

## Paul O'Brien

Year of Call: 2004

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### Professional Career to date

Devil Masters: Robert Weir, Gary Allan.

2004: Year of call

1999-2003: Solicitor, Maclay Murray & Spens, Glasgow

1997-1999: Trainee solicitor, Maclay Murray & Spens, Glasgow

### Education & Professional Qualifications

Diploma in Legal Practice, University of Edinburgh (1997)

LLB (Hons) University of Edinburgh (1996)

### Areas of Expertise

- Public Law, Judicial Review and Human Rights
- Commercial Contracts
- Commercial Property
- Insolvency
- Intellectual Property Rights
- Professional Liability
- Alternative Dispute Resolution

### Professional Experience

Paul O'Brien has a broad practice primarily based around commercial litigation, intellectual property law and professional negligence. He appears regularly in the commercial and ordinary courts, and he has appeared in the Inner House both alone and with senior counsel, and in the Supreme Court. Before calling to the Bar in 2004, he practiced as a solicitor in Glasgow for several years as a commercial litigator. He is a Fellow of the Chartered Institute of Arbitrators.

### Recent Cases

*Renyana Stahl Anstalt v. Loch Lomond & The Trossachs National Park Authority* [2017] SAC (Civ) 11, 2017 SLT (Sh Ct) 138, affirmed [2018] CSIH 22, 2018 SC 406, 2018 SLT 331

Paul acted for the local authority in this case concerning the access rights legislation under the Land Reform (Scotland) Act 2003 and a dispute over public access to part of an estate. The local authority succeeded before the Sheriff Appeal Court and the Inner House. The case involved questions as to how a landowner's purpose in obstructing entry should be assessed when applying the Act.

*Ted Jacob Engineering Group Inc v. Morrison* [2018] CSOH 51.

Paul is junior counsel for the defenders in this commercial action, which involves claims connected with the sale of a business in Dubai. Questions of foreign law were considered at a preliminary proof. The case is currently under appeal.

*Unicorn Tower Ltd v. HSBC Bank plc* [2018] CSOH 30

Paul acts for the Bank in this claim brought by borrowers who challenge its right to terminate a loan facility. A range of issues were argued at debate, leading to the dismissal of the borrowers' claim.

*Feidhm Mara Teoranta t/a Effective Offshore v. Opito Ltd* [2018] CSOH 10

Paul acted for Opito, which approves health and safety training providers in the oil and gas industry, in successfully defending a damages claim brought by a training provider whose approvals had been withdrawn.

*Higherdelta Ltd v Covea Insurance plc* [2017] CSOH 84, [2017] Lloyd's Rep IR 650

Paul was junior counsel for the pursuer in this action to enforce an insurance policy. The main issue related to alleged non-disclosure by the pursuer. The pursuer was successful at proof.

*Lusona Consultancy (Accountancy & Finance) Ltd v. McEwan* [2017] CSOH 52

Acted for the pursuer in an action to enforce restrictive covenants. The decision relates to a debate on the proper approach to severance of unenforceable covenants.

*Johnston Press Pension Plan Trustees v. Sedgwick Noble Lowndes Ltd* [2017] CSOH 21

Junior counsel for the defenders in a professional negligence action alleging failure to achieve equalisation of retirement ages in various pension funds. The action was successfully defended on the basis that equalisation had in fact been achieved.

*HOE International Ltd v Andersen* [2015] CSIH 24, 2015 SC 506; [2017] CSIH 9, 2017 SC 313

Acted for the defenders in this action, in which the pursuer alleges breach of warranty provisions in a contract for the sale of a business. Two preliminary issues were determined by the Inner House, involving the time limits for proceeding with an action after service, and whether the notice of the proposed warranty claims complied with contractual requirements.

*SSE Generation Ltd v. Hochtief Solutions AG* [2016] CSOH 141

Paul was part of the team of counsel instructed for the pursuers in a six-month proof. The case involved the collapse of the headrace tunnel at a recently constructed hydroelectric power station, with a wide range of complex technical and legal issues arising.

