Litigation in Scotland Report 2026

MFMac

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Foreword

Welcome to the 2026 edition of our annual Litigation in Scotland report.

In this year's Litigation in Scotland report, we look at the current and future trends in Scottish litigation as well as taking a deeper dive into group proceedings, expert evidence, caveats and noise nuisance (in the context of energy infrastructure) claims. We also examine some of the key judicial review cases in Scotland in 2025 as well as taking an in depth look at the impact of the *Finch* decision on environmental and planning law in Scotland.

There has been a plethora of restructuring plans approved in England & Wales but, to date, only three in Scotland. We look at the only Scottish decision on restructuring plans and why they have not been taken up to the same extent as they have in England & Wales.

In personal injury law, we consider asbestos cases and the key differences in asbestos litigation in Scotland compared to England & Wales.

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

Julie Hamilton is a Partner and Solicitor Advocate in MFMac's commercial dispute resolution team.

julie.hamilton@mfmac.com

MFMac has one of the largest and most experienced litigation teams in Scotland. We are committed to providing our valued clients with high-quality, strategic and commercial legal advice.

MFMac's Litigation Team

MFMac has one of the largest and most experienced litigation teams in Scotland. We are committed to providing our valued clients with high-quality, strategic and commercial legal advice. Our clients include leading national businesses, public sector organisations and high-net-worth private individuals and entrepreneurs.

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

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

Our lawyers are also regularly involved in various forms of alternative dispute resolution, including mediation, arbitration and adjudication. Our broad experience gives us the insight our clients need to ensure the successful resolution of any dispute. We recognise that funding litigation can be a challenge, and we offer a variety of options for our clients in appropriate cases, including hourly rates, fixed fees and success fee arrangements. We also work with litigation funders in certain cases to provide cover for our clients' costs and insurance cover for adverse costs, providing clients with the assurance they need before embarking on litigation.

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Current and Future Trends in Litigation in Scotland

Lucy Harington looks at what happened in litigation in Scotland in 2025 and what is coming up.

2025 saw a wide range of litigation taking place in the Scottish Courts. In this article we look at the key trends in litigation in Scotland and what the future holds.

Group proceedings

Group proceedings continue to be a fertile ground for litigation. In particular, there have been several diesel emissions claims raised. These have resulted in decisions being issued on permission to bring group proceedings and the appointment of a representative party. At the end of 2025, *Jaguar Land Rover Automatic Plc and others* were refused permission to appeal the decision on both these points to the Supreme Court.

Public inquiries

Public inquiries have come under scrutiny in 2025 in Scotland with the highly publicised collapse of the Sheku Bayoh inquiry in October 2025. In addition, the cost of inquiries has been highlighted, with an inquiry into the cost-effectiveness of inquiries being launched in April. The report and recommendations were published on 21 December 2025. The recommendations include setting timescales and creating a central budget for public inquiries. Recently published figures showed the total cost of inquires since 2007 to September 2025 had exceeded £250m.

Judicial review

Challenging decisions by way of judicial review continues to be a significant part of the Scottish litigation landscape.

We had been waiting for decisions on the application of the Non-Domestic Rates (Miscellaneous Anti-Avoidance Measures) (Scotland) Regulations 2023 and then, like buses, three came along at once. The judgments were all in relation to various councils' decisions to find landlords liable for non-domestic rates. The judgments provided clarification on the interaction between the Regulations and the Non-Domestic Rates (Scotland) Act 2020 as well as the approach the courts will take.

As we highlighted in last year's report, judicial review continues to be used in ESG cases and the much-anticipated decision in the *Rosebank* and *Jackdaw* cases brought by Greenpeace and Uplift was published at the beginning of the year.

Group proceedings continue to be a fertile ground for litigation, with recent rulings clarifying permission requirements and representative appointments.

Time bar

Prescription (time bar) continues to be a thorny issue in Scotland. In a landmark decision in a dispute about a collateral warranty earlier this year (*Legal and General Assurance (Pensions Management) Ltd v the Firm of Halliday Fraser Munro and Others* [2025] CSIH 24), the Inner House determined that a collateral warranty was not subject to the same time bar as applied to the original contract. This meant a new five-year prescriptive period applied to the warranty and was a notable shift from previous determinations on collateral warranties. An application has been made for permission to appeal to the Supreme Court.

In another case involving time bar issues, *Tilbury Douglas Construction Limited v Ove Arup & Partners Scotland Limited [2024] CSIH 15*, the correct interpretation of sections 6(4) and 11(3) of the Prescription and Limitation (Scotland) 1973 (before the changes made by the Prescription Act 2018) was in dispute. However, the appeal to the Supreme Court has recently been withdrawn. Disputes about interpretation of the legislation will continue to be the subject of litigation.

> **Landmark time bar rulings and a surge in civil court actions signal a shifting litigation landscape.**

Increase in the number of court actions

The statistics published by the Scottish Courts and Tribunals Service indicate that the number of civil court actions raised in the Court of Session and the All-Scotland Personal Injury Court continue to increase year on year. The number of intellectual property cases raised in the Court of Session has also risen over the last few years. However, the number of Sheriff Court actions is still below pre-pandemic levels.

On the ground, we have also seen an increase in breach of warranty claim enquiries over the course of the year. This is likely to be due to a tighter economic climate which means businesses are being more aggressive with their litigation strategies.

What does the future look like for litigation in Scotland?

Group proceedings

This will continue to be a growth area in litigation in Scotland with other types of claims, such as data breaches, being raised as group proceedings. In addition, given the number of existing claims, this will continue to be an evolving landscape.

The legislation that introduced opt-in group proceedings also allowed for opt-out proceedings in Scotland, but that has not yet been brought into force. There is a Scottish Civil Justice Council (SCJC) call for evidence underway on whether opt-out proceedings should be allowed in Scotland. If opt-out proceedings are introduced, it would herald a significant change in Scottish litigation as well as having a wider impact across the UK.

Modes of attendance

The SCJC also issued a call for evidence on mode of attendance at court hearings. They are looking into the court rules that govern whether court hearings are held in-person or virtually. Currently, the rule of thumb is that any procedural hearings are held online but substantive hearings are heard in-person (it is also possible to request a hybrid hearing). It remains to be seen if there will be a change to the court rules and, possibly, a greater emphasis placed on in-person hearings.

Protective expenses orders in environmental claims

In 2025, the SCJC consulted on protective expenses orders and sought views on extending costs protection against an adverse award of expenses in environmental actions to the Sheriff Court (currently, this protection for claimants is only available in the Court of Session).

On 20 January 2026, the SCJC announced that it had decided to extend the availability of costs protection to cover all types of civil procedure that challenge an act or omission regarding the law relating to the environment (except for group proceedings). There will be a further consultation on the proposed rules in June 2026. The revised proposal could increase environmental litigation.

