Not quite clean break: post-settlement claims
P.16

Uncertainty of death: doubts over s 29 claims
P.18

OK to not be OK: support with wellbeing
P.22

Journal

Journal of the Law Society of Scotland

Volume 68 Number 1 – January 2023

Heads together

Diversity, the partnership model and Scotland in a global practice: we catch up with Pinsent Masons' new senior partner on tour

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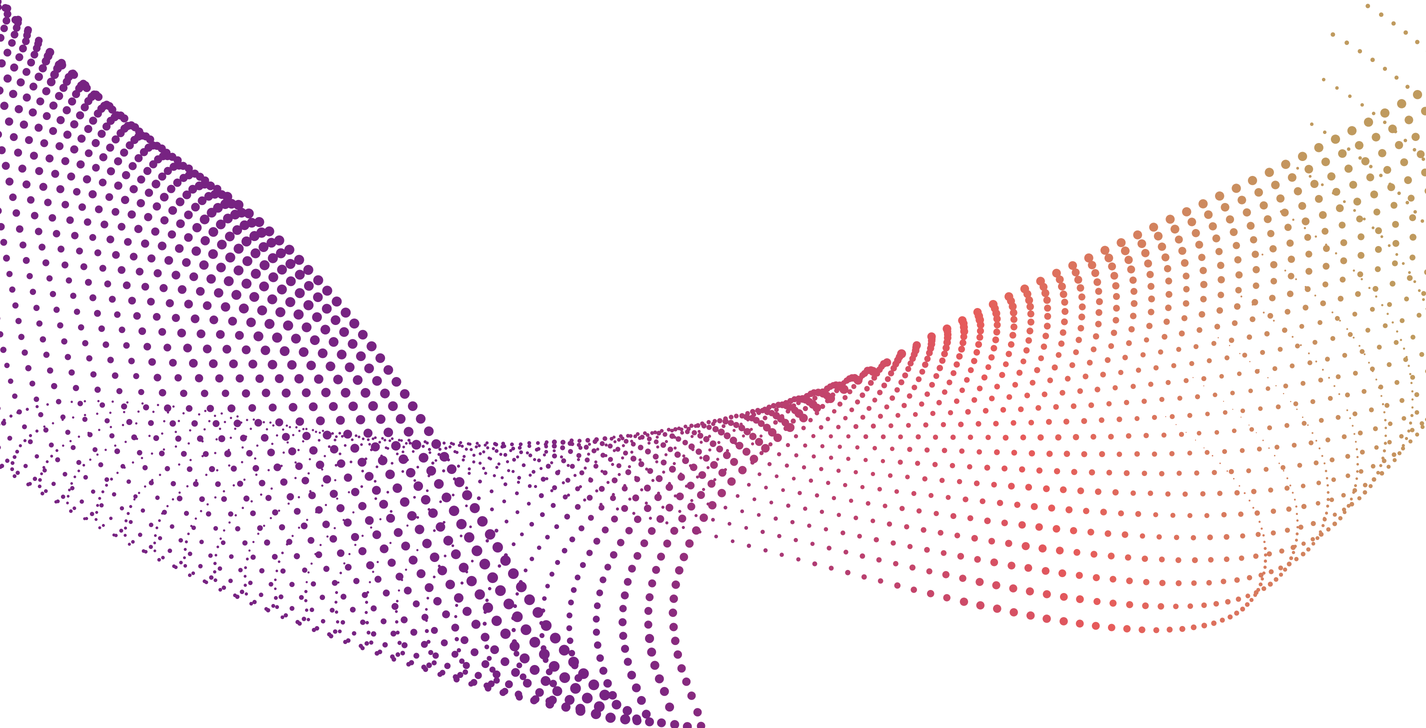

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Regulator reprise

As 2023 emerges a little dazed from the wreckage of 2022, I wish each of you good luck through whatever situations will face us next.

In one respect, for the Society and the profession, the mists of uncertainty have lifted somewhat. The Scottish Government, which is developing a habit of slipping out major announcements affecting the legal profession just before Christmas, chose that time to reveal that the different branches of the profession will not after all become subject to one single, external regulator as desired by Esther Roberton in her 2018 report. Instead, the model for the future will be not unlike that in place at the Society since the Legal Services (Scotland) Act 2010, with a lay-chaired Regulatory Committee, operating independently of Council.

Little was said about why this outcome has been preferred. But for the moment, the defenders of a legal profession free from the risk of politically motivated governance have won the day over those who advocate the separation of the professions from their regulators.

I have previously argued that independence lies at the heart of this debate: on the one hand the fundamental importance of an independent legal profession, and on the other, the belief – equally an article of faith for some – that regulation should be independent of the regulated. Reconciling those two principles has been proving a decidedly elusive task.

An argument can be made that the proposed new-look Regulatory Committee – with enhanced duties of consultation and annual reporting, bound to uphold a lengthy set of regulatory objectives, and subject to the Freedom of Information Act as well as the oversight of the Lord President – will find little room to hide when it comes to being seen to act independently and in the public interest. At the end of the day, nonetheless, it will remain formally part of the Society (or other professional body qualifying as a first tier regulator), and perceptions of how it operates will no doubt continue to have significant influence in shaping public confidence.

It would be fair to say, therefore, that in choosing this option the Government is placing considerable trust in professional bodies such as the Society in asking them to deliver its vision of a "modern, forward-looking model for legal services regulation". Its stipulation for evidence of improvements in regulation suggests that quite a high bar will be set.

The onus will lie principally on the Regulatory Committee, but also on the Society and its members, to keep the system running at optimum level. But as the consultation outcome apparently favoured by the majority of the profession, it is a challenge that should be tackled with enthusiasm. J

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.68 NO.1 – JANUARY 2023

Perspectives

04 Journal online
Web-only articles for January

05 Guest view
Andy Agathangelou

06 Viewpoints
Lord Denning; regulation reform

07 Offbeat
Quirky news; Profile column

08 President
Regulation result

Regulars

10 People
31 Consultations
40 Notifications
49 Archive
50 Classified
51 Recruitment

Features

12
We catch up with Pinsent Masons' new senior partner Andrew Masraf, on tour with Scotland head Katharine Hardie

16
An EAT decision is causing some rethinking around settlement agreements and future claims

18
The uncertainty in the law around financial claims on the death of a cohabitant, and the prospects for reform

22
The way mental health issues are regarded within the profession is changing, but much more needs to be done

24
A new decision on financial provision has taken a novel approach to some issues

Briefings

26 Civil court
Roundup, including funding, fees

28 Licensing
Proposals to curb promotion

29 Planning
NPF4 reaches its final form

29 Insolvency
Rights in adjudication where creditor's claim rejected

30 Tax
Autumn budgets: principal points

32 Immigration
Ruling on the Rwanda plan

32 Discipline Tribunal
Four recent cases

34 Civil court
Separate article on a novel expenses issue

35 Property
Registers and personal data: human rights compatible?

In practice

38 Professional news
Office bearers; SLCC; solicitor advocates; SLAB; policy work

41 Be nice to HR
Rupa Mooker's latest column

42 Tradecraft tips
More points from practice

43 Charity trustee work
Why it should bring benefits

44 Risk management
Reduce stress, reduce risk

46 Legal services regulation
Government sets out its plans

48 The Unloved Lawyer
Feeling like the celebrity jungle

49 Ask Ash
A new colleague won't be social

Financial provision: decision that challenges some thinking: Page 24

ONLINE INSIGHT

PUBLISHED ONLY ON **WWW.LAWSCOT.ORG.UK/MEMBERS/JOURNAL/**

Subsidy control: the new regime
As the UK's new post-Brexit subsidy control regime comes into force, affecting awards of financial assistance by public authorities, Jonathan Branton and Alexander Rose discuss the key changes.

Serving court proceedings: could technology help?
Courts in England & Wales have allowed proceedings to be served in unusual ways including by crypto technology and social media. Alec Fair and Evie Dransfield discuss what the Scottish courts might do in similar situations.

***SD v Grampian*: the "duty nexus" continued**
A recent medical negligence decision shows how the restated *SAAMCO* principles can limit or exclude a defending professional's liability through an analysis of the scope of their duties, as Louise Kelso, Rachael Jane Ruth and Stephen Kirk explain.

Time limits in employment tribunals: a cautionary tale
Ewan Stafford highlights an EAT decision illustrating the strictness of the test for extension of time to bring an unfair dismissal claim, even where a claimant pleads personal issues affecting their ability.

OPINION

Andy Agathangelou

The Business Banking Resolution Service, which was intended to deliver compensation to victims of bank malpractice, has failed and should be replaced by a proper independent tribunal service

I run a certified social enterprise for people who have been shortchanged by the financial sector, many of whom are scam victims. Some members are angry about the Business Banking Resolution Service (BBRS). I think their views are justified and the purpose of this article is to set out why.

The BBRS was established to handle compensation payable to victims of malpractice by UK banks. It has been severely criticised by many stakeholders.

For example, consider these comments by Kevin Hollinrake MP, when chair of the All-Party Parliamentary Group on Fair Business Banking: "Heavily restricted eligibility rules" were to blame for the scheme's poor performance; these rules had "conspired to avoid the very things we've campaigned so long and hard for – justice and compensation for those who've been denied it under previous flawed redress schemes".

He added "Quite frankly, the scheme is currently a shambles and a complete embarrassment to UK Finance and the seven member banks who designed it." And: "The APPG warned them all in writing in 2018 that the eligibility criteria would exclude at least 85% of complainants and that's proven to be the case."

Scottish lawyer Cat MacLean, who resigned from her role on the BBRS' SME Liaison Panel, has also been reported as having been critical of the organisation, with the Times reporting that she had "significant concerns about [her] professional credibility" if she remained on the panel, and that she had concluded that the BBRS was "completely defective". She quit her role on the panel in May 2022 and has not spoken publicly about the organisation or her involvement since.

These were strong words for sure from a respected MP, who is now Parliamentary Under-Secretary of State for Enterprise, Markets and Small Business, and a Scottish lawyer with extensive subject-matter expertise and dispute resolution experience. Both are credible witnesses to what has been going on.

So what's wrong with the BBRS? I believe it has three significant problems:

• ***Insufficient independence:*** The governance structure of the BBRS means the directors are not truly independent. The participating banks fund it, and they also created a company, known as the Bank Appointed Member, jointly owned by them, that has the power to block the directors from exercising key powers they would normally be expected to hold. There are also concerns about the independence of some of the adjudicators who are former bank employees who sold interest rate hedging products or are accused of otherwise mistreating SMEs. The conflict of interest issues here are astonishingly bad.

• ***Too restrictive eligibility criteria:*** This means almost all prospective claims are excluded, so the BBRS has failed to achieve its central purpose – to handle fairly a meaningful number of cases. UK Finance estimated that some 60,000 firms would be within scope for the BBRS's historical scheme, which in theory deals with legacy misconduct cases such as RBS's Global Restructuring Group, HBoS Reading, interest rate hedging products mis-selling, Lloyds Business Support Unit, bank signature forgery cases and more. But in fact, with that scheme due to close to new applications on 14 February 2023, the number of adjudicated cases resulting in financial awards was just 18 according to the BBRS's own figures published in November.

• ***Trust and confidence not being restored:*** One of the stated objectives of the BBRS was that it would lead to trust between SMEs and the banks being rebuilt. I guess I'm stating the obvious here, but it's clear that hasn't happened. It could actually be even worse, if there are open, festering wounds not being treated properly.

What should be done now? I believe those calling for the BBRS to be scrapped are right, because too many prospective claimants just don't trust it.

It needs to be replaced with something that is truly independent, where both sides can have their case properly assessed. We came close to the right solution back in 2018, but an opportunity was missed.

Then, following a review, the Financial Conduct Authority commented: "We have publicly stated our support for a tribunal that could deal with disputes that fall outside the ombudsman service's remit. We see a role for both an extended ombudsman service and a tribunal, as they meet different needs. For example, the ombudsman service's expertise lies in providing a quick and informal process for financial services disputes. A tribunal, on the other hand, would provide a more formal, court like approach for some higher value disputes, or disputes involving complainants above the ombudsman service's eligibility thresholds. However, we do not have the power to set a tribunal up. This would require primary legislation and is therefore a matter for the Government."

But instead of the Government moving in that direction, it pursued the alternative proposed by UK Finance, the banks' trade body, which led to the BBRS. It's time to scrap the BBRS and to introduce a proper independent tribunal service, along the lines that Richard Samuel, barrister of 3 Hare Court, has been proposing for years.

Andy Agathangelou FRSA is founder of the Transparency Task Force and chair of the Secretariat Committee, APPG on Personal Banking & Fairer Financial Services

Denning defended

In his "Criminal Court" column at Journal, December 2022, 26, your venerable columnist Frank Crowe gratuitously opines that "Lord Denning was of his time and said many things which would not be acceptable nowadays".

I would be interested to have drawn to my attention any evidence at all that substantiates this judgmental assertion. I may be perceived as being biased as regards this matter, seeing that I had the privilege of meeting socially with the late Lord Denning, and my finding him to be a down-to-earth, unassuming, and gracious gentleman, but amongst his more than 2,000 published judgments, and very many published writings, I find precious few things, let alone "many things", said therein that some may think to be unacceptable nowadays.

Furthermore, I am of opinion that, in the case of a judge, his being "of his time" is both praiseworthy and indeed a *sine qua non* for the job. Lord Denning should perhaps be best remembered for his being receptive to what was best in the jurisprudence of the European Union, long before our accession thereto. For my part, Lord Denning was *the* greatest UK civil judge of the 20th century.

George Lawrence Allen, Edinburgh

Elephant in the room

Among the initial responses to the Government's announcement of its plans for the future regulation of the Scottish legal profession (see p 46 of this issue) was a series of posts over the Christmas period by Brian Inkster, founder of Inksters Solicitors, on his blog page "The Time Blawg". We draw readers' attention for their interest, in addition to the regular Blog of the Month post below.

A supporter of the Roberton proposal for a single independent regulator, Inkster considers that the Government's response has "No real rebuttal around the point that good regulation should be independent of those it regulates, which seems to be the elephant in the room". He doubts that the proposed first tier regulator with an independent regulatory committee "comes even close" to avoiding "capture", i.e. the process by which regulation becomes directed away from the public interest and towards the interests of the regulated industry itself.

Inkster's view is that independence is the trend in regulation generally, as well as being the position for legal services in England & Wales since 2007. That jurisdiction still has a very complex regulatory structure, but he cites the 2020 independent review by Professor Stephen Mayson which calls for a single regulator there also, with certain powers of delegation to other bodies.

The question is raised among the comments posted in response whether this would create too large a machinery. The comments, and the further posts in the series, are also worth a look by those with an interest in the debate. – *Editor*

BLOG OF THE MONTH

blogs.ed.ac.uk/private-law

The latest posts on the Edinburgh Private Law Blog are a two-part study by Alexandra Braun, Lord President Reid Professor of Law, on compensating unpaid domestic care in the testamentary context.

Part one finds that, despite comparable recognition in damages actions, current Scots law offers limited options to carers not in a contractual relationship and not provided for by will. Part two considers certain other jurisdictions, concluding that "private law has a role to play, and ways should be explored to recognise the value of unpaid domestic care in the testamentary context".

BOOK REVIEWS

Scots Criminal Law

5TH EDITION
CUBIE, COTTAM AND McINTYRE
PUBLISHER: BLOOMSBURY PROFESSIONAL
ISBN: 978-1526523327; £48 (E-BOOK £38.88)

Six years have passed since the last edition of this invaluable work hit the shelves.

The book addresses the general principles and thereafter the main common law and statutory offences, under four heads: offences against the person; social protection offences including drugs and road traffic; property offences; and offences against the state and administration of justice.

The crimes are thoroughly described with an abundance of case law together with helpful discussion. This is not a book which simply states the law; rather it encourages thought about how a crime is constituted and proved, and also, particularly with references to the Scottish Law Commission report, why sexual offences were created under statute. In an ingenious marketing step, the chapter on sexual offences is available to download free from the publisher's website.

In that chapter, the authors deftly consider the statutory offences created in 2009, as well as the common law offences which are still invoked in historical sexual offending indictments. Another area where the book is particularly strong is the consideration of the proof of wicked recklessness within the context of intention in murder and culpable homicide.

The authors give the impression that they were under some time constraint; this is evident in errors in some of the footnotes. However this is an outstanding, easily accessible and digestible text that every criminal practitioner ought to have readily to hand.

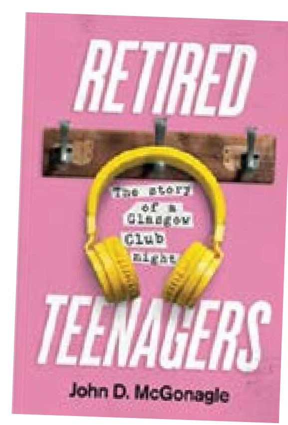
David J Dickson, solicitor advocate and review editor. For a fuller review see bit.ly/3XaHcyY

Retired Teenagers: The Story of a Glasgow Club Night

JOHN D McGONAGLE (AVAILABLE ON AMAZON; £8.99)

"If John's career is blessed with the same ingenuity, energy and enthusiasm that pulses from this book, he will have one heck of a practice."

This month's leisure selection is at bit.ly/3XaHcyY



Cloudy, with a chance of reality

New year predictions. No sooner do we escape the wreckage of one year than we are bombarded with visions of the next from every sector. Pretty brave, given the vagaries of global events.

But what about trying to predict a full century ahead? Paul Fairie of Calgary, Alberta (@paulisci), who delights in digging up curiosities from old newspapers, compiled some remarkable visions from 1923 about our present new year. These include:

"People will toil not more than four hours a day, owing to the work of electricity". But, you know, clients.

"Women will probably be shaving their – heads! And the men will be wearing curls." Men's perms only took about half that time. But didn't stay.

"Gasoline as a motive power will have been replaced by radio." Nice thought at least.

"The average life of man could be increased to 100 [or 200; or 300] years." Retiring when?

"Cancer, tuberculosis,… and leprosy will be eradicated." Half marks.

"Watch-size radio telephones will keep everybody in communication with the ends of the earth." Impressive. And for 2123, anyone?

PROFILE

Eleanor Lane

Eleanor Lane is a partner at CMS Scotland and convener of the Society's Marine Law Subcommittee

❶ Tell us about your career so far?

My legal career has been remarkably stable. I had a summer placement at Dundas & Wilson, which turned into a traineeship, which turned into an NQ job, which (after some time!) turned into a partnership – and in 2013 D&W merged with CMS. Lest that seem overly dull, my first degree was in theology, and pre-D&W I had a variety of jobs including roustabout, bookshop manager, stable hand, secretary, and bar worker. At D&W/CMS I've been lucky enough to have worked on some great projects and with some great people, so that's kept my interest.

❷ What drew you to join the Marine Law Subcommittee?

I feel very strongly about the importance of the marine sector in Scotland and the need to safeguard it for the future. The versatility of our ports, and their hinterland connections, is vital in protecting Scotland's place on the international stage for both trade and tourism. The Scottish fishing industry, the offshore decommissioning sector and the safeguarding of our lighthouses are essential factors in ensuring the Scottish economy remains strong. As Scotland's place within the UK and our relationship with Europe started to come under increasing discussion, it seemed an appropriate time to join the committee.

❸ What has been a highlight for you as convener?

Engaging with the other board members and industry specialists, hearing what matters to them, and learning more about their work.

❹ Your committee has a large non-solicitor membership; what would you say to non-solicitors looking to join a committee?

It's not as boring as it sounds! Plus, it's actually really important. The input we get from our non-solicitor members is invaluable; they tend to be extremely familiar with the detailed legal requirements because they are dealing with them daily, and bring a real-world perspective which most of the solicitor members (myself included) simply don't have.

Go to bit.ly/3XaHcyY for the full interview

WORLD WIDE WEIRD

① Cop out

A police officer was sacked after colleagues found her hiding in the wardrobe of a suspect during a police raid in Greater Manchester.
bit.ly/3X0VnGU

② Blood lines

The Delhi-based Society to Awaken Remembrance of the Martyrs creates paintings in blood donated by members, and gives them away for display. It believes the paintings will instil patriotism.
bit.ly/3ibaEWX

③ The fake escape

Spanish police are searching for 14 passengers who fled when a plane from Morocco to Turkey made an emergency landing in Barcelona after a woman on board faked that she was about to give birth.
bit.ly/3GjiTYQ

TECH OF THE MONTH

Khan Academy

Apple and Google Play: free

If you or a member of your family are studying for exams, the Khan Academy app can save you a small fortune on textbooks. It features lessons and videos in a number of subjects including computing and economics. It's also free, and easy to use.

PRESIDENT

Murray Etherington

The Scottish Government's proposals for the reform of legal services regulation are a welcome sign of confidence in the Society and the profession, and good news for consumers and the profession alike

appy new year to you all! I hope 2023 is a peaceful and prosperous one for our members, particularly given the tumultuous few years we have had.

The start of a new year is always a time to look ahead and make plans for change and improvement – whether that's considering the next step in your career or personal life, improving your health or taking on a new challenge. Whatever goals you may have set yourself for the year ahead, I wish you every success. As for me, the usual eat less and exercise more will continue to be the main priorities and, who knows, maybe 2023 is the year I actually do it!

Shape of reform

As an organisation, the Society is no different and, after many years of hard work, I'm very pleased that one of our own long-term goals has been reached. I'm sure many of you are aware that just before the break for Christmas and New Year, the Scottish Government published its plans for reforming legal services regulation – something we believe is good news for both consumers who need legal services and the profession itself.

The Government has confirmed that the Society will continue as the regulator of Scottish solicitors. The proposals have highlighted that the Society will gain additional powers and new flexibility to act to protect the public interest when needed, and I was delighted to see that changes are also proposed to the complaints system to make it simpler and quicker, benefitting all those involved.

