proposed settlement is 'just and reasonable', and while we are yet to see how decisions will be taken on settlements in more complex settings with groups of claimants, it is a sign of things to come.

Where does Scotland fit into this trend? The Competition Act 1998 applies UK-wide, and so while the gravitational pull of competition litigation is naturally towards London, we expect to see significant growth in the volume and value of competition cases with a Scottish dimension. This could be because the litigation is conducted in Scotland, or because the cross-border nature of the dispute means that Scots law and procedure is otherwise important to the conduct of the case.

> *While the gravitational pull of competition litigation is naturally towards London, we expect to see significant growth in the volume and value of competition cases with a Scottish dimension.*

Choice of forum is an important question for claimants. While Scottish pursuers may wish to raise proceedings in the Court of Session for strategic reasons, it is also open to parties to seek to transfer proceedings to the CAT. That procedure has now been followed in the *Trucks* cartel litigation.

Procedural distinctions between Scotland and England may inform decisions about choice of forum – for example, in Scotland there is no requirement for defenders to proactively disclose relevant material as in England, meaning that pursuers have to devote more energy to recover relevant information. On the issue of public enforcement, when a decision of a public body is challenged by way of judicial review, it is important to note the differences between the substantive law of judicial review in Scotland and England, including the grounds on which a challenge can be raised.

More broadly, there are other substantive and procedural considerations which may impact on Scottish competition cases.

Time-bar is an important consideration. The Scots law of prescription applies to claims brought under the 1998 Act and applies a time-bar period of five years (as opposed to six years in England). More fundamentally, the expiry of the prescriptive period in Scotland extinguishes any obligation to pay damages for wrongdoing as a matter of substantive law, which is a critical consideration for English lawyers to be aware of when advising clients on competition issues.

The way in which privilege operates on either side of the border is also a consideration worth bearing in mind where choice of forum is in play. Although the law on legal professional privilege has broadly developed in the same direction, recent cases in Scotland (such as *Roche Diagnostics v Greater Glasgow Health Board & Another*) have highlighted conceptual differences behind the principle in Scotland and England.

In the same case, real practical differences are highlighted by the court where the application of without prejudice privilege is concerned.

In addition to the practical challenges that arise, it is reasonable to expect that unanswered questions on privilege and waiver may arise in competition cases given the role of group proceedings, cases involving numerous parties and parallel actions across the border.

These are just a few of the Scottish specific issues which we see as being relevant to competition litigation in 2025. In the meantime, lawyers in Scotland (just as in England) will have to grapple with many of the same issues including the tougher consumer protection laws coming into force in 2025 following the introduction of the Digital Markets, Competition and Consumers Act 2024 and the stronger enforcement powers vesting in the CMA as a result.

Richard McMeeken is a Partner and Solicitor Advocate in MFMac's Commercial Litigation team.

richard.mcmeeken@mfmac.com

Robin Mackintosh is a Senior Solicitor in MFMac's Commercial Litigation team.

robin.mackintosh@mfmac.com

Case Review:
Mex Group Worldwide Limited v Ford & Ors

Julie Hamilton provides an overview of an unlawful means conspiracy case heard by the Court of Session in 2024, which raised some interesting issues in relation to jurisdiction.

Arguments in cases in the Scottish courts based on alleged unlawful means conspiracy seem to be on the rise. One such case, *Mex Group Worldwide Limited v Ford & Ors* [2024] CSOH 86, has raised several interesting issues, including in relation to jurisdiction. The English courts have also been involved in the dispute, with a worldwide freezing order sought ([2024] EWCA Civ 959).

Background

Mex maintains that all 12 defenders engaged in a complex unlawful means conspiracy against it by causing the eleventh defender, a SARL, to seek to renege on an agreement recorded in a British Virgin Islands (BVI) High Court Consent Order in 2020. Mex claims to have suffered a loss of £85 million, mainly due to the failure of a planned bond issue due to the defenders' actions.

Specifically in relation to the third and eighth defenders, Mex maintains that a commercial inducement of $7 million was paid to the third defender by the transfer of funds by the ninth and tenth defenders to the eighth defender (indirectly benefiting the third defender) in order to induce him to cause the SARL to seek to renege on the agreement and Consent Order.

> *Arguments in cases in the Scottish courts based on alleged unlawful means conspiracy seem to be on the rise.*

Jurisdiction

The third, eighth and ninth defenders are not domiciled in Scotland and challenged the jurisdiction of the Scottish court. A preliminary trial took place, and the court considered the relevant provisions in paragraph 2 of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982.

