



AMPERSAND

ADVOCATES

Ampersand Advocates
Commercial Disputes Conference
20th March 2026



Welcome

The Hon. Lord Sandison



AMPERSAND ADVOCATES DISPUTE RESOLUTION CONFERENCE

Litigating in the Commercial Court

The Hon. Lord Sandison

20 March 2026



The Standing International Forum of Commercial Courts (SIFoCC) brings together the world's commercial courts.

SIFoCC exists for three reasons:

1. Users – that is, business and markets – will be better served if best practice is shared between courts and judiciaries work together to keep pace with rapid commercial change.
 2. Together courts can make a stronger contribution to the rule of law than they can separately, and through that contribute to stability and prosperity worldwide.
 3. As a means of supporting developing jurisdictions (long encouraged by agencies such as the World Bank) to enhance their attractiveness to investors by offering an effective means for resolving commercial disputes.
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1. Commerce depends on the rule of law and case management processes should promote stability, equality and fairness, and be designed to enable disputes to be resolved in a timely and economic manner.
2. Case management should be seen as a means to that end and not as a process for its own sake.
3. Case management entails a judicial grip on the proceedings at all stages; pre-trial, trial, appellate and enforcement.
4. Case management requires the early identification of what is common ground and what the real issues are.

5. Case management should be firm but not rigid. Delay is the enemy of justice and applications for adjournments should be subject to rigorous scrutiny, with sufficient flexibility to accommodate relaxation where appropriate in the interests of justice.
6. Case management involves shared responsibility by parties and their representatives under judicial leadership.
7. The co-operation of the legal profession is crucial to successful case management and should be robustly encouraged.
8. Overriding control of case management should remain in judicial hands, whatever parties may agree amongst themselves.

9. Case management is an integral part of the judicial function and should be afforded adequate time and other resources.
10. Each jurisdiction will have its own unique case management requirements, no one size will fit all.
11. Early involvement of commercial judges in case management is advantageous.
12. The ethos of case management transcends national boundaries and traditions.

13. Case management should be seen as a step towards ADR.
14. Technological developments should be harnessed to improve case management.
15. Appellate case management is equally important.
16. Case management remains relevant to enforcement proceedings.

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Case management should be seen as a step towards ADR

(e) may make such other order as he thinks fit for the speedy determination of the action.

(o) may make such other order as he thinks fit.

DAWN RAIDS

Recovery and Admissibility of Evidence in Commercial Disputes

Eoghainn Maclean & Kirsty Shaw



“DAWN RAIDS” under S1 of the Administration of Justice (Scotland) Act 1972

s.1 – Extended powers of courts to order inspection of documents and other property, etc.

“(1) Without prejudice to the existing powers of the Court of Session [of the Sheriff Appeal Court] and of the sheriff court, those courts shall have power, subject to the provisions of subsection (4) of this section, to order the inspection, photographing, preservation, custody and detention of documents and other property (including, where appropriate, land) which appear to the court to be property as to which any question may relevantly arise **in any existing civil proceedings** before that court or in **civil proceedings which are likely to be brought**, and to order the production and recovery of any such property, the taking of samples thereof and the carrying out of any experiment thereon or therewith.”



Rules / Procedure

Court of Session: Chapter 64 of the Rules of the Court of Session 1994.

Sheriff Court: Chapter 3 of the Summary Application Rules, Part 1.



Petition

Test:

- (1) are the proceedings likely to be brought? **And**
- (2) in relation to those proceedings, does the petitioner have a prima facie, intelligible and stateable case?

*in determining the latter question, it is not necessary or appropriate to subject the pleadings to a detailed examination (Harwood v Jackson, 2003 S.L.T. 1026 (OH))



Petition

Statement of Facts (Rule 64.2)

1. List of documents and other property the petitioner wishes to be made subject to the order (“listed items”)
2. Address of the premises within which the petitioner believes the listed items will be found.
3. The facts which give rise to the petitioner’s belief that were the order not to be granted the listed items or any of them would cease to be available.

Accompanying Documents (Rule 64.3)

- Affidavit supporting averments in the petition.



Petitioner's Undertaking

- “64.3 The petitioner shall lodge with the application – (b) an undertaking that he will:
- (i) comply with any order of the court as to payment of compensation if it is subsequently discovered that the order, or implementation of the order, has caused loss to the respondent or, where the haver is not the respondent, to the haver; and
 - (ii) will bring within a reasonable time of the execution of the order any proceedings which he decides to bring; and
 - (iii) will not, without leave of the court, use any information, documents or other property obtained as a result of the order, except for the purpose of any proceedings which he decides to bring and to which the order relates.



Petition

Prayer (or craves)

- Commissioner to be appointed (senior counsel in COS or solicitor / solicitor advocate in Sheriff Court) who is to explain to the respondents / havers: (i) the meaning and effect of the order; (ii) how claims for confidentiality / privilege work; (iii) right to take legal advice to vary order.
 - Commission and diligence
 - Order for the commissioner to be allowed to enter premises (as specified in the petition) to search and take other steps (including copying documents, taking photos, take possession of listed items, including electronic devices).
 - Allow others to attend to assist the commissioner (solicitors, representatives)
- Respondent to provide access and confirm whereabouts of listed items and how to find them.