Lucy Harington is a professional support lawyer in MFMac's Litigation Division.

lucy.harington@mfmac.com

Transferred loss

Forthwell v Pontagadea UK Ltd [2024] CSIH 38 is due to be heard in the Supreme Court in March 2026. This case concerns transferred loss (where a party to a contract seeks to recover losses suffered by a third party) and to what extent this principle exists in Scots Law. The Supreme Court decision should provide further clarity. If it confirms the principle is recognised in Scotland, then this will likely open the door for more of these types of claims.

It is clear that with the increased use of judicial reviews, public inquiries and group proceedings, Scottish litigation certainly seems to be evolving and that looks set to continue for the considerable future.

A Year of Development for Scottish Group Proceedings

Julie Hamilton reflects on what has happened in group proceedings over the last year.

2025 marked a period of maturity for Scottish group proceedings, with a number of Court of Session decisions ruling on its operation after five years in existence. This increased activity aligns with rising public awareness, with *City AM* recently reporting that the UK public's recognition of 'class actions' is at its highest level since 2020.

As understanding grows, claimant groups are becoming increasingly confident using the Chapter 26A procedure – increasing litigation risk for businesses (particularly in consumer-facing industries). This article provides a timely overview of recent decisions relating to group proceedings in Scotland and their impact for those involved.

Clarifying preliminary applications

***Joseph Mackay v Nissan Motor Co Ltd & Others* [2025] CSIH 14 / *Milligan v Jaguar Land Rover Automotive plc* 2025 CSIH 16**

As many are aware, prospective claimants must seek permission from the court to initiate group proceedings in Scotland. This initial step is designed to root out claims which clearly should not be brought under Chapter 26A and is comprised of two applications: *(1)* that the representative party is suitable; and *(2)* there is sufficient commonality and a *prima facie* case.

Two Inner House (i.e. appeal) decisions – *Mackay* and *Milligan* – shed light on the court's interpretation of the preliminary applications. We now know that the applications are to be applied sequentially, in that the representative party application must be granted *before* consideration turns to commonality and a case's strength. The judgments also held that the assessments are a matter of judicial discretion and cannot be easily appealed.

Mackay and *Milligan* also marked the beginning of a defining precedent set in 2025: that preliminary applications are not "high hurdles" and should be applied flexibly by judges. Whilst the court acknowledged that the preliminary stage functions to evaluate the appropriateness of a group claim, it was not designed to be an insurmountable barrier.

For instance, the decisions clarified that the suitability of a representative party must be assessed holistically rather than with a strict application of the criteria in RCS 26A.7. Furthermore, claims do not have to be identical in order to have a permissible level of similarity to progress. Nor do written pleadings need to be fully developed, as the court is merely assessing whether there is a "serious question… to be tried" rather than performing any substantive assessment at this early stage.

> **Preliminary applications are not 'high hurdles' and should be applied flexibly by judges.**

Focusing defender effort

***Bell v Volvo Car Corporation & Others* [2025] CSOH 64**

The low threshold for permission set in *Mackay* and *Milligan* was reinforced in the July decision of *Bell*, where the court emphasised that Chapter 26A procedure was intended to improve access to justice and potential claims should not be derailed by technicalities when seeking permission.

The court has clearly adopted a pragmatic approach to permission. As the judge noted in *Bell*, the preliminary stage is not fertile ground for procedural objections, with the climate for defenders doing so being described as "bracing".

As matters currently stand, defenders should therefore recognise the likely difficulty of opposing a group claim at the permission stage and instead focus on substantive preparation and careful analysis of evidence and strategy from the outset.

Maintaining policy objectives

***Michelle Donnelly v Johnson & Johnson Medical Limited* [2025] CSOH 77**

Nevertheless, another 2025 decision provided hope for defenders looking to use the preliminary safeguards to their advantage. In a first for Scotland, the Outer House refused permission for an action to progress as a group proceeding (as discussed in our **recent article**).

The court here found insufficient commonality among claims, noting that significant differences would hinder the efficient use of expert evidence. A small group size further undermined efficiency, making individual actions more appropriate.

This decision highlights the need for applicants to demonstrate clear common issues and procedural benefits in order to be granted permission. For defenders, *Donnelly* signals that weaknesses such as group size and factual divergence remain viable grounds for objection at an early stage – particularly where they cut against the policy objective of efficiency.

Document recovery in group proceedings

***Batchelor v Opel Automobile GmBH & Others* [2025] CSOH 18**

Beyond preliminary applications, *Batchelor* examined the court's powers on document recovery under Chapter 26A. Lord Sandison confirmed these powers are extensive (comparable to those in commercial and IP actions) and exceed standard commission and diligence (document recovery) powers under ordinary procedure.

On the issue of the prospective costs of complying with the order, Lord Sandison pronounced that he did not accept that there is any general rule of law, even in the context of the grant of commission and diligence, that a party to an action is entitled in the first instance to payment or security from his opponent in respect of the costs of complying with an order for the recovery of documents. This is an innovative approach and was stated as afforded to the judge under his wide general discretion under Chapter 26A.

Crucially, the decision in *Batchelor* also emphasised the general power under RCS 26A.27, allowing a judge to make any order they believe is necessary to secure a fair and efficient determination of a group proceeding. It will be interesting to monitor how RCS 26A.27 is used in future decisions to assist with interpretation of other Chapter 26A rules.

> **Judges have wide discretion under Chapter 26A, including the power to make any order necessary to secure a fair and efficient determination of group proceedings.**

Opt-in or Opt-out?