Paragraph 2 provides that a person may be sued *"where he is one of a number of defenders, in the courts for the place where any of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".*

Forum non Conveniens

The third defender, domiciled in Luxembourg, argued that Scotland was forum non conveniens (not the appropriate forum) in respect of the dispute. An action was live in the BVI relating to the Consent Order which was capable of resolving the dispute. The question in the BVI proceedings was whether the Consent Order had been obtained by fraud. This was a prior question which ought to be determined before the current action. The BVI was the most appropriate forum. The third defender further argued that Luxembourg was the next most suitable forum due to his domicile.

Mex highlighted that there was no evidence to demonstrate that all the defenders could be convened in the BVI, and further there was no strongly identifiable connection other than the current live action. Mex further highlighted that any proceedings in Luxembourg would be conducted in French, a language to which neither the defenders nor Mex were native speakers. Bringing an action in Luxembourg would ultimately result in an increased risk of irreconcilable judgments being issued.

Closely Connected

The eighth defender sought to distinguish itself from the remaining defenders to prove that they were not closely connected. It maintained that it had not participated in the conspiracy and that no evidence could be led to the contrary. Since there was no possibility of any judgment being given against the eighth defender, the risk of irreconcilable judgments did not arise.

Prorogation Clause

The ninth defender (domiciled in Germany) challenged jurisdiction on the basis the court had no jurisdiction to hear claims based on a breach of, or non-contractual claims in relation to, a Deed of Affirmation (the basis of the claim against it). The introductory words in paragraph 2 of the 1982 Act stipulated that it was *"subject to… rule 6 (prorogation)"*.

The Deed contained a prorogation clause determining that the choice of law and jurisdiction would be the laws of Luxembourg and/or Germany and their courts.

The pursuer maintained that this action was not based on or connected with the Deed, instead it was only noted to provide the necessary background for this claim.

> *"This case highlights the importance of carefully pleading the basis of jurisdiction against a defender, and the necessity of a close connection with claims against other "anchor" defenders.*

Decision

The court ultimately held that the Scottish courts had the necessary jurisdiction to hear the claims relating to both the third and eighth defenders. Lord Sandison noted that the precise role played by each conspirator, whether active or passive, in itself wrongful or lawful, was not the "true touchstone of liability". The issue of close connection was to be assessed on "a broad commonsense approach… bearing in mind the objective of the article, applying the simple wide test set out… and refraining from an over-sophisticated analysis of the matter." (*Compagnie Commercial Andre SA v Artibell Shipping Co Ltd* [1999] SLT 1051).

The suggested alternative jurisdictions of the BVI and Luxembourg were refused by the court. The nature and incidents of the alleged conspiracy extended far beyond the BVI and the allegations had very little substantial connection with Luxembourg. The court also highlighted that pursuing a claim in an alternative jurisdiction would ultimately present a risk of irreconcilable judgements being issued, as the remaining "anchor" defenders would still be pursued in Scotland.

However, the court had no jurisdiction as regards any claim or dispute arising out of or in connection with the Deed of Affirmation. It didn't matter that the action was not founded upon that Deed. The pursuer's pleadings that the ninth defender's actions breached that Deed could not proceed to trial (albeit other elements of the case against the ninth defender would continue). The Scottish courts did not have a common law discretion to refuse to give effect to a prorogation clause.

Comment

This case highlights the importance of carefully pleading the basis of jurisdiction against a defender, and the necessity of a close connection with claims against other "anchor" defenders. Successfully arguing forum non conveniens is generally difficult – a court would have to be persuaded that a foreign court having jurisdiction was clearly more appropriate.

While this decision is simply on the question of jurisdiction, it remains to be seen whether the pursuer can establish its case on liability. Watch this space.

Julie Hamilton is a Partner and Solicitor Advocate specialising in commercial litigation.

julie.hamilton@mfmac.com

Corporate Insolvency: Is it all that different in Scotland?

Nicola Ross provides a helpful overview of the key differences between insolvency practices in Scotland and England & Wales.

In 2024, we saw major names across multiple sectors go into insolvency processes. For every household name which collapsed, scores of other businesses also had administrators or liquidators appointed. Those businesses might not have generated the same individual headlines, but it is clear that, across the UK, there is a trend towards increasing numbers of corporate insolvencies.

The Insolvency Act 1986 is a UK-wide statute, but it is a mistake to think that all of the provisions apply across the whole of the UK in the same way. There are lots of differences between insolvency practices in Scotland and England and Wales – some subtle and some significant. Here, we explore those differences and some potential pitfalls for the unwary.

1. The underlying Insolvency Rules are not the same

As anyone dealing with insolvency will know, the provisions of the Insolvency Act 1986 only take you so far. A lot of the technical detail comes from the underlying rules.

There are different rules in Scotland – the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 and the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018. Although the technical detail of the rules is supposed to mostly mirror the rules which apply in England and Wales, there are some fairly significant differences (such as approval of fees – *more on that later*).

