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Journal

Journal of the Law Society of Scotland

Volume 66 Number 2 – February 2021

Looking for light?

We're stuck in lockdown, again, and it's winter. The Journal took a mini-survey of how lawyers are coping, and shares their experiences and tips

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Child Abuse, Child Protection & the Law 2nd Edition

Tom Guthrie; Morag Driscoll

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

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

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

The text discusses the following relevant legislation:

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

An intensive resource on child protection law

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

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

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

W. GREEN

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Stain on the system

Scotland's independent prosecution system has long been held out as a model of independence and upholding of the public interest, one which leaves little if any room for private prosecutions such as have led to some controversial cases south of the border.

Something has gone very wrong, however. The Scottish Government is settling actions, reportedly at a figure exceeding £20 million, brought by the former administrators of Rangers FC, following a public admission on behalf of the Lord Advocate (who did not hold that office at the time) that criminal proceedings against them had been brought maliciously.

That extraordinary, and shocking, state of affairs strikes at the heart of a system which ought to embody everything that is ethical about our profession. Independence, objectivity, integrity, justice being seen to be done. The result, as others have observed, was treatment such as we are more used to reading about taking place in Russia or certain regimes in the Middle East.

How did these professional standards come to be set aside? And to what treatment were the unfortunate individuals subjected, and with what consequences, that required their claims to be settled at a level equivalent to about a fifth of the current prosecution service annual budget?

Fortunately our judges cleared the ground for this to come to light by overturning the 1961 decision that would have prevented the Lord Advocate from being held to account even where malice was involved – a clear illustration of the vital role played by the law and the courts, and the necessity of upholding the rule of law in the modern world.

But the settling of these actions must in no way be the end of the story. Nor should any terms of settlement be allowed to become a shield against full scrutiny of what took place. (The two men are now seeking to make their own complaint of criminality, and it would certainly provide a test for the system as to how that might be investigated.)

An inquiry has been promised. It should not shirk from fully investigating the parts played by all those actually or nominally involved. The issue is too important to settle for less. And it needs to be enabled to take place without going the way of Lord Hardie's inquiry into the Edinburgh trams project, which has now been running for longer than the troubled project itself, and has had to be given a further year's funding, taking its total cost to about £11.8 million.

It is high time public confidence is restored in the way Scotland's national authorities operate. J

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.66 NO.2 – FEBRUARY 2021

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In practice

ONLINE INSIGHT

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

Public procurement in post-Brexit UK

Totis Kotsonis and Jonathan Taylor discuss the effect of the trade agreement reached with the EU on UK public procurement law, and the regulations to bring UK law into line.

Sustainable procurement: a key to reaching net zero

The sustainable procurement duty, and emerging enhancements of it, give the public sector a vital role in helping to meet the Scottish Government's net zero carbon emissions target, as Jill Fryer explains.

Corporate directors face the chop

Following a consultation on when to permit exemptions, the UK Government is expected to bring in a ban on the appointment of corporate directors. Edwin Mustard and Tom Swan advise businesses to consider the implications.

The courts are getting there virtually...

Online civil proofs have brought many benefits, says road accident lawyer Jodi Gordon, and there should be no going back to the old ways.

Journal index 2020

The annual index for 2020, covering published articles in the paper and digital issues of the Journal magazine, is annexed to this format and also www.lawscot.org.uk/members/journal

OPINION

Hannah Leslie

Housebuilders are responding to calls to create greener homes, but are constrained by market forces and customer demand – which could be shaped through financial incentives to raise awareness of energy performance

Homes make up 15% of the total greenhouse gas emissions in Scotland, and at Springfield we have long recognised our responsibility to reduce this output. There is an ongoing debate in housing over what needs to come first to allow further progress in the delivery of low carbon homes to be made: Government regulation; housebuilder innovation; customer demand; and/or something which is arguably interlinked, financial incentives.

In Scotland, homes are built to some of the highest energy standards in Europe because of the ambitious targets set by the Scottish Government. The main advantage to delivering increased energy standards through the building standards system is that it creates a level playing field, with all new homes having to comply when home builders are bidding in a competitive land market. Changes through building standards allow housebuilders to adjust the design of their portfolio of homes. Changes through planning policy, however, are less helpful and risk 34 different approaches being implemented by planning authorities.

Particularly in the affordable housing sector, there are examples across Scotland where housebuilders have used innovation to improve the green credentials of new build homes. Our aim with every development is to create a place people are proud to call home, with properties that are as environmentally sustainable as possible, and we are constantly exploring new ways to achieve this. These have included making the infrastructure for charging electric cars a standard feature, using recycled materials to create a waste plastic road, and strategically using air source heat pumps as a greener alternative to gas.

Whilst demonstrably there is room for innovation in housebuilding, it must be acknowledged that there are constraints. The first, mentioned above, relates to the competitive land market and the impact of higher build costs on the viability of sites. Secondly, and most crucially, builders must construct homes which warranty bodies are happy to accredit, which surveyors are happy to value and ultimately which mortgage lenders are happy to lend on. In many ways this is why we have seen more innovation in the affordable housing sector. There are a lot of ducks that need to be lined up before a company can risk being a leader in innovation in the new build for sale market.

Customer demand has probably advanced the least, with market evidence suggesting that location and layout still feature much higher on a home buyer's shopping list. If there was an increased demand for greener homes, this would inevitably drive the market. At the minute, with more people spending time at home, and in many cases working from home, it will be interesting to see what impact the higher energy usage, and in turn the more expensive utility bill, will have on customer behaviour and the demand for greener homes. Across the Springfield Group we are already seeing a stronger draw to larger homes, with gardens and access to green space, as a consequence of COVID lockdowns. Is it possible that people will also start being more aware of the running costs and demand a more efficient home?

When buying a car, we tend to have more awareness of the efficiency of the vehicle than we do when buying a house. This is likely to be directly linked to the cost of road tax and the cost of filling up the tank. With that in mind, financial incentives, such as reduced land and buildings transaction tax, or even council tax, would help raise awareness of energy performance certificates and, in turn, increase the customer demand for better, more efficient homes. "Green mortgages" have been referred to for years, but are yet to become mainstream. If lenders were to promote specific products with affordability assessments which took into account the lower running costs of an energy efficient home, then customers would have a direct advantage from choosing "green".

As we begin to emerge from one of the most difficult periods in generations, we should reflect on better, greener ways to live our lives. Housebuilders have a role, and as one of Scotland's leading housebuilders we are very keen to play our part, but as explained we are only part of the picture.

Hannah Leslie is group lawyer with Springfield Properties plc

How to stay email secure?

The increased risk endured by conducting ourselves digitally and by email has been obvious since March 2020.

I, and doubtless others in the profession, have seen a marked increase, both professionally and personally, in the number of emails with viral attachments and texts coming from third parties suggesting your account needs updated. I predict these instances will continue to grow, and become more convincing and effective.

My worry is that the many innocuous attachments we constantly receive from professional colleagues could, with viral evolution, be sent by a third party and with devastating results.

How can we try to offset this very likely threat?

For the time being, perhaps in any communication with known colleagues, we in our email systems go back to the last transaction, and "reply" but rename the topic, so that we remain assured the "historic" connection is reliable.

For the time being, we could further consider telephoning our professional colleagues, or seeking confirmation on headed paper, when we receive an email with no historic string. Most practitioners know each other, if not personally, then by voices over the phone.

It may be two years down the line before the hackers catch up, and we are forced to rethink. But they will catch up, and contemplating this inevitability should, in my opinion, be addressed now.

Therefore, I ask whether it is feasible that the Society develop a server (with high upload/download speeds), or a cloud solution, where all digital exchanges between practitioners across Scotland, and all lender and panel communications, are centralised and concurrently secured. Such a system would negate the need for the above verifications, and the multiple secure email logins that are currently driving us all to distraction.

In such a system each firm or practitioner would have a secure login, similar to online banking, to enter the server. Such a vehicle could secure all email exchanges, while offsetting evolving threats centrally.

The development of such a system could, with further evolution, include: the Society's digital access to a firm's software and accounts systems to effect regulatory compliance and audit, negating the need for regulatory inspections; centralising accounts software and systems, negating the need for each firm to purchase/update internal accounting and other software systems; and a verifiable, transparent and continuous monitoring of trends in the profession.

Ed Wright, Black & McCorry, Livingston

Conveyancing Practice in Scotland 8th edition

ANN STEWART AND EUAN SINCLAIR
PUBLISHER: BLOOMSBURY PROFESSIONAL
ISBN: 978-1526509468; PRICE £85.50 (E-BOOK £76.95)

The publication of the eighth edition of *Conveyancing Practice in Scotland* makes it the most current textbook on the subject, and one very much aligned to the principle that it is a text for practitioners and students alike.

As well as updating it, the authors are to be congratulated for improving the layout and general flow of the text. The book follows the flow of a transaction from start to finish and is to be commended for its attention to detail, while at the same time holding the reader's attention as a result of clarity of expression and its practical approach.

It is good to see references to ongoing developments throughout the text. The pace of change has increased dramatically due to COVID-19, and there can be little doubt that there will be considerable changes to practice which will require to be covered in a further edition. Another good feature is the incorporation of styles at relevant places, allowing the reader to understand better the application of the principle being described.

When compared to the late Professor McDonald's *Conveyancing Manual*, the table of cases is very much on the light side. The absence of a case digest and a reading list, both found in the *Manual*, is disappointing but does not detract from the overall nature of this book. Since its first edition the book has gone from strength to strength and I commend it to you. Professor Sinclair would have been proud.

Professor Stewart Brymer, Brymer Legal Ltd
For a fuller review see bit.ly/3tuT5Se

The Switch

BETH O'LEARY
QUERCUS: £8.99; E-BOOK £4.99)

"Before you know it, you are invested in the people portrayed and you can't wait to see how life turns out for them in the end."

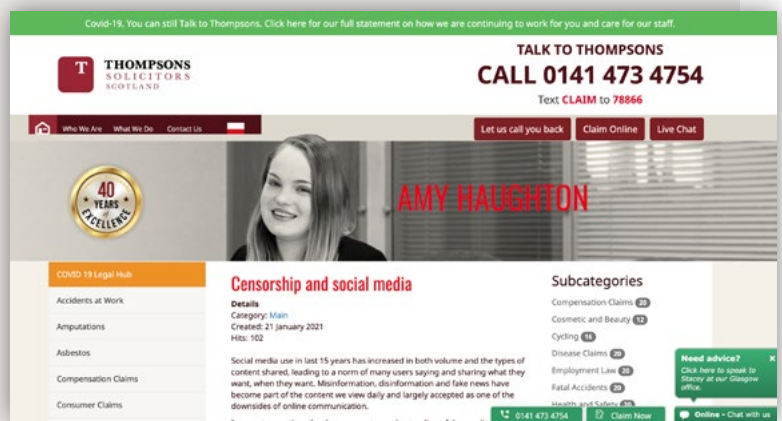
This month's leisure selection is at bit.ly/3tuT5Se
The book review editor is David J Dickson

thompsons-scotland.co.uk

The reaction of the social media giants to the Trump-inspired riot at the Capitol in Washington and its aftermath, has prompted this post by Amy Haughton, associate at Thompsons.

While any censorship has negative connotations, she writes, the exceptional circumstances here justify the sanctions taken. However, "the unease this causes, and the resulting public scrutiny of what is being done, is important to prevent us going too far down the road of censorship".

To find this blog, go to bit.ly/3jcWUHh



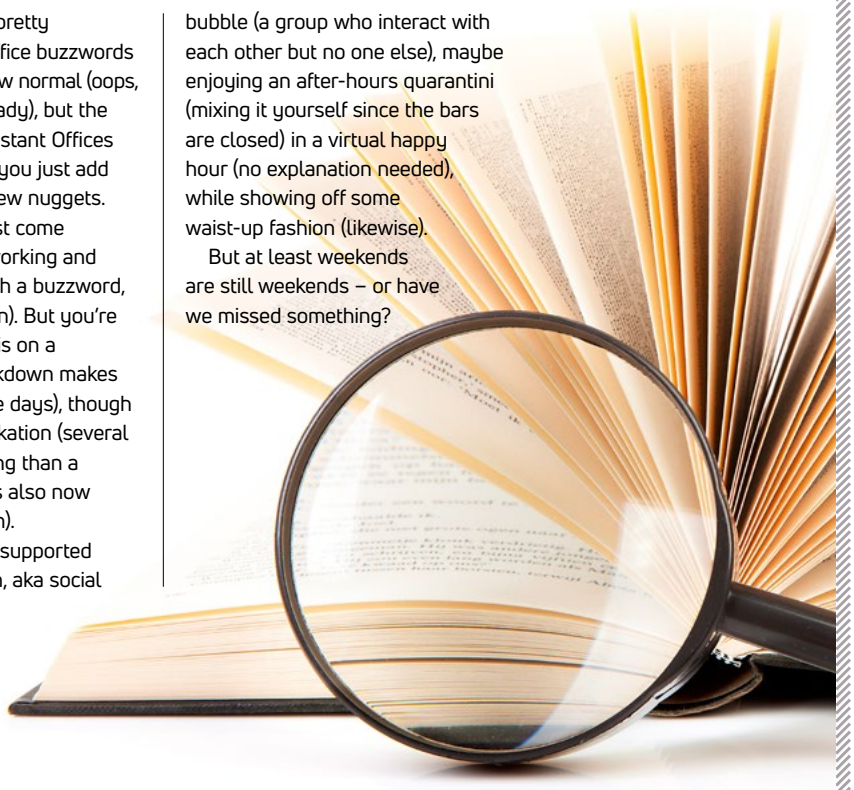
Zooming in on the jargon

You might think it's pretty predictable which office buzzwords have become the new normal (oops, there goes one already), but the 2021 hot list from Instant Offices (what are these: do you just add water?) contains a few nuggets.

True, top of the list come lockdown, remote working and unmute (not so much a buzzword, more a weary refrain). But you're probably reading this on a Blursday (when lockdown makes you lose track of the days), though hopefully not a workation (several degrees less inspiring than a staycation, or as it is also now known, coronacation).

We trust you are supported by your quaranteam, aka social bubble (a group who interact with each other but no one else), maybe enjoying an after-hours quarantini (mixing it yourself since the bars are closed) in a virtual happy hour (no explanation needed), while showing off some waist-up fashion (likewise).

But at least weekends are still weekends – or have we missed something?



PROFILE

Anne Hastie

Anne Hastie is a lay member of the Society's Appeals and Reviews Committee

❶ Tell us about your career so far?

I had a back to front career. I emigrated from Glasgow to the east coast to become a farmer's wife. I got involved with whatever my two children were doing, which led from volunteering to part-time roles. I found my niche, initially volunteering at Citizens Advice, then securing the manager job at Haddington CAB, where I spent 25 years.

❷ What led you to become involved with the Society?

I first applied for a committee role in 2004. I didn't make the cut, but was asked if I would consider complaints investigation – in those days, reports were written by solicitor and non-solicitor volunteers. I was soon invited to apply for the Client Care Committee. While I was involved with complaints, we identified the need for an Appeals Committee – the Society has so many committees but it wasn't clear where people should go if they were unhappy with a decision. So I was delighted when that committee was established.

❸ What have you found most interesting about the committee's work?

Hearing appeals from across the board, particularly from prospective entrants who had difficulties in meeting the requirements. The committee was very busy to start with, but now it keeps being cancelled – I put this down to other committees getting it right first time. In addition to Complaints & Oversight, I'm on the Administrative Justice Committee considering legislation around tribunals, which fits well with my CAB experience.

❹ Has anything surprised you about the Society?

It has always impressed me how much Society staff, committee conveners and solicitor members appreciate non-solicitors' input. I was even more surprised to be invited to be part of the "#100 Legal": me, a non-solicitor!

Go to bit.ly/3tuT5Se for the full interview

WORLD WIDE WEIRD

① Rumours of my death...

A French woman from the Loire region was ruled dead by a court in 2017. Still alive, she can't get the courts to undo the effects of the ruling.
bit.ly/3pPWCsg

② We are not amused

A woman in Thailand has been jailed for 43 years for criticising the nation's royal family on Facebook and YouTube, in a move seen as a warning to youthful protesters.
cnn.it/39KgqrB

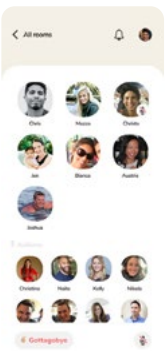
③ Question of ID

Hyper-realistic face masks about to go on sale in Japan will give you the exact appearance of an unidentified Japanese adult whose features have been printed onto them.
reut.rs/2L2N2mJ

TECH OF THE MONTH

Clubhouse

One of the coolest apps out there is Clubhouse. It's a social media platform that's audio only and lets you join in discussions with a wide variety of celebs and others. The catch is, it's invitation only, so you'll need to know someone who's already signed up (you can sign up to check). Available in the Apple store.



PRESIDENT

Amanda Millar

Here in February 2021 we can record progress in combating the COVID-19 pandemic, in legal aid funding and in the position of the LGBT+ community – while recognising that in each case there is much still to be done

So ... February 2021, progress? The health and social care key workers and over 70s in my family have received their first dose of the coronavirus vaccine. The supply and rollout remain headline news, with contract terms rarely so high profile on our news cycle. We await a response to priority consideration being given to court staff and solicitors essential to keep the justice system running. Progress.

The Cabinet Secretary for Justice spoke to our governing Council, with one member commenting: "He can talk the talk, but can he walk the walk?" The regulations to increase legal aid fees across the board by 5% this year have been laid in the Scottish Parliament. Details of the resilience and traineeship funds should be out by the time this is published. Progress.

Attitudes, 40 years on

February is LGBT+ History month. The first day of this month was the 40th anniversary of the decriminalisation of sexual intercourse between consenting adult men in private in Scotland. 1 February 1981 is a "simple" date in history for two generations of young gay men who have grown up able to live their lives in Scotland without fear of criminalisation for who they love. However, it is dark-shadowed life experience for two generations of adult gay men who grew up in a time pre-1981, in the shadow of criminality, contributing to society but unable to live their lives openly in a society whose laws valued and respected them. The Society's head of Education wrote about this at the start of February.

As a lesbian I was of no interest to the legislators, but was still told in the 1990s, "You can't be gay. Your life will be over", and the recipient of a selection of other derogatory, prejudicial and deliberately hateful remarks as an attempt to achieve a perception of conformity. I lived a different dark-shadowed life experience for years. Just a couple of years ago I received an email from someone I considered a friend and colleague, who compared sexuality with political affiliation... as a choice.

Today many members of the LGBT+ community, including in our profession, continue to live lives less than their whole, due to unfounded accusations of predatory behaviour, the continued existence of extreme and homophobic, bi-phobic and transphobic publicly expressed views, the view of many with no experience of prejudice or hate for their gender, sexuality or race that there isn't a problem, and the fact that there are, perhaps not surprisingly given the preceding, a lack of identifiable role models.

I am the fifth female president of the Law Society of Scotland in its 71-year history. I am the first open member of the LGBT+ community elected by the governing Council to be President and leader of the Scottish solicitor profession. Progress.

Much still to do

There is #MuchStillToDo to get out of the grip of the global pandemic as positively as possible, never forgetting the horror of loss of life, loss of business and limitation of opportunity for many. To do it positively we must learn from what has worked well before and during the pandemic to maximise the future opportunity and preparedness. Lawscot Wellbeing has lots of useful information to support your mental wellbeing during the pandemic.

There is #MuchStillToDo on #LegalAid, but it's a start that wasn't even close to the line a year ago.

There is #MuchStillToDo on #Inclusion. In the past 40 years, and particularly the past 10, much progress has been made, and it will continue, to ensure the profession reflects the society that it serves.

Progress, with #MuchStillToDo

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

People on the move

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

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

ABERDEINS, the professional services group founded by **Rob Aberdein**, is changing its name to MORAY GROUP. At the same time its legal services operations will be brought under the name SIMPSON & MARWICK, following its acquisition of the residential property and estate agency business from CLYDE & CO in October 2020.

BALFOUR+MANSON, Edinburgh and Aberdeen, has promoted **Michaela Guthrie**, in the Clinical Negligence team in Edinburgh, to senior associate, and **James Hyams**, in the Private Client team in Edinburgh, to associate.

BLACKADDERS, Dundee and elsewhere, has appointed **Lynn Melville** as a partner in its Private Client team, based in the Dundee and Perth offices. She was formerly a partner at BTO SOLICITORS.

BRODIES LLP, Edinburgh, Glasgow, Aberdeen and Dingwall, has re-elected managing partner **Nick Scott** to serve a second three-year term in the role, commencing 1 May 2021.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has announced the promotion of five new partners: **Catriona Macallan** and **Paul Scullion** in the Corporate Finance team, **Caroline Maciver** in the Construction & Projects practice and **Claire MacPherson** and **Fiona Clarke** in Private Client.

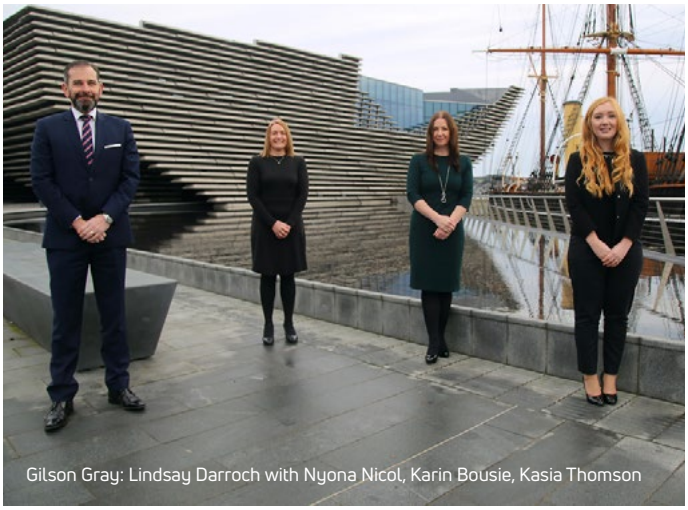
DWF, Glasgow, Edinburgh and globally, has announced five promotions across its Insurance and Corporate teams in Scotland: **Andrew McConnell** to director (Insurance, Glasgow), **Justine Reilly** and **Michael Higgins** to senior associate (both Insurance, Glasgow), **Graham Tait** to associate (Corporate, Glasgow) and **Siobhan Cameron** to associate (Corporate, Edinburgh).

