

Scottish Real Estate

Non-COVID-19 Autumn 2020 round-up

While headlines have, understandably, been dominated for months by the response to COVID-19, this alert looks to summarise the following non-COVID-19 legal developments affecting real estate in Scotland over the spring and summer of 2020:

Contents

New Scottish community right to buy land for sustainable development	2
New Scottish Land Commission protocols	2
Case about common good land	2
Supreme Court decision on restraint of trade in commercial leases	3
Recent Scottish cases on the electronic communications code	3
Important Scottish planning case on the tilted balance	3
The Tied Pubs (Scotland) Bill	4
The Heat Networks (Scotland) Bill	4
Digital transformation for Registers of Scotland	4
Conclusion	4

New Scottish community right to buy land for sustainable development

A new community right to buy land for sustainable development came into force in April 2020. The right to buy is exercisable by a properly constituted community body, or third party purchaser nominee. It extends not just to the purchase of land, but also to the acquisition of tenancy rights. It is a compulsory purchase power, meaning that, in theory, it can be invoked even if the owner of the land (or tenant under the lease) does not wish to sell. Market value for the land/lease must be paid to the owner/tenant.

The Scottish Ministers' consent is required for the exercise of the new right. They must not consent unless the transfer is likely to further the achievement of "sustainable development" (which is not defined), is in the public interest, will result in a significant benefit to the community and is the most practical way of achieving the benefit. There are also various procedural requirements that the community body must comply with (e.g. community ballot). If land or a tenancy is affected by an application for a right to buy, the owner/tenant must not take any steps to dispose of it (subject to certain exceptions).

Scottish Land Commission protocols

The Scottish Land Commission is producing a [series of protocols](#) to implement the Scottish Government's 'Land Rights and Responsibilities Statement', which

was published in 2017. The latest three protocols in the series were published in August 2020. They focus on: good stewardship and management of land; the diversification of land ownership and tenure; and the encouragement of positive negotiations for the transfer of land to communities. They follow the publication in June 2020 of two protocols for trusts and charities that own land.

Common good land

In August 2020, the Inner House of the Court of Session gave its decision in the case of [Guild v. Angus Council \[2020\] CSIH 50](#). This was a judicial review against Angus Council's decision to close and demolish a leisure centre in Forfar. The issue was whether the demolition would constitute a proposed disposal or change of use of "common good" property. If it would, the council should have published details and consulted with the community about the proposed closure and demolition.

The Inner House allowed the judicial review. It held that the land on which the leisure centre was built was part of the common good, and that it followed that the leisure centre was therefore also part of the common good. The court also found that demolishing the building and returning the land to open parkland would amount to a change of use, even though it would still be used for leisure purposes. Demolishing the building would also fall within the meaning of the word "disposal", as the community would no longer have access to the leisure centre facilities.



Supreme Court decision on restraint of trade in commercial leases

Whilst not a Scottish case, the Supreme Court case of [Peninsula Securities Limited v. Dunnes Stores \(Bangor\) Limited \[2020\] UKSC 36](#) which was decided in August 2020, is of interest in Scotland. A restrictive covenant granted by a landlord of a shopping centre in Northern Ireland to an anchor tenant (undertaking not to develop neighbouring land for a large unit trading textiles, provisions or groceries) was found by the Supreme Court to be enforceable. For more information, please see [this article by Fiona Caldwell and Gareth Hale of our Dispute Resolution team](#).

Electronic communications code – recent Scottish cases

Several Scottish cases on the electronic communications code (ECC) have been decided by the Lands Tribunal for Scotland over the past few months. One was [EE Limited v. MacDonald LTS/ECC/2019/009](#), decided in April 2020, where the Tribunal held that the right to carry out works to install electronic communications apparatus should be interpreted as including a right to take access over neighbouring land to reach the land on which the apparatus is to be installed.

Another was [Argiva v. Kingsbeck Limited LTS/ECC/2019/005](#), decided in May 2020.