2. There is no Official Receiver in Scotland

In England and Wales the Official Receiver, who is a government civil servant, will take corporate insolvency appointments. That's not the case in Scotland, where in every corporate insolvency a qualified insolvency practitioner must have consented to act as administrator, liquidator or receiver (as appropriate).

This means that there is no liquidator of last resort in Scotland, although it does also mean that there is no Official Receiver to take a percentage of the asset realisations.

3. There is no such thing as an LPA Receiver in Scotland

The appointment of a Law of Property Act Receiver, where a fixed charge security holder appoints someone to take control of the charged asset (usually to sell, or take control of the rents), is a powerful tool but it's not available in Scotland. We do not have LPA Receivers, nor anything equivalent. The only receiver recognised in Scotland is an Administrative Receiver under the Insolvency Act 1986.

4. The law on challengeable transactions is different

As is the case for insolvencies in England and Wales, the provisions of the 1986 Act mean that transactions entered into by a company before a formal insolvency process begins can be challenged in Scotland if they are detrimental to the company's creditors.

However, there are some important differences in the law between both jurisdictions, as follows:

	SCOTLAND	ENGLAND & WALES
	TERMINOLOGY	
	Gratuitous alienation	**Transactions at undervalue**
Section(s) of Act	242	238; 246; 241
Challengeable period – unconnected	2 years	2 years
Challengeable period – connected (e.g. director, group company, spouse of director)	5 years	2 years
Available defences	• Adequate consideration paid • Balance sheet solvent immediately before transfer or anytime afterwards • Conventional gift or charitable donation which is reasonable to make • Good faith irrelevant	• Good faith with reasonable belief transaction would benefit company • Consideration given not significantly less than consideration received • Company able to pay debts (within meaning of section 123)
	Unfair Preference	**Unfair Preference**
Section(s) of Act	243	239; 246; 241
Challengeable period – unconnected	6 months	6 months
Challengeable period – connected (e.g. director, group company, spouse of director)	6 months	2 years
Available defences	• Transactions in ordinary course of business • Payment in cash for a debt which had become payable (unless collusive with purpose of prejudicing general body of creditors) • Parties to transaction undertook reciprocal obligations (unless collusive with the purpose of prejudicing general body of creditors)	• Didn't intend to prefer • Company able to pay debts as they fall due – s.123 test

Common law challenges

Although the use of the statutory challenges set out above is significantly more widespread, it is possible to challenge gratuitous alienations and unfair preferences at common law. In practice, that doesn't happen terribly often, largely due to the more significant evidential burden, but the benefit to the common law challenges is that the time limits set out above don't apply.

5. Landlord's Hypothec: A security for landlords

The landlord's hypothec creates a fixed security in favour of the landlord for arrears of rent over the tenant's moveable property which is located on the leased premises. If the tenant enters into an insolvency process then the landlord can rely on the hypothec and will be treated as a secured creditor over the moveable property owned by the tenant on the leased property. In practice, this usually means that the moveable assets are sold and the arrears paid over to the landlord or, if the assets are unlikely to generate a surplus over the secured amount then they may simply be handed over to the landlord to deal with as they wish.

6. Insolvency Practitioners' fees: Retrospective approval

The Insolvency Rules applicable in Scotland do not provide for Insolvency Practitioners' fees being approved in advance. Instead, there is a process to follow which essentially involves retrospective approval of accounts. This approval can come from the creditors or, from the court, following a court process involving the appointment of a Court Reporter (who will be a fellow Insolvency Practitioner who will examine the accounts and the files belonging to the case and recommend the amount of the fee).

7. Partnerships and unincorporated bodies are under the bankruptcy regime

In Scotland, it is the personal insolvency regime which applies to partnerships and unincorporated associations rather than the corporate insolvency processes. This means that the process to follow is one of bankruptcy under the Bankruptcy (Scotland) Act 2016.

8. Caveats

Unique to Scotland, caveats are documents which are lodged at court by businesses and individuals, amongst others. Their purpose is to provide early warning of certain court proceedings which have been raised against them, including liquidation petitions.

Having a caveat in place means that the party who lodged the caveat has the right to be heard in court before any decision is taken on whether the interim orders, or in the case of liquidation, the initial orders, should be granted.

In the case of a creditor trying to commence liquidation proceedings against a debtor company, this can slightly delay the process but it can often lead to resolution of the matter (by payment of the outstanding debt).

Summary

Although Scottish corporate insolvency cases have the same legislative starting point as cases in England and Wales (namely the Insolvency Act 1986), there are multiple differences which can often have a material bearing on the processes and strategies to be implemented. Appreciating these differences will be important when dealing with Scottish companies.

