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Journal

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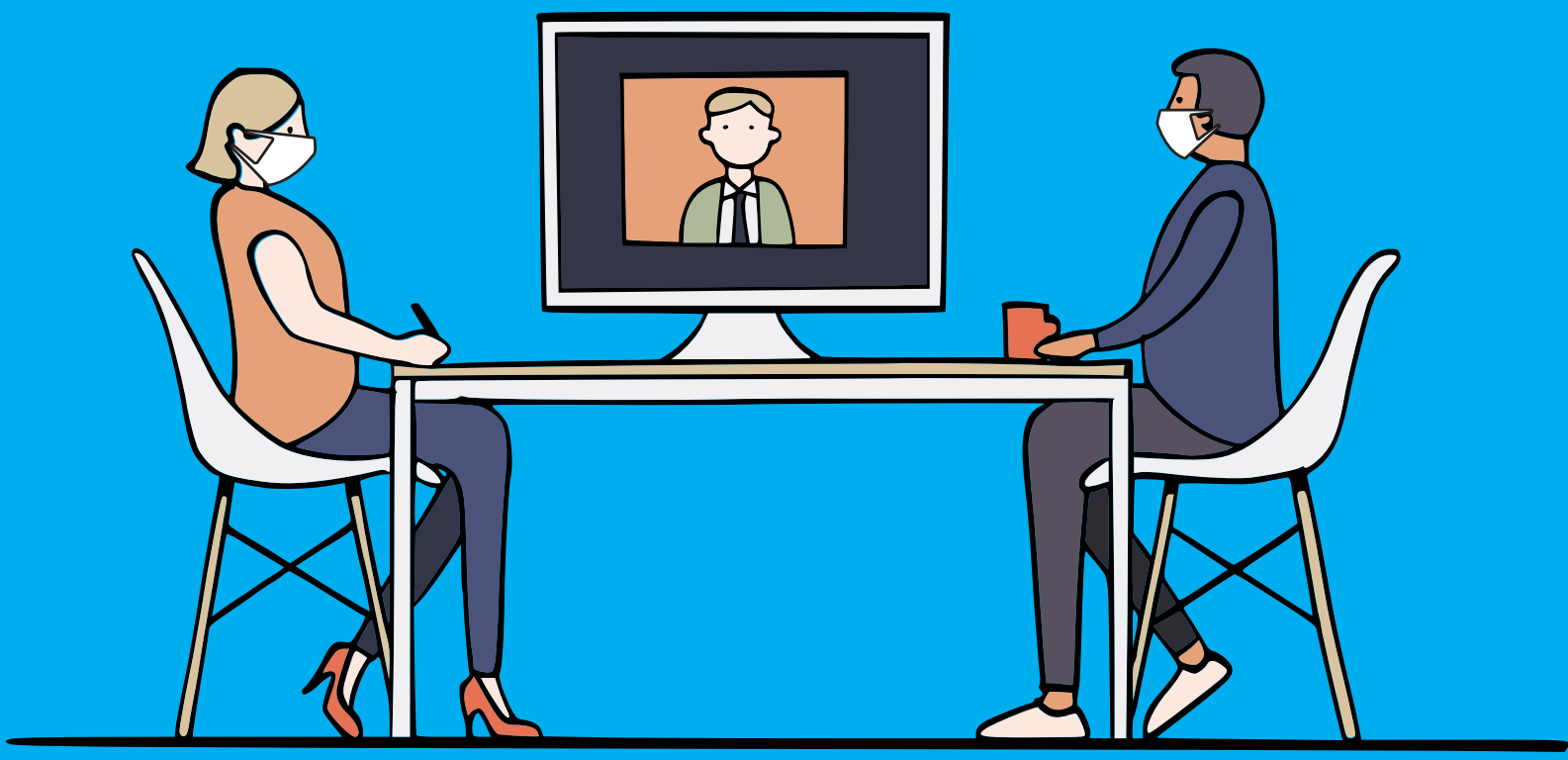
Volume 65 Number 8 – August 2020



Staying remote?

Has lockdown working changed how solicitors regard their offices? The Journal reports as reopening beckons

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Click here to see Peter's welcome message

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Holyrood's priorities

Which current bill before the Scottish Parliament has generated the most heat in public debate? Nothing to do with the pandemic emergency, or even the independence debate, but hate crime.

The bill based on Lord Bracadale's report, supposedly largely a consolidating measure, finds itself at the centre of a storm into which virtually every commentator seems to have felt obliged to pitch their criticisms, alongside interests ranging from bishops to secularists to the police.

Some of the comments have been remarkable (is there really a serious argument that possession of the Bible could become an offence?), but the Society and the Faculty of Advocates have each presented substantial and considered responses to the committee scrutinising the bill, making some weighty points about lack of clarity of the proposed offences, not least where the bill happens to depart from Lord Bracadale's proposals

Faculty goes so far as to conclude that ministers should "reconsider" the bill – which, given that its main purpose is to restate existing law, should not be lightly dismissed. If the bill does proceed, it can be expected to take up much parliamentary time before it is passed. The same may be true of the well intended incorporation of the United Nations Children's Rights Convention, a bill still to be introduced. Are these the best use of the now limited time remaining before next May's election?

Perhaps our MSPs' time would be better spent attempting to mitigate the many hardships that seem destined to result from the coronavirus lockdown and its after-effects on the economy. Some debt advisers, for example, regularly voice warnings that debtor support is in a poorer state now than 10 or 15 years ago. That should be cause for serious concern.

And what about those worried for their own homes? Into the mix here we have the Holyrood Local Government Committee's decision to drop the Fair Rents (Scotland) Bill from its programme, claiming excessive workload. Taken in private session after this member's bill had been referred to the committee for scrutiny, it goes against the principles of accountability that are supposed to govern the way the Parliament conducts itself.

Whether the bill, which has wider relevance than COVID-19 related problems, is the best way to address the serious issue of private rented sector costs is something that should be debated openly in the chamber, not annulled by the private decision of a handful of MSPs.

There are many worthy topics for legislation, but at times of national emergency such as this, our Parliament would improve its public standing if it cleared its decks in order to prioritise devoting as much time as possible to alleviating the effects of lockdown and recession on our people. J

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.65 NO.8 – AUGUST 2020

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ONLINE INSIGHT

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

The broken shield: a compliance nightmare?
Loretta Maxfield considers the implications of the CJEU decision upholding the standard contractual clauses for data protection outside the EU, but invalidating the EU-US Privacy Shield.

Legal tech: some tips for catching up
Brian Rooney provides some personal recommendations for the benefit of lawyers whose legal tech is lagging behind, and impeding their productivity.

Charities: members have "fiduciary" duties
A Supreme Court decision in an English appeal on the duties of members of a charitable company should be noted also by Scottish charities, Alan Eccles advises.

Tradecraft: money and practicalities
In his latest "tradecraft" collection of practical advice, Ashley Swanson focuses on property transactions and trying to smooth the path particularly around settlement.

OPINION

Stuart Munro

While the pilot scheme has encouraged some to believe that remote summary trials can become the norm, serious questions remain to be answered if basic rights are to be protected, as they must

It's funny how quickly things change. Six months ago the news was all about Brexit; summer meant heading to the sun; work meant commuting, the office, the courts.

Then, in mid-March, our lives were turned upside down. The initial hope that coronavirus would be over in a few weeks has been replaced by a recognition that we're in it for the long haul, with social distancing, local lockdowns and further waves and spikes until a vaccine finally comes to the rescue.

The pandemic has had an enormous effect on the justice system and those who work in it. Scottish courts went into near-shutdown for several weeks, the largest sheriff courts being reduced to dealing with a handful of custodies each day.

Any society needs a functioning justice system. Thoughts turned to how the courts could reopen, while observing social distancing and shielding. The understandable priority was High Court trials. But how can you accommodate 15 jurors (not to mention everyone else) with social distancing? A proposal to abolish juries temporarily rightly caused outcry, and was abandoned. Instead, the solution presented was to spread the jury around the courtroom; but the need to find somewhere else for the jury to deliberate and for the public to watch the proceedings meant three courtrooms being needed for every trial. And the lockdown had caused a backlog in trials, which would grow unless the courts could run the same number as before. Something would have to give.

Scottish Courts & Tribunals Service realised that remote hearings – where some or all participants are elsewhere – could be part of the answer. It cautiously introduced Webex videoconferencing for the Inner House, then the Outer House and Court of Criminal Appeal. However, to free up enough space for High Court business (to say nothing of sheriff and jury trials), there would need to be a clearout of sheriff court business.

Against that background SCTS decided to pilot Webex for summary trials. The first remote summary trial took place in Inverness on 9 June, with a single accused, two police officers giving evidence, and one Crown production. The sheriff was in chambers; everyone else participated remotely. The technology worked perfectly well, and the trial proceeded without incident. The accused was acquitted. Further pilots have followed in different courts.

But just as a swallow does not a summer make, so a handful of pilot trials do not provide a basis for a fundamental redesign of criminal courts. Many issues remain to be answered. For instance:

- Where should witnesses give evidence from? Is it appropriate that they participate from home? How to guard against undue influence? And if they have to come to the courthouse, is it not as well putting them in the same room as the sheriff?
- What about the accused? Can they participate from home? What if they record witness evidence? How can we tell they are following the proceedings? How can they communicate with their solicitor? Or should they also be at court, and in the same room too?
- How does the system cope with vulnerable witnesses or accused? What if a participant doesn't have wi-fi, or a suitable laptop, iPad or phone? The system has to cater for everyone.
- And what about volume? Most courts allocate six to 10 trials per courtroom, on the assumption that most will resolve or be adjourned, and only a handful will proceed. How would Webex cope with callovers and last minute changes in priority?

Many of these challenges will be capable of being addressed. Webex is a safe, secure, reliable and established technology.

Courts, like the rest of society, must adapt to a changing world. But any change has to be for the better. Certain fundamentals – effective participation, the right to private communication with a lawyer – are non-negotiable. Summary cases can involve very serious allegations; they can lead to imprisonment, loss of employment and family breakdown.

Importantly, the context has changed since early lockdown. High Court trials are now using remote juries – where the trial takes place as normal, but the jury is located outside the courtroom. That could mean each trial only requiring one courtroom, thereby removing the threatened takeover of the whole court estate, and freeing up courts for business such as summary trials.

Webex will no doubt continue to play an important role in our justice system. It may help with procedural, non-evidential business. Remote trials may work in certain instances, such as health and safety prosecutions. There may be greater scope in other types of process, such as fatal accident inquiries or commercial proofs. Ultimately, however, we must proceed with caution. Maintaining a functioning justice system in a pandemic must involve preserving fundamental rights, and that will require careful planning, consultation and evaluation..

Stuart Munro, director, Livingstone Brown, Glasgow, and member of the Law Society of Scotland's Criminal Law Committee

CORRESPONDENCE

"New", not "young"

I recently completed my Diploma after five years as a mature student, beginning when I was 47. I had never really considered subconscious age discrimination, though as a gay male secretary when starting my career in the late 1980s, discrimination was not new to me. In fact, I experienced the spectrum of discrimination in the office environment, not only against myself but due to race, sex, sexuality and disability to name but a few.

Over the years, there has been considerable progress, including legislation and increased awareness of these issues. There also appears to be more awareness in the public mind of age discrimination against mature people in the workplace. This does not mean, of course, that there is not still considerable work needed in all areas to eliminate discrimination: witness the recent racial discrimination that still features daily in the headlines.

With this in mind, I have felt it necessary to raise an issue on several occasions with both my universities regarding statements that are quite common but as to which there appears to be a lack of understanding of the impact they have on mature students. The comments are quite innocent and run off the tongue easily, but I suggest that, just like other comments about sexuality, race, sex etc, they no longer have a place in modern society.

You are now wondering what on earth these could be. Surely you have never made them? Well, you might be surprised. The first instance I experienced was when a senior lecturer was discussing what the legal profession was looking for in its graduates. The phrase "what firms are looking for in their young lawyers..." took me by surprise, as I was sitting near the front and whilst I was the oldest, there were certainly other students in their 30s and 40s. Such statements have been quite common over the years and I have made a point of raising it privately with the lecturer, or guest speaker, to make them aware of how disappointing this can be to a mature student.

On another occasion, a speaker said they had thought about rejoining a firm in their late 30s or early 40s after teaching, but had decided they were "past it". Again, not only I but others in the class felt excluded by this and wondered whether it was worth all the effort studying if this was the reality. I, and other mature students I have met, have considerable drive and ambition to undertake university studies later in life and it should be appreciated how these off-the-cuff remarks can come across.

I write this in the hope that, just as you would not now make references to sex or race, references to age are considered and adjusted. Robert Neil Butler as early as 1969 coined the phrase "ageism" and considered that it could be either "casual or systematic". The above statements fall squarely under the "casual" element.

An article I recently read referred at one point to "young lawyers", but also later to "newly graduated" and "newly qualified". So, when you are going to use the word "young" to refer to a group of people who may not, actually, all be "young", please consider the implications and use a different expression.

A proud mature student

BOOK REVIEWS

Employment Law in Scotland, 3rd edition

SAM MIDDLEMISS AND MARGARET DOWNIE

PUBLISHER: BLOOMSBURY PROFESSIONAL
ISBN: 978-1526509628; PRICE: £85

At nearly 900 pages, this is a comprehensive overview of employment law. Its timing is unfortunate because of the disruption due to COVID-19 and presumably temporary changes to Employment Tribunal practices. It is anyone's guess what Brexit will bring.

The authors cover the major bases of British employment law, and its current place in the respective legal frameworks of Scotland, and England & Wales. They draw on a large body of case law.

A distinctive feature of Scottish Employment Tribunal practice is that unlike south of the border, witnesses give their evidence in person, as opposed to by written statement, in almost all cases; and witnesses who have still to give evidence are not permitted to hear preceding evidence. The authors do not make these distinctions clear. They also indicate tribunal judgments are usually given on the final day of the hearing. This is only in undefended cases.

An increasing number of cases at first instance are heard by a legally qualified judge sitting alone. This has undermined the concept of the industrial jury, which underpinned the original tribunal system.

This book will prove a worthwhile addition to any employment lawyer's bookshelf, but needs to be treated with caution on matters of procedure.

Steve Briggs, Beacon Workplace Law Ltd
For a fuller review see bit.ly/3icoFMM

The Curious Case of Maggie Macbeth

STACEY MURRAY
RED DOOR PRESS: £8.99; E-BOOK £2.99

"A gentle book, one to settle down with after (another) fraught day of homeworking and switch off."

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

The book review editor is David J Dickson

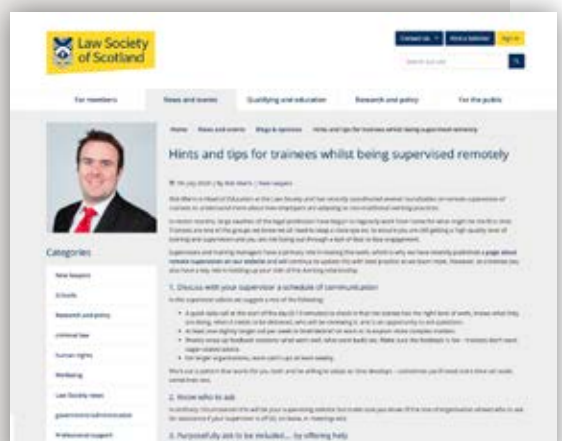
BLOG OF THE MONTH

lawscot.org.uk

We return to home territory this month to highlight Rob Marrs' "Hints and tips for trainees whilst being supervised remotely". Knowing the difficulties facing trainees, who normally learn much by osmosis, and their supervising solicitors, he provides 10 tips to encourage trainees to be proactive in seeking things to do, obtaining support and supervision – and, at number 1, setting a pattern of communication. Wellbeing features, too.

Supervisors will find a link to a page of tips for them as well!

To find this blog, go to bit.ly/33vHrrJ



Buy your way in

Public opinion in Ukraine has split over a Justice Ministry scheme offering gift certificates for "luxury cells" in the country's less than congenial remand centres.

Introduced in May, the "pay cells" offer three meals a day, 24-hour security – and a reduced risk of catching COVID-19. But limited to those awaiting trial, and still presumed innocent.

Certificates are only valid for six months, after which the remand centre gets to keep the money. An incentive to go out and offend, or just to turn yourself in? Justice Minister Denys Malyuska, who claims the initiative will fight corruption, has promoted the service as a potential birthday present for officials and politicians. Surely it wouldn't work here...

Proceeds are supposed to be used to improve conditions in regular cells. But reaction has ranged from "the best marketing tool in the history of the Justice Ministry", to "circus" and "laughing stock".

tinyurl.com/y2yr5wsh

PROFILE

Rachel Wood

Rachel Wood joined the Law Society of Scotland in May as Executive Director of Regulation

1 Tell us about your career to date?

I am a bit of poacher turned gamekeeper, having worked in big firms for over 25 years. My career has been varied but there have been consistent strands in relation to risk, quality assurance and change management. I started as a corporate solicitor and moved into knowledge management at McGrigors, then worked in risk management there as well. For a few years, I was Director of Risk and Knowledge at HBJ Gateley before returning to Pinsent Masons, my most recent post.

2 What motivated you to become a solicitor?

Accident! My first degree was in history and my options on graduating seemed to be academia, teaching or law.

I thought law would be the most challenging, applied for the accelerated LLB and here I still am.

3 How have you found joining the Society?

I don't think I would recommend joining any organisation during a global pandemic and full lockdown! It has made it more challenging to connect with people and learn the ways of working, but everyone has bent over backwards to be helpful and, with lockdown easing, I have enjoyed some walking meetings with colleagues. Thank goodness we have today's communications, but there's no substitute for face-to-face connection. And I do miss being able to print and read documents in hard copy!

4 What do you see as the key regulatory issues?

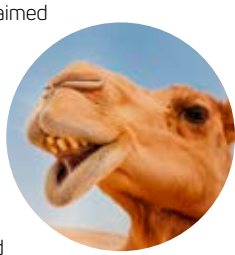
At the moment, the challenge is maintaining high quality client service and continuing regulatory compliance during remote working, furlough and court closures – to which the profession is rising admirably. Longer term, the legal services review is essential to allow the Society to modernise regulation.

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

WORLD WIDE WEIRD

1 Getting the hump

tinyurl.com/y3gkv343



Prosecutors have claimed they were unable to act when a herd of 80 camels caused havoc in the Russian region of Astrakhan after being released by a pensioner who could no longer keep them.

2 Bear faced

tinyurl.com/yxgzwbq9

Campaigners are attempting to prevent Mexican authorities from trapping and relocating a black bear in a wildlife park that approached hikers and appeared to pose for a selfie.

3 Rooster rap

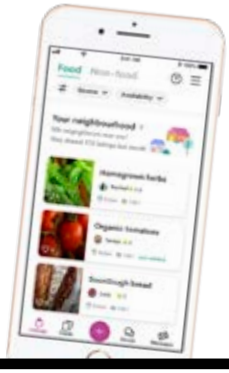
bit.ly/33vWxSq

A Louisiana man, who claims to be pastor of a church called Holy Fight Ministries, is claiming in a lawsuit that his arrest for illegal cockfighting was a constitutional violation of religious freedom.

TECH OF THE MONTH

Olio

iOS, Android – free



Tons of good food goes to waste every day. Olio is a localised way of allowing people to share food and other items that they might otherwise throw away.

www.olioex.com

PRESIDENT

Amanda Millar

Technology has enabled many events to happen recently that would not otherwise have – but is not a panacea when it comes to upholding justice and the rights of the citizen, rights which globally are under increased threat due to the pandemic

So ... August and the staycation is in front of me as I write, and behind as you read. I hope you are all as safe and well as possible in these ongoing challenging times. I speak regularly to people looking for a career in law and always say one of its great joys is that nothing stays the same and every day is different. Now the whole of society is getting a chance to see that in action, and not necessarily in a good way!

As a profession, we continue to show our resilience, flexibility, and desire to deliver for our clients and make meaningful contributions to civil society.

Technology has continued to be my constant companion in my work as your President. I had the opportunity to attend a world leaders' round table of lawyers recently, and inputs from colleagues in Asia and Latin America brought into sharp focus the fact that there is much legal turmoil across the world at present, impacting on the human and civil rights many of us here take for granted. The changes we have experienced through global pandemic necessity, and the resurgence of extreme views, show us that we must not be complacent about our human rights and the need to preserve the pillars of our profession that contribute to the democratic and civil rights that we hold dear:

The independence of the rule of law, our responsibility as solicitors to provide advice without fear or favour, the right to be tried by a jury of your peers for the most serious offences, the right to express a strong opinion that may disagree with that of others.

We should oppose hatred, discrimination and marginalisation, but not debate. We must maintain our professional standards in the interest of our hard-won reputations but in the greater interest of society. As citizens, we have rights and responsibilities. As solicitors, we have rights and responsibilities to ensure these are upheld for all through ethical, professional advice and appropriate challenge. We contribute to supporting business, relationships and individuals in good times and bad. We prosecute, defend, challenge, protect, develop, regulate, secure and sustain.

Technology, while incredibly helpful and positive in so many fields, is not the panacea for everything that is currently challenging. In many areas there is work still to do – as the results of our survey on the virtual custody courts pilot showed..

Society needs our profession to remain viable to continue this work.

Virtual activity

It was with great joy and hope that I launched our first virtual summer school to people from a diverse range of backgrounds with an interest in the law, which allowed us to open up the opportunity to many more participants and had more than 70 attendees – more than three times as many, and from a wider range of locations, than we can normally accommodate at the in-person events.

I also participated in a panel session with my #oneprofessionmanyjourneys fellow role models, hearing their inspiring stories and running out of time to answer the myriad questions from the very engaged students first thing on a Monday!

Our High Street and Sole Practitioners Conference took place towards the end of July, again entirely remotely, and with the highest-ever attendance of close to 200 participants. Wonderful to be able to engage with so many members and share knowledge from a wide variety of speakers in the interests of continuing to support members in a range of ways in these most unusual of times.

For our in-house colleagues, we launched the nominations for the now annual Rising Star award. I am fascinated to see this year's nominations and I know our in-house sector will have risen to their own challenges of client service and development. More information can be found on p 40 and on our website.