Burness Paull | Fr Clarke, MacPherson, Maciver, Macallan, Scullion

GILSON GRAY, Edinburgh, Glasgow, Dundee and North Berwick, has appointed oil and gas specialist **Calum Crighton**, co-founder of LEX ENERGY and dual qualified in Scots and English law, as a partner in its corporate practice, based in Aberdeen.

Gilson Gray has also made three recent hires for its Dundee team: associate **Karin Bousie**, solicitor **Kasia Thomson** and senior paralegal **Nyona Nicol**.

Katie McKenna, solicitor, has joined legal technology company CASEDO as Marketing and Engagement Director.



Gilson Gray: Lindsay Darroch with Nyona Nicol, Karin Bousie, Kasia Thomson

MACROBERTS, Glasgow, Edinburgh and Dundee, has appointed **KENNY SCOTT** as a senior associate in its Employment team. He joins from SHOOSMITHS and will be based in Edinburgh.

MILLER HENDRY, Dundee, Perth and Crieff, has made three new year promotions: **Lindsay Kirkwood** to associate in the Private Client department in Dundee, **Samera Ali** to senior solicitor in Private Client in Perth, and **Michael Johnston** to senior solicitor in Residential Property in Perth. **Sharon Somerville**, previously with WRIGHT, JOHNSTON & MACKENZIE in Dunfermline, has joined the Commercial team as a senior solicitor based in Dundee.

MORTON FRASER, Edinburgh and Glasgow, has appointed **Hayley Johnson** as an associate in its Employment Law team, based in Edinburgh. She joins from SLATER & GORDON.

MOV8 REAL ESTATE, Edinburgh, Glasgow and elsewhere, announces that **Gerald Segal** has joined its Conveyancing department as an associate solicitor.

SIMPSON & MARWICK, Edinburgh and North Berwick, has appointed **Malcolm Cannon** as managing director, Property Services. He joins from the INSTITUTE OF DIRECTORS in Scotland.

AC WHITE, Ayr, announce the retirement of their senior partner **Lesley McMath** on 31 December 2020, and the appointment of **Gemma Waddell**, previously an associate within the firm, as a partner from 1 January 2021.

WRIGHT, JOHNSTON & MACKENZIE, Glasgow, Edinburgh, Inverness, Dunblane and Dunfermline, have appointed **Roddy Harrison**, a private client specialist, as a partner, principally based in Edinburgh. He previously headed BTO SOLICITORS' Private Client team for 16 years before becoming partner at DENTONS in 2018.

denovo

What the best High Street law firms do...

Part 1 – Going paperless in court

If you don't use a tablet and legal tech in court, you've probably contemplated doing it. But can you really use it to practise more effectively?

Carrying bundles of case files to court, or prison, or between office and home, can be disorganised and time consuming. What if somebody told you that all your file notes, witness statements, productions, correspondence and everything else you need could be available electronically on an iPad? Would you do it?

We reached out to Matthew McGovern, from McGovern Reid Court Lawyers, to find out how they are changing the game by using iPads in court...

When did you start introducing new tech?

"We had seen the Crown going paperless and operating iPads in court and we thought we should be doing the same. We also felt that the administrative burden placed on us by our client base and the court was becoming increasingly unmanageable and that technology could offer significant time savings, as well as reducing costs in the medium term. Early last year, we started using Denovo's CaseLoad and we invested in iPads with keyboards and pencils. We now use our iPads at court daily and are carrying fewer and fewer paper files. It's revolutionised the way we work."

What was the key challenge you faced?

"Affordability was a key challenge for us. Most of our work is funded through legal aid and the fee rates are ultimately a significant barrier to investing in and developing our firm. While the technology and software required an upfront capital investment, that has been offset against a reduction in expenditure in other areas of the business and our initial analysis is that, notwithstanding that outlay, the technology we've introduced will represent a significant saving to the firm over the next couple of years."

How has technology improved your working practices?

"The biggest improvement is the service we are able to offer our clients. This is most noticeable when an accused is appearing from custody. An accused is never more vulnerable or volatile than when being told that their bail is opposed. It can be difficult to obtain full instructions. We can now access multiple client files, including recently prepared criminal justice social work reports, which allow us to address the court fully about the client's circumstances. While this might seem like an anodyne example, the easiest way to lose a criminal client is to get them remanded, and there have been a number of occasions this year when the difference between the sheriff granting or refusing bail has been the information we have been able to access through CaseLoad on our iPads.

"The other improvement we have noticed is our ability to adapt to the various changes in criminal procedure. In our local court in Hamilton there were three significant reforms to summary procedure in 2020 alone. Each placed an increased burden on us without offering any increase in funding to compensate for the extra work. The most recent reform introduced a pre-intermediate diet meeting between prosecution and defence. Before the changes to our practice, this would have involved our secretary finding the paper file, checking to make sure that disclosure had been matched up with the file, you hoping there was a phone number written on the front of the file and that the client would answer rather than returning the call when you didn't have the paper file with you, and obtaining instructions before speaking to the prosecutor.

"Now we have everything saved on CaseLoad and we can immediately access the entire file and phone the client using their number saved on the system. Even if the client doesn't answer and phones back later, discussing their case is easy as it is on our iPad which we always have within arm's reach. As a result we can have an informed discussion with the prosecutor which can either resolve the case or prevent it having to call in court. A process which previously would have been extremely time consuming has been distilled to one phone call to the client and another to the prosecutor."

Are you planning on introducing more tech in 2021?

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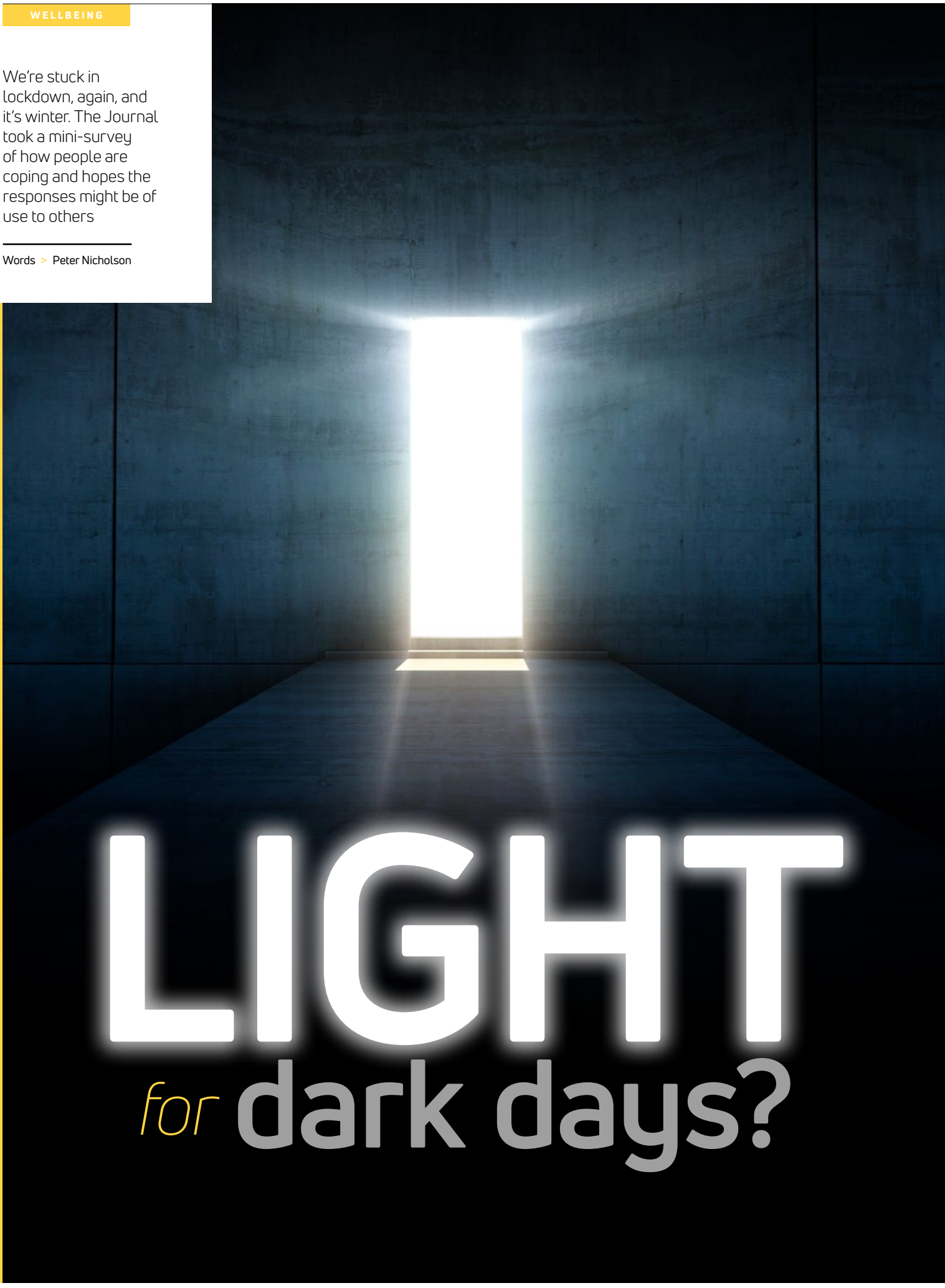
We're stuck in lockdown, again, and it's winter. The Journal took a mini-survey of how people are coping and hopes the responses might be of use to others

Words > Peter Nicholson



LIGHT *for* dark days?

Lockdown, second time around. Are you coping? Is it easier or harder this time? How do you combat periods of low mood? The Journal set out to uncover some answers that might help those who are finding the going hard just now.

Alan Moffat, clerk at Ampersand Advocates and someone who takes an interest in this topic, believes people basically fall into two camps. "Some are quite comfortable with the homeworking and being restricted in what they can do, and if you're in that happy place that's great, but there are some who have struggled with the lack of interaction right through this whole time, even when lockdown eased, so I think we all have to be mindful that even if you are in a good place, everybody around you may not be.

"Given it's winter, I think it has been incredibly difficult for those with young children who are having to home school, and also those who live on their own, because the opportunities to go out and get some sunlight are limited to being quite religious about taking a lunch break."

Criminal defence solicitor Melissa Rutherford admits: "I have been finding this lockdown much more difficult than the first, whether it's because now that we know what to expect, it's just harder to deal with, or it's the mental exhaustion of going through all the emotions again, or it's the time of year and weather.

"I have a seven-year-old daughter and we are struggling with motivation for home schooling and working from home in general. The days I am at court or prison visits have been fine; I have managed to secure space in the adult world for myself and it's been more like what was normal life. The days we are at home are tough, long, busy and tiring."

Stephen Vallance of the HM Connect network has a further angle: "Everyone is coping, but I'm not sure how many are flourishing. I think economically more firms are doing okay or better. The issues with remote working, and with pressure of work, are though pretty universal and there are a lot of people working at unprecedented levels of busyness, often without their support staff because they have been furloughing. I do worry that they are finding it tough, because as a profession we can't work at that pace without some form of rest or quieter period."

Out of town

Negative feelings are likely even in rural areas less affected by the virus. Campbeltown solicitor Campbell Read is glad to have "fantastic access to open spaces and beaches; none of us use public transport for work, so all that has really happened here is transaction volume is down". (That, he explains, is partly because not all firms were set up like his for remote working before the first lockdown, though others have since been catching up.)

Mentally, it has been harder this time, however. "The first lockdown was nice weather: you could be outdoors, people were exercising, but now in the cold of winter, when it's dark morning and night, it's much harder to maintain that positive attitude."

And although many people locally showed a great community spirit, with action groups shopping for the elderly and checking to make sure everyone was all right, there was a darker side. Lack of clarity between regulations and guidance about what you could and couldn't do, "almost created a sort of vigilante culture – some people took it on themselves to prosecute others for bad behaviour, including in social media. Somebody put on a Facebook page, is it OK to take my dog to the local beach for a walk? I consulted the rules and said no problem, and ended up getting death threats, and did I want to bring COVID to Kintyre and kill everyone. It was ridiculous".

Children issues

For Read, the toughest thing has been the children, especially when they have to be home schooled, though he has key worker status.

Others agree. Local authority solicitor and manager Nicola Hogg found 2020 "really challenging", with disruption to career plans, the demands of home schooling and "still needing to do your job, the logistics of having to work from home and trying to set yourself up for that and still provide a service and be a manager. It's been huge, actually, and friends in private practice are still having to worry about their billing and feeing and so on. It's put an incredible amount of pressure on people".

Is it any or better or worse this time round? "As the children get older, it doesn't get easier; it's just different," she says.

With she and her husband both now key workers and having some schooling available, she adds: "I honestly don't know on reflection how I managed with the children and a busy job, other than I just had to get on with it. There was no alternative. I worked late into the night, juggling things, constantly reprioritising work tasks. Trying to get out at lunchtime became even more important, for everybody's sanity, and realising the points when you were only going to be able to do one thing, and that had to be work; the kids would just have to have TV time – perhaps with a treat to be extra quiet!"

Melissa Rutherford says she and her daughter "are both trying our best, but she is missing her friends, her routine at school and everything about it. She even told me the other night, 'Mummy, I think we are hanging out together too much.' I understand. I must get pretty boring after a while".

It isn't just school-age children who are finding it tough. Alan Moffat's daughter is in her first year of a law degree, "basically distance learning, and that's quite difficult for students generally: they've not had the normal university experience they would expect because they're unable to make friends, network and learn from each other. That has not been an easy start: law is a difficult subject at the best of times".

He observes: "I don't think you can overstate the impact when they had their 18th birthday in lockdown, their end of school year cut short, never got their prom or whatever, missed their first freshers' week – that's a pretty tough start to adult life. So that's something we have to be mindful of."

Not just "fine"

Words of wisdom can be had from Twitter, like this recently shared quote: "A useful starting point is to assume no one is okay."

Moffat is one who tries to put that into practice. "We have to be mindful of what everybody is potentially going through in their life, so from the point of view of the line manager for my team, of my members, but also solicitors and support staff, it's always good just to speak to people and see how they are.

"There is not the same level of just saying 'fine' if somebody asks how you are and brushing it off. I think

people now ask out of genuine interest because they want to make sure before they ask a question that things are OK. I definitely think there is a greater understanding and this time round people are more likely to pick up the phone, whereas before an email might have been the way to do things."

Another team leader points to the value of managers being open about their own difficulties. "Checking in with my team regarding their mental health and being open about mine has been really important in the last 10 months," personal injury solicitor Cat Headley affirms. "And having partners in my firm speak openly about their struggles has, oddly, provided comfort that no matter what level you are at, this year has been a struggle and there is no shame in admitting it. Leadership on mental health and reducing stigma has never been more important than it is right now."

Employers can provide further support. "The council has been really good about sending out surveys about wellbeing, offering us courses that we can attend," Nicola Hogg reports. "We have a referral service we can phone and there are helplines available, so as a manager I've been reminding my staff that they can access that support.

"We've got a WhatsApp group where we might share silly videos and jokes, and I suppose you just have to be realistic in your own expectations of what you or others can achieve in a day, with all the other demands that might be placed on you."

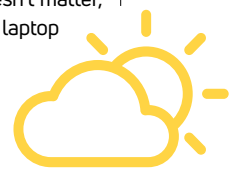
Be kind to yourself – within rules

Cat Headley, who lives alone, has learned to accept her own good and bad days. "I think the most basic advice I could give is to recognise how you are feeling on any given day and be okay with that. If you are having a bad day, even a crisis day, accept that that is what it is; don't beat yourself up about it or tell yourself to 'get a grip'. Allowing yourself those days and knowing that everyone has them has enabled me to get through them a bit more easily. That might mean setting simple but achievable work goals for the day, speaking to a colleague about how I'm feeling or taking some time off to get to the end of the day.

"Equally, when I'm feeling happy and content, I acknowledge that and enjoy it as a 'good day' and proof that not every day is a bad one, even at the moment."

Pretty much everyone underlines the importance of daily routines, with regular breaks and exercise – even when the pressure is on, as Hogg noted above. She also rates being, "not strict with yourself but kind to yourself, getting yourself up and dressed and treating it like the professional job that it is. One of my colleagues appeared in a dressing gown one day. You can't be doing that because it's not good for your mental health".

If you feel down, she continues, "that's okay, but try and find something that makes you feel better: going out for a quick walk, phoning a friend, watching a funny video: it doesn't matter, just do something. And if work is annoying, close the laptop and walk away. Quite often I use the delete button – that's a top tip actually, if you go back to it tomorrow it'll still be there – and don't respond too quickly to emails, because everybody has resorted to those; there's not the same conversation going on".



Do something different

What else might work? Perhaps a dog, even in the office, as Campbell Read does: "She comes in with me every day. Our office is a converted church, very spacious, and she takes a lot of the edge off things for people. It's incredible what an animal does in the office."

Sign up to mental health days

"We have learned from our partnership with See Me, and collaboration with LawCare, that enabling people to share their own experiences is one of the best things you can do for the conversation around mental health. Having people speak out and be role models helps bring stories to life and personalise the conversation, bringing it closer to home."

The quote is from the most recent of the Society's blogs on mental health (bit.ly/3auxxwu): Olivia Moore promotes the benefits for employers of taking part in "mental health days". A calendar of events is provided, plus links to more Lawscot Wellbeing resources.

LawCare itself is always there. Its latest annual statistics recorded a 9% increase in enquirers last year, with 34% of issues since March having a COVID element.

Chief executive Elizabeth Rimmer comments: "Many people are finding it difficult to keep going – to those people we would say focus on what is happening in the present moment, take one day at a time, eat well, get enough sleep, take some exercise outside and reach out to someone to talk about how you are feeling. LawCare is here to offer you emotional support on 0800 279 6888, or email support@lawcare.org.uk"

For those times you are able to put everything aside, Stephen Vallance advises doing something totally different. "I've got my bike set up in our back room. I now have an app on my phone linked to our TV, and in the evening I can go cycling in the Alps, so that gives one relief.

"The other one, it sounds mad, but I got so frustrated that I went out and bought myself a van, which I'm now converting into a camper van. I have no knowledge or experience of camper vans, or doing mechanical work, I don't even care whether I finish it, but it's lovely having something so removed from your work, spending a few hours just pottering about. It's finding things you can focus on. If there's a positive you can take, it's that there has never been a better time to learn new skills."

Looking ahead

Another learning he offers is: "It doesn't matter what you do, there is always uncertainty. We forget that things were uncertain a year, five years, 10 years ago, and the only way you kind of get to grips with it is to take control of the things you can take control of."

He concludes: "My own personal view is that we're in this for a while yet, and I sense that whether we are or not, we've reached one of those points in history that things are not going to go back the way. Remote signatures and registration, blended working, these are here to stay, whether lockdown is over or not."

Campbell Read definitely would like some IT-enabled tasks to be allowed to continue, such as notarising documents remotely: "I've been asking for that for a long time. We've got clients on the islands and if they needed something notarised, quite often that meant an expensive long journey. So I hope we can keep that when we move forward."

He also hopes that not everything will continue remotely just because it can. "Virtual meetings are great, but we are really missing out on human contact and it's a big worry for me that that might be lost permanently in the name of financial economies. Especially for younger lawyers. I am aware of many junior solicitors in particular who don't want to meet people face to face or talk to them on the phone – they want to email or text, and I really fear that we are going to have a generation where we all become quite distant from each other. Human interaction will be lost and I think that will have a crashing impact on mental health."

Legal education: discontent with content

Derek Auchie believes most current LLB teaching involves too much detail at the expense of context, and hopes to start a debate on the merits of a transactional approach in its place

Something has been bothering me about how law is taught at undergraduate level in the UK (and in many other countries). Most of it, especially at non-honours level, is focused on content.

This may not, at first blush, seem cause for concern. What is wrong with content? Nothing. It is worth considering the *volume* of content.

It is essential, of course, that the basic principles of a legal subject area are imparted, so that students understand how it works, how it fits together. But do students need to know more than this? We tend to go much further than basic principles; we teach detail. Not all of it, of course, but arguably much more than we need to.

My question about content arises because of a shortage of something else: context. We assume the solution is to manufacture scenarios for students. So we dream up fictitious characters who get into (sometimes rather wild) legal difficulties, describe them in a paragraph or two, and ask students to resolve them.

There is nothing wrong with this approach, as such. There is perhaps a better approach to the question of context: to learn the principles *and* the application of the law through transactions.

Transactional learning

By transactions, I don't just mean contracts, but the mechanisms within which the law is applied. And I don't just mean part of a transaction, but from beginning to end, so that the student understands where and how the legal principles apply throughout. Contract is however the easiest subject by which to demonstrate the transactional model.

Students would be given a contract, and the law taught through the life of that contract. To a non-lawyer this might seem obvious. To a legal academic, alarm bells may already be ringing. But these are the alarm bells of habit, not of logic.

Under a transactional learning model, students would start with the correspondence preceding the contract, and whether (and in which circumstances) a valid contract is formed. They would move to consider what its terms are, then their meaning (interpretation) and onwards to circumstances of breach and remedies for breach. The whole course, and the principles of contract law, would be taught through this transaction (or more than one).

The idea is that the principles would be taught as the contract unfolds, at each stage of the transaction. By the end of the course the students have seen a whole contract, from before its existence to after its termination. They would visualise the principles as fitting into this transaction.

This model of learning can be applied to most subjects. For example, family law could be taught through a divorce "transaction", perhaps along with adoption or cohabitation; and criminal law through the study of a number of criminal charges.

There are several benefits to this approach:

- It is less abstract than traditional teaching. Students can see how the principles apply, not just what they are. This is likely to make the learning process more engaging, enjoyable and memorable.
- It allows the application of problem-solving skills in a more

even and realistic way than is currently done. Rather than punctuating weeks of lectures on content with intermittent scenarios, the whole learning experience is a scenario.

• Problem-solving skills are far more likely to be of use in professional life than volumes of content, most of which is practically obscure and difficult to retain for any period of time.

• This form of learning is compatible with other alternative forms. These include problem-based learning (a form of student-centred collaborative learning: see, for example, the YouTube video PBL at Universiteit Maastricht), and flipped learning, where students are provided with material (usually pre-recorded lectures) before class, and class time is spent on deepening knowledge. The latter method is associated with the idea that lectures are not an effective way to learn: see John Bergmann's discussion of this method on YouTube.

Missing content?

Some may worry that a shift towards transactional learning would mean students would know less law, diluting their ability to spot issues in practice. There are a number of problems with this argument.

First, a good proportion of the material currently taught arises rarely in practice.

Secondly, the content taught may well be out of date by the time the students practise law. Technique, on the other hand, does not age.

