

# Scots Commercial Law

Friday 26 July 2024

09.00 – 12.30

(three hours and thirty minutes)

Candidates should answer **THREE** QUESTIONS.

All sections of a question must be answered.

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## Question 1

Evaluate the importance of the duty of good faith in the context of cautionary obligations. Explain the prerequisites for the duty to be applicable and identify scenarios that would constitute a breach of this duty. Support your discussion with pertinent case law and illustrate your points with original examples.

## Question 2

Joanna is an artist looking to start a sole trader business selling handcrafted pottery. She decides to purchase a kiln to create her pieces and also to fire pottery for friends and other local artists for a fee.

On 10 February 2023, Joanna searches online for kilns available in her area. She comes across a model called the FireMaster 3000, known for its high-temperature capabilities and large capacity, which is listed for sale by a local retailer, KilnCraft Ltd.

The advertisement for the kiln reads:

*“For sale: £4,000. Built in 2015, the FireMaster 3000 is an industrial-grade kiln capable of reaching temperatures of up to 1,300°C, perfect for both stoneware and porcelain. Featuring an upgraded digital control panel, recently replaced heating elements, and a sturdy stand. Visit KilnCraft Ltd to view and purchase today!”*

Joanna visits KilnCraft Ltd on the same day, 10 February 2023, to inspect the FireMaster 3000, which she finds in the showroom. The kiln appears to be in good condition externally, but Joanna is concerned about the control panel, which seems outdated. A representative from KilnCraft Ltd assures her that if she buys the kiln for £3,800, KilnCraft Ltd will install a brand-new digital control panel. They mention it will take about one week to receive the new control panel and another day to install it.

Joanna agrees to the deal and, since she doesn't need the kiln immediately, says there's no rush. She pays a deposit of £800.

On 5 March 2023, KilnCraft Ltd contacts Joanna to inform her that the control panel has arrived and requests the balance. Joanna visits the showroom the same day, sees the kiln with what appears to be a new control panel, and pays the remaining £3,000. She decides to keep the kiln at KilnCraft Ltd's storage facility and pays an additional £50 for storage for March.

On 20 March 2023, Joanna decides to start a firing project with a local artist. When they attempt to fire the kiln, it fails to reach the required temperature and the control panel malfunctions. Upon closer inspection, Joanna discovers that the control panel is not new but is

actually a refurbished unit with visible wear. Further, an inspection by a technician reveals that the heating elements are worn out and incapable of maintaining high temperatures, and the kiln's internal structure has significant wear, making it unsafe to use. The cost to replace the control panel, heating elements, and to refurbish the internal structure is estimated to be over £3,500.

Joanna complains to KilnCraft Ltd, but their representative insists that she bought the kiln "as seen" in the showroom and that KilnCraft Ltd does not guarantee the quality of second-hand equipment, although this disclaimer does not appear in any of the documents she received.

Answer the following questions:

- a. Does Joanna have grounds to claim that KilnCraft Ltd breached the contract by failing to provide the agreed-upon new digital control panel?
- b. Is KilnCraft Ltd liable for the defects in the kiln, considering the advertisement's description and the representative's assurances, despite their claim that the kiln was sold "as seen"?
- c. What remedies are available to Joanna for the defective kiln and misrepresentation by KilnCraft Ltd?
- d. If the facts were different and the control panel was damaged by a power surge on 7 March 2023, who would be responsible for repairing or replacing it?

### Question 3

Art Lovers Ltd (“Art Lovers”) is a company that specialises in purchasing artwork from artists and sells it to customers. It owns a significant number of paintings and also owns a gallery in Ballater, which is subject to a standard security in favour of Braemar Bank (“Braemar”). Art Lovers wishes to expand and therefore seeks further finance. It consequently obtains a loan from Balmoral Bank (“Balmoral”), and grants Balmoral a floating charge with a negative pledge over its whole property and undertaking. Sometime later, Art Lovers has paid off the debt due to Braemar but acquires a new loan from them, which is secured by a floating charge with negative pledge over all of its property and undertaking. After being damaged by an unruly customer, one of Art Lovers’ expensive paintings is taken to Banchory Repairs Ltd (“Banchory”) for fixing. The repairs are carried out but Banchory remains unpaid.