On a sad note, I was shocked by the sudden death in late July of Sheriff Richard Davidson, who I had the opportunity to appear before in Dundee, Fort William and in hospital. He was always forthright, and my abiding memory of him was that he took a person-centred approach to cases involving those with mental illness, before it was established as "the right thing to do". An attitude which should inspire.

Stay safe.

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

People on the move

Thorntons Law LLP (l to r): Michaela Dougan, Lauren Fettes, Joanne Clancy, Rachel High, Rachel Anderson and Neil Falconer

ABERDEIN CONSIDINE, Aberdeen and elsewhere, has appointed **Nicola Gray** as a partner in the Employment Law team, working primarily in Aberdeen and Aberdeenshire. She joins from MACKINNONS, where she led employment services.

ADDLESHAW GODDARD, Edinburgh, Glasgow, Aberdeen and internationally, has appointed **David Kirchin**, head of the corporate team in Scotland, as its new head of Scotland. He will also sit on the board of the company. He succeeds **Malcolm McPherson**, who has retired as a partner but will remain with the business as a consultant.

BELLWETHER GREEN, Edinburgh and Glasgow, has appointed **Caroline Clark** as a consultant to its Litigation and Regulation team.

BLACKADDERS, Dundee and elsewhere, has appointed **Peter Duff** of its Glasgow office as chairman, following the retirement of partner **Scott Williamson**, who will continue as a consultant.

Johnston Clark has also been re-elected for the seventh time as managing partner, a position he has held since 2000.

BRODIES LLP, Edinburgh, Glasgow, Aberdeen and Dingwall, has appointed private client lawyer **Lisa Law**, an accredited specialist in incapacity and mental disability law, as a director, and **Sarah Lilley**, an accredited specialist in child law, as a senior associate. Both will be based in Dingwall and join from INNES & MACKAY.

DENTONS, Edinburgh, Glasgow, Aberdeen and globally, is to close its Aberdeen and Watford offices, with lawyers and staff in these locations working from home permanently. The Edinburgh and Milton Keynes offices will be available to those staff now working from home permanently.

JONES WHYTE LLP, Glasgow, announces the promotion of family lawyer **Amerdeep Dhami** to associate, personal injury solicitor **Nicola Waters** to associate, and **Matthew McCabe**, head of the Industrial Deafness Department, to senior solicitor.

KIPPEN CAMPBELL LLP, Perth, is delighted to announce the appointment of senior associate **Jacqueline Jane Dow** as a partner with effect from 1 August 2020. She will assume responsibility for the running of the firm's Private Client department.

LEVY & McRAE SOLICITORS LLP, Glasgow, has announced the appointment of **Carol Gammie** as an associate. She joins the firm after having worked as a legal consultant with the OFFICE OF THE PROSECUTOR OF THE UNITED NATIONS in The Hague. She is also a commissioner with the Scottish Criminal Cases Review Commission.

MORTON FRASER LLP, Edinburgh has announced a total of 17 promotions across the practice, all with effect from 1 July 2020.

Mimi Stewart has been made a legal director in the Construction team, and also in that team, **Caroline Earnshaw** and **Julie Scott-Gilroy** become senior associates, as does **Lauren Hart** (Banking & Finance).

There are seven new associates: **Matthew Barclay** (Agricultural & Rural), **Bess Innes** (Commercial Property), **Jack Kerr, Kirsten McManus** and **Emma Wood** (all Succession & Tax Planning), and **Catherine MacPherson** and **Angela Myles** (both Banking & Finance).

Six new senior solicitors are **Robyn Keay** and **Matthew Miller** (Litigation), **Laura McKenna** and **Nicole Moscardini** (Employment), **Katie Mahoney** (Succession & Tax Planning), and **Fay Shearer** (Commercial Property).

MURRAY SNELL LLP, Edinburgh, part of the MACROBERTS group, has appointed **Gail Clarke** as an associate in its Estates, Forestry, Agriculture & Renewables team. She joins from BLACKADDERS.

SHOOSMITHS LLP, Edinburgh, Glasgow and elsewhere, has appointed **Michael McLaughlin**, formerly head of Employment (Scotland) with DWF, to its Glasgow office.

STUART & STUART, Edinburgh, Bonnyrigg and Penicuik, announce the retirement of **Gordon Cameron** as a partner on 31 July 2020. Mr Cameron began his career at the firm in 1985 and became a partner in 1987. He will remain with the firm as a consultant. **Emma Horne**, head of the Private Client team, is assumed as a partner from 1 August 2020. The firm has also welcomed **Angela Agrawal**, who joined in January as an associate specialising in residential conveyancing.

THORNTONS LAW LLP, Dundee and elsewhere, has promoted **Joanne Clancy** and **Lauren Fettes** from Personal Injury in Edinburgh, and **Neil Falconer** from Intellectual Property in Edinburgh, to associate; and **Rachel Anderson** and **Rachel High**, both from Private Client in Dundee, and **Michaela Dougan** from Personal Injury in Edinburgh, to senior solicitor.

There are only 3 problems your law firm faces

It all boils down to time, profit and efficiency. We think we can help

Three problems? Here they are...
1. We need to save time
2. We need to make more profit
3. We need to make our team more efficient.

Now, you may be thinking, "Come on, of course they are; this is not new information." However, my point is not whether these *are* the problems; I'm saying they are the *only* problems law firms face. No matter how you dress it up or how you describe them, it's always these three core challenges. And in most cases, businesses turn to tech for help.

Are lawyers technophobes?

What I find frustrating is when I hear people speak about lawyers as if they are stuffy, three piece suit wearing, money clutching laggards who must be tamed and tricked into modernising their business. For the most part that is simply not the case, and I instantly empathise with the vast majority of lawyers out there grinding and fighting the good fight. You're not technophobic idiots who repel the idea of future proofing your business. You're just busy and want help to make it perform to its best.

Time

When it comes to saving time, we keep our solutions in search of problems. We are less interested in looking "really cool", and more interested in being productive. You're interested in technology that solves problems you encounter every day in practice: writing, billing, analysing firm performance, and client relationship management. You want to do these things quicker and more efficiently. We can tick that box.

I can also guess where lawyers don't want to be at 6.30pm: just like everyone else, you don't want to be in the office! So, when developing our software, we think about your everyday practice. If you have to work late, it's not because you're uploading your latest TikTok video! If we can save you time and help you leave at 5.30 instead of 6.30, you might just consider buying our product. Plus, we know you simply won't believe us if an overly enthusiastic salesperson tells you our product is so revolutionary that you'll suddenly be working a 40-hour week! We're realists and BS is not a language we speak!

Profit

I've often heard that lawyers will only buy software that looks "cool" and is quite expensive. Maybe that's true for big firms, but whatever anyone's perception is, lawyers aren't made of money. If your rates seem high, your costs are too. Margins for most of you are tight, and getting tighter. So, we have to give you a system that does what you need, at a price that works for you. From there we streamline and automate what we can to help you reach your goals and maximise ROI in every way possible.

One way includes finding a cost-effective package that can simply "get the job done". So, rather than you viewing our tech as a reluctant overhead, you buy into the idea that this system will help you and ultimately make you more profitable. Tick!

Efficiency

SMBs are constantly looking for new technology to create a more productive and efficient workforce. In addition, remote working has led to an increased need for on-demand data – accessible any time, from anywhere. I define productivity as the strategic alignment of vision, focus, and technology. Identifying tech solutions that unlock these and enable true productivity, all within budget, is a goal of all SMBs.

Rather than me rhyming off 20 features that will make you and you team more efficient, just ask yourself a few questions and take it as read that we can tick those boxes too:

- Do you have a clumsy, paper-based, error-prone, manual system?
- Are you running your business on Excel and it's no longer working or scaling?
- Do you have people who need to work remotely or at home, but you need access to the same files?
- Are you micro-managing your team and their processes because you just can't trust them to do things exactly the way you would?
- Are you and/or your team spending most of your day working through laborious administrative tasks?
- Do you have a system that can't keep up?

It's safe to say that if you're not maximising your time or being as efficient as you can, you're leaving money on the table. We want to reduce the time spent performing routine and critical tasks, so you don't lose the opportunity to serve additional clients.

Let's not overcomplicate things

Lawyers do complex work and can have complicated demands. That doesn't mean you need complicated software.

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Practice Performance Matters

Reinventing the office

When law firm offices reopen, will it be back to work as before? How much will have changed through experience of remote working? The Journal revisited firms we quizzed as lockdown began

Words: Peter Nicholson

Solicitors' offices south of the border are opening up; on present indications Scotland has a few weeks to wait. By then, it will be almost six months since lockdown took effect. Will "going back" mean just that, or has the working day changed for good?

Back in April, soon after lockdown, the Journal surveyed a spread of firms to find out how their teams were adjusting to remote working. This month we followed up to find out how they now view the pros and cons, and the impact on future practice.

Driven change

"The main positive has been that it has forced innovation in terms of new practice and procedures", reports Greg Whyte, managing partner of Jones Whyte. "We can now operate with only 2% of the overall team physically present (and this number is decreasing as we adapt further). The negative has been the absence of the social side, both in and out of work time."

Shepherd & Wedderburn's Andrew Blain reflects others in paying tribute to technical support. "Thanks to the tremendous work of our IT team and the dedication of our lawyers and support staff, we have not seen any disruption to client services while working remotely." Secure videoconferencing technology for remote meetings with clients, contacts and colleagues has been extended to virtual social events for keeping in touch.

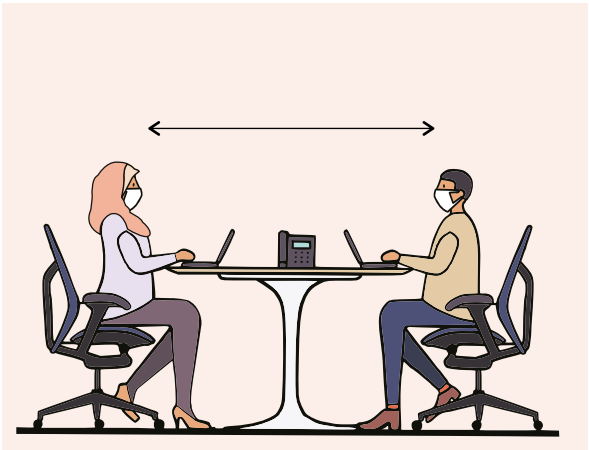
"There have been many positives," Brodies' Nick Scott affirms. "Perhaps, most importantly, how quickly and seamlessly our colleagues engaged remote working. It has also accelerated the move towards more digital practices. One tangible measure is the reduction in printing, which has decreased tenfold in the last three months."

Wellbeing, often cited as a concern in this context, has he believes seen benefits, "with many colleagues taking advantage of the time they are getting back from their daily commute and using that for exercise and fitness".

Jennifer Young, chairman of Ledingham Chalmers, believes remote working "has largely worked well, with "a strong community spirit about embracing this change", but has had its challenges, such as juggling work and family commitments.

"In some ways, remote working has brought us closer together across the firm. While folks have missed the opportunity to turn to a colleague during the day to bounce ideas off them, or we've had to think again about how best to mentor team members online, there's something more intimate about being 'invited' into someone's home over videoconference."

Overall, output does not appear to have suffered. "If anything, we are more productive from home," claims Simon Allison, employment partner at Blackadders. "Except for occasional trips to the office for essential scanning, there isn't anything that cannot be done from home, thanks to technology. It has been refreshing to see how adaptable our colleagues have been throughout this situation."



That is reflected by Marianne McJannett, associate at TC Young, who has been able to carry out her work "in the same way as I did in the office, meeting deadlines and client needs as required. I have not missed the morning commute and fighting for a coveted seat on the train into Glasgow, although I do miss having 45 minutes each day to sit and read and set myself up for the day, or switch off at the end of the day".

Likewise, Paula Skinner, partner at Harper Macleod, says: "Before all this I would always have thought that in our line of work, when you are involved in deals, you would need to be in the office. However, we have proven that remote working can be done effectively. Many of our clients are entrepreneurs and they've simply been getting on with it, as are we."

A need for contact

But people do miss the casual contact with colleagues, especially for work matters.

"Not having people right beside me to bounce around ideas, or even listen, has been difficult," McJannett acknowledges. "While we have daily phone calls with each other, and weekly team meetings via Zoom – a lifeline and a great way of keeping in touch, it's not the same as a quick chat over a cuppa in the morning."

She further admits: "The biggest negative for me has not been remote working; it has been working at home in a pandemic. This has involved general worry about the global situation, as well as personal anxieties about family and friends' health, while also juggling being a full time employee and stay-at-home mum to a very active toddler. It has certainly been a challenge."

Skinner comments: "It is working apart, rather than 'working from home', which is the issue you need to monitor

constantly. We've learned that having everyone working from home means you need to be more organised than ever, even in terms of simple things such as filing because you can't quickly ask one another where something is. It's a guaranteed way to leak time so you really have to be disciplined."

She too misses "the small chats": "When you are beside someone all day you can get a better idea of what is really going on with them, though I think the fact that we have all recognised this shows we are thinking about one another's wellbeing, and that's a good thing.

"For my part, I feel I can be more productive in the office, but that's partly because it is more efficient for me as a senior person to have a quick chat with a younger colleague, mentor them and pass on pieces of work. Those small, immediate interactions are definitely harder to replicate."

Young observes: "Internal communications have become even more important. We took the view we couldn't communicate too much." These have included weekly team updates, live virtual Q&A sessions, and surveys about how people want to be updated, and what they would like to see happen when they return to the office.

"The main positive has been that it has forced innovation in terms of new practice and procedures"

She points out the particular challenges for new people joining, for whom strong internal communication has been particularly important.

Maree Allison at the Scottish Social Services Council agrees. "Induction and training of new staff is more challenging. We are conscious that for some staff it has been an isolating and difficult time."

Whyte, too, stresses the importance of the "informal conversation or chance encounter" for ongoing learning. Another risk he sees from extended homeworking is the dissipation of the trust and relationships built up between team members working together. "As time passes, cracks naturally appear and the need to re-engage in a traditional setting (both professionally and socially) becomes apparent."

Flexible future?

Has the experience led to a change of thinking about how much homeworking, and flexible hours to allow?

Allison replies that while the SSSC already had a very supportive approach to flexible hours, "We are developing an approach which will be much more supportive of the principle that work is an activity, not a place. Most staff are indicating that in future they would like to work a few days at home and a few days in the office."

"Unsurprisingly, most colleagues are expressing an interest in a mix of home and office working," Blain reports. "We will certainly be guided by our colleagues' preferences and the needs of clients, who, almost without exception, have also adapted rapidly to homeworking."

For Whyte, "The pandemic has strengthened our view that homeworking is something to be embraced rather than feared.

"Flexibility is what professionals, especially millennials, demand and expect nowadays. It is not, as is sometimes said, that millennials are entitled: far from it. Rather, millennials have choices and opportunities. Enabling these enhances rather than stifles productivity and creativity."

Scott emphasises allowing choice, given there are those who do prefer to work from the office; Young agrees that her firm now has "lots of confidence in, and a much clearer picture of", how well both homeworking and flexible hours can work.

McJannett "would question any employer whose employees stepped up to the plate and continued to work from home to support a business during lockdown, who then denies them the option of remote working in future".

TC Young has been "incredibly supportive" of her circumstances, and "as long as the work is getting done, to the same standard and in line with client expectations, then allowing people the option of flexible working is key to adapting to the changing landscape of the workplace".

Skinner responds: "From my discussions it's clear that everyone in the team at least wants to get back to

the office to some degree, though in general I think people feel they have been able to achieve a good work/life balance."

Blackadders' Allison begins with team goals and timescales. "It doesn't matter whether we choose to do something outwith working hours or between 9am and 5pm. It is about assisting them accomplish these goals. Leaders need to be clear about how their team fit into the bigger picture. You cannot over-communicate when you're working with a remote team."

He sounds a note of caution about "psychological safety", which is "a real concern for our firm. Our partners have taken it in turns to email all staff on a monthly basis with an update from each unit" – covering not only firm business, but voluntary work undertaken by staff. "We even had one update featuring a trainee's TikTok dance routine. Our managing partner also conducted a live webinar where staff could sign in anonymously and type their questions. They could ask him anything (and they did)."

Anne Campbell of Lennox Forensic Accountants describes homeworking as "the ultimate in business interruption insurance"; the need now is "to make sure that our business structure and operating procedures are redesigned, then built up from that starting point".

As regards hours, her firm sets certain parameters. "We quickly realised it was essential for us to keep to a core period where we knew the whole team would be working and available. These core hours of 9.30 to 2 mean there is a good chunk of the day when we know we can interact freely with each other and schedule calls and catchups with the team and with clients and others. Outside these hours, everyone was free to make up their hours at whatever times suited them, subject only to the requirement that, once stabilised, these became relatively fixed so that we all became familiar with each other's work patterns.

"Because we all have different commitments and also times of day when we are at our most productive, between us we are working from 6am until 10pm, and productivity is higher than ever."

Shape of the office

What does it all mean for office needs? Here Lennox Forensic has made the most radical change.

"In our new world of work, maintaining an office space 24/7 just doesn't make sense," Campbell declares. "We have taken the decision to give up our office and have taken a shared space which we use as a team hub, where we can get together for in-person meetings once or twice a week, and which also acts as our physical presence and a space where we can meet clients and contacts.

"We have set up a social enterprise to manage the space when we are not using it and are letting it out on a non-profit basis to support local freelancers and small businesses who need *ad hoc* space but cannot afford to take on premises at this time... it is a privilege to be able to help in this way."

Our other respondents may be

"It doesn't matter whether we choose to do something outwith working hours or between 9am and 5pm. It is about assisting the team to accomplish these goals"

Remote hearings: how far?

We took the chance to ask about our respondents' experience with remote court and tribunal hearings, and whether they think these might become the norm.

Jennifer Young reports a general view in her firm that they have been effective and efficient, and an expectation such digital use will increase. However, "There is a high level of frustration that the Scottish court infrastructure seems to lag behind that in other jurisdictions, and England in particular."

Nick Scott responds: "We believe this is a positive step forward for the Scottish courts, and a move towards creating a system that... delivers a number of benefits for our clients, particularly in efficiency and cost."

Greg Whyte states: "From a personal perspective I think this is a long overdue positive move. Hopefully, remote hearings will be a bigger part of what we do"; and (concerning Fitness to Practise Panel hearings) Maree Allison adds: "Feedback has been very positive. For us, they will be the norm when appropriate."

Marianne McJannett found tribunal

preliminary hearings "relatively easy" to carry out this way: "and the employment judge was very understanding when my toddler came into the room asking for Fireman Sam to be put back on the television!" But they took longer than usual, two running well over an hour instead of normally 20-30 minutes.

She adds: "To conduct final hearings relying on witness evidence and numerous documents could be difficult, and ultimately I think would take up far more tribunal time than would be required for in-person hearings."

Simon Allison's team hopes remote hearings, while good for straightforward case management, do not become the norm. "Just like with meeting clients over Zoom, it is very difficult to gauge emotions, which makes it difficult to ensure that justice is done."

viewing their office space differently, but still regard it as integral.

"In planning Brodies' new office in Edinburgh [a move scheduled for next year], we had already challenged ourselves to think differently about what the office is, and how clients and colleagues will want to use it," Scott explains. "Having a physical presence is still very important, arguably more so, as changes brought about by the pandemic will likely see more virtual hearings, for example, and so to be able to provide the space and the technology for our clients in that respect, is fundamental."

Similarly Whyte says: "We have just completed the purchase of a new head office in central Glasgow. I believe it is important to have a base where everyone can congregate and meet clients. I suspect it will operate more as a hub than as a place to be every day."

From an in-house perspective Maree Allison also predicts office space – shared with two other public bodies – being geared more towards meetings and training, with most staff working partly from home.

Blain regards it as too early to assess the impact of the last few months on future requirements, "but the experiences are likely to impact how businesses use office space in future".

Young is confident Ledingham Chalmers will still need its five offices across the country. "They're important to our staff and our clients. But lockdown will have an impact on how we use them in the future and what technology we'll need."

She expects a rise in demand for video meetings, and with fewer people present, more demand for areas for team activities. "That doesn't necessarily mean fewer desks, but will make us think more about how we use our existing space. It could well mean we need less storage space for colleagues who, until lockdown, weren't confident about going paperless!"

Meeting client needs

As for dealings with clients and others, Young expects these to continue online longer term. "There's a real discipline around meetings, and meeting structure, when they take place virtually. It's really easy too to share documents during these sessions and update them in real time."

McJannett takes a similar view. Presenting Zoom webinars has been "fantastic and a great way of updating clients and contacts throughout the country, without the travel time and expense". Attending client management committee meetings virtually has also worked well: "an effective way for clients to keep costs down while taking appropriate legal advice on difficult decisions". And CPD "has been really nice to do from the comfort of my desk".

Whyte plans to respond to demand: "We will keep in place all new methods of communication and interaction, while recognising that face time is still king for a great many clients, lawyers and transactions."

Blackadders' Allison, though, has found client video calls "quite challenging, since it is normally straight down to business – there is little chatter about niceties or personal matters, and lawyers have to work hard to spot their clients' real emotions during a Zoom call".

From the SSSC, his wife reports: "As a public body we work closely with Government and other public bodies. That engagement has worked very well remotely and we expect that will become the norm."

A beneficial side effect, Scott relates, has been greater use of electronic documentation and e-signing. "We believe this is progress towards legal systems and processes that are more fit for the future, and would encourage their greater use as restrictions ease."

Campbell remarks: "It turns out that new ways of working are fine after all – and in most cases an improvement. Remote client identity verification is a must now, and certainly appreciated by clients. And the enforced rollout of all our tech-forward solutions that were previously only used for those clients we thought suited to these approaches has been a revelation."

She concludes: "It feels like five or 10 years' worth of change has happened in four months – and it turns out that is a good thing!"

Power of the group

Group proceedings can now be brought in Scotland. The Journal discussed with Robert Milligan QC, a member of the working group that produced the court rules, what they contain and who may benefit

Words: Peter Nicholson

Class actions, or group proceedings as they are officially known, have arrived in Scotland. Enabled by part 4 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, detailed rules in the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Group Proceedings) 2020 came into force on 31 July.

Recommended by Lord Gill's review of the civil courts – rather than, as with most of the rest of the Act, the Taylor report – the aim of group proceedings is to provide for claims that would not otherwise be economic to bring to court, due to their low value individually compared with the costs of litigating.

