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Success without the human cost
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Journal

Journal of the Law Society of Scotland

Volume 66 Number 1 – January 2021

Done deal

The clock stopped ticking just in time, but there is plenty still to be worked through regarding future relations with the EU – and the impact on UK law

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Child Abuse, Child Protection & the Law 2nd Edition

Tom Guthrie; Morag Driscoll

The law surrounding child abuse and protection in Scotland has seen huge changes in legislation in recent years. Accessing full coverage of the law can be time-consuming, which is why an up-to-date reference is invaluable for the field.

This second edition builds on Alison Cleland's ground-breaking title. It has been thoroughly revised and rewritten by its expert authors to reflect the dramatic changes in Scottish legislation and development of policy and practice in the last decade.

Child Abuse, Child Protection and the Law serves as an exhaustive guide for anyone in the field, particularly criminal and family lawyers, social workers, medical practitioners and police and youth workers.

The text discusses the following relevant legislation:

- Children's Hearings (Scotland) Act 2011 and related secondary legislation
- Victims and Witnesses (Scotland) Act 2014
- Children and Young People (Scotland) Act 2014
- Human Trafficking and Exploitation (Scotland) Act 2015
- Domestic Abuse (Scotland) Act 2018
- Data Protection Act 2018
- Age of Criminal Responsibility (Scotland) Act 2019
- Children (Scotland) Act 2020

An intensive resource on child protection law

This new edition contains a comprehensive analysis of the applicable law, policies and procedures, presented in an accessible, child-centred way.

It covers familial abuse, Local Authority led protection processes, the legal processes including emergency protection, criminal processes and the impact of child maltreatment.

Ultimately, this guide acts as an essential reference for every child protection case.

W. GREEN

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Law Society of Scotland

Publishers
The Law Society of Scotland
Atria One, 144 Morrison Street,
Edinburgh EH3 8EX
t: 0131 226 7411 f: 0131 225 2934
e: lawscot@lawscot.org.uk

President: Amanda Millar
Vice President: Ken Dalling
Chief Executive: Lorna Jack

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Editorial
Connect Publications (Scotland) Ltd

Editor: Peter Nicholson: 07785 460743
e: peter@connectcommunications.co.uk

Advertising: Elliot Whitehead: +44 7795 977708
e: journalsales@connectcommunications.co.uk

Review editor: David J Dickson

Online legal news:
e: news@connectcommunications.co.uk

Other Connect Publications contacts,
telephone 0141 561 0300

Head of design: James Cargill (0141 561 3030)
james@connectcommunications.co.uk

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Editor

Email > peter@connectcommunications.co.uk
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Distant light

As COVID-19 cases surge, and we become even more locked down, I have noticed news broadcasts referring to any glimmer of related good news, such as projected vaccine rollout, as a "chink of light".

In dark times, made darker by it being January, we all need something to cling on to, to look forward to. That, I suppose, is an illustration of how we need to pay particular attention to our mental health through this pandemic, and more than ever in the month that is notorious for bringing on bouts of depression.

And the message of the pandemic, that we have to help each other out and pull through this together, equally applies in this context. In other words, don't suffer alone. If you need help and haven't a friend or family member you can open up to, there are resources and professional support on hand through the Lawscot Wellbeing pages online.

Even if your new year doesn't feel great at the moment, I wish you a happier one as it goes on – and an upward curve for us all.

Nailing the package

Also needing a bigger chink of light right now is the legal aid sector. The Christmas present from the Government, in the form of the 10% fee rise over two years plus other business support, was welcomed as a good start, even if well short of what is needed to repair the finances of many practices. But the goodwill built up during negotiations and expressed on both sides at the time of the initial announcement risked being sacrificed when a draft SSI released two days later – on Christmas Eve – was read as taking away with one hand part of what had just been given with the other. A failure of communication somewhere, surely.

It has since been clarified that that was a separate, and (it is claimed) cost neutral revision of the criminal fees rules. However the Society, and members, are now on the alert to ensure that that is in fact the case, and that the full package announced will be promptly delivered. Especially now, unity is strength in the talks.

Déjà vu

Also just in time for Christmas was the UK Government's Brexit deal with the EU. It is rather far from the "deep and special relationship" desired by Theresa May when talks first opened, and does not avoid the negative impacts now coming to light for many individuals and businesses. It does however contain provisions permitting UK lawyers to continue to provide some types of advice in member states. An outline can be found on the Law Society of England & Wales website. More generally, it is designed to be subject to review, and we have not heard the last of negotiations. One way or another, advisers will be kept busy.

Contributors

If you would like to contribute to Scotland's most widely read and respected legal publication please email: **peter@connectcommunications.co.uk**

Lynda Towers
is director of Public Law with Morton Fraser LLP

Dawn Robertson
is an employment law partner with Rooney Nimmo

Musab Hemsi, Simon Mayberry
(co-authors) are partner and senior associate respectively with LexLayton

Mike Blair
is a partner in Land & Rural Business with Gillespie Macandrew

Graeme Thompson
is an executive coach, working across both business and sport

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.66 NO.1 – JANUARY 2021

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Pro bono: three case studies Page 42

In practice

ONLINE INSIGHT

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After Brexit: the employment law outlook

Laura Morrison surveys the aspects of employment law most likely to change now that the UK is no longer subject to European Union requirements.

Building better: housebuilding and climate change

Natasha MacDonald reviews the means by which housebuilding and renovation could play a greater part in achieving climate change targets – but how can we incentivise the necessary investment?

Investors and the Government veto

Paul Marshall and James Millward explain the aims of the National Security and Investment Bill, which adds to the Government's powers to intervene in sensitive acquisitions.

Part of the fabric?

Office workers need to get back into their offices: an unpopular opinion or not? Musab Hemsi argues that some presence there is necessary for many to make their full expected contribution.

OPINION

Melissa Rutherford and Tony Bone

The founders of Trauma Aware Lawyers in Scotland believe Scottish lawyers, and courts, need a better understanding of adverse childhood experiences and their impact on those most likely to come into contact with the legal system

Scotland is aiming to be one of the first trauma-aware countries in the world. Compelling evidence is now available in the public realm that trauma can have a lifelong impact on both the physical and mental health of a child, as well as their behaviour. Children who have experienced trauma can be impacted in the way they think, the way they interact with people, their learning and their risk-taking behaviour.

Risk factors known to be linked to adverse childhood experiences (ACEs) include alcohol or drug misuse and addiction, neglect, death of a parent, domestic abuse or violence within the family, parental divorce or separation, a parent with mental health issues, sexual abuse and poverty. Academic studies have found that as the number of trauma factors that a person has experienced increases, so does their susceptibility – and their risk of having a range of physical and mental health conditions. Their mental health risk brings the increased likelihood of them ending up in prison, or engaging in violent and/or antisocial behaviour.

Trauma Aware Lawyers in Scotland is a newly established movement of lawyers who are seeking to use their own personal and professional experience to educate all professionals involved in the legal system, including judges, court staff and law students.

The founders are Melissa Rutherford (Rutherford Sheridan Solicitors), Tony Bone (Tony Bone Legal), Iain Smith (Keegan Smith Defence Solicitors) and Nadine Martin (Harper Macleod LLP). We are four practising lawyers in Scotland who have, for one reason or another, become aware of trauma and ACEs and who are committed to bringing compassion to the legal system. We hope that we can educate and influence further understanding of what having a trauma-informed legal and court system in Scotland means, and that the practice of the law can be empathetic and caring.

We felt like we couldn't keep this to ourselves any more. This is so vital to how we treat our clients or those most in need of our help. As a result of our epiphany and our new learning, all four of us now carry out our roles in a different way. Lawyers aren't taught about trauma at all, despite the fact that most of the people we represent in court have suffered trauma in their lives.

We feel that we have a duty, or even an obligation now to share what we know and to raise awareness of the impact of trauma on the people we deal with. We need a person-centred approach for both victims and accused persons within the legal system.

The court system is one where people are often in crisis and addiction as a result of something that has happened to them. We must educate ourselves so that we have the empathy and deep understanding of trauma in order to build relationships and trust, and to ensure that all individuals involved in the court system or legal system in Scotland are treated with respect and not re-traumatised.

As a movement, our objective is to raise awareness of the effects of childhood trauma within the legal sector in Scotland. We really want to change the way that the whole of the justice system treats people in the legal system, by raising awareness among lawyers and decision-makers of how trauma impacts on people and the unforeseen consequences of their decisions in later life, which ultimately leads to a never-ending cycle of incarceration or an inordinate impact on the public purse. As we now know, all too often ACEs manifest in adolescence and/or adulthood in all sorts of ways. The old approach is not working, and is certainly not helping those most affected by childhood trauma and whose skills and talents are lost forever.

We would like to thank the Law Society of Scotland for putting a CPD resource online on trauma. We hope to work with the Society in the future to create further CPD seminars and updates, and add to these resources so they can be accessed by the profession. The Society also recognises that being trauma-aware is essential to provide a good service to clients. A quote from its website highlights this: "Trauma-informed knowledge is essential to elevate your client care skills within many practice areas, including family law, criminal law, child law and personal injury."

Please contact us for more information at TraumaAwareLawyers@gmail.com. Find us on Facebook: Trauma Aware Lawyers in Scotland, Instagram: @trauma_aware_lawyers_scotland, Twitter: @traumaAwareLaw, and Linkedin group Trauma Aware Lawyers in Scotland.

Melissa Rutherford is co-founder of Rutherford Sheridan, Glasgow and a board member of charity Indigo Childcare. Tony Bone practises as Tony Bone Legal, Kilmarnock.

VIEWPOINTS

Dear *who*?

Dear Colleagues

Very few of us will forget 2020. As a profession, we have shown resilience, adaptability and creativity under incredibly challenging circumstances. 2021 will, we hope, see the return of the normality so many of us crave.

2020 also gave us a chance to reflect. The lessons we have learned mean that we will never really go back to "normal". In some ways this may be a good thing. The last year has forced us to confront practices that we do not believe are working, and think about how we create lasting change. So, in the spirit of new year resolutions, we suggest that one practice we should all leave behind this year is the use of "Dear Sirs" in formal letters.

As you rush to catch the post, it is easy to quickly open a firm style, paying little heed to the default masculine salutation. We have done it ourselves. In less busy moments, you might pause and amend. However, from our own experiences as junior women in the profession, we know it is unlikely that you'll start a wider conversation about what those two words represent. We tell ourselves that it's not the time or place. We worry that we'll be seen to be causing a fuss over nothing, that there are bigger issues at play. We say it doesn't matter.

Yet, as lawyers, we know that accurate drafting does matter. Indeed, we pride ourselves on it. However, "Dear Sirs" is premised on an inaccurate assumption that it will be a male colleague who receives your letter. Given that our profession is now 53% female, chances are that this assumption is incorrect. Some say that "Dear Sirs" is appropriate as it refers to the firm, not an individual. To this we would say that the erasure of all women partners in Scotland is regrettable.

This form of address is not just inaccurate, however. It represents something greater. The use of "Dear Sirs" privileges the male norm. It tells women that we do not belong. Lady Hale, writing about the lack of women in the judiciary, noted that "the absence of women from the bench is even more important than our presence, in the message it sends out". We suggest the same can be said here.

Fortunately, unlike increasing judicial diversity, there is a simple solution. It does not take radical measures and is not resource intensive. A number of firms in Scotland have already issued guidance and updated their styles. The Law Society of Ireland discontinued the use of "Dear Sirs" last year. Suggested alternatives include Dear Sir or Madam; Dear [firm name]; Dear Solicitors; or Dear Colleagues.

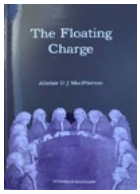
Perhaps making this simple change will focus our minds on how to tackle the bigger problems, which do require strategic, collaborative action. Our gender pay gap still stands at 23%. Women make up fewer than 30% of partners. A third of women who responded to 2018 Law Society of Scotland research reported personal experience of bullying, harassment or sexual harassment. One hundred years since Madge Easton Anderson became the first woman law agent in Scotland, there remains work to be done.

As with any lengthy to do list, starting with a simple task can get the ball rolling. So, as we enter this new year, let's update the firm style and prioritise equality in 2021.

Seonaid Stevenson-McCabe, Katy MacAskill and Màiri McAllan, co-founders, RebLaw Scotland

BOOK REVIEWS

The Floating Charge



A D J MACPHERSON
PUBLISHER: EDINBURGH LEGAL EDUCATION TRUST
ISBN 978-1999611828; PRICE: £30

This is the eighth volume in a series, *Studies in Scots Law*. Its author is a lecturer in commercial law at the University of Aberdeen. It is a revised version of his 2017 PhD thesis, and is an excellent analysis of the subject matter. In the author's words, "The work contained within this book is unashamedly academic yet also inescapably practical." I agree totally.

The book is well laid out and easy to access. The index is not as detailed as one might expect, but that is a very minor criticism as it does not detract from the comprehensive coverage.

The detail in the book goes well beyond that which a busy practitioner is likely to require day-to-day, but when a detailed analysis of the nature and scope of a floating charge to heritable and moveable property is required, reference should be made to this book.

A number of topics are ably addressed, one being the case for a floating charge attaching on the appointment of an administrator (chapter 3). Chapter 6 contains a very good analysis of floating charge enforcement. Part B of the book also contains a very useful review of *Sharp v Thomson* and the non-floating charge case, *Burnett's Trustee v Grainger*. The author is not slow to criticise the former; the review of the case law and the various commentaries thereon is most welcome.

My central recommendation is that this book should be a "must read" for solicitors involved with property and insolvency law and practice.

Professor Stewart Brymer, Brymer Legal Ltd.
For a fuller review see bit.ly/2L1dM7f

One Two Three Four: The Beatles in Time

CRAIG BROWN
(4TH ESTATE: £20; E-BOOK: £4.99)

"This is one of the most engaging biographies I have read in a long while."
This month's leisure selection is at bit.ly/2L1dM7f

The review editor is David J Dickson

BLOG OF THE MONTH

ukandeu.ac.uk

How much freedom does the deal finally struck with the EU leave the UK to make its own rules? Not much, if this analysis by a self styled independent research body is correct.

Titled "British sovereignty run by Europe", it maintains that any UK moves, whether by subsidy or legal change, in order to secure a competitive edge, risk provoking significant sanctions, which would apply pending any dispute resolution. The UK might even have less autonomy than individual EU states. Various comments follow the blog.
To find this blog, go to bit.ly/39ipFxN

Late show on no shows

The Good Law Project, led by barrister Jolyon Maugham QC, has been making a name for itself through its persistent digging into the acts of Government, particularly the processes by which a number of high value contracts for COVID-19 related services have been awarded, including to people and companies with connections to ministers.

A regular line of legal challenge has been the failure to publish details of these contracts as required by the Public Contracts Regulations 2015.

Perhaps irked by the constant demands (to comply with the law?), it seems that HMG has engaged the services of litigation support business Legastat, "for support in its fight", *The Times* reported. "How fitting, then, that officials finally published details of the contract eight days after they are required to do so by law."

The GLP's response? "You couldn't make it up."

PROFILE

Jim McKay

Jim McKay is head of CPD & Training at the Law Society of Scotland

1 Tell us about your career so far

First job was at Keele University, researching corporate manslaughter combined with teaching undergrad criminal law. I then joined a local business who were in political publishing. I found that exciting and fast paced, and moved back to Scotland to open their Edinburgh office in my early 30s. After a stint at Holyrood Communications, I joined the Society in June 2016. And very glad I did too.

2 Why did you decide to join the Society?

Mostly, I was ready for a change after the best part of 15 years in a niche industry. When I saw the job advertised it was one of those klaxon moments; it just looked right for me. From the moment I walked into the foyer, I knew I wanted to work there. It just seemed obvious that it was genuinely going to be a great place to work, in all sorts of ways.

3 What are the main issues for the Society/your department?

Supporting the profession is number one for everyone at the Society. In CPD we play our part by getting all the regulatory courses, like the new partner practice management course, working well online. Ditto all our training programme, including the annual conference in April 2021. We have put CPD packages together to help ease the financial burden, as well as making CPD free to any member who has had the misfortune to become unemployed.

4 What's your top tip for new lawyers?

Keep an eye and half a mind on how the whole business and people side works, and work on the skills needed for that too.

Go to bit.ly/2L1dM7f for the full interview

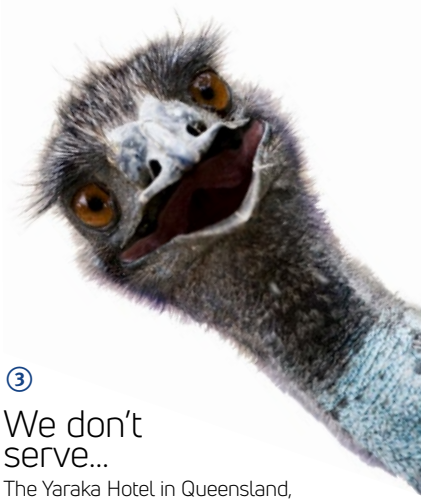
WORLD WIDE WEIRD

1 Love you like crazy

"Every part of this story is truly bonkers" – the non-swimmer Scot jailed in the Isle of Man for breaking its COVID lockdown, after crossing the sea by jet ski just to see his girlfriend.
bit.ly/35aekhM

2 Big Mac and sighs

A Good Samaritan who offered to pay for a stranger's meal at a McDonald's drive-thru got a shock when she was told the bill – but has caused much entertainment on TikTok.
bit.ly/2XcymDZ



3 We don't serve...

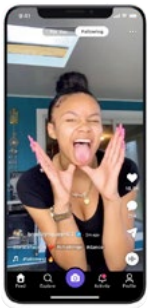
The Yaraka Hotel in Queensland, Australia, has banned emus from its premises and erected emu barricades following a spate of bad behaviour from some feathered regulars.
ab.co/38jPDBw

TECH OF THE MONTH

Dubsmash

iOS, Android, free

With the festive season behind us, Dubsmash will keep your spirits up. The free app lets you create and share short videos of you lip syncing to an audio clip, which can be anything from famous movie one-liners to animal lines. It's silly and lots of fun. Available on Apple and Android.



PRESIDENT

Amanda Millar

As we begin 2021, we should assess which of the changes enforced last year mean progress and which do not; we should prize the value of acting together as a profession; and we can only hope for progress on the major issues of the day

So ... welcome to the new world that is 2021!

The first six months as your President had me contribute to our work on climate change by being involved in more than 80 events across the world without utilising any Air Miles, and I only travelled to Edinburgh once, for the opening of the legal year. The collaborative and often productive nature of much of this engagement with the profession, Government, public sector and wider stakeholders is a positive I hope we can continue to build on.

Many technological advances have been made through this experience. Some will stay, having brought efficiencies, savings and some processes closer to the 21st century. Some should not, as they brought nothing but additional work and frustration, and jeopardised many of the fundamental values of our justice system, while still others have room for improvement or can be redeveloped now that the ideas have come to the fore. LawscotTech will continue to work with motivated external partners and the profession, with the aim of partnership working towards meaningful and effective systems that work for all, without reinventing the wheel too often.

Lessons from 2020

In my home our mantra is that communication is key. Regularly we wonder why it seems people do not communicate with one another. If 2020 taught us anything, it is that this remains more true than ever. Those who communicated, were listened to and collaborated through the challenges to find effective solutions, achieved more than those who "barried on" with their own ideas and agendas, expecting others to follow.

The collegiality and engagement of the profession with the Law Society of Scotland is something else I hope will be maintained for the future. The support of Law Society colleagues and members was invaluable to me in leading the organisation internally and externally through some of the most challenging times in the Society's and the profession's history. These challenges have not passed yet, but they have been and will continue to be met head on. I believe progress has been and will go on being made if we continue to work together. Even when on different sides, as a profession like ours requires, the goals are the same – quality advice, representation, delivery of justice, promotion and protection of the rule of law, all in the interest of our civil society.

On the wish list

My hopes for the rest of my year are to see meaningful, delivered progress in achievable and sustainable ways, maintaining respect for the value of the profession to society, with improved and regularly reviewed levels of legal aid payments across the board, prompt business recovery from the economic shock suffered due to COVID, clarity in the new world out of the European Union, and the opportunity to breathe and recover some of the resilience and goodwill used up surviving much of the trauma of 2020.

Oh and I'd really love not to have to explain (again) the importance of the rule of law and legal aid to our lawmakers, but I will if needed.

Amanda Millar is President of the Law Society of Scotland – President@lawscot.org.uk
Twitter: @amanda_millar

People on the move

Intimations for the People section should be sent to peter@connectcommunications.co.uk

To advertise here, contact Elliot Whitehead on +44 7795 977708; journalsales@connectcommunications.co.uk

ABERDEIN CONSIDINE, Aberdeen and elsewhere, have appointed **Greig Brown** as mortgage operations director, based at the firm's Edinburgh office. He joins from MORTGAGE ADVICE BUREAU in Scotland, where he was head of operations.

BALFOUR+MANSON, Edinburgh and Aberdeen, has promoted two of its associates to partner, effective from 1 January 2021: **Martin Walker**, in the Litigation team, who joined the firm as a trainee, and Private Client team specialist **Graeme Thomson**, who joined as a senior associate in 2018.

Graeme Thomson and Martin Walker of Balfour+Manson

BOYD LEGAL, Edinburgh and Kirkcaldy, has promoted **Rachael Brandon**, manager of its Equity Release team, from senior associate to company director.

BURGES SALMON, Edinburgh and UK wide, has appointed **Nigel Watson** as a corporate partner to lead its Employee Incentives team. He joins from BRODIES, where he was a partner and head of its Employee Benefits practice.

CAIRN ENERGY PLC, Edinburgh has appointed **Anne McSherry** as company secretary. She succeeds **Duncan Wood**, who has retired from the role after 22 years. Ms McSherry has worked at Cairn since 2009.