Thirdly, lawyers can look up content. I can't think of a time in practice when I lamented discarding my (illegible) lecture notes because a point I needed was not covered in textbooks. It is enough that students are aware of the general principles, that there are times when something should be checked and how to do that.

Fourthly, most client advice does not give rise to fine legal points. Rather, where a problem arises, the solution is usually obvious, resolved (at most) with some thought and possibly brief confirmation with some legal sources. There are exceptions, of course, but it seems illogical to build much of the method of legal education around these. Better, surely, to design it to equip future lawyers to deal with what they will face 90% of the time, not the other 10% (and I am being generous here; a more realistic split might be 99% and 1%, even in contentious business).

Fifthly, is learning more legal content really the best way to train lawyers to spot issues? Arguably a transactional approach would better equip lawyers to do this. It would improve interpretation and problem-solving skills, as well as attention to detail: all skills that would allow better detection and resolution of issues, when compared with a greater knowledge of legal detail.

Role of the Diploma

One argument against a transactional approach in the law degree is that this is what the Diploma in Professional Legal Practice is for. But it makes little sense to cram the practice of the law into a quarter, or a fifth, of the time spent at university. It seems more sensible to introduce it from day one. This allows the skills in (for example) analysis and problem-solving to be acquired over a longer period through repeated practice, and to bed in, so that by the time of the Diploma more advanced practical work can be undertaken.

Non-lawyer graduates

With many UK law graduates pursuing a career outside the profession, it might be said that an increased concentration on legal transactions would be misplaced. In fact, the reverse is true. Such concentration would suit graduates who go into other areas, since it would involve teaching global professional skills. These include analysing documents, problem solving, attention to detail and written and oral presentation – essential skills in any professional discipline.

"There is perhaps a better approach to the question of context, to learn the principles and the application of the law through transactions"

Further, the law applies everywhere. An understanding of legal principles will stand any professional in good stead. I cannot think of a university subject which applies so broadly across all professional areas. Perhaps that explains why so many LLB graduates secure employment in other disciplines.

Law reform

It might be said that a transactional approach would "dumb down" legal education, such that lawyers would be less able to challenge the law and argue for reform. This too is questionable. If law graduates have seen how the law applies, this makes them more likely to spot problems with it.

Secondly, more conceptual problems can be explored in honours (and masters) study. The transactional approach can be adopted in ordinary level subjects.

Thirdly, there is a danger of intellectual snobbery: assuming that practical issues in the law are of lesser value than more conceptual issues. Both are important, but most law graduates will not work as academics or in law reform bodies. Higher level study exists for those who hope to.

Process skills

The transactional approach would enhance certain practical legal skills, which are crucial but at present often neglected. For instance, statutory interpretation. Some lawyers simply do not know how to perform this task properly. A transactional approach can be used to require students to navigate their way around a statute, gaining an understanding of how it is composed and realising that a focus only on the relevant provision is misguided. This can be played out within practical scenarios right across ordinary level subjects.

Interpreting case law is another key area to which a rigorous approach can be taken under this method, for example where there is conflicting case law.

Resources

One major practical issue with a transactional approach is resources. Undergraduate UK law school classes are often large, and the approach might appear to involve more input than traditional lectures and tutorials. This need not be the case. Pre-recorded lectures, delivered ahead of classes as part of "flipped learning" (see above), can allow more student contact time in smaller groups. The use of recorded lectures has been imposed by COVID-19 and it is clearly a perfectly good, indeed possibly better way (as suggested earlier), to deliver core content.

The broader context: a community approach

So far, I have discussed the transactional approach within individual subject areas. It is possible to build on it by connecting subject areas together. Core ordinary level subjects could be taught on the basis of a "family" or "community" (perhaps a street or neighbourhood) who encounter legal issues such as family breakdown, consumer disputes, company formation, criminal charges, property disputes, debt, personal injury and employment law. This would make learning more interesting and memorable and help bind the disparate subjects of the LLB together, while allowing students to grasp the reality of legal problems: they happen in everyday life, not at the extremes.

This would require a major effort in coordination, and may be too ambitious for most institutions. A more realistic alternative (perhaps as a starting point) might be to group two or three subjects in this way.

Dispute resolution: a possible vehicle?

An alternative way to teach transactionally could be, in part, to deliver material through the eyes of disputes. Students could then consider not only the applicable law, but also how best to resolve the dispute.

This would allow the introduction of techniques around negotiation, mediation and adjudicative methods at an early stage in legal education, demonstrating how the law does not operate in a vacuum. It might even be possible to compress "black letter" law into (say) one academic year, followed by another year (or more) of delivery within a dispute resolution context on the subjects learned in year one: traditional learning followed by applied learning.

Although certain core subjects would have to be followed initially, the second half of the degree (for those taking honours) could consist of electives, some ordinary, some honours, with a requirement to take some of each type. This would have the benefit (to my mind) of avoiding the teaching of all basic legal subjects to all students, though if structured carefully, good coverage could be maintained.

Clinical legal studies

Clinical legal studies are very valuable, not least in allowing students to have contact with real clients. However pointing to such courses as the solution ignores the facts that they are (a) usually elective, therefore not all students will benefit from them; and (b) of limited scope, not filtered through the whole legal educational experience. They offer a complement to what could be a more integrated transactional approach, not a substitute.

Conclusion

I offer these suggestions in the hope of starting a broad conversation on whether, and if so how, we can improve on educating future professionals in law. The answer may be that the status quo is the best way. If so, that is fine. At least we will have come to that point not through apathy and habit, but having conducted a rigorous debate. I invite any comments, with a view to a structured examination of the issues: d.auchie@abdn.ac.uk.

Now, get back to handling your transactions!

Professor Derek P Auchie
Chair in Dispute Process Law, University of Aberdeen; solicitor and tribunal chair

New approach for sex offence victims

Greig Walker introduces the landmark Act to improve forensic medical services for victims of rape and sexual assault

The Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 was unanimously passed by the Scottish Parliament on 10 December 2020 and received Royal Assent on 20 January 2021, becoming the first dedicated Forensic Services Act in the UK.

The word "Medical" is significant, since the FMS Act clarifies the legal position of the health boards responsible for the provision of healthcare and forensic medical examination for victims of sexual crime in Scotland, via healthcare professionals employed or contracted by them. The bill was steered through the Scottish Parliament by the Cabinet Secretary for Health and Sport, Jeane Freeman, with lead scrutiny by the Health & Sport Committee. MSPs welcomed the health policy focus of the legislation, including a statutory requirement for trauma-informed care. How, then, to ensure that sight was not lost of the Scottish criminal justice system's needs in terms of robust, high quality forensic evidence?

Taskforce support

Close coordination between health and justice partners is secured through the Chief Medical Officer's Rape & Sexual Assault Taskforce, established in 2017 in response to a report on forensic medical services by HM Inspectorate of Constabulary. This taskforce, chaired by Dr Gregor Smith, championed the development of the bill and will support the implementation of the FMS Act. Backed by £10 million of Scottish Government funding over four years, a Sexual Assault Response Coordination Service (SARCS) is being developed in each health board in Scotland, delivering a vision of person-centred, trauma-informed care.

To ensure a consistent, national approach to the delivery of these services, a package of resources was launched in November 2020. It includes clinical pathways for adults, children and young people respectively, as well as national forms and data sets to ensure that performance against Healthcare Improvement Scotland quality indicators can be closely monitored and reported to the Parliament annually under s 15 of the Act.

A key taskforce achievement to date is that forensic medical examinations of victims now take place in an appropriate healthcare setting, and no longer in police stations. Building on this important development, the FMS Act will require all health boards to offer "self-referral" services to victims aged 16 or over. This means that a victim can access healthcare and examination without having previously made a police report.

MSPs warmly welcomed the self-referral provisions of the bill, and endorsed the proposition that self-referral empowers victims, giving them greater choice which may positively influence their decision to report the crime to police and encouraging those who may be reluctant to make a police report to access appropriate NHS services. It is however expected that many victims will still access services via the traditional "police referral" route. The Act gives statutory underpinning to that and in so doing replaces the relevant parts of a 2014 memorandum of understanding between Police Scotland and health boards.

Evidence focus

In line with the standard Scottish Parliament bill process, written evidence on the bill was provided by interested bodies including the Law Society of Scotland and Faculty of Advocates; the Society also provided oral evidence. The bill was amended at stage 2 to adopt some of the suggestions made by each professional body: an improved definition of "evidence" suggested by the Society, and a "cooling-off period" where a victim requests the destruction of self-referral evidence provided by them, as suggested by the Faculty.

The fine details of how a consistent, national model of self-referral will operate will be set out in a formal protocol under development by the Chief Medical Officer's taskforce, to be approved by the Lord Advocate in due course. A particular aspect of self-referral services, to be determined by regulations, is the retention period for evidence collected in the course of such services. The Scottish Government has recently launched a 12-week consultation on a proposal to prescribe 26 months (two years, two months) as a proportionate period. Interested practitioners are encouraged to review the consultation paper and contribute views.

To support the aims of the FMS Act, NHS Education Scotland delivers "essentials" training to the doctors who examine victims and the nurses who support them. This training has helped to increase the numbers of female sexual offence examiners; it includes best practice on trauma-informed care and the requirements of the Scottish criminal justice system. To complement this ongoing health sector training work, the Chief Medical Officer's taskforce is initiating a Justice System Training short life working group to ensure legal professionals with an interest in the Act are aware of it and have confidence that reforms to service delivery continue to secure the chain of evidence and the integrity of the criminal justice system.

It is hoped this article has made some contribution to raising awareness of Scotland's healthcare-focused model of forensic medical service for victims of sexual crime, now enshrined in landmark legislation.

For further information and background, including a link to the secondary legislation consultation, see *bit.ly/3pAGU44*

Greig Walker is a solicitor who was seconded from the Scottish Government Legal Directorate to the policy-making role of Bill Team Leader

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The last twelve months have changed everything.

And the remainder of 2021 looks as if it may be equally demanding for law firms up and down the country.

2020 taught us a multitude of new skills - not least of which was the enforced move to homeworking. That said, with an uncertain economic climate likely to continue for some time, many legal practices are looking at how to plan for uncertainty.

Here are 6 key considerations to factor into your business model.

Agility.

Flexibility in how and where you work goes without saying. However, it's not just about homeworking. There are other considerations such as on-boarding new staff, managing your team effectively and keeping business communications as free-flowing as possible.

Your team is not really a team unless it can work seamlessly when working remotely.

Security.

This is no longer the straightforward issue that it used to be. When everything was office-based, the focus of security was also office-based. In the advent of home and remote working this has changed.

Your cloud-based practice management system will be just as secure as it ever, but individual PCs and laptops running on a myriad of broadband connections require a more robust approach. Make sure your home IT security is as robust as that of your office.

Secure client communications.

The same issue applies to communicating with clients. With emails being sent out from a variety of IP addresses you need to be sure they are reaching clients safely. Take a look at email encryption methods and legal e-signature applications to bridge this gap.

Income control.

No business ever went bust because it made a loss. The simple fact is businesses go into receivership because they cannot pay the bills. Cashflow rather than profit is the key business health indicator. That means getting bills out on time, chasing late payments vigorously and keeping a keen eye on work in progress levels.

These issues can be managed effectively by managing clients' payment expectations, frequent interim billing and putting in place robust credit and WIP control systems. Your practice management software should be able to provide you with key data and alerts for WIP and unpaid bills. If it doesn't, consider looking at a new software supplier.

Remember: the older a debt is, the less chance you have of being paid.

Cost control.

Cost control is the other side of the coin. Over time, the cost base of any successful business tends to increase. So, perhaps now is the time to take a hard look at your outgoings and the value you derive from them.

It's not just a case of cutting costs for the sake of it - don't cut off your nose to spite your face. The real equation is value for money. For example: a case management system may look like good value on paper. However, if you are paying additional fees for a separate accounts system and Microsoft licences, a more expensive fully integrated software system may end up being more cost-effective and efficient.

Looking after your clients.

Finally, your business is nothing without your clients and it pays to keep them onside by delivering quality service. That goes without saying but it's not the complete picture. Existing / past clients can be a lucrative source of new business. Contact them regularly. Use your practice management software's Client Relationship Management module and virtual strongroom to contact them with relevant reminders, information and perhaps even the occasional offer.

Uncertainty seems to be with us for a good while yet. Take a look at these six key considerations and reduce your risk.

To find out more about how cloud-based legal software can help you plan in uncertain times, please contact us on 0345 2020 578 or innovate@lawware.co.uk.

Mike O'Donnell, Marketing Manager, LawWare Ltd.

Short-term let licensing: order or disorder?

Draft rules have been published for the impending licensing of short-term lets – but, Stephen McGowan argues, they do not always fit well with the statutory framework within which they sit, and could cause practical difficulties

Following a period of consultation last year, the Scottish Government is moving forward with the introduction of its new licensing scheme for short-term lets. The new regime aims to help local authorities balance the needs and concerns of their communities in the face of the rise in short-term lets, spurred on by technological innovation and global tourism. The draft order, the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021, was published over the festive break and is now moving inexorably towards enactment. It will sit within the wider licensing landscape of the Civic Government (Scotland) Act 1982, which licenses various activities from taxis to tattooists.

The publication of the draft order has initiated renewed adverse comment from those who would be affected by the introduction of the scheme. The Association of Scotland's Self Caterers said one half of all their members would leave the industry as a result of licensing; and the chairman of tourism body SkyeConnect protested that "poorly drafted short-term lets licensing legislation would be hugely onerous to microbusinesses in Skye and right across Scotland".

The Government's reaction to this to date has not been to pivot on policy, but to delay the commencement of the scheme, with a revised deadline for licence applications now slated for 1 April 2023.

From a licensing practitioner's perspective, there are several elements of the draft order that merit analysis. I have written previously (Journal, February 2020, 20) about the impact that the processing of thousands of applications and related inspections will have on local authority resource, as well as the cost to property owners in achieving compliance. These concerns are heightened by the pressure on both local councils – where a significant amount of attention is being diverted by COVID-19 – and the tourism sector, which is reeling from the impact of the pandemic.

The focus of this article, however, is on practical issues with the regulations themselves, and I have picked out three key areas for further analysis:

- single licences for multiple accommodations;
- public consultation; and
- overprovision.

Single licences for multiple accommodations

The order proposes, sensibly, that where you have a single building with multiple accommodations, e.g. a block of self-catering flats, then (so long as there are shared facilities) it should be the case that there is a single licence for the whole building, as opposed to individual licences for each apartment. The policy intent behind this includes, also sensibly, the idea of catching unconventional accommodations in a single location, such as pop-up "pods".

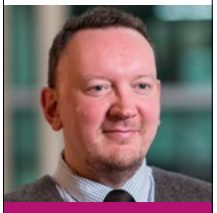
That will certainly cut down on cost and administration, but on a practical level this could lead to difficulties in front of the licensing committee. For example, where a block of self-catering flats with shared facilities is under a single licence, then the misuse or lack of upkeep of but one of the flats could lead to licensing breaches. This means the licensed status of the whole block would be placed under threat as there is only one licence covering all of the flats. Issues arising from one flat could therefore lead to the licence being suspended. That would affect all flats, not just the one that caused or gave rise to the mischief.

Public consultation

The order proposes that neighbours within 20m of an application premises will be written to by the local authority in order to raise any views they may have. In certain city centre locations that will capture a very large number of owner/occupiers, meaning a significant amount of potential notifications for the local authority to administer. When the Licensing (Scotland) Act 2005 was working its way through the Scottish Parliament, a proposed 20m rule was dropped to 4m, as a result of concerns over the level of administration it would require.

The order also proposes that it is for the local authority to display a site notice. This inverts the position for all other licence types under the 1982 Act (e.g. public entertainment, late hours catering and so on), where it is for the applicant to organise and ensure the display of the notice. This inversion creates additional workload for the local authority and I can foresee issues over access, and from notices being torn down and so on. From the applicant's perspective, it can hardly be welcome that errors in the site notice display might delay or frustrate the application, when they have no control over this element of the process.

"Publication of the draft order has initiated adverse comment from those who would be affected by the scheme"



Stephen McGowan is head of Licensing (Scotland) at UK law firm TLT, and author of *Local Government Licensing Law in Scotland* (Institute of Licensing, 2012)

Separately, there is also provision for the local authority to "combine" a site notice where there is a planning application as well as a licence application. I think that this is regrettable. I can understand the theory of cutting red tape, but the two regimes are not interconnected. The underlying law that relates to planning and to licensing is wholly separate: the criteria for assessment, the grounds for refusal and so on, are not equivalent. You cannot demand that the public grasps such intricacies and this will surely result in confusion. I have no doubt it will lead to significant issues in front of licensing committees where objectors are raising planning issues of no relevance to the consideration of a licence application. This type of thing happens now, without conflation of any site notices.

Overprovision

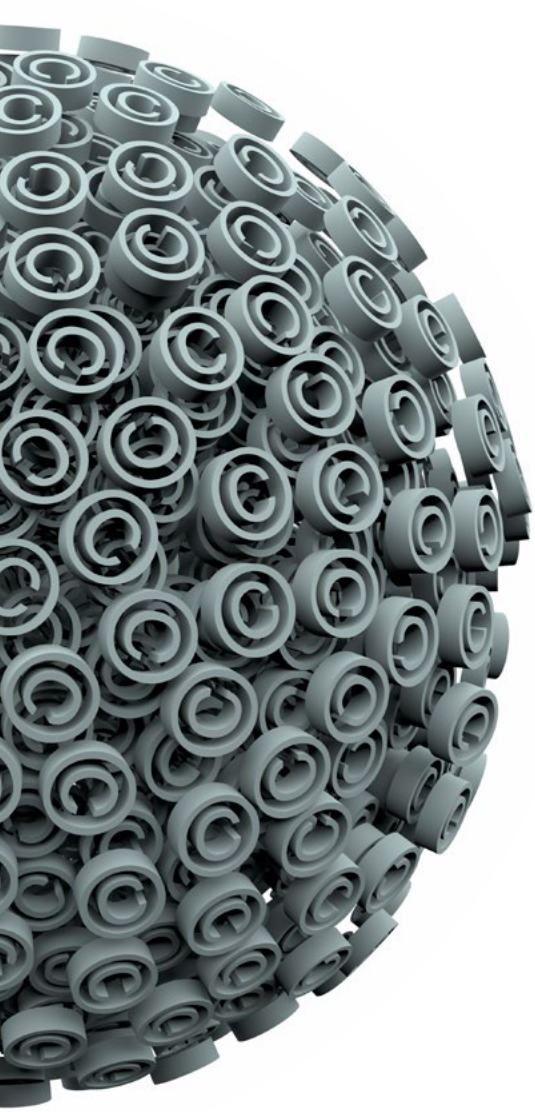
The 2021 order creates an "overprovision" ground of refusal for a short-term let licence. On the face of it, this appears to suggest that there are too many short-term let licences in force in a particular area. Yet it leaves this provision hanging with no corollary requirement for the local authority to assess, consult or define what it thinks overprovision looks like. Nor what the mischief is, or how this will be geographically defined.

This a real shame, given there is a very advanced approach to dealing with overprovision under the Licensing (Scotland) Act 2005, which the Parliament could have looked to utilise. It appears to me to be a potential straw man, and I can foresee unsuccessful applicants taking appeals. Also, how does this work at the point of transition into the new scheme, when there will be hundreds of applications but no "live" licences? And how does the idea of overprovision in this context link to the separate proposal to amend planning law by creating the ability to designate a short-term let "control area"? Is a planning "control area" also an area of overprovision? The creation of two competing concepts that relate to the same mischief – the idea of "saturation" of an activity in an area – is one that I think will lead to confusion when the licensing scheme goes live. This is especially true given that the levers that pull on the planning criteria and tests are not the same as those that pull on licensing criteria.

It would surely have been more efficacious to follow the 2005 Act model, and require a lawful, evidence led policy to be instituted by the licensing authority to assess and declare what overprovision is, as they see it. This would not only benefit the local authority – by making refusals less amenable to successful appeal – but also provide interested parties such as new entrants to the market, or prospective domestic property owners, with knowledge of whether a state of overprovision exists in a particular locality.

The Scottish "IP Court": the case for reform

Proposals by solicitor Colin Hulme and advocate Usman Tariq for reform of Court of Session IP litigation practice have been well received by practitioners and have been put to the Scottish Civil Justice Council, as this collaborative article reports



Caroline Pigott, convener, IP Committee:
The ability to protect intellectual property (IP) is vital to scientific and technological innovation and those in creative industries. It plays a hugely important role in the Scottish economy by ensuring creators can exercise certain rights to safeguard the integrity of their work and see a return for the investment of their intellectual creation.

It might therefore be expected that IP cases would frequently come before the Scottish courts. However, research published in 2017 by Jane Cornwell (senior lecturer at the University of Edinburgh and currently a member of the Law Society of Scotland's IP Committee) showed that case volumes were relatively low, with some important sectors, such as the creative industries and life sciences, not well represented (Journal, September 2017, 18). The research highlighted potential loss of business to courts in other jurisdictions, with intra-UK jurisdictional competition with the English courts a particular consideration. While participants noted that the Court of Session does offer a good forum for IP litigation, there was also a clear interest in updating its IP rules to increase competitiveness in the IP litigation marketplace.

There has been a feeling over the past few years that the current court processes could be improved to enhance the ability to enforce rights and to boost Scotland's reputation as a venue for IP rights enforcement. It is also important to ensure that a sufficient number of cases come before the Scottish courts for judges to demonstrate and enhance their ability to decide on complex IP issues. Members of the committee identified absence of discovery, ability to obtain interim interdicts and the Scottish system of pleadings as existing advantages. However, looking to the Intellectual Property & Enterprise Court (IPEC) in England & Wales as a comparator, the cost cap and two-day timeframe there are seen as attractive, particularly in terms of ascertaining risk profile.

When we heard that Colin Hulme and Usman Tariq were leading a project on this topic, we were keen to engage. Last spring we were pleased to welcome them to discuss the reform proposals.

Colin Hulme, co-author:
We have submitted a paper to the Scottish Civil Justice Council asking it to consider proposals for reform of the practice of IP litigation in the Court of Session.

Our proposals (see panel) call for reforms to the Rules of the Court of Session to ensure that Scotland will be seen as an attractive jurisdiction for the resolution of IP disputes. In particular, it is clear to us that improvements can and need to be made to enable us to offer a satisfactory alternative to IPEC and other parts of the High Court of England & Wales. Considerable investment has made England a very attractive jurisdiction for the resolution of IP disputes. We seek to make changes here to enable us to offer a suitable alternative and to improve access to justice for Scottish rights-holders.