Opt-in: given the nod

Two basic types of class actions exist: opt-in, under which claimants must elect to join the proceedings, and those who do not are able to raise their own actions; and opt-out, which determine the rights of all members of the class except those who expressly choose otherwise. While the Act envisages both types, initially the rules – new chapter 26A of the Court of Session Rules – only provide for opt-in.

Robert Milligan QC, a member of the Scottish Civil Justice Council working group which developed the rules, told the Journal that the group was tasked with producing straightforward rules encompassing only the essential procedural elements required to enable group proceedings to operate effectively.

"We made a commitment to produce the new rules quickly so that potential litigants could benefit from the new procedures as soon as possible," he said. "We looked at the practical and procedural aspects relating to implementation of each of the different regimes and decided to begin with an opt-in system, as more stakeholders would be familiar with it."

This would allow the court to gain experience in dealing with what is anticipated to be the more straightforward type of group procedure cases. "The benefit of this experience can be taken forward when considering the development of an opt-out regime in future. The rules should be seen as the start of the process, rather than the end to it, and it is very possible that an opt-out procedure will be introduced in due course."

"The rules should be seen as the start of the process, and it is possible that an opt-out procedure will be introduced in due course"

He added that in addition to lessening the financial burden for individual claimants, "For defenders, an advantage of the opt-in procedure is that it gives knowledge about the size and scale of the action, and the legal costs of one action should be significantly less than the combined costs of many separate actions."

Essential differences

The popular image of a class action may involve a group of consumers with a common complaint against a supplier, but any number of people from two upwards, who each have a separate claim, can constitute a class under the Act. How then will group proceedings differ from an action with several individual pursuers?

"In group proceedings a representative party brings the action on behalf of all members of the group," Milligan explains. "The rules introduce a new form of summons, a new procedure for the appointment of a representative party and for obtaining permission of the court to bring the group proceedings. The rules provide a mechanism enabling a group member to opt-in to the case (or withdraw from it), and for the preparation and

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maintenance of a group register by the representative party."

In addition, one of the main objectives is to identify and resolve common issues at an early stage. "The working group considered that an essential feature would be the incorporation of broad case management powers to facilitate judicial discretion to manage cases with flexibility in the individual circumstances of the case. The new rules therefore draw on elements of existing Court of Session case management models to achieve this aim and include provisions for fixing a preliminary hearing, case management hearings, debates and pre-proof hearings as appropriate."

Milligan accepted that the procedure might be suitable for, say, a personal injury action where several family members claim damages for the death of a relative, or a number of individuals alleging defective surgical implants or the like – if the claims "raise issues which are the same as, similar or related to each other".

The permission stage

If actions need the court's permission, how will that be determined? Here the Act requires the court to be satisfied as to the similarity (in fact and law) of the issues raised; and that the representative party "has made all reasonable efforts" to identify and notify all potential members of the group. The rules further provide for refusal (for which reasons must be given) where the representative party has not demonstrated that:

- there is a *prima facie* case;
- that it is a more efficient administration of justice for the claims to be brought as group proceedings rather than separate proceedings; or
- that the proposed proceedings have any real prospects of success.

Milligan further highlighted that when granting permission, the Lord Ordinary must make an order (to be advertised within seven days), which among other matters:

- states the name and designation of the representative party;
- defines the group and the issues;
- requires the representative party to lodge a group register;
- specifies how a person can become a group member and a timescale for doing so; and
- specifies how a person can withdraw their claim.

The granting or refusing of permission can be reclaimed without requiring leave.

A Lord Ordinary must also be satisfied as to the suitability of the proposed representative. Factors for consideration include their special expertise and abilities, their own interest in the proceedings, demonstration that they would act fairly and adequately in the interests of the group as a whole, and that they have no conflicting interests; and demonstration of their competence to litigate the claims, "including financial resources to meet any expenses awarded".

"This approach should improve access to justice for a great many potential litigants, and save parties money as well as saving court time"

Anticipated claims

Access to justice issues apparently led to the SCJC expediting its work on the rules. Milligan told how the working group were aware of the multi-party consumer litigations raised against Volkswagen Group in other jurisdictions in relation to the widely publicised emissions scandal.

"Similar consumer litigation may be brought in Scotland under the new regime. Because of concerns about prescription in those proceedings, there was a degree of urgency in implementing the new rules. That at least partly explains why an opt-in model was used."

What is not part of the rules at this stage is public law matters such as environmental claims. "The working group's initial focus was to develop court rules for ordinary actions raised by summons, which it considered would form the bulk of the group proceedings actions coming before the court," Milligan confirms. "This approach should improve access to justice for a great many potential litigants, and save parties money as well as saving court time. The SCJC intends to consider whether the rules can be modified to incorporate judicial review cases at a later stage."

Who pays?

An important question is how the rules on expenses will work. In this respect the rules are less than specific – by design, according to Milligan.

"The working group concluded that until there is relevant operational experience and data available from Scottish Courts & Tribunals Service, the cost of servicing the new procedure will remain unknown. It will not be possible to agree policy on new fees provision in the absence of that information, and the position is the same regarding potential changes to existing tables of solicitors' fees. The SCJC therefore intends to programme a future review of these aspects by its Costs & Funding Committee.

"In the meantime, under the opt-in procedure the court will be entitled to determine the liability of each group member for payment of a share of any taxed expenses incurred by the representative party (and may do so before or after the conclusion of the action). In awarding expenses in group proceedings, the court will retain its discretion to apply the general rule that expenses follow success."

Robert Milligan QC is a member of Compass Chambers and has acted in a number of group litigations

First questions for the system

The new Scottish regime reflects a wider trend, but questions remain about how it will work in practice, as this commentary explains

Introduction of the new regime in Scotland reflects a trend across Europe of facilitating group proceedings. For example:

• Competition opt-out claims have been possible in the UK since 2015.

• In October 2019, the English Court of Appeal permitted an opt-out data protection class action on behalf of around 4 million people to proceed against Google, using the "representative action" mechanism.

• In January 2020 the Netherlands introduced a procedure for bringing opt-out class actions for all causes of action.

• At European Union level, the Directive for Collective Consumer Redress is likely to be passed later this year, setting out minimum standards for collective proceedings that each member state must incorporate into their domestic procedural law.

In the US, the trend has been in the opposite direction, with a series of Supreme Court decisions that have applied more stringent tests at the certification stage.

As it happens, Scotland already has an opt-out class action mechanism. As noted in the first bullet point above, it is possible to apply for a collective proceedings order ("CPO") on an opt-out basis UK-wide, but only for competition claims. The new Scottish regime is not restricted to competition claims, and pursuer firms are likely to focus on areas that have traditionally been fruitful for collective proceedings in other jurisdictions, including product liability, consumer protection, employment and pensions, data breach claims, and shareholder/securities actions.

Introduction of the new regime on 31 July has gained a lot of attention, both within Scotland and beyond. Claims are already under preparation. Pursuer law firms will collaborate with likeminded firms in other jurisdictions, and litigation funders are actively exploring this area. We could well see a steady stream of claims filed under the new regime, but its long term viability depends on how the courts handle this new procedure and how they resolve the important issues that the rules do not directly address.

Determining certification

There are a number of important questions on how the courts will apply the authorisation and permission criteria. For example:

• The applicant must demonstrate it has financial resources to meet any expenses. However, the rules state that "details of funding arrangements

do not require to be disclosed". It is not immediately obvious how the court can properly assess the viability of funding arrangements without access to the relevant documents.

• As to the "permission" criteria:

Criterion (a) in s 20(6) of the Act (claims raise similar issues) is a commonality requirement, which is a usual feature of group proceedings mechanisms. The wording is very similar to the commonality test in the UK-wide CPO regime, which requires that claims have the same, similar or related issues of fact or law. Under that regime, the Competition Appeals Tribunal has ruled that a single qualifying common issue can be sufficient: *Merricks v MasterCard* [2017] CAT 16. The commonality test for US class actions requires that common issues must predominate over individual issues, but it appears that there is no predominance requirement in the Scottish regime.

Criterion (b) requires that the representative has made "all reasonable efforts" to identify and notify potential group members. In principle, persons outside Scotland can participate in opt-in claims, so is there an obligation to contact potential group members beyond Scottish borders? This could be an onerous requirement.

• Perhaps the most significant question is on the extent to which the courts will require document production for certification hearings. Preventing a defender from accessing funding documents may prejudice its ability to raise concerns on the applicant's ability to pay expenses. Absent access to documents, both from the pursuer and the defender, any merits assessment (*prima facie* case/real prospects of success) is likely to be denuded of value. Broader document disclosure would result in a more robust certification hearing, but would inevitably increase costs.

Parties that fail at the certification hearing will likely appeal, particularly for high value claims. Thus, clearer guidance on the certification standards should develop, albeit this process will take a number of years.

Costs and expenses

Group proceedings can be high value, raise new procedural issues that do not apply in unitary claims, and be vigorously defended. Accordingly, they will be expensive to pursue, and pursuer law firms will work with litigation funders on these projects.

A key battleground will be the extent to which group members are liable for expenses. The court will consider the proposed representative's financial resources to meet any expenses awarded, but there is ambiguity on whether the representative will be liable for group members' adverse costs or only for their own.

Who bears the cost risk, and to what extent, will influence participation rates in these claims. Where group members bear cost risk (as under the English group litigation order opt-in regime, where group members are typically severally liable for common costs), participation is disincentivised. Both to address this risk and also to encourage participation, claimant law firms and litigation funders purchase adverse cost insurance ("ATE"). However, cover can be inadequate, as recently demonstrated by *Sharp v Blank* [2020] EWHC 1870 (Ch), a costs decision of the English High Court following the failed shareholder claim concerning Lloyds' acquisition of HBOS, where total adverse costs cover is £21.45 million but the defendants are claiming costs in excess of £30 million. If, in contrast, full cost risk is borne by the representative on behalf of the group, putative group members will be less concerned by the adequacy of ATE, resulting in higher participation rates.

Securing the finance required to pursue a dispute will be key to advancing the action. The Law Society of Scotland is continually working with the legal profession to improve price transparency and flexibility. However, as we have seen around the world, we expect that litigation funders will provide attractive funding solutions for group proceedings in Scotland.

Kenny Henderson and **Graeme MacLeod,** **CMS** and **Frances Sim,** Restitution

Recovery time for contracts?

Influential legal figures have called for a "breathing space" approach to contractual disputes caused by COVID-19 disruption. Peter Nicholson attended a webinar to develop the idea, and interviewed two of the group behind the concept

A plethora of defaults; a deluge of disputes; an unbearable strain on the judicial system, domestically and internationally. All of these warnings have surfaced in assessments of the effects of COVID-19 on the world of commercial contracts.

That many business relationships have been disrupted by the pandemic is unarguable. But how should the law respond? Some commentators dusted down the authorities on *force majeure,* frustration and the like; but is it helpful to turn at the outset to such concepts when the business, and economic, priority will usually be to preserve the trading relationship?

Governments globally have recognised this, through temporary legislation designed to provide relief to individuals and businesses which might otherwise face harsh outcomes through no fault of their own. So have a group of senior lawyers, combining judicial and academic expertise, under the auspices of the British Institute of International & Comparative Law (BIICL).

An initial meeting of seven, including two former UK Supreme Court Presidents (Lords Phillips and Neuberger), and Scotland's Sir David Edward QC, led to the release in April of "Breathing space – a Concept Note on the effect of the pandemic on commercial contracts", and a larger group delivering a fuller comparative survey in a second concept note in May.

Seeking breathing space

"In times of uncertainty, the law must provide a solid, practical and predictable foundation for the resolution of disputes and the confidence necessary for an eventual recovery," the first paper states. While sometimes, as with the business interruption insurance dispute, the courts may be the only option, "In other cases, arguably an outcome which leaves one party a winner, and the other a loser, will not take full account of the market/social contextualisation of the crisis."

Can "a more creative... but nevertheless rigorous approach" be adopted without prejudicing the need for legal certainty? The note continues: "In many jurisdictions, procedural rules already encourage conciliation – can these be developed further to give a breathing space? The onus at least in the first instance would be for the continuance of a viable contract rather than bringing it to an immediate end."

Calling for a comparative approach, it urges a debate as a matter of priority on how the law might encourage "a legal environment which is conducive to optimism and a global recovery".

In furtherance of that aim, BIICL held a webinar in late June to explore possible approaches, and the Journal was able to interview two of the contributors to follow up some of the themes.

Comparative angles

Opening speaker Dr Eva Lein of Lausanne University explained that the concept notes related to both dispute resolution methods and the substantive law. On the former, constructive alternatives to relieve the strain on formal processes would be needed; on substantive law, some jurisdictions including Singapore and Germany had already enacted temporary measures – these vary considerably; and there is a problem in how they interact with general contract law.

> *"From a business perspective I don't think businesses are necessarily looking for justice but for resolution"*

In the UK the Cabinet Office provided welcome guidance dated 7 May (since revised on 30 June), which (while not formally applying to Scotland) urges "responsible contractual behaviour in the context of the pandemic", both ahead of and during dispute resolution.

Turning to contractual principles, Lein noted that these can be interpreted and applied differently between jurisdictions. A Spanish court has already ruled that COVID-19 is a very specific situation that requires a very flexible approach, and that "It is necessary to adapt contract law institutions to the social reality of the moment." The question remains how UK courts will react.

Resolution first

International arbitrator and former general counsel Wolf von Kumberg predicted that contractual relationships would change in a more collaborative direction, as would dealing with commercial disputes. Renegotiations would be needed and the courts were not the right place for these. He too approved the Cabinet Office guidance – "an extremely well thought through document" – though it would require alternative and fast track dispute resolution mechanisms, for the sake of continuing business relationships.

In the future, building in a means of amending essential terms including pricing and payment should become a feature of contracts, with a neutral mechanism to assist in cases of difficulty. Training in effective communication and conflict management would also be important; and ADR tools should be built into contracts, with businesses adopting corresponding policies and guidelines. Virtual ADR processes were already proving very effective, possibly with advantages over face-to-face mediation.

He concluded: "If people say what we are advocating isn't really justice, from a business perspective I don't think businesses are necessarily looking for justice but for resolution, and what we should be offering is a resolution of their current issues."

Catherine Dixon, chief executive of the Chartered Institute of Arbitrators, said her organisation now had a pandemic disputes resolution service using ADR to facilitate businesses, particularly SMEs, recovering quickly, keeping costs down and giving some certainty as quickly as possible. She believed it reflected the Cabinet Office approach. Operating online and on a fixed cost basis, it offered the options of facilitated contract renegotiation, mediation and/or fast track arbitration.

She was joined by James South of the Centre for Effective Dispute Resolution, who believed the pandemic had accelerated a trend of the arbitration and mediation communities coming together, with the aim of providing clarity and keeping things simple for businesses: a "one stop shop" approach. In his experience parties did not really care about concepts such as *force majeure*; "they just want issues resolved", and emerging disputes nipped in the bud quickly.

Challenge for the law

Finally Sir William Blair, former judge at the London Commercial Court and a co-author of both concept notes, highlighted some points in the second note. Its focus was international

Sir William Blair

Dr Eva Lein

commercial contracts and its aim was to prevent disputes "clogging up the system when we should be focusing on recovery".

He observed that while English law had always taken a very commercial approach, this was a crisis "like no other", which deserved a response like no other, and the law had the responsibility of rising to the challenge. He proposed that where contracts are viable, the emphasis should be on making them work. If they are not, "we should be focusing on an equitable solution to bring the contracts to an end" – the current law of frustration being "not necessarily ideal".

In terms of legal principles, the courts should be open to finding implied terms in certain cases, perhaps to allow a breathing space; and should be slow to find that contractual obligations had been waived by parties entering discussions with that aim. Further, "the time of mediation has come", and though the courts had been slow to encourage it in the absence of agreement, "we've really got to look at that again".

Advice for advisers

Afterwards I spoke with both Sir William and Eva Lein.

In response to my question, will legal advisers have to rethink their approach to dispute resolution, Lein pointed first to learning from other jurisdictions, "because this is a crisis that affects all countries in similar ways and we can learn more from each other than we usually do".

She continued: "We should look more and more at what happens elsewhere, how efficient the solutions are elsewhere; and we also have to think more about online hearings and technology in the courts" – with discussion whether online hearings should become the default, except for specific or very important disputes.

I had noted Blair's comment that concept note 2 focused on international commercial contracts, and wondered to what extent it applied domestically.

"Well, a lot of it certainly does," he replied, "but I think what has changed in international commercial contracts over the last 30 or 40 years is the whole concept of the supply chain... you've got the prospect of a disruption anywhere in the chain disrupting the whole chain. If you compare that with the domestic situation, broadly within that you are applying a single law, single emergency regulations and guidance, but in the supply chain you've got a whole number that may be relevant."

Judicial creativity?

How far should we encourage judges to be creative, something hinted at in the first note? Would that not go against the trend of recent Supreme Court decisions respecting parties' bargains?

Blair disputed "that we are looking for the courts to do anything other than courts have always done, which is to apply legal principle to changing circumstances". Commercial certainty remains key. "But what you've got to recognise is that in this pandemic, working out what your legal rights are is much more difficult... There has been nothing like this, so we can't gauge as clearly as we would like how legal liabilities are going to work out, and that is another very good reason for parties resolving their disputes by negotiation or by mediation rather than having full blown disputes." If judicial decision-making produces new results, that is the nature of the common law process.

Lein suggested that legal concepts could be changing. "There are contract law solutions, and there is flexibility in their interpretation." She recalled the Spanish case where the court adapted the law to the social reality of the moment: "but it's the existing regimes that adapt, it's not that the judge invents something out of thin air".

Relational contracts

Another emerging idea is the use of long term "relational contracts", centred around parties committing to acting in good faith if unforeseen circumstances arise over a lengthy contractual relationship. Can that, I wondered, be applied to the present situation, or is it for the future?

"It's a very good question," Blair replies. "We do not have, at any rate in the English branch of the common law, any general doctrine of good faith performance, and we will not introduce one. There are reasons for that. One is that English law is used surprisingly often in international commerce and finance, when parties that have no connection with England just adopt it as a convenient law to apply. These parties want the contract to be enforced according to its terms, and that's why we take the position we do.

"But if you have a contract that lasts for say 20 years, the parties can't possibly anticipate all the things that may arise; they won't have been anticipating a pandemic, obviously, but there will be lots of other more minor things they won't have anticipated. Lord Leggatt, recently appointed to the UK Supreme Court, has said in a number of cases that at least for that kind of contract, the court will expect parties to negotiate in good faith to try and resolve issues that were unanticipated in a contract that lasts a long time."

www.biicl.org/projects/breathing-space

Relevant persons: the final word?

The Supreme Court has affirmed that despite the importance of sibling relationships, they do not confer relevant person status before children's hearings. Alan W Robertson believes the decision still places an onus on the authorities involved

The vexed question as to who can fall within the definition of a relevant person (in terms of s 81(1) of the Children's Hearings Scotland Act 2011) was an interesting subject that formed my first article with the Journal back in November 2014, and a notable number since. Since then there has been a steady flow of reported appeals in this regard. However, the UK Supreme Court pronounced judgment in the recent decision of *ABC v Principal Reporter* [2020] UKSC 26 (18 June 2020). There are a number of interesting observations that arise from the judgment.

The court was invited to consider two appeals, brought by ABC and XY. Both appeals had been dismissed by the Inner House of the Court of Session.

ABC had a younger brother who was subject to a compulsory supervision order that regulated his contact with ABC. ABC did not have the status of a "relevant person" and therefore did not have the rights that he would have had as such. ABC lodged a petition for judicial review with the Court of Session. In short compass, the Inner House rejected the contention, upheld by the Lord Ordinary, that there was a requirement to read down the provisions of s 81(3) of the 2011 Act, setting out who should be deemed to be a relevant person, to include the words "or persons whose established family life with the child may be interfered with by the hearing and whose rights require the procedural protection of being a relevant person".

XY had three siblings who were all subject to a compulsory supervision order. The CSO, *inter alia*, regulated XY's contact with his three siblings. XY was not afforded relevant person status (although it appears he was for a period of time), and thus argued that the provisions of the 2011 Act were in contravention of his article 6 and article 8 rights under the European Convention on Human Rights. The Inner House dismissed his appeal.

Important, but...

At the outset, the Supreme Court noted the importance of siblings in terms of their relationship to each other. The court observed (at para 1): "Siblings can be as important as parents in the lives of those who have them. While parents have been likened to the doctors doing their ward rounds to see the bigger picture, siblings have been likened to the nurses: they are there every day. 'These siblings are often "fellow travellers" through adversity or significant life events; they can act as a source of support for some children and a source of conflict for others. For these reasons, siblings are a potentially powerful influence on development...'

"The court also appeared to be anxious to explain why it would not be appropriate for every sibling to be afforded relevant person status"

(White & Hughes, *Why Siblings Matter: The Role of Brother and Sister Relationships in Development and Wellbeing* (2018))."

We are told later in the judgment that the importance of sibling relationships is not in dispute. The court however suggested that cases involving sibling contact were very few and far between.

Despite the court making so many concessions, a line appears to have been drawn. The core of the ruling can be found at para 45, where the court accepts that the decision of *Principal Reporter v K* [2010] UKSC 56; 2011 SC (UKSC) 91, relied on by the Lord Ordinary, was only intended to apply to unmarried fathers and to a limited class of others with a significant involvement in the upbringing of the child. We are told further that this was subsequently enacted in the test set out in s 81(3) of the 2011 Act.

Further considerations

The court also appeared to be anxious to explain why it would not be appropriate for every sibling to be afforded relevant person status. First of all, there a duty to attend panel and court hearings. The failure to do either could result in criminal sanctions being taken against the relevant person. While there is no doubt the court is quite correct about that, I would add that from my own experience, reporters appear to be disinclined to seek warrants from panels – especially in respect of a young, vulnerable person.

To be fair, the court stated further reasons why it would not be appropriate to afford a sibling relevant person status. A relevant person has the power to accept

or not to accept grounds of referral. If there were a number of relevant persons, or alternatively, more than necessary, this could result in disruptive referrals to the sheriff. However, even if that is correct, it is not particularly common for relevant persons to accept the whole of the supporting facts pertaining to the grounds. In such case, it is quite proper for the matter to be remitted to the sheriff for proof.

