

## Kenny McBrearty QC

Year of Call: 2000 Year of Silk: 2013

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### Professional Career to date

Devil Masters: Ian M. Duguid QC, Andrew R.W. Young QC.

2013: Silk

2006: Appointed Standing Junior Counsel to the Scottish Government

2000: Called to the Bar

1994-1997: Solicitor with Simpson & Marwick, Edinburgh

1994: Qualified as a solicitor

### Education & Professional Qualifications

LLB with First Class Honours, 1987-1991, University of Aberdeen

Diploma in Legal Practice, 1992, University of Aberdeen

Accredited Mediator, Mediation Forum Ireland

Fluent in Spanish

### Areas of Expertise

- Commercial Contracts
- Professional Liability
- Public Law, Judicial Review and Human Rights
- International
- Media Law
- Commercial Property
- Insolvency

### Professional Experience

Kenny's practice is centred predominantly in the fields of commercial law and professional negligence but his ability to provide strong oral advocacy has seen him instructed in a wide range of cases, in both private and public law. He has appeared in cases relating to, amongst other matters, commercial contracts, banking, the misuse of confidential information, professional negligence (involving accountants, solicitors, surveyors, engineers and doctors), insurance, intellectual property, partnership, planning, property law, sports law, fire recovery, flooding, private international law, telecommunications, extradition, freedom of information, human rights and challenges to Acts of the Scottish Parliament. He has appeared at all levels of the Scottish court system, including the Supreme Court.

He also has experience of appearing at arbitration, public inquiries and disciplinary tribunals, both of professional and sporting bodies. He has been instructed for the United Kingdom government in relation to applications to the European Court of Human Rights. Chambers and Partners recommend him as "a sharp tactician with an assured court manner. He has a great manner with clients. He's

excellent. Very thorough, practical and commercial."

## Recent Cases

### Commercial Contracts

*SSE Generation Limited v Hochtief Solutions AG*: appeal to the Inner House in commercial proceedings arising out of the collapse of a tunnel which formed part of a hydro-electric tunnel. Decision pending.

*Khaled Zahid v Duthus Group Investments Ltd*: contractual dispute arising out of transaction involving parties in the UK, Saudi Arabia and Dubai.

*Comlex Limited v Allianz Insurance plc* [2016] Lloyd's Rep. I.R. 631: action to force insurers to indemnify under an insurance contract, where it was argued that there was no insurable interest.

*TOR Corporate A.S. v SINOPEC*: Commercial Court proceedings to determine damages following upon findings at an International Commercial Arbitration. Concerned with the interpretation and fulfilment of a contract for the management of an oil rig. Sum sued for \$61m. Also instructed in prior arbitration and related Judicial Review proceedings: 2008 SC 303); [2011] CSIH 54 and [2012] CSOH 112.

*Kenwright v Stewart Milne Group* [2016] CSIH 45: commercial court proceedings and appeal relating to the interpretation of a contract and indemnity concerning the sale of development land

*Restaurantdiary Australia Pty v Restaurantdiary.com Ltd*: dispute concerning a licence agreement relating to the distribution of software, centred on interpretation of the agreement and allegations of bad faith.

*Pinnacle Cloud Solutions Ltd v MacLellan Property Ltd*: [2014] CSOH 155: action for breach of confidentiality; breach of covenants; fraud and failure to deliver property, in an ongoing dispute between two competing companies working in the IT sector.

*Ahmad v The Rangers Football Club Limited*: instructed for the pursuer in claim for payment of bonus under director's contract of employment.

*Search Consultancy Ltd v BE-IT Resourcing Ltd*: section 1 proceedings for preservation of evidence and related interdict proceedings, relating to alleged misuse of confidential information.

*Royal Bank of Scotland plc v O'Donnell* 2015 SC 258: Commercial Court action and appeal re the enforcement of a personal guarantee against company directors in which reduction of the guarantee was sought on the basis of alleged misrepresentation.

*Allied Vehicles Limited v Glasgow City Council* [2013] CSOH 192: interpretation of contract relating to a scheme for the provision of electric vehicles.