*Hooley Ltd, petitioner* [2016] CSOH 141, 2017 SLT 58, [2016] BCC 826

Paul acted as junior counsel for the petitioners/pursuers in these related actions which concern companies incorporated in Scotland but with assets in India. The cases concern both the interaction between Scottish and Indian procedures, and the appointment of administrators in Scotland where assets are located abroad.

*McDonald v. Dundee City Council* 2016 SLT (Sh Ct) 122

Acted for the Council in this claim by a former employee who claimed damages in respect of a reference which included reference to disciplinary proceedings which remained unresolved. The action was successfully defended.

*Swift Advances plc v. Martin* [2015] CSIH 65, 2016 SCLR 385, 2015 Hous LR 50

Acted for the pursuer in resisting the Inner House appeal in this action. The pursuer was a mortgage lender which had obtained decree to enforce its security over the defender's home. The Inner House affirmed the decision. This was the first case where the Inner House required to consider the preaction requirements of the Home Owner and Debtor Protection (Scotland) Act 2010, and in particular what was involved in making reasonable efforts to reach agreement.

*Clark v TripAdvisor LLC* [2014] CSOH 20, 2014 SLT 418, 2014 SCLR 563, affirmed [2014] CSIH 110, 2015 SC 368, 2015 SLT 59.

Counsel for the respondent, in application to recover details of identity of website user from company based in the USA. The petitioners wish to bring defamation proceedings against those users. The case concerns the scope of the court's statutory powers under the Administration of Justice Act, and their

application to companies outside the jurisdiction. The respondent successfully argued that those powers did not extend to it.

*David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48, 2014 SLT 791, 2014 SCLR 711

Junior counsel for the pursuers in damages claim for property damage from explosion. The case raises issues of when the prescriptive period begins to run when the cause of an explosion is not immediately discoverable. The Supreme Court held (overruling a line of earlier authority) that where a pursuer knows that he has suffered loss but cannot know that it is actionable or what has caused it, that is not sufficient to stop time from running.

*Ted Jacob Engineering Group Inc v Robert Matthew, Johnson-Marshall and Partners* [2014] CSIH 18, 2014 SC 579, 2014 SCLR 454

Junior counsel for the respondents in an application for recovery of documents prior to commencement of proceedings. The case raised issues of the standard of prima facie case required to obtain an order under section 1 of the Administration of Justice (Scotland) Act 1972, and of the approach of the court where the asserted prima facie case depends on rules of foreign law (in this case, Dubai).

*Regus (Maxim) Ltd v Bank of Scotland* [2013] CSIH 12, 2013 SC 331, 2013 SLT 447

Junior counsel for the defender in this action in which the pursuer contended that the Bank had taken on certain obligations by way of a letter of intent. The case involved issues as to the legal effect of such letters and the scope of the Scots law on promise.

*Winding Up Board of Landsbanki Islands HF v Mills* [2013] UKSC 13, 2013 SC (UKSC) 201, 2013 SLT 634, [2013] 1 WLR 725, [2013] 2 All ER 355, [2013] 1 All ER (Comm) 1257, [2013] 1 BCLC 465.

Junior Counsel for Landsbanki in these proceedings, in which an insolvent Icelandic bank and its insolvent Scottish subsidiary have presented various claims against one another, and a preliminary issue has arisen as to which country's courts should determine those claims. The case involves consideration of the special rules applying to banking insolvencies under the Credit Institutions (Reorganisation and Winding Up) Regulations 2004. Paul appeared at all stages of the case.

*Farstad Supply AS v Enviroco Ltd* [2013] CSIH 9, 2013 SC 302, 2013 SLT 421

Junior counsel for the pursuers. The court considered the approach that should be taken to pre-judgment interest on damages awards, in particular following the fall in commercial interests after 2008. The case raised important issues of the general principles to be applied in this area.