Scottish Civil Justice Council consultation

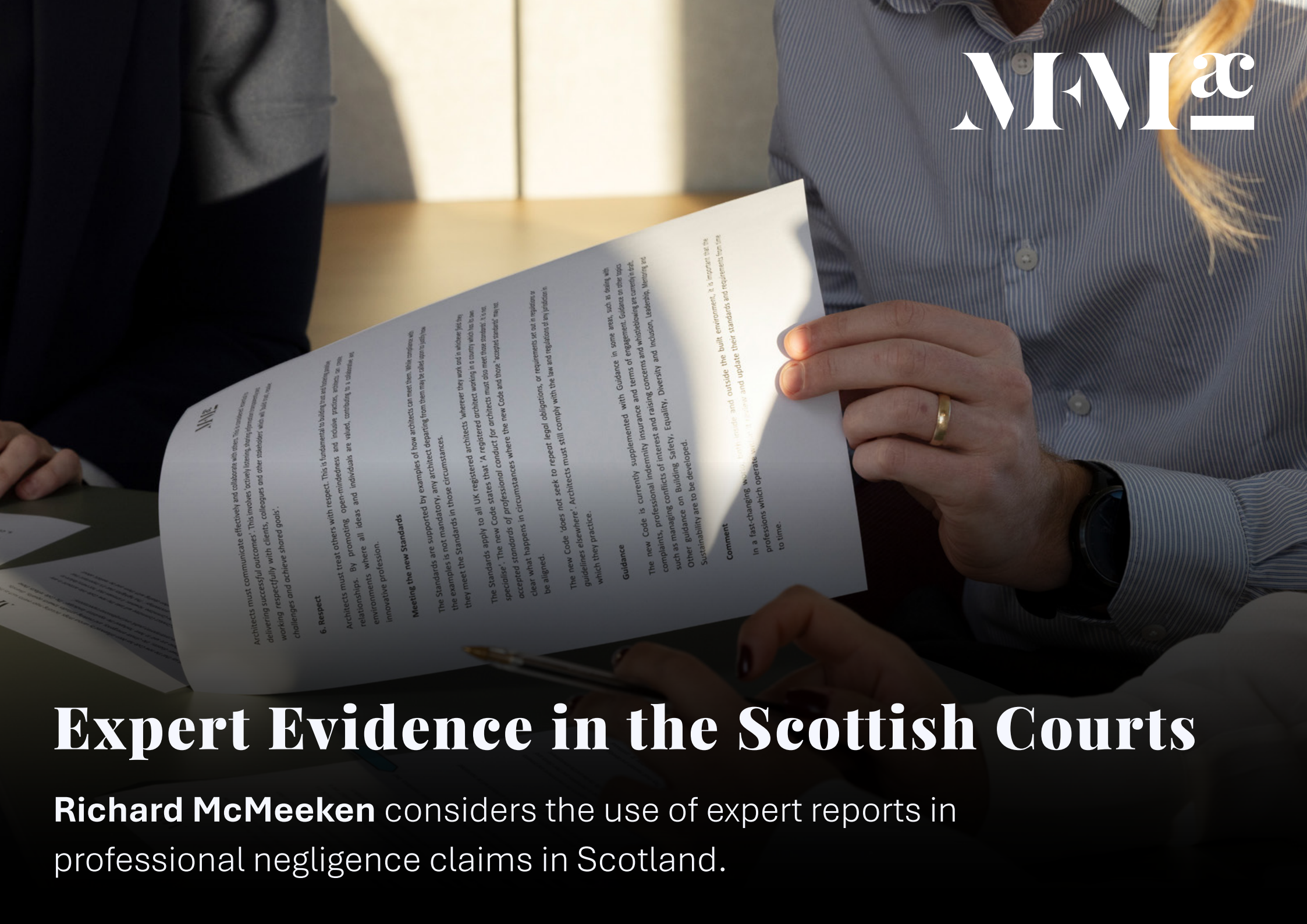
Finally, as we enter 2026, we close by looking at a potentially seismic change to Scottish group procedure currently under consideration. The Scottish Civil Justice Council (SCJC) opened a call for evidence in its consultation on Chapter 26A which, most notably, will consider whether to allow "opt-out" group proceedings in Scotland.

Despite legislation already allowing for opt-out class actions (which automatically includes all potential claimants) in Scotland, current rules only provide for a group proceeding on an opt-in basis (which requires potential claimants to sign up to proceedings). The SCJC now believes it may be time to bring the legislation into full effect.

While opt-out would improve the ability of claimants to raise group proceedings, there is concern that it would mainly benefit litigation funders and dramatically increase demand for limited court resources. Indeed, this concern prompted the UK Government to open a review into the operation of opt-out rules in the Competition Appeal Tribunal.

Julie Hamilton is a Partner and Solicitor Advocate in MFMac's commercial dispute resolution team.

julie.hamilton@mfmac.com



Expert Evidence in the Scottish Courts

Richard McMeeken considers the use of expert reports in professional negligence claims in Scotland.

One of the key considerations in any professional liability claim is the instruction of an expert report to support the pursuer's claim that the defender has acted in breach of duty. However, in *Cockburn v Hope* [2024] CSOH 69, Lord Sandison queried whether, in Scotland, an expert always requires to be instructed.

Background

The claim was not a difficult one. It was an action for payment of money arising out of the defender's alleged breaches of duty in the course of her activities as the judicial factor on the estate of the pursuer's father. These were said to include that the defender did not act quickly or effectively to deal with the father's various activities, failed to remove or address the activities of an errant company director, and dealt with property in a way which diminished its value.

However, the pursuer had raised the action without a supportive expert report and the defender's counsel submitted at debate, with reference to Lord Woolman's judgment in *Tods Murray WS v Arakin Ltd* [2010] CSOH 90, that doing so was an abuse of process.

The need for an expert

Lord Sandison recognised that the view expressed by the defender's counsel was a popular one but was unconvinced that it was supported either in principle or by authority. He accepted that in very many cases it would be impossible to determine that the test had been met without an expert witness providing the evidential material necessary in order for the court to reach a conclusion. A good example was *JD v Lothian Health Board* [2017] CSIH 27, which was a complex medical negligence case based on an allegation of misdiagnosis. Lord Brodie's comments in that case about the necessity of an expert report had to be read in light of the factual background.

Lord Sandison did not consider that the other cases cited by the defender's counsel were supportive of the proposition that a failure to produce an expert report was always a problem for the pursuer. In *Chisholm v Grampian Health Board* [2022] CSOH 39, Lord Clark had observed that "expert evidence must be provided to support causation" but caveated his remarks with the words "In a clinical negligence case of this kind..."

> **Failure to produce an expert report is not automatically an abuse of process; its necessity depends on the nature and complexity of the case.**

Addressing the *Arakin* judgment, Lord Sandison explained that he considered it to have a "considerable and somewhat curious gravitational pull" in Scotland given the "extended and tortuous procedural history", that it involved a "notorious party litigant" and that the counterclaim (in which the lack of an expert report was relevant) was dismissed as an abuse of process given that it was obvious that the claim was entirely without merit. The lack of an expert report in that case was, according to Lord Sandison, "an indication or badge of the lack of merit rather than its fount".

Lord Sandison recognised that Lord Braid had recently commented when considering an English case of *Levicom International Holdings BV v Linklaters* [2010] EWCA Civ 494 that it was "striking" that two members of the English Court of Appeal had, when dealing with a similar situation, reached their own conclusions on the question of negligence without any expert evidence having been led. Lord Braid had observed that "whatever the position may be in England, in Scotland expert evidence would always be required before the court could find negligence established", under reference again to *Arakin*. However, the question of a lack of an expert report had not been central to Lord Braid's analysis and, therefore, he had not analysed the issue in any more depth.