*Gregor Homes Ltd v Mark Emlick*; 2012 SLT (Sh. Ct.) 5, proceedings concerning a contract for the fit-out of a property, focusing agency and ostensible authority. Related Court of Session proceedings to reduce the transfer of properties, based on lawful means conspiracy.

*Whyte & Mackay Ltd v Capstone International Inc*. 2011 S.C. 221: Appeal concerned with an order for interim implement of contract and interim interdict. Arising out of a contract for the exclusive distributorship of whisky within the USA.

*Luminar Lava Ignite Ltd v Mama Group plc* 2010 SC 310: Commercial Court action and appeal concerning the interpretation of a non-compete contract entered into in connection with the sale of property.

*SJD Group Ltd v KJM (Scotland) Ltd* [2010] CSOH 13: Commercial Court proceeding to prove of the tenor of a franchise agreement.

*Stokors S.A. v Steven Alexander*: Commercial Court proceedings based on the alleged fraud of a

stockbroker executing derivative trading on behalf of clients based in Switzerland and Lebanon. Total loss amounting to 12m. Included complex cross-border issues.

*Gibson v The Royal Bank of Scotland* 2009 SLT 444: action for reduction in relation to a standard security granted in contravention of a pre-existing contract engaging an option to purchase property.

*Global Resources Group Ltd v MacKay* 2009 SLT 104: Commercial Court proceedings concerning the scope of the delict of inducing breach of contract in the context of a contract for provision of services in the oil industry.

*Giftex Corporation v Divex Ltd* [2007] CSOH 48: Commercial Court proceedings concerning an agent's right to commission on a contract for the sale of military equipment in the United Arab Emirates.

*Champion Technologies v Raymond Smith and Dunlaw Engineering Ltd*: Application under Section 1 of the Administration of Justice and consequent interdict proceedings in connection with the wrongful removal of, and damage to, property and computer data. Application of "springboard" interdict.

*Narden Services Ltd*: 2006 SLT 338: Petition procedure for the rectification of the Register of Companies, following upon alleged irregularities in the transfer of shares.

*Hardie v Wales, as partners of Whale Engineering; CA195/01*: Commercial Court proceedings concerning ownership of partnership property.

*Dalgleish v National Westminster Bank plc* 2001 SLT (Sh. Ct.) 124: interaction between contractual rights and unjustified enrichment under the *condictio indebiti*.

*Edinburgh Rugby Limited v Scottish Rugby Union*: instructed in a number of disputes relating to breach of contract and breach of warranty.

*Anglo-Dutch Petroleum International Inc v Ramco Energy plc*: Commercial Court proceedings, defending the enforcement of a judgement for \$16m obtained in the Texan Courts. Action settled prior to proof after the judgement was overturned on appeal in Texas.

## **Insolvency**

*Liquidator of Grampian McLennan's Distribution Services Limited v Carnbroe Limited* 2018 SLT 215; appeal to the Inner House in action to reduce a disposition of property on the basis that it was a gratuitous alienation.

*MacMillan v T. Leith Developments Ltd* 2017 SC 642: appeal to bench of 5 judges in the Inner House, considering the meaning of "effectually executed diligence" in receivership and whether such diligence ranked ahead of the floating charge. Over-ruled previous Inner House authority of 40 years standing.

*Joint Administrators of Oceancrown Ltd v Stonegale Ltd* 2016 S.C. (U.K.S.C.) 91; appeal to the Supreme Court in proceedings brought by administrators of three separate companies to reduce dispositions of property on the basis that they were gratuitous alienations.

## **Public Law, Judicial Review and Human Rights**

*Romein v The Advocate General for Scotland* [2018] 2 WLR 18: appeal to the Supreme Court regarding the scope of the statutory provisions intended to remedy the historical sex discrimination in nationality law.

*O v The Advocate General for Scotland* 2018 SLT 163: Judicial Review challenging the Secretary of State's decision to reduce the weekly amount payable to asylum seekers in respect of their dependent children. Challenged based on interpretation of Council Directive 2003/9/EC, discrimination under art. 14 of the ECHR and irrationality.

