

PNLA
Professional Negligence
Lawyers Association

**PROFESSIONAL NEGLIGENCE
LAWYERS' ASSOCIATION**

**PROFESSIONAL NEGLIGENCE
AND LIABILITY UPDATE**

EDINBURGH CONFERENCE

22nd May 2019



**PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION
EDINBURGH CONFERENCE
Wednesday 22nd May**

0830–0900 Registration

0900-0910

Chairperson's opening remarks

Karen Cornwell - Legal Director, TLT, Glasgow

0910-0945 **"Professional Negligence Cases, Preparation and Presentation: a View from the Bench"**

Keynote Speaker - Lady Wolffe -Commercial Judge - Court of Session

0945-1020 **- "Nae Chance"- "A Brief Review of Lost Chance Claims in Scots Law"**

Sheriff Stuart Reid - Commercial Sheriff, Glasgow Sheriff Court

1020–1055 **"Success/Interim/Additional Fees - all change, are you all ready?"**

Alex Quinn - Law Cost Accountant, Quinn Andrews, Edinburgh

1055-1115 Coffee

1115-1150

"Enough Interest?"

Nicholas Davidson QC - 4 New Square, London

1150-1225 **"The Commercial Court for you, in practice: a view from the front row**

- and back in the office"

Alan McMillan - Partner, Solicitor Advocate, Burness Paull LLP, Edinburgh

1225–1230

Q&A

1230-1330 Lunch

1330–1405 **"The role of the expert in Professional Negligence"**

Stephen O'Rourke QC -Terra Firma Chambers, Advocate and Barrister (North and South)

1405-1440 **"Repeat Prescription: an examination of the Prescription (Scotland) Act 2018"**

Andrew Foyle - Partner, Solicitor Advocate, Shoosmiths, Edinburgh

1440-1500 Afternoon Tea

1500-1535 **"Professional Negligence Update"**

David Massaro - Advocate, Axiom Advocates, Edinburgh

1535-1540 Chairperson's closing remarks



PROFESSIONAL NEGLIGENCE AND LIABILITY
Edinburgh Conference
Upper Library, The Signet Library, Parliament Square, Edinburgh, EH1 1RF
22 May 2019
ATTENDEES (1 of 3)

The Hon Lady Wolffe	Commercial Judge - Court of Session	Edinburgh
Sheriff Stuart Reid	Glasgow Sheriff Court	Glasgow
Sarah Ainslie	TLT	Glasgow
Lynne Arnott	MBM Commercial	Edinburgh
Beverley Atkinson	DAC Beachcroft	Edinburgh
Gordon Balfour	Arnot Manderson	Edinburgh
Rachael Bicknell	Addleshaw Goddard	Edinburgh
Stephen Blane	Urquharts	Edinburgh
Emma Boffey	CMS Cameron McKenna Nabarro Olswang	Edinburgh
David Chase	Temple Legal Protection	Guildford
Iain Clark	Gilson Gray	Edinburgh
Andrea Cohen	Consultant - Compli/ Weightmans/PNLA	Cheshire
Christopher Cooney	Campbell Courtney & Cooney	Surrey
Karen Cornwell	TLT/PNLA	Glasgow
Nicholas Davidson QC	4 New Square	London
Timothy Edward	Dentons UK & Middle East	Edinburgh
Andrew Foyle	Shoosmiths	Edinburgh
Alastair Frood	Shepherd & Wedderburn	Edinburgh
Linda Fyffe	Laurie & Co	Aberdeen

Eve Gilchrist	TLT	Edinburgh
Frank Gill	Kennedys Scotland	Edinburgh
Alison Grant	DWF	Glasgow
Nadia Lucherini	CMS Cameron McKenna Nabarro Olswang	Edinburgh
Chris Mackay	Burness Paull	Edinburgh
Cat MacLean	MBM Commercial	Edinburgh
Katy Manley	Manley Turnbull/PNLA	Cheltenham
David Massaro	Axiom Advocates	Edinburgh
Andrew McConnell	DWF	Glasgow
Paul McIntosh	Aberdein Considine	Edinburgh
Van McKellar	Jackson Boyd	Edinburgh
Michael McLean	Jones Whyte Law	Glasgow
Richard McMeeken	Morton Fraser	Edinburgh
Alan McMillan	Burness Paull	Edinburgh
Robin Millar	Young & Partners Business Lawyers Limited	Dunfermline
David Niven	Pennington Manches	London
Stephen O'Rourke QC	Terra Firma Chambers	Edinburgh
Matthew Pascall	Temple Legal Protection	Guildford
Alex Quinn	Quinn Andrews	Edinburgh
Lauren Rae	Thorntons Law	Dundee
Tony Reynolds	TLT	Edinburgh
Jamie Robb	BTO	Glasgow

Morag Shepherd	NHS National Services Scotland	Edinburgh
Karen Stachura	BTO	Glasgow
Matthew Thomson	Lockton	Edinburgh
Michael Upton	Advocate	Edinburgh
Sarah Wardell	Dentons UK & Middle East	Edinburgh
Graham Weatherston	Graham Weatherston	Glasgow
Shannan Wilkie	Burness Paull	Edinburgh



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Contacts:

Matthew Pascall

Senior Underwriting Manager

Matthew was called to the Bar in 1984 and before leaving to join Temple was a Legal 500 Tier 1 barrister. He leads the commercial litigation insurance team where his wide-ranging knowledge and experience of the commercial legal sector is invaluable to our client law firms.

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David Chase

Senior Underwriter

David has extensive experience in risk analysis, case management and relationship management. He considers all types of commercial litigation including professional negligence and insolvency. Management of our fully-delegated schemes is a speciality of his.

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Nicholas Ellor

Senior Underwriter

Nicholas has twenty years' experience working as a solicitor on both contentious and non-contentious company commercial and corporate matters. Having been a practitioner, he is fully aware of the pressure and time constraints a commercial litigator has to operate under.

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Jacob White

Underwriter

Jacob supports the senior commercial underwriters by reviewing a wide range of cases involving all types of commercial and business litigation. This involves providing costs solutions to SMEs, large corporates, private individuals and insolvency practitioners.

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Richard Steel

Business Development Manager

Richard has 30 years of corporate business development experience, the last 10 years specifically within the legal insurance sector dealing with full lifecycle ATE insurance. This is put to good use, building new law firm relationships and developing our portfolio of services to meet the demands of a rapidly changing market.

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PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

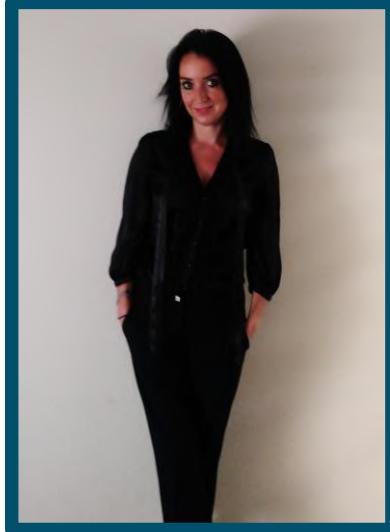
INTRODUCTION

“Scots law - in this ever changing landscape you can stop to look at the view but need to keep moving”



**Karen Cornwell
Legal Director, TLT, Glasgow**

Chair's Introduction



Karen Cornwell
Legal Director - Glasgow
+44 (0)333 006 1397
karen.cornwell@TLTsolicitors.com

Karen is a Notary Public and qualified as a solicitor in Scotland in 1999 and England and Wales in 2010.

Her background has exclusively been in litigation with a strong emphasis on all manners of commercial, property, banking litigation and professional negligence.

Karen is one of only nine solicitors to be Accredited as a Specialist in Professional Negligence Law by the Law Society of Scotland.

She is also an active member of the Professional Negligence Lawyer's Association. In 2018 Karen was appointed to the Pursuers' Panel of the Law Society of Scotland.

Jurisdictions

England & Wales, Scotland

Sectors

Financial services

Services

Professional negligence
Property disputes
Commercial disputes
Professional negligence
Dispute resolution
Financial services litigation



**Lady Wolffe
Commercial Judge
Court of Session**

Keynote Speaker

**"Professional Negligence Cases, Preparation and
Presentation:
a View from the Bench"**



Lady Wolffe

Commercial Judge - Court of Session

The Hon Lady Wolffe (Sarah P L Wolffe QC) was appointed as a Senator of the College of Justice, Scotland's Supreme Courts, in 2014.

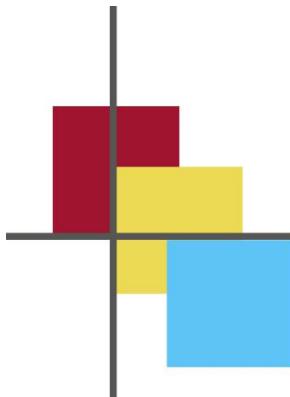
She is one of the Commercial Court judges, and the first woman in Scotland to hold that position.

She was called to the Scottish Bar in 1994; appointed a standing junior to the Department of Trade and Industry in 1996, and took silk in 2008. Her principal areas in practice were in Commercial and Public law. She was one of the founding members of Axiom Advocates.

While in practice, she was a contributor or Scottish editor to a number of editions of two legal textbooks, MacGillivray on Insurance Law and Mithani on Director's Disqualification.

She was one of the UK members on the Panel of Experts looking at the harmonisation of aspects of professional indemnity insurance. She was also, prior to her appointment, the Chancellor (or legal advisor) to several Bishops in the Scottish Episcopal Church. She was born in the United States and her first degree was from Dartmouth College (graduating Summa cum Laude), one of the Ivy League colleges. After post-graduate work at Balliol College at the University of Oxford, she took a graduate LLB from the University of Edinburgh.

Her husband is the Lord Advocate. She has two sons (of whom she is inordinately proud).



PNLA

Professional Negligence Lawyers Association

Notes:-



**Sheriff Stuart Reid
Commercial Sheriff
Glasgow Sheriff Court**



Sheriff Stuart Reid

Commercial Sheriff, Glasgow Sheriff Court

Sheriff Reid was admitted as a solicitor in 1992. For almost 20 years, he worked as a commercial litigator with Maclay Murray & Spens in Glasgow.

In that time, he conducted a wide range of commercial litigation, often with cross-border elements, in diverse areas such as insolvency, corporate, commercial property, partnership, banking, professional negligence and judicial review.

He also enjoyed memorable diversions into the more esoteric realms of shipping and aviation litigation.

In 2000, he qualified as a solicitor advocate, with extended rights of audience in the civil courts.

He conducted various commercial litigations before the Outer House and, on appeal, before the Inner House of the Court of Session.

He was fortunate to work in Maclays' London office for a year where he observed commercial litigation from the English perspective. In 2012, he was appointed as a resident Sheriff in Glasgow. He is presently one of the three nominated commercial sheriffs at Glasgow.

“NAE CHANCE”
A BRIEF REVIEW OF LOST CHANCE CLAIMS IN SCOTS LAW

SHERIFF S. REID
GLASGOW SHERIFF COURT

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23RD MAY 2019

Where did it start?

1. *Chaplin v Hicks* [1911] 2KB 786
2. *Kitchen v Royal Air Force Association* [1958] 1WLR 563

Where did we go then?

3. *Kenyon v Bell* 1953 SC 125
4. *Yeoman v Ferries* 1967 SC 255
5. *Michael Robins Business Transfer Consultants v Skilling* 1976 SLT (Notes) 18
6. *Beattie v Furness-Houlder Insurance (Northern) Ltd* 1976 SLT (Notes) 60
7. *Campbell v F and F Moffat (Transport) Ltd* 1992 SLT 962
8. *Kyle v P & J Stormonth Darling* WS 1992 SLT 264 (OH); 1994 SLT 191 (Ex Div)

The dam bursts in England...

9. *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602
10. *Spring v Guardian Assurance plc* [1995] 2 AC 296
11. *Sharif v Garrett & Co* [2002] 1WLR 3118
12. *Dixon v Clement Jones Solicitors* [2005] PNLR 6
13. *Maden v Clifford Coppock & Carter* [2005] PNLR 7

14. *Dayman v Lawrence Graham* [2008] EWHC 2036
15. *Wellesley Partners LLP v Withers LLP* [2016] 2 WLR 1351
16. *McGill v Sports and Entertainment Media Group & Others* [2017] 1 WLR 989
17. *Assetco plc v Grant Thornton (UK) LLP* [2019] EWHC 150 (Comm)

.... but not in clinical negligence....

18. *Hotson v East Berkshire Area Health Authority* [1987] AC 750
19. *Wilsher v Essex Area Health Authority* [1988] AC 1074
20. *Gregg v Scott* [2005] 2 AC 176

Meanwhile in Scotland

21. *Paul v Ogilvy* 2001 SLT 171
22. *Kelvin Homes Ltd v Ritchie Bros Public Works Contractors Ltd* 2005 Rep.LR 128
23. *Londale Ltd & Others v Scottish Motor Auctions (Holdings) Ltd* [2011] CSOH 4
24. *McCindle Group Ltd v Maclay Murray & Spens* [2013] CSOH 72
25. *Glare v Clydesdale Bank plc* [2015] CSOH 184

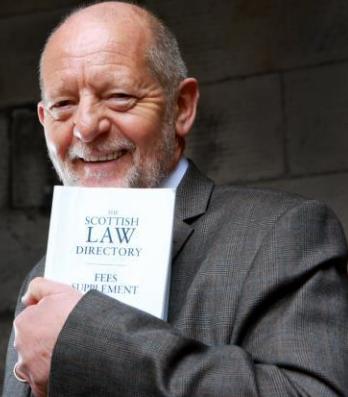
Where are we now?