PURPOSE OF A DAWN RAID

“The **sole purpose** of that process is to take documents or property in relation to which the court considers a question may relevantly arise in an action likely to be brought into the custody of the court **without giving those in possession of such material an opportunity to conceal or destroy it.** Nothing that is recovered by way of a “dawn raid” is to be disclosed to or put into the possession of the petitioner...**without consent** of the person from whom it was recovered **or an order of the court.** The court places considerable trust in petitioners, their agents, and its own commissioners, to respect that basic principle and all that flows from it.”

**Thorntons Investment Holdings Ltd v Matheson [2023] CSOH 63
at paragraph [43]**



Thorntons Investment Holdings Ltd v Matheson [2023] CSOH 63

PRINCIPLE ONE:

Where the court grants permission for the petitioner to be allowed to inspect documents or property recovered from the dawn raid that will be for the specific purpose of:

“raising proceedings against the respondent along the lines set out in the petition...” [para 9]

The petitioner is not entitled to use the material for other purposes.

R64.4 – modification of undertakings “The court may, on cause shown, modify, by addition, deletion or substitution, the undertaking [given by the petitioner]...”



Thorntons Investment Holdings Ltd v Matheson [2023] CSOH 63

PRINCIPLE TWO:

If an IT expert has been instructed to carry out an examination of electronic devices and report on their findings, that report should be disclosed to the commissioner and court only.

Permission is required from the court for the IT expert's report to be released to the petitioners.



Thorntons Investment Holdings Ltd v Matheson

[2023] CSOH 63

PRINCIPLE THREE

The role of the commissioner should be wholly independent of the petitioner and its agents.

The sole purpose for which a representative of a petitioner is permitted to attend a dawn raid is to provide the commissioner with more specialised knowledge which may assist in determining whether or not a particular item being examined falls within the description of a listed item.

Solicitors on behalf of a petitioner should not routinely be shown items which the commissioner is considering seizing and **not under any circumstances** should the solicitor be shown items that he or she has already decided to seize.



Thorntons Investment Holdings Ltd v Matheson [2023] CSOH 63

PRINCIPLE FOUR

The court should not as “readily” authorise attendance at a dawn raid of a petitioner’s representative or IT expert.

- Clear demonstration that specialised knowledge may be required should be given before authorisation is given.
- IT expert should only be in attendance if it can be shown that an expert is required to examine or image on the spot electronic devices. If the devices are simply seized and taken away for later analysis, an IT expert is not required to attend.



Thorntons Investment Holdings Ltd v Matheson

[2023] CSOH 63

PRINCIPLE FIVE

The court can grant retrospective permission in respect of prior use of material recovered under s1 for purposes not initially allowed.

This will only be done in limited circumstances.

“...the starting point...will be the need to preserve the integrity of the undertaking...and that a correspondingly heavy onus will lie on any party seeking retrospective permission” [para 53]



USE & ADMISSIBILITY OF EVIDENCE FROM THE RAID

Eoghainn MacLean, advocate



- **PROCEDURE AFTER RAID**
- **FULL HEARING**
- **COLLATERAL USE & PERMISSION**



- **PROCEDURE AFTER RAID**



- **FULL HEARING**



- **OVERALL TESTS**

MOORE V GREATER GLASGOW HEALTH BOARD 1978 SC 123 AT P131

TED JACOB ENGINEERING GROUP INC V RMJM 2014 SC 579 (IH) AT §§60-62, 63, 64-65, 75-77, 85, 107, 108

MEX GROUP WORLDWIDE LTD V FORD 2024 SLT 901 AT §47



- **ANSWERS**
- **RELEVANCY ETC**
- **FAILURE TO DISCLOSE**
- **TAINTED EVIDENCE GOT THE ORDER**



- **RELEVANCY ETC**



- **FAILURE TO DISCLOSE**

BELL V INKERSALL INVESTMENTS LTD 2006 SC 507

ARCHER, PETITIONER 2019 SLT 267 AT [43]

**MEX GROUP WORLDWIDE LTD V FORD 2024 SLT 901 AT [43]-
[44]**

PE LTD V TOMINEY 2025 SLT 1089 AT [24]-[27]



- **TAINTED EVIDENCE GOT THE ORDER**



a) **IRREGULARLY OR ILLEGALLY OBTAINED**



b) HUMAN RIGHTS & APPROACH

THORNTONS INVESTMENT HOLDINGS LTD V MATHESON 2023
SLT 1305 AT §§84-91, ESP. §90 "THORTONS NO 2"

COWIE V VITALITY CORPORATE SERVICES LTD 2024 SLT 713
AT §§97-112, ESP §97



c) ADMISSIBILITY

**DUKE OF ARGYLL V DUCHESS OF ARGYLL (No3) 1963 SLT
(NOTES) 42 AT P43**

**BARONETCY OF PRINGLE OF STICHILL, RE 2016 SC (UKPC) 1
AT §§76-78, ESPECIALLY §77**

**THORNTONS INVESTMENT HOLDINGS LTD V MATHESON, ABOVE
AT §84**

COWIE V VITALITY CORPORATE SERVICES LTD, ABOVE AT §99



d) ARTICLE 8

1. EVERYONE HAS THE RIGHT TO RESPECT FOR HIS PRIVATE AND FAMILY LIFE, HIS HOME AND HIS CORRESPONDENCE.

2. THERE SHALL BE NO INTERFERENCE BY A PUBLIC AUTHORITY WITH THE EXERCISE OF THIS RIGHT EXCEPT SUCH AS IS IN ACCORDANCE WITH THE LAW AND IS NECESSARY IN A DEMOCRATIC SOCIETY IN THE INTERESTS OF NATIONAL SECURITY, PUBLIC SAFETY OR THE ECONOMIC WELL-BEING OF THE COUNTRY, FOR THE PREVENTION OF DISORDER OR CRIME, FOR THE PROTECTION OF HEALTH OR MORALS, OR FOR THE PROTECTION OF THE RIGHTS AND FREEDOMS OF OTHERS



