SHEPHERD+WEDDERBURN

Property lawyers used to say that nothing much changes in Scottish property law. But a decade and a half of the Scottish Parliament has altered that outlook, and 2015 has seen significant legislative change and key judicial determinations. In this briefing, we consider the most significant court decisions and legislative and procedural changes over the past twelve months.

Landlord and tenant

There was something of a trend for court decisions to overturn embedded practice, only to have the status quo restored on appeal.

Breaking up is hard to do

In *Marks & Spencer plc v BNP Paribas Securities Service Trust Co (Jersey) Ltd,* which considered whether rent payable in advance should be apportioned on exercise of a break option during the relevant quarter, the Supreme Court confirmed the Court of Appeal's decision (overturning the first instance decision) that when deciding whether to imply a term into a contract, the question should be one of business necessity, rather than what the parties would reasonably have understood the contract to mean.

Marks & Spencer had exercised a break option, the date of the break falling in the middle of a rental quarter. Having paid the quarter's rent in full in advance, they sought repayment of a proportion of the rent attributable to the period after the break. The Supreme Court's decision that entitlement to such apportionment could not be implied in the contract – a term can only be implied when it is so obvious as to go without saying, or is necessary for business efficiency – makes it clear that the test for implied terms will be strictly applied. The court said that because the lease had been negotiated between commercial parties, with legal representation, had such a provision been intended, it would have been expressly stated. If tenants wish to ensure that they will be entitled to an appropriate refund following a mid-quarter break, the lease should say so in unequivocal terms. This is an important rule of thumb for all commercial contracts.

Contents

...a term can only be implied when it is so obvious as to go without saying, or is necessary for business efficiency.

Dilapidations Disarray

In a similar volte face, the Inner House of the Court of Session reversed the earlier decision of the Lord Ordinary in *@SIPP Pension Trustees v Insight Travel Services Limited*. The scope of the tenants' repairing obligation in a commercial lease, and the extent of the landlords' entitlement to damages, if the obligation had not been met at the end of the lease, were at issue.

Originally the Lord Ordinary found that the obligation to keep the property in good and substantial repair did not necessarily impose an obligation to put the property into that condition regardless of its condition at the start of the lease. The somewhat surprising conclusion was reversed by the Inner House: if the property was not in good and substantial repair at the beginning of the lease, the tenants had to carry out repairs that would put it into that condition.

Payment in full, or damages?

The tenants also challenged the landlords' entitlement to claim damages based on the cost of putting the premises into the relevant state of repair, regardless of whether or not they actually planned to carry out the work. The lease entitled the landlords, in the absence of work actually having been done, to seek a monetary payment instead, of "a sum equal to the amount required to put the leased subjects into good and substantial repair". The Lord Ordinary had concluded that, based on commercial common sense, it would be wrong to interpret this as meaning that a tenant had entered into an obligation to pay a sum which might bear no relation to the loss actually suffered by the landlords. In contrast, the Inner House was clear that, in this case, the obligation in question was a payment clause, not a damages clause: the sum due by the tenants did not depend on loss suffered by the landlords. Payment of the amount that the works would cost was not dependent on the landlords' intention to carry them out, nor was it relevant that the cost of carrying out the repairs may have been disproportionate to any increase in the capital value of the premises realised as a result of such work.

The precise wording of the clause is the key to the outcome. In contrast, the opposite outcome in the 2014 case of *Grove Investments Ltd v Cape Building Products Ltd* depended on the words in the lease which required the tenants to pay to the landlords "the total value of the Schedule of Dilapidations prepared by the landlords". The landlords argued that this was a payment clause, while the tenants argued that the word "value" meant that the obligation was not to pay the estimated costs of repair, but to compensate the landlords for loss suffered due to the tenant's breach.

In *Grove*, the court preferred the tenants' construction, which they said best accorded with commercial common sense, and if it had been intended that the schedule of dilapidations should include binding estimates of the costs of repair, it would have been more natural to use the expression "costs of repair" rather than "value".

The approach in *Grove* was adopted in *Mapeley Acquisition Co v City of Edinburgh Council*. The Outer House judge decided that the landlords were not entitled to recover a sum equivalent to the total cost of repairs set out in the Schedule of Dilapidations, which related to repairs which the landlords might have no intention of carrying out. The precise wording contained in the lease was, according to the judge, capable of being interpreted both ways: where such wording is capable of more than one meaning, the court should adopt the interpretation which best accords with business common sense. The landlords' approach, that they were entitled to the full estimated cost of repairs, would be "a radical departure from the landlords' entitlement at common law", which would have to have been clearly indicated in the lease, but, it was said, had not been in the lease in question.