26. *Perry v Raleys Solicitors* [2019] 2 WLR 636



**Alex Quinn
Law Cost Accountant, Edinburgh**

**"Success/Interim/Additional Fees -
all change, are you all ready?"**



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Alex Quinn - Law Cost Accountant

Alex has been involved in the Law accountancy profession for over 40 years initially developing the firm of Alex Quinn & Partners from 1971 until 2003.

His practice during this time was primarily in respect of preparation of accounts on behalf of Pursuers in regard to Personal Injury actions and Commercial Actions.

From 2003 until 2016 Alex was a Consultant Law Costs Accountant with Simpson & Marwick/ Clyde & Co dealing mainly with the development of Fees and Costs teams and adjustment of defenders Law Costs. Since then as an independent Law Costs accountant Alex has been involved for both Pursuers and Defenders in the preparation of Accounts/adjustment of Accounts and attending at taxations in the Court of Session and Sheriff Court.

In addition Alex has acted as an Expert witness in both the Court of Session and Sheriff Court in regard to Solicitors fees and also the charges of Counsel.

In regard to providing expert evidence reference is made to the case of Tods Murray v Arakin (2012) CSOH 26 where his evidence was described by the trial judge as "highly persuasive".

Alex is valued for his sound and pragmatic approach in regard to reaching agreement on the reasonable costs/expenses payable. Whether the action is low value or at the other end of the scale Alex has a wealth of knowledge in regard to all level of Costs with additional fee uplifts being an area in which he specialises.

During Alex's time in practice he has sat on numerous Committees in relation to the development of Solicitors charges, not only in the Court of Session but also within the Sheriff Court, and in particular was a member of the Law Society's Remuneration Committee for a period of some 10 years in that regard.



SEMINAR NOTES

For

THE PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

WEDNESDAY 22 MAY 2019

Presented by

**ALEX QUINN
LAW COSTS ACCOUNTANT
(QUINN ANDREWS)**

- **Additional Fees**
- **Interim Payment of Fees**
- **Success Fees**
- **Court Dues**

ADDITIONAL FEES

Introduction

I have the pleasure in addressing you today on a number of topics which are always questionable in a variety of cases, whether in the Court of Session, or the Sheriff Court. Additional Fees are commonly referred to as the “lottery” fee and what I hope to achieve in speaking to you this morning is to take away the so-called “lottery” element and demonstrate that if a case is worthy of an Additional Fee, then it has an excellent chance of success.

At the present time an award of an Additional Fee, in the Court of Session, is initially determined by the Court and the level/percentage increase is subsequently determined by the Auditor of the Court of Session. The latter determination is to change in respect of Actions raised on or after 29 April 2019 in the Court of Session in that Judges, in a similar manner to that of Sheriffs, can determine the percentage to be applied to the Solicitor’s fee in the event that the Court grants an Additional Fee. It will still be open to the Judge to remit the percentage uplift to the Auditor for determination if they so wish.

What merits an increase in either agreeing an Additional Fee or seeking approval of the Court on such factors to be taken into consideration in awarding an Additional Fee, and in particular under what Heads?

To my mind, an unusual or abnormal case is likely to justify an Additional Fee. In the embryo stages of Additional Fee Applications, Lords Kissen and Leechman (Feddon and Others v R.O.S Stuart (Plant) Ltd, 1967 SLT(Notes)24 and Szaranek and Others v Edmund Nutall Sons & Co (London) Ltd 1968 SLT(Notes)48, both agreed that an Additional Fee was merited in cases of an abnormal nature. Lord Kissen, in the case of Feddon, said

"In my opinion, the Court should exercise its discretion to give an Additional Fee where the case is different from the normal type of case heard in these Courts in regard to complexity and the other factors mentioned in paragraph (d). In other words, it is only in exceptional cases that, in my opinion, an Additional Fee is to be allowed by the Court."

As I have said, both these cases were in the early stages of the development of what may or may not be Additional Fee cases. While we have certainly developed since the 1960s, we are still left with the thought process as to what parameters do we have to justify that a case falls into the unusual or abnormal category. While the following are not set in stone they do, I think, provide a guideline as to what type of cases justify an Additional Fee:-

- Injuries (physical or psychological) involving life-changing circumstances.
- Unusual complexities involved in liability and/or quantum and the number of Expert Reports that are required to reasonably present or defend the circumstances surrounding the Claim.
- Skill, time and labour – often referred to as the “adrenalin factor” and the case of *Maltby v D J Freeman & Co* (1978) 1 W.L.R.431, per Walton J, at 435 may assist in that regard.
- Sexual Abuse Cases.
- Settlement Figure – possibly in excess of £250K.
- The Court will look favourably on attempts to agree Heads of Evidence with a view to limiting matters in dispute. I hasten to add, genuine attempts and not simply a Notice to Admit everything on the Record!

What percentage should apply in the event that an Additional Fee is allowed?

First and foremost, albeit not exclusively, the percentage increase depends very much on the number of Heads agreed to, or determined by, the Court. For many years I have

expressed the view that the most important Heads are (a) complexity/novelty; and (b) skill, time and labour. These are the Heads which tend to attract the greater percentage increase and Auditors have advanced such a view which might not be shared by all!

The undernoted provides a rough guide as to what one might expect, depending on the different Heads that have been agreed or determined:-

- If two Heads are agreed/or awarded by the Court, then that by and large would mean an uplift in fees of between 30%/50%.
- If three/four Heads are agreed/or awarded by the Court, then that would attract an uplift on fees of approximately 50%/80%.
- If five Heads are agreed/or awarded by the Court, then that would attract an uplift of 85%/100%.
- If six/seven Heads are agreed/or awarded by the Court, then that would attract an uplift of fees of approximately 100%/150%.

Please note. The above percentages were arrived at following consideration of forty Accounts which had been negotiated in which Additional Fees had been sought.

The Auditor is not obliged to provide a detailed analysis as to the percentage to be applied to each Head of the Additional Fee granted by the Court but generally will provide an inclusive percentage uplift, which is very much in line with the actions of Sheriffs.

However, fairly recently the Auditor, following upon a Note of Objections in an exceptional case required to provide the Court with guidance as to how the Additional Fee of 170% allowed by the Auditor had been calculated. You will see from the attached, in the final paragraph, the Auditor's calculations. The sole purpose in highlighting the Auditor's Note is to emphasise the importance of Heads (a) and (b). I

hasten to add that the case was exceptional, and you could probably count on one hand the number of cases, in any one year, in which such a high percentage would apply. Notwithstanding my own views regarding the importance of Heads (a) and (b), I would like to draw your attention to the case of Stewart Hill and Another v Stewart Milne Group Ltd and Others (2016) CSIH 65. As you will see from Her Ladyship's Opinion, an Additional Fee following upon an Appeal from the Sheriff Court was allowed under Heads (b) and (f), with the Court allowing a percentage increase of 20%.

I feel this demonstrates the wide gulf that can arise in determining the percentage increase to be applied.

What happens in general practice in regard to determining an Additional Fee?

As a general rule, the question of whether a case merits an Additional Fee is not determined until after the case has settled and the Account of Expenses has been prepared. It is at this time that normally, not always, Law Accountants are invited by their respective Agents to see, while adjusting the level of expenses, whether firstly the case merits an Additional Fee; and secondly, if it does, justification for the percentage uplift. It is only when Law Accountants and their respective instructing Agents fail to agree that the question of an Additional Fee falls to be determined by the Court. Substantial time and effort would be saved if Agents and Counsel at the time of settlement could agree whether the case merited an Additional Fee and if so, what Heads should apply.

If a Motion is necessary to determine an Additional Fee it is not unusual for Counsel to draft Detailed Submissions in support of such an Application, with the opposing party preparing Responses thereto. Accordingly, the Court are provided with Written Submissions to assist in determining whether a case merits an Additional Fee or not.

INTERIM PAYMENT OF COSTS/EXPENSES

From discussions with Solicitors, I understand that there is a growing practice on the payment of interim fees and outlays following upon settlement of Actions and presentation of the Account of Expenses. While our present Rules do not provide for the automatic payment of interim fees, I venture to suggest that it is highly likely to become the norm, particularly in more substantial cases, bearing in mind the new Rules on Interest which came into operation on 29 April 2019.

I would additionally draw your attention to the Paper prepared by Andrew Smith, QC, on this very matter, which is easily accessible and very much worth the read in regard to the payment of interim costs.

SUCCESS FEES IN SCOTLAND – HOW WILL THEY WORK?

I am reliably informed that Legislation is well advanced in regard to the payment of Success Fees in Scotland. It is envisaged that a Fee Charging Agreement will be entered into between the Solicitor and his Client on the percentage that the Solicitor is entitled to from the Pursuer's Damages in the event of success. The Solicitor would, of course, be entitled to recover and retain whatever Judicial Costs have been agreed or taxed.

The Scottish Civil Justice Council have determined that the existence of a Success Fee Agreement should not be added to the list of factors to be taken into account when considering an Application for an Additional Fee.

It is widely anticipated that Success Fees will be capped in line with Sheriff Principal Taylor's recommendations which, in Personal Injury Actions, are as undernoted:-

20% (inclusive of VAT) on Damages of £100,000

10% (inclusive of VAT) on Damages from £100,001 - £500,000

2.5% (inclusive of VAT) on all Damages over £500K

For example, in a PI Case, where a Success Fee Agreement was in place and the case settled for £150,000.00, the Success Fee would be as follows:-

20% of the first £100,000, plus

10% of the remaining £50,000

In other words, £20,000 plus £5,000, resulting in a total Success Fee of £25,000. A sliding scale of Success Fees protects the Pursuer's Principal Sum.

I note in passing that Sheriff Principal Taylor recommended that a cap on Employment Cases should be 35%, and in Commercial Actions 50%, and I understand such Legislation is likely to come into force during the summer.

COURT DUES IN THE COURT OF SESSION/SHERIFF COURT

I attach details of Court dues payable in the Court of Session and the Sheriff Court in regard to a Proof/Trial/Appeal. As you will see, there is a very wide gulf between what Court dues are payable in the Court of Session, as opposed to the Sheriff Court, and I generally highlight this very wide gulf for information purposes.

As a Law Costs Accountant, I can tell you that there is very little difference between Solicitors' fees, Counsels' fees, and Experts' fees, whether in the Court of Session or Sheriff Court.

QUINN ANDREWS LAW COSTS ACCOUNTANTS

DX ED21, EDINBURGH

TEL: 0131 332 5585

John Glare v Clydesdale Bank plc

NOTE

The Auditor respectfully responds to the Note of Objection No 73 of process as follows:-

- With regard to paragraph 1, the Auditor considers that, in certain circumstances, framing file notes of meetings is recoverable work on a party and party basis - for example, where the file note is to be passed to an expert or Counsel, or if, as in the case of Objection 49, the discussions at the meeting are of sufficient importance. It would, in such circumstances, be reasonable for conducting the cause in a proper manner to have the hand-written notes framed. Paragraph 1(a) of Chapter I of the Table of Fees is the appropriate fee for this work. The entry referred to in Objection 140 does not include framing a file note of a meeting. The fee claimed is for preparing folders and considering papers in advance of a meeting with a witness, and framing a list of questions for the witness and a related Note. The appropriate fee for the first part of this work is a time charge and for the second a framing charge. Having identified all the work as reasonable for conducting the cause in a proper manner, the Auditor applied the relevant fee to each part of the work and, having done so, determined that the fee claimed was appropriate.
- With regard to paragraph 2, the purpose of the internal phone call was to discuss the issues described in the entry dated 21 July 2014. These were complex issues and the colleague in the London office was an expert in the relevant field. The Auditor accordingly concluded that the internal discussion between the Edinburgh and London offices was reasonable for conducting the cause in a proper manner.
- With regard to paragraph 3, the Auditor was advised at the diet of taxation that the author of the report dated 16 September 2014 was a Mr Philip Goodwin, but that Mr Goodwin left Deloittes shortly after drafting it. The report was, however, extensively revised and expanded by Ms Elizabeth Gutteridge of Deloittes before it was intimated to the Pursuers and lodged in process. At all stages, a number of other individuals within Deloittes also contributed to the production of the report. The author of the report on which the Defenders intended to rely was Ms Gutteridge, and she would have been the witness to speak to the report. On 26 January 2016, the Court certified Ms Gutteridge as a skilled witness. In the opinion of the Auditor, it is clearly not the intention of Rule of Court 42.13A to require parties to seek certification of every individual involved in the production of an expert report. Certification of Ms

Gutteridge was sufficient, in principle, to allow recovery in respect of work undertaken by the other individuals who contributed to the production of the report.