If you have any Scottish corporate insolvency cases which you would like to talk to us about, we would be delighted to hear from you.

Nicola Ross is a Partner specialising in commercial litigation.

nicola.ross@mfmac.com

Cross-Border Insolvency: Enforcing an English Bankruptcy Order in Scotland

In this article, **Leon Breakey** explains some of the issues that can arise when an English bankruptcy order is issued and the debtor owns property in Scotland.

When an English debtor with an interest in heritable property in Scotland is made bankrupt under English law, a crucial question arises: how can the English bankruptcy order be enforced in Scotland? This article explores this issue, highlighting the potential risks for trustees and the solution provided by Section 426 of the Insolvency Act 1986.

The Issue: Bankruptcy Orders and Scottish Property

Insolvency practitioners may not frequently encounter this scenario but, when it does arise, the trustee in bankruptcy will need to be proactive. If an English debtor owns Scottish heritable property, the bankruptcy order issued in England does not automatically prevent the debtor from dealing with that property in Scotland.

In Scotland, personal bankruptcy is known as sequestration. Under Scots law, when a debtor is sequestrated, their estate, including any heritable property, vests in the trustee for the benefit of creditors. The trustee in a Scottish sequestration can automatically prevent the debtor from selling or dealing with their Scottish property by recording the sequestration order in the Register of Inhibitions. This register notifies the public about individuals who cannot competently enter into voluntary property transactions.

However, English bankruptcy orders are not automatically registered in the same way under either the Bankruptcy (Scotland) Act 2016 or the Insolvency Act 1986. This creates a risk for English trustees, as a debtor could attempt to sell their Scottish property without the trustee's knowledge, potentially to the detriment of creditors.

The Risk: Unaware Trustees and Unsuspecting Sales

Without the automatic registration of English bankruptcy orders in Scotland, there is a clear risk that an English trustee might not be aware if a debtor attempts to sell their Scottish property. This could result in the debtor transferring the property to a third party without the trustee's knowledge or consent, putting creditors at a disadvantage.

Disgruntled creditors, in such cases, could in theory hold the English trustee accountable for the loss. Therefore, it is crucial for trustees to take steps to protect the debtor's Scottish property, ensuring that the bankruptcy order is recognised and enforced in Scotland.

> *"English bankruptcy orders are not automatically registered in the same way as in Scotland, which creates a risk for English trustees.*

The Solution: Section 426 of the Insolvency Act 1986

The solution to this issue lies in Section 426 of the Insolvency Act 1986, which facilitates cooperation between courts in any part of the United Kingdom with jurisdiction over insolvency cases. Section 426 allows an English trustee to apply to the Scottish courts to have the English bankruptcy order recognised and enforced in Scotland.

How it Works

To enforce the English bankruptcy order, the English trustee can lodge a petition with the Court of Session in Scotland. The petition requests that the English bankruptcy order be treated as if it were a Scottish bankruptcy order, allowing it to be recorded in the Register of Inhibitions.

Once the petition is granted, the English bankruptcy order is recorded in the register, giving the English trustee the same protections as if the bankruptcy order had been granted in Scotland. This prevents the debtor from selling or dealing with their Scottish heritable property without the trustee's knowledge.

Broader Application of Section 426

Section 426 is not restricted to recognition of bankruptcy orders. Its application extends to a variety of cross-border insolvency scenarios, both corporate and personal. The section is a powerful tool for officeholders in certain countries to make a request to the UK courts for assistance, allowing those officeholders to enforce foreign insolvency orders and protect the interests of creditors.

> *"Section 426 of the Insolvency Act 1986 facilitates cooperation between courts in any part of the UK with jurisdiction over insolvency cases.*

How We Can Help

At MFMac, we frequently assist insolvency practitioners with cross-border insolvency matters.

If you would like to discuss this issue further or have any questions, please do not hesitate to contact us.If you have any Scottish corporate or personal insolvency cases which you would like to talk to us about, we would be delighted to hear from you.

Leon Breakey is a Partner and specialises in insolvency and company law matters.

leon.breakey@mfmac.com

The Court of Session's First Decision on the Housing Policies in National Planning Framework 4

Isobell Reid and **Cameron Greig** examine the Court of Session's eagerly awaited decision in the case of *Miller Homes Ltd v Scottish Ministers* [2024] CSIH 11.

This was the Court of Session's first decision on the housing policies contained in National Planning Framework 4 ("NPF4").

The case concerned an application made by Miller Homes in March 2022 for planning permission for 250 residential houses on farmland in Mossend, West Lothian. The application was made under West Lothian Council's pre-existing Local Development Plan ("LDP").

