OUTER HOUSE, COURT OF SESSION

[2019] CSOH 85

CA63/19

OPINION OF LADY WOLFFE

In the cause

MARGARET HAMILTON OF ROCKHALL

Pursuer

against

LORD LYON KING OF ARMS

Defender

Pursuer: Lindsay QC; Lindsays
Defender: Mure QC; The Court of the Lord Lyon

5 November 2019

Introduction

Outline of dispute

[1] The present action concerns the parties' dispute as to the validity, proper meaning and effect of heads of agreements ("the Agreement") entered into in 2008 to settle extra-judicially prior litigation (in the form of a judicial review) between the parties. The Agreement was a composite agreement in that it also resolved a separate, second judicial review ("the Lindberg judicial review") brought at the same time by another individual, Dr Lindberg, who is not a party to these proceedings. In October 2017 the defender indicated an intention to alter his usage (to use a neutral word) in respect of the wording of

barony titles. The Disputed Wording is set out in paragraph [29]. The effect of the change is that the holder is no longer expressly recognised as "the baron of [x place]", or as "holder of" the barony of [x place]. The pursuer challenges the Disputed Wording as a breach of the Agreement. While that is the trigger for the dispute, as will be seen, these simple facts have given rise to a number of subsidiary legal issues. The matter came before the court for a three-day debate, at which both parties sought to challenge aspects of each other's pleadings.

Background

Subsistence of barony titles after the abolition of feudal land tenure

[2] The terms on which the Lord Lyon recognises the holder of a barony title and grants Letters Patent are at the heart of the dispute between the parties. Lyon Sellar described the history and nature of estates held in barony with considerable erudition in *Sturzenegger, Petitioner (No 2)* 2015 SLT (Lyon Ct) 2 at paragraphs 13-17 ("*Sturzenegger*"). Upon the coming into force on 28 November 2004 of the principal provisions of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5) ("the 2000 Act"), the feudal system as a form of landholding was abolished and such estates ceased to exist as feudal estates: see section 63 of the 2000 Act. This ended any connection between ownership of land and the former feudal barony. However, the "dignity" of baron was unaffected. The term "dignity" included "any quality or precedence associated with, and any heraldic privilege incidental to, a dignity": section 63(4) of the 2000 Act. By virtue of section 62 of the 2000 Act, which provided that "nothing in this Act shall be taken to supersede or impair the jurisdiction or prerogative of the Lord Lyon King of Arms", it remains competent for the Lord Lyon to

grant new arms to persons who own barony titles. The dignity of a barony title is a form of incorporeal heritable property.

The business of the firm of which the pursuer is a partner

[3] The pursuer is, together with her husband and her daughter, a partner of a partnership ("the firm") which markets and sells barony titles ("barony titles") to the public. The firm does not itself grant these titles but facilitates the grants of arms based on barony titles from the Lord Lyon King of Arms ("Lord Lyon") by letters patent in favour of their clients. However, none of the foregoing is the subject of averment by the pursuer. The pursuer does not sue *qua* partner of the firm. She sues in this action as an individual, which was the same capacity in which she entered into the Agreement.

Genesis of the current action: the change of wording to Letters Patent in October 2017

[4] The wording of the Letters Patent which the Lord Lyon grants has varied over time. In the pursuer's view, the effect of the change of wording proposed by the Lord Lyon in October 2017, ie the Disputed Wording, made the barony titles much less marketable or, more accurately, the value to the firm of the title sold was materially reduced. This is because the purchaser perceives that the desirability of a barony title resides in the territorial designation contained in the letters patent, thus: *"[Name of purchasers], Baron of X"* (where "X" is a Scottish place name). The market value of a barony title in the former style is said to be worth about £85,000, whereas the worth of a barony title containing the Disputed Wording is said be only about £10,000. This is said to have a material impact on the pursuer's own title, were she to dispose of it to a third party. The pursuer also asserted in

submissions that her interest to bring these proceedings is based on the diminution in her drawings *qua* partner of the firm. (The defender challenges that contention as having no foundation in the pleadings.)

[5] Central to this action is the pursuer's contention that the Agreement was a contract of compromise which is binding on the defender, and that the Disputed Wording breaches the Agreement. I set out the terms of the Agreement in the next paragraph.

The Agreement

[6] The Agreement was in the following terms:

> "**Heads of Agreement**
>
> 1. The decisions by Lyon (Blair) in the Dr Lindberg and Mrs Hamilton Petitions will be quashed, under reservation of the competency issue. There will be no expenses due to or by.
>
> 2. Dr Lindberg and Mrs Hamilton will abandon their current petitions to the Lord Lyon and submit new Petitions seeking (1) recognition respectively as Baroness of Lag and Baron of Delvine and (2) a grant of arms with, in respect of Dr Lindberg a helmet befitting his degree, namely the helmet assigned to barons as specified in Scots Heraldry, and in respect of Mrs Hamilton, the right of her heirs in the dignity of baron to bear and use such a helmet.
>
> 3. Lyon accepts that Dr Lindberg falls within the jurisdiction, and exercising his discretion, as a person who will require to bear arms in Scotland arising out of his ownership of the dignity of the Barony of Delvine.
>
> 4. In respect of future Petitions for Grants of Arms by other persons owning a dignity of baron which has been acquired post the appointed day, provided that the Lord Lyon determines that the dignity of baron exists, that the petitioner is a virtuous and well deserving person and determines to exercise his discretion in their favour to grant arms the Lord Lyon will, (i) if so required, officially recognise the petitioner as 'Baron of [the barony]' and (2) grant them ensigns armorial with a helmet befitting their degree, namely the helmet assigned to the barons.
>
> 5. Where a petitioner has no connection with Scotland that otherwise brings the petitioner within the jurisdiction of the Lord Lyon, Lyon accepts that subject

> to other relevant considerations he will accept the ownership of a dignity of a barony as sufficient to bring the petitioner within his discretionary jurisdiction to grant arms to that person as a person who will require to bear arms in Scotland by reason of his ownership of the dignity." (Emphasis added.)

I have numbered the individual paragraphs for ease of reference; the numbering internal to paragraphs 2 and 4 is in the original. The references to "petition" and "petitioner" in the foregoing mean, respectively, the form of the application for a grant of arms to the Lord Lyon and the person who brings such an application (as opposed to a petition by way of judicial review to these courts). The pursuer relies in particular on the words underlined in proviso (i) in paragraph 4.

The judicial review proceedings and the Lindberg judicial review

[7] In about 2006 the pursuer applied to the then Lord Lyon (Lyon Blair) to be recognised officially as the "Baroness of Lag" and to receive a grant of arms with baronial additaments appropriate to the Dignity of Baron in the Baronage of Scotland. On 15 May 2006 Lyon Blair determined to recognise the pursuer only as "Holder of the Barony of Lag" and to grant the pursuer a coat of arms without any baronial additaments. He issued a Warrant for Letters Patent dated 15 May 2006 ("the 2006 Warrant"). In 2006 the pursuer presented a petition for judicial review ("the Hamilton judicial review") challenging Lyon Blair's refusal, in effect, to recognise her as Baroness of Lag.

[8] In terms of the prayer, in the Hamilton judicial review she sought orders (i) for recognition in the name Margaret Hamilton of Rockhall, Baroness of Lag, and (ii) to authorise the Lyon Clerk to prepare Letters Patent granting her and her descendants such Ensigns Armorial, together with all additaments appropriate to the Dignity of Baron in the

Baronage of Scotland. The Lindberg judicial review was brought at the same time and it proceeded on broadly the same grounds. The two judicial review proceedings were settled extra-judicially in 2008 by a single agreement, namely the Agreement recorded above, at paragraph [6].

[9] The pursuer avers that the Agreement also resolved the Lindberg judicial review. As part of the settlement of the Hamilton judicial review, it was agreed that the 2006 Warrant be reduced. In due course, Lyon Blair recognised the pursuer as "the Baroness of Lag" with grant of arms with baronial additaments appropriate to the dignity of baron.

The office of Lord Lyon and the power to grant arms

[10] A number of arguments concern the office of the Lord Lyon, the nature of the powers he exercises in that role generally (eg administrative or judicial) and in the exercise of the royal prerogative, delegated to him, to grant arms. A further issue concerned the capacity of one Lord Lyon to bind a successor in office. Accordingly, it may assist to set out the background to these matters insofar as they were uncontroversial between the parties.

The Lord Lyon and his immediate predecessors

[11] The compearing defender in these proceedings is Dr Joseph J Morrow CBE, QC, LLD, the current holder of the office of Lord Lyon King of Arms, in relation to the grant of arms. The previous holder of the office was David Sellar MVO, MA, LLB, FRHistS, FSA, who was Lord Lyon at the time of the Agreement at issue in these proceedings. Lyon Blair was the Lord Lyon who granted the 2006 Warrant.

The Office of Lord Lyon

[12] The Lord Lyon King of Arms is an Officer of State. It has been observed that in his armorial jurisdiction, "Lyon stands in the place of the King.": *per* Report by Lyon-Depute Boswell (1796), Lyon Office Records, cited by Sir Thomas Innes of Learney, Lord Lyon King of Arms in *Scots Heraldry* (2nd Ed, 1956) at page 7 ("*Scots Heraldry*"). Sir Thomas Innes of Learney is the undoubted modern authority on the history of the Office of Lord Lyon.

[13] The Lyon King of Arms Act 1867 (30 & 31 Vict C 17, "the 1867 Act") provides *inter alia*:

> "1. The jurisdiction of the Lyon Court in Scotland shall be exercised by the Lyon King of Arms, who shall have the same rights, duties, powers, privileges and dignities as have heretofore belonged to the Lyon King of Arms in Scotland, except in so far as these are herein-after altered or regulated.
>
> 2. The Lyon King of Arms shall be bound to discharge the duties of his office personally...."

The defender emphasised that section 2, which provided that the duties of Lord Lyon were non-delegable but were to be exercised personally, underscored the personal discretion vested in the Lord Lyon.

[14] Earlier statutes of the old Scottish Parliament include: The Officers of Arms Act 1587 (c 46); The Lyon King of Arms Act 1592; the Lyon King of Arms Act 1669 (c 95) and The Lyon King of Arms Act 1672 (c 47) ("the 1672 Act"). By virtue of *inter alia* the 1672 Act, the Lord Lyon is expressly authorized to grant arms to "virtuous and well deserving persons" (a phrase repeated in para 5 of the Agreement). In *Scots Heraldry*, Sir Thomas Innes records the following elaboration of those words and persons who are

> "in all places of honour and worshipe among other noble men to be renouned [ie reknowned] reputed taken and accepted by shewing certain ensigns and demonstrations of honour and noblesse" (spelling in original),

which he describes as "persons deserving of being raised to the nobility" and who, by virtue of the grant of arms become root of a "noble stok" (*ibid* at p 85).