Admittedly, having a larger number of relevant persons than would otherwise be accepted could theoretically result in a larger number of attendees at panel hearings. That would be undesirable for a number of reasons. Reporters are duty bound to keep numbers to the minimum. At the moment, there does appear to be a very strong emphasis on that point by virtue of hearings operating by means of the Vscene mobile app.

That in itself generates another issue which the court was anxious to point out. It observed that relevant persons have "comprehensive access" to papers, documents and reports about the child. Normally, these reports (which are mostly prepared by the social work department) are fairly detailed and chronicle much of the history of the family and the background. Given that confidentiality is of the utmost importance in the context of panels, it would be most undesirable for people who may not otherwise be entitled to it to have access to that information. And that in turn appears to have been a significant point that the court founded on. At para 50, the court specifically pointed to the "dissemination of sensitive information" as being a significant factor against the proposed reading down of the definition of a relevant person.

Bespoke to the case

The court broadly concluded the case by stating that it was necessary to have a "bespoke enquiry", and that it was important that the public authorities concerned were aware of the interests of the child; the onus fell on such authorities to ensure that the child's interests were being met. We are not told of course what is meant by a "bespoke enquiry". I would take it to mean that we should avoid any sense of generic hearings, or perhaps simply rubber stamping decisions without first properly considering matters. In any event, it is apparent from the court's attitude that the onus lies firmly on the public authorities to exercise good and sensible judgment. By implication therefore, the onus appears to rest firmly upon Children's Hearings Scotland, the appropriate implementation authority, and Scottish Children's Reporter Administration.

But the main challenge here, as I see it, is leaving too much in the hands of panel members. It was quite properly accepted by the court that panel members are not lawyers. They are not legally qualified. Therefore, this will continue to present challenges in terms of future panel hearings where the issue of relevant persons will arise. It is appreciated and accepted that panels by their own nature are not intended to be legalistic and should focus on the interests of the child. Nonetheless, one should not underestimate the importance of ensuring that as a decision-making body, they produce decisions that are lawful.

Looking forwards, there is no doubt that the question whether a person is or should be a relevant person will continue to surface in cases. The answer to clients as to whether they meet the criteria will not always be straightforward or clear cut. One might hope that the position of siblings in the context of relevant person status has now been clarified. But then again, if in this matter we are required to have bespoke hearings, the advice will have to be just that. Bespoke.

Alan W Robertson is a senior associate with MBS Solicitors, Edinburgh

sign& send

Letters in a digital age

Sign&Send allows users to send letters by post in just three clicks

Laroque moves to working from home

When the work-from-home regulations came into force, we didn't have to think too hard about what we would need to do. We'd been lucky. We'd had a dry run, as it were: in June 2018 we were flooded out of our Kelvinbridge office. We were out for three months.

The facts were bizarre: it had been the warmest and sunniest spring and early summer any of us could remember. Then, during the night of 19-20 June, a whole season's worth of rainfall cascaded on to Scotland's central belt. Immediately after the deluge, the lovely weather resumed.

A colleague texted me from the office a little after nine on yet another gloriously sunny morning: "It's raining. From the ceiling..."

In the end, we lost about £5,000 worth of equipment. But we learned what we needed to do to allow us all to work efficiently from home. So, we were fortunate to have resilience measures already in place when homeworking came into force in March this year. We appreciate this was not so for all businesses, and our team has been busy working with firms to ensure they have the capacity they need to maintain productivity levels as they work remotely.

Support

One of our clients was able to switch to homeworking with impressive speed. We had already worked with them on automating routine tasks and on outsourcing their postroom: getting letters into the post during the pandemic was a problem already solved. Among the problems remaining: how to get client signatures on to terms of business and agreements. Before the pandemic this had been done by posting out hard-copy documents, but a new, smarter solution for both their employees and clients was now needed.

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Our service uses high quality printers, paper and envelopes to ensure a consistent letter print process to maintain professional standards. The system automatically inserts your signature graphic to outgoing letters. High-quality printers ensure that the final version looks as if it has actually been signed by hand. Letters can be sent in just three clicks directly from Microsoft Word. All that is needed is an internet connection; location is now irrelevant.

New solutions

Listening to and working alongside our clients as we negotiated the current situation has changed our release schedule. One challenge many firms faced was post arriving into a central location that needed sorted and returned to the original sender. We're pleased to have a solution for this. It will soon be possible for Sign&Send clients to include a business reply envelope allowing the returned mail to be delivered directly to them.

Laroque Software has over 20 years' experience developing bespoke IT solutions for the legal industry. We are committed to embedding efficiency and providing personalised, ongoing support to our clients.

If you would like to learn more about how Sign&Send could help your business, please visit signandsend.co.uk, email enquiries@signandsend.co.uk, or call us on 0141 357 0453. One of our team members would be delighted to speak to you.

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Laroque

Unfair prejudice – a game of two halves

Tom McEntegart considers the litigation involving the Scottish football authorities and some of their member clubs, including its affirmation of the precedence of arbitration, and the principles of unfair prejudice likely to have governed the final (but private) decision

The recent dispute regarding the relegation of football clubs Hearts and Partick Thistle was the proverbial game of two halves, although not one for the football purists.

The case concerned a joint legal bid by the two member clubs against the Scottish Professional Football League (SPFL) to reverse their relegations, which happened as a result of the coronavirus.

Following weeks of acrimony played out in the media about the merits or otherwise of the decision of the SPFL's member clubs to end the football season early as a result of the pandemic, and the subsequent failed attempt at reconstruction to avoid any clubs being relegated from their respective leagues, there was a sense of inevitability that legal proceedings would follow.

Petition process

The first half was played out before the Court of Session, following the lodging of a petition by Heart of Midlothian Football Club plc and Partick Thistle Football Club Ltd: [2020] CSOH 68. The petition alleged that the SPFL had conducted its affairs in a manner that was unfairly prejudicial to them.

Orders were sought in terms of s 996 of the Companies Act 2006 to (1) suspend the written resolution that had been passed to alter the rules of the SPFL insofar as it dealt with relegation and promotion; (2) interdict the SPFL from implementing the terms of the written resolution insofar as it dealt with relegation and promotion; and (3) reduce the written resolution in that respect.

The case called before Lord Clark at the start of July at a by order hearing which continued over three days. It generated considerable media and public interest, even if the outcome for the football fan was a less than satisfactory score draw.

The interest was understandable, given the importance football plays as the country's national sport. However, the public and accessible nature of the proceedings was also no doubt a significant factor in keeping the dispute in the spotlight. The hearing was streamed online to what may well have been a record attendance for the Court of Session.

Court v arbitration

To the ordinary supporter, the hearing was no doubt disappointing, given its inconclusive result. There were nevertheless a number of interesting issues that Lord Clark was required to consider, the most significant of which being whether the dispute should be dealt with by the court or by arbitration.

Lord Clark's conclusion – that he was obliged to give effect to the parties' agreement as reflected in the articles of association of the Scottish Football Association (SFA), which state that a "football dispute" shall be settled by arbitration – was not surprising, but it was a welcome affirmation of the approach the courts take when faced with such agreements.

Although he acknowledged the considerable public and media interest in having the issues aired in open court (a wish shared by the petitioners), his Lordship found as a matter of law that he was not entitled to refuse the application to sist on the grounds that the public interest should usurp the parties' agreement.

"The questions of who did what when,... and whether what happened constituted unfair prejudice remain unanswered, at least in public"

The parties had agreed to be bound by the terms of the SFA's articles, which meant that the SPFL and the other respondents were entitled to invoke the arbitration provisions in the articles. As they had done so, the court was obliged to give effect to this.

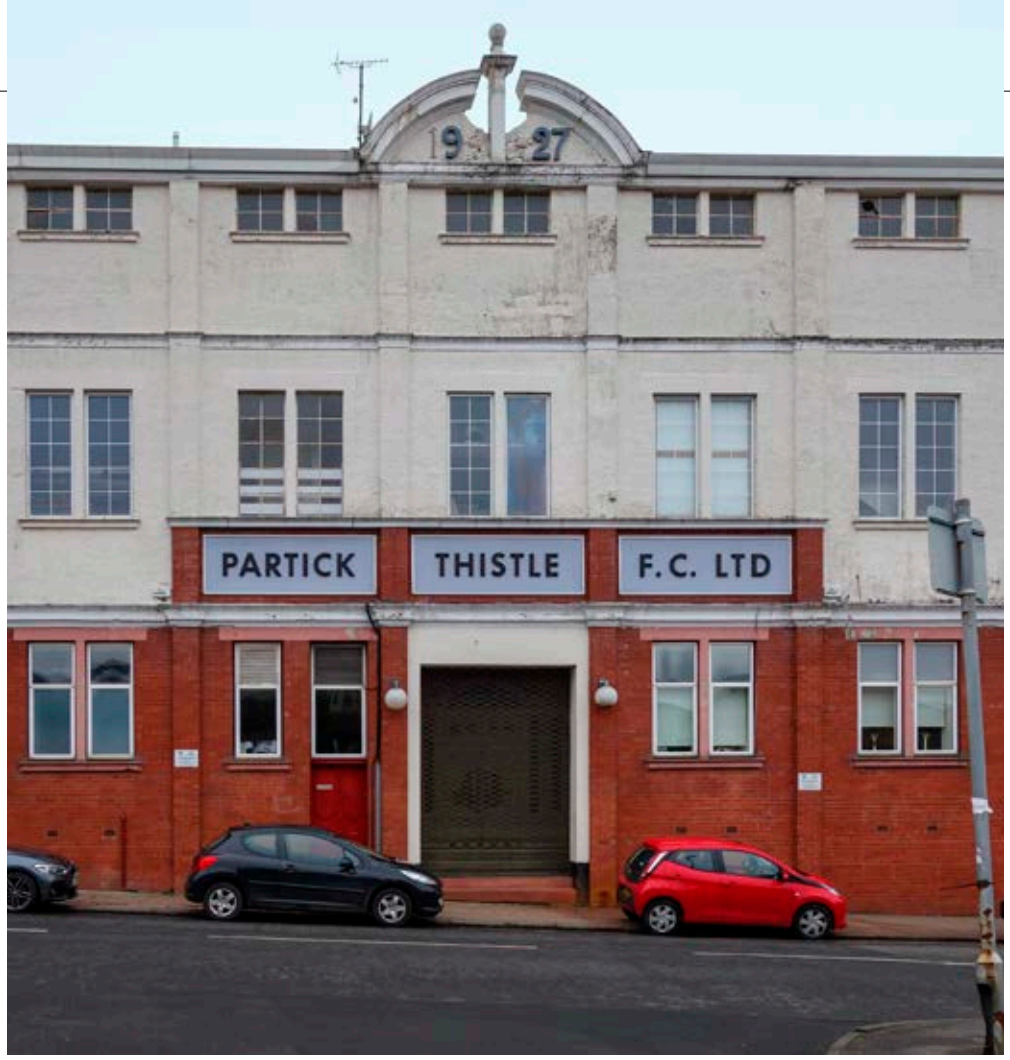
Two other procedural issues were considered by Lord Clark. The first concerned the motion by the respondents Dundee United, Raith Rovers and Cove Rangers to have the petition dismissed. In refusing the motion, his Lordship made clear that it was not appropriate to deal with such an application at what was essentially a procedural hearing, and that the issues would need to be properly developed in the pleadings and then debated before such a motion could be properly considered.

The second was a motion by Hearts and Partick Thistle for recovery of documents. While recognising the need to respect the powers and duties of the arbitration tribunal, Lord Clark noted the importance of resolving the dispute before the start of the football season on 1 August and decided to make an order for recovery of the documents sought. In doing so, his Lordship was requiring the parties "to put their cards on the table".

Confidentiality of arbitration

Somewhat frustratingly, although entirely understandably given the procedural nature of the hearing, while the substance of the dispute was referred to, it was not explored before Lord Clark.

The frustration at not hearing the respective arguments on whether the



SPFL's actions were unfairly prejudicial was exacerbated by the knowledge that the second half was to be played out behind closed doors in front of the arbitration tribunal appointed in accordance with the SFA's articles of association.

The questions of who did what when, why Dundee changed its no vote to a yes vote to carry the resolution, and whether what happened constituted unfair prejudice remain unanswered, at least in public. The arbitration process is confidential and information about the process can only be disclosed in limited circumstances, including where disclosure is authorised by the parties or is in the public interest.

In the week leading up to the start of the 2020-21 football season, the arbitration process was concluded with the claim of unfair prejudice being rejected by the arbitration tribunal. While the decision has been made public, the tribunal's reasoning for its decision has not. In arriving at its decision the tribunal will have needed to consider the meaning of unfair prejudice and whether the conduct that Hearts and Partick Thistle complained of met this test.

Unfair prejudice

So what is unfair prejudice? The leading authority is the House of Lords decision in *O'Neill v Phillips* [1999] 1 WLR 1092, and the speech of Lord Hoffmann. His Lordship deals with the meaning of unfair prejudice in the context of s 459 of the Companies Act 1985, although it is accepted his reasoning applies equally to s 994 of the 2006 Act.

Lord Hoffmann commented that context is crucial: conduct that is perfectly fair in a business context may not necessarily be fair between family members. A company is formed for economic reasons, usually with legal advice.

At pp 1098-99 he states that "a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But... there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith".

While cases of unfair prejudice are highly fact specific, and cover a wide range of circumstances – everything from the improper withdrawal of funds, to the diversion of business or commercial opportunities to another company in which the respondent had an interest – there are certain principles that can be identified from the authorities:

(1) The conduct must be both prejudicial and unfair. It is not enough to have one without the other.

(2) The prejudice must be to the interests of the shareholder in their capacity as a member, not in any other capacity. A failure to pay salary is not unfair prejudice.

(3) A member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which they agreed that the affairs of the company should be conducted (although unfairness may arise if the rules are breached or the rules are used in a manner that would be contrary to good faith).

(4) Unfairness is an objective concept, to be judged according to established equitable principles, and requires the conduct complained of to be such as is contrary to good faith.

(5) The petitioner's conduct is also relevant when assessing whether any prejudice is unfair.

Valid procedure

The conduct complained of in the petition was the decision of the member clubs of the SPFL on 15 April 2020 to pass a written resolution that altered the rules of the SPFL. The resolution was passed after Dundee withdrew its previously-submitted no vote and voted yes, allowing the resolution to pass. The resolution relegated Hearts and Partick Thistle from their respective divisions, and promoted Dundee United, Raith Rovers and Cove Rangers.

Central to the arbitration tribunal's decision would have been whether the resolution was validly passed, and in particular whether the no vote originally submitted by Dundee should have counted, instead of it being withdrawn later that same day to be replaced the following week by a yes vote.

Had the no vote stood, the resolution would not have been passed and neither Hearts nor Partick Thistle would have suffered the prejudice caused by their relegation.

Being relegated to a lower division of the SPFL will cause financial harm to both clubs.

If the no vote was validly withdrawn, the resolution altering the SPFL's rules and relegating Hearts and Partick Thistle was lawful and did not amount to unfair prejudice.

The tribunal's decision indicates that Dundee was entitled to withdraw its no vote and that the subsequent resolution of the SPFL was validly passed.

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Claims from over the border: the Villiers legacy

In the wake of the Supreme Court decision in the *Villiers* maintenance claim, Elizabeth Ahmad and John West compare the options available to parties in Scotland and England, and highlight some considerations for Scottish advisers

On the day when Boris Johnson averred that there was "no border" between Scotland and England, the Supreme Court issued its judgment in *Villiers v Villiers* [2020] UKSC 30 (1 July 2020). Border or no, *Villiers* illustrates how different family law is in Scotland and England & Wales, and the importance of understanding the different jurisdictional rules for divorce and maintenance claims. *Villiers* settles that there can be contemporaneous proceedings in more than one of the constituent parts of the UK.

There is a long and rather tortuous history to the case, but the headlines are:

- Mr and Mrs Villiers lived for most of their marriage in Scotland and were living in Scotland when they separated.
- A free-standing maintenance claim was made by Mrs Villiers in E&W (and the case was an appeal against orders made in her favour by the English courts).
- A divorce application, making no financial claim, was made by Mr Villiers in Scotland (which remains sisted).
- The Supreme Court decided that the English courts had exclusive competency to deal with all maintenance claims arising from the marriage and separation, given that the English court was first seised of the issue of maintenance, and that the maintenance claim itself was not a "related action" to the divorce application for the purposes of article 13 of the Maintenance Regulation (Council Regulation (EC) No 4/2009 on jurisdiction on applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations).
- The Scottish courts retain exclusive competency to deal with the merits of the divorce and all other financial claims.

Why is this the outcome and what are the implications?

Divorce v maintenance

The first thing to be aware of is that there are different jurisdictional rules for divorce and maintenance claims.

The jurisdictional rules for divorce derive from Brussels IIa (Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility). Those rules have direct effect and are referred to in the Domicile and Matrimonial Proceedings Act 1973. That Act also provides the rules for allocation of jurisdiction where there are competing proceedings in "related" (UK) jurisdictions. If there are proceedings in more than one part of the UK, those that will prevail are those in the place where the couple last resided together.

"Villiers illustrates the importance of understanding the different jurisdictional rules for divorce and maintenance claims"

The jurisdictional rules for free-standing maintenance claims derive from the Maintenance Regulation cited above. These obviously have direct effect, and appropriate changes were made to the Civil Jurisdiction and Judgments Act 1982 after the Maintenance Regulation was brought into force. The UK went further than just incorporating the Maintenance Regulation as between itself and EU member states, though, incorporating the same rules intra-UK (in the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011). The jurisdictional grounds for the person seeking maintenance include being able to sue (a) in the place where the defendant is habitually resident; or (b) where they – the maintenance creditor – are habitually resident.

It is important to note that there are no time requirements for being "habitually resident". The necessary habitual residence can be acquired swiftly.

Given these differences, it is important to have an understanding of the differences north and south of the border.

The English perspective

Financial claims on divorce in E&W

If the parties had last resided together in E&W, and the English courts had been dealing with the divorce, the financial outcome would be very different. The court in E&W has wide discretionary powers on divorce to make such orders for capital provision, including pension sharing, and for maintenance as it thinks are "reasonable in all of the circumstances of the case". The court's focus is on meeting the "reasonable" needs – housing and income – of the parties, not dividing the value of property built up during marriage. The courts in E&W will amalgamate any pre-marriage period of cohabitation with the time that the parties have been married (up until divorce, so there is no "relevant date", either). There is no automatic exclusion of pre-marital, inherited or gifted wealth.

In appropriate cases, the powers can include making a spousal maintenance order for "joint lives", that is until one of the parties dies, the recipient remarries or the court orders otherwise.

Claims not related to divorce

In *Villiers*, Mrs Villiers was not able to avail herself of English law for her divorce and ancillary financial provision, though, and it was necessary to turn to another, standalone, maintenance remedy – what is often called a "failure to maintain" application, under s 27 of the Matrimonial Causes Act 1973. This is not a direct comparator to a standalone aliment claim, and like the remedies available on divorce, it is likely to give more generous provision to the dependent party than they would get in Scotland.

An application under s 27 is a claim made by one spouse against the other on the basis that he/she has failed reasonably to maintain the applicant. There need not be any divorce, nullity or judicial separation proceedings in existence: this is a self-standing application.

What is required at a practical level? The application requires a statement justifying the financial provision sought. A court fee of £255 is payable. Financial disclosure needs to be given by both parties. The court can make orders for the maintenance needs of the applicant or for the benefit of a child of the family (subject to the jurisdiction of the CMS in the case of a child). Orders can be made for:

- maintenance, and/or
- lump sum provision, and/or
- legal costs on an ongoing basis.

The court can make an order for interim maintenance. The application may be made at any time, provided the parties are still married. The court can make an order for maintenance for such term as it thinks fit, and this can endure beyond the marriage itself.

The other type of maintenance claim that can be made on a free-standing basis is an application for capital and/or maintenance for the benefit of a child, under sched 1 to the Children Act 1989.

A sched 1 order can provide:

- money to be settled on trust to provide or contribute towards the costs of housing a child;
- any number of lump sums designed to meet the capital needs of a child (such as for a car or furniture);
- educational expenses for a child;
- expenses connected with the disability of a child;
- maintenance orders for a child (subject to the jurisdiction of the CMS);
- a carer's allowance for the person who looks after the child.

An application can be made by the parent of a child; a step-parent where the child has been treated as a child of the family; a guardian or special guardian of the child; or any person who is named in a child arrangements order as someone with whom the child lives.

The child, if aged over 18, can make an application themselves in certain circumstances.

An application can be made against a parent or parents, or a current or former step-parent where the child has been treated as a child of the family. It is made on a standard form and a court fee of £215 is payable. The court directs financial disclosure by both parties and has a wide discretion in assessing the appropriate orders to make. It can again make an interim maintenance order, and it can order one party to meet the other party's costs of the litigation on an ongoing basis.

The Scottish perspective

The regime for financial provision on divorce/dissolution in Scotland is well known, and the extent to which there is maintenance beyond divorce (i.e. a periodical allowance) is limited, with the Scottish courts being obliged to prefer a clean break on divorce. As a result there are some key points to consider when advising clients with the potential for cross-border actions:

Acting for the financially independent party

When acting for the would-be payer you will want to ensure that the scope and incentive for the creditor to pursue a claim in E&W is minimised, by (1) continuing to aliment the other party; (2) being careful about what steps you take, and are seen to take, in relation to habitual residence (for example, if the financially weaker party is in Scotland, think long and hard before moving to E&W and giving them jurisdiction to raise in E&W); and (3) trying to ensure swift progress of the Scottish divorce action (given that the s 27 application must be made before the divorce).

Acting for the financially dependent party

Get the client to take advice in E&W. Always. Even if you know that it will be a Scottish divorce. Can your client move if they would be better off in E&W?

Both Lord Sales and Lady Black underline that it is for the maintenance creditor to choose where to litigate (assuming they can satisfy the jurisdiction hurdles), and *Villiers* does make it harder for a payer to try to seise jurisdiction tactically.