d) ARTICLE 8

(1) APPLICABILITY

**REED & MURDOCH, HUMAN RIGHTS LAW IN SCOTLAND, 5TH
ED, §6.96**

**BC V CHIEF CONSTABLE OF POLICE SCOTLAND 2021 SC 265
(IH) AT §§83 & 91-100, 129, 147-149**

**FIVE STAR (INTERNATIONAL) LTD V SHAFATULLA, SHERIFF
STUART REID, 2ND MARCH 2026, GLASGOW**



d) ARTICLE 8

(2) COMPATIBILITY

**THORNTONS INVESTMENT HOLDINGS LTD V MATHESON, ABOVE
AT §§90-91**

**COWIE V VITALITY CORPORATE SERVICES LTD, ABOVE AT
§§105-107**

**FIVE STAR (INTERNATIONAL) LTD V SHAFATULLA, SHERIFF
STUART REID, 2ND MARCH 2026, GLASGOW**



e) **NOT DERIVED**

THORNTONS INVESTMENT HOLDINGS LTD V MATHESON, ABOVE
AT §92-93

HM ADVOCATE V P 2012 SC (UKSC) 108 AT §§27



- **COLLATERAL USE & PERMISSION**

COBRA GOLF INC V RATA 1996 FSR 819 AT 830-832

**IOMEGA CORP V MYRICA (UK) LTD (No.2)1998 SC 636 AT
640I-641B, 646B-G, 654C-F & 656C-D**

DUFF & PHELPS LTD, MINUTER 2022 SLT 450 AT §§5&6

**THORNTONS INVESTMENT HOLDINGS LTD V MATHESON 2024 SC
36 AT §§48-52, 55&56, 62-65 "THORTONS NO 1"**



The End



Construction Law - issues with claims involving Third Parties

Robert Howie KC

20 March 2026



The latest on prescription

Nick McAndrew, Advocate

20 March 2026



Topics to cover

Recent arguments on Section 6(4) (fraud/error)

Amendments to Section 11(3) (discoverability)



An explosive decision

Morrison v ICL Plastics Ltd 2014 UKSC 48

The creditor need only be aware of the existence of the 'loss, injury or damage' that is established under Section 11(1). Subsection 11(3) is therefore read as if it said...

*'the creditor was not aware . . . that loss, injury or damage, **which had been caused** as aforesaid, had occurred' (emphasis added). The creditor has then to be aware only of the occurrence of loss, while the words 'caused as aforesaid' connect the loss to the cause of action.'* (para. [16])



An explosive decision

Before ***Morrison***:

*'... a more or less consistent line of decisions of the Scottish courts to the effect that section 11(3) postponed the start of the five-year prescriptive period until the date on which the pursuer was aware both (a) that he or she had sustained loss **and (b) that the loss had been caused by fault or negligence**'*

**Scottish Law Commission, Report on Prescription (247),
para. 3.2**



The ramifications

Gordon's Trsts v Campbell Riddell Breeze 2017 UKSC 75

The issue:

*'A question which the current appeal raises is whether section 11(3) starts the prescriptive clock when the creditor of the obligation is aware that he or she has spent money **but does not know that that expenditure will be ineffective.**' (para. [18])*



The ramifications

Gordon's Trsts v Campbell Riddell Breeze 2017 UKSC 75

Characterising the loss (Section 11(1)):

*'if, as a result of a breach of contract, **a person purchases defective goods**, incurs expenditure or fails to regain possession of his property when he or she wished to do so, **the section 11(1) clock starts when the person acquires the goods**, the expenditure is incurred or when the person fails to obtain vacant possession of the property'* (para. [19])



The ramifications

Gordon's Trsts v Campbell Riddell Breeze 2017 UKSC 75

Knowledge of the facts that constitute that loss (Section 11(3)):

*'Section 11(3), which postpones the start of the prescriptive period, is concerned with the awareness of the creditor. **But that which the creditor must actually or constructively be aware of before the prescriptive period begins is the same "loss, injury or damage" of which section 11(1) speaks...**' (para. [21])*



The ramifications

Gordon's Trsts v Campbell Riddell Breeze 2017 UKSC 75

Knowledge of the facts that constitute that loss (Section 11(3)):

*'Section 11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively **that he or she has suffered a detriment in the sense that something has gone awry** rendering the creditor poorer or otherwise at a disadvantage.'*



The aftermath

- **Midlothian Council:** knowledge of development expenditure reliant on a ground investigation report (but not that the expenditure was wasted)
- **WPH Developments:** knowledge that a wall had been built (but not that it was an unauthorised encroachment)
- **Tilbury Douglas:** knowledge of a fixed price contract (but not the design issue that meant the fixed price was too low)



The saviour: Section 6(4) to the rescue

'In the computation of a prescriptive period in relation to any obligation for the purposes of this section—

