The 1984 Act would appear to be just the sort of legislation Lord Browne-Wilkinson had in mind. The absence of an action on the statute would point against a remedy in negligence.

B. CONCLUSION

The outcome in *Jain* is not surprising given the nature of the loss suffered, the identity of the defendant and the primary purpose of the legislation. One may still question whether a more balanced approach might not be developed. The action taken by the regulator was utterly unreasonable and highly oppressive. Whilst the interests of residents of care homes must be protected it would be wrong to ignore the interests of those such as the claimants: "the public interest in the provision of nursing homes, particularly those who are willing and able to take patients who are not easy to look after... is liable to be affected if the owners of such homes have no recompense for the dreadful financial consequences of a slipshod, unwarranted application to the court such as was made here".[15]

Were a duty to exist the competing interests could be taken into account in establishing the standard of care. Considerations which are relevant to the exercise of reasonable care by a public body but not to a private individual can be taken into account.[16] This approach has been adopted in *Burnett* and in several other Scottish public authority liability cases.[17] Finally, the House of Lords emphasised that, had the actions of the regulator occurred after October 2000, an infringement of the Human Rights Act 1998 might have arisen. It was arguably incompatible with Convention rights to have closed the home without affording the claimants the opportunity of showing the application to be insubstantial and based on insufficient grounds.

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A Strange Notice

In *Christie Owen and Davies plc, t/a Christie & Co v Campbell*[1] the pursuers entered into a "sole-selling rights agreement" with Campbell, in terms of which the pursuers agreed to market Campbell's leasehold interest in licensed premises. The pursuers

15 *Jain v Trent Strategic Health Authority* [2008] QB 246 at 281-282 per Jacob LJ.
16 *Just v British Columbia* (1989) 64 DLR (4th) 689.
17 See e.g. *McCafferty v Secretary of State* 1998 SCLR 379 at 382 per Lord Johnston.

1 [2009] CSIH 26, 2009 SLT 518. The opinion of the court was delivered by Lord Clarke. For discussion of proceedings before the sheriff and the sheriff principal, see R G Anderson, "Intimation 1862-2008" (2008) 12 EdinLR 275.

did so, finding a buyer willing to pay £46,000 for an assignation of the lease. As a result of the transaction, the pursuers became entitled to payment of a commission of £7,966 plus VAT. Tucked away in the agreement was a clause which ran:

> ... I/we hereby authorise the vendor's solicitors ... to pay out of money received by such solicitors, the fees requested by [the pursuers].

Campbell's solicitors were the second defenders and the contradictors to the action. The solicitors had acted for Campbell in the assignation of the lease and it was the solicitors who held the funds following the assignation of Campbell's lease. Following the settlement of the lease transaction, the pursuers sent a letter to the solicitors enclosing their fee note. The letter stated, "We look forward to receiving payment in early course. We look forward to hearing from you in due course".[2] The pursuers were not paid. The report does not disclose any commercial reason why the solicitors refused to pay. The only reason argued was that, although the clause in the agreement was capable of being an assignation,[3] there had been no proper intimation of the assignation. But there is no indication in any of the opinions that the solicitors had paid away the moneys they admittedly held or that they had received a competing claim to payment and were thus in double-distress. The solicitors even conceded before the court that if the documents had been read when they were received then they would have been "left in no real doubt that the appellants fell to be paid the sum in question".[4] And, in any event, providing no other interests intervene between intimation and the raising of the action, the production of the assignation in process amounts to judicial intimation,[5] which is the "best of all intimations".[6] This point does not appear to have been raised at any stage in the case.

A. THE LAW

Before the Extra Division, two principles were discussed: first, whether sending a letter together with a large commercial agreement to which the debtor is not party is sufficient intimation; and, second, whether intimation not complying with the terms of the Transmission of Moveable Property (Scotland) Act 1862 requires to be acknowledged.

(1) A preliminary issue

Nowhere in the opinion of the sheriff, sheriff principal, or the Division, is there recognition that, in *Christie*, there was no competition. Intimation serves at least two purposes.[7] One is to inform the debtor of the assignation. The other is to provide a

2 Para 5.

3 Whether such payment instructions should be construed as assignations rather than mandates is controversial. See Anderson (n 1) at 276 n 7.

4 A concession highlighted by the Division: para 11.

5 See R G Anderson, *Assignation* (2008) paras 7-16 ff; Anderson (n 1) 279 n 21.

6 *Carter v McIntosh* (1862) 24 D 925 at 934 per the Lord Justice-Clerk (Inglis).