As important as the Supreme Court judgment is, the next stages in the High Court in E&W and Dumbarton Sheriff Court are what matter to the Villiers – will the Scottish courts allow the sist to be continued pending the outcome of the English proceedings, or will it be a race to divorce/final orders in E&W? If she is not divorced before the English application is heard, will the court make an order in Mrs Villiers' favour that outlasts her divorce? J

Elizabeth Ahmad is a paralegal with Pennington Manches Cooper, who act for Mrs Villiers in England & Wales. **John West** is an associate with SKO Family Law Specialists, who act for her in Scotland.

Briefings

Coronapocalypse?

Some musings on the continuing effects of COVID-19 to open this month's criminal procedure briefing are followed by cases on sentencing, sufficiency of evidence, domestic abuse and, inevitably, *Moorov*

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

The thing about the pandemic and lockdown is that it has created lots of new words like "covidiot": a person "who ignores the warnings regarding public health and safety", or "who hoards goods, denying them from their neighbours". There are others like "Blursday", which connotes that sense of loss of reality when the routine of work wanes and one day seems much like another, particularly if you are furloughed.

As we move into transition, new words are being invented to cope with these "unprecedented" times. (I know some people scream at the overuse of this exceptional word.)

Can I offer, as things reopen, the "covidexcuse"? At the local supermarket when buying a few essentials like a copy of the *Racing Post* (no more doomscrolling for me), and some square sausage to bolster me for my 10,000 steps and 10 staircases a day, I proffer my debit card as it is the preferred option, but when I ask for £20 cashback I am told this service is no longer on offer "due to COVID". At the big supermarket, the recycling centre has been closed, but at least you get a trolley free – due to COVID. My older daughter, who lives in Sussex, noticed a takeaway with the legend outside: "Cash payments only due to COVID." Aye right!

But what of the future? How does business restart? Time to look back to blue sky thinking, what was once politically, socially and organisationally difficult but might now float in the perfect storm. A few years ago there were some controversial court closures, but now like other organisations, too many branch offices and cost centres are so "pre-Corona" (I don't think they can sell that beer any more). Some agents have not been in court since mid-March – it's all virtual.

Is it time to dust down the proposition paper *A New Model for Summary Criminal Court Procedure* from February 2017?

Intermediate diets were seen by many as a waste of time, but I always felt they could work if both sides were properly prepared with full disclosure, issues were focused, reasonable pleas offered or the length of trials envisaged better estimated. The aspirational model suggested that only custody accused appeared at court in the first instance, and thereafter the only court appearance should be to tender a guilty plea or for a trial to take place. I doubted the practicalities of that vision, but it may come to pass. I did think, since the public had been weaned on the Diary Room in *Big Brother*, could we not have court outstations where punters and their solicitors could have cases called and dealt with without having to travel into the Big City?

Jury changes have been discussed over the years, but the reduction in jurors from 15 to perhaps 12 was shelved and the abolition of "not proven" seems to have stalled. An early coronavirus push to abolish juries was seen as a step too far too soon, and the wartime jury of seven, requiring five for guilty, may not be on the policymakers' agenda either. Models for a three courtroom jury trial are unsustainable long term, just as limiting pub or restaurant customer numbers to comply with physical distancing are ultimately uneconomic. We shall see...

Meantime, I recently saw my grandchildren, my older daughter's brood of five, for the first time in five months. The oldest, now 10, seemed to have developed a keen sense of fairness and was critical of some of the school rules. I bought her a copy of the Ladybird guide to Baroness Hale, alias *Equal to Everything – Judge Brenda and the Supreme Court*. It was written to inspire more women to enter the profession, but it produced results much quicker than anticipated.

Last month, during lockdown, purple paint was found splashed on the bathroom door. Suspicion fell on Leila, aged four and a half, who had been spotted in the vicinity and was found to have a purple stain on her arm. She was put on trial by her peers. Isla, 10, was the judge complete with makeshift wig and a gavel that all the lieges are disappointed to find are not used by UK judges. Merryn, seven, was a fearsome looking court police officer, and Jago, eight, and Astrid, two and a half, the jury. A verdict of guilty was swiftly returned and a community sentence imposed. May I offer this as a social bubble model? The dignity of the court was maintained, give or take a bit of thumb-sucking by some of the participants.

"Is it time to dust down the proposition paper A New Model for Summary Criminal Court Procedure from February 2017?"

Sentencing young offenders

COVID or no, there are still a few appeal cases to keep this column going for now, but there may be a gap in 2021 before trials pick up again.

Ahead of the end of the consultation period on 21 August of the Scottish Sentencing Council guideline on young people, Lady Dorrian delivered the opinion of the court in the appeal against sentence *Hay v HM Advocate* [2020] HCJAC 30 (8 July 2020). The appellant was 20 at the time, and at time of sentencing, having pled guilty to a charge of murder involving breaking into a house and repeatedly stabbing the occupant, after being involved in a five-day alcohol and drugs binge.

The guilty plea came at a continued preliminary hearing about six months after the incident, following a continuation for defence enquiries into the appellant's psychiatric condition. The sentencing judge fixed the punishment part of the life sentence at 19 years, reduced from 20 years for the plea.

The Appeal Court recognised this was a serious, unprovoked and distressing offence, aggravated by having been committed in the victim's own home in the presence of members of his family. However, bearing in mind the appellant's youth, lack of maturity and underdeveloped sense of responsibility, it set the headline figure at 18 years and gave a discount of two years, resulting in a punishment part of 16 years. The court stressed the considerable utilitarian value in a plea of guilty to a charge of murder.

Common purpose

Sufficiency of evidence was in question in *Douglas v HM Advocate* [2020] HCJAC 23 (10 June 2020). The appellant and his co-accused were convicted of two similar offences committed near to each other in Aberdeenshire on the same day, involving forcing their way into homes, demanding money and drugs, assaulting the occupants with knives to severe injury and permanent disfigurement and robbing them of mobile phones and other property. The second charge also involved the use of an axe and libelled attempted murder.

There seemed to be ample evidence for the first charge, which involved both accused and occurred about 9am, but in the second incident, which took place at 9pm, the complainer was unable to identify any of the three assailants. He did hear a fourth male speaking about them all getting out of there and shortly afterwards the men left and a car was heard accelerating away.

A neighbour was able to corroborate men entering the house and one of them demanding drugs. She saw a car driven off shortly afterwards and gave a vague description. CCTV evidence linked the appellant to a green car seen nearby. The second complainer's blood was found on a rear interior door release. There

Frank Crowe's grandchildren found their sister guilty of vandalism after a trial

was forensic evidence linking co-accused with the recovery of stolen property.

The appellant's position was that he "was there" but did not do it. The Crown case on the second charge was circumstantial and based on an allegation of antecedent conduct. It was accepted the appellant was either one of the three active participants or the fourth person.

Giving the opinion of the court in one of his last judgments before retiring, Lord Brodie considered the appellant was not simply a bystander but was part of a group who acted together in pursuance of a common criminal purpose, namely to rob the complainer of drugs and other property using violence. They had arrived in a car at the complainer's house, immediately got out and ran into the house wearing dark clothes with balaclavas, some carrying weapons, and there was the shout "give me the drugs". The inference that the appellant was party to an agreement to attack and rob the complainer was well nigh irresistible.

The evidence of the appellant's involvement in a similar incident earlier in the day was not necessary for sufficiency in the other charge, but strengthened the inferences which could be drawn. The appeal was refused.

Domestic abuse

Domestic abuse remains high on the agenda in the sheriff court. *Finlay v HM Advocate* [2020] HCJAC 29 (25 June 2020) is another example of the complexities which can arise when an exceptional latitude features in the charge. It involved allegations of threatening or abusive behaviour contrary to s 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 by the appellant towards his partner, later wife, from February 2014 until the end of December 2017. The couple met at the start of this period, moved in together in June 2014 and married in 2016. A daughter was born in October 2017.

The complainer spoke to various incidents of threatening and controlling behaviour. Her sister spoke to the majority of these, and further corroboration came from text messages where the appellant apologised for his behaviour and promised it would not continue. A friend corroborated the complainer's account of an incident towards the end of December 2017. A submission of no case to answer was repelled by the sheriff.

In his charge, the sheriff commented that because the incidents had occurred at home, there was inevitably a lack of corroboration for some of them and this had shaped the Crown's approach. He directed the jury that it was not enough for the Crown to describe the events as a single course of conduct; they had to be satisfied of that.

The defence submitted that the incidents occurred over a period of nearly four years and were separate events each of which required corroboration. The Crown suggested that whether the circumstances were a single course of conduct was a question of fact and degree, and this was accepted by the court.

Except in a *Moorov* context involving mutual corroboration, the phrase "a course of conduct" has no significance in relation to sufficiency of evidence and the individual acts referred to in a charge require to be corroborated.

However in the present case, the charge was a statutory one, and one manner of committing the offence involved a course of conduct: s 38(3)(b)(ii). The use of the phrase "a single episode" was apt to cause confusion in this context and "course of conduct" better conveyed that this was a single crime, in accordance with the wording of s 38. There required to be corroborating evidence of that course of conduct, i.e. evidence of two or more incidents referred to in the libel from which the jury could conclude they were not isolated acts but truly part of a course of conduct. Corroboration of one incident alone might be sufficient for corroboration of the crime restricted to that one incident, or single act, but not for a course of conduct. Save for the deletion of one locus for which there was no evidence of criminal conduct, the appeal was refused.

Moorov: similarity of charges

My final case for this month inevitably involves the application of the *Moorov* doctrine. In *Mohammed v HM Advocate* [2020] HCJAC 27 (17 June 2020) the appellant faced three charges at trial: (1) a rape in May 2009; (2) an indecent assault between October 2009 and October 2010; and (3) a rape in December 2009. He was acquitted on charge 1. Charges 1 and 2 were said to have occurred in the appellant's car when it was parked in the Perthshire countryside. The first charge involved holding the complainer down, lying on top of her and raping her.

In charge 2 the appellant, complainer and another drove to a remote area to smoke cannabis. The other person fell asleep. The appellant took alcohol and a duvet from the car boot; the complainer declined a drink. It was snowing outside so the couple lay under the duvet. The appellant started to touch the complainer's leg. She pushed him away and was scared. He then fell asleep.

The trial judge considered that whilst the indecent assault was less serious than the rapes, there were similarities between the two episodes as the complainers were offered wine he had brought with him and both episodes occurred at night. Charge 3 occurred in the complainer's flat when she was asleep and incapable of giving or withholding consent. The incidents were close in time.

While at the close of the Crown case there was a sufficiency of evidence in respect of all three charges, once the jury had acquitted of the first charge they were left with two charges where the nature of the allegations, circumstances of commission and locus were all quite different. The similarity of both events occurring at night was neutral. The trial judge had an ongoing duty to review questions of law such as sufficiency of evidence as the trial proceeded. The jury should have been directed that if they acquitted on charge 1 they could not convict on either charge 2 or 3. There had to be an overall similarity in the conduct identifying each charge as a component part of a course of conduct persistently pursued by the accused. The appeal succeeded and the convictions were quashed.

Briefings

Employment

CLAIRE McKEE,
ASSOCIATE, DENTONS UK
& MIDDLE EAST LLP

The law on unfair dismissal in Great Britain was originally introduced under the Industrial Relations Act 1971. Advising as to whether or not a dismissal is likely to fall within the band of reasonable responses is something which employment lawyers deal with day in, day out. Now and again, a case reaches the Employment Appeal Tribunal (EAT) which shows that there are still shades of grey in what is generally considered to be a settled area of the law.

In the recent case of *Tai Tarian Ltd v Christie* [2020] UKEAT 0059_19_0303 (3 March 2020), the EAT considered under what circumstances an employer can rely on anonymous statements during disciplinary investigations.

The claimant, Christie, was employed as a carpenter by the respondent (a housing association) for 14 years. One of the respondent's tenants complained that Christie had made homophobic remarks while carrying out maintenance work in one of their properties. Two interviews were subsequently held with the tenant, who requested anonymity as she suffered from anxiety. A disciplinary hearing followed and the decision was taken to dismiss Christie for misconduct. The decision-making managers were not able to interview the tenant – this was requested once at the appeal stage but the tenant refused for personal reasons.

Reasonable response?

Christie raised a claim for unfair dismissal, alleging that the dismissal process was unfair because of the reliance on the evidence of an anonymous witness. The Employment Tribunal (ET) upheld his claim, finding that the investigation was unreasonable and the decision to dismiss "based solely upon the complaint of an anonymous tenant... fell beyond the band of reasonable responses open to a reasonable employer of a similar size and with similar administrative resources". The ET held that it was also unreasonable for the respondent to have relied on the anonymous account and to have preferred that evidence when the tenant had not been interviewed by either of the relevant decision-makers and had refused to provide any additional information.

The respondent appealed this decision and the EAT allowed the appeal. The EAT found that the tribunal had erred in its findings on the question of fairness. It concluded that the ET had not demonstrated any "logical and substantial grounds" for its conclusion that the respondent could not have reasonably accepted the tenant's evidence as truthful. In the circumstances, it was within the band of reasonable responses for an employer to preserve the anonymity of the tenant. Further, it was not the case that the tenant had refused to provide additional evidence; she had simply declined to provide evidence on the one occasion she was asked. The case has been remitted to a different tribunal for re-hearing.

Commentary

Although the witness in this case was a tenant, a more common scenario is where a witness is a colleague of the employee under investigation and will only provide information if they are first given anonymity. The cases on this issue are clear that anonymity does not necessarily make a dismissal unfair, but the employer must balance the need to protect the identity of the witness with the need to provide a fair hearing for the employee under investigation.

Acas (in its *Conducting Workplace Investigations* guidance) advises that anonymity should be avoided where possible, as it is likely to put the investigated employee at a disadvantage. The guidance says an investigator should only consider anonymising witness statements where the witness has a genuine fear of retaliation.

While this case acts as a reminder that there are limited circumstances in which it will be reasonable for an employer to withhold the identity of witnesses, employers looking to do so should still proceed with caution.

Family

FIONA SASAN, PARTNER,
MORTON FRASER LLP

The recent decision of Lady Wise in *SMA v MMA* [2020] CSOH 54 (28 May 2020) highlights the importance of getting the instruction of your expert witness right and ensuring they are provided with all the salient information before they give evidence. This was a particularly complex case because of how the assets were held, which meant that expert evidence was central to the dispute.

Mr and Mrs A had been married for 29 years. Throughout their marriage Mr A operated a number of restaurants and invested in commercial property, such that at separation the matrimonial property was worth in excess of £10 million, the vast majority of which he owned. Mr A held his assets in shares in a holding company, as an individual/sole trader, and as part of a partnership with his elderly father. He operated each restaurant through a limited company, each company's shares being owned by the holding company. Money was freely moved around by way of inter-company loans on Mr A's instruction as and when cash flow dictated a need.

Mr A argued that each business had to be valued within that structure, including valuing some restaurants on the basis that they were merely tenants even though Mr A was the landlord. Mrs A led evidence from C, an expert surveyor, specialising in the restaurant and licensed premises trade, and argued that Mr A was the "controlling mind" of all the businesses and therefore the court should collapse the corporate structure, combining Mr A's interest in the heritage business assets into one as that was within Mr A's power, apart from one property owned with his father as trustees for the partnership with him and leased to one business. In respect of that property, it was argued that the father would likely agree to a sale on a willing seller-willing buyer basis as he would be unlikely to stand in his son's way if he wanted to sell. Mr A senior's share would be accounted for in the valuation.

Independent expert?

Mr A led evidence from his own expert surveyor R, who did not assess the group of businesses as a whole but valued them as individual going concerns on leasehold at lower values and the heritage separately. During the proof, R accepted that he had issued terms of engagement to Mr A in the format of agent/

client and not as a professional expert witness whose primary duty was to the court. R's report was absent the usual statement about being independent with a duty to the court, and his letter set out a client complaints process for his firm, which would not apply to a surveyor acting as an expert witness. R had also accepted instruction to conduct a valuation for Mr A's bankers after the proof for the purpose of raising capital to pay Mrs A, which he had factored into his quote for his services.

After C's evidence had been led, R had met with Mr A and his representatives and subsequently reviewed downwards the multiplier he had used, saying he had been further convinced of Mr A's "remarkable contribution" to the business and that it had been understated in his valuation, even though R accepted he had never come across such a concept in any previous valuation and that account had already been taken in valuing the fair maintainable operating profit under a reasonably efficient operator (REO) on the assumption that Mr A left the business on sale. R was seeking to factor in something on the basis that Mr A's contribution was so stellar that the REO assumption was simply not adequate to reflect the impact of Mr A's departure on profit.

For Mrs A it was argued, under reference to the approach in *Kennedy v Cordia (Services)* 2016 SC (UKSC) 59, that R's evidence could not be described as impartial and that he had effectively acted as an advocate for Mr A.

No reliance

Rejecting R's evidence and accepting C's, Lady Wise decided: "In light of the unsatisfactory nature of [R's] change of heart on valuation, the backdrop of the absence in his report to his duties to the court and the other errors mentioned take on more significance than they might have otherwise. I do not doubt [R's] general motivation of course, but in light of the evidence about how his views developed I consider that he has allowed himself to be influenced by [Mr A's] views on the matter. As a result, he departed from the necessary position of impartiality of a witness giving opinion evidence and appeared to promote the defender's cause on valuation... I am effectively left with no definitive valuation by [R]. For all these reasons I have concluded that I cannot rely on his evidence at all and so cannot use any of his figures for the purpose of valuing the various business interests."

It further transpired that Mr A's expert forensic accountant, valuing the shares in the corporate entities, had relied on R's valuations, was unaware of certain figures which had since been agreed between experts during proof and had not considered all the other reports, and so his evidence had to be disregarded also.

This case illustrates the importance

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Local government

To inform its stage 1 consideration, Parliament's Local Government & Communities Committee seeks views on Green MSP Andy Wightman's European Charter of Local Self-Government (Incorporation) (Scotland) Bill. The bill would incorporate the Charter, which sets out principles to protect the basic powers of local authorities, into domestic law. See www.parliament.scot/parliamentarybusiness/CurrentCommittees/115604.aspx
Respond by 17 September via the above web page.

Criminal injuries

The UK Ministry of Justice is conducting a comprehensive review of the Criminal Injuries Compensation Scheme, the first since 2012. See consult.justice.gov.uk/digital-communications/criminal-injuries-compensation-scheme-review-2020/
Respond by 9 October via the above web page.

Planning for housing

Scottish ministers, in pursuit of their "plan-led planning system" commitment, intend to update parts of the Scottish Planning Policy (SPP). The objective is "to overcome current conflict in the planning system and actively address lengthy technical debates about the numbers of homes that we will need in the future". See consult.gov.scot/planning-architecture/proposed-policy-amendments/
Respond by 9 October via the above web page.

Prescription

The Government seeks comments on how to commence the Prescription (Scotland) Act 2018, which makes a number of changes to negative prescription time limits. See consult.gov.scot/private-law-unit/prescription-commencement-regulations/
Respond by 14 October via the above web page.

Judicial retirement age

The Lord Chancellor seeks views on the mandatory retirement age for judges, and specifically on whether age 70 achieves the objective of balancing the requirement for sufficient judicial expertise with promoting diversity and protecting the independence of and confidence in the judiciary. Although mainly concerning England & Wales, the consultation includes both the Supreme Court and employment judges. In addition, there is a strong assumption that the mandatory age should be uniform across the UK jurisdictions. See consult.justice.gov.uk/digital-communications/judicial-mandatory-retirement-age/
Respond by 16 October via the above web page.

Land Court/Lands Tribunal

The Scottish Government is asking whether it would be wise to incorporate the Lands Tribunal for Scotland into the Scottish Land Court. In addition, views are sought on recusals by legal members, the necessity for a Gaelic speaker, and powers to award expenses. See consult.gov.scot/justice/land-court-and-the-lands-tribunal/
Respond by 19 October via the above web page.

.... and finally

As noted last month, the Government seeks views on raising the age limit for referral to children's hearings from 16 to 18 **(see consult.gov.scot/children-and-families/age-of-referral-to-the-principal-reporter/ and respond by 7 October).**

of demonstrating the independence of your expert witness at proof. It is also notable for the application of an unequal sharing of the value of the net matrimonial property, based on a 58:42% split to account for source of funds arguments. That will be seen as a shift from the more recent reported cases which have evaluated source of funds more forensically and deducted from the net value to be shared.

Morton Fraser acted for the wife pursuer in this case

Human Rights

ROSS CAMERON,
SENIOR SOLICITOR,
ANDERSON STRATHERN LLP

In *Prior v Scottish Ministers* [2020] CSIH 36 (30 June 2020), the Inner House rejected the petitioners' submission that ss 27B-27D of the Court of Session Act 1988 required a Lord Ordinary, when considering a request for a review of an earlier refusal by a different Lord Ordinary of permission to proceed in a petition for judicial review, to appoint an oral hearing.

The court dealt with a number of issues of both substance and procedure. *Inter alia*, it addressed (1) whether on a construction of the statutory provisions regulating judicial review, it is competent for a second Lord Ordinary to refuse a request to review a refusal of permission without appointing an oral hearing; and (2) if the legislation did provide that a petitioner may be refused permission without an oral hearing and hence a right of appeal, whether that is ECHR compatible.

The reclaimers had previously raised petitions for judicial review in which permission was refused on the papers, and a subsequent request for review at an oral hearing was rejected by a second Lord Ordinary. They reclaimed against the refusal of their petitions for declarator that ss 27B-27D were unlawful in so far as they did not permit an oral hearing or right of appeal in some cases. The primary basis of their challenge was that the legislation and the rules guaranteed a petitioner an oral hearing on the issue of permission and a right of appeal in the event of a refusal. They argued that if the court took the view that there was no right to an oral hearing and, therefore, no right of appeal, the 1988 Act was incompatible with the right of access to a court under article 6.

Necessary and proportionate

Refusing the reclaiming motions, the court held it competent for a second Lord Ordinary to refuse a request for a review of a refusal of permission without appointing an oral hearing. Even when article 6 applied with full force, whether an oral hearing could be dispensed with would depend on the nature and complexity of the case and whether it could be disposed of fairly without a hearing. The court observed that the application of sift-type procedures was seen as necessary and proportionate in order to avoid wasting "precious judicial resources" on cases where there was no real prospect of success, and that such systems were article 6 compliant provided the case could be dealt with fairly on the papers.

