Edinburgh University Press
The Tun – Holyrood Road,
12 (2f) Jackson's Entry
Edinburgh EH8 8PJ
www.euppublishing.com/journals

Dear contributor,

Here is a proof of your contribution to appear in the forthcoming issue of the *Edinburgh Law Review.*

Please read through the proof carefully and either confirm that the proof is accurate or notify the journal editors as to any corrections. This can be done by emailing a marked-up copy of the proof.

It would be very helpful if you could respond within seven days.
Contributors to the Analysis part of the journal should send their response to the Analysis Editors, Professor Adelyn Wilson (Private Law) or Dr Christopher McCorkindale (Public Law). Reviewers should send their response to the Reviews Editor, Alisdair MacPherson. All other contributors should respond to the journal editor, David Fox

Contact details are as follows:

Professor David Fox
Journal editor, *Edinburgh Law Review*
School of Law, University of Edinburgh,
Old College, South Bridge,
Edinburgh EH8 9YL
Email: d.fox@ed.ac.uk

Analysis Editor, Private Law, *Edinburgh Law Review*
Professor Adelyn Wilson
Email: adelyn.wilson@abdn.ac.uk
School of Law, University of Aberdeen,
Taylor Building,
Old Aberdeen AB24 3UB

Analysis Editor, Public Law, *Edinburgh Law Review*
Dr Christopher McCorkindale
Email: christopher.mccorkindale@strath.ac.uk,
University of Strathclyde Law School,
16 Richmond Street,
Glasgow G1 1XQ

Book Reviews Editor, *Edinburgh Law Review*
Dr Alisdair MacPherson,
School of Law, University of Aberdeen,
Taylor Building,
Old Aberdeen AB24 3UB
Email: alisdair.macpherson@abdn.ac.uk

EUP Journals Blog
EUP now has a blog where you can post comments about your article and your research (see EUP Journals Blog at http://euppublishingblog.com)

- EUP will tweet each post upon publication and on occasions when it links to news, events or anniversaries
- A link on the journal or book webpage to the blog post will be made live
- Posts will be tagged with key words and themes and used in online search engines though AdWords, adverts and social media campaigns
- Posts will be highlighted in relevant email campaigns and/or printed publicity items
- Authors will be given the permalink to their post and encouraged to share and reference the post among personal networks and through their own blogs and websites

Open Access
EUP offers green (default) and gold Open Access publication options for your article. More information can be found here: https://www.euppublishing.com/customer-services/open-access

ALCS
In order to ensure that you receive income for secondary uses of your work, including photocopying and digital reproduction, we recommend that you join the Authors' Licensing and Collecting Society (ALCS). Details on how to join the Society can be found at: https://www.alcs.co.uk/What-we-do/Membership-of-ALCS.

EUP Book and Journal Discounts
As a thank you for publishing with Edinburgh University Press, you are entitled to a 40% discount on all EUP books, journal subscriptions and the journal issue containing your paper. Please visit https://www.euppublishing.com/customer-services/authors/author-and-editor-discounts for more information.

Postage: Please note that postage costs are additional and will be charged at current rates.

Ordering: Please contact marketing@eup.ed.ac.uk to place book orders, and journals@eup.ed.ac.uk for journal orders.

We hope all is in order with your proof, but please get in touch if you have any queries or concerns.

Best wishes,

Ann Vinnicombe
Managing Production Editor
Journals Production Department
Edinburgh University Press
Email: Ann.Vinnicombe@eup.ed.ac.uk

Contributor Discount Order Form

EUP book and journal contributors recieve 40% discount on EUP books and journals when ordering directly from us. Journal contributors recieve a 40% discount on additional copies of the issue to which they contributed.

If you would like to order journals and books, please fill out two separate forms.

EDINBURGH University Press

Please deliver the following titles to:

PLEASE PRINT CLEARLY

Customer Details

Name:..

Email Address: ....

Shipping Address: ....

Postal Code:......................................Country: ....

Telephone: ....

Billing Address (if different from Shipping): ....

Postal Code:......................................Country: ....

Telephone: ....

Books: edinburghuniversitypress.com

QTY	ISBN	AUTHOR/TITLE	FULL PRICE	DISCOUNT PRICE
			Books total	
			P&P	
			Total	

*Books P&P UK: £2.50 for the first book, 50p per additional book; EU: £3.00 per book; ROW: £5.00 per book

Journal subscriptions: euppublishing.com

ISSN	TITLE	PRINT / ONLINE / P&O	FULL PRICE	DISCOUNT PRICE
			Journal subs total	

Journal single issues

ISSN	TITLE	PRINT / ONLINE / P&O	FULL PRICE	DISCOUNT PRICE
			Journal single issue total	

Payment method

Please do not send cash through the post. To pay by card payment, we will set up a secure payment link. For your own protection, do not send your card details by email. Return book order forms to: **marketing@eup.ed.ac.uk** and journal order forms to: **journals@eup.ed.ac.uk**

Edinburgh University Press Limited
Registered in Scotland no. 139240 Registered address: The Tun - Holyrood Road, 12 (2f) Jackson's Entry, Edinburgh, EH8 8PJ, UK
Registered at Companies House Edinburgh on 9th day of July 1992 Company Registration No. SC139240 Charities No. SC035813

EDINBURGH University Press

Library subscription recommendation form

Complete this section and give to your librarian

Dear Librarian

I recommend ____ as a valuable addition to the Library collection

ISSN ______________________
eISSN______________________
ISBN_______________________

Name ____

Department ____
Email ____

Reason(s)

☐ USAGE - I will regularly use this journal and recommend articles to colleagues and students

☐ ENHANCEMENT - This will enhance the Library's scholarly collection and benefit research, learning and teaching in the field

☐ CONNECTION - I am a member of the editorial/advisory board and/or a regular contributing author

Additional Comments____
____
____

For more information, to request a quote or to place an order for a journal subscription or collection, email: journals@eup.ed.ac.uk, call us on +44 (0) 131 650 4220 or visit:

www.euppublishing.com

Edinburgh University Press, The Tun - Holyrood Road, 12 (2f) Jackson's Entry, Edinburgh, EH8 8PJ

The Edinburgh Law Review 26.3 (2022): 422-467
Edinburgh University Press

www.euppublishing.com/elr

Analysis

EdinLR Vol 26 pp 422-427
DOI: 10.3366/elr.2022.0789

Medical Intervention and *Incapax* Patients: The Place of *Negotiorum Gestio* within Law's "Fundamental Structural Language"

A. INTRODUCTION

In 2017, Professor Martin Hogg published a magisterial monograph on the subject of *Obligations: Law and Language*.[1] From the outset of that work, the author notes that the words used by the parties to obligational relationships – even obligational relationships which are constituted *ex voluntate* – do not need to, and indeed do not generally, map on to the "fundamental structural language" of the law.[2] This "fundamental structural language" can be understood as the lexicon comprised of those basic terms which are used by "external observers" of obligational relationships – most often being lawyers, legislators and jurists – to "make sense" of the law of obligations conceptually, as well as of specific undertakings in particular.[3] Words such as "promise", "offer" and "unqualified acceptance", to take some basic examples not directly examined by Hogg for "constraints of space",[4] might be applied by the parties to a (potentially) obligational relationship. However, the subjective understanding that the parties themselves have of these terms, or their respective intentions in using them, will not necessarily correspond with the objective legal understanding of the relevant words.

Within the field of *ex lege* obligations – that is, those obligations which are imposed by law, or arise juridically – there is less (indeed, usually no) opportunity for the parties to demonstrate their own understanding of the words habitually employed to describe the obligational nexus. It does not matter how a negligent driver who is sued for causing injury to another road user would describe their relationship to the pursuer: the institutional position is that they are delictually liable to repair the *damnum* (loss) that they wrongfully caused. A party to a frustrated agreement might not think themselves to be "unjustifiably enriched" by possessing something given to them in the expectation of their performance of some undertaking which is no longer forthcoming (nor, indeed, might they have conceptualised the original agreement as

1 M Hogg, *Obligations: Law and Language* (2017).
2 Ibid *passim*.
3 Ibid 1.
4 Ibid 3.

a "contract"), but this is ultimately the legal position that they find themselves in. The available examples of this phenomenon are legion and, in a sense, limited only by one's imagination: the "fundamental structural language" of the law is primarily employed for a variety of purposes disconnected from mere description of particular and prosaic relationships. It is used to ensure consistency in legal decision-making, predictability in legal outcomes, and clarity in conceptualisation and pedagogy (*inter alia*).[5]

One fundamental structural concept which has been neglected in the study and practice of modern Scots law is the idea of *negotiorum gestio*, an institutional concept which in many respects languishes "in the decent obscurity of a learned language".[6] This concept is unknown to, or at least unarticulated in,[7] Anglo-American jurisprudence,[8] but has formed a foundational part of the Scots law of obligations since at least the time of Stair.[9] Notwithstanding the fact that the subject forms a core and definitional part of Scots private law under section 126(4) of the Scotland Act 1998,[10] "there is a view", endorsed by implication by Niall Whitty in the *Stair Memorial Encyclopaedia*, "that the full potential of *negotiorum gestio* in Scots law has not, or not yet, been realised".[11] While, then, it has been said that "in broad terms, *negotiorum gestio*-like actions have played a considerable role in health care provision" in and across numerous civil-law jurisdictions,[12] the idea has gained little traction in Scotland, notwithstanding the suggestion made in a "pioneering" article[13] of 1959 by Professor Sir T B Smith.[14] Following from a recent observation to the effect that "adopting [a] *negotiorum gestio* analysis … would not materially change the requirements for a successful suit against a negligent physician",[15] the present article seeks to critically consider the extent to which the institutional idea of *negotiorum gestio*, and the "fundamental structural language" surrounding it, might be employed in respect of medico-legal matters in Scotland today.

5 Ibid 4-5.

6 Recall Gibbon, who stressed that the most "licentious" passages of his renowned *History of the Decline and Fall of the Roman Empire* were accessible only to the educated and could not serve to titillate the common rabble: H Morely (ed), *Memoirs of Edward Gibbon* (1891) 194.

7 D Sheenan, "Negotiorum gestio: a civilian concept in the common law?" [2008] ICLQ 253.

8 J P Dawson, "Negotiorum gestio: the altruistic intermeddler" (1961) Harvard Law Review 817 at 817.

9 As Hogg notes, "the publication in 1681 of the *Institutions of the Laws of Scotland* by James Dalrymple (Viscount Stair) cemented a Roman concept of obligations in Scots law": Hogg, *Obligations* 32.

10 This section of the Scotland Act ought to be, as Gretton notes, of considerable interest to comparatists: see G L Gretton, "Trust without equity", in L Smith (ed), *Trusts and Patrimonies* (2015) 87 at 109 n 106.

11 N R Whitty, "Negotiorum gestio", in *The Laws of Scotland: Stair Memorial Encyclopaedia* (1995) para 87 at para 88.

12 See S Birkeland, "Negotiorum gestio in family medicine, informed consent obtainment and disciplinary responsibility" [2016] International Journal of Family Medicine 1.

13 See D W Meyers, "T B Smith: a pioneer of modern medical jurisprudence", in E C Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 199 *passim*.

14 T B Smith, "Law, professional ethics and the human body" [1959] SLT 125.

15 J Brown, "Obligations, consent and contracts in Scots law: re-analysing the basis of medical malpractice liability in light of *Montgomery v Lanarkshire Health Board*" [2021] Legal Studies 156 at 163.

B. *NEGOTIORUM GESTIO*

Literally translated as "management of affairs",[16] a relationship of *negotiorum gestio* arises where a party intervenes, with a benevolent motive, in the affairs of another absent or incapacitated person so as to safeguard the interests of that absent or *incapax* person (termed the *dominus*).[17] Though the *negotiorum gestor* in all circumstances lacks any actual authorisation or mandate, they will not be delictually liable for any interference with the interests of the *dominus*, provided that it may be presumed that the *dominus* would have consented to the interference, if they were aware of the circumstances.[18] If the ostensible *negotiorum gestor* acts so as to interfere with the interests of the *dominus* despite having knowledge that the *dominus* would not have consented to the interference, then the supposed *gestor* is not a *negotiorum gestor* at all, but rather is an officious intermeddler who may be liable in delict depending on the nature of the interference.[19]

Whitty suggests that for *negotiorum gestio* proper to arise, the *gestor* must "intend to donate his labour and services", but also "intend to recover his expenses and outlays from the *dominus*".[20] While this plainly describes the necessary requirements for a claim of *actio negotiorum gestorum* – that is, a claim for the *gestor*'s expenses and outlays – it may be queried whether such intention to recover, or indeed the very ability to recover outlays and expenses, is in fact a core component of *negotiorum gestio* in all its guises. This question may be realised because plainly *negotiorum gestio* may serve not only as a "sword" arming the *gestor* with a potential claim for recompense of costs incurred,[21] but also as a "shield" protecting them from delictual claims[22] such as, for example, one of wrongful interference with property. It would be odd – indeed, it would be unjust – for an individual who usefully intervened so as to prevent his neighbour's house from burning down by entering the property (perhaps inadvertently causing damage as he did so) and extinguishing the fire to be precluded from justifying his behaviour on the grounds of *negotiorum gestio* simply because he did not incur or intend to recover expenses in the course of his rescue. Accordingly, it may be thought, instead, that useful benevolent – though unauthorised – intervention in the affairs of an absent or *incapax* person may be justified by reference to *negotiorum gestio* even in the absence of any so-called

16 As Whitty notes, the abstract noun is civilian, not properly-speaking Roman, the term in this incarnation being found in only one Roman text (D.49.1.24pr. (Scaevola), where the *gestor* is implicitly likened to a tutor or curator: Whitty, "Negotiorum gestio" para 87.

17 Ibid para 87.

18 Bell, *Principles* s.540.

19 Brown, "Obligations" 163.

20 Whitty, "Negotiorum gestio" para 95.

21 Stair was of the view that a *gestor* would be entitled not only to expenses, but to recompense for services rendered: Stair, *Inst* 1.8.3. In this he was "corrected" (see Whitty, "Negotiorum gestio" para 115) by Erskine, who took the view – endorsed by later authorities – that recovery for *negotiorum gestio* is limited to expenses: Erskine, *Inst* 3.3.52.

22 Consider e.g. Bankton, who notes that officious intermeddling amounts to *culpa*, and so gives rise to a right of reparation on the part of the *dominus* whose interests are interfered with, "yet, when the management is undertaken to serve an absent friend, whose business calls for it, the agent ought not to suffer by his good office": Bankton, *Inst* 1.9.24.

animus negotia aliena gerendi,[23] but that such intention to recover expenses must be present if there is to be a successful action to claim any outlays.