- With regard to paragraph 4, the Auditor agrees that the appropriate charge for framing a witness statement is the framing charge in paragraph 1(c) of Chapter I of the Table of Fees. When taxing this account, however, the Auditor noted that time charges were claimed, not just for framing the statements but also for preparation for taking the statements, for then taking them, and for subsequently revising them when additional information was received (which included further preparation and discussion with the witnesses). Further time charges were claimed for the subsequent analysis of each witness statement with a view to identifying and preparing relevant productions. The charges which the Auditor has allowed combine framing charges for each of the witness statements and time charges for other related work which the Auditor considered reasonable for conducting the cause in a proper manner.
- Finally, with regard to paragraph 5, the Auditor does not accept the submission that up to 25% has historically been allowed per head. That does not reflect his approach to additional fees - nor is he aware of that having been the approach of his predecessors. The additional fee of 170% allowed by the Auditor in this case was calculated as follows:-

Head (a) - 50%

Head (b) - 50%

Head (c) - 30%

Head (f) - 15%

Head (g) - 25%

IN RESPECT WHEREOF

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 65

XA76/15

Lady Smith

Lord Brodie

Lady Clark of Calton

OPINION OF THE COURT

delivered by LADY SMITH

in the cause

STEWART WELLS HILL and ROBERT THOMSON HILL

Pursuers and Respondents;

against

STEWART MILNE GROUP LIMITED

First Defender and Appellant;

GLADEDALE (NORTHERN) LIMITED (formerly BETT LIMITED)

Second Defender and Appellant:

Pursuers and Respondents: Bowen QC; Balfour & Mansons, Solicitors, Edinburgh

Defenders and Appellants: McIlvride QC; Morton Fraser LLP, Solicitors, Edinburgh

29 July 2016

[1] The appellants were successful in their appeal from the decision of the sheriff for the reasons explained in the court's opinions of 13 May 2016. We refer to those opinions for a full explanation of the background, the factual and the legal issues

that arose in this litigation and were, ultimately, determined in the appellants' favour.

[2] On 12 July 2016, we granted the appellants' motions (i) to find the respondents liable in the expenses of the appeal and of the action in the sheriff court, (ii) to certify John Duncan of URS Scott Wilson as a skilled witness, and (iii) to certify the action in the sheriff court as suitable for the employment of junior counsel.

[3] The appellants also sought an additional fee, having regard to the factors specified in parts (b), (e) and (f) of rule 42.14(3) of the Rules of the Court of Session. That motion was opposed. We heard submissions and made avizandum.

Specialised knowledge, time and labour required of the solicitor

[4] Senior counsel for the appellants submitted that the two principal issues - the proper construction of a commercial contract and whether the appellants had in fact achieved completion and commissioning of the drainage and sewage systems at the residential development sites – both required specialised knowledge of the circumstances in which Scottish Water allowed connection of such systems to public mains, agreed to accept vesting of privately constructed systems and made payments to reimburse costs incurred in their construction. These were unusual features. They were not matters which solicitors regularly encounter and investigations were required including the identification of and seeking advice from an appropriate expert. Considerable time and labour had been expended in obtaining and marshalling the relevant evidence including matters such as the dates that the numerous houses were accepted by the local authority as fit for occupation, the dates of their actual occupation, the dates of requests to Scottish Water for reimbursement of costs and the dates on which payments were made. The amount of information gathered regarding these matters was not adequately reflected in the sheriff's note or not reflected at all. An indication of the skill, time and labour involved could be gleaned from a consideration of the Appendix.

[5] Senior counsel for the respondents submitted that nothing raised in the appeal went beyond the routine construction of a commercial contract. Whilst he accepted that that required to be carried out against a background of the relevant

factual context, there would have to be something out of the ordinary to warrant an additional fee. There was nothing extraordinary in this case and no indication of unusual effort being required of the solicitor.

[6] For the reasons advanced by senior counsel for the appellants, we are satisfied that the subject matter was unusual, required the acquisition of specialised knowledge and understanding of both a technical and legal nature, we accept that it must have demanded more than a routine level of skill, time and labour on the part of the solicitor and that an additional fee is, in all the circumstances, accordingly warranted.

Importance of the cause or subject matter to the client

[7] Senior counsel for the appellants submitted that although the contract was a "bespoke" one and its construction would not, of itself, have wide ranging consequences, there was potential for wide ranging significance to the appellants. They were house builders and may have to enter into similar contracts in the future.

[8] The respondents resisted the suggestion that the decision could be of any general importance to the appellants. The case required the construction of an unusually worded bespoke contract and concerned nothing that would be of general application. It was not a test case for other contracts or of any other evident special importance.

[9] For the reasons advanced by senior counsel for the respondents, we are not satisfied that an additional fee is warranted on the basis of importance of the cause or subject matter to the appellants.

The amount of money involved in the case

[10] Senior counsel for the appellants referred to: the sheriff having granted decree for £345,000; the sum that would have been due by 13 May 2016 if the sheriff's construction of the contract had been correct being £454,000; the risk of the appellants being subject to a possibly open ended ongoing liability of £5000 per

month. These sums were such, he submitted, as to justify an additional fee under this head.

[11] Senior counsel for the respondents submitted that the sums involved were not high as compared to other construction related disputes. Further, the appellants could have terminated the monthly payments through their own hand by carrying out snagging works so that the systems could be adopted, thereby achieving what the respondents contended was the required state of completion.

[12] Whilst we accept that other construction related disputes can involve far greater sums, we are persuaded, on balance, that the combination of the capital sum at stake and the risk of an ongoing significant liability demonstrates that an additional fee is also justified under this head. It is no answer to suggest that the appellants could have brought an end to the monthly liability by doing that which the respondents contended they were obliged to do before being freed of the obligation. Nor, as we understand it, would the remedying of whatever were ultimately determined as outstanding snagging items be a straightforward matter either as regards practicality nor as regards the potential costs involved in doing so.

Competency

[13] So far as the additional fee due in relation to the proceedings in the Inner House is concerned, Rule of Court 42.14 clearly applies and we will remit the fixing of the amount of that fee to the auditor.

[14] An issue was, however, raised by counsel for the respondent regarding the competency of our awarding an additional fee in relation to the sheriff court part of the proceedings under that rule. His submission was that the *Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993* ("A/S of 1993") applied and, in terms of its Schedule 1, there required to be a remit to the sheriff to decide whether there should be an increase in the fees to cover the responsibility undertaken by the solicitor and if so, to fix the percentage uplift. The sheriff court was, he submitted, the appropriate court to deal with issues relating to procedures which had taken place there. He relied on the decision in *LPetitioner 1996 SLT 928* as support for his submissions. He also asserted that this court had not previously

awarded an additional fee so as to encompass proceedings in both the sheriff court and this court.

[15] For the appellants, Mr McIlvride submitted that in directing the court to pronounce an interlocutor awarding expenses and remitting to the auditor for taxation, whenever expenses are found due "in any cause", Rule 42.1 referred to all parts of the cause in question including any part that had taken place in the sheriff court. There was, accordingly, no need to have resort to the A/S of 1993. The case of *LPetitioner* was not in point since there were two separate processes involved and the decision turned on an interpretation of legal aid regulations.

[16] Paragraph 5(b) of the A/S of 1993 provides:

"The court may, on a motion made on or after the date of any interlocutor disposing of expenses, pronounce a further interlocutor regarding those expenses allowing a percentage increase in the fees authorised by the Table of Fees to cover the responsibility undertaken by the solicitor in the conduct of the cause. In fixing the amount of the percentage increase the following factors shall be taken into account"

There then follows a list of factors which is in identical terms to those set out in Rule of Court 42.14(3) and so include:

"....

(b) the skill, time and labour, and specialised knowledge required, of the solicitor

...

(f) the amount or value of money or property involved in the cause."

[17] Turning to our decision on the competency issue, whilst we accept that it is not an entirely straightforward matter, we are not persuaded that it is incompetent for this court to award an additional fee in terms which cover not only that part of the proceedings that took place in this court but also any earlier part that occurred in the sheriff court. We do not read the case of *LPetitioner* as indicating that there must be a remit on any motion for an additional fee which covers that part of proceedings

in the cause which took place in the sheriff court. The decision on competency in that case turned on an interpretation of the relevant legal aid regulations (*Civil Legal Aid (Scotland)(Fees) Regulations 1989*, reg 5(4)) and, furthermore, involved two sets of proceedings, one of which was a petition to the *nobile officium*. That is not to say that, in an individual case, the court may not decide that its particular circumstances make it inappropriate for this court to determine the issue and, accordingly, require there to be a remit to the sheriff. However, we would expect that, in most cases, this court will, having heard a substantive appeal, be well placed to decide whether or not an additional fee should be allowed. It would be very unfortunate indeed if the final resolution of all outstanding issues were to be delayed and further expense occasioned by what might justifiably be thought to be a cumbersome procedure, unless it is truly necessary to remit the matter.

[18] The question then becomes whether we should simply allow an additional fee in the usual way, indicating that, in doing so, we have had regard to heads (b) and (f) of Rule of Court 42.14 or whether, on the basis that that could only apply to the proceedings in the Inner House, we should fix the percentage uplift to be applied to that part of the taxed account relating to the sheriff court part of the proceedings, in accordance with paragraph 5(b)(ii) and(vi) of Schedule 1 of the A/S of 1993.

[19] In the case of *Miller v Chivas Brothers Ltd* [2014] CSIH 65, this court, in an appeal against the sheriff's restriction of an award of expenses after proof, when allowing the appeal, awarded the sheriff court expenses that had been withheld, allowed a percentage increase in terms of Schedule 1 of the A/S of 1993 and fixed the percentage at 15%. The court there evidently read the reference to "court" in the A/S of 1993 as being wide enough to cover this court, in addition to its obvious application to the sheriff court. That makes sense. "Court" is not defined let alone restrictively defined and it is not unusual for this court to make awards of expenses in relation to the sheriff court part of proceedings. And this court will frequently be in as good a position as the sheriff to decide whether the solicitor's fee should be enhanced or not.

[20] Further, despite the initial attractions of Mr McIrvine's submission, we are not persuaded that rule 42.1 of the Rules of the Court of Session is intended to apply

to uplifts in awards of expenses in relation to the sheriff court part of proceedings. Reading the two sets of rules together, it seems tolerably clear that a system has been provided for which is as follow: this court has the power to decide whether there should be an enhanced fee when awarding expenses in relation to all proceedings in the cause, whether sheriff court or Court of Session but that power derives, in the latter case from Rule of Court 42.14 and in the former from Schedule 1(5)(b) of the A/S of 1993. That means that insofar as the enhancement in relation to the sheriff court part of the proceedings is concerned, not only must the issue be determined as a matter of principle but the extent of the percentage uplift must be specified. In the circumstances of this case, we are satisfied that the percentage uplift should be 20%.

[21] In summary, we will grant the motion for an additional fee in relation to the proceedings in the Inner House, under reference to paragraphs (b) and (f) of Rule of Court 42.14; in relation to proceedings in the sheriff court, under reference to the same heads, we will allow the appellant a percentage increase in the fees authorised by the table of fees amounting to 20%; and we will remit the appellant's account of expenses, when lodged, to the auditor of court, to tax.



DIFFERENCE BETWEEN COURT OF SESSION AND SHERIFF COURT

COURT DUES

	Pursuer	Defender
PROOF/TRIAL		
<i>Court of Session</i>		
4 day Proof/Trial (£209 per 30 minutes taking 5 ½ hours per day)	£2,299 per day = £9,196	£2,299 per day = £9,196
<i>Total for 4 day Proof/Trial</i>	<i>£18,392 (one half payable by each party)</i>	
ASPIC		
4 day Proof (£81 per 30 minutes taking 5 ½ hours per day)	£891 per day = £3,564	<i>No Court dues for Proof payable by Defender</i>
<i>Total for 4 day Proof/Trial</i>	<i>£3,564</i>	
Sheriff Court		
4 day Proof (£237 per day)	£237.00 per day = £948.00	<i>No Court dues for Proof payable by Defender</i>
<i>Total for 4 day Proof/Trial</i>	<i>£948.00</i>	



DIFFERENCE BETWEEN COURT OF SESSION AND SHERIFF COURT

COURT DUES

	Appellant	Respondent
APPEAL		
<i>Court of Session</i>		
1 day Appeal (£522 per 30 minutes taking 5 hours per day)	£5,220 per day	£5,220 per day
<i>Total for 2 day Appeal</i>	<i>£10,440 (one half payable by each party)</i>	

***Cancellation fees of 50% are payable in the even that the Court hearing is cancelling within 28 days of the Hearing by each party*

<u>ASPIC</u>		
1 day Appeal	£237	<i>No Court dues for Appeal payable by Respondent</i>
<i>Total for 1 day Appeal</i>	<i>£237</i>	
<u>Sheriff Court (bench of 1)</u>		
1 day Appeal	£237	<i>No Court dues would be payable by the Respondent</i>
<i>Total for 1 day Appeal</i>	<i>£237</i>	
<u>Sheriff Court (bench of 3 or more)</u>		
1 day Appeal	£593	<i>No Court dues would be payable by the Respondent</i>
<i>Total for 1 day Appeal</i>	<i>£593</i>	



**Nicholas
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"Enough Interest?"



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He's a great leader on complex cases who is always calm and measured.

- Chambers & Partners

Nicholas Davidson QC is a commercial litigator and arbitrator who has been described in the Legal 500 as being "an exceptional silk" (2019) with "a charming manner, which puts clients at ease" (2016) and by Chambers & Partners (2019) as someone who "produces masterpieces. The work, the detail, the focus that goes into it - it is outstanding; it blows me away." "You want him on your side and not on the other side."

Also as "one of the leading trial lawyers of his generation with excellent client skills" (2015), displaying "mastery of the law and practice of insurance" (2011); and in Chambers and Partners as "a great leader" (2017) "extremely competent, user-friendly and authoritative" (2016) and "a must-have barrister who is mustard when it comes to identifying the salient points" (2010) and a "master cross-examiner" (2011) and "a sensational cross-examiner and advocate" (2013). He is equally at home in trial work and in appellate work at all levels ("listened to" was another).