CULLEN KILSHAW, Galashiels and elsewhere, and IAIN SMITH & PARTNERS, Galashiels, announce the merger of their practices from January 2021 as CULLEN KILSHAW. Iain Smith & Partners' existing offices in Bank Close, Galashiels will house the merged and enlarged Court departments of both firms, while their other staff will relocate to Cullen Kilshaw's headquarters in Waverley Chambers, Ladhope Vale, Galashiels.

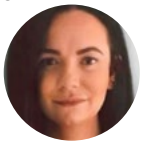
DIGBY BROWN, Edinburgh and elsewhere, has announced the promotion of nine members of staff across four of its offices, including four new associates. Those promoted to associate are **Lee Murray**, Network team (Ayr), **Ryan Smith**, General Personal Injury Litigation (Kirkcaldy), and **Megan Keenan**, Clinical Negligence and **David Henderson**, Foreign & Travel (both Glasgow). Three in the Edinburgh office advance to senior solicitor: **Isabel Wosiak** (Foreign & Travel), and **Saira Ahmed** and **Zara Clark** (both Serious Injury). They are joined by Joanne Gray, of the Serious Injury team in Glasgow. Also promoted is **Nicola Hoey** in the Glasgow office, who becomes a welfare rights adviser.

GILSON GRAY, Glasgow, Edinburgh, Dundee and North Berwick, has promoted **Denise Laverty**, an accredited specialist in family law and accredited family law mediator, and dual qualified in England & Wales, to partner in the Family Law team. She joined Gilson Gray as a legal director in June 2019.

MBM COMMERCIAL, Edinburgh and London, has appointed **Tim Edward** as a partner in its Dispute Resolution practice. He joins from DENTONS, where he was a partner and head of its Commercial Dispute Resolution practice in Scotland.

MOV8 REAL ESTATE LTD, Edinburgh and Glasgow, announces the promotion of **Tracy McAlpine**, Head of New Build & Intermediary Conveyancing, to Director of New Build & Intermediary Services.

SCULLION LAW, Glasgow and Hamilton, has added to its court department with the appointment of two criminal law solicitors: **Anna MacKay**, who joins as an associate from BRIDGE LITIGATION, and **Lucy McKenna**, who has joined the firm after completing her training at PATERSON BELL.



From top (l to r): Emma Letham, Hannah Prentice, Alison Reid, Sarajane Drake, and Leanne Follan from Wright, Johnston & Mackenzie LLP

WRIGHT, JOHNSTON & MACKENZIE LLP, Glasgow, Edinburgh, Inverness, Dunblane and Dunfermline, has promoted five members of staff. **Emma Letham**, of the firm's Family Law team at its Glasgow office, becomes an associate, and there are four new senior solicitors: **Hannah Prentice** and **Alison Reid**, who work in the Private Client team in the Inverness office, and **Sarajane Drake** and **Leanne Follan**, commercial property solicitors in the Glasgow office.

THORNTONS LAW LLP, Dundee and elsewhere, announce the promotion to partner of **Gary Mannion**, of the Personal Injury team in Dundee, and **Lucy Metcalf**, of the Family Law team in Edinburgh; and the promotion of **Janice Napier** to legal director in Business Law within the Commercial Property team in Perth.

Above: Gary Mannion, Lucy Metcalf and Janice Napier of Thorntons Law LLP

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Are you getting the most out of your legal software?

Software for practice, case and accounts management is an important tool for your legal business. But do you know the real extent of what it can do?

After the initial rush to implement new software, some legal practices don't take the time to find out the extra value that it can offer. That means you could be working more effectively if only you knew about your software's full potential.

Let's try to uncover a few of the hidden benefits that exist in many systems.

Client Relationship Management.

All law firms know that looking after clients is their number one priority. Using the information you already have stored within client records and case files such as names, addresses, DOB, gender, marital status and email address you can produce mailing lists, mailshots and filter information to generate reports unique to your business.

A virtual strongroom.

This ties in with client care. Each item held within a virtual Strongroom can be categorised - allowing you to quickly find items and generate reports. Strongroom supports you to add review dates and use the notifications and onscreen displays to ensure you are alerted to items that require your attention. It's also a great mechanism for keeping on top of the needs of existing clients and generating new business by setting review dates for wills and other important documents.

Document Sharing.

Most good practice management systems should offer some form of file sharing or "drop box" mechanism. This allows you to upload files for your colleagues to view and edit, increasing productivity and saving time.

Risk Assessment and AML.

Software with risk assessment and anti-money laundering features

puts you one step ahead of the game when it comes to compliance. The risk assessment features allow you to input responses to risk-based questions and determine if the MLRO (Money Laundering Reporting Officer) is required to authorise the client before concluding that the firm may continue to act for them.

Similarly, anti-money laundering features allow you to add identification details to clients' records. These can include scanned copies of verification documents to calculate the risk at client and case file level. From there, you can add notifications and create reports that will show clients with money laundering information missing or expired and clients with a high-risk assessment score.

Reporting.

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brexit
the final chapter?

A trade deal with the EU was completed and enacted at the last minute, but is far from the end of the story. Lynda Towers sets the Trade and Cooperation Agreement in context, along with the further UK and Scottish legislation passed as the Brexit process concluded

The end of an old year and the beginning of the new year is usually seen as a time for optimism and for looking forward with anticipation to new challenges in the year ahead. Moving from 2020 to 2021 has certainly met that challenge. We have vaccines approved and ready to roll out to help bring the COVID-19 virus under control. We are promised by the experts and the politicians that the world we know today will start to look more like the world we knew this time last year, if not exactly the same. That might have been the end of the story had Brexit not come into play on 31 December 2020 as well.

With the Prime Minister now enjoying a substantial majority in the House of Commons, it was always likely that the UK would reach the end of the transition period and leave the single market and the customs union. The days when a second referendum was being suggested, a closer relationship was being sought with the EU and equivalence arrangements were contemplated disappeared with the election of the Johnson Government, if not before. While negotiations have been taking place between the UK and the EU over the last year, obscured by the COVID-19 difficulties, it has long been clear that the only serious options on the table were a "no-deal" and trading on WTO terms, or a free trade agreement (FTA).

The FTA became "thinner" on areas of cooperation, on content and detail as time progressed. Thinking back over the Brexit journey, the impact of the FTA now looks like a "hard Brexit" as it was understood over the intervening years since June 2016. The UK is not part of the single market or the customs union. There is no longer seen to be a role for the EU Court of Justice. The UK has the power to enter into its own FTAs across the world. It is now an independent coastal state and sovereignty has been restored to the UK. The Government claims it has delivered what it promised.

Finally agreed on Christmas Eve, the FTA was signed off provisionally by the EU President on 30 December and considered but not ratified by the EU Parliament on the same day. The enabling legislation, the EU (Future Relationship) Bill, was introduced into and passed in a single day by the UK Parliament on 30 December. This was despite the Scottish Parliament voting against giving legislative consent to the bill. However, the size of the Prime Minister's majority when the bill passed the Commons, by 521 votes to 73, belies the concerns, politically and commercially, as to what operating within the terms of the FTA and the expiry of the transition period will mean for the UK's economic and business future.

The agreement, and the gaps

The FTA itself comprises 1,246 pages of "legally scrubbed" text. The headline good news is that no tariffs or quotas will be applied to goods being exported from or imported into the UK. Less good news is that there will be non-tariff barriers of an administrative nature, in the form of additional checks when goods move across UK-EU borders and greater quantities of required paperwork including customs declarations, phytosanitary certificates, product safety certificates and rules of origin documentation which will now be required to accompany goods being traded. These will mostly be new requirements resulting in additional costs to business. Delays seem likely at ports, in the short term at least, adding to costs. The UK has decided to bring its checks in incrementally at two monthly intervals until summer 2021, but the EU began its checks immediately on 1 January 2021. It remains to be seen where the financial balance comes to rest.

There appears to be a process agreed to manage fishing for the next five and a half years, which allows EU boats the right to continue to fish, albeit with the amount of catch decreasing incrementally, and UK fishermen being allowed to sell their products in the single market. This is a result which has pleased neither side's fishing fleet, suggesting that the next set of negotiations to determine what will happen at the end of this period

"Free movement of people between the UK and the EU has now come to an end, whether as workers or visitors"

will need to start now.

The FTA does not deal with arrangements for Gibraltar (although an interim agreement on access by workers across the border has been reached), financial services, or recognition of professional qualifications. Certain security and enforcement arrangements are agreed in the FTA, but not to the same extent previously enjoyed. Erasmus exchanges will no longer be available to most UK students, although they will be able to access a UK scheme which has yet to be set up.

A separate agreement, again settled just before Christmas, deals with the detailed implementation of the Irish Protocol and how it is going to work in practice to ensure an open trade border on the island of Ireland. At time of writing it is being suggested that the checking infrastructure in ports is not yet in place in Northern Ireland, the IT systems are yet to be fully tested, and the EU officials themselves, who have an oversight role, may be hotdesking!

Free movement of people between the UK and the EU has now come to an end, whether as workers or visitors. The FTA covers some of the new arrangements, but it is clear there is still some negotiation required to finalise matters.

Much more legislation

Against the background of the FTA being negotiated and undoubted relief that agreement has been reached, there remain a number of possible legal challenges and uncertainties on the horizon. The extra time afforded by the transition period means that a number of Acts have now been passed in Westminster setting the post-FTA framework within which immigration (and related social security), private international law on agreements, fisheries, agriculture, taxation and trade data will all operate. Policy development in these areas and making secondary legislation continues.

The biggest constitutional change, and possible area of legal challenge, is the United Kingdom Internal Market Act 2020. It is perhaps best remembered as the bill which purported to allow the Government to depart from international law, in this case the Northern Ireland Protocol which was part of the Withdrawal Agreement, but in a "specific and limited way". This resulted in outcry from the legal profession and led to the resignation of the Advocate General for Scotland, but not his UK law officer colleagues. The offending clauses were removed by the House of Lords, led among others by Lord Hope of Craighead, who lodged amendments. The removal of these clauses was eventually accepted by the Government as part of the wider FTA negotiations. The amendments also provided for additional consultation requirements with the national authorities, including Scottish ministers.

The Act attempts to create a UK single market, the working of which is overseen by the Competition & Markets Authority for the whole of

the UK. The aim is to ensure that there is mutual recognition of goods, which may cover regulatory requirements, non-discrimination of goods (subject to certain exceptions which are set out in sched 1 to the Act), and the provision of services and professional qualifications across the UK. This is a complex piece of legislation and there is considerable scope for disagreement as to when and where the lines of the devolved settlement have been crossed.

To add further to this complication, the Scottish Parliament passed the UK Withdrawal from the European Union (Continuity) (Scotland) Bill 2020 just before Christmas. This has two main areas of interest. First, it gives powers to Scottish ministers to keep devolved legislation in step with EU law. Secondly, it enacts the core EU environmental principles into Scots law as "guiding principles on the environment" which ministers will have a duty to have regard to in making policies on the environment. Environmental policy is a devolved function in Scotland.

The bill also sets up an oversight body, Environmental Standards Scotland. While the detail of how this will work in practice has yet to be published, it is clearly seen as the enforcement body on the environmental functions under the bill. It is not beyond the bounds of legal possibility that it will be argued that the authorities exercising the functions being exercised under the two last mentioned pieces of legislation have the potential to clash.

Time does not stand still

When the FTA was announced, Michel Barnier said that "the clock has stopped ticking". He may have been correct so far as the deadline for negotiating an FTA between the UK and the EU was concerned. However, the hands of the clock are going to keep turning for years to come. Despite its length, the FTA still feels like a framework document with lots of matters still to be agreed. There are important matters to the UK economy, such as financial and related services, which are not covered by the FTA. Inevitably, although EU regulatory arrangements and bodies fell away on 31 December, their UK replacements may not yet be in place. Despite the best endeavours of those drafting replacement legislation, it may not be fully fit for purpose, since policies are still being developed and the negotiations have only just finished. There are bound to be lots of areas where the legislation is open to interpretation, and lawyers and clients will have to work their way through to a pragmatic outcome, ultimately with the help of the courts.

Perhaps we now have some inkling as to the meaning of that much discussed phrase "Brexit means Brexit". Or perhaps not. In any event it can probably be safely predicted that we lawyers had better hang on to our EU law books and subscriptions to EU journals. It is not a dying expertise yet. It is probably also the case that many of our academics will face marking innumerable student essays on "What is UK Sovereignty? Discuss" for years to come. Who would envy them that joy?

Lynda Towers is director of Public Law with Morton Fraser LLP

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Chapter 31: Community Rights to Buy

REUTERS/Russell Cheyne

Stress: a case for the tribunal?

A recent EAT case raises interesting questions as to whether the Employment Tribunal or the court is likely to be the more advantageous forum for the employee in some workplace stress claims, Dawn Robertson believes

The judgment handed down by the Employment Appeal Tribunal (EAT) sitting in London in the case of *Royal Bank of Scotland plc v AB* UKEAT/0266/18/DA & UKEAT/0187/18/DA (27 February 2020) caught my attention as a former personal injury lawyer turned employment lawyer.

This was an appeal heard by Mr Justice Swift (sitting alone) against the decision at a remedies hearing, following the conclusion that the claimant, AB, had suffered discrimination on the grounds of disability. AB contended that as a result of the unlawful discrimination she had suffered a serious psychiatric injury which prevented her from working for the foreseeable future and which required round-the-clock care.

Royal Bank of Scotland (RBS) sought to appeal the Employment Tribunal's decisions *inter alia* on whether (and to what extent) the psychiatric injury was caused by the discrimination.

The appeal was dismissed on all but one ground, namely that the tribunal erred in concluding that there was no requirement for an assessment of AB's capacity to conduct litigation. The EAT held that the failure to assess had not rendered the tribunal proceedings void and did not constitute unfairness to AB amounting to an error of law.

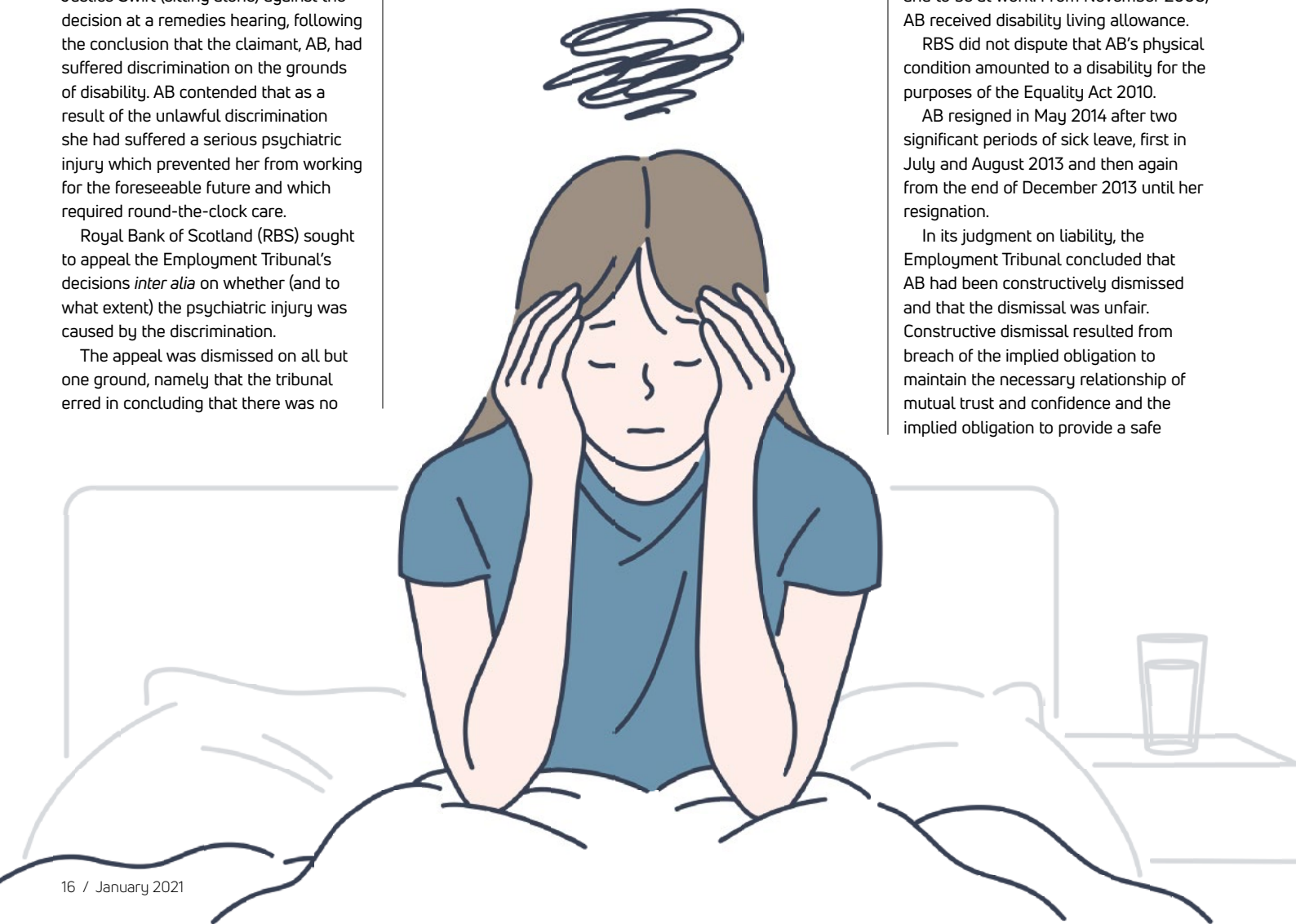
The facts

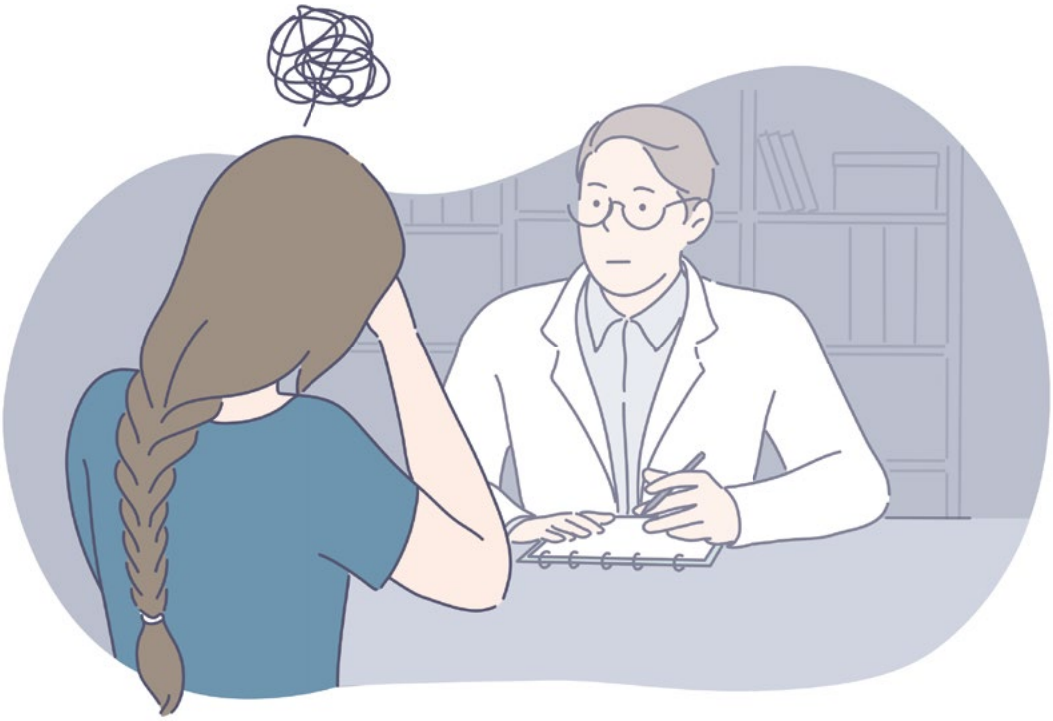
On her way to her first day of employment as a customer services officer at an RBS NatWest branch in Croydon, in August 2008, AB was knocked down by a car. She suffered a broken leg, damage to her knee ligaments and nerve damage. She was only able to start work two months later, and then only with a leg brace, foot splint and crutches. In fact, she needed the foot splint throughout her employment and walked with a slight limp. Throughout her employment the injuries continued to give her pain, affected her ability to work and to be at work. From November 2008, AB received disability living allowance.

RBS did not dispute that AB's physical condition amounted to a disability for the purposes of the Equality Act 2010.

AB resigned in May 2014 after two significant periods of sick leave, first in July and August 2013 and then again from the end of December 2013 until her resignation.

In its judgment on liability, the Employment Tribunal concluded that AB had been constructively dismissed and that the dismissal was unfair. Constructive dismissal resulted from breach of the implied obligation to maintain the necessary relationship of mutual trust and confidence and the implied obligation to provide a safe





working environment. In addition, the tribunal concluded that discrimination had taken place: first, by RBS failing to make reasonable adjustments relating to AB's work station and requiring AB to work on a branch till; secondly, as a result of comments made to or about AB on five occasions; and thirdly, by reason of a failure to permit AB to transfer to another branch.

AB's contention was that, as a result of the discrimination, she suffered from severe depression. A consultant psychiatrist engaged as an expert witness for AB, diagnosed her as suffering from a severe depressive disorder with psychosis. His stated conclusions were that AB showed "severe signs and symptoms of multiple psychiatric disorders, namely severe depression, anxiety and conversion disorders as well as psychosis". Crucially, he held the view that both the tribunal (presumably the then extant proceedings) and discrimination were "the primary causes of the current presentation".

RBS's expert consultant psychiatrist unsurprisingly disagreed, both as to the cause of AB's psychiatric injury and the extent of that injury. As a result, it was left to the tribunal, first to decide whether AB's psychiatric condition was the consequence of the acts of discrimination that had occurred at work, or whether it had been caused by matters predating those events (in particular the accident); and secondly, to resolve the disputes of evidence as to the extent of the psychiatric injury from which AB suffered.