Personal appointment of the Lord Lyon by the Monarch

[15] The Lord Lyon is personally appointed by the Monarch in terms of letters patent. In relation to the grant of arms, the Lord Lyon exercises the royal prerogative on behalf of the Monarch. The powers and duties conferred on the holder of the office are exercisable by, and binding upon the holder of the office for the time being: see section 12 of the Interpretation Act 1978. However, unlike many other ministerial offices of offices of state, there is no statutory provision dealing with a vacancy in this Office of State, or providing that it shall be a corporation sole. (This may be contrasted with the statutory provisions made for Ministers of the Crown, as for example provided for in section 5 of the Crown Suits (Scotland) Act 1857; section 1(6) of the Public Registers and Records (Scotland) Act 1948; Ministers of the Crown Act 1975, Schedule 1, paragraph 5; or article 4 of the Secretary of State for Transport Order 1976 (SI 1976 No 1775).) The potential significance of this is that there is no presumed or imputed continuity of obligations as between one holder of the office of Lord Lyon and his predecessor, a point the defender relies on to argue that the Agreement was not binding on successor Lords Lyon.

The distinct jurisdictions exercised by the Lord Lyon

[16] The Lord Lyon has two distinct types of jurisdiction. It is helpful to note these two jurisdictions.

The Lord Lyon's administrative or ministerial jurisdiction

[17] The first jurisdiction is a ministerial or an administrative jurisdiction, in which the Lord Lyon has a wide discretion in exercising the prerogative powers delegated to him: see *Stair Memorial Encyclopedia* (Reissue) *"Courts and Competency"* at paragraph 276; *Kerr* v *Advocate General for Scotland* 2010 SC 1 (Ex Div) ("*Kerr*") at paragraphs 6-7 per Lord Marnoch (delivering the Opinion of the Court). New grants of arms are made pursuant to claims not of right but of grace; the petitioner has no inherent right to a grant. See section 1 of the 1672 Act, which provided that the Lord Lyon

> "may give Armes to vertuous and well deserving Persones and Extracts of all Armes expressing the blasoning of the Arms undir his hand and seall of office."

Thus, in petitions of the type mentioned in paragraphs 4 and 5 of the Agreement, it is for the Lord Lyon to decide (i) whether he has jurisdiction to make a grant of arms to the petitioner; (ii) whether the petitioner is a "vertuous and well deserving person"; and, in the event that the Lord Lyon decides to exercise his discretion under the royal prerogative to make a grant of arms, (iii) what form they should take. (The foregoing is averred in the defender's averments, and admitted by the pursuer.) Such ministerial and administrative functions are reserved matters: see paragraphs 1 and 2 of Schedule 5 to the Scotland Act 1998 ("the Scotland Act"); Part 1 of Schedule B to the 1867 Act and The Lyon Court and Office Fees (Variation) (Reserved Functions) Order 2016 (SI 2016 No 1138, with Explanatory Memorandum). This has the potential to affect the question of who is more properly called as defender, if not the current Lord Lyon, as the appropriate representative of the Monarch. (This argument only emerged at debate.) So, for example, if the power exercised concerns a reserved matter, the proper defender would be the Advocate General for Scotland.

Procedure for application of a new grant of arms

[18] An application for a new grant of arms is made by petition to the Lord Lyon King of Arms in the Court of the Lord Lyon. Where the petition is granted, the Lord Lyon's determination is set out in a Warrant for Letters Patent, by which the Lord Lyon authorises the Lyon Clerk (i) to prepare Letters Patent granting appropriate ensigns armorial and (ii) to matriculate the arms in the Public Register of All Arms and Bearings in Scotland. In due course, the Letters Patent are issued to the petitioner. The Letters Patent are a formal title deed from the Crown granting the arms. That is their function. Since the grant of arms is a matter for the Lord Lyon's "very wide discretion" in the exercise of the royal prerogative assigned to him by the 1867 Act, his determinations may only be reviewed by the Court of Session on traditional public law grounds: see *Kerr* at paragraph 7. The decision in *Kerr* also made clear the Lord Lyon's wide discretion, in particular, as to how to record or recognise the names of those petitioning for a grant of arms: see paragraphs 8 to 11. The defender notes that in *Kerr*, an Extra Division refused a challenge to the Lord Lyon's refusal to recognise the applicants in Letters Patent (and hence in the Public Register) in a name or style that incorporated a territorial designation.

Judicial functions of the Lord Lyon

[19] The second type of jurisdiction concerns the Lord Lyon's judicial functions in determining a claimant's entitlement in respect of legal rights. These are not reserved: see paragraphs 1 and 2 of Schedule 5 to the Scotland Act. Part 2 of Schedule B to the 1867 Act; and The Lyon Court and Office Fees (Variation) (Devolved Functions) Order 2016 (SI 2016 No 390, with Policy Note) ("the 2016 Devolved Functions Order"). The Lord Lyon also has

jurisdiction in the matter of change of surname: see the 2016 Devolved Functions Order just noted. In Scotland, persons may call themselves by any name, but if they wish a certificate regarding change of a surname they may apply to the Lord Lyon, who again, has a wide discretion in the matter: see *Kerr* at paragraphs 9-10.

The evolution of the Lord Lyon's practice and the wording for grants of letters patent

[20] The essential issue that divides the parties is whether paragraphs 4 and 5 of the Agreement were contractual (as the pursuer contends), and which gives rise to issues about the capacity of one Lord Lyon to bind his successor in such obligations, or whether they are no more than the articulation of Lyon Sellar's proposed policy or practice at the time made in the exercise of his ministerial discretion (as the defender contends), and which gives rise to issues about the width of that discretion and whether one Lord Lyon may permissibly fetter the discretion of a successor. In order better to understand parties' arguments about the nature of the ministerial power the Lord Lyon exercises, and which characterisation the defender supported by reference to examples of other earlier policies and their changes, it is helpful to set out the evolution of the Lord Lyon's practice in relation to the wording of grants of letters patent. While this narrative was not formally agreed by the parties, I did not understand Mr Lindsay QC, senior counsel for the pursuer, to dispute it. (In the following, I use "practice" or "policy" without prejudice to characterisation of the jurisdiction from which it flows.) Nor did I understand Mr Lindsay's final position to be to dispute that the exercise of the royal prerogative in the grant of arms involved a ministerial (as opposed to a judicial) jurisdiction.

The Lord Lyon's practice prior to 28 November 2004

[21] The appointed day for the parts of the 2000 Act relevant to the issues in this case, under section 23 of the 2000 Act, was 28 November 2004 ("the appointed day"). An example of the Lord Lyon's practice prior to the appointed day was produced, in the form of the Letters Patent for Junaid Bhatti ("Mr Bhatti") subscribed by Lyon Blair on 27 July 2007. Mr Bhatti was named as "Baron of Ballencrieff". Towards the end of his letters patent there was what is known as a "nobility clause". The defender founds on the fact that such clauses have since been omitted from such deeds, without objection by the pursuer or the firm.

The practice between 28 November 2004 (ie the appointed day) and Agreement

[22] Although no example of Letters Patent issued in relation to this period was produced, it was a matter of averment and admission in the pleadings that various changes of wording were made, including the omission of the nobility clause in respect of grants made after 2007.

[23] Lyon Blair issued a detailed Note on 15 May 2006 ("Lyon Blair's Note") in connection with the present pursuer's original petition. At page 1 of Lyon Blair's Note he noted that the pursuer's petition (ie her application to the Lyon Court) was "the first Petition for a grant of Arms by a person claiming ownership of a barony which has come before me since the coming into force on [the appointed day]". In Lyon Blair's Note, Lyon Blair explained (at pages 1-2) why he was prepared to recognise the petitioner as holder of the Barony of Lag. Thereafter, Lyon Blair's Note explained why Lyon Blair was not willing to accept an entry in the Scottish Barony Register as evidence of ownership of a barony (pages 2-4). Finally, Lyon Blair's Note dealt with the question of baronial additaments (pages 4-9). (Baronial

"additaments" are symbols signifying a particular rank.) The policy set out in Lyon Blair's Note was reflected in the 2016 Warrant he issued on the same date. It would appear that Lyon Blair's Note accords with the practice adopted by Lyon Blair between the appointed day and the date that he vacated the office, in respect of persons whose claimed ownership commenced on or after the appointed day.

The practice following the Agreement

[24] Paragraphs 4 and 5 of the Agreement were published on the website of the Court of the Lord Lyon on 3 December 2008. Reference was made to an exchange of emails dated 3 December 2008 between the then Lyon Clerk and the solicitor then acting for the Lord Lyon in the Office of the Solicitor to the Advocate General for Scotland. The court was advised that the text (with one or two minor differences) was recorded for a time within the FAQs section of the website of the Lyon Court.

[25] An example of Lyon Sellar's policy is seen in the Letters Patent granted to Pier Felice Alberto Renato degli Uberti, dated 31 October 2012. Immediately below Mr Uberti's name, the text stated:

> "**baron of** Cartsburn for aught yet seen",

and later stated, under reference to an entry in the Scottish Barony Register, that

> "the Petitioner did acquire for aught yet seen the barony of Cartsburn".

It also stated that:

> "We have (Primo) Officially Recognised as We do by These Presents Officially Recognise the Petitioner in the name Pier Felice Alberto Renato degli Uberti, **baron of** Cartsburn for aught yet seen". (Emphasis in bold added.)

The practice after Menking, Petitioner

[26] The present defender, Lyon Morrow, was appointed by Letters Patent dated 7 January 2014, following the retirement of Lyon Sellar. The defender considered a petition dated 21 August 2014 from George David Menking. He subsequently issued a note dated 30 April 2015 (reported at 2015 SLT (Lyon Ct) 21 ("*Menking*")) in respect of his application. (Parenthetically, it should be noted that not every issuance from the Lyon Court is a judicial decision. In his note of argument the pursuer's senior counsel referred to *Menking* as if it were a judicial decision of the Lyon Court. As the defender's senior counsel helpfully explained, however, the Lyon Court may issue a policy and have it publicised in the law reports. *Menking* was one such example. At debate the pursuer's counsel departed from this part of his note of argument.)

[27] In *Menking* the defender observed (at para 8), that "[in] the established recent practice the dignity of barony establishes for its owner jurisdiction to petition the Lord Lyon for a grant of Arms." At paragraphs 29 to 31, the defender also set out his practice in regard to the wording recording his jurisdiction which he would authorise for inclusion in the Letters Patent for a grant of arms in the case of feudal or any other dignities. That text made clear that the wording recognising jurisdiction would not include the words "Baron of [the barony]" or "Baron of [X]". Rather, it would refer to the relevant deed of assignation of the relevant barony, by which the petitioner was brought within the jurisdiction of the Lord Lyon to make a new grant of arms. In relation to the grant of arms, *Menking* provided first (at paragraph 5), that as long as the present custodian of the Scottish Barony Register was "a person of skill", the defender would accept the custodian's report as evidence that the petitioner is owner of a barony and entitled to the dignity thereof. Second, having

referred (at paragraph 29 of *Menking*) to the previous wording of recognition, the defender set out (at paragraph 30) the wording that he proposed to adopt both in reference to Mr Menking's application and with all future petitions involving feudal and other dignities, namely:

> "By Deed of Assignation recorded in the Scottish Barony Register, the Petitioner **holds the** [Lordship and Regality of the Garioch] **being of the genus of barony**, which ownership brings the Petitioner within the jurisdiction of the Lord Lyon, King of Arms." (Emphasis added.)