Section 25 of the Town and Country Planning (Scotland) Act 1997 required West Lothian Council to determine the planning application in accordance with the LDP, which categorised the site as greenfield land. It provided that West Lothian Council would encourage the development of other categories of site in preference to greenfield sites. However, the LDP also required West Lothian Council to maintain a supply of land which is, or is expected to be, available for development for housing within the next five years (referred to as a five-year effective housing land supply). As such, the LDP's Policy HOU 2 stated that, as an exception to the general rule against the development of greenfield land, where there is a shortfall in the supply of housing land, applications for permission to develop greenfield land would be supported, provided certain criteria are met.

Miller Homes relied on Policy HOU 2 in support of their planning application, arguing that there was a substantial shortfall in the five-year effective housing land supply and that they were fulfilling the other criteria too.

On 13 February 2023, prior to the determination of the planning application, NPF4 was adopted. NPF4 became part of the statutory development plan and accordingly sits alongside the LDP. NPF4 Policy 16(f) set out a new mechanism for the exceptional release of housing land, only providing a release mechanism in "limited circumstances" and requiring new LDPs to establish a Local Housing Land Requirement (based on the Minimum All-Tenure Housing Land Requirement (MATHLR)).

In April 2023, the Scottish Ministers called in the planning application (which was then at appeal) for determination. The Scottish Ministers issued their decision to refuse planning permission in July 2023, on the basis that the planning application was contrary to a number of policies in the LDP, as well as a number of policies in NPF4, which had since been adopted.

> *"This was the Court of Session's first decision on the housing policies contained in NPF4.*

Principally, it was the Scottish Ministers' position that NPF4's Policy 16(f) did not support the proposed development. Policies 16(f) and HOU 2 were said to be incompatible and, in accordance with Section 24 of the 1997 Act, Policy 16(f) was to be applied as it came into force at a later date.

It was this decision of the Scottish Ministers which was the subject of the challenge by Miller Homes to the Court of Session. In their view, Policy HOU 2 ought to continue to apply until such time as the LDP is replaced with a new style LDP implementing Policy 16(f) of NPF4.

In its decision, the Court of Session rejected the argument that Policy 16(f) did not operate until the adoption of a new style LDP, finding that there is no requirement to await a new style LDP to rely upon national housing policy.

Agreeing with the Scottish Ministers' position, the Court of Session determined that where there is any conflict between the LDP and NPF4 in terms of housing policy, then it is NPF4 which is the prevailing policy. They found that Policy 16 "is the antithesis of HOU 2" and that it supersedes the requirement for a five-year effective housing land supply. As such, it was not the case that the LDP's exceptional housing land release policies would remain applicable. In the circumstances, the Scottish Ministers were entitled to conclude that "the MATHLR represents the most up to date target for housing land within the development plan".

The Court of Session further found that whilst Policy 16(f)(iii)'s first bullet point cannot operate without the provision of a housing pipeline (and that can only be established by a Delivery Programme), it does not mean that the whole of Policy 16 cannot operate at all in the absence of a pipeline.

Implications

One implication from the decision is that the Court of Session considers there to now be potential for a material consideration to arise if there is a perceived lacuna in the development plan, or if the development plan is out of date or the planning authority has failed to update the delivery programme. However, the Court of Session was clear that the Transitional Provisions Regulations do allow for the publication of a delivery programme (establishing a deliverable housing land pipeline) under old-style LDPs.

Further implications of the decision will take time to emerge. It is clear, however, that applications for housing development on unallocated sites which cannot satisfy the "limited circumstances" set out in Policy 16(f) are now more than likely to be refused unless there are material considerations which could allow for approval. There are a number of similar appeals still before the DPEA for development on unallocated sites which had been placed on hold pending the Court of Session's decision; these will shortly require to be determined.

> *"The Transitional Provision Regulations allow for the publication of a delivery programme under old-style LDPs.*

Isobell Reid is a Partner in MFMac's Planning team.

isobell.reid@mfmac.com

Cameron Greig is a Senior Associate in MFMac's Planning team.

cameron.greig@mfmac.com

Scottish and English Planning Regimes: The Basics

The planning regime in Scotland has always differed from that in England. Each legal jurisdiction has been governed by its own legislation and statutory framework ever since the foundations for the planning system were laid in 1948. Scotland has fully devolved responsibility for town and country planning policy and decision making.

Douglas Milne and **Cameron Greig** set out the key differences between the planning regimes north and south of the border.

Submission and Processing

Other than for nationally significant infrastructure projects ("NSIPs"), a planning application for a development in England is made to the local planning authority. All planning applications are processed in the same manner.