*Imran Shahid v The Scottish Ministers* 2016 SC (UKSC) 1: Appeal to the Supreme Court appeal based on breaches of arts. 3 & 8 of the ECHR, in consequence of a prisoner having been kept in solitary confinement for 56 months, and breaches of the provisions regulating solitary confinement.

*McNamara v The United Kingdom* 22510/13: instructed for the UK in an application to the European Court of Human Rights based on an alleged breach of the reasonable time requirement of art. 6 as a result of the length of civil proceedings.

*Great Stuart Trustees Ltd v Public Guardian* 2015 SLT 115: interpretation of the Adults with Incapacity (Scotland) Act 2000 re powers of attorney; instructed as amicus curiae.

*H v Lord Advocate & The Scottish Ministers* 2012 SC (UKSC) 308: instructed for the Scottish Ministers in an appeal to the High Court and then to the Supreme Court concerning extradition, in particular, the balancing of the public interest in extradition with the article 8 rights of extraditees and their children, and the competency of the appeal having regard to the inter-relationship between the Extradition Act 2003 and the Scotland Act 1998.

*Ruddy v Chief Constable* 2013 SC (UKSC) 126: appeal to the Supreme Court concerning the competency of raising claims for damages under the Scotland Act and the Human Rights Act by way of ordinary action rather than judicial review, and also concerning the competency of different grounds of action against different defenders in the same proceedings. Subsequent action in Court of Session reported at 2014 SC 58

*Salvesen v Riddell* 2013 SC (UKSC) 236 instructed on behalf of the Lord Advocate in respect of a pending appeal to the Supreme Court relating to the compatibility of certain provisions of the Agricultural Holdings (Scotland) Act 2003 with article 1, protocol 1 of the ECHR.

*Thomson v Scottish Ministers* 2011 SLT 683 and 2013 SLT 628; instructed for the Scottish Ministers in proceedings brought by the mother of a woman murdered by a prisoner while on home release. Action based on an alleged breach of article 2 of the ECHR.

*BJ v Proudfoot & Lord Advocate*: 2011 S.C. 201; Inner House; challenge to the legislation allowing for the placing of children in secure accommodation; alleged incompatibility with Article 5 of the ECHR

*Anderson v Shetland Islands Council & Scottish Water*: 2010 SC 446; Inner House appeal in judicial review proceedings. Concerned with the scope of water authority's obligations under the Sewerage (Scotland) Act 1968.

*Lord Advocate v McNamara* 2009 SC 598, Inner House; proceedings to have a party litigant declared vexatious; consideration of the tests to be applied.

*ICL Inquiry*: appointed as Junior Counsel to the Inquiry, chaired by Lord Gill, into the explosion at the ICL plastics factory in Glasgow. The Inquiry was the first held in Scotland under the Inquiries Act 2005, and was the first instructed jointly by the UK and Scottish Governments.

*The Scottish Ministers v Scottish Information Commissioner, re Alexander's Application and Elstone's Application* 2007 SC 330: Inner House; appeal under the Freedom of Information (Scotland) Act 2002; application of the exemptions under sections 28 and 30 of the Act.

## **Media Law**

*A v Procurator Fiscal, Dundee* 2018 SLT 72: application to the High Court at common-law to obtain anonymity orders and reporting restrictions for a complainer in a criminal case alleged to have been the victim of blackmail.

*McAnulty v McCulloch*: defamation action based on allegations of racism. Due to proceed to proof in April 2018.

(Identity withheld): instructed to advise on civil proceedings re blackmail and on obtaining anonymity orders.

## **Professional Liability**

*Soofi v Dykes [2017] CSIH 40*: alleged solicitor's negligence in failing to advise re the need for a warranty to be included in missives for the purchase of a commercial property.

*Park's of Hamilton (Holdings) Ltd v Holmes Mackillop LLP [2015] CSOH 6*: solicitor's negligence claim based on failure to advise in respect of time limits in relation to enforcement of a warranty arising out of a share purchase agreement.