(a) any period during which by reason of—

(i) fraud on the part of the debtor or any person acting on his behalf, or

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,

the creditor failed to make a relevant claim in relation to the obligation... shall not be reckoned as, or as part of, the prescriptive period'



'Section 6(4) has been tested to destruction and beyond in the authorities since the judicial enfeeblement of section 11(3) in its former terms' (para. [76], per Lord Sandison)

The Scottish Ministers v Leggatt & Anr 2026 CSOH 9



Recent discussion of Section 6(4)

Greater Glasgow Health Board v Multiplex & Ors 2025 CSOH 56

- **Threshold test:** *'... the conduct founded upon must have been sufficient to induce an **objective reasonable person** into error. It is perhaps this requirement which explains why **normal everyday conduct** is insufficient to engage section 6(4), since such conduct will not generally, viewed objectively, be sufficient to induce error.'* (para. [139])



Recent discussion of Section 6(4)

***Greater Glasgow Health Board v Multiplex & Ors* 2025 CSOH 56**

- **Attribution of knowledge:** the ‘rules’ of attribution discussed in ***Dryburgh*** (derived from ***Meridian Global Funds***).



A new solution: reform of Section 11(3)

Transitional period: the amended provisions do not apply to claims that would have prescribed before 1 June 2022:

The Prescription (Scotland) Act 2018 (Commencement, Saving and Transitional Provisions) Regulations 2022, Regs. 2(2) & 3(2)



A new solution: reform of Section 11(3)

“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~~ **of each of the facts mentioned in subsection (3A)**, 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.”



A new solution: reform of Section 11(3)

Subsection 3A: the facts referred to in subsection (3) are –

- (a) that loss, injury or damage has occurred.
- (b) that loss, injury or damage was caused by a person's act or omission, and
- (c) the identity of that person.



The new provisions in context

No change to pre-existing law on:

- Characterisation of the loss
- Knowledge of actionability
- Knowledge of detriment

Meaning a limited scope?



Application of new provisions

Case Study 1: *Morrison v ICL Plastics*

- **Limb (a)** – knowledge of loss: ✓
- **Limb (b)** – knowledge of act or omission: ✗
- **Limb (c)** – knowledge of identity: ✗



Application of new provisions

Case Study 2: *Midlothian Council v Raeburn*

- **Limb (a)** – knowledge of loss: ✓
- **Limb (b)** – knowledge of act or omission: ✓ (?)
- **Limb (c)** – knowledge of identity: ✓



Act or omission: what knowledge is relevant?

*'...the recommended new test addresses this point by requiring that there be awareness of the factual cause of loss by an act or omission. If creditors are aware that they have incurred expenditure **but do not know that the reason they incurred it was an act or omission of the debtor (as opposed, for instance, to simply paying the debtor's invoice for services rendered)**, then they do not yet have the awareness necessary for time to start to run against them under the recommended test.'*

Scottish Law Commission, Report on Prescription (247), para. 3.20



Watch this space....



Contract Law Update 2026

Ross G Anderson, Advocate



Two Subjects

- Deemed Purification of contractual conditions: UKSC decision in *King Crude* (2025)
- Termination on reasonable notice: UKPC decision in *Anheuser*



Deemed Purification: *Mackay v Dick & Stevenson* (1881) 8 R (HL) 37

Lord Watson:

"The passage cited by Lord Shand from Bell's Principles (§ 50) to the effect that '*If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor has done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement,*' expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of Scotland, and I think it ought to be applied to the present case."



Deemed Purification and Postestative Conditions

Mackay v Dick & Stevenson (1881) 8 R (HL) 37

Lord Blackburn at :

"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."



King Crude Carriers SA v Ridgbury November LLC [2025] UKSC 39, [2025] 3 WLR 707

- Debt v damages

Opinion by Lord Hamblen and Lord Burrows (with whom Lord Reed PSC, Lord Hodge DPSC and Lord Stephens agreed):

- Lord Blackburn’s dictum approved
- Lord Watson’s dictum on deemed fulfilment so as to trigger a debt held (“*without prejudice to the position in Scotland*”) not to represent English law.
- No discussion of Scots law context



King Crude Carriers SA

2. Deposit

As security for the correct fulfilment of this Agreement the Buyers shall lodge a deposit of 10% (ten per cent) [...] 10% (ten per cent) of the Purchase Price (the "Deposit") in an [...] account for the Parties with the Deposit Holder within three (3) Banking Days after the date that:

- (i) this Agreement has been signed by the Parties and exchanged in original or by email or telefax; and*
- (ii) the Deposit Holder has confirmed in writing to the Parties that the account has been fully opened and ready to receive funds.*

Agreements signed, but buyers failed to provide Deposit Holder with necessary documentation to enable accounts to be opened.