As can be seen, although this was (*inter alia*) an Employment Tribunal claim, aspects of the case read like a common law damages claim for workplace stress. With that in mind, the question arises: is workplace stress handled better in the Employment Tribunal or in the court?

Effects of the discrimination

As already mentioned, one of the core issues of the case was whether – and to what extent – the discrimination had caused AB harm.

One ground on which RBS sought to appeal the tribunal's decision was that it should have reduced the amount payable to AB to take account of "the possibility that her psychiatric condition would have occurred in any event by reason of her pre-existing vulnerability and other psycho-social stressors".

In other words, RBS's position was that the tribunal was wrong not to reduce AB's compensation on account of the possibility that her psychiatric condition would have developed even without the unlawful discrimination.

"Constructive dismissal resulted from breach of the implied obligation... of mutual trust and confidence and... to provide a safe working environment"

Readers may recall the seminal judgment of the then Hale LJ in *Hatton v Sutherland* [2002] ICR 1613, setting out the 16 principles to be applied in a claim for damages in respect of psychiatric injury caused by stress in the workplace. Propositions 15 and 16 were cited as relevant in the current case, namely:

"15. Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrong doing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment...

"16. The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event."

The distinction between these two propositions is clear, if nuanced: proposition 15 is intended for cases where there is a concurrent cause of harm, and proposition 16 is intended for cases where there is a pre-existing susceptibility for the individual to suffer the harm alleged, but a lack of concurrent cause.

Applying proposition 15, the Employment Tribunal apportioned the cause of harm suffered by AB, concluding that 75% was attributable to the unlawful discrimination and 25% to the accident. Having reviewed the tribunal's treatment of the conflicting expert evidence, the EAT considered that its assessment was one which was "reasonably available to it" and that its apportionment of harm did not, therefore, disclose any error of law. As a result, RBS's appeal in this regard failed and the assessment that 75% of the harm was attributable to its unlawful disability discrimination was upheld.

Employer's knowledge of claimant's disability

As noted earlier, RBS did not dispute that AB's physical condition, following the accident, amounted to a disability for the purposes of the Equality Act 2010.

The status of her mental condition was less clear, however. In his EAT judgment Mr Justice Swift stated that "either the tribunal concluded, or it was common ground, that AB suffered from a mental illness that amounted to a disability".

He further noted: "During the course of her employment AB had two significant periods of sick leave in July and August 2013 when she

was absent from work because of 'low mood and physical pain'; and then from the end of December 2013 until her resignation at the beginning of May 2014 when she was absent from work by reason of stress."

Notwithstanding the foregoing, he went on to say: "the tribunal further concluded that RBS *could not have reasonably been expected to know* that by reason of these matters AB suffered from a disability for the purposes of the Equality Act 2010" (emphasis added).

From the above extracts, it is clear that the Employment Tribunal has drawn a distinction between, first, knowing that AB suffered from a mental illness that amounted to a disability during her employment and, secondly, appreciating that it was a disability which gained her protection under the 2010 Act.

In other words, the tribunal accepted that RBS did not know that AB had a mental illness which constituted a disability for the purposes of the 2010 Act. That the tribunal nevertheless found in her favour would be staggering but for the fact that AB already had a physical disability as a result of the accident, and one assumes that the discrimination claim succeeded as a result of what might be said to be the primary (physical) disability as opposed to the secondary (mental) disability. Put another way, it appears unlikely that AB would have succeeded in her discrimination claim without that factor, given the tribunal's conclusion that her employer did not know and could not have reasonably been expected to know that she suffered from a mental illness that constituted a disability for the purposes of the 2010 Act.

So, which forum – court or employment tribunal?

One generally views the court as the appropriate forum for workplace stress claims – see, for example, *Cross v Highlands & Islands Enterprise* 2001 SLT 1060; *Green v Argyll & Bute Council*, 28 February 2002, unreported; *Taplin v Fife Council*, 17 December 2002, unreported; and, more recently, cases such as *Easton v B&Q plc* [2015] EWHC 880 (QB), *MacLennan v Hartford Europe Ltd* [2012] EWHC 346 (QB), and *Miller v North Lanarkshire Council* [2019] SC EDIN 61.

While, on the face of it, this case supports the view that a workplace stress claim can be successful in the Employment Tribunal, its unique set of circumstances make it a difficult case on which to rely too heavily. Unusually, the claimant had a physical disability which led to a difficult working environment, resulting in workplace stress which developed into mental illness. Added to this was the need for the employer to be aware of a disability: again, had the claimant not been able to rely on its knowledge of her physical disability, it is unlikely that she would have succeeded.

When comparing what is required in the court to what is required in the Employment Tribunal, there are similarities and differences. The courts require proof of "an identifiable psychiatric or psychological illness or condition", whereas under the Equality Act a disability is a "physical or mental impairment" and the impairment must have "a substantial and long-term adverse effect" on a person's "ability to carry out normal day-to-day activities".

Although very different approaches, being able to meet one of those tests will often also mean being able to meet the other: neither is, on the face of it, easier than the other. In terms of other criteria, causation is a requirement in both court and Employment Tribunal proceedings (see the comment on *Sheriff* below), and foreseeability, at least superficially, is similar to the question of knowledge of the employer in a disability discrimination context.

Limitations aside, given the relative lack of success of pursuers claiming workplace stress in the Scottish courts to date, the Employment Tribunal is a forum which should always be considered by those involved in workplace stress litigation. While there may be concern around whether disability discrimination can be proved, there should be no concern around what can be recovered by way of compensation.

The English case of *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481 confirmed that an Employment Tribunal has jurisdiction to award compensation by way of damages for personal injury including both physical and psychiatric injury, caused by the statutory tort of unlawful discrimination. The Court of Appeal confirmed that the statutory language is clear that a claimant is entitled to be compensated for the loss and damage *actually* sustained as a result of the discrimination: the question was one of causation.

While unfair dismissal compensation is capped in the Employment Tribunal, damages arising from unlawful discrimination are not. Therefore, provided the claimant can demonstrate their loss was caused by the unlawful discrimination and can prove the loss alleged, an unlimited award, such as that made in the instant case, can be made, including a claim for injury to feelings, akin to an award for pain and suffering (solatium). As a result of her requiring 24/7 care, the damages claimed by AB were considerable, and the overall outcome of the remedies proceedings was an order that RBS pay AB £4,670,535, together with pre-judgment interest of £54,266.

Concluding comments

The personal tragedy at the centre of this case has largely been overlooked for the purposes of this article. It should not be ignored, however. To give some context, the following was recorded by a medical consultant who examined AB for the purposes of the case:

"[AB] presented with her back to me. She was observed to perform a variety of movements throughout the assessment, for example, she was observed to slap herself, scratch herself, and rock to and from. She communicated broken/stuttering speech accompanied by other non-verbal vocalisations."

The facts of this case may be remarkable in terms of the severity of the psychiatric injury suffered by AB, primarily as a result of workplace stress. As unusual as the case may be, it is a sobering reminder to us all.

Dawn Robertson, employment law partner, Rooney Nimmo

Are discrimination comparators outdated?

Comparators are part and parcel of most discrimination claims, but is the requirement to find them always helpful? Musab Hemsi and Simon Mayberry argue that more flexible rules would achieve a better balance

Both authors are relatively long in the tooth when it comes to dealing with discrimination law. Both have spent years on either side of discrimination cases, grappling with the Equality Act 2010 and its predecessors, all the while unable to shake the inkling that something didn't quite feel right.

Equality is, to our mind, a work in progress. As a legal, ethical and moral imperative, why do we invest so much time, energy and cost into so many multi-day tribunal hearings, poring over the minutiae of legal doctrine? It was not so long ago that we marked the 10-year anniversary of the Equality Act coming into force. This seems like a sensible juncture to take a step back and examine how powerful a weapon it has been in the war on prejudice.

One school of thought is that the state of contemporary, statutory discrimination law is flawed; and one of the principal flaws is the requirement for comparators.

Put simply, comparators are those who are like a discrimination claimant but for the protected characteristic being relied on in the claim. Comparators have existed in our labour laws for decades, so the Equality Act cannot be blamed alone for any defect they contain.

Appealing, but a hurdle

Both conceptually and methodologically, why do we even have comparators? Seriously, take a moment to think about it. Judges are bound to consider comparators in the vast majority of the discrimination claims that come before them (certain claims, such as discrimination on the grounds of pregnancy/maternity, do not require a comparator). Comparators appear to be the favoured heuristic for observing discrimination.

We can see the appeal. Lawmakers have created a process where tribunals are able to evaluate and adjudicate workplace claims without the need to engage too deeply in workplace dynamics. It is a rigid, prescriptive structure of law. If no comparator can be identified, the claim fails. Easy peasy.

Comparators are the longstanding barometer our judiciary must use. But the profound mismatch between the methodology of using comparators and the modern realities of work renders them increasingly unhelpful. Far too often, they place a legal hurdle for litigants in person to trip over, perhaps taking advantage of the reality that in today's increasingly mobile, knowledge-based and differentiated economy, comparators will often not be found.

A need for balance

To go further, our experience is that such inflexibility in the evaluation and adjudication of workplace disputes no longer accords with the inquisitorial nature of the UK Employment Tribunals.

By treating comparators as an essential element of discrimination claims, tribunals have their hands tied and face having to turn a blind eye to unlawful acts of prejudice, bias and inequity.

The essential requirement of comparators unnecessarily narrows the scope of discrimination laws and disregards the central lesson from claims such as harassment: discrimination can occur without a comparator present. It forces us to apply a binary logic to disputes where, in practice, it is more often the case that discrimination is covert, multi-layered, or unconsciously being carried out by the perpetrator. The growing complexity around personal identity and the continued expansion of protected traits means we are headed towards comparisons which produce false certainties, if we have not already arrived there.

We see a need for equality law to evolve in order to balance prescriptiveness with simplicity. We do not propose doing away with comparators (actual ones or their hypothetical abstracts), but rather removing them as an essential step in proving discrimination. Doing so would allow the growth of our equality laws and empower those who adjudicate on them to replace arbitrary barriers with logic and reason.

Musab Hemsi is a partner, and **Simon Mayberry** a senior associate, at LexLeyton

Land reform: 25 years in perspective

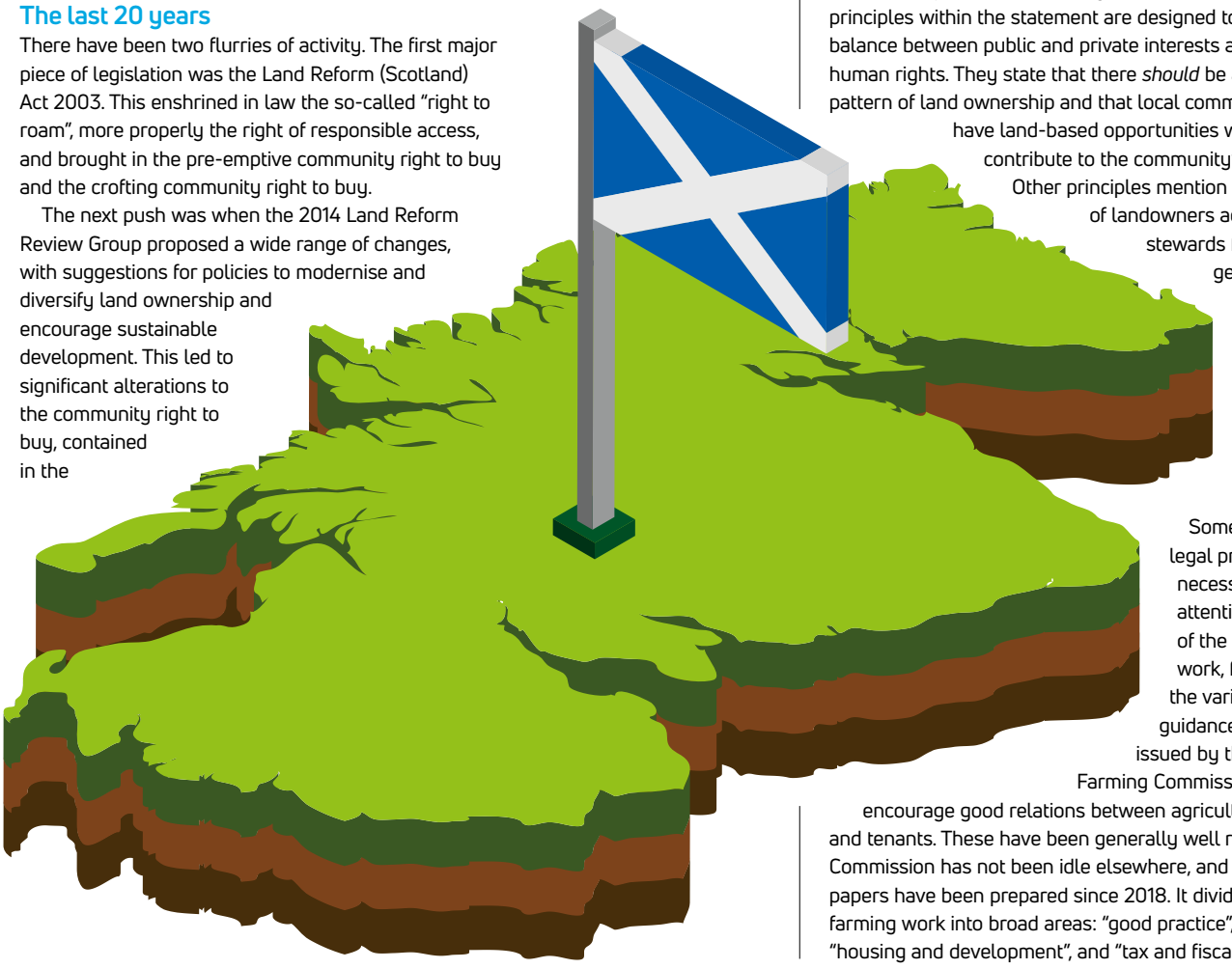
Land reform has featured prominently in the output of the Scottish Parliament, but Mike Blair believes the work of the Scottish Land Commission could bring further significant change in the years ahead

A renaissance of land reform is probably one of the major achievements following the foundation of the Scottish Parliament in 1999. It's worthwhile remembering where things were a quarter of a century ago. The Parliament was only a political project. Andy Wightman's book *Who Owns Scotland* was only to be published in 1996. It was still a few years before the Land Reform Policy Group, established following the Labour victory in the 1997 election, was to report. Following the establishment of the Parliament, one of the first land reform endeavours was to introduce the legislation formally putting the feudal system six feet under, though it was seen in the profession as largely a "conveyancing" issue at the time.

The last 20 years

There have been two flurries of activity. The first major piece of legislation was the Land Reform (Scotland) Act 2003. This enshrined in law the so-called "right to roam", more properly the right of responsible access, and brought in the pre-emptive community right to buy and the crofting community right to buy.

The next push was when the 2014 Land Reform Review Group proposed a wide range of changes, with suggestions for policies to modernise and diversify land ownership and encourage sustainable development. This led to significant alterations to the community right to buy, contained in the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2016. It has nevertheless taken longer to bring some of these provisions into force, and the "sustainable development" right to buy in the 2016 Act is only slowly emerging from the nest.



Scottish Land Commission

In order to maintain the impulsion on all matters land reform, the 2016 Act created the Scottish Land Commission. This consists of a board of five plus the (Agricultural) Tenant Farming Commissioner; it has been established in Inverness since 2017.

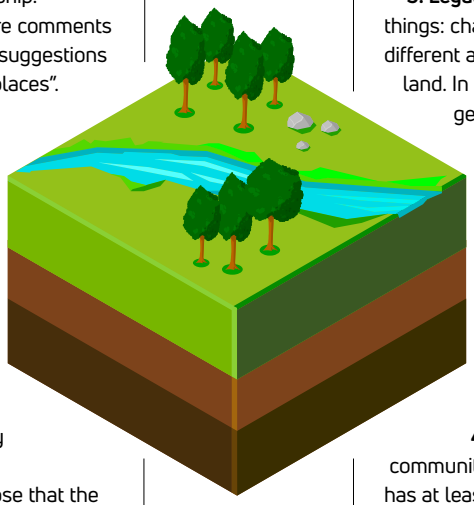
The overarching statement of purpose behind the Land Commission is the "Land Rights and Responsibilities Statement", published following the 2016 Act. The six principles within the statement are designed to promote the balance between public and private interests and respect for human rights. They state that there *should* be a more diverse pattern of land ownership and that local communities *should* have land-based opportunities which will contribute to the community's wellbeing. Other principles mention the importance of landowners acting as stewards for future generations, transparency of ownership information and the wish for greater collaboration and community engagement.

Some sectors of the legal profession have necessarily paid close attention to some of the Commission's work, for example the various codes and guidance documents issued by the Tenant Farming Commissioner to help encourage good relations between agricultural landlords and tenants. These have been generally well received. The Commission has not been idle elsewhere, and numerous papers have been prepared since 2018. It divides its non-farming work into broad areas: "good practice", "ownership", "housing and development", and "tax and fiscal".

Commission output

Amongst the "good practice" papers which the Land Commission has produced are several about community engagement, diversification of ownership, and good stewardship. Under the heading of "ownership", perceived as fundamental by many, there are extensive papers on the website about comparable international experience and issues arising from the scale and concentration of ownership.

Under the "housing and development" thread are comments on ways of improving the use of derelict land and suggestions for improved delivery of "more homes and better places". In particular, it points out that in the last 50 years, the share of the national wealth taken up by the ownership of dwellinghouses has increased significantly, but this begs the question whether anybody other than the baby boomers is better off in a practical sense. Under the heading of "tax and fiscal", the Commission has ranged quite broadly, examining the scope for that hardy annual the "land value tax", and discussing other ways of sharing the value of land consequent on changes due to public decisions, as for example by the planning authorities.



The cynics amongst the profession might suppose that the commissioning of these papers is merely a way of recycling taxpayers' money to academics and consultants. We can see however that had the Commission not existed, most of these ideas would have remained within academic or activist circles, without necessarily getting a broader exposure and consideration publicly. Anybody involved in acting for developers, whether commercial or residential, could do a lot worse than read some of the Land Commission papers to see where Scotland might be headed.

"A major part of the history of the law in Scotland is a succession of changes to the way in which the land, such a major asset, is owned or managed"

Initially, land reform was sometimes seen as very much a rural and countryside activity, and not something that should concern bigger businesses in urban settings. We should however be in no doubt that some of the proposals would represent quite a change to many types of business, both urban and rural.

Future issues

Land reform, which was a fairly general expression back in the late 1990s, has now become much closer to the mainstream in today's Scotland. There are however a number of significant questions as to where it may head in the future.

1. Legislative time. The Land Commission has been busy publishing papers and issuing advice to government. This is its remit. The same can be said of its cousin the Scottish Law Commission. It is notorious however that despite the creation of the Scottish Parliament, the availability of time and civil service resources to put through legislation suggested by the Law Commission is pretty scarce. It remains to be seen just how much legislative time will be made available for the Land Commission's suggestions.

2. Money, priorities and sustainability. The Scottish Government controls the purse strings. It is for it to say how much money goes into the land fund, which serves to support community buyouts. The majority of community buyouts, and certainly the larger ones, have required considerable assistance from the land fund to make them happen. The prominent examples of Gigha, Eigg, Ulva, Portobello and Assynt all relied to a considerable extent on public funding. All these decisions involve a policy choice. Is it better to spend money acquiring a piece of Scotland for the community of that area, or could the same money be used for refurbishing a school? Also, once the community are owners, sustainable management and generating revenue without going back to the taxpayer are not automatically easier than for the previous owner.

3. Legal uncertainties. Land reform is trying to do two things: changing the *rules*, and also trying to encourage different approaches in the *practice* of people who use the land. In recent legislation, there is a tendency to make general statements on rights which the people are to enjoy, without much detail on what can be done to assert these in practical situations. General statements of rights, when put into legislation, do not make it easy for a lawyer to advise a client, public or private, on what they can actually do in the real world. This lack of clarity does not help a court in making decisions, and there is a lack of that specification which most of us were taught was necessary in something called "law". People are entitled to know what the rules are.

4. Governance. While it is clear that much if not most community based land management has been beneficial, or has at least the potential to be beneficial to the community it serves, there are examples where the quality of governance can only be described as weak and subject to local currents of opinion. Back in the 18th century, town councils controlled considerable assets and your prospects of getting a deal with "the town" went up substantially if you were a friend of the provost or the bailies. Inevitably, the same risk applies in more modern community bodies, where "changes of regime" or mere inefficiency have resulted in unfairness to others. "The community" is at present little regulated and there is little recourse against what those in charge may do, but a wider collaboration, as envisaged in the intended community land partnerships, will be part of the way forward.

Land reform is old hat!

We should remember that a major part of the history of the law in Scotland is a succession of changes to the way in which land, such a major asset, is owned or managed. Consider the Leases Act 1449, before which there was no real right in a lease; and the abolition of the heritable jurisdictions in 1747 after the '45, which was a drastic bit of land reform on any view. Although not so perceived at the time, the transfer of value which the development of the crofting legislative structures has brought about has been immense.

Consider also the Agricultural Holdings (Scotland) Act 1949. The farm tenants, who had helped keep the country fed during the U-boat campaign of World War 2, were given security of tenure. The same can be said of the Town and Country Planning Act in 1947 and the abolition of future feuduties in 1974. All these interventions in the way land is owned and used were thought to be a big deal in their day, but are now part of the furniture.

We are probably too close to the current phase of land reform to see just what changes may flow from the recent efforts to promote it, but nobody should be in any doubt that the suggestions of the Land Commission, if carried into effect as policy, would mean that our successors in the profession will be living in a rather different Scotland from the present, never mind 25 years ago. Keep watching that space!

Mike Blair, partner, Land & Rural Business, Gillespie Macandrew

denovo

Why your firm should outsource your cashroom

Bring your systems up to date without a big upfront cost

Businesses are tightening their belts and looking to outsource – creating smart solutions to unlock new levels of efficiency in their practices. It is now not enough to continue operating in an antiquated way. It's all about convenience and minimising the slack in every area of your practice. And with remote working going nowhere fast, you need to be sure you are prepared with the right systems and support in place.