In the context of judicial review provisions, the court ruled that the second Lord Ordinary must, in light of the stated grounds in the petition, again ask himself whether the appointment of an oral hearing would make any difference to the decision to refuse. Where the question was simply one of determining whether the error of law, which ought to have been clearly identified in the petition, had any real prospects of success, this system was designed to achieve fairness in the decision-making process. There was no reason to suppose that it did not do so, as it did not impair the very essence of the right of access to a court. Rather, it provided a route to the court other than in circumstances in which two different judges had considered that there was no real prospect of success.

In assessing the proportionality of the relevant judicial review provisions, the court observed that regard had to be had to the considered process through which they emerged. The particular mischief that was sought to be addressed was the excessive time being taken up in listening to oral argument on petitions which had no real prospect of success. The statistics showed that refusals such as were complained of represented just over 10% of the total number of petitions lodged, which demonstrated a reasonable relationship of proportionality between the means employed (the scrutiny of two different judges and a defined test for the grant of permission), and the aim sought to be achieved (the early elimination of petitions without merit and the consequent preservation of judicial resources).

Commentary

This is a significant decision in the context of human rights law in Scotland. It is clear that the ability of a second, different Lord Ordinary to refuse, without an oral hearing, a request for a review of a refusal by another judge to grant an application for permission, is lawful and proportionate.

Whilst the current case is concerned with article 6 rights in the context of judicial review, it serves as a reminder that the overarching principle of fairness is key and all human rights issues are always highly fact sensitive. Moreover, it makes clear that when assessing the legitimate aim and proportionality of any human rights interference, the court will look to the background of the statutory provisions in question and have cognisance of the particular mischief to be addressed.

Pensions

JUNE CROMBIE,
HEAD OF PENSIONS
SCOTLAND, DWF LLP

Hughes: PPF compensation cap

Protection of the rights of qualifying pension scheme members on insolvency of sponsors of eligible defined benefit pension schemes dates from the Pensions Act 2004, which established the Pension Protection Fund ("PPF") – arguably to implement article 8 of Directive 2008/94/EC, which provides pension protection on employer insolvency. The directive did not prescribe either the protection required or how that should be achieved.

The PPF pays compensation based on categorisation at the point of the employer's insolvency. Members who had reached normal pension age under their original scheme rules

at that point would receive 100% compensation (based on original scheme benefits), albeit inflationary increases are materially lower. However, if a member was under normal pension age, PPF compensation was generally limited to 90% of benefits, and subject to an absolute cap. As a result, some members' benefits were materially reduced. Earlier cases challenged the UK's approach, including *Hampshire v Board of the Pension Protection Fund* (C-17/17) [2019] ICR 327, decided by the CJEU in 2018 – which required a 50% of scheme benefits underpin. Following *Hampshire*, the PPF has applied a one-off compliance check at the PPF assessment date, on an interim basis.

Both the compensation cap and the method of implementing the *Hampshire* underpin were challenged by 25 claimants in *Hughes v Board of the Pension Protection Fund* [2020] EWHC 1598 (Admin), decided on 22 June in the Administrative Court. Many of the claimants had reductions applied to PPF compensation because they were below normal pension age in their original schemes at the relevant insolvency dates: for Hughes the reduction was 75%. They contended that the cap was disproportionate and age discriminatory, and that the method the PPF used to implement the *Hampshire* judgment was not precise enough.

The court held that:

• the application of the compensation cap constitutes unlawful age discrimination, so is contrary to article 8;

• whilst article 8 does not require a yearly comparison, any scheme adopted by the PPF must actually deliver compensation equal to 50% of the amount of benefits a member/survivor would have received under their original scheme – not 50% of the actuarially predicted value. However, the "precise mechanism" to achieve compliance was not prescribed, with the court stating it was to be a matter for the PPF;

• the time limit for compensation underpayment claims to the PPF is six years;

• during a PPF assessment period following employer insolvency, trustees of schemes must calculate the limit on benefits payable by reference to the PPF level of compensation, *including* the uplifts required by article 8, so checks and action will be required.

If not successfully appealed, a review of PPF compensation should be expected, with adjustments to remove the cap and deliver compensation to meet 50% of scheme benefits for both members and survivors, based on the rules of the original scheme.

Avacade: unlawful activities and restitution orders for FCA

On 30 June, the High Court held that the activities of two pension advisory companies, Avacade Ltd and Alexandra Associates (UK) Ltd ("AA"), were unlawful, because they had carried out FCA-regulated activities without FCA authorisation: *Financial Conduct Authority v Avacade Ltd (in liquidation) (t/a Avacade Investment Options)* [2020] EWHC 1673 (Ch).

The FCA alleged both companies provided a pension report service, and made misleading statements inducing pension savers to transfer their pensions into self-invested personal pensions ("SIPPs") and then into "alternative" investments such as HotPods (office space available for rent), tree plantations and Brazilian property development. More than 2,000 pension savers transferred more than £90 million into these SIPPs. Many underlying investments failed or were in liquidation.

The court also found that the companies had made unapproved financial promotions via their websites, issued promotional material and made telephone calls to pension savers and had made false or misleading statements. The FCA was found to have jurisdiction to apply for restitution orders, as the "knowingly concerned" test was met since the three individuals who were directors and managers in Avacade had knowledge of the business models and active involvement, as had two of those individuals as senior managers in AA. The FCA has asked the court for orders banning the companies from engaging in unauthorised activities in the UK, and for financial restitution: a further hearing will take place.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

John Christopher Bartlett

A complaint was made by the Council of the Law Society of Scotland against John Christopher Bartlett, solicitor, Dingwall. The Tribunal found the respondent guilty of professional misconduct in respect of his breaches of (a) rule B6.4.1, (b) rule B6.7.1, (c) rules B6.7.3 and B6.7.4, (d) rule B6.23, (e) rule B6.13.2 and (f) rules B6.15 and B1.2, all of the Law Society of Scotland Practice Rules 2011, said findings of professional misconduct (a)-(f) being *in cumulo* and finding of professional misconduct (f) being found individually. The Tribunal censured the respondent and restricted his practising certificate for an aggregate period of two years.

The respondent accepted that he had failed to rectify breaches of the accounts rules and that some of these had been drawn to his attention following a 2011 inspection. He had failed to comply with proper anti-money laundering practices. His accounting records were not up to date and were not up to standard. He had not chosen to use appropriate accounting methods or software. He had not maintained proper anti-money laundering procedures, policies and provided appropriate staff training. He had not acted properly as cashroom manager. He had submitted false and inaccurate accounts certificates to the Society.

The Tribunal was satisfied that the respondent's many failures over a period of five years were a serious and reprehensible departure from the standards of competent and reputable solicitors, particularly when he had failed to address the matters drawn to his attention in 2011. Accordingly, he was guilty of professional misconduct. The Tribunal was satisfied that the conduct *in cumulo* amounted to professional misconduct. However, the submission of nine false and inaccurate accounts certificates was capable of amounting to professional misconduct on its own. Accounts certificates are one of the means by which the Society monitors compliance with the rules and risk to client money. The Society is entitled to rely on accounts certificates as showing the matters which have been identified and the measures taken to deal with them. Failure to record the breaches on the accounts certificates called the respondent's integrity into question. He knew about the issues raised in the 2011 inspection and other problems. His completion of the certificates without comment, knowing he had not resolved all issues, despite his efforts, demonstrated a lack of integrity.

Briefings

Duncan McKinnon Burd

A complaint was made by the Council of the Law Society of Scotland against Duncan McKinnon Burd, Anderson MacArthur Ltd, Somerled Square, Portree, Isle of Skye. The Tribunal found the respondent guilty of professional misconduct in respect that he (1) submitted accounts to the Scottish Legal Aid Board which included outlays which were unrestricted for alcoholic beverages and food for others, in breach of rule B1.2 of the Law Society of Scotland Practice Rules, article 3 of the Criminal Code of Conduct, reg 8(1)(c) of the Criminal Fees Regulations 1989 and SLAB's Code of Practice for Legal Assistance (April 1998); and (2) failed to communicate effectively with SLAB in breach of rule B1.9.1 of the Law Society of Scotland Practice Rules and failed to cooperate with SLAB in breach of s 3.7.1 of SLAB's Code of Practice for Legal Assistance (April 1998). The Tribunal censured the respondent and fined him £5,000.

The respondent fell short of the standards of competent and reputable solicitors to a serious and reprehensible extent when he included alcoholic beverages in his account and when his claim against the legal aid fund included the costs of food purchased for other people. SLAB had pointed out to the respondent in August 2012 and he subsequently agreed in correspondence that charging for alcohol was not appropriate. The respondent, nevertheless, continued to include charges for alcohol in the accounts that he submitted to SLAB. Counsel for the respondent accepted that the respondent would occasionally buy food for others. These expenses were not properly recoverable. The respondent had been reckless in submitting claims for alcohol and food for others and expecting SLAB to find them and abate them without making the true situation plain to them. The respondent had failed, on occasion, to provide SLAB with sufficient information to allow them to make a proper determination. On repeated occasions, the respondent certified to the best of his knowledge and belief that the items charged in the account were accurate and represented a true and complete record of all the work done. The respondent lacked integrity when making this declaration as he knew that he had submitted expenses for alcohol which he had already accepted could not be charged, and for food for other people.

The respondent failed to communicate effectively with SLAB and failed to co-operate with them. The respondent corresponded with SLAB in terms that were not transparent or straightforward. His choice of language was intemperate. He was evasive in answering legitimate queries posed to him by SLAB staff. Despite the background of the deteriorating relationship between the respondent and SLAB, the respondent's lack of communication and co-operation was not acceptable.

Gordon Dangerfield

A complaint was made by the Council of the Law Society of Scotland against Gordon Dangerfield, Archer Coyle Solicitors, Glasgow. The Tribunal found the respondent not guilty of professional misconduct. The Tribunal did not consider that the conduct established might meet the test for unsatisfactory professional conduct and therefore declined to remit the complaint to the Society in terms of s 53ZA of the Solicitors (Scotland) Act 1980.

The first averment of misconduct related to correspondence sent by the respondent. According to the complainers, the correspondence contained grave allegations against another solicitor which amounted to an insulting, intemperate and disparaging attack on another solicitor as they were untrue. However, the Tribunal did not consider that the content of the correspondence was sufficient to meet the test for professional misconduct or that the language used was intemperate, insulting and disparaging. The respondent's assertions were factually correct. Taking into account the averments of duty, the Tribunal did not consider that the respondent's conduct in this correspondence represented a serious and reprehensible departure from the standards of competent and reputable solicitors.

The second averment of misconduct related to the respondent's conduct in court on two occasions. It was alleged that he made unfounded allegations which were unjustified in fact and law against another solicitor's character in writing, and in court when he asserted that she was in contempt of court. However, the Tribunal did not consider that the respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors.

There will be occasions where agents must be free to make submissions on unpalatable matters such as contempt of court against other practitioners. If an agent is incorrect in his/her assessment of the situation, they ought not to be subject to disciplinary proceedings. This might have a chilling effect on the ability of court practitioners to do their best for clients and seek justice for them. In the present case, the respondent was most likely wrong in law regarding contempt. However, this did not make the matter of disciplinary concern. The Tribunal accepted that there were limits to freedom of speech which had to be balanced against the requirement for court practitioners to act appropriately and in a manner of mutual trust and confidence with other solicitors. There would be circumstances where the conduct was such that disciplinary action would be required. However, the latitude had to be protected, and the Tribunal was concerned that a finding of professional misconduct in the circumstances of this case might limit the freedom of court practitioners.

The Tribunal found it disappointing to have to deal with a case of this nature. The matter ought to have been resolved long before contempt of court or defamation were mentioned and certainly well in advance of a complaint to the Scottish Legal Complaints Commission. This was a standoff between two lawyers about a trivial incident which ought to have been swiftly sorted out between the parties themselves, without recourse to the Tribunal.

John James Rankin Hodge

A complaint was made by the Council of the Law Society of Scotland against John James Rankin Hodge, Wallace Hodge & Co Ltd, Ayr. The Tribunal found the respondent guilty of professional misconduct in respect that (a) he failed to write to the secondary complainer to advise her that legal consequences might arise from her signing a discharge of a standard security granted by her late father in favour of her and her siblings, and that she should seek independent legal advice prior to signing the document; (b) he failed to act with integrity in that he advised the secondary complainer that the other executors and residuary beneficiaries had agreed to pay her a one-eighth share of the proceeds of sale of the house in question, but then made payment of the said sums conditional on the secondary complainer taking no further action in respect of the circumstances surrounding her discharge of the standard security; (c) he failed to act with integrity in respect that he made payment of the sums due to the secondary complainer conditional upon her withdrawing the complaint which she had made to the SLCC regarding the respondent, thus delaying or hindering the advancement of the executry; and (d) he placed himself in a conflict of interest situation.

The Tribunal censured the respondent, fined him £6,000 and ordained him to pay compensation of £2,500 to the secondary complainer.

The respondent breached the practice rules. He fell short of the ethical standards of his profession. He prioritised his interests over those of the clients, creating a conflict of interest. He could not provide independent and impartial advice when his own personal interests were involved. This was a deliberate and repeated strategy which demonstrated a lack of integrity.

Code to recovery

The Scottish and UK Governments have worked together on a code of practice designed to help commercial landlords and tenants to pull through the COVID-19 disruption together

Property

BEN MACPHERSON,
MINISTER FOR PUBLIC
FINANCE AND MIGRATION

Collaboration, open dialogue and mutual support are key to overcoming the unprecedented challenges facing the commercial property sector in Scotland as a consequence of the COVID-19 pandemic.

With tenants, commercial landlords, investors and lenders experiencing significant financial pressures, there is a vital and shared need for all parties to generate joint solutions that are flexible in the short term and sustainable in the long term, as we continue to suppress the virus and restart the economy.

The Scottish Government is supporting businesses through the pandemic using a range of regulatory, fiscal and monetary measures, as well as offering advice and regular updates.

Collective work

Specifically in relation to commercial property, early action was taken, as part of the Coronavirus (Scotland) Act 2020, to support businesses to remain in their properties even if rent could not be paid. Following the latest three-monthly review of the Act on 24 June, it was decided to keep those anti-irritancy measures in place.

Under these measures, commercial leases cannot currently be terminated for non-payment of rent for a period of 14 weeks, rather than the previous 14 day period. I encourage parties to use this time to reach mutually agreed solutions that enable businesses to return to trading and generate income. It is in no one's interests for viable businesses to be closed and properties to become vacant.

To aid with this collective response, my team and I worked with the UK Government to introduce the code of practice for commercial property relationships during the COVID-19 pandemic. The code covers the whole of the UK and is intended to promote good practice between landlords and tenants as they deal with the financial shocks and uncertainty caused by the pandemic.

As a voluntary code, it does not change the legal relationship or lease contract already in place between landlord and tenant, and any guarantor. However, both the Scottish Government and the UK Government strongly encourage landlords and tenants to utilise the code and urge lenders to continue providing support as proactively as possible to enable tenancies to endure, to sustain jobs and to maintain productive capacity. Contributing to a successful restart of our economy is something we all have a shared interest in.

Be transparent

The key principles of the code are transparency and collaborative communication to create a unified approach. Our common goal is business continuity that extends beyond the pandemic, providing more stability and assurance for everyone. But we recognise that even if landlords and tenants utilise the code in their discussions, the desired outcome may not be achieved. In these cases, a third party mediator may be beneficial in facilitating discussions to help achieve a negotiated arrangement.

If you are a commercial tenant seeking rent concessions from your landlord, for example, openly and transparently sharing appropriate financial information will allow landlords to understand what concessions will support you back towards generating income and paying the rent in the future.

Landlords should provide concessions where they reasonably can whilst considering their own circumstances. If a landlord refuses a concession, they should be equally open and transparent and make it clear to the tenant why this decision was made.

"Contributing to a successful restart of our economy is something we all have a shared interest in"

Towards recovery

The aim of the code is to facilitate these types of discussions in order to allow the creation of a shared recovery plan for temporary and sustainable solutions outside the arrangements of the current lease. However, the code does not change the legal responsibilities of either party, and tenants are still legally liable for payment obligations – tenants who can still pay in full or in part should continue to do so.

Through the pandemic, buildings need to continue to be insured and maintained. Landlords need to think about the impact service charges and insurance costs have on a tenant's finances. If the property has been used less, service charge costs should be lowered accordingly to provide the best value for tenants. However, as these are both non-profit making charges, proportionate essential costs should continue to be paid by the tenant wherever possible.

Taken together with the anti-irritancy measures, the code will help to provide the breathing space for tenants, landlords and lenders to work together on a plan for a sustainable future. Its principles are supported by many representative bodies, from both the landlords' and tenants' perspectives, including the British Property Federation, Royal Institution of Chartered Surveyors, British Retail Consortium and Federation of Small Businesses.

The transition back to normality will take time and the Scottish Government will continue to monitor the economy to determine whether further intervention is necessary.

The code of practice represents a good starting point on our road to economic recovery and I strongly encourage all relevant parties to use it.

The code of practice can be found at www.gov.uk/government/publications/code-of-practice-for-the-commercial-property-sector

"So, how are you?"

Some reflections on the COVID-19 pandemic from the in-house perspective, in the wake of the Society's survey of in-house lawyers' experiences during lockdown

In-house

CATHERINE CORR,
PRINCIPAL SOLICITOR,
LEGAL SERVICES,
SCOTTISH ENTERPRISE

The Law Society of Scotland, in collaboration with the In-house Lawyers' Committee, recently took the temperature of the in-house community it serves, launching its online survey on 5 June.

The survey attracted over 400 responses, indicating that in these uncertain times, people seem increasingly keen to connect.

In what can feel like a relentless barrage of unsettling news, it might be easy to feel overwhelmed and worried about the future.

Encouragingly, however, the responses appear to indicate that the in-house community is adapting, proactively engaging with evolving work practices and, to an extent at least, flourishing, as we move past the first acute phase of the crisis and look towards the future.

A full report on the survey has been published by the Society: see www.lawscot.org.uk/research-and-policy/research/research/. This article predominantly focuses on key themes drawn from the responses to the survey question: "Please share any positive changes that you or your in-house legal team have seen in relation to your role or working practices as a result of the COVID-19 crisis", together with my own experiences, personal reflections and impressions on how the in-house community has adapted.

Catching up: technology and flexibility

A key theme emerging is the increased engagement with modern technology as well as the accelerated acceptance of its place at the heart of the effective delivery of legal services in the 21st century.

The fact that most of us have been working from home for the past few months has underlined the importance of having an up-to-date and secure IT infrastructure that can sustain and support remote working on this scale. The value of investing in quality IT support teams and in programs such as Zoom or Microsoft Teams to keep connected is also increasingly recognised as fundamental – no longer a nice to have but an intrinsic part of the job.

While the in-house community to an extent was already up on this curve – with online meetings being a part of the everyday for many – such interactions are obviously now the default, and more time and effort it seems are being invested into making them work effectively.

Indeed, the consensus appears to be that more is being achieved through the online approach and less time and resource wasted. Availability and use of increasingly sophisticated online meeting packages are also assisting in overcoming concerns that might otherwise arise about the lack of ability to read facial signals or body language.

> *"The practical consequences of lockdown have accelerated changes and encouraged innovations in areas that have, prior to now, seemed to be immovable features"*

Virtual pub quizzes and team catchups via programmes such as WhatsApp, Twitter or Teams, or use of Yammer, are also tools that are being deployed with greater frequency and commitment across organisations, to ensure that the more social aspect of work is being maintained – enabling many, ironically, to feel more connected to others across the business, not less.

Forced to rethink

Perhaps more notable, however, has been the shifting in the wider legal landscape that in turn has had an impact on our day-to-day work. The practical consequences of lockdown have accelerated changes and encouraged innovations in areas that have, prior to now, seemed to be immovable features of the marketplace, whether in fact always required or not.

Electronic signatures on most documentation has, for example, become more the norm. While the ability to conclude most contracts electronically already existed within the law, it has now entered the mainstream, coupled with an increased flexibility in mindset around the different media that can be used in this respect and around the use of witnesses. Use of encrypted e-signatures also seems set to rise. Law Society of Scotland smartcards, previously considered as not particularly relevant for most and often left to expire, may see a resurgence in value across the profession.

An increased use of the various sophisticated signing platforms that exist, such as DocuSign or Adobe, is also noticeable, as is awareness of the various issues that potentially arise in relation to such platforms, for example in respect of version approval and control.

The opportunities afforded by automated online documentation solutions and portals to save time, facilitate business continuity and hopefully enhance ultimate end user experience, are also increasingly being recognised, explored and deployed.

Even Registers of Scotland and the courts are engaging, now accepting and indeed encouraging online submission of documentation and forms.

While some might say the law in this respect is simply catching up with other disciplines, the reality is that this is still relatively new ground for most, and market practice is developing in real time.

More widespread recognition and acceptance of the advantages of technology and the flexibilities it can offer in legal practice, is however in turn, at least from my own perspective, enabling us to shift the often held perception within our wider organisations that the law can be overly formal and cumbersome.

Necessity, it seems, is indeed proving to be the mother of (re)invention.

Big girls (and boys) do cry (at least sometimes)

There also appears to be something of a more subtle mindset shift across practitioners and many employers.

The realities of working from home have fused our private and professional lives in a way that is unprecedented.

On the one hand, it has afforded, to many of

us for the first time, a taste at least of that often elusive concept of work-life balance – whether that is being able to do a spot of exercise in place of the daily commute, the basic satisfaction of putting on the washing machine before work, or the chance to avoid the indigestion-inducing dash to do the nursery drop-off in the morning.

Abiding by lockdown rules has also, however, inevitably meant that the messiness of real life has intruded into the day-to-day. It's difficult to be overly adversarial or detached in a negotiation, for example, when you are sitting on a patio chair in your bedroom, you have a child hanging around your neck or you have a dog that suddenly decides the postman is his nemesis while you are on a call.

The public sector has always led the way in terms of advocating resonant communication, but even there I have noticed a shift in emphasis in recent times, with most calls starting with "So how are you?" followed by some exchange of personal anecdote on experience of lockdown so far.

In short, there seems to be a deeper awareness and acceptance of the human side of our fellow professionals and colleagues, and flowing from that, a more tolerant and collaborative approach to interacting with each other. There also seems to be, at least at present, a greater acceptance of flexibility in working practices by employers.