Clause 2(ii) not purified. Sellers terminated but sought payment of the Deposits as debts



MacKay v Dick & Stevenson in Scotland

- Lord Hamblen and Borrows say no convincing explanation for the *Mackay v Dick* principle.
- *Credential Bath Street* [2007] CSOH at [61] per Lord Reed.
- *R D Construction Ltd v Hallam Land Management Ltd* 2011 SC 286 at [55] per Lord Reed (But cf *King Crude* at [59])
- *Beaton and Chemcem Scotland Ltd v Beaton* [2024] CSOH 41 at [53] per Lord Sandison not necessary to “*explore the uncertain limits of this ever-so-slightly antiquated principle.*”
- Role of specific implement in Scots law and *White & Carter (Councils) Ltd*



Uncertain limits: good faith and fair dealing

Dowling v James Methven, Sons & Company Ltd 1921 SC 948 at 956 per Lord Salvesen (with whom Lord Dundas and Lord Ormidale agreed)

To permit defenders to terminate a contract because an agreed level of turnover had not been reached, when the defenders were entirely responsible for the Pursuer not being able to reach that level, would “*be contrary to all fair dealing and to a fair construction of the contract itself*”.



International Benchmarks

Unidroit *Principles of International Commercial Contracts* (2016) Art 5.3.3:

(1) If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on non-fulfilment of the condition.

(2) If fulfilment of a condition is brought about by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the fulfilment of the condition.



International Benchmarks

US (Second) Restatement of Contracts

§ 205: *“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement”*

§ 245: *“Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.”*

Case law refers to implied promises to use good faith, diligence and best efforts



Reasonable Notice: *Anheuser-Busch International Inc* [2026] UKPC 8

Opinion by Lord Hodge. Issue of termination on reasonable notice.

- Oral agreement concluded in 1975 between BHL and ABI (InBev) – no fixed duration – operated for around 40 years without difficulty
- ABI sought to terminate on reasonable notice – 3 months – on 1 November 2015
- BHL argued for three and half years for notice and claimed \$2.4m and refused to pay ABI invoices



Anheuser-Busch International Inc [2026] UKPC 8

- First instance judge held that a reasonable period of notice would have been 15 months
- CA of Bahamas held that period of notice given by ABI (there and half months) was within the range of reasonable periods of notice
- BHL argued for three and half years for notice and claimed \$2.4m and refused to pay ABI invoices
- UKPC upheld Bahamas CA



Anheuser-Busch International Inc [2026] UKPC 8

Whistle-stop tour of case law in Australia, New Zealand, Hong Kong and Canada

Propositions summarized:

1. Whether implied term answered in light of contract
2. Implication of a reasonable period serves common purpose of parties:
 - (a) Purpose to be determined at date of contract;
 - (b) "chief purpose is to enable parties to achieve an orderly end to their relationship: winding-up and opportunity to recipient of notice to make alternative arrangements
3. Length of reasonable notice to be assessed in light of circumstances at time notice given
4. The various factors listed in different cases relevant only to extend they have a bearing upon chief purpose.



Reasonable Notice: Relevant Factors

1. Formality of contract
2. Length of time relationship been in operation.
3. Significance of relationship to business of recipient of notice. Likely to be of “central importance”.
4. Extent recipient invested financial, management and personnel resources into relationship
5. Whether recipient of notice, with knowledge and assent of counterparty, incurred extraordinary capital expenditure or business expenses.
6. Whether recipient has entered into contractual commitments with third parties in reliance of the contract – but period of notice not designed to protect recipient from all financial loss
7. Implied obligation to use reasonable or best efforts to promote counterparty’s business tend to support shorter period



Commercial Contract Law – Recent Developments (Part 2):

Sean White, Advocate



Commercial Contract Law – Recent Developments (Part 2):

- 1) Contract (Formation and Remedies) (Scotland) Bill
- 2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1



1) Contract (Formation and Remedies) (Scotland) Bill

- Bill passed by Scottish Parliament on 3 March 2026.
- *"An Act of the Scottish Parliament to make provision in relation to formation of contract and remedies for breach of contract; and for connected purposes."* (Introductory Text)
- *"Scotland's contract law will be modernised under legislation backed by MSPs, providing clearer rules for individuals and businesses on how legally binding agreements are formed and some of the remedies available when they are breached."* (Scottish Government website).
- Implements recommendations by Scottish Law Commission: *Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses* (Scot Law Com No 252).



1) Contract (Formation and Remedies) (Scotland) Bill

Need for reform:

- Need for clarity, certainty, and accessibility:

"The rules should not be surprising or too far out of line with ordinary common sense, especially in business ... Law which can only be tentatively identified after a trawl through extensive authorities must be condemned as not fit for purpose."

- Limitations of common law:

"A small legal system like Scotland may not produce sufficient case law to enable the law to keep moving with the times."

- Outdated rules and language:

"Some rules also become so firmly fixed over time that, even when plainly inappropriate in contemporary conditions, they cannot be easily shifted by way of judicial decision alone..."

- Commercial and competitiveness concerns:

"Lack of comprehensibility and accessibility... a major factor... when opting for English law rather than Scots law... The review has used the DCFR as a yardstick... [to assess] whether legislative intervention is required in pursuit of... simplification and modernisation of the law."



1) Contract (Formation and Remedies) (Scotland) Bill

Part 1 – formation of contract:

- S.1 – Statutory rules on formation (ss.2-13) = default position. Opt out may be express or implied.
- Ss.2-3 – Requirements for conclusion of a contract: intention + essential characteristics + sufficient content to be given legal effect. Objectively determined.
- Ss.4-10 – Rules on offers and acceptance.
 - S.6 – Offer lapses on fundamental change of circumstances.
 - S.7 – Acceptance by conduct – must be conduct of which the offeror is or ought to be aware. Silence or inactivity insufficient.
 - S.8 – Qualified acceptance = rejection + counter-offer ('battle of the forms').
- Ss.11-12 – Time limits. Acceptance within time specified or within a reasonable time.
- S.13 – Notification. Takes effect on receipt – “when reasonable to expect the person to be able to obtain access to a notification without undue delay”.
- S.14 – Expressly abolishes the postal acceptance rule.
- S.15 – Interpretation of Part 1.