*Institute of Chartered Accountants of Scotland v Harris*: prosecuted professional misconduct complaints concerning CA's obligations in relation to an insolvent company.

*McCann v Waddell & Mackintosh [2014] CSOH 15A*: successfully defended a claim against solicitors in respect of alleged negligence in advising in relation to missives for the sale of development land.

*McCrindle v MacLay Murray and Spens [2013] CSOH 97*: successfully pursued a claim against solicitors in respect of negligence in failing to protect a client's claim for retrospective interest in a claim in an arbitration.

*Steven v Hewatts 2013 SLT 758*: solicitors negligence claim based on alleged failure to advise on, and implement, an Inheritance Tax arrangement. Issues as to whether a duty of care is imposed on the solicitor with regard to the intended beneficiary of the scheme.

*Heather Capital Limited v Savills Commercial Ltd*: instructed for the defenders in relation to alleged surveyor's negligence. Sum sued for £5.6m.

*Gregor v VMH LLP*: solicitors negligence, based on failure to advise on the proper terms of a personal guarantee.

*The Legal Services Centre Ltd v Miller Samuel LLP [2006] CSOH 191*: Solicitors negligence. Debate re time-bar.

*Stewart Travel Centre v Wylie & Bisset*: accountants' negligence claim based on the defenders' failures in understating the pursuers' liabilities in their financial statements, and on their negligent advice given in reliance on those erroneous statements.

*Halifax Life Ltd v DLA Piper LLP*: instructed for pursuers in claim based on solicitor's breach of warranty of authority in relation to a non-existent principal. Claim valued at approximately £4m.

*Martin McAllister v Wallace Hodge*: action for breach of trust by a solicitor acting as trustee and professional adviser to the trust.

### **Property (Including Commercial Property)**

*West Dunbartonshire Council v William Thompson & Son (Dumbarton) Ltd 2016 SLT 125*: appeal concerning the validity of a break notice.

*Tyco Fire and Integrated Solutions (UK) Ltd v Regent Quay Development Ltd 2016 Hous. L.R. 118*: appeal concerning the validity of break notice.

*Kenwright v Stewart Milne Group*: [2016] CSIH 45 see above.

*TDC (Aberdeen) Ltd v Orange Personal Communications Ltd & Others*: Commercial Court action concerned with the recovery of land used by telecommunications operators for the purpose of providing network services. Concerned with the interaction between property rights and rights under the Electronic Communications Code 1984. Has since advised in relation to similar issues.

*Sheltered Housing Management Ltd v Bon Accord 2010 SC 516*: appeal against decision of the Lands Tribunal, concerning the meaning and effect of "community burdens" under the Title Conditions (Scotland) Act 2003. Also related Commercial Court proceedings for recovery of violent profits based on the wrongful possession of property.

*Petition of the Crown Estate Commissioners 2010 SLT 741*: appointed as amicus curiae in petition to establish the scope of the Crown Estate Commissioners' right to charge in respect of moorings.

Concluded after proof.

*Batt Cables plc v Spencer Business Parks Ltd*

2010 SLT 860: Commercial Court action to determine whether a break notice had been validly exercised under a commercial lease.

*Little Cumbrae Estate Ltd v Island of Little Cumbrae Ltd* 2007 SC 525, appeal concerning the interpretation of a lease, in particular, the landlord's obligation to repair *damnum fatale*.

*William Collins & Sons Ltd v CGU Insurance plc* 2006 SC 674, Inner House: interpretation of a commercial lease and the landlord's right to obtain interim access to property.

*Luminar Lava Ignite Ltd v Mama Group plc*: see above.

*Gregor Homes Ltd v Emlick*: see above.

### Intellectual Property Rights

*British Sky Broadcasting Limited v DBros & Others*: instructed for BSkyB in proceedings relating to alleged breach of transmission rights under s.298 of the Copyright Design and Patents Act 1988.