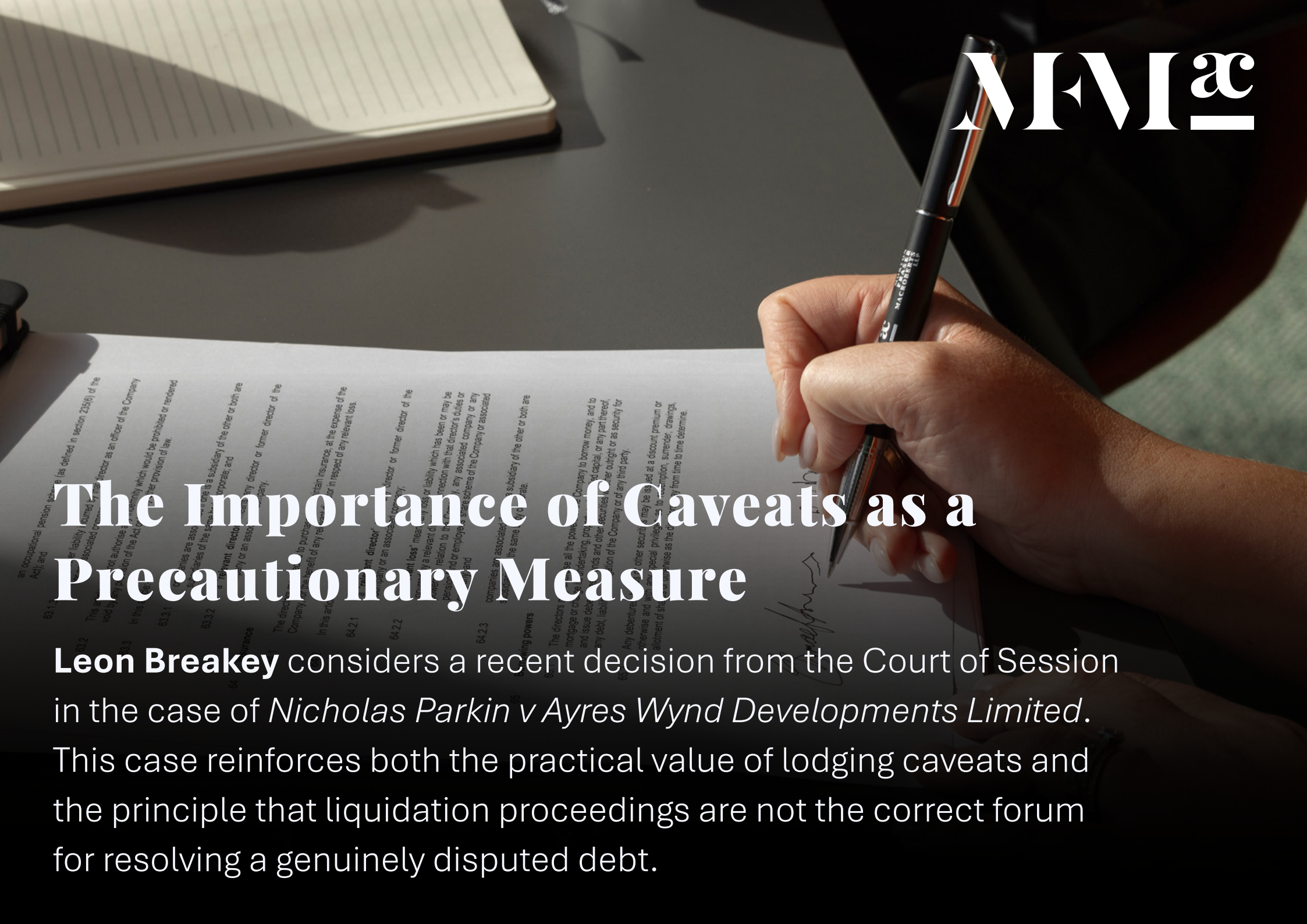
Richard McMeeken is a Partner and Solicitor Advocate in MFMac's commercial dispute resolution team.

richard.mcmeeken@mfmac.com

In Lord Sandison's opinion, the position in Scotland was summed up perfectly by Lord Diplock in the English case of *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 in which the court considered that when dealing with issues of professional negligence concerning members of the legal profession, the judge would be as well-placed as any expert to opine on the breach of duty. Lord Sandison considered that Lord Diplock's approach could be widened by asking whether the question the court is being asked to resolve is simply what reasonable decisions or courses of action were or were not open in a particular and ascertained or agreed set of circumstances? If that is the question then expert evidence may well be unnecessary and, if it is provided, may be "lacking in value or even inadmissible".

Reflections

Lord Sandison's decision is an interesting one and puts the cat amongst the pigeons a little in Scotland when it comes to expert evidence. It is also interesting that the court relies on English authority with Lord Sandison opining that it would be unsatisfactory to simply say "England is another country and they do things differently there" as can sometimes be the case in the Scottish courts. Notwithstanding Lord Sandison's views, however, it will still be a brave solicitor who embarks upon a professional liability claim in this jurisdiction without the comfort of a supportive expert report.



The Importance of Caveats as a Precautionary Measure

Leon Breakey considers a recent decision from the Court of Session in the case of *Nicholas Parkin v Ayres Wynd Developments Limited*. This case reinforces both the practical value of lodging caveats and the principle that liquidation proceedings are not the correct forum for resolving a genuinely disputed debt.

What is a caveat?

A caveat is a document that can be lodged in the Scottish courts in the name of an individual or a company to act as an early warning mechanism. If another party seeks interim orders, for example, an interim interdict (injunction), or initiates insolvency proceedings such as the winding up of a company, the caveat will trigger notification to the caveat holder (the caveator).

Where a caveat is in place, no interim orders will be granted without the caveator being given the opportunity to be heard at a caveat hearing. Without having a caveat, first orders for service and advertisement of insolvency proceedings may be issued without warning, leaving the affected party unaware until it is too late to respond. This early notification allows immediate action and can prevent unfavourable orders from being granted unchallenged.

Parkin v Ayres Wynd Development Limited: What happened?

Mr Parkin sought to wind up Ayres Wynd Developments Limited ("the company") on the basis that the company could not pay its debts as they fell due in terms of section 123 of the Insolvency Act 1986. He was a director and shareholder of the company and claimed it owed him almost £1.4m. As the company had a caveat in place, a caveat hearing was assigned before any orders were granted by the court.

At the caveat hearing, arguments centred initially on standing. The company was already in administration but the appointment was contested. The putative administrators had filed notice to move from administration to voluntary liquidation. Mr Parkin contended that only the company had a caveat lodged and therefore the directors (as third and fourth respondent) could not address the court. He also argued that, because the company was in voluntary liquidation, the directors could not instruct legal representation on the company's behalf as the decision-making powers now lay with the liquidator.

Lord Lake rejected the petitioner's arguments. Both the petition process and caveat hearings are public, meaning that anyone present who has an interest in the petition is entitled to be heard. The company's voluntary liquidation was also separately disputed and was the subject of other ongoing proceedings. As such, Lord Lake could not assume that the company was in liquidation as this would essentially determine the outcome of the current petition. By declining to determine the validity of the voluntary liquidation, Lord Lake held that legal advisers for the company were properly instructed.

First orders and a disputed debt

While the Court of Session Rules provide that first orders *shall* be granted, Lord Lake confirmed that this must be read alongside the Rules as a whole, in particular that a caveat may be lodged against an order for the winding up of a company. Lodging a caveat indicates an intention on behalf of the caveator to be heard, and therefore the court having heard the party, may decide to refuse first orders where appropriate.

