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Journal

Journal of the Law Society of Scotland

Volume 66 Number 3 – March 2021

Smaller prints

How to start reducing your business carbon footprint?
Some expert advice on managing emissions downwards

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YOUR ESSENTIAL
LAND & PROPERTY LAW RESOURCE

Commercial Leases in Scotland: A Practitioner's Guide, 3rd Edition

Kenneth S Gerber

It is vitally important for those dealing with commercial leases in Scotland to have a practical, easy-to-use guide taking you through all aspects of increasingly complex transaction. The 3rd Edition of Ken Gerber's text fulfils this role. This is anything but a dusty, unwieldy book, and is instead a tool providing plain English answers to any real-life queries you may have relating to commercial leases.

The text has been expanded and considerably updated since the previous edition in 2011, taking in all relevant changes to the law since that time. Major new legislation covering long leases, land registration and Land and Building's Transaction Tax are covered, while the full treatment on repairs and dilapidations has been significantly enhanced.

Author Ken Gerber has worked to develop the practical nature of the book, making it easier for you to find the required know how and work your way through complex issues. He has added four new chapters to this edition, in line with developments in this area of the law. These cover licensed premises and also premises for renewables. There is also a practical new chapter aimed at developing skills in negotiating and revising a lease.

Commercial Leases in Scotland provides comparative commentary on the relevant provisions under English law, imparting a far deeper understanding of this legal area and allowing solicitors and surveyors to understand the differences between the systems when seeking instructions from clients outside Scotland. To enhance ease of use, the book contains tables of statutes, cases and a glossary of Scottish commercial leasing terms.

Commercial Leases in Scotland is the go-to resource for anybody working in this area.

Make sure you're up to date with the most current aspects of Land & Property law.

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Law Society of Scotland

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

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

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Editorial
Connect Publications (Scotland) Ltd

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

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

Review editor: David J Dickson

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

Other Connect Publications contacts,
telephone 0141 561 0300

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

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Editor

Email > peter@connectcommunications.co.uk
Read > www.lawscot.org.uk/news-and-events/blogs-opinions/
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Starting up again

Spring is in the air, at least when the sun is shining, and as the sap starts to rise, so emotionally most of us look forward to (hoped for) good months ahead.

With it, this year, totally understandably, comes a growing desire, if not impatience, to be free of the restrictions that have added to the mental burden of the winter months, on top of what we endured last year.

Therein lies a difficult issue for government, reflected in a sharp division of public opinion. On the one hand there are those who argue that COVID cases are declining, most people in the vulnerable groups have been vaccinated, and individuals' wellbeing and significant sectors of the economy will both suffer perhaps irretrievable damage if there is not an early return to near normality. On the other, many respond that we have made the mistake of downplaying the risks before, a large proportion of the population are still capable of catching and spreading the virus, the vaccine is in any event not an absolute shield and you cannot isolate vulnerable people from the rest of society, and the claimed choice between health and the economy is a false one.

For what it's worth, in my view those last points are the clinchers. There is no question that individual liberty has been seriously compromised during the pandemic, to an extent that would previously have been considered unthinkable. But if a mutating virus is still at large, to whose benefit is it if we encourage activities that could yet reverse recent improvements in infection and death rates?

Easy answers there are not, and a judgment call has to be made as to the point at which freedoms can be increased without risking a rise in serious illness that would also re-burden our health service when it is due some much needed recovery time. But even that is not the end of the story.

At that point also, if not before, we must not lose sight of the needs of those whose livelihoods will remain at risk for a longer period due to their working lives and/or personal finances being thrown into disarray – many of them with no resources to fall back on. Emergency protections have been in place regarding housing rights, debt enforcement, welfare benefits and more, and the transition out of these will bring equally pressing questions. Lawmakers and policy makers alike have a heavy responsibility to ensure that the disadvantaged are not left behind in the rush to restart. The first announcements of support measures continuing through the summer are encouraging, but they need to evolve into a properly woven, and probably continuing, safety net.

