



Law Society
of Scotland

The Scottish Law Commission's Consultation on the Tenth Programme of Law Reform

Consultation Response by the Law Society of
Scotland

13 June 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Public Policy Committee welcomes the opportunity to consider and respond to the Scottish Law Commission's consultation on the Tenth Programme of Law Reform. The Sub-committee has the following comments to put forward for consideration.

Preliminary Comments

We are delighted to provide suggestions to the Scottish Law Commission in connection with the Tenth Programme of Law Reform. For 51 years the Scottish Law Commission and its English counterpart the Law Commission have provided constructive, important and necessary, suggestions for law reform. Many of the Scottish Law Commission proposals have reached the statute book but there is an abiding concern that the work of the Commission is not being implemented as quickly as it needs to be. As we stated in our priorities for the 2016 Scottish Parliamentary election "the Scottish Law Commission also has an important role in revising and promoting codification of the law. We welcome the expanded brief of the Scottish Parliament's Delegated Powers and Law Reform Committee to consider Scottish Law Commission Bills in the current parliamentary term. It is important that the Parliament increases the pace of implementing Scottish Law Commission bills."

We have urged the political parties to give consideration to committing to the implementation of at least two Scottish Law Commission bills in each session and we reiterate that recommendation.

We have asked the Public Policy Committee Sub-Committees to examine their remits and the legislation which affects their areas of concern. Arising from that survey the Sub-Committees have brought forward the following issues for consideration by the Scottish Law Commission to be included in the Tenth Programme of Law Reform. The areas are:-

- (a) Reform of crofting law and consolidation of agricultural, private rented housing and environment law.
- (b) Consolidation of diligence legislation and consolidation of the law of diligence.
- (c) Amendment of the Family (Scotland) Act 2006 Section 28.

Reform of Crofting Law and Consolidation of Agricultural, Private Rented Housing and Environmental Law

Background

The Rural Affairs Sub-committee has discussed the increasing fragmentation of the law which applies in a rural context. The requirement to look at numerous statutes to ascertain the law relating to a particular matter does not serve the interests of accessibility. For lawyers who routinely advise on this area of law it causes frustration but for those who are not familiar with the law, the sheer proliferation of legislation can make it difficult to ascertain exactly what the law is and from an industry perspective it is therefore unhelpful. Codification and, where necessary, clarification, would significantly improve the current situation.

Perhaps the area most in need of reform is Crofting law but the same comments regarding fragmentation and inaccessibility could equally be made in relation to law applying to Agricultural Tenancies, Private Rented Housing and the Environment. The current law affecting these areas is fragmented over a considerable number of statutes, some of which combine elements from other fields and most of which require the implementation of secondary legislation to make them effective. The result is that in key areas affecting rural communities and rural businesses the law has become fragmented and overly complex.

Reform of Crofting Law

We recognise that the Scottish Government has already committed to the reform of crofting law during this parliamentary term. Many practitioners who deal with crofting law on a regular basis consider that reform is long overdue and the Government's plans to review are therefore welcomed.

The last consolidation of crofting law was the Crofters (Scotland) Act 1993 and much has changed in the last quarter of a century. Although further Acts were passed in 2007, 2010 and 2013, problems persist and indeed commentators have stated that the 2013 Act merely served to add a further layer of complexity to the system.

It is understood that the intended overhaul may include reform of the regulatory process and a number of rural practitioners have identified serious concerns regarding the Crofting Commission but it is not the Committee's intention to focus on those in terms of this project.

What are the main issues?

We refer to findings of the Crofting Law Sump, which identified a number of key issues in its final report which we think would merit further consideration (<http://www.crofting.org/uploads/news/CLGreport.pdf>). The recommendations in the report are numerous but the first listed priority was simplification of the crofting code. It also called for the term "crofter" to be re-defined to take account of everyone who is entitled to occupy a croft as a principal. Another proposition was a review in relation to succession and the rightful occupancy of crofts.

Who is affected?

Crofting law affects a substantial number of rural communities in the crofting counties Scotland, not only crofters and landlords directly affected and regulated by the current legal framework but also impacts on the wider community in these counties.

Agricultural Tenancies

A short excerpt from *Agricultural Tenancies* 4th edition Lord Gill, gives a good illustration of some of the problems that arise in the context of agricultural tenancies:

“Short limited duration tenancies, limited duration tenancies, modern limited duration tenancies and repairing tenancies

“The expression “holding” that is used in relation to the land held under a 1991 Act tenant does not apply to a short limited duration tenancy or a limited duration tenancy. The 2016 Act, when in force, will add the new modern limited duration tenancy and the repairing tenancy to the 2003 Act. The 2003 Act refers to the subjects of let in these tenancies as “the land”. The 2016 Act refers to the subjects as “the land” in the two new tenancies that it creates; but elsewhere it uses the expressions “agricultural holding” and “holding” indiscriminately...”