1) Contract (Formation and Remedies) (Scotland) Bill

Part 2 – remedies for breach of contract:

- S.16 – Statutory rules on remedies (ss.17-21, 21A-21C) = default position. Opt out may be express or implied.
- S.17 - Mutuality of contract – Breach by A does not prevent exercising rights arising from any breach by B. Prior to rescission and subject to lawfully withholding.
- Ss.18-21 – reciprocal restitution (*‘restitutio in integrum’*).
 - S.18 - Non-reciprocated benefits only. Repayment, redelivery or payment of value received.
 - Ss.19 – 21 – provisions on approach to valuing a transferred benefit.
- Ss.21A-21D – contractual retention.
 - 21A – Temporary withholding or suspension where breach or material anticipatory breach of counterpart obligation. Presumption of counterpart. Proportionality control.
 - 21B – Notification requirements. Before retention or as soon as reasonably practical.
 - 21C – For party disputing to show that retention is clearly disproportionate.
 - 21D – Coincides with existing legal remedies. Discretion to refuse where inequitable.
- S.22 – Amendment to Law Reform (Contributory Negligence) Act 1945.



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Background:

- Concerned interpretation of termination provisions (Cl. 8.9) in the standard form JCT Design and Build Contract 2016:

8.9.1 *If the Employer:*

1. *does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4.9 and/or any VAT properly chargeable on that amount; or*
2. ~~*fails to comply with clause 7.1 [number not used]; or*~~
3. *fails to comply with clause 3.16,*

the Contractor may give to the Employer a notice specifying the default or defaults (a 'specified' default or defaults).



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Background, cont.:

8.9.3 *If a specified default or a specified suspension event continues for ~~14 days~~ [28 days] from the receipt of notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 21 days from, the expiry of that ~~14 day~~ [28 day] period by a further notice to the Employer terminate the Contractor's employment under this Contract.*

8.9.4 *If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not):*

- 1. the Employer repeats a specified default; or*
- 2. a specified suspension event is repeated for any period, such that the regular progress of the Works is or is likely to be materially affected thereby,*

then, upon or within ~~a reasonable time~~ [28 days] after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract.



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Facts:

- December 2022 - Employer failed to pay the Contractor when payment fell due.
- Following day – Contractor served default notice under clause 8.9.1.
- Employer subsequently paid the contractor what was due, within 28 days.
- May 2023 - Employer again failed to pay the Contractor when payment fell due.
- Following day - Contractor served a termination notice under cl.8.9.4.
- Contractor argued that the May non-payment was repetition of the default specified in the December default notice.
- Employer again subsequently paid the Contractor what he was due and asserted that the Contractor had repudiated the contract.
- Adjudication in Employer's favour.



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Issue:

- Can a Contractor terminate for repeated late payments (under Cl.8.9.4) where each failure to pay has been remedied within the specified period (under Cl.8.9.3)?

TCC - [2023] EWHC 2965 (TCC):

- Mr Adrian Williamson KC (Sitting as a Deputy High Court Judge).
- Decision in favour of Employer (Hexagon).
- Opening words of Cl.8.9.4 "*If the contractor for any reason does not give the further notice referred to in clause 8.9.3 ...*" envisaged a situation in which the Contractor could have served a further notice under Cl.8.9.3 but had chosen not to do so.
- Contractor could not terminate under Cl.8.9.4 unless the right to serve a Cl.8.9.3 had accrued and they had chosen not to exercise it.



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Court of Appeal - [2024] EWCA Civ 962:

- Lord Justice Coulson, Lord Justice Popplewell and Lord Justice Stuart-Smith: Appeal allowed.

*"The correct place to start is with the words that are to be interpreted themselves. **Viewed in isolation, the natural meaning of the conditional words at the commencement of Clause 8.9.4 are clear: [they] are broad enough to cover any state of affairs other than one where the Contractor does give notice.** Put another way, unless the Contractor gives the further notice referred to in clause 8.9.3, the condition is satisfied. Viewed in isolation there is no basis for a submission that the conditional words imply anything about whether the Contractor could or could not have given the notice. That natural meaning is reinforced by the words "for any reason", which (at risk of paraphrasing) mean that there is to be no exception based upon the reason why the Contractor does not give the notice...**The first step, therefore, is that the natural meaning of the words in Clause 8.9.4 viewed on their own does not give rise to an inference or an implication that the Contractor could have given a further notice but did not do so.**" (Para 29).*



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Court of Appeal - [2024] EWCA Civ 962, cont.:

- Context of contract as a whole:

"It is, however, necessary, and vital to view the words in context." (Para 30).