The Society has a proud track record in maintaining professional standards and protecting the public. The 2018 Roberton report itself stated that "Scotland is home to a well educated, well respected legal profession with a high degree of public trust", despite its overarching recommendation to create a new politically appointed body as regulator. We argued strongly against that model, highlighting how this would bring unnecessary added costs and raise serious issues in terms of the independence of the legal profession from the state.

Vote of confidence

The introduction of a bill later this year represents a real opportunity to deliver many of the changes we need and have pushed for over many years to be a responsive and effective regulator.

I would like to thank all of those involved in this process, including all of the staff members at the Society, and the office bearers past and present, who helped shape our response to the Roberton report and the subsequent engagement with Government. Thank you also to all those members who responded to the consultation paper, and lastly to the Government for having confidence in the profession and the Society.

In the meantime, we will continue our work to maintain the profession's high standards and expertise, to provide the support you, our members, need to deliver high quality legal advice and services for clients each and every day, and to promote and protect the public interest.

More change ahead, but in a very positive direction.

Murray Etherington is President of the Law Society of Scotland – President@lawscot.org.uk

What's your New Year's Resolution?

Get your law firm finances into shape and reduce risk with our full range of outsourced services.

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People on the move

McCash & Hunter: Fiona McNaughton, Samantha Lamond and Kenneth McKay (centre) join the existing partners

McKee Campbell Morrison: Colm Kerr, Marc Waters and Darcy King

ADDLESHAW GODDARD, Edinburgh, Glasgow, Aberdeen and internationally, has announced partner **Alan Shanks**, then head of the firm's Finance & Projects team in Scotland, as its new head of Scotland from 1 December 2022. He succeeds **David Kirchin**, who becomes divisional managing partner for Corporate & Commercial from January 2023.

Addleshaw Goddard has appointed solicitor advocate **Douglas Blyth** as a partner in its Dispute Resolution team in Scotland, based in Glasgow. He joins from DENTONS, where he headed the Dispute Resolution practice in Scotland.

BLACKADDERS LLP, Dundee and elsewhere, has appointed **Karen Phillips** as a partner in its Private Client team in Edinburgh. She began her career at Blackadders and rejoins the firm from BALFOUR+MANSON, where she was a partner.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has appointed **Christine Yuill**, a chartered tax adviser, as a partner in its Tax team, based in Glasgow. She joins from PINSENT MASONS, where she was a partner.

CENTRAL COURT LAWYERS, Livingston, has promoted **Craig Scott**, associate, to partner.

The London office of DICKSON MINTO has been acquired by US and international firm MILBANK. Seven partners, 20 associates and 10 business services professionals from Dickson Minto's Private Equity team will join Milbank's London office from January 2023. Dickson Minto's office in Edinburgh will continue to operate independently.

DWF, Edinburgh, Glasgow and globally, has promoted **Gemma Gallagher** to director in the Corporate team from 1 January 2023.

HUNTER & ROBERTSON SOLICITORS, Paisley, has appointed **Terence Docherty** as a director. He joined the firm as a senior associate in August 2021 and manages the Conveyancing & Private Client department.

LANARKSHIRE LAW PRACTICE, Bellshill has acquired the firm of NICOLSON O'BRIEN, Airdrie. The Nicolson O'Brien name will be retained, while becoming part of the Lanarkshire Law group. Partner **Paul Nicolson** and recently retired partner **Frances Porter** will remain as consultants. **Paula Lutton** joins as a director from CARTYS, where she was a partner.

Nicolson O'Brien's office has moved from Stirling Street, Airdrie to 5 Graham Street, Airdrie ML6 6AB.

LINDSAYS, Edinburgh, Glasgow and Dundee, has appointed **Alasdair Craig** as a senior associate in the Commercial Property team, based in Glasgow. He joins from SMITH & VALENTINE.

McCASH & HUNTER LLP, Perth has promoted **Fiona McNaughton**, **Samantha Lamond** and **Kenneth McKay** to partner with effect from 1 January 2023.

Ewan McIntyre has been appointed as the first general counsel of Edinburgh-based SNAPDRAGON MONITORING, an online brand protection and reputation management specialist. He was formerly a partner with BURNESS PAULL and a consultant with BURGES SALMON.

McKEE CAMPBELL MORRISON, Glasgow has appointed **Colm Kerr**, who joins from DENTONS, as an associate director in the Corporate team; recently qualified **Marc Waters** as a solicitor in the Insolvency & Litigation team; and **Darcy King** as a trainee paralegal in the Private Client team.

MORTON FRASER, Edinburgh and Glasgow, has appointed **Karen Wylie** as a senior associate in its Family Law team, based in Glasgow. She rejoins the firm from GIBSON KERR.

Pinsent Masons' Laura Cameron

Thorntons: Richart Hart and Abbi Armstrong

Thorntons: Mike Kemp, chair Colin Graham, and Anne Miller

PINSENT MASONS, Edinburgh, Glasgow, Aberdeen and globally, has announced that Scottish litigation partner **Laura Cameron** will succeed John Cleland as the firm's managing partner with effect from 1 May 2023. The firm's first female board member, she recently completed her second (the maximum) four-year term as Global Head of its Risk Advisory Services Group.

THORNTONS LAW, Dundee and elsewhere, has expanded its Commercial Real Estate team in Glasgow with the appointment of **Richard Hart**, who joins from SHEPHERD & WEDDERBURN, as legal director, and **Abbi Armstrong**, who joins from McJERROW & STEVENSON, as a senior solicitor.

THORNTONS has promoted three of its legal directors to partner: **Anne Miller** and **Mike Kemp** in the Dispute Resolution & Claims team in Dundee, and **Graeme Dickson** in the Private Client team in Edinburgh.

Locum positions

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Law Society of Scotland

INTERVIEW

Culture that binds

Helping clients with diversity, Scotland as part of a global practice, and a supportive culture within a partnership model: all topics as the Journal caught up with Andrew Masraf, Pinsent Masons' senior partner, on tour with Scotland head Katharine Hardie

Text: Peter Nicholson

Photography: Mike Wilkinson©

"It's probably true that the firm now, for both of us, does not look any different."

Andrew Masraf, recently elected senior partner of Pinsent Masons, is in Scotland as part of a tour of the multinational law firm's offices (there are 27 in 13 countries, plus a network of associated firms). North of the border he is hosted by head of Scotland Katharine Hardie, who, like Masraf, has been at the same firm, or its merged successor, since trainee days.

"I remember being challenged once by somebody when I told them I'd never moved firm," Hardie recalls, "and they said that doesn't say much about your ambition. I said, 'I don't agree with you, because I think we're ambitious for the organisation that we're in'. And I want to be part of the growth of this business."

Shared vision

Indeed, in the 10 years or so since Pinsents' merger with McGrigor Donald, it has added 100 partners globally (the current total is 480), seen revenues increase by more than half to top £530 million in 2021-22, built a strong presence in continental Europe and established itself in Australia. Its Vario business, a mixture of legal contracting and managed legal services, has grown from a startup eight years ago to £35-40 million turnover this year. It has acquired a reputation for championing diversity, and for spearheading carbon-neutral practices. So how does Masraf justify the statement that opens this feature?

"The big consistent, I think, is the culture, the piece which binds the partnership together." Attempting to define that, he adds: "My sense is there's a genuine sense of collegiality, that clients

are genuinely shared, as are opportunities. Partners look after each other when we're looking for opportunities, but when times are tougher there's a culture of gathering around supporting our colleagues. There's a real sense of shared vision."

Culture is reflected in Masraf's own position, the somewhat unusual one of an elected senior partner. Business-wise, he describes it as a combination of chairman and chief executive, working with managing partner John Cleland on delivering the strategy set by the board. "You are also, and this is much more traditional, effectively seen as the guardian of the firm's culture, if that doesn't make it sound too grand. You are the person people look to, to make sure that the decisions being made are in line with our strategy, our values; you're ultimately the last line of appeal, so it's quite a pastoral role in that respect."

It's a post for which he went through a full election campaign, with numerous virtual or in-person hustings, standing on a platform titled 'Vision 2026', reflecting the four-year term of office. Its key strands – the people-centric one of ensuring the firm is relevant to its clients and its people, and the business-focused one of geographic and revenue growth – sound like something the firm itself would produce. Masraf describes it as "really an extension of what we were doing. There's no radical departure; it was saying that it's a good and clear strategy, and how can we articulate and refine that for the next four years as a pivot from where we've got to".

Legal services plus

Rather than simply a law firm, Pinsent Masons brands itself as "A professional services business with law at the core". Why such a focus? That, Masraf explains, is about delivering a coherent and integrated service. "It's not about offering non-legal services on a standalone basis; it's the ability to respond to client demand and say we can provide a range of services in the round to deliver what you need." A team of forensic accountants works on corporate transactions or with the fraud and asset tracing team, while a project management team will support large corporate deals or major litigations. So legal services plus, you might say, rather than professional services as an umbrella of which legal services is one element.

Scotland in the world

Asked how her role as head of Scotland fits into the firm-wide scheme, Hardie explains that, over the 10 years since the merger, it has evolved from when the late Kirk Murdoch had to ensure the efficient integration of the two firms. Today, "the key part for me as chair of Scotland is making sure that the three Scottish offices remain relevant to the rest of the business" – of which Scotland remains a very significant part. With such a large partnership, "you've got to have lots of levers around the business, people who understand everything that's happening. I feed in to Andrew, and the managing partner, and we work collaboratively to make sure we're getting the best out of the business, and also the best for clients".

"A centralised approach has its limitations", Masraf observes. "You really have to be on the ground to know what's going on. That's why people like Katharine are so important in making sure we're knitting together."

How does Pinsents' Scottish operation see itself within the business? Hardie has no doubt: "I definitely feel we have a Scottish identity. And I think if you were to ask people in the Leeds office, or Birmingham, they would say the same: they're a Birmingham-based player and they're part of an international law firm. Every office has its own feel, so Glasgow is very different from Edinburgh; go down to Birmingham and the sign says Pinsent Masons but it's how Birmingham wants to be seen in the Birmingham market."

Masraf emphasises: "Clients want to know that we are operating in the markets in which they are instructing us, and that means we have to remain domestically strong, but with that breadth of capability to reflect a client base which is operating in a range of local, regional, national and international markets."

At the same time, Scottish based lawyers have "huge opportunities" to be involved in international transactions, or to work in other jurisdictions, or indeed advance to global positions within the firm. Solicitor advocate Jim Cormack KC was recently appointed global head of the Litigation, Regulatory & Tax team, with responsibility for practice group revenues and for more than 260 staff across the UK and six overseas offices. And since our interview, the election has been confirmed of Glasgow-based partner Laura Cameron, already the first female member of the global board, as the firm's next managing partner, succeeding John Cleland from 1 May 2023.

Diversity outreach

Since his election, Masraf has been going out seeing general counsel and clients around the country – revealing a notable consistency of conversation, he says. Some of it was not a surprise. "Economic and social challenges, energy security, cost of living has been a theme in every single conversation in every sector". But beyond that, he says, "Of importance to GCs in all our conversations has been diversity and inclusion, both gender and race and ethnicity: again nothing new there but a consistent theme; and ESG, particularly for corporates and particularly around reporting: many say they are struggling to understand really what standards they are trying to report against, because that isn't really settled.

"And perhaps the most interesting theme which has emerged is a real interest in social mobility, particularly looking at – and GCs have articulated it in this

➔

"The big consistent is the culture, the piece which binds the partnership together. Clients are genuinely shared, as are opportunities"

way – how do we broaden the reach of the profession to more people?"

It's a subject on which Masraf believes law firms have a definite role in assisting clients. "Clients are realising it's a real team effort, because for people from perhaps socially disadvantaged backgrounds, access into the profession is pretty opaque; actually access to the business community as a whole is a bit opaque. So there's an opportunity for us to work together, to say you can join Pinsent Masons on a schools programme or internship or through an apprenticeship. We introduce these to our wider client base – banks and financial institutions, engineering businesses and construction companies, all of which have legal functions. Don't feel that your gateway to the profession is a narrow one through private practice. From our own client base, look at what help is out there and who runs these schools programmes and internships and academies. In reality we're all doing it but perhaps in isolation. The ability to knit that together I think is really quite exciting, and on the face of it seems quite simple."

At this, Hardie points to a story that recently made the mainstream press – the winner of Pinsents' latest Kirk Murdoch scholarship, an award for deserving undergraduates, is a single mother who was working as a barista but is determined to join the profession.

Hardie has noticed a growing trend for graduates to work first as paralegals, pursuing a training contract before committing themselves financially to the diploma. "At the moment, on top of our trainee cohort we've got about 16 paralegals in Scotland who are law graduates, doing litigation support, property support, banking support – learning while also getting paid. In addition our Vario group has a lot of paralegals and assistant paralegals who are working either for clients or in our business, and that's another route for graduates to gain experience. A significant number of our trainees come to us through this route as well."

"It would be very easy for us to miss talented people coming into the profession if these schemes didn't exist," Masraf adds, "because I've absolutely no doubt that these are people who are really intelligent, really motivated, will have long and successful careers. They've just come through alternative routes and I'd really celebrate that."

Photography: Mike Wilkinson©

2023 in prospect

Looking to the year ahead with its economic challenges, Hardie points to the energy and renewables sector as continuing to provide opportunities in Scotland, with clients involved in offshore wind projects, new hydrogen developments, energy security, and related corporate deals, and with Aberdeen, her home city, undergoing a major transition from oil and gas.

Masraf reports a similar picture across the wider firm. "Those examples are there throughout our network, so we can take offshore renewables experience from what we're doing here in the UK in what were traditionally our home markets, across our network to our clients whether it's the Middle East or Australia. That's one of the benefits of this platform, and it's really powerful.

"I think we go into whatever turmoil 2023 is going to throw up, a pretty well hedged business, geographically and across our skillsets."

Strategy wise, a key focus for Masraf will be to continue to develop the firm's presence in Europe, which it has been building since it opened in Paris and Munich in 2012 – one that has been "absolutely validated" by events since the Brexit vote. "The exciting piece is when our colleagues in Amsterdam are doing deals with our colleagues in Munich and Dublin without reference to the UK at all. We're increasingly seeing those sort of cross-border mandates. It's a real validation of the quality of people we've been able to hire; hopefully it's a reflection of the strategy as well."

Partnership: still a vehicle

There are those who view partnership as an outdated business model for law firms, but even at its present size, Pinsents retains it. "It's one of those things we keep under review," Masraf confirms. "As our Vario business develops, it's one thing we will keep an eye on, whether the current structure reflects the needs of the services we are providing. We've always found that the existing structure is a really powerful way of reflecting our culture – actually it's a good question whether it's the culture that reflects the structure. But essentially we are one global partnership, so there are no vereins, no other contractual arrangements: if you're a partner in Pinsent Masons you're a partner in the global firm."

He denies finding it unwieldy. "It's the combination between the executive role and the partnership, so the executive are tasked with setting and delivering strategy, and there are certain things where we will need a partnership vote – the elections are a good example of the partnership having a say in who they want to be led by. Ultimately we are a people business and the people in the room are the senior employees and shareholders and there's something very powerful about that. We keep it under review because markets change, opportunities change, but we haven't seen a requirement to do anything different at the moment."

The best start

What advice can our interviewees give to new lawyers starting out at this time? Hardie tells her own new starts not to sit at home on their laptops, but to get into the office and see how the senior lawyers operate. "Learn from them. I don't think it's just the legal profession. With all professions, you cannot learn working from home. You've got to be around people."

For Masraf: "One of the interesting discussions is around the O shaped lawyer [featured at Journal, October 2022, 36]. That agility, that ability to say I need a range of experiences, to be flexible, my career will take all sorts of paths and opportunities – be really openminded and think about the opportunities. It's so easy in our profession that your focus comes nearer and nearer to the things you see on your desk. For me the O shaped lawyer is someone who's able to listen and articulate how to have a conversation with clients about the macroeconomic picture, or the geopolitical position, just as much as their technical skillset. It's being openminded and agile."

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Settled for all time?

An EAT decision has altered our understanding of the extent to which settlement agreements can exclude the possibility of future claims, as William Lane and Paman Singh explain

The Employment Appeal Tribunal recently held, in *Bathgate v Technip UK Ltd* [2022] EAT 155, that settlement agreements cannot settle potential future claims that – at the time the agreement is entered into – the parties are unaware of.

Settling future claims

Settlement agreements are frequently described as giving the employer and departing employee a "clean break". The employee receives a financial package, while the employer gains comfort that employment tribunal proceedings will not be inbound.

An impediment to a completely clean break, however, is the matter of potential future claims. Employment law permits certain claims to arise after an employment relationship has ended. An example is a post-employment discrimination claim under the Equality Act 2010 (e.g. in relation to the provision of an unfavourable reference).

Employers, therefore, often seek to ensure that settlement agreements operate to settle any potential future claims that may subsequently arise (as well as settling existing claims).

Position prior to *Bathgate*

Employment protection legislation sets out various fundamental requirements for a settlement agreement to be valid.

One requirement is that a settlement agreement must relate to a "particular complaint". This has long been identified as a potential stumbling block for attempts to settle potential future claims. How can a settlement agreement relate to a "particular complaint" if that particular complaint has not yet arisen – and so is unknown to the parties – when the settlement agreement is entered into?

Despite this, however, it has generally been understood that settlement of potential future claims is possible. A key authority is *Hilton UK Hotels Ltd v McNaughton* [2005] UKEAT 0059_04_2009, in which the EAT (Lady Smith) identified the following principles:

1. A "blanket" settlement agreement is not valid (*Lunt v Merseyside* [1999] IRLR 458 (EAT)). In other words, simply stating "the employee settles all and any claims against the employer" will not work.
2. A settlement agreement that lists claims being settled by generic description or references to legislative provisions is valid (*Hinton v University of East London* [2005] EWCA Civ 532).
3. A settlement agreement can settle potential future claims, provided it does so plainly and unequivocally (*Royal National Orthopaedic Hospital Trust v Howard* [2002] IRLR 849 (EAT)).

On account of those principles, settlement agreements often contain a clause like this: "This agreement is in full and final settlement of all and any claims the Employee has or may have in future against the Employer whether arising from his employment or its termination, and whether or not such claims and/or the circumstances giving rise to them are, or could be, known to the Parties and including, but not limited to, claims for unfair dismissal under section 111 of the Employment Rights Act 1996, for a statutory redundancy payment under section 163 of the Employment Rights Act 1996, in relation to working time or holiday pay under regulation 30 of the Working Time Regulations 1998, for equal pay or equality of terms under sections 120 and 127 of the Equality Act 2010", and the list will continue, often to great length.

Such a clause aims to:

- be a plain and unequivocal settlement of both existing and potential future claims (satisfying *Howard*); and
- list all potential claims by means of a generic description and/or reference to a legislative provision (satisfying *Hinton*).

Those principles, however, came under challenge in *Bathgate*.

Facts of *Bathgate*

Charles Bathgate had approximately 20 years' service with Technip. His employment terminated in January 2017, via a settlement agreement which contained:

- a *Hinton*-type list of claims being settled (including age discrimination under s 120 of the Equality Act 2010); and
- wording to the effect that all potential future claims were being settled.

The financial package included various payments on termination, and an additional payment to be made in June 2017, calculated by reference to a collective agreement.

In March 2017 (i.e. some time after entering into the settlement agreement) Technip decided that the additional payment scheduled for June 2017 need not be paid to Bathgate. He became aware of Technip's decision in June 2017, and considered it amounted to age discrimination.

To be clear, therefore, at the time the settlement agreement was entered into, neither Bathgate nor Technip could have been aware that Bathgate would subsequently have an age discrimination complaint. At the time of entering into the settlement agreement, that complaint was an entirely unforeseen future claim.

Complaint not settled

Bathgate raised employment tribunal proceedings for age discrimination. The employment tribunal decided that the settlement agreement had validly settled the age discrimination complaint (drawing on the principles identified in *Hilton*).

Bathgate appealed to the EAT on this point. The EAT (Lord Summers) held that the settlement agreement did not settle the age discrimination complaint. The requirement for a settlement agreement to relate to a particular complaint meant that potential future claims – that had not yet arisen and were therefore unknown to the parties – could not be settled.

Although Technip referred to *Hinton* and *Howard*, the EAT was unmoved. Consulting *Hansard*, the EAT noted the relevant parliamentary intention was that settlement "should only be available in the context of an agreement which settles a particular complaint that has *already arisen* between the parties" (emphasis added).

The EAT was also critical of the *Hinton*-type list approach, observing that it was a

construction contrary to the broad purposes of the employment protection legislation: protecting an employee who is agreeing to relinquish rights. It observed that there was no difference in principle between a *Hinton*-type list and *Lunt*-type "blanket" wording.

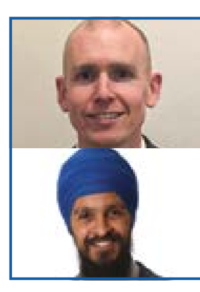
Drafting settlement agreements post-*Bathgate*

In light of the *Bathgate* judgment, solicitors drafting settlement agreements may wish to give particular consideration to:

• ensuring that settlement agreements specifically identify the principal complaints "in play" in the particular circumstances (rather than relying solely on a *Hinton*-type list);

• considering whether there is merit in having the parties warrant that they are unaware of potential future claims (or circumstances that could give rise to them); and

• managing client expectations about the possibility of future claims arising that the settlement agreement does not – and cannot – cover.



William Lane and **Paman Singh** are solicitor members of the Law Society of Scotland's Employment Law Subcommittee

The rise of settlement agreements

Settlement agreements can come at emotional times for employees, who should be allowed time and the right advice prior to accepting, Marianne McJannett advises

The changing nature of the economy and job market means that there has been a sharp increase in the number of employer clients looking to exit employees via settlement agreements, and, as a result, more individuals looking for advice in relation to these agreements. While these documents are usually fairly straightforward, they can be an overwhelming and emotional experience for those being offered a settlement agreement. Here we look at when these are used and how an employer should approach this process with any member of staff.