The wording in square brackets will vary according to the nature and title of the barony in question.

[28] Other examples of this policy in action were produced to the Court. (See, eg the Letters Patent relating to Tamara Viktorovna Ettinger, as holder of the barony of Cramond (dated 24 February 2018) and to Bradley Paul Johnson, as holder of the baronies of Hallyards, or Lochmaben and of Kintrye, dated 27 August 2018.) In each case, by reference to the relevant deed of assignation recorded in the Scottish Barony Register, the Letters Patent stated that:

> "the Petitioner, *prima facie*, holds the [Barony of X / Lordship of X]".

The defender noted that these changes did not prompt any challenge by the pursuer or the firm at the time.

The Disputed Wording articulated in October 2017

[29] By letter dated 23 October 2017, the defender advised the pursuer's agents that with effect from 1 January 2018 (ie providing about nine weeks' notice) any application based on ownership of a barony will no longer make reference to the deed of assignation transferring the barony. As a consequence, there would no longer be any express statement in the

Letters Patent that the Lord Lyon officially recognises the applicant petitioner as "baron of" the barony in question. Rather, the Letters Patent will in future simply state that the petitioner "being within the jurisdiction of the Lord Lyon, King of Arms – he assigns Armorial Bearings"("the Disputed Wording"). At the request of the pursuer's agents, the date for this new policy was postponed, and it came into effect on 1 March 2018, providing an additional eight weeks' notice. In submissions, it was explained that since that date, the defender has received only three petitions to which the new policy was applicable, one of which was thereafter withdrawn. No Letters Patent have yet been prepared in relation to the other two petitions to him.

[30] The defender's position, in short, is that the change effected by the Disputed Wording was within the wide discretion of the Lord Lyon. The pursuer contends it is a breach of paragraph 4 of the Agreement. The Letters Patent were the only document in which the defender could give official recognition of a dignity using the desiderated wording.

Outline of parties' arguments

[31] The pursuer seeks to enforce paragraph 4 of the Agreement, which is said to have been breached by the Lord Lyon adopting the Disputed Wording. The pursuer's action is resisted on a variety of fronts, which, in turn has prompted counter-arguments from the pursuer. In outline:

1. The defender argues that the provisions of the Agreement on which the pursuer relies did not create obligations enforceable by the pursuer.

2. If the court finds that those provisions may have created enforceable rights, the defender next argues that those rights are indivisible and they would therefore require to be vindicated jointly with Dr Lindberg, the other party to the Agreement; or would be enforceable only by third parties. An ancillary issue arose as to whether any obligation accepted by a previous Lyon (eg in the Agreement) was binding on a subsequent Lyon.

3. If the court found that the Agreement created enforceable obligations, the defender next argued that those obligations had in any event been terminated. In reply, the pursuer argued that the obligations in the Agreement were not terminable, or not terminable except on a material change of circumstances for which, it is said, the defender had no averments. *Esto* the Agreement was capable of termination, and which was not confined to a material change of circumstances, the pursuer then argued that the Agreement could only be terminated upon the giving of reasonable notice and, separately, no reasonable notice had been given (though this last variation might require proof). (I shall refer to the cluster of questions under the heading "the termination issue".)

4. The defender contends that the provisions of the Agreement on which the pursuer relies are not valid and are unenforceable against the defender because:

   (i) they unlawfully fetter the exercise of a prerogative discretion, and

   (ii) on the pursuer's averments, they are designed to support values in a secondary market in baronial dignities.

5. The defender advanced a number of other arguments, namely,

(i) that pursuer has no relevant averments of title and interest;

(ii) that this court has no jurisdiction (by reason of the value of the cause being below £100,000);

(iii) that the alleged losses on which the pursuer's action is predicated were not within the reasonable contemplation of the parties to the Agreement and are therefore too remote to sound in damages and, further,

(iv) that the court could not grant interdict against the Lord Lyon King of Arms in these proceedings. In the course of submissions, Mr Lindsay abandoned any motion for interdict. I need not record parties' submissions on the question of remedies, which I was asked to reserve until after determination of the merits of the pursuer's claim.

The parties' submissions

Preliminary comment

[32] Parties produced Notes of Argument and a joint statement of legal principles; the defender produced a further speaking note. Submissions ranged widely and under reference to a large number of authorities, over the course of three days. I have had regard to parties' oral and written submissions. I do not propose to rehearse these *ad longum.* In summarising these, I intend no disrespect to Counsel's full and careful submissions, all of which I have taken consideration.

Submissions on behalf of the defender

The approach to construction of the Agreement

[33] Mr Mure QC, who appeared for the defender, noted that the background to the Agreement was largely a matter of admission between parties. In so far as the Agreement was contractual, it fell to be interpreted according to modern principles of construction, as in the case of any other agreement. Extrinsic evidence of the factual matrix may therefore be used to identify the purpose of the Agreement and the dispute that the parties thereto were seeking to settle by it. In the present case, therefore, the petition in the Hamilton judicial review, along with her prior petition and warrant were relevant. Mr Mure noted that the summons was clear that the dispute concerned the wording of the 2006 Warrant issued on 15 May 2006 by Lyon Blair in respect of the pursuer's personal petition. The orders sought by the pursuer in the Hamilton judicial review concerned the pursuer alone (see paragraph [8], above). In none of the earlier proceedings did the pursuer claim *qua* partner in any firm or partnership.

[34] Turning to the issue of who were the parties to the Agreement, Mr Mure noted that the Crown has the capacity to contract. In Scotland, it has always been possible to sue the Crown on the basis of a contractual liability. In so far as the Agreement is held to be contractual, it is a contract entered into by the Crown acting through the agency of the Lord Lyon as an Officer of State: see *Wade & Forsyth: Administrative Law* (11th Ed, 2014) at pages 698-701 and *Town Investments Ltd* v *Department of the Environment* [1978] AC 359 at 381D-E, 400 & 402C-D. Developed to its logical conclusion, albeit on a hypothesis that the defender did not accept (that the Agreement created enforceable obligations), Mr Mure's final position was that Lyon Sellar had entered into the Agreement on behalf the Monarch. If that

were correct, then the action would require to be directed against the Monarch and, as the subject matter concerned a reserved matter, the Advocate General for Scotland was the appropriate defender. (This point emerged only in submissions at the debate.)

[35] Mr Mure noted that a Crown servant acting in his official capacity is not liable to actions for breach of warranty of authority: *Dunn* v *Macdonald* [1897] 1 QB 555 at 556-558. While the Crown may bind itself by a commercial contract, such as a lease, like any other public authority it cannot fetter the exercise of its discretion in the future as it sees fit: *Ayr Harbour Trustees* v *Oswald* (1883) 10 R (HL) 85 at 87 ("*Ayr*") and *York Corporation* v *Henry Leetham and Sons Ltd* [1924] 1 Ch 557 at 569-570 ("*York Corporation*").

The meaning of the particular paragraphs

[36] Turning to consider the individual paragraphs of the Agreement, Mr Mure noted that paragraph 1 recorded parties' agreement that the decisions by Lyon Blair in the prior petitions will be quashed. The reservation of the "competency issue" was a reference to the issue later decided by an Extra Division of the Inner House in *Kerr*, namely whether petitions for judicial review were competent in relation to particular decisions of the Lord Lyon. As a compromise agreement, the reference to expenses did not indicate that the pursuer had a right to expenses. Indeed, the pursuer abandoned her original petition to the Lyon Court and raised a fresh petition.

[37] Paragraphs 2 and 3 dealt with future action in relation to the two petitioners, Dr Lindberg and Mrs Hamilton. Paragraphs 1 to 3 were acted upon and he submitted that those provisions were now spent.

[38] Paragraphs 4 and 5 of the Agreement did not concern either Dr Lindberg or the pursuer. On the basis of the pursuer's pleadings and productions, he submitted that they do not concern any dispute being litigated between either of those petitioners and the Lord Lyon. In terms, the paragraphs concern "other persons" (eg see para 4 of the Agreement).

[39] Mr Mure outlined the defender's principal position on paragraphs 4 and 5 of the Agreement is as follows. They set out the policy of the then Lord Lyon, Lyon Sellar, who died on 26 January 2019. No Lord Lyon is bound to follow a policy of his predecessor, for none can bind his successor. The defender is not therefore bound by his predecessor's policies. In any event, paragraphs 4 and 5 do not contain contractual stipulations intended to be for the benefit of, or enforceable by, either Dr Lindberg or the pursuer. He developed this submission, as follows:

1. The words in paragraph 4 to the effect that the Lord Lyon would "if so required, officially recognise the petitioner as "Baron of [the barony]" proceeded upon the mistaken hypothesis that a petitioner may "require" anything of the Lord Lyon in such a petition. However, such grants of arms are a matter of grace and not of right. Further, paragraph 4 of the Agreement did not stipulate where, when or how any such official recognition would be made.
2. The pursuer's complaint was that the defender will not include "the assignation clause" in Letters Patent. However, the Agreement does not contain any reference to an "assignation clause". Accordingly, even if paragraphs 4 and 5 were contractual, there has been no breach on the part of

the defender. In any event, by the grant to a petitioner of arms appropriate to the dignity of such a baron, the Lord Lyon is *ipso facto* accepting that he has jurisdiction in recognition *inter alia* of the petitioner's ownership of the barony.

3. If, contrary to the defender's contention, those paragraphs were intended to and did create rights, those would be rights created for the benefit of third parties and not for the benefit of either Dr Lindberg or the pursuer: he referred again to the wording in paragraph 4 to "other persons". The dispute that was settled under paragraphs 1 to 3 of the Agreement did not concern third parties or their rights.

4. The pursuer does not aver that in those prior judicial review proceedings in the Court of Session she asserted or sought to vindicate any rights *qua* partner in a firm. He submitted that it was clear on the evidence of the petition for judicial review, that she did not do so. No such interest is mentioned in the Agreement. Accordingly, the pursuer had no personal patrimonial interest in the performance by Lyon Blair of the approach set out in paragraphs 4 and 5 of the Agreement. On the pursuer's averments, the purported losses to which she refers were not in the reasonable contemplation of the parties to the Agreement, and are too remote to sound in damages: see *Balfour Beatty Construction (Scotland) Ltd* v *Scottish Power plc* 1994 SC (HL) 20 per Lord Jauncey at pages 30-32. It is not for a stranger to the arms to challenge the grant: see *Stewart Mackenzie* v *Fraser-Mackenzie* 1922 SC (HL) 39 at 44-45.

5. In any event, any losses that the pursuer avers would be caused by a departure from the policy position set out in paragraphs 4 and 5 of the Agreement, would be caused to the partnership of which she avers she is a partner. As a Scottish firm, that partnership has separate legal personality. The Agreement cannot properly be interpreted as intended to confer a benefit on the pursuer in her capacity as a partner in that firm, or upon the firm itself: the partnership was not a party to the petition to the Lord Lyon, the judicial review proceedings or the Agreement. The pursuer has no interest to sue upon paragraphs 4 or 5 of the Agreement.