After encountering financial problems, Art Lovers needs some emergency funds and pledges a valuable painting to Bon Accord Lending Ltd (“Bon Accord”) in return for a loan. It also enters into a factoring arrangement with Bon Accord and assigns to that company some payment claims it has against customers. However, these attempts to raise finance are ultimately in vain, as Art Lovers defaults on its debts, the company enters liquidation and the floating charges attach. The creditors involved are confused as to their relative priorities in relation to the various assets. With reference to authority, please explain the ranking priorities of the parties as regards all of the following assets:

- a) the gallery in Ballater;
- b) the painting repaired by Banchory;
- c) the painting pledged to Bon Accord; and
- d) the payment claims assigned to Bon Accord

### Question 4

Discuss the concept of proximate cause in Scots insurance law and its implications for claims settlement. In particular,

- a) evaluate the challenges and controversies associated with determining proximate cause, especially in complex cases involving multiple perils;
- b) discuss how Scottish courts have approached the issue in significant cases, and assess whether current legal principles provide adequate clarity and fairness for both insurers and policyholders.

## Question 5

Mary Mason is sequestrated on 14th February 2024. She was apparently insolvent in terms of s 16 of the Bankruptcy (Scotland) Act 2016 on 10th December 2023. In investigating her estate, the trustee in sequestration has discovered the following:

- a) Mary is registered as owner of houses at 14 and 16 Birch Crescent, Edinburgh. Mary entered a contract to sell 14 Birch Crescent to Marcel Gillepsie on 4<sup>th</sup> December 2023. She received payment of the price on 23<sup>rd</sup> January 2024.
- b) Mary sold her house at 23 Station Way, Glasgow to her friend, Charlotte Muir, on 12<sup>th</sup> February 2022. The price was £25 and the disposition registered on 19<sup>th</sup> February 2022. Charlotte then gave the house to her friend, Walter Mann on 6<sup>th</sup> January 2024. Walter registered the disposition in his favour on 16<sup>th</sup> January 2024.
- c) Mary borrowed £25,000 from Horizon Bank plc on 1<sup>st</sup> August 2023. This loan was eventually secured by a standard security over 16 Birch Crescent, Edinburgh, registered on 15<sup>th</sup> February 2024.
- d) Mary owed unpaid tax to HM Revenue & Customs. They arrested her bank account with the Bank of Scotland on 22<sup>nd</sup> October 2023.

Advise Mary's trustee in sequestration how best to proceed in relation to each of these matters.

## Question 6

John Smith is owed £20,000 by Sam Billard. Sam has a house which he co-owns with his wife Patricia. The house was acquired by Sam and Patricia in April 2008. The disposition in their favour was registered in the Land Register in May 2008. Sam and Patricia are in the process of marketing their property. They have not yet concluded missives to sell but Susie Dillon has been to view the property and has submitted an offer. Sam and Patricia have already concluded missives to buy a house from Jonathan Thomson. The date of entry will be 28 March 2024.

Sam has a current account with the Royal Bank of Scotland plc. This is currently overdrawn. Sam also has a savings account with HSBC which is in credit.

In their house Sam and Patricia have a collection of antiquarian books valued at £40,000. This is kept in a spare bedroom in the family home. Sam's Jaguar car is kept in a garage. Sam is the beneficiary in his father Jimmy Billard's executry. The executor Leslie Dale, has not yet made payment to Sam.

John comes to see you as his solicitor. He wants to know what steps he can take to recover the

money due to him by Sam. He is concerned that Sam will not pay him. John has a suspicion that Sam is not in a good financial position.

- a) Advise John, assuming John has not yet obtained decree for payment against Sam.
- b) Advise John, assuming he has now obtained decree for payment against Sam.

**END OF PAPER**