A settlement agreement is a legal document between an employer and employee recording the terms on which the employment relationship comes to an end, and settling any claims which the employee has at the time at which the settlement agreement is entered into. A settlement agreement can be offered to an employee as part of a "protected conversation", i.e. a conversation which is protected by virtue of s 111A of the Employment Rights Act 1996. These conversations usually arise either prior to or during a more formal process, such as a disciplinary, grievance or performance management process, and allow the parties to agree to end the employment relationship in lieu of proceeding with a formal process. Additionally, a settlement agreement might be offered before or during a redundancy consultation, with the incentive of an enhancement beyond the statutory or contractual redundancy payment, if the agreement is entered into prior to a full redundancy process being undertaken.

Because it is a legal document, the employee requires to take legal advice on the terms of the agreement. Employees require to understand the full implications of entering into a settlement agreement, and what this means in terms of their right to bring any possible claims. As it is in the employer's interest that an employee signs a settlement agreement, they will make a financial contribution towards the legal expenses.

The most important aspect of the settlement agreement for many employees is the financial contribution that will be made. There are contractual elements to this payment, with a payment in lieu of contractual notice often being made, as well as a payment in lieu of any accrued but untaken annual leave. These elements are subject to deductions for tax and national insurance as contractual payments. In addition, there is often an *ex gratia* payment, which can be made up of any statutory redundancy, or can simply be a lump sum amount. A termination payment can be paid free from tax and NI up to £30,000, so it is an effective way to agree an exit for employees.

However, where there may be issues around performance or conduct, what might be the biggest incentive for an employee is an agreed reference, and, occasionally, an agreed announcement. This allows employees to understand fully what will and will not be said about them after they have left and to any future employers, which can be worth more than a lump sum payment.

It is recommended that an employee be given 10 calendar days in which to accept the terms of the protected conversation, or initial settlement offer, although depending on the seniority of the person involved or seriousness of the allegations against them, this may be shortened. It is a big decision for an employee to walk away from a job and, although there is often an urgency to the offer being made, employers should understand that there can be a lot of emotion attached to the employee in taking the advice they need, and ensure it is the right decision for them.

Marianne McJannett is Head of Employment with Bellwether Green

Death and disputes

The Scottish Law Commission's recent *Report on Cohabitation* did not extend to claims following death. Tom Quail considers the limited guidance –statutory or judicial – under the present law, and calls for reform here also

In November 2022, the Scottish Law Commission issued its report (Scot Law Com No 261) proposing reform of the law on cohabitation for couples whose relationship ends in separation. The reforms do not extend to the law where a cohabitant dies intestate and a survivor wishes to make a claim under the Family Law (Scotland) Act 2006, s 29. This article will consider the present law on such a claim, the case law, the information relevant to providing advice on a s 29 claim and also look at the present position regarding reform.

Before examining the law, it is perhaps important to understand the context of the legislation. Prior to the 2006 Act, a deceased's cohabitant had no right to claim in an intestate estate. The principles of economic disadvantage and the economic burden of caring for a child, which presently apply in determining a claim in terms of s 28, do not apply to s 29.

Tom Quail is lead partner in the Family Law team at Wright, Johnston & Mackenzie LLP, Glasgow

Section 29 orders

Section 29 applies where a person dies intestate and, immediately prior to death, was domiciled in Scotland and cohabiting with another. In such circumstances, the court can order payment of a capital sum to the survivor from the deceased's estate, or a transfer of property (heritable or moveable) from the estate. The court can also make an interim order.

In deciding whether to make an order, the court has to consider:

- the size and nature of the net intestate estate;
- any benefit received, or to be received, by the survivor as a consequence of the deceased's death and from somewhere other than the net intestate estate;
- the nature and extent of any other rights against or claims on the intestate estate; and
- any other matter the court considers appropriate.

the transfer is to take place.

"Net intestate estate" is defined as estate which remains after payment of inheritance tax, other liabilities having priority over legal and prior rights, and the legal and prior rights of any surviving spouse or civil partner.

Uncertainty

Section 29 has given rise to much concern. The factors in s 25(2) of the 2006 Act, such as the length and nature of the relationship which are relevant as to whether or not an applicant is a cohabitant, are not specifically directed to be taken into consideration when the court is exercising its discretion to make an award under s 29. When exercising its discretion, the court appears to be overwhelmed by the number of potentially relevant factors so it is difficult, if not impossible, to focus on factors which are significant in the circumstances of a particular case. There is also a dearth of reported case law. Accordingly, it is difficult to advise a party on whether to proceed with a s 29 application. There has been an understandable tendency for parties to settle without resort to litigation.

With a view to offering some guidance on how to advise on a s 29 claim, it might be helpful initially to consider the two main reported cases, *Savage v Purches* 2009 GWD 9-157 and *Kerr v Mangan* [2014] CSIH 69.

"An application to the court requires to be raised and served within six months of the date of death. This time limit is strict and cannot be overridden"

Any order a court can make (a capital sum or property transfer) cannot be greater than the amount the surviving cohabitant would have been entitled to had they been the spouse or civil partner of the deceased.

Court proceedings can be raised in either the Court of Session or the sheriffdom in which the deceased was habitually resident at date of death (or, if it is unclear which is the relevant sheriffdom, in Edinburgh Sheriff Court).

An application to the court requires to be raised and served within six months of the date of death. This time limit is strict and cannot be overridden. This was set out in *Simpson v Downie* 2013 SLT 178. While that case concerned a claim under s 28(8), the wording of both s 28(10) and s 29(6) ("Any application under this section shall be made") is the same. Court proceedings should be raised against the executor dative if one has been appointed. It is also recommended that proceedings should be raised against any other party who is entitled to be appointed as executor dative, as the executor has the powers, duties and liabilities in terms of the law of succession.

In making any orders, the court can specify the date the capital sum is to be paid, for the order to be paid in instalments and, in relation to any transfer of property, the date on which

Savage v Purches

In *Savage*, Mr Savage and Mr Voysey (the deceased) cohabited for less than two and a half years. The net estate was £198,000. The deceased had enjoyed a previous relationship of 15 years which led to a will being prepared (it was destroyed when the relationship ended) and an "expression of wish" in relation to a BT pension scheme. The net estate did not include a death benefit lump sum of £249,680, which the trustees decided should be divided equally between the pursuer (Savage) and the defender (the deceased's half sister), nor did it include an index linked pension from BT which, at the time of the decision, was £9,500 per annum, which the trustees decided should be paid to the pursuer/cohabitant. An actuary valued the net replacement value of the pension rights received by Savage at almost £299,000.

There was no shared ownership of heritable or moveable property, mortgage or life assurance during the parties' relationship.

At the beginning of the relationship, the cohabitant was a young man earning a modest income, living in tied accommodation. During cohabitation the parties enjoyed a fairly comfortable lifestyle (including a holiday in New York), funded by the deceased. The cohabitant owned his own property and had funds available of approximately £230,000, which derived predominantly from a payment following his father's death in the Piper Alpha tragedy. He changed career during the relationship, moving into property letting and being supported by the deceased while his business was built up. The deceased kept financial details, and the closeness of his

relationship with the defender, from the cohabitant.

The sheriff found Savage to be of limited credibility and reliability, describing him as giving the impression of exuding a sense of self entitlement, and found that while he was entitled to claim on the estate of the deceased, on considering the provisions of s 29 his claim should be assessed at nil.

Kerr v Mangan

In *Kerr*, the parties had cohabited for 22 years. The issue was whether a house and plots of land in Ireland, valued at not less than €200,000, formed part of the deceased's net intestate estate. The sheriff at first instance awarded the pursuer £5,502. On appeal, it was determined that the Irish properties were not part of the net estate. This was upheld in the Inner House. Accordingly, the award was reduced to nil as the debts in the estate exceeded the assets.

The court set out its concern that s 29 provided little, if any, indication of underlying principle, that the factors in subs (3) were obvious, but limited, and that the ability to have regard to "any matter the court considers appropriate" gave no useful guidance at all. If clarity was to be achieved, s 29 needed to be replaced with a provision that gave a clear indication not only of the mischief which it sought to address but also of the underlying policy.

Proposed reforms

The Scottish Law Commission in its 2009 *Report on Succession* (Scot Law Com No 215) proposed the repeal of s 29. It recommended, in deciding whether a couple were living together in a cohabiting relationship, consideration of matters such as whether they were members of the same household; the stability of the relationship; whether they had a sexual relationship; whether they had children together or had accepted children as children of the family; and whether they appeared to family, friends and members of the public to be persons who were married, in civil partnership or cohabitants.

The Commission also recommended that if the couple were cohabiting, the court should fix an appropriate percentage of entitlement to the estate, having considered:

(a) the length of the cohabitation;

(b) the interdependence, financial or otherwise, between the couple during their cohabitation; and

(c) the surviving cohabitant's contribution (financial or otherwise) to their life together.

However, these recommendations have not been enacted.

In the Commission's recent *Report on Cohabitation*, which was restricted to claims where a relationship ends on separation, the Commission proposed a new definition of cohabitants, being a couple who are or were living together as a couple in an enduring family relationship, aged 16 or over, not spouses or civil partners and not closely related to each other.

In deciding whether there has been an enduring family relationship, the court would have regard to all the circumstances of the relationship, including its duration; the extent to which the couple live or lived together in the same residence; the extent to which they are or were financially independent; and whether there is a child of whom they are parents or who was accepted by them as a child of the family.

These recommendations have only recently been proposed. If enacted, they would not apply to claims for cohabitants whose relationship ends on death.

Quantifying a claim

Having looked at the present legislation, relevant cases and the proposed reforms, what can we take as being the relevant factors in advising on and quantifying a claim under s 29?

The following matters appear to me to be of relevance.

- Any benefits received, or to be received, by the surviving cohabitant other than from the deceased's net estate require to be taken into consideration in terms of s 29(3)(b), for example the pension lump sum death benefit in *Savage v Purches*. In valuing pension benefits, a replacement value/ actuarial value should be obtained, as was done in *Savage*.
- It is important to consider all benefits to be paid out using the broader definition of the deceased's estate, and not the narrow definition in s 29(10). Accordingly, life assurance, death in service benefits, pensions, share options etc are all relevant factors. The value of these and to whom the benefits are paid by the trustees are all factors in quantifying a claim.

In *Kerr v Mangan*, the court indicated that s 29(3) gave no useful guidance in that matters were not mentioned which might have been considered relevant, such as:

(i) the length of cohabitation;

(ii) the nature and extent of the surviving cohabitant's own assets or marital status;

(iii) the terms of any prior agreement entered into by the cohabitants;

(iv) the interdependence of their finances;

(v) the needs of the surviving cohabitant;

(vi) the interests of children, and whether those interests should vary according to whether or not they are children of both cohabitants;

(vii) the quality of the cohabitation;

(viii) the nature and extent of any services provided by the surviving cohabitant;

(ix) whether or not there was an intention to marry; and

(x) to what extent it could be said that overall the surviving cohabitant deserved to have the benefit of being treated in the same way as a surviving spouse or civil partner.

However, a number of these factors are referred to in both the Scottish Law Commission's *Report on Succession* in 2009 and its *Report on Cohabitation* in 2022. In addition, while in *Savage v Purches* there were no children of the family, a number of these factors were taken into consideration by the sheriff. The sheriff was of the view that in the exercise of his discretion, he was entitled to take these matters into consideration in terms of s 29(3)(d), namely "any other matter the court considers appropriate".

Accordingly, in giving advice and in quantifying a claim, the points mentioned above can be taken into consideration. It is very much a balancing exercise. However, taking account of all relevant factors will enhance the cogency of your argument in discussions and also in litigation, in the event that agreement is not able to be reached. As in *Savage*, an assessment should also be made of your client, otherwise the sheriff may do that.

The Scottish Law Commission indicated in its *Report on Cohabitation* that problems in this area were identified shortly after the 2006 Act came into force and reform was long overdue. Its proposed reforms in terms of s 28 are aimed at achieving fairer outcomes for cohabitants when their relationship breaks down, by clarifying and simplifying the law. Reforms aimed at achieving fairer outcomes when a relationship ends on death are equally deserving.

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From stressed to supported

The pandemic may have passed, but the factors impacting on mental health continue, as do efforts to have wellbeing recognised across the legal profession as an issue to be taken seriously. Puneet Kaur surveys the current picture

Although the pandemic feels like a lifetime ago, the context of unpredictability arising from the lockdown, unemployment, restrictions and the changes to today's standard of living has impacted on the mental health of many.

In research conducted by mental health charity Mind, around one in three adults and young people said their mental health had deteriorated since March 2020. LawCare, the legal profession's support charity, found that 26% of calls to its helpline are due to stress and 11% due to anxiety.

The Law Society of Scotland launched a three-year action plan to deal with the issues surrounding mental health within the legal sector. This was created alongside Scotland's national programme, See Me, which found that 77% of individuals wanted a better understanding of mental health issues so they could provide support, and stated that if training was provided, it would positively change workplace culture.

Our profession can be extremely tough, partly as it appears to be competitive and resilient. Most solicitors state they work well under pressure, but this pressure can also negatively affect performance.

A great example of a leader failing to safeguard his employees' mental health is the former UK chair of accountancy firm KMPG, Bill Michael, who told employees to "stop moaning" during a virtual meeting in which they expressed their struggles with remote working during the pandemic. Although Michael did resign after issuing an apology, this type of put-down response is common in all sectors of business, including law.

It is this perception of toughness that legal professionals find it hard to speak out against, whether in relation to mental health affected by their career or personal issues they are dealing with.

Who is responsible?

The onus is usually on the individual to fix their mental health issues but, in reality, we have a collective responsibility to create a positive work environment for everyone.

There is a longstanding view that stress and pressure are part of the job of being a solicitor. This causes stigma around mental health issues affecting legal professionals. It is understandable that stress can come with any job, but it can become excessive if someone works long hours to meet client deadlines or demands which cross over into their personal life, leading to a lack of morale and increased leave.

Other factors can be dealing with personal issues while working in a high-pressured environment. Even external issues – the pandemic, the rising cost of living or the war in Ukraine – may have a drastic impact on mental health.

Mental health is a complex subject. Depending on your field, the challenges you face will differ. For example, a solicitor working with private clients will have different mental challenges and problems to a solicitor working in corporate, or an advocate.

What can be done?

Law firms should focus on three aspects in particular, when promoting employees' wellbeing and offering advice and resources. These are **support**, **training** and **culture**. Undoubtedly, there are law firms which have been working towards improvement, implementing measures to tackle this issue, but it is far from being resolved among most.

Be proactive rather than reactive in supporting employees' wellbeing. The commitment from employers should be clear. With firms returning to office working full time, it is essential to introduce a safe space for discussions about mental health. Encourage everyday conversation about mental health when individuals can speak freely with no judgment, and when they do speak, realise that others are facing the same anxiety and stress. Storytelling is a

great way to break down issues associated with mental health and build trust within a firm, but talking about it yourself or hearing about other people's struggles can also help you deal with your own.

Unlike many individuals, I preferred working in the office to remotely, as it was quite challenging when other family members were also working from home. I was in my last year of traineeship and looking forward to face-to-face meetings with clients. I thought this would improve my confidence, knowledge and communication but I never had a chance to exercise this until after I qualified.

I remember trying to bury myself under my work and staying active (working out, going for runs, walking the dog), but I did not realise that after some time, I would feel alone and depressed or that I was not getting enough work completed efficiently; I felt like a robot at times as the work that could be carried out was limited. There was also a social aspect which was sacrificed, which impacted me mentally as I couldn't talk to anyone face to face apart from my family. In my opinion, discussing how you really feel on the phone does not have the same impact as talking to someone face to face.

One aspect that did help me, apart from yoga, was the wellbeing webinars introduced by the Society at the start of lockdown. These focused on positive mental health and are just as effective today. They helped me realise that other solicitors are dealing with similar issues and gave me tips on how to manage my own wellbeing.

Another thing to consider is introducing diversity and inclusion training. From the action plan carried out by the Society and See Me, it is vital, now more than ever, to create positive changes and expand common knowledge about mental health within the legal sector.

Actions taken

My firm has decided to have monthly meetings with all staff to discuss workload and general issues. In these meetings, which are confidential, employees can raise any issues they are struggling with, personal or work related, so the firm can assist and help ease or resolve their concerns.

A similar approach was taken by Allen & Overy, which introduced a monthly survey to gather feedback on mental wellness and concerns that its global staff were facing. Since then, it has created a Minds Matter programme, which encourages employees to discuss mental health and provides support where it is needed.

Other examples are Chicago-based Baker McKenzie, which started providing training to partners and managers in mental health, while UK-based Ashurst set up a wellbeing space in its Glasgow office which staff could use for yoga, quiet reflection and check-in sessions. Global firm Dentons also took the initiative to tackle this issue and implemented a four-day week scheme across its offices in the UK, Ireland, United States, Canada, Australia and New Zealand.

European firm Fieldfisher took a different direction, partnering with LawCare for a round table discussion of the pressures affecting both in-house lawyers and private practice. The first event, Wellbeing in Law, in April 2022, discussed the understanding of wellbeing and ways of improving and monitoring this to help achieve a positive outcome. The discussion outlined three key questions:

1. What can senior lawyers and GCs do to improve their own wellbeing and the wellbeing of their teams?
2. How do/should lawyers measure "success" in terms of a career in law?
3. What, if anything, needs to change in the practice of law?

Some of the responses to these questions included workplaces:

- having honest conversations;
- setting realistic deadlines;
- introducing firebreaks – sensible recovery downtime between deals;
- having red, amber and green days when staff can acknowledge that different days will be slow, steady or busy (or a mix);
- introducing initiatives to support psychological safety; and
- providing for time blocks in diaries for no calls, and 50-minute calls, to ensure breaks.

Introducing these measures could assist in overcoming the burnout solicitors are facing, and increasing productivity and success.

While in-house counselling and schemes are fantastic initiatives to support employee wellbeing, it is vital to recognise that not everyone feels comfortable speaking to someone internal, or responds to the support offer in the same way. If you feel that listening to webinars will not help and you would rather speak about your concerns, there are other avenues you can explore. For example, LawCare is a free and confidential service for the legal profession, including staff and concerned family members, provided over the phone, by email or online chat. LawCare continues to support and call for a change in legal culture.

Tips for solicitors, practising or aspiring

Recognise and seek support

Whether through internal mentoring schemes or external support, if you are feeling anxiety, stress or general mental ill health, try and use the resources made available to you or speak up if you feel there is lack of assistance. Taking that first step towards asking for help can feel scary and overwhelming, but listening to your inner voice that says you need help, and recognising that, shows great strength.

If more solicitors talk openly about the challenges faced in the legal profession, this will assist others by giving them an insight into the issues they may face and helping them to navigate them.

Key links

www.mind.org.uk/need-urgent-help/using-this-tool

www.lawscot.org.uk/members/wellbeing

www.lawcare.org.uk

Balance work and social life

As we know, life as a solicitor can seem daunting, so it is important to take time away from your studies/work when you have the chance, to strive for a healthy work-life balance.

For aspiring solicitors, researching firms and their working practices is a great way to figure out what environment you might be in. Try speaking to people who are already in the firm, and figure out what the working life entails and what practices they have on mental health.

For practising solicitors, it is essential to take time away from your desk when you feel overwhelmed and burnt out. Get into regular selfcare habits, and if need be, diarise them. These can include going for a walk or taking a coffee break.

During the pandemic, we felt more isolated than ever – the key issue for many facing mental health problems. Within the legal world, the pandemic took away the ability to network and attend events or law fairs. Aspiring lawyers have had to work harder to build connections and create professional relationships. Regardless of whether you are working or studying, planning catchups with your manager or friends could improve your mental health and is a great way to stay connected.

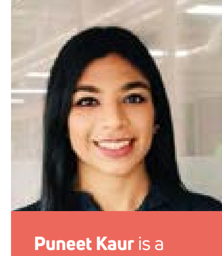
The result?

Following the lockdown and introduction of flexible working, the way we work has changed forever, but there remains the cemented culture and stigma around mental health within the legal profession.

It is clear that many law firms and institutions are introducing measures and initiatives to tackle mental health issues. It is still unclear whether these work for everyone or whether firms need to readdress these to ensure an effective support system for all staff.

As more frequent conversations surrounding mental health occur in the workplace, more issues can be identified and solved – more systems of support can be established and introduced.

The more we talk about mental health, both within the professional setting and in wider society, surely the easier life will become.



Puneet Kaur is a senior solicitor with Inheritance Legal

Assets, experts and fair sharing

An Outer House decision has taken an interesting and, at times, novel approach to disputed matters in a claim for financial provision, as Alison Edmondson reports

he judgment of Lady Carmichael in *Macdonald v Macdonald* [2022] CSOH 84 (25 November 2022) is a decision regarding financial provision on divorce which has points of interest for future cases.

The parties were married on 9 August 2002 and separated on 27 May 2019, the relevant date for the purposes of the Family Law (Scotland) Act 1985. Matters in dispute were primarily valuation issues, along with arguments for unequal sharing of the net matrimonial property. The third focus of this article will be the admissibility of expert evidence.

Valuation issues

There were two primary disputes with regard to valuation: corporate interests and rural land.

On the latter, the wife pursuer led a rural property surveyor and also a chartered forester as part of the land was woodland. The forester's evidence was preferred to the defender's more generalist rural surveyor. It is always worth enquiring of an expert whether onward referral to another expert might assist in valuation.

The largest asset by far was a company ("MGL") of which the defender was sole shareholder. Each party led an expert forensic accountant. By the proof the accountants had agreed on the future maintainable earnings. Three issues were disputed: the multiplier (which turned on the specifics of this case); the net debt (including deduction of corporation tax); and whether net asset value should be used as a backstop valuation.

M v M represents an evolution of the law about corporation tax. Lord Tyre's decision in *W v W* 2013 Fam LR 85 was distinguished. Lord Tyre did not treat liability for corporation tax as net debt, describing it as a "haggle point". Lady Carmichael preferred the evidence of the defender's expert witness, who spoke to an evolution in practice in the market such that although 10 or 15 years ago there would have been an argument as to whether corporation tax liabiity should be treated as working capital or debt, it was now generally accepted as a debt-like item (on the basis that the seller had enjoyed the profit and should bear the tax).