C. *NEGOTIORUM GESTIO* AND MEDICAL TREATMENT

> Scots law has not, or not yet, extended the doctrine of *negotiorum gestio* beyond the preservation of the patrimonial interests of the *dominus* so as to cover the preservation of his health, or the rescue of his person in situations where his life or personal safety is endangered.[24]

This, it is submitted, is one of those clear instances, alluded to by Whitty, in which it can be said that the full potential of *negotiorum gestio* has not been realised. This can be demonstrated by considering the uses to which "functional equivalents"[25] of *negotiorum gestio* have been put in many of the codified Continental European jurisdictions.[26] As was recently observed by Birkeland, the "institution" of *negotiorum gestio* "may appear familiar to some medical doctors",[27] since it can be invoked "in acute situations where a patient temporarily is not decision-competent".[28] Indeed, the German "functional equivalent" of *negotiorum gestio* – *Geschäftsführung ohne Auftrag* [agency without specific authorisation][29] – is expressly extended to the medical sphere by the rules pertinent to the "treatment contract" (*Behandlungsvertrag*) set out in § 630d BGB. Hence, in the many European jurisdictions which recognise the institutional concept of *negotiorum gestio*, the doctrine has been used to assess whether medical intervention may be justified.

Recognising the value of "informed consent" within modern medico-legal practice, and the view that the paternalistic principle of "best interests" (expressly rejected by the Scottish Parliament in passing the Adults with Incapacity (Scotland) Act 2000[30]) "is not a safeguard which complies with article 12 [of the Convention on the Rights of Persons with Disabilities (CRPD)] in relation to adults", it may be thought that the concept of *negotiorum gestio* provides an institutional mechanism by which a "best interpretation of will and preferences" test could be introduced into Scots

23 This term simply translates as "intention to manage the affairs of another", but Latinised as such it implicitly includes both an "intention of managing another's affair and of recovering his expenses and outlays": Whitty, "Negotiorum gestio" para 110.

24 Ibid para 102.

25 See *Ted Jacobs Engineering Group Inc. v Johnson Marshall and Partners* [2014] CSIH 18 at para 90 per Lord Drummond Young: "in translating a legal rule or concept, it is generally functional equivalence rather than linguistic equivalence that matters".

26 See Christian von Bar, *Benevolent Intervention in Another's Affairs* (2009) 56: "all the codifications of the states which currently belong to the EU contain … an independent law on the unsolicited and unobligated undertaking of another's affairs, though the designation for that law varies".

27 Birkeland, "Negotiorum gestio" 1.

28 Ibid 2.

29 Bürgerliches Gesetzbuch (BGB) 2.13. On this concept and *negotiorum gestio*, see G Dannemann and R Schulze, *German Civil Code (Bürgerliches Gesetzbuch (BGB) Article-by-Article Commentary* vol 1 (2020) 1377.

30 G T Laurie et al, *Mason and McCall Smith's Law and Medical Ethics*, 11th edn (2019) 4.26.

law.[31] Indeed, as Meyers noted, the focus of the enquiry in any purported case of *negotiorum gestio* is "'do we know or can we find out what the patient would want done under the circumstances at hand?' Not, 'What do we think is 'best' for the patient?'".[32] This perfectly accords with the approach endorsed by the UN Committee on CRPD, suggesting that if Scotland is serious about protecting the interests of vulnerable groups, this is an approach which should be expressly adopted by the courts.

In counterpoint to the above, it might be contended that there is a significant difference between a codified jurisdiction such as Germany and an uncodified jurisdiction such as Scotland. In the former, the application of *negotiorum gestio* to medico-legal situations is expressly provided for in statute. To this, it may be countered that in the uncodified Nordic jurisdictions, the institution of *negotiorum gestio* is not only recognised, but has been applied to medico-legal cases also. As von Bar notes, "decisions that explicitly refer to this area are very rare" in uncodified jurisdictions,[33] and indeed "at least as far as Finland and Sweden are concerned a discrete profile of the law of benevolent intervention is hardly discernible".[34] In Denmark, however, the legal position has been described as "similar to Scotland" and it seems apparent that a conception of *negotiorum gestio* which "has remained particularly faithful to its historical model in Roman law" has been received into that jurisdiction also.[35] Indeed, it has a role to play in "acute [medical] situations where a patient temporarily is not decision competent (the traffic victim brought in an unconscious state to the emergency ward in need of acute intervention[)]".[36]

Unlike in Scotland, Danish jurisprudents appear to have consistently thought it "self-evident that acts of benevolent intervention may be directed towards saving the life and preserving the health of another".[37] This observation was, however, "deduced indirectly" with reference to "the fact that the concept of *negotiorum gestio* is accepted as a general ground of justification in Danish tort law".[38] In other words, it is because *negotiorum gestio* is clearly conceptualised as a "shield",[39] as well as a "sword",[40] in Denmark that this legal system clearly recognises the relevance of *negotiorum gestio* to instances in which the *gestor* has acted to preserve the life or limb of the *dominus*. Were Scots lawyers to better appreciate the utility of *negotiorum gestio* as a defence to what are – at first sight – delictual wrongs, this jurisdiction too could readily extend the concept to the dignitary, and not merely patrimonial, interests of human persons.

31 General Comment No.1 (on Article 12: Equal recognition before the law (Adopted 11 April 2014)).
32 Meyers, "T B Smith" 209.
33 Von Bar, *Benevolent Intervention* 74.
34 Ibid 75.
35 Ibid 73-75.
36 Birkeland, "Negotiorum gestio" 2.
37 Ibid 74.
38 Ibid 74 n 53.
39 I.e. as a defence to a delictual claim.
40 I.e. as a means of allowing the *gestor* an action to claim expenses.

D. CONCLUSION

Ultimately, then, it appears that the "fundamental structural language" of the law does not correlate with the descriptive language ordinarily used by law-subjects to describe the nexus of obligational relationships in which persons might become entwined. As such, the fact that presently few lawyers – and fewer medical practitioners – in Scotland would describe medical intervention in the affairs of an incapable adult as giving rise to a relationship of *negotiorum gestio* is irrelevant to the argument presented in this paper. There may be no reported decision, as yet, vindicating the view that the law of *negotiorum gestio* in Scotland should apply, as in Denmark, to the protection of the non-patrimonial aspects of a person's existence as well as the patrimonial, but such is not fatal to the development of this area of law. Scots lawyers have, historically, been committed to "the institutional scheme or, in other words, to a more systematic approach" towards jurisprudence.[41] By recalling that commitment and through use of reason, it may be concluded that the Scottish conception of *negotiorum gestio* extends to the medico-legal sphere in this jurisdiction, as it does in many other Continental European legal systems.

Jonathan Brown
University of Strathclyde

EdinLR Vol 26 pp 427-433
DOI: 10.3366/elr.2022.0790

Corporate Re-domiciliation: Regulatory Policy and Technical Challenges

A. INTRODUCTION

The UK Government's public consultation on corporate re-domiciliation concluded on 7 January 2022.[1] Re-domiciliation is a process whereby an overseas corporate entity transfers its registration to another jurisdiction without any interruption to its business or legal continuity. A company may wish to do this, for example, to restructure, rationalise group structures, avail itself of different laws and tax rates, or reflect the business realities of its operations. Re-domiciliation transcends tax issues and refers, in this context, to admission to the UK company register as a UK company. In the absence of a re-domiciliation process, overseas companies which wish to relocate their legal identity to a UK jurisdiction may set up a UK parent holding company or incorporate a UK subsidiary and transfer the business to it. In more

41 P Birks, "More logic and less experience: the difference between Scots law and English law", in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997) 167 at 174 n 20.

1 Department for Business, Energy & Industrial Strategy (BEIS) et al, Consultation on *Corporate re-domiciliation* (2021).

July 18, 2022 Time: 01:30pm elr.2022.0789.tex

complex cases, a scheme of arrangement under the Companies Act 2006, Part 26, might be used to compromise claims against the old vehicle to enable the restructure. Often the old company must be wound up, a new company incorporated, and the assets transferred. Old creditors must either be repaid in full or novate their claims to be owed by the new vehicle. Such transfers can trigger taxable events and ultimately involve the liquidation of one entity and its replacement with another. This position also applies intra-UK: a Scottish company cannot become an English company other than by winding up and transferring its assets to a new vehicle.[2] This position can be contrasted with other jurisdictions which do allow corporate re-domiciliation.[3] This UK Government consultation considered whether the UK should provide such a mechanism, noting that any change would require primary legislation.

The UK Government's initial proposal is that the UK allow inward re-domiciliation (non-UK companies becoming UK companies), if permitted by the laws of their existing jurisdiction.[4] The Government is more ambivalent to outward re-domiciliation (UK companies becoming non-UK companies), noting that it is considering the merits of establishing such a scheme alongside the inward process.[5] It is "not minded at present" to enable intra-UK changes.[6]

This article explores policy and technical company law issues which arise in establishing a re-domiciliation regime, including different policy objectives which could be used to justify re-domiciliation, the implications for rule design arising from different objectives, and technical questions as to the re-domiciliation process.

B. POLICY

As with any legislative initiative, the policy objectives must be clear from the outset so that an appropriate re-domiciliation framework can be devised. Unfortunately, the consultation paper does not clearly outline the UK Government's policy aims, meaning these must be inferred.

Any re-domiciliation regime needs to avoid providing an opportunity for regulatory arbitrage,[7] whereby re-domiciliation serves to avoid rules that would otherwise apply to a company. This risk is lower than it initially seems – re-domiciliation does not require the pretence that the company has *always* been a UK company. Rather, it applies the law of the old jurisdiction until the exact moment of re-domiciliation, and UK law afterwards. Transferring jurisdiction would not automatically end claims against the company in that old jurisdiction, but it may make it more complicated and challenging for creditors, minority shareholders, employees or customers to hold the company to account, so there is some potential for forum shopping. There are reputational risks for the UK in being seen as facilitating such flights from other

2 G Morse et al, *Palmer's Company Law* (Release 173, 2022) para 2.507.
3 Examples include Singapore, Hong Kong, Ireland, some US states, etc: BEIS et al para 2.8.
4 See J Harris, "Government consults on introduction of a corporate re-domiciliation regime" (2022) 43 The Company Lawyer 56.
5 BEIS et al para 4.4.
6 Ibid para 3.4.
7 V Fleischer, "Regulatory Arbitrage" (2011) 89 Texas LR 227.

jurisdictions – especially if, as a consequence, dissatisfied claimants are left behind. For this reason, a residual "public interest" threshold (such as requiring good faith or allowing consideration of national security risks) may be included to allow applications to be refused on this basis.[8]

Identifying avoidable risks is different, however, from establishing the positive policy objectives behind the introduction of a re-domiciliation regime. Possible policy objectives might include economic benefit to the UK and support for open markets.[9] The consultation paper suggests that the result of facilitating re-domiciliation will be "to increase the attractiveness and availability of the UK" as a business location.[10] Allowing re-domiciliation, it notes, *could* bring investment, skilled jobs, increase demand for professional services, enhance and expand the innovation base, and contribute to the UK's world-leading capital markets.[11] It thus seems that re-domiciliation is not an end in itself, but a means to economically benefit the UK. This approach justifies the requirement that an applicant company be solvent, be a going concern, and not be in liquidation (or any similar process), though the proposal also allows for a mere one-year trading record and anticipates that applicant companies may become insolvent shortly after re-domiciling.[12] If jobs and economic growth are the aim, it would seem appropriate to include an economic threshold, as is the case, for example, in Singapore, which requires entities to meet two of three financial or sizing criteria.[13] No such provision is made in the current proposal. Yet, the proposal includes that an applicant company could be required to provide a "wider impact" report,[14] which seems to suggest a need for some economic substance. With economic scale and a trading record, a minimum regulatory framework could be adopted, as the applicant entities would be established businesses.

Equally, it may make economic sense to attract insolvent or near-insolvent entities to increase demand for professional services and reinforce the UK's significant grip on managing complex cross-border insolvencies. The attractiveness of UK insolvency and restructuring regimes for large and complex multinational insolvencies is well known, often involving use of the Companies Act 2006, Part 26 (schemes of arrangement) and now Part 26A (restructuring plans). The courts have played their part by being open to "good forum shopping", allowing UK jurisdiction to trump that of the place of incorporation.[15] Allowing overseas companies in financial distress to re-domicile here would allow those businesses to avail themselves of UK

8 BEIS et al para 3.7.
9 Ibid paras 1.2, 1.5, 4.5.
10 Ibid para 1.4.
11 Ibid paras 1.4-3.2.
12 Ibid paras 3.7, 3.10.
13 Accounting and Corporate Regulatory Authority, "Inward re-domiciliation regime in Singapore" (2020), available at https://www.acra.gov.sg/legislation/legislative-reform/companies-act-reform/companies-amendment-act-2017/inward-re-domiciliation-regime-in-singapore.
14 BEIS et al para 3.7. Most consultation respondents agreed that there should be no turnover or size requirements: HM Government, *Corporate Re-domiciliation Consultation: Summary of Responses* (2022) para 3.60.
15 See *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 at [18]-[19]; *Re Gategroup Guarantee Ltd (No 2)* [2021] EWHC 775, [2022] 1 BCLC 141 at [22].

July 18, 2022 Time: 01:30pm elr.2022.0789.tex

mechanisms under the rules of the place of incorporation. If these considerations are the policy drivers, then the framework should allow for re-domiciliation applicants to be insolvent or in financial distress.

It may be that the policy objective is simply to reinforce a political message of "Open Britain". This objective would require merely a bare-bones, facilitative, framework aimed at attracting overseas businesses which can then be trumpeted as wishing to "relocate" to the UK, even if these entities do not bring employment or other economic activity, and even if they are insolvent. Re-domiciliation of itself does not require any relocation or physical presence of a business in the UK. Possibly, the proposal is less about regulatory arbitrage by companies and more about regulatory competition by the UK, post-Brexit, now that the EU has adopted a Directive on cross-border mergers, conversions and divisions (which will come into force on 31 January 2023).[16] This Directive will facilitate EU companies wishing to re-domicile between Member States and reinforce their freedom of establishment.[17] The UK Government's policy may be to modernise the UK framework to ensure that UK company law does not fall behind competitor jurisdictions. That driver might require wider reforms than re-domiciliation, such as providing for cross-border mergers.[18]

Whatever the objective, excluding outward re-domiciliation by UK companies creates policy inconsistencies. This would render inward re-domiciliation unattractive to potential client companies, since they will not wish to be locked into the UK jurisdiction any more than the jurisdiction which they are leaving. Further, preventing outward re-domiciliation while allowing inward re-domiciliation runs contrary to a flexible, enabling, open markets approach based on freedom of choice, which is the foundation of UK company law policy.[19] Indeed, a majority of consultation respondents favoured permitting inward and outward re-domiciliation, though the Government notes that respondents were unable to evidence the potential demand for outward re-domiciliation.[20]

Freedom of choice, economic efficiency and open markets would suggest that provision should be made also for intra-UK re-domiciliation. However, prohibition might be justified if the policy basis is state-level economic benefit, since internal re-domiciliation merely redistributes corporate activity within the UK. Equally, a failure to provide for intra-UK re-domiciliation may simply reflect a political unwillingness to alter the current balance of incorporations. Even so, not allowing for intra-UK re-domiciliation is likely to create policy contradictions. Despite this

16 Directive (EU) 2019/2121 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJL 321/1, 12.12.2019. On which, see C Gerner-Beuerle et al, "Cross-border reincorporations in the European Union: the case for comprehensive harmonisation" (2018) 18 1 Journal of Corporate Law Studies 1.