On a review of the authorities including *Foxhall & Gyle Nurseries Limited, Petitioners* and *PEC Barr (Holdings) Ltd v Munro Holdings UK Ltd*, Lord Lake reiterated that first orders should be granted unless the respondents were bound to succeed in their opposition to the petition. In this regard, Lord Lake relied on *Mac Plant Services v Contract Lifting Services*, in which Lord Hodge held that a winding up petition was not the process for determining a disputed debt and where the respondent company can show that the debt is disputed in good faith and on substantial grounds, then the petition will likely be dismissed.
The English courts adopted a similar approach in the case of *IPS Law LLP v Safe Harbour Equity Distressed Debt Fund 3 LP*.

> **Maintaining a caveat ensures parties are heard before interim orders are granted, preventing unfavourable decisions being made without notice.**

The existence of the debt itself was at the heart of the current petition. Although the petitioner provided evidence of payments made, no affidavit was lodged explaining the basis of the alleged debt or the relevancy of the payments. The company, in contrast, maintained that the debt had been satisfied and produced evidence in support of that position.

The court refused to grant first orders, effectively dismissing the petition. Lord Lake said that this was a "paradigm of where there is a substantial dispute and the matter ought not to be resolved in a petition for winding up."

Lessons learned

This judgment clearly illustrates the value of maintaining caveats. Had the company not lodged a caveat, first orders would likely have been granted without its knowledge and without being given an opportunity to dispute the debt upon which the petition was based.

Leon Breakey is a Partner in MFMac's commercial dispute resolution team, specialising in insolvency and company law matters.

leon.breakey@mfmac.com

Noise Nuisance Claims in Scotland

Isobell Reid takes a look at noise nuisance claims in Scotland, particularly claims relating to energy infrastructure.

Noise nuisance is an area of law which is receiving a lot of attention in courts around the UK and Ireland, specifically with regards to noise emanating from wind turbines and other energy infrastructure.

What is nuisance in Scots law?

At common law, the principal authority for nuisance in Scotland is *Watt v Jamieson*. This case is authority for the proposition that nuisance will be established if the invasion complained of can be demonstrated to be more than what the reasonable proprietor ought to be expected to tolerate, taking into account the circumstances of both parties.

In Scotland, the test is whether, objectively, a potential pursuer has been exposed to something that is more than what is tolerable, giving due weight to the surrounding circumstances of the offensive conduct and effects. This has been applied by the Scottish courts by asking whether a reasonable person would be of the same view as a potential pursuer.

Noise, and other issues such as smells or artificial light, can also be statutory nuisances under the Environmental Protection Act 1990. To be a statutory nuisance, the issue must either be a nuisance or be prejudicial to health. Statutory nuisance is dealt with by the local authority who have the power to serve an abatement notice.

> **Nuisance in Scots law is established where the interference is more than what a reasonable proprietor ought to tolerate, assessed objectively in light of all circumstances.**

What level of noise is more than reasonably tolerable?

Silence is not an absolute right, and the assessment is objective in nature. For example, a noisy toilet in a neighbouring flat has been found to be a level of noise that a reasonable person had to tolerate.

Although not a noise nuisance case, a case about nuisance in respect of fungus growing on a property determined that whether something is reasonably tolerable is dependent on the facts and circumstances and can only be decided after enquiry. Every case of nuisance will therefore turn on its own facts.

What if the nuisance complained of was already present before a claim is raised?

It is now well settled in law that there is no obligation on a person to tolerate a nuisance where the nuisance has been going on since before the person bought their property. There is Supreme Court authority that coming to a nuisance is not a defence. It is also not a defence in a claim of nuisance that the activity in question is of public benefit. However, it may be relevant to any defence that the aggrieved neighbour has changed the use of their land.

What if there is planning permission in place?

The Supreme Court has held that planning permission is not usually a defence to a nuisance action. However, if the activity for which planning permission was granted was of benefit to the public, then public interest can be a relevant factor when considering whether to grant an injunction (interdict).

In a Scottish case, *Milne v Stuartfield Windpower Ltd*, a couple brought a legal claim against a wind energy company. They said the noise from nearby wind turbines was so disruptive that it amounted to a statutory nuisance. The wind energy company argued that the turbines complied with planning permission, including noise limits. Their position was, as people have different sensitivities to noise, personal complaints were not enough. The court said meeting planning conditions does *not* protect a company from nuisance claims and you do not need scientific evidence to prove a nuisance; clear, honest descriptions from affected individuals can be enough.

It is also worth noting that shadow flicker (flickering light effect caused by rotating wind turbine blades casting moving shadows across nearby homes) is also a potential issue. Very recently, a wind farm operator in Scotland had to shut down its wind farm following a complaint of shadow flicker from a neighbour. The Council found that it was in breach of a planning condition and, in this case, the operator implemented additional shutdown protocols on a voluntary basis, such that a nuisance claim was not necessary, but it does highlight the potential for nuisance claims arising from shadow flicker.

In a recent Irish decision concerning noise nuisance from wind turbines, the court also ruled that meeting the noise limits in planning permission does not automatically mean that the noise is reasonable. The impact on people living nearby also needed to be considered.

Remedies

Interdict

When a party wants to stop a nuisance in Scotland, the remedy is interdict (a court order preventing the nuisance from continuing). Interim interdict can also be sought before the defender is notified, provided that the test for interim interdict is met.

However, the Scottish Courts may delay or refuse perpetual interdict if immediate enforcement would harm the public interest or cause disproportionate injury to the defender. In *MacBean v Scottish Water*, a claim over unpleasant odours failed because the court accepted Scottish Water's evidence and efforts to remedy the issue. The balance of convenience therefore tipped against interdict.

In addition, where interdict would disrupt essential services or production, the courts may suspend enforcement while remedial measures are carried out.

Interim interdict also carries risk. If it is recalled, it is deemed wrongful, exposing the complainer to damages. Certainly, in wind turbine cases, a claim for damages is likely to be a significant sum.

Damages

Another remedy available is an award of damages in respect of harm to health or economic harm connected to property disturbance. However, negligence needs to be proven by the complainer. It is not enough that the nuisance happened, there needs to be a breach of duty by the neighbouring proprietor.

In a recent Irish case, significant damages were awarded against the wind farm operator in addition to an order for the three turbines to be shut down.

Isobell Reid is a Partner in MFMac's planning law team.

isobell.reid@mfmac.com

Practical considerations

It appears from the case law that the courts in Scotland have taken into consideration the operator's actions when confronted with a nuisance complaint. Early intervention by an operator is essential and they should respond to any complaint promptly.

It is also common in Scotland for parties to enter into co-operation agreements (noise disturbance agreements). These are voluntary, contractual arrangements typically between wind farm developers/ operators and local residents providing for compensation or other community benefits. They are not mandatory but are common in Scotland and typically provide financial compensation to offset the impact of wind farm noise (and sometimes shadow flicker) and ensure residential amenity. Such an agreement will not automatically negate a nuisance claim, but it could be a strong factor in any defence. It is unlikely to prevent a nuisance claim if the agreed-upon noise levels are still unreasonable or if the agreement was not followed.

Conclusion

To date, the Scottish courts have only considered statutory noise nuisance and have taken a fairly pragmatic approach. Given the number of energy projects in Scotland, it is likely that more claims, including common law claims, will be brought against operators in the future.