Neeraj Thomas, IP committee member:
We agree with the central objectives of the reforms. It is important for this jurisdiction to consider how it can increase its competitiveness in the IP disputes landscape. There are two aspects to this: (1) considering whether there is an unmet need in the form of SMEs and individuals who feel unable to enforce their IP

Key proposals

The main proposals of the Hulme and Tariq paper are:

- introduction of an optional "costs cap" of £50,000, meaning that the successful party in an IP action can recover no more than £50,000 by way of expenses. This should offer a degree of costs protection for those wishing to litigate over IP disputes;
- development of a simplified process for smaller IP claims, so that they can be dealt with in a more streamlined way;
- nomination of a single IP judge so that all IP cases in the Court of Session go before one IP judge, who would have ownership for the conduct of these cases and increase judicial management of IP cases coming before the court;
- introduction of an order equivalent to a *Norwich Pharmacal* order, which allows for identification of parties hidden behind social media profiles; and
- better promotion of the Court of Session as an IP court so that those with rights to enforce would be encouraged to use the court, as opposed to not litigating or litigating elsewhere.

rights in the Court of Session and whether the IPEC model can be replicated in Scotland to open up IP litigation to this constituency; and (2) considering how to retain IP disputes of any size in Scotland and attract cross-border disputes to Scotland.

The success of IPEC has wider significance for this jurisdiction. Often a litigant will have a jurisdictional choice in IP disputes between raising proceedings in Scotland or England & Wales. This is particularly the case where there has been cross-border infringement (e.g. online) or there is a validity challenge to a registered IP right. This should be seen as an opportunity to attract more IP disputes to this jurisdiction.

But competition works both ways: as Jane Cornwell said in her research, Scotland could be described as a "porous" jurisdiction, potentially losing IP business to other jurisdictions.

There are a number of reasons which may have contributed to this view, including: increased jurisdictional flexibility among practitioners as a growing number of Scottish firms have merged with English or international firms in recent years; a perception of London as the UK's IP litigation hub; the success of IPEC in reducing costs and narrowing Scotland's competitive advantage in terms of expense; Scottish patent and trade mark attorneys tending to refer disputes to IPEC; and concerns about the relative inexperience of this jurisdiction in dealing with complex IP disputes.

Proposals must work in practice as well as sounding good on paper. With that in mind, Colin Hulme and Usman Tariq have consulted widely and it is to their credit that these changes were almost universally supported by stakeholders. There was general support for the recommendation of introducing an IPEC-style procedure in Scotland, as well as better promoting IP litigation in Scotland. As this is such an important issue, the IP Committee's own recommendation for endorsement was referred up to and formally approved by the Society's Public Policy Committee.

Colin Hulme:

Our proposals focus on specific improvements which can be made to attract IP disputes to the Court of Session without the need for legislation. These are practical reforms which can be made within the existing infrastructure to adapt chapter 55 of the Rules of the Court of Session, dealing with IP actions, to meet the current challenges to our jurisdiction. We are not proposing the creation of a new court, but rather to introduce IPEC-style procedure in the Court of Session to facilitate better branding and promotion of the IP Court. In the longer term we consider there is a strong case for removing IP actions from the rules of privative jurisdiction of the Court of Session, but such a change might require legislation and we do not wish our more attainable recommendations to be held up by such an obstacle.

There are many reasons to be proud of existing Scottish IP litigation practice. However, continual evolution of our IP disputes landscape is vital to meet the increasing challenges to our jurisdiction and improve access to justice for Scottish rights-holders. The IPEC provides a model for reform of the Scottish IP Court, but also poses a significant competitive challenge: it is imperative to learn from its success.

Neeraj Thomas:

The IP Committee welcomes the practical approach in the paper, which incorporates some of the key benefits from the IPEC model. In particular, if practical to do so, the appointment of a single judge (perhaps with the appointment of a deputy to deal with absence or other levels of activity) to manage and hear all IP disputes brought before the Court of Session would allow for a concentration of experience and expertise. Additionally, having a single person responsible for the management of these cases would likely mean that such a nominated IP judge would be in a better position to take ownership of the practice of IP litigation, as has been the case with the presiding judge in IPEC. The increased case management in IPEC has a significant impact on the conduct of parties and their representatives in proceedings.

"They have consulted widely and it is to their credit that these changes were almost universally accepted"

We were also particularly attracted to the introduction of a Scottish equivalent to an English *Norwich Pharmacal* order. There is no doubt that an increasingly urgent issue in the protection of IP rights is the need to identify the party infringing them while hiding behind an online pseudonym or other anonymous means. At present there are very limited measures available in Scotland to enable such unknown infringers to be identified without commencing court proceedings. Indeed, this could well be a proposal which it would be worth introducing more broadly, for example in areas such as online defamation.

Caroline Pigott:

It is important for both domestic and international stakeholders, perhaps particularly SMEs and individuals who may have more limited resources, to ensure that our court processes are as user-friendly as possible and offer practical and commercial solutions so IP rights-holders can effectively and efficiently enforce those rights. Overall, the Law Society of Scotland confirms its support and considers that the adoption of these proposals would support the core objectives of improving the attractiveness of Scotland as an international venue for IP dispute resolution and increasing access to justice for Scottish IP rights-holders.

Caroline Pigott
is a senior trade mark attorney and solicitor at HGF Ltd, and convener of the Law Society of Scotland's Intellectual Property Law Committee

Colin Hulme
is a partner and head of IP at Burness Paull, and has been leading the IP Court Reform project along with Usman Tariq of Ampersand Advocates

Neeraj Thomas
is an of counsel in the Technology, Intellectual Property & and Media team at CMS and a member of the IP Law Committee

The impact of COVID-19 on dispute resolution

Mediation as one of the cures?

At a time of change, with lockdown continuing and a return to work for many in Scotland delayed at least until the spring, one certainty of the "new normal" is that social and commercial disputes will continue to arise.

The reality is that, at a time of increased conflict, many of the traditional pathways to resolution of disputes may be blocked for various reasons.

In a situation where public, third and private sector organisations require to focus attention and resources on moving forward, the Scottish courts and tribunals system at present has a significant backlog of cases which is likely to continue while the requirement rightly remains to give priority to the health and safety of users.

As a result, it is unlikely that the courts and tribunals system will be in a position to cope fully with the short to medium term requirement for fast, fair and effective dispute resolution. In many other difficult situations outside the justice system, that requirement is also likely to be greater in the months ahead.

A number of business leaders, professional advisers and organisations across all sectors have joined together to invite the Scottish Government, publicly funded bodies, the courts, third sector agencies and business organisations to address the situation by encouraging and making more use of mediation, and mediation skills, as a means to resolve disputes, manage difficult problems and build an effective post-pandemic economy.

Those involved argue that "mediation is a fast and cost-effective method for public sector, not-for-profit and business stakeholders to find solutions to the range of economic and social issues arising from COVID-19 – and more generally. It has a very good track record already. Mediation can be one of the cures to help alleviate some of the difficult challenges facing our economy and society as a whole".

They also note that the UK Government, in guidance responding to the COVID-19 situation issued on 7 May 2020, said: "The Government would strongly encourage parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes."

In 2019, a report by an Expert Group in Scotland recommended a number of steps, many of which could now be implemented, to place mediation at the heart of Scotland's approach to dispute resolution. These recommendations have even greater importance and applicability in the emerging economic environment as we all seek to grapple with the impact of the pandemic in this country.

The time has now come to take action.

Endorsements

"The benefit of mediation is inestimable in terms of its positive impact on people's lives. It brings disputes to a conclusion in a way that engages the decision-makers in the outcome. Litigation can create winners and losers; mediation gives all the participants a sense of control over a stressful part of their life. This is even more critical when we have no control over the pandemic and its implications for our health and socio-economic wellbeing."
Tom Campbell, Executive Chair, North Coast 500 Ltd

"Whilst the courts undoubtedly provide an essential public service as the default forum for the resolution of disputes and, perhaps most importantly, for the development of the law, I have never come across a dispute where the parties would not have benefited in some way from the use of mediation. Right now, as Scotland begins its recovery from the COVID-19 pandemic, it is needed more than ever."
Gareth Hale, Partner, Dentons UK & Middle East LLP

"In my experience, disagreements settled by mediation give those participating not only the opportunity to have a positive win-win experience, but also a vehicle for learning. During the pandemic there have been extra strains placed on teams that we have never experienced before. Mediation through Zoom has been very effective in a short space of time in getting people to move forwards positively. A constructive and proactive way forward for the economy would be for organisations to be made more aware of mediation as a positive and potentially speedy mechanism for resolving disputes."
Pip Haydock, Managing Director, The 2Gether Partnership Ltd

"As an employment lawyer, I have found mediation to be the best way to resolve complex disputes which arise between employers and employees. Many employment related disputes, particularly those involving actual or perceived discrimination, have a high emotional content and mediation affords both parties the opportunity to voice and respond to underlying concerns and, having done so, to focus on obtaining a long-term resolution."
Stuart Robertson, Partner, Head of Employment Law, Gilson Gray LLP

"I'm an ombudsman, using investigation and adjudication as the default process for dispute resolution. It is a perfect method for examining the detail of the evidence, requiring redress and making recommendations for improvement. The outcome will inevitably be for or against, creating a winner and a loser. Ombuds are therefore increasingly using the techniques of mediation where the parties can explore what happened, how they feel about it, and find mutually acceptable solutions that allow trust to be restored and relationships rebuilt."
Lewis Shand Smith, Chair, The Business Banking Resolution Service

"I have worked on social justice issues for 20 years – in Scottish and humanitarian contexts. The pandemic has clearly exposed the profound inequality that some face daily. The practice of mediation and principled negotiation offers an invitation to change with tools to navigate complex, emotive disputes in a more effective way – reducing negative impact on parties and providing respectful space for exploration. At its best, creativity is rekindled and relationships rebuilt. It is about enlarging and extending options for conflict resolution, and in no way detracting from other important routes to justice that may be available through the courts or other processes."
Flora Henderson, Alliance Manager, Future Pathways, Scotland's In Care Survivors' Support Fund

"The HR and employment law implications of the COVID-19 pandemic have been well documented. Workplace disputes have not gone away during lockdown. In fact, some have festered; others have escalated quickly. Workplace disputes have always lent themselves very well to mediation. At the start of lockdown, we figured that mediation would also have to wait until social distancing was relaxed. However, online technology like Zoom has been incredibly effective for mediation. In one recent case, the experience for all concerned was just as rich. New ways of working have made mediation all the more important."
David Morgan, Partner, Burness Paull LLP

"No one anticipated this disruptive pandemic. As we struggle back towards normal, with all of the uncertainty for parties' legal rights, the best approach is undoubtedly to focus on resolution rather than on contractual rights. While negotiation can work where both parties are working towards the same goal, rarely in commercial disputes do both parties want the same end result, and negotiation can then feel rather like trench warfare. Mediation, with an impartial mediator helping the parties come together, is supremely successful in overcoming such entrenchment. In the 15 years or so that I have been mediating with my clients, I have only ever participated in one mediation that did not result in resolution."
Cat MacLean, Partner and Head of Dispute Resolution, MBM Commercial LLP

"This mediation-focused call to action has my unequivocal support because it reflects the reality of the work regime in which we now live. As we are seeing around the world, the notion of going back to where we were is not a realistic option. We need to establish new and better ways of working. In essence, our business culture needs to change. We need to create the conditions for better conversations and better negotiations. The potential of mediation to do so online has already been proven."
James C McG Johnston OBE, Director, Transcend Change Ltd

"As a millennial designer in favour of collaboration, transparency, creativity and communication, for me mediation seeks to get to the bottom of a problem, acknowledge and accept it, generate possible solutions and then test them. The result typically responds to the underlying issue and a successful mediation involves a positive outcome for both parties. It is a human-centred approach to conflict resolution. On the contrary, from the perspective of the 'customer', traditional litigation takes up a lot of time, causes huge stress, and for at least 50% of those involved, the outcome is hugely negative. A move to favour mediation fits well with the Scottish Government's vision for national wellbeing."
Rosemary Scrimgeour, Co-founder, Building Workshop

"The skills and techniques of mediation have huge benefit, well beyond engaging in a formal mediation process. As I know from my own experience, open questioning, active listening, impartiality and respectful dialogue are powerful tools in management and relationship building."
Fiona M Larg MBE, Chief Operating Officer and Secretary, University of the Highlands & Islands

"Litigation is fundamental to dispute resolution, because its conclusions set the state's expectations of societal behaviours. Bearing that in mind, I have found that mediation may best produce innovative and balanced solutions to diverse and evolving circumstances, for the benefit of willing stakeholders. COVID-19 is one such circumstance."
Ross Taylor, Partner, Wright Johnston & MacKenzie LLP

Discount season

The Sheriff Appeal Court has reaffirmed the utilitarian value of an early plea, for sentencing purposes, in decisions leading this month's criminal court roundup, which suggests that the reasons apply particularly in present circumstances

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

Claim your sentence discount!

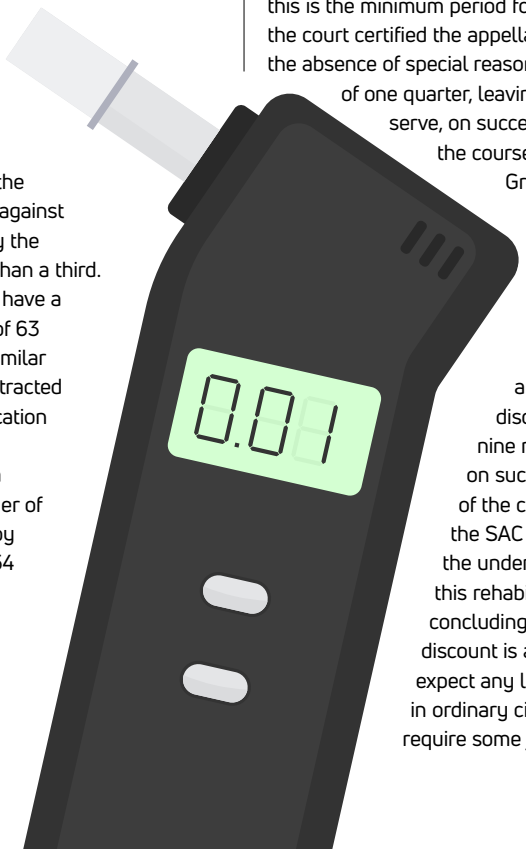
The jurisprudential output of the Sheriff Appeal Court is not large. I am not sure of their workload these days and can understand their reticence to publish an opinion which does little more than state the obvious. However, over the years summary appeal decisions have formed the cornerstones of Scots criminal law: e.g. *Williamson v Wither* 1981 SCCR 214, which sets the Scottish standard on "no case to answer", as opposed to the more qualitative English approach.

Recently there was a flurry of activity by the court in *Hendry v Procurator Fiscal, Elgin* [2020] SAC 008 (17 November 2020) and *Grant v Procurator Fiscal, Elgin* [2020] SAC 009 (18 November 2020). Both opinions quote from *Boyd v Procurator Fiscal, Inverness* [2020] SAC (Crim) 7, decided on 7 October 2020 but only published (following representations) on 27 January 2021.

All three are drink-driving cases where guilty pleas were tendered at the outset and appeals were taken not against the headline sentences but against the discount selected by the sheriff, which was less than a third.

Hendry was found to have a breath alcohol reading of 63 micrograms. He had a similar conviction in 2015, so attracted the enhanced disqualification period of three years.

The sheriff imposed a community payback order of 200 hours, discounted by 25% to 150 hours, and 54 months' disqualification discounted by the same factor. Since the opinion does not disclose the disqualification, I leave you to do the maths.



The sheriff's view was that the early plea was of limited utilitarian value, as it appeared to be a straightforward two police witness case with no defence, and any trial would have been unlikely to last more than 30 minutes. She allowed the appellant the opportunity to participate in the drink-driving rehabilitation programme, but restricted to 10% the reduction of disqualification on successful completion: a discount of up to 25% can be given.

Grant was a 69-year-old first offender who pled guilty to a complaint containing two drink-driving charges committed 12 days apart, with readings of 108 and 75 micrograms respectively. It follows that he was processed after the first offence and committed the second one before making an early court appearance.

Headline sentences of a *cumulo* fine of £3,000 and 48 months' disqualification were selected. The sheriff considered a 15% discount appropriate, once again indicating the limited utilitarian value of the plea given the nature of the offending and there being no civilian witnesses. Similarly a 10% reduction was granted in the event of successful completion of a rehabilitation course.

Boyd, with a breath reading of 63 micrograms, also had a relevant previous conviction. His fine was correctly discounted from £1,500 to £1,000, but no discount was given to a four-year disqualification and only a sixth was given in relation to successfully completing the rehabilitation course.

In *Hendry* and *Grant* the Appeal Court granted discounts of one third to the sentences. Hendry's sentence became 130 hours' unpaid work and three years' disqualification. While this is the minimum period for a repeat offence, the court certified the appellant as suitable in the absence of special reasons for a reduction of one quarter, leaving 27 months to serve, on successful completion of the course.

Grant's appeal was dealt with in the same way, resulting in a total fine of £2,000 for the offences and three years' disqualification, with nine months' reduction on successful completion of the course. In *Boyd* the SAC fully supported the underlying purpose of this rehabilitative initiative, concluding: "As a one quarter discount is available, we would expect any lesser discount, in ordinary circumstances, to require some justification."

Boyd's disqualification was discounted from four years to three, the legal minimum, but he was afforded a discount of a quarter (nine months) if he successfully completed the course. The sheriff had regarded both the alcohol reading and length of journey taken as being aggravators, but the court considered they indicated a "heightened benefit in such a driving course that a lesser reward for doing so is counterproductive".

The court noted that in *Gemmell v HM Advocate* 2012 JC 212, while a reduction of one third on pleading at the first calling was not an entitlement, practitioners should be able to give advice to clients with a degree of confidence about the likely discount. It also referenced *Wilson v Procurator Fiscal, Aberdeen* [2018] HCJAC 50 (Journal, October 2018, 28), where the Criminal Appeal Court said discounts should be of the same level for all punitive aspects of the sentence.

In the present climate, with backlogs, delays and adjournments, those accused who wish to face up to their case and have it dealt with at the outset should be properly rewarded for the utilitarian value of such pleas with the full advertised discounts.

Dodgy libels

In *HM Advocate v Turner* [2020] HCJ 12 (17 January 2020; published 9 December), Lord Turnbull wrote at some length when dealing with an objection to the charge at a preliminary hearing. His opinion is in emphatic terms about the irrelevant inclusion of a charge of attempting to pervert the course of justice as a consequence of the appellant stating a defence to the principal charge.

The accused had been driving on a motorway when his vehicle left the carriageway, travelled down an embankment and overturned, killing two passengers. He was relatively unscathed, but confused, shocked and hypothermic. He told rescuers a deer had run on to the road and he had swerved to avoid it. He repeated this when cautioned. This evidence was said to be inconsistent with the Crown information, hence the inclusion of the charge in addition to contravention of s 1 of the Road Traffic Act 1988 (causing death by dangerous driving).

His Lordship held that the course of justice had not begun until police spoke to the accused, so references to earlier remarks to civilians had to be excised from the charge. He also rejected the Crown's contention that there was something "so stark" about the accused's conduct at the crash site that distinguished it from allegations of sexual assault when an account of consensual sexual activity is given by way of response by the suspect.

Lord Turnbull considered the present charge represented a change of practice by the Crown. He was left with the impression that the

decision to include it on the libel "may not, in fact, have been the product of mature consideration".

While giving false information to lead the Crown away from the culprit by, for example giving a false name, is an attempt to defeat justice, stating a defence which may later prove unfounded does not amount to interference with the course of justice. Accordingly the second charge was held irrelevant and deleted from the indictment.

Culpable homicide not reckless

Ditchburn v HM Advocate [2020] HCJAC 55 (29 January 2020, published 17 December) is an example of the tragic circumstances which can arise out of a "small argument". The appellant's position was that the deceased started picking on a third party and he had intervened and punched him on the jaw. Other evidence described the blow as a "wee slap". All three men sat down and subsequently the deceased slumped off his seat and fell to the floor. There was no apparent injury but he was seen to be bleeding from the mouth. Medical evidence highlighted complications of blunt force mouth trauma which were just one element in a multi-factorial death.

At trial self-defence was pled, in normal form. The judge directed the jury that to convict of culpable homicide they would need to be satisfied the accused's actions were intentional or reckless or grossly careless. It was conceded that the reference to recklessness was inappropriate and potentially apt to confuse. The Appeal Court held there had been a miscarriage of justice, quashed the conviction and ordered a retrial.

(The accused was reindicted but in the event pled guilty and was sentenced to six years' imprisonment. He had a lengthy record for violence, and had not sought immediate medical help for his victim, who was not in good health, was substantially intoxicated and had been bleeding heavily.)

Five judges on s 275

I decided to spare regular readers another instalment in the Criminal Procedure (Scotland) Act 1995, s 275 saga in my December article. I had other cases to report, but I was also concerned that the appeal was reported in some detail before trial, anonymised but referring to "[an address in Fife]" as the locus. I now understand that trial took place in January 2021, when the appellant was convicted.

The circumstances in *CH v HM Advocate* [2020] HCJAC 43 (13 October 2020) are that the appellant and complainer were introduced by the complainer's friend, witness A, during July 2017. They became Facebook friends, communicating for about a week until they arranged a night out including A. The appellant's position in the s 275 application was that on the night in question he picked the complainer up and drove her to the locus, where he twice had consensual intercourse with her. They then met A and went on the night out, during which time the women drank alcohol but the appellant did not as he was driving. Afterwards the complainer and appellant returned to the locus where the complainer "came on to him" because she had been drinking and was behaving in a disinhibited manner. The appellant stated he refused to engage in sexual activity as he had an aversion to the smell of alcohol. The complainer was annoyed and frustrated at this. However he averred the following morning they had consensual sexual intercourse.

"The fact that a person may have consented to sexual activity on one occasion has no bearing at all on whether they consented on another occasion"

At a preliminary hearing the judge granted the application but only to the extent that the couple had gone on a night out. He did not regard the information that consensual intercourse had occurred earlier in the evening or the morning afterwards as relevant. The libel was one of tying up the complainer and repeatedly raping her when she was intoxicated. On appeal the court was critical of the note of appeal for failing to specify any ground of appeal or legal propositions. The note simply asserted that the appellant should be allowed to give his version in full since he would be covering a 48-hour period of events. If this was not allowed, his evidence would be disjointed and have gaps which would "adversely impact on his credibility". It was submitted that the evidence of sexual activity not referred to in the charge was so closely related to the alleged offence in time, place and character that it was not collateral.

