

# mackinnons

solicitors

## Commercial and Dispute Resolution Winter Newsletter 2011-2012

Welcome to our Winter Newsletter. This is intended to provide you with a snapshot not only of recent legal developments but also of changes within the firm over the last few months.

If you have a particular interest in any of the issues raised or wish to suggest a topic for us to write on in the future, please feel free to contact me or our Practice Manager Nicola Elder on either 01224 632 464 or [neil@mackinnons.com](mailto:neil@mackinnons.com) or [nicola@mackinnons.com](mailto:nicola@mackinnons.com).

Best Wishes for the Festive Season and a Prosperous New Year when it comes.

Neil Smith

### Recognition for Mackinnons

The Chambers UK 2012 industry guide has ranked Mackinnons in the top bracket in Scotland in its shipping category. This is a great tribute to the hard work and dedication of our experienced team. In addition, the Legal 500 guide also has described Mackinnons as being "a leading firm with an extensive marine insurance litigation practice". We are honoured to be held in such high esteem by these publications.

Partner Keith MacRae commented:

"We are very pleased to be rated so highly by the Chambers and Legal 500 law guides this year. For the firm to be top ranked in Scotland for Shipping by Chambers is a great tribute to the hard work put in over many years and it is an honour to be the only top ranked firm in the Chambers guide with its principal office in Aberdeen.

We are Scotland's biggest shipping law team and Mackinnons has been privileged to serve our maritime and offshore communities throughout its long history. To have myself, Bruce Craig and Graham Jones ranked as leading individuals in Shipping, and Bruce ranked for Health & Safety as well, gives us all great pleasure."

### Offshore Workers' Leave

The Supreme Court has recently rejected the trade unions' appeal in the case of *Russell v Transocean International Resources Limited and others*, holding that employers can lawfully insist that offshore workers take annual leave during their field breaks. In reaching its judgement, the Court refused to refer the issue to the European Court of Justice and as there is no right of appeal to Europe, the Court's decision has effectively ended the uncertainty surrounding the legality of the "2 week on, 2 week off" rota.

However, the question of pay during annual leave remains a grey area: must companies take into account allowances paid whilst offshore? It's likely that there will be court action on this shortly. It is worth noting that the Russell case proceeded on the basis that workers were not actually required to do any work during their field break other than attend occasional training courses, medical examinations and other meetings.

If you routinely require your employees to do some work during their field break, the number of uninterrupted field break days they are allowed should be kept under review to ensure that they receive their annual leave entitlement.

For more information please contact Katie Williams or Lesley Rennie on 01224 632 464 or email [katie@mackinnons.com](mailto:katie@mackinnons.com) or [lesley@mackinnons.com](mailto:lesley@mackinnons.com).





## INSOLVENCY – AN EFFECTIVE WEAPON FOR CREDITORS?

The Bankruptcy and Diligence (Scotland) Act 2007, which has gradually come into force in recent years, allows a review of recent Scottish Government bankruptcy statistics. Dealing firstly with the sequestration of individuals or non corporate bodies, in the year to November 2011, there were approximately 5,000 granted in Scotland. Most of these were on application of the debtor rather than the creditor.

If a creditor wishes to petition for bankruptcy, they must be due £3,000 or more. All sequestration petitions must be raised in the Sheriff Court which is more accessible and less expensive than the Court of Session. The process generally takes around 8 weeks from commencement through to bankruptcy being granted. It is worth noting that most Sheriff Court Petitions are raised by HM Revenue & Customs.

There may be many reasons why a debtor would not want to be declared bankrupt:

- ✎ credit ratings will be seriously prejudiced;
- ✎ if property (or a share) is owned, it could be lost;
- ✎ disqualification from holding certain offices such as a directorship;
- ✎ some contracts of employment allow termination on bankruptcy.



As a general rule, debtors with the most to lose are likely to resist sequestration. From a creditor's view point, these are the most attractive targets when raising bankruptcy proceedings.

Freezing of assets can also force early resolution. The recent Court of Session case of *Martin Bain v Rangers Football Club* (23.9.2011) highlights this. Here, the former Ibrox Chief Executive successfully arrested a club bank account on the dependence of an action for breach of contract. Any successful arrestment puts pressure on cash-flow and hurts a debtor where it matters most.

In almost all corporate entities there exist personal guarantees by directors and these coupled with the threat of bankruptcy and the powers of the Liquidator to report potential criminal actions such as non co-operation and actions to defraud creditors, are an effective lever.

For more information, please contact Martin Sinclair on 01224 632 464 or email [martin@mackinnons.com](mailto:martin@mackinnons.com)

### Loss of Society Awards

There has recently been a sharp increase in awards made to surviving family members in claims raised following a death. For the first time, the six-figure barrier has been broken and the awards recently peaked with a 17 year old daughter receiving £120,000 for distress, grief and loss of society following her father's death in a car accident.

These awards were all made by juries, which traditionally award more than a Judge hearing the case is likely to. Shortly after these awards were made, they were considered by a Judge sitting alone. He affirmed that assessing damages is an appropriate questions for a jury because awards should reflect society's expectations and that the court should be guided by jury decisions. However, at the same time he also provided general guidance on what he thought to be the appropriate awards for surviving family members, which was significantly less than juries had been awarding.