However, Lord Tyre's approach was adopted in relation to another element of net debt. MGL had committed to purchase plant and equipment but had not completed the purchase at the relevant date. This *was* regarded by the court as a "haggle point" and therefore left out of account in calculating the net debt figure.

The most striking valuation point is the court's discussion of the role of the net asset value when valuing a shareholding on an enterprise basis. The pursuer's expert adopted the conventional view that, absent any special factors, the value of a company cannot fall below the value of its net assets. This was a case in which there were no supervening factors which might justify a sale of the shares on the open market at below net asset value (for example, significant anticipated changes in the company's market or forced relocation of a business particularly dependent on its location). The court's enterprise valuation brought out a value less than the court's net asset valuation. The lower figure was used for the purpose of valuing the defender's 100% shareholding.

Of course, this is only one Outer House decision. The role of the forensic accountant is unchanged by this decision. Agents' instructions to forensic accountants should continue to seek expert opinion as to what a willing buyer would pay to a willing seller on the open market at arm's length. However, it is important to ask valuers to explain why they say that a valuation should not fall below net asset value. Equally, when cross examining a valuer who has used a net asset basis, Lady Carmichael's approach should be put to the witness. In the writer's view it is unlikely that valuation orthodoxy will be altered by this decision, but that remains to be seen.

Minority discount

The defender was also a 50% shareholder in another company, "HRL". One point is of broader interest. The expert witnesses disagreed about whether a discount should be applied for the fact that the defender's shareholding was only 50%, where a 75% shareholder vote was required to pass special resolutions. The pursuer's expert had applied no discount, on the basis that this business was a quasi-partnership and there was a clear understanding that the defender had rights beyond those set out in the articles including the right to withdraw his capital. Her counsel relied in argument on Lord Hoffmann's dicta in *O'Neill v Phillips* [1999] 1 WLR 1092.

Lady Carmichael noted that Lord Hoffmann's dicta were in the context of considering the existence of unfair prejudice, commenting: "His remarks are not of assistance in determining whether a discount is appropriate in a valuation of a shareholding." The pursuer's approach would take into account factors that relate to buyers with particular characteristics (for instance, if the most likely purchaser was the other shareholder or the company). That was not consistent with an arm's length transaction between a notional willing buyer and willing seller. The court therefore did in effect apply a "minority" discount to the valuation of the 50% shareholding.

Arguments for unequal sharing

The case exhibits the full gamut of arguments around unequal sharing, almost all of which were advanced in various respects by each party. Not all will be of future relevance, but those which might be useful examples to refer to are:

- Secured debt had been reduced by the defender's post-separation payments and he sought reimbursement, characterising this as an economic disadvantage/advantage. He was given credit, but only in part because he had occupied the jointly owned properties since separation.
- Company MGL had incurred expense which increased the value of the matrimonial land. The court declined to treat expenditure by the company of which the defender was sole shareholder as his personal expenditure.
- The pursuer had retained the proceeds of the joint account and the defender sought credit for half of that sum. He was given credit based on s 9(1)(b), but under deduction of the court's assessment of the pursuer's alimentary need

during a period when no aliment was paid.

• The defender argued that the funds used to acquire jointly owned heritable property had come from inheritance/lifetime gift from his parents. The pursuer lodged the declaration made to HMRC by the defender as his father's executor, which was inconsistent with this position. The defender received a warning about the privilege against self-incrimination and that the court might make a reference to COPFS. The pursuer accepted that there was an element of inheritance/third party gift and the court gave the defender credit in terms of s 10(6) to that extent.

The overall approach taken to arguments for unequal division is a hybrid of forensic consideration of their constituent parts and then a broad approach on the extent of the departure from equal sharing.

The defender had either ownership or effective practical control of nearly the full extent of the net matrimonial property, and accordingly periodical allowance was awarded until payment of the majority of the pursuer's capital entitlement.

Expert evidence

The pursuer had led expert evidence concerning the parties' likely exposure to capital gains tax. The defender objected on the basis that the witness was speaking to matters of law. The evidence was heard subject to competency and relevancy. It was held inadmissible except insofar as relating to HMRC practicalities, because "Matters of domestic law are for the court, as is the application of that law to the facts of the case."

In the writer's view this approach is the correct interpretation of the Supreme Court's decision in *Kennedy v Cordia (Services)* [2016] UKSC 6. However, it poses real practical problems. If it is correct to say that the evidence of a tax expert is inadmissible, then it must be assumed either that every judge and sheriff has sufficient expertise in UK tax law to be able to apply it correctly, or that counsel or agents will be in a position to address the court on the law as it relates to taxation of assets on divorce. The writer professes no such expertise! It may be conceivable that in the highest value Court of Session cases, counsel (or specialist tax counsel) will be in a position to make such submissions. However, for the majority of cases in both courts, it is more practical to lead evidence from a tax accountant. Such evidence will be of considerable assistance to parties, to advisers and also to the court. *Kennedy v Cordia* is, in this instance, practically unhelpful.

Separately, the pursuer's forensic accountant submitted a report adjusting his opinion shortly prior to proof. Counsel for the defender submitted that the court should therefore attach little weight to his evidence. That submission was categorically rejected. The expert had become aware of more information at a relatively late stage, after experts had met, when it became apparent that the defender had furnished his own expert with information that had not been provided in response to the pursuer's expert's queries. As the judgment puts it, "That is the point of experts meeting."

Conclusion

This case illustrates the importance of forensic preparation of arguments justifying unequal division, but also the practical impossibility for the court in adopting a wholly forensic approach to its determination. It also illustrates the vital role of experts and the care that must be taken by agents in their instruction.

Expenses: a departure from practice

Prior to publication of the judgment, the court was addressed on the terms of the order to be granted and on expenses. It issued a very detailed interlocutor with supporting reasons on expenses (extending to some 10 pages). That in itself is significant: the court was prepared to dedicate time and attention to proper consideration of every single element of expenses, again applying a more forensic approach rather than a broad brush.

The key point for which this case will be critical in future is that Lady Carmichael accepted the invitation of counsel to fix the percentage uplift for the additional fee sought. While that is common practice in the sheriff court, it has never been accepted practice in the Court of Session. However, Lady Carmichael took a similar approach to the Lord Ordinary in *Philips v Scottish Ministers* [2021] CSOH 52 in deciding that she should determine the level of uplift herself and determining what level that should be. She considered submissions made under each of the heads in the Act of Sederunt (Taxation of Judicial Expenses) 2019 and specified the weight attached to each.

Alison Edmondson is a partner with SKO Family Law Specialists, who acted for the pursuer in the case discussed

Costs: the tail that wags the dog

Decisions on costs of litigation, and liability for these, including cases of interest from outwith Scotland, dominate this month's civil procedure roundup, which also notes the important recent opinions on legal professional privilege

Civil Court

CHARLES HENNESSY, RETIRED SOLICITOR ADVOCATE, PROFESSOR AND CIVIL PROCEDURE EXPERT

Judicial review

It is difficult to ignore the large number of judicial review decisions that have been published recently. Back in 2009 the Scottish Civil Courts Review noted the extent to which JRs contributed to the workload of the Court of Session, including the disproportionate amount of time taken up with hearings. It proposed various reforms to address these concerns. Although the most recent set of civil statistics (for the year to 31 March 2021) showed a significant reduction in such cases, that could be explained by a number of extraneous factors, including Covid. I don't know how many JRs have been raised since, but from the number of decisions published lately, it looks like there are more of them now than ever.

State funding of litigation

One such case was *Halley v Scottish Ministers* [2022] CSOH 81 (9 November 2022), in which a part time sheriff whose conduct was to be investigated by a tribunal established under s 21 of the Courts Reform (Scotland) Act 2014 challenged the respondents' decision to refuse to fund the cost of his legal representation before the tribunal. It emerged during the proceedings that the tribunal had actually offered to pay those costs; the main bone of contention then became whether the respondents should also pay for his legal representation at the judicial review in which he sought to challenge preliminary decisions of the tribunal.

Among other things, this involved consideration of ECHR article 6(1). After lengthy consideration of numerous cases about state funding of litigation, Lady Drummond refused to grant the order sought. She concluded: "Considering all these factors,... the petitioner has a reasonable opportunity to present his case to the court without funding for legal representation being provided by the respondents. The costs of the substantive petition are not prohibitively expensive and it is not unreasonable for the petitioner to proceed with the judicial review without funding from the respondents. The respondents' refusal to spend limited public funds on meeting the costs of the substantive petition is in all the circumstances proportionate... The denial of funding for legal representation for the substantive petition does not constitute a limitation on the petitioner's right of access to the court which undermines the very core of that right and makes it practically impossible or excessively difficult for him to exercise his rights."

The cost of litigation

I would like to think that anyone involved in the conduct of litigation in Scotland would be interested in cases in other jurisdictions which involve issues that may eventually impact on us. Three such recent cases focusing on various aspects of the costs of litigation are worth a look.

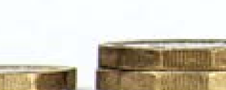
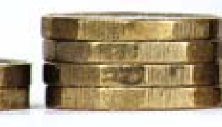
In *Belsner v Cam Legal Services* [2022] EWCA Civ 1387 and *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388, the Court of Appeal considered two low value personal injury claims in which the claimant's solicitors had made certain deductions from their client's damages in terms of their contingency fee agreements. These deductions were challenged by the clients. The English charging principles and practices are complex, so much so that it seems there are law firms whose sole business is the challenging of other lawyers' fees. The precise details are immaterial and none of the lawyers came out of it well, but there are two general points to take from the decisions.

First, there was judicial criticism of an appeal about such a relatively small bill taking up four days of the Appeal Court's time. Secondly, the court urged the profession to reconsider the whole way in which success fees and other charges work in low value PI claims. The Law Society Gazette commented that the Court of Appeal seemed to regard much of the personal injury claims business as "one grubby process" in need of significant reform or shutting down altogether. A precedent we should take great care to avoid, I would suggest.

There are some telling observations about the principle of equality of arms in an interesting judgment of 22 October 2022 from the European Court of Human Rights, in *Coventry v United Kingdom* [2022] ECHR 816. Most people would associate the principle with a desire to support individual claimants pursuing powerful and wealthy opponents, but in this case it was prayed in aid of an uninsured defender. The case concerned a claim for nuisance against the owner of a stadium used for motor sports. The claimants had the benefit of ATE insurance and their lawyers were acting under a success fee arrangement. The ATE premiums and success fees were recoverable from the losing party. Ultimately the claimants succeeded and were awarded £20,000 in damages. They were also awarded a total of about £850,000 in costs (not counting costs before the Supreme Court!), of which well over half were success fees and ATE premiums.

The defender complained that this was unfair to them and the ECHR agreed. It said that the adversarial principle and the principle of equality of arms are fundamental components of the concept of a "fair hearing" within article 6(1). Each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent or opponents. The court referred to the "blackmail or chilling effect" of the fact that the costs burden on the opposing parties was so excessive that often a party was driven to settle early despite good prospects of a successful defence. The very different financial risks faced by the parties would be likely to impact on every decision concerning the conduct of proceedings and could also preclude a settlement, even in the early stages, if a party was simply not in a position to pay the opposing party's costs. The court ruled that the costs scheme applicable at the time in England was a violation of article 6(1). QOCS, anyone?

Finally, if you are really nosy, have a look at *University of Manchester v McAslan & Partners* [2022] EWHC 2750 (TCC), a claim for damages

> "The court ruled that the costs scheme applicable at the time in England was a violation of article 6(1). QOCS, anyone?"

for breach of contract relating to the design and construction of a building project. The court was asked to, and did, approve the budget costs of all the parties in a claim which was worth just under £14 million; the decision includes a detailed schedule setting out past and projected costs for each party. Although the value of the claim was high, the figures are eyewatering. For example, the claimants' pre-action costs up to the issuing of proceedings were about £1.2 million. The disclosure costs for all four parties totalled around £1 million; expert witnesses' estimated costs came to just over £1.5 million. Prospective trial preparation and conduct costs for all parties totalled about £2.5 million. At these levels, is there not a risk of litigators pricing themselves out of the market?

Legal professional privilege

In *SLCC v Murray* [2022] CSIH 46 (11 October 2022) the Inner House had to rule on the application of the important principle of legal professional privilege ("LPP") in the context of the investigation of a complaint to the SLCC against a solicitor. As the court put it, "The question which arises in this petition is whether the petitioner is entitled, under s 17 of, and sched 2 to, the Legal Profession and Legal Aid (Scotland) Act 2007, to apply for the production and delivery of documents which would otherwise be covered by legal professional privilege".

The wife in divorce proceedings made complaints against her husband's solicitors, in particular their alleged failure to provide "in a timely manner, all necessary vouching" requested by her own solicitor. The SLCC sought the third party solicitors' file for their investigation. The husband did not waive his privilege and the solicitors refused to provide the file on grounds of confidentiality and LPP. The SLCC argued that it had the right to obtain such papers. The Faculty of Advocates and the Law Society of Scotland, as interveners, opposed the petition.

The court upheld LPP, and the judgment contains a number of observations about confidentiality and privilege which should be compulsory reading for any practising lawyer. In a supplementary opinion, [2022] CSIH 54 (9 December 2022), the court emphasised the distinction between confidentiality and LPP. Service of a notice by the SLCC under s 17 of the 2007 Act relieves the practitioner of the general duty of confidentiality. However LPP is "in a special position" and applies to those documents which fit the definition. I understand that the Society is reviewing the ramifications of these decisions and is likely to issue guidance to the profession, so I will say no more meantime.

Additional fee

Does the award of an additional fee apply only to work done up to the date of the award, or to the proceedings as a whole? That was the simple question posed in the case of *Whitehouse v Chief Constable* [2022] CSOH 75 (5 October 2022). The answer, regrettably, is not quite so simple. Paragraphs 15-18 of the opinion contain the crux of the decision, but they defy easy summary, I am afraid to say. Suffice it to say that in the Court of Session the court can allow an additional fee under certain headings and the auditor will then fix the amount of the fee, taking those headings into account. The auditor's discretion is a significant part of that complex equation.

State immunity

In *Morrison v Mapfre Middlesex Insurance* [2022] CSIH 45 (6 October 2022) the Inner House considered the application of s 14(2) of the State Immunity Act 1978. So far as I am aware, this is the first time the Scottish courts have done so. The pursuer was on a tour bus in Malta which hit a tree. He sued the tour operators for damages, and they convened the third party, alleging that they were in breach of their duty to maintain the road. The third party (a private company) argued that they were exercising sovereign authority delegated by the Maltese state and accordingly were entitled to immunity from suit outwith Malta in accordance with the Act. They took a preliminary plea of no jurisdiction; a preliminary proof was held to ascertain the background arrangements with the Maltese Government. After proof the Lord Ordinary sustained the plea. The defenders' appeal was refused.

Lord Carloway, delivering the opinion of the court, set out briefly the rationale for state immunity and the development of the law which led to the 1978 Act. In this situation, there is a distinction between acts involving commercial or private rights, which are not immune, and acts arising from the exercise of sovereign power, which are. On the evidence, the third party was carrying out the Maltese state's obligation to maintain its major public roads and therefore immunity applied.

Pleadings (or lack of)

In *Golden Lane Securities v Scarborough* [2022] CSOH 76 (7 October 2022), Lord Clark had to rule on an objection to evidence in a commercial action based on lack of notice in the pleadings. The case concerned a claim and counterclaim arising out of a purported agreement. Witness statements had been provided in accordance with the predominant commercial practice. An objection was taken to certain passages of evidence in the defender's supplementary witness statement, lodged six weeks before the proof. It is necessary to read the whole judgment to understand the position fully; however Lord Clark sustained the objection and made certain observations of interest for commercial litigators.

"Whilst pleadings in commercial actions are intended to be succinctly expressed, fair notice remains as a key requirement. There may be particular circumstances in which a lack of specification in pleadings is sufficiently developed in a witness statement, and in some instances that can be allowed. Controversial evidence being led subject to competency and relevancy can of course also be permitted. But where the evidence objected to is on material points of real substance in a supplementary witness statement and these are not mentioned in the pleadings, and the points also lack specification and are not vouched, there is prejudice to the other party in seeking to deal with it at the proof."

It is interesting to compare this with Lord Clark's decision on the adequacy of pleadings in another commercial action, *SSE Energy Supply v Stag Hotel* [2022] CSOH 54, noted in my article at Journal, November 2022, 40.

Sheriff Appeal Court: competency of appeal

In *Thorntons LLP v Dymoke* [2022] SAC Civ 29 (29 September 2022), two procedural issues arose which are worth noting. The action concerned a dispute between solicitors and their clients, who each represented themselves separately. The action settled after mediation and an interlocutor was pronounced, purportedly of consent, disposing of the action. Both defenders lodged separate appeals.

The respondents argued that the appeal was incompetent having regard to rule 6.2(2)(b) of the SAC Rules 2021, namely the requirement to set out, in the note of appeal, the grounds of appeal etc. The court observed that any such failure was not a question of competency. If a respondent wished to challenge a note on these grounds, the appropriate procedure was to proceed by way of motion to find the appellant in default. An appellant could seek relief from any such failure under rule 2.

The respondents also argued that since the interlocutor was of consent, it was not open to the court to consider an appeal. Under reference to the most recent edition of Macphail and cases cited there, the court refused to countenance the appeal by the first appellant but allowed it to proceed in relation to the second appellant,

who had not been present or represented when the interlocutor had been pronounced and therefore could not have consented to it.

Simple procedure: evidence of service

The Sheriff Appeal Court addressed the vexed question of what formality is required to entitle a court to pronounce decree in an undefended simple procedure case, in *Cabot Financial (UK) v Bell* [2022] SAC Civ 31 (24 October 2022). The summary sheriff had refused to grant a decree in absence where the claimant's lawyers had lodged form 6C (confirmation of formal service) but no Royal Mail Track and Trace receipt or other evidence of receipt of the claim form.

Rule 18.2(4) of the Simple Procedure Rules provides: "After formally serving a document, a confirmation of formal service must be completed, and any evidence of delivery attached to it." There was scope for arguing that this could be taken as meaning "evidence of delivery (if any) attached to it", and that the presumption of receipt of a document that was sent which is contained in s 26(5) of the Interpretation and Legislative Reform (Scotland) Act 2010 was engaged.

Contrary decisions on the point had already been made in *Cabot Financial (UK) v Finnegan* 2021 SLT (Sh Ct) 237 and *Cabot Financial (UK) v Donnelly* 2022 SLT (Sh Ct) 147. The claimants appealed. It is interesting to note that as there was no party to oppose the appeal, the court appointed an *amicus curiae*. Their function is "to assist the court by presenting a neutral appraisal of the issues which require to be decided and by raising considerations that might not otherwise come to the court's attention": see *Hamilton v Glasgow Community and Safety Services* [2016] SC (SAC) 5.

The issue appears to be of considerable practical significance to those involved in high volume debt recovery actions, and I understand that the claimants' lawyers are seeking permission to appeal the decision further, although it should be noted that the Act of Sederunt (Simple Procedure Amendment) (Miscellaneous) 2022 (SSI 2022/211), which came into force on 28 November 2022, seems to address any uncertainty on the point by substituting a different wording for rule 18.2(4) as follows:

"(4) After formally serving a document, a confirmation of formal service must be completed and any evidence of sending... attached to it (for example, a postal receipt...)."

See also the article on p 34.

Licensing

AUDREY JUNNER, PARTNER, MILLER SAMUEL HILL BROWN

The Scottish Government is consulting on proposals to restrict the advertising and promotion of alcohol, with the measures to be introduced as part of the current legislative programme.

According to the ministerial foreword, the catalysts for action are threefold: to prevent young people being exposed to alcohol marketing; to reduce "alcohol cues" that negatively impact on the alcohol-dependent; and "to prevent influence on social norms relating to consumption in general".

Clampdown

The possible measures could scarcely be more wide ranging. They include the prohibition of alcohol sports sponsorship; a ban on outdoor alcohol advertising on vehicles, in public spaces and in print media produced in Scotland; and a prohibition on the sale of alcohol-branded merchandise, whether paid for or freely distributed (such as T-shirts, hats, jackets and baseball caps – "walking billboards", according to the consultation). Curbs on television, radio and cinema advertising are likely. The measures may also embrace zero-alcohol products branded in the style of their alcoholic counterparts. Even more ambitiously, the Government is considering the restriction of paid online advertising. All that appears to be missing is a requirement for separate checkouts for alcohol purchases – although such a step cannot be completely ruled out.

For the licensed trade and its advisers, major challenges look certain to lie ahead. As matters stand, the Licensing (Scotland) Act 2005 imposes controls on the display of alcohol in the off-trade. It may only be displayed in a single public area approved by the licensing board and an area to which the public do not have access. The location of promotions is also circumscribed. Far wider restrictions are on the horizon. Window displays will now be excluded from a permitted area on the basis that "shop fronts are a source of marketing exposure for both children and young people as well as those in recovery".

The prohibition of aisle-end displays is also under consideration, as is a measure reminiscent of tobacco controls, that would require alcohol displays located behind a checkout counter to be in "a closed cupboard". The visibility of alcohol (a theme running through the whole consultation) may be addressed by "structural separation" to ensure that it is "near the back of the shop away from entrances, exits or checkouts": perhaps a return to the "shop-within-a-shop" arrangement that was the norm in supermarkets until self-service started to become commonplace in the late 1980s.

Ireland introduced comprehensive placement restrictions in November 2020. However, although there has been no evaluation of their impact, the consultation appears to be heavily influenced by the Irish approach.

As to enforcement, the Government may work

with existing regulatory bodies, noting that the new system would not be suited to supervision by local licensing standards officers, as marketing campaigns are often not associated with particular licensed premises. It is also possible that new regulatory arrangements may be put in place or a new regulatory body could be created in Scotland to monitor and enforce compliance.