Always aiming to maintain a wide breadth of knowledge of the law and commercial awareness, he is committed both to understanding his clients' angles on their cases and to readiness to search for new angles. Despite having conducted many large cases for the defence, he does much claimant work. He is particularly interested in claims about investment advice and management.

Other directory (and in one case *The Lawyer*) comments in his time in Silk have been:

"A "fantastic" litigator and arbitrator, particularly noted for his skills in cross-examination and advocacy."

"Nicholas Davidson QC is "clearly one of the top guys at the Bar" and is held in the highest regard. Junior lawyers often turn to him for advice and he "rather generously and happily imparts his knowledge to them."

"Very approachable"

"Breathtaking intellect"

"Fearsome intellect"

"Sharp intellect and cuts quickly to the issues"

"A good advocate with great court presence"

"Frighteningly intelligent and incisive"



NEW SQUARE

"An excellent advocate on weighty matters"

"Dry but hugely talented"

"Terrifying intellect and precision"

"Top-notch"

"Hot stuff"

"Incredibly bright"

"One of the barristers of choice for the defence of large issues"

"Names such as Nicholas Davidson QC ... have the most impressive professional negligence track records at the Bar"

"Wide-ranging experience"

"Excellent"

"Top professional negligence silk"

Nicholas is a past chairman of the Professional Negligence Bar Association and is also a member of the British Insurance Law Association, Chancery Bar Association, COMBAR, Bar European Group and Society for Computers and Law.

He has given numerous talks to the Professional Negligence Bar Association and Professional Negligence Lawyers' Association, particularly including the topics of professional insurance needs, obligations, and ability to exclude or restrict liability, and spoke on "Claims against Funds and Investment Managers" at the 2011 COMBAR North American meeting.

Privacy Policy

Click here for a **Privacy Policy** for Nicholas Davidson QC.

Areas of Expertise

Commercial Dispute Resolution

As someone interested in and aiming to maintain high awareness of economics and finance Nicholas has a keen interest in commercial matters. He is involved not only in pure financial or interpretation litigation (a case of particular satisfaction to him was *AIB Group (UK) plc v. Martin and Gold* [2001] UKHL 63) but also in very tough business disputes. In *Ross River Ltd v Cambridge City Football Club* [2007] EWHC 2115 Ch he acted for the Club in establishing that a transaction in relation to its ground had been affected by bribery and fraudulent misrepresentation. He acted for Newcastle Airport in a high profile claim (settled the day before trial) against its former Chief Executive and the Estate of its Finance Director seeking to recoup in respect of multi-million bonuses which had become payable on a refinancing.

Insurance & Reinsurance

Nicholas regards the interpretation of documents as an exceptionally interesting area, and is intrigued by the challenges, including those of professional indemnity policies with the requirements to conform to Minimum Terms, not to mention the special context of solicitors' policies' with the Assigned Risks Pool policy in the background.

Nicholas has extensive experience, as advocate and arbitrator, of insurance law, especially professional indemnity insurance law, and the practical operation of policies, including dishonesty issues and the potentially vexing subjects of "notification" of circumstances and the composite nature of the insurance. Recent work for Quinn Insurance has seen cases which have interested



many – *William McIlroy (Swindon) Ltd v. Quinn Insurance Ltd* [2010] EWHC 2448 (TCC) (arbitration clause; time bar; relevance of ICOB; now on its way to the Court of Appeal); *Quinn Insurance v. The Law Society* [2010] EWCA Civ 805 (on the extent to which insurers can access documents, on which decision he has delivered explanatory talks to the British Insurance Law Association and the Professional Negligence Bar Association); *Kidsons v. Underwriters at Lloyds* [2008] EWCA Civ 1206 (application of minimum terms; notifications of Circumstances and their effect). *Quorum A/S v. Schramm* [2002] 1 Lloyd's Rep. 249 involved unusual interpretation problems and exploration of the London and French markets for a Degas pastel thought to be of unique interest to the Greek shipowning community.

He frequently deals with issues relating to fraud exceptions and reimbursement claims based on dishonesty.

He is experienced in the procedures where dishonesty is under consideration, and has conducted “indemnity cons” and is familiar with issues as to the handling of subsequent arbitrations.

Professional Liability

Accountants, Auditors & Actuaries

Nicholas has frequently worked with accountants on numerous aspects of litigation, often to do with company valuation issues (a notable early case was involved successful defence of a share valuation claim where the claimant's expert was perhaps the then doyen of share valuation, Bruce Sutherland: *Whiteoak v. Walker* (1983) showed that if a company's articles required a valuation to be carried out by a generalist accountant he was not to be judged as if he had held himself out as a share valuation specialist).

In 2016 he led for the claimants in one of The Lawyer's “leading cases of the year”, *Harlequin Property (SVG) Ltd v Wilkins Kennedy*, in which Harlequin recovered more than £9 million in a case which the Judge described as having been defended “stubbornly” [2016] EWHC 3188(TCC) [2017] 4 WLR 30.

Insurance Brokers & Agents

Nicholas' most recent case in this field involved an 8-figure claim for a broker's client whose insurers were admittedly entitled to avoid for non-disclosure, the issue being how the non-disclosure had come about.

Financial Services Professionals

Nicholas' considerable experience of, and great interest in, financial services claims has perhaps had an emphasis on investment management or advice, where he has acted for both claimants and defendants (usually in arbitrations). Being himself a trustee of a defined benefit pension scheme, he has to be able to understand the investment challenges for trustees and managers, and to be aware of legislative and administrative background. He has acted for a major financial adviser in defence of a split caps claim, and for various individuals who, having sold successful businesses, made or are making claims against leading investment houses when their investments disappointed by 7-figure sums, and for other individuals whose investments are said not to have been tailored suitably; certain pension issues following the demise of a business, and issues relating to offshore investment funds, have been referred to him.

Lawyers

Nicholas has deep experience of both claimant and defendant work in lawyers' liability cases, across the range of common law and equitable remedies. He led the defence teams in both the *Bristol and West* and *Nationwide* cases, and the technically vital cases in the House of Lords *Cave v Robinson, Jarvis and Rolf* (limitation) and *Medcalf v Mardell* (wasted costs). More recent defence and recovery work has included pursuit for a major national solicitors firm of recovery proceedings against one of the practices in the middle of the huge commercial mortgage fraud involving Dunlop Haywards, defence and third party recovery work for solicitors who had acted for banks on a syndicated loan for a fraudulent project, and defence of a claim where a solicitor was alleged to have induced the client to make the commercial decision to make a large and risky loan; and work in cases of internal problems in a practice. For claimants he was brought in to a leading role in the Supreme Court in *AIB v Mark Redler*, and notably has led in



NEW SQUARE

claims involving the specialist employment work of major law practices, successively in *Newcastle International Airport v Eversheds*, *Wright v Lewis Silkin* and *Commodities Research Unit International Ltd v King Wood Mallesons*. The *Wright* case featured the problems of cross-border work, as did *Bancroft v Weil Gotshal*, where Nicholas acted for an international investment fund in a claim related to the handling of a central European business acquisition.

He has been / is involved in some extremely high value claims in overseas matters. His wide experience across all Divisions of the High Court includes financial matters post-divorce, a field in which he practised while a junior and in relation to which he has experience in Silk, and to which he brings his interest in investment and pension matters (he is a Trustee of a Defined Benefit Pension Scheme).

Surveyors & Valuers

Nicholas has appeared in various surveying and valuation cases, and finds valuation cases particularly intriguing. He particularly relished the valuation challenge in *Hartle v. Laceys* [1999] Lloyd's Rep. P.N. 315, in which he effectively had to argue both sides' cases in the Court of Appeal as the appellant was unrepresented, in which the evidence was that for a significant period following a residential development market collapse there was no active market. Valuation problems were a frequent factor in the litigation in which we was engaged throughout the 1990s.

Qualifications & Memberships

M.A. (Cantab.)



Enough interest?

Nicholas Davidson QC
4 New Square
May 2019



Recovery?

Principal sum
Interest
Costs (net)
Interest on costs
What is the net gain?



Fair comment

Farstad Supply AS v Enviroco Ltd
[2013] CSIH 9 [2013] S.C. 302



Fair comment

It hardly seems appropriate that ... we should retroactively jettison settled practice in favour of a regime described by others as incoherent



Fair comment

... legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again.

(Lord Nicholls in *Sempra Metals v Inland Revenue Commissioners* [2007] UKHL 34 [2008] 1 A.C. 561 at para. 51)



Some important literature

Scottish Law Commission
2006 report
Interest on Debt and Damages



Some important literature

Law Commission
2004 report
Pre-judgment Interest
on Debt and Damages



Some important literature

Law Commission website:
This project reviews the system for awarding interest before judgment, which leads to widespread confusion and mistakes. Even when the rules are applied correctly, they bear little relationship to commercial reality. In short cases, debtors often pay too much – frequently paying 8 per cent at a time when base rate is 4 per cent or less. In long-running cases the present ban on compound interest means that claimants may be undercompensated.



Some important literature

Interest Awards
in Australia
(Edelman and Cassidy)



Some important literature

Interest in
International Arbitration
(Secomb)



Some important literature

Foreign Currency Claims
in the Conflict of Laws
(Vaughan Black)



Simplifying legislation?

Arbitration Act 1996



Simplifying legislation?

Arbitration Act 1996
Arbitration (Scotland) Act 2010



Simplifying legislation?

*The National Housing Trust v.
Y.P. Seaton & Associates Co Ltd*
[2015] UKPC 43; [2016] B.L.R. 215



From the case pipeline

*Waddington Ltd v.
Chan Chun Hoo Thomas*
[2016] HKCA 200



From the case pipeline

Sunny v Bank of America
[2016] HKCA 201



From the case pipeline

Admiralty and Commercial Court
Guide



From the case pipeline

*F & C Alternative Investments
(Holdings) Ltd v. Barthelemy (no. 3)*
[2012] EWCA Civ 843
[2013] 1 W.L.R. 548



From the case pipeline

Jaura v. Ahmed
[2002] EWCA Civ 210
[2002] All ER (D) 289



From the case pipeline

De Fazio v De Fazio
[2014] CSOH 56



From the case pipeline

Kitcatt v MMS UK Holdings Ltd
[2017] EWHC 786 (Comm)



From the case pipeline

Perry v. Raleys

[2017] EWCA Civ 314 [2017] PNLR no.

27

(result changed in Supreme Court)



From the case pipeline

Carrasco v Johnson

[2018] EWCA 87



From the case pipeline

Zagora Management Ltd v Zurich

Insurance Plc

[2019] EWHC 205



From the case pipeline

FM Capital Partners Ltd v. Marino
[2019] EWHC 725



Alan McMillan
Partner, Solicitor Advocate
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Edinburgh

**"The Commercial Court for you, in practice: a view
from the front row - and back in the office"**



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"Leader of the pack" (Chambers UK) Alan McMillan is a formidable commercial litigator. He also heads up the property litigation team. He represents clients from the whole spectrum of the property and commercial sectors. He also has wide experience of acting in contentious planning and other commercial disputes. He is known for having significant arbitration experience, including cross-border enforcement.

Alan is a CEDR-accredited mediator and has co-authored the leading Scottish text on dilapidations as well as chairing the Property Litigation Association in Scotland.

He is ranked in Band 1 by Chambers UK for real estate litigation in Scotland.

Expertise Areas:
Dispute Resolution
Professional Negligence
Property Litigation
Renewables

Sector Areas: Property & Infrastructure



NOTES TO ACCOMPANY THE PRESENTATION

ON 22 MAY 2019 FOR THE PNLA

**“THE COMMERCIAL COURT – THE VIEW FROM THE BACK OF THE COURT – AND
BACK OF THE OFFICE”**

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1 INTRODUCTION

- 1936 – Where we were then
- The 1994 initiative for Commercial Actions – effective from 20 September 1994. Now approaching its 25th anniversary.
- Purpose – to make commercial litigation more expeditious and more convenient to litigants.
- Where we are now – Daydogs.

2 ASSERTIONS

- The Commercial Court is “better” than the ordinary courts.
- Further reforms are making it better still.
- Those charged with keeping the Commercial Court “competitive” in the civil disputes environment are keenly aware of the need to continue to adapt to users’ needs.
- The court/public sector may struggle to achieve the funding of the private sector, but nonetheless must continue to strive to make changes.
- Civil Online – the fully digital version of Simple Procedure for cases to be dealt with online, went “live” on 25 April 2019. Provides a model, and a “start”.
- Just as is the case with practitioners, being fully “online” is only one aspect of making commercial/civil justice more efficient.
- Need to look to some extent at the nuts and bolts/rules, practices, procedures. (Commercial cost) to consider it’s “better”.

Before going on to talk about what the commercial court feels like in practice – both in court, and also when preparing the documentation and submissions for the court, consideration of the guidance available and rules set out for commercial actions.

3 NATURE OF COMMERCIAL ACTIONS

- Commercial action defined rule 47.1(2) “an action arising out of, or concerned with, any transaction or dispute of a commercial or business nature...”
- ‘Broad definition’ as per Lord MacFadyen in Rankin's Tr v HC Somerville & Russell 1999 SC 166 at 170 E.

- List contained in Practice Note no. 1 of 2017.
- Look at whole circumstances of case.

4 RULES OF COURT DISAPPLIED

- Rules re making up of Record.
- Adjustment of pleadings.
- Closing of Record.
- Fixing and allocation of diets in OH.
- Form of counterclaim.
- Applications for warrants for diligence.
- Lodging of productions.
- Rules apply unless expressly or impliedly excluded.