17 The Directive gives effect to existing ECJ jurisprudence, especially *Polbud* (Case C-106/16) [2018] 2 CMLR 5.

18 See City of London Law Society and The Law Society "Response … [to the] consultation on 'corporate re-domiciliation'" (2022), available at https://www.citysolicitors.org.uk/storage/2022/01/Response-to-consultation-on-Corporate-Redomiciliation.pdf, 24.

19 Company Law Review Steering Group, *Modern Company Law for a Competitive Economy, Final Report*, vol 1, ch 1, paras 1.10-1.15.

20 HM Government (n 16) paras 2.4, 3.33, 3.82-84, 3.89.

conceptual concern, a lack of firm support for intra-UK re-domiciliation, at least as evidenced by the Government's summary of consultation responses, is likely to remove this issue from any future agenda.[21]

There are, therefore, several unresolved policy challenges and inconsistencies which the consultation has revealed. The opacity as to the precise policy goals makes it difficult to determine the appropriate overall framework, which in turn impacts on the detailed rules required, to which we now turn.

C. TECHNICAL CHALLENGES: ENTRY ON THE REGISTER

Whatever the policy objectives of any re-domiciliation regime, there are many practical questions as to the process which must also be addressed. How these questions are answered will dictate how definitive the UK's company register can be said to be.

Many of the technical matters surrounding re-domiciliation will be for the incoming entity's advisers prior to making a re-domiciliation application, for example, ensuring that the corporate form, articles of association, and board composition meet the requirements of the Companies Act 2006. Commonly, the incoming entity must re-register any outstanding charges so they appear on the public record,[22] without affecting their perfection (which will have already been secured under their previous law of incorporation). A key issue is that there must be a specific moment at which re-domiciliation occurs, with the Companies House record being definitive as to the company's status.[23]

One possibility is to adopt an objective administrative process, based on a clear set of deliverables, which will be required for admission by Companies House to the register.[24] Once met, the existing jurisdiction would release the entity from its register. Ideally, admission and release would occur simultaneously,[25] but that may be difficult to achieve. One option is to limit re-domiciliation to jurisdictions which have reached bilateral agreements with Companies House whereby the respective registries agree to move in tandem once both registrars are satisfied that their jurisdiction's re-domiciliation requirements have been met. Of course, agreement might be reached quickly with jurisdictions, such as Canada or New Zealand, where there is already a commonality of corporate processes and registries. Such an objective approach strengthens the UK register: a company would only be admitted if the existing jurisdiction has released it. This approach would reduce opportunistic registry-hopping, as both registries must agree, but would also limit the regime's scope to certain jurisdictions.

21 Ibid paras 2.5, 3.38.

22 Cf Companies Act 2006 s859A ff.

23 See J Hardman, "The butterfly effect: theoretical implications of an apparently minor corporate transparency proposal" (2021) 50 Common Law World Review 180.

24 Companies Act 2006 Part 2.

25 Directive 2017/1132 art 86p(3), as amended, requires the existing registry to remove immediately the registration of the departing company on notification by the new registry of the company's new registration.

Alternatively, a subjective approach would leave the moment of transfer to the UK jurisdiction, based on confirmation from the transferring company. Companies House would check that the company *may* re-domicile under the outbound jurisdiction's laws, then ask the company to confirm that they have done all that is required to re-domicile. This is simpler, but less certain: if the incoming company lies or errs, it would still be on the UK register (which is conclusive as to the fact of incorporation in the UK[26]) while also remaining on the overseas register. Applying a subjective approach would mean that courts would need to determine *ex post* the company's status and which governing law would apply. Thus, a subjective approach to re-domiciliation would weaken the register as a definitive statement of a company's status. It is envisaged that, in these circumstances, Companies House would have powers to seek the winding up of the UK company,[27] but that option may not materialise for some time after the registration.

The choice between approaches depends on whether re-domiciliation is to be regarded as a matter purely for UK law (so could accept a subjective approach), or, as a matter of respect for the outgoing jurisdiction and in the interests of comity and clarity, entry on the UK register should only be permitted alongside removal from the foreign register.

The other difficult "timing" issues which would need to be addressed arise from those areas of UK law which sometimes require a retrospective examination of facts and circumstances. For example, historic transactions concluded within a certain period prior to a company's insolvency can be subsequently challenged upon that insolvency,[28] likewise derivative claims and unfairly prejudicial petitions have a backward trajectory. The question is whether that backward examination can consider events which occurred when the company was an entity under the previous jurisdiction or is limited to events postdating admission to the UK register. The latter approach might encourage forum shopping while the former may be unfair if relevant acts could not have been challenged under the law of that jurisdiction. A further issue is determining the value of distributable profits which a company may have, which is dependent, essentially, upon it having accumulated realised profits.[29] The issue is whether there are indeed distributable profits where the governing accounting principles differ significantly between the former jurisdiction and the UK. There are also questions as to whether the Companies House record should start afresh from the date of UK registration or whether some measure of corporate history should be available on the public record, comprising at least an indication of the incoming entity's prior registration(s).

26 Companies Act 2006 s 15(4).
27 BEIS et al (n 1) para 3.15.
28 See Insolvency Act 1986, ss 238-246ZB; also Company Directors Disqualification Act 1986 s 7A.
29 Companies Act 2006 s 830.

D. CONCLUSION

Clearly the consultation document is only an opening gambit, as was acknowledged by the UK Government.[30] While the Government has committed to further development of the proposal and the intention to introduce a re-domiciliation regime,[31] issues of policy and process will need to be addressed before attempting to devise an appropriate framework. Both categories of issue will impact on the detail and conceptual framework of UK company law.

Interestingly, while a majority of consultation respondents supported outward re-domiciliation alongside inward re-domiciliation, they were unable to offer firm evidence of demand for either option,[32] so time will be needed for a more detailed analysis and engagement with the business community. From a Scottish perspective, it may be advantageous that there seems to be little support, at least among consultation respondents, for intra-UK re-domiciliation,[33] as recent research suggests that Scots law may lose out: it is difficult enough to attract the incorporation of new Scottish companies, without adding the need to retain existing companies.[34] Scots private laws need to modernise to mitigate its unattractiveness compared to English law.[35] The potential for re-domiciliation makes this issue even more acute.

Brenda Hannigan
University of Southampton
and Jonathan Hardman
University of Edinburgh

EdinLR Vol 26 pp 433-437
DOI: 10.3366/elr.2022.0791

Sky UK Ltd v Cherrie: Outer House Rules on Communicating Copyright Works on Reddit and YouTube

A. INTRODUCTION

Sky UK Ltd v Cherrie[1] presented the first opportunity for a Scottish court to add to the growing jurisprudence on copyright infringement by means of linking content on

30 HM Government (n 16) para 2.2.
31 Ibid paras 1.4, 4.1.
32 Ibid paras 3.17, 3.89.
33 Ibid paras 2.5, 3.38.
34 See J Hardman, "The slow death of the Scottish plc listed in London: an empirical study" [2022] Journal of Business Law 118.
35 J Hardman, "Further legal determinants of external finance in Scotland: an intra-UK market for incorporation?" (2021) 25 Edinburgh LR 192; Idem, "The legislative assault on the Scottish subsidiary" (2022) 26 Edinburgh LR 117.

1 *Sky UK Ltd v Cherrie* [2021] CSOH 36, 2021 SLT 743.

the internet. Lady Wolffe's decision in the Outer House is particularly noteworthy, as Sky's pursuit of an interim interdict in this case concerned not only material which was protected by a paywall, but also programmes that were available "free to air". The focal point of this article lies on how the right to communicate a work to the public under section 20 of the Copyright, Designs and Patents Act 1988 ("CDPA") was interpreted vis-à-vis decisions of the Court of Justice of the European Union, in the context of content linking, which are sometimes viewed as difficult to reconcile.

B. FACTS

Sky is a well-known, major provider of pay TV services both via satellite and the internet. In order to view most of Sky's broadcasts, users need to subscribe to their services and use specific equipment. The exceptions to this are programmes broadcast on the Sky Arts channel, which were made free to air in September 2020. Mr Cherrie was a registered user of the free to view Reddit social media platform. As a "redditor", he would post links and images of Sky programmes to communities – "subreddits" – based on their specific interests. As sole moderator of three subreddits, controlling their content, he encouraged his audience to make requests for links to UK TV programmes to which he provided access via a Google Drive containing hyperlinked copies of the content. The defender also operated his own YouTube channel which he used to upload copies of Sky broadcasts.

Sky alleged that Mr Cherrie's activities on Reddit and YouTube constituted infringement of their copyright in the broadcasts. He uploaded clickable hyperlinks to and copies of entire episodes of Sky programmes, which were easily identifiable by other users based on the labels Mr Cherrie had attached to them. The broadcasts included both programmes that were hidden behind a paywall (which made them only available to paying Sky subscribers) and free to air content from the Sky Arts channel. In respect of the latter, "free to air" may suggest that Sky anticipated that this content would be accessible by the public at large. However, the pursuer pointed out that, while access did not come at a cost, individuals were still required to create a "Sky Go" account. This required account-holders to agree to Sky's terms and conditions, specifically a prohibition not to copy, download or transmit content that was not for personal use.

Sky argued that these activities amounted to infringement of sections 17 and 20 of the CDPA. Section 17 concerns copying by making a photograph of the whole or a substantial part of any image forming part of the broadcast (section 17(4)), while section 20 restricts the communication of copies of the broadcasts to the public. In other words, Mr Cherrie provided unauthorised access to view and share Sky programmes: he communicated the content to a "new public" which Sky did not have in mind at the time it was initially made available for viewing. There was evidence of thousands of readers of Mr Cherrie's subreddits, and just short of 100,000 followers – and over 16 million views – of his YouTube channel. While Sky had already made successful requests to YouTube to close Mr Cherrie's account and to Reddit to take down specified unauthorised content, this proved a "cat-and-mouse" activity, as the defender kept on uploading new material. This led Sky to pursue an interim interdict against Mr Cherrie directly.

C. DECISION

Lady Wolffe had no difficulty in finding that the evidence Sky presented identified the defender as the person behind the alleged breaches of copyright, both in respect of Reddit and YouTube.

The Lord Ordinary also found that Sky had a strong *prima facie* case on the breach of copyright arguments. In respect of the broadcasts behind paywalls, the defender's activity went well beyond the mere copying of images, which would satisfy the requirements under section 17(4), by copying and making available whole episodes of Sky's content. Since the content was made available to the public by electronic means which allowed readers of his subreddits to access at a time and in a way suitable to them, there was also a strong case under section 20: Mr Cherrie had clearly enabled a "new public" to access the content without Sky's authorisation as the rights-holder.

In respect of the free to air Sky Arts channel broadcasts, Lady Wolffe considered the test for the "new public" as part of the communication right under section 20 in more detail. On the question of whether the provision of hyperlinks on one website to copyright works made available on another could be regarded as an "act of communication", the Lord Ordinary referred to the seminal decision in *Svensson*,[2] in which the Court of Justice of the European Union (CJEU) held that "the provision, on a website, of clickable links to protected works published without any access restrictions on another site, [which] affords users of the first site direct access to those works"[3] constituted such an act. In respect of the "new public" criterion, the CJEU held in the same decision that:

> [...] in order to be covered by the concept of "communication to the public", [...] a communication [...] concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the Internet, and therefore by the same technical means, must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public[.][4]

Lady Wolffe pointed out that the CJEU confirmed its view on a "new public" in *GS Media*[5] as "a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work".[6] Applying these statements to the facts, she focused on the necessity of Sky Arts viewers to download the Sky Go app and agree to its terms and conditions, including the "personal use only" restriction. In that manner, Sky retained some control over that channel's audience without making "those programmes free to the world at

2 C-466/12 *Svensson v Retriever Sverige AB* EU:C:2014:76.
3 Ibid para 18.
4 Ibid para 24.
5 C-160/15 *GS Media BV v Sanoma Media Netherlands BV* EU:C:2016:644.
6 Ibid para 37.

large".[7] In addition, she agreed with the pursuer's argument that much of the Sky Arts content was time limited, meaning that many programmes could only be viewed to Sky Go users during a specific time frame. By hyperlinking these programmes, the defender effectively circumvented this second attempt by Sky at retaining control as rights-holder. As a result, the balance of convenience favoured Sky and the interim interdict was duly granted.

D. DISCUSSION

Lady Wolffe's judgment will be valued as another strengthening of the position of copyright holders in broadcasts in the seemingly never-ending battle against unwelcome – or unauthorised – sharing of protected content online. Most of this decision centres on the meaning of what constitutes a "new public" for the purpose of the communication right in section 20. As alluded to earlier, this issue has been considered many times in varying contexts by both the CJEU and national courts, raising questions of where the balance should be struck between rights-holders' and users' interests in the era of sharing content online.

The Lord Ordinary's decision on the content protected by a paywall, whereby only paying subscribers should have access to works protected by copyright, seems uncontentious: hyperlinking such content without authorisation clearly constitutes making it available to a new public in view of the CJEU's decisions in *Svensson* and *GS Media*. However, in respect of the free to air programmes, the position may not be as straightforward, and case law on the issue has been difficult to reconcile. There is a compelling view that free to air means as much, namely available to all free of charge; alternatively, in the present case, that content was indeed available free of charge, but only to Sky Go customers.

At the heart of the matter are competing policy objectives: to allow copyright holders to exercise some form of control in respect of authorising access to content on the one hand, and to allow hyperlinking to support the sharing of information and the functioning of the internet on the other. In *Svensson* and *GS Media*, the CJEU maintained that where content is made available freely online with the authorisation of rights-holders, making that content available by hyperlinking it via another website would not fulfil the "new public" criterion. However, in those decisions there had not been any attempts by rights-holders to restrict access, unlike in *Sky Ltd v Cherrie* in respect of the Sky Arts channel. The CJEU alluded to "restrictive measures" potentially making a difference in *Svensson*, pointing to situations where content may no longer be available on the original online location, or where access restrictions were introduced subsequently (without stating whether this equates to paywalls or non-monetary restrictions, too).[8]

In *VG Bild-Kunst*,[9] the CJEU more recently repeated and appeared to build on its view on restricting access. These comments were obiter, made in an equally open and

7 *Sky UK Ltd v Cherrie* para 32.

8 *Svensson* para 27.

9 C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* EU:C:201:181.

unillustrated manner, maintaining that rights-holders "cannot be allowed to limit his or her consent by means other than effective *technological* measures".[10] This raises the question of whether apps and platforms such as the Sky Go app, which come with terms and conditions on how to use content, and the time-limited availability of programmes, can be regarded as such "technological" means? McDonagh highlights the demand for Mr Cherrie's hyperlinks and uploads both on Reddit and YouTube to perhaps go some way to support the view that the Sky Go app constitutes the kind of restrictions the CJEU in *VG Bild-Kunst* could have had in mind.[11]

The editors of the new issue of *Copinger and Skone James*[12] have proposed introducing the term "limitation" in the discussion of "new public" and "(effective technological) restrictions", arguing that the better way to address this issue would be to explore what group of users the rights-holder had in mind when providing access to its content, instead of using the open access of content to all as the starting point. They draw on the words by Advocate-General Szpunar's Opinion in *VG Bild-Kunst*:

> The copyright holder takes into account the extent of that *circle of potential users* in authorising the making available of his or her work. This is important in particular when the work is made available under a licence, since the potential number of presumptive visitors may be an important factor in determining the price of the licence.[13]

The *price of the licence* may well be nil, as long as the rights-holder has a clear view of what their target audience may be. In the current case, Sky had different target audiences in mind in respect of access to their offerings: many channels could only be accessed via a paid subscription, technical equipment or a Sky account, while individuals who choose to take out subscriptions form the relevant target audience; access is limited by means of a licence, without labelling it as such. Anyone uploading or sharing the programmes to non-subscribers free of charge would be regarded as introducing that content to a "new public" for the purposes of section 20 of the CDPA. This may be a sensible manner to approach online content sharing from the viewpoint of rights-holders. Whether this decision will act as a deterrent for individuals who regard the internet as a copyright-free zone is another matter.