Huge implications

Assuming that existing businesses will fall within the legislation, the practical and costs implications are considerable and look set to make a huge impact on the workload of licensing boards. The whole of the off-trade would require to obtain permission for the premises licence layout changes, save for possible exemptions in relation to small shops. (The consultation acknowledges that "further work will need to be undertaken on the impact to small retailers before any potential restrictions were introduced".) That would involve the submission of licence variation applications supported by fresh layout drawings, as well as the expense of structural works. In many cases, the works are likely to result in a reduction in the capacity of alcohol displays and a smaller product range. One wonders how the curbs might affect specialist drinks retailers where the entire shop is given

"All that appears to be missing is a requirement for separate checkouts for alcohol purchases – although such a step cannot be completely ruled out"

over to the display of alcohol.

In the sports arena, there are already predictions that a sponsorship ban could prevent the hosting of major football events, such as UEFA club competition finals, with wider consequences for Scottish clubs playing in European competitions sponsored by drinks companies.

Unsurprisingly, commentators have observed that the proposals mirror the wish list of anti-alcohol lobbyists and have compared attempts to airbursh alcohol from society with the zeal of the temperance movement, even predicting progress towards outright prohibition. What might lie ahead if, as appears, alcohol is set to become "the new tobacco": plain packaging and health warnings on labels?

The consultation closes on 9 March 2023 and can be accessed on the publications section of the Scottish Government's website.

Planning

ALASTAIR McKIE,
PARTNER, ANDERSON STRATHERN LLP

I last reported on the emerging National Planning Framework 4 ("NPF4") in my article at Journal, January 2022, 38.

NPF4 sets out the Scottish Government's key planning policies for how and where Scotland should develop until 2045. Extensive consultation has now been concluded and the Government laid the Revised Draft NPF4 (extending to 160 pages) before the Scottish Parliament on 8 November 2022. It is anticipated that it may be approved by the Parliament in late January, with ministers adopting it shortly thereafter. I am pleased to report that NPF4 is greatly improved and a much clearer and more coherent policy document than that which was consulted on.

My understanding is that the role of the Parliament will be to debate NPF4 but it will not be subject to amendment. NPF4 will either be (most likely) approved in whole or rejected by the Parliament.

With a lifespan of 10 years, NPF4 is the Government's long-term spatial strategy combined with a comprehensive set of 33 national planning policies, which when adopted will form part of the development plan for decision-making. Even in its unadopted form, NPF4 is already exerting a significant effect on new development proposals as it is a material planning consideration in decision-making, being the Government's settled view on national planning policy.

Once adopted, NPF4 will enjoy development plan status, which means that in law (under

s 25 and s 37(2) of the Planning Act) there will be a legal presumption in favour of consent being granted for development proposals that conform to NPF 4, and conversely one against consent for those which do not. NPF4 will therefore exert a very significant influence on what is built (or not built for that matter) and where.

NPF4 and LDPs

The policy framework of NPF4 is complex and will involve detailed policy assessments for new development proposals. NPF4 will not replace the planning authority's local development plan ("LDP"), but will create a second tier of development plan, with existing strategic development plans being abolished. In addition, regional special strategies and local place plans will be material considerations.

Under the Planning Act, in the event of a conflict between NPF4 and the LDP, the latter will take priority, meaning that it is possible for a planning authority (in theory) to override policies of NPF4 with its LDP, but that seems unlikely as a Scottish Government reporter will be examining an LDP for consistency. Nevertheless, tensions may be created where NPF4 and a local development plan do not align, and in some instances this will make for complex and detailed policy assessments for new development proposals and those being considered at appeal.

Although some planning authorities have delayed bringing forward their replacement LDPs while NPF4 is being finalised, others have proceeded, and a number of proposed LDPs will shortly be examined by reporters and presumably checked for consistency with NPF4.

Principles and policies

NPF4 contains a national spatial strategy, which guides decisions on development proposals and aims to produce some new concepts: "just transition", "conserving and recycling assets", "local living", "compact urban growth", "rebalanced development", and "rural revitalisation". These spatial principles are then translated into:

- "sustainable places" – where emissions will be reduced, with restored and better connected biodiversity;
- "liveable places" – where people can live better, healthier lives;
- "productive places" – which produce a greener, fairer and more inclusive wellbeing economy.

At the heart of NPF4 are policies to address the global climate and nature crises, and as one might expect, it provides significant support for renewable energy projects, with all onshore and offshore renewable electricity generation exceeding 50MW being considered as "national development" – which will still need permission but in circumstances where the "need" for the development has been established. There are in total 18 national developments which support the delivery of NPF4, including Edinburgh and Dundee waterfronts, and urban mass/rapid transit networks.

Under housing, NPF4 states that provision of affordable homes on a site will be at least 25% (it expects that to be exceeded) of the total number of homes. Annex E sets out the "minimum all-tenure housing land requirement" for the whole of Scotland by planning authority area, including for example 36,000 homes for Edinburgh in a 10 year period.

NPF4 will exert a profound influence on land use and investment in Scotland, and provide the key policies to assist in achieving net zero sustainable development by 2045. Whether NPF4 will deliver on this remains to be seen.

Insolvency

ANDREW FOYLE,
SOLICITOR ADVOCATE AND JOINT HEAD OF LITIGATION, SHOOSMITHS IN SCOTLAND

Rule 7.19 of the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018/347 states that "any creditor" may appeal to the court in relation to the acceptance or rejection of "any claim" not later than 14 days before the end of the accounting period. In *Spex Group Holdings Ltd, Noter* [2022] CSOH 74 the court was called

upon to consider how widely the term "any creditor" should be construed. In doing so, the court may have diverged the Scottish law on this point from the law of England & Wales.

Appeal

The noter was a creditor and contributory of two companies and sought directions on a number of issues. By the time of the hearing before the Lord Ordinary, agreement had been reached on the majority of the matters on which directions were sought. The remaining issue was reasonably narrow, concerning the right of a creditor whose claim has been rejected by the liquidator to appeal against the adjudication of another creditor's claim.

As set out above, the rule in Scotland states that "any" creditor may appeal in relation to "any claim". The noter argued that this allowed them, even in a case where their own claim had been rejected, to appeal against the liquidator's adjudication of another creditor's claim.

The respondent argued that where a creditor's claim, following adjudication, had been rejected by the liquidator, the creditor no longer had a locus to appeal against any adjudication except their own. In effect the rejection of the claim meant that they were no longer a creditor and therefore had no right of appeal. It was argued that Parliament could not have intended a rejected creditor to be allowed to appeal, or to put other creditors to the expense of such an appeal.

Support for the respondent's view appeared to be found in English authorities, encapsulated in McPherson & Keay's *Law of Company Liquidation* as follows: "A creditor has the right to apply under rule 14.8(3) [of the equivalent English rules] unless and until the liquidator had rejected his or her proof."

This was in turn based on a judgment of the Chancery Court at first instance.

Single meaning

The court found in favour of the noter's interpretation of the rule. It was accordingly held that a creditor whose claim was rejected retained a right to appeal against the adjudication of other creditors' claims and not merely their own.

In reaching this view, the Lord Ordinary noted that the Scottish rule was intended to cover all appeals against adjudication. Therefore, the words "any creditor" must be construed accordingly. Logically, a creditor could not be a creditor for the purpose of appealing against their own adjudication, but not a creditor when appealing against another party's adjudication. "Creditor" within the rule ought to have a single meaning.

The Lord Ordinary found that elsewhere in the rules the term "creditor" was used to include a person whose claim had been rejected. Therefore, this interpretation was consistent with the rules as a whole.

With regard to the referenced English authorities, the Lord Ordinary noted that the English rule was in two parts. The first dealt with appeals against one's own adjudication and the second with appeals against another creditor's adjudication. By contrast, the Scottish rule dealt with all forms of appeal in a single paragraph using the words "any creditor".

This distinction aside, it was found that the English position was based on a first instance decision of a judge in the Chancery Division. That judgment is not binding in Scotland; furthermore, the comments upon which the textbook statement was based were obiter and had not been fully argued before the court. The Lord Ordinary was therefore not persuaded that the English authority should be followed in Scotland. Nothing put before the court suggested that the policy intention of the Scottish Parliament was contrary to the conclusion reached, and the decision accorded with the plain wording of the rule.

Comment

A creditor whose claim is rejected will usually be appealing against that rejection. It is rare for such a creditor to be appealing solely against the adjudication of a third party's claim. Nevertheless, this judgment makes clear that a creditor whose claim is rejected will remain a creditor for the purposes of appeal regardless of that rejection.

While the Lord Ordinary identified that the English position is perhaps not based on solid ground, it does appear that the law of Scotland differs in this regard.

Tax

ZITA DEMPSEY, ASSOCIATE,

AND HAYLEY STEVENSON, SOLICITOR, PINSENT MASONS LLP

In the aftermath of the disastrous economic consequences of Kwasi Kwarteng's radical mini-budget, his successor, Jeremy Hunt, presented a less controversial autumn statement in November. Individuals and businesses should familiarise themselves with the changes announced therein. Some of the key upcoming changes have been highlighted below.

Individuals

Income tax and NICs

While no changes have been announced to the rates of income tax or NICs, individuals in England, Wales and Northern Ireland can expect to pay more over time as a result of the reduced thresholds. The additional rate threshold, at which the highest earners are subject to a 45% rate of income tax, will be lowered from £150,000 to £125,140 from 6 April 2023. Additionally, the personal allowance and 40% rate threshold of income tax, and the NICs primary threshold and lower profits limit, will be frozen until April 2028 – two years later than the date announced at the Spring Budget 2021.

The tax-free allowance for dividend income is also due to be reduced, falling from £2,000 to £1,000 from 6 April 2023 and then to £500 from 6 April 2024.

December's Scottish Budget has confirmed that income tax thresholds in Scotland will be treated in the same way, but changes are coming to the Scottish rates of income tax, with the higher rate and top rate of tax due to increase by 1%, to 42% and 47% respectively.

Capital gains tax

The CGT annual allowance will be cut from £12,300 to £6,000 for the tax year 2023-24, and further reduced to £3,000 from April 2024. For business owners who are poised to make significant gains, this reduction will have little impact, but those making small gains, such as employee shareholders, will be most affected. This may also increase the administrative burden on those individuals, and on HMRC, as those who would not previously have been required to fill out a self-assessment tax return may now have to do so.

Businesses

Research and development ("R&D")

While the Government has committed to increasing spending on R&D, small and medium sized enterprises in R&D-heavy sectors will be disappointed by the changes to the tax incentives available to them. The R&D tax credit for SMEs will be cut from 14.5% to 10% from 1 April 2023, and the SME additional deduction for R&D costs will be cut from 130% to 86%. However, the Government has increased the rate of the research and development expenditure credit ("RDEC"), which

benefits large businesses, from 13% to 20%. While helpful to large businesses, the RDEC does not benefit startups, as it is these small businesses which rely on the cash repayments provided by the R&D tax credits for SMEs as a source of financing. Given that the Government has announced its intention to consult on the design of a "simplified, single RDEC-like scheme for all", we can expect further changes in this area.

Energy and environment

Given the current economic and political conditions, the planned increase in the rate of the energy profits levy from 25% to 35% from 1 January 2023 and its extension to the end of March 2028 will not have come as a surprise to anyone in the industry.

The news that a new temporary electricity generator levy – a 45% windfall tax on the "extraordinary returns" of low-carbon electricity generators – will be introduced from 1 January 2023 to 31 March 2028 is likely to be more controversial. Industry experts have expressed concern that this levy will disincentivise investment in renewable energy projects at a time when the Government is trying to encourage it.

The Government also plans to introduce vehicle excise duty on electric cars from April 2025 onwards. While it is arguable that this policy, in removing an incentive to purchase an electric car, is at odds with the Government's plan to achieve net zero transport, many industry experts believe that this change was inevitable, as the Government will have to find some way to replace the tax which it currently receives from petrol and diesel vehicles when the sale of those vehicles is banned in 2030.

Conclusion

Given that many of Hunt's proposals had been released in advance of the budget, little in it came as a surprise to the markets, and accordingly there was no real economic shock following his announcements. As such, the Chancellor can take solace in the fact that his budget did not have the grave and immediate consequences that his predecessor's did. However, it remains to be seen whether it will be enough to support the ailing UK economy through a period of soaring inflation, conflict and instability in Europe, and a cost of living crisis.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Charity regulation

Following previous Government consultations on updating the Charities and Trustee Investment (Scotland) Act 2005, the Scottish Parliament's Social Justice & Social Security Committee now seeks views on the resulting Charities (Regulation and Administration) (Scotland) Bill, which will strengthen and extend the regulator's powers. See www.parliament.scot/about/news/news-listing/views-sought-on-bill-to-strengthen-charity-regulator

Respond by 3 February.

Education appeal committees

The Tribunals (Scotland) Act 2014 envisages that the work of education appeal committees will transfer to the Scottish Tribunals. The Scottish Government is now consulting on the implications of that transfer. See consult.gov.scot/learning-directorate/transfer-of-education-appeal-committees/

Respond by 6 February.

Effective Government decisions

In order to better understand the Scottish Government's current policy decision-making process, and to identify the skills and key principles necessary to support an effective process, the Parliament's Finance & Public Administration Committee is seeking views on what are the key principles and best practice. See yourviews.parliament.scot/finance/inquiry-into-public-administration/

Respond by 7 February.

Foreign civil or commercial judgments

The UK Government seeks views on whether the UK should sign and ratify the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague 2019). See www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019

Respond by 9 February.

Public participation in Parliament

The Scottish Parliament's Citizen Participation & Public Petitions Committee has launched a call for views as part of an ongoing inquiry into how people's voices are heard in the Parliament's work, particularly for views on the recent Citizens' Panel recommendations on community engagement, deliberative democracy, public involvement and the way Parliament communicates and educates the public on its work. See www.parliament.scot/about/news/news-listing/holyrood-committee-launches-call-for-views-on-citizens-panel-recommendations

Respond by 10 February.

Local development plans

The Scottish Government seeks views on how to define the Gypsy/Traveller community in order to implement the duty under the Planning (Scotland) Act 2019 to involve it properly in preparing local development plans. See consult.gov.scot/planning-architecture/local-development-plan-evidence-report/

Respond by 15 February.

R&D tax relief

HM Revenue & Customs seeks views on its draft guidance covering changes to the research and development tax reliefs due to be implemented on 1 April 2023. See www.gov.uk/government/consultations/draft-guidance-research-and-development-rd-tax-reliefs

Respond by 28 February.

Briefings

Immigration

MEGAN ANDERSON,
TRAINEE SOLICITOR,
LATTA & CO

The high profile case of *AAA v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin) was decided on 19 December 2022. This has been a long awaited decision that has gripped the immigration law world since the Rwanda plan was announced.

Various human rights agencies and organisations, including the UNHCR, have commented on their aversion to the plan. Nevertheless, the High Court ruled that the Rwanda plan is legal and that the UK Government can therefore send asylum seekers to Rwanda to claim asylum, if their asylum claims are determined to be inadmissible (i.e. that they should not be considered on their merits) by the Home Office.

What is the Rwanda plan?

The Rwanda plan, also known as the Migration and Economic Development Partnership, was announced by the Government in April 2022. The part of this deal that has been so controversial is the UK and Rwanda's asylum partnership relationship. This will allow the UK Government to send some of those who come to the UK to claim asylum, to Rwanda to have their claims considered there instead. This agreement also includes the Government providing Rwanda with £120 million, although this is to increase once the country increases the number of asylum seekers that it accepts. It rings somewhat similar to the Israel-Rwanda scheme which was eventually abandoned.

Those who will be considered under the Rwanda plan are those who arrived in the UK having passed through another safe third country. There has been a key focus in the media on those crossing the English Channel from France, as France is an example of a safe third country, and small boat crossings have increased by 60% between 2021 and 2022 alone. If a claim is found to be inadmissible, the Government will then determine whether the claimant should be sent to Rwanda to have their claim considered. However, to date no one has been removed to Rwanda due to the intervention of the European Court of Human Rights.

Why is the plan so controversial?

Concerns around the Rwanda plan have stemmed from fears around whether the basic rights of those sent there would be assured. Further, asylum seekers sent to Rwanda would have their claims considered by Rwanda and not the UK. Once decided, the UK would not permit those granted asylum in Rwanda to return. Further, it appears as though the Government has not learned from the Israeli plan, which started in 2014 and was curtailed in 2018. Some commentators have gone as far to state that the plan is a breach of international law.

The High Court decision

The High Court has decided that the Rwanda plan is lawful and that the UK Government can send people to Rwanda to have their asylum claims considered. It did not find that Rwanda is a safe country; this was not for the court to consider. Instead, it said that the Home Secretary's decision was lawful as she had considered all relevant information available. However, the court held that the decisions made by the Home Office in regard to each individual claim were not given proper consideration. One key error made by the Home Office was that each claimant was confused with another, therefore the facts were not true for each person. Each case must therefore be reconsidered on its own merits.

What happens next?

It is likely that appeals will be brought to the Court of Appeal, and the plans to remove asylum seekers to Rwanda will be put on hold yet again. The current Home Secretary, Suella Braverman, has said that the Government will stand against any further legal challenge. It is unlikely that it will back down, as the current Government seems determined to move forward with its plan. The eight individual claimants will have their decisions reconsidered; whether the outcome will be different, however, remains to be seen.

Scottish Solicitors' Discipline Tribunal

Ian Gordon Davidson

A complaint was made by the Council of the Law Society of Scotland against Ian Gordon Davidson, solicitor, Dundee. The Tribunal found the respondent guilty of professional misconduct in respect that on the death of his father he:

(a) failed to inform The Royal Bank of Scotland (where the deceased held accounts which the respondent continued to operate) of the death;

(b) failed to disclose to the secondary complainer (his brother and co-executor) the existence of a standard security held by the deceased over a property owned by the respondent and his wife;

(c) failed to make the payments due to service a loan to the deceased for the respondent's benefit;

(d) failed to disclose that the Aviva death benefit had been paid out;

(e) failed to obtemper an agreement in relation to the Aviva policy and misappropriated the policy proceeds;

(f) falsely stated that he was in correspondence with Aviva and the Financial Ombudsman Service;

(g) encashed National Savings Bonds contrary to his agreement with the secondary complainer;

(h) failed to disclose to the secondary complainer the value of the National Savings Bonds;

(i) failed to ensure that appropriate buildings insurance cover was in place for a property which formed part of the estate;

(j) failed to settle gas and electricity bills in relation to said property;

(k) failed to account for sums totalling

£44,563.00 paid into accounts held in the joint names of his mother and the deceased over which he had control;

(l) acted inappropriately and in breach of rules B6.12.1 and B6.2.3 in relation to the Aviva policy proceeds;

(m) acted inappropriately and in breach of said rules in relation to a Tesco Bank transfer;

(n) induced Tesco Bank by fraud to write off a debt of £6,663.32;

(o) embezzled payments received from Tesco Bank;

(p) failed to disclose to the secondary complainer the existence of a Tesco Bank credit card account; and

(q) destroyed copies of correspondence and failed to maintain any file in order to conceal his own fraudulent actings.

The Tribunal ordered that the name of the respondent be struck of the roll of solicitors in Scotland and ordained him to pay £5,000 compensation to the secondary complainer.

Principles of honesty and integrity are fundamental to the profession. Members of the profession are in a very privileged position and members of the public must be able to trust that a solicitor will carry out his duties and obligations in an honest and trustworthy manner. Solicitors require to be persons of integrity. If the public is to have trust in the profession, solicitors must observe high standards of conduct. The need to have integrity applies equally to a solicitor's private life as it does his professional conduct.

The Tribunal rejected the submission that the respondent was not acting as a solicitor in this case. He had corresponded with Aviva and Tesco Bank on his employer's headed notepaper. He had received funds into his employer's client account. The secondary complainer had trusted him to deal with winding up the estate because the respondent was still a practising solicitor. However, even if the respondent was not so acting, members of the profession are required to maintain standards in relation to their private or commercial lives as well as in their professional practice. The nature and extent of the dishonesty in this case constituted a serious and reprehensible departure from the standards of competent and reputable solicitors. Accordingly, the Tribunal found him guilty of professional misconduct. Strike off was the only appropriate sanction.

Alan Niall Macpherson Mickel

A complaint was made by the Council of the Law Society of Scotland against Alan Niall Macpherson Mickel, solicitor, Glasgow. The Tribunal found the respondent guilty of professional misconduct in relation to his breaches of rules B1.2 (insofar as it related to a lack of integrity), B6.2.3, B6.3.1, B6.4.1, B6.7.1, B6.11.1 and B6.12.2 of the Law Society of Scotland Practice Rules 2011.

The Tribunal censured the respondent and directed that for an aggregate period of two years, any practising certificate held or issued to the respondent shall be subject to such restriction as will limit him to acting as a qualified assistant to, and to being supervised by, such employer as may be approved by the Society.

The respondent, having been informed that sums due to the Scottish Legal Aid Board had been improperly taken as fees, failed to take action, or instruct others to take action, to remit the judicial expenses to SLAB. He failed to cooperate and communicate effectively with SLAB. He allowed his integrity to be called into question. The respondent knew that sums were due to SLAB when he received an email from the cashier. Despite the matter being drawn to his attention again later in the year, the respondent failed to correct matters or cooperate and communicate with SLAB. The respondent's failure to act was reckless and lacked integrity. In failing to remit the sums due in breach of an express statutory obligation, and taking money to fees, a deficit was created on the client account. Public funds were therefore used for the firm's benefit. The loss had to be covered by the Client Protection Fund. The respondent's behaviour constituted a serious and reprehensible departure from the standards of competent and reputable solicitors. Accordingly, he was guilty of professional misconduct.