“...Leases for grazing or mowing

“The former seasonal lets for grazing or mowing are subject to new provisions and are referred to as leases for grazing or mowing. In this case too, the subjects of let are referred to as “the land”...”

See page 10 of Agricultural tenancies at paragraphs 1-28 and 1.30

The text then goes on to highlight a catalogue of drafting errors in the 2003 and 2016 acts. He concludes by pointing out that “Despite all of the reforms that the 2003 Act and 2016 Act have made, it remains a serious deficiency in the law of Scotland that it is not possible to create a fixed duration tenancy for more than five years and less than 10.” (See page 12 at paragraph 1-35).

Private Residential Leases/Private Rented Housing

At present the legislation in this sector is spread over 8 statutes.

- The Rent (Scotland) Act 1984 still relevant for pre-1 January 1989 tenancies
- The Housing (Scotland) Act 1987 - sets the “tolerable standard “ and definitions on over-crowding
- The Housing (Scotland) Act 1988- the current leasing framework
- The Anti-Social Behaviour Etc. (Scotland) Act 2004 - landlord registration and control of tenants’ behaviour

- The Housing (Scotland) Act 2006– sets “the Repairing Standard “
- The Private Rented Housing (Scotland) Act 2011– HMOs, Tenancy Deposit Schemes, Tenancy Information Pack
- The Housing (Scotland) Act 2014 – sets up First Tier Tribunal, further Landlord Registration provisions, enforcement of Repairing Standard, Letting Agents
- The Private Housing (Tenancies) (Scotland) Act 2016 –replaces the 1988 Act as the framework for tenancies , does not consolidate or fully repeal the other Acts

Environmental Law

- The Wildlife & Countryside Act 1981, which is a UK statute, has been amended differently in the devolved administrations.

Conclusions

We have specifically addressed Crofting in detail in this submission. We appreciate the Scottish Government enacted legislation affecting agriculture and housing in 2016 (albeit that it is likely to be late 2017/2018 before this legislation is fully in force) and Crofting has received less attention recently. Whilst we consider there is scope for review and consolidation of Crofting law we also consider consolidation of the law relating to the other sectors is also required and would be welcomed by practitioners and stake holders directly affected.

Consolidation of Diligence Legislation and Codification of the Law of Diligence: A Proposal for the Scottish Law Commission's Tenth Programme of Law Reform Significance

As the most direct method for enforcement of debt, the law of diligence is of fundamental importance both for the purposes of commercial certainty and consumer protection. It supports the former in ensuring that debts are paid where possible and the latter by ensuring that debtors receive proper procedural protection and allows them to retain such assets as are necessary for basic dignity.

As well as being of fundamental importance, the law of diligence is inherently challenging standing, as it does, at the intersection of the law of civil procedure, insolvency and property.

For these reasons, particular care is needed to ensure that the law is both equitable and as accessible as possible.

Work done so far

The Scottish Law Commission undertook a review of the law in this area, culminating in its Reports on Diligence on the Dependence and Admiralty Arrestment's (Scot Law Com No 164, 1998), Pounding and Warrant Sale (Scot Law Com No 177, 2000) Diligence (Scot Law Com No 183, 2001). Each of these reports resulted in legislation and the changes proposed were very important to the improvement of the law of Scotland, particularly in providing greater procedural protections and information for debtors. As a result the law of diligence is in a considerably better position than it was at the beginning of this century.

Work still to do

However, there is still work to be done. The reasons for this are threefold: (i) the legislation is scattered throughout the statute book in a manner that hampers accessibility, understanding and coherence; (ii) on some points there are gaps in the legislative scheme, partly as a result of some of the Commission's proposals not being implemented; (iii) some of the provisions could do with a degree of clarification.

(i) Scattered Legislation

Excluding bankruptcy legislation, rules relevant to diligence can be found in the following statutes: the Diligence Act 1661; the Adjudication Act 1672; the Bills of Exchange Act 1681; the Inland Bills Act 1696; the Bills of Exchange (Scotland) Act 1772; the Titles to Land (Consolidation) (Scotland) Act 1868; the Consumer Credit Act 1974; the Debtors (Scotland) Act 1987; the Debt Arrangement and Attachment (Scotland) Act 2002 and the Bankruptcy and Diligence (Scotland) Act 2007. Both the 1987 Act and 2002 Act have been amended with the insertion of provisions disrupting their numbering and, as will be discussed below, the legislation requires to be read in light of case law which is itself complex.

Such a widely-scattered range of legislation presents a problem for the accessibility of the law. It means that finding the relevant rules is harder work than it needs to be. Further, the disparate sources can create traps for the unwary: the rules on the pre-requisites for doing diligence vary subtly from one diligence to the other.