In *Mapeley,* the relevant wording gave the landlords the option either (i) for the tenants to carry out at their entire expense the works necessary to put the premises into appropriate repair and condition or (ii) for them to pay to the landlords a reasonable sum equal to the cost of carrying out such work.

Clearly, the judge in *Mapeley* was heavily influenced by *Grove* (as had been the Lord Ordinary in the earlier hearing of *@SIPP Pension Trustees*). However, it is less clear that the language of the clause in Mapeley would support this interpretation, if the reasoning of the Inner House (being of course, a higher court) in *@SIPP Pension*

Payment of the amount that the works would cost was not dependent on the landlord's intention to carry them out.

Trustees is to be followed. It is interesting to speculate whether the outcome in *Mapeley* might have been different, had it been decided after *@SIPP Pension Trustees*.

While the decision in *Grove* was distinguished in *@SIPP Pension Trustees*, *Mapeley* was not cited. But the Inner House pointed out that it is important to note that the decision in *Grove* does not lay down any general rule to the effect that the landlords in a commercial lease are, if repairs are outstanding at termination, only entitled to be compensated for capital loss actually suffered. It is when wording is unclear, and so capable of being construed as having more than one meaning that the Court then seeks to identify the most commercially sensible interpretation. Whatever confusion remains, it is clear that, when negotiating the terms of the lease, the parties need to be certain about the intended outcome and use clear and well-defined language to achieve this.

Be prepared

Tenants should be prepared to have to comply with dilapidations requirements at the end of the lease, if they have not adequately maintained the property during the term of the lease, and to remove any alterations made to the premises, if the lease so specifies. In *PDPF GP Limited v Santander UK Plc* the tenants of an office building in South Gyle Business Park in Edinburgh maintained they had not received sufficient notice of terminal dilapidations when, two weeks before the end of the lease the landlords served a lengthy schedule of dilapidations seeking removal of the tenants' alterations and replacement of the floor coverings. Relying on a clause in the lease obliging the tenants to carry out any works contained in a notice served on it by the landlords within three months, the tenants maintained that at least an equivalent period of notice was required. The judge disagreed, since other clauses in the lease contained no time limit, and held that sufficient, and valid notice had been given.

While it would be courteous, to say the least, for landlords to provide as much notice as possible for terminal dilapidations and removal of tenants' alterations, where the lease contains clear indications, as in this case, that the tenants are expected to leave the premises in good condition and to replace the floor coverings at the end of the lease, then it should not come as much of a surprise when the landlords require compliance with that condition. The removal of licensed works requires no formality and there is a clear message that better communication between landlords or their managing agents, and tenants can avoid last minute problems. It is always open to tenants to ask whether or not the landlords will insist on removal of the tenants' alterations.

Conversion of "ultra-long" leases to outright ownership

On 28 November 2015, all ultra-long leases automatically converted to outright ownership in favour of the former tenants, under the provisions of the Long Leases (Scotland) Act 2012. To qualify for conversion, a lease had to:

- be registered in either the Land Register or the Register of Sasines;
- have an initial term of more than 175 years;
- have more than 100 years still to run as at 28 November 2015, where the property is mainly used as a private dwellinghouse, or more than 175 years in other cases; and
- have an annual rent of not more than £100.

Certain lease types are excepted, including leases of minerals, harbours (where there is a harbour authority) and leases for installation and maintenance of pipes and cables.

Although conversion is automatic, actual titles and title sheets will not be automatically updated, and so for some time to come, titles and title sheets will be inaccurate. A former tenant who is now an owner will need to take positive action to have their title upgraded. This can either be by way of:

- submitting a request for rectification of the title sheet at any time; or
- on the next registrable transaction affecting the property, bringing this to the Keeper's attention and have the change made at that point.

In either case, the former tenant will need to

It is interesting to speculate whether the outcome in Mapeley might have been different, had it been decided after @SIPP Pension Trustees.

When wording is unclear, and so capable of being construed as having more than one meaning, the Court then seeks to identify the most commercially sensible interpretation.

A former tenant under an ultra-long lease who is now an owner will need to take positive action to have their title upgraded.

provide evidence that it is a qualifying lease, and that it is considered to have converted to ownership.

Certain former lease conditions will have automatically converted to real burdens affecting the property. These include lease conditions regulating the maintenance, management, reinstatement or use of property, or regulating the provision of services, to property other than the land converted to ownership; conditions conferring a power of management over a group of related properties, and those imposed under a common scheme on a group of related properties. Applications to rectify the title sheet can include a request to show on the title sheet those conditions which are considered to have survived as real burdens.