David Wilkie-Thorburn

A complaint was made by the Council of the Law Society of Scotland against David Wilkie-Thorburn, solicitor, Aberdeen. The Tribunal found the respondent guilty of professional misconduct in respect that he, by sending an electronic message which was menacing and threatening in nature and which resulted in a racially aggravated conviction under s 127(1)(a) of the Communication Act 2003, acted in contravention of rule B1.2 of the Practice Rules 2011; failed to maintain the standards of propriety expected of him as a member of the legal profession in his private life; breached the duty upon him to act with integrity; and acted in a way which brought the profession into disrepute.

The Tribunal suspended the respondent from practice for a period of two years.

It is well established that conduct that takes place in the private life of a member of the profession can amount to professional misconduct. Not all inappropriate, even criminal conduct, that occurs in a solicitor's private life will do so. However, here the respondent had sent a menacing and intimidating message to a third party, a hairdresser in his husband's salon, that specifically referenced his role as a senior prosecutor. This resulted in the recipient of the message being placed in a state of fear and alarm that she was at risk of being deported, and the subsequent conviction of the respondent. The Tribunal considered the conduct to be not only deplorable but shocking. The admitted conduct clearly fell below the standards to be expected of a competent and reputable solicitor and could only be described as serious and reprehensible, and serious enough that the appropriate sanction was a period of suspension.

Hugh Colin Somerville (s 42ZA appeal)

An appeal was made under s 42ZA(10) of the Solicitors (Scotland) Act 1980 by Wesley Mitchell against the determination by the Council of the Law Society of Scotland not to uphold a complaint of unsatisfactory professional conduct by the appellant against Hugh Colin Somerville, solicitor, Musselburgh ("the second respondent"). The appeal was defended by the first respondents. The second respondent did not enter the process.

The appellant made several complaints about the second respondent. Those related to his involvement in the affairs of two elderly sisters (Ms A and Ms B). The appellant was a friend of these ladies and a beneficiary of their wills. The appellant was not himself a client of the second respondent. This was a "third party complaint". The Tribunal was only concerned with two of those heads of complaint at the substantive appeal hearing.

The Tribunal was persuaded that there were shortcomings in the Professional Conduct Subcommittee's reasoning in relation to the respondent's conduct on 16 May 2012. The evidence supported a finding that his conduct was a departure from the standards of competent and reputable solicitors and therefore constituted unsatisfactory professional conduct. The committee had fundamentally erred in its approach to the case by taking account manifestly irrelevant considerations and had arrived at a decision no reasonable subcommittee could reach.

A solicitor must act on his or her client's instructions and act in their best interests. A solicitor should be satisfied when taking instructions that the client has capacity to give them. If there is any doubt, medical advice should be sought. The Tribunal was of the view that there were warning signs that Ms B may have been a vulnerable client. Therefore, the complaint about the second respondent's conduct on 16 May 2012 was partially upheld to the extent that he had acted inappropriately when he attended at Ms B's house and signed a new will for her by way of notarial execution. However, the Tribunal was not satisfied that the appeal in relation to the remaining elements of the complaint was made out.

Expenses: barred by delay?

A sheriff court decision has rejected a challenge to an award of expenses on the basis of inordinate and inexcusable delay, in relation to final judgments that predate the four month rule

Civil Court

LYDIA McLACHLAN, SENIOR ASSOCIATE, BRODIES LLP

It's not often that unreported decisions in family law cases have implications for other civil practitioners, but the decision in *RM v JG* [2022] SC LER 36 (31 October 2022) raises important questions relative to the enforcement of awards of expenses, in particular in actions where final judgments were made prior to 29 April 2019.

The court was asked to determine whether lengthy delay in seeking taxation of an award of expenses could justify dismissal of an action. After hearing from counsel for both parties, Sheriff Cruickshank found that it could not and refused JG's motion for dismissal. His decision may be the subject of an appeal.

The background to this case is unusual and noteworthy. RM raised an action for contact with his child in 2011. He later initiated minute proceedings for contempt of court, alleging JG's failure to obtemper court orders for contact. Following proof JG was found guilty of contempt; RM was also successful in the principal action. He was awarded expenses as taxed in July 2015 and June 2016 respectively.

RM did not attempt to enforce either award for over five years. During this period neither party raised the matter of expenses. When the first award was made, JG was living in a property in Shetland which was owned by her grandfather. She had no significant assets. In August 2015 the title was transferred into her sister's name. In July 2020 her sister transferred the title to JG. In June 2022 JG, having decided to relocate to mainland Scotland, transferred the property back to her sister. JG maintained she was not aware that RM was then seeking to recover the expenses.

In May 2022 RM lodged for taxation an account which exceeded £220,000 including counsel's fees. Before the taxation, JG lodged the motion to dismiss in terms of OCR, rule 15.7. The basis for dismissal was inordinate and inexcusable delay by RM or his agent in progressing the action, resulting in unfairness.

Submissions for dismissal

Counsel for JG's primary contention was that despite final judgments having been given in 2015 and 2016, the court could dismiss the action under rule 15.7. The action remained in dependence despite the final orders, as it remained possible to seek variation of s 11 orders for children by minute. There had been inordinate and inexcusable delay in bringing matters to a conclusion.

Counsel sought to rely on the fact that JG's principal agent had retired from practice and her current solicitor had insufficient knowledge of the case to comment on the lengthy account of expenses. JG would not have taken title to the property had she known that RM intended to pursue the award. Having transferred the property back to her sister, she had insufficient assets to meet a decree. If the taxation went ahead and decree was extracted she would be declared bankrupt and the transfer would be challenged as a gratuitous alienation. That would result in unfairness to JG.

Reference was made to ECHR article 6. Although there was then no rule requiring the account of expenses to be lodged within a specified time (the four month rule having only been introduced for final judgments from 29 April 2019), the court ought to require determination of liability within a reasonable time, and ought to consider whether a fair trial had been prejudiced. Allowing the account to be taxed at this stage was incompatible with article 6.

Counsel further argued that RM's right to lodge an account for taxation had prescribed after five years. (This required a somewhat strained construction of the 1973 Act.) Lastly, counsel founded on mora, taciturnity and acquiescence. Given the length of time which had passed without steps being taken to pursue the expenses, and her article 6 right, JG was entitled to proceed on the basis that expenses were not to be pursued. She was clearly prejudiced as she would not have accepted the gift of the property had she known that RM would attempt to recover the expenses. Acquiescence or prejudice could be inferred where mora and taciturnity were established.

Decision

Acknowledging the considerable importance of the matter for the parties, Sheriff Cruickshank refused the motion based on his interpretation of rule 15.7. He did not accept that the action was still in dependence, given that final orders had been made in 2015 and 2016, thus rule 15.7 could not operate. To find otherwise would provide JG an opportunity to appeal against the awards of expenses made by the court.

In any event Sheriff Cruickshank considered that the tests for rule 15.7 were not met. Although the delay could be categorised as inordinate, it was not inexcusable. RM did not wish to incur the expense of having an account prepared and going to taxation if there was no prospect of recovery. That was excusable. The prospect of recovery only arose in 2020 when title to the property was transferred to JG.

JG's further arguments were beyond the scope of rule 15.7, but would have been refused in any event.

Beyond the above reasons and the sheriff's comments about the delay which was inordinate but not inexcusable, there is no reference to JG's arguments about human rights. It remains to be seen whether this will be a feature on appeal.

Transparency, human rights and the registers

A decision of the EU Court of Justice has called into question the human rights compatibility of publicly accessible registers disclosing personal data about the beneficial owners of land and other assets

Property

ROSS CALDWELL, PARTNER,

JONATHAN SEDDON, PARTNER,

AND SALLY ANTHONY, PROFESSIONAL SUPPORT LAWYER, MORTON FRASER LLP

We can probably all agree that undesirable activities in any self-respecting liberal democracy include unlawful tax evasion, money laundering and the hiding of illicit wealth.

And if one is a money launderer or a tax evader or wishes to hide one's illicit wealth, then being able to use opaque offshore corporate or trust structures to, in effect, hide one's beneficial ownership of UK corporates or real estate is more than just helpful – one might say it is positively enabling.

The UK Government has legislated for three corporate beneficial ownership registers that must be kept up to date on pain of criminal and civil sanctions, to make it more difficult to hide illicit wealth. However, similar registers maintained in the EEA have been held to be unlawful by the EU Court of Justice on the basis of human rights legislation. What, if anything, does this mean for the UK registers?

The three registers set up in the UK to address this issue are:

• The **Register of People with Significant Control** ("PSC"), maintained by Companies House, brought into being by the Small Business, Enterprise and Employment Act 2015, introducing part 21A to the Companies Act 2006. The following UK entities must maintain a PSC Register at Companies House:

- all limited companies (except certain listed companies);
- all limited liability partnerships;
- Scottish limited partnerships;
- Scottish qualifying partnerships.

The PSC rules are complex, but the net effect is that any natural person who is, directly or indirectly, an ultimate beneficial owner ("UBO") of voting rights or equity interests (i.e. shares or membership or partnership interests) representing a controlling influence in any such entity must be capable of being identified by *anyone* through publicly available and searchable registers.

• The **Register of Overseas Entities** ("ROE"), maintained by Companies House, created through the Economic Crime (Transparency and Enforcement) Act 2022 ("ECTEA"). ECTEA applies to all UK real estate and therefore affects the following land registers:

- in England & Wales, HM Land Registry;
- in Scotland, the General Register of Sasines and the Land Register of Scotland;
- in Northern Ireland, the Land Registry.

The ECTEA rules on beneficial ownership are based on the PSC rules and take effect in similar terms: where an entity (which will include a trust in some contexts) registered, incorporated or established in an overseas country owns (or in certain cases, leases) UK real estate, that entity must be registered in the ROE together with prescribed information such that any UBO of the entity must be capable of being identified by *anyone* through publicly available and searchable registers.

ECTEA takes retrospective effect, so that overseas entities which acquired real estate situated in England & Wales on or after 1 January 1999 but before 1 August 2022, or in Scotland on or after 8 December 2014 but before 1 August 2022, have until 31 January 2023 to register.

From 5 September 2022, overseas entities must register in the ROE *before* they can acquire ownership of land or certain leases anywhere in the UK.

"We understand that the Netherlands has as a result ordered the closure of its Register of Beneficial Owners"

• The **UK Trust Registration Service** ("TRS"), maintained by HM Revenue & Customs, set up in 2017 to satisfy the Anti-Money Laundering Directive (EU) 2015/849 (as amended, the "AML Directive") and UK implementing legislation. New rules came into force in October 2020 that require all UK trusts, with a few exceptions, and some non-UK trusts to register with HMRC.

Previously, only trusts that paid certain taxes were required to register with TRS.

The data on TRS are only available to those with a "legitimate interest", such as law enforcement agencies investigating money laundering and the financing of terrorist activities. HMRC can refuse access where there is a disproportionate risk of exposing the beneficial owner to, for example, fraud, blackmail, or intimidation.

In addition to these three UK-wide registers, in Scotland another new transparency register, the Register of Persons Holding a Controlled Interest in Land ("RCI") was introduced in April 2022. Its primary purpose is to increase transparency regarding individuals who have control over decision-making in relation to land, enabling communities and individuals to identify more easily who they should engage with on decisions about the land. The RCI is relevant to certain categories of owners of Scottish land (individuals, partnerships, trusts, unincorporated bodies or overseas entities) as well as tenants of Scottish registrable leases, where another party has significant influence or control over such decisions and that controlling interest is not transparent. Information about such controlling "associates" is to be publicly available and searchable in the RCI.

In this article, we refer to all four registers as "UK registers".

International parallels

Similar registers have been brought into effect across the European Economic Area, in an international drive towards transparency of ownership in the battle against organised crime and unlawful tax evasion.

But what if the effects of human rights charters and legislation were not considered in this regard? And what if a court were to hold that such registers were incompatible with, for example, a fundamental human right to respect for private and family life?

In fact, that is precisely what happened when the EU Court of Justice considered two challenges (*WM* (C-37/20) and *Sovim SA*

(C-601/20)) to the laws of Luxembourg as regards the Register of Beneficial Owners in that jurisdiction, in the context of both the AML Directive and the EU Charter of Fundamental Rights (the "EU Charter").

What implications might this case have for the validity of the UK registers?

The CJEU case

The case involved a referral from the Luxembourg District Court in connection with the register set up to implement the relevant section of the AML Directive. The Luxembourg register applies to UBOs of corporate entities incorporated or established in Luxembourg.

Sovim SA applied to the Luxembourg Business Register ("LBR") to have its UBO information restricted so that it was accessible only by "national authorities, credit institutions, financial institutions, bailiffs and notaries acting in their capacity as public officers", and not by the general public, on the basis that UBOs would otherwise be exposed to a "disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation". The LBR refused the application and Sovim brought the present proceedings arguing, *inter alia*, that granting public access to the identity and personal data of its UBO would infringe the right to respect for private and family life, and the right to the protection of personal data, enshrined respectively in articles 7 and 8 of the EU Charter.

The Luxembourg court stayed proceedings and referred this and other questions to the CJEU for a preliminary ruling.

Article 7 of the EU Charter provides: "Everyone has the right to respect for his or her private and family life, home and communications." Article 8 relates to the right to protection of personal data, which finds broader effect in an EU perspective under the GDPR: Regulation (EU) 2016/679. Being an EU regulation, the GDPR has direct effect across all EEA countries.

The EU Charter occupies a slightly incongruous position in EU law, in the sense that it is not directly binding law, but must be complied with by EU institutions when promulgating, and by EEA countries when passing domestic laws which give effect to or amplify, EU directives and regulations.

The CJEU agreed with Sovim and held that making information regarding beneficial owners available in a register searchable by the general public in Luxembourg was inconsistent with articles 7 and 8. The following passages of the judgment are worthy of note:

- At para 39: "It should also be noted that, as is apparent from the court's settled case law, making personal data available to third parties constitutes an interference with the fundamental rights enshrined in articles 7 and 8 of the Charter, whatever the subsequent use of the information communicated. In that connection, it does not matter whether the information in question relating to private life is sensitive or whether the persons concerned have been inconvenienced in any way on account of that interference."
- At paras 41-44: "As regards the seriousness of that interference, it is important to note that, in so far as the information made available to the general public relates to the identity of the beneficial owner as well as to the nature and extent of the beneficial interest held in corporate or other legal entities, that information is capable of enabling a profile to be drawn up concerning certain personal identifying data more or less extensive in nature…

"In addition, it is inherent in making that information available to the general public in such a manner that it is then accessible to a potentially unlimited number of persons, with the result that such processing of personal data is liable to enable that information to be freely accessed also by persons who, for reasons unrelated to the objective pursued by that measure, seek to find out about, *inter alia*, the material and financial situation of a beneficial owner.

"Furthermore, the potential consequences for the data subjects resulting from possible abuse of their personal data are exacerbated by the fact that, once those data have been made available to the general public, they can not only be freely consulted, but also retained and disseminated and that, in the event of such successive processing, it becomes increasingly difficult, or even illusory, for those data subjects to defend themselves effectively against abuse.

"Accordingly, the general public's access to information on beneficial ownership… constitutes a serious interference with the fundamental rights enshrined in articles 7 and 8 of the [EU] Charter."

> *"the CJEU judgment can be considered to be persuasive, perhaps highly so, in the context of the ECHR article 8 right"*

What this judgment means is that any register of beneficial owners maintained in an EEA country which identifies the UBO of an applicable entity and the extent of that UBO's interest, and makes that information available to the general public, is unlawful since it constitutes a serious interference with the fundamental rights enshrined in articles 7 and 8 of the EU Charter. Indeed, we understand that the Netherlands has as a result ordered the closure of its Register of Beneficial Owners, and no doubt other EEA countries will follow suit.

Brexit and all that

Those of you who have not fallen asleep by this stage will no doubt be wondering what all this has to do with the UK, given that this country is no longer a member of the European Union – especially since the UK legislation which gave effect to Brexit specifically clarified that the EU Charter was *not* an adopted EU law in the UK: European Union (Withdrawal) Act 2018, s 5(4).

While that is undoubtedly correct, the position in the UK is more nuanced for two reasons:

1. First, while the EU Charter is not part of UK law, the European Convention on Human Rights is very much part of UK law through the Human Rights Act 1998. Article 8 of the ECHR sets out a "right to respect for private and family life" in very similar terms to article 7 of the EU Charter: "Everyone has the right to respect for his private and family life, his home and his correspondence."

The ECHR differs from the EU Charter in that it clarifies at article 8(2) that there "shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". We refer to that as the "public interest exemption". The EU Charter contains no equivalent provision.

2. Secondly, the UK has adopted the GDPR into law, since modifying it through the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419 (as so modified,

the "UK GDPR"). Further, through the Data Protection Act 2018, the UK has in certain respects adopted more stringent data protection rules than those required under the original GDPR text. So while there is no equivalent human right in the ECHR to article 8 of the EU Charter, nevertheless data protection is undoubtedly a fundamental right under UK law directly actionable in the courts, ultimately deriving from EU law.

Accordingly, the CJEU judgment can be considered to be persuasive, perhaps highly so, in the context of the ECHR article 8 right to respect for private and family life. Accordingly, if an applicable legal entity or its UBO were to argue in a UK court that any of the publicly searchable UK registers (the PSC Register, the ROE and the RCI, but not at present the TRS) contravened either article 8 of the ECHR or the GDPR, this judgment may well be given considerable weight by the UK court.

Having said that, article 8 of the ECHR is subject to the public interest exemption whereas article 7 of the EU Charter is not. A UK court may therefore conclude that the exemption applies in a manner which takes the UK registers outside the protection provided by article 8. As regards the UK GDPR, it seems likely that the processing of personal data for the purposes of the UK registers will be justified on the basis of the legal obligations set out in the applicable legislation (see article 6(1)(c) of the UK GDPR), and in addition that the exemption from data protection obligations in para 5(1) of sched 2 to the Data Protection Act 2018 will apply to the publication of certain personal data on these UK registers.

Nevertheless, the ultimate arbiter of the ECHR is the European Court of Human Rights in Strasbourg such that, even if the UK Supreme Court were to hold that the ECHR was inapplicable or not engaged (through the public interest exemption or otherwise), a litigant could apply to the Strasbourg court. That court might be persuaded to follow the reasoning of the CJEU (a fellow European court) in this regard, particularly given that the EU Charter and the ECHR are in more or less identical terms, subject to the public interest exemption.

If the Strasbourg court found itself persuaded by the CJEU's general approach, it might not pay as much cognisance to the exemption as one might expect a UK court to. This is because the CJEU recognised that there is a balancing act which needs to be struck between the aims of a particular piece of legislation (in this case, the AML Directive and the Luxembourg legislation) and the public interest in seeing that those aims are achieved, on the one hand, and on the other hand ensuring that the effects of the legislation do not give rise to a disproportionately serious interference with the fundamental rights protected in the EU Charter.

It is therefore entirely possible that the European Court of Human Rights would consider the UK registers to be disproportionate in effect in the sense of the CJEU ruling.

Conclusions

It is difficult to say how the CJEU judgment will play out in countries which are not in the European Economic Area and which are therefore not subject to its jurisdiction. However, there must now be considered to be some risk that the PSC Register, the ROE and the RCI in the UK are incompatible with article 8 of the ECHR. No doubt the UK and Scottish Governments consider otherwise, and ultimately the UK Parliament at Westminster is sovereign. But we cannot discount the possibility that the judgment will give rise to ECHR challenges to the UK registers in the UK courts (noting that the Human Rights Act 1998 is also an Act of the UK Parliament). And while the UK courts might seek to give effect to UK Acts of Parliament so far as possible, perhaps relying on the public interest exemption, the European Court of Human Rights is more likely to consider itself persuaded, and possibly even bound, by the approach of the CJEU as regards a fundamental human right in the EU Charter which is in almost identical terms to the equivalent human right in the ECHR, subject to the public interest exemption.

What we think we are also seeing here is a sudden halt to the inexorable momentum in international affairs towards absolute transparency of ownership in the fight against organised crime and tax evasion. Countries may well have to consider whether maintaining publicly searchable registers of this nature is in fact proportionate in a wider sense, including as regards human rights. In this context, it may be necessary for the UK Government (and the Scottish Government as regards the RCI) to restrict access to the UK registers to those who can show a legitimate interest in accessing the information, or even to close down the UK registers completely.

This article originally appeared in slightly expanded form on the Morton Fraser website.

SLCC reports upturn in complaints

A rise in the number of complaints about solicitors has been reported by the Scottish Legal Complaints Commission in its annual report for the year to 30 June 2022.

New complaints received totalled 1,159, up from 1,054 in 2020-21. Of these, 1,146 were about solicitors or firms of solicitors (up from 1,033) and 12 about advocates (down from 21). The numbers accepted for investigation were 492 about solicitors (up from 437) and five about advocates (down from six). There were no complaints about commercial attorneys.

Complaints closed at all stages totalled 1,158, down from 1,186, and 459 remained open at the end of the year, up from 388. "The overall timescales went down and we updated our public estimated timescale for all stages from 11 months to 9.5 months", the report states.

But it describes non-co-operation by solicitors with its investigations as "now the single biggest delay in our investigation times", and during the year it took the "unprecedented step" of raising Court of Session actions to recover files. "We will continue to do this as long as is necessary to be able to deliver our statutory duties."

Of complaints closed, 162 were rejected as premature (down from 196), 646 were concluded at eligibility stage, including accepted conduct (up from 545); 80, or 76% of cases referred, were resolved by mediation (down from 90); 137 after investigation (down from 224); and 133 by determination (up from 131). Just over 300 were resolved, withdrawn or discontinued before a decision to accept or reject.

Decisions resulted in awards totalling:

- £240,586.78 in compensation for inconvenience and distress;
- £112,487.52 in compensation for financial loss; and
- £68,728.89 in fee reductions and fee or outlay refunds.

During the year the SLCC trialled simultaneous investigations with the Law Society of Scotland for hybrid complaints so that both bodies investigate at the same time. "This has only been practical since we moved to digital investigation files", the report states. "There is a huge potential benefit to those involved in the complaints process, as they don't need to wait for one organisation to finish to start the next investigation."