It is to be hoped that such behaviour shifts endure far longer than the current crisis, given it is recognised that a collegiate and collaborative approach in general leads to faster and better results and more motivated employees.

A seat at the table

Finally, the crisis has also, it seems, seen an increased rather than reduced demand for legal advice, raising new considerations for in-house lawyers almost hourly in what is often uncharted territory.

The practical challenges presented by COVID-19 have, for example, given rise to an enhanced role for compliance and governance advice across a myriad different business areas, from established ones such as HR/wellbeing, data protection and property to new ones created by the crisis, all of which are having to be considered in real time.

There has also been an increased recognition of the importance of legal advice in relation to new service design within the business. The need for businesses to adapt and interact with third parties speedily and in new ways to survive in the "new normal" has required, and is requiring, creative and agile advice to be given by legal teams, often within very tight timescales. For the first time, it seems, many are recognising the legal team as not just part of the support side of the business but as an intrinsic part of its strategic team.

It remains to be seen whether this approach continues as we emerge slowly from lockdown, but it is to be hoped that in-house legal teams can grasp this opportunity to take their seat at the table in relation to the overall strategic direction of the business in the longer term.

Parting thoughts

In assessing, therefore, the winners and losers of La Vida Lockdown so far, it seems that the in-house community is holding its own.

It is to be hoped that the opportunities and the valuable insights which have been, and are every day being gained during this time, are built upon to enable us not just to emerge from the current climate but to flourish.

The signs at least are positive. Law and in-house legal practice are evolving... and in so doing are showing they are nothing if not resilient.

Catherine Corr is a member of the In-house Lawyers' Committee

FROM THE ARCHIVES

50 years ago

From "Professional Practice – Press Announcements", August 1970: "In the past the Council of the Society have always taken the view that announcements and notices relating to solicitors should be published only in the legal press. In view of the trend towards amalgamation of practices the Council feel their ruling in as far as it relates to notices of amalgamations should be relaxed and they have accordingly resolved that there will be no objection to solicitors making one announcement of an amalgamation of practices in the public press. The position relating to other notices remains as before."

25 years ago

From "Aspect", August 1995: "We predicted... some years ago that those of our members who undertook... domestic conveyancing at bucket-shop prices might well find themselves in a position of practising at a loss or even having to give up because they could no longer afford to sustain their firm. Sadly, that prediction is now becoming a reality... There is real rage within the Profession at what is happening and at the apparent inability to redress the problem. It appears that in the West of Scotland at least the fee levels have been set... by estate agents and others using the advertisement of cheap legal fees".

Rising Star Award opens to entries

Nominations are now open for the 2020 Law Society of Scotland In-house Rising Star award.

The award recognises the outstanding achievement of a newly qualified Scottish solicitor with up to five years' post-qualification experience, or trainee working in-house. Entries will be judged by In-house Lawyers' Committee members and individuals working closely with the in-house community.

Nomination forms can be accessed at www.lawscot.org.uk/members/professional-support/in-house/in-house-rising-star-award/. The deadline for nominations falls at 5pm on 28 August 2020.

The winner will be announced on 6 October at the In-house Annual Conference, which is to be a virtual event this year.

Catherine Corr, a member of the committee and one of this year's judging panel, said: "As we work through the unprecedented circumstances presented by the COVID-19 pandemic, it remains important that we recognise talented and committed individuals and I encourage all my in-house colleagues to nominate their legal stars of the year.

"Last year, we had 13 nominations, the most since we launched the award eight years ago. The standard of nominations is incredibly high each year and I have no doubt that this year's candidates for the award will be just as exceptional."

Survey highlights virtual custody court problems

A report by the Law Society of Scotland on the pilot virtual custody court hearings has highlighted significant issues faced by solicitors and their clients.

Five virtual custody courts have been piloted in Aberdeen, Edinburgh, Falkirk, Glasgow and Saltcoats, but a survey covering 144 prosecutors and defence solicitors has revealed issues with obtaining instructions and apparent inconsistencies in the way the pilot courts are operating.

Among the findings, 81% were either dissatisfied or very dissatisfied with the client consultation process, with only 10% indicating that they were either very satisfied or satisfied. Most defence agents (78%) experienced problems in obtaining sight of the papers or arranging the client consultation. More than half of respondents (58%) preferred videoconferencing to using the telephone.

Many identified issues with technology not working well, including audibility and visual problems, not being able to consult privately with clients, or being unable to identify if a client was vulnerable or needed additional support, which had an impact on them obtaining clear instructions and undertaking effective representation. The Society has called for further monitoring and evaluation of the pilot, and for clarity from the Scottish Government, Police Scotland, the courts and Crown Office on any expansion of, or longer-term plans for, virtual custody courts.

President Amanda Millar commented: "There is a role for technology in the justice system and there may be some potential advantages to virtual custody courts beyond the immediate need for COVID-19 safety measures. However, the survey findings have highlighted a range of practical problems arising from the pilot, as well as issues resulting from the different approaches adopted by the pilot courts. These will have to be addressed before there can be any plans for a further rollout."

The report can be accessed at bit.ly/3hNAMRB

Council seats open to nominations

There are three co-opted seats on the Society's Council for which elections are due to be held in September. They cover:
(a) newly qualified solicitors who have held a practising certificate for less than five years;
(b) solicitor advocates;
(c) members outside England, Scotland and Wales.

The electorate for each is limited to the qualifying condition for the specific constituency. Any member who wishes to stand for any of these co-opted seats (and meets the qualifying condition) may obtain a nomination form from David Cullen, registrar, at davidcullen@lawscot.org.uk. Forms should be completed and returned by Thursday 10 September 2020.

There is also to be a new co-opted seat for solicitors working in the third sector. Nomination forms for this seat can also be obtained from David Cullen. The deadline for completed forms is again Thursday 10 September.

Another levy? Ministers consult

In its 2020 Budget, the UK Government announced its intention to introduce an economic crime levy, aimed at raising approximately £100 million per year from entities regulated for anti-money laundering (AML) purposes. These funds would be used to resource a sustainable programme to tackle economic crime.

The UK Government is currently running a consultation on the levy (gov.uk/government/consultations/economic-crime-levy-consultation), seeking views on what the levy will pay for, how it should be calculated and distributed across the AML regulated sector and how it should be collected.

It lays out a number of options as to how the levy might be applied, with minimum revenue being the suggested qualifying criterion. Depending on the figure applied, particular strata of Scottish legal firms may be exempt. The Society will be submitting a response. Members with an interest in the proposals can submit their own responses by the 13 October deadline.

PUBLIC POLICY HIGHLIGHTS

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

Hate crime

There has been a lot of media interest in the Society's submission to the Scottish Parliament Justice Committee's call for views on the Hate Crime and Public Order (Scotland) Bill. The submission highlighted major flaws which could prevent the bill from achieving its stated goals.

In particular, it criticised the "vagueness" in the bill and its policy intentions, highlighting the risk that this could result in a lack of certainty in understanding what constitutes criminal behaviour. This would have consequences for solicitors, whether prosecuting or defending on the offences created.

The Society is further concerned that the bill presents a significant threat to freedom of expression, with the potential for criminalising what may be abusive or insulting. These terms are highly subjective, requiring judicial clarification on a case-by-case basis. Further, the provisions for a new offence of "stirring up hatred" set too low a standard. They would mean that an offence can be committed if hatred is "likely" to be stirred up. That is not the threshold required for criminal law, which depends on guilty intention.

While it is right to have laws which reflect the increasing diversity of Scotland's population and which send a clear message that hatred should have no place in our society, the Society has significant reservations regarding the bill as currently drafted.

Future of transport

The Society submitted a response to the Department of Transport's call for evidence on the Future of Transport Regulatory Review, which focused on highlighting areas where the rights of those with disabilities may not be adequately protected.

One of the Government's principles in facilitating innovation in urban mobility for freight, passengers and services was to ensure that the benefits of innovation in mobility "must be available to all parts of the UK and all segments of society". With this in mind, the response highlighted that no mode of transport or transport service should be permitted if it reduces access to any facility or service providing mobility for any category of persons. This includes, but is not limited to, people who have disabilities of any kind.

COVID-19

Last month, the Society submitted responses on three different areas related to how COVID-19 is affecting work in the health and social care sector.

• **Clinical Guidance for NHS Scotland: Using physical restraint for patients with confirmed or suspected COVID-19.** This guidance is intended to operate alongside existing local and national guidance on supporting mental health and learning disabilities patients. The Society highlighted concerns that the guidance drafted does not sufficiently emphasise the existing legal and ethical considerations applying to the use of physical restraint for these patients. As the current situation means that they may be receiving treatment for COVID-19 in an acute hospital setting where staff are not as familiar with the relevant legal and ethical considerations, it is even more important that these are emphasised within the guidance.

• **National Clinical and Practice Guidance for Adult Care Homes in Scotland during the COVID-19 pandemic.** Recent written evidence to the Scottish Parliament's Equalities & Human Rights Committee's inquiry on the impact of COVID-19 is relevant for this guidance, too. In particular, given the case histories gathered as part of that evidence, the Society recommended that as a matter of urgency clear advice should be given that there should never be any blanket prohibition on transferring a resident from a care home to a hospital for any reason. It also highlighted the importance of ensuring that any appointees with relevant powers are included in decision-making on important issues such as whether a Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) should be in place.

• **Reporting on Coronavirus Acts: Adults with Incapacity provisions.** The Society previously commented on modifications to adults with incapacity legislation in the context of the pandemic, so took the opportunity to reiterate some of these comments. It also called for the end of blanket "stop the clock" provisions which remain in place in respect of guardianship orders and certificates authorising medical treatment while the emergency legislation is in force.

The Policy team can be contacted on any of the matters above at policy@lawscot.org.uk
Twitter: @Lawscot

OBITUARIES

IRIS CHRISTINE MARY McMILLAN (retired solicitor), Edinburgh
On 26 February 2020, Iris Christine Mary McMillan, formerly employed with City of Edinburgh Council, Edinburgh, and longstanding member of the Law Society of Scotland's Health & Medical Law Committee.
AGE: 66 ADMITTED: 1983

WILLIAM JAMES SCOTT CROSBY (retired solicitor), Brussels
On 25 April 2020, William James Scott Crosby, *avocat*, Brussels
AGE: 69 ADMITTED: 1979

Will Relief Scotland

Will Relief Scotland appeals for firms

Will Relief Scotland is appealing for solicitors' firms to join its 2020 campaign, which runs in September.

Since it started in 2006, more than £200,000 has been raised through the generosity of Scottish solicitors. This supports four Scottish-based charities working across the world to bring relief and life transformation to thousands of people in need: Blythswood Care, EMMS International, MAF Scotland and Signpost International.

Will you consider joining the September 2020 campaign this year and, along with other member solicitors, make a difference?

For more details contact Mairi Ferrier on 01349 830777 or mairi.ferrier@blythswood.org

Rule change: incorporated practices

Rule D5 of the Practice Rules sets out the requirements which must be met before a body corporate can be recognised by the Society as an "incorporated practice" in terms of s 34(1A) of the Solicitors (Scotland) Act 1980. The rules have now been amended in line with proposed amendments sent to members before the AGM in May.

The main purpose of the amendments is to equalise the treatment of incorporated practices, regardless of whether structured as a company or a limited liability partnership, given that, in reality, both types of structure may have only a limited number of individuals qualified to own, manage and control the business and hence both types may need to consider how to manage the same risks. New guidance accompanies the amended rules and can be found on the Society's website.

Fine margins are not so fine

Pricing post-COVID requires us to raise our game and our sights, says Stephen Gold

The oldest cliché about lawyers is that they are too expensive. "Like the doors of the Ritz hotel, justice in England is open to all," quipped Victorian judge Sir James Matthew. He'd have said the same about Scotland. But while he had a point to make about High Court litigation, many SME firms, a sector which comprises the majority of the UK profession, consistently fail to recognise their own value, use a finger in the wind as a measure, and short-change themselves in the process.

In the most striking example I know, a firm engaged consultants to help them improve their pricing, and agreed that if a minimum increase in turnover was achieved, the consultants would receive a bonus of £20,000. The firm turned out to be just as hapless after the training as before, and turnover didn't increase. But they paid the bonus anyway to avoid the embarrassment of having to admit it.

Clients ravaged financially by the pandemic are more aggressive than ever on price. It's a dangerous time for lawyers who lack the skill and confidence to negotiate on their own behalf, have themselves been severely affected, and who confuse the need to be busy with the need to be profitable.

Addressing an image problem

It's easy to identify the problem, but what is the solution? Surprisingly, there are lessons in a jar of face cream. Oil of Olay was created by a chemist working for the South African operations of Procter & Gamble in 1952. Its biggest market is the US. Over the years, discounting had given it a downmarket image, and by 1990, mocked as "Oil of Old Lady", it was sold mostly in convenience stores at $3.99.

The choice was to ditch it, or perform urgent, as it were, cosmetic surgery. P&G decided to relaunch, focusing on women from their mid-30s, an age at which they were becoming more conscious of the need for skin care, and willing to invest in it. The cream's composition was substantially improved. It was rebranded "OLAY", repackaged to look good on the shelves of upmarket stores as well as mass outlets, and then pitched at various price points: $12.99, $15.99 and $18.99. The last was most successful – expensive enough to be regarded as premium, but good value against competitors. It has become a market leader at almost five times the original price.

"It's a dangerous time for lawyers who lack the confidence to negotiate, have themselves been severely affected, and who confuse the need to be busy with the need to be profitable"

What are the lessons of Olay?

Firstly, whether cosmetics or counsel, clients will pay good money if a product or service is important to them, providers demonstrate a commitment to quality, and skilfully articulate their value. I know of no client who has ever been to a lawyer on a matter they did not think was important. A specialist professional's life consists of doing broadly similar things again and again. But that in no way diminishes the importance of the task.

It is easy to forget that what may seem routine, for example making a will, conveying a house, finalising an undefended divorce, defending a road traffic charge, enforcing rights, forming a company, or winding up an estate is for the client always a big deal. How well it is done may have life-changing consequences. The premium price women are willing to pay for Olay reflects the value they place on its effect, not the cost of its constituents. In professional services, pricing work on the basis of value, articulating confidently how the figure has been calculated and why it is fair, is the surest route to profit and enduring client loyalty. It definitely beats dividing time into six-minute units, then applying an opaque and arbitrary multiplier.

Secondly, only a premium service will attract a premium price. The new Olay was not old wine in new bottles; it was significantly better. For law firms, being premium means more than being technically proficient. That's just a ticket to the game. It means being responsive, accessible, empathetic, friendly and with great communications. Being impressive online and immaculate front of house are not optional. This is a tall order, but at the same time, every firm can achieve it. Whether they do, depends far more on commitment than budget.

Finally, P&G demonstrates that whether our business is multinational or local, success depends on making thoughtful choices about which markets we want to be in, investing in acquiring a deep understanding of what clients need, not thinking we know instinctively, and then doing what it takes to deliver. The importance of what lawyers do, and the skill, effort and resources required to do it well, mean that if we do indeed deliver, we should be bold and confident about earning a decent margin. We'll never reach the stars by pricing in the basement.

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.
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Training beyond the law

Offering a perspective from south of the border, Mark Lello believes that a standard legal training fails to equip lawyers as business people, a deficit addressed by his firm's training academy

Being a great lawyer doesn't mean you are a great business person.

Along with other professional disciplines, lawyers excel in producing experts within their own specialisms. But what the pandemic has proved is that being a great litigator, conveyancing or private client lawyer does not necessarily equip them well for the challenges of running a business at times of great uncertainty.

A law degree is the strongest platform for a continued career in almost every domain. So it is all the more ironic that so many lawyers, and indeed firms, lack the basic business skills with which to appreciate and react to the challenges facing their clients due to COVID-19.

There are many contributing factors to this limitation, but a fundamental issue is the failure by most law firms to invest in non-legal training, development and mentoring.

Business insights, not just legal prowess

The last four months have probably changed the way we live and work forever. So how have we reacted? Our profession has always been accused of being too introspective, of failing to understand how our clients are evolving their behaviour when dealing with other professional service providers and the broader environment.

Let's face it. Our clients will happily spend the same amount of money on a flat screen TV as they would a fairly complex will – especially as they can click and collect the TV. That said, credit where it's due – a profession not known for its rapid adoption of innovation has turned to technologies such as

videoconferencing, which many considered to be a suboptimal way of servicing clients, but which have been well received by practitioners and clients alike.

Necessity has also seen huge progress in the move towards electronic signatures for wills and other documents, benefitting clients with mobility issues and also allowing us to serve a far larger geographic area.

Let's build a better lawyer

Crises of one sort or another are cyclical. Thirteen years ago it was a global financial meltdown, and 19 years ago it was 9/11. Such crises are infrequent, but the result is often that there will be a large number of partners across the UK who have never experienced business turmoil, and therefore have limited experience and knowledge to call upon.

But it's not just crises that many lawyer trainee programmes fail to address. Practical issues such as cash flow, winning new business, client handling and how to run a meeting are often learned by osmosis rather than in a structured manner.

Another problem that often needs addressing is the fact that law is very siloed. The overarching needs of both private and corporate clients are often ignored, with the result that the solicitor lacks the depth of experience to discuss the wider issues. A prime example of this is the universal need for a power of attorney, which is just as important as a shareholder agreement for owners of businesses, and arguably should be put in place at the same time.

Real world training should be mandatory

Our "Parker Bullen Training Academy" strategy was devised to complement the structured legal training and "on the job" experience with real world content, to which trainees will not have been exposed, but which is nonetheless crucial in adding value when advising clients and colleagues on a day-to-day basis, and especially when a crisis occurs.

It should be noted that other law firms have participated, and the training is also open to accountancy firms, many of whom share the same issues as us.

The training modules have been designed in part around the unknowns that senior practitioners wished they had been told about when they were junior lawyers. Good examples are the importance of marketing as an integral part of one's practice, and of making sure your colleagues know you: the all-important and overlooked "internal market", not just that of the external customer.

Fit for a new environment

We're not the first. Neither should law firms be the last.

When redesigning our training programme we looked at other organisations with similar business issues and customer dynamics to ours. The way Goldman Sachs train is an interesting parallel, and especially their approach to small businesses. How they develop their employees for future leadership roles, and how colleagues and clients behave in the workplace, were apposite learnings.

Training must also be flexible, to adapt and evolve alongside the needs of the business and clients. A good example in our case has been the inclusion of a module on franchising, as we have a strong presence in the military, and many ex-forces personnel choose franchising as post-service employment.

In conclusion, COVID-19 has galvanised us. More than ever, we are striving to build a better and stronger business. Integral to this is a focus on training programmes that make us fit for purpose in a new business environment and better able to tackle whatever external events throw at us.

Mark Lello is a partner and head of the Commercial department with Parker Bullen LLP, Salisbury and Andover

TAX REPORTING

Get ready for DAC6

Solicitors involved with clients' cross-border tax arrangements need to know about the new mandatory reporting regime, even if legal privilege will often exempt them from having to report

DAC6 is a mandatory reporting regime for intermediaries (including lawyers, accountants and others) involved in cross-border arrangements that bear hallmarks associated with tax avoidance and aggressive tax planning. The legislation is in the International Tax Enforcement (Disclosable Arrangements) Regulations 2020, implementing EU Council Directive 2018/822. In the UK reports are made to HMRC. HMRC published guidance on the regulations on 1 July 2020 (HMRC IEIM 610000 onwards).

There is an important exception for lawyers, where to report would breach client confidentiality (referred to as "legal privilege" here). This means that in most cases legal privilege will prevent lawyers from making a report. However, the lawyer must notify other intermediaries (if any) involved in the transaction of the reporting obligation, provided that doing so does not breach legal privilege, and otherwise notify the client. The legal privilege exception does not mean lawyers can ignore DAC6. Many firms, however, will be involved in little or no cross-border work and for them compliance may not be overly onerous.

In addition to new arrangements from 1 July 2020, the reporting obligations also apply to arrangements entered into between 25 June 2018 and 30 June 2020 ("look back" arrangements).

The reporting deadlines were delayed in response to the coronavirus pandemic. The delayed reporting deadlines are:

- "look back" arrangements: 28 February 2021;
- arrangements between 1 July and 31 December 2020: within 30 days beginning on 1 January 2021;
- arrangements from 1 January 2021: 30 days from certain reporting trigger points.

Transactions the rules apply to

The regulations apply to "reportable cross-border arrangements". Cross-border arrangements are arrangements that concern an EU member state and another country. The UK is treated as an EU member state for these purposes up until 31 December 2020, and it is expected that the DAC6 regime will continue to apply after the end of the transition period.

A cross-border arrangement is reportable if any of several hallmarks linked to tax avoidance and tax reporting apply to it. Some, but not all, require the main benefit or one of the main benefits of the arrangement to be obtaining a tax advantage. Some apply automatically. The analysis of the hallmarks has the potential to be a significant piece of work in itself. The width of the definition means that transactions which are purely commercial and have no tax motivation can be caught.

Who the rules apply to

The regulations apply to intermediaries involved in designing, marketing or organising reportable cross-border arrangements; or making them available for implementation (HMRC calls them "promoters"). They also apply to intermediaries who provide aid, assistance or advice if they knew, or could reasonably be expected to know, that a reportable cross-border arrangement was involved (HMRC calls them "service providers"). It is very unlikely that lawyers will be promoters. Lawyers who are involved with cross-border arrangements will almost always be within the scope of the definition of intermediaries, but as service providers, not promoters. The rules can apply even if the lawyer is not advising on tax issues.

A lawyer who is a service provider does not have to report unless they knew, or could reasonably be expected to know, that the arrangement fell within one of the hallmarks. The hallmarks are complex to apply, so this would require a good understanding of the tax issues. HMRC says that service providers are not expected to do any additional external due diligence beyond what they would normally do; and lawyers are only expected to read the information they would normally need to look at, and do not have to review everything to which they have access to check if a transaction is reportable. On the other hand, intermediaries cannot be wilfully blind or artificially split up information.