Thorsten Lauterbach
Robert Gordon University

10 Ibid para 46 (emphasis added).
11 D McDonagh, "Sky UK Ltd v Cherrie–blue sky linking?" (2021) Entertainment LR 209.
12 *Copinger and Skone James on Copyright* (ed N Caddick, G Harbottle, U Suthersanen, 18th edn, 2021) para 7-242.
13 *VG Bild-Kunst* para 73.

EdinLR Vol 26 pp 438-443
DOI: 10.3366/elr.2022.0792

Love Thy Neighbour, By Allowing Access for Repairs

A. INTRODUCTION

Angus and Brenda are neighbours. A side-wall of her house is built right to the boundary with his land. The harling is crumbling and Brenda wants to repair it. Can she come onto Angus's land to do so? With his permission she can. But if he refuses access? Baron David Hume, in his lectures at the University of Edinburgh in 1821–22, said:

> [An] owner's interest must yield sometimes to the immediate interest even of an individual where this is out of all proportion to the owner's interest in preventing the interference, or where the matter in question, though immediately concerning an individual, does at the same time, in its consequences, though remotely, concern the neighbourhood too … On the like ground I think it may be maintained with respect to conterminous properties in a Burgh, which in many instances, owing to the crowded situation of the building, cannot be repaired without some temporary interference, as by resting ladders on the next area, that this slight and temporary inconvenience must be put up with, from the necessity of the case.[1]

This statement, however, appeared forgotten until highlighted in Kenneth Reid's *The Law of Property in Scotland*[2] where he ascribes the right to common interest. There is no reference to Hume in the recently rediscovered Edinburgh Sheriff Court case of *Brydon v Lewis*[3] from 1958, where it was held that the owner of a lower tenement flat seemingly had a servitude of necessity enabling access through the garden belonging to the upper flat in order to carry out repairs to a wall. But Hume's statement is mentioned in *Soulsby v Jones*, where Lord President Carloway commented that it was "sound in principle".[4]

Thus Brenda can point to Inner House authority allowing her to take access. What though are the exact parameters of this right? Unlike a servitude of access, it would not stop Angus from building on his land. This is clear from *Soulsby*, where the principal argument that such a servitude had been created by acquisitive prescription was unsuccessful. Assuming, however, that access is permissible, how can it be taken? And for how long? What ancillary rights are there, such as to leave equipment while the work is ongoing?[5] Is compensation payable and, if so, in what circumstances?

1 *Baron David Hume's Lectures 1786-1822*, vol III (ed G C H Paton, Stair Society vol 15, 1952) 206-207.

2 K G C Reid, *The Law of Property in Scotland* (1996) para 359.

3 12 February 1958 (debate) and 26 August 1958 (proof). See K G C Reid and G L Gretton, *Conveyancing 2017* (2018) 162-165. The case was found by Professor Roderick Paisley.

4 [2020] CSOH 103, 2021 SLT 286 at para 26. Case aff'd [2021] CSIH 48, 2021 SLT 1259. See further K G C Reid, G L Gretton and A J M Steven, *Conveyancing 2021* (2022) 152-153.

5 On this subject in relation to servitudes, see R R M Paisley, *Rights Ancillary to Servitudes* (2022).

These and other questions remain unanswered. This contrasts with the position in England and Wales where the matter is governed by the Access to Neighbouring Land Act 1992. This legislation was recently considered by the High Court in *Prime London Holdings 11 Ltd v Thurloe Lodge Ltd.*[6]

B. THE ACCESS TO NEIGHBOURING LAND ACT 1992

The 1992 Act is based on a Report of the Law Commission of 1985.[7] The impetus for the project which led to it was a "steady trickle of cases in which members of the public or their Member of Parliament have approached the Lord Chancellor's Department"[8] or the Law Commission directly about problems arising out of an absence of right to enter a neighbour's land at common law. Following consultation, however, the Law Commission concluded that "there is no clear indication of how often such [problems] arise."[9] Moreover, in most cases drawn to its attention the work requiring access was minor, for example, repairs to gutters. Nevertheless, the Law Commission supported reform because it was unsatisfactory that properties should be left deteriorating where a neighbour refused access.[10] By keeping that reform limited, account was taken of opponents of change who quoted the adage: "an Englishman's home is his castle."[11]

After carefully considering the merits of an "automatic" right of access, the Law Commission recommended a "discretionary" scheme where court authorisation was needed.[12] It argued that the advantage of this approach was that the exact conditions under which the particular access would be taken could be specified. As for the counter-argument that litigation is expensive and uncertain, the Law Commission stated:

> We expect that, in clear cases, the existence of a right to apply to a court would be enough to secure the necessary access. If [the neighbour] had no good reason for refusing, his choice would lie between giving way on the best terms he could obtain and fighting a case, which would end, not only with an adverse decision, but also with an award of costs against him.[13]

It was recommended that access could be taken for preservation work, not improvements.[14] The court would have to be satisfied that the work was reasonably necessary for the preservation of the applicant's land and could not be done without that access. If, however, the taking of access would cause hardship for the neighbour and thus be unreasonable then authorisation would be refused.[15] An access order if

6 [2022] EWHC 303 (Ch).
7 Law Commission, Report on *Rights of Access to Neighbouring Land* (Law Com No 151, 1985).
8 Ibid para 1.4.
9 Ibid para 3.3.
10 Ibid paras 3.27-3.28.
11 Ibid para 3.16. One wonders what such consultees would have made of G Alexander, *Property and Human Flourishing* (2018).
12 Ibid paras 3.29-3.63.
13 Ibid para 3.41.
14 Ibid paras 4.2-4.8.
15 Ibid paras 4.98-4.105.

granted would set out the type of work to be done, the land over which the access would be taken and timings. The owner taking access would have to make good any damage to the neighbouring land and indemnify the neighbouring owner for any loss, such as an impact on its ability to trade.[16]

When implemented by a Private Member's Bill, which became the 1992 Act, the Law Commission's recommendations were adopted with minor changes. The Bill was sponsored by Lord Murton of Lindisfarne, but only after a previous attempt to take it forward in the House of Commons, by John Ward MP, failed due to procedural hurdles.[17] Paradoxically, the proceedings in the House of Lords in relation to Mr Ward's aborted Bill had significant engagement by Scottish peers despite it being restricted to England and Wales. During the second reading, Lord Carmichael of Kelvingrove stated:

> I understand that the legal position in Scotland is somewhat different … I have a feeling that Scottish title to land is perhaps more explicit in allowing some flexibility for those owning or occupying neighbouring land. I am sure that … the Lord Advocate will be able to enlighten the House on the point or indicate whether there are equivalent loopholes in Scottish law on which, at a future date, he may think legislation for Scotland would be helpful.[18]

He was supported by Lord Mackie of Benshie:

> I hope that … the Lord Advocate will assure us that foolishness does not pertain in Scotland and that there are methods whereby in Scotland an unreasonable neighbour, or rather the neighbour of an unreasonable man, can be protected.[19]

The Lord Advocate, Lord Fraser of Carmyllie, replied as follows:

> I do not come to the Dispatch Box trying in any sense to indicate that Scotland has solved the problem or that in this particular area of law it can claim any superiority. As in England, there is no such general right of access to neighbouring land in Scotland. It is only possible if there is some statutory or contractual right or a right arising out of land law. It is certainly not completely general.
>
> On the other hand, the land law of Scotland is very different from the law of England. While there may be those who think that some such legislation ought to be provided in Scotland, I should most firmly counsel against any effort to extend this Bill to Scotland. It will be readily appreciated that it would not happily sit with the rest of Scottish law. Curiously enough, although there have been marked problems on this side of the Border, the situation does not seem to have given rise to quite the same difficulties North of the Border.[20]

16 Ibid paras 4.2, 4.14-4.16, 4.30-4.31, 4.32-4.34 and 4.48-4.59.

17 See Hansard HL Deb 11 December 1991, col 819. Lord Murton was MP for Poole from 1964 to 1979; Mr Ward was his successor.

18 Hansard HL Deb 16 June 1991, cols 172-173.

19 Ibid, col 180.

20 Ibid, col 181.

Why the Bill would not "happily sit" with Scots law was not explained. Thirty years on there remains no legislation in Scotland on the matter.[21]

C. *PRIME LONDON HOLDINGS 11 LTD V THURLOE LODGE LTD*

The applicant owned Amberwood House, South Kensington. Originally a school, it became a residential property in the early twentieth century and its occupants have included Dame Margot Fonteyn. The applicant was now redeveloping it as a "super prime" property and requested access over a passageway on neighbouring property belonging to the defendant. This was to erect scaffolding to carry out rendering and painting of the building's north wall. The defendant, whose property was also being redeveloped, refused. The applicant therefore sought an access order under section 1 of the 1992 Act. According to Nicholas Thompsell, who heard the case as a Deputy Judge, this was the first time that the High Court had considered the legislation.[22] The application was successful.

The court worked through the provisions in the 1992 Act. First, the works were held to be "reasonably necessary for the preservation of the whole or part of"[23] Amberwood House. What was needed was "maintenance, repair or renewal",[24] thus falling within one of the cases of "basic preservation works"[25] for which access could be authorised. Secondly, it was accepted by the defendant that it was impossible to carry out the work without access over its land.[26] Thirdly, it was held that the making of an order would cause "interference with, or disturbance of, [the defendant's] use or enjoyment"[27] of its land. Fourthly, an order would not cause the defendant to "suffer hardship"[28] but the court would consider "the prospect of financial loss"[29] when making an order. Fifthly, although there would be interference and disturbance, on the facts this would not be to "such a degree … that it would be unreasonable to make the order".[30]

The 1992 Act provides for certain losses arising out of access taken under an order to be compensatable, namely "any loss, damage or injury, or … any substantial

21 Except for the Tenements (Scotland) Act 2004 s 17 which gives flat owners access over parts of their tenement belonging to other flat owners.

22 In *Prime London Holdings 11 Ltd* para 1, he notes his understanding that the 1992 Act had been the subject of County Court litigation but that "the only published decision to which counsel were able to refer me was a decision of HHJ Bailey in the Central London County Court in *BPT Ltd v Patterson* [2016] All ER (D) 229." In fact the 1992 Act was considered by the Court of Appeal in *Dean v Walker* (1997) 73 P & CR 366, which again involved wall repairs, with one of the two judges who heard it being coincidentally Wall J. I owe this reference to Professor Roderick Paisley.

23 Access to Neighbouring Land Act 1992 s 1(2)(a).

24 1992 Act s 1(4)(a).

25 1992 Act s 1(4).

26 1992 Act s 1(2(b).

27 1992 Act s 1(3)(a).

28 1992 Act s 1(3)(b).

29 *Prime London Holdings 11 Ltd* para 81.

30 1992 Act s 1(3). Under the Law Commission's recommendations it was only unreasonable hardship which would preclude an order being made.

loss of privacy or substantial inconvenience".[31] The amount payable here would depend on when the work was carried out and how it impacted on the defendant's own redevelopment works. Finally, the court considered the question of payment to the defendant for the privilege of entering its land. But no amount is payable on this ground if the land requiring the work done on it is "residential".[32] The court engaged in a detailed discussion of what constitutes "residential". This will interest those having to interpret that term in other contexts in Scotland.[33] It concluded that, despite the fact that Amberwood House was currently unoccupied due to the redevelopment work, it was still residential. The work being done was with the intention of it remaining a residence.

The court thus made an order but the judge noted: "If this case has proven anything, it has proven that the Biblical precept to 'love thy neighbour' is one that owners of neighbouring properties would do well to abide by."[34] The effort and cost could have been avoided by "only a modicum of goodwill".[35] He expressed the hope that his detailed analysis of the 1992 Act would help potential litigants and avoid cases on it for another thirty years. His advice, however, has apparently fallen on deaf ears. His judgment is being appealed.

D. SCOTS THOUGHTS

We return to Angus and Brenda whom we met earlier. The 1992 Act is inapplicable in Scotland but here are some tentative thoughts about our law. First, declarator could be sought by Brenda that there is the right to take access under the authority of Hume as approved in *Soulsby*. Ideally, the precise terms on which the access would be taken would be spelled out.[36] Secondly, although such a right to take access is not a servitude, it is suggested that the *civiliter* principle would apply: exercise of the right must be reasonable and impose the minimum possible burden on the land being accessed, consistent with full enjoyment of the right.[37] Thirdly, it is suggested, again by analogy to the law of servitudes, that there are ancillary rights such as leaving scaffolding.[38] Fourthly, Brenda will be liable for any damage caused to Angus's property under general principles of the law of delict.[39] Fifthly, Angus must also be compensated for any period of being unable to use the part of his land being

31 1992 Act s 2(4).

32 1992 Act s 2(5), (7). The payment provisions do not appear in the Law Commission Report. They were introduced during the Bill's passage and the exception for residential land apparently after "pressure from the country landowners' interests". See *Prime London Holdings 11 Ltd* paras 195-197.

33 For example, in relation to leases, real burdens or enforcement of standard securities.

34 *Prime London Holdings 11 Ltd* para 263.

35 Ibid.

36 Although the court has power "to pronounce such decree of declarator as they may think right within the limits of a too widely stated conclusion": *Rothfield v North British Railway Co* 1920 SC 805 at 830 per Lord Dundas. I am grateful to David Welsh for this reference.

37 See e.g. Erskine, *Inst* 2.9.34; D J Cusine and R R M Paisley, *Servitudes and Public Rights of Way* (1998) paras 12.180-12.185.

38 Hume, quoted above, refers to "resting ladders".

39 See E C Reid, *The Law of Delict in Scotland* (2022) paras 31.10-31.12.

accessed.[40] An analogy may be drawn here from the case law on the use of another's land where that is not granted by the owner without charge.[41] It would, however, seem preferable for there to be a clear statutory framework like in England and Wales. Having now considered the 1992 Act and its application in *Prime London Holdings 11 Ltd*, it is not clear to me why Lord Fraser was so against the legislation applying in Scotland. While the Scottish Law Commission is presently fully committed on property law work,[42] it should consider a future project on the issue.

Andrew J M Steven
University of Edinburgh

EdinLR Vol 26 pp 443-448
DOI: 10.3366/elr.2022.0793

A Brief Overview of Purpose and Overview Clauses

A. INTRODUCTION

The Northern Ireland Protocol Bill[1] was introduced on 13 June 2022. This note will not consider the detail of the bill. This is discussed elsewhere.[2] Instead focus is on the nature and role of the "admirably clear"[3] section 1 of the bill as introduced,[4] titled "Overview of main provisions". This summarises the contents of the bill:

> This Act—
>
> (a) provides that certain specified provision of the Northern Ireland Protocol does not have effect in the United Kingdom;
> (b) gives Ministers of the Crown powers to provide that other provision of the Northern Ireland Protocol does not have effect in the United Kingdom;

40 A real-life example, where my view was sought, involved scaffolding being erected onto city centre parking spaces which could then not be occupied by lessees.