> **Planning permission does not shield against nuisance claims; courts assess reasonableness and may grant interdict or damages even where conditions are met.**

Restructuring Plans in Scotland

Nicola Ross looks at the use of restructuring plans in Scotland and considers why their use might be less prevalent in Scotland in comparison to the take-up in England.

The statutory restructuring plan mechanism, introduced by the Corporate Insolvency and Governance Act 2020, introduced a flexible, court-sanctioned tool to rescue financially distressed businesses. The take-up in England and Wales has been widespread, with several well-known names having plans approved. However, despite being available since summer 2020, Scottish restructuring plans remain remarkably rare.

As of January 2026, official statistics from the UK Government record only 3 restructuring plans in Scotland registered under CIGA between 26 June 2020 and 31 December 2025[1]. This is in contrast to the figures for England and Wales which show a total of 57 restructuring plans over the same period (with 22 being registered in 2025 alone).

Dobbies Garden Centres: The first reported decision from the Scottish Courts

It had been thought that a major factor in the slow uptake of restructuring plans in Scotland was the absence of Scottish precedent as, until recently, there was almost no case law to guide practitioners which caused doubt over how the process would work in Scotland.

That changed with the sanction of the Dobbies' restructuring plan in December 2024. When sanctioning the plan, the court issued a **fully reasoned decision** which provided clarity on how the Scottish courts will consider matters such as treatment of creditor classes, the relevant alternative, fairness test and the cross-class cram down (which, in the case of the Dobbies' plan, was allowed).

It had been hoped that this comprehensive opinion would be a game-changer: providing restructuring professionals with clarity on how the Scottish courts will apply the legislative framework, reducing uncertainty and legal risk about cross-class cram down in a Scottish context, and therefore making restructuring plans more attractive. Yet even now, with that precedent in place for over a year, the overall number of plans proposed in Scotland remains very small.

[1] **Commentary: Company Insolvency Statistics – December 2025 | GOV.UK**

Why restructuring plans remain rare in Scotland

Several factors may help explain the reluctance of Scottish companies (and their advisers) to adopt restructuring plans:

Complexity and cost

The process is court-based, requires convening multiple classes of creditors, preparing explanatory statements, legal and valuation advice, often expert evidence, and involves considerable court and administrative costs. For many companies – particularly smaller or medium-sized enterprises – those overheads will often outweigh the expected benefit and may mean that the company simply runs out of money (and therefore time) before a restructuring plan can be sanctioned.

Role of the Court Reporter

The Scottish Courts have made it clear that they expect a Court Reporter to be involved in the Restructuring Plan process. The Reporter is a court appointed professional (typically a solicitor operating in private practice but may also be an accountant) who is there to report to the court on whether the requirements of the legislation and court process have been followed. The costs of the Court Reporter are met by the company which proposes the restructuring plan and is therefore an important consideration for companies considering plans. Court Reporters are not involved in the restructuring plan process in England and Wales so this is an important distinction between the jurisdictions.

Market structure skewed towards SMEs

Scotland's economy is characterised by a high proportion of small and medium-size enterprises. Historically, tools such as company voluntary arrangements (CVAs) have played a relatively limited role in Scotland because of this market structure. The same seems to be true, for now at least, with restructuring plans.

Risk-reward imbalance for smaller businesses

For a small company, the time, expense, and uncertainty of convening creditor meetings, obtaining consents or relying on cram down may not make sense, especially where liquidation or informal creditor compromises may achieve similar net returns at lower cost.

Taken together, despite the availability of the statutory tool, the practical threshold for using a restructuring plan remains high. The evidence from Scotland suggests that, for the time being, they will typically be limited to larger companies (e.g. Premier Oil, Dobbies) with complex creditor or lease obligations, secured lending, or multi-site retail/property liabilities where the cost and complexity may pay off in value preservation or going-concern rescue.

> **Despite being available, restructuring plans remain rare in Scotland due to high cost, complexity and a market dominated by SMEs.**

Future outlook

There is, of course, the possibility that as knowledge of the tool grows in the Scottish market and it is seen to be used successfully (particularly for smaller businesses) across the whole of the UK, that the number of restructuring plans proposed and sanctioned in Scotland will increase.

Legislative change would also help promote their use as might a reduced role for a Court Reporter (or perhaps even, over time and when the court is more familiar with the mechanics of restructuring plans, removal of that role). A lower level of overall financial investment needed to put a restructuring plan into place would lower the threshold for what may constitute a viable restructuring plan, making them more accessible to the wider Scottish business landscape.

Given the high degree of flexibility on offer, at the same time as the ability to bind creditors to an agreement (even if it is against their will) that helps secure the survival of the business, the restructuring plan should be an incredibly useful part of the toolkit available to directors of distressed businesses. The turnaround of a distressed business would often be a much better outcome than a liquidation (either CVL or compulsory) and it is very much hoped that restructuring plans move on from their slow start in Scotland and become more widely used.

Nicola Ross is a Partner and insolvency specialist in MFMac's commercial dispute resolution team.

nicola.ross@mfmac.com

Judicial Review in Scotland

It has been a busy year with Scottish judicial reviews covering many areas. **Jenny Dickson** and **Ewan McGillivray** highlight some of the key decisions from 2025.

Challenging the UK Government

Mr and Mrs Fanning challenged both the UK and Scottish Governments' approaches to winter fuel payments to pensioners. The UK Government decided to make this benefit means-tested in 2024. The Scottish Government wanted to keep it universal. However, when the block grant paid to Scotland was adjusted down due to the UK Government's decision, the benefit was means-tested in Scotland as well. The petitioners relied on a number of points including failures to carry out an impact assessment and consult pensioners. The State has wide discretion when allocating limited resources. The court held that the parliamentary control mechanisms in place are sufficient, without the need for additional safeguards to be imposed, such as the requirement to consult. There was no legitimate expectation of consultation. The case was also interesting as it found the petitioners had standing to challenge a decision by the UK Government. Although this did not directly impact them, it was said to have 'rippled out beyond England and Wales' sufficiently to confer standing.

As the judicial review was unsuccessful, the court did not address the question of remedies. It remains to be seen what remedy might be considered competent by a Scottish court in relation to a decision of the UK Government implementing a policy change which had direct effect in England and Wales only.

Challenging inquiries

Scotland continues to see many inquiries to review matters of public concern. This has led to Judicial Reviews challenging decisions by Public Inquiries and a Fatal Accident Inquiry.

One such case involved a decision of the Chair of the Scottish Hospitals public inquiry to refuse to allow a party's expert report as evidence. The basis was that allowing this in would result in the inquiry becoming more of an adversarial process than an inquisitorial one. The evidence was also late and threatened the inquiry's timetable. However, the court decided, on natural justice grounds, that the expert evidence ought to have been admitted, noting that the evidence would assist the Chair in making findings.