*"[The] answer depends on whether the context supports an interpretation that excludes from the scope of Clause 8.9.4 a case where the Contractor has not had an accrued right to serve a notice under Clause 8.9.3. In order to support such an interpretation there needs to be a sufficient linkage between Clauses 8.9.3 and 8.9.4 so as to imply that Clause 8.9.4 means "if the Contractor ... had or has an accrued right to but does not give the further notice under Clause 8.9.3" ... **inference, though supportable, is not compelling, not least because of the words "for any reason", which remain broad enough to catch a case where the reason why the further notice may not be given is that there is no accrued right to give it**" (Para 31).*



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Court of Appeal - [2024] EWCA Civ 962, cont.:

- Cf. Cl.8.4:

8.4.3 *If the Employer does not give the further notice referred to in clause 8.4.2 (whether as a result of the ending of any specified default or otherwise) but the Contractor repeats a specified default (whether previously repeated or not) then, upon or within a reasonable time after such repetition, the Employer may by notice to the Contractor terminate that employment.*

*"...broad enough to cover cases where the specified default ends either (a) 14 days or more after receipt of the notice under clause 8.4.1 or (b) less than 14 days after receipt. It therefore **covers both a case where the right to give a further notice had accrued and a case where it had not ... since the words "for any reason" are at least as broad as the words "whether as a result of the ending of any specified default or otherwise", the same result must follow for Clause 8.9.4**" (Para 33).*



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Court of Appeal - [2024] EWCA Civ 962, cont.:

- Cf. wording of provisions in earlier versions of standard form contracts:

*"The only point of interest to emerge is that it is common ground that the 1998 version of the JCT Form, as set out above, had the effect that Providence contends should be attributed to the current Standard Form. **We were taken to two cases which considered the 1998 version, neither of which suggested that the termination provisions in that version were uncommercial or otherwise inappropriate**" (Para 38).*

- Commercial common sense:

*"...I agree that the commercial consequences of Providence's interpretation represent a **contractual allocation of risk that is commercially acceptable**, even though it renders the Employer's ice thinner from the outset than would be the case if Hexagon's interpretation were to be adopted." (Para 42).*

- Conclusion:

"Standing back and reviewing the case as a whole, I am persuaded that the plain meaning of the words "does not give", the congruence of those critical words in Clauses 8.4.3 and 8.9.4, and the presence of the words "for any reason" in Clause 8.9.4, when seen in the full context of the terms of the contract and the previous versions of the JCT Form, lead to the conclusion that Providence's interpretation is to be preferred. I reject the submission that the commercial consequences of the rival interpretations should lead to a different result" (Para 44).



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Supreme Court Decision.:

- Employer's Appeal allowed – the contract had not been validly terminated under Cl.8.9.
- Lord Burrows (with whom Lord Reed, Lord Briggs, Lord Stephens and Lord Richards agreed).
- Interpretation of industry-wide standard form contracts (cf. "take it or leave it" standard form):

*"...**clear law that explanatory notes to a contract may be admissible evidence as an aid to interpretation**... not in dispute that the JCT's Design and Build Contract Guide 2016 to the JCT standard form contract (2016 edition) is admissible evidence in interpreting the contract." (Para 24).*

"...the admissible background context may include past decisions of the courts on, and practice in relation to, clauses in an earlier version of the standard form. For example, it may be clear that the standard form has been amended so as to depart from a decision of a court..." (Para 26).

*"However, the general position taken by the courts is that, subject to exceptions, **an examination of what has been termed the "archaeology of the forms" is to be discouraged**..." (Para 28).*



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Supreme Court Decision, cont. – interpreting standard form contracts:

"[Appellant] suggested ... that a different approach applies to the interpretation of a standard form contract, such as the JCT contract in this case ... because ... the aim is to effect the intention of the person who drafted the standard form contract rather than the objective intentions of the contracting parties" (Para 29).

*"In my view, that submission goes too far ... **I readily accept to be correct, that an industry-wide standard-form contract should usually be interpreted consistently for all contracting parties using that form** and, subject to bespoke amendments, that interpretation is unlikely to be contradicted by the objective intentions of the particular contracting parties." (Para 30).*

*"Nevertheless, **the established approach, based on the objective intentions of the contracting parties in the relevant context, should still be applied to the interpretation of an industry-wide standard form contract.** It is not a departure from that approach to say that, where parties choose to use an industry-wide standard form, it can generally be taken that their objective intentions in the relevant context are that their respective rights and obligations should be consistent with those of other parties using the same form and should reflect the objective intentions of those who were concerned with the drawing up of that standard form agreement."*



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Supreme Court Decision, cont. – objective natural meaning:

*“Focussing first on the objective natural meaning of the words in clause 8.9.4, in the context of clause 8.9, **clause 8.9.4 appears to be parasitic on clause 8.9.3 rather than being independent of it.** That is essentially because of the opening words of clause 8.9.4 ie “If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not): ...”. If clause 8.9.4 were independent of clause 8.9.3 there would be no need for those opening words ... In my view, they make clear that the Contractor must have had an accrued right to terminate under clause 8.9.3 before clause 8.9.4 applies ” (Para 32).*

“That interpretation is objectively and contextually a natural one. In contrast, the interpretation put forward by ... the Contractor contradicts the objective natural meaning of the words in their context because, essentially, his suggested interpretation renders the opening words of clause 8.9.4 superfluous. Even if not superfluous, they are on his alternative interpretation unclear and ambiguous” (Para 33).



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Supreme Court Decision, cont. – commercial common sense:

"The objective natural meaning of the words in the context of clause 8.9, contended for by [the Appellant], is supported by that interpretation producing a rational and less extreme outcome than the interpretation contended for by [the Respondent]. *The rational consequence is that it is only where the earlier breach (for which a specified notice of default was given by the Contractor) went uncured for 28 days, and was in that sense particularly serious, that the Contractor can terminate immediately for a further late payment ... While also rational, the contrasting interpretation put forward by the Contractor would produce an extreme outcome."* (Paras 34-35).