Oliver v HM Advocate [2019] HCJAC 93 was authority that the court could consider sexual activity within "a period of hours, or perhaps a day or two, following an alleged event". The Crown conceded that while sexual behaviour in the aftermath of an alleged incident was likely to be irrelevant, one could not say that it would never be relevant.

The court reiterated that the evidence sought to be elicited must be admissible at common law and it was not simply a question of a general exercise of discretion in the interests of fairness. Whether a fact is relevant depends very much on its context and the degree of connection between what is sought to be proved, or disproved, and the facts libelled.

As regards collateral matters, reference was made to Lord Ross in *Brady v HM Advocate* 1986 JC 68 at 73: "The existence of a collateral fact does not render more probable the existence of the fact in issue... a jury may become confused by having... their attention diverted from the true matter in issue."

The court noted the tension between the period after the event referred to in *Oliver*, and *Lee Thomson*, High Court, 13 December 2019, unreported, where the court approved the preliminary hearing judge's rationale that "the fact that a person may have consented to sexual activity on one occasion has no bearing at all on whether they consented on another occasion, either before or after the incident in question, save possibly, in particular circumstances, in the immediate aftermath".

It also noted that, in contrast to *Oliver*, no special defence of consent was lodged and the appellant's position was that the events libelled in the indictment had not taken place. The Crown's position was that the other acts of intercourse averred were disputed as not having taken place either and the appellant was seeking to introduce other matters of dispute, which must render them collateral.

The appeal was refused as the evidence sought to be led was not admissible at common law, being collateral. Even if admissible it would be prohibited by statute and could not be brought within any of the permitted exceptions.

Lord Menzies, who had delivered the opinion of the court in *Oliver*, was part of the bench in the present case and in concurring, said that *Oliver* was not authority for the proposition that any evidence of events occurring within the immediate aftermath would be relevant. There was no hard edged rule, as cases were fact specific, and "'the immediate aftermath' should be reckoned in hours, not days".

Shield legislation designed to protect the privacy and dignity of complainers has been in force in some form since 1985, and crucially as respects s 275, largely in its present form since 2002. After a sticky start, judicial attitudes have become more robust. *CH* is a rather laborious 65-page decision, but it is worth being aware of the principles and limited scope of s 275 applications. The door has been left ever so slightly ajar, as there is a danger that if all context is removed from the libel, the evidence adduced could appear to have an artificiality about it which jurors might find puzzling.

Practitioners have to present clear and specific applications if they are to have any prospects of success within the restrictions imposed by statute.

Briefings

Family

FIONA SASAN, PARTNER, MORTON FRASER LLP

In a world of great financial uncertainty, the issue of resources is likely to become acutely relevant in financial provision divorces. Under s 8 of the Family Law (Scotland) Act 1985, it has always been the case that a court, in making a financial award, must ensure the award is reasonable having regard to the parties' resources. What effect will COVID-19 have on the resources of many of our clients?

Where separation took place pre-COVID-19, the values attributable to some assets may have since been materially affected. Although we currently have an upsurge in property values, the keen-eyed will have noticed the clear rider in valuation reports caveating that the market is likely to be unpredictable due to the unique circumstances, and valuations can rise and fall dramatically.

Agents in practice regularly ignore the distinction between relevant date and current date values of heritable property on transfer, no doubt as a consequence of a relatively stable property market over the last few years. As property values face the possibility of artificial inflation or even a future crash, s 10(3A) takes on much more potential significance, with appropriate warnings and explanations to the client being necessary concerning possible loss. *Wallis v Wallis* 1993 SC (HL) 49 considered the injustice of the relevant date value being applied on transfer where a property boom meant a windfall to the transferee. Section 10(3A) was designed to add flexibility to take account of that.

In the current crisis, there may be good reason to invite a court to invoke s 10(3A)(b) (additional subs (2B), where the court considers that, due to exceptional circumstances, the appropriate valuation date should be a date as near to the date of transfer as the court may determine). Such provision opens up the possibility of arguing for a much more cautious approach to valuation during the pandemic.

Equally, other assets such as shares, investments or business interests may fluctuate in value due to the fact that, while the value may still be significant, there are insufficient resources with which to raise funds to meet any award. The court does have the option in s 12(3) to order payment of a capital sum by instalments, and it is entirely possible that this could be over a number of years. The issue of resources is normally a matter for proof.

Due before the deadline

In an unreported case we were involved in, the operation of the husband's business was particularly vulnerable to lockdown restrictions, and the court was prepared to structure the substantial capital payment in a way which reflected his need to stagger the way he raised the necessary funds. The court identified the capital award as being his liability, and made it payable "by" three dates over the following three years, with a lump sum being paid annually. Interest would not start to accrue on any payment until the day after the payable "by" date.

Following extract of the divorce decree, the wife served an inhibition in execution on the husband to protect her award. When the husband sought to sell a property, he moved for restriction of the inhibition to allow the sale to proceed, but with no proposal to release the net proceeds to the wife. The husband argued that the money was not "due" until the next payment date, so the inhibition could not be used to extract payment as that would defeat the court's careful structuring of payments to reflect the impact of COVID-19.

The motion called before the Inner House, where the case was under appeal. The wife argued that the whole capital award was still "due". The husband had merely been given dates from which interest would begin to run if part payment had not been made. The intention was always that he should pay the award when funds allowed. The inhibition should not be restricted or recalled unless all the free sale proceeds were to be paid over to the wife to account of the capital award.

Although there was no written decision, the subsequent interlocutor upheld the wife's arguments, recalling the inhibition in return for the sale proceeds being paid to her immediately, and making clear that the same consideration would apply to any future recall or restriction, irrespective of payment "by" dates. A capital award may indeed be payable by instalments, but still be due. Only the impetus to pay the award may be delayed by the court until a certain date.

The foregoing, whilst thought to be a niche issue, serves as a reminder to ensure that careful consideration is applied when structuring staggered capital awards. Such technicalities may become increasingly relevant during COVID-19. Having a clear grasp of the distinction when it comes to enforcement and recovery is invaluable in a world where debt seems to be more readily forgiven, and utilisation of protective tools for your client will become increasingly important.

Employment

MARIANNE McJANNETT, ASSOCIATE, TC YOUNG

The past few months have seen the rollout of COVID-19 vaccinations across the UK. While the availability and speed of the process are being questioned daily in the press, one issue has been brought to the forefront of discussions amongst clients – whether or not they can mandate their staff to have this vaccination.

While this might seem like an obvious solution to make our way out of the pandemic that we have been subject to for almost 12 months, there are some factors which need to be considered by employers before taking a "no jab, no job" approach with their staff or potential staff.

The requirement to have the vaccine might be seen in some industries as being a "reasonable instruction", and it is likely that this will be the case in health and social care sectors. It is not unusual for workers in these sectors to be required to disclose their vaccination records as part of the recruitment process. Therefore the COVID-19 vaccination is likely to fall into this category. However, for other employers there is unlikely to be a situation where requiring an employee to be vaccinated is a requirement for their role, and particularly not one which would necessarily give rise to a fair dismissal.

Any variation in treatment between those who have and those who haven't been vaccinated may amount to indirect discrimination. For example, the current vaccination programme has NHS and social care workers being vaccinated first, followed by the over 80s, over 70s and over 65s. With the working population being older, there are potential indirect age discrimination issues for not recruiting a younger member of staff who has not been vaccinated. Similarly, failing to recruit someone on the basis that they have not been vaccinated or have chosen not to be vaccinated could directly and indirectly discriminate against someone who is pregnant or breastfeeding. While the vaccination has been given the green light for these categories, medical advice is that it is down to the individual patient as to whether she wishes to receive the vaccine.

Finally, but just as important, requiring evidence of vaccination gives rise to significant data protection issues. Employers would have to consider why they need evidence of vaccination and whether it is appropriate for their business.

These conversations within firms and between clients are likely to be ongoing over the coming months, if they are not already taking place, and therefore it is important to consider the likely legal implications of such an approach.

Human Rights

ROSS CAMERON, ASSOCIATE, ANDERSON STRATHERN LLP

In *SMO (a child) v TikTok Inc* [2020] EWHC 3589 (QB), the court granted anonymity to a child claimant in an intended claim for breach of privacy against a social media company.

The Children's Commissioner for England intends to bring an action on behalf of a 12-year-old girl from London against six corporate defendants said to be involved in the operation of TikTok. The claimant alleges that the defendants have committed various GDPR breaches, and claims damages for loss of control of personal data.

A pre-action application sought permission to issue the proceedings under a pseudonym, relying *inter alia* on rule 39 of the Civil Procedure Rules, which prohibits disclosure of a party's identity only if the court considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interest of that party.

Curiously, there was a rush by the claimants' agents to issue the claim against the defendants before 31 December 2020. All but one of the defendants were foreign to England & Wales, and the claimant wished to avoid any jurisdictional challenge post-Brexit, and to be able to take advantage of the simpler enforcement regime for proceedings issued by that date.

Court's considerations

Transparency as to party identity is an aspect of the law of open justice, a principle affirmed in *Scott v Scott* [1913] AC 417. However, in *SMO* the court recognised that the Human Rights Act 1998 is effectively "a statutory exception" to this principle and the court "must act compatibly with the Convention rights, including the right to respect for private life protected by article 8". Moreover, "article 6 provides that the general rule of open justice may be departed from 'where the interests of juveniles or the protection of the private life of the parties so require'". This does not provide any automatic protection for children, however: "A balance must always be struck, and attention must be paid to the specifics of the individual case, not just generalities."

Against this backdrop, the court considered the nature of the likely attention and harm that this case could cause to the claimant. The Commissioner identified that there was a risk of direct online bullying by other children or users of TikTok, and a risk of negative or hostile reactions from social media influencers who might feel that their status or earnings were under threat. The court considered that these were both realistic assessments and reasonably foreseeable. It accepted that children are particularly sensitive to the sort of attention and scrutiny that this case would bring, and that such attention can have a marked detrimental impact on a child's mental health.

When assessing whether to derogate from the principle of open justice, the court also considered whether a lesser measure would suffice. It accepted that the claimant opting out of social media activity was not a realistic means of avoiding the risk, especially when children are required nowadays to have internet access for educational purposes.

While the court recognised that it is important for the media to be able to put a name to a participant in the legal process, this was not a case in which that aim could justify the risk of harm. That risk was significant. While it was not said in terms that the case could not otherwise be brought, the court accepted that requiring the claimant to be named could have a chilling effect on the bringing of claims by children to vindicate their data protection rights. On that footing, it held that anonymity would support the legitimate aim of affording access to justice, and was necessary to secure the administration of justice.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Charity law

In 2019 the Government consulted on improvements to charity law that would increase transparency and accountability with a view to maintaining public trust and confidence in charities and the regulator, OSCR. It now seeks views to assist in creating detailed proposals for more significant reform of charity law. See consult.gov.scot/local-government-and-communities/strengthening-scottish-charity-law/

Respond by 19 February via the above web page.

Legal complaints

The Government is looking at how to take forward regulation of legal services in light of the report of the independent review led by Esther Roberton. This further consultation looks specifically at improvements that could be made to the complaints system in the short term under powers in the Legal Profession and Legal Aid (Scotland) Act 2007, pending more fundamental statutory reform. See consult.gov.scot/justice/amendments-to-legal-complaints/

Respond by 20 February via the above web page.

Heating new homes

The Government is committed to ensuring that, from 2024, newly built homes use heating systems which produce zero direct emissions at the point of use. It is seeking the views of a broad range of stakeholders and groups across Scotland on the "high level vision" for achieving this target. See consult.gov.scot/energy-and-climate-change-directorate/new-build-heat-standard/

Respond by 3 March via the above web page.

Mediation in planning

Central to the Government's stated intentions underpinning the Planning (Scotland) Act 2019 was developing steps to reduce conflict, improve community engagement and build public trust in planning matters. Views are now sought on guidance for planning authorities, developers, communities and other potentially interested parties on the promotion and use of mediation in the planning system. See consult.gov.scot/local-government-and-communities/mediation-in-planning/

Respond by 12 March via the above web page.

.... and finally

As noted last month, the Scottish Government seeks views on preparing Scotland's fourth National Planning Framework (see consult.gov.scot/planning-architecture/national-planning-framework-position-statement/ and **respond by 19 February**). The UK Government is consulting on controls on restrictive covenants in employment contracts (see www.gov.uk/government/consultations/measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment and **respond by 26 February**).

STOP PRESS: For the Scottish Legal Complaints Commission consultation on the levies to be levied on legal professionals for the year from 1 July 2021, see the news item on p 38, and **respond by 18 March**.

Comment

This judgment is of significance as it demonstrates factors that will be taken into account when deciding whether to anonymise a child claimant's details when pursuing a claim against a social media giant. It is important that justice be open and transparent; however there is a balance to be struck. This is true in Scotland as it is in England & Wales. The risk of significant harm to a child that can be caused by online bullying or "trolling" appears to be a factor that will be taken into account by the court when assessing whether it can derogate from the general rule of open justice set out within article 6.

In Scotland, the power to grant anonymity is part of the court's inherent jurisdiction or power. However, as Lord Malcolm held in *MH v Mental Health Tribunal for Scotland* 2019 SC 342, generally "court litigation is inconsistent with a desire for privacy, and it is a vital part of open justice that the press should be free to report proceedings in court". Notwithstanding this, the court has to take into account the facts and circumstances of each particular case when deciding whether it is appropriate to derogate from the Convention rule of open justice.

Although *SMO* is an English authority, if an equivalent motion in a similar case were to be brought before a Scottish court, it is indicative of the considerations that the judge or sheriff would likely take into account when deciding whether to grant anonymity.

Pensions

JUNE CROMBIE,
HEAD OF PENSIONS
SCOTLAND, DWF LLP

Corporate sponsors of defined benefit pension schemes currently have the choice whether to engage with the trustees of their pension schemes and to ask The Pensions Regulator (TPR) to "clear" proposed business changes that may adversely affect their pension (and so security of members' benefits), to obtain protection from sanctions. After an initial flurry of applications, many instead chose to make their own private assessment and not to apply for clearance. However, high profile collapses leaving large pension scheme deficits, such as BHS and Carillion, and the recommendations by the House of Commons Work & Pensions Committee (report published 25 July 2016), have prompted statutory changes.

The Pension Schemes Bill, introduced in the House of Lords in January 2020, passed its final hurdle on 19 January 2021, a House of Lords debate on amendments. It covers a range of measures, including strengthened powers for TPR and civil and criminal sanctions in part 3.

The Government confirmed its intent to protect by refusing to make changes to restrict those who may come under clause 107 (sanctions for avoidance of employer debt), in case loopholes were introduced. It stressed that its aim is not to hinder business but to "target individuals who intentionally or knowingly mishandle pension schemes or endanger workers' pensions by behaviours such as chronic mismanagement of a business or avoiding pension liabilities". Royal Assent is expected imminently, with a phased introduction and more detail to come in regulations.

Part 3 reforms

- Part 3 adds two new tests that, if met, means TPR can issue contribution notices requiring payment to a scheme or the Pension Protection Fund, where TPR considers there have been steps to avoid an employer debt. Any person who knowingly assists in any way can also be served with a contribution notice. Joint and several liability is possible. Statutory defences are also set out.
- It reduces the scope of scheme sponsors to make their own "commercial assessment" of the impact, by requiring "persons involved in a corporate transaction to make a statement setting out information about the event and how any detriment to a defined benefit pension scheme, as a result of this event, is to be mitigated". "Event" is an umbrella term and is not restricted to sales, acquisitions and restructuring, so can include re-financing, dividends or other assets leaving a company or group, or other events
- It strengthens TPR's powers to gather information. TPR is to be notified of notifiable events and then of material changes (including if the event is not going to or does not take place), with a mandatory accompanying statement. Alongside that, TPR will have authority to enter a wider range of premises and to require certain individuals to attend an interview. This could be the employer, a person connected with the employer, an associate of the employer or a person of prescribed description.

The new civil penalty up to £1 million applies to non-compliance with any of these, without reasonable excuse, and to the provision of false or misleading information to TPR or to the trustee or managers of the pension scheme and other compliance failures.

- Part 3 also adds three new criminal offences, in clauses 106 and 107:
  - failure to pay the debt due before the date specified in the contribution notice;
  - avoidance of employer debt as result of an act or failure to act or course of conduct, with avoidance as its intention and without a reasonable excuse;
  - conduct risking accrued scheme benefits, with actual or implied knowledge of the negative impact on members' benefits, with the possibility of the new civil penalty of up to £1 million and/or fine, and/or, on indictment, imprisonment for up to seven years. As stated above, the pool of potential targets is deliberately wide.

What advice to give?

A view often expressed by corporates and their advisers is that what is good for the corporate is good for the pension scheme, and so for scheme members. That is not necessarily correct, and indeed the reverse may be true.

What advice would I give to any corporate sponsor of a defined benefit pension scheme looking at changes to the corporate financial status quo? Planning at an early stage may well save time and money later. Challenges might come because of steps not identified as triggers, for example, paying dividends or refinancing, if in fact they are deemed to have led to scheme members losing out. Given these new powers and consequences, taking advice early and carefully considering whether to contact TPR, and as appropriate engaging early with the pension scheme trustees, is prudent risk management.

Charities

SOPHIE MILLS, TRAINEE SOLICITOR, THE WS SOCIETY

In *Office of the Scottish Charity Regulator, Appellant* [2021] CSIH 7 (29 January 2021), the Inner House dismissed OSCR's appeal against the Upper Tribunal's decision that two trading subsidiaries of a charity should be entered on the Scottish Charities Register, despite both having activities which were commercial in nature, because all their activities provided public benefit and contributed to advancing their charitable purposes.

Background

The appeal concerned two limited companies (NLTL and NLHL), wholly owned by New Lanark Trust (NLT). NLT is a registered charity responsible for managing the UNESCO World Heritage Site at New Lanark. The companies' principal purpose is to produce income through various trading activities, to be donated by gift aid to NLT. NLTL operates a visitor attraction (with entry fee), a retail shop and café. NLHL operates a hotel, conference centre and wedding venue within New Lanark village.

The companies applied to OSCR for entry on the register. OSCR refused registration on the grounds that neither company provided "public benefit" within the meaning of the Charities and Trustee Investment (Scotland) Act 2005, s 7(1)(b). They therefore failed to satisfy the charity test.

OSCR's decision

OSCR recognised that some of NLTL's activities, such as exhibitions, events, tours and maintenance of the buildings, contributed to the public benefit provided by NLT. However, the shop and café had a large combined turnover; neither were in furtherance of NLTL's charitable purposes or incidental thereto.

Similarly, NLHL's significant activities were not understood to be furthering charitable purposes, despite its distribution of profits to NTL providing benefit to the public. NLHL's primary activities were not directly related, connected or incidental to its charitable purposes. It followed that there was no public benefit.

Before the tribunals

The First-tier Tribunal (FtT) agreed with and upheld OSCR's decisions. For both NLHL and NLTL, the contribution to the advancement of charitable purposes was secondary to the principal, commercial activities.

The Upper Tribunal (UT) allowed an appeal and directed that the companies be entered in the register. It concluded that the FtT had not provided adequate and intelligible reasons for its decision: the FtT failed to consider whether the commercial activities of each of the companies were in furtherance of their charitable purposes ([2019] UT 62; [2019] UT 63).

Going on to remake the decisions ([2020] UT 9; [2020] UT 10), the UT considered OSCR's analysis, which suggested two commercial activities that would not compromise the public benefit requirement: (i) where the activity contributes to furthering the charitable purposes; and (ii) where the activity is merely incidental. The UT held that OSCR's reasons for refusing the companies' applications, which were based on (ii), missed the point of the companies' arguments, which were based on (i). The companies submitted that the provision of the commercial facilities in the setting of New Lanark village amounted to public benefit. OSCR responded to suggest these were "non-primary purpose trading".

The UT held that a commercial activity could have a dual purpose of raising funds and contributing to charitable purposes. In that case, a balancing exercise between these was inappropriate and unnecessary. If public benefit was provided, it was irrelevant that the companies also raised funds for their own benefit or that of another charitable body. On that basis, the appeal turned on the factual question of whether the companies' commercial activities contributed to the furthering of their charitable purposes. From the findings in fact, the UT concluded that they did. It was a crucial feature of the site that it was maintained as a living village so visitors could experience the original concept that led to its World Heritage designation: the availability of commercial facilities was an integral part of the presentation, contributing to the experience and providing public benefit.

Inner House

OSCR appealed. The Inner House refused the appeals, which were essentially against the UT's conclusions on matters of fact when remaking the decisions about whether all of the activities advanced the companies' charitable purposes. The UT reached conclusions that it was entitled to make. The court suggested that OSCR erred in its interpretation of the UT's decision: as the UT found all the activities advanced the companies' charitable purposes, it correctly decided that a balancing assessment between activities was not required. The balancing exercise would be required if only *some* of the activities had advanced the companies' charitable purposes. That was not the case here.

Comment

The significance of this case is limited, given the unique circumstances that the companies carried out all their activities within their UNESCO site. It is, however, an important decision for providing clarity on how the tribunal will approach cases where commercial activities are in issue in relation to the charity test.

The Inner House confirmed that, where all of a company's commercial activities advance its charitable purpose, when assessing public benefit a balancing exercise is not required, but that in "mixed" cases, performing a balancing act would be appropriate.

Playing safe: on the right track?

Is the long period of uncertainty now common between having an offer accepted and missives concluding, good for clients or the profession? Or should the profession be taking action before someone else decides to do it for us?

Property

RON HASTINGS, DIRECTOR, HASTINGS LEGAL

There was a day when the process of buying and selling in Scotland was hailed as one of the jewels in the crown of the Scottish legal system, when an acceptable offer would be followed by early conclusion of missives and a binding contract, and everyone knew where they stood.

We would pour scorn on the unsatisfactory system south of the border. In England, particularly in times of flux, the pressures of a rising or falling market and the merry dance between offer being agreed and contracts exchanged would take months, with buyers and sellers open to gazumping or gazundering while seemingly powerless to cement the deal, and being left with the ever present worry that, somewhere along the line, it could all come tumbling down like a house of cards. The longer the chain, the weaker the links and, even with good faith on the part of the principal players, if some party in the process wasn't playing ball, the conveyancing train would come off the rails, leaving the faultless parties with no deal and no right to compensation for the disappointment and non-recoverable expense, not to mention lost time and money, and added stress.