In Scotland, all planning applications are made to the local planning authority. However, the processing of an application and the available rights of appeal differ depending on the type of development, its size and importance. This is known as the development hierarchy and is split into three categories:

- National developments are top tier and are set out in National Planning Framework 4.
- Major developments which include developments such as housing proposals over 50 units, supermarkets over 5,000 square metres and wind farms over 20MW.
- Local developments include single unit houses, shop front alterations and change of use of properties.

Pre-application Consultation

In England, applicants are required to undertake pre-application consultation where the proposed development is of a certain description including NSIPs and wind farm developments comprising the installation of more than two wind turbines or where the turbine height exceeds 15 metres.

In Scotland, pre-application consultation is required for national and major developments but not for applications to vary a condition attached to an existing planning permission.

Extending the Life of a Planning Permission

There is no mechanism to apply to an English planning authority to extend the lifetime of a planning permission. However, there is a streamlined renewal process for planning permissions granted on or before 1 October 2010.

By contrast, an application can be made to a Scottish planning authority to extend the lifetime of a planning permission.

Appeal

All planning appeals for English property are made to the Secretary of State, irrespective of the size of the development.

For Scottish property, certain local developments have appeal rights to a Local Review Body only, consisting of local councillors, rather than to the Scottish Ministers.

Judicial Review Time Limits

In England, the time limit for a judicial review is six weeks.

In Scotland, the time limit is:

- for decisions of the local planning authority, three months or such longer period as is equitable in the circumstances; or
- for statutory appeals against a decision by the Scottish Ministers or Reporter, six weeks.

Major Infrastructure Projects

There are a number of different statutory consents that are required for major infrastructure projects, not just planning permission e.g. a project may also need compulsory purchase powers for land assembly or road orders to stop up roads.

In England, all necessary consents for NSIPs can now be obtained by means of applying for a Development Consent Order (DCO).

In Scotland, the necessary statutory consents for any major infrastructure project are usually applied for and obtained separately. However, in certain instances a Transport and Works Order or the Private/Hybrid Bill process in the Scottish Parliament could be used. This legislative process was used for the Edinburgh Tram Project and the Forth Crossing.

Discharge of Planning Obligations

In England, planning obligations can be discharged by voluntary agreement between an applicant and planning authority at any time. However, a formal application to discharge or vary an obligation can only be made, to the planning authority, five years after entering into it. There are appeal rights to the Secretary of State against any refusal or failure to determine such application.

Planning obligations in Scotland can only be discharged or varied by formal application to the planning authority. In contrast to the position in England, an application can be made at any time. There are appeal rights to the Scottish Ministers against any refusal or failure to determine such application.

Community Infrastructure Levy

Local planning authorities in England are entitled to charge a Community Infrastructure Levy ("CIL") on all new development. The CIL is calculated on a price per square foot basis for each new development. Local authorities can choose whether to charge the CIL, whether it will apply to all developments or only to certain types of development and the amount of the CIL. Most local authorities have now adopted CIL plans, although some are still in the consultation phase.

No CIL applies in Scotland. However, the Planning (Scotland) Act 2019 does contain a power to introduce an infrastructure levy going forward.

Section 75 agreements

Although no CIL has been set up for Scotland, planning authorities can still impose obligations on developers to provide funding for infrastructure, community facilities and the like, via Section 75 agreements (which are broadly equivalent to Section 106 agreements in England).

> *"No CIL applies in Scotland, but the Planning (Scotland) Act 2019 contains a power to introduce an infrastructure levy going forward.*

Douglas Milne is a Partner in MFMac's Planning team.
douglas.milne@mfmac.com

Cameron Greig is a Senior Associate in MFMac's Planning team.
cameron.greig@mfmac.com

Recent Trends in Judicial Review Cases

Jenny Dickson considers the recent trends in the types of decisions that are being judicially reviewed in the Court of Session.

In recent years, the number of judicial reviews raised in Scotland has increased. As well as this being borne out by the civil justice statistics, we have also seen an increase in judicial review instructions at MFMac. These seek to challenge a wide range of different types of decisions, not just the more traditional judicial review topics of planning and immigration. Challenges to decisions about the provision of social care are more common, as are challenges which are raised for commercial reasons.

Just as the judicial reviews themselves are varied, the reasons for an increase in cases are also varied. The number of these cases has always ebbed and flowed as they are influenced by legislative and procedural changes, as well as political and public interest. In recent years, we have seen a number of challenges to decisions made by local authorities about prioritising their budgets. We have also seen judicial reviews questioning the application of the Equality Act 2010 during the decision-making process. These are just a few of the many examples which might explain the current increase in judicial reviews.

There are a number of interesting judicial reviews proceeding through the Scottish courts at present.