7 See Anderson (n 1) at 276.

certain date on which the law holds transfer to occur. *Christie* was entirely concerned with the first of these purposes. Rather like the well-known decision in *Libertas-Kommerz*,[8] therefore, it is questionable whether *Christie* is any authority for whether informal intimation without acknowledgement would be valid in a case where there is a competing assignee or arrester.

(2) Covering letters and intimation

The sheriff and the sheriff principal took the commercial and common sense view that an assignee intimating an assignation should properly communicate what he is doing in any correspondence. It is not sufficient to send a letter demanding payment and enclose a full copy of an agreement to which the debtor is not party and which may be hundreds of pages long. The debtor cannot be expected to trawl through the provisions of the agreement for his own interest.

Surprisingly, however, the Extra Division took a different view. "Intimate", Lord Clarke tersely remarked, "simply means to 'make known"'.[9] By sending the letter together with a fee note and the agreement, and demanding payment "in accordance with the [agreement]", the pursuers had properly intimated the assignation. With respect, this conclusion may be doubted. A demand for payment may be made on all sorts of legal grounds. That the pursuers in this case had a contract with Campbell that entitled them to payment of a commission would not necessarily mean that there was any entitlement to payment from the solicitors (with whom the pursuers had no contract). If the demand for payment was based on the pursuers' position that they were assignees, the intimation by letter can be effective only if it tells the debtor that there has been an assignation, where the assignation can be found and, if the document is large, give the debtor reasonable instructions on where to find the operative clause.[10] In the same way that an insolvency practitioner does not respond to correspondence if there are no funds to pay him for doing so, solicitors do not read 100-page documents unless they are instructed (and paid) to do so. As it happens, however, the method of intimation in this case was unusual, for mainstream corporate and financial practice long ago moved away from complying with the terms of the Transmission of Moveable Property (Scotland) Act 1862 (which requires a certified copy of the assignation to be sent to the debtor). The *Christie* case therefore provides little support for the standard financial practice of sending to the debtor a clearly marked letter by recorded delivery, which contains an abbreviated notice signed by cedent and assignee.

8 *Libertas-Kommerz GmbH v Johnson* 1977 SC 191.

9 *Christie* at para 14.

10 A similar issue arose in *McLauchlin, Petitioner* [2009] CSOH 49. An "on demand" bond granted by a cautioner stated that a "certificate" by an officer of the lender would be conclusive evidence of the sums due. The cautioner consented to registration of the bond for execution. The lender served a charge for payment on the cautioner. The charge expired. The lender sought to do summary diligence. The petitioner sought suspension on the basis there had been no "certificate" crystallising the sums due. Lady Stacey held that the sums due were intelligible from the demand letters: see para 28.

(3) Acknowledgement

There has been some doubt in practice about whether an acknowledgement from the debtor is necessary before intimation of an assignation is effective. The law is clear in principle: an assignation is a transfer of a right against a debtor without the debtor's consent. Acknowledgement is thus only of evidential value.[11] But it is sometimes suggested that where the intimation is informal – that is to say, where it does not conform to the 1862 Act or a recognised equipollent – an acknowledgement from the debtor would be necessary for a valid intimation.[12] The Division, approving the treatment of the subject provided by Professor Wilson,[13] suggests in *obiter dicta* that (a) informal intimation is competent and (b) even where the intimation is informal, no acknowledgement is required.[14]

B. CONCLUSION

The *Christie* case is a strange one. Standing back for a moment, it might be queried how an action for payment of £9,360.65 required the consideration of a sheriff, a sheriff principal and the Inner House where there was no substantive defence to the action. The law of intimation is unsatisfactory in a number of respects. Yet intimation is crucial to practice. The wider questions, raised in a previous note,[15] are not addressed, so the *obiter dicta* about the general law of informal intimation and acknowledgment must be taken subject to the important caveat that no competing assignee or arrester was involved.

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An Opportunity Missed? Some Comments on the Interpretation and Legislative Reform (Scotland) Bill

The Interpretation and Legislative Reform (Scotland) Bill has now been introduced into the Scottish Parliament,[1] following upon a consultation by the Scottish

11 The Transmission of Moveable Property (Scotland) Act 1862, for instance, provides that an acknowledgement from the debtor is "sufficient" evidence of intimation.

12 See, for instance, Anderson, *Assignation* (n 5) paras 7-11 ff.

13 W A Wilson, *The Scottish Law of Debt*, 2nd edn (1991) para 27.3.

14 *Christie* at para 15.

15 Anderson (n 1).

1 The Bill, together with accompanying documents, is available at *http://www.scottish.parliament.uk/s3/bills/27-InterpretLegRef*.