### Damages (Scotland) Act 2011

The Damages (Scotland) Act 2011 (the Act) came into force on 7 July and a key change is the introduction of a fixed system to calculate Loss of Support awards in death cases.

Generally, where there has been a wrongful death, certain specified relatives who were dependent on the deceased can claim loss of support. Formerly, how support was calculated could vary dramatically. However, the new Act specifies that, in all but exceptional cases, the loss will simply be calculated using 75% of the deceased's net annual income as a basis for the calculation, with no deduction being made for any other earnings that there may be within the family. This is likely to have a significant increase on awards made in the vast majority of cases.

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## The Ogden Tables – 7<sup>th</sup> Edition

The Scottish (and English) courts are routinely referred to tables of actuarial multipliers, the Ogden Tables, which are used to calculate certain heads of claim, particularly future loss of earnings. This tends to be the single biggest element of most claims for personal injuries and death. The 7<sup>th</sup> edition of the Ogden Tables was published on 10 October 2011. Aside from updating figures on predicted mortality rates, some of the most important new information is contained within the introduction to the Tables.

Since 2001, on the basis of a decision made by the UK government, a global discount rate of 2.5% has been applied to all multipliers to reflect the real value of money in the UK. However, the authors of the 7<sup>th</sup> edition of the tables make it clear, with particular reference to a case heard in Guernsey in 2010, that they consider that this number is out of step with the present economic situation.

The Scottish Government has recently formed a consultation group to consider the issue. It is therefore likely that, within the next 6-9 months, the discount rate will be reduced, perhaps to around 0.5%. We have recent experience of a case where the other side attempted to argue for an alteration to -1%.

To give the reader an idea of the potential effect of such a change, the basic multiplier (ignoring other deductible factors) to be applied for loss of earnings to a man of 30 up to a pension age 65 is presently 22.84. At a discount rate of 0.5%, this figure would increase to 31.15. The effect of this on awards of damages for loss of earnings will be very significant. Applying the revised multiplier to a yearly loss of £15,000 in this example would increase the claim by approximately £125,000. Once the rate is officially changed, the levels of damages paid will therefore increase in many cases.

In present cases, Defenders can continue to argue that the existing discount of 2.5% ought to apply. Senior QCs who we have discussed this with consider it highly unlikely that a single judge hearing a case in Scotland will ignore the existing law.

It is therefore important that companies defending personal injury claims at present use the time available over the coming months to attempt to progress matters which ought to be settled. It does however 'take two to tango', so we may see claimants and their agents digging in to wait for the changes.

For more information on this developing area of the law, please email [neil@mackinnons.com](mailto:neil@mackinnons.com).



We are delighted to announce various senior appointments and promotions in recent months. Ashleigh McConnell and Morag Christoffersen were promoted to become Associates in the Private Client and Commercial departments respectively. Ashleigh specialises in trusts and executries and Morag specialises in shipping and commercial law.

Katie Williams will be promoted to Partner from 1 January 2012, becoming the first full-time employment law partner in the firm's 169 year history.

The Firm has created the new post of Practice Manager with Nicola Elder taking this position. Bruce Craig becomes Managing Partner taking over from Charles Scott who held the post for more than 20 years and who remains as Senior Partner.





## Employment Law Update

Next year will see significant changes to UK employment law. Following a review of legislation and various consultations, the Government has announced a raft of measures to overhaul employment law and make it more “employer-friendly”. These measures are intended to encourage small and start-up employers to recruit more staff by removing perceived risks and increasing the efficiency of Employment Tribunals.

In recent years, the number of Tribunal claims has rocketed. In a “no-win, no-fee” culture and with a background of a difficult economic climate, some employers are reluctant to recruit for fear of facing a Tribunal claim further down the line. However, the Government has confirmed that it is to increase the qualifying length of service from 1 to 2 years for employees to be able to raise a claim for unfair dismissal in the hope that this will bolster business confidence. This will take effect from 6 April 2012.

In addition:

- Protected conversations may be introduced to enable employers to have frank discussions with their employees without the risk of a constructive dismissal claim or other recrimination.
- TUPE and the period of consultation required in collective redundancies are being reviewed and may be reformed in 2012.
- The Government is considering introducing “no-fault” dismissals for micro-employers (less than 10 employees).
- The Tribunal service is being radically reformed to improve efficiency and cut costs, with mediation required before a claim is formally lodged.
- Where a claim goes to Tribunal, employees will be required to pay a fee and the Tribunal can order the employee to put up to £1000 on deposit to cover an award of costs made against them.
- From April 2012, Employment Judges will sit alone in unfair dismissal cases.

If you would like any further information on this matter, please contact Katie Williams or Lesley Rennie on 01224 632 464 or email [katie@mackinnons.com](mailto:katie@mackinnons.com) or [lesley@mackinnons.com](mailto:lesley@mackinnons.com).

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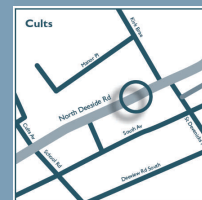
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