The Tribunal held that there is no rule preventing someone who has litigation pending under the old telecommunications code from applying for rights under the ECC. The Tribunal also found that the party who is actually going to carry out the works (and who has control over a site) has title and interest to apply for rights under the ECC, even if the rights are being sought for an infrastructure system that delivers a different operator's services.

Planning – tilted balance

The decision in an important Scottish planning case, [Gladman Developments Ltd v. Scottish Ministers \[2020\] CSIH 28](#), was published in June 2020. This was an appeal by a developer against the decision of the Scottish Ministers' reporter to dismiss the developer's challenge to the local authority's refusal of planning permission for a residential development. At issue was how planning authorities should apply the Scottish Government's presumption in favour of development that contributes to sustainable development (otherwise known as the "tilted balance"). The Inner House of the Court of Session held that the presumption should have been applied as soon as it had been established that there was a shortfall in the five-year effective housing land supply. A housing development that will help with a housing shortage will almost inevitably contribute to sustainable development. The existence of potential adverse impacts of a proposed development do not prevent the operation of the tilted balance. Rather, they should be weighed up against the benefits that the development would deliver in terms of housing supply and economic gain. The Inner House therefore quashed the reporter's decision and remitted the matter to the Scottish Ministers for redetermination.

In response to the decision in *Gladman*, the Scottish Government has published a consultation on the housing section of the Scottish planning policy. It proposes the removal of the presumption from the Scottish planning policy on the basis that the tilted balance was never intended to override normal planning judgment based on the development plan and other material considerations. The closing date for responses is 9 October 2020 and the outcome is awaited with interest.

For information about other ongoing Scottish planning reforms, please see our Estates Gazette article ["Scotland's divergent path of planning reform, 2 September 2020"](#).



Tied Pubs (Scotland) Bill

Over the summer, Scottish Parliamentary committees have been examining the proposed Tied Pubs (Scotland) Bill. If passed, the Bill will introduce a Scottish Pubs Code, which will set out rules and procedures to govern the relationship between pub-owning businesses and their tied tenants. A tied tenant is someone who leases a pub from a pub-owning business and is contractually obliged to buy beer and other products from that business. In return, they may pay a lower than usual rent and receive other support from the pub-owning business. The Bill would give tied tenants the option to request a “market-rent-only” lease. This would mean that a tenant could pay rent at the going market rate, without having to buy products from the pub-owning business, or to sell only the brand of the pub-owning business. Stage 1 consideration of the Bill is to be completed by 27 November 2020.

Heat Networks (Scotland) Bill

The proposed Heat Networks (Scotland) Bill has been under consideration by a Scottish Parliamentary committee this summer. If passed, the Bill will regulate the heat network sector in Scotland. Heat networks are a form of infrastructure made up of insulated pipes and systems that generate heat in the form of hot water or steam. Heat networks are often more energy efficient than individual fossil fuel heating systems, and so can help reduce emissions from buildings. The Bill puts in place rules around heat network licences, consents, assets and zones. Stage 1 consideration of the Bill is to be completed by 4 December 2020.

Digital transformation for Registers of Scotland

The pandemic has accelerated the provision of digital services at Registers of Scotland. We now have the ability to electronically submit copies of “wet ink” signed deeds to Registers of Scotland for registration in the Land Register of Scotland, the Register of Sasines, the Register of Inhibitions and the Register of Judgments. Whilst the pandemic was the catalyst for such change, it is anticipated that these systems will become the new ‘normal’, long after the emergency legislation that facilitated such change expires.

The big news for conveyancing in England and Wales over the summer has been the move by their Land Registry to accept certain electronically **signed** documents. In Scotland, electronic signatures still cannot be registered, except in very limited circumstances. But it remains to be seen whether, and if so when, Registers of Scotland might follow in the footsteps of their English counterparts.

Conclusion

The foregoing developments demonstrate that whilst a global pandemic can disrupt our ‘normal’ and have a radical effect on the way we work and live, we have found a way to ensure that decisions are made, policies are developed, consultations are progressed and new technology is adopted in a time of huge challenge. That innovation and resilience will hopefully stand us in good stead for what comes next.