41 N R Whitty, "Unjustified enrichment" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2022) paras 506-517.

42 On heritable securities and owners associations for tenements.

1 Bill 12 of 2022-23.

2 See, e.g., Sir Jonathan Jones QC, "The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen" (*Politics Home*, 15 June 2022) available at https://www.politicshome.com/thehouse/article/northern-ireland-protocol-bill-one-of-the-most-extraordinary-i-have-ever-seen; M Elliott, "Northern Ireland Protocol Bill" (Public Law for Everyone blog, 13 June 2022), available at https://publiclawforeveryone.com/2022/06/13/the-northern-ireland-protocol-bill/; and R Cormacain, "Northern Ireland Protocol Bill: A Rule of Law Analysis of its Compliance with International Law" (*Bingham Centre for the Rule of Law*, 17 June 2022), available at https://binghamcentre.biicl.org/documents/146_northern_ireland_protocol_bill_report.pdf.

3 Cormacain (n 2) 5.

4 Available at https://publications.parliament.uk/pa/bills/cbill/58-03/0012/220012.pdf.

(c) provides that enactments, including the Union with Ireland Act 1800 and the Act of Union (Ireland) 1800, are not to be affected by provision of the Northern Ireland Protocol that does not have effect in the United Kingdom;
(d) gives Ministers of the Crown powers to make new law in connection with the Northern Ireland Protocol (including where provision of the Protocol does not have effect in the United Kingdom).

It has been suggested that such a clause has no legal consequence and is unnecessary and "political propaganda".[5]

This article will show that contrary to that position such overview clauses are not unusual in legislation, and have a role in determining the purpose of legislation which can assist in its interpretation given the prevailing use of purposive interpretation in the United Kingdom today.[6]

B. OVERVIEW AND PURPOSE CLAUSES

In 1973 the government set up a committee chaired by Sir David Renton QC MP[7] tasked with considering the preparation of legislation (with the exception of policy formulation - an omission which given the nature of legislation and the legislative process was unfortunate).[8] The committee considered ways in which legislation could be prepared with greater simplicity and clarity.

The Renton Report was published in May 1975.[9] It made various recommendations and there are a number of interesting ideas throughout the report, but the committee report was, as Renton bemoaned in 1979,[10] largely ignored. However, while some of the wider scale changes that Renton recommended were not acted upon, the recommendations led to incremental changes into drafting practice. Two are relevant here.

In Chapter X the Renton Report stressed that legislation should be prepared with the ultimate user prioritised. Renton stressed that this user was not just to include lawyers and advisers but the "ordinary citizen"[11] as there could be multiple users with differing needs and interests.[12] This focus on accessibility of legislation to users

5 DA Green, "The curious clause one of the Northern Ireland Protocol Bill" (14 June 2022), available at https://davidallengreen.com/2022/06/the-curious-clause-one-of-the-northern-irish-protocol-bill/.

6 Authorities are numerous. Let *R (Quintavelle) v Secretary of State for Health* [2003] UKHL 13 at [7] speak for the others. See D Bailey and L Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) chs 11 and 12.

7 Renton had a fascinating life chronicled in J Biffen, "Lord Renton: obituary" (*The Guardian*, 25 May 2007).

8 Committee on the Preparation of Legislation, *The preparation of legislation: report of a committee appointed by the Lord President of the Council* (Cmnd. 6053, 1975) (hereafter "Renton Report") at para 1.2.

9 A century after the last parliamentary committee consideration that followed the establishment of Office of the Parliamentary Counsel in 1869 and separate Scottish parliamentary counsel in 1871: Renton Report at para 2.13.

10 Statute Law Society, *Statute Law: Renton and the need for Reform* (1979) 2-8.

11 Renton Report at para 10.1.

12 Renton Report at para 10.1. See also I McLeod, *Principles of Legislative and regulatory Drafting* (2009) 5-8.

informed other recommendations aimed at simplifying legislation and its language and improving understanding.

One mechanism to achieve this was the introduction of statements of purpose, clauses of a bill which would set out the purpose of the bill as a whole, or of parts of a bill.[13] The evidence submitted to Renton indicated judges and users of legislation thought purpose clauses would be helpful, though drafters were less fond of them, particularly given concerns about amendments during the passage of a bill.[14]

Renton was wary of purpose clauses becoming manifestos and expressed concerns about lengthy preambles. Instead he considered that statements of purpose could be valuable when used to illuminate the legal effects of legislation, thereby serving a role in resolving any uncertainties in other provisions (in essence fulfilling a role of providing provision within legislation which could aid its interpretation and assist the reader in determining the meaning of provisions). Renton recommended:

(a) That statements of purpose should be used when they are the most convenient method of delimiting or otherwise clarifying the scope and effect of legislation;
(b) That when a statement of purpose is so used, it should be contained in a clause that is in the Bill and not a preamble.[15]

The second recommendation was important to Renton. It was felt that putting the provision in a clause, rather than in a preamble, gave parliament the opportunity to amend the provision like any other clause of a bill, whereas preambles would be subject to rules that may make amendment more difficult.[16]

Statements of purpose were not a new thing conjured out of the ether by Renton. They, or variants of them, had been used in some legislation for many years. Sometimes statements of purpose appeared as or in preambles. The Riotous Assembles (Scotland) Act 1822[17] had a lengthy preamble to section 1 as to the rationale behind the legislation which imposed strict liability on councils to compensate for damage caused by riots within their council area. Preambles have had a well-established role in legislative interpretation in determining the purpose of legislation from the internal content and context of the Act, thereby assisting the courts in purposive interpretation of legislation.[18] And while a preamble will not trump the clear wording of legislation, a reading which is contrary to the purpose set out in the preamble will be questionable.[19]

13 Renton Report at paras 11.6-11.8.
14 Renton Report at para 11.7.
15 Renton Report at para 11.8.
16 Renton Report at para 11.8. It should be noted that amendment of preambles is possible but restricted during parliamentary consideration. See *Director of Public Prosecutions v Schieldkamp* [1971] AC 1 at 17 per Viscount Dilhorne.
17 Discussed in *Cora Foundation v East Dunbartonshire Council* [2014] CSIH 46, 2014 SC 665.
18 For example, see *Attorney General v Prince Ernest Augustus of Hanover* [1957] AC 436 and *Cora Foundation* (n 17).
19 *Matthew v Trinidad and Tobago* [2004] UKPC 33 at para 46 per Lord Bingham.

Sometimes statements of purpose appeared in individual sections setting out the objective of the provision before providing further detail. For example, section 73(1) of the Road Traffic Act 1960 began:

> With a view to protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue, it is hereby enacted that it shall not be lawful.

The Act then went on to detail the relevant offences.[20]

In recent years, however, purpose clauses have started being used in the way envisaged by Renton. This accords with a trend in Anglo-american legislation.[21] For example, in Victoria each Act since 1985 has a statement of purpose.[22] The Office of the Parliamentary Counsel drafting guidance, a regularly updated document which explains approaches to drafting, includes section 3.2 which explicitly references purpose clauses.[23]

Purpose clauses explicitly identify the objective of legislation and will be influential, although not determinative, in its interpretation.[24] Internal assistance in determining the purpose of legislation to further purposive interpretation is often dependent on close contextual reading.[25] Explicit provision in a clause setting out the objects of legislation makes that easier, albeit the clause is only one facet of the content of the Act which, when read as a whole, determines the purpose in aiding interpretation.[26]

Statement of purpose clauses are used, occasionally, in the UK. For example section 2 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 sets out the purpose of the legislation in preserving EU law in Scotland. An earlier version of the legislation, passed by the Scottish Parliament but then challenged at the instance of the Attorney General and the Advocate General for

20 The example is given by Bennion, *Statute Law*, 3rd ed (1990) 65.

21 See A Scalia and BA Garner, *Reading law: the interpretation of legal texts* (2012) 230, DC Pearce, *Statutory interpretation in Australia*, 9th ed (2019) paras. 2.21 and 4.63, and D Berry, "Purpose sections: Why they are a good idea for drafters and users" (*The Loophole*, May 2011) 49 (which details examples of their use from jurisdictions including Barbados, Canada, Australia, New Zealand, and others).

22 D Pearce, *Statutory interpretation in Australia*, 9th ed (2009) para 2.21.

23 Office of the Parliamentary Counsel, *Drafting Guidance* (June 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892409/OPC_drafting_guidance_June_2020-1.pdf.

24 Bailey and Norbury (n 6) section 17.2.

25 Such as described in *Kostal (UK) Ltd v Dunkley* [2021] UKSC 47, [2022] 2 All ER 607 at para 30 per Lords Leggatt, Briggs and Kitchin.

26 Australian material gives the best illustration of this. See, for example, Acts Interpretation Act 1901, s 15AA and *Russo v Aiello* (2003) 215 CLR 643, and see *IW v City of Perth* (1997) 191 CLR 1 at 12 per Brennan, CJ and McHugh, J) and *Victims Compensation Found Corporation v Brown* (2003) 77 ALJR 1797. The latter case is discussed in some detail in this context by RS Geddes, "Purpose and context in statutory interpretation" in Judicial Commission of New South Wales, *Statutory interpretation, principles and pragmatism for a new age* (Educational Monograph 4, 2007) 153-4 https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/education-monograph-4.pdf.

Scotland, was considered by the Supreme Court in 2018.[27] Section 1 of the bill as originally enacted contained a differently worded purpose clause, which "accurately summarised" the object of the legislation and was used by the Supreme Court in its consideration of the legislative competence of the bill.[28]

Section 3.2 of the Office of the Parliamentary Counsel drafting guidance distinguishes between purpose clauses and overview clauses. The latter are used for navigational purposes and are more common in the UK than statement of purpose clauses.[29] They can identify what a bill contains, draw out common themes within legislation, can provide signposts to other parts of the legislation, or can give a contextual background to the legislation, including identifying other legislation against which the relevant legislation is enacted.

A couple of examples demonstrate the use of these clauses. Section 1 of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 is an overview provision for the 110 section, two schedule, and seven part Act. It tells the reader of the legislation what each part of the Act does, summarising the key elements of each part, and identifying the functions of the legislation. This is more helpful to the reader than the general list of contents, because it gives context, not just a list of section titles but identifying common threads and elements, which gives readers the wider context of the bill aiding them in orienting themselves around legislation. Overviews of this type are not uncommon.[30]

Overview clauses need not just be summaries of legislative content. The Corporation Tax Act 2010 contains a number of overview clauses[31] but some, such as section 35, give legislative context.[32] This provision not only sets out the approach in the relevant part but provides a signpost to other legislation relevant to the operation of the provisions (here, the Corporation Tax Act 2009). Identifying that background legislative context explicitly aids the user (in this case to identify where rules regarding the calculation of losses relevant to the part can be found) and context is generally relevant in interpretation,[33]

Overview clauses, although framed as orientational aids, can also help identify the purpose of legislation even where this is not the main objective of the provision. This can be done negatively. For example, section 1(3) of the Commercial Rent

27 *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64, [2019] AC 1022.

28 Ibid at para 28 per Lord Reed.

29 Bailey and Norbury (n 6) section 17.3.

30 See, e.g., Insolvency Act 1986 s A1 (inserted by Corporate Insolvency and Governance Act 2020 s 1) Data Protection Act 2018 s 1, Subsidy Control Act 2022 s 1, and Building Safety Act 2022 s 1 and s 61 (the latter providing an overview of a part of the Act).

31 Corporation Tax Act 2010 ss 1, 2, 55, 97, 98, 111, 129, etc.

32 Office of the Parliamentary Counsel (n 23) para. 3.2.5.

33 On contextual interpretation see Bailey and Norbury, *Bennion* (n 6) section 11.2, and chs 7, 8, and 21. Interpretation of one Act may inform interpretation of another where the legislation is on similar areas (*in pari materia*). Bailey and Norbury (n 6) section 21.5 and D Lowe and C Potter, *Understanding legislation* (2018) at paras. 5.31ff discuss in detail.

(Coronavirus) Act 2022 provides that the Act is not to supplant agreements dealing with the subject of the legislation, thereby indicating the legislation is not intended to be prescriptive in all circumstances. Purpose can be indicated positively through the language used. One illustration is the *Local Government Byelaws (Wales) Bill* case[34] where Lord Neuberger set out the overview clause[35] and then used it to assist determining purpose in assessing legislative competence.[36]

C. THE NORTHERN IRELAND PROTOCOL BILL

Clause 1 of the Northern Ireland Protocol bill is then not unusual as a legislative device. It is an overview clause setting out the structure of the legislation, and explicitly references the legislative context underpinning the bill.

In addition, given the wording of subclauses (1) and (2) in explicitly stating that the Northern Ireland protocol[37] does not apply in the United Kingdom, the purpose of the bill is made clear. The bill has the purpose not only of disapplying the protocol (seemingly contrary to the EU withdrawal agreement) but also delegating powers to ministers to do so. This serves to comply with the requirement that it is presumed that parliament does not intend to legislate in a way contrary to the rule of law unless it does so expressly,[38] the "principle of legality",[39] and also the requirement from *AXA General Insurance Ltd v Lord Advocate*[40] that delegation of powers to act contrary to the rule of law needs to be express and unambiguous. How a domestic court will respond to such an explicit provision is yet to be seen.

Scott Wortley
University of Edinburgh

34 [2012] UKSC 53, [2013] 1 AC 792.

35 Ibid at para 21.

36 Ibid at para 48.

37 The Protocol on Ireland/Northern Ireland in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01.

38 *R v Secretary of State for the Home Department ex. p. Simms* [2000] 2 AC 115 131 per Lord Hoffmann.

39 Discussed in Bailey and Norbury (n 6) ch 27, A Burrows, *Thinking about statutes: interpretation, interaction, improvement* (2018) 68-74.

40 [2011] UKSC 46, [2012] 1 AC 868 at para. 152 per Lord Reed.

EdinLR Vol 26 pp 449-452
DOI: 10.3366/elr.2022.0794

Qualified Immunity of the Lord Advocate in *Whitehouse and Clark v Chief Constable and Lord Advocate*

A. INTRODUCTION

In *Whitehouse and Clark v. The Chief Constable and The Lord Advocate*,[1] the pursuers, the administrators of Rangers Football Club, sought damages against the Chief Constable of Police Scotland and the Lord Advocate arising out of their treatment by police and prosecution following the winding up and sale of Rangers.[2] The Lord Advocate contended that he and his Advocate Deputies and Procurator Fiscal Deputies had immunity from suit in terms of *Hester v MacDonald*.[3] Therefore, the issue before the Inner House on reclaiming motion was whether the Lord Advocate had absolute immunity against a malicious prosecution action following upon an indictment, and, secondarily, whether Article 8 of the European Convention on Human Rights (ECHR) could be engaged.