5 THE COMMERCIAL JUDGE(S)

- Nominated by Lord President.
- Designed to enhance the expertise of the court.
- Currently 4 Commercial judges, (Lord Doherty, Lord Bannatyne, Lady Wolffe, Lord Ericht).
- Same judge to preside throughout a case.
- Counsel and solicitor advocates expected to provide continuity.
- Wide discretion afforded to judge re procedure.

6 RAISING THE ACTION

- Mark “Commercial Action” above instance and on backing.
- For pursuer to decide forum (unless prescribed by contract).

7 TRANSFER TO COMMERCIAL ROLL

- Any party can apply to have cause transferred to Commercial roll.

- Court will require to be satisfied that it is a ‘Commercial action’.
- All of the circumstances of case considered.
- Transferred case put out By Order within 14 days.

8 THE COMMERCIAL ROLL

- All hearings on Commercial roll.
- Dates and times of hearings fixed by Commercial judge.
- No fixings of diets by Keeper.

9 WITHDRAWAL FROM THE COMMERCIAL ROLL

- Motion for withdrawal prior to preliminary hearing.
- Bases for withdrawal:
 - On motion of party commercial judge not satisfied that case suitable.
 - Motion made with consent of all other parties.
- Discretion for judge to withdraw if not satisfied case is Commercial action.

10 PRE-ACTION PROTOCOL

- Review in 2004.
- Paragraph 10, Practice Note no 1 of 2017.
- Pursuer's solicitors to communicate nature of claim, legal and factual basis on which proceed.
- To supply copies of any documents relying upon.
- Pursuer to have obtained and disclosed expert reports.
- Defender's solicitor to give substantive response.
- To disclose any documents relying upon.
- Pursuer's solicitor to give considered reply.
- Only exception – urgency. How interpreted.

11 SUMMONS (PARA 13; NO. 1 OF 2017)

- “Pleadings” not required (nor encouraged).
- Fair notice still requested.
- No pleas in law where construction of a document.
- Lodge core documents at outset.
- Commercial Action Registration Form (CA1).
- Consideration being given by the Consultative Committee to other initiatives to encourage abbreviated pleadings.

12 DEFENCES

- Answer to summons within 7 days of calling.
- Append list of documents.
- Brief form of pleading.
- No need to admit or deny every allegation.
- Commercial Action Registration Form.

13 COUNTERCLAIM AND THIRD PARTY NOTICES

- Apply by motion cf ordinary procedure for counterclaims.
- Framed in same way as summons.
- Competent to conclude for rectification of a document in counterclaim in a Commercial action
– Euan Wallace & Partners v Westcot Homes Limited 2000 SLT 327 at 331F-G.

14 IDENTIFYING THE ISSUES

- Preliminary Hearing is one of the most important stages of a commercial action.
- Counsel and solicitor advocates must be up to speed on the case.
- Informality of procedure.
- Assumption that pre-proof protocol has been followed.

- Note of issues for determination.
- Wide powers granted to judge under r.47.11.

15 **ADJUSTMENT OF PLEADINGS**

- At discretion of the commercial judge whether to allow adjustment.
- Changes to be highlighted.
- May order making up of record or ‘clean’ proceedings.
- Judge to decide whether and how further specification should be given.
- See Royal Bank of Scotland v Holmes 1999 SLT 563 at 570G.

16 **THE PRELIMINARY HEARING**

- Orders.
- On motion of a party or ex proprio motu.
- Orders to produce.
- Recovery of documents from third parties.
- Lists of witnesses and witness statements.
- Potential to proceed directly to substantive hearing.
- Alternative dispute resolution.
- Wide terms of rule 47.11(1)(e).

17 **THE PROCEDURAL HEARING**

- Second important stage of commercial action.
- The Rules.
- Documents to be lodged 3 days prior to hearing.
- May be modified where necessary.
- Appointment to debate at discretion of judge see Highland and Universal Properties Ltd v Safeway Properties Limited 1996 SC 424.

- Allowance of proof.
- Statement of Agreed Facts.
- Skilled persons and assessors.
- Conclusion.

18 MOTIONS BY EMAIL

- gcs@scotcourts.gov.uk and commercial@scotcourts.gov.uk.
- Date and time of hearing on motion fixed by commercial judge/clerk.

19 DEBATES AND PROOFS

- Debates follow the same rules for procedure roll under an ordinary action (chapter 28) by virtue of r.47.13 (and para 22 of no. 1 of 2017).
- Proof largely follows ordinary procedure.
- Documents must be lodged at least 7 days prior to proof (r.47.14).
- Preparation of single bundle of productions.
- Electronic versions (para 25 of no. 1 of 2017).

20 GUIDANCE ON THE RECOVERY OF DOCUMENTS

- Guidance has had effect since 4 February 2019.
- 12 paragraph note – available on the court website. Appears below:

Guidance by the commercial judges on the recovery of documents in commercial actions

1. The court expects the parties to a commercial action and their legal representatives to co-operate in identifying documents which are relevant to the dispute. All those involved should adopt a co-operative, constructive and sensible approach. In so far as possible relevant documents should be produced voluntarily to the party seeking recovery.
2. The recovery of documents should be reasonable and proportionate having regard to the issues in the action which are truly contentious. Both the party seeking recovery and the party in possession of the documents should strive to avoid unnecessary or disproportionate expense being incurred. Equally, where recovery of documents is

sought from a non-party haver the party seeking recovery and the non-party haver should strive to avoid unnecessary or disproportionate expense being incurred.

3. As soon as litigation is contemplated the parties' legal representatives must notify their clients of the need to preserve documents which may be relevant to the litigation. Documents to be preserved include electronic data which would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business. The documents concerned include documents held by a third party on a party's behalf.
4. Where a party believes that relevant documents are held by a third party (on the third party's own behalf or for another non-party) it should inform the third party of the need to preserve those documents.
5. It will not generally be appropriate for a party to seek recovery of documents if copies of the documents are already in its possession (for instance, because it has many of the documents in common from the parties' previous dealings, or if informal disclosure and inspection of documents has already been provided); or if the documents are readily available to it from other sources. Where specifications of documents seek recovery of all documents relating to every issue in the litigation, or a plethora of issues, the party seeking recovery will require to satisfy the court that such a wide scale approach is essential, and that the possibility of a more discriminating approach has been properly explored but is not appropriate.
6. Discussions concerning the recovery of documents should be commenced as early as possible by the parties' legal advisers (ordinarily in conjunction with the pre-action protocol). It is likely to be desirable to focus matters by framing a draft specification or an equivalent document at an early stage. As already indicated, the recovery of documents should be reasonable and proportionate having regard to the issues in the action which are truly contentious. The appropriate search method or methods and the scope of the search should be discussed with that objective in mind. In the case of electronic documents the discussion should include consideration of the use of technology, including whether data sampling, or keyword or other automated search methods, ought to be used, and, if so, the parameters of such searches.
7. Unless otherwise agreed, or unless the court otherwise directs, the haver should identify all possible repositories of relevant documents. It should also distinguish between documents (including electronic data) which are reasonably accessible and those which are not. Where electronic data is not reasonably accessible the party seeking its recovery should demonstrate that its relevance and materiality justify the expense and burden of retrieving and producing it. Parties should seek to agree the appropriate search method(s) and the scope and extent of the search(es). In some cases a staged approach may be the appropriate way forward.
8. It is desirable that by the time of the preliminary hearing discussions have taken place and agreement has been reached as to the documents which require to be recovered. In the event that discussions have not produced agreement by that time the court will

expect to be advised of the stage the discussions have reached, the matters outstanding, and the timescale within which it is anticipated that agreement may be reached. If by the preliminary hearing a dispute concerning recovery has been focussed the court may determine the dispute at that hearing or fix a further hearing for that purpose. Where parties disagree as to the appropriate search method for electronic documents the party proposing a particular method should be in a position to advise the court of the merits of the method in the circumstances and the estimated cost of using it.

9. Unless otherwise agreed, or unless the court otherwise directs, party havers and third party havers should provide the party seeking recovery with details of the reasonable searches for relevant documents which they have carried out. The details provided should describe (i) the repositories searched; (ii) the nature of the searches and by whom they were carried out; (iii) any limitations or restrictions in those searches and the reasons for them; (iv) any relevant repositories not searched which may contain further relevant documents, and the reasons for not searching them.
10. Unless otherwise agreed, or unless the court otherwise directs, electronic documents should generally be made available in a form which allows the party receiving them the same ability to access, search, review and display the documents as the haver had. This will normally involve documents being provided in their native format (i.e. in the original form in which the document was created by a computer software programme) together with any available searchable optical character recognition (“OCR”) versions. Where OCR versions are provided the court recognises that provision may require to be on an “as is” basis with no assurance to the party obtaining recovery that those versions are complete or accurate.
11. Havers should do their best to avoid producing duplicate documents or documents which are of no relevance to the proceedings. Indiscriminate “dumping” of documents (including electronic data) in response to a specification should be eschewed because it is liable to place excessive and unacceptable time and expense burdens on the party seeking recovery.
12. This guidance has effect from 4 February 2019.

J. Raymond Doherty

Iain A. S. Peebles

Sarah Wolffe

Andrew Stewart

January 2019

GUIDANCE BY THE COMMERCIAL JUDGES ON DISPENSING WITH CERTAIN OF THE COURT'S USUAL REQUIREMENTS

21.1 This guidance has effect from 4 February 2019.

Guidance by the commercial judges on dispensing with certain of the court's usual requirements

1. The principal purpose of Chapter 47 of the Rules of Court, Practice Note 1 of 2017 and of the guidance in 'Commercial Actions: Guidance for Practitioners' is to seek to ensure the effective and efficient conduct of commercial actions. In that regard, rule 47.5 provides that, subject to the provisions of Chapter 47, the procedure in a commercial action shall be such as the commercial judge shall order or direct.
2. The commercial judges recognise that there may be some commercial actions which do not merit full compliance with every aspect of the Guidance or in which standard procedural orders are not necessary or appropriate, whether for cost or other reasons. In such circumstances, the power in rule 47.5 can be used to allow more appropriate orders or directions to be given.
3. Without prejudice to that generality, and merely by way of example:
 - (a) While the standard approach of requiring certain written documents for particular hearings (eg notes of argument for a debate, or witness statements and written submissions for a proof) is likely to be appropriate in very many commercial actions, there may nonetheless be certain cases in which it is not necessary or appropriate to make such an order.
 - (b) The court appreciates that the preparation of electronic joint bundles can be time-consuming and expensive and that these factors may not always be outweighed by the benefits of having an electronic joint bundle.
 - (c) At a more specific level, it is recognised that it may not be possible, in respect of certain types of document, to comply with the requirement in paragraph 53 of the Guidance to have each document, when lodged electronically on a memory stick, put in the format of a text-searchable pdf file. Similarly, the requirement in the standard interlocutor that where witness statements make reference to productions they should be annotated with hyperlinks to the relevant document within the joint bundle may in some cases be unduly onerous or may cause disproportionate costs.
4. Accordingly, in any commercial action, if there are specific aspects of the Guidance that a party wishes to have dispensed with, or standard procedural orders that are considered to be unnecessary or inappropriate, the issue should be brought before the

court. If not raised at a Preliminary Hearing, it should be raised in the Note of Proposals for Further Procedure lodged prior to the Procedural Hearing. In dealing with the matter, the court will have regard to the full circumstances, including whether disproportionate costs are likely to be incurred or whether any technical or other difficulties exist.

5. This guidance has effect from 4 February 2019.

J. Raymond Doherty

Iain A. S. Peebles

Sarah Wolffe

Andrew Stewart

January 2019

22 COMMERCIAL ACTIONS – GUIDANCE OF PRACTITIONERS

- The guidance has effect from 4 February 2019.

23 COMMENTARY

- 23.1 Hard copies – the new guidance requires that any document that exceeds 20 pages or is in colour must be lodged in hard copy form at the public counter. In addition, defences or answers, affidavits, witness statements and expert reports will not be accepted without a principal signature and therefore must be lodged in hard copy form. It occurs to the author that we are now seeing the advent of “digital signatures”. It seems that the next step will be not to require hard copies when they become generally accepted and acceptable.
- 23.2 The guidance confirms (paragraph 7) that all documents lodged in hard copy form, must also, in any case, be provided in electronic form as a general rule.
- 23.3 The restriction on electronic lodging kicks in at 12MB (quite low ...).
- 23.4 After that they have to be presented on a “USB mass storage device” – A.K.A. a Memory Stick – for uploading to the electronic process.
- 23.5 This is a rather odd and I suppose arguably convoluted process: you need to take your memory stick physically to the court, hang around and wait for it to be taken by court officials, uploaded to their process, and then handed back to you. Better than it used to be, though.
- 23.6 Examples are given in the guidance of the documents which can be “routinely” submitted by email provided they are 20 pages or less, are in black and white and do not require principal

signature. This is all fine, and helpful, but from the practitioner's perspective it still involves taking documentation from the system, transferring it to a memory stick, having someone physically take it to court, hang around for that to be uploaded, and then physically bring the memory stick back.

- 23.7 As to the lodging of productions, hard copy productions are not generally now being stored by the commercial court.



Q&A



**Stephen O'Rourke QC
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Barrister (North and South)**

"The role of the expert in Professional Negligence"

Stephen O'Rourke QC



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Stephen O'Rourke QC specialises in commercial litigation, public and administrative law, property and corporate/regulatory crime.