*Joint Administrators of Rangers FC plc, Noters* [2012] CSOH 55, 2012 SLT 599, [2013] 2 BCLC 436

Junior counsel for Ticketus, who disputed the administrators' entitlement to terminate arrangements entered into for tickets in future years. The case raised questions both as to the nature of Ticketus' rights under those arrangements, and the circumstances in which an administrator may properly cause a company to breach its contracts.

*Verathon Medical (Canada) ULC v Aircraft Medical Ltd* [2011] CSOH 19

Junior Counsel for the defenders in this intellectual property action, which relates to a patent for a video laryngoscope. Validity and infringement were both in issue. A proof was heard over several weeks. The outcome was that the patent was found to be valid but not infringed.

*Farstad Supply AS v Enviroco Ltd* [2010] UKSC 18, [2010] Bus LR 1087, [2010] 2 Lloyd's Rep 387, 2010 SCLR 379

Junior Counsel for the pursuers in this action. The action is a damages claim relating to a vessel which was destroyed by fire. The case was appealed to the Supreme Court on the question of whether the defenders were entitled to claim a contribution from a third party (who in turn would be entitled to an indemnity from the pursuers) under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, even though that third party would have had a contractual defence to any claim by the pursuers. The pursuers were successful before the Supreme Court.

*Tayplan Ltd v Smith* [2009] CSOH 93

In this action, a company in administration seeks to recover various funds which it alleges had been misappropriated or wrongly paid out by the directors. Paul is acting as Counsel for the company, and the decision relates to a lengthy proof at which we were largely successful. The decision has been reclaimed by the directors (who are now party litigants), and the reclaiming motion is due to be heard shortly.

*Morris Amusements Ltd v Glasgow City Council* [2009] CSOH 84, 2009 SLT 697

In this action, a local authority exercised statutory powers to arrange for the demolition of a fire-damaged building, and the owner of the neighbouring building alleges that its property was damaged because of the way in which the demolition works were carried out. Damages are claimed from both the contractors and the local authority. Paul is Junior Counsel for the Council. The case raises issues of the extent of the Council's liability for any negligence on the part of its contractors, and the scope of the "extra-hazardous works" doctrine in Scots law. The case is reported in relation to a debate on relevancy and specification, and a proof is set down for next year.

*Rosserlane Consultants Ltd, petitioners* [2008] CSOH 120

Junior Counsel for the respondents in this case, in which parties claiming to be creditors of a dissolved limited partnership invited the court to appoint a judicial factor over the partnership's assets. We obtained recall of the appointment. The case involves issues of legal principle regarding the scope of the court's power to appoint a judicial factor, and how that power should be exercised, in cases where the basis of the petition is in dispute.

*Scottish & Southern Energy plc v Lerwick Engineering & Fabrication Ltd* 2008 SCLR 317

Counsel for the defender in this action, which is reported in relation to a debate on relevancy. The central legal question was whether the indemnity clause founded upon by the pursuers was effective even where the loss for which they claimed had been caused wholly or partly by their own fault.

*Melfort Pier Holidays Ltd v Melfort Club* 2007 SC 243

This was a dispute between two neighbouring businesses as to whether the pursuers were entitled, on the basis of a public right of way, to encroach onto the defenders' property in order to obtain access to their property for commercial vehicles. The case raises legal issues as to the nature of the public's right in roads and the effect of encroachment by the public beyond the boundaries of the road. The case is reported in relation to an interim interdict; Paul appeared for the pursuer in the Outer House, and the decision was affirmed by the Inner House, where Paul was Junior Counsel.

### **Advocates Courts & Tribunals**

Supreme Court; Court of Session (Outer House and Inner House); Sheriff Court; First-Tier Tribunal (VAT); Sheriff Appeal Court, Scottish Land Court

### **Publications**

*Extinction of Servitudes Through Confusion* 1995 SLT (News) 228