**Scottish Government Consultation on the Scottish Law Commission Report on Review of Contract Law**

**Response by the Centre for Scots Law at the University of Aberdeen**

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**Question 1 – Default Rules The reforms are mostly a set of default rules in so far as parties may choose by agreement to provide otherwise. […] Are you content with this approach? If not, please provide your reasons.**

We are in broad agreement with this proposal, although the terminology of defeasible rules (in the sense that the rules would be defeasible by parties’ agreement to the contrary) may be preferable to that of default rules.

There could be more clarity regarding section 1(1)(b) of the draft bill. Is the agreement itself a contract subject to the defeasible rules?

The provision could be more clearly drafted. It would be easier to say that the parties are free to make any agreement they wish subject to the usual exceptions regarding criminal law, public policy etc. There could simply be a provision saying that sections 2-13 are defeasible.

**Question 2 – Are you aware of any subsequent case law or legislation which impacts on any of the recommendations contained in the Report?**

No.

**Question 3 – Are you aware of change in contract law practice which impacts on any of the recommendations contained in the Report?**

No.

**Question 4 – Do you agree that the provisions contained in the draft Contract (Scotland) Bill give effect to the recommendations of the SLC?**

Yes, we agree that the provisions contained in the draft Contract (Scotland) Bill give effect to the SLC’s recommendations, but the drafting could be clearer and the SLC’s approach to such issues as formation of contract is very piecemeal.

**Question 5 – Is there anything in the BRIA that requires to be updated?**

No.

**Question 6 – Are there any direct or indirect impacts on children and young people as a result of the legislative proposals set out in the SLC’s draft Bill?**

It is not clear that the proposals will have an impact on children and young people in particular. Any such impact would most likely be minimal. The aspect of contract law most obviously relevant to children and young people is legal capacity for formation of contract, but the rules on legal capacity (stated elsewhere) are compatible with the UN Convention on the Rights of the Child.

**Question 7**

**Is there any impact on specific groups of children and young people as a result of the legislative proposals set out in the SLC’s draft Bill?**

No.

**Question 8**

**Are you satisfied that the approach of a statutory statement on contract formation does not differentiate Scots and English law in a way that might deter cross-jurisdictional business?**

No, at present the Scots and English courts work in relative harmony where contract law is concerned. There is a danger that legislation could lead to unexpected divergences or interpretative dilemmas in areas of the law which had hitherto been relatively clear and on which Scots and English law had been substantially the same.

Such differences as already exist between Scots and English law (e.g. the existence of the consideration doctrine in English law and the absence of an equivalent in Scots law) do not seem to impinge upon cross-border transactions. However, those differences are already well understood.

**Question 9**

**Are you aware of any technical advances/ practical changes which postdate the Report which may impact on this approach?**

One notable technical advance which postdates the Report is the advent of such advanced AI software as Chat GPT and the increasing prominence of dynamic pricing for, e.g., airline tickets.

As a general observation, rules regarding electronic communication should be built around reasonable circumstances, including a reasonable time (e.g. reasonable business hours).

**Question 10**

**Are you content with the approach taken in respect of the battle of the forms?**

We are not sure what relevance section 2(2) has to the battle of the forms.

It is worth considering whether the wording ‘of that kind’ in section 2 of the draft bill might lead to a sort of law of *contracts*, as opposed to a general law of contract. This potential (and potentially unintended) consequence should be considered.

**Question 11 – Are you content with the approach taken in respect of the acceptance of general offers?**

We take the view that the common law regarding offer and acceptance is already equipped to address the problem of general offers. For instance, if one drives into a car park, that very act may be regarded as contractual acceptance.

The language of unqualified assent is quite similar to the language of acceptance, which calls into question how the language of unqualified assent improves upon the existing law.

**Question 12 – Are you content with the approach of rejecting a special rule about proposals by businesses to supply goods from stock, or to supply services, at a stated price?**

We agree that such a special rule should be rejected.

**Question 13 – Do you agree that the law on interpretation is settled and that legislative reform is not needed or wanted?**

The development of the law on interpretation has fallen into some confusion. Arguably, the Inner House has placed undue emphasis on linguistic meanings of contractual terms to the neglect of matters of context, although that confusion may be more effectively remedied by the judiciary, and ideally by the Supreme Court, than by legislation.

That said, there is value in guidance for the courts, but this need not take the form of legislative provisions. Even if the guidance is provided via legislative provisions, those provisions could be akin to the guidance provided in Schedule 2 to the Consumer Rights Act 2015. Guidance could provide a non-exhaustive list of principles relevant to the interpretation of contracts, for example, the principle that contracts are to be construed objectively; that meaning is contextual; and that regard must be had to the purpose of the contract. No hierarchy of principles should be created by such guidance.