Ranked Tier 1 for Commercial Litigation in the latest edition of the Legal 500 (2019), Stephen O'Rourke is '*Proactive and impressive in court*'. Described as '*Stalwart and fearless*' he is also ranked Tier 1 for Civil liberties, human rights, public inquiries, and public and administrative law (including local government).

Previous editions have noted that he is '*recommended for public inquiries*', describing him as '*a very thorough advocate*' with a '*first-rate reputation in high value cases*'.

Biography

Stephen is a careful and accomplished court practitioner with a wealth of experience acting for government, commercial clients and high net worth individuals. He has depth of experience across a range of challenging cases in the areas of commercial law, public and administrative law, planning and property law, fatal accident inquiries and regulatory crime. He is regularly instructed in the Inner and Outer Houses of the Court of Session, the Lands Valuation Appeal Court, the High Court of Justiciary, the Land Court, the Lands Tribunal and other Tribunals.

Stephen is an accredited mediator and accepts instructions both as mediator and as counsel for parties involved in mediation. He also accepts instructions both to represent parties in arbitration and to act as arbitrator.

Appointments

Legal Chair, Parole Board for Scotland, 2017

Member of Fraud Advisory Panel, 2017

Advocate Member of the Scottish Sentencing Council, 2015 - 2019

Standing Junior to the Advocate General for Scotland (General Pool), 2013 - 2017

Ad Hoc Reporter to the Scottish Legal Complaints Commission

Advocate Depute (full time High Court prosecutor), 2010 - 2013

Director of the Faculty of Advocates Dispute Resolution Service

Trustee of the English Speaking Union, 2013 - 2015

Former Tutor in Commercial Law, Business Law and Roman Law, Edinburgh University

Memberships

Member of the Centre for Commercial Law, Edinburgh University
Member of the Chartered Institute of Arbitrators
Member of Scottish Mediation Network
Member of the Council of the Stair Society, 2010 - 2013
Member of Faculty Council, 2005 - 2008

Recent Cases

Supreme Court:

Uprichard v Scottish Ministers [2013] UKSC 21

Cairngorms Campaign v Cairngorms National Park Authority (settled while pending before the Supreme Court)**Court of Session:**

DC v DG & DR [2017] CSIH 72

Fife Council Assessor v Hall Construction Services Ltd [2017] CSIH 71

Fatal Accident Inquiry: Liberton High School [2017] FAI 14

McManus & another v Lanarkshire Housing Association & others [2017] CSIH 17

Boston Scientific Limited v The Common Service Agency [2016] CSOH 132

Auchnie v Auchnie [2014] CSIH 102

KM (Pakistan) v Secretary of State for the Home Department [2014] CSOH 70

SK (Pakistan) v Secretary of State for the Home Department [2014] CSOH 35

MS v Secretary of State for the Home Department [2014] CSOH 1

RK(DRC) v Secretary of State for the Home Department [2014] CSIH 2

AA (Palestine) v Secretary of State for the Home Department [2013] CSIH 87

MIK (Pakistan) v Secretary of State for the Home Department [2013] CSOH 176

Scottish Natural Heritage v The Assessor for Highland & Western Isles [2009] CSIH 91

McGovern v Glasgow City Council [2009] CSOH 148

John Green v SIAC Assecurazione SpA [2006] CSOH 162

Wilson & Gould v Glasgow City Council 2004 SLT 1189

*Nicol v Advocate General for Scotland & others (Lord Menzies, 2003)***High Court of Justiciary:**

Scott v Procurator Fiscal, Glasgow [2013] HCJAC 52

Jones & Doyle v Her Majesty's Advocate 2010 SCCR 523 & [2009] HCJAC 108

McKnight v Her Majesty's Advocate 2008 SCCR 983

Gray & another v Her Majesty's Advocate [2005] HCJAC 104

Stewart v Her Majesty's Advocate 2005 SCCR 565

Dudley v Her Majesty's Advocate [2004] HCJAC**Lands Tribunal for Scotland:**

Council for Music in Hospitals v Trustees of R. Gerald Assoc. 2008 SLT (Lands Tr) 17

Graham v Lee [2008/41]

Expert (or 'Skilled') Witnesses
Professional Negligence Lawyers' Association
Edinburgh Conference
22 May 2019

The use of Experts can be critical to success. In this seminar I will address the issue of how, when and why to instruct an expert, where to look, who to choose and what they need from us, the lawyers. I will also consider some of the classic pitfalls when it comes to expert witnesses and how to avoid them.

experto credite

'trust the expert'

"Stetimus tela aspera contra contulimusque manus: experto credite, quantus in clipeum adsurgat, quo turbine torqueat hastam"

Virgil's Aeneid (Book XI, line 283)

"We have faced his fierce weapons, and fought him hand to hand: trust one who proved it, how huge he looms above his shield, with what whirlwind he hurls his spear!"

....defend and attack (shield and spear)

What makes an Expert Witness?

No one 'can fairly be asked to meet evidence of opinion given by a quack, a charlatan or an enthusiastic amateur'

Lord Bingham, *R v Robb (1991) 93 Cr.App. R. 161 @ 166*

No statutory definition of an expert in Scotland, however definitions from other jurisdictions including England, Australia and America make reference to a person being expert as a result of knowledge, skill, training, education or experience, and in a position to assist the decision maker with matters where he requires independent, impartial assistance.

Two most important qualities accordingly are:

1. *possession of knowledge of the specialism in question; and*
2. *an ability to use that knowledge by virtue of training and/or experience in the field.*

To what purpose?

- To provide opinion evidence, as opposed to, or distinct from, fact based evidence (but based upon an assumed factual matrix) in order to assist the judge/arbitrator in deciding the outcome of the case.

- The opinion(s) must be in response to clear and precise instructions.
- All materials required in order to arrive at the opinion, including any other expert opinions in the case, must be provided to the expert.

Adversarial model: party appointed/instructed experts

Parties decide which experts to instruct, and what to instruction them to do.

'The bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.'

Lord President (Cooper) in *Davie v Magistrates of Edinburgh* 1953 SC 34 @ 40

Role of the Expert Witness

Recently emphasised in *Kennedy v Cordia* [2016] UKSC 6

Expert witness' evidence is admissible if 4 conditions met:

- 1 – the evidence will assist the court in reaching a judgement
- 2 – the expert has the necessary knowledge and experience
- 3 – the expert is impartial in the presentation and assessment of evidence
- 4 – there is a reliable body of knowledge or experience supporting the expert's evidence.

Duties of the expert witness in Scotland (1)

Duty to the Court

'To say that the expert witness must give his evidence impartially, that he appears as an independent witness and not as an advocate for the party who calls him, is true but rather insulting, since it applies to all witnesses. The difference is that an expert who is giving opinion evidence cannot literally fulfil his oath to tell the truth etc, since only facts are true or false. He fulfils his oath by giving his opinion frankly and honestly, without minimising any difficulties it may cause or suppressing any doubts which he has.'

Sir Gerald Gordon QC, In S Mclean (ed), Legal Issues in Medicine (1981) 214

Duties of the expert witness in Scotland (2)

The Ikarian Reefer [1994] 2 Lloyd's Rep 68, as approved by Lord Nimmo Smith in *McTear v Imperial Tobacco* 2005 2 SC 1, wherein Cresswell J set out the duties and responsibilities of Expert Witnesses in England.

However:

*'Although the duties set out by Cresswell J in *The Ikarian Reefer* may be of assistance when looking at an expert's testimony in court and, in particular, when comparing it with the testimony of other experts, it is difficult to extend the duties much beyond the witness box in the Scottish context.'*

Per Lord Carloway, *AW v Douglas* [2006] CSOH 178

Duties of the expert witness in Scotland (3)

Duty to the Court

The Law Society of Scotland Code of Practice at Section 11 states:

Independence

11. Experts will bear in mind that:

- (a) When giving evidence at court, the role of a witness of fact, or an expert witness, is to assist the court and remain independent of the parties;*
- (b) A solicitor must not make or offer to make payment to a witness contingent upon the nature of the evidence given.*

Duties of the expert witness in Scotland (4)

Duty to the Court

England: Civil Procedure Rules, Part 35.3

- 1. It is the duty of an expert to help the court on the matters within his expertise.*
- 2. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.*

No equivalent rule in Scotland (at present)

Recent salient warning re conflicts of interest – *EXP v Barker* [2017] EWCA Civ 63 – consultant defendant's expert failed to disclose they had been colleagues and had co-authored papers.

Experts will be mindful of their duties to their own professional bodies (see individual codes of practice)

Duties of the expert witness in Scotland (5)

Duty to the client

'In stating his opinion, the expert is required 'where there is a range of opinion', (a) to summarise the range of opinion and (b) give reasons for his own opinion.
CPR 35, Practice Direction (England & Wales)

'At first sight, the requirement that an expert should indicate any opinions contrary to his own would appear not to be in the interests of his client. But the expert who fails to address honestly any view contrary to his own, will readily lose the favour of the trial judge, and thus do a disservice to his client.'

Experts in the Civil Courts, para 11.10

Claims in Negligence?

Witnesses generally are immune from suit for evidence given on oath – this seems to have evolved (or to at least have been considered) in similar terms to the immunity of counsel. However just as that immunity has been eroded in recent years, there may be circumstances where an action might be brought against an expert witness for negligent preparation of his evidence (although proving that the outcome of the litigation might have been materially different would, amongst other issues, be challenging). Such a claim might lie either at the instance of the party instructing the expert, or the other side.

The expert's report – reference to documents (1)

RCS 27.1.— Lodging of documents founded on or adopted

- (1) Any document founded on by a party, or adopted as incorporated, in his pleadings shall, so far as in his possession or within his control, be lodged in process as a production by him—
- (a) when founded on or adopted in a summons, at the time of lodging the summons for calling;
 - (b) when founded on or adopted in a petition, note, application, minute, defences, counterclaim or answers, at the time of lodging that writ; and
 - (c) when founded on or adopted in an adjustment to any pleadings, at the time when such adjustment is intimated to any other party.

The expert's report – reference to documents (2)

AW v Douglas & another [2006] CSOH 178, Lord Carloway

(no requirement to lodge documentation referred to in an expert's report) – robust dismissal of English practice

BSA International SA v Irvine [2009] CSOH 77, Ld Glennie

While an expert witness had a duty to volunteer all relevant information if a failure to do so would leave the court with a misleading impression of his opinion, waiver of privilege had to be approached as a matter of fairness and it was not relevant to a proper assessment of the evidence to know the basis upon which the factual assumptions were made; thus M were not entitled to the material founding the report.

Expert witnesses – ‘Hot tubbing’ and joint meetings

“Hot-tubbing” is the colloquial name for the court process of calling expert witnesses to give evidence and be cross-examined concurrently. It also involves the parties’ experts engaging in discussion together while in the witness box. Not all court users have warmed to the term: when Lord Justice Jackson reviewed hot-tubbing in his lecture to the Commercial Bar Association of Victoria on 29 June 2016 (**Judiciary: Concurrent expert evidence – a gift from Australia**), the Australian judges warned him against using the vernacular. They prefer “CEE” – concurrent expert evidence.

Jackson LJ is a supporter of hot-tubbing and thinks it will catch on more widely in England and Wales. He argues it makes judges prepare more thoroughly, can reduce experts’ time in the witness box and can thereby reduce costs.

Since Jackson LJ’s lecture in June, the findings of the Civil Justice Council’s consultation on hot-tubbing have been published: **Concurrent expert evidence and “hot-tubbing” in English litigation since the “Jackson reforms”: a legal and empirical study**. The report emphasises “the overarching purpose of expert evidence (as stated in CPR 35.3) is for those experts ‘to help the Court on matters within their expertise’” (page 13). It also explains the various forms of concurrent evidence available such as:

- Sequential, back-to-back evidence, which is counsel led and involves one expert then the other giving evidence, being examined, then cross- and re-examined on one issue at a time.
- Hot-tubbing, which is described in **Practice Direction (PD) 35.11** and led by the judge, who acts as a chair of proceedings in leading the oral examination of the expert witnesses.
- Hybrid forms of hot-tubbing, which have arisen as a result of the judge’s power to modify the hot-tubbing procedure set out in PD35.11. The variants relate to how the experts are allowed to interact while in the hot-tub, differences in judicial practice in leading (or not) the discussion and differences in counsel’s role.
- The “teach-in” approach, which involves the parties appointing and paying for a neutral expert adviser to provide a tutorial (or teach-in) to the judge to improve understanding of the technical issues.

The committee reflected on whether the process saved time, improved the quality of the evidence, assisted the court and saved costs and gave recommendations that included: training for all civil judges; amending the directions and listing questionnaires to ensure that hot-tubbing is at least considered at the Case Management Conference stage; adopting an amended version of PD35 and guidance for the judiciary and practitioners; preparing an information note for expert witnesses and helping the Academy of Experts to

create a training video; and ensuring references to hot-tubbing and concurrent evidence in the various court guides are more consistent.

Hot-tubbing is part of a rapidly-evolving area of civil procedure. You can read more about the process here: [Will "hot-tubbing" catch on in England and Wales?](#)

As for Joint meetings of experts in advance of proof, these can be helpful, but must be approached with caution. If lawyers are not present, as is usually the case, there may be a danger that an expert may be pressed into making inappropriate concessions. I would suggest that where joint meetings between expert witnesses are going to take place, they should do so once the individual experts have already conducted a full and thorough consideration of all materials in the case and there is a clear understanding regarding what the agenda of the meeting will be and what will be discussed. It would be useful to confirm whether all discussions at the joint meeting will be on a 'without prejudice' basis, or whether specific matters are to be (or are anticipated to be) the subject of joint agreement.