Further guidance from Registers of Scotland

The dissolved tenant

When a corporate tenant is dissolved or struck off the Companies Register, it ceases to exist, and so the landlords will naturally want to find replacement tenants as soon as possible. What is the position, however, if that company is subsequently restored to the Register, (a company can be restored to the Register up to six years after its dissolution) given that the Companies Act 2006 provides that "the general effect of an order of the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register". Do landlords have to recognise that company as its tenants again?

This issue was clarified in *ENB Securities Ltd v Alan Love and Prestwick Hotels Ltd* in which the tenants had been struck off the Register and dissolved in June 2013, due to failure to comply with statutory obligations. The company's interest in the lease therefore fell to the Crown as *bona vacantia* and the Crown's representative in Scotland – the Queen's and Lord Treasurer's Remembrancer (QLTR) – disclaimed any right of the Crown in the tenants' interest in the lease. Several months later, however, the tenant company's director petitioned the court to have the company restored to the Register saying there had simply been an administrative oversight in failing to lodge accounts. The tenant company was solvent and trading. The company was duly restored.

Meanwhile however, the landlords had raised an action of declarator and removal of the tenants from the premises. On being restored, the tenants defended this action, contending that the effect of such restoration was that the lease continued as if there had been no interruption.

The Inner House determined that the restored company no longer had any rights to the leased premises. Because a company can be restored to the Companies Register up to six years after its dissolution, great uncertainty would arise if all matters reverted to the pre-dissolution status quo. The landlords are likely to have re-let the premises to other tenants. Restoring the status quo would damage the new tenants' rights. In the court's view that was not Parliament's intention. For a court considering a petition for restoration to have to consider all such relevant factors would require a "much wider and more thorough investigative procedure at the stage when the petition for restoration is presented", and would add to the cost and complexity of such petition proceedings. Again that was not Parliament's intention.

On dissolution of a company, there are two options for what happens to its assets, which at that point vest in the Crown:

1. Where the QLTR does not disclaim the property, it remains vested in the Crown who may dispose of the property to third parties. If the company is later restored, the Crown must account to the restored company for the price paid, or value, but the onward conveyance is unaffected.
2. Where the QLTR does disclaim the Crown's interest (as happened in this case), the effect of the disclaimer is to terminate the rights, interests and liabilities of the company in respect of the property disclaimed, which is deemed not to have vested in the Crown. For all intents and purposes the property is neither the original company's nor the Crown's. In those circumstances the court may make an order vesting the property disclaimed to

..."the general effect of an order of the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

any person entitled to it or to whom it may seem just that the property should be delivered by way of compensation.

The natural and ordinary meaning of the clause

Sometimes parties to a contract discover, after the event, that the actual effect of the wording is not what they expected it to be. Clauses that deal with calculations, or a methodology for working out future payments are particularly prone to this.The Supreme Court decision in A*rnold v Britton and Others*, on interpretation of the service charge provisions in the leases of holiday chalets at a leisure park, although an English (or more correctly Welsh) case, highlights this issue.

Each of the 91 chalets in the leisure park had 99 year leases with a modest annual rent. Seventy of the chalets were subject to a service charge of £90 per annum which was to increase by 10% every three years. Later leases required the tenants to pay £90 but with an increase of 10% each consecutive year, which would result in exceptionally high annual charges in the coming years. The service charge for a lease commencing in 1974 will be over £1 million in 2072. Under one of the original leases with a triennial uplift, the 2072 payment will be £1,900.

The argument was that the clause should be interpreted to mean that the £90 plus 10% annually is the maximum amount they can be charged and is not a fixed rate, and that the service charge should be proportionate to the amount the landlords were required to pay for the provision of services.

Unfortunately for the tenants, a majority of the Supreme Court justices felt differently, and took the view that, when interpreting a written contract, the court must identify the intention of the parties by reference to "what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean".

This involves consideration of the natural and ordinary meaning of the clause, any other relevant provisions of the lease, the overall purpose of the clause and the lease, the facts and circumstances known or assumed by the parties at the time that the document was executed, and commercial common sense. Subjective evidence of any party's intentions is disregarded.

The fact that the amount of the charge exceeded the tenants' original expectations was not a justification for rejecting the natural interpretation of the clause, which is that it is a fixed sum. Commercial common sense is not the only consideration to take into account when interpreting a contractual term. The natural meaning of the wording of the clause is also of great significance. Commercial common sense is not something which can be applied retrospectively, nor is it a way to rectify any perceived unforeseen negative effect of a contract clause. It is not the job of the court to rewrite contract terms simply to assist a party who had entered into an ill-advised arrangement.