6. If, contrary to the defender's contention, paragraphs 4 and 5 were undertakings by Lyon Sellar to the pursuer and Dr Lindberg jointly, then both those parties would require to join in vindicating the correlative right, for those paragraphs do not distinguish between them and the undertakings, construed as the pursuer would have it, must be seen as undertaken as an indivisible obligation: see *Grange Trust Trustees* v *City of Edinburgh Council* [2017] CSOH 102 per Lord Boyd at paragraphs 13-26 ("*Grange Trust Trustees*").

7. No petitioner may require the Lord Lyon to grant warrant for Letters Patent with specific wording. The reference in paragraph 4 of the Agreement to "if required" is therefore wrong in law. An application for arms proceeds in the manner described in the information leaflet (this was lodged at no 7/9 of Process at page 4). As that leaflet explains, the Letters Patent are a formal title deed from the Crown granting the arms. That is their function. Since the

grant of arms is a matter for the Lord Lyon's discretion in the exercise of the royal prerogative assigned to him, it is not for any individual person such as the pursuer to purport to bind the Lord Lyon in any part of that process, nor for any holder of that office to purport to bind himself.

The consequence of the Lord Lyon not being a corporation sole

[40] In any event, insofar as the pursuer contended that the Agreement binds all holders of the office of Lord Lyon in perpetuity unless and until there is a material change of circumstances, Mr Mure submitted that that cannot be so, for the following reasons.

1. The Lord Lyon is not a corporation sole. There is no continuity in respect of contracts he enters into. While he is personally bound by any contract he enters into, as is the Monarch in respect of the exercise of the royal prerogative, one Lord Lyon cannot transmit liability to a successor in office. Accordingly, given the nature of the office, the personal appointment by the Monarch of each successive incumbent, and the applicable law just described above, the initials of parties' counsel acting in 2008 cannot have been intended to bind any future holder of the office to abide by the policy set out in paragraphs 4 and 5. No Lord Lyon possesses the power to bind himself, *a fortiori* to bind future holders of the office, as to the manner in which the prerogative powers conferred upon the office holder by the said Acts would in future be exercised. Those paragraphs are therefore invalid and unenforceable as being an unlawful fetter upon the Lord Lyon's wide statutory discretion in such matters.

2. Moreover, on the pursuer's construction paragraphs 4 and 5 of the Agreement would have been entered into with the purpose of supporting a secondary market in baronies, and of supporting the values of baronies in that market. Such a contract, entered into by an officer of state bound by statute to exercise prerogative powers and duties, would be against public policy and *contra bonos mores*: *Chitty on Contracts* (33rd Ed, 2018) at paragraphs 16-047 to 16-053. It would bring into disrepute the office of Lord Lyon. Contracts are contrary to public policy in so far as they are entered into by officers of the Crown and purport to oblige them to favour a particular business or to create or support a market in dignities. While it may be proper for such an officer to publish a policy about his approach to the exercise of such powers, it cannot be right that one Lord Lyon may bind himself and successors in perpetuity or until (as the pursuer would have it) there is a material change of circumstances. The existence of, and need for, a wide discretion in such matters is clear from *Kerr* at paragraphs 8-10.

3. The pursuer admits the defender's averments about various prior changes to the wording of Letters Patent, namely (i) the omission of the nobility clause from Letters Patent in respect of grants made after 2007; (ii) limiting the recognition of orders, honours and decorations to those awarded in the United Kingdom; and (iii) limiting the narration of qualifications.

The termination issue

[41] Mr Mure suggested that if paragraphs 4 and 5 of the Agreement were a contractual agreement, he submitted that they are not a compromise of the dispute that was before the Court of Session in 2008 between the pursuer, Dr Lindberg and Lyon Blair in the form of the Hamilton and Lindberg judicial reviews. Insofar as those paragraphs constituted a contractual agreement capable of binding future holders of the office (which the defender denied), being an agreement of indefinite duration it may be terminated by any party giving notice. On this basis, notice was given by means of (i) the Note in *Menking* and (ii) the correspondence in 2017 (referred to in para [24], above.)

[42] On a proper interpretation of the Note in *Menking*, the policy described there is not in accordance with the pursuer's interpretation of the Agreement and represented a change in policy. Putting it another way, Mr Mure submitted that the pursuer's complaint about the omission of the words "baron of [x]" was not founded on the Agreement and, in any event, this had already been effected by the defender in *Menking*.

[43] The pursuer avers that a reasonable period of notice would have been one year. On a proper interpretation of the Note in *Menking*, the policy described there is not in accordance with the pursuer's interpretation of the Agreement. It clearly represented a change of policy set out in a public judgment, of which the firm and the pursuer were well aware. Moreover, on 23 October 2017 the defender advised the pursuer's solicitor of a further change in policy. Mr Mure noted that some 18 months had now elapsed since that letter was issued. In these circumstances, the provisions in paragraphs 4 and 5 of the Agreement are not binding upon the defender.

[44] If the pursuer were correct in her averment that the Agreement could only be terminated on a material change of circumstance (which for the reasons already noted, the defender denies), parties are in dispute about whether there has been such a material change. The defender has made relevant averments about this point, namely: (i) the appointment of a new holder of the office of Lord Lyon King of Arms; (ii) the publication in *Menking, Petitioner* of a new policy; (iii) the use, as averred by the pursuer, of the prerogative powers of the Lord Lyon to support a market in baronies; and (iv) the misuse of Letters Patent by holders of baronies who have obtained new grants of arms from the Lord Lyon.

Submissions on behalf of the pursuer

Pursuer's motion

[45] Mr Lindsay invited the court to sustain the pursuer's first, second and third pleas-in-law and to pronounce decree *de plano* in terms of the first and second conclusions. The pursuer does not seek interdict in terms of the third conclusion, as it considers that the defender, as the holder of a public office, will abide by the terms of any declarator pronounced by this court. In the alternative, the court should delete certain of the defender's averments and thereafter allow a proof before answer on the issues which remain in dispute between the parties.

[46] Mr Lindsay divided his submissions into the following chapters: (1) the court's jurisdiction over the present proceedings, (2) the pursuer's title and interest to bring the present proceedings, (3) the binding nature of the Agreement, (4) why the Disputed Wording breaches the Agreement, (5) why the Disputed Wording is contrary to *Menking*, (6) why the Agreement cannot be terminated by reasonable notice, (7) why there has been no

material change of circumstances which would bring the Agreement to an end and (8) why the Agreement is not *contra bonos mores.*

Jurisdiction

[47] In Mr Lindsay's submission the pursuer has relevantly averred that this court has jurisdiction, as the value of the rights forming the subject matter of this action exceeds £100,000. He referred to the averments in articles 1 and 9 of condescendence which provided:

> "1. ... The value of the rights forming the subject matter of this action exceeds £100,000. As hereinafter condescended upon, the defender's new policy will reduce the capital value of the pursuer's one third share of the Partnership by more than £100,000. In this regard, reference is made to the averments in article 9 of condescendence, *infra*. In addition, the capital value of the pursuer's own barony title will be reduced in value by approximately £75,000 if it can no longer be sold with the purchaser being recognised by the defender as the Baron or Baroness of Lag. With such recognition, the pursuer's barony title has a capital value of approximately £85,000. Without such recognition, its value is approximately £10,000. This court accordingly has jurisdiction ..."

and, in Article 9:

> **"9 ... Accordingly, the new policy has had and will continue to have a detrimental impact upon the business of the Partnership, of which the pursuer is a partner. The pursuer's** profits from the sale of barony titles, as a partner of the Partnership, have averaged £62,328 *per annum* over the last 5 years. As the new policy will have a detrimental impact upon the business of the Partnership, by reducing the number of sales and by reducing purchase **prices, the capital value of the pursuer's one third shar**e of the Partnership will be reduced. The pursuer reasonably estimates that the new policy will reduce the capital value of her **one third share of the Partnership by at least £100,000** ..." (Emphasis added by pursuer.)

[48] Mr Lindsay submitted that these averments relevantly aver that the value of the rights forming the subject matter of this action exceeds £100,000. In addition, reasonable and adequate specification is given of why this is the case. As the pursuer has relevantly averred that this court has jurisdiction, this issue cannot be determined against the pursuer

at debate. Accordingly, if the defender wishes to continue to dispute jurisdiction it will be necessary to have a proof before answer.

Title and interest

[49] The pursuer has sufficient title and interest to pursue this action in her own name and it is not necessary for Dr Lindberg to be an additional defender. "Title" to sue involves some legal relation which gives the pursuer some right which the defender either infringes or denies: *D & J Nicol* v *Dundee Harbour Trustees* 1915 SC (HL) 7 *per* Lord Dunedin at page 12. In the present case, the pursuer has title to enforce the Agreement as she was a party to it. The Agreement was negotiated and agreed by senior counsel for each party. The Agreement was initialled by the parties' senior counsel and each party was provided with an initialled Agreement for their records.

[50] "Interest" means some benefit from asserting the right. There must be a real issue, the existence of a sufficient interest being essentially a matter depending on the circumstances of the case: *Lennox* v *Scottish Branch of the British Show Jumping Association* 1996 SLT 353 applying *Scottish Old People's Welfare Council, Ptrs* 1987 SLT 179. The pursuer's interest arises from the impact on her drawings from the firm.

[51] Mr Lindsay expanded on his submission. The Disputed Wording will have a detrimental impact upon the business of the firm, of which the pursuer is a partner. The capital value of the pursuer's one third share of the firm will also be diminished by the change. As a consequence of this detrimental impact on its business, the pursuer's personal drawings from the Partnership will be reduced. It is this reduction in her personal drawings that provides the necessary interest to bring the present proceedings: *Vaughan* v

Greater Glasgow Passenger Transport Executive 1984 SC 32 (*Vaughan*"); and *Anthony* v *Brabbs* 1998 SC 894 (*Anthony*").

The indivisibility of the obligations in the Agreement

[52] Mr Lindsay turned to the defender's argument that Dr Lindberg also required to enter the process to vindicate rights under the Agreement. In *Grange Trust's Trustees* v *City of Edinburgh Council* Lord Boyd provided guidance on when it is necessary for all parties to a contract to seek to enforce its obligations and when it is permissible for one party alone to bring proceedings:

> "15. The question is whether the pursuers have title to pursue this action at their own hand. The defender submits that the obligation is not divisible and therefore all the creditors must conjoin in the action. Gloag (at p203) states:
>
> 'If the action is for the enforcement of a contractual right which is in its nature indivisible, all those entitled to enforce the right must join in the action, no one creditor having a title to sue separately, and without the authority of the others.'
>
> The authorities suggest that is the correct approach when the pursuer holds a pro indiviso share and the other shareholders are not party to the action. In Detrick and Webster v Laing's Patent, etc., Sewing Machine Co 1885 R 416 several owners of a patent made an arrangement with the owners of a similar patent providing for the mutual use of patented parts and payment of royalties. By the time of the reclaiming motion only Webster was left in the process. He held a six twelfth share of the patent. The court held that all parties must conjoin in the action. The Lord President said that where the action is founded on an agreement and nothing else when it came to enforcing the agreement all those who form one party must conjoin in bringing the action. In actions of removing all the proprietors must conjoin in the action; Gloag p203; Crozier v Downie (1871) 9M 826 . The same rule applies in a lease granted by a liferenter and fiar; Gloag supra; Buchanan v Yuille (1831) 9 S 843 .
>
> 16. The issue then is whether or not the Trustees and the Club can be separated out as having different interests or whether they are to be regarded as one party in construing the rights under the Minute of Agreement."