Presence in court during competing testimony?

Yes – seek leave of the court/arbitrator for this to happen – is very useful indeed

It is particularly important that, where the expert evidence is to consist of one professional person's view of the professional competence of another, the expert witness should hear the latter under examination in chief and cross-examination before expressing his opinion... Experts, unlike lay witnesses, may in all cases sit in court to hear the evidence of other witnesses before they have themselves given evidence. This is a matter for the court's discretion...

The appropriate course of action is accordingly, subject to funding your expert's attendance, to move the court or arbitrator to allow your expert to be present during the examination and/or cross examination of the other side's expert.

Major changes coming – Scottish Civil Justice Council – The New Civil Procedure Rules

... there are, however, significant changes coming in Scotland with regard to Expert Witness Evidence

6.1 The SCCR, noting Part 35 of the English and Welsh Civil Procedure Rules, recommended that a rule be introduced clarifying that the overriding duty of an expert witness was to the court. The Review also supported the disclosure, on request, of all written and oral instructions to the expert and the basis upon which the expert is remunerated, including whether the expert is retained on a contingency basis, has agreed to defer his fees, or has a continuing financial relationship with the agent of the party instructing him.

6.2 The SCJC has considered the recommendations of the SCCR (Scottish Civil Court Review) and supports the introduction of statutory duties for expert witnesses. It will consider the introduction of a code of practice for expert witnesses, and guidance as to the form of experts' reports. The SCJC does not consider, however, that the case has been made for requiring experts to disclose their otherwise private arrangements with the party that instructed them.

The SCJC considers that the duties of expert witnesses should be set out in the new civil procedure rules. But the SCJC is not satisfied that experts should be required to disclose the terms of their instruction.

Case management powers

6.3 The SCCR noted the terms of rule 47.12(2)(h) of the Rules of the Court of Session 1994 which provides there should be consultation between skilled persons with a view to agreeing about any points held in common. The commercial judge:

“..may direct that skilled persons should meet with a view to reaching agreement and identifying areas of disagreement, and may order them thereafter to produce a joint note, to be lodged in process by one of the parties, identifying areas of agreement and disagreement, and the basis of any disagreement.”

6.4 The SCCR recommended that:

“In all cases to which the active case management model applies, the court should have power to require experts to confer, exchange opinions, and prepare a note on what can be agreed and the reasons for their disagreements. [SCCR Report, Recommendations, paragraph 121]”

The SCJC considers that judges should be given the power to make orders about expert witnesses, including a power to require them to confer in advance of proof, in the interests of the narrowing of the issues in dispute and the efficient use of court time.

6.5 The SCCR recommended that:

“The provisions of RCS 47.11, whereby the commercial judge may order the reports of skilled persons or witness statements to be lodged in process, and at the procedural hearing may determine in light of these that proof is unnecessary on any issue, should apply generally to all types of action that are subject to active judicial case management.”
[SCCR Report, Recommendations, paragraph 115]

6.6 The SCCR considered that the advance intimation and lodging of witness statements was particularly helpful in the case of expert evidence as this gives the court proper time to prepare and shortens any proof diet. The SCCR commended the enabling power within the commercial court and recommended that it should apply generally to all types of action subject to active judicial case management. [SCCR Report, Chapter 9, paragraph 47]

6.7 The SCJC agrees with this view and considers that this power would be important in allowing the ambition of the statement of principle to be met.

6.8 The SCCR recommended that:

“A rule should be adopted to introduce a presumption that an expert’s report would be treated as evidence in chief and that oral evidence would be restricted to cross examination or to comment on the terms of any other expert reports lodged in process or spoken to in evidence.
[SCCR Report, Chapter 9, paragraph 91]”

6.9 The SCJC has noted the approach of the family courts, reflected in the Court of Session’s voluntary protocol in family actions:

“5.3 Where affidavits or reports have been lodged they may be treated as all or part of the evidence in chief of the deponent or author.

5.4 It is recognised that the use of affidavits limits the length of proofs.”

The SCJC considers that the court should be able to order that the reports of skilled persons or expert witness be lodged in process, and may determine in light of these that proof is unnecessary on any issue. The default position should be that the report of an expert stands as that expert's evidence-in-chief.

The form of expert evidence

6.10 At present questions of whether expert evidence is needed, what type, and the number of experts required, are left to the parties. The general response to the SCCR's consultation indicated there was little support for radical reform in this area [SCCR Report, Chapter 9, paragraph 62]. However, some respondents suggested that the court's general case management powers could be developed to give the court the discretion to decide what expert evidence was necessary. Flaws were identified in the control of expert evidence in family law cases, and concerns expressed about the resultant costs to parties and the public purse.

6.11 The SCCR noted the approach in other jurisdictions, particularly that in England and Wales where expert evidence is governed by Part 35 of the Civil Procedure Rules 1998. The general principle adopted in England and Wales is that the court should have control over the giving of expert evidence and that this should be restricted to what is reasonably required to resolve the dispute. [Civil Procedure Rules 1998, rule 35.1] Part 35 also contains a rule setting out the court's power to restrict expert evidence, that rule is as follows:

"35.4 (1) No party may call an expert or put in evidence an expert's report without the court's permission.

(2) When parties apply for permission they must provide an estimate of the costs of the proposed expert evidence and identify –

(a) the field in which expert evidence is required and the issues which the expert evidence will address; and

(b) where practicable, the name of the proposed expert.

(3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting

permission may specify the issues which the expert evidence should address.”

6.12 The SCCR recommended that:

“We are not persuaded that it is necessary to introduce a general permission rule in Scotland or to introduce express case management powers that would enable the court to regulate the type of expert evidence to be adduced or the number of experts that parties may lead. With the exception of proceedings relating to children, respondents did not identify any problems relating to inappropriate use of experts and if witnesses are called unnecessarily this can be addressed by the court’s powers in relation to certification of witnesses.

However, given the concerns that have been expressed in relation to cases involving children we recommend that the provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children’s referrals.”

6.13 The SCJC agrees that there should be no general requirement to seek the court’s permission to instruct an expert witness. The SCJC has noted the experience in courts, such as the commercial courts, where there is already a culture of judicial involvement in decisions concerning expert evidence.

6.14 The SCCR did not endorse a presumption in favour of the instruction of single joint experts. It did, however, recommend that the court should have the power, in actively case managed cases, to order the instruction of such witnesses.

The SCJC considers that parties should not require to seek the court’s permission before instructing an expert witness, but that the rules should provide for a strong power for the judge, where appropriate, to make orders about the identity and scope of expert witnesses and their evidence.

Arbitration

- Tribunal Appointed Experts
- Party Appointed Experts
- Single Joint Expert appointed by the parties

Rule 34 of the Scottish Arbitration Rules (Default Rule)

(1) The tribunal may obtain an expert opinion on any matter arising in the arbitration.'

(2) The parties must be given a reasonable opportunity-

- (a) To make representations about any written expert opinion, and*
- (b) to hear any oral expert opinion and to ask questions of the expert giving it.*

Tribunal can obtain an expert opinion on any matter arising – parties are severally liable to pay the expenses of the expert so appointed under Mandatory Rule 60(1)(b)(ii)

Tribunal should not meet and discuss the case with an expert appointed by it without obtaining the consent of the parties:

Hussman (Europe) Ltd v Al Ameen Developments & Trade Co [2000] 2 Lloyd's Rep 83

Scottish Arbitration Rules, Parratt & Foreman, pg 206

Parties to an arbitration are, of course, free to agree all procedural and evidential matters they wish. In recent cases where I have acted as arbitrator, parties have been content to follow the Commercial Court rules of procedure and timetable constructed accordingly. An arbitrator can accordingly be enabled to direct parties to the effect that their experts should participate in a joint discussion and prepare a joint schedule setting out points of agreement and disagreement

Arbitrators are of course often appointed precisely because they have expertise in a given field (such as a Surveyor, for example) and parties in those circumstances may be content to agree that the Arbitrator should exercise his specialist competence in making his award. I would recommend that parties specifically agree that course of action where it is required, for the avoidance of any doubt.

Where expert witnesses are called, the arbitrator may of course reject their evidence and rely upon his own general skill and experience. However he should not, in those circumstances, adopt a theory of his own, or employ his own knowledge of specific relevant facts, and act on them, without putting this to the parties so that their experts have the opportunity of commenting on it.

Expert Determination

In *Zvi Construction Co LLC v. Notre Dame University (USA) in England [2016]*

EWHC 1924, the Technology and Construction Court (TCC) had to consider whether a party had expressly or impliedly accepted the jurisdiction of an expert to decide a dispute in a case where the contractual position was unclear.

Facts

TJAC Waterloo LLC (TJAC) agreed to sell a property to the University of Notre Dame and the parties entered into a development agreement. TJAC contracted with Zvi Construction (Zvi) to carry out work to the property but Zvi also entered into a duty of care agreement with the University and became a party to the development agreement.

Zvi carried out the building works. However, on completion the University alleged that there were serious defects with the works amounting to around US\$9 million. The contractual position as to the correct method of dispute resolution was unclear. The duty of care agreement specified that the English courts had jurisdiction whereas the development agreement provided for arbitration. Arbitration was intended where there was a dispute as to the meaning or construction of the agreement and determination by an expert surveyor was intended with regard to the parties' rights and obligations under the agreement.

The University asked RICS to appoint an expert. The expert issued directions and the parties served their submissions about the quality of the building works and the alleged defects. At no point did any of the parties raise an issue with the expert's jurisdiction to decide the dispute. There was even a three-day hearing and a final decision issued by the expert which found Zvi/TJAC liable for the defects. The University became concerned about the other parties' abilities to pay any debt and issued proceedings in the US to restrain them from disposing of their assets. It was only at this point that Zvi challenged the jurisdiction of the expert and sought an injunction from the TCC to prevent the University from enforcing the expert's determination.

Zvi argued that the expert had no authority to issue an award against it as Zvi had "no rights, duties and obligations" under the development agreement and, as such, the expert determination clause was not binding on it.

Judgment

The TCC did not agree. The court highlighted that the expert determination clause referred to "any dispute arising between the parties". Zvi had fully participated in the expert determination process by exchanging correspondence and emails, serving submissions without reservation and agreeing that the expert should address liability and quantum separately. The deputy judge found that this amounted to a course of conduct from which it

was inferred that Zvi had impliedly agreed that the expert would have jurisdiction under the agreement to deal with the dispute.

Commentary

Zvi put forward some compelling arguments as to why the expert had no jurisdiction to deal with the dispute in the English courts and also challenged it in the courts in the US. However, the deciding factor for the TCC was that Zvi took several active steps that made it clear that it was submitting to the expert's jurisdiction to deal with the dispute between the parties.

Where a party is in any doubt about or wishes to challenge an expert's jurisdiction, the lesson from this case is that it must raise its concerns with the expert and the other parties as soon as possible, otherwise it runs the risk of accepting the expert's jurisdiction, either expressly or impliedly.

Finally: Pitfalls & some asides...

It is always worth considering objecting to the use of a particular expert by the other side on the basis that the evidence would not be admissible, would be incompetent, is irrelevant to the issues in the case or is not properly within a field of expertise. Expert evidence might successfully be rejected on the basis that it is too hypothetical or not based upon any first-hand knowledge or experience of the matters involved in the case – *Sharpe v Highlands and Islands Fire Board* 2008 SCLR 526 (decision from the Outer House upheld in the Division)

A court can accept some parts of an expert witness' testimony, but reject other parts. So, for example, an employment expert might be accepted on his evidence that but for the accident a pursuer would have obtained a reasonably well paid administrative job, but would not have otherwise worked to age 65. If there was evidence that the pursuer's working life might otherwise be limited, the Court could reject that part of an expert's testimony.

What the decision maker cannot do, however, is reject competing opinions from experts and chose a third way of his own devising – in a Canadian case, *McLean v Weir* (1977) 3 CCLT 87 a pursuer/plaintiff sought to prove that the surgeon should have informed him that an examination performed had a 1 in 1000 risk of causing quadriplegia. He sought to rely on the doctrine *res ipsa loquitur* and led no expert evidence that the examination was negligent. The defendant/defendant led expert evidence to the effect that the procedure was

not negligent. The Supreme Court of Canada found against the plaintiff and gave the following opinion.

'If the medical evidence is equivocal, the court may elect which of the theories advanced it accepts. If only two medical theories are advanced, the court may elect between the two or reject them both; it cannot adopt a third theory of its own, no matter how plausible such might be to the court.'

An important qualification of the above rule, however, arises where the judge is interpreting the meaning and effect of a contractual provision and where there is expert evidence led/available which points to different meanings and/or effects. The judge's task is to interpret the contractual provision and give it effect, which *might* involve the judge 'steering a path' between expert views. This issue may often arise in adjudications, for example – see *City Inns Ltd v Shepherd Construction Ltd [2006] CSOH 94 & [2010] CSIH 68* – (with thanks to Derek Crawford MCIArb for his comments)

Single joint experts in litigation? Does appear to happen in England in some cases, however parties often instruct their own experts all the same, leading to 3 opinions for the judge to consider.

Worst case scenario:

Obtain a report, lodge it, don't consult, don't provide your expert with the other side's report, then leave everything to the proof (or the day before) when suddenly you discover the expert has shifted his view – or worse still, your expert does not see the other side's report until confronted with it in the witness box, at which point he changes his position...