When drafting, it cannot be assumed that commercial common sense will automatically apply to resolve any perceived imbalance in the terms of the contract. Common sense is only one of a number of considerations a court will take, and can be heavily outweighed by explicit and clear contractual terms to the contrary. Careful attention therefore needs to be taken when drafting, to ensure agreed commercial terms are accurately reflected. However, the less clear the drafting, the more likely a court is to intervene and interpret along the lines of commercial common sense.

Common sense is only one of a number of considerations a court will take, and can be heavily outweighed by explicit and clear contractual terms to the contrary.

Consenting to assignation

No year is complete without a case or two on the reasonableness of a landlord's consent. *Homebase Limited v Grantchester Developments (Falkirk) Limited* pointed out that, in considering the request, landlords are entitled to apply a two-stage test:

- whether the proposed assignees meets the financial test specified in the lease; and
- whether landlords' consent can be withheld, which can only happen if it is reasonable to do so.

Following an application for consent to assign, the landlords became suspicious that payments were being made by the assignors in consideration for the assignation. When the landlords asked to see the terms of agreement between the assignors and the

"what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean."

assignees, the request was refused on the basis that it was irrelevant to the landlords' decision. This was followed by a claim that the landlords were unreasonably withholding consent by demanding this information prior to making a decision.

This was rejected in light of the two stage test: The first stage is an objective test to determine whether the proposed assignees meet the financial test specified in the lease (e.g. of sound financial standing demonstrably capable of fulfilling the tenants' obligations). If this test is passed, the second stage is to determine whether the landlords' consent can be withheld, which can only be done if it is reasonable to do so. There may be good reasons, unconnected with the financial standing of the proposed assignees, why a landlord wishes to withhold consent. The payment of a rent subsidy or reverse premium may affect the rental value of the property, and therefore the landlords' request for extra information was reasonable, entitling them to withhold consent unless and until the information is supplied.

Land reform

From its inception, the Scottish Parliament has had a strong land reform agenda. The Land Reform (Scotland) Act 2003 introduced the "right to roam", allowing all citizens to have access to all land in Scotland, subject to the rights of householders and others. The 2003 Act also introduced the Community Right to Buy. 2015 saw the extension of the application of that right to the whole of Scotland, under the **Community Empowerment (Scotland) Act 2015**, which will come into force on 15 April 2016, and further rights are proposed under the Land Reform (Scotland) Bill.

Community Right To Buy

From 15 April, a community body may register an interest in acquiring any land in Scotland. The procedure to be followed is broadly the same as the existing arrangements under the 2003 Act: a community body must be formed, although, as well as being able to form as a company limited by guarantee, it will be able to form as a Scottish Charitable Incorporated Organisation or a Community Benefit Society. The minimum number of members is reduced from twenty to ten, although at least three-quarters of them, rather than just a majority, must be members of the community.

Whether or not the community body can register its interest (in the Register of Community Interests in Land) will still be up to Scottish Ministers to decide. The right to buy continues to be a pre-emptive one, and is activated when the owner (or creditor in possession) wishes to sell or transfer the registered land or any part of it.

The changes don't apply to an application to register a community interest made prior to 15 April 2016, nor to a community interest that is already registered by that date. Any right to buy that is exercised on the basis of an interest registered before 15 April will proceed under the original 2003 Act provisions.

Previously applicable only to transactions relating to predominantly rural land, a search in the Register of Community Interests in Land will become standard for all property transactions. Exceptions for some types of transactions under the 2003 Act will continue to apply – the principal exception is where missives are concluded prior to an interest being registered.

Wider Land Reform

The Land Reform (Scotland) Bill introduced on 22 June 2015 takes the land reform agenda to new levels. The key items covered by the Bill include provisions for:

- A land rights and responsibilities statement.
- Establishing the Scottish Land Commission, its functions and those of the Land Commissioners and Tenant Farming Commissioner;
- access to and provision of information about owners and controllers of land.
- Engaging communities in decisions relating to land.
- Enabling the purchase of land to further sustainable development.
- Non-domestic rates to be levied on shootings and deer forests.
- Change of use of common good land.
- The management of deer.
- Access rights to land.
- A new form of agricultural tenancy – the

2015 saw the extension of the application of the Community Right to Buy to the whole of Scotland which will come into force on 15 April 2016.

...the less clear the drafting, the more likely a court is to intervene and interpret along the lines of commercial common sense.

Modern Limited Duration Tenancy.
- Removing the requirement to register before tenants of certain holdings can exercise a right to buy.
- A new power of sale where a landlord is in breach of certain obligations.
- Expanding the list of the persons to whom holdings can be assigned or bequeathed or transferred on intestacy and landlords' objections to such successor tenants.
- A two-year amnesty period for certain improvements carried out by tenants.
- Notice of certain improvements proposed by landlords.