Contributors

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

Kirsty MacArthur
is a director of consultancy MacArthur Green

Nikki Slowey
is co-founder of social business Flexibility Works

Sam Middlemiss
is formerly Reader at Robert Gordon University, Aberdeen

Gillian Baker
is a solicitor and PhD candidate at Edinburgh Napier University

Lesley-Anne Barnes Macfarlane
lectures in family law at Edinburgh Napier University

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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In practice

ONLINE INSIGHT

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Trading and charitable status: context matters

Alan Eccles considers the significance of the Court of Session's recent decision on charitable status for the entities running activities at the famous New Lanark heritage site.

A pensions decision for all court lawyers

A pensions dispute, tax issues, appeals by stated case and the court's dispensing power regarding non-compliance with its rules: all feature in a recent Inner House decision reviewed by Frances Ennis.

Offending tenants and eviction guidance

An appeal decision underlines the importance of landlords having regard to the statutory guidance in addition to their own policy, when tenants are convicted of offences connected with the property, as Jim Bauld explains.

COVID, QOCS and CPAP thoughts

Carly Forrest, Niamh Murray-Sheridan and Gemma Nicholson assess the likely impact on personal injury practice this year of the coming of qualified one-way cost shifting, and the emergence of COVID-19 related claims

OPINION

David Martyn

Since the pandemic, employers are increasingly resorting to "fire and rehire" practices to reduce workers' rights, and protections need to be strengthened

COVID-19 has thrown the practice of "fire and rehire" into sharp relief.

In aviation and hospitality, terms and conditions have been slashed. Employers have relied on temporary travel restrictions and social distancing rules to justify permanent removal of longstanding contractual rights – rights which will not be reinstated when restrictions are lifted.

While trades unions have mounted effective industrial campaigns against such attacks (most notably in British Airways and British Gas), is it time to consider more fundamental reform?

The notion that the state should interfere at all in the operation of private contracts is anathema to many. Why should an employer be prevented from varying the bargain when, as now, circumstances change?

The answer lies in the unequal bargaining power of the parties to the employment contract. As the Supreme Court reminded us last month in the *Uber* case, "it is the very fact that an employer is often in a position to dictate such contract terms that gives rise to the need for the statutory protection": [2021] UKSC 5.

Rights to the minimum wage, annual leave and sick pay would rarely find their way into an employment contract if matters were left to the market. Social policy demands that the playing field is levelled.

At present, statutory protection against detrimental contractual variation – primarily the law of unfair dismissal – is weak and ineffective. An employee is only unfairly dismissed if they can prove there were no "good, sound business reasons" for dismissing and re-engaging them on less favourable terms.

In practice, such claims rarely succeed. Dismissing someone in order to pay them less for doing the same job may be morally wrong, but many would define it as "good" business.

The power of the courts was stretched to its limits last month in a case brought by the USDAW union. Following record profits, Tesco told frontline distribution workers (yes, the same people who risked their lives to keep us fed) that a contractual benefit Tesco had described as "permanent", "guaranteed", and only to be removed by "mutual consent" would, in fact, be removed by dismissal and re-engagement.

USDAW argued that any steps by Tesco to bring about removal of such a benefit would, *prima facie*, be in breach of contract and an unfair dismissal. In the first case of its kind, the Court of Session agreed to interdict Tesco from issuing notices of dismissal for this purpose, albeit *ad interim*.

Though welcome, this is unlikely to be of wider application where less concrete contractual guarantees are at play.

A number of alternatives present themselves. Gavin Newlands MP has introduced a private member's bill which seeks to extend the list of "automatically" unfair reasons for dismissal to include any dismissal where "the reason... is to re-employ the employee on less favourable terms". The proposal has an attractive simplicity. It has garnered cross-party support, and BEIS has now asked Acas to review how "fire and rehire" tactics have been used.

While the UK Government has officially described the practice as "completely unacceptable", the bill may go too far for some on the right.

However, this is not a binary choice. Employee protections could be strengthened if, for example, an employer was obliged to show that proposed variations were justified by a genuine existential threat to the viability of the business, rather than just "good" business.

Alternatively, a statutory compensation tariff could be introduced, based on age, length of service and earnings. At present, terms and conditions are often bought out by employers at a fraction of their true value. Some sort of statutory floor would provide a degree of additional protection. It would also act as a financial disincentive against large scale changes.

Where there is union recognition, trade union rights should be clarified and strengthened. The Supreme Court is due to consider whether an employer can bypass a recognised union to offer incentives to vary contracts without union agreement. The unlawfulness of that practice should be placed on a statutory footing. Effective and sustainable "change management" of any kind is simply not feasible without the meaningful engagement of employee representatives.