Surplus

In its annual accounts the SLCC reports a surplus of £343,488 for the year, down from £533,108 in 2020-21. This results from income being £151,862 higher than expected, due to higher complaint levy income and recovered secondment income, and expenditure underspending by £185,445 through staffing and member costs.

The accounts report adds: "However, the board is also considering the potential need for reserves to empower longer term efficiency work, for example, a potential downsizing of property need with upfront costs but the potential for long term savings. The need for operating reserves, and for this type of investment reserve, will be fully considered in the budgeting process for 2023-24... There is also the need to consider the impact of increasing costs due to inflation and pay on the SLCC's finances."

Jim Martin, SLCC chair, who stood down at the end of 2022, commented: "Although we continue to look for and implement efficiencies in our ways of working, we believe that the key opportunities for improvement are in reducing delays in getting the files and responses we need from firms to investigate cases, and in removing unnecessary prescription in the statutory process."

Murray chosen for 2024-25 presidency

NHS in-house solicitor Susan Murray has been named as the Law Society of Scotland's President-elect for 2024-25.

She will assume the role of Vice President in May 2023, when Sheila Webster succeeds Murray Etherington as President.

The new President-elect has been a Council member for the Edinburgh constituency since 2017, sits on the Society's board and is convener of its Equality & Diversity Committee. A senior litigation solicitor with the NHS Central Legal Office, she is an accredited specialist in medical negligence. She is the first in-house solicitor to be named President-elect for a decade.

Pat Thom, who was also nominated for the role, will continue as convener of the Civil Legal Aid Committee.

Admissions ceremony welcomes 55

Fifty five new solicitors were welcomed to the profession at an admissions ceremony at the Signet Library on 9 December. Recently appointed Sheriff Krista Johnston, special guest for the event, spoke about her three-decade legal career including 15 years as a solicitor advocate working in criminal defence. Society President Murray Etherington told the entrants that in addition to helping some of the most vulnerable individuals in our society, "each of us also has a vital role to play in upholding some of the key tenets of our legal system – to stand up for and defend the independence of the profession, the rule of law and access to justice".

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key areas from the last few weeks are highlighted below. For more information see www.lawscot.org.uk/research-and-policy/

Trusts and succession

The Trusts & Succession Law Committee is reviewing the Trusts and Succession (Scotland) Bill, recently introduced to the Scottish Parliament.

The bill proposes a number of changes in relation to how trusts are administered and managed, as well as limited changes to succession law, including:

- restating statutory provisions on the appointment, resignation, removal and discharge of trustees and decision-making by trustees, and clarifying the law on breach of trust;
- reforming powers of the courts including remedies for the administration of trusts, the liability of trustees in the expenses of litigation, and to remedy defects in the exercise of trustees' fiduciary powers;
- conferring power on the courts to alter trust purposes in certain circumstances;
- providing for private purpose trusts and appointment of a protector;
- amending the order of intestate succession to provide for a spouse or civil partner to have the right to the whole of the estate if the deceased is not survived by any prior relative; and
- clarifying the rule in s 2(2) of the Succession (Scotland) Act 2016 about the effect of divorce, dissolution or annulment on a special destination.

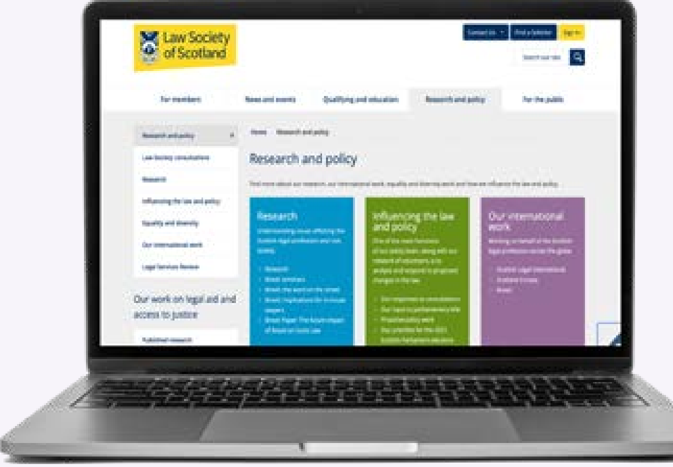
The committee would welcome views on the bill's provisions from members. Send your comments to policy@lawscot.org.uk

Patient Safety Commissioner

The Society's Health & Medical Law Subcommittee submitted written evidence to the Health, Social Care & Sport Committee of the Scottish Parliament on the Patient Safety Commissioner for Scotland Bill. It highlighted that the establishment of a Patient Safety Commissioner ("PSC") may contribute to addressing the issues identified by the Independent Medicines & Medical Devices Safety Review (the Cumberledge report), but that much will depend on the detail of the role and how it is delivered in practice. It noted that patient safety depends on a vast and complex system, and that any new role must add further benefit for patients in Scotland, rather than duplicating what already exists.

The written evidence also highlighted the need for the PSC to have clearly defined statutory powers, including powers to obtain relevant information and intelligence from health boards; the importance of the PSC being independent; and the need for clarification on the PSC's proposed relationship with the Crown Office & Procurator Fiscal Service.

For more information see the research and policy section of the Society's website.



ACCREDITED SPECIALISTS

Employment law
ELOUISA MARGARET LEONARD CRICHTON, Dentons UK & Middle East LLP (accredited 12 December 2022).

Re-accredited: CATHERINE JEAN GREIG, Greig Employment Law Ltd (accredited 13 December 2017).

Family law
Re-accredited: ANN-MARIE CHALMERS, Rooney Family Law Ltd (accredited 20 October 2017).

Incapacity and mental disability law

KAREN ELIZABETH PHILLIPS, Blackadders LLP (accredited 1 December 2022).

Insolvency law
JAMIE STEWART NELLANY, Brodies LLP (accredited 5 December 2022).

Re-accredited: ALLANA CLAIR BREADEN SWEENEY, Burness Paull LLP (accredited 19 December 2017).

Personal injury law
Re-accredited: MARK DALZIEL GIBSON, Digby Brown LLP (accredited 9 November 2012); GARY IAN MANNION, Thorntons Law LLP (accredited 21 December 2017).

Trusts law
Accredited: KAREN ELIZABETH PHILLIPS, Blackadders LLP (accredited 8 December 2022).

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ACCREDITED PARALEGALS

Civil litigation – debt recovery
TRACY KERR, Yuill & Kyle Ltd.

Civil litigation – reparation
RACHEL NICOL, Thompsons.

Residential conveyancing
DENISE GARRETT, O'Hares.

Wills and executries
ROBBIE McKINLAY, Taits; HOLLY RICE, Jameson + Mackay LLP; GILLIAN SMILLIE, Lindsays.

OBITUARY

ALEXANDER KEMP SCOTT (retired solicitor), Dalbeattie
On 19 December 2022, Alexander Kemp Scott, formerly partner and latterly consultant of the firm Austins, Dalbeattie.
AGE: 92
ADMITTED: 1954

JOHN ALEXANDER DAVIDSON INNES, WS (retired solicitor), Edinburgh
On 8 November 2022, John Alexander Davidson Innes WS, formerly partner of the firm Dundas & Wilson CS, Edinburgh.
AGE: 82
ADMITTED: 1966

SLAB reports rising payments despite lower total

The total cost to the taxpayer of providing legal assistance was £118.2 million in 2021-22, according to the Scottish Legal Aid Board's recently published annual report and accounts.

The total is up 19% on the previous year's cost of £99.1 million, but still 10% below the amount paid in the pre-pandemic year of 2019-20. SLAB states that the ongoing pace of the court recovery programme meant that by the end of the year, weekly payments for most case types were at or above pre-pandemic levels.

Criminal legal assistance was up by 29% overall, with solemn criminal legal aid spending rising by 49% to £29 million and summary criminal legal aid by 30% to £21 million. Civil legal assistance rose by 8%, with family disputes accounting for 56% of net expenditure. Direct services accounted for £5 million, children's legal aid for £4.4 million and grant funding for £3.8 million.

SLAB's administration costs rose by almost £1 million to £13.9 million, due in part to pension costs on the retirement of senior staff and the purchase of four years of Oracle licences at 2021-22 prices.

Chief executive Colin Lancaster, recognising that solicitors' finances had been hit by the massive disruption brought about by the pandemic, commented: "As a reflection of the ongoing recovery in the wider justice system, the increase in payments to legal aid firms compared to 2020-21 is welcome."

He added, however, that the legal aid system and delivery model were fundamentally unaltered from the 1950s, had not evolved to fully reflect societal changes over the decades, and were in urgent need of reform.

"It is overly complex; elements of it can be confusing and time consuming for both applicants and solicitors and for SLAB to deliver; and this complexity makes aspects of it more costly to administer than need be."

The transformational potential of additional or alternative systems and the legislation required to deliver them "need careful thought and will take time to deliver". The right solution – one that met the needs of users and those who deliver the services they rely on – had to be informed by detailed analysis both of the problem and data that can illustrate it. It also needed "constructive dialogue in order to build a shared understanding of the issues and an informed approach to identifying what is likely to be a range of measures to address those issues".

Notifications

APPLICATIONS FOR ADMISSION 18 NOV-15 DEC 2022

AITKEN, Lyndsey
BANCEWICZ, Frances Anne
CLAY, Angela Leanne
CONNER, Emelia Lily
CRANE, Phoebe Ngaio
CRUICKSHANK, Hannah
DEAYTON, Hannah Emily
EWING, Lisa Victoria
FERGUSON, Thomas Alexander
FYFE, Kirsty Mari
GALLANAGH, Catherine Anita
HODGES, Jonathan James Alexander
KENNETH DAVID-WEST, Ibinabo Katrina
LAIRD, Holly
LALLEY, Roisin
LENNON, Martin Patrick
McEWAN, Iona MacKenzie
McEWAN, Perry Violet
McINTYRE, Kaye
MILLAR, Laura
NOCK, Lucy
PENMAN, Craig
RANKL, Joshua Nicola
RIMMER, Sheyda Ellen
ROACH, Duncan John
ROBERTSON, Greg
SCOTT, Adam Graham
SHARPE, Mhari Jane
SHEERIN, Taylor Rose
SMART, Gregory Francis
STOBIE, Charmaine Elizabeth
TANNOCK, Charlene
WISMACH, Kirsten
WITHERS, Eilidh Jean
YIU, Victoria An Yi Tuck
ZAHID, Aminah
ZYDEK, Antonia Elisabeth

ENTRANCE CERTIFICATES ISSUED 25 NOV-15 DEC 2022

AHMED, Shakeela
AHMED, Sofia
ALLAM, Nadine Montgomery
BOWES, Ramadimetja Salome
FINLAY, Brooke Shearer
HARRIS, Gareth Alun
HIRANI, Nimmi Flora
KELLY, Jennifer Alice
MUIR, Jack William
SHORTER, James Robert
SINCLAIR, Shannon Murray
STEWART, Alexander Daniel
WEIR, Jemma Louise

Extended rights of audience for 14

Two introduction ceremonies for solicitor advocates were held during December.

In the first, Society President Murray Etherington invited Lord Clark to administer the declaration of allegiance to seven solicitor advocates granted extended rights of audience to appear in the High Court and the Judicial Committee of the Privy Council (l-r in photo): Peter Motion (COPFS), Iain Jane (Iain Jane & Co), Brian Cooney (Fleming & Reid), Imran Bashir (COPFS), Samantha Brown (COPFS), Elaine Jackson (COPFS) and Peter Barr (Collins & Co).

In the second ceremony, Vice President Sheila Webster invited Lord Arthurson to administer the declaration to a further seven solicitor advocates granted extended rights of audience in the criminal courts (l-r in photo): Christopher MacFarlane (Collins & Co), Frankie Morgan (COPFS), Ron Mackenna (Ron Mackenna Defence), Trina Sinclair (COPFS), Clare Russell (Craig Wood Solicitors), Robert Weir (COPFS), and Neil Martin (COPFS).

Five introduction to court ceremonies were held in 2022, with around 40 solicitor advocates granted extended rights of audience across the year.

MBE for Ritchie

Former Aberdeen solicitor Sheila Ritchie was awarded an MBE in the New Year Honours for political service in Scotland. She retired from practice on being elected a Member of the European Parliament in 2019, serving until Brexit took effect. She is current convener of the Scottish Liberal Democrats.

2023: the people agenda

HR teams are essential and need supported, just like other employees in a business. Let's make that happen in 2023, Rupa Mooker urges

Most of us will agree that, due to the nature of their work, HR and other people teams help keep many businesses in motion. Their role in developing a positive business culture, improving employee engagement and productivity is significant. HR teams are not a luxury – they're essential. Anyone who doesn't agree should give their whole HR team a week off and see what happens!

These teams have a *lot* of responsibilities, including disciplinaries, grievances, sickness absence management, personal problems, remote working, performance management, mental health, redundancy, salaries, annual leave, payroll, managing conflict, supporting managers and employees, diversity equity and inclusion ("DEI"), talent management, recruitment, learning and development, employment law...

Add in the global pandemic, and now the economic volatility and cost of living crisis, and it's fair to say that HR leaders have been, and continue to be, tested like never before.

2023 expectations

Personally, I have found work incredibly emotional and hard to deal with at times. At other times, I am excited and optimistic about the many changes which are inevitably for the better. As we start a new year and continue with our already significant workloads, alongside adapting policies, supporting managers to cope with different ways of working, and looking after employees in these uncertain times, the expectations placed on HR professionals to make sure everyone is OK, or even thriving, are now higher than ever before. But who is looking after the HR team?

Despite some thinking to the contrary (there's a Forbes list of "Ten reasons everyone hates HR"), your "people" people are the same as everyone else. We are not immune to the stresses and anxieties that others face. Although the very nature of our job means we tend to put others first, this can often be at the detriment of our own wellbeing.

Looking to 2023, some of the priorities from the last few years like employee wellbeing, DEI and flexible work practices will remain at the top of business agendas. A recent survey by Gartner of more than 800 HR leaders identified the top five HR priorities for 2023. Leader and manager effectiveness was number one, with change management, employee experience, recruiting and the future of work filling the other four spaces. HR professionals will therefore continue to play vital roles as these priorities evolve and businesses lean heavily on them to face another challenging year, with employee expectations in the spotlight. The responsibilities of HR continue to increase, but not always with a corresponding increase in the resources or time required to carry out such duties.

Support your "people" people

Just as our businesses and employees have changing needs, so too must we look at the changing demands on HR teams and the resultant impacts on them. CIPD's *Health and Wellbeing at Work 2021* report found almost four-fifths of surveyed employees had taken a stress-related absence in the last year. Realistically, therefore, these issues will affect HR too. It is so important to look after your "people" people. So, how can you support these teams?

Regular check-ins – Senior leadership teams have a duty of care to keep their HR people from burning out. Check-ins to ask how they are coping with workload and personal responsibilities can help manage stress by identifying any issues early on.

Be consistent – If you have offered all employees job flexibility and remote working, offer your HR team the same. Giving them more control over their day and acknowledging their different roles and personal responsibilities – the same as every other employee – is invaluable.

Break the barriers – As demonstrated by the Forbes list, HR appears to have a reputation problem! Leaders and senior management teams who recognise the value of HR in their businesses and communicate that widely, help break down barriers between employees and HR. It's always less stressful if you can do your job without thinking no one likes you or sees you as an obstacle.

Focus on strategic HR – HR should be actively involved with long-term business plans and work with senior leadership to develop, communicate and implement business strategies. Making them strategic partners offers huge benefits, not least to company culture, employee engagement and business performance. Showing your HR team it is highly valued demonstrates support.

Finally, one for the HR leaders and teams themselves – we are very good at advising others how to look after their mental health and wellbeing when things get tough. Let's make 2023 the year we look after ourselves properly too.

Rupa Mooker is Director of People & Development with MacRoberts

Tradecraft tips

Ashley Swanson's latest collection of practice advice, based on his years of experience

Wayward solicitors – 1

In a dispute involving a claim against an executry, the solicitor acting for the claimant intimated to us his intention to resign agency because he was not able to take the case on to the next stage. I did not want my clients to know about this before the claimant himself had been informed, as he was the son-in-law of one of my clients. Accordingly, I asked the other solicitor to inform me once he had written to his client resigning agency so that I could bring my clients up to date with developments.

Not only did he write to me at the appropriate time, he also gave me a copy of the letter which he had sent to his client, intimating resignation of agency but also spelling out what he regarded as the shortcomings in his client's case. Reading the copy letter, my eyes came out on stalks. Under no circumstances should I have been copied directly into solicitor to client correspondence. In a contentious situation, you have to be very careful not to communicate anything at all to the other side beyond what is necessary or what is supportive of your client's case.

Wayward solicitors – 2

At a meeting with the beneficiaries in an estate, the solicitor acting proposed that a legacy should be created for someone who was not in the will to begin with. I considered that this was completely out of order. Such a proposal, if it should have been made at all, should have been contained in a letter to the beneficiaries and they should have been given time to consider it and to consult with one another, if appropriate. As it happened, I felt that they had been bounced into making a decision on the spot.

As a solicitor, you have a certain amount of influence over people, but this has to be exercised with a considerable amount of discretion on occasion. If, for example, you perceive an injustice in a will, is it really your place to try to redress the balance? A will is a set of instructions and it is the solicitor's job to implement those instructions. If the testator had wanted X to benefit from the will, then X would have been mentioned.

Self sufficiency

In a longrunning dispute, my clients were getting fed up with the delay, and even though they were completely in the right, they were seriously considering conceding the matter just to get some sort of closure. This would not only have diminished the value of their house; it would also have written off the value of the many hours of work which I had done on the matter, including two site visits. However, I could well understand the clients' frustration.

The Canadian singer/songwriter Joni Mitchell has a wonderful line in one of her songs: "You know I'll try to be there for you when your spirits start to sink." In such situations you have to keep your clients' spirits up and try to point the way to a final resolution.

In dealing with awkward cases, my inclination is always to seek a solution which requires little, if any, input from third parties. In this case, such a thing was possible and this is what was done. In a letter to his mother, T E Lawrence (of Arabia) wrote: "Imagination should be kept in the most precious caskets." You have to try to use your imagination in moving your clients towards a solution which gives them something positive out of the situation, rather than just chucking in the sponge because they are losing heart.

Chronological order

Clients were buying a small area of ground from the neighbouring country estate, and also seeking a minute of waiver from the estate to allow a farm steading to be converted to residential accommodation. The price for the whole package was £25,000 but, as the estate had elected to waive exemption from VAT on their ground, another £5,000 would have to be paid to cover the VAT. This was a major problem and, as one of the clients was a businesswoman, I suggested that she should consult her accountant. She replied that he was "useless at VAT", so I had to try to work out a solution.

By laying the events out in chronological order, I noticed that my clients had acquired the steading site before the estate had elected to waive exemption from VAT and, in any event, the value of the ground which they were buying was only £1,000, the remainder of the price being for the waiver of the restriction in the title, which restriction was not actually agricultural ground as such and therefore not subject to VAT. This brought the VAT bill down from £5,000 to a much more acceptable £200. Reading over a file again right from the beginning and laying out the component parts in a coherent order and studying them carefully can occasionally produce positive results. Do not grudge the time it takes to do this.

Ashley Swanson is a solicitor in Aberdeen. The views expressed are personal. We invite other solicitors to contribute from their experience.

Why become a charity trustee?

Solicitors are sought after as members of charity boards, but do you know what is involved? Ahsan Mustafa shares his experience and highlights the valuable learning it can bring

Since good corporate governance is essential for the success of any organisation, solicitors are sought-out members of boardrooms across all sectors. The quality of an organisation is dependent on the quality of its decision making.

Broadly, there are three sectors in the UK: public, private, and the third sector, which covers charity and voluntary work. If you are thinking of gaining some board experience, I believe that joining a third sector board will help make you a better lawyer while allowing you to give something back to the community and society at large. Due to the cost of living crisis, fuel poverty and a rise in homelessness, the third sector has never been so important.

Board members of charities are trustees, as they are entrusted to protect public funds. They are regulated by OSCR, the Office of the Scottish Charity Regulator. If a charity is a limited company, trustees – as directors – will also need to be aware of their duties under the Companies Act 2006 and to HMRC. The Charities (Regulation and Administration) (Scotland) Bill was introduced on 15 November 2022 and will give more power to OSCR to investigate former trustees and ex-charities, ensure the publication of all charity annual accounts and create a compulsory trustee database.

Forming a Scottish charitable incorporated organisation (SCIO) provides protection to trustees against liability and enables a charity to simply report to OSCR rather than both OSCR and Companies House.

Community action

I am currently the chair of a charity called the Pollokshields Development Agency ("PDA"), established in 1987. It provides facilities such as weekly lunch meetings for the community's seniors, home schooling and after school activities, craft and cooking classes for women, language classes, mental health activities for men, and youth groups. Two of my immediate predecessors were practising solicitors. There may be a perception that charity board trustees are generally retired people. However, this is not always true: most board members at the PDA are in their 30s and 40s (although one board member is 90 years old). There are two other solicitors currently on the board, as well as a medical consultant, an electrical engineer, a Citizens' Advice Bureau adviser, a businessperson and a media personality. The vice chair is also the vice convener of the Ethnic Minorities Law Centre and a board member of the West of Scotland Regional Equality Council. So, it is possible to be on multiple boards.

Work on a charity board can help solicitors develop as professionals. Being a charity trustee means being accountable to OSCR and Companies House. Dealing with this accountability will help a solicitor understand their own regulatory obligations to the Law Society of Scotland, Scottish Legal Complaints Commission, Scottish Legal Aid Board and, if the firm works for banks, the Financial Conduct Authority. Ensuring the charity's funds are correctly managed will be good training when it comes to solicitors' accounts and managing a client account. You also develop a keener insight into conflicts of interest, and this will help you recognise a conflict more readily in your professional life.

Board meetings are often attended by local councillors and professionals of other disciplines, and this is excellent experience in dealing with multiple stakeholders with (sometimes) competing priorities, and managing expectations of funders.