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Supreme Court Decision, cont. – criticisms of Court of Appeal decision:

“Stuart-Smith LJ placed great weight on clause 8.4. **Oddly his reasoning started by incorrectly focussing on the natural meaning of the words of clause 8.9.4 "viewed in isolation"** (para 29) although he almost immediately corrected this by making clear that it is "necessary, and vital to view the words in context" (para 30). But what appeared to drive his analysis in favour of the Contractor was his conviction that, because the structure of clauses 8.9 and 8.4 was the same and the words of clauses 8.9.4 and 8.4.3 were so similar, the words in clauses 8.9.4 and 8.4.3 should be given the same meaning...” (Para 36).

“With respect, that **heavy reliance on clause 8.4.3 is misplaced for three main reasons. First, there is no necessary reason why the right to terminate should be symmetrical as between Employer and Contractor** given that the relevant contractual obligations are so different. **Secondly ... clauses 8.9 and 8.4, as incorporated in this contract, were plainly asymmetrical** because the time periods specified ... were different and in respect of clause 8.4, but not clause 8.9, a failure to comply with clause 7.1 was a possible specified default ... **Thirdly, different words were used by the drafter of the JCT standard form in clause 8.4.3 to those used in clause 8.9.4 ... Why use that different wording ... if the two clauses had the same meaning?**” (Para 37).



2) Providence Building Services Limited (Respondent) v Hexagon Housing Association Limited (Appellant) [2026] UKSC 1

Supreme Court Decision, cont. – summary:

- Contrasting positions of unanimous Court of Appeal and Supreme Court decisions highlight continued difficulties with contractual interpretation cases, despite vast jurisprudence.
- Parties will not generally be taken to have included wording in a contractual clause without a reason for having done so.
- Approach to interpretation of industry-wide standard form contracts is the same objective and contextual approach as with interpretation of any other contract, although the parties' objective intentions will generally be taken to be aligned with others using the same form of contract and to reflect the intentions of the drafters.



Protecting Intellectual Property Rights

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Intellectual Property Rights in action

- Up to the 1980s, tangible assets accounted for 80% of company value. These days, the UK Intellectual Property Office estimates that between 70% - 80% of a typical company's value lies in intangible assets.
- Globally, there are in the region of 20 million patents currently in force; nearly 100 million registered trade marks; and an unquantifiable body of copyright and trade secrets.



Intellectual Property Rights in action



The value of IP rights to our economy

- Intellectual property is a key driver for innovation and growth and enables entire sectors of our economy to compete globally.
- It is essential that Scotland is seen as an effective place to resolve intellectual property disputes.



IP Litigation in Scotland: Which Court?

- Sheriff Court or Court of Session?
- Specialist rules – RCS 55
 - Similar to chapter 47 commercial actions
 - Preliminary hearing and a procedural hearing
 - Intellectual property judges



IP Litigation in Scotland

- Court of Session exclusive jurisdiction
- Court of Session non-exclusive jurisdiction



Protecting rights *ad interim*

- Ex-parte hearings
- Prima facie and balance of convenience
- Undertakings given
- Obtained at the applicant's risk -> recall



Protecting rights

- Usefulness of the interdict (*ad interim* or perpetual)?
- Contempt of Court proceedings
 - Interim interdict -> Minute
 - Perpetual interdict -> Petition



Jurisdictional flexibility in IP disputes

- A litigant in many cases will have a jurisdictional choice between raising proceedings in Scotland or England where:
 - there has been cross-border infringement (e.g. via a website or online marketplace); or
 - there is a validity challenge to a registered intellectual property right (e.g. trade mark, patent or registered design) because such challenges can be raised in any of the UK jurisdictions.



Jurisdictional flexibility in IP disputes

- “Grants had a choice of proceeding in either jurisdiction. They elected to sue in Scotland, as they are entitled to do. It would be surprising if it were otherwise given that the alleged infringement is being committed partly in Scotland and Hendrick’s is produced in Scotland. There is no need, where there is jurisdiction in both countries, to raise separate actions in each one. That would be an inefficient use of judicial and court time.” (*William Grant & Sons Irish Brands Ltd v Lidl Stiftung & Co KG* 2021 S.L.T. 889, paragraph 33)



Jurisdictional flexibility in IP disputes

- “It is clear from the approach of the courts in England that the grant of orders, against persons who are domiciled in the jurisdiction, which have an extra territorial effect are commonplace. The same approach is appropriate in Scotland.” (*William Grant*, paragraph 34)



Benefits of litigating in Scotland - the Court of Session

- Less costly than other jurisdictions
- Disclosure:
 - Not automatic like other jurisdictions
 - S1 Administration of Justice (Scotland) Act 1972 orders
 - Court's case management powers
- The ex-parte interim interdict
- The Intellectual Property (Enforcement etc.) Regulations 2006: publication notice



Conclusion

- Huge value of intellectual property to business and the Scottish economy
- There is a fair bit of intellectual property litigation in Scotland – there could be more
- There are benefits to litigating in Scotland versus other jurisdictions



Any questions?



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Questions & Closing remarks