In the present case, he submitted, the obligations contained in the Agreement were not indivisible. The pursuer and Dr Lindberg have separate and distinct interests and are not one party when construing the rights and obligations under the Agreement.

[53] He developed this submission, as follows. Dr Lindberg's interests in the Agreement were limited to its first three paragraphs. Dr Lindberg was concerned merely with his own petition; and it is the first three paragraphs that set out how his dispute with the Lord Lyon will be resolved. He had no interest in any future petitions at the instance of third parties. In distinction to Dr Lindberg, the pursuer had an interest not only in the resolution of the dispute relating to her own petition but also in future petitions at the instance of third parties. The pursuer had an interest in such petitions because of the business of the firm. Dr Lindberg has no interest in the firm and no interest in such future petitions.

[54] Paragraphs 4 and 5 of the Agreement set out the terms upon which such future petitions will be granted and who is subject to the jurisdiction of the Lord Lyon. The obligations contained in paragraphs 4 and 5 were distinct and separate from those contained in paragraphs 1, 2 and 3 of the Agreement. The obligations in paragraphs 4 and 5 were severable from those in paragraphs 1, 2 and 3. It is only the pursuer, as a partner in the firm, that has an interest in the obligations imposed upon the defender by paragraphs 4 and 5 of the Agreement.

[55] In the present proceedings, the pursuer is seeking to enforce the obligations imposed upon the defender by paragraph 4(i) of the Agreement. Accordingly, Dr Lindberg does not require to be a pursuer in the present proceedings, in which he has no interest. Dr Lindberg has no interest in paragraph 4(i). Only the pursuer has such an interest. This why the

obligation that the pursuer is seeking to enforce is distinct and separate from the other obligations in the Agreement.

[56] As the pursuer and Dr Lindberg have distinct interests they are not to be viewed as one party for the purposes of the Agreement; and they are free to enforce their own individual interests without the consent or concurrence of the other. Accordingly, as the pursuer has both title and interest to pursue the present action and as it is not necessary for Dr Lindberg to be a party to the present proceedings, the defender's third plea-in-law should be repelled, and the supporting averments in Answers 5 and 12 should not be admitted to probation.

Whether the Agreement gave rise to enforceable obligations

[57] On this matter, the pursuer's position was that the Agreement, entered into by the pursuer and by one of the defender's predecessors in office on or about 13 November 2008, remains in full force and effect and the defender is bound by its terms. The Agreement was not personal to the defender's predecessor in office as it was entered into *ex officio*. Further, the Agreement is not a ministerial or judicial decision. It is a contract of compromise, which settled contentious litigation extra-judicially. Accordingly, the rules relating to the inability of the defender to bind his successors in office, which only apply to judicial and administrative decisions, are inapplicable.

[58] The Agreement is a contract of compromise between the parties to the petitions, *videlicet*: the pursuer, Dr Lindberg and the office of Lord Lyon. The defender's predecessor in office did not enter into the Agreement in a personal capacity. Rather he was the respondent to the petitions and a party to the Agreement in his official capacity as

Lord Lyon. This contract is accordingly binding upon all his successors in office, such as the present incumbent of the office of Lord Lyon, the defender. As a contract of compromise, the Agreement is distinct from ministerial decisions made by the defender when deciding whether or not to grant arms. It is simply an exercise of the contractual powers which vest in the office of the Lord Lyon King of Arms. It is not an exercise of any ministerial power. Nor is it the exercise of any judicial power: see *Baron of Ardgowan* v *Lord Lyon King of Arms* 2008 SLT 251; and *Kerr*.

[59] In addition, the common law rules of precedent, which prevent a single judge from binding another single judge, do not apply to the Agreement as it is not a judicial decision. When acting in a judicial capacity, the defender cannot bind his successors with any judicial precedents. However, the position is different when it comes to entering into a contract. Contracts entered into *ex officio* by the defender are binding upon his successors in office. For example, a lease entered into by one Lord Lyon would be binding upon his successor until its termination date. The same principles apply to the Agreement.

[60] As a contract of compromise, the Agreement regulates and governs the parties' rights and obligations in respect of its subject matter. It is well established that settlement agreements entered into by parties to extra-judicially settle litigation, such as the Agreement, are binding contracts. Thereafter, the parties' rights and obligations are determined by the terms of the settlement agreement. The reasons why this is the case were explained by the First Division in *Evenoon Ltd* v *Jackel & Co Ltd* 1982 SLT 83 *per* Lord Cameron at 88:

> "The defenders reject the pursuers' claim to damages on the ground that any such claim was extinguished by reason of a **'contract of compromise'** entered into between the parties in November 1976 ... The 'contract of compromise' is apparently a synonym for the form of contract treated by Stair under the name of 'transaction'. The use of the

> word 'compromise' in this context seems to have been introduced in Gloag on Contract (2nd ed.) at p. 456 , and repeated by Lord Keith of Avonholm in Hunter v. Bradford Property Trust Ltd. at p. 190. Stair numbers 'transaction' amongst mutual onerous contracts (Inst., I. x. 12) as a nominate contract — in which law determines the implied terms; as he puts it: 'Transaction may well be numbered amongst mutual onerous contracts, for thereby either party quitteth a part of what he claims, for shunning the hazard and expences of law' . In the first edition of his Institutions (1681) Stair wrote of 'transaction': 'Which, being an useful mean to terminate pleas, the law of this and most nations observe the same inviolably, and will not admit the recalling thereof, upon anything can be pretended from new discovery of the parties' rights, or finding of writs or witnesses; but if nothing be abated, there is no transaction'. **There is nothing in this passage or in that quoted by Lord Keith in Hunter which requires that every issue in dispute be set out in detail, provided the cause or causes of dispute are identified or identifiable and the agreement necessarily involves a quittance or abatement of part of what the parties claim as their rights. It is in these circumstances that this implied condition is brought into operation and operates so as to extinguish any subsequent claims arising out of those rights which have been compromised."** (Emphasis added.)

Accordingly, the Agreement superseded whatever the parties' rights and obligations may have been prior to the commencement of proceedings. As there was no judicial determination of the parties' respective rights and obligations, no issues of *res judicata* arise, and the parties' rights and obligations are governed by the common law of contract. As the defender has failed to aver a relevant defence to the binding nature of the Agreement, the pursuer's first and second pleas-in-law should be sustained and decree of declarator should be pronounced in terms of the first conclusion.

The Disputed Wording breaches the Agreement

[61] The Disputed Wording introduced by the defender in no longer makes any reference in Letters Patent to the Deed of Assignation transferring the barony breaches the obligations imposed upon the defender by paragraph 4(i) of the Agreement. Mr Lindsay referred to the correspondence anent the Disputed Wording, which I have already noted above.

Correspondence anent the Disputed Wording

[62] Mr Lindsay noted the correspondence anent the introduction of Disputed Wording. By letter dated 23 October 2017 addressed to Dr Michael Yellowlees of Lindsays Solicitors, the defender advised that he had reconsidered the wording relating to feudal baronies contained in Letters Patent. He further advised that he had decided that from 1 January 2018:

(i) any application based on the ownership of a barony will no longer make any reference to the Deed of Assignation transferring the barony; and

(ii) the Letters Patent will simply state the petitioner "being within the jurisdiction of the Lord Lyon, King of Arms – he assigns Armorial Bearings".

The effect of the Disputed Wording, which is to omit the assignation clause, will mean that there is no longer any express statement in the Letters Patent that the Lord Lyon officially recognises the petitioner as baron of the barony in question. This is, Mr Lindsay submitted, a breach of the obligation to do so which is imposed by paragraph 4(i) of the Agreement. The Letters Patent are the only document in which such official recognition can be given by the defender. As the defender has failed to aver any relevant defence to the Disputed Wording being a breach of the obligations imposed upon him by paragraph 4(i) of the Agreement, the

The Disputed Wording breaches Menking.

[63] In his note of argument, Mr Lindsay had argued that the Disputed Wording was contrary to the terms of his judicial decision in *Menking*, in which the defender set out how his jurisdiction to make a grant of arms would be mentioned in Letters Patent. (The import of *Menking* is summarised above, at paras [26] and [27].) The pursuer relied in particular on the proposed wording of recognition thereby introduced, namely, **"**By Deed of Assignation

recorded in the Scottish Barony Register, the Petitioner holds the Lordship and Regality of the Garioch being of the genus of barony, which ownership brings the Petitioner within the jurisdiction of the Lord Lyon, King of Arms", and which was argued to be binding as a judicial decision. As Mr Lindsay departed from that analysis, I need not record the argument advanced under the misconception of *Menking* as being a judicial decision.

Who is the proper defender?

[64] Mr Lindsay objected to the defender's argument, which emerged in submissions, that the proper defender was the Advocate General. This had not been foreshadowed in any note of argument or at any case management hearing prior to the debate. If that argument were entertained, he submitted that it was competent to sue either the Lord Lyon or the Advocate General. If it were a good point, he invited the court to put the case out by order to enable an appropriate minute of amendment to be presented addressing this point.

The termination issue

[65] In relation to the defender's argument that the Agreement was terminated and had been terminated, Mr Lindsay submitted that the Agreement, as a contract of compromise, cannot be terminated by either party giving reasonable notice. Rather it remains in full force and effect until there has been a material change in circumstances. That is apparent from both the terms of the Agreement and from the circumstances in which the parties entered into it. The applicable legal principles, for determining the duration of a contract, are accurately summarised in paragraph 9.15 of the leading textbook *The Law of Contract in Scotland, 3rd Edition*, McBryde:

> "The first task is to construe the terms of the contract, before proceeding to consider what might be implied. The contract, properly construed, may have an express term on duration. Otherwise it may be possible to imply the duration of a contract. **A contract may be implied to continue as long as a particular set of circumstances exists**, such as the business of chartering a ship, or a shipping company trades at Greenock or until a business is discontinued or until computer technology was superseded and out of date. It is highly unlikely that the parties will enter into an agreement for perpetuity, which cannot be terminated by any of them. **But this is not impossible**, particularly if the agreement involves the use of land. Another possibility is that a contract is on a day-to-day basis and does not need to have any formal termination." (Emphasis added.)

In the present case, the necessary and inescapable implication of paragraphs 4 and 5 of the Agreement is that the Agreement was to continue as long as the pursuer was engaged in the brokerage of barony titles. In the absence of any material change in these circumstances, the Agreement cannot be unilaterally terminated by the defender.