Are we doing better?

There seems to be universal agreement that reform of the house buying process in England & Wales is long overdue, while key players outside the legal profession engage in the usual lawyer bashing and seek to tap into this public dissatisfaction with failed and slow sales progression, with their own versions of the one stop shop and IT platforms in an attempt to give the impression that they have the solution. We may scoff, but if we take a leaf out of Burns' book and see ourselves as others see us, in truth are we really that much better in Scotland?

No doubt much of the blame can be attributed to factors outwith our control resulting in a lengthier period of uncertainty between offer and concluded missives. One of the main causes has been the time taken to process mortgage applications, with offers, other than cash offers, being conditional on the loan coming good. A mortgage promise is no longer considered worth the paper it is written on, and conveyancers wisely delay concluding missives until the buyer has the loan in place.

Where the purchaser has a property to sell, the offer missives may also be delayed until the sale concludes. The result is that with the exception of straight cash offers, very few transactions conclude within a few weeks from the offer date. Further complications arise in cross-border transactions where a buyer is relying on exchanging contracts. Inevitably, where there is uncertainty, this slows down the process and we end up with a backlog due to a reluctance of some to progress any conveyancing until all the ducks are lined up with all the lights at green.

As a result, nothing gets done and, like in England, chaos reigns with a last minute rush to get everything in place. Meanwhile the clients are left in the dark, biting their fingernails, worried the deal will collapse and bewildered at a process which they mistakenly thought was secured weeks or months earlier, only to find that in reality they were left exposed, or face a last minute rush and apparent panic in the week, days or even hours before cash and keys are exchanged with the deal finally secure.

Just the way it is?

By our nature conveyancers are conservative (with a small c), and most would not contemplate advising a client to agree to anything that exposes them to any degree of risk. Clearly, backs need to be covered and advisers need to protect clients, and themselves, against the possibility of things going wrong. But a no can do sir, jobs worth approach doesn't do clients or the legal profession any good. It may be the safe approach to do nothing, but sitting on hands or blaming the system, or the "other side", simply adds to the frustration, stress and uncertainty and, inevitably, the affected clients will blame the lawyers.

In reality, even these days most deals stick, and once through the jungle, despite the frustrating delays, most clients emerge to the light of a new dawn and achieve house buyers' nirvana when they get the keys to their new house – though in all too many cases with a soured experience tainted by the process.

It is surely in the interests of the legal profession, and our clients, to improve on what for many has become a poor experience. Accepting that deals come good in the majority of cases, it makes sense to progress and prepare as much of the groundwork as possible, to minimise stress and delays further down the line. Clearly it takes two to tango, but those conveyancing firms that take a proactive and progressive approach should benefit both their clients and their business, so others eventually see the sense of following suit.

Over the years the Scottish legal profession has been keen to promote the benefits of our system and has introduced practices and procedures that help smoothe the process. Among these has been an almost universal acceptance of a standard set of conditions which are adopted in most formal offers, covering the sort of issues that other systems leave for pre-contract enquiries, thus avoiding delays and flagging up issues with professional advice and guidance at the outset so there should be no nasty surprises.

Principle and practice

Leaving aside the factors causing delays, there is still an underlying principle that you act honourably and do unto others as you would have them do to you.

In Scotland we still have an excellent and efficient system. As a rule, if a client goes back on a commitment and changes tack without justification, a Scottish solicitor will not simply act as a mouthpiece and do their instructing client's bidding but would feel professionally obliged to withdraw and tell them to go elsewhere. The practice rules and guidance notes laid down by the Law Society of Scotland enshrine noble and time honoured principles; but in practice do they hold water, or do some seek to hang on to the defaulting client and the prospect of payment?

Despite the guidelines, it is not uncommon to have an offer that fails to disclose a dependent sale or some other undisclosed precondition, with a tempting offer being accompanied by expressions of good faith but with any attempt to progress missives beyond the offer stage then falling on stony ground.

Get in first

Is it not time to address the issue and remind the profession that we are not simply mouthpieces?

We represent and advise clients against an established background of ethics and professional practice that demands respect and an appreciation that others are making plans relying on the offer coming good. We do not ply our trade in a vacuum, and while clients are left disappointed and without a remedy, failed missives have consequences and uncertainty has a knock-on effect.

Clients, both buying and selling, deserve a better service, and failing to adhere to high standards, and to appreciate the need to respect the "other side", leads to chaos, uncertainty, frustration and expense both for clients and the profession. Loss of reputation for an individual or firm is bad enough, but damage to the hard earned reputation that the legal profession has in the eyes of the buying and selling public could be a huge loss to both the profession and clients, and once gone would not be likely to be restored.

Now is the time to get our conveyancing house in order before those in power decide to step in and impose a solution on us. You may think that unlikely, but consider the response to consumerism that gave rise to the imposition of the SLCC, who are only too happy to entertain any expression of dissatisfaction. If nothing else, the administrative cost of dealing with a complaint to that body by a client or an affected third party, which might be a dissatisfied client on the "other side", should be incentive enough to keep most conveyancers on the right side of the track!

Wide world of in-house

This month's in-house profile returns to local government, featuring a solicitor whose roles cover litigation, governance, elections, COVID-19 – and who has taken on the Trump Organisation in his time

In-house

MARTIN INGRAM, SENIOR SOLICITOR, ABERDEENSHIRE COUNCIL

Where do you come from, and what was your career path to your current position?

My legal career started in 2003 as a trainee solicitor at Scottish Borders Council where, after qualifying, I stayed on as a newly qualified solicitor for a year. I really enjoyed working in-house within local government; however, I was keen to expand my knowledge and experience in intellectual property and information technology law following the completion of an LLM in that field.

I joined Thorntons Solicitors in 2006 in the Education & IP unit of their Business Law team. In this role I had the opportunity to work close to the music industry, and even got to attend T in the Park as a legal adviser. Although I particularly enjoyed the collaborative working in the sector, I found the commercial contract and black letter law aspect of IT law was less appealing to me than I had first thought. An opportunity arose in 2009 to work for Aberdeenshire Council's litigation team, and I was delighted to be able to work in-house again in "home" territory.

Can you tell us about the opportunities you've had and the diversity of roles you've undertaken at Aberdeenshire Council?

Back in 2009 when I joined Aberdeenshire Council there were three geographically spread legal teams: North, Central and South. Within each team the legal work was broadly separated into litigation, conveyancing and licensing. Governance, commercial and committee monitoring work crossed all the legal teams to a greater or lesser extent.

As well as being involved in court work, I gained experience in planning and committee monitoring. Following a corporate restructure of the council's former Law & Administration directorate and the establishment of a new Legal & Governance service (now Legal & People) in 2011, a new Governance team was embedded into the structure, taking the planning law, committee monitoring and licensing work streams together for the first time. My substantive role as a senior solicitor crosses the two areas of law that I enjoy: litigation and governance, and with a lead role in planning law.

How has the landscape changed in recent times in your area of work, and how have you as an in-house solicitor supported those changes?

One of the big changes was the introduction of the public sector equality duty (PSED) in 2011. This was brought in by the Equality Act 2010 and means that public authorities must consider how their actions, policies and decisions affect different groups of people in different ways and how they must integrate equality and good relations into their business. I had a lead role in helping to establish the council's processes and procedures in complying with the PSED, in training elected members and officers and developing the council's equality impact assessment documentation. Ten years on, this work forms the basis of the council's everyday activity across all of its work.

Another key function of the council's legal service is supporting the elections function and the returning officer for the Aberdeenshire area. In January 2019, I was seconded to the role of elections coordinator and was tasked with undertaking a rapid improvement project to review and improve the council's elections structure. This project was planned at a time when no elections were scheduled for more than two years (with the exception of electing a board member to the Cairngorms National Park Authority that March) but, as it transpired, we required to deliver a European election in May 2019, then there was a snap UK general election in December 2019 and then Aberdeenshire held the first mainland UK by-election during the COVID-19 pandemic in October 2020.

Although elections are a creature of statute and it's vital that the elections coordinator understands and can interpret the relevant legislation, the role of the coordinator is much broader than that. It incorporates the organising of polling stations and the counting of ballots, as well as recruiting and training all the staff required to support the delivery of the election.

What are the current hot topics in your sector?

The response to the pandemic is undoubtedly the biggest challenge for local government now. I'm the legal adviser to the council's Risk & Resilience team and am responsible for reviewing the UK and Scottish coronavirus legislation. I have to identify what is applicable to local authorities and provide guidance to colleagues in the relevant service – whether that's environmental health, enforcement, health or social care.

I have sat on several civil contingencies and recovery groups which are organising and supporting humanitarian assistance to residents affected by isolation and shielding, mobilising

"Local authority solicitors have a unique and privileged position in assisting colleagues to deliver services in the local area"

staff to recovery efforts and critical service delivery. The pandemic has certainly brought into sharp focus the definition of "urgency" and what work is essential for local authorities to deliver their core and statutory services with an ever-dwindling budget.

What motivates you to head to work?

Without being too clichéd, it's about being able to make a difference and have a positive impact in the local community. Local authority solicitors have a unique and privileged position in assisting colleagues to deliver services in the local area. The current economic situation is a challenge and we've had to change the way we work. Understanding the legislative framework for local authorities and how services are delivered means that in-house lawyers can support the changes that need to be made (not least because of the pandemic), but we can embed organisational strategy, governance and best practice into service delivery and realise tangible outcomes for the community.

How have attitudes and working practices changed in the law since you started out?

Aberdeenshire Council, as an organisation, was an early adopter of flexible working, but the benefits of this policy were particularly promoted by the head of Legal & People to staff within her service. There was a willingness to remove core working hours and provide staff with the technology and equipment to work flexibly. An outcome-focused approach to service delivery means there is the ability to get the work done and have a good work-life balance.

Would you encourage young lawyers to work in-house as a career option?

Absolutely, yes. There is no need to have worked in private practice first – a traineeship with a local authority is much more analogous to a traditional traineeship with a law firm. We cover litigation, property law, commercial work and governance. I'm the lead tutor for the public administration law course at the University of Aberdeen and I encourage students to consider a career in local government.

The breadth of work is there, as is the opportunity to be involved in niche or bespoke areas of law. A local authority trainee is directly involved in high import work from a very early stage and not confined to research. There's the ability to specialise in-house or be a more general practitioner. Former colleagues have moved on to work in private practice and the bar as equally as we have colleagues who have moved from private practice in-house. It can also be the launch pad for other senior positions within the organisation.

What is your most unusual work experience?

Much of my work experience has been unusual. However, this has mostly been a reflection of the breadth and variety of the work involved.

Some of the matters I have worked on have attracted far more media interest, such as the time when the Trump Organisation was seeking planning approval for its golf courses on the Menie Estate near Balmedie. I was involved in providing planning and governance advice to officers and elected members during much of that period – one of my more unusual experiences was defending the council in a legal battle with the then US President-elect over a flagpole on the grounds of one of his courses.

Other cases, while having less public profile, have had more legal significance. For example, a guardianship application of mine that started out at Aberdeen Sheriff Court was appealed by the adult's sister; this allowed the opportunity to appear at the newly established Sheriff Appeal Court in one of the first cases to be heard by that court following the extension of its jurisdiction to civil matters. The case went on to be determined in the Inner House in a decision that has clarified the procedure to be followed in opposed applications for welfare guardianships and the approach to be taken to the use of mental health officer reports in such cases.

What some may consider a more mundane example involved a case brought against the council by a resident objecting to its street cleanliness operations. It was, however, the first case of its kind in Scotland, and following the publication of the 74-page judgment of Sheriff Andrew Miller I was invited to give a presentation on the case to a meeting of the Association for Public Service Excellence. Does that make me the leading expert on local authority road cleaning?

What would you put in room 101?

Since we all went back into temporary lockdown at the start of this year, having to stay at home and also work there throughout the week, it sometimes feels like I have already been put in room 101. The thing I have most recently put in that room is an office chair that one of my colleagues kindly delivered to my home – I am most grateful to her for this as it is far more comfortable than the metal folding chair I was using beforehand!

SLCC plans standstill levy, but promises second look

Standstill levies to fund its operations in the year from 1 July 2021 have been proposed by the Scottish Legal Complaints Commission.

Following last year's criticism over its 3.5% budget and levy increase, this year's draft plan, now out to consultation, shows income and expenditure both slightly down, from £3.993m to £3.958m, but with the annual levy element of its income unchanged.

However the SLCC says the proposed levies will be reviewed again before a final levy is set: "Potential variables this year are more significant than in previous years, and there are a number of factors which could influence a revised levy. One of those is likely complaint numbers, and we are seeking further information in this consultation on factors likely to impact transactions and consumer satisfaction."

The public sector pay policy for 2021-22 will also lead to lower costs than had been assumed.

Current levies are £492 for principals and managers, £400 for other private practice solicitors with three or more years' experience, £200 for those in their first three years, £130 for those practising outwith Scotland, £120 for in-house lawyers and £189 for advocates. Conveyancing and executry practitioners pay at the £400 or £200 rate as appropriate, and members of the Association of Commercial Attorneys £127.

All of these would remain unchanged, as would the complaints levy of £5,000 and the approved regulator fee of £3,000 levied on the Law Society of Scotland.

The SLCC's draft operating plan for 2021-22 focuses on delivering improvements in its complaint handling functions while supporting the legal sector to prevent the common causes of complaints.

Responding, the Society said the SLCC should "follow their own logic" and make a substantial reduction in the levy, to match a fall in complaints received.

President Amanda Millar commented: "The SLCC has justified inflation-busting rises in the levy in recent years by pointing to an increase in complaints received. Their annual report shows complaint numbers dropped by a substantial percentage last year, so according to their own logic the levy should likewise fall."

The consultation is at bit.ly/3pJGCYU. Responses are due by Thursday 18 March.

Notifications

ENTRANCE CERTIFICATES ISSUED DURING DECEMBER 2020/ JANUARY 2021

AL-LATIF, Mohammed Belal
AMJAD, Mohammed Sohail
BAXTER, Hannah
BRENNAN, Jennifer Marion
BROCK, Alexander James
BRUCE, Kirsten Jessica Eleanor
CAMPBELL, Sophie
CHEAPE, Sarah Gillian
CLEMENTE, Nadia Luisa
COLTMAN, Eilidh Margaret
CORDINGLEY, Columba Cecilia Teixeira
DODSON, Laura Kirsty
EWING, Lisa Victoria
FEENEY, Amber Penelope
FITZPATRICK, Anya Maria
FOX, Anna Veronica
GRANT, Stephen Charles
HAMILTON, Iona
HERDIS, Sarah Jane
HOWARTH, Tamara
KERR, Leonie
KERR, Zoe
KHAN, Iqra Yasmin
KOCELA, Anna Maria
KYLE, Lauren Elizabeth
LEWIS, Nicole
LUKS, Linards
McCONNELL, Kathleen
McQUEEN, Ross Craig
METCALFE, Claire
MICHIE, Gavin James
MILLER, Jamie Thomas
MITCHELL, Carla
MITCHELL, David Alexander
MORTON, Samuel Allan
PAUL, Abigail Sara
RUSSELL, Kathryn Helen
SHEERINS, Niall
SILVER, Victoria Jane Blyth
STEEDMAN, Kerry Christina Linda
STEPHEN, Brooke
STEWART, Kirsty Meg
TUMANGAN, Claudine Angela
WOOD, Abigail Patricia Holly

APPLICATIONS FOR ADMISSION DECEMBER 2020/ JANUARY 2021

ALEXANDER, Beth Anne
ALLAN, Christie Margaret
ANDERSON, Mathew Balfour
BAIN, Steven James
BALLANTYNE, Michael
BARBER, Rachael Winifred
BOLAND, Linzi
CAREY, Alice Elizabeth Anne
COLLINS, Eilidh Jane
CRUIKSHANK, Paul Anthony
CURRIE, Katherine
DAVIDSON, Sarah Shirley Douglas
DEAN, Claudia Catherine Anne
DOCI, Ledia
DRAYAK, Taurean Eltanin Andrew
DUFF, Seamus Rory McCallum
FINLAY, George Henry
FLATMAN, Roisin Hazel
FRETWELL, Lauren
GECEVICIUTE, Gabriele Ruta
HAMILTON, Jack Andrew
HEPBURN, Jasmine Kira Rennie
HUNTER, Jamie Jean
JACKSON, Elise Nicole
JEFFRIES, David Andrew
JEYNES, Rebecca Louise
JONES, Bethan
KEARY, Olivia Margaret
KINSELLA, Julie Theresa
McADAM, Michael Anthony
McBRIDE, Natalie Jean Emma
MacDOUGALL, Finlay Euan Cameron
McGOWAN, Ross John
MACKAY, Lyndsey Christine
McKINLAY, Ainsley Paula
MacLACHLAN, Ashley Jane
McMICHAEL-PHILLIPS, Katherine Jane
MATTHEW, Hannah
MILLER, Meriel Jane
MURPHY, Alistair Ian
O'KEEFE, Declan
PATERSON, Scott Callum
ROBBINS, Mark John
SMITH, Kate
TAYLOR, Jenna Claire McArthur
THOMSON, Callum Macewan
TREASE, Rachel
VAN LOOY, Marsaili Elisabeth
WATERS, Marc Anthony
WILLS, Emma Marie
WRIGHT, Emily Heather
ZIARKOWSKA, Anna

OBITUARIES

IAN DEAN CB (retired solicitor), Edinburgh
On 11 October 2020, Ian Dean CB, formerly Crown Agent with the Procurator Fiscal Service, Edinburgh.
AGE: 89
ADMITTED: 1956

ELIZABETH BAKER, Glasgow
On 23 November 2020, Elizabeth Baker, formerly sole partner of the firm Elizabeth Baker, Glasgow, and latterly employee of the firm Mitchells Roberton, Glasgow.
AGE: 65
ADMITTED: 1984

ROBERT LOUIS STIRLING (retired solicitor), Falkirk
On 8 December 2020, Robert Louis Stirling, formerly sole partner of the firm Stirling & Co, Falkirk.
AGE: 80
ADMITTED: 1964

AGNES ANNE CAIRNS (retired solicitor), Dunoon
On 14 December 2020, Agnes Anne Cairns, formerly employee of the firm Cairns & Co, Greenock, and latterly employee of the firm McCusker, Cochrane & Gunn Ltd, Glasgow.
AGE: 66
ADMITTED: 1977

ALAN JONATHAN KARTER (retired solicitor), London
On 22 December 2020, Alan Jonathan Karter, admitted as an English solicitor in 1984, formerly employed with Freshfields New York and latterly with the firm Simmons & Simmons, London.
AGE: 65
ADMITTED: 1979

GRAEME HUNTER (retired solicitor), Glasgow
On 28 December 2020, Graeme Hunter, formerly partner of the firm Adie Hunter, Glasgow, and latterly consultant of the firm Mitchells Roberton Ltd, Glasgow.
AGE: 60
ADMITTED: 1985

JULIE ELIZABETH LONGMUIR, Aberdeen
On 28 December 2020, Julie Elizabeth Longmuir, formerly partner of the firm Gray & Connochie, Aberdeen, and latterly partner of the firm Ledingham Chalmers LLP, Aberdeen.
AGE: 59
ADMITTED: 1985

PROFESSOR ROBERT RENNIE (retired solicitor), Glasgow
On 6 January 2021, Professor Robert Rennie, formerly partner of the firm Ballantyne & Copland, Motherwell, and latterly partner and then consultant of the firm Harper Macleod LLP, Glasgow.
AGE: 73
ADMITTED: 1969
A full appreciation is on p 47

STEPHEN PAUL DOUGHERTY WS, Edinburgh
On 20 January 2021, Stephen Paul Dougherty WS, partner of the firm Shoosmiths, Edinburgh.
AGE: 59
ADMITTED: 1988

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/

Fixed-Term Parliaments Act

The Joint Committee on the Fixed-Term Parliaments Act has been appointed to review the operation of the 2011 Act and make recommendations for repeal or amendment as necessary.

The Constitutional Law Committee responded in December. Among other points, it highlights the fact that as the Act was designed by a coalition Government, it failed to clarify the implications for the future of the Government of losing a confidence vote. It also noted that for the Government to achieve its original policy intention, the bill should provide that the restored prerogative power to dissolve Parliament would specifically require the consent of the monarch.

Climate Change Plan update

The Scottish Government published an update to *Securing a Green Recovery on a Path to Net Zero: Climate Change Plan 2018-2032*, in December 2020. A number of committees contributed to a joint response to four of the Scottish Parliament's committees on the plan.

The response welcomed the coordinated approach the update sets out. The importance of integrating the update and subsequent policies with other environmental strategies was noted, including plans around tackling waste and developing a circular economy. It highlighted the need for clear communication with consumers about innovation and energy developments, and noted the role of commercial laws and trading relationships in creating an investment environment to support the achieving of climate change targets.

Short-term let regulations

The Planning and Licensing Law Committees submitted written evidence to the Scottish Parliament's Local Government & Communities Committee in respect of the regulations introducing planning and licensing schemes in relation to short-term letting in Scotland. They noted that much will depend on the practical operation of the schemes, and stressed the need for clear guidance ahead of these becoming effective, for example what constitutes a material change of use of a house, and relevant considerations in determining a planning application. Concerns regarding local authorities' resources to operate the schemes were noted, and drafting points made regarding the licensing order.

Culpable Homicide (Scotland) Bill

The Criminal Law Committee provided a stage 1 briefing on this bill. (The bill did not pass the stage 1 debate.) The committee recommended carrying out a comprehensive review once the forthcoming Scottish Law Commission report is available, rather than piecemeal changes.

Domestic Abuse (Protection) (Scotland) Bill

The Criminal Law Committee also provided a briefing on this bill at stage 1. It noted that a significant number of operational, resourcing and practical matters, which it raised previously in evidence and which were referred to in the stage 1 report, still needed to be addressed, including the risk of numerous potentially overlapping measures, the proportionality of the threshold in s 4, and whether an order has primacy over existing rights.

Disabled young people

The Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill aims to "improve opportunities for disabled children and young people as they grow up". The Mental Health & Disability Committee provided written evidence to the Education & Skills Committee at stage 1.

It welcomed proposals for a National Transitions Strategy, and new duties on local authorities to prepare and implement transition plans for each disabled young person. However, it highlighted the need for appropriate forms of redress and remedy where disputes arise, and robust dispute resolution mechanisms. The committee also highlighted concerns regarding the definitions of "child" and "young person", and called for clarity on how the proposals would interact with existing adults with incapacity legislation.