Learning curve

Being a charity trustee develops leadership skills, as staff members look to you for direction. You learn about managing staff as they are effectively employed by you. As a result, you will feel compelled to learn about employment law and regulations. Although you may have a manager who supervises staff, the ultimate responsibility lies with the board. All staff must have their right to work checked, and they must be aware of grievance policy and procedure.

"Joining a third sector board will help make you a better lawyer while allowing you to give something back to the community"

You have to learn quickly about IT and resource management, as without adequate IT backup the charity's operations can come to a standstill very fast. You also become skilled in budgeting, management of public funds, project management, dealing with funders such as local authorities and financial institutions, ensuring liability insurance is in place, working in collaboration with other third sector organisations, and, of course, delivering services to the users. Make sure you read and review all policies on a regular basis and ensure that you are familiar with the charity's constitution, ensuring good governance.

Excellent training in governance is available from the Scottish Council of Voluntary Organisations, or SCVO. The Law Society of Scotland is also very supportive of charity work; a very comprehensive CPD programme took place in April 2022 entitled "Third Sector and Charity Law Conference". I hope that a programme of this nature is planned again for 2023.

The work of a charity board member is very rewarding, as you get the chance to make a difference for the community. There is a feeling of contentment when you know that your work can help vulnerable members of the community.

Ahsan Mustafa is a solicitor with Nolans Law

In practice

RISK MANAGEMENT

More than just a message

With poor communication remaining a principal source of complaints against solicitors, the new year provides a good opportunity for a refresher on the principles of good communication, Eileen Sherry believes

One of the most memorable lines in the 1967 film *Cool Hand Luke* is uttered by Captain, the warden in charge of a Florida prison camp. Used as an explanation, or justification, for his actions in losing his temper and resorting to physical violence, Captain explains to the prisoners that what they are seeing is "failure to communicate". The clear implication is that the title character, Luke, is at fault and has brought a physical beating upon himself.

Clearly, in the context of providing legal services, any failure to communicate is a situation which practitioners will seek to avoid. It could be argued, however, that to prove effective, communication needs to be a two-way process. In the context of managing expectations, whether between solicitors and their clients or between solicitors themselves, this would seem to be especially true. As with any process, the quality of information or input provided is inextricably linked to the quality of the end result.

We know that poor communication is often cited as a leading source of complaints to the Scottish Legal Complaints Commission, and it is clear that effective communication is essential in managing client expectations. By setting clear goals, being transparent and actively listening to any concerns, solicitors can build trust and foster a positive and fruitful working relationship, leading, in turn, to better outcomes for both solicitor and client.

The need for good communication is not just limited to our dealings with clients and other third parties. Effective communication is the lifeblood of any organisation, and the way we communicate within our own firms and organisations can have a huge impact on workload, time pressures, efficiency, and staff morale/wellbeing.

Communication is central to the effective performance of a solicitor's role, but is not something on which in-depth training is regularly provided, and professionals can find it difficult. When done poorly, this can lead to misunderstandings and dissatisfaction. A regular refresher on points to bear in mind when it comes to communication can, therefore, represent a key aspect of any organisation's risk management strategy.

What do we mean by communication?

In the context of providing legal services, communication is more than simply conveying a message. It is often a two-way process which allows an interchange of information for the purpose of determining next steps or the best way forward.

Recipients of advice or information can often make assumptions based on their own perceptions of the sender's communication style, and an impression can be gained based on how direct the sender is in expressing views, and the extent to which consideration is given to the recipient's own opinions.

Legal advice can be required by any person, from any background, and it needs to be easily received and accurately understood. Consideration must always be given to the recipient's level of understanding and the most appropriate mode of communication. In order to communicate effectively, we must, to a certain extent, put ourselves in the recipient's shoes. The quickest or easiest option sometimes fails to yield the desired result, and we no doubt all have experience of receiving correspondence where the overall tone has seemed curt or rude, regardless of whether this was the sender's intention.

Promoting clear and effective communication

Clients or colleagues can feel shortchanged if the communication they receive leads them to feel undervalued or in the dark about what is going on. In order to avoid alienating the recipient, or creating a belief that we have not taken the time to communicate properly, we must invest in the right medium to achieve the desired result. For this reason, one of our first considerations when attempting to communicate advice, or a message, must be to decide which medium is best for the task at hand.

Oral communication – e.g. meetings (virtual or in person) and phone calls – can be helpful when immediate feedback is needed, or if there is a personal dimension to the message which is to be conveyed. Written communication, on the other hand, is sometimes a more appropriate choice when words need to be chosen carefully, when a formal record is required, or when the message is likely to need detailed consideration. Essentially, a judgment call needs to be made regarding the nature of the message and the desired relationship and/or anticipated form of response.

When applicable, the non-verbal elements of communication (tone and body language) can be of critical importance – not in the sense of denying the significance of the words used, but rather in highlighting how important it is that any non-verbal elements are compatible with what we are trying to say, rather than giving out mixed messages.

Effectively managing expectations

The following points are provided as suggested hallmarks of effective communication in managing expectations, whether that be the expectations of our clients, or the expectations of our colleagues.

- ***Listening to understand***

First, seek to understand fully, for yourself, what

is being asked – whether this is something being asked of you as a provider of legal advice, or something you will be asking of your intended recipient – and build a full picture in your own mind. Once questions have been posed, it is only by carefully listening to and considering the responses that we can be clear on what is being asked. We all know the risks involved in making assumptions, but we can be equally guilty of doing just that when faced with the everyday pressures of work.

Questions are used for a variety of reasons – to gather information, stimulate thought and discussion, explore attitudes and ideas, solve problems, and/or clarify your own or someone else's thinking. The quality of the answer you get will, to some extent, depend on the quality of the questions you ask.

- ***Agreeing expectations***

Provision of legal advice is a service, and it is tempting to say "yes" promptly when asked to assist by a client or colleague. It ought to be borne in mind, however, that in doing so we may end up shortchanging both ourselves and our clients or colleagues. Setting realistic targets, and agreeing with your contact what they can expect – rather than telling them – helps to ensure "buy in", and confirms that your working relationship is a two-way street.

Overpromising and underdelivering erodes trust, so planning for contingencies is a positive way to ensure positive results. If what you are being asked is simply not going to be possible to achieve, figuring out what the larger objective – and the recipient's priority – is, can assist in providing a solution-focused and positive service, while delivering an answer which is grounded in reality. Setting clear, realistic goals, combined with provision of regular updates, can help prevent misunderstandings and ensure that the recipient understands what they can expect from you.

- ***Overcommunicating***

Overcommunicating keeps your recipient in the loop and, when coupled with early provision of information, minimises the risk of surprises. Most people would rather get disappointing news early, so that they can attempt to find solutions. Regular communication allows your recipient the choice to review and consider the message which is being transmitted. They may, following consideration, decide that what is being said is not relevant or is unnecessary for their purposes, but failing to communicate the message in the first instance takes that choice away.

The points noted above are all equally applicable in the context of (a) client care, and (b) ensuring efficient delegation of tasks internally. In the legal world, as with many other professions, the remote or hybrid working which became essential during the Covid-19 pandemic is here to stay. Considering the three points noted above could well assist in ensuring that solicitors adapt to this way of working, and protect against the possibility of communication breakdown. In a world where supervision, in particular, is often carried out in a more remote manner than previously, it is imperative that timeous and effective communication is maintained, to ensure that client needs are met and that less experienced employees feel supported and confident in asking for assistance when needed.

The above comments are offered in the hope that something may resonate. The feeling of being stretched under pressures of work is one which is familiar to most solicitors; however, prevention is always better than cure. Taking the time to ensure effective communication now is ultimately far preferable to dealing with the fallout if, or when, issues arise further down the line.

It is perhaps fair to say that the suggestions noted in this article propose nothing particularly new. However, mindful of the new year and the opportunity to refresh and re-centre our risk management techniques, and in the words of Cool Hand Luke himself, one might also be forgiven for observing that, sometimes, "Nothing can be a real cool hand". J

Eileen Sherry is a senior associate at DWF and has authored this piece of behalf of Master Policy brokers Lockton

The same, only better

Ministers have finally decided on the future shape of legal services regulation in Scotland, pulling back from the Roberton report's call for a single independent regulator. Peter Nicholson summarises the Government response

The Law Society of Scotland should retain its regulatory functions, subject to increased transparency and accountability for its Regulatory Committee, the Scottish Government has concluded.

Just before Christmas, ministers published their long-awaited response to the results of their consultation on legal services regulation reform. In essence, the Government has declined to follow the core recommendation of the 2018 report by Esther Roberton, that there should be a new single regulator for all providers of legal services in Scotland, while accepting the need for more openness on the part of the professional bodies.

In addition, there will be a new set of regulatory objectives and professional principles, applying to all branches of the legal profession; retention of a single gateway complaints handler, with additional oversight powers; removal of significant restrictions on the operation of alternative business structures; and some legal sanction surrounding the use of the term "lawyer".

Regulatory framework

"Building on the existing framework", the response sets out a two tier system for regulators, allowing for a "proportionate and risk based approach" but also adaptability for changes in the market. Regulators such as the Society, "with a significant membership or whose members provide largely consumer-facing services", would be first tier regulators, operating largely as the Society already does through a Regulatory Committee comprising legal and non-legal members with a non-legal chair. Operating independently of the regulator's governing body, this committee would set its own governance structure, priorities and strategy, with a requirement to consult on its work.

"The response sets out a two-tier system for regulators, allowing for a 'proportionate and risk based approach' but also adaptability for changes"

There would be new duties to publish and lay a report before the Scottish Parliament each year, again in consultation with specified persons; and the committee would be brought within the freedom of information legislation, as is already the case with bodies including the General Teaching Council for Scotland and the General Medical Council.

Second tier regulators – those whose membership is comparatively small and less consumer facing or more specialist in terms of legal work undertaken – would not require such a committee but would have to publish their regulatory regime and an annual report, keep a publicly available register of members and ensure professional indemnity insurance cover. This presumably covers the likes of the Association of Commercial Attorneys, whose members can conduct construction litigation. Which category the Faculty of Advocates would come into is not entirely clear.

The Lord President and Court of Session should maintain responsibility for prescribing the criteria and procedure for admission to the legal professions, and for the approval of changes to practice rules, and should retain an overarching regulatory role in order to protect the independence of the legal profession.

There would also be a process for intervention by ministers in the event of failure to regulate in the public interest or to adhere to the regulatory objectives – the document references in this connection s 38 of the Legal Services (Scotland) Act 2010, which confers powers to be exercised with the agreement of the Lord President.

Objectives and principles

Supported in the consultation responses, the introduction of a modern set of regulatory objectives and professional principles is to be taken forward. Thirteen intended regulatory objectives are listed, which run through the rule of law, the interests of (and access to) justice, public and consumer interest, independent legal professions, equal opportunities and diversity, innovation and competition, accountability, quality assurance and continuous improvement, and the Better Regulation, Consumer, and Human Rights ("PANEL") Principles.

Eight proposed professional principles cover:

- upholding the rule of law and the proper administration of justice;
- accountability in protecting the consumer and public interest;
- acting with independence (in the interests of justice);
- acting with integrity;
- acting in clients' best interests (and keeping client confidentiality);
- maintaining good standards of work;
- compliance with the duties normally owed by legal representatives to the court; and
- acting in conformity with professional rules and ethics.

Complaint handling

On this subject, on which the Society and the Scottish Legal Complaints Commission have largely been agreed on the need for process reform, the Government agrees that the SLCC and regulators "should have more flexibility and the ability to act in a proportionate way in considering discipline and legal complaints". A single gateway for complaints should continue, with additional oversight of complaints handling by regulators, conferring "the ability to direct regulators on the

way in which they deal with complaints about the conduct of legal professionals" – the aspect of complaints that remains within the Society's remit at present.

The current funding model should continue, paid by a levy and in consultation with the legal profession. There is no indication of additional controls being applied to the SLCC's budgeting process.

Alternative business structures

Greater flexibility will be introduced to the possibilities for alternative business structures, to address concerns that Scottish firms are at a competitive disadvantage compared to others. That will involve removing the restrictions in the 2010 Act that require such firms to operate for "fee, reward or gain" – allowing third sector organisations to employ legal professionals directly, to undertake reserved activities such as court proceedings – and also require a minimum of 51% ownership by legal professionals. Liberalisation, it is said, should allow for employee and community ownership as well as for greater outside ownership – there being "little evidence that non-lawyer ownership has increased professional risk" in England & Wales, in the view of the Solicitors Regulation Authority.

Other matters

The revised model should provide for entity regulation of legal businesses. Without replacing or diluting the regulation of individual legal professionals, the Government is following the view of the 80% of respondents who agreed that regulation should reflect the consumer perspective that their contract is with the legal business.

On the Society's long campaign for legal protection around who can advertise themselves as a "lawyer", the Government has accepted that there is a consumer expectation that someone who so describes themselves should be suitably qualified and regulated, but also that there are "notable and legitimate" reasons for others to take the title: an exclusivity rule like that for the term "solicitor" might have unintended consequences for legal academics, in-house lawyers and those who practise religious law, for example. Similarly, "advocate" may be used to describe any person who speaks on behalf of someone else. The proposed solution therefore is to make it an offence to pretend falsely to be a "lawyer" or "member of the Faculty of Advocates" in order to provide legal services to the public for a profit.

Legal tech is given a mention – regulators should have the flexibility to promote the use of "sandboxes" (essentially, test beds), and thereby innovation in provision of legal services. (Tech-adopting solicitor Brian Inkster has commented that he is "struggling to think of examples" of who this might help.)

And what work will come within this brave new scheme? The Government will "consider how a definition of legal services could be applied to Scotland in terms of reform".

Reactions

Comment on the proposals has predictably followed the positions taken during the consultation. The Society, which backed the model chosen and strongly opposed any politically appointed regulator as a threat to the independence of the profession, described the announcement as "good news for Scottish consumers and the legal sector".

David Gordon, the non-solicitor convener of the Society's Regulatory Committee, commented: "We are proud of our track record in maintaining professional standards and protecting the public. This is why we are so pleased to get confirmation from ministers that the Law Society will continue as the regulator of Scottish solicitors and do so independently from the state. This is a big and important vote of confidence in the work we do."

He added: "We know there is more to be done to improve both transparency and the public accountability of the Regulatory Committee's public interest work. We are already looking at what can be changed in advance of the new legislation, and look forward to working with Government in thinking through wider changes which can maintain and grow public confidence."

The SLCC, which aligned itself with the Competition & Markets Authority in supporting the Roberton single regulator plan, put on a brave face by welcoming the proposed reforms of complaints handling, while conceding it "had hoped to see more fundamental reform to better reflect the legal services sector of today and of the future".

Chief executive Neil Stevenson continued: "We also saw opportunities to drive efficiency by reducing existing duplication of processes, functions and back office systems across multiple bodies which have not been delivered.

"However, we do believe these proposals could help to create a more efficient and proportionate complaints system, one that resolves complaints swiftly and draws learning from them to drive improvement. Proposals to improve transparency and accountability across the regulatory system are also very welcome."

The proposed reforms have still to take legislative shape. The Government concludes by saying it has "committed to developing a bill on the regulation of legal services and will continue to engage with stakeholders representing the consumer and legal perspective taking that forward".

It will be some time yet before anything reaches the statute book, but all the bodies involved in regulating the Scottish profession can now plan ahead with a greater degree of confidence.

Read the Government's response on its publications web page (22 December 2022).

See also Viewpoints, p 6

Maggots of the legal jungle

A solicitor's life can sometimes feel like the celebrity jungle, but without the support of others... Is there any escape?

Life in the legal profession can sometimes feel like you're stuck in the jungle. That was certainly my experience for many years.

I would be at my desk from 7am until about 10pm, all week. Unlike those on *I'm a Celebrity...*, I physically could have left the office, got into my car and gone home, but I had so much work to do and so much pressure that to have gone home earlier would have meant either longer hours for the next few days, or a bigger pile of work that I would have found impossible to tackle due to feeling overwhelmed.

When you have 20 things that are urgent and no assistance, where do you even start? I usually started by crying at my desk before anyone came in, wondering how I would ever get out of this situation. At least in the jungle, you are surrounded by others in a similar situation who support you, unlike the dark, cold, creaky office where you roam before and after hours like the ghost of Christmas past.

Spiders and snakes

In terms of creepy crawlies, the worst there was in the office were the massive spiders that would crawl out from under files or through the old fireplace holes. However, I had plenty of experience of colleagues who could only be described as snakes – those who could see your potential in terms of your legal knowledge, business awareness and ability to run a team, but all of these threatened their perceived top spot.

I have come across this professionally on a couple of occasions: partners who have no ability to understand that multiple partners can co-exist with their respective skills, and that it is not a race to the top, trampling on anyone that you see as a threat in order to do so. This manifested itself in terms of partners talking behind my back and spreading rumours – the type of behaviour you thought you had left behind when you finished school, but unfortunately you hadn't. These partners may now be at the tops of their respective trees, but what about the trail of destruction they left on the jungle floor?

To be fair, I have never been asked to eat bugs or put my hand into a boxful of maggots during my time as a solicitor. However, I have been asked to undertake various types of work that are outwith my area of expertise. While it might be easy for you, dear reader, to say "Just say no", we all know that this is a phrase reserved for the scene in *Trainspotting* where Sick Boy is advising Renton on his drug use, and is much less realistic in the legal profession.

At one firm I did express my concerns, using the partner perspective of "I think there is risk in this if you ask me to continue with this work that I am not experienced in." Answers included "Just have a go", "Ninety per cent of being a lawyer is creativity", and "You got a first class degree – I'm sure you can manage this". I'd rather have eaten live maggots than undertake some of the work I was given.

When the fire dims

I could not believe that these people were in charge of law firms, and could only reasonably conclude that they had been made partners due either to time spent or as a succession plan, which I know very well a lot of firms struggle with. Life in the law under these conditions made me feel alone, underappreciated and insecure in terms of who I could truly trust.

As a result of these experiences, I wanted to leave the law – a career I had spent years studying, training and working hard for. When I began university, the world was my oyster and I had a sparkle in my eyes as if I was looking at the bright lights of fabulous Las Vegas. Over the years, those lights dimmed to complete darkness, like the fire in the camp towards the end of *I'm A Celebrity...*

In these situations, I realised that those firms would never improve or change, and after declaring to myself "I'm a solicitor – get me out of here!", I took a metaphorical helicopter trip out of the legal jungle for a while. I have ended up on an island that is very peaceful, but in the distance I can see the jungle... There is always a torch glowing into the night, the snakes are slithering around the trees and you can hear the crunch of insects as those still stranded do what they need to in order to survive. If you ever hear yourself saying the words "I'm a solicitor – get me out of here", then work on your exit plan and it will be the best decision you ever make.

The Unloved Lawyer is a practising solicitor

ASK ASH

Antisocial behaviour?

Our new colleague refuses to do anything sociable

Dear Ash,

A new colleague has recently joined our firm and, although he seems quite reserved, he seems to have rejected all our team's efforts to get him to attend social events. I thought that it would be good for him to attend such events in order to help him get to know the team, but he just doesn't seem interested. We recently had a Christmas drinks event, but he refused to attend and had no real explanation other than it was "not his thing". None of us were intending to stay long as we all had client meetings the next day, and I explained this to him. However, he shrugged his shoulders and said he still would not be coming. I find this to be quite rude and standoffish and, although he may be a good lawyer, I think it is important to try to make an effort to get to know colleagues too.

Ash replies:

I appreciate your viewpoint in all this, and your efforts to make your new colleague feel welcome. However, if I was to play devil's advocate, there may be a perfectly valid reason for him deciding not to attend such social events. Some people can, despite their professional persona, just feel inherently shy or awkward at such events. It can be akin to a professional actor who, on stage, may be perfectly at ease, but out of character may not feel comfortable socialising with effectively a bunch of strangers.

It could be that he is going through some personal issues at this time and, although he needs to work, he just does not have the ability or time right now to make additional efforts to socialise outside of work.

Whatever his reason may be for his current stance, please do not necessarily write him off as rude, he may just need time to adjust and adapt to his new surroundings or to deal with whatever may be troubling him in his personal life.

Be calm and patient and do continue to persist with your efforts on the social front, as I'm sure your attempts to bring your colleagues together are welcomed by others in your workplace.

Send your queries to Ash

"Ash" is a solicitor who is willing to answer work-related queries from solicitors and other legal professionals, which can be put to her via the editor: **peter@connectmedia.cc**. Confidence will be respected and any advice published will be anonymised.

Please note that letters to Ash are not received at the Law Society of Scotland. The Society offers a support service for trainees through its Education, Training & Qualifications team. Email **legaleduc@lawscot.org.uk** or phone **0131 226 7411** (select option 3).

FROM THE ARCHIVES

50 years ago

From *"Land Tenure Reform", January 1973:* "... the Green Paper starts off with a eulogy of the feudal system and proceeds with unabated vigour to narrate its serious disadvantages. If there is one thing immutable in this evolutionary world it is that the feudal system is on its way out, however violently its protagonists may protest. The feudal system, a system of inestimable merit, has been the victim of intolerable abuse in recent years by superiors more concerned with making money out of it than with the welfare of property owners and the community."

25 years ago

From *"On Golden Pond – And Beyond", January 1998:* "In December 1997, Health Secretary Frank Dobson set up a Royal Commission on long-term care to examine the funding implications for the elderly... As with pensions, still too many of our clients hope that the state will provide. The Royal Commission and the welfare review will almost certainly make personal provision a priority for those who can – leaving a 'back-up' state-funded service which may yet move the Victorian workhouse into a twenty-first century environment... Golden Pond life is almost certain to be a key subject for the new millennium."

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John Ellis (Otherwise Ian Ellis) - Deceased
Would anyone holding or knowing of a Will for the above, with his last known address being 1 Daisy Sandbank, Dunoon, PA23 8SH, please contact Michael Vaughan, MacRoberts LLP, 10 George Street, Edinburgh, EH2 2PF (0131 248 2199 or Michael.vaughan@macroberts.com)

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