Focus on what you want to do

SME legal practices tell me that for the most part they still utilise outdated and ineffective tools for their legal accounting needs. If you fall into this category, you could be putting your firm at a significant disadvantage.

Whether you are stuck in the stone age of paper systems, using accounting software that is not tailored to your practice, or spending tens of thousands of pounds on salaries for in-house cashiers, now is the time to make the change to effective, streamlined, flexible and compliant ways of working. If you put your trust in others to run your cashiering, management accounts and payroll functions, you can focus on what you want to be doing – feeing and running your business.

Diane Ireland, legal process engineer at Inksters Solicitors, started using our Outsourced Cashroom Services a few years ago and had this to say: "It was a big decision for us to outsource our cashroom function. We have our own in-house cashier, but with Denovo Cashroom Services supplementing this function we can deliver day-to-day financial transactions much more efficiently. This has allowed us to free up time for our cashier to focus on more corporate financial tasks. We no longer worry about holidays/absences. Working with Denovo Cashroom Services ensures the continual running of this essential function. Denovo Cashroom Services provide us flexible, professional and knowledgeable services with a real friendly and personal touch, delivering a compliant finance function."

The obvious benefits

The major reason law firms opt to outsource is because it really does save time and money. Take cashiering, for example. By contracting with a third-party provider, you get instant access to a team of expert SOLAS qualified staff who interact with you and your clients using the latest technology and techniques. Your clients get better care, your outsourced cashiers resolve issues faster, and you don't need to deal with high turnover or infrastructure costs. Everybody wins!

The expertise you need

A move to outsource is akin to asking for a helping hand – a big leap for some legal professionals, I know! Plenty of smaller firms outsource not because they want to cut their overhead or they can't find qualified staff, but because they simply don't have the in-house expertise. In growth situations they don't have time to develop it either. In that case, seeking out a third-party provider is perhaps the smartest move a firm can make.

Supporting growth

While growth is usually a good thing, a business can experience growing pains. Managing growth is often difficult, and your firm might struggle to keep up with demand. Teaming up with a third-party provider is the best thing you can do. Again, look at cashiering as an example. You might have some great cashiers already in place, but they're suddenly overwhelmed by the volume, and you just keep growing.

An outsourced cashroom adds a team of highly trained people to supplement your existing team. They exist to support you if your cashier has moved on or retired, if you are starting up a new firm, or you are just looking for a way to streamline your cashroom. Having a fully qualified team behind you can help run your day-to-day accounts functions while making sure that your firm is practising within the Law Society of Scotland's accounting rules, and provide you with management information and management accounts allowing you to focus on growing your business.

Access to technology

Infrastructure cost is another major concern when it comes to in-house services. Businesses that outsource HR might choose to do so because implementing a new payroll system is expensive. A firm that sends cashiering out of house might be doing so because the Law Society of Scotland regulates how firms manage clients' money. The solicitors' accounts rules are complex and technical, but mandatory. A legal cashiering service takes away that worry, as your third-party provider ensures compliance with the accounts rules. They have already invested in the technology needed to deliver the services you seek – and staff are already trained to use it.

Remember... outsourcing helps you get the focus back on your core business and control costs at the same time.

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Scottish lawyers... is this you?

Running a law firm can be messy and demanding, especially these days. Your “must do” list seems never ending. At Denovo we’re all about creating smart solutions to unlock new levels of efficiency in your practice.

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Success: the hidden price

How do we measure success in law practices? Do we tolerate behaviours by those we regard as successful, that impact negatively on others? Performance coach Graeme Thompson believes that achieving our best involves something different

Can there be anything better than standing on top of the Olympic or Paralympic podium, having the medal you have desired for so long, put around your neck? And then the public adoration at your achievement?

It has got to be a perfect scenario, hasn't it? That actual moment, and what follows. However, it does not guarantee or sustain you forever. For some athletes it disappears very quickly and turns into a challenging emotional and mental situation.

Achieving partner status in a legal firm could be considered an equivalent podium moment. You have worked hard for a long time to be awarded this title. Now you have enhanced status, professionally and even socially. You have arrived.

In both scenarios, has the journey prior to achieving the goal been worth it? This is a question that many ask.

In the last 20 years, Team GB at both the Olympics and Paralympics has had an incredible rise of medal success. London 2012 was a fantastic event for the host nation. It then went on to an unprecedented achievement at Rio 2016: Great Britain became the first host nation to achieve more medals at the following Olympics. Unfortunately, due to COVID we do not know yet what the 2020/21 Olympics will bring, but since Rio, troubling issues have been uncovered in numerous sports.

UK Sport oversaw the investment into all the sports and was there to monitor progress, including standards and ethics. It was overseer of this elite sporting system. Its mantra was "no compromise". Everything was about medals. It was the only currency of success.

Recent investigations, such as into British cycling, canoeing and a present one in gymnastics, have shown some very poor behaviour by coaches. These include coaches who led athletes to gold medals, who were revered by the system and bestowed with honours. Bullying, fat shaming and even an accusation of sex for selection are all examples of this poor behaviour.

Success in law: a human cost?

Achieving fee income levels is often a sole focus of success for lawyers. "What gets measured, gets done" – no compromise in action again. So what behaviours are ignored, accepted, or even worse, promoted in law firms because they contribute to this sole focus?

Are there practices and traditions in terms of behaviours going unchallenged because "it is the way we have always done things" to be successful? Or although everyone knows certain behaviour is inappropriate, if the offender is the star fees performer and the clients like them, that somehow seems to make it OK? Same with a gold medal winning coach, who is set to deliver again with an athlete at the next Games.

So how are the leadership, or you as the leadership, in your legal firm seeking to ensure this culture is not prevalent? It is a difficult challenge, but not an impossible one. Acknowledging issues is the starting point. That can be uncomfortable and unpopular, but that's part of effective leadership. Then start looking at the causes and effects.

I attended a recent international lawyers' webinar, where the partner development coach at Pinsent Masons explained how that firm had reduced its profit targets because the singular focus on fees was having a detrimental effect on the mental and emotional status of the staff. She had been at the forefront of these negotiations with the firm's leaders, evidencing to them the longer term negative impact of trying to maintain annual record breaking profit levels. There was a human cost to this.

And there is real evidence of the human cost. In the United States, in 2016 the American Bar Association, together with the Hazelden Betty Ford Foundation, in a study of attorneys (bit.ly/37ZVFHi) identified significant mental health concerns in the legal profession. Of the attorneys surveyed, 28% reported experiencing symptoms of depression, 19% reported symptoms of anxiety, 23% experienced symptoms of stress and 21% qualified as problem drinkers.

What makes us peak?

Change does not only come from the top. The millennial generation, who account for 25% of the world's population, are different from previous ones. JP Box in his book *The Millennial Lawyer: How Your Firm Can Motivate and Retain Young Associates*, identifies that while Generation Xers and Boomers are comfortable finding activities outside of work to give back to good causes, charities and communities, millennials believe that work should include both making a living and making the world a better place. They want more for their work to be part of a cause or a social good. They will look at work-life blend rather than work-life balance.

This combines with the fact that the number one complaint about bad bosses is that they do not take any interest in the whole person and purely consider their work activity. When I worked with athletes, to understand what motivated and affected their performance, I needed to know about their whole life. They were a person first and an athlete second. Often the reasons for less than expected competition results lay outwith the competition and the training arena.

For those with strong professional ambition, be they lawyer or athlete, the self-pressure to compete and achieve is immense. Much of it is innate within them. These are double edged characteristics; in that they make the individual successful but they can have damaging effects. The endless pursuit of perfection and ambition is like that. The individual's surrounding organisation and culture should be seeking to help them cope with these personnel characteristics. The concern for these types of people is that if their company or profession promotes, allows, or ignores the negative traits, those traits will only become more dangerous in their impact on the individual.

"When I worked with athletes, I needed to know about their whole life. They were a person first and an athlete second"

Be it the "last to leave the office" culture, or who can attend most network events of a week's evening, these have become the races people want to run. How about taking the view that if someone can do their job in regular hours, they must be the most effective person in the office?

People need help with finding balance in their work-life blend. Balance is underrated as a status to be in, probably because it sounds like having to make compromises. It is not. It is challenging to balance the right mixture of demands on you. It requires real ability to find it. It needs real commitment to be sustained. Most importantly, it can bring long term positive outcomes for people and businesses alike. Suppose, for example, staff turnover rates, caused by some of the issues identified by the 2016 American Bar Association study, were reduced and less time and money could be spent on having to recruit.

Know yourself, manage yourself

On a personal level, when I have been working with such athletes, and recently with lawyers, support is needed to raise their awareness of their own values and beliefs. That includes identifying their fears and challenging their assumptions. This leads to a heightened understanding about themselves and their ability to know what impacts on them emotionally and mentally. The final stage is self-management, which is allowing someone to have more options on their future choices and behaviour because they understand and manage better the situations they encounter. This type of coaching is valuable for people at all stages of their career. As I said earlier, for some athletes, after winning their medal is when they need most help. Earlier interventions might have prepared them better for that moment.

It is still right to set your sights on future high targets, and they can bring elation, satisfaction, and enhanced futures. However, when setting them and whilst on that journey, make well informed decisions, through strong self-awareness of your own personal values and behaviours along the way. Remember that 80% of what people remember about us, is how we made them feel, not what status we held.

Also, critically recognise the impact on you, and all other aspects of your life, of the journey you choose. Whatever the system, or the profession, seems to provide or even impose as the way to do things, there are always choices. They remain your choices and nobody, however hard it feels at times, can take that away from you.

Graeme Thompson has 20 years' experience in elite sport, having led performance programmes in rugby league, water polo and curling/wheelchair curling. He also has 20 years' boardroom experience including chairing the world governing body of rugby league. He is now an executive coach, working across both business and sport.

If you would like to discuss any issues highlighted in this article, you can contact Graeme Thompson confidentially at horizons.consulting@outlook.com.

Graeme Thompson

Hey Legal: creating a community in a time of crisis

Launched a year ago to provide online CPD and a community platform for Scottish lawyers, Hey Legal has responded to the COVID-19 crisis by reaching out to support, and entertain, the profession

In a year like no other, a sense of community has never been more important. However, coronavirus presents a unique challenge to our community, one which requires a collaborative, cooperative and digital approach. We are fortunate to be part of a profession that strives to be collegiate, innovative and adaptive – one which, in times of crisis, endures. One response to the coronavirus crisis put community above all else, creating a digital platform for Scottish lawyers to come together to learn, stay connected and laugh.

Hey Legal launched in January 2020, with the aim to create smart learning and digital content for Scottish lawyers. Its vision was a digital library of content that lawyers would access at times that suited them – waiting at court, commuting, at the gym, on a walk or at home. The business model was similar to Netflix, a valuable monthly subscription allowing unlimited access to a growing content library. The Hey Legal mission states: "We aim to inspire new ideas and thinking in Scottish law firms. We want to reimagine learning for Scottish lawyers. Hey Legal is designed to change the status quo from doing only the minimal required CPD hours, to participating in engaged daily learning through choice."

The thinking was that, by making learning easy and enjoyable, lawyers would learn much more and be able to help clients more. The focus was on three areas: black letter law, wellbeing, and business development, as for lawyers to prosper they need all these aspects to be working well.

"The focus was on black letter law, wellbeing and business development, as for lawyers to prosper they need these all to be working well"

Response to lockdown

As lockdown began, Hey Legal decided to remove its subscription element and make all of its content free during lockdown. The thinking was that lawyers who were suddenly at home would benefit from the content already created, and access for as many people as possible would be a good thing. The response was staggering, with hundreds of accounts being opened over the first few weeks from across the Scottish legal landscape, and a community now at around 3,000-plus across its various platforms. In unprecedented times the business model took a back seat; the engagement showed this to have been a warmly received initiative.

Coronavirus essentials

When lockdown came into force in Scotland, it presented many challenges for lawyers in terms of working methods and getting new clients. Recognising the difficulty, and even panic, experienced by the profession, Hey Legal sought to create resources that could assist. From advice on emergency SLAB payments, working remotely, wellbeing strategies, to updates about licensing and the courts, Hey Legal became a platform for those in the know to share their knowledge.

The Hey Legal Quiz

To provide some lighthearted entertainment during lockdown, Hey Legal began running the Hey Legal Quiz. The quiz is an interview of 20 questions with some of Scotland's most notable legal figures, including Donald Findlay QC, Lady Rae, Lord Matthews, Dean of Faculty Roddy Dunlop QC, and Keith Stewart QC, the newly appointed Advocate General for Scotland. The quiz is unique as it asks them to consider not only their life in the law but their personal lives too. Edith Forrest, advocate who created and hosts the Hey Legal Quiz said: "Every time I speak to colleagues or go to court, somebody is asking who my next guest is. So, it has proved to be a highly successful project in lockdown and beyond."

The quiz, on the Hey Legal YouTube channel, has been popular not only with the legal profession, but also with the public and the press. Why? It provides an honest and sometimes vulnerable insight into what is often a guarded and mysterious profession. It also provides learning but doesn't at all feel like work.

What next?

Having been in operation for just a year, the small and agile team at Hey Legal are just getting started. A news section has been added and the team have also been running virtual conferences.

Ally Thomson, founder of Hey Legal (pictured), said: "2020 has been a year like no other, especially in terms of launching a business. We have kept our core content free thus far and established a place in the Scottish legal sector, and we will now look to build out our business model with some paid for events and memberships. We are indebted to all the contributors who have engaged with us. We are kicking off the new year with our 'Shape Your Success in 2021 Summit', with the Lord President, Lord Carloway providing the keynote introductory talk and some excellent expert speakers lined up. The aim is to help attendees get a plan for the year ahead."

To create a free Hey Legal account, visit heylegal.co.uk and to contribute your knowledge to Hey Legal, please email hey@heylegal.co.uk

Who has the final word?

Issues relating to appeals have featured strongly in recent civil procedure decisions, as this month's roundup shows, as well as points on expenses and a refusal of amendment

Civil Court

LINDSAY FOULIS, SHERIFF AT PERTH

Appeals

Successfully appealing against a judgment in circumstances in which the focus of the attack is the determination of issues of credibility and reliability by the judge at first instance is a difficult task. The court at first instance has seen the witnesses and thus is accepted to be in a far better position to assess these issues. Accordingly the observations by Lord President Carloway in *Woodhouse v Lochs and Glens (Transport)* [2020] CSIH 67 (30 October 2020) are worth noting.

The Lord President observed that an appellate court had to bear in mind the limitations of the appeal process, which was narrowly focused on particular issues rather than the evidence as a whole. However, he continued, when an appeal court is not reviewing primary facts but inferences from these facts, the court can more easily reverse the first instance conclusion, especially one which did not involve credibility and reliability. This was particularly the case if the matter to be reviewed is the application of the law to facts, whether primary or inferential. In such a situation, the larger appellate court can be beneficial in playing a significant part in arriving at the correct decision. That court, when engaging in the intellectual process of applying the law to the facts, or drawing inferences from primary facts, may be more objective and less influenced by perception or sympathy for a witness.

The court also reiterated that *res ipsa loquitur* was not a legal principle but a presumption of facts dependent on the circumstances of each case. If it applied, the defender was required to demonstrate that the accident occurred without fault on his part. It was insufficient to give a possible alternative explanation consistent with no negligence on his part. The defender required to establish facts from which it was not possible to draw an inference of negligence.

The Lord President further stated that the fact that lower speed improves vehicle handling, especially in cross winds, did not require expert evidence. It was a matter of ordinary everyday experience.

In *SCA v MMA* [2020] CSIH 66 (27 October 2020) the appellant made a submission for the first time in the appellate court. The Lord Ordinary had not been invited to make a calculation on the basis of inferences drawn from one of the defender's witnesses. As a result, there was no error on the part of the Lord Ordinary and thus nothing to warrant the Inner House upsetting a careful assessment made at first instance. If effect had been given to the submission, there were consequences which had not been discussed in evidence. The court was accordingly not in a position to unravel the Lord Ordinary's decision and identify appropriate alternatives.

In *Finlayson v Munro* [2020] SAC (Civ) 18 (3 December 2020) Appeal Sheriff Holligan observed that expert evidence is not evidence of primary fact and the appellate court can take a contrary view. Further, when no findings in fact have been made by the judge at first instance, the appellate court can review the evidence and make its own findings.

Sheriff Principal Murray in *Alam v Ibrahim* [2020] SAC (Civ) 20 (1 December 2020) noted that, in general, where a fact finder did not clearly express and provide a brief explanation for their rejection of evidence, the door was opened to a potential appeal. In assessing whether such an acceptance or rejection of evidence was justified, the appeal court, while unable to observe the demeanour of a witness, could analyse the transcript of the evidence to determine whether there was a basis for the decision of the court at first instance, as the transcript provided details of the differences and areas of conflict in the evidence.

Sheriff Principal Turnbull also observed that while s 116(2) of the Courts Reform (Scotland) Act 2014 allowed prior decisions to be open to review in the appeal, failure to appeal a procedural determination in time might be deemed to be an acceptance of the subsequent procedure, as it was not possible to return to the point subject to criticism.

Appeals after extract

The general rule on this matter is that the issue of an extract bars any appeal unless there has been some impropriety in the issue of the extract. Two recent decisions of the Sheriff Appeal Court have been given on this point. In *Rivers Leasing Ltd v Patrick* [2020] SAC (Civ) 19 (20 February 2018) Sheriff Principal Turnbull allowed an appeal to be received when a note of appeal had been sent in circumstances in which it could be reasonably anticipated that the note would be received on time, but inexplicably had been received 12 days later than expected, even allowing for it being sent on 14 December.

In *The Parachute Regiment Charity v Hay* [2020] SAC (Civ) 23 (30 August 2019) Sheriff Principal Stephen refused such an application. That decision in the circumstances may well not come as any great surprise. However the observations by the President of the court should act as a warning to practitioners. A final judgment in terms of s 136 of the 2014 Act had been pronounced dated 16 May 2019. An appeal had to be taken within 28 days. The note of appeal was lodged on 10 July. The interlocutor dated 16 May 2019 was extracted the day before. It would appear that on 17 May the sheriff had directed the clerk to contact parties to confirm whether interest was sought and if so from what date. The appellant responded on 6 June that interest should run from the date of decree. Her agents then inquired of the sheriff clerk when the interlocutor would be issued. Thereafter the pursuers intimated an account of expenses which also detailed the interlocutor dated 16 May. Further email correspondence indicated the appellant's dissatisfaction that the interlocutor bore the date 16 May as opposed to 6 June 2019, and that the defender intended to appeal. Senior counsel who had conducted the proceedings was instructed to draft the note of appeal. This was lodged the day after the interlocutor was extracted.

Sheriff Principal Stephen rejected any suggestion that the date of the interlocutor was erroneous. What took place on 16 May clearly constituted the pronouncing of a final judgment. It was unfortunate that the issue of that interlocutor had been delayed, which significantly reduced the period for lodging a note of appeal. However, an appeal could still have been taken prior to the issue of the extract and in light of what had taken place a late appeal would likely have been allowed. This should have been addressed as a matter of urgency. The agent could have drafted grounds

Update

Since the last article, *Friel v Brown* (March article) has been reported at 2020 SCLR 723, *Transform Schools (North Lanarkshire) Ltd v Balfour Beatty Construction Ltd* (March) at 2020 SCLR 707, and *Promontoria (Henrico) Ltd v Friel* (March) at 2020 SCLR 771.

of appeal without instructing senior counsel to do so. The grounds could have been in general terms but could subsequently have been amended. In light of the intended basis for the appeal, these grounds could have been prepared before 16 May as that interlocutor simply started the clock ticking for the purposes of an appeal. Email communication with the sheriff clerk's office might not have been answered, but the appellant's agent could have checked the position regarding the interlocutor courtesy of ICMS. Agents had a duty to obtain and check an interlocutor for its accuracy, particularly if crucial. It was for agents to be au fait with appellate procedure rather than rely on the assistance of sheriff clerks. These matters were the responsibility of the agents.

I may be wrong, but I suspect practitioners reading this might identify with certain aspects which were the subject of criticism. As they say, "You've been telt!"

Amendment

The decision of Sheriff Wade in an otherwise unremarkable reparation claim arising from a road traffic accident is worthy of comment. In *ER v CD* [2020] PER 46 (2 September 2020) the pursuer moved to have a minute of amendment received in very close proximity of the proof. At a pre-proof hearing a few weeks earlier, there was no suggestion of the prospect of amendment. The action had been in dependence for approximately a year with no hint of the matters now raised in the proposed amendment.

One of the factors which Sheriff Wade founded on in refusing the amendment was that despite inquiry on the part of the defender as to the possibility of amendment, there had been no indication that such was to be forthcoming. It is suggested that at a pre-proof hearing, if a party has a feeling that an amendment may be forthcoming in due course, the necessary inquiry should be made. If the answer is in the negative, it may strengthen a party's hand in opposing any subsequent amendment.

In this case, the defender also sought sanction for the employment of junior counsel. This was granted as the defender was an anxious individual who had complained to his insurers and advisers as to the lack of transparency on the part of the pursuer. The independence of counsel gave additional support and management.

Expenses

As a point of reference the decision of Lord Tyre in *CJC Media (Scotland) v Sinclair* [2020] CSOH 93 (20 November 2020) is a useful one, as it sets out clearly the distinction between the roles of the judge and auditor in relation to the issue of expenses. The former makes the award of expenses and in reaching that decision exercises judicial discretion. That discretion includes issues such as modification, and the scale by which expenses are to be taxed. Accordingly such issues require to be argued before the judge when expenses are sought. Once that decision is made, the matter is remitted to the auditor when the account is lodged.

The auditor has no power to reconsider matters on which the court has exercised discretion. Rather, the role of the auditor is to determine what expenses were incurred in the reasonable conduct of proceedings in the proper manner. In the exercise of that function the auditor can refuse to allow expenses incurred as a result of fault or error on the part of the entitled party, and expenses incurred in respect of part of the process for which that party was unsuccessful.