Overturning sixty years of established law, the Inner House decided that the Lord Advocate had no absolute immunity in connection with prosecutions if they are proved to have been malicious and without probable cause. *Whitehouse* therefore represents a significant constitutional change in Scotland, and sets a new precedent for civil actions against the Lord Advocate following upon indictment. This article examines the court's reasoning in order to understand how and why the court reached its decision, and briefly considers the implications for Scots constitutional law going forward.

B. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arose out of the 2011 winding up and sale of Rangers Football Club. The pursuers were the administrators of the club, and were indicted in connection with alleged wrongdoing with regard to its acquisition and financial management.[4]

By June 2016, all proceedings against the pursuers were at an end, having been dismissed or withdrawn.[5] Pursuers subsequently filed the instant action, averring malicious prosecution and infringement of Article 8 of ECHR by the Chief Constable, the Lord Advocate, and his deputies.

At first instance, the Lord Ordinary held that the Lord Advocate enjoyed the same protection as superior judges in any matter which properly fell within the scope of his

1 [2019] CSIH 52, 2020 SC 133.
2 *Whitehouse* at para 1.
3 1961 SC 370.
4 *Whitehouse* at para 4.
5 *Whitehouse* at para 10.

official duties, following *Hester v MacDonald*.[6] Further, Article 8 could be engaged by a decision to prosecute where the charges had been "trumped up".[7]

C. DECISION AND RATIO

Was *Hester* correctly decided or could the Lord Advocate be liable in damages for acts which were malicious and without probable cause?[8]

The pursuers' submission averred that *Hester* had been wrongly decided, creating an absolute immunity "out of the air" and contrary to prior authority that the actions of a public official were protected only on a qualified basis.[9] After a thorough review of the historical development of the law in Scotland and an analysis of the authorities upon which *Hester* relied, the court agreed.

In the view of the court, none of the authorities cited in that case was sufficient to support the Lord Advocate's absolute immunity from suit. While the Lord Advocate did have a certain historical privilege (exemption from payment of expenses and penalties, no requirement to find caution),[10] he did not have immunity from suit.[11] Lady Dorrian highlighted the "complete circularity of approach, in which the only real basis for the immunity asserted rests on … Hume's footnote".[12]

The court clarified:

> In essence, in relation to his acts, the Lord Advocate and those for whom he is responsible are generally subject to the same rights and duties as other public officials in the conduct of their public duties.[13]

The court added:

> Where there is proof of malice and lack of probable cause in relation to the general acts of a public official, including the Lord Advocate and those for whom he is responsible, the matter is actionable.[14]

As such, the Lord Advocate could be liable for an action in civil damages if malice and lack of probable cause were averred and proven.

The court then considered whether *Hester* should be overruled on the basis that the policy considerations which existed in 1961 no longer applied.[15] Even if *Hester* had been correctly decided, the court would have done what it could to "sort out" what it called the "undesirable consequences" of *Hester* on public policy grounds.[16]

6 *Whitehouse* at para 15.
7 *Whitehouse* at para 20.
8 *Whitehouse* at para 57.
9 *Whitehouse* at para 21.
10 See e.g. Hume, Commentaries on Crimes, Volume ii, 134, footnote 1.
11 *Whitehouse* at paras 84-85.
12 *Whitehouse* at para 146.
13 *Whitehouse* at para 87.
14 *Whitehouse* at para 90.
15 *Whitehouse* at para 92.
16 *Whitehouse* at para 133, citing *Crawford Adjusters v Sagicor Insurance* [2013] UKPC 17, [2014] AC 366 at para 84 per Lady Hale.

Although the judiciary is typically cautious of overstepping its constitutional role, the scope of the law of reparation is an area in which the law has traditionally been moved forward by the courts and not by Parliament.[17] The fundamental principle in play was that everyone has a right to liberty, property, and reputation, and that there ought to be a remedy if these rights are wrongfully interfered with.[18] In this instance, specifically, intervention by the courts was justified in the interest of the proper administration of justice.[19]

Despite the Lord Advocate's concerns, the court took the view that a prohibition of malicious conduct was unlikely to have a "chilling effect" on independent and robust decision-making,[20] nor would it diminish prosecutorial endeavour.[21] An Advocate Depute would more likely be concerned about the soundness of their acts in terms of disciplinary measures than the remote prospect of an action for reparation against the Lord Advocate.[22] The court conceded that there might be some increase in malicious prosecution cases following upon failed prosecutions, but was satisfied that the sanction of an award of expenses and the requirement to provide caution for expenses would likely deter unmeritorious cases.[23]

A qualified prosecutorial immunity brings Scotland into line with the rest of the western world, excluding the United States.[24] The Canadian case of *Nelles* v *The Attorney General for Ontario* lays out the necessary elements of a malicious prosecution claim:

a) the proceedings must have been initiated by the defendant;
b) the proceedings must have terminated in favour of the plaintiff;
c) the absence of reasonable and probable cause;
d) malice, or a primary purpose other than that of carrying the law into effect.[25]

Accordingly, any would-be pursuer faces the "formidable" task of proving a negative: that the prosecutor did not have a subjective belief in the existence of reasonable and probable cause.[26] This high burden of proof, it is argued, offers sufficient protection for the honest prosecutor who errs as a result of "incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence or even gross negligence".[27]

Finally, there was little substance to the argument that the duties of the Lord Advocate had substantially changed since *Hester*, or that modern society required a

17 *Whitehouse* at para 98.
18 *Whitehouse* at para 99.
19 *Whitehouse* at para 100.
20 *Whitehouse* at para 100.
21 *Whitehouse* at para 102.
22 *Whitehouse* at para 103.
23 *Whitehouse* at para 101.
24 *Whitehouse* at para 109.
25 *Nelles v The Attorney General for Ontario* [1989] 2 SCR 170 at para 193 per Lamer J, citing JG Fleming, *The Law of Torts* (1977) 598.
26 *Whitehouse* at para 107.
27 *Whitehouse* at para 107, citing *Miazga* v *Kvello (Succession)* [2009] 3 RCS 339 at 378.

more sceptical view of public functions. Therefore, if *Hester* had been determined to have been correctly decided, it would have been overruled on the basis that public policy no longer supported its continued application.[28]

The court then considered whether the pursuers' cases, insofar as they were based on Article 8 of the ECHR, were relevant for inquiry.[29] Although the court opined that an Article 8 claim may add nothing to a malicious prosecution suit, it was nevertheless relevant to proceed to enquiry.[30] Consistently with the jurisprudence of the European Court of Human Rights, a malicious prosecution conducted without probable cause undoubtedly shows disrespect for a person's private life.[31] Article 8 could be engaged and infringed in the event of prosecution on "trumped up false charges".[32]

D. CONCLUSION

The *Whitehouse* decision represents a significant departure from the preceding sixty years of law and brings Scotland into line with the vast majority of western countries. Despite its significance in terms of black letter constitutional law, the real-world impact is likely to be minimal for two reasons. First, because, as Justice Lamer noted in *Nelles*, the requirement that the aggrieved party convincingly aver and prove malice and lack of probable cause sets the burden of proof very high. Unless a Lord Advocate incriminates himself or herself in writing, or the want of probable cause is egregious beyond words, cases in which a pursuer can convincingly prove the prosecutor's lack of subjective belief are likely to be few and far between. Second, one would hope that such actions will not arise with great frequency since appointees to the role are traditionally individuals with prestigious legal backgrounds and the Lord Advocate is (historically) presumed to be above calumny.[33]

That said, since the *Whitehouse* decision, prosecutors have admitted that the prosecution against Whitehouse and Clark did constitute malicious prosecution.[34] This being so, since the matter was settled before proceeding to proof, the scope of reparation available through this new judicial channel remains untested. However, the £10.5 million settlements offered to Mr Whitehouse and Mr Clark indicate that such damages may be significant.[35]

Lisa Cowan
University of Edinburgh

28 *Whitehouse* at para 113.
29 *Whitehouse* at para 114.
30 *Whitehouse* at para 123.
31 *Whitehouse* at paras 115-116.
32 *Whitehouse* at para 123.
33 *Whitehouse* at para 126.
34 "Rangers administrators awarded pay-out over 'malicious' prosecution" (*BBC News*, 27 August 2020), available at *https://www.bbc.com/news/uk-scotland-glasgow-west-53930935*.
35 "£24m tax bill for ex-Rangers administrators' legal claim" (*BBC News*, 8 February 2021), available at *https://www.bbc.com/news/uk-scotland-55983492*.

EdinLR Vol 26 pp 453-458
DOI: 10.3366/elr.2022.0795

Sheku Bayoh – Immunity of Evidence in Public Inquiries: Truth versus the Administration of Justice?

"The setting up of a Public Inquiry is a critical moment for Scottish justice, the rule of law and important step forward in the family's campaign to establish accountability": Aamer Anwar solicitor for the Bayoh family 12 November 2019.

"Today we commence an investigation that will be thorough and fearless": Lord Bracadale statement on the opening of the Sheku Bayoh Public Inquiry 30 November 2020.[1]

A. BACKGROUND

The death of Sheku Bayoh on 3 May 2015, on the streets of Kirkcaldy and whilst in police custody,[2] has cast a shadow over Scottish society during the last seven years – a period of time that is itself a testament both to the seriousness of the issue and to the tenacity of the Bayoh family in their campaign for justice, as well as to the complexity of the criminal justice process as it applies to this case. It was a full three years after the event that the Crown Office announced that no police officers, nor Police Scotland as an institution, would face criminal prosecution unless new evidence came to light.[3] This was confirmed a year later, in November 2019, after the family had requested a review of this decision.[4] The criminal investigation was carried out over several years by the Police and Investigations Review Commissioner (PIRC).[5]

These delays led some – notably the Bayoh family solicitor, Aamer Anwar – to question the suitability of a Fatal Accident Inquiry (FAI) as the best vehicle through which to scrutinise the events leading to Bayoh's death. "The family," Anwar said, "do not have the trust or belief that an FAI under the control of the Lord Advocate would have the remit or the courage to deal with serious public concerns".[6] Although an

1 Transcript of statement at opening of Sheku Bayoh Inquiry. Due to the lockdown rules in place at the time – this was delivered solely through social media, https://www.youtube.com/watch?v=3qW7NmWUArU&t=11s.

2 "Man dies shortly after he was detained by police" (*BBC News*, 5 May 2015), available at https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-32579802.

3 S Carrell, "No charges for Scottish police over Sheku Bayoh death in custody" (*The Guardian*, 3 October 2018), available at https://www.theguardian.com/uk-news/2018/oct/03/no-charges-for-scottish-police-over-sheku-bayoh-death-in-custody.

4 A recently created remedy open to Scottish citizens under the Victims and Witnesses (Scotland) Act 2014.

5 The power to investigate deaths in police custody is outlined in s 33A of Police, Public Order and Criminal Justice (Scotland) Act 2006. This was added in 2013 after the launch of Police Scotland.

6 Aamer Anwar press release statement on 11th November 2019.

FAI is the normal judicial process to investigate deaths in police custody in Scotland,[7] campaigners wished for a broader public inquiry which could be instituted by the Scottish Government under the Inquiries Act 2005.

Section 1 of the 2005 Act gives the discretion to ministers to call an inquiry where "particular events have caused, or are capable of causing, public concern".[8] Humza Yousaf, the then Scottish Cabinet Secretary for Justice, agreed to institute an inquiry in November 2019, following the end of the criminal justice process. Lord Bracadale, a retired High Court judge, agreed to chair the inquiry and jointly drew up the terms of reference. Mr Yousaf, in a Parliamentary answer,[9] indicated how the inquiry would do the work of an FAI but also go further by investigating the immediate police response to Bayoh's death and the subsequent work of the PIRC.[10] Further it would "establish the extent (if any) to which the events leading up to and following Mr Bayoh's death" were "affected by his actual or perceived race".[11] These were objects beyond the remit of a traditional FAI, which looks at the circumstances and cause of death and which make recommendations on precautions that could be taken.[12]

However, the decision to launch a public inquiry that intersected so closely with the criminal justice process posed immediate and difficult legal questions. These included the status of evidence given in the inquiry and the extent to which it could be used in any future criminal prosecution. These issues have arisen in a number of statutory public inquiries across the United Kingdom. The impact of these debates on the next few years of the inquiry could have a lasting significance.

B. "FULL AND FRANK" SUBMISSIONS – THE INQUIRY RULING

Prior to the first full hearings, Senior Counsel to the inquiry, Angela Grahame QC, sought undertakings that evidence given by police officers during the inquiry would not – and could not - be used by the Crown in any related future prosecution.

Lord Bracadale agreed to the request and made this undertaking to the Solicitor General and also to the Deputy Chief Constable to give the police officers additional protection from any internal disciplinary processes that may be brought.[13] However, this was not agreed to by the Solicitor General on the basis that to do so would not be in the public interest[14] in light of the Crown Office's general responsibility to

7 A recent example of this can be seen with the death of Warren Fenty in an Aberdeenshire police station in 2014. The FAI at Aberdeen Sheriff Court concluded its hearings in February 2022.

8 Two other recent examples of this power being used in Scotland are the Scottish Hospitals Inquiry chaired by Lord Brodie established in 2020 and the Scottish Covid-19 Inquiry chaired by Lady Poole established in 2021.

9 Humza Yousuf Parliamentary Answer to Question S5W-29236, May 21 2020.

10 Terms of Reference of Sheku Bayoh Inquiry, available at https://www.shekubayohinquiry.scot/key-documents.

11 Ibid.

12 The full responsibilities of FAIs are outlined in the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016.

13 Ruling by Chair of the Sheku Bayoh Inquiry, March 1 2022.

14 Response of Solicitor General to Lord Bracadale, March 22 2022.

"provid[e] just and effective means by which crimes may be investigated, prosecuted and offenders brought to justice".[15] As a result, the inquiry began its public hearings in May 2022 without the evidence of the relevant police officers.

Why then did such a discrepancy arise? It seems to run contrary to experience in other UK public inquiries where there remained a possibility of criminal prosecution and where such assurances were given by the Attorney General. Notably this occurred in the Grenfell Public Inquiry[16] in 2020 and the Undercover Policing Inquiry[17] in 2016. On a narrower basis, the chair of the Manchester Arena Bombing Inquiry refused to seek an undertaking for one witness, the brother of the bomber, as to do so would have been, in their view, "an affront to justice".[18]

Central to Lord Bracadale's request, which echoed the words of other inquiries, was the integrity of the inquisitorial process. Without such undertakings the inquiry, he said, "would be seriously impeded";[19] and the "public interest in striving to ascertain the truth,"[20] in danger of being thwarted.

The stakes were so high, Lord Bracadale believed, because of the privilege against self-incrimination, or the "right to silence". In an overview of the relevant case law, Lord Bracadale highlighted the "sacred and inviolable" nature of the right, both in domestic law[21] and in the jurisprudence of the European Court of Human Rights (ECtHR).[22] Article 6 of the European Convention on Human Rights (ECHR) does not explicitly mention the right to silence as an aspect of the right to a fair trial, but it is viewed by the ECtHR as fundamental to "the very basis of a fair trial".[23] Lord Bracadale clearly believed that the police officers involved in the Bayoh incident would exercise that right and in doing so undermine the inquiry process. Mentioned both in Lord Bracadale's ruling and in Grahame QC's submission was the report from the Stephen Lawrence inquiry[24] in which the five suspects in the murder case refused to answer any question during the initial inquest, in the exercise of this privilege. MacPherson labelled this process "frustrating and indeed almost farcical",[25] a term quoted in the Bayoh ruling.