ACCREDITED SPECIALISTS

Charity law
Re-accredited:
MARION ELIZABETH DAVIS, BTO Solicitors LLP (accredited 11 December 2015).

Child law
Re-accredited:
SUSAN OSWALD, SKO Family Law (accredited 6 October 2010).

Construction law
Re-accredited: KARYN WATT, Anderson Strathern (accredited 11 January 2006).

Employment law
Re-accredited:
LYNNE MARR, Brodies (accredited 1 November 2010).

Family law
Re-accredited: JENNIFER GALLAGHER, Lindsays (accredited 10 January 2011);
LINDSAY OGILVIE, Turcan Connell (accredited 20 November 2015).

Family mediation
Re-accredited:
SHEILA BYTH, McKinnon Forbes (accredited 5 December 2014);
JENNIFER COLLEDGE and SANDI SHIELDS (both Colledge & Shields; both accredited 1 June 2017);
DONNA McKAY, Brodies (accredited 20 November 2017).

Personal injury law
Re-accredited: MARTIN SINCLAIR, Mackinnons (accredited 7 September 2005); LYNNE MACFARLANE, DWF LLP (accredited 4 September 2015);
IAIN SCOTT, Ledingham Chalmers (accredited 24 November 2015).

Public procurement
Re-accredited:
DUNCAN OSLER, MacRoberts LLP (accredited 24 November 2005).

Election of members of Council 2021

The Council elections which are due to take place this year are for group 3 of the groupings of constituencies under part II of the first schedule to the Society's constitution.

The relevant constituencies are:

- Alloa, Falkirk, Lithlithgow & Stirling: two seats
- Arbroath, Dundee & Forfar: one seat
- Campbeltown, Dunoon, Oban, Rothesay & Fort William: two seats
- Dingwall, Dornoch, Elgin, Inverness, Kirkwall, Lerwick, Lochmaddy, Portree, Stornoway, Tain & Wick: two seats
- Duns, Haddington, Jedburgh, Peebles & Selkirk: two seats
- England & Wales: one seat

Each candidate must submit an information and nomination form in word format. Forms can be obtained from the registrar, David Cullen by email: davidcullen@lawscot.org.uk

The deadline for receipt of completed nomination papers from all candidates is 12 noon on **Wednesday 21 April 2021**.

Voting will run from 12 noon on Wednesday 5 May to 12 noon on Wednesday 19 May 2021, by electronic means only. The Society publishes the full election result.

New standard clauses from 1 March

A new (fourth) edition of the Scottish Standard Clauses for house sales and purchases has been published, to come into effect on 1 March 2021.

The clauses, with an explanatory note covering the changes, and changes considered but not implemented, can be found at www.rfpg.org/standard-clauses.html, along with previous editions.

Priorities for our Parliament

The Society has published its statement of priorities that it will press on MSPs and ministers after the coming election – all underpinned by the rule of law, as President Amanda Millar explains

In 2020, the pandemic focused minds on the immediate challenges of our economy, working practices and lives being turned upside down. At the same time, our network of committee volunteers, staff and Council have been working on where we want our country to be in 2026 and beyond.

This month, we published the culmination of this work – our *Priorities for the 2021 Scottish Parliament elections*. This clear statement of intent demonstrates how we will focus our interactions with ministers and MSPs over the next five years. There are six key strands, but we open with one overarching principle – the importance of the rule of law and human rights.

Through our work as lawyers we dedicate our skills, experience and professionalism to protect and uphold people's legal and human rights, ensuring those rights apply equally to all. In doing so, we are upholding the rule of law, a cornerstone of our society and democracy. We must be able to carry out this fundamental role without fear of intimidation or restrictions to our independence or impartiality.

As President I have made this point repeatedly and will continue to do so. The rule of law opens our priorities because I believe this, along with respecting and valuing our members who uphold it, should be utterly central in the minds of our lawmakers. Whatever controversies play out over the next five years, our political representatives must not only work within the rule of law, but defend, champion and celebrate it.

A momentous five years

It is astonishing to look back just five years to the last Holyrood elections. Since May 2016 we have seen three Prime Ministers, two UK general elections, and a vote to leave the EU followed by four years of Brexit negotiations. Then last year the pandemic led our Parliaments to introduce unprecedented emergency powers to restrict freedoms, to suppress transmission.

Yet while much has changed, much that we called for in 2016 returns with greater urgency in 2021. Despite reviews, consultations and extensive discussion, two central pillars of our 2016 priorities return: the need for progress on modern legal services regulation, and measures to protect access to justice.

I'm pleased to see that the issues I have worked to focus on as President will be central in our influencing work over the next five years, but disappointed that we have seen only very limited progress on legal aid in particular. As the realities of the pandemic hit home, I have seen legal aid solicitors in tears, fearful of the future and angry at a system which does not seem to care. This is a group of public servants who have long been forced to work more for less. The recent uplift in fees is welcome, but only a small step towards reforming the system and treating those working within it with the respect and value they deserve.

Diversity and opportunity

Another issue I have championed throughout my time on Council and as President is diversity within our profession. Scotland aims to be an inclusive and welcoming place, and its solicitors are increasingly diverse and representative of wider society. We can and should celebrate our progress, but we have a long way to go to truly reflect the society we serve.

There is more to do to advance equality of opportunity for all, and I want to see a career in law appeal to our young people, regardless of background. Initiatives like our StreetLaw programme and the Lawscot Foundation, which I know many of you have supported and contributed to, are helping to foster aspiration. Last year's role models campaign highlighted that people from a variety of backgrounds already exist in the profession. Particularly among those with no lawyers in their families or social groups, these projects show that working in the law is a realistic aspiration for anyone with the intellect and graft to get there. Our priorities call for greater Government involvement to further this work, including through funding a legal apprenticeship route.

Of course, for entry places to the profession to continue to become available, we need to see growth in our economy and our legal sector. In the turbulent economic climate to come, Scotland has the skills and resources to succeed. We call for modern laws on moveable transactions and trusts; and press for Government backing for our exciting emerging legaltech sector and promotion of international trade and opportunities to expand legal services into global markets.

Our influencing work is more important than ever. Politicians want to hear from people living and working in their constituencies about the real changes they can deliver in office to benefit their communities. As the election campaign gets underway, I encourage all our members to read our priorities and consider contacting your local prospective MSPs to discuss how turning these aspirations into reality can drive real benefit for our citizens and businesses alike.

Respect for the rule of law: six themes

- Protecting access to justice
- Modernising regulation of legal services
- Boosting economic recovery
- Shaping Scotland's legal and constitutional future
- Enhancing the diversity of the legal profession
- Driving public policy and law reform

See more at www.lawscot.org.uk/2021priorities

The gift that keeps on giving

The key to our recovery lies in our most basic instinct, says Stephen Gold

What kind of society do we want to be after we emerge from COVID-19? As we inch towards freedom, it's a pressing question. There has been much talk lately of being kinder, more appreciative and working together for the common good. At which point reality has come crashing through the window with the Great EU Vaccine Cock-Up, a display of selfishness that flowed from the problems caused by a lumbering, cautious, rules-obsessed bureaucracy, attempting to meet simultaneously the needs of 27 different countries, each with its own agenda.

As the commentator John Ashcroft put it, after Brussels first invoked article 16 of the Brexit treaty, then executed one of the swiftest reverse-ferrets in diplomatic history, "Hats off to the European Commission. It takes supreme political skill to unite the DUP, Sinn Fein, the *Guardian*, the *Daily Express*, the entire Tory party, the Irish Prime Minister and even the EU's own Michel Barnier."

The response of the UK, which got ahead through a tight-knit taskforce of pharma experts and venture capitalists, given the brief and resources to "do what it takes", has been to avoid vaccine nationalism, and commit as soon as practicable to making surplus supplies available to other nations. In doing so, it is acknowledging something that lies at the very heart of human progress: the power of reciprocity. Ever since we were, quite literally, scratching each other's backs on the African savannah, we have built civilisation on the principle that human beings depend on one another. "No man is an island, entire of itself", said John Donne. "Every man is a piece of the Continent, a part of the main". What is true of the individual, is true of nations. No country is an island in the sense Donne means it, however it appears on the map. Our best state is neither dependence, nor independence, but interdependence. Cast your handcrafted, lockdown sourdough upon the waters, and it will return after many days.

The power to persuade

Professor Robert Cialdini is a global authority on the nature of persuasion, which he says depends on six principles: reciprocity, scarcity, authority, commitment and consistency, liking, consensus. It is no coincidence that reciprocity comes first. Law firms are in the business of persuasion and good at acknowledging in principle the value of reciprocity. But principle is not always followed by practice. On the contrary, the way firms are run, with an emphasis on narrow specialism, individual billing targets and the indulgence of stars, militates against the culture of teamwork, collegiality and mutual support to which they say they aspire. The expression "silo thinking", a focus on one's own practice area and disinterest in the wider firm, has become a cliché, but for many reflects reality. There are real consequences in lost opportunities, and depleted morale.

If change is to happen, it must be led from the top. The US has just inaugurated a new President. On 20 January 1961, it inaugurated President John F Kennedy, and his address will be forever remembered for this phrase, which has been adapted and quoted endlessly by leaders in all walks of life: "And so, my fellow Americans: ask not what your country can do for you — ask what you can do for your country."

It's a perfect encapsulation of the perspective that brings the greatest benefit to the greatest number. The person who tries to live sincerely by this precept is not some naive paragon, but one who appreciates that as well as being good for society at large, it is good for them individually. The essence of the human instinct for reciprocity is that if we do someone a favour, they are hard-wired to want to pay us back. Going out of our way to fashion opportunities for colleagues, or support them through difficulty or just take a sincere interest in their world, builds a reservoir of trust and goodwill that sustains and advances our own careers. Clients stick like glue, and are inclined to reward more handsomely the advisers who they know go the extra mile and consistently make sincere, visible investments in the relationship. Nobody ever built a successful professional network who was known only as a taker.

Oration is rarely enough. Build into the rhythm of firm life that teams meet regularly to look forensically at one another's businesses, identify where mutual opportunities lie and make plans together to pursue them. There is a powerful case for making a formal metric in appraisal of the extent to which people support, mentor, collaborate and work to deliver the whole firm, not just their corner of it. As we claw our way out of a historic human disaster and economic slump, it's reciprocity's ancient power that will lead us to herd immunity.

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

TRUSTS

TRS: more trusts, more information, more access

The anti-money laundering measure, the Trust Registration Service, is being extended, with many more trusts being required to register, and solicitors need to start identifying which ones will be caught

HMRC's Trust Registration Service (TRS) was set up in 2017 to address the requirements of the Fourth Money Laundering Directive and provide information and transparency on trusts to help in the fight against money laundering and terrorist financing. All trusts which incur a liability to any UK tax are already required to register, and the information on the TRS must be kept up to date whenever changes occur.

As part of the implementation of the Fifth Money Laundering Directive (5MLD), TRS is about to undergo some significant changes:

1. More trusts will need to register.
2. Information held on TRS will be more widely available (but not to the general public unless they have a "legitimate interest").
3. Taxable trusts (which should already have registered) will have to provide more information about their "beneficial owners".

The vast majority of trusts which are dealt with by Scottish solicitors are private family trusts, and the prospect of money laundering involving them is extremely remote. Trust structures have been used to mask money laundering in Scotland and further afield and, as with so many regulatory requirements, all the conventional innocent structures have to comply so that the authorities have a better chance of identifying those who are not so innocent.

We will mention later the arrangements for access to trust information on TRS, and the requirement to register some non-UK trusts if they acquire UK land or property or enter into a business relationship with a UK adviser, both of which have given rise to considerable concern. For Scottish solicitors, however, the most immediate priority will be to identify the large number of further trusts which will need to be added to TRS, even although they do not currently give rise to a UK tax liability (and may never do so).

Timetable

The new regulations setting out these requirements came into force on 6 October 2020, and trusts which are now required to register have until 10 March 2022 to do so. New trusts set up after 9 February 2022 must register within 30 days. Of course the HMRC system to allow all these new registrations isn't ready yet, but we are told it should be available in "early spring" 2021.

So what trusts will now need to register? Essentially *all* UK-resident express trusts come under the new rules, *unless* they are covered by one of the exemptions specified in the regulations. Express trusts are those deliberately created by the settlor in lifetime or on death, rather than by court order, statute or other legal provision. The exemptions are generally categories of trusts which are deemed to be low risk for anti-money laundering purposes or are adequately regulated already.

"For Scottish solicitors the most immediate priority will be to identify the large number of further trusts which will need to be added to TRS"

Exemptions

The main exemptions affecting our practices are:

1. UK registered pension trusts.
2. Charitable trusts which are regulated in the UK.
3. Certain trusts incidental to commercial transactions or used as part of the infrastructure of financial markets.
4. Trusts for vulnerable beneficiaries.
5. Trusts for bereaved minors, and 18-25 trusts (both these categories can only be set up under a will for the deceased's children, not other beneficiaries).
6. Personal injury trusts.
7. Trusts holding only pure protection life insurance policies. This will include term, critical illness and disablement policies but not whole of life policies or investment bonds.
8. Trusts in existence on 6 October 2020 which hold less than £100. These are essentially "pilot trusts", which have been put in place to receive more substantial assets in the future, possibly from a pension plan or will. Pilot trusts created now will have to register, as will older pilot trusts when they receive additional assets.
9. Will trusts created on death which only receive assets from the estate and are wound up within two years of the death. This could cover discretionary or liferent trusts created in a will which the executors decide not to activate, or specifically a two-year discretionary trust designed to take advantage of IHTA 1984, s 144.
10. Trusts which receive only death benefits from a life insurance policy which are then wound up within two years of the death. Most such trusts are wound up very quickly after the death, but this exemption will help trusts which only hold term policies (see 7 above).
11. Co-ownership trusts where the trustees and beneficiaries are the same people. This exemption mainly addresses the English situation where joint ownership of a property or even a joint bank account creates a form of trust, a complication which we are largely spared in Scotland.

One notable absence from the list of exemptions, despite many representations to the contrary, is bare trusts, despite the fact that they are not really trusts at all. Bare trusts *will* have to be registered unless they come under one of the specific exemptions.

Non-UK resident trusts

Non-UK resident trusts will have to register if they have at least one UK resident trustee and they either:

1. enter into a business relationship with a UK adviser which is expected to last more than 12 months (for example, investment management or continuing legal or tax advice), *or*
2. acquire UK land or property.

Non-UK resident trusts with *no* UK-resident

trustees must also register if they acquire UK land or property, but *not* if they only come under the business relationship test. Trusts which have to register only under this category will not have their TRS information made accessible.

Information required

All trusts being registered must provide information about each beneficial owner, including their name, country of residence, nationality and the nature and extent of their beneficial interest. Taxable trusts must also provide information about the trust assets and value, although this does not normally need to be updated regularly.

"Beneficial owner" is essentially the term used for any of the parties involved in a trust, even although a Scottish interpretation would not ascribe any ownership, beneficial or otherwise, to most of them. However 5MLD and its predecessors have been drafted largely by officials from countries which don't use or recognise trusts at all and can't understand why anyone would be involved in an arrangement if they didn't have what we would understand as a beneficial interest.

So for the purpose of TRS a beneficial owner includes a settlor, trustee, protector, beneficiary, class of beneficiaries and any other individual who has control over the trust. Where beneficiaries are identified as a class (for example, the issue of a particular person) and the class is not yet fully identifiable, it is sufficient to provide a description of the class. That changes if any individual beneficiary receives any payment or asset from the trust, at which point their personal information must be added.

Access to TRS information

The government recognises that the vast majority of trusts are established for legitimate reasons and, particularly because trusts are so widely used in the UK, has sought a proportionate solution to the information sharing obligations imposed by 5MLD. Access to TRS information is available to four distinct groups:

1. Law enforcement agencies.
2. "Obliged entities" – essentially firms who are themselves subject to the requirements of 5MLD – these do not have access to TRS itself but must see a copy of the trust's TRS entry before entering into a business relationship.
3. Third parties with a legitimate interest in obtaining the information. The decision on whether the interest is legitimate and whether information should therefore be released will be made by HMRC.
4. Third parties (not necessarily with a legitimate interest) if the trust holds a controlling interest in a non-EEA legal entity which is not required to register in an EU member state. The justification for this is that layered ownership of this sort poses a greater risk of money laundering or terrorist financing.

What must trustees do now?

A huge number of trusts will now have to register on TRS, so trustees and their advisers should start identifying those trusts and assembling the information which will need to be added to TRS, even although the deadline is still more than a year off and the system is not yet available for use.

Of course many people will not realise or remember that they have created a trust (particularly with life polices), or know that they are trustees, and HMRC has a communication plan to attempt to inform these people about the new requirements. HMRC recognises, however, that many lay people will not register their trusts and the penalty regime is deliberately "soft" to accommodate such situations.

That will not help us as advisers, particularly where we or our colleagues may be trustees of trusts, and each of us will have to develop a plan for identifying the trusts which need to be registered and gathering the information required. All this, and then dealing with the registration itself, will take time and cost money, and a major concern is whether clients (be they settlors, trustees or beneficiaries) are going to be prepared to pay for it.

There is a real danger that this additional regulatory requirement and the associated costs and potential loss of confidentiality will discourage clients from setting up or continuing trusts, even though the protections which they provide for the trust assets and beneficiaries can be absolutely vital and cannot be provided as effectively by just about any other type of structure.

So the challenges for trust advisers are twofold, not just explaining and complying with the new TRS requirements (and getting paid for doing so!), but also being ambassadors for the trust concept and the many situations where a trust can benefit individual clients, families and businesses.

Ian Macdonald
is head of private client, Wright, Johnston & Mackenzie LLP

Annie Pearson
is a senior associate, Wright, Johnston & Mackenzie LLP

RISK MANAGEMENT

A proper conclusion

Planning ahead is needed as much in relation to closing down your practice as in other aspects of business, says Matthew Thomson of Lockton, as he brings some tips on matters to think about in advance

"By failing to plan, you are planning to fail"

This quote from Benjamin Franklin applies just as much to closing down a law firm as it does to any other area of legal practice. As always, preparation is key.

Where possible, solicitors should plan carefully for ceasing practice, well in advance of actually doing so. All firms should undertake some form of planning. While this might be part of a broader retirement strategy or succession plan, the closure of a practice can sometimes happen sooner than anticipated. For example, financial difficulties or unexpected illness can lead to principals giving up their practice all of a sudden. As such, even where solicitors have no plans to close their firm in the near future, it is often sensible to carry out some form of contingency planning in the event of such issues arising.

Managing the process

Where a practice is ceasing, arrangements need to be made for how ongoing business will be transferred, how client files will be dealt with and how accounting procedures are to be completed. It is critically important to communicate with clients throughout the process, providing them with plenty of notice to allow them to transfer any ongoing business.

In order to close a practice effectively, as a starting point we would strongly encourage practitioners to follow the Law Society of Scotland's Ceasing a Practice Checklist. This will prove extremely useful to solicitors in covering off the many aspects that need to be considered when winding up (or ceasing) their firm.

As outlined above, planning is key. Your firm's risk management procedures should include having a plan in place for an orderly closedown.

In your plan, you might want to consider:

- how clients will be informed, well in advance of the closure;
- how you will ensure that you do not take on new work that could continue beyond the intended closure date (such as litigation, complicated executries or conveyancing matters);
- who else needs to be notified of the closure – for example, the Society, Lockton, your bank and any other relevant organisations and authorities your firm has dealings with;
- how active matters will be transferred to a successor firm or another firm;
- dealing with client files, including archiving and indexing closed files and letting a third party know where the files are stored (see paragraph below);
- compliance with GDPR requirements and preserving client confidentiality following closure;
- returning money on account to clients and any property that might be held on behalf of the client.

Where a file has been archived following closure, the defence of a claim under run-off cover is often made much more difficult in situations where the file cannot be traced. As such it is important to provide clients and others (e.g. the Society, former colleagues or another firm) with details of where files have been archived so they can be retrieved at a later date if necessary. This is particularly relevant to sole practitioner firms, where only the sole practitioner themselves might know where past documents have been archived. In these cases it is important for the sole practitioner to ensure that files can still be obtained in the event that the practitioner becomes uncontactable.

"Selling a practice as a going concern, at the desired price, can be challenging and requires strategic planning"

As a matter of good practice, you should notify any former clients who may be affected, for example those who have appointed you executor in a professional capacity and those clients for whom you hold documents such as wills or title deeds. That may be an opportunity for them to collect such documents and reduce your future archiving cost. It is important to obtain written acknowledgments from clients that documents or other client property have been returned. Again, that might help in the defence of a potential future claim.

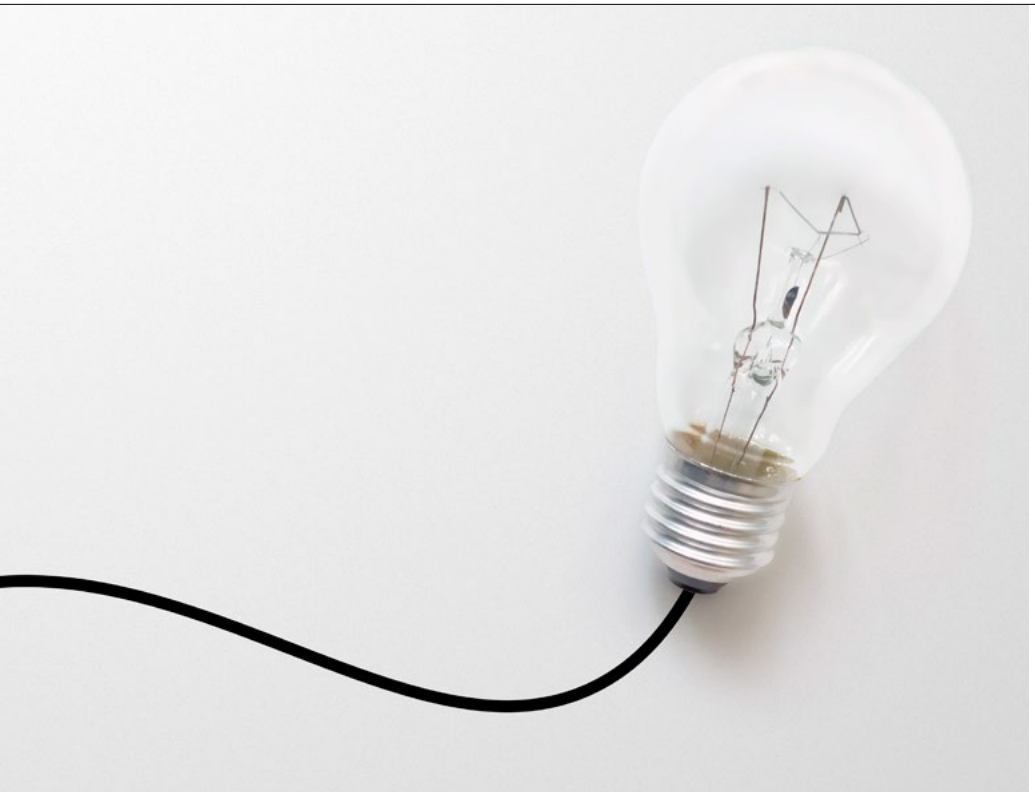
Retirement through merger and acquisition

Many sole practitioners and smaller firms will choose to sell their business as a retirement strategy. However, selling a practice as a going concern, at the desired price, can be challenging and requires strategic planning.