Once the auditor has taxed the account, an objection taken against the decision of the auditor will only succeed if the auditor has misdirected himself, taken account of irrelevant considerations or ignored relevant considerations, or misunderstood a matter before him. The objections are further limited to specific matters in the auditor's report.

In *Moles v Cook* [2020] EDIN 48 (15 December 2019) the issue was whether the defenders could pass on to the pursuer their liability for the expenses of the third party brought into the action by the defenders. Sheriff McGowan recognised that as a matter of generality, the liability of an unsuccessful pursuer is normally limited to the persons convened as defenders. However, there were exceptions to this general principle in circumstances in which substantial justice dictated that the pursuer bear all or a part of the defender's liability to a third party. Such a circumstance would be unreasonable conduct on the part of the pursuer.

Sheriff McGowan considered that there had been such conduct in that there had been no effort to investigate issues which had been raised clearly in the defenders' pleadings. The matter had been allowed to proceed to proof with these difficulties still clearly manifest. Sheriff McGowan was prepared to pronounce an interlocutor finding the pursuer liable to the defenders in a sum equivalent to the latter's liability in expenses to the third party. Any difficulty caused by this interlocutor could be addressed by the defenders providing information to the pursuer concerning the third party's account of expenses and seeking their input in any agreement reached. The pursuer would also have title and interest to attend any taxation of the third party's account of expenses and make any appropriate submission.

Licensing

AUDREY JUNNER, PARTNER,
MILLER SAMUEL HILL BROWN

Licensing lawyers are no strangers to changes in the law in their field. Since the Licensing (Scotland) Act 2005 was introduced there have been three additional pieces of primary legislation and over 30 regulations to absorb. However, 2020 took things to a very different place.

The Coronavirus (Scotland) Act 2020 was a statute like none other, passed to ensure licensing board business could continue in the grips of a pandemic, with new timeframes to protect licences. There followed a raft of regulations designed to suppress the virus – but the impact of their controls was, and continues to be, catastrophic for the licensed trade.

Quite apart from closure and partial reopening, we have had a music ban, the 10pm curfew, restrictions on gaming machines, and mandatory collection of customers' contact details. Face coverings became mandatory. There were the infamous café regulations, the Strategic Framework, and (to date) 10 versions of regulations from the relentless level reviews. With these regulations came guidance, and with guidance came confusion, local interpretations and a legal status that was at times impossible to pin down. Some of those regulations are now the subject of legal proceedings which question their basis in law and their proportionality.

While the focus for many licensing solicitors in 2020 was squarely on interpreting this continually evolving legislative landscape and supporting clients through the crisis, those in local authorities have also had other matters to attend to, as even in a pandemic licensing does not stand still.

Theatre licensing

As of 27 January 2021, the Theatres Act 1968, which provided a licensing regime for premises used for the public performance of plays, will be repealed. Instead, as a result of an amendment to the Civic Government (Scotland) Act 1982 brought into force by s 74 of the Air Weapons and Licensing (Scotland) Act 2015, a local authority can resolve under s 9 to license theatres under its public entertainment licensing (PEL) regime. The licensing of theatres is therefore no longer mandatory, and after the end of the month in some parts of the country will be an unregulated activity.

Some local authorities including Edinburgh did take the opportunity in 2020 and resolved to include theatres under their PEL regime. Others already had plays listed as an activity within their resolution, so that the requirement to hold a PEL automatically applies on the repeal of the 1968 Act. Notably, many theatres also

hold premises licences under the Licensing (Scotland) Act 2005 so will continue to be exempt for that reason.

This shift in approach has not been widely publicised, so it is not clear whether all theatres were aware of the changes, which impact their very ability to perform the work which is at the core of their operation. With theatres sadly closed under Scotland's Strategic Framework until they enter level 1, the smooth transition between the two regimes becomes a less pressing issue, but there will come a time that theatres are no longer dark. The show must go on and it must be properly licensed.

Short term lets (STLs)

The 1982 Act is set to be expanded in other ways this year, as it will also be the vehicle used to regulate short term lets (STLs). Unlike theatres, the licensing of STLs will be mandatory; however the local authority will have discretion to designate planning control areas. Within those areas planning permission for a material change of use would always be required for a dwellinghouse to operate as a short term let; otherwise the necessity for planning consent would be determined on a case by case basis.

The Government has determined that it will follow its original timetables on STLs, despite the impact of COVID-19. The regulations establishing the system will be in place by April 2021. Each local authority must have a live system for accepting applications in place by 1 April 2022, all hosts must apply for a licence by 1 April 2023 and that application must be determined and licence granted by 1 April 2024.

Impact of Brexit

The small matter of exiting from Europe has many practical impacts on the licensed trade, critically the effect on foreign workers within the industry, but in legislative terms there is only one piece of relevant licensing legislation. The Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019 amend ss 102 (sale of alcohol to a child or young person) and 108 (delivery of alcohol by or to a child or young person) to include a UK driving licence as an acceptable form of identification. This does not replace the reference to a European Driving Licence but is in addition to it. Licence holders can continue to accept the documents as before, and this minor but important amendment ensures that the law keeps up with the UK's new status. Originally this was due to come into force on exit day, but this has since been amended by virtue of the EU (Withdrawal Agreement) Act 2020 to "IP Completion Day", which was 31 December 2020.

Planning

ALASTAIR McKIE
PARTNER, ANDERSON STRATHERN LLP

Section 37 of the Planning (Scotland) Act 2019 makes some significant and helpful changes to the modification and discharge of planning obligations (s 75 agreements). It came into force on 18 November 2020, through the Planning (Scotland) Act 2019 (Commencement No 5 and Saving, Transitional and Consequential Provisions) Regulations 2020. Section 37 amends s 75A and s 75B of the Town and Country Planning (Scotland) Act 1997, which address the modification and discharge of planning obligations and the appeal regime.

Until 18 November 2020, applications to discharge or modify a planning obligation had to be made by way of a formal application under s 75A of the 1997 Act (not dissimilar in many respects to a planning application), with a requirement to notify interested parties and provide them with an opportunity to respond and participate in the decision and any appeal.

Whilst this process was helpful in providing an opportunity for any party (against whom the obligation is enforceable) to revisit the terms of a planning obligation, it was clearly a matter of concern for planning authorities, as these obligations are the principal legal mechanisms that control the delivery of developer contributions towards necessary transport, educational and social infrastructure and affordable housing. A planning obligation is registered against the title of the development and is usually binding on all landowners in relation to that title. Solicitors will require to check the terms of a planning obligation particularly when acting for a purchaser of land affected by a planning obligation.

Prior to 18 November 2020, a planning authority to whom a s 75A application was made could only determine that the planning obligation was to continue without modification, was to be discharged, or was to have effect subject to the modifications specified in the application. Section 75B provided for a right of appeal against a decision (or deemed refusal by a planning authority) to the Scottish ministers – whose decision-making is normally delegated to a reporter.

Two ways instead of one

The amendments by s 37 of the 2019 Act have a number of important effects, principally providing greater flexibility combined with a number of safeguards to protect applicants and non-applicants (who may not participate in the process but will nevertheless be directly affected).

As from 18 November 2020 there are two separate methods (rather than the single s 75A route) of modifying or discharging a planning obligation. Section 75A (as amended from 18 November) provides that a modification or discharge of a planning obligation may be effected by means of either:

- an agreement in writing among the planning authority and all of the persons against whom the planning obligation is enforceable (s 75A(1)(a)); or
- an application under s 75A, or following thereon an appeal to the Scottish ministers (ss 75A(1)(b) and 75B).

Modification by agreement

Provided all the parties (and that means the planning authority and all of the parties against whom the planning obligation is enforceable) are in agreement, it may be cost effective and efficient to proceed with an amending agreement or discharge rather than a formal application under s 75A(1)(b). Amending agreements or discharges do not take effect until they are recorded or registered. There is no appeal available should parties fail to agree, and in such circumstances the applicant would have to make an application to the planning authority under s 75A(1)(b).

Application to modify or discharge

There are important qualifications and safeguards imposed for "non-applicants" in relation to the terms of a planning authority's decision and an appeal decision of Scottish ministers. The authority, and ministers, are prohibited from modifying a planning obligation to put or increase a burden on any non-applicant, unless they have obtained that person's consent before making the determination.

The authority, and ministers, are also enabled (subject to the prohibition above) to propose an alternative modification that was not expressed in the applicant's original application. Where they propose to discharge the planning obligation – despite that not being sought in the application – or to modify it in a way that is not sought in the application, they must obtain the applicant's consent before making the determination. Modifications or discharges do not take effect until they are recorded or registered.

Insolvency

ANDREW FOYLE, SOLICITOR ADVOCATE, JOINT HEAD OF LITIGATION (SCOTLAND), SHOOSMITHS

While there is no definition of a pre-pack administration in the insolvency legislation, the IPA's Statement of Insolvency Practice 16 (SIP16) defines it as "an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to

the appointment of an administrator and the administrator effects the sale immediately on, or shortly after, appointment".

About half of all pre-pack administrations involve a sale of the whole or a substantial part of the business in administration to a person connected with that business. Because pre-packs are, by definition, presented to creditors as a *fait accompli*, the potential for abuse of the process has long been a concern to government.

SIP16 already exists. It's aimed at ensuring insolvency practitioners don't find themselves subject to a conflict of interest. Nevertheless, the optics for creditors often give the appearance (warranted or not) of debtor companies escaping their liabilities and carrying on regardless. It was against this background that the Graham review was undertaken in 2014, resulting in the Small Business, Enterprise and Employment Act 2015. That Act gave powers to the Secretary of State to make provision (including for full prohibition) for the sale of a business to a connected person. That power was then effectively re-enacted as part of the Corporate Insolvency and Governance Act 2020. To date, it hasn't been used. However, the Government announced on 8 October its intention to apply such powers and has since published draft regulations.

Call in the evaluator

The draft regulations are to apply only to administrations commencing on or after the date that the regulations come into force. They apply only to a "substantial disposal" by an administrator to a "connected person" (as defined in para 60A of sched B1 to the Insolvency Act 1986). A "substantial disposal" is a "disposal, hiring out or sale to one or more connected persons during the period of 8 weeks, beginning with the day on which the company enters administration". It must be in relation to the whole or a substantial part of the company's business or assets. What is considered "a substantial part" is a matter for the administrator's opinion. Importantly, the definition includes disposals effected in a series of transactions.

Where the regulations apply, the administrator has two routes to effect a pre-pack administration. The first is to obtain a decision of the creditors of the company under para 51 or 52 of sched B1. Given that many pre-packs are driven by a desire for secrecy and to prevent market speculation, it is unlikely this option will be widely adopted. The second route is for the administrator to obtain a report from a person known as the "evaluator".

The regulations contain a number of provisions regarding who can be an evaluator. Most importantly, the evaluator must be independent of the administrator and of the company. Their role is to examine the proposed transaction and to give either a "case made" opinion or a "case not made" opinion. The former is an opinion that the consideration or price provided for the relevant property and the grounds for the disposal to a connected person are reasonable in the circumstances. The latter is where the evaluator is not so satisfied.

Seen to be independent?

The regulations suggest that it is the connected person themselves who must obtain and provide the administrator with the report. Subsequently, the administrator must

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Corporate transparency

The UK Department for Business, Energy & Industrial Strategy (BEIS) and Companies House seek views on three topics related to their corporate transparency and register reform agenda. Separate consultations on powers of the registrar, implementing the ban on corporate directors, and improving the quality and value of financial information on the companies register are on gov.uk/government/consultations/ (launch date 9 December 2020).

Respond by 3 February via the respective web pages.

Police complaints and misconduct

Holyrood's Justice Subcommittee on Policing seeks views on the recommendations in Dame Elish Angiolini's final report on the Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing. See parliament.scot/parliamentarybusiness/CurrentCommittees/116658.aspx

Respond by 5 February via the above web page.

Conduct on public bodies

Scottish ministers welcome views on their "major rewrite" of the Councillors' Code of Conduct (see consult.gov.scot/housing-and-social-justice/the-councillors-code-of-conduct/), and separately on their Model Code of Conduct for members of devolved public bodies (see consult.gov.scot/public-bodies-unit/ethical-standards-in-public-life/).

Respond by 8 February via the respective web pages.

Regulating electricians

Anyone can call themselves an electrician, without the need for any qualifications or competency. The Government seeks views on whether regulation is required to give greater public protection and reduce the level of poor workmanship. See consult.gov.scot/energy-and-climate-change-directorate/a-consultation-on-the-regulation-of-electricians/

Respond by 12 February via the respective web pages.

National Planning Framework

The Government has set out its thinking on the issues in preparing Scotland's fourth National Planning Framework (NPF4), and seeks comments on the four key outcomes of net zero emissions, resilient communities, a "wellbeing economy", and "better, greener places". See consult.gov.scot/planning-architecture/national-planning-framework-position-statement/

Respond by 19 February via the above web page.

Restrictive covenants

BEIS seeks views on "options to reform post-termination non-compete clauses in contracts of employment". Possibilities include making clauses enforceable only when the employer provides compensation during the term of the clause, and making such clauses unenforceable. See www.gov.uk/government/consultations/measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment

Respond by 26 February via the above web page.

Animal welfare

The Government seeks views on recommendations by the Farm Animal Welfare Committee in its "Opinion on the Welfare of Animals during Transport" document. See consult.gov.scot/agriculture-and-rural-economy/farm-animal-welfare-committee-opinion-on-the-welfa/

Respond by 26 February via the above web page.

consider the report and make a decision on whether to proceed. Notably, the regulations do not prevent the administrator from proceeding with the transaction, even where the opinion is a "case not made" report. However, the administrator must, if they proceed with the disposal, provide a copy to every creditor (other than opted out creditors) of whose claim they are aware. If the transaction proceeded in the face of a "case not made" opinion, the administrators must give their reasons for proceeding. Copies of the report(s) must also be filed with Companies House (redacted for commercially sensitive information if required), together with the administrator's statement of proposals.

This independent scrutiny of the transaction may serve to improve creditor confidence in the process of administration, particularly when taken alongside the Government's stated aim of working with regulated professional bodies to strengthen SIP16. However, there is a risk that creditors' suspicions around the fairness of the process might shift to suspicion about the independence of the evaluator over time, especially if the same evaluator is seen in multiple insolvencies. Consequently, a truly independent evaluator is key to the success of the proposal.

Tax

CHRISTINE YUILL, PARTNER, AND ZITA DEMPSEY, SOLICITOR, PINSENT MASONS LLP

In July 2020, the Chancellor asked the Office of Tax Simplification (OTS) to carry out a review of capital gains tax (CGT), "to identify opportunities relating to administrative and technical issues as well as areas where the present rules can distort behaviour or do not meet their policy intent". The OTS published its first report on 11 November 2020 and made recommendations covering four areas: rates and boundaries; the annual exempt amount; reliefs; and capital transfers. This briefing will consider the first three areas. The second report will be published early in 2021 and will be more technical and administrative in nature.

The Government clearly needs a way of reclaiming the estimated £394 billion it will borrow this financial year to fight the COVID-19 crisis, and the OTS sets out how some of its recommendations could raise additional revenue. However, it is not certain that the recommendations will raise the amounts estimated. There is also some concern that the recommendations are inappropriate from a policy point of view, although it will be for the Government to decide what changes it takes forward.

CGT rates

The OTS report showed that, in the 2017-18 tax year, £8.3 billion of CGT was paid by 265,000 UK taxpayers, compared with £180 billion of income tax paid by 31.2 million taxpayers. This highlights the unsurprising fact that CGT is paid by relatively few taxpayers when compared with income tax, and that the average individual CGT tax liability is much higher than the average income tax liability.

These statistics lead to the OTS's first recommendation, that the Government should consider aligning CGT rates with income tax rates. This would prohibit often already wealthy individuals from taking advantage of methods of converting income into capital to benefit from a lower tax rate, and would also simplify the tax system. Aligning rates could, without a change in taxpayer behaviour, raise an additional £14 billion in CGT each year.

However, if the rates were aligned, there would likely be a change in taxpayer behaviour. The OTS itself recognised this; in particular the potential for taxpayers instead to hold their assets in companies, to benefit from what would be a lower rate of corporation tax. It is therefore unlikely that an alignment in rates would raise anywhere near the estimated £14 billion. Additionally, lower rates of CGT were originally introduced to encourage investment and reflect the fact that investments tend to carry more risk than income earned through employment, and so aligning rates may not be appropriate from a policy point of view.

Annual exempt amount

The current CGT annual exempt amount is £12,300, and the OTS highlighted that a high proportion of taxpayers are reporting gains that sit just below this threshold, arguing that individuals may be managing their gains so as to fall within the annual exempt amount. The OTS recommended that, if the purpose of the annual exempt amount is simply administrative (to reduce the number of people who are required to submit a CGT return), then it should be lowered to between £2,000 and £4,000. This would double the number of taxpayers required to pay CGT in any given year. However, this again assumes that taxpayer behaviour would not change, when it is likely that individuals would simply spread their gains across a greater number of years in order to stay below the threshold.

Business reliefs

The most popular CGT relief is business asset disposal relief (formerly entrepreneurs' relief) (BADR), which is targeted at company owner managers. This relief reduces the CGT payable on the disposal of business assets (including shares) to 10%. The OTS argued that the objective of BADR is to operate as an alternative to a pension when a business owner retires. If this is the case, the OTS recommended that the relief is amended to increase the minimum shareholding and holding period and to reintroduce a minimum age requirement.

However, this is not the only objective of BADR. The relief was also originally introduced to encourage investment, reinvestment and growth in UK businesses, which it cannot do if there is, for example, a minimum 10 year holding period for the asset.

The OTS's first report highlights some clear inconsistencies in the CGT regime, particularly in comparison to the income tax regime. However, not all the recommendations set out in the report are likely to fix the issues they are intended to address. It remains to be seen which recommendations the Government adopts, and all eyes are on the next Budget for an indication of the approach that will be taken.

Immigration

DARREN COX, SOLICITOR, LATTA & CO

The COVID-19 pandemic and the consequent lockdown restrictions have resulted in a substantial shift across the legal profession, both in the way that criminal and civil lawyers

conduct their day-to-day operations, and in the operation of the courts and tribunals. For immigration and asylum practitioners, there has been a marked increase of appeals, mainly those in the Upper Tribunal ("UT"), which deals with appeals from the First-tier Tribunal ("FTT"), being determined "on the papers" (on the basis of written submissions and without an oral hearing).

The basis for the increasing determination of appeals on the papers came from the President of the UT, Mr Justice Lane, in his Presidential Guidance Note No 1 2020. Part of that guidance note essentially laid out the circumstances in which decisions on some appeals might be made without an oral hearing being required. For any practitioners working in the immigration and asylum sphere, it has become very much commonplace throughout the pandemic for this to be the course adopted by the UT. The Joint Council for the Welfare of Immigrants ("JCWI") recently sought judicial review of the relevant part of the guidance note, namely paras 9-17, on the basis that it created an "overall paper norm" or, in other words, a presumption in favour of hearings being determined on the papers.

Overriding objective

Fordham J heard the case in the England & Wales High Court, the resultant judgment of which is *JCWI v President of the UT (IAC)* [2020] EWHC 3103 (Admin). The issue in the case was a relatively narrow one, given that counsel for the President accepted that if it was held that the guidance note created an overall paper norm, it therefore followed that the guidance was unlawful.

The learned judge determined this issue in the affirmative. Having regard to basic common law requirements, he held that the guidance note was unlawful as it directed judges to proceed on the basis that appeals should normally be decided on the papers rather than at remote hearings (something else which has become more common in the immigration and asylum sphere and looks to be here to stay for the foreseeable future). Fordham J held that this was because such basic common law requirements "inform the overriding objective of just and fair disposal, with which judges are duty-bound to comply".

On the point of fairness, Fordham J's judgment was particularly scathing insofar as it relates to the following part of the guidance note: "The fact that the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing to decide the relevant questions".

Fordham J considered this advice from President Lane to be both erroneous in law and capable of encouraging unlawful acts. It was considered that the guidance note unlawfully focused on complex and novel issues as justification for an oral hearing, by consequence failing to consider other relevant and important factors which might justify same.

Do it all again?

So, what next? The ramifications of the judgment are already beginning to be seen by practitioners. The consequence of Fordham J's decision and the resultant order was that the UT must bring to the attention of all appellants, whose UT substantive appeals (i.e. not permission to appeal applications which are routinely determined on the papers) were decided in favour of the Home Office since 23 March 2020, Fordham J's judgment, order and a statement: "if you have not taken legal advice on your position, you are strongly advised to do so now".

Furthermore, the part of the guidance note which was declared unlawful by Fordham J has now been withdrawn by the UT and a revised guidance note issued. It is clear that the number of affected appellants is potentially significant, given the guidance note was being applied in practice for a period of around eight months.

JCWI has now set up a helpline to assist those who have potentially been affected. The best method for challenging decisions reached on the basis of the unlawful guidance note remains to be seen. However, rule 43 of the Tribunal Procedure (Upper Tribunal Rules) 2008, para (2)(d) of which empowers the UT to set aside or remake a decision where "there has been some other procedural irregularity in the proceedings", would appear to apply. An alternative may be to appeal the decision to the Inner House (or the Court of Appeal in England & Wales).

What is certain is that the significant backlog of cases which the UT had sought to reduce is likely to grow further, with many of these cases being reopened and oral hearings having to take place.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Eric Robert Lumsden

A complaint was made by the Council of the Law Society of Scotland against Eric Robert Lumsden, Sneddon Morrison, Whitburn. The Tribunal found the respondent guilty of professional misconduct in respect that (a) he failed to advise his client he had been requested to give and had given undertakings to make two payments from her ledger totalling more than £70,000 to two third parties; and (b) he failed to make a required disclosure in terms of s 330 of the Proceeds of Crime Act 2002 and failed to advise the purchaser's Scottish solicitor regarding the contact with their client or make enquiries of the purchaser's Scottish solicitor regarding the source of their client's deposit. The Tribunal censured the respondent and fined him £1,000.