For further information on the proposals in the Bill, see our briefing.

Review of Agricultural holdings

Initially part of the Scottish Government's general review on land reform, it was decided that the Agricultural Holdings legislation merited separate attention. The review group appointed to this task produced its final report in 2015, making a total of 49 recommendations to reform the agricultural tenancy sector in Scotland.

The aims of the report are to:

- Encourage further agricultural letting: reversing recent decline; encouraging new entrants and facilitating retirement with dignity;
- Establish suitable letting vehicles for the 21st century; and
- Promote and ensure productive relations between tenants and landlords, including providing effective means for speedy and cost effective dispute resolution.

Its principal recommendations are:

- Creation of a Tenant Farming Commissioner to promote and secure effective landlord/tenant relationships and behaviour.
- The review of rents for secure 1991 Act tenancies: rents should be determined on the basis of the productive capacity of the holding rather than open market basis; The rent review period will remain at three years.
- Secure 1991 Act tenancies should be registerable in the Land Register to allow tenants ability to grant security over the lease to raise funds for investment and improvements, although protection would be required against resumption to make the tenancy suitable for security purposes.
- The provisions for succession and lifetime assignation of 1991 Act tenancies should be aligned and that the class of beneficiaries should be same.
- A secure 1991 Act tenant should be able to convert their tenancy into a new long duration and "modern" Limited Duration Tenancy (LDT) with a minimum term of 35 years, which would allow the tenant to transfer that LDT to anyone on the open market and for value.
- The current right of secure 1991 Act tenants to buy their holding (the right to register a pre-emptive right to buy if the landlord decides to sell) should be altered to an automatic right i.e. no requirement to register.
- New forms of tenancy should be created: in particular (i) a new "modern" LDT with a minimum ten-year term and greater freedom for parties to agree the terms of the lease. An optional break at five years is suggested only where the tenant is a new entrant; and (ii) a 35 year full repairing LDT to allow the tenant to take on full responsibility for the repair, renewal and replacement of all fixed equipment.
- Existing grazing lets would be retained – but extended to expressly include cropping – and would be the sole means of letting agricultural land for a period of less than ten years.

A more detailed commentary, and analysis of the proposals is available in our briefing note

Land ownership and maintenance

Maintenance of open spaces, including landscaped areas, play parks and woodlands is a key consideration in developments, particularly residential estates. There are several ways in which developers deal with these areas – one popular method being the "land-owning" model. The key elements of this model are:

- The developer nominates a third party maintenance company to be the

...a search in the Register of Community Interests in Land will become standard for all property transactions.

owner of the open space within the development.
- The proprietors of units (houses) in the development are obliged to pay the costs of maintenance of the open space on a pro rata basis.
- The third party maintenance company is obliged to carry out maintenance of the open space, usually in accordance with a "Management and Maintenance Specification" attached to the Deed of Condition for the development.

The competence of the "land-owning" model was challenged in *Marriott v Greenbelt Group Limited* – in which the Lands Tribunal was asked to consider both questions of competency and of the enforceability of the relevant burdens relating to maintenance of open space.

Greenbelt was nominated as third party maintenance company at Menstrie Mains Housing Development, and took title to the open ground, under burden of an obligation to carry out maintenance works. The owners of houses in the development were not given any rights to use the open ground, but were each obliged by a burden in the Deed of Conditions to pay Greenbelt a share of maintenance costs of that ground.

The model was challenged on a number of grounds, principally seeking to demonstrate that the model was conceptually flawed in its entirety. The arguments were that the burden did not relate to the burdened property (i.e. the houses); that it created an unlawful monopoly; was contrary to public policy and an unreasonable restraint of trade; that the arrangement was a breach of competition law; and that the burden itself was void from uncertainty.

All but the last argument failed. In general, the Tribunal considered that the land-owning model was a competent model. Indeed, they expressed the view that it has advantages, by relieving proprietors of discharging the maintenance responsibilities themselves. Nothing in the Scottish Law Commission's report on real burdens, which led to the Title Conditions (Scotland) Act 2003, nor anything in that Act itself indicated any hostility to this type of arrangement, nor any intention to outlaw it.