[66] Further guidance is provided in *Gloag on Contract* at page 302:

> **"Inference of Permanency** – Cases of this kind, however, are not reducible to any general rule. It may be inferred from the terms of the contract that it was intended to be permanent. That will be the inference if there was anything of the nature of prepayment**."**

In the present case, there was prepayment by the pursuer. In particular, the pursuer waived the award of judicial expenses that she would otherwise have been entitled to, as the successful party, as consideration for the Agreement. The parties' agreement that there was to be no award of expenses due to or by any party was expressly referred to in the Agreement because it was the petitioner's consideration for the rights conferred upon her by the Agreement. This is a further indication that the Agreement was intended to endure until there was a material change of circumstances.

[67] In any event, contracts of compromise, such as the Agreement, which resolve contentious litigation and for which consideration has been paid by one or both parties cannot be terminated upon the giving of reasonable notice. If that were the case, it would

never be possible to settle contentious litigation extra-judicially as neither party would be able to rely upon their settlement agreement if it could simply be terminated upon the giving of reasonable notice.

Agreement was not validly terminated

[68] Mr Lindsay had a fall back to the effect that, even if the Agreement can be terminated by the parties giving reasonable notice to each other, the Agreement had not been validly terminated by the defender, for two reasons.

1. First, no notice was given by the defender to the other parties to the Agreement, the pursuer and Dr Lindberg, that he wished to terminate the Agreement. The defender does not aver that any such notice was ever given direct to the pursuer or to Dr Lindberg. The absence of any such averments renders the defender's averments on this issue wholly irrelevant. Rather, by letter dated 23 October 2017 to Dr Michael Yellowlees, a solicitor, the defender advised that he had reconsidered the wording relating to feudal baronies contained in Letters Patent. This letter made no reference to the Agreement and was not copied by the defender to the pursuer or to Dr Lindberg. In particular, this letter did not state that the defender was giving notice of his termination of the Agreement. Indeed, the letter makes no reference to the pursuer or to Dr Lindberg. Accordingly, no notice was given by the defender to the other contracting parties of his intention to terminate the Agreement. Writing a letter to a solicitor, who had acted for the pursuer

and for Dr Lindberg in the past, does not constitute the giving of notice to the other contracting parties of an intention to terminate the Agreement.

2. Secondly, in any event, no reasonable period of notice was given. Having regard to the timescales involved in the brokerage of barony titles, one year would have been a reasonable period of notice within which to conclude all ongoing business. Such a period of notice was not given by the defender. In any event, the defender fails to relevantly aver what a reasonable period of notice would have been in these particular circumstances; and fails to aver any factual circumstances from which such a period could be inferred.

For these two reasons, no valid notice of termination of the Agreement was ever given by the defender to the other contracting parties and therefore the Agreement remains in full force and effect.

[69] The defender's averments in Answer 6, relating to terminating the Agreement upon the giving of notice, being irrelevant and lacking in specification, these averments ought not to be admitted to probation.

No material change of circumstances

[70] The pursuer accepts that the Agreement cannot continue indefinitely and will come to an end upon a material change in circumstances. However, the Agreement remains in full force and effect as there has been no material change in circumstances since the date on which it was entered into. None of the pursuer's averments give rise to any such inference. In any event, the defender has not relevantly averred any such material change in circumstances. He developed this as follows.

No relevant averments of material change in circumstances

[71] The defender's averments relating to the alleged material change in circumstances are to be found in Answer 6, and provide:

> "Furthermore, in light of the averments in the defender's Answers, it is clear that there has been a material change of circumstances, including the appointment of a new Lord Lyon; the unchallenged change of policy in 2015 referred to in answer 7 and commented upon approvingly by the Partnership on its website; the apparent attempt to use the Lord Lyon's prerogative powers to support a market in and the prices of estates held in barony; and the misuse of Letters Patent by those to whom they have been issued."

Mr Lindsay submitted that their averments are wholly irrelevant and do not set out any relevant material change in circumstances that would bring the Agreement to an end for the following reasons:

1. The appointment of a new Lord Lyon is not a material change in circumstances. Such an appointment is a routine event which was within the reasonable contemplation of the parties when they entered into the Agreement,
2. The procedure to be adopted in the future as set out in *Menking* did not breach the terms of the Agreement,
3. As there was a well-established market for barony titles when the Agreement was entered into, the continued existence of such a market cannot constitute a material change in circumstances, and
4. The pursuer is unaware of any misuse of Letters Patent by those to whom they have been issued. In any event, the pursuer has no liability or responsibility for any such misuse.

Accordingly, the defender's averments in Answer 6, relating to an alleged material change of circumstances, being irrelevant and lacking in specification, these averments ought not to be admitted to probation.

The public policy issue: whether the Agreement was contra bonos mores

[72] On this issue, the pursuer's position was that the Agreement is not *contra bonos mores* or otherwise contrary to public policy.

[73] The leading authoritative definition of when a contract is *contra bonos mores* was provided by Lord Dunedin in *Farmers' Mart Ltd* v *Milne* 1914 SC (HL) 84 at 86:

> "As to the general proposition that you cannot sue upon an illegal contract, there is, of course, no doubt; the question is whether a contract of this sort is an illegal contract. Now, taking it upon Scotch authority first, before coming to English authority, I find that the matter is very clearly dealt with, as it always is, by Mr Bell in his Principles. After setting forth that there are such things as illegal and immoral contracts, he deals in section 37 with contracts void at common law. He first sets forth contracts properly immoral, *contra bonos mores* , then certain rules as to *pactum illicitum* , and so on; and then he says this: '**Contracts for indecent or mischievous purposes or considerations, or prejudicial or offensive to the public or to third parties, or inconsistent with public law or arrangements are invalid**.' One best sees what is the true meaning of the words he there uses by going to the illustrations that he gives in the note in which he sets forth the cases on which his proposition is founded; and in the clause which I have read,—'**prejudicial or offensive to the public or to third parties**'—he adds this 'such are, *exempli gratia* , agreements in which a creditor in **fraud** of an agreement to accept a composition stipulates for a preference to himself'; and he gives a reference to his well-known work—the large work— Commentaries on the Law of Scotland. Now the Commentaries give more than one illustration of this matter. They give the one I have just read, and they give also a case where a creditor has got a sum in order to accede to a trustee; that is a case, not of regular sequestration, but of **private arrangement with the creditor where his concurrence has been bought**. And another very good instance of the same thing is given by a case which is referred to in Lord Hunter's judgment and has been cited to your Lordships—the case of M'Gown v. Tod in the Faculty Collection." (Emphasis added.)

The business of the firm is not contrary to the public interest or otherwise *contra bonos mores.* The sale of barony titles involves no indecent or mischievous purpose. It is not prejudicial or

offensive to the public or to third parties. No fraud has been perpetrated. The Agreement ensured recognition for all purchasers of barony titles regardless of whether or not they had used the services of the firm. The Agreement does not improperly favour the firm nor does it create a market which is prejudicial or offensive to the public in any way.

[74] The purchasers of barony titles are generally wealthy individuals who thereafter take an interest in their barony. Many such individuals have invested considerable sums of money in their baronies to the benefit of local people and the wider community. Accordingly, there was nothing improper in one of the defender's predecessors in office entering into the Agreement, upon the advice of senior counsel, and thereafter acting in accordance with its terms. The defender's averments in Answer 9, averring that the Agreement is *contra bonos mores,* ought not be admitted to probation as they are wholly irrelevant.

Discussion

Preliminary observations

[75] The pursuer's reliance on paragraph 4 of the Agreement is central to her claim, particularly her reading of that paragraph in support of her primary position as requiring the Lord Lyon in all time coming to use the phrase "Baron of the [barony of]" in the recognition of "other persons" as the holders of the dignity of an extant barony title. While questions of jurisdiction or the pursuer's title and interest might be logically prior issues, a determination against the pursuer on those issues (and which was essentially argued to be a deficiency on the pleadings) would leave unresolved what is the critical issue at the heart of the dispute between the parties. Indeed, as I understand it, the pursuer perils her case on

the Agreement, or at least paragraph 4, having contractual effect and being binding on the defender as the successor in office to Lyon Sellar. I therefore propose first to address the meaning and effect of the Agreement, before considering the other issues arising, insofar as it is necessary to do so.

The meaning and effect of the Agreement

The context giving rise to the Agreement

[76] The undisputed background was that the Agreement was entered into to settle the two judicial reviews by an extrajudicial settlement among the parties to those proceedings. *Prima facie* therefore it is a contract of compromise. One feature of a contract of compromise is that the obligations it creates supersede the rights or claims which were the subject of the litigation and it constitutes a contract binding on the parties to it. That aspect of a compromise agreement was not disputed as a generality. However, the pursuer argues that, as an extrajudicial compromise, the Agreement cannot thereafter be terminated by one party. In the alternative, the pursuer argues the Agreement cannot be terminated without a material change of circumstances (and she asserted that there were none) and, further, if the Agreement is terminable, insufficient notice has been given. I address the termination issue, below.

[77] Having regard to this context and to the language used in the Agreement, I find that some parts of it did create certain legal effects, in the sense that if a party proposed to advance a claim inconsistent with the compromise, its terms could be founded on to preclude that claim. So for instance, if one party sought expenses in respect of the judicial

review proceedings, the other party could successfully resist this on the basis of the agreement that there be "no expenses due to or by" recorded in paragraph 1.

Paragraphs 1 to 3

[78] How, then, are the individual paragraphs of the Agreement to be construed? It is patent that the first three paragraphs are addressed to resolution of claims advanced in the judicial reviews. The first two paragraphs deal with procedural matters, namely, in paragraph 1, the quashing of the Lord Lyon's decisions in respect of the petitioners' applications to him (ie by the pursuer and by Dr Lindberg), together with the agreement that there were to be no expenses due to or by in the judicial proceedings, and in paragraph 2, the petitioners were to withdraw their current petitions to the Lord Lyon and to submit fresh applications to him in specified terms. Paragraph 3 is solely concerned with a jurisdictional issue in respect of Dr Lindberg, and which records the Lord Lyon's agreement that Dr Lindberg falls within his jurisdiction by reason of his ownership of the dignity of the Barony of Delvine.

[79] It is not disputed that those three paragraphs were implemented. Indeed, the pursuer is designed in these proceedings as "Baroness of Lag" (the Lord Lyon's earlier refusal to recognize her as such formed part of her judicial review). Accordingly, while these paragraphs resolved the disputes in the judicial reviews, and may therefore have constituted new obligations in place of the subject-matter of those proceedings, I accept as well-founded the defender's submission that these paragraphs are spent. In any event, Mr Lindsay did not advance any argument to the contrary.