The Scottish Police Federation raised a Judicial Review against the Chair of the public inquiry into the death of Sheku Bayoh. It was argued that the Chair should recuse himself due to concerns about a lack of transparency about meetings he had with the deceased's family. Before a decision was issued in the Judicial Review, the Chair of the inquiry resigned. The inquiry started over five years ago and is investigating a death that occurred in 2015. Concluding the Inquiry will be a considerable challenge for a new Chair.

A Judicial Review also challenged a decision of the Sheriff in a Fatal Accident Inquiry. This was the first challenge of a determination made under the Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016. Dr Duncan was the GP who had treated the deceased prior to death. She had not considered it necessary to refer the patient to the Paediatric

Assessment Unit (PAU). The Sheriff accepted evidence that the GP could not be criticised for this, using the test of a doctor exercising ordinary skill and care. However, in the Determination, the Sheriff also found that making the referral to the PAU was a reasonable precaution which might realistically have resulted in the death being avoided. Dr Duncan, perhaps concerned that the Sheriff's decision would be seen as a criticism of her, raised Judicial Review proceedings and argued that the Sheriff had erred in law in making the finding about the referral to the PAU. The court rejected this, there being nothing in the statutory language precluding a finding about a reasonable precaution being made, where another option, also reasonable, was available.

Challenging whether the duty to give reasons has been complied with

Finally, a case against Western Isles Council considered the common law duty to give reasons for an administrative decision, where the relevant statute gives rise to no express obligation on the public body in question. This is an area where there is a dearth of caselaw in Scotland. The case considered the local authority's duty under the Social Work (Scotland) Act 1968 to assess an individual's community care needs. The court decided that the terms of the Council's own forms to be completed by the individual (which included questions such "What do I want to achieve?" and "How will we achieve this?") established the common law duty to give reasons. The questions quoted implied that the individual's wishes about their care are of significance and effect will be given to them where possible.

Conclusion

The jurisprudence continues to develop, as decisions in a range of areas are challenged. What might we see in 2026? So far, there have been no Judicial Reviews in Scotland tackling the thorny issue of asylum hotels. Scottish Local Government elections are, though, due to take place in May 2026. Reform is currently polling above the Conservatives, and they have pledged to challenge asylum hotel decisions, so we may see an increase in these cases next year.

> **Judicial review in Scotland continues to evolve, with courts affirming wide discretion for government decisions while reinforcing principles of natural justice and the duty to give reasons.**

Jenny Dickson is Chair, Partner and Solicitor Advocate in MFMac's dispute resolution team.

jenny.dickson@mfmac.com

Ewan McGillivray is a Legal Director in MFMac's dispute resolution team.

ewan.mcgillivray@mfmac.com

Environmental Impact Assessment and Downstream Emissions: *Finch* in Scotland

Cameron Greig explores the impact in Scotland of the UK Supreme Court's decision in *Finch* and the creative remedies which the courts have arrived at while the law in this area continues to develop.

The UK Supreme Court issued its landmark decision in *Finch* in June 2024 which clarified that downstream emissions may need to be included in the Environmental Impact Assessment ("EIA") of certain projects. The Supreme Court's judgment had immediate consequences for fossil fuel projects across the country. In England, the planning consent for the UK's first deep coal mine in decades, at Whitehaven, was successfully challenged in the High Court on the back of the decision whilst, in Scotland, environmental campaigners successfully pursued challenges in the Court of Session to the consents for the Jackdaw and Rosebank oil and gas fields.

In the Scottish challenges, the interesting and fundamental question for the court was the nature of the remedies which should be granted.

The decision in *Finch*

The *Finch* decision involved a judicial review of Surrey County Council's approval for the extension and operation of an existing oil site including the drilling of four new wells. The EIA for the project had assessed the greenhouse gas emissions from the site's construction, production, decommissioning and subsequent restoration. However, the key question for the court was whether the EIA should have also considered downstream greenhouse gas emissions which would result when the oil extracted from the development site was refined and combusted.

The Supreme Court, by a 3:2 majority and overturning the previous High Court and Court of Appeal decisions, held that the downstream emissions were indeed "effects of the project" which required to be assessed. The court's view was that what constitutes an effect of a project is ultimately a question of causation. In this case, the court was content that the extraction of oil at the site would initiate a causal chain leading to the combustion of the oil and the consequent release of greenhouse gases; the majority were of the view that this outcome was not only likely, but inevitable. The court considered that the causal chain would not be broken by any intervening steps between extraction and combustion such as refinement. Interestingly, the court also noted that the legislation does not impose any geographical limits to the environment effects of a project.

On this basis and as there had been no assessment of the downstream effects of the development, the court held that the planning consent which had been granted was unlawful and fell to be quashed.

> **The Supreme Court held that downstream greenhouse gas emissions from oil extraction are 'effects of the project' and must be assessed in an Environmental Impact Assessment.**

The Scottish challenges: Rosebank and Jackdaw Fields

While *Finch* was on its long journey through the courts, consents were granted for the Rosebank and Jackdaw oil and gas fields off the coast of Scotland. Consent for the Jackdaw field was granted on 27 May 2022, three months following the Court of Appeal decision in *Finch*, while the Rosebank field was granted five days before *Finch* was heard in the Supreme Court. The decisions to grant consent were both challenged in the Court of Session by environmental campaigners and those court actions were sisted (paused) pending the Supreme Court decision in *Finch*.

In light of the Supreme Court decision, parties agreed that the decisions to grant consent were unlawful as the EIAs had not taken downstream emissions into account. The cases ultimately called before Lord Ericht who had the task of deciding the appropriate remedy: should the consents be quashed or would a declarator that the consents were unlawful be sufficient so that the projects could continue to proceed as planned? Lord Ericht delivered his judgment in January 2025.

In coming to his decision, Lord Ericht took into account the potential prejudice to public and private interests. The three main interests which he balanced were: *(1)* the public interest in authorities acting lawfully and in good administration; *(2)* the private interests of the public in respect of climate change issues arising out of the projects; and *(3)* the private interests of the developers.

Lord Ericht concluded that the public interest in authorities acting lawfully and the private interests of members of the public regarding the climate impacts on the one hand outweighed the private interests of the developers on the other.

However, Lord Ericht pragmatically decided to suspend the quashing of the consents until a fresh decision on the projects had been reached and ordered that no oil or gas can be extracted from the sites in the interim period.

Going forward

Whilst *Finch* is certainly a landmark decision in planning and environment law, important questions remain as to the scope of the duty to assess downstream emissions and as to the proper approach to the key question of causation. As such, further challenges will continue to come forward. In this context, Lord Ericht's decision provides valuable insight into the bespoke and creative remedies that courts can provide whilst the law in this area continues to develop.

Cameron Greig is a Legal Director in MFMac's planning law team.

cameron.greig@mfmac.com

Asbestos Litigation: Key Differences in Jurisdictions

Nicola Edgar looks at the main differences in asbestos litigation between England & Wales and Scotland.

Asbestos Litigation: Key Differences in Jurisdictions

Despite predictions that personal injury claims resulting from negligent exposure to asbestos would diminish over time, asbestos litigation remains an evolving area of law throughout the UK.