Practice mergers and acquisitions always need to be approached carefully, and principals considering this option should ask themselves the following questions:

- How good is our client book?
- How profitable is the business?
- Have we identified particular firms with whom the business has a natural fit?
- Have we carried out identity and other checks on potential buyers?
- Do we have a good claims experience?
- Is the acquiring practice taking on our firm's past liabilities (i.e. will it become a "successor practice"), or will we be responsible for insuring these?

It is essential that solicitors inform clients of any change in ownership before it happens.



Solicitors would clearly have to gain client consent to transfer files and any money in advance. They should therefore provide clients with sufficient information to allow them to make an informed choice about whether they continue to instruct the new firm (the firm once it has changed ownership) or take their business elsewhere.

Insurance and client protection

The Master Policy is provided on a "claims made" basis, meaning that cover applies at the date the claim is made, not when the error or omission causing the claim occurred. Losses on the Master Policy are therefore "long tail liabilities", meaning it can often take several years after the work was done for a claim to arise.

When a practice ceases and there is no successor practice to take on responsibility for any claims that might arise from historic work, the firm's Master Policy certificate will go into "run-off".

In run-off, the Master Policy continues to provide cover in respect of claims already intimated as well as any claims that are intimated after the closure of the practice, insofar as they are related to matters dealt with by the firm prior to its closing. Run-off cover continues indefinitely as long as the Master Policy arrangement remains in force.

This provides a significant degree of protection for both the public and for principals in law firms, who might otherwise face personal liability for claims that may arise after the firm in question has ceased.

Solicitors should be aware that, unless the practice is taken over and the acquiring firm accepts liability for the practice's past liabilities, the Master Policy cover must be placed into run-off when a practice ceases. The limit of indemnity provided in run-off will be whatever the mandatory limit of indemnity is under the Master Policy at the time the claim is made. The self-insured amount will be the same as that applying to the firm at the time the policy goes into run-off.

Depending on the nature and value of your work, you might want to take additional PI run-off top-up cover, over and above the £2 million.

Run-off premiums and top-up insurance

As stated above, the run-off cover remains in force as long as the Master Policy arrangement is in place and is paid for by a one-off premium charge. In some cases there may be no charge for run-off cover if the firm has been paying into the Master Policy for at least four years and has had no Master Policy claims.

There is no entitlement to a refund of the Master Policy premium paid for the year in which the practice closes.

If you purchase top-up professional indemnity cover at the time of closure, you may wish to continue to have added protection above the Master Policy £2 million limit. This can be arranged, but practitioners should be aware that top-up cover is annually renewable and will attract an annual premium charge.

Contact Lockton!

Any principal taking steps towards ceasing their practice in any circumstances should contact the Master Policy team at Lockton at an early stage, to discuss the various Master Policy implications and how these might affect overall costs of closing the practice. These include future premium rating, assessment of self-insured amount (excess) contributions in respect of past and future claims intimations, possible charges for run-off cover, and professional indemnity insurance top-up cover requirements.

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

FROM THE ARCHIVES

50 years ago

From "The Future of the Profession", February 1971: "The Law Society is supposed to speak for the profession in Scotland, and many matters of public interest are referred to it for comment... But does it speak out often enough at national and local levels on matters on which it is specially qualified to comment? It is surely one function of the Society to take a lead in the affairs of the country and make its voice heard on the issues of the time. There must be many issues on which the profession can and should without political bias at least make constructive comment. '*Humani Nihil Alienum*.'"

25 years ago

From "Trials of the Small Screen", February 1996 (on a first experience of taking children's evidence by CCTV): "The next day the sheriff called us into chambers. There was another problem. One of the two child complainers... had spoken so softly that none of her evidence had been picked up by the tape. A shorthand writer would have said to her, 'Sorry, but I can't hear you.' The tape machine had merely run on, recording questions but no answers. Various solutions were discussed... In the end it was probably just as well that the jury had so little difficulty acquitting the accused."

THE ETERNAL OPTIMIST

Putting the resolve into **resolutions**

Focus on small steps rather than big goals, and you may find it easier to carry out those good resolutions, Stephen Vallance believes

2021 stretches ahead, looking for now very much like 2020. How many of you have forgotten your new year's resolutions? Are you still struggling with weight, fitness or business issues that you promised yourself you were going to address this year?

It's a recurring theme. We know change is needed, but life and business keep getting in the way. We start with the best of intentions, but the motivation goes and things continue as before, leaving us bemoaning our lack of willpower or drive. Why is that, and what could we do differently to help achieve the outcomes that we want this year?

Habit forming

The "why" is fairly simple. Change is hard. Whether our diet, our exercise regime or the way our business operates, change is challenging: it hurts. We find the status quo easy. The current way is etched into us so deeply that we don't have to think about it. Doing it differently takes thought and commitment, and is uncomfortable at least until a new normal is created. Just think about anything you have failed to change in your business or personal life, and you will see an echo of this pain point. We all know the prize we are seeking, and at some level we know the effort will be worthwhile, but often it just feels like too large a mountain to climb.

Resolutions, new year or otherwise, are the worst. Why? Because we declare big goals and then expect quick results. For anyone who has dieted or committed to a 10k, you know how slowly the pounds come off or the kilometres go on – often too slowly, so we fall off the wagon and straight back into our old habits. As these new habits are not well formed, they are not yet etched deeply enough into our daily routines, so giving them up is easy. "I'm too busy today to make a salad", "I've had a tough day – I deserve a wine", or "I'm too busy to do business development" are all easy excuses to break the new routine. Once broken, most of us seldom re-commit.

"... starts with a single step"

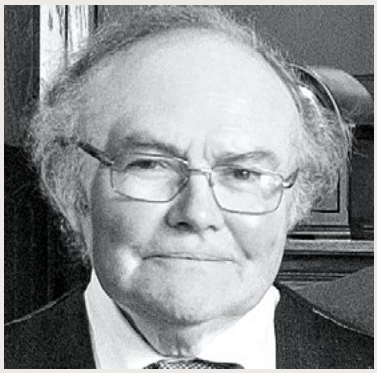
Let's take business development as an example of something we want to work on this year (the principles, though, work with everything). Here are a few things to do differently. First, commit simply to the change, not the goal. You know you want to be better, and initially that is enough. There is little to be achieved at this stage by setting big goals; you just want to be a little better every day. Next, look at the *minimum* level that you can commit to every day towards that goal, with little or no effort. Maybe it is just one phone call to a new prospect, or one letter to a client that you haven't heard from for a while. Whatever it is, it has to be so minimal that you know you can do it every day without fail, and that you will. Better yet, set a time to have it done by.

If you start on this path, a few things will begin to happen. Most importantly, you will be creating a new routine, a new good habit. There will be days when you do far more than the minimum: we all know that starting something is the hardest part, so once you've done your minimum you may find you are happy to do more. You are however safe in the knowledge that only the minimum ever *has* to get done. You are also released from the shackles of looking for a quick payback for your efforts. Anything will be a bonus, because you've not had to put much effort in. You might be pleasantly surprised.

I've sat with so many people who have shared great plans for change. The difference between those who succeeded and those who failed was universally that the former did something and the latter did naught. Change is hard, but it needn't be as hard as we make it, and success is always habit forming.

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

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



Professor Emeritus Robert Rennie

30 June 1947– 6 January 2021

Like many others, I was saddened by the news of Robert Rennie's sudden death. In an instant we lost a man who was a great inspiration to many and who made a stellar contribution to the Scots law of property. He was classic "old school" but, at the same time, he had a keen eye on developments which would improve legal practice and the underlying law.

Personally, he was an adversary, academic collaborator, colleague and, most of all, friend and on occasion mentor. Like the late Professor Alastair McDonald was to me and Professor Jack Halliday to him, Robert was above all an excellent listener and someone who always made time for you. That was, and is, a skill which only a few master and stems from an underlying care for other people. Robert had that in abundance.

Robert qualified as a solicitor in 1969, after studying at the University of Glasgow and training at Bishop, Milne, Boyd & Co, the firm of Professor Halliday who then held the (part-time) Chair in Conveyancing. Robert, in turn, held the same chair for 20 years until he retired in 2014, when he was given the title Emeritus Professor. In 1972 he joined the Motherwell practice Ballantyne & Copland – at the time, a significant piece of transfer news in the legal marketplace. He remained there until 2002 when he joined Harper Macleod, where he continued as a consultant until his death and contributed greatly to the work and, in particular, the ethos of the firm.

Robert was one of the few solicitors who combined a busy and successful legal practice with an academic career. He was a prodigious author of more than 150 articles and much-valued textbooks on a range of subjects including conveyancing, missives, execution of deeds, solicitors' negligence, the law of minerals, standard securities, land tenure following feudal abolition, and electronic conveyancing. One of his last contributions was his leadership in 2015 of a small group of authors on a much-needed detailed review of the Scots law of leases. His contribution to, and appetite for, legal study was immense, and it was difficult, if not nigh impossible, to turn down a request from him to collaborate on a project.

He also served on a number of advisory groups to the Scottish Law Commission, including those that considered proposals on feudal abolition; title conditions; the law of the tenement; leasehold tenure; and the law relating to the seabed and foreshore. He was a member of the Law Society of Scotland's Conveyancing Committee for more than 15 years, and convener for a period.

All of the foregoing led to him being in demand as a conference speaker and chair, as well as being someone the profession could turn to for an opinion on property law and professional negligence matters. Indeed, he delivered more than 4,000 opinions following his professorial appointment. He was the classic example of the old adage that if you wanted something done quickly, you should ask a busy person. Throughout, however, Robert displayed a generous attitude and a warmth of character and care for other members of the profession and clients alike.

It was always an honour and a pleasure to be asked to work with Robert, whether on an article, a book or in a conference. One such case was the *Essays on Conveyancing and Property Law*, gathered from 20 invited contributors from Robert's peers in the judiciary, academia and legal practice. The collection was published on Robert's retiral, when a special conference was held in the University of Glasgow followed by an informal dinner. Robert thoroughly enjoyed the day and was genuinely touched by the whole event.

As Douglas Cusine said in his appreciation, a lasting memory of everyone who encountered Robert was that he was always able to inject a bit of humour into the most serious of discussions, with a characteristic twinkle and an appropriate comment, very often with a straight face. He was, as they say, "one of the good guys". That said, it was sometimes a challenge to feel quite so charitable towards the "Little Professor" (as his long-time friend and colleague, Lord Bonomy, once called him), after you had been embarrassed at one of his end-of-year dinners for honours students to which he invited a select band of "senior members of the profession". Each guest knew to expect a colourful description of some facet of their past life which Robert had somehow managed to discover. He was an impish master of ceremonies at these dinners, which were enjoyed by everyone invited.

While we have all lost a valued professional colleague who, at all times, was modest and unassuming about his achievements, we also recognise a very sad loss to his family who provided the essential support which allowed Robert's career to blossom. Robert was a dedicated family man and his values were grounded on that essential bedrock in his life. He was a loving husband, father, father-in-law and devoted grandpa to seven grandchildren. His caring personality meant that he never forgot to ask after the family of others if they had been ill. It was, quite simply, a pleasure knowing and working with him. It seems almost insufficient to say that he will be sorely missed. Thank you, Robert.

(Professor) Stewart Brymer

ASK ASH

Trainee in a rut

How can I break out of only being given admin tasks?

Dear Ash,

Work has been particularly busy recently; and as a trainee I seem to be emailed about relatively mundane administrative tasks by colleagues, which despite not being very complicated can be quite time consuming. As I joined the firm shortly before COVID, I did not have the chance of much face-to-face interaction with more senior colleagues before having to work from home, and feel I have missed out on being able to develop relationships and be trusted with more complex pieces of work. I know I am fortunate to be working and I don't want to burden unnecessarily my overstretched line manager; however, I am beginning to feel more of an administrative assistant than a trainee lawyer, and this is only adding to my frustrations and impinging upon my mental health.

Ash replies:

As a trainee, please be assured that many of us also had to start at the bottom of the career ladder by initially dealing with more mundane tasks. This unfortunately seems to be par for the course. However, the initial period of training should also normally be peppered with legal work such as client interaction, attendance at meetings or court/tribunals, all of which you seem to be missing out on because of the restrictions. I suggest you come up with a few ideas on how you could improve your situation, and then consider presenting this plan to your line manager for further discussion; this way you will be viewed as taking the initiative rather than, as you fear, seemingly burdening them.

For a start you could request perhaps being allowed to attend any virtual meetings with clients in regard to the cases you are involved in. A number of hearings are currently online and you could again request your line manager to consider asking the relevant clerk to allow you to attend virtually due to your involvement.

I have recently attended virtual hearings myself which have included trainee lawyers and trainee social workers, therefore there should not be an issue with your attendance.

In order to make your allotted tasks more interesting, I suggest you consider setting up a call with the person managing the case to get more background; this will not only give you an opportunity to deal with colleagues on a one-to-one basis but will also help to provide more context and interest for the task in question, even if it is more of an administrative task.

With the introduction of the vaccine programme we are hopefully moving towards a light at the end of this long tunnel, so keep your spirits up and take care of your mental health.

Try to go for a walk and interact with colleagues or friends on a regular basis to allow you to vent and deal with your lockdown emotions. We all need a listening ear to get through this final stretch of the COVID marathon, so please do not feel you are alone.

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).

Royal Faculty invites new members

The Royal Faculty of Procurators in Glasgow is opening its doors to new members. Its council is accepting applications from solicitors and law firms until the end of March.

Incorporated prior to 1668, the historic society houses a comprehensive law library, and has embarked on a 10-year, £200,000 maintenance and renovation programme which will enhance the facilities at its A-listed building in Nelson Mandela Place.

There is also a small branch library at Glasgow Sheriff Court for practitioners' use.

Chief executive John McKenzie said: "We're delighted to welcome applications from new members at such a significant point in our history.

"At a time when budgets are constrained and the cost of purchasing legal resources continues to rise, it makes increasing sense for both large and small firms to rely on the collective resources available from our libraries. As well as the physical stock, we have electronic subscriptions to a range of online legal databases including Westlaw and LexisNexis.

"Our knowledgeable staff are happy to carry out research and answer questions. This has proved invaluable during COVID when people are working from home."

The Royal Faculty also runs CPD and trainee CPD seminars throughout the year, online during the pandemic. There are free seminars and social events offering networking and education for trainees and newly qualifieds.

Other benefits include access to an independent auditor and court feeing service, discounted room hire and preferential rates on book purchase.

Practice unit membership, which allows all lawyers in a firm to become members, costs from £49.50 per month for a one-partner firm. Individual membership costs £46 per month. Book Lending Scheme membership, available to practitioners outwith the Greater Glasgow area, costs £199 per annum.

For more details contact library@rfpg.org

Jane Barrie is a council member of the Royal Faculty

Classifieds

Irving Geddes WS, 14 Comrie Street, Crieff, PH7 4AZ (DX 566381 Crieff) have been instructed to deal with the administration of the estate of the late **Christopher Hannah**, who latterly resided at 4/2, 4 Brunton Terrace, Glasgow, G44 3DY and who died on 16th December 2020. Please contact David Geddes at Irving Geddes WS, if you have any information as to the whereabouts of a Will for the deceased.

William Crawford (deceased)
Would any Solicitor or other person holding or having knowledge of a Will of the late William Crawford, who died on 13 January 2021 and resided latterly at 15 Kennoway Drive, Glasgow G11 7TU, please contact Mrs Carole Johnston, Holmes Mackillop, Solicitors, 35 William Street, Johnstone PA5 8DR. Tel: 01505 328271 Email: cmj@homack.co.uk

Estelle Yonace (Deceased)
Would anyone holding or have knowledge of a Will by Estelle Yonace late of 49 Riverside Park, Linnpark Avenue, Netherlee, Glasgow, G44 3PG. Please contact John Jackson & Dick Limited, 48-50 Cadzow Street, Hamilton, ML3 6DT (pmilligan@jacksondicklaw.com)

IN ASSOCIATION WITH

BAILLIE GIFFORD

From law to long-term investments

How barrister Brenesha Cox made the switch

Brenesha Cox joined Baillie Gifford's Client Service Manager Programme nearly two years ago after working as a barrister and legal adviser in London and Turks & Caicos. Specialising in IP and commercial law, Brenesha had become increasingly interested in the work of her financial services clients, in particular how the management of capital can effect social change. When she saw Baillie Gifford was looking for people from a broad range of backgrounds, it became an exciting opportunity to take her career in a new direction.

We asked Brenesha what she enjoys most about her new career: "My last role was in quite a traditional culture, so I love the amount of autonomy I have as a Client Service Manager at Baillie Gifford and that I can be myself without any pretence. This enables me to really enjoy building long-term relationships with the clients and getting to understand their hopes and aims."

She went on to say that the client management and advocacy skills gained through her legal career have been useful in her new role, but there's also been a lot of support from the firm to make the transition.

"I started the programme as part of a group of six, all from different backgrounds, including oil and gas, retail and the special forces. We were given a comprehensive induction, that included an in-depth overview of the investment strategies, and have since received professional training to gain our industry qualifications."

As to the culture at Baillie Gifford, Brenesha describes it as forward thinking, a firm where people work hard but a nine to five day means they can enjoy the fruits of their labour. She also enjoys having the opportunity to continually develop her

knowledge by getting involved in projects, attending conferences or completing a secondment in one of the investment management teams.

If you're interested in transferring your skills from law to investment management, find out more about the Client Service Manager Programme at *clientservicemanager.bailliegifford.com*

Invest in a new career with Baillie Gifford

Client Service Manager Programme

Highly competitive salary + benefits

Edinburgh

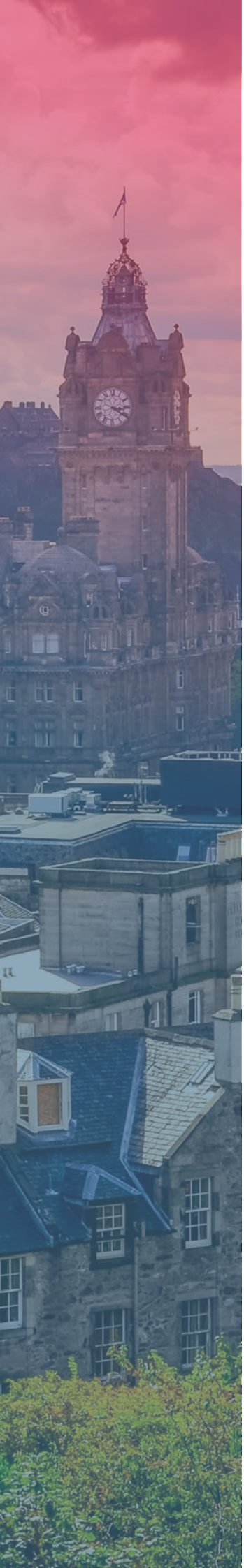
We're looking for legal professionals who are interested in taking their career in a new direction. If you're great at building relationships and curious about the world, this is an exciting opportunity to become a Client Service Manager at Baillie Gifford.

There's no one type of person we're looking for, but there are some key attributes that will help you flourish as a Client Service Manager. These include the ability to build rapport easily with clients and colleagues alike, and a flexible attitude that's open to new ideas and solutions. Financial services experience isn't necessary, as we'll provide a comprehensive induction to the firm and the investment management industry, as well as full support to study for professional qualifications.

To find out more visit **clientservicemanager.bailliegifford.com**

BAILLIE GIFFORD

Closing date for applications: 28 April 2021.



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Our aim is to ensure that you make career choices appropriate for you, and that you find the right position at the right time. We have outlined below some of our current roles at the 1 year - 4 years' pqe level.

Glasgow

Private Client

You will be involved in providing ongoing advice to a wide range of clients. You should have a genuine interest and enthusiasm for private client work. In addition to advising on wills, powers of attorney, executry administration and trust administration you can expect to be involved in advising clients on a wide range of complex matters including trust and executry disputes, estate planning for high net worth clients and providing advice to clients on trust and executry matters.
(Assignment 11930)

Edinburgh

Employment

You will primarily work with employer clients along with some individual advisory work and a mix of contentious and non-contentious matters. The ideal candidates should have at least 1 year's pqe in employment law, dealing with a mixed caseload of contentious and non-contentious matters and a desire to continue to work across all areas.
(Assignment 11925)

Insurance

Exciting opportunity to join a specialist defender-insurance practice. You will have exposure to all aspects of life in a busy team, and will undertake a wide range of legal activities, including drafting, assisting with investigations, taking witness statements and attending court.
(Assignment 11918)

Edinburgh or Glasgow

Corporate

This dynamic law firm currently have a need for a Corporate Solicitor to join its team in either Glasgow or Edinburgh. This is a prosperous position and you will be involved in a range of work which includes; incorporation and business services, company secretarial services, acquisitions and disposals, commercial contracts and the protection, exploitation and acquisition of Intellectual Property.
(Assignment 11869)

Channel Island Opportunities

Exciting opportunities within Global firms! We are currently working on positions across a range of practice areas including dispute resolution, corporate, banking, finance and funds. You must have gained experience from a top tier firm and have a genuine interest in relocating to the Channel Islands.

London Opportunities

Looking to relocate and progress your career with a high-flying London firm? We have been seeing an increase in instructions for Scottish qualified lawyers from City law firms as well as US firms. The key areas they are looking to recruit in are: Banking, Corporate, Employment.

For more information or a confidential discussion please contact Frasia Wright, frasia@frasiawright.com, Cameron Adrain, cameron@frasiawright.com or Teddie Wright, teddie@frasiawright.com on 01294 850501.

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Journal

Journal of the Law Society of Scotland

Index of published articles (paper and digital issues of the Journal magazine) January-December 2020

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