The transaction involved the sale of the property of the client, a distressed borrower, and the purchase by her of an interest in that property. It is never acceptable to pay a client's money to a third party without the written instruction of the client. Clients and the public must have confidence that solicitors will deal properly with their money. The importance of transparency when handling clients' money has been fundamental for many years. Paying off a purchaser's loan (particularly when acting for the seller) is very unusual and should have raised suspicion. Any payments to the purchaser ought to have been paid to her solicitor. The client's money was sent out without express authority of the client. The respondent took no steps to verify the purchaser's mandate. This created a risk for the client. There was a need for an informed instruction from her. This conduct was a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore constituted professional misconduct.

The respondent failed to make a required disclosure in terms of s 330. He failed to advise the purchaser's agent about his contact with the purchaser and did not make enquiries with them about the source of their client's deposit. The property investment club provided a mandate from the purchaser which bore to be signed by her. The respondent took no steps to verify this document. He was aware of apparent third party funding over and above that provided by the purchaser's lender. He ought in the circumstances to have disclosed this arrangement to the purchaser's solicitors and to SOCA. It was unclear whether the purchaser's lending bank was aware of the additional third party funding and source of purchase deposit. It seems likely that they were not. The respondent did not make the required disclosures to the purchaser's solicitors or SOCA, which was a significant error of judgment. Making these disclosures is essential in the prevention of money laundering. It is essential that the public can have confidence that the profession will adhere to anti-money laundering provisions which exist to protect society from criminal acts. The Tribunal considered the failure to make the disclosures to be a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore constituting professional misconduct.

Scotland's inner cities: is the landscape changing?

What do reducing requirements for commercial space post-COVID mean for property use in our city centres? Whether this is successfully managed will depend on local planning policy as well as the legal framework

Property/Planning

FRASER MITCHELL, PARTNER, PLANNING, AT SHOOSMITHS IN SCOTLAND

Step back a year, and who could have foreseen how COVID-19 would impact on society and the economy, including how and where people live and work? Scotland's city and town centres, which continue to see significant commercial and residential investment in developments like Haymarket and St James in Edinburgh and Osborne+Co's office development on Argyle Street in Glasgow, have not been immune from this shift.

Consequently, it is prudent to consider the extent to which the pandemic, and by association, demand for homeworking, will impact temporarily or permanently on how developers, investors, landlords and planning authorities view the inner city landscape.

Agents of change

There is much to consider in terms of how Scotland's planning system could react to the current (December 2020) and predicted decrease in inner city office and retail footfall.

According to the Fraser of Allander Institute (Scottish Business Monitor), which surveyed 500 companies, over 25% expect to reduce office space permanently. It's a sobering statistic, and one that may also reflect an anticipated rise in unemployment among Scotland's traditionally office-based professions. It also underlines that some form of home based working is here to stay.

The pandemic aside, other agents of change will continue to influence significantly the shape of the inner city landscape. With Scotland declaring a climate emergency (April 2019), hosting COP26, and announcing a target to be carbon net zero by 2045, there has never been a greater focus on the environment and identifying sustainable ways to live, work, and travel. Notably, the UK Government has signalled its commitment to ban all new petrol and diesel cars in the UK by 2030. With some local authorities already taking steps to create a more pedestrian and cycle friendly environment, there are already signs of a shift in terms of how society will function.

Moreover, city and town centres also continue to deal with the changing nature of retail. The rise in online shopping, fuelled in part by restrictions on movement imposed during the pandemic, has adversely impacted the high street and notable traditional high street names.

In this complex picture of policy, planning, legal, economic and social change, we must also consider the stark fact that just as Government seeks to alleviate a chronic shortage of housing, there are also constraints on supply of land. These too are factors in shifting the dial in how town and city centres are planned.

Undoubtedly, these factors will all greatly influence change within our inner city landscapes. However, to understand why they present both challenges and opportunities in a planning context, it is important to recall the traditional process by which major commercial and residential space in our cities is created.

The current planning landscape

Central to any development progressing is the legislation that applies in Scotland. Planning applications are subject to the "s 25 assessment", meaning they should be determined in accordance with the policies of the local development plan, unless material considerations indicate otherwise. Notably, any proposal is more likely to secure planning approval if it has policy support.

Interestingly, while the current planning framework attracts criticism for being slow and expensive, this same framework has appealed to institutional and overseas investors for over a decade. These parties have benefited from rental returns on their investment in major office infrastructure and, increasingly, in build to rent (BTR) developments in Scotland's cities.

Within this context, investors and landlords will have long lease agreements in place with tenants that may include hotels or a suite of companies within one office block. There will also be break clauses, though it is beyond the scope of this piece to consider the legal ramifications for investors and landlords if financially pressed tenants seek to terminate or renegotiate a lease. However, if in response to a sudden downturn in demand for their office space, a developer or investor wishes to repurpose or effect a change of use of their office development, it is important to consider the planning and policy ramifications.

Changing a building's use from a retail or office space to a residential model presents legal and planning issues, not least in requiring the applicant to gain planning permission. This inevitably incurs additional cost, possible delay, and no guarantee that approval will be secured. However, there is scope for optimism. Planning authorities are aware of the challenges facing

town and city centres, and some are proving more receptive to providing their policy support to permit alternative use.

For example, Glasgow City Council's City Centre Living Strategy seeks to double the city centre population by 2035. This signals a policy aspiration, and arguably a green light for developers to explore alternative uses for potentially redundant buildings. An enlightened outlook on policy will undoubtedly provide developers and investors with increased confidence that the planning authorities have a vision for their inner city areas that looks beyond the limits of traditional retail and office uses.

Differences in approach

In the above context, Scotland's position differs from England. South of the border, the planning system provides for permitted development rights that enable an existing office development to convert to a residential development *without* the need to seek planning permission. Fundamentally, this offers investors and developers a streamlined and flexible way in which building types for which there is currently no market can be repurposed to meet a market demand.

Additionally, in England, developments that come forward under permitted development rights are not required to comply with space standards or to provide affordable housing. These factors may seem an attractive proposition for Scotland's planning system.

However, there is a cost. In England, as space standards do not apply to residential developments under permitted development rights, some residential flats as small as just 90 square feet have been created in former office buildings! The same system has enabled flats to be created with only single aspect or internal windows, and in one notable case saw flats sharing the same corridor within the remaining office development. To be fair, the English system has provided some good quality housing through its process. However, the absence of rigorous scrutiny of proposals has also led to instances of poor quality development.

"In England ... some residential flats as small as just 90 square feet have been created in former office buildings!"

Consequently, I envisage little appetite for the Scottish Government to adopt a similar approach. For at the very heart of the Scottish planning system is the central tenet of place-making, whereby planning dictates that the appropriate development must be built in the right place.

2021 and beyond

It is January 2021, and in the year ahead I expect (and hope) the success of a COVID vaccine will be a gamechanger for society and the economy, though I suspect we may yet see further casualties in retail, and businesses further rationalising their office estate. In 2031, we may look back and recognise that the COVID pandemic simply served to accelerate the demand for a carbon friendly, mixed use model of office and residential development, with greater leisure and education space and a reduced retail offering.

In the months and years to come, I suspect landlords will increasingly consider whether vacant office buildings are better used as private rented developments (akin to BTR) for student accommodation, or even hotel use. For example, in inner city locations like Princes Street and George Street in Edinburgh, where the upper floors of street-front units are currently lying empty or used for storage, we may see applications to repurpose. Notably, any such successful developments would likely tip the value of these buildings on their head. For the principal value may be in residential (rented) use, with ground floor retail or leisure contributing little to the value proposition.

To support any such change of use, we will likely see planning authorities explore new policies designed to breathe life into ailing city and town centres. Developers may even seek a legislative framework similar to that in place in England.

Undoubtedly, significant challenges lie ahead to transform Scotland's inner city landscapes successfully, not least in deciding the very purpose of the high street. It is an emotive subject, particularly in a location like Edinburgh where the retail element is a key feature of the historic fabric of the city. That said, I sense a genuine will among planning authorities to overcome the considerable challenges, and ultimately to ensure that relevant sustainable development is at the forefront of future thinking. There is a precedent. Glasgow and its riverside are already very different to its heavy industry dominated past.

The key question is the extent to which the Scottish Government and planning authorities respond to calls for further changes in how our towns and cities are structured, and how investors react. The demand for space in inner city areas will not disappear, but the purpose of that space has changed, and will continue to change.

Unquestionably, the current pandemic has accelerated changes in how citizens live in and utilise their towns and cities, and in turn the actions of the working population and visitors will influence investor, developer and landlord decisions. We must now ensure that the legal framework and planning policy are in place to enable the right opportunities to come forward, redefining the shape of our urban landscape for the next 50 years.

Four to the fore: ILC's new faces

The In-house Lawyers' Committee's four new members introduce themselves, and tell of their aims for the ILC and the challenges of the coming year

In-house

IN-HOUSE LAWYERS' COMMITTEE

Brief introductions – tell us about your career path to date; how have you got to where you are now?

Hope Craig: I trained in private practice and I moved in-house not long after I qualified. I have been working at Heriot-Watt University since 2017.

Lynette Purves: After enjoying a varied traineeship with a full service commercial law firm, I worked as a commercial property lawyer in private practice for six happy years until it was time for a new challenge. Having experienced and thoroughly enjoyed in-house life through a couple of past secondments, my sights were set on moving in-house. As a renewable energy and climate enthusiast at heart, I was delighted to land my current role as UK legal counsel for European renewable energy company, ERG.

Anne Garness: I trained and initially worked in private practice. In 2001, I decided to make the move to the public sector, and spent 18 years at Angus Council where I was DPO and managed the property, contracts and information governance team. A year ago I felt it was time for a change and took a position in the Legal & Corporate Governance team at the Scottish Social Services Council, where I provide advice on information governance, contracts and the legislative framework underpinning the work of the SSSC.

Neil Campbell: I would describe my career path as long and winding but incredibly rewarding! I am currently a managing legal counsel in the Outsourcing, Technology & IP team at NatWest. Prior to NatWest, I spent six years in Sydney, working at one of Australia's largest law firms before moving to an in-house role with an Australian energy company. I studied law at Dundee University and my traineeship was with a sole partner firm. When I first qualified, I wasn't sure what I wanted to do. I joined a small in-house team in a software company, and it opened my eyes to the role of the in-house lawyer.

You all work for very different organisations, doing very different roles. What are some of the common themes that bring such a diverse group together?

NC: I think there are lots of common themes which unite us. For example, becoming truly customer focused and the need to develop the skills and behaviours which are necessary to become a successful in-house lawyer. The challenges and opportunities facing the legal profession apply as much to in-house as to private practice. For example, new legal service providers entering the market; the potential for technology to disrupt the traditional role of the lawyer; concerns about wellbeing, diversity and inclusion; and the increasing pressure from clients to do "more for less".

HC: Despite in-house lawyers working in a wide variety of sectors, our roles all involve promoting the needs and strategies of the organisations in which we work, whilst also adhering to the professional standards and ethical obligations that lawyers must abide by. An in-house legal team is just one piece of an organisation's jigsaw; an in-house lawyer must be able to work collaboratively with colleagues from various departments to deliver results.

"I believe that our ILC has an important role to play in creating and facilitating opportunities for connecting and collaborating with each other."

We use our legal knowledge to enhance the organisation and so we must evolve in our roles to meet any changing business needs.

AG: I believe that the role of an in-house lawyer is to have a "can do" approach which provides the support needed to deliver the service within the governance arrangements of the organisation. The skillset for an in-house lawyer is the same, regardless of the employer – an understanding of the needs of the organisation, an ability to find solutions as well as provide legal advice, and lots of tenacity to see things through. I'm pleased that in recent years we've seen a rise in the profile of in-house lawyers and they are getting the recognition they rightly deserve in the role they play. The ILC has played an important part in this.

Why did you join the In-house Lawyers' Committee? What do you hope to bring to the role of committee member and what do you hope to get out of it?

LP: "Alone we can do so little; together we can do so much," as Helen Keller so rightly put it. As Scotland's community of in-house lawyers continues to grow, I believe that our ILC has an important role to play in creating and facilitating opportunities for connecting and collaborating with each other. I am therefore particularly excited to be working on launching our new online networking platform for sole in-house counsel and small teams, as well as working on creating new networking, mentoring and personal development opportunities across our whole in-house community.

HC: The ILC is doing a lot of fantastic work, including the creation of the online community platform this coming year. I am keen to raise awareness of the value that in-house lawyers bring not only to the organisations in which they work, but also to the wider legal community. I also want to use this opportunity to highlight the interesting and varied work of the various legal teams within the Scottish higher and further education sector.

AG: I wanted something positive to remember




Hope Craig, Lynette Purves, Anne Garness, and Neil Campbell

about 2020! I noticed that the ILC did not have anyone representing a regulator and thought I could bring this different perspective to the committee. Regulators play such an important part in protecting the public and I thought it would be good to bring this perspective to the Law Society of Scotland, a fellow regulator of course. The SSSC was very supportive of my application, recognising that this professional development activity would benefit it as well as myself. I'm looking forward to working with fellow committee members from different sectors to discuss issues affecting the in-house sector, promote engagement with the in-house lawyers' community and hopefully learn some new skills along the way.

NC: I believe it is important to give something back to the wider community. I have a lot of experience as a lawyer, but more than that I am enthusiastic, proactive and enjoy collaborating with others! I am a member of the O Shaped Lawyer working group, a group of UK in-house lawyers who are working with universities, law firms and in-house teams to encourage the learning and development of more human centric skills (like empathy, collaboration, openness, trust, communication) by law students and practising lawyers alike: see Journal, September 2020, 36. One thing I would like to do is raise awareness of the O Shaped Lawyer Programme within the wider in-house community in Scotland.

2020 has been quite a year! What do you see as the biggest challenges ahead for in-house lawyers (or in your sector) in 2021 and after the pandemic?

HC: The UK's exit from the European Union and the COVID pandemic have both brought with them dramatic changes and unique challenges. This has resulted in in-house lawyers being asked to provide advice on a large volume of unprecedented issues, and 2021 looks set to be no quieter! Getting to grips with new legislation/Government guidelines is only part of the story. It is more important than ever that in-house lawyers are flexible and continue to develop their skills to provide their organisations with the support that they need.

AG: In my view, in-house lawyers have been facing some of the same challenges as those in private practice – trying to maintain the right work-life balance especially when working from home. In the public sector there is the continual pressure of diminishing resources and increased demand. That is only going to become more challenging when the impact of the cost of the pandemic resource is felt. I fear the impact of the pandemic will continue well beyond 2021 for both employers and our members. It is good to see the efforts of the Society to support its members with the challenges, and in particular those struggling with mental health issues. Looking ahead, I've no doubt that despite the challenges from COVID, Brexit and the economic outlook, in-house lawyers will continue to strive to provide an excellent service, meeting the needs of their employer and its staff.

What advice would you give anyone looking to start a career in your sector or in-house more generally?

LP: If you're thinking about moving in-house, why not reach out for an informal chat with those who have "been there, done that"? Hear their stories and ask them your burning questions. If you don't know who to speak to, please feel free to drop me a line (or any other members of the ILC) – we'd be more than happy to help you.

Secondments in-house are also a great opportunity to "try before you buy". Even if you decide to stay in private practice, you'll no doubt return with increased commercial astuteness and that certain *je ne sais quoi* that can only be gained from working in-house.

And if you're interested in working in the renewable energy sector? I'd say that there has never been a better time. With the UK hosting the upcoming COP26, and with an increasing number of renewable energy businesses basing themselves here in Scotland, it really is an exciting time to be working in this growing and innovative sector.

HC: In-house lawyer roles come in all sorts of shapes and sizes. Think about what you want to get out of your job and take it from there. Do not apply for a post simply because the vacancy has come up – do your research and assess it against what you are looking for in a job. If you are not sure whether working in-house is for you and you would like to find out more, keep an eye on the in-house lawyers' blog on the Society's website.

AG: I would encourage anyone to consider a career in-house. Whilst the financial rewards may not be the same as private practice, there are other worthwhile benefits. When working in-house you are part of a team, working with colleagues from different parts of the organisation, supporting them and contributing to projects from their initiation to completion.

NC: Go for it! This is an exciting time to be an in-house lawyer. If you have any questions or concerns, reach out to me or any member of the ILC.

Legal aid package must be met in full: Society

The Scottish Government's legal aid deal for solicitors is separate from new regulations making certain changes to the fee structure for criminal work, the Government has assured the Law Society of Scotland.

Just before Christmas, Justice Secretary Humza Yousaf announced a package comprising a 10% uplift in fees, split between the next two financial years, and a £9 million "resilience fund" to support solicitors and law centres who have lost legal aid income due to COVID-19. Together with the previously announced enhanced fee for early guilty pleas in solemn cases, and the payment of half the cost of up to 40 trainees in legal aid firms, the total value would be up to £20 million. He also promised reform of fees for criminal summary and solemn business.

In an initial reaction, Society President Amanda Millar described the package as a "positive response" and "a start towards addressing three decades of underinvestment", sentiments that were shared by many legal aid lawyers. However draft criminal fees regulations released to the profession two days later appeared to claw back part of what had been granted, by extending the fixed fee and abolishing or reducing various other payments, prompting a seven page letter to ministers from the Glasgow Bar Association, published on its website glasgowbarassociation.co.uk.

The Society has since been assured, and has advised members concerned, that these regulations are independent of and do not include the first 5% uplift. They are also intended to be cost neutral, a matter the Society will be seeking to ensure in further urgent discussions this month ahead of the planned laying of the regulations before the Parliament on 1 February.

The Society has stressed the need for it to be "absolutely clear that the profession will end up 10% better off at the end of the changes".

On the resilience fund, the Society is seeking to ensure that it is up and running as soon as possible and that most support goes to those firms hit hardest financially by COVID-19, many of which have been unable to access other support packages. It has further made clear that it expects the full amount promised to be paid over, whatever method of allocation is adopted.

Complaints proposals out for views

The Scottish Government is consulting on how to take forward shorter term reforms to legal complaints, ahead of possible further reaching reforms to professional regulation as proposed in the Roberton review.

With the present statutory process criticised on all sides as cumbersome and inflexible, the paper sets out three "packages":

- introducing a category of hybrid issue complaints – dealing with complaints raising both service and conduct issues as one complaint;
- changes to the process of assessment, investigation, reporting, determination and conclusion;
- changes to allow losses to a complainer that cannot be recovered from the solicitor to be met under the Master Policy.

In an initial response, Craig Cathcart, convener of the Regulatory Committee, said the Society had worked closely with the Scottish Government and SLCC over the last few years to identify a package to try and make the system quicker and more efficient.

He commented: "While they do not solve all the problems in the system, these changes offer a significant and positive step forward ahead of any primary legislation in the next term of the Scottish Parliament. Our hope is that, following this consultation, the Scottish Government will move forward quickly so these changes can be delivered for the rapid benefit of the public and the profession."

The consultation is at consult.gov.scot/justice/amendments-to-legal-complaints. The deadline for responses is 20 February 2021.

RoS looks to make digital permanent

Registers of Scotland has opened a consultation on making permanent the digital solutions introduced in response to the COVID-19 pandemic.

The Keeper, Jennifer Henderson, says the view has been expressed very strongly by Registers' customers and stakeholders, including the Society, that they would like to continue dealing digitally in the future, following the new processes introduced in response to the closure of the paper based system during the COVID-19 lockdown.

Registers' experience is that submission of applications and supporting deeds through the digital portal has improved speed and efficiency, and reduced risk in preparing and submitting documents. However if digital submissions are to be placed on a permanent footing, and become the default method, permanent legislation will be required. Recognising the close partnership working that marked the adoption of the present service, Registers wants to hear users' views before taking the next step.

The paper proposes that digital submission should be the default method in future, subject to necessary exceptions. It also covers the status and format of extracts, registration of judgments (digital submission should again be the default), and registration in the Books of Council and Session (where paper registration should continue to be required, except that the register should be opened to true electronic documents, executed by qualified electronic signature).

The consultation is at ros.gov.uk/about/publications/consultations-and-surveys/2020/digital-submissions-2020. The deadline for submissions is 1 February 2021.

PUBLIC POLICY HIGHLIGHTS

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

SEPA enforcement action

The Environmental Law Committee responded to the Scottish Environment Protection Agency's consultation on the revised guidance on the use of enforcement action.

The response broadly supported SEPA's proposals on enforcement and the use of variable monetary penalties (VMPs). On VMPs, the detailed nature of the proposed approach while retaining simplicity was commended. Clarity around the use of SEPA's enforcement powers and when matters will be reported for prosecution is important. Consistency in the VMP regime will be a key concern for operators.

It further considered the approach to calculating weightings in the VMP regime to be appropriate, but noted that as a new regime it would be appropriate to monitor this and review in two to three years' time.

European data protection

In a joint response with the Law Society of England & Wales, the Privacy Committee responded to the European Data Protection Board's call for comments on its recommendations (01/2020) on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data. This is of relevance to the UK as a third country from 1 January 2021.

Hate crime

The Criminal Law Committee submitted a stage 1 briefing on the Hate Crime and Public Order (Scotland) Bill. Among other comments, it welcomed the new working group on misogynistic harassment, though the timing meant that none of the group's findings could be included in the bill. It strongly opposed the matter of misogyny being dealt with by affirmative regulations.

Domestic abuse

The Criminal Law Committee also submitted a stage 1 briefing on the Domestic Abuse and Protection (Scotland) Bill, which creates new short term measures for the courts and police to provide protection to a person at risk of abuse.

It reaffirmed the committee's view that "domestic abuse is a situation that must not be tolerated in our law or society", but emphasised the need for gender-neutral drafting and raised specific concerns including the interaction of the new protection orders and protection notices with existing remedies.