Void from uncertainty

The problem with the burden, however, was that the benefited land – the open ground – was not sufficiently identified. The Deed of Conditions described the open ground as "the areas of amenity woodland, landscaped open spaces, play areas and others to be provided on the Whole Subjects in terms of the Planning Permission". The planning permission" was defined as that issued by the Scottish Ministers under Reference No. 00/00129OUT on 7 March 2002, together with any variation of it, or supplementary permission issued. While this description nominates the benefited land, it could not be said to identify it within the "four corners" of the deed – an essential rule for creation of real burdens being that it must be possible to determine from within the deed itself the precise and full nature of the extent of the burden. Reference to planning permission as a means of identifying the extent of the open ground failed this test, as it would only be by looking at the permission, and any variations or supplementary versions of it, that a burdened owner could find out what it was they were obliged to pay for.

Although the decision is good news for the land-owning model for maintenance, it does not solve the underlying problem, that be-devils many developers, of adequately identifying areas of land, at an early stage in the development, when flexibility is required in case of subsequent changes, or re-alignment of areas. While using the Development Management Scheme (a model scheme introduced by the Title Conditions Act) can fix the problem where open spaces are to be conveyed to the house owners themselves, it does not appear suited to the land-owning model in its current format.

Some re-thinking, and possibly some adjustment of the model is required to find a solution that will provide both certainty for homeowners, and flexibility for developers.

...the Tribunal considered that the land-owning model was a competent model. They expressed the view that it has advantages, by relieving proprietors of discharging the maintenance responsibilities themselves.

An essential rule for creation of real burdens is that it must be possible to determine from within the deed itself the precise and full nature of the extent of the burden

Land registration

2015 has been a fraught year for property lawyers, following the introduction, on 8 December 2014, of a new land registration regime under the Land Registration etc. (Scotland) Act 2012.

New approaches and new procedures, such as the introduction of a system of advance notices, which give a period of priority for deeds that are about to be submitted for registration, have taken time to get used to. There continues to be uncertainty about how applications for registration will be processed, once they have been submitted, and the spectre of rejection is ever-present.

Completion of the Register

Change continues. A key driver of the 2012 Act regime is to complete transfer of title to all land in Scotland, out of the historic, deed-based Register of Sasines, and into the map-based Land Register. Clarity and accessibility of property ownership and the accompanying title records is increasingly regarded as a key element of a modern commercially focused society. Swift, reliable access to clear information about the ownership and rights or burdens affecting the land, publicly available in one place, means that property transactions can be effected more easily, faster and cheaper.

Now, all deeds that transfer title to property, whether for valuable consideration or not, must be registered in the Land Register. From 1 April 2016, all standard securities must be registered in the Land Register, which will trigger a first registration of the title to the land being secured, if it is still in the Sasine Register. This will be a voluntary registration, and the usual voluntary registration fee will be waived in these cases, meaning that the title and the security can be registered for a fixed registration fee of £60.

Voluntary registration

Owners whose title is still in the Sasine Register are being positively encouraged to register their title in the Land Register on a "voluntary" basis. By way of inducement, the fee for a voluntary registration is currently discounted by 25%. This will be subject to review in 2017.

Preparing for voluntary registration can be a time-consuming process, particularly for old and complex titles, such as those under which many large estates are held, where there have been many areas sold off over the years.

More detail about the benefits of voluntary registration and the process involved is available in our briefing note.

Keeper induced registration

A further new trigger introduced by the 2012 Act is one that may be considered the ultimate power – Keeper Induced Registration (KIR) – by which the Registers can transfer a title onto the Land Register, without any action being taken by the land owner.

The Registers set out their proposals for KIR in a consultation published in 2015, following the running of several KIR pilots.

The pilots concentrated on a mix of three property types:

- Registers of Scotland "research areas" (areas of land that have been, or are likely to be, split up into several units of property sharing common burdens, such as residential developments);
- Heritage assets, for example properties owned by the National Trust for Scotland, where the Registers worked with the organisations concerned; and
- Other property types (not in research areas) including residential and commercial property, farms and rural estates, and land relevant to other Scottish Government initiatives, but without any involvement of the property owner or their advisers.

The Registers conclude that research areas are likely to be the most fruitful and successful source of property for KIR. With an estimated 700,000 unregistered properties located in the research area, this will make a significant dent in the 1.2 million unregistered properties that need to be transferred from the Sasine Register to the Land Register. The Registers already have a lot of information about these properties, their likely extent and the burdens and rights that will affect them, as most are private and public sector residential developments, which typically have common prior titles.

KIR is likely to focus on these properties initially, rather than heritage assets or other property types. Attempting KIR in collaboration with the owner can be overly resource intensive, making this an unviable

Clarity and accessibility of property ownership and the accompanying title records is increasingly regarded as a key element of a modern commercially focused society.

Click here for further analysis on KIR

option from the Registers' perspective. Applying KIR to more complex properties, where little or no background information is available makes it difficult to produce a clear and accurate land register title. Where Sasine titles are vague or obscure, with outdated descriptions and poor quality plans, without the benefit of the owner's local knowledge, the resulting Land Register title is likely to be incomplete.