> *Just as the judicial reviews themselves are varied, so too are the reasons for an increase in cases.*

NHS Greater Glasgow and Clyde are challenging the decision of the Chair of the Scottish Hospitals Public Inquiry to refuse to allow expert evidence. The public inquiry was set up back in 2020 to consider the construction of two hospitals in Scotland: the Queen Elizabeth University Hospital in Glasgow and the Royal Hospital for Children and Young People in Edinburgh. It has already heard a number of chapters of evidence. In summer 2024, shortly prior to the commencement of hearings on the next chapter of evidence, NHS Greater Glasgow and Clyde sought to have an expert report admitted as evidence and for its authors to give evidence. The report covered substantive matters, being about the risk of infection from the ventilation systems at one of the hospitals. For reasons of principle and practicality, the Chair of the public inquiry refused to admit the report evidence and refused to call its authors as witnesses.

That decision is being challenged at the judicial review, which was heard on 17 December 2024. Judicial reviews challenging decisions about the recovery and admissibility of evidence are rare, but are not unheard of. In 2023, the Cabinet Office sought judicial review of the Chair of the UK Covid 19 Inquiry's decision about the recoverability of documents. Similar to that decision, lawyers who specialise in public inquiries throughout the UK will be keenly following NHS Greater Glasgow and Clyde's judicial review.

At the beginning of January 2025, the Court of Session will hear another judicial review, considering the **decision to remove universal winter fuel benefit for all pensioners**. The petition has been raised against both the UK and Scottish Governments, with the former having originally made the decision to limit winter fuel payment to those who satisfy a means-test, and the latter following suit. We understand the case will focus on the public sector equality duty under the Equality Act 2010. That duty must be exercised by Ministers during the decision-making process. There are various steps they are obliged to take. In this judicial review, the arguments will focus, in particular, on whether the two governments adequately consulted with those of pensionable age and released an equality impact assessment.

By the time this article is published, the decision may already have been issued in the judicial reviews into the **approval of the Rosebank oilfield and Jackdaw gas field**. As part of the consenting process for these fields, the government required to consider environmental impact assessments. Those assessments did not take into account all the considerations which have subsequently been held by the Supreme Court to be relevant. The decisions to approve these fields were unlawful, and parties are in dispute as to what steps should now be taken. In essence, environmental campaigners argue that work should be paused to allow fuller environmental impact assessments to be carried out. The companies addressed the court on the high cost and possible threat to the projects themselves of pausing their work. They acted lawfully in relying on the government's consent when starting the works.

These are just three of the many judicial reviews presently before the Scottish courts. These three are very typical of the trends that we are noticing in this area, with judicial reviews challenging decisions made in different forums, about varied subject matter, and the determination of which will have very different impacts. The increase in judicial review cases results in many fascinating arguments being before the court, which ensures the continued development of public and administrative law.

Jenny Dickson is Chair of MFMac and a Partner and Solicitor Advocate in MFMac's Litigation and Dispute Resolution team.

jenny.dickson@mfmac.com

Secondary Victim Claims: A United Approach

Nicola Edgar provides an overview of the recent Supreme Court decision providing clarity on secondary victim claims in a clinical negligence context across our jurisdictions.

In January 2024, the Supreme Court handed down its judgement in the case of *Paul v Royal Wolverhampton NHS Trust* (2024) UKSC 1 and the conjoined cases of *Polmear v Royal Cornwall Hospitals NHS Trust* and *Purchase v Ahmed*. This decision was significant and provided clarity on secondary victim claims in a medical negligence context. Whilst this decision was reached following the application of the laws of England and Wales, its significance extends to Scotland and provides an indication of how the Scottish courts would also approach such a case.

Background

It is long established that a secondary victim to an accident can claim for psychiatric injury they have suffered as a result of witnessing the death or injury of their loved one. When considering these types of claims, the courts apply a strict test, which was established in the case of *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 which was brought following the Hillsborough Stadium disaster, which restricts who would succeed in their claim.

The question for the Supreme Court in the conjoined appeals of *Paul*, *Polmear* and *Purchase* was whether secondary victim claims should extend to a clinical negligence context, in circumstances where a claimant witnessed the death or injury of their loved one following a negligent failure to diagnose and treat their loved one's illness.

The Conjoined Appeals

Each case concerned an individual who died in distressing circumstances following a missed diagnosis.

In *Paul*, whilst with his two young daughters, Mr Paul suffered a cardiac arrest and was pronounced dead upon arrival at the hospital. 14 months earlier, he had not received appropriate treatment when attending hospital with pain in his chest and jaw. Had he done so, he would not have suffered the cardiac arrest when he did.

Polmear was the case of Esmee Polmear whose diagnosis of veno-occlusive disease had been missed six months earlier. As a result of not receiving treatment, she sadly passed away at the age of 6, despite her parents' attempts to resuscitate her.