Redress for child abuse

The Charity Law, Mental Health & Disability and Civil Justice Committees contributed to a stage 1 briefing on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill.

Comments included the need for more detail around what a "fair and meaningful" contribution to the redress scheme would be, and the statement of principles; where alternative approaches to financial contributions by charities may be required to avoid compromising the independence of and confidence in the sector; the potential for the waiver to significantly prejudice the interests of the survivor and expose them to the costs of legal action; and accessibility and support for adults with incapacity.

National security

The National Security and Investment Bill, which provides for a new regime for Government scrutiny of, and intervention in, investments for the purposes of protecting national security, was introduced on 11 November 2020. The Banking, Company & Insolvency Law and Competition Law Committees submitted written evidence ahead of its committee stage, welcoming the overarching objective of safeguarding the UK's infrastructure in the context of a modern understanding of threats to national security.

However, they highlighted a number of concerns regarding the practical application of the regime, including its potential width. Although the intention is to narrow the issues through secondary legislation, further detail should be provided in the bill in the interests of ensuring appropriate scrutiny in Parliament.

UK-EU agreement

A Trade and Cooperation Agreement was finally reached between the UK and EU on 24 December; on 30 December MPs voted in favour of the deal by 521 to 73. The deal was quickly signed into law by the EU (Future Relationship) Act 2020, which passed all stages in both Houses and was given Royal Assent that day, in order to take effect from 11pm on 31 December.

The Society produced a preliminary briefing on the agreement and implementing legislation in advance of the debate. The Policy team will be looking more closely at their terms in the coming days and weeks.

Notifications

ENTRANCE CERTIFICATES ISSUED DURING NOVEMBER/ DECEMBER 2020

ALLAN, Emily Linda
BANNIGAN, Chloe
BANSAL, Veer
BARNES, Danielle
BRITTON, Douglas Mitchell
CAMPBELL, Sarah Margaret
CASIDAY, Augustine Michael Cortney
COOPER, Carli Ann
CORRIGAN, Mairead Clare
CUNNINGHAM, Stuart
DONACHIE, Josey Patricia
GALLACHER, Dean John
GLYNN, Findlay James McLeod
HADDEN, Nicola Margaret Dorina
HOFFORD, Oliver Cameron Paterson
LEE, Niamh Orla
LI, Ningzhou Lemon
McILWHAM, Sarah Frances
McKENDRICK, Julie Kathryn
McNALLY, Sophie Marie
MITCHELL, Dylan Lee
NELSON, Paul Joseph
RODGER, Alexandra Louise
SHAH, Rohini Premal
WEST, Rebecca Dorothy
YIU, Victoria Ann Yi Tuck

APPLICATIONS FOR ADMISSION NOVEMBER/DECEMBER 2020

ANWAR, Mohammed Awais
BRENNEN, Laura Greta
BROWN, Mhairi Margaret
CAPALDI, Francesca Marianna
CASTER, Jack Stanley
CLARK, Louise Catherine
CLARK, Rebecca
CONSIDINE, Daniel John
DEANS, Jonathan Ian
DHESI, Anita Kaur
DONALDSON, Jennifer Ross
KING, Scott Alexander
KINGSTON, Cecily Clare
KWOK, Eva Yee Wah
MacFARLANE, Lorna Jane
MALONE, Louise
MERCHANT, Kathryn Grace Ann
MURPHY, Judith Anne Heidi
NISA, Hajira Noreen
O'NEIL, Anna
SIDHU, Gurnish Kaur
SMITH, Lynsey
SMITH, Simon John
STEWART, Michael Patrick
TRAYNOR, Scott
VAILLANCOURT, Meghan Elizabeth
WALLACE, Natalie
WALLACE, Rhona Emily
WHITWELL-CLAYDON, Jennifer Rose
WRIGHT, Thomas Ross
YOUNG, Ciara Jayne

Social media guidance revised

Updated guidance on using social media has been published by the Society. It covers the opportunities to be taken, an outline of the main platforms currently in use, and security considerations, as well as matters of good practice and the legal and ethical considerations that may arise.

The guidance can be found in section E, division B of the rules and guidance on the Society's website. An introduction by Antony McFadyen of the Technology Law & Practice Committee, with some summarised "golden rules of thumb", is at www.lawscot.org.uk/news-and-events/law-society-news/socialmediaguidance/

SOLICITOR ADVOCATES

Solicitor advocates: a 30 year celebration

To mark 30 years of the law enabling solicitors to become solicitor advocates, in 2021 the Journal will profile some who have made their mark in the role. First, Fiona J Robb recalls how it happened, and how to qualify today

On one view, 12 May 1993 could be said to be most appropriate starting point to celebrate the introduction of the first solicitor advocates. On that day the first admission ceremony took place, attended by my predecessor as director of Professional Practice, Bruce Ritchie. He had been tasked as the individual within the Society who was responsible for the scheme and for the working party on rights of audience.

The Journal account, published in June 1993, records the day as "cold, overcast and snell with an Edinburgh nor-east wind". It was also observed as being remarkably prosaic, considering its revolutionary nature. "If you hadn't known, you wouldn't have known," said a solicitor who happened to be there.

The first intrant to the court was Robert Shiels (a member of the working party), and at that first ceremony he was accompanied by seven other colleagues. They were welcomed by Lord Prosser, who commented: "Your admission to rights of audience in the High Court is a change, an innovation in the division of work, a variation in the roles. It will prove significant in its usefulness in the attainment of better justice. If it does not achieve that, it is of no significance and no use."

Thirty years in law

This innovation followed many years of lobbying from Scottish solicitors who sought the right to plead before Scotland's supreme courts. On one view the battle was won with the drafting of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which imported a new s 25A into the Solicitors (Scotland) Act 1980, authorising the Society's Council to establish standards to allow a solicitor to have a right of audience in the supreme courts. The relevant provisions of the 1990 Act came into force in 1991, so with a generous interpretation 2021 is the year to begin a period of celebration for 30 years of the growth and development of solicitor advocates.

How have things developed? We now have 195 civil solicitor advocates and 142 criminal solicitor advocates, including five who are qualified in both areas. We have seen solicitor advocates go on to become Queen's Counsel, sheriffs, senators, Solicitor General and Lord Advocate, and during the next year the Journal will feature profiles of a number of solicitor advocates, showcasing their achievements and demonstrating that they have, as suggested by Lord Prosser, been substantial contributors to the attainment of better justice.

How can you become a solicitor advocate?

The Society of Solicitor Advocates runs an introductory course for prospective solicitor advocates each year, usually in May. The event is intended for all solicitors (civil or criminal) who are thinking about applying for extended rights of audience but are unsure of what is involved.

Thereafter the process is run by the Law Society of Scotland, which runs the training courses and exams.

The structure of the courses differs for criminal and civil rights of audience training. Candidates must have recorded six days' experience of sitting-in to become familiar with court procedure before completion of the course.

The civil course is assessed by way of both oral and written assessments and the criminal course is assessed by way of an oral assessment.

There is usually one exam diet per year that candidates are able to undertake. There are two exams for all candidates, one on the practice and procedure of the relevant courts and one on professional conduct.

I believe that qualifying as a solicitor advocate is a great career development and I hope that the profiles of the individuals featured over the next year will encourage more solicitors to take that next step.

Fiona J Robb is director of Professional Practice at the Law Society of Scotland

Sir Gerald bows out at 91

Founder-editor of *Scottish Criminal Case Reports* calls it a day after 40 years

The end of 2020 saw the end of an era in Scots law publishing, as Sir Gerald Gordon QC retired as editor of the Society's publication *Scottish Criminal Case Reports* after completing 40 years in charge.

Now 91, Gordon has edited the series since its inception in 1981 and, with only a few exceptions, has edited every report and written every case commentary published to date.

Though he holds a special affection for a series he was very much involved in creating, Gordon told the Journal that it was not actually his idea but that of the late John Boyle, then in charge of the Society's publications fund. "That was at a time when the *Scots Law Times* was way behind with reporting, and Crown Office had started sending roneoed accounts to the fiscals and defence solicitors were getting a bit miffed because they didn't have this up to date information when the fiscals did." Which makes it a little ironic that defence lawyers have been known to refer to the series as the "fiscal's friend", something that amuses him greatly.

Gordon's condition for being involved was that he would be allowed to write commentaries on cases if so minded – not a usual feature of mainstream law reports. "I started with some trepidation, because I had at that time fairly recently become a full time sheriff at Glasgow and didn't know quite how their Lordships would react to a sheriff telling them off. Actually they were very good and I got a rather nice letter from [Lord Justice General] George Emslie after the first issue. In fact, I think the bench treated me much more respectfully than I treated them!"

In any event SCCR very quickly established itself, and kept its status even as other law reporting became more current. As it does today, though to a different mix of content: "The work of the courts is different and the number of cases has exploded. We no longer worry about housebreakings; we worry a little still about drugs; we never worried about 'historic sex cases' in those days – we didn't have any." Gordon, however, has not lost his forthright manner: one of the last cases he reports is "a rather pointless five judge thing".

His retirement marks the end of a publishing career that began with a *Scots Law Times* article in 1956, three years after his admission as an advocate, and includes the standard texts on both criminal law and criminal procedure as well as SCCR. However he recalls an inauspicious start – his first submission was rejected by the late T B Smith, who disagreed with his analysis of *Donoghue v Stevenson*. Fortunately for the profession, that proved to be no deterrent.

ASK ASH

Feeling the need to bond

COVID makes it hard for a trainee to feel one of the team

Dear Ash,

As a trainee, I feel that COVID has particularly impacted me as I am missing out on being able to interact with colleagues in the office. Other more senior colleagues seem to have a rapport with each other already, and often seem to interact for social reasons by Zoom, but I don't yet have such bonds with people and seem only to be contacted with various boring admin tasks. I don't want to seen ungrateful as I do have a job at least, but I can't help feeling demotivated.

Ash replies:

I can sympathise with those who have been robbed by COVID of the opportunity to interact fully and build rapport with colleagues. You are certainly not alone: one of my friends started a new job just prior to when the pandemic disrupted normal life, and she too, despite being more senior, has found it challenging to interact with others.

However, one of the ways my friend tried to reach out to others was to suggest a Zoom quiz night with colleagues. This allowed colleagues to form teams and interact in a more relaxed setting. It also helped when she was having to contact the same colleagues for work matters later, as she felt she knew more about their sense of humour and likes/dislikes through the chat at the social event. Therefore why don't you suggest organising such an event as a bit of an icebreaker – it will also allow you to escape from some of the more mundane admin tasks.

I also suggest that you have a call with your line manager to discuss other projects or cases you might want to get involved in. This may then at least allow you to be kept in mind for other tasks which may be of a more challenging nature.

Please do remember that you are not alone in how you are feeling, and that you need to find creative ways to help you through these challenging times. On a positive, there is now a vaccine and there is potentially some light at the end of this long tunnel.

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).

Pro bono: a world of opportunity

Pro bono work can be hugely rewarding for firms and solicitors alike. If you're considering making it one of your 2021 resolutions, read this compilation by the Society to discover the impact it makes on solicitors and the charities they support

Case study one

SHEPHERD AND WEDDERBURN/ SAFE HARBOUR

The solicitor firm's view

We encourage our people to take part in CSR projects, because we see the positive results for everyone involved. They get to face new challenges and take on responsibilities in ways that help them grow and develop. At times this involves advising on unique and complex legal challenges. Our support for Safe Harbour has involved specialists from across our firm, and we are proud to have been a constant in the life of this small but valuable charity.

We support a wide variety of projects. Many, like our work with Safe Harbour, have developed organically. However, we also play an active role in more formal projects. Gillian Carty, our chair, was instrumental in establishing our Citizens Advice Bureau project, which involves our solicitors meeting and helping members of the public. Elouisa Crichton volunteers for Maternity Action, which runs an advice clinic on Mumsnet to help answer questions about maternity and family leave. The firm is a member of the Competition Pro Bono Scheme, established with a number of UK practices to support businesses and individuals with competition law issues. We have been fortunate to advise on several novel issues involving different emerging markets.

Each of our colleagues is encouraged to take up to five days' paid leave each year to undertake volunteering work with good causes close to their hearts. Last year, we hosted the first (virtual) Shepherd and Wedderburn Values Awards, at which we recognised colleagues who had made special contributions to CSR projects. Having dedicated matters and time recording codes ensures that the time they spend is captured and people feel empowered to participate. The personal growth achieved cannot be overestimated. Particularly during the pandemic, this is a valued and valuable part of our contribution to the communities in which we live and work.

The charity's view: Duncan Shaw, chief executive officer, Safe Harbour

Safe Harbour supports people facing serious mental health issues, ranging from undisclosed childhood trauma, sexual assaults and transgender issues to PTSD, stillbirth and other traumatic situations. Often, our clients have not responded to standard NHS services and need long term and effective intervention, support and care. Without the support of Shepherd and Wedderburn, Safe Harbour would not have survived.

The whole team has been consistently on our side. Partner Liz McRobb (right) worked with us on our strategy under the Pilotlight programme in 2013, and has mentored us ever since. She also met and listened to clients as they shared harrowing life stories and explained how, through Safe Harbour support, they had been able to rebuild their lives.

Senior associate Elouisa Crichton supports us with the same passion. She also listens when I need guidance and support to navigate a difficult time, never more so as we face the challenges of the pandemic. Truly, we are all in this together.

In the last year we benefited from having senior associate Lauren Miller join our board, and we continue to receive specialist support from many other committed advisers. To all at Shepherd and Wedderburn, your support has meant we can focus on what matters: people's lives.

Case study two

RYAN McCUAIG/WHO CARES? SCOTLAND

The solicitor's view: Ryan McCuaig, trainee solicitor at Thorntons Law and chair of the board of Who Cares? Scotland

I decided to become a solicitor because I wanted to give a voice to others. That desire is rooted in my experiences of the care system at a young age. Having systems, processes and professionals involved in your life can be overwhelming and, for a child at the centre, it can feel impossible to have your voice heard. I've never forgotten that feeling, and it has motivated me throughout my education and career.

When I began studying for my Diploma, I connected with Who Cares? Scotland, a charity providing advocacy for care experienced people, as well as opportunities for them to come together as part of a community and campaign for change to the system. In 2018 I successfully applied to join their board and, in 2019, I was appointed chair. It has been a great privilege to carry out that role alongside my traineeship. Thorntons have been incredibly supportive, for which I am immensely grateful.

Joining a charity board has many benefits for those pursuing a legal career. In private practice you will be expected to demonstrate commercial awareness. Chairing the Who Cares? Scotland board has developed my business skills. The trustees monitor the charity's strategic direction, as well as ensuring that it meets its obligations to its workforce and those it serves. We also oversee the budgeting process, HR, policy development, and hold relationships with key internal and external stakeholders. As well as chairing meetings, my role often involves ambassadorial and representative work, including relationship development and public speaking, all relevant skills in the "day job".

Recently, the board recruited the new CEO, Louise Hunter. That involved consultation with care experienced members of the organisation and our staff, reflecting the charity's values, alongside the more traditional aspects such as reviewing applications and holding interviews. It was important to recruit the right person, and leading that process alongside our vice chair has given me further experience, which will help in my career as a solicitor.

I find my role as chair immensely satisfying, knowing that the work we do helps ensure that voices of children and young people are heard; and that we are fighting for their rights, and helping them form bonds with other care experienced people. That is why I do it. The fact that the experience might also be useful professionally is a bonus.

The charity's view: Marie-Claire Jones, director of fundraising and development at Who Cares? Scotland

Ryan has been an asset to our board from the moment he joined. Not only does he bring his valuable perspective as a person with lived experience of the care system, he also brings an astute mind, knowledge of law and an eye for detail, that come with being a legal professional.

There is a great synergy between the legal sector and our work. We are both committed to human rights and to representing those who may need help in having rights met. If any readers would like to know more, and how they can be involved, visit www.whocaresscotland.org.

Case study three

GAVIN McEWAN/LAWSCOT FOUNDATION

The solicitor's view: Gavin McEwan, partner and head of Charities, Turcan Connell

When the Law Society of Scotland asked me in 2015 whether I would be willing to help it create a new charity to relieve hardship amongst young law students, I immediately agreed. The Lawscot Foundation is the result of that pro bono work. Following its establishment, I volunteered as one of its first trustees. My pro bono involvement has included a range of work and advice from drafting the constitution, providing guidance on charity law and governance, to drafting key resolutions and fundraising agreements, as well as carrying out the day-to-day role of charity trustee.

When I was at law school in the 1990s, the financial situation for many students was becoming much tougher. For many, it has not improved since. That bright potential law students are denied an opportunity to join the profession merely through financial and other disadvantage is an injustice: it represents a loss of young legal talent from diverse social and economic backgrounds.

The work of the Foundation means so much to the students receiving bursaries, mentoring and other support. It also means a lot to me personally: coming from a similar social background, I knew it was the right thing for me to commit time towards. It has been hugely rewarding to watch the Foundation carry out its valuable work, to know that it is making a difference, and to have made a contribution of my own.

The charity's view: Heather McKendrick, Lawscot Foundation

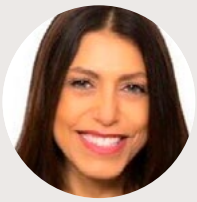
No matter the size of the charity, there are certain tasks and regulatory functions that must be completed, each year. It's very easy, especially when getting a new charity off the ground, to focus on its purposes – such as giving grants to young people – but the legal and regulatory requirements are just as important.

This is why we are so grateful to have had Gavin's expertise, advice and patience from the outset. He has been extremely generous with his time and knowledge in helping the charity to go through all the required steps just to be registered. This has included drafting the constitution, advising on what is required by the regulator, OSCR, and even what must be displayed on publicity materials.

It's hard to imagine navigating the complex world of setting up a new charity without this sort of professional expertise. While the output of charities, such as fundraising and impact, is normally what is focused on, the work of the solicitor keeping us right and providing guidance is critical and does not often get the spotlight it deserves!

The pro bono specialist

REBECCA SAMARAS



Rebecca Samaras is director of Pro Bono and Clinical Legal Education at the University of Edinburgh Law School, member of the Society's Access to Justice Committee, trustee of the Access to Justice Foundation, and chair of the Scottish University Law Clinic Network

Forever the positivist, I start with a much-used quote by Einstein: "In the midst of every crisis, lies great opportunity."

2020 will be remembered as a year of crisis, and there are still extremely difficult times ahead for us all, not just in 2021, but for many years to come. University law clinics, law centres, charities, indeed all advice agencies have reported, unsurprisingly, a significant increase in demand. With further reductions in grant and public funding expected, last year highlighted the widening cracks in access to justice provision.

Throughout 2020, the Access to Justice Committee worked hard to campaign for crisis support, not just for now, but for permanent solutions. There were financial campaigns too, with grants being awarded by the Community Justice Fund through the Access to Justice Foundation to charities such as JustRight Scotland, Shelter Scotland and the Legal Services Agency.

Collaboration is key, and this is where opportunities can and should be harnessed. Swift action taken to move face-to-face support online will, I hope, allow us to continue to help the most vulnerable in society. All Scottish university law clinics have taken such steps. This has not been easy, and we all rely heavily on the pro bono support of our legal community.

I would like to end with a call to action (or a shameless plea!) for the collaboration and community for which our profession is renowned. We cannot provide support without you, and the need for more volunteers for our law clinics is greater than ever. If you are an individual or a firm and would like to know about pro bono opportunities in your community, please get in touch at sulcn@outlook.com.

RISK MANAGEMENT

Phone to beat the fraudsters

Matthew Thomson of Lockton revisits the topic of client account fraud with some advice and accounts of real cases reported under the Master Policy

What is the best single weapon a solicitor can deploy in the war against the fraudsters determined to steal your clients' money and leave you carrying the can?

Answer: the telephone. While it would be lovely to roll out a new and dynamic risk management tool to the profession, any one of the payment frauds intimated to the Master Policy during this time of COVID – and indeed in the years before – could have been averted by judicious use of the good old telephone.

No comfort

Take, for example, the following situation.

The firm had acted for commercial clients for many years, who although based in Jersey had long been active in the Scottish property market, buying up rather dilapidated commercial properties, doing them up and selling them on. So receipt of instructions to act in the sale of a warehouse unit with yard and access road was no surprise.

The transaction proceeded uneventfully and was heading quietly towards settlement when the world blew up in March 2020. Like office staff all over the country and the world, the firm's team were dispatched with laptops and mobiles, and set up the virtual operation with hardly a blink.

With settlement just days away, an email was received from the clients. COVID-related challenges to the business model had impacted on cash flow, and the proceeds from the sale could not now be used as had been intended for further projects.

So could the funds please instead be paid into the following account?

Nothing about the email caused the firm any concern. There was nothing unusual in the language, the email address appeared correct, and the instructions made sense. The cashier, though, had read all about fraud risks in the papers, so she wasn't going to take any chances. She emailed the partner responsible for the client to check that she was content for the payment to be made as instructed. On receipt of confirmation, again by email, she transferred the sale proceeds – a little over £500,000 – to the account instructed.

Unfortunately, the fraudsters who had sent the original email requesting payment of funds to a new account were also able to intercept the cashier's email to the partner. So the comforting confirmation received from the responsible partner had in fact come straight from the fraudsters – with the result that the funds were paid not to the clients, but into the fraudsters' bank account.

There was no answer at all to the clients' subsequent claim against the firm alleging, rightly, that they had paid away client funds without instructions to do so.

Attorney sale hack

In another case, the nephew of an elderly client, acting under a power of attorney, instructed the firm in the sale of his uncle's house.

The firm had acted for the elderly gentleman for many years, and had details of his bank account on file.

It was not, though, considered unreasonable or unexpected when his nephew asked if the sale proceeds could instead be paid into his own account. Uncle's only bank account, he reminded the firm, was an old fashioned deposit account, and it would be much easier to exercise his obligations under the power of attorney if he had easy access to the funds.