Land and Buildings Transaction Tax

On 1 April 2015, Scotland's first devolved taxes – Scottish landfill tax and Land and Buildings Transaction Tax (LBTT) – were introduced. Revenue Scotland was created as the agency to administer and collect the taxes.

LBTT replaces Stamp Duty Land Tax (SDLT) in Scotland. It operates a progressive method of calculating the tax, rather than the previous "slab" method. Although similar to SDLT in a number of ways, LBTT does differ in some significant respects, particularly in the reliefs that are available.

Sub-sale relief

Originally absent from the primary legislation, a limited form of relief for developments was subsequently introduced. Sub-sale development relief is available to the purchaser in a transaction involving sub-sale arrangements where significant development is in prospect. Relief is claimed when the first purchaser submits an LBTT return for the land transaction. There is a requirement that development must be completed within five years from the date on which the first purchaser entered into the qualifying sub-sale.

Open Ended Investment Companies

An exemption from LBTT for the transfer of properties from Authorised Unit Trusts (AUTs) to Open Ended Investment Companies (OEICs) in Scotland, in certain specified circumstances was introduced in October 2015. A number of AUTs have been converting to OEICs, to get the status of a Property Authorised Investment Fund, a tax efficient structure introduced to the UK in 2008, which entitles investors to be taxed on rental income from the properties in the Fund, as though they had a direct interest in the properties themselves. Conversion from an AUT to an OEIC is therefore of considerable benefit to a number of investors, particularly those who are tax exempt. The introduction of an exemption from LBTT on conversion provides an equivalent relief in Scotland, similar to the existing SDLT relief in England.

Further information can be found in our briefing notes: the Introduction of LBTT; and rates of LBTT compared to those for SDLT

New rules for judicial review in Scotland

Proposals for procedural reform of the Scottish Courts system have been underway for some time, and a number of these came into effect in September 2015. These included the introduction of new rules on the judicial review procedure, with changes which will have a direct impact on the risks associated with legal challenges.

The most significant change is the introduction of a time limit for bringing a judicial review challenge. A challenge must now be brought within three months from the date on which the grounds for bringing the action arose. For planning permissions, this means such challenges must be brought within three months of the planning authority's decision to issue the permission. However, the new rules will allow the Court to make an exception to this time limit, and extend the period if it would be "equitable" to do so, in the particular circumstances.

A new, preliminary "permission" stage of the judicial review process is introduced. The Court decides at the outset whether to grant or refuse permission to proceed with the judicial review. It will consider whether the applicant has "sufficient interest" in the subject matter of the application; and also, whether the application for judicial review has a "real prospect of success".

The introduction of the three-month timescale will give some welcome comfort to developers, for whom the previous absence of a time limit resulted in a state of uncertainty about when a grant of planning permission could be regarded as free from the risk of a judicial review challenge.

Now, all deeds that transfer title to property, whether for valuable consideration or not, must be registered

Although similar to SDLT in a number of ways, LBTT does differ in some significant respects, particularly in the reliefs that are available.

The three-month timescale will give some welcome comfort to developers, for whom the previous absence of a time limit resulted in a state of uncertainty.

Private residential tenancy reform

The Private Housing (Tenancies) (Scotland) Bill will radically reform the law relating to the letting of residential property in Scotland.

Much of the clarification in the Bill is welcome news for tenants, but there are two key proposals which give private landlords cause for concern.

1. the possibility of future 'rent control' on residential tenancies; and
2. the abolition of the 'no fault' ground for recovering possession from a residential tenant after the expiry of the agreed lease term.

Rent Control

A landlord of residential property will have the right to review the rent to the open market rent, but not more than once in any 12 month period. There is, however, the possibility that Scottish Government may introduce a "cap" on rent review increases in future, within a designated "rent pressure zone". Before rent control arrangements could be introduced, a local authority would have to apply to Scottish Ministers for all or part of the authority's area to be designated as a "rent pressure zone" (to which the cap would apply). Before introducing any cap, Scottish Ministers would require to undertake a consultation process with representatives of both landlords and tenants, and exhibit to the Scottish Parliament evidence on which they believe that rents payable within the proposed rent pressure zone are rising by too much, that rent rises are causing undue hardship to tenants, and the local authority concerned is coming under increasing pressure to provide housing or subsidise the cost of housing due to the rent rises within the proposed zone.