Paragraphs 4 and 5 of the Agreement

[80] The curiosity of the Agreement is that, its first three paragraphs having exhausted the subject-matter of the two judicial reviews, it nonetheless sought in paragraphs 4 and 5 to regulate other matters by "other persons" in future. The paragraphs do not arise from any claim made in the judicial reviews. In submissions the pursuer suggested that her husband was the *dominus litus* of the two judicial reviews and that the agreement of no expenses due to or by (recorded in paragraph 1) was a *quid pro quo* for other features of the Agreement (ie possibly paragraphs 4 and 5). As I understood him, the defender did not accept this explanation. In any event, there are simply no averments to this effect and no averments that the pursuer had a wider interest, eg *qua* partner in the firm, at the time of her judicial review or at the time of the Agreement. (She does have averments anent her interest in the firm, in articles 1 and 9, but essentially these are directed to establishing that the pursuer's claim is above the £100,000 threshold for the privative jurisdiction.) Notwithstanding this, the pursuer made no motion to amend to introduce reference to these matters, nor did she suggest that a proof would be required to determine them.

[81] Paragraph 4 is expressed as an intention on the part of the Lord Lyon to respond in future to petitions by "other persons" owning a dignity of baron (acquired after the appointed day under the 2000 Act) to recognize such a person ("if so required") as "Baron of [the barony]" and to grant ensigns armorial, so long as certain stipulations are met. These are as follows:

(i) that the Lord Lyon determines that the dignity of baron exists,

(ii) that the petitioner is a "virtuous and well deserving person; and

(iii) that the Lord Lyon "determines to exercise his discretion" in their favour.

The pursuer focused on the fact that there was a reservation of discretion in the foregoing, whereas the defender maintained that this was an inept provision.

[82] The pursuer's complaint is that the Disputed Wording is inconsistent with proviso (i) of paragraph 4 of the Agreement, as, in effect, requiring the Lord Lyon to recognize third party petitioners ("other persons") as "Baron of [the barony]" and which she argues precludes the Lord Lyon from using any wording inconsistent with this.

The character of paragraphs 4 and 5

[83] In my view, these paragraphs were not framed as creating enforceable obligations or, at least, as creating obligations enforceable by the parties to the Agreement. On the latter point, this simply follows from the terms of the paragraphs: paragraph 4 concerns future applications by "other persons" and paragraph 5 concerns a "petitioner who has no connection with Scotland…". The only capacity in which the pursuer instructed her judicial review or in which she advances her claim in these proceedings is as an individual. In her *individual* capacity, she can have no interest in enforcing these provisions on behalf of other persons. It was not suggested, in my view rightly, that either of these provisions created a *jus quaesitum tertio.* These paragraphs are not framed as being for the benefit of particular individuals.

[84] More importantly, however, is that having regard to their language and subject-matter, paragraphs 4 and 5 do not in my view have contractual effect. The fundamental point is that, having regard to their subject matter, paragraphs 4 and 5 amount to no more than an expression of intent, or the statement of a practice or policy to be adopted, by the Lord Lyon as to how he proposed in future to respond to applications falling within the

terms of these paragraphs. This is entirely consistent with the "wide discretion", as it was described, he exercised in his ministerial functions. This may be tested by asking: could a person ever compel the Lord Lyon to exercise the royal prerogative and make a grant of arms to him (invoking the language of "if required" in paragraph 4 of the Agreement)? In light of the particular nature of the prerogative exercised, involving the recognition and grant of arms (and which parties are agreed is only ever a matter of grace (and not entitlement)), the answer to that question is clearly in the negative. It is difficult to figure the grounds of a stateable challenge, which would only be competent by way of judicial review, being made to a refusal by a Lord Lyon to grant new arms.

[85] Under reference to cases including *Ayr* at 87, *York Corporation* at 569 to 570 and *R* v *Hammersmith and Fulham Borough Council ex p Beddowes* [1987] AC 1050 at 164 to 1070, the defender argued that if paragraphs 4 and 5 of the Agreement had the meaning the pursuer contended for, these would constitute an unlawful fetter on the Lord Lyon's discretion. I note that at the heart of what was objectionable in those cases was a policy or agreement whose effect was that the public authority in question had disabled itself entirely from exercising the statutory power conferred, with the consequence that it necessarily frustrated pursuit of the statutory purposes for which the power had been conferred. In my view, paragraphs 4 and 5 are not of that character, in the sense that they are not premised on the Lord Lyon *refraining* from the exercise of the royal prerogative vested in him.

[86] It respectfully seems to me that the issue of any impermissible fetter of discretion arising in this case is subtly different. This is because of the qualities inherent in and unique to the royal prerogative power available to the Lord Lyon. The very particular character of the royal prerogative power that is exercised by the Lord Lyon as a matter of grace is, in my

view, wholly inimical to the articulation of a policy or practice by him that is capable of binding successors in the office of Lord Lyon in the grant of arms. Putting it another way, by reason of the nature of the royal prerogative power exercised, any policy or practice articulated is not capable of creating correlative rights or expectations in favour of prospective applicants for the grant of arms (much less in entities who facilitate such applications for commercial gain). In the very special context under consideration, any attempt to purport to bind not only himself but his successor in office as Lord Lyon, which is the effect of the pursuer's reading of paragraph 4 of the Agreement, would clearly be incompetent. In my view, the phraseology in proviso (i), of "if so required", is therefore plainly inept. This conclusion arises from an analysis of the power exercised, not the nature of the Lord Lyon's office. It is therefore not necessary to consider the discrete arguments about the nature of the Lord Lyon's office, the consequences of not being a corporation sole or whether the Lord Lyon or the Advocate General is the proper defender. I reserve my opinion on those matters.

[87] Furthermore, this analysis of the nature of the royal prerogative exercised in the grant of arms is amply supported by the discussion by Sir Thomas Innes of Learney of the ancient origins and status of the office of Lord Lyon (see, eg chapter 2 of *Scots Heraldry*, 2nd ed, 1956) and the nature of the powers the Lord Lyon exercises. In the recognition and grant of arms, the Lord Lyon exercises the royal prerogative in place of the Monarch. By its nature, the Lord Lyon enjoys the widest discretion in the exercise of the royal prerogative. This is entirely concomitant with the grant of arms only ever being a matter of grace, not right. It is hard to identify in modern times an exercise of prerogative power enjoying a greater degree of discretion than that vested in the Lord Lyon in respect of the grant of arms.

The breadth of the discretion the Lord Lyon has in such matters, which is almost unique in a modern context, arises from the origins and nature of his ancient office and the very particular character of the royal prerogative he exercises on behalf of the Monarch.

[88] Returning to the terms of paragraphs 4 and 5 of the Agreement, it is clear that the paragraphs do no more than articulate a practice which is proposed to be followed in future. At its highest, these paragraphs were entered into in exercise of a ministerial or administrative function. That reinforces the conclusion, above, that these paragraphs are not contractual in character, even if they had purported to be expressed in terms as for the benefit of, or enforceable by, one of the parties to the Agreement (which I have determined they do not) and notwithstanding their inclusion in a document described as an "agreement".

[89] In relation to the issue of the indivisibility, the defender argues (under reference to the observation of Lord Boyd in *Grange Trust Trustees, cit supra,* at paras 15 to 16) that the obligations embodied in the Agreement are indivisible and hence Dr Lindberg also required to be a party to these proceedings. My finding that paragraphs 4 and 5 do not have contractual effect renders this argument redundant. However, even if I had found (i) that these paragraphs were contractual in nature and (ii) that they were enforceable by the parties to the Agreement, it remains the case that these two paragraphs are clearly of a different character from the first three paragraphs, by reason of their subject matter; and they are enforceable by different parties. The first three paragraphs arise from, and are directed to resolving, the judicial reviews. Paragraphs 4 and 5 bear to relate to persons *other than* the parties to the Agreement and to be prospective in intent. Applying Lord Boyd's formulation of the question in paragraph 16 of *Grange Trust Trustees* (quoted above, at

para [52]), it is: whether Dr Lindberg and the pursuer "can be separated out as having different interest or whether they are to be regarded as one party in construing the rights" under the Agreement? For the reasons already given, Dr Lindberg's interests were different from the pursuer's and he had no ostensible interest in paragraph 4, which is at the heart of the dispute in this case.

[90] More fundamentally, I have found that these paragraphs do not have contractual effect. Accordingly, while I find in favour of the defender on that issue, on the basis of the pleadings and arguments as presented at debate, I do not find that paragraphs 4 and 5 of the Agreement are indivisible from the other paragraphs and I reject the defender's argument on the indivisibility point. The pursuer's case would not fall to be dismissed on the basis that Dr Lindberg had not joined it.

[91] If paragraphs 4 and 5 are analysed as indicating how the Lord Lyon proposed to exercise his administrative or ministerial discretion (no distinction was drawn in the arguments before me between those descriptors), on the hypothesis that this is competent, the next question is whether this is an immutable policy (as the pursuer appears at times to have contended) or, if not, what rules govern any proposed change to it. In the absence of full argument, I express my opinion on a tentative basis. There was no argument advanced that the pursuer had any legitimate expectation that might be defeated by the change effected in the Disputed Wording. I reserve my opinion on whether the Lord Lyon's exercise of the royal prerogative in respect of the grant of arms and, more particularly, in respect of the form or language in which that grant is expressed, can ever give rise to a legitimate expectation. This is not to ignore the development of the law in its application of the grounds of judicial review to the exercise of the royal prerogative. Rather, it is to

recognise the very particular nature of the royal prerogative being exercised here. As I have already noted, in respect of the *grant* of arms (as distinct from adjudicating among competing claimants to an extant title), it is hard to identify in modern times an exercise of prerogative power enjoying a greater degree of discretion than that vested in the Lord Lyon. In these circumstances, it is unlikely that the Lord Lyon could competently articulate or agree that a practice or policy would be immutable or to subsist in perpetuity (which is in substance what the pursuer argues). In any event, properly construed, this is not what paragraphs 4 or 5 purported to do. Subject potentially to issues of legitimate expectations (viewed from the perspective of a potential applicant) or *vires* or jurisdictional issues, the Lord Lyon is in my view free to alter his practices or policies in respect of the form, wording and grant of arms as he sees fit in the exercise of his wide discretion.

Conclusion on paragraphs 4 and 5 of the Agreement

[92] The consequences of the foregoing are, first, that paragraph 4 of the Agreement is not contractual in character and it does not confer any contractual right enforceable by the pursuer in her personal capacity. Conversely, the Lord Lyon's decision to use a form of wording (such as the Disputed Wording) which is inconsistent with paragraph 4, does not give rise to an actionable civil wrong (in the form of a breach of contract) susceptible to challenge by the pursuer (or, indeed, by any person) in an ordinary or commercial action. (In point of fact, the Lord Lyon has departed in other ways from the terms of paragraph 4, but this prompted no challenge at the time. While reference was made to these matters in submissions, absent a plea of personal bar or waiver, in my view these are no more than jury points.) Secondly, *a fortiori* paragraph 4 does not have the quality of a compromise which is

immutable, unless altered with the consent of all interested parties. I reject as ill-founded the pursuer's argument to the contrary. Thirdly, the arguments about whether the contracts of one Lord Lyon bind his successor (on the hypothesis that these parts of the Agreement had contractual effect), or the mutation of that argument to impute liability on the Monarch (as the principal on whose behalf the royal prerogative was exercised, albeit by different Lord Lyons (and which meant any action required to be directed against the Advocate General for Scotland)), do not arise. Fourthly, as I have found that these paragraphs do not have contractual effect, there is no scope for application of rules of imputation into contracts of the terms of duration or, absent such a term, of rules about the subsistence of a contract without express duration until there is a material change of circumstances. It follows that the criticisms of the defender's pleadings for want of averments about these matters are without any force.