For instance, section 10(2) of the Debt Arrangement and Attachment (Scotland) Act 2002 requires expiry of the days of charge for payment prior to attachment. Section 174(2) of the Bankruptcy and Diligence (Scotland) Act 2007 does the same for money attachment. Such expiry also appears to be necessary for earnings arrestment since a decree or document of debt is not said to provide direct warrant for it: compare paragraph (a) of section 87(2) of the Debtors (Scotland) Act 1987 with paragraphs (b) and (ba), which make such provision with respect to but there is no provision equivalent to section 10(2) in Part III of the Debtors (Scotland) Act 1987. The policy reasons behind requiring a charge for attachment and earnings arrestment but not for general arrestment (unless there is a summary warrant) and inhibition might also benefit from consideration.

Similarly, the provisions on attachment (s 10(5)) and arrestment (s 73(4)) provide definitions of what counts as a decree or document of debt but these do not quite match that in section 221 of the Bankruptcy and Diligence (Scotland) Act (which is relevant to earnings arrestment, money attachment and inhibition) since the latter makes reference to bills which have been protested for non-payment. The law is probably the same for attachment and arrestment because of the early legislation on bills of exchange but the position could be clearer.

A similar degree of variation exists with the requirement to provide debt information and advice packs to debtor's who are individuals: for money attachment, earnings arrestment and attachment there is a window of 12 weeks prior to the diligence (2007 Act, s 174(2) (d); 1987 Act, s 47(3) 2002 Act, s 10(3) (c)) while for inhibition the pack must accompany the schedule of inhibition (2007 Act, s 147). For arrestment, the provision requiring the pack to be supplied (1987 Act, s 73D (has not been commenced)) but if it ever is, it will reflect the rule for inhibitions. Again, it is worth thinking about whether these differences are justified and whether the rules could be gathered together in a common set of rules setting out the pre-requisites for all diligences.

Of course, the law of adjudication was not covered by the debt information and advice pack regime because it was expected that adjudication would be replaced by land attachment (although there is a requirement of provision of advice and information with respect to residential property under section 5B of the Heritable (Securities) Scotland Act 1894).

Another anomaly is that while arrestment and inhibition on the dependence are subject to a common set of rules in Part 1A of the 1987 Act, while there are separate but substantially similar rules on the procedure for granting interim attachments in sections 9Cff of the 2002 Act.

A codifying statute on diligence would assist parties because they would not have to hunt through the statute book in the same way and would facilitate clarity about where and why common or divergent approaches should be taken to the particular diligences.

(ii) Gaps in the Legislative Scheme

The most disappointing aspect of the recent diligence reforms was the failure to bring the land attachments provisions into force, leaving the law of adjudication in force. As subsequent case law has shown (*Hull v Campbell* 2011 CSOH 24; 2011 SLT 881), the law of adjudication is subject to serious uncertainty as well

as practical problems which mean that it is unfit for the 21st century. (If we are honest, it was barely fit for the 19th century.) That said, the current provisions are clearly unacceptable to the government. A re-examination of diligence would provide the opportunity to reconsider how to find an approach which strikes the proper balance between the interests of debtor and creditor.

Less seriously, the provisions in the 2007 Act on inhibitions could easily be read as a complete code but they are not. In particular, the so-called prior-missives rule is omitted: *Playfair Investments Ltd v McElvogue* 2012 CSOH 148, 2013 SLT 225. This could easily be a trap for the unwary. In relation to attachment, the fact that poinding was abolished rather than reformed leaves room for doubt as to whether the case law establishing that a poinder has a real right applies to attachment and the dispute about the effect of arrestment prior to forthcoming has been long and tortuous. These matters could be clarified by legislation.

(iii) Matters Requiring Clarification

As might be inferred from *Playfair*, it is not altogether clear that the 2007 Act gave full effect to the Commission's proposals with respect to inhibitions. Most seriously, the legislation makes no provision regarding the effect of reduction for breach of inhibition but does provide that an inhibition confers no preference in a ranking procedure (section 154). This raises questions about the effect of a sequestration on the inhibitor's right to reduce for breach of inhibition or on a reduction on the basis of inhibition (since the basis of the preference in sequestration was the right to reduce on the basis of inhibition). The matter would benefit from re-examination.

Conclusions

As is evident from the above discussion, while a large part of the project would simply involve bringing existing rules together but there are other aspects which involve more technical aspects. The task is therefore a little more complex than the recent and very welcome consolidation of bankruptcy legislation and for that reason; the Commission seems best placed to undertake it.

Amendment of the Family (Scotland) Act 2006 Section 28

The Family Law Sub-committee supports the restoration of the common law remedy of unjustified enrichment after the expiry of the one year time limit under section 28 of the Family Law (Scotland) Act 2006.