Abolition of the "no fault" ground for regaining possession

The Bill proposes removal of a residential landlord's ability to regain possession of their property simply because the end-date of the tenancy has arrived (the "no-fault" ground). Instead, a landlord must identify one of sixteen specific "eviction grounds" to justify removing the tenant. If none of these grounds apply, the tenant cannot be asked to leave the property (despite the agreed lease term having ended). The specific eviction grounds are broadly as follows:

- Landlord intends to sell the property
- Landlord's lender intends to sell the property.
- Landlord intends to carry out significant disruptive works to the property.
- Landlord or a family member intends to live in the property.
- Landlord intends to use the property for another purpose other than housing
- Property is required for religious purposes.
- Tenancy was given to an employee and the tenant is no longer an employee.
- The property is purpose-built student accommodation and the tenant is no longer a student.
- The tenant is not occupying the property as their home.
- Tenant has materially breached their tenancy agreement.
- Tenant is in rent arrears for three or more consecutive months.
- Criminal behaviour.
- Tenant has acted in an anti-social manner.
- Landlord's local authority registration has been withdrawn or refused.
- The landlord's HMO licence has been revoked; or an overcrowding statutory notice has been served on the landlord.

Student accommodation

Representations had been made by the private student accommodation sector about potential adverse effects to student letting arrangements from the proposed abolition of the "no fault" ground. The inability to agree with a student a finite nine month tenancy (to align with the university academic year) would however present challenges for private investors operating in the student accommodation sector.

Following the Stage 1 consideration of the Bill, however, it appeared that the relevant Minister was minded to reconsider the position for purpose built student accommodation by the private sector. This has resulted in an amendment to the Bill that will ensure it will be possible to grant fixed term lettings of such accommodation.

For further information on the private rental sector, refer to our briefing note.

the possibility of future 'rent control' and abolition of the 'no fault' ground for recovering possession give private residential landlords cause for concern.

Secured lending

A promising decision for borrowers

In a decision that may be considered good news for borrowers, the Supreme Court determined that discussions which take place between a lender and a borrower, prior to the formal loan documentation being signed, can amount to a legally binding unilateral promise by the lender to provide the funding.

The case of *Royal Bank of Scotland plc v Carlyle* concerned a property developer, who had discussions with RBS for funding to purchase and develop two plots of land at Gleneagles. Funding would be in two separate stages: the first tranche to fund the purchase of the land, and the second to fund the development of the buildings.

Mr Carlyle was given the purchase funding and bought the plots. Some months later, in early 2008, he sought to take the development funding. By that time, however, the financial crisis was taking hold, and the bank's attitude had changed. Mr Carlyle was told that no development funding would be forthcoming and he was asked to repay the purchase funding. Being unable to do so, RBS raised an action for repayment.

The key consideration was whether RBS had bound itself to provide the development funding at the same time as it agreed to provide the purchase funding. Mr Carlyle and the bank had never entered into a written contract for the development funding. Despite the absence of a written agreement, the Supreme Court's view was that the discussions which had taken place between the parties were not pre-contractual but contractual, and amounted to a promise by the Bank, which was legally binding.

Some caution is required. The standard of words used by the bank in their discussions was very high: it was explicitly stated to Mr Carlyle that the entire funding arrangement was agreed; and Mr Carlyle had made it clear to the bank that provision of the purchase funds was conditional on the development funds also being available. While the decision may therefore be said to be very fact-specific, the Court recognised the commercial reality of lending discussions prior to the recession, where deals would often proceed in reliance of discussions with the lender, before the paperwork was finalised.

Document signing and delivery

Counterpart signing

On 1 July 2015, a significant transformation in execution of documents in Scotland took place. The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 may be small in size (seven sections and no Schedules), but it is likely to have a major impact on the way commercial transactions are conducted in the future. See our detailed briefing note for more detailed commentary.

Get in touch

Should you wish to discuss any of the issues covered in this Update, please get in touch with one of our specialist lawyers on the left or visit our website: shepwedd.co.uk

David Mitchell, Partner
Commercial Property
T +44 (0)131 473 5217
E david.mitchell@shepwedd.co.uk

Andrew Hall, Partner
Housebuilding
T +44(0)141 566 8505
E andrew.hall@shepwedd.co.uk

Colin Innes, Partner
Planning
T +44 (0)131 473 5104
E colin.innes@shepwedd.co.uk

Colin Archibald, Partner
Property Litigation
T +44 (0)131 473 5471
E colin.archibald@shepwedd.co.uk

Scott Ritchie, Partner
Private Rented Sector
T +44 (0)131 473 5761
E scott.ritchie@shepwedd.co.uk

Peter Misselbrook, Consultant
Rural
T +44 (0)131 473 5435
E peter.misselbrook@shepwedd.co.uk