This is partly due to a new wave of claims from workers who were indirectly exposed to asbestos whilst working in public buildings, including schools and hospitals. Throughout their employment, these employees were exposed to degrading materials which released fibres into the air. This has resulted in an increasing number of claims being made by teachers and nurses, meaning that asbestos litigation looks set to remain a topical and important issue for the foreseeable future.

The differences between Scots law and the law of England and Wales have potentially significant implications on both the prospects and value of a claim. This includes the entitlement to claim damages for pleural plaques and who is entitled to make a claim in the event that the injuries suffered prove to be fatal. For this reason, the choice of forum in which to bring a claim requires careful early consideration.

This article explores the key differences in asbestos litigation north and south of the border, highlighting some of the risks and opportunities for both claimants and defenders.

Forum shopping

Personal injury claimants will primarily be advised to bring their claim in the jurisdiction in which the defender is based. If a defender is based throughout the UK, it is open to the claimant to decide in which jurisdiction they wish to bring their claim. In those circumstances, claimants should consider whether there is an advantage in bringing their claim in any particular jurisdiction.

As an alternative, a claimant may be advised to raise a court action in the country where the negligent act which caused the injury occurred. For industrial disease cases, this will be the country where they were exposed to asbestos and it follows that if the claimant was primarily exposed to asbestos in Scotland, that is the jurisdiction in which they should bring their claim in Scotland. In reality, the position can be more complicated, particularly when a claimant's work history includes exposure in multiple locations with multiple employers, or where the claimant lives in England, when much of the exposure was in Scotland.

> **Claimants should carefully consider jurisdiction, as Scots law may allow compensation where the law of England and Wales does not.**

Given the various factors to take into account from the outset, it is crucial for both claimants and defenders to take advice at an early stage. A claimant may potentially prejudice their claim by instructing a solicitor in Engand or Wales to progress a claim which should ultimately be brought in Scotland. For a defender, any arguments disputing a particular jurisdiction should be considered at the outset of litigation to allow a potential challenge. Given that Scots law allows for compensation in circumstances where the law of England and Wales does not, claimants would be well advised to consider the advantages of raising a claim north of the border.

Entitlement to claim for pleural plaques

Pleural plaques are in most cases asymptomatic and do not develop into a more serious condition. This means that they are an indicator of asbestos exposure, as opposed to a condition which causes breathlessness or other symptoms. Following the case of *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, there is no entitlement to make a claim for personal injury for suffering from pleural plaques in England and Wales. Legislation was subsequently brought into effect in Scotland, under the Damages (Asbestos-related Conditions) (Scotland) Act 2009, which provides for compensation for asymptomatic asbestos-related conditions caused by negligent exposure to asbestos. The level of compensation takes account of the worry these conditions create for future health given the potential that the individual may develop a more serious asbestos related condition. Therefore, in these cases, there is an advantage to making a claim in Scotland, which would not be possible in England.

Nevertheless, this entitlement to claim in Scotland has created complications. The time bar rules in Scotland dictate that a claimant has three years from the date of first knowledge of an asbestos-related condition to raise a claim. A further diagnosis of a more serious asbestos-related condition does not allow for that limitation period to recommence, meaning that, if an individual is advised they have developed pleural plaques, they need to raise an action within three years of that date.

Claimants can apply for provisional damages, based on their condition at the time, with the right to return to court for further damages should their condition deteriorate, or they develop a more serious condition. However, many people do not seek provisional damages as their condition is asymptomatic and is not impairing them in any way. The result is they may unwittingly jeopardise their right to claim in the future for a more serious, potentially fatal, condition including asbestosis, lung cancer or mesothelioma.

The Scottish Law Commission has recently recommended a change to the law to alter time bar rules to distinguish asymptomatic and symptomatic asbestos-related conditions, so that asymptomatic asbestos conditions no longer bar claims for symptomatic conditions. The Commission also recommends that this exception applies to a relative's claim, in the event of the injured person's death. To date, these proposals have not been enacted and there is no prospective legislation.

The current difference in the law has the potential to create circumstances where a claim which is time barred in Scotland can be raised in England.

Loss of society claims

In the event that the individual negligently exposed to asbestos dies as a result of an asbestos-related condition, such as mesothelioma, the Damages (Scotland) Act 2011 provides that their loved ones will be entitled to make a claim to compensate them for the loss of their relationship. In Scotland, the relevant head of claim is known as loss of society.

Those relatives entitled to claim include the deceased's spouse, civil partner or cohabitee, parents, children, grandchildren and siblings, together with anyone accepted as one of those relatives, step, half and adopted relatives. There is no statutory limit on the damages and each award will be based on the nature and extent of the relationship. This can be compared to the restrictive statutory limits on bereavement damages in England.

Nevertheless, bringing a claim south of the border does not necessarily exclude claimants from awards of damages at this higher level. In *Haggerty-Garton & Others v Imperial Chemical Industries Limited* (2021) EWHC 2924 (QB), the High Court in England applied Scots law of loss of society in quantifying damages for the first time, as the fatal injury occurred in Scotland. This follows the general rule that regardless of the jurisdiction in which the claim is brought, the law which should be applied is the law of the country where the negligence occurred. Mr Haggerty died from mesothelioma which was caused by negligent exposure to asbestos in the 1970s whilst working in Scotland. Mr Haggerty's biological children accepted £50,000 each in respect of their claims in advance of the trial. His widow was awarded £115,000 and his three stepchildren were awarded between £35,000 to £40,000 each. If this case had been governed by English law, only the widow would have been entitled to bereavement damages of £15,120.

> **Choice of forum is critical in asbestos litigation, as Scots law offers broader rights and higher potential awards than England and Wales.**

In December, the UK Supreme Court handed down their judgment in the Scottish case of *Crozier or Veale v Scottish Power* [2025] UKSC 45. The judgment has confirmed the right of relatives of those who have died of mesothelioma to bring claims under the Damages (Scotland) Act 2011, even when the deceased settled a claim for another asbestos-related condition, such as pleural plaques or asbestosis, during their lifetime. In making this decision, the court clarified that relatives are entitled to compensation if their relative then goes on to develop mesothelioma which leads to their death. Whilst this case applies to Scots law, the unanimous verdict is persuasive for claims brought south of the border.

Summary

Whilst this is a complex and constantly evolving area of law, it is clear that the choice of forum can significantly impact the prospects and value of a claim. For this reason, it is essential to establish the facts and circumstances at an early stage to allow time for careful consideration of the most favourable jurisdiction in which to raise the claim from a claimant perspective, and the prospects of successfully challenging jurisdiction from a defender's perspective.

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

nicola.edgar@mfmac.com

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andrew.meakin@mfmac.com

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Contact Us

MORTON
FRASER
MACROBERTS
LLP

Edinburgh

9 Haymarket Square
Edinburgh
EH3 8RY

T 0131 247 1000

Glasgow

60 York Street
Glasgow
G2 8JX

T 0141 303 1100

www.mfmac.com