*The Football Association Premier League Ltd v Thompson & Others*: instructed for the Football Association Premier League Ltd in a number of actions seeking to interdict premises from showing live football matches transmitted from outwith the U.K, contrary to s.298 of the Copyright Design and Patents Act 1988.

### International

*Service Temps Inc. v Macleod & McCorquodale* 2014 SLT 375: action for decree conform for enforcement of a judgment of the Texas courts in Scotland. Concerned with submission to jurisdiction and the scope of the Protection of Trading Interests Act 1980.

Instructed in a number of actions with a private international law dimension: see *Stokors S.A. v Steven Alexander, TOR Corporate A.S. v China National Star Petroleum Corporation; Whyte & Mackay Ltd v Capstone International Inc. and Anglo-Dutch Petroleum International Inc. v Ramco Energy plc* above.

### Planning

*Tesco Stores Ltd v Dundee City Council & Asda Stores Ltd* 2012 S.C. (U.K.S.C.) 278: instructed for the Interested Party in an appeal to the Inner House and then the Supreme Court against the decision of the planning authority to grant planning consent. Concerned with the proper interpretation and application of the sequential approach.

### Sport

*Donaghy v Goodwillie*: instructed for the pursuer, a football agent, in relation to claim against player for alleged breach of an exclusive agency agreement.

Instructed for the Scottish F.A. in an appeal following disciplinary proceedings relating to dual interest of the owner of a Scottish Premiership club.

Instructed for a Scottish Premiership club to raise Judicial Review proceedings in respect of disciplinary sanctions.

Instructed for Scottish Premiership club in relation to proceedings to prevent supporters' attendance at matches, based on breaches of season ticket conditions and UEFA regulations.

Instructed on behalf of Dundee F.C. for appeal before the Scottish Football Association against a decision of the Scottish Premier League, concerning alleged transfer irregularities on the part of Livingston F.C.

*Edinburgh Rugby Limited v Scottish Rugby Union*: see above. Also instructed for disciplinary hearing brought by SRU.

#### **Other notable cases**

*K v Chief Constable, Police Scotland*: acted for pursuer in a claim for psychiatric illness alleged to have been caused by lack of procedural fair treatment in an quasi-disciplinary/employment context. Judgment awaited.

*Colin Montgomery v Gaynor Montgomery*: instructed in divorce proceedings, in particular, in relation to a proof concerned with whether a post-nuptial agreement should be reduced.

*Cunningham v Cameron & British Gas Services Ltd* [2013] CSOH 193: successfully pursued claim for fire damage as a result of a blocked flue and faulty installation of boiler.

*Viewpoint Housing Association Ltd v City of Edinburgh Council* 2007 SLT 772; scope of local authority's duties as roads authority and floods authority

#### **Advocates Courts & Tribunals**

Supreme Court; Court of Session, Outer House and Inner House; Sheriff Court; International Commercial Arbitration, before a panel of three arbiters; Disciplinary Tribunal of the Institute of Chartered Accountants of Scotland; Scottish Football Association Appeal Tribunal; Scottish Rugby Union Disciplinary Hearing; Traffic Commissioner Hearings.

#### **Advocates Appointments & Memberships**

2013: Silk

2008: Appointed junior counsel to the ICL Inquiry into the gas explosion at ICL Plastics Ltd in Glasgow in 2004, which killed nine people and injured over fifty-four. The inquiry, chaired by the Lord Justice-Clerk, Lord Gill, was the first public inquiry held in Scotland under the Inquiries Act 2005 and was the first inquiry under that Act, instructed jointly by the Scottish and UK Governments.

2006: Appointed Standing Junior Counsel to the Scottish Government.

#### **Directories**

Ranked in the last edition of Chambers and Partners as Band 1 for Commercial Dispute Resolution; Band 1 for Real Estate Litigation; and Band 2 for Professional Negligence.

Ranked in the latest edition of the Legal 500 as tier 1 for Commercial Litigation, Professional Negligence and Civil liberties, Human Rights, Public Inquiries, and Public and Administrative Law.

#### **Advocates Additional Information**

Fluent in Spanish