In more recent memory was the FAI into the 2014 "Bin Lorry" crash at George Square in Glasgow.[26] The driver of the lorry, Harry Clarke, refused to answer most of

15 Ibid.
16 Established in 2017 following the Grenfell Tower fire which killed 72 people: https://www.grenfelltowerinquiry.org.uk/.
17 Established in 2015 following revelations of 'appalling practices' in undercover policing across the UK: https://www.ucpi.org.uk/.
18 Established in 2019 following the bombing of Manchester Arena in 2017 which killed 22 people: https://manchesterarenainquiry.org.uk/.
19 Bracadale report (n 13) para 2.
20 Ibid para 19.
21 Livingston v Murray 1830 9 S 161.
22 Saunders v United Kingdom (1997) 23 EHRR 313.
23 Ibid para 72.
24 A public inquiry in 1998 called into the murder of Stephen Lawrence in 1993 and overseen by Sir William MacPherson.
25 Sir William MacPherson, *The Stephen Lawrence Inquiry Report* (1999) Cm. 4262-I Para 42.29.
26 A bin lorry went out of control after the driver Harry Clarke collapsed at the wheel killing six individuals on December 22 2014.

the questions asked of him at the inquiry despite the assertion by the Crown Office at the beginning of the Inquiry that no criminal prosecution would take place over the events. In this case, Sheriff Beckett QC explicitly advised Clarke of his right and made no inference from his silence.[27] However, Lord Bracadale was not content to take this approach as, without the undertaking, he believed he would not receive "full, frank and uninhibited evidence"[28] and therefore would not be able to fulfil the inquiry's objectives. Essentially, the whole truth of the events could not be discovered without such a commitment. The same formulation was used by Sir Martin Moore-Bick in his ruling on the application for undertakings in the Grenfell Tower Inquiry, controversially asked for by building companies[29] involved in the refurbishment of the housing. Without such an undertaking, he said, "it [would] not be possible for the Inquiry properly to fulfil its Terms of References".[30]

C. CROWN OBJECTIONS

Although these arguments were accepted by the Attorney General in the context of the Grenfell Inquiry, the Crown did not agree in the Bayou inquiry. Ruth Charteris QC drew a contrast with other public inquiries where the "totality of evidence" had been considered before the undertakings were sought and the "likelihood that important evidence would not be available to the inquiry" was more established.[31] However, she did not share Lord Bracadale's view that aspects of the inquiry would grind to a halt if undertakings were not given. It was, she said, "not yet clear" whether police officers would rely on their right to silence and so "the impact [on the inquiry] is still unknown".[32] Ultimately, and departing from the reasons given for making such undertakings in other inquiry settings, the Crown took the view there was no established and clear need for the undertakings to be given.

This outcome has satisfied the Bayoh family who opposed the request for undertakings at the inquiry, albeit for different reasons. They argued that the family had a "legitimate expectation"[33] that police officers would fully cooperate with the inquiry and answer all relevant questions put to them due to their public service role and their legal responsibilities.[34] Therefore, the family argued that they required no additional legal protection when giving their evidence. These arguments were not mentioned by the Solicitor General but perhaps they underpin the view that there was not enough evidence that the right to silence would in fact be invoked by police officers. Lord Bracadale in his ruling did not reject the family's submissions outright but said the difficulty was that all of the police's legal obligations were subject to

27 The issues are outlined by Sheriff Beckett in paras 210-214 of the FAI report. See [2015] FAI 31.

28 Bracadale report (n 13) para 24.

29 The hearing was delayed in February 2020 as a late application for the undertakings was made by a number of companies.

30 Grenfell Tower Inquiry Ruling on Undertaking, February 6 2020.

31 Response to Sol Gen (n 14).

32 Ibid.

33 Submission by Claire Mitchell QC on behalf of the Bayoh family, Feb 22 2022.

34 Outlined in Police and Fire Reform (Scotland) Act 2012.

the same human rights protection as any other citizen, which included their right to invoke the privilege against self-incrimination.

Consequently, the request for a very specific and limited form of immunity for evidence given in the inquiry was rejected. It is worthy of note that, reflecting the sensitivity of the general concept of immunity, Lord Bracadale emphasised early on in his ruling that "the requests do not seek immunity from prosecution or disciplinary action".[35] Similarly, Moore-Bick in his request for the Grenfell Inquiry directly addressed misrepresentation of the issues: "Contrary to reports in the press it does *not* grant anyone immunity from prosecution" (emphasis original).[36] The false equation of the request with special treatment for police led to a tetchy submission on the issue to the inquiry from the Dean of the Faculty of Advocates, Roddy Dunlop QC, when representing the Scottish Police Federation. He condemned the Bayoh family's solicitor, Aamer Anwar's, description of the request for undertakings as "an insult, shameful and astonishing"[37] and "wholly unwarranted"[38] as it was "commonplace"[39] for such requests to be made – albeit that generally these requests have not been made by serving police officers who have legal responsibilities and powers that most citizens do not.

D. CONCLUSIONS

In making his ruling, Lord Bracadale outlined the issues that he had to take into account when making his requests for undertakings. The two main ones were whether the "public interest in establishing truth" could be established without them and whether the "Inquiry would be hampered"[40] without them. There was some dispute between counsel in the submissions to the inquiry on which of these were more important,[41] or indeed relevant, but for Lord Bracadale not "much turned"[42] on this debate. Ultimately the request seems to have been a pragmatic one: that the inquiry with its stated terms of reference would not be able to fulfil its role unless these requests were made. Underpinning this view was that all serving police officers and those that have left the force since the incident might, by right, exercise their privilege against self-incrimination.

It is telling that the Crown did not accept that reading of events and, in refusing the request, reflected that there was limited evidence that the inquiry would not function due to individuals refusing to give testimony. Although not mentioned in the Crown's response to the inquiry chair, it would seem that this conclusion was driven in part by the fact that the evidence was to be given by police officers.

35 Bracadale report (n 13) para 3.
36 Grenfell ruling re undertaking (n 30) para 24.
37 Bayoh family statement, Feb 22 2022.
38 Roddy Dunlop submission to Sheku Bayoh Inquiry, Feb 22 2022.
39 Ibid.
40 Bracadale report (n 13) para 17.
41 Notably between Senior Counsel to the Inquiry and Shelagh McCall QC who represents two of the police officers involved in the inquiry.
42 Bracadale report (n 13) para 17.

The Sheku Bayoh Inquiry began its public hearings on May 10 2022 and heard from a variety of witnesses over the following weeks, including police officers. Although in its early stages[43] the Solicitor General's approach seems to have been vindicated as there have been no issues so far concerning the privilege against self-incrimination. It has not been the case that the inquiry was inevitably going to be disrupted and unable to carry out its statutory role if undertakings were not given. This may not always be the case as the inquiry progresses but it seems the "administration of justice" and the proper functioning of the public inquiry has been upheld by the Crown refusing the request.

Nick McKerrell
Glasgow Caledonian University

EdinLR Vol 26 pp 458-467
DOI: 10.3366/elr.2022.0796

Gender Critical Litigation: Reconciling *Fair Play for Women* and *For Women Scotland*

A. INTRODUCTION

Crowdfunded litigation has emerged as a key campaign strategy for "gender critical" activists across the United Kingdom, supporting a diverse range of civil cases from employment tribunal actions[1] to petitions in judicial review.[2] Its influence has been felt in Scottish courts too, as reflected in two recent judicial review cases – *Fair Play for Women Ltd*[3] and *For Women Scotland Ltd*[4] – which were supported by crowdfunding to the tune of at least £235,000.[5] The Court of Session handed down judgments in these cases just days apart in February 2022. These opinions generated considerable social media comment – and not a little confusion – as their outcomes

43 It is estimated the Inquiry could take up to two years.

1 For example, *Forstater v CGD Europe* [2021] UKEAT/0105/20/JOJ. £123,865 was raised to support the case via crowdfunding online from 4,617 contributors https://www.crowdjustice.com/case/lost-job-speaking-out/.

2 See, for example, *Bell v Tavistock* [2021] EWCA Civ 1363. £118,810 was raised in support of the case from 3,811 people. https://www.crowdjustice.com/case/protect-gd-children/.

3 *Petition, Fair Play for Women Ltd* [2022] CSOH 20; *Fair Play for Women v Registrar General for Scotland* [2022] CSIH 7. In subsequent references, these judgments will be identified as *Fair Play for Women* (Outer House) and *Fair Play for Women* (Inner House).

4 *Petition, For Women Scotland Ltd* [2021] CSOH; *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4. In subsequent references, these judgments will be identified as *For Women Scotland* (Outer House) and *For Women Scotland* (Inner House).

5 Fair Play for Women, "Reclaim the definition of "sex" in Scotland" (2022) https://www.crowdfunder.co.uk/p/reclaim-sex-in-scotland and For Women Scotland, "Stop the Scottish Government redefining 'woman' to include men" (2021) https://www.crowdjustice.com/case/stop-scottish-government-redefining-woman/.

seemed at odds with one another. While both cases concerned legal definitions of "women" and "sex," in *For Women Scotland*, the Inner House concluded the Scottish Parliament had "conflated and confused" different protected characteristics by including transwomen in one legal definition of "women."[6] In *Fair Play for Women*, by contrast, the court held "there is no universal legal definition of the word sex" in law – and that the concept of "sex" does not always or necessarily mean biological sex.[7]

This article argues that, despite appearances, the Court of Session's decisions in these cases can be reconciled in straightforward legal terms. While shared ideological commitments explain why these cases were pursued by activist groups, I show the legal issues raised by these actions are only superficially similar. Having more fully introduced the "gender critical" beliefs underpinning the two petitions, I show that *For Women Scotland* is best understood as a case about the technical limits of devolution and the complex interaction between reservations and exceptions in Schedule 5 of the Scotland Act 1998. *Fair Play for Women*, by contrast, represents an ultimately unsuccessful attempt to persuade the Scottish courts to adopt a single biological definition of the concept of the "sex" for all legal purposes. Read together, these cases illustrate the opportunities and risks of strategic litigation by political interest groups. While *For Women Scotland* represents a significant victory for gender critical activists, *Fair Play for Women* can be seen as a more fundamental setback. In conclusion, I suggest these cases represent a good opportunity for public lawyers to reappraise our understandings of "public interest litigation", and to recognise more consistently the contested character of legal actions which command the interest and, increasingly, the financial support of organised sections of the public.

B. WHAT IS "GENDER CRITICAL" LITIGATION?

"Gender critical" ideas can be understood as "the belief that sex is biologically determined, binary and immutable," while gender is socially constructed.[8] While critiques of the social construction of gender identities and roles have been a longstanding feature of different canons of feminist analysis, modern "gender critical" activism contends that sex – and *not* gender – should represent the primary category of social and legal analysis. This view has resulted in a range of policy preoccupations and campaigning efforts across the UK. These have included resisting reforms to the Gender Recognition Act 2004 (and implicitly and explicitly opposing the gender recognition for transgender people the 2004 Act enables); contesting the legality of NHS Trusts prescribing puberty blockers to transgender teenagers diagnosed with gender dysphoria;[9] pursuing employment tribunal cases seeking to establish that gender critical beliefs are protected under the Equality Act 2010 for the purposes of

6 *For Women Scotland* (Inner House) para 40.

7 *Fair Play for Women* (Inner House) para 20.

8 S Cowan and S Morris, "Should 'Gender Critical' Views about Trans People Be Protected as Philosophical Beliefs in the Workplace? Lessons for the Future from Forstater, Mackereth and Higgs" (2020) 51 *Industrial Law Journal* 1.

9 *Bell v Tavistock* [2021] EWCA Civ 1363.

discrimination, victimisation and harassment;[10] opposition to other administrative and legal changes which do not accord particular legal status or bureaucratic significance to recorded sex at birth; putting pressure on parliamentarians to use the language of "sex" rather than "gender" in new legislation;[11] and promoting the idea that the concept of "sex" should be understood in policy, legislation and society in exclusively biological terms. #SexNotGender is the basic shibboleth of this active, agitated and international social media subculture.

C. *FOR WOMEN SCOTLAND LTD*

For Women Scotland characterise themselves as a "group of women from all over Scotland working to protect and strengthen women and children's rights."[12] In October 2020, the company launched a crowdfunding campaign to challenge the legislative competence of certain provisions of the Gender Representation on Public Boards (Scotland) Act 2018, raising £196,815 from 5,278 contributors. This represents one of the highest value litigation crowdfunding campaigns in Scotland in the last seven years.[13]

Section 1(1) of the 2018 Act established a "gender representation objective" for public boards with devolved and mixed functions. The objective was for "50% of non-executive members who are women", a goal the Scottish Government sought to facilitate by incorporating different positive action measures into the Act, including new rules on recruitment and appointment of board members.[14] The 2018 Act defines a "woman" for these purposes as "including a person who has the protected characteristic of gender reassignment" under the Equality Act 2010 "if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female."[15] The Scottish Parliament was able to pass this proposal as a result of the Scotland Act 2016, which partially reformed the reservation of "equal opportunities" to Westminster. Since 1998, "equal opportunities" has been a reserved matter under Schedule 5 of the Scotland Act, with some limited exceptions for the encouragement "other than by prohibition or regulation" of equal opportunities through legislation. The 2016 Act added new exceptions to this reservation, giving Holyrood competence to introduce legislation promoting the inclusion of people with "protected characteristics" in non-executive posts "on boards of Scottish public authorities with mixed functions or no

10 *Forstater v CGD Europe* [2021] UKEAT/0105/20/JOJ.

11 Demands of this kind helped shape the final text of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021, for example, by eliminating a reference in an earlier statute to the "gender" of medical examiners to their "sex" in section 5 of the Act. They also informed the inclusion of "sex" in section 12 of the Hate Crime and Public Order (Scotland) Act 2021.

12 For Women Scotland, accessible at: *https://forwomen.scot/*.

13 See generally, A Tickell, "The Continuation of Politics by Other Means: Crowdfunded Litigation in Scotland (2015-2021)" (2022) 26 *Edinburgh Law Review* 100.

14 2018 Act ss 3-6.