Seek to identify and then instruct an expert as early as possible. Apart from anything else, Scotland being a small jurisdiction and many fields of specialism containing fairly few experts, it is all too common that when you go to instruct your chosen expert they have unfortunately already been instructed by the other side...!

Choosing an expert may be the single most important decision which you make about a case – move quickly, but also take some time to choose the right expert (e.g. a 'big name' expert who is otherwise well regarded may not know a local specialist market, which might be critical to success).

Make sure instructions are clear and precise.

Make sure English based experts adjust the wording of their reports to reflect their duties in Scotland. There is no need for specific wording in a report, but including the 'standard' English wording may create confusion.

Whenever possible, ask that experts provide their report in draft, consult with them and then revise their report into its final form. They may resist, but don't take no for an answer!

Provide the expert with all necessary documents including the pleadings and any opposing expert reports.

Experts need to consider the point of view of their competing expert very thoroughly, and be prepared to deal with questions raised by the bench - nothing dissolves more quickly than an unprepared expert witness. There is no professional barrier to consulting with experts (unlike witnesses to fact), so do it as much as is required!

Encourage your experts to be civil and not lose their tempers! A good example, on the recommendation of Sheila Webster FCIArb to whom I am most grateful, can be found in the opinion of Lord Malcolm in the case of *Aviva v McDonalds* [2014] CSOH 009A, a landlord and tenant case involving the branch of McDonald's beside PC World out past Corstorphine:

Notwithstanding the submission to the contrary, and granted that there was a prior history of him advising the defender, Mr Mendelsohn gave independent expert advice on behalf of ADL. He is not an employee of the defender. The evidence shows that he did not simply echo or reinforce the defender's concerns. There is nothing to suggest that his conclusions were unprofessional or tainted by bias - indeed the opposite was accepted by Mr Duncan. While Mr Mendelsohn felt the need to apologise for his occasionally unhelpful attitude towards some of the questions asked of him in cross-examination, and though it is true that an expert witness will do well to remain calm and polite throughout, none of that has caused me to doubt his bona fides and professionalism in respect of the advice tendered to the defender.

In conclusion, I'd like to quote from Iain Drummond of Shepherd & Wedderburn, whose conclusion on expert witnesses in an online piece is very clear and concise, as follows:

'Experts and those who instruct them should be aware of the rules and guidance of the applicable jurisdiction. In both jurisdictions, experts should be

independent, professional and fair and work within the bounds of their expertise. In England, experts must also be aware of their overriding duty to the court and the duties to act expeditiously and proportionately. In both jurisdictions, experts must be prepared to fully explain their methodology and analysis of the facts and how they have arrived at their opinions. Experts in England are required to set out in their report that they have complied with their duties. There is no such requirement in Scotland. Also, experts must accept that ultimately the court has the final say.'

Stephen O'Rourke QC
May 2019



**Andrew Foyle
Partner, Solicitor Advocate
Shoosmiths
Edinburgh**

**"Repeat Prescription: an examination of the
Prescription (Scotland) Act 2018"**



SHOOSMITHS



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Andrew is a Partner in the litigation and recoveries team based in Edinburgh. His clients are primarily financial institutions for whom he acts in a range of litigation matters, including contractual disputes, general banking litigation, recoveries and the pursuit of professional negligence actions. Andrew also acts for a range of commercial clients and insolvency practitioners. Recent examples of his work include successfully defending a lender in a multi-million pound claim for damages raised against them by a former customer where it was claimed that they had acted negligently in their approach to realisation of securities, and a reported case which further clarified the law relating to pre-action requirements under the Home Owner & Debtor Protection (Scotland) Act 2010.

Andrew joined Shoosmiths as a partner in 2013 following more than a decade at Edinburgh firm Anderson Strathern LLP where he trained and latterly managed their banking litigation team. Prior to that, Andrew was a researcher at the Scottish Law Commission where his projects included the Report on Poindings and Warrant Sales, and the Report on Diligence.

Andrew is a solicitor advocate with rights of audience in the Supreme Courts in Scotland and is a ranked lawyer for Banking Litigation in the Chambers UK Guide, where he is described as being "steady, sensible and pragmatic" as well as having "a breadth of knowledge on litigious matters". Commentators described him as "very approachable, dedicated to his client and provides very clear and concise legal advice". Andrew is regularly called upon to speak at external events and conferences on his areas of expertise, and is a regular contributor to publications such as the Journal of the Law Society of Scotland on topics including insolvency and commercial litigation.



SHOOSMITHS

Repeat Prescription:
Prescription (Scotland) Act 2018

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A brief history of time bar

- The 1973 Act
- Five years or 20 years?
- When does the clock start running?
 - "Appropriate date" (Section 6)
 - Schedule 2 obligations
 - Claims for reparation (Section 11)
 - Date when loss and damage occurred
 - Discoverability (s. 11(3))



The discoverability test

"In relation to a case where on the date referred to in subsection (1) above ... the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware"

Discoverability test

- *Greater Glasgow Health Board –v- Baxter, Clark & Paul* 1990 SC 237
 - Knowledge of loss injury or damage
 - Knowledge of negligence
 - Knowledge of the identity of the debtor not necessary
- *Gasper –v- Rodger* 1996 SLT 44

Discoverability test

- *Morrison –v- ICL Plastics*
 - 2013 SC 391 (Inner House)
 - 2014 SC (UKSC) 222 (Supreme Court)
- *Gordon's Trustees –v- Campbell Riddell Breeze Paterson LLP* [2017] UKSC 75

Scottish Law Commission

- Interrelation of five-year and 20-year periods
- The discoverability test
- "Long Stop" prescription date
- Standstill agreements
- Burden of proof
- Effect of fraud, concealment and error
- Definition of "relevant claim"

The new Act

- Largely enacts the SLC Report
- Major change: The discoverability test –
 - Awareness that you have incurred loss injury or damage;
 - Awareness that the loss injury or damage was caused by a person's act or omission (whether or not you are aware that is constitutes a claim); and
 - Awareness of the identity of that person.

Conclusions

- New act goes beyond the previous discoverability test
- Introduction of standstill agreements in Scotland is radical
- True long stop date adds clarity
- However, otherwise not a radical departure from the pre-existing law

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"Professional Negligence Update"

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Professional Career to date

Devil Masters: Gavin Walker, Morag Ross, Susan Duff, Claire Mitchell

July 2014: Admitted to the Faculty of Advocates

2013 – July 2014: Devil at the Faculty of Advocates

2012 – 2013: Senior Solicitor, Commercial Dispute Resolution, HBJ Gateley

2010 – 2012: Solicitor, Commercial Dispute Resolution, HBJ Gateley

2008 – 2010: Trainee Solicitor, HBJ Gateley

2006 – 2007: Legal Assistant, Scottish Law Commission

2006: Researcher at the University of Edinburgh (standard securities, E-commerce)

Education & Professional Qualifications

Currently studying part-time for an LL.M (Public Law), University of London (2014 – 2018)

Faculty of Advocates' Joint Lord Reid Scholar (2013- 2014)

Postgraduate Diploma in Legal Practice, University of Edinburgh (2008)

LL.B (Hons) (1st Class), University of Edinburgh (2006)

Areas of Expertise

- Commercial Contracts
- Commercial Property
- Company, Corporate Finance and Tax
- Insolvency
- Professional Liability
- Public Law, Judicial Review and Human Rights
- Construction and Engineering

Professional Experience

David's areas of practice are commercial and public law.

David is recommended by Chambers UK for commercial dispute resolution in Scotland. He has a particular expertise in property and contract matters. He also regularly acts for clients in professional negligence actions, insolvency and corporate cases, and construction disputes.

David is a Standing Junior to the UK Government. He represents the UK Government in judicial review cases, including cases concerning human rights and EU law, and in civil and commercial matters. He also acts for local authorities and other public bodies.

David appears regularly in the Court of Session and the Sheriff Court. He has appeared in the UK Supreme Court, the Sheriff Appeal Court, the First Tier Tribunal and other specialist tribunals. He often represents clients in adjudications, arbitrations and mediations.

Prior to calling to the Bar, David practised as a senior solicitor for HBJ Gateley. He was the joint recipient of the Faculty's Lord Reid Scholarship in 2013-14. He is a court reporter for Session Cases, a contributor to Court of Session Practice, and teaches property, trusts and succession law at the University of Edinburgh. He is studying part-time for an LLM in public law.

Recent Cases

Commercial Contracts

As Counsel:

Acting for an engineering company in a dispute about whether a consultancy agreement can be terminated (Court of Session Commercial Action)

Acting for a developer in a dispute with his lender about whether payments were due following termination of a loan agreement (Sheriff Court Commercial Action)

Acting for a bank in a dispute about the validity of a personal guarantee (Court of Session)

Acting for a property owner seeking damages for misrepresentation, including success at obtaining interim diligence (Court of Session)

As a solicitor:

Success in a six day proof before answer about whether a purchaser was entitled to rescind a contract and claim damages (Sheriff Court)

Acting for a bank in the enforcement of a personal guarantee (Royal Bank of Scotland plc v O'Donnell 2013 CSOH 78)

Commercial Property

As Counsel:

Acting in two large dilapidations claims for commercial landlords (one in the Court of Session and one at arbitration)

Acting for a commercial tenant in seeking to establish a right of access to its premises (Court of Session)

Acting for a property owner seeking damages for nuisance, including success at debate (Sheriff Court)

Advising a commercial tenant on the prospects for terminating its lease on account of the landlord's breach

Acting for a tenant in seeking interdict against the landlord from breaching the terms of the lease: agreement reached just before the interim interdict hearing (Court of Session)

As a solicitor:

Acting for a commercial tenant in an Arbitration concerning disputed service charges in a Deed of Conditions

Acting for a commercial landlord in a dispute about the validity of a break notice (Court of Session)

Acting for a property owner in a mediation in a boundary dispute for land with development potential

Advising a commercial tenant on whether consent to an assignation had been unreasonably withheld

Company, corporate finance and tax

As Counsel:

Acting for a company seeking damages from its former director for a breach of fiduciary duty (Sheriff Court Commercial Action)

Advising a director on an application for leave to remain as a director following disqualification

Acting for a shareholder in a petition seeking remedies for unfair prejudice (Court of Session)

As a solicitor:

Acting for a company director defending an application for leave to bring derivative proceedings (Sheriff Court) Construction and Engineering

As Counsel:

Acting for a public body in two large adjudications: one with Senior Counsel and one as lead Counsel

Acting for a sub-contractor in defending a large, six party dispute about defects in a commercial building (Court of Session)

Acting for a building owner seeking to recover damages for defects in a large commercial building (Court of Session)

Insolvency

As Counsel:

Acting for liquidators pursuing misfeasance claims against former directors (Court of Session and Sheriff Court)

Acting for a trustee in sequestration in seeking to reduce an unfair preference (Sheriff Court)

Acting in an appeal concerning gratuitous alienations to the Supreme Court

As a solicitor:

Acting for the Liquidator seeking directions from the Court on whether he could disclaim onerous property in Joint Liquidators of Scottish Coal Ltd, Noters 2013 SLT 1055

Acting for a trustee in sequestration in conducting a private examination of a debtor

Professional Liability

As Counsel:

Acting for Bank in professional negligence claims against surveyors and solicitors (Court of Session)

Acting for a borrower in a claim against a bank for mis-selling and breaches of the FCA Handbook

Public Law, Judicial Review and Human Rights

As Counsel:

Acting for the Home Secretary in judicial reviews in immigration cases, including both human rights and EU law matters

Advice to owners of land in a dispute about the amount of compensation payable following a compulsory purchase

Representing a local authority in a dispute about liability for business rates

Acting in an appeal to the First Tier Tribunal from a monetary penalty notice issued by the Information Commissioner

Advocates Courts & Tribunals

UK Supreme Court, Court of Session (Inner and Outer House), Sheriff Appeal Court, Sheriff Courts, First Tier Tribunal, High Court of Justiciary, local authority sub-committee. David also has experience of adjudication, arbitration and mediation.

Advocates Appointments & Memberships

2015 - Present: Standing Junior to the Advocate General for Scotland

2015 – Present: Member, Faculty of Advocates Human Rights and Rule of Law Committee

2014 – Present: Contributor, Court of Session Practice (Bloomsbury Professional)

2014 – Present: Law Reporter for Session Cases, Scottish Council of Law Reporting

2006 – Present: Part-time Tutor in Law, University of Edinburgh (Property, Trusts and Succession Law)

Publications

2015 – Present: Contributor, Court of Session Practice (Bloomsbury Professional)

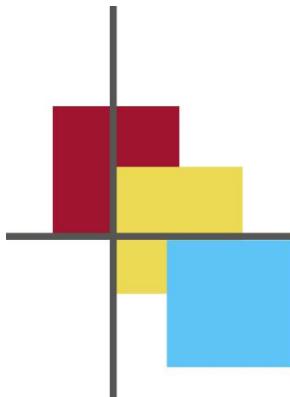
2008: Standard Securities and Variation to the Standard Conditions 2008 SLT (News) 271, co-written with Dr Andrew Steven (Scottish Law Commissioner)

Directories

In 2016, David was ranked by Chambers UK (2017) for commercial dispute resolution in Scotland: "He is recommended by several market sources as an advocate to watch, with his client-handling skills singled out for particular praise." The comments they received from instructing solicitors included: "He is an excellent technical lawyer." "He is a bright and diligent advocate with a growing practice." "He is definitely a star of the future."

Advocates Additional Information

Learning French at the French Institute, Edinburgh



PNLA

Professional Negligence Lawyers Association

Notes:-



Chair's closing remarks and Q&A