Finally, in *Purchase*, Evelyn Purchase passed away, aged 20, from severe pneumonia, which had not been diagnosed by her GP. Evelyn's mother found Evelyn passed away in distressing circumstances shortly after receiving a voicemail from her.

The claimants were seeking compensation for their own psychological illness that had developed after witnessing the harrowing deaths of their loved ones.

> *It is long established that a secondary victim to an accident can claim for psychatric injury they have suffered as a result of witnessing the death or injury of their loved one.*

The Key Issues for the Court

Following an unsuccessful appeal to the Court of Appeal, the claimants appealed to the Supreme Court. The key issue for the Supreme Court was whether a doctor, in providing medical services to a patient, owes a duty to the family of their patient, in addition to the patient. That duty to the family would be to protect them against the risk of any injury that they might suffer from witnessing the death or injury of their relative caused by the doctor's negligence.

The Supreme Court dismissed the appeals by a majority judgement of 6:1, refusing to extend secondary victim claims to a clinical negligence setting.

Closeness to the accident or 'event'

Often the fatal consequences of medical negligence take time to manifest, with symptoms developing over days or even years. The court considered that the first manifestation of injury is not what qualifies as an event giving rise to a claim, thereby eliminating the complex question of what counts as a first manifestation and what symptoms must be witnessed to give rise to a claim. The court referred to *Alcock* as authority that witnessing an injury caused by negligence is not sufficient in a secondary victim claim, and does not meet the threshold test of being present at the accident or its immediate aftermath.

The court has left one area potentially open for future claims and this was explored in paragraph 123 of the judgment. This involved hypothetical examples of a doctor injecting a patient with the wrong drug or dosage resulting in immediate adverse reaction in the patient that is witnessed by a close relative.

Duty of Care

Whilst clearly a duty of care exists between a clinician and their patient, the court held that the duty does not extend to their family on the basis that they cannot be expected to protect family from the risk of developing an illness as a result of witnessing the consequences of a negligent act. If the law was extended on this basis, this may lead to successful claims from, for example, an expecting father who develops a psychiatric illness after witnessing the unexpected stillbirth of his child or family members who were present when the life support of their loved one was ceased. This would clearly place an additional burden on clinicians and may result in it being necessary for them to exclude family members from witnessing certain events and being with their relatives. The court has clarified that there is not the same proximity of relationship between clinicians and their patient's family, easing the pressure on clinicians in those circumstances.

Scots Law

Whilst these cases were brought within the England and Wales jurisdiction, Lord Carloway commented on how the cases would have been dealt with had the negligence occurred in Scotland.

He emphasised that had the families brought claims for damages in Scotland under the Damages (Scotland) Act 2011 for their pain and suffering, loss of society and loss of support of their loved one, they would likely have been successful in being awarded damages. Families in Scotland have the benefit of being entitled to claim substantial damages in these circumstances, in comparison to the damages available in England and Wales.

Nevertheless, these cases were brought as secondary victim claims. Both Lord Carloway and Lord Sales were in agreement that had Scots law been applied to the facts and circumstances of these cases, the same decision would have been reached and the individuals would not have been successful in their secondary victims claims for damages. These comments have provided welcome certainty as to the aligned approach in our respective jurisdictions.

> *These comments provide welcome certainty as to the aligned approach in our respective jurisdictions.*

Nicola Edgar is a Partner in MFMac's Litigation and Dispute Resolution team. She is an accredited specialist in personal injury law and has been certified by the Law Society of Scotland as a trauma informed lawyer.

nicola.edgar@mfmac.com

MFMac's Litigation Team

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

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

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

> *MFMac is committed to providing our valued clients with high-quality, strategic and commercial legal advice.*

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

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

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

MFMac's Cross-Border & International Services

With offices in Edinburgh and Glasgow and a long and distinguished history at the heart of the legal community in Scotland, MFMac regularly works with English, Irish and international law firms on high-value and complex cross-border transactions and disputes. Unlike many of our competitors, we only have offices in Scotland, and we intend to keep it that way. We are proud of our position as one of the leading, and largest, independent Scottish law firms. Our lawyers are acknowledged experts in Scots law and the commercial markets in Scotland, and our business focus and network of contacts reflects this.

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

> *"When partnering with lead counsel law firms, our primary focus is to work seamlessly with you to ensure a collaborative approach throughout.*

MFMac is focused on providing solutions for you and your clients in a number of areas, including, but not limited to:

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

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

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

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

For further information on our cross-border and international services, please contact **Ross Caldwell**.

ross.caldwell@mfmac.com

Edinburgh

9 Haymarket Square
Edinburgh, EH3 8RY

T 0131 247 1000

Glasgow

Capella, 60 York Street
Glasgow, G2 8JX

T 0141 303 1100

www.mfmac.com