**Question 14 - In the light of the subsequent case law do you consider that the law of retention would benefit from clarification?**

Yes, the principle of mutuality requires clarification, as do the more specific issues regarding retention: i.e. both the principle and remedy require clarification. Consider, for instance, *McNeill v Aberdeen City Council* [2013] CSIH 102, where the Inner House, in considering the range of obligations in respect of which an employer may exercise the remedy of retention in response to an employee’s breach of contract, concluded that those obligations do not include the duty to maintain a relationship of trust and confidence. The court reached this conclusion by relying on the notion of ‘substantive obligations’ and deciding, in a counter-intuitive move, that the trust and confidence duty in employment contracts is not such a substantive obligation.

**Question 15 - Are you content with the proposed approach taken to restitution following recission?**

There may be some value in a statutory definition of rescission. Judges sometimes confuse resiling, rescission and repudiation.

Arguably, a remedy of restitution following rescission already applies, and ought to apply, at common law, but confusion in case law might make a statutory regime desirable.

If development is left to the common law, arguably, restitution following rescission ought to be viewed as flowing not from unjustified enrichment but from the mutuality principle in contract: see especially, *Connelly v Simpson* 1993 SC 391 (rejecting a right to restitution based on unjustified enrichment in this context)and *Stork Technical Services (RBG) Ltd v Ross’s Executor* [2015] CSOH 10A (suggesting that there may nevertheless exist a right to restitution flowing from the mutuality principle).

**Question 16**

**In light of the decision in Primeo are you content with the proposed approach taken to apply the defence of contributory negligence to claims of damages for breach of contract?**

Yes, but there could perhaps be a bespoke freestanding provision regarding contributory negligence in the context of breach of contract. On a related note, there may be value in consolidating extant statutory provisions regarding the general law of contract (e.g. those contained in the Contract (Scotland) Act 1997) and any future reforms into a single piece of contract-related legislation in an effort to make the law simpler and more accessible.

Although it should generally be possible for a plea of contributory negligence to be excluded by contract, this should not be competent for consumers. Such a term should be blacklisted in terms of the Consumer Rights Act 2015.

**Question 17 - Are you aware of any developments in case law which suggest that the law of anticipated breach needs reform?**

No, but some consideration could be given to the sort of scenario that arose in *White & Carter (Councils) Limited* v *McGregor* 1962 (HL) 1, where one party performs and demands payment (as opposed to mere damages). The extent to which such a right to demand payment is subject to a reasonableness test could be clarified.

**Question 18 - Are you aware of any developments in the courts which are either helping or hindering this area of the law?**

The SLC might consider this matter further as a limited exception to the compensation principle.

**Question 19 - Do you have any views on the current state of the law in respect of transferred loss claims?**

We urge the SLC to consider the matter further.

**Question 20 - Has the UK Supreme Court decision produced certainty or has it caused any difficulties or created unfairness?**

The decision of the Supreme Court in *ParkingEye Ltd v Beavis* [2015] UKSC 67 (conjoined with *Cavendish Square Holding BV v Makdessi*) constitutes an unsatisfactory development in the law of contract, especially for consumers. Legislation would be desirable to protect consumers to protect them from ever-increasing charges.

As regards liquidated damages and penalty clauses, it would be preferable to revert to the traditional test based on a genuine pre-estimate of loss (*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79) which is less ambiguous than one based on legitimate interest. The distinction between primary and secondary obligations is flawed. A test based on a genuine pre-estimate of loss can also be flexible: a pre-estimate of loss need not be accurate for that pre-estimate to be reasonable.

**Further comments**

Statutory reform could clarify that a claim for non-patrimonial loss is available in general for breach of contract and not simply as regards contracts of which the dominant purpose is non-pecuniary (*Jarvis v Swan Tours* [1973] QB 233).

Further consideration could also be given to frustration of contract, particularly with a view to widening the range of remedies available. Perhaps further consideration could be given to equitable adjustment.

Finally, some consideration ought to be given to consolidating all existing contract legislation into one statute. There are also certain provisions which would benefit from clarification. Note, for instance, the confusing notion of a gratuitous unilateral obligation contained in the Requirements of Writing (Scotland) Act 1995, s 1. At the same time, it may be helpful to recast section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 in positive language and to make express provision for innocent, negligent and fraudulent misrepresentation in a single statutory provision.