So it was no surprise when, a few days later, an email was received from the nephew with details of the account into which the proceeds should be paid. When the transaction settled, the free proceeds were paid into the account purporting to belong to the nephew, and the firm considered the transaction concluded.

It was therefore something of a shock when the nephew contacted the firm a few days later. Following the sale, he was keen to move uncle's money into an income generating fund to provide for his expenses. When could he expect receipt of the proceeds?

Following initial panic, a full investigation ensued, and it was discovered that a member of staff's emails had been hacked. Fraudsters had then been able to intervene at will, and the email providing details of the destination bank account had not come from the nephew. Again, there was no answer to the claim then pursued against the firm for reimbursement of the client's funds which had been paid away without proper authority or instructions.

Executry sting

Fraudsters are constantly on the lookout for opportunities to steal client funds. And those opportunities don't only arise in conveyancing situations.

As a small private client practice in rural southern Scotland, the firm did not consider itself particularly attractive to high-end fraudsters, nor then especially vulnerable to the sort of problems the senior partner had heard about at Law Society of Scotland events.

The first few weeks following the announcement of the national lockdown had been hard going. The firm was a traditional one, and the move to laptops and kitchen tables had not been easy for partners or staff. But as spring moved towards summer, the senior partner felt that the worst was behind him. Everyone was working away quite well, and things seemed to be going relatively smoothly, barring the occasional wi-fi related emergency.

Client matters, though, were proceeding generally unaffected. In particular, the executry paralegal was working away at his home, and

"A phone call to a client or a colleague to check their instructions takes minutes"

finishing up the administration of the fairly small estate of a local gentleman who had died the summer before. Knowing the case, and in fact having known the gentleman, the cashier was not especially surprised to receive an email from her colleague instructing her to make a payment out of the executry account, and providing payment details. She was, though, surprised to see that the amount she was told to pay exceeded the balance available.

In ordinary times, the cashier would have taken the opportunity to step away from her desk, wander up from the cashroom, and have a word with her colleague. But these were not ordinary times, so email had to suffice. She fired a quick note to her colleague: "insufficient funds for payment – please advise".

On receipt of a response – "just pay the whole balance, same account details please" – she proceeded to make the payment as instructed. And thought no more about it.

It was several weeks before the executry paralegal next worked on the case. Checking his email sent box for his correspondence on the case, he was surprised to see an exchange of emails to and from the cashroom. He had no recollection of instructing the payment, and on looking at it carefully it made no sense in the administration of the estate. He immediately raised the alarm.

Following investigation, it was discovered that the email account had been accessed and manipulated. The instruction to make the payment had been made by a fraudster, who had then also received and replied to the cashier's query. Here again, client funds were paid away on the strength of fraudulent instructions, and without proper authority.

Rules for safety

So what can we learn from these sorry tales?

- Always treat email instructions with a degree of suspicion.
- Any concerns regarding the veracity of an email need to be taken seriously and acted on.
- Checking is better than not checking. Always.
- But checking by email into instructions received by email is worthless. If the instructions were fraudulent, the response might well be intercepted too, and no comfort can be taken from any confirmation received.
- A phone call to a client or a colleague to check their instructions takes minutes and could save hundreds of thousands of pounds.
- Every member of your staff should be aware that bank account details provided in an email should never be relied on without further (non-email) verification.
- All staff should receive regular training regarding the risk of payment fraud, how it is perpetrated and how it can be avoided.
- Have strong procedures and protocols in place regarding the checking and authorisation of any payments to be made from the client account (or indeed the firm's own account). Dual signoff for larger amounts is always wise.
- Make sure that clients understand that the bank details provided to you are fixed. Email instructions regarding changes to the account details will not be acted on.
- Clients fall foul of fraudsters too. Make sure they know that you will *not* contact them by email to advise a change of your bank details.
- If you do fall victim to fraudsters like the firms in these examples, this should be reported under the Master Policy as a matter of urgency. The quicker Master Policy insurers are made aware of matters, the more likely that some of the funds might be recovered.

Matthew Thomson is a client executive in the Master Policy team at Lockton. He deals with all aspects of client service and risk management for solicitor firms in Scotland.

FROM THE ARCHIVES

50 years ago

From "Drinking Laws – Committee of Inquiry", January 1971: "There are many anomalies in our Scottish licensing code, the origins of which date from the eighteenth century; these will intrigue the historian of 2000 A.D., but they merely irritate the practising solicitor of 1970!... Saturday night is a favourite night for functions and a special permission is needed for the function to proceed until midnight... but never on Sundays! Must the taking of a drink between 12 midnight and 1 a.m. suffer a 'sea change' and in the twinkling of an eye take on a sinister hue?"

25 years ago

From "Training Advocates", January 1996: "Last autumn a major change took place in the training provided for intrants to the Faculty of Advocates. Until then, intrants... commenced devilling at various times throughout the year, subsequently being admitted as advocates on any of five different dates each year. During devilling, the main responsibility for training has been assumed by [the] devilmaster. However, as from October, all devils will now commence training on the same date each year... They will undergo a structured training programme before admission to the Faculty in either the following June... or... July."

WORD OF GOLD

Let's raise the "R" rate (no, not that one)

Stephen Gold asks: What will it mean to be resilient in the post-COVID world?

Happy new year. Boy, are we happy to see the back of the old one. We're still in the woods. The first half of this year, perhaps longer, will be tough, as social distancing continues, unemployment bites, and businesses begin repaying £200 billion of Government-underwritten debt. Yet with the arrival of three vaccines and a Brexit deal, four horsemen not of the apocalypse, but of hope and optimism can be seen peeking over the parapet. "Consider the parties you didn't have this holiday season as merely postponed," advises Goldman Sachs.

Markets are high. One in five Britons wants to start a business this year, rising to one in three among 18-34 year olds. The social and economic costs of the pandemic have left us all feeling battered, but compared to many other sectors, such as travel, hospitality and retail, the professions have had a pretty good war. Though their natural instinct is always to be cautious, the growth opportunities as society is liberated are clear.

So too is the opportunity to make permanent improvements to our working lives. It's realistic to hope that offices will once again hum with activity. But embracing a mix of home and office working will be a boon to firms and individuals. The compulsory drudgery of the five (or six, or seven) day commute has gone for good. That mythical creature, work-life balance, may actually be glimpsed. With location less important, firms out of the major cities, who often have difficulty recruiting, may now have access to quality people who would not normally consider them. Conversely, living in a rural or semi-rural location while working for a city centre firm is now entirely plausible. There are reasons to be cheerful, but still, as Donald Rumsfeld famously put it, "known knowns, known unknowns and unknown unknowns" lurk in the undergrowth.

Resilience reimagined

We've heard a lot about "R", the number that tells us whether COVID is receding, or as now, galloping ahead. There is another "R" of equal importance: resilience. How prepared are we to cope with and quickly recover from shocks? Last March, at a national level, the answer was, "we're not". Many thousands of our fellow citizens have died as a result. We continue to suffer. Sir John Bell, regius professor of medicine at Oxford, was instrumental in forging the partnership between the university and AstraZeneca to develop a British vaccine. He has made clear his frustration that years of neglect by successive governments have left the country without the means to manufacture the vaccine at the necessary pace.

It is not just government that has been neglectful. COVID has compelled businesses of every kind to redefine what it means to be resilient. Law firms have shown great agility, but often they have started from a low base. It matters that the lessons of COVID are not forgotten as things loosen up.

Perhaps the most important is that the enemy of resilience is a focus on short term equity partner returns. Resilient businesses are willing to make necessary sacrifices today for the sake of sustained performance in the future. Premises and technology infrastructure, people development, effective sales, marketing and finance functions: these are all costly, but investing in them is non-negotiable if a firm is serious about long term success.

Time for questions

So too is having enough cash in the business. A surprising number of firms still think it's fine to borrow to pay tax, VAT and PI, as long as partner drawings are protected. Others are not so profligate, but still have drawings policies that leave them dangerously exposed to sudden changes in the wind. Every business should have a contingency fund of no less than four months' cash cover (six months' is better), and in all circumstances, a reliable cash flow projection which enables intelligent decision making. If a firm cannot build that level of reserve over a reasonable period of time, fundamental questions need to be asked about how it is run, and whether it has a future.

COVID has been ghastly, but it has at least created a climate where it is legitimate to question everything about the way a firm operates, and make changes. Leaders will never have a greater opportunity, nor a greater imperative, to reappraise strategy, and put every aspect of their firms' performance under the microscope. Resilient leaders cultivate optimism in themselves and their people, not in a Pollyanna-ish way, but with a mindset that says, we can get through this, and go on to greater things, if we are thoughtful, nimble, unafraid to look the hard questions in the face, and take decisive action. As Goldman Sachs (and Shirley Bassey) attest, it's time to get the party started.

Stephen Gold was the founder and senior partner of Golds, a multi-award-winning law firm which grew from a sole practice to become a UK leader in its sectors. He is now a consultant, non-exec and trusted adviser to leading firms nationwide and internationally. e: stephen@stephengold.co.uk; t: 0044 7968 484232; w: www.stephengold.co.uk; twitter: @thewordofgold

COP26: a challenge for 2021

Ahead of the Glasgow climate change summit in November this year, the Society's survey of members' attitudes to the subject is helping with plans to develop their interest

2021 is a year not short of challenges for us all. Against the backdrop of COVID-19, which continues to have a significant and immediate impact, planning is going forward towards November 2021 when the 26th UN Conference on Climate Change (COP26) is to be held in Glasgow.

This event in Scotland presents an opportunity to increase awareness of the effects of climate change and to stress its global importance. Looking to the future, climate change will continue to have a long term impact while the pandemic is now the immediate concern. We would like to highlight what is happening now in the lead up to COP26 and to explore the opportunities offered to us as the legal profession in Scotland.

The UK Government held the Climate Ambition Summit in December 2020 to raise awareness of COP26. This coincided with the fifth anniversary of the ratification of the Paris Agreement, which committed to limiting global warming to well below 2°Celsius, and preferably to 1.5° Celsius, compared to pre-industrial levels. The event, described as "a major milestone" on the road to COP26, sought to promote the key COP26 challenges of adaptation and resilience, clean energy and clean transport, finance and nature based solutions. How we as the legal profession can feed into these themes underpins our work going forward.

Looking towards COP26, the Society has set up a crosscutting policy working group to look at the opportunities presented by the conference in Scotland, and the issue of climate change for the legal profession more generally. The working group's first key task was to develop and undertake a survey of the profession. This has now concluded and the results have been published (bit.ly/LSSCOP26).

The working group considered that a brief survey of the profession was appropriate at this stage to obtain valuable information and to ascertain how best to increase awareness of the conference and develop plans to explore the opportunities for engagement that COP26 offers.

What did the report say?

The responses to the survey were varied, which is hardly surprising since the issue of climate change affects us all but is interpreted in different ways. A 57% majority of those responding to the survey indicated that climate change was either somewhat or very important to them in a professional capacity, which is encouraging at the current time.

We recognise that a number of solicitors are already directly involved in advising clients on climate change law and their responsibilities, on the development of sustainable business practices and in green investment. Other solicitors have a personal interest in environmental concerns and/or may be introducing sustainable practices for their own business.

Other matters arising from the survey included the immediate implications of holding a large-scale conference such as COP26. There will be inevitable local practical impacts and traffic disruption in Glasgow, due to the sheer size of the event. It will impact on resourcing involving Police Scotland, with their responsibilities for maintaining public order and safety, and thereafter on the courts and the justice system.

The survey highlighted that COVID-19 has influenced views of climate change to some extent, with 49% responding that, in their professional opinion, climate change was somewhat or much more important than the pandemic, and 29% saying it was of equal importance.

The information from the survey allows us to consider opportunities to influence our membership and beyond, and develop relevant training and other opportunities for support and engagement for members in 2021.

What are the plans?

With the support from the profession around these topics, we are engaging with our members and stakeholders to help to build networks and draw on our combined professional experience and support. We are planning to offer opportunities to build our members' current level of interest and awareness of climate change and associated issues.

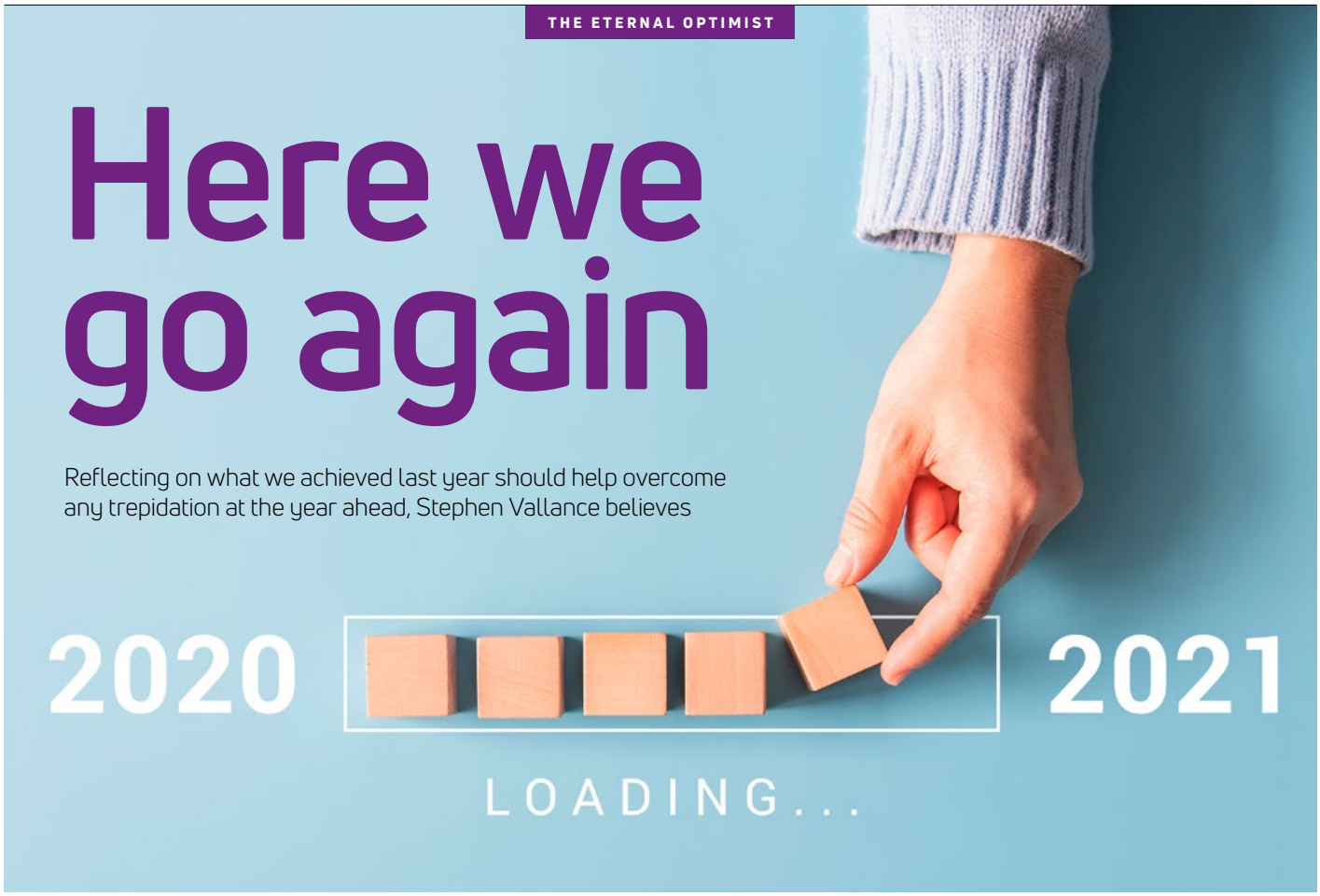
So, we echo the message from the Climate Ambition Summit that the scale of the challenge facing the world is huge. We are keen to be part of Glasgow's success and show what climate change means to the profession, given its importance and gravity.

Gillian Mawdsley and Alison McNab
are policy executives with the Law Society of Scotland

THE ETERNAL OPTIMIST

Here we go again

Reflecting on what we achieved last year should help overcome any trepidation at the year ahead, Stephen Vallance believes



Welcome back to my little corner of the Journal. If any of the topics that I cover resonate with you or there is a particular issue that you'd like raised, please contact me at stephen.vallance@hmconnect.co.uk.

January again! Who would believe it, with all the challenges last year brought addressed, and a moment to reflect back on all that we achieved, often in the face of considerable adversity.

I usually spend the last day or two of every year hopefully taking some satisfaction from what has been a good year (however one might define that). Inevitably though, as I look ahead, a certain dread fills me at the thought of having to do it all again. Whether it is the thought of having to generate all the fees again or perhaps deal with other business issues, it always feels more daunting contemplating what lies ahead, even if only a repeat of what has just been done.

Over time I have come to realise that there is no point in worrying about the whole year. It is easier to break things down into smaller, more digestible chunks and deal with them a month or a quarter at a time. Most of us, I hope, will already be doing that with financial projections and monthly management accounts. Do we, though, also set out a schedule for our bigger issues and goals, and break them down into achievable chunks as well? All too often I've spoken to firms with great plans that you know will not be achieved when they move from the discussion to the execution phase and client work inevitably interferes. Rather than getting just a little done each week towards it, their plans sit neglected. They justify this by the demands of fee paying work. Indeed, one of the reasons why so much was achieved last year was that things were forced on us and we had to prioritise them for our businesses to function.

There can be little doubt that 2020 was an unusual year (my new year resolution is to give up the word "unprecedented"), and we all should be suitably proud of ourselves for what we have achieved just by steering our businesses through to 2021. For those of you who do not remember 2008, 2001, 2000, 1987 or 1974 (a small prize if you can confirm the major challenges in each), or any of the smaller recessions or disasters in between, what we have come to realise is that these unusual occurrences are in fact a recurring theme in the modern world. Likewise, in the microcosm of our own practice areas there are changes happening constantly. Perhaps, then, as with our finances, we should be looking ahead each year at how best to prepare ourselves for some of the challenges on the horizon or some of the changes that we want to make.

2020 saw the profession embrace technology and leapfrog a decade forward, in a way that it hasn't done for 20 years. We have seen huge progress in remote working, e-signatures, paperless offices, and an even greater reliance on digital marketing. As we look back, these journeys no longer feel as long or as difficult as they were at the time. Isn't this, then, the right moment to think about the next round of changes that we need to consider? What do you want to achieve in the year ahead, and what are the steps that you or the firm need to take that will allow you to get there? The exciting part, I hope, is that the last year has shown us almost anything is possible.

This year already is exposing new issues to address (I also gave up the word "Brexit"). We already know that change and challenges are the only constant in life and business, and we don't have to look far to see a number of areas that might drive these. Likewise the speed of change will never again be as slow as it was in the last few years (yes, I meant what I wrote there). Having overcome as much as we have, though, what lies ahead shouldn't frighten us. We just need to decide what we want to achieve and break it down into manageable pieces, then make sure we do them.

Stephen Vallance works with HM Connect, the referral and support network operated by Harper Macleod

Classifieds

Organisation: Lockton Companies LLP
Contract Type: Full-Time
Practice Area: Other

Location: Edinburgh
Salary: Competitive
PQE 3+ years

Lockton is the largest privately own global insurance broker in the world. Our UK and Ireland operations have almost 1,000 FTE across a network of branches, including those situated in Edinburgh, Glasgow and Aberdeen.

Job Description

Our business has achieved significant success in recent years with strong organic growth and positive Client and employee feedback. The internal culture of the organisation, led by our Partners, is recognised as a key differentiator and the quality of service delivery is highly rated by Clients – including The Law Society of Scotland and Solicitor firms in Scotland.

To maintain these high standards, Lockton is expanding in Scotland and so is investing in talent for the future in our dedicated Law Society of Scotland Team and beyond.

We have two roles, the first of which is dedicated to the production and delivery of Risk Management to the Scottish legal profession. This includes the development of online learning modules and tools, delivery of seminars, writing articles together with identifying loss trends and building procedures and processes which will aid clients in both their understanding and elimination of risk.

The second is a role within our Transactional Risks team working with a broad base of clients, both buyers and sellers, as well as for the firms that advise them. The role will include reviewing and advising on transaction documents, Due Diligence and various M&A related insurance products, including Warranty and Indemnity, Tax and Contingent insurances and the candidate will ideally have past experience in Corporate Legal work.

Employee Specification

Scottish qualified solicitor with experience of working in the legal profession in private practice, within the public sector or as “in-house” legal resource

- Experience and knowledge of Scottish residential property work – Risk Management Role
- Experience of Corporate Legal work – Transactional Risks Role
- Experience of building relationships with stakeholders
- Interested in risk management and compliance for law firms

Knowledge and Skills Required

- Excellent interpersonal skills and communication skills – writing reports, articles, letters and presentations as well as delivering talks and seminars internally and externally; ability to communicate openly and confidently, conveying a high level of integrity and credibility
- Understanding a collaborative organisational culture
- Strong stakeholder management and client engagement skills
- Ability to think and act strategically as well as being task focused
- Self-starter – motivated and able to work to deadlines with authority
- Commercial awareness of the legal sector
- Awareness of The Master Policy for Professional Indemnity Insurance (desirable)
- Flexible – able to adapt to changing situations and competing demands

To apply, please send your CV and cover letter to:

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QUALIFYING IN 2021 AND LOOKING FOR A CHANGE?

CHANNEL ISLANDS - NQ 2021

We have been instructed on excellent opportunities for lawyers due to qualify in 2021, who are interested in working in the Channel Islands. To be considered for these opportunities, you will ideally be training with a well regarded commercial law firm and have at least 6 months experience in any of the following areas: corporate, banking, finance, funds and commercial litigation. The starting salary is significantly higher than the Scottish market, and a contribution to your relocation expenses would also be made.

This is a great chance to start your legal career with a top ranked firm and gain exposure to some of the best quality work in these sectors.

For an initial and confidential chat about working and living in the Channel Islands, please contact Teddie or Cameron on 01294 850501 or teddie@frasiawright.com or cameron@frasiawright.com for further details.

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