The statutory cohabitation scheme, which was introduced in May 2006, provides a remedy for a former cohabitant who has suffered economic disadvantage as a result of that cohabitation. This is a statutory version of the old common law remedy of unjustified enrichment which the courts were developing up to the time of the Family Law (Scotland) Act 2006.

One feature of the statutory remedy is the very short and strict time limit for making a claim – that an action must be raised in court within 12 months of the end of the cohabitation. Bear in mind that it is not 12 months from the parties' separation – cohabitation within the meaning of the Act can end a long time before one or other party actually leaves the other one.

The short and strict time limit was not an insurmountable problem, however, because the old common law remedy was still competent, first of all in parallel with the statutory remedy, and then alone, after the expiry of the 12-month period, or so we thought.

No one suggested, at the time the legislation was being discussed, that the common law remedy would not persist, it would certainly have been strongly opposed if that had been the policy of the government.

In an article by Michael Hughes, an agent recounted how in the Alloa Sheriff Court case of *Jenkins v Gillespie* (unreported) the Sheriff decided that the remedy of unjustified enrichment cannot survive the 12-month limit due to the doctrine of subsidiarity.¹

The pursuer had brought a claim outside the one year time limit and was therefore unable to make a claim under s28 of the FLSA 2006 and made a plea of unjustified enrichment. The defender made a relevancy plea on the basis that unjustified enrichment is a subsidiary remedy, precluded by the s28 remedy. As the pursuer was timebarred from making a s28 claim, he could not successfully plea unjustified enrichment.

The principle underpinning the decision in this case is that unjustified enrichment is an option of last resort - "if a legal remedy is available at the time when the action which gives rise to the claim for recompense has to be taken then normally that legal remedy should be pursued to the exclusion of a claim of recompense"²

¹ The subsidiarity exclusion: cohabitation and unjustified enrichment," 2016 SLT (News) 7 Michael Hughes

² Varney Scotland Ltd v Lanark Borough Council 1974 SC 245; Also, see Transco plc v Glasgow City Council 2005 SLT 958 where Lord Hodge confirmed the principle and Courtney's Exrs v Campbell [2016] CSOH 136 where Lord Beckett accepted that the subsidiarity principle applied and the pursuers claim was dismissed.

It has been said that the subsidiarity principle is not absolute and that there are limited scenarios where it may not apply. In *Courtney's Executors v Campbell* Lord Beckett stated that had the pursuers been able to show "special and strong" circumstances why the claim for unjustified enrichment should be accepted when the statutory remedy had lapsed then such a claim may be accepted.³ There may also be other scenarios where a pursuer who has lived with the defender may make a successful claim for unjustified enrichment, for example, if it can be established that the persons in question were not cohabiting as defined by s25(2) of the FLSA then it follows that s28 and the subsidiarity principle do not apply. A claimant may then be able to claim unjustified enrichment.

Where a claim under s28 is brought timeously but fails, a claim for unjustified enrichment may be successful.

It is generally agreed that that reading of the law is strictly speaking correct although was never the intention of Parliament when passing the FLSA which sought through s28 to ensure fairness between cohabitants.

It has to be said that when the matter has arisen the court has tended to support the idea of a time-bar attaching to an unjustified enrichment claim if the claim could have been made under s28 if in time – *Simpson v Downie* (2012) CSIH 74:

'... we have reached the conclusion that the parliamentary intention behind s28, read as a whole, is that the court's novel jurisdiction to entertain cohabitants' financial claims may be exercised only in respect of applications which are made within the one-year time limit laid down in subsection (8) ...'

Then in *Courtney's Executors v Campbell* (2016) CSOH 136:

'Whilst it is true ... that the 2006 Act does not explicitly exclude an action based on unjustified enrichment after the period specified in s 28(8) ... I am not persuaded that the equitable remedy will always remain open following the expiry of the 12 month period. Parliament, and particularly the parliamentary draftsmen on whom it relies are expected to be aware of the common law ...'

Whilst it is true that that expectation may be justified, we should remember that nowhere in the parliamentary discussions was there any mention of a limitation on the common law remedy. The objectives set out in the Policy Memorandum accompanying the Bill in 2005 (para 64) states that

'...the aim was to introduce greater certainty and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when the relationship ends.'

Nevertheless if the decision in *Jenkins v Gillespie* is taken as being correct then a valuable common-law remedy will effectively die without any parliamentary discussion. It would be strange if we were to approve of

³ *Courtney's Exrs v Campbell* [2016] CSOH 136 (28 September 2016).

such a thing by default and to the surprise of many litigants most of the legal profession yet that may be what will happen unless the law is changed.

Conclusions

The common law remedy should be restored and clarified now by providing that the doctrine of subsidiarity shall not apply to unjustified enrichment.



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