Client confidentiality/ legal privilege

The legal privilege exception will almost always prevent lawyers from making a report to HMRC, unless the client has expressly waived privilege. If a report cannot be made without disclosing privileged information, the obligation does not arise, even though some of the information that would be disclosed is not privileged in itself (for example, information received from third parties). The privilege issues can be complex, and specialist advice may be needed in specific cases. The Law Society of England & Wales has published a guidance note on legal professional privilege and DAC6 which may be helpful: see www.lawsociety.org.uk/topics/tax/dac-6-and-lpp

Where privilege applies, the lawyer must notify other intermediaries involved that the arrangement is reportable, unless that would also breach privilege. If privilege prevents the lawyer from reporting, it is also likely to prevent

them telling other intermediaries. In practice much of the relevant information may already have been shared with other intermediaries with the client's consent, or the client may consent to a limited waiver of privilege to allow the intermediaries to discuss the reporting requirement. If there are no other intermediaries, or the client does not want to waive privilege, the reporting obligation shifts to the taxpayer who used the arrangement (in most cases, the client).

Time limits for making reports

From 1 January 2021 the time limit for making a report is 30 days from the earliest of the following triggers:

- the day after the arrangement is made available for implementation;
- the day after the arrangement is ready for implementation;
- the day the first step in implementation is made;
- for service provider intermediaries, the day after the day the intermediary first provided the aid, assistance or advice.

Multiple intermediaries

Where more than one intermediary is involved, all have a reporting obligation. However, an intermediary is exempted from the reporting obligation if another intermediary has made a report and the first intermediary holds evidence of that, and can demonstrate that it does not have any other reportable information relating to the arrangement. HMRC will issue the reporting intermediary with an arrangement reference number (ARN), which it must provide to the other intermediaries involved. The ARN is evidence that the report has been made.

Penalties

Penalties apply for failure to comply with the reporting requirements, or failure to notify other intermediaries or the client that the transaction is reportable where legal privilege applies. The default penalty is a one off penalty of up to £5,000. The amount of the penalty is determined by HMRC, taking account of all the relevant facts. HMRC may choose not to charge a penalty, depending on all the facts and circumstances.

Penalties are appealable to the First-tier Tribunal. There is a reasonable excuse defence to a penalty and whether the intermediary had reasonable procedures in place to comply with the rules.

What does it mean for lawyers?

These rules have important implications for lawyers, even if legal privilege means they will rarely have to make a report. Firms should be preparing for DAC6 now, including:

- reviewing risk and compliance procedures;
- ensuring they can identify how and when legal privilege applies;
- putting procedures in place to identify cross-border arrangements at matter opening and keeping matters under review in case they become reportable;
- identifying "look back" arrangements;
- creating a central repository of cross-border arrangements and recording the outcome of reviews;
- recording details of DAC6 reviews and outcomes on individual files;
- making colleagues aware of the rules and providing clear guidance on internal procedures for dealing with DAC6;
- creating flow charts/decision trees to help colleagues decide if arrangements are reportable;
- reviewing letters of engagement to exclude DAC6 reviews from the scope of work, and to allow the firm the option of charging for reviews;
- where multiple intermediaries are involved, agreeing how the DAC6 compliance will be dealt with at the outset; and ensuring effective communication and co-ordination as the matter progresses.

The measures that are appropriate will vary from firm to firm and, depending on the types of work undertaken, may be relatively limited. As always, it is not enough to be compliant: compliance must also be demonstrated, so a little planning now may go a long way.

Heather Thompson is a partner with Brodies and a member of the Law Society of Scotland Tax Law Committee

Notifications

ENTRANCE CERTIFICATES ISSUED DURING JUNE/JULY 2020

ABDEL-RAZIK, Maryam
AHMED, Justine Jamie Anne
ANDREWS, Jonathan
ARTHUR, Helena Elizabeth
BAIN, Isabelle Eliza
BANAG MONGO, Anais Gwenaelle Christine
BARNETT, Emma Victoria
BELL, Nikkie
BENNETT, Angie
BONAVENTURA, Iona Elizabeth
BOYLE, Thomas Oliver Steging
BRICE, Emma Nicole
BROWN, Debbie Avril
CAMPBELL, Eilidh Morag
CAMPBELL, Euan Colin
CAMPBELL, Lucy Frances
CAPALDI, Caterina Giulia
CLAXTON, Rowena Lucy
COUCHLIN, Emily
CURLEY, Michael Thomas
CURRAN, Kirsty Lauren
CUTHBERTSON, Bernie Marcia
DENHEEN, Olivia
DE-PELLETTE, Nicole
DUHERIC, Hana Vera
ESSON, Rebecca Charlotte
FAIRLEY, Sarah Valerie
FERGUSON, Evana
FERGUSSON, Andie Spiers
FERGUSSON, Hannah Margaret
FORBES, Robbie Stuart
FRASER, Lauren Anne-Louise
FULTON, Craig John William
GALBRAITH, Nicole Margaret
GAMBA, Elaine Miller
GARDINER, Sophie Victoria
GARLAND, Iona Eilidh
GHUMRO, Imtiaz Ahmed
GILLAN, Baktosch
GOLDBECK, Matthias
GRANT, Gillian Elizabeth
GRAY, Harriet Hazel
GRAY, Michael
HAIR, Charlotte Anna Marion
HARKNESS, Ciaran Andrew
HARRIS, Wendy Elizabeth
HENDRIE, Emma Louise
HILL, Rachel Margaret
HO, Vivien
HORNSBY, Mallory
HOUSTON, Jordan
JACK, Lucy Katerina
JOHNSON, Alexander Adam
JOHNSTON, Elliot Iain
JONES, Ben Thomas Wynton
KEENAN, Paul Gerard
KING, Deborah Louise
KORNEJEVA, Anastasija
KROLL, Sarah Hornung
McALLISTER, Lindsay Regan
McCORMICK, Kirsty Jessie
MACDONALD, Andrew Lewis
McFARLANE, Lucie Maria
McKAY, James Robert
McKENNA, Abigail
McLEAN, Iain Donald
McLEVY, Leigh Catherine
McMILLAN, Hayley Elizabeth Joan
McMURCHIE, Lauren
McMURRAY, Hannah Alison
MACNEILAGE, Jessica Harriet Taylor
MALLEY, Sophie
MALTMAN, Heather
MANSON, Emma Mackenzie
MARAMBA, Innocent Sifelani
MARTIN, Ross
MATHESON, Euan George
MATHIESON, Iain Thomas
MILLER, Corrin Frances
MINTER, Janette Carruthers
MITCHELL, Eamonn Craig
MONTGOMERY, Kerri
MUKIT, Myeda
MURDOCH, Emma Jane Elizabeth
MURPHY, Euan Jack
NIMMO, Gemma Louise
NOBLE, Hazel Janet
O'DONNELL, Rebecca Georgia
O'HARE, Caitlin
O'NEILL, Megan
PANGEVA, Slavina Stoycheva
PAUL, Abigail Sara
PELOSI, Mark John
RICE, Lucy Katy
RICHARDSON, Jack David
ROUDH, Simon Dildarjeet Singh
SAMSON, James Alexander Ewing
SCOTT, Erin Atlanta
SCOTT, Susannah Louise
SHORT, Michael Kenneth
SIEDLECKI, Igor Grzegorz
SIMPSON, Ross James Alexander
SKINNER, Celine Page
SMART, Kathryn Ann
SOMMERVILLE, Chloe Jemima
SPENCE, Alexander
STEEN, Anna Katie
STEVENSON, Shannon Margaret
STRACHAN, Joanna Mary
STREET, Kirsty Ann
SUMMERS, Courtney Jade
SUTHERLAND, Sharron
SWIRA, Monalisa
THOMSON, Chloe Janet
TORRANCE, Charlotte Mary Jane
TOWNSEND, Jack
TOWNSEND, Laura Alice
WARK, Alexandra Rose
WATRET, Charlotte Frances
WEBB, Kirstie Anne
WILSON, Ginny
WILSON, Kathryn Frances
WILSON, Ross
WILSON, Sarah Dallimore
WOOD, Emily Elizabeth
WOODS, Dylan William
WUERSCH, Anne Seraphine

APPLICATIONS FOR ADMISSION JUNE/JULY 2020

ANWAR, Zarah
BELL, Scott Robert
BENES, Ruzena Martina
BROWN, Ashley Jane
CARMICHAEL, Lisa Anne
CARR, Bethany Ann
CHRISTIE, Ailie Elizabeth
CHRISTIE, Fraser Scott
CLARK, Miriam Christine
CONNELLY, Kevin Edward
CRANSTON, Emily Chrisanne
CROCKER, Camilla Rose
CUNNINGHAM, Katie
DAVIES, Sophie Marie
DONNELLY, Roisin Colleen
DUFF, Lucy Georgina
DUGAN, Roisin Anne
ENWEGBARA, Philips Anthony Anaemeze
FLEMING, Charlotte Alexandra
FROTAN, Emma
GARDINER, Ross James
HALLEY, James
HARDING, Andrew Paul
HARVEY, Douglas James
HASTON, Nicola
HIGGINS, Katie
HODGSON, Elizabeth
IANNARELLI, Lesley Ann
IRELAND, Kate Elizbeth
JAGLA, Catriona Esther
JORDAN, Thomas Charles
KANE, Cameron Macleod
KERSHAW, Victoria Louise
KHAN, Nisar
KHAN, Said Jamil
LAING, Caroline Margaret
MACDONOUGH, Carly Alana
McINTYRE, Ashleigh
McKIRDY, Erin Mary
McLELLAND, Ross William
MACLEOD, Maria
MAGEE, Carys Erin
MOHAMMED, Omar Hassan
MORRISON, Holly Rachel
NUTTALL, Elspeth Mary Grace
O'SULLIVAN, Emily Rose
PEOPLES, Erin Louise
PORTER, Cheryl Stewart
SADIQ, Muhammad Pervez
SELLA, Francesca
SHABBIR, Muhammad Bilaal
SMITHERAM, Jie
STEVENSON, Katie Maureen
WARD, Victoria Joanne
WATSON, Mark John Reid
WHITE, Charlotte Joy

RISK MANAGEMENT

Wills and executries: red flags and claims

On behalf of Lockton, the authors consider some common issues arising from wills, trusts and executries, and provide some tips for avoiding problems

In February 2020, Lockton published a *Red Flag Checklist* for will drafting. This article follows on from that checklist, and covers the areas in which claims arise most commonly and some ways in which these can be avoided.

Who can bring a claim?

In brief, a solicitor owes a general duty to draft a will or trust with reasonable skill and care. If they fail to do so, a claim can arise, provided the claimant can prove what was intended or went wrong and point to the loss caused.

While space does not permit more detailed analysis, it is worth saying that the identity of a claimant is important (and complex) in these types of cases. Case law has identified that claims can be brought by an executor where the loss is suffered by the estate, and by a disappointed beneficiary in certain circumstances.

There are three main stages at which claims arise relating to wills, trusts and executries:
(1) taking instructions from the client;
(2) drafting the documents and having them signed; and
(3) management of the trust or executry.

1. Taking instructions

It is a given that a solicitor must take appropriate instructions which accurately reflect the testator's wishes, but there are several other pitfalls.

File note everything

We see numerous claims where it is alleged that the testator's instructions were not properly reflected in the final document. These are largely raised by disappointed beneficiaries who were told they would receive something but didn't. Without proper file notes of discussions with the testator and decisions made, the solicitor is in a considerably more difficult position when arguing that the will or trust reflected the testator's final wishes. Without proper file notes it often becomes an issue of credibility, involving a lengthier and trickier process.

Who is the client?

It seems obvious that instructions should be taken directly from the testator, and particular care should be taken where there is any suspicion that the instructions are not the testator's. Claims arising from assertions of "undue influence" remain common, and it is important that proper instructions are taken whereby the testator knows what is being disposed of and understands the legal effect of the gifts in their will.

Capacity

The "golden rule" in will drafting is for the solicitor to be sure of the testator's mental capacity (solicitors should follow the Law Society of Scotland's guidance on vulnerable clients). If there are uncertainties, normally the best practice could be to have a will witnessed or approved by a medical practitioner (where they are willing), who should examine the testator and record their examination and findings.

This cannot happen in every situation, though, especially where time is of the essence. Failure to follow the practice is not necessarily negligent, as the court found in *Wharton v Bancroft* [2011] EWHC 3250 (Ch). At para 110 the judge rejected criticisms of the solicitor for failing to follow the rule, saying: "His job was to take the will of a dying man. A solicitor so placed cannot simply conjure up a medical attendant… I do not think Mr Bancroft is to be criticised for deciding to make his own assessment (accepted as correct) and to get on with the job of drawing a will in contemplation of marriage so that Mr Wharton could marry. I certainly do not think that 'the golden rule' has in the present case anything to do with the ease with which I may infer coercion."

This is obviously a fine line. However, the solicitor should not hesitate or delay in drafting a will due to possible (rather than obvious) doubt as to the testator's capacity, or to obtain medical practitioner input, particularly where time is of the essence, otherwise the solicitor may be liable to the disappointed beneficiaries of the unfinished will.

Points to clarify

It is relatively common for claims to arise where a property is left to a specified person in a will, only for there to be an undischarged survivorship destination in the title, leading to the bequest being ineffective. This can result in a large claim by a disappointed beneficiary for the value of the property. Other examples (largely at lower values) involve bequests for specific items where those have already been disponed; or specific sums of money. Good practice would be to raise the possibility of cash bequests being in the form of a percentage of the estate rather than a specific figure, in case a will is not revisited (a £150,000 bequest in 1990 is very different to the same in 2020).

2. Drafting and signing the documents

It goes without saying that the document must be competently drafted and should reflect the testator's intentions. Below are some further points which should be considered at this stage to avoid claims.

Avoid delay

Delaying meeting to take instructions, or drafting or finalising a will, is risky, and can result in claims from either an executor, say on the basis of increased tax payable, or a disappointed beneficiary where the delay prevents a bequest being made. A solicitor must prepare the testator's will within a reasonable timescale. If urgency is needed (and apparent), even a short delay will likely be deemed unreasonable. While solicitors are generally very busy, claims under this heading are normally relatively sizeable, and they are in the most part avoidable with adequate preparation and good work practices.

Tax

Claims arising from a will or trust drafted without the proper care

or expertise in relation to tax are also relatively common, resulting in large inheritance or capital gains tax bills being payable, or an available nil rate band being lost. Solicitors should take great care when providing tax advice; usually, it should only be given where such expertise exists within the firm, or has been sought externally. Many solicitors now expressly exclude tax advice in their engagement letters for standard wills, or recommend in writing that the input of an accountant/financial adviser/tax lawyer is sought, thereby spreading the risk profile.

Signing the will/trust

It seems obvious that wills and trust deeds need to be properly signed; however, there are numerous examples of this not being done. Claims have also been successfully raised where a solicitor has failed to provide the testator with full and proper instructions as to signing. To protect against claims, the will should be checked carefully once signed. Whilst that might seem unnecessarily cautious, studies suggest the majority of the population are not familiar with signing formal documents, and a quick check is considerably more efficient than discovering and dealing with errors years later, on the testator's death. A solicitor cannot compel a testator to return the will to them for safekeeping (and checking), but they may not entirely avoid liability where they don't ensure that the will is validly executed by asking to see it afterwards.

Issues with drafting and signing are more often caused by failings in a firm's processes or systems than technical incompetence, and key issues can be allowed to slip under the radar. Having robust systems in place is an important failsafe to prompt good attention to detail and suitable follow-up steps.

3. Managing the trust or executry

Once the executry or trust is underway, in some cases we have seen a tendency to relax a little. Given the size of some trusts and executries, points can easily be overlooked without proper procedures in place.

The basics

Claims have arisen where the solicitor fails to arrange basic (and easily missed) points such as collection of rents, payment of utility bills, or even necessary insurances for a property. One such claim involved a fire at a property where the solicitor had not arranged buildings and contents insurance. The beneficiaries looked to the solicitor to compensate the substantial decrease in its value. Insurance had been overlooked following a change of file handlers, something a checklist or similar would likely have caught.

Distributions

Claims and complaints are relatively common where beneficiaries have been overpaid, or distributions have been made on the basis of an invalid will and later require to be recovered. Making distributions without ensuring the payee's details and identity is too common, and more worrying in these days of online identity fraud. Having appropriate and robust systems for checking where funds should be paid is a vital part of the modern solicitor's job. These claims are often large, (in the most part) indefensible, and if due to criminal intervention, the funds are often not recovered.

Claims by executors/trustees

It is clear that the executor/trustee may claim against a solicitor for losses to the estate where those losses arise post-death, during the administration and due to the solicitor's negligence. One example is a delay in obtaining confirmation whereby income is lost. More difficult is whether the executor/trustee can recover post-death losses suffered by the estate resulting from negligent advice given to the testator during their lifetime. In *Fraser v McArthur Stewart* [2008] CSOH 159 the court found that no liability may attach for incorrect advice even where that is relied on by the testator, as long as the will reflects their final intentions – further reinforcing the importance of file notes and proper procedures.

Possible risks into the future

In the COVID-19 world there appears to be a greater demand for wills, coupled with new methods of execution and law firms offering online wills. These bring with them further risks and should be approached meticulously and with great care. The Law Society of Scotland released temporary guidance notes on 25 March 2020 setting out best practice in the circumstances (www.lawscot.org.uk/news-and-events/law-society-news/coronavirus-updates/). At the outset, firms should have in place a proper method by which to take and note full instructions while ensuring that the testator has proper capacity and is not being unduly influenced. When arranging for the wills to be signed and witnessed, the Society guidance should be followed.

While it remains unclear how the courts will view negligence under these circumstances, all efforts should be made to minimise risk by following guidance and fully noting discussions and considerations. We would also say that any wills created, signed and witnessed with COVID-19 restrictions in place should be reconsidered as those restrictions ease. This might simply involve arranging for the will to be re-signed when (for example) a witness is available, but reconsideration will minimise the risk profile more generally.

Finally, in general we urge solicitors to find the time to stop and think about what needs to be done in each executry and trust, however routine those steps may seem. A suitable process, questionnaire or checklist (such as Lockton's own) should be created and a system adopted which the entire business should be required to follow. Detailed file notes should be taken at all points, given that the testator's instructions are key to the whole affair. The steps will soon become second nature and the risk of claims can only be reduced.

This article was co-authored for Lockton by Alan Calvert, partner, and Ed Grundy, senior solicitor, of Brodies' Dispute Resolution team, specialising in professional indemnity claims

ASK ASH

Dreading going back

My anxiety levels shoot up at the prospect of returning to the office

Dear Ash,

I have been working from home now since the beginning of lockdown, but my employer has made clear that we are all to return to the office from next week. Although I'm normally quite a bubbly and upbeat person, I am struggling with the idea of returning to work. I have managed to get into a good routine at home and am dreading the prospect of commuting to work and of interacting with colleagues in the office. My anxiety levels increase every time I think about going back to the office, but I'm also conscious that I don't want to lose my job, especially in the current market conditions.

Ash replies:

Lockdown has had an inevitable impact on everyone's mental health: even those who may not have previously experienced anxiety seem to have been impacted.

You therefore need to try to source some help from your GP; and I'm sure you won't be alone in seeking such help. Your GP may be able to provide some helpful technical support, such as simple breathing or coping strategies; medication may also be an option depending upon the severity of your condition.

I also suggest speaking to your employer about phasing in your return to work in the office. If your productivity at home has been good, there may be scope for you at least to seek to work from home a couple of days a week, and this may help you to cope better with your anxiety levels. And your employer may have to adopt some form of rota for employees working from the office in any case, in order to ensure that social distance measures are maintained, therefore it is worth asking about working from home.

In addition I highly recommend that you go for a brisk 30-minute walk or running on a regular basis, as the endorphins from such activities should also help with improving your outlook, and provide you with more confidence about the outside world.

There is still much uncertainty about future lockdown measures, therefore try to find a flexible solution with your employer which will not only help you to keep safe on a physical level but will help to address your mental health. You are not alone in how you are feeling; and you may find it helpful to seek some help online in the form of blogs from others with similar concerns or from professional support organisations such as LawCare. Try to remain positive, and keep safe.

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).

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Miss Phillippa Marie Claude (deceased) – Would any solicitor holding or knowing of a Will relative to Miss Phillippa Marie Claude, latterly of Margaret McDonald House, 89 Buccleuch Street, Glasgow, G3 6QT and who died on 21st April, 2020, please contact Donnie Macleod, Miller Hendry Solicitors, 21 Comrie Street, Crieff, Perthshire, PH7 4AX: Tel 01764 655151; Email: donniemacleod@millerhendry.co.uk

Mr James Liddell Cunningham Rae (deceased) – Would anyone holding or having knowledge of a Will by James Liddell Cunningham Rae late of 97 Fort Street, Motherwell ML1 3RQ (and sometime at Newfield Crescent, Burnbank, Hamilton and Hillside Crescent, Hamilton) please contact John Jackson & Dick Limited, 48-50 Cadzow Street, Hamilton ML3 6DU (pmilligan@jacksondicklaw.com).

Mr Fraser Russell (deceased) – Would anyone holding or having knowledge of a Will by Fraser Russell late of 38 Strutherhill, Larkhall ML9 1LR (sometime at 26 Machan Road, Larkhall, ML9 1HG, 63 Swinhill Road, Birkenshaw, Larkhall, ML9 2TX, and 15 Windsor Path, Larkhall, ML9 2RX) please contact John Jackson & Dick Limited, 48-50 Cadzow Street, Hamilton ML3 6DU (pmilligan@jacksondicklaw.com).

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This well-known Glasgow firm seeks an experienced Employment Lawyer. The successful candidate will be at least 8 years' PQE, have an excellent track record and some client following. This is an exciting role if you currently working for another progressive firm. (Assignment 11595)

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Real Estate Edinburgh

Our client is seeking a Real Estate partner to join its firm in Edinburgh. The ideal candidate will be at least 7 years' PQE with experience in this area of the law. This role would suit someone interested in the opportunity to lead or develop a team. (Assignment 11535)

Commercial Edinburgh

This growing firm is currently looking to hire commercial partners to join the team in Edinburgh. You will join this experienced commercial team and be able to provide high level support in one of the following areas; corporate, real estate, IP/IT, employment law or banking. (Assignment 11548)

For more information or a confidential discussion, please contact Frasia Wright (frasia@frasiawright.com) or Cameron Adrain (cameron@frasiawright.com) on email, or by telephone on 01294 850501.

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