[93] The foregoing suffices to resolve the critical issue between the parties. Out of deference to the arguments I have heard, I address the other issues.

Other issues

The termination issue

[94] In the event that I had concluded that paragraph 4 constituted an enforceable obligation, that it was conceived in favour of the pursuer or enforceable by the pursuer, and that it was a liability that transmitted against the defender, the current Lord Lyon, I would have nonetheless rejected as ill-founded the pursuer's contention that this was incapable of termination. The authorities cited by the defender amply vouched that it would have been appropriate to imply a right of termination upon giving reasonable notice. Even if the

Lord Lyon were obliged to give reasonable notice of a proposed change in what is recorded in paragraphs 4 or 5 of the Agreement, the Lord Lyon did so in this case as disclosed in the exchanges with the pursuer's agents. In fact, the Lord Lyon acceded to the request as he postponed the implementation of the Disputed Wording for the full period the pursuer's agents sought. If paragraph 4 were terminable upon a change of circumstance, in my view the defender had advanced relevant factors to support that conclusion. However, the pursuer in her pleadings contends for a longer period (of one year). Had the question of what was a reasonable notice been a live issue, then, in the absence of admissions of the parties' averments, proof would have been required to resolve the issue of whether reasonable notice had been given of the departure from paragraph 4 of the Agreement.

Title and interest, want of jurisdiction

[95] There was no dispute as to the rules to be applied. For a person to have title to sue, she must be a party (using the word in its wides sense) to some legal relation which gives her some right which the defender infringes or denies. In relation to interest to sue, this connotes some benefit from asserting the right with which an action is concerned, or from preventing its infringement. There must be a real issue, the existence of a sufficient interest being essentially a matter depending on the whole circumstances.

[96] In light of the foregoing analysis of the Agreement, in my view neither the pursuer nor the firm has title and interest to challenge the Disputed Wording. Insofar as the Agreement affected the pursuer's interests in her personal capacity, namely paragraphs 1 and 2 (para 3 was concerned solely with Dr Lindberg), those have been implemented and there is no outstanding matter contained within them that is capable of founding any legal

action at her instance. As already noted, paragraphs 4 and 5 are determinedly not conceived in the pursuer's favour *qua* an individual, the capacity in which she sues (which is explicable because she seeks to enforce the Agreement in the capacity in which she had entered into it, and this was not *qua* partner of the firm).

[97] To establish her interest to bring these proceedings the pursuer relies on the diminution in her drawings as a partner of the firm, whose profitability is said to have been adversely affected as a result of the adoption of the Disputed Wording. The defender challenged this type of loss as too remote to be recoverable. The pursuer relied on the claim by the pursuer in *Anthony* for lost company dividends (or the diminution in drawings *Vaughan*, which raised a similar issue). In my view, these cases are readily distinguishable. Each was an action for personal injury by the person who suffered the legal wrong, and who was by reason of that personal injury unable to contribute his efforts to the business of the company (in *Anthony*) or partnership (in *Vaughan*). The loss of earnings in those cases took the form of a claim for the diminution in the pursuer's dividends from a limited company of which he was the sole director and employee and one of its two shareholders (the facts in *Anthony*) or diminution in partnership drawings (*Vaughan*). In that context, this head of claim is unremarkable as the company dividends or partnership drawings represented his remuneration and which was reduced as a consequence of the personal injury *he* suffered. Accordingly, the wrong committed by the defenders in each of those cases was committed against the pursuers and foreseeably caused a diminution in their ability to work for the company or partnership, and hence, affected *the pursuers'* earning capacity. In response to a question from the court, Mr Lindsay accepted that there was no similar link here (ie between any wrong to the pursuer and which affected her ability to contribute to the business of the

firm), but he argued that this did not matter. I do not accept that submission. In my view, the pursuer's claim in the present case is not analogous for the simple reason that there is no equivalent injury or wrong to the pursuer in this case and which can be said to affect *her* ability to contribute to the business of the firm (being the element common to *Vaughan* and *Anthony*). Mr Lindsay conceded as much. Even if paragraph 4 had embodied an enforceable obligation, it cannot be said that any breach thereof affected the *pursuer's* ability to contribute to the profitability of the firm. Rather, her claim is based on the indirect effect on her, of the impact of the Disputed Wording on the business *of the firm*.

[98] To the extent that the pursuer's claim is predicated on the adverse impact the Disputed Wording has had on the business of the firm, with the consequent diminution in her drawings, there is no sufficient legal or other nexus between a breach of any contractual obligation owed to the pursuer (on the pursuer's reading of paragraph 4 of the Agreement (but which I have rejected)) and any incidental adverse effect on the business of the firm. This is because the firm is a separate legal person who is not a party to the Agreement and in respect of whom it cannot be said to have suffered any legal wrong as a consequence of the defender's adoption of the Disputed Wording. In these circumstances, any loss of profitability by the firm does not confer interest on the pursuer to sue as an individual, even if an indirect or incidental consequence of the Adopted Wording was a diminution in the profits of the firm and a consequent diminution in her drawings *qua* partner. For these reasons, I find that the pursuer's averments of the effect of the adoption of the Disputed Wording on any interest she may have *qua* partner – which were essentially directed to overcoming the limit of the privative jurisdiction–, are irrelevant. Accordingly, she has no

relevant averments to establish title and interest to enforce paragraph 4 of the Agreement (even if I had found that it created an obligation enforceable by her).

[99] Finally, in relation to jurisdiction, the pursuer's averments seeking to establish that she is within the privative jurisdiction of this court fall into two categories. The first is the averment of the diminution in value of her own barony title. There is no relevancy challenge to this averment. However, the loss said to flow from that is below the privative jurisdiction. It is for that reason that there are averments (in articles 1 and 9) which also invoke her diminished earnings *qua* partner in the firm. However, in my view, the defender's submission that there are no relevant averments about the pursuer having any interest *qua* partner at the time of the pursuer's judicial review or at the time of the Agreement are well founded. Averments of losses said to flow from her diminished drawings *qua* partner of the firm are accordingly irrelevant. There is also some force in the defender's observation that no accounts of the firm were lodged to vouch the asserted quantum of loss relied on to establish jurisdiction, and note of which might have been permissible in the more flexible practice available to the commercial judge. More fundamentally, given that the firm was not a party to the Agreement, no legal duty or relevant legal nexus was plead as having been owed by the defender to the firm and there is no legal basis averred for a claim by the pursuer on behalf of the firm. Accordingly, the pursuer's averments (in articles 1 and 9) based on her diminution in the value of her drawings from, or interest in, the firm are irrelevant. Absent these averments, which I find to be irrelevant, the value of her claim is *prima facie* below the privative jurisdiction. This is not a matter I would have reserved for proof, had the pursuer otherwise established the merits of her case.

Is the Agreement contra bonos mores?

[100] The pursuer did not dispute the defender's characterisation of the firm's trade as facilitating a secondary market in the sale of titles. In effect, this appears to enable persons who have no connection with Scotland and who are not domiciled here, nonetheless to obtain a grant of arms so long as they can show that they have acquired a barony title. It is far from clear that this is the purpose for which the royal prerogative is properly to be exercised by the Lord Lyon.

[101] While I was not referred to this part of *Scots Heraldry*, I note Sir Thomas Innes' description of the relatively high proportion of Scots who held titles and honours at the time of the Union in 1707 (eg he noted that there was one peer per 8000 persons, whereas in England the figure was one peer for every 32,000 persons). Also notable was the learned author's description of the width of distribution of arms and honours to many *strata* of society:

> "In Scotland, not only peers and lairds, but professors, lawyers, merchants, and business men, have continually registered arms as a matter of course, by descent if proved, otherwise under new grants." (*Scots Heraldry*, *cit supra*, at p 85).

Lyon Innes' enthusiasm to revivify the grant of arms in Scotland, which is evident in the early chapters of *Scots Heraldry*, is remarked upon by Lyon Sellar: see *Sterzenegger* at paragraph 16. That enthusiasm notwithstanding the expansiveness with which Lyon Innes viewed jurisdiction in respect of barony titles, and which might be seen as at least not averse to the activities engaged in by the firm, it must be noted that Lyon Innes' discussion elsewhere in that volume (see, eg from page 85ff) appears to assume that the applicant has a Scottish domicile (presumably, technically, because one of the incidents of ownership of a barony title is the right to bear coats of arms in Scotland and a record

of which is maintained by the Lord Lyon) or he has a Scottish connection. By contrast, see Lyon Innes' discussion of the acceptance of "honorary arms" of foreigners, at least to the extent that they are *armes de petite noblesse*. The discussion in the cases referred to in the footnote to this passage (footnote 2 at page 92) is apparently confined to foreign–domiciled applicants but who are capable of demonstrating they enjoy equivalent foreign tokens of rank. Otherwise, his discussion of foreign applicants presupposes they can show some Scottish connection, viz,

> "Where the petitioner is a foreigner, eg an American citizen, or domiciled in another jurisdiction, and might have difficulty getting a Scottish grant of arms, he may indeed, <u>if he cannot prove his pedigree back to some Scottish ancestry</u>, word his petition to the Lord Lyon so as to obtain from his Lordship a grant of arms to that *ancestor and his descendants.*" (Emphasis by underlining added.)

It may be that paragraph 5 of the Agreement was directed to addressing that jurisdictional issue. (I express no view on the *vires* of paragraph 5 or whether, as appears to be assumed, a want of jurisdiction –if that be the case– can be cured by the exercise of the Lord Lyon's discretion.) But the tenor of Lyon Innes' discussion in *Scots Heraldry* would be inimical to support for a secondary market of barony titles simply on the basis that persons with no Scottish domicile or no Scottish connection had the money and inclination to obtain one. Further, while no submissions were made as to how the requirement that the applicant be a "virtuous and well deserving person" was met, the *de facto* promotion of a secondary market in barony titles would appear to be out of step with the passage from Lyon Sellar's in *Scots Heraldry* at p 85 (quoted at para [14], above) that, in short, barony titles are conferred on

"persons deserving of being raised to the nobility….". Nor is it clear that confirmation that this requirement has been met is delegable to the Lyon Clerk. While the defender's averments and submissions on the public policy issue have considerable force, given my determination of the other issues, it is not necessary to decide this question. In the absence of fuller argument, I reserve my opinion on this issue.

Decision

[102] It follows that the pursuer's case is ill-founded as is her challenge to the relevancy of aspects of the defender's pleadings. I shall issue an interlocutor to give effect to my determination of the legal issues debated. I reserve meantime all question of expenses.