15 2018 Act s 2.

reserved functions."[16] The 2016 Act provided that the "protected characteristics have the same meaning as the Equality Act 2020" for the purposes of this exception.[17]

In *For Women Scotland*, the key dispute was whether the 2018 Act's definition of "women" fell within this exception to the reservation of equal opportunities (and so within the Parliament's legislative competence) or whether its approach was *ultra vires*. For Women Scotland argued that section 2 departed from the conceptual scheme of sex[18] and gender-reassignment in the Equality Act 2010,[19] and therefore exceeded devolved powers. The crowdfunder in support of the case expressed the social analysis behind the case more directly, arguing that the Scottish Government were essentially "redefining "woman" to include men" in law.[20] The Equality Network, which describes itself as "the leading national charity working for lesbian, gay, bisexual, transgender and intersex equality and human rights in Scotland",[21] was granted permission to intervene with written submissions, addressing "some of the equal opportunities arguments from the perspective of transgender people."[22]

For Women Scotland lost their case at first instance but on appeal persuaded the Inner House of the Court of Session that these provisions are outside legislative competence. In the Outer House, Lady Wise concluded For Women Scotland's case was "misconceived" on the basis the contested provisions did not:

> purport to redefine woman in the sense of excluding those who have that biological sex, nor does it seek to redefine the protected characteristic of gender reassignment which definition is governed by UK-wide legislation and not part of the exception. The key definition has the effect only of including as women, for the purpose of a piece of legislation designed to improve gender representation on public boards, those who can meet the aforementioned stringent criteria. If they do, they are deemed to be representative of the female gender in this limited context; they are included as women for that single purpose.[23]

On appeal, Lady Dorrian did not agree, holding that these provisions of the 2018 Act exceeded Holyrood's legislative competence. "By incorporating those transsexuals living as women into the definition of woman," the Inner House found, the 2018 Act "conflates and confuses two separate and distinct protected characteristics, and in one case qualifies the nature of the characteristic which is to be given protection."[24] The Lord Justice Clerk elaborated:

> [I]t would have been open to the Scottish Parliament to include an equal opportunities objective on public boards aimed at encouraging representation of women. It would have been open to them separately to do so for any other protected characteristic, including

16 Scotland Act 2016 s 37.
17 Scotland Act 1998 Schedule 5, L2.
18 Equality Act 2010 s 11.
19 Equality Act 2010 s 7.
20 For Women Scotland, "Stop the Scottish Government redefining 'woman' to include men" (2021) https://www.crowdjustice.com/case/stop-scottish-government-redefining-woman/.
21 Accessible at: https://www.equality-network.org/.
22 *For Women Scotland* (Outer House) para 42.
23 *For Women Scotland* (Outer House) para 53.
24 *For Women Scotland* (Inner House) para 40.

> that of gender reassignment. That is not what they have done. They have chosen to make a representation objective in relation to women but expanded the definition of women to include only some of those possessing another protected characteristic.[25]

On this basis, the court held the definition of "woman" adopted in the 2018 Act "impinges on the nature of protected characteristics which is a reserved matter under Schedule 5," fell outside the limited exception to the reservation of equal opportunities, and was accordingly *ultra vires*.[26]

The court's approach to interpreting Schedule 5 is also significant from the point of view of intersectional understandings of discrimination. While the reception of this decision focused on its implications for gender critical activism and transgender rights, the judgment has wider resonances for other protected characteristics which should not be overlooked. One significant feature of the Court's approach to legislative competence is that it effectively excludes recognition of intersectionality in this small corner of devolved equality law. The American legal scholar Kimberlé Crenshaw is widely credited with coining the concept of "intersectionality" in her analysis of prejudice and discrimination.[27] Rooted in critical race studies and black feminism, Crenshaw's key insight was that "black women's experiences are much broader than the general categories that discrimination discourse provides", particularly in the context of legal articulations of the nature of discrimination. Crenshaw's critique had two key targets. Firstly, "colour blind" feminist literature which did not reckon with the dynamics of race, and secondly, legal frameworks for the evaluation of discrimination were – and arguably remain – rooted in what she described as a "single-issue framework" within which sex and race were understood as distinct and separate lines of discrimination, rather than intersecting axes, which need to be understood together to be adequately understood at all. If the Scottish Parliament wished to incentivise greater inclusion of ethnic minority women on public boards in future, for example, *For Women Scotland* suggests this would be an impermissible objective to incorporate into legislation, as the intersectional outlook advocated by Crenshaw would constitute another "confusion and conflation" of the protected characteristics of race[28] and sex.[29] In this context, it is significant that the recognition of "dual discrimination" in section 14 of the Equality Act 2010 has still not been brought into force by UK ministers. For the limited purposes of the Scottish Parliament's competence over equal opportunities, *For Women Scotland* locks Scots law into exactly the kind of single-issue equality framework Crenshaw criticises.

25 *For Women Scotland* (Inner House) para 40.

26 *For Women Scotland* (Inner House) para 40.

27 K Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1 *University of Chicago Legal Forum* 139, further elaborated in K Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43 *Stanford Law Review* 1241.

28 Equality Act 2010 s 9.

29 Equality Act 2010 s 11.

D. *FAIR PLAY FOR WOMEN LTD*

For Women Scotland was easily misunderstood as a judgment mandating a general distinction between concepts of "sex" and "gender" in law. That the Inner House's judgment did not do so is neatly reflected by the *Fair Play for Women* case, decided in the same court by a similar bench just days later. Fair Play for Women Ltd describes itself as "a campaigning and consultancy group which raises awareness, provides evidence and analysis, and works to protect the rights of women and girls in the UK."[30] In March 2021, the group raised £101,000 from 3,259 supporters to raise judicial review proceedings in the High Court in London, challenging the lawfulness of the Office For National Statistics' guidance on how the public should answer the question "what is your sex?" in the 2021 census.[31] This was followed by separate proceedings in the Court of Session, arguing that the guidance given by the Registrar General for Scotland on completion of the Scottish census was also unlawful. The guidance stated:

> If you are transgender the answer you give can be different from what is on your birth certificate. You do not need a Gender Recognition Certificate (GRC). If you are non-binary or you are not sure how to answer, you could use the sex registered on your official documents, such as your passport. A voluntary question about trans status or history will follow if you are aged 16 or over. You can respond as non-binary in that question.[32]

In March 2022, the group raised a further £38,428 from 1,332 contributors to meet the costs of this litigation, having channelled excess funds from its initial crowdfund to support the Court of Session case. As Lord Sandison explained, the legal key question raised by the petition was:

> whether, absent possession of a [gender recognition certificate], a transgender person, non-binary person or any other person not sure how to answer the sex question would be acting lawfully by answering the question other than by reference to the sex recorded on that person's birth certificate.[33]

Under the Census Act 1920, questions about sex have been designated as core questions for over 100 years, meaning that respondents must answer this question, truthfully, on pain of criminal prosecution.[34] There is, by contrast, no compulsion to complete census questions concerning a person's religion, sexual orientation, or gender identity.[35] With the exception of those with a certificate under the Gender Recognition Act 2004, Fair Play for Women argued that a "person's sex is determined for all legal purposes (including, crucially for present purposes, the obligation to answer correctly the census sex question) as being that with which that person was registered at birth."[36] On this basis, they argued the Registrar General's guidance was

30 Accessible at: https://fairplayforwomen.com/.
31 *R (Fair Play for Women Ltd) v UK Statistics Authority* [2021] EWHC 940 (Admin).
32 *Fair Play for Women* (Outer House) para 1.
33 *Fair Play for Women* (Outer House) para 38.
34 Census Act 1920 s 8(1).
35 Census Act 1920, s 8(1A).
36 *Fair Play for Women* (Outer House) para 39.

unlawful, in the sense that it was informing census respondents that they could give a "false" answer to the census question, and so fell to be reduced.[37] Their *esto* position was that although concept of "sex" in the 1920 Act was not defined, "the meaning was readily and naturally comprehended as a binary term admitting of no understanding but a biological one," which they submitted also required respondents to answer in terms of recorded sex at birth.[38]

These arguments were not without precedent. In criminal courts, for example, people have been convicted of common law fraud and sexual offences, based on the conclusion that they had secured sex by deception by failing to disclose their underlying sex to their partners.[39] The respondents, by contrast, suggested the 1920 Act should be construed as legislation which is "always speaking."[40] In essence, they argued that times change, concepts like "sex" change with the times, and statutory interpretation should track this evolving social understanding. The Equality Network was again permitted to intervene, arguing "there was no single legal definition of "sex" which applied in every context, and certainly not in the context of the 1920 Act and its subordinate legislation."[41]

At first instance, Lord Sandison rejected Fair Play for Women's core submission, holding that "there is no general rule or principle of law that a question as to a person's sex may only properly be answered by reference to the sex stated on that person's birth certificate or [gender recognition certificate]."[42] He elaborated:

> [A]ny determined attempt to construct a cohesive picture out of the isolated incidences in which the words in question have been used in diverse statutory provisions appears to be more of a legal Rorschach test than anything else, in that it risks being much more a reflection of the mindset of the observer than a recognition of objective features of the field surveyed.[43]

This conclusion was supported by the Inner House in a fast-tracked appeal seven days later. While Lady Dorrian accepted "there are some contexts in which a rigid definition based on biological sex must be adopted",[44] she held, following *Bellinger v Bellinger*,[45] "there is no universal legal definition of the word sex,"[46]

37 *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 para 38.

38 *Fair Play for Women* (Inner House) para 13.

39 In England and Wales, this has been treated as vitiating consent under the Sexual Offences Act 2003 in *R v McNally* [2013] EWCA Crim 1051. In Scotland, prosecutions have been brought on the basis of common law fraud charges. See, for example, *HM Advocate v Wilson* (Unreported) BBC Scotland (2013) "Sex fraud woman put on probation" 19th April 2013 https://www.bbc.com/news/uk-scotland-north-east-orkney-shetland-22078298. These judgments have been criticised. See A Sharpe, "Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent" (2014) Criminal Law Review 207.

40 *Fair Play for Women* (Inner House) para 23.

41 *Fair Play for Women* (Outer House) para 34.

42 *Fair Play for Women* (Outer House) para 40.

43 *Fair Play for Women* (Outer House) para 47.

44 *Fair Play for Women* (Inner House) para 12

45 [2003] 2 AC 467.

46 *Fair Play for Women* (Inner House) para 20.

and there are many circumstances in which the words "sex" and "gender" have been used synonymously and interchangeably" by policy-makers and courts,[47] reflecting the "popular and common usage of the terms synonymously."[48] In reaching this conclusion, both courts laid emphasis on the social context in which the language of "sex" is being used, here a census questionnaire being sent to every household in Scotland. Understood in this context, Lady Dorrian concluded:

> It is to be expected that the language used, and the meaning to be attributed to the words used, are to be interpreted according to their popular and common meaning, not according to a specialist, restricted definition which may be adopted where matters of status and rights may be in issue.[49]

Fair Play for Women's petition was accordingly dismissed, and no further appeal was pursued.

E. ANALYSIS

In Harlow and Rawlings' terms, both of these cases can be understood as strategic litigation by political groups bringing "pressure through law," using "the law and legal techniques as an instrument for obtaining wider collective objectives."[50] As Ramsden and Gledhill point out, "strategic litigation is oriented towards advancing a variety of causes that transcend the individual litigation", and the impact sought by pursuing such cases "is not focused solely on legal outcomes, but on producing broader social effects, including the building blocks to change social attitudes and effectuate political reform."[51] In most cases, judges do not feel the need to speak about the political context within which their decisions might resonate. It is significant that Lady Wise and the Inner House felt the need to emphasise that their judgments in *For Women Scotland* did not:

> form part of the policy debate about transgender rights, a highly contentious policy issue to which this decision cannot properly contribute. At its core, this litigation is concerned with whether certain statutory provisions were beyond the legislative competence of the Scottish Parliament.[52]

Lady Wise stressed that:

> While I record certain statements that were made about Scottish Ministers' policy or position on transgender rights, that matter was at best tangential to the central dispute and has had no bearing on the decision.[53]

47 *Fair Play for Women* (Inner House) para 22.
48 *Fair Play for Women* (Inner House) para 22.
49 *Fair Play for Women* (Inner House) para 22.
50 C Harlow and R Rawlings, *Pressure Through Law* (1992) 1.
51 M Ramsden and K Gledhill, "Defining Strategic Litigation" (2019) *Civil Justice Quarterly* 38(4) 407 at 425.
52 *For Women Scotland* (Outer House) para 1.
53 *For Women Scotland* (Outer House) para 1.

While we can understand the court's anxiety for its decisions not to be misinterpreted as political interventions in a contentious debate, these decisions inevitably form part of the policy debate about transgender rights in the UK. This is, after all, why these judicial review petitions were lodged, supported, crowdfunded, resisted and intervened in. While the court's decision in *For Women Scotland* may, as Lady Dorrian held, not hinge on the "debate about the rights and wrongs of policy decisions in this area, but on the proper interpretation" of the Scotland Act,[54] the political constituency for litigation enforcing the technical constraints of the Scotland Act is vanishingly small. Judges can decide how to reason their decisions. They cannot limit the social resonance of their opinions or save their judgments from selective quotation in the press, cherry-picking on social media, or dumb confusion in both.

Elsewhere, I have suggested that the sometimes couthy language of "public interest litigation" can fail to reflect the extent to which crowdfunded litigation is a raw manifestation of politics, which is to say, it is politically motivated and the subject of legitimate disagreement.[55] While both groups have a right of access to the court's supervisory jurisdiction, whether cases like *Fair Play for Women* and *For Women Scotland* are in the public interest is rightly contested.[56] An interest which prompts litigation can be "widely shared" by some sections of the public without necessarily being progressive or consistent with the rights of others.[57] Litigation is tool which can be used for different and incompatible ideological purposes. Public lawyers interested in the diverse ways diverse groups apply public and private pressure through law should reflect on the implications of our critical vocabulary. Alternative conceptual frameworks to describe this kind of legal activism are available, from "strategic litigation" and "cause lawyering"[58] to "impact" and "test-case litigation."[59]

Recognising the contested character of supposedly "public interest litigation" also creates more critical space to recognise the phenomenon of *un*strategic litigation involving a degree of public participation where the legal interventions of political actors miscarry or produce adverse or unforeseen consequences.[60] As Duffy explains, "in practice, litigation will often be inherently risky in diverse ways,"[61] and "the positive nature and impact of litigation can certainly not be taken for granted" either in terms of the public interest, or the particular collective interest the strategic litigants hoped to vindicate.[62] We can see this dynamic in these two cases. While For Women Scotland achieved their goal of having the contested provisions of the 2018 Act declared outside of legislative competence, Fair Play for Women secured

54 *For Women Scotland* (Inner House) para 27.

55 Tickell (n 13) 106.

56 A K Chen and S Cummings, *Public Interest Lawyering: A Contemporary Perspective* (2013).

57 T Mullen, "Public interest litigation in Scotland" (2015) 4 *Juridical Review* 363.

58 A Sarat and S A Scheingold, *Cause Lawyers and Social Movements* (2006).

59 M Ramsden and K Gledhill, "Defining Strategic Litigation" (2019) 4 *Civil Justice Quarterly* 407.

60 C McCorkindale and A McHarg, "Litigating Brexit" in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (2021).

61 H Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (2018) 238.

62 Ibid 5.

the precise opposite of their strategic goals, securing unwanted judicial confirmation that "there is currently no single definition of sex, or gender, in law."[63]

Approaching litigation funded by public participation in this more critical way is ultimately more illuminating than rehearsing tired and familiar David and Goliath stories. It makes it more likely we will recognise and reckon with the diverse social, cultural and economic capital which can be mobilised through litigation campaigns. The campaigns themselves raise problematic questions of who the powerful and strategic political actors really are in these complex, and undoubtedly costly, courtroom dramas.

Andrew Tickell
Glasgow Caledonian University

63 S Cowan, H J Giles, R Hewer, B Kaufmann, M Kenny, S Morris and Katie Nicoll Baines, "Sex and gender equality law and policy: a response to Murray, Hunter Blackburn" (2021) 30 *Scottish Affairs* 74 at 76.