In Scotland, the Fair Work Convention recently confirmed that fire and rehire does not meet its definition of a "fair work" practice in a modern Scotland. Although employment law is reserved, there are steps the Scottish Government can take. For directly employed public sector workers, why not introduce a clear guarantee into individual contracts that fire and rehire will never be used to bring about contractual change? Procurement, contracting and grant allocation policy could be used for wider impact.

It is clear that the economic insecurity caused by the pandemic has been used by opportunistic employers to impose damaging contractual changes on vulnerable workers, often with little economic justification. It's time for legislators north and south of the border to offer more than a round of applause to low paid, frontline workers. Removing the scourge of fire and rehire will not solve all the problems of precarious, insecure work; but, as someone said, every little helps.

David Martyn is a partner in the Employment team with Thompsons Scotland

VIEWPOINTS

Clubhouse: not so cool?

In last month's Journal, the "Tech of the Month" was Clubhouse, the new audio only social media platform, which was labelled "one of the coolest apps out there".

However, for anyone, and maybe especially lawyers, joining Clubhouse should come with a very big *caveat emptor*.

As pointed out last month, "the catch is, it's invitation only, so you'll need to know someone who's already signed up".

Be warned, however, that the catch is a much bigger one than that. To give out an invite you have to share your entire mobile phone address book with Clubhouse. Clubhouse then creates shadow profiles of everyone in your address book who has not yet joined the Club. You are then pushed to invite them to join Clubhouse.

More worrying, perhaps, is the fact that this practice connects you with people you might prefer never to speak with again. If a former "friend" has your number in their address book and joins Clubhouse, then even if you do not have their number in your address book the app will connect you up and even suggest you get in a room together.

Clubhouse ignores GDPR. Getting on board before they curb these privacy violations might not be a cool look for a lawyer.

Brian Inkster, Inksters

Appeal for stroke survivors

Six years ago, completely out of the blue I had a sudden and life changing stroke. I'm not alone in this: stroke strikes every five minutes in the UK, and around 1.2 million survivors are living with its devastating effects. Yet, despite this, research into stroke is severely underfunded. Just 1% of the total UK public and third sector health research spend goes towards stroke research.

When I had my stroke I was incredibly frightened and I thought I was going to die. But three weeks later, I was out of hospital and starting physiotherapy. Within months I was able to start working again. My recovery has been made possible thanks to stroke research, which continues to improve care and find new ways to rebuild lives.

The Stroke Association has launched a unique opportunity for stroke survivors, like myself, and those who care for stroke survivors, both informally and as health and social care professionals, to have our say on the future of stroke research. Partnered with the James Lind Alliance, the charity will find out what matters to us most so research can make the biggest difference to our lives.

With such limited funds for stroke research, worsened by the COVID-19 pandemic, it's vital that we come together and make our voices heard. If you're a stroke survivor, or you care for or work with someone affected by stroke, join me and speak up for stroke.

Don't miss your chance: visit www.stroke.org.uk/jla by the deadline of 21 March.

Chris Tarrant, radio and TV broadcaster

BOOK REVIEWS

Sentencing Rape: A Comparative Analysis

GRAEME BROWN
PUBLISHER: HART PUBLISHING
ISBN: 978-1509917570; PRICE: £75 (E-BOOK £67.50)

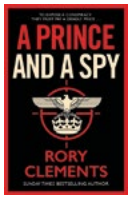
This is an important and timely book. Dr Brown provides not only a comparative analysis from English-speaking jurisdictions, but also the most detailed study on contemporary sentencing practice in Scotland in relation to rape and, by extension, other sexual offences. He also offers very important material on the seriousness of rape and the victim's role in sentencing, and on image based sexual abuse. The Scottish Sentencing Council is preparing guidance on the subject. Its literature review is explicitly limited in its scope. Dr Brown has, singlehandedly, done that work and provided a most important resource.

Dr Brown's knowledge of the law, the practice and the cases on sentencing in Scotland is, arguably, second to none and his chapter on Scots law is a masterly and comprehensive examination of the subject. It ought to be compulsory reading for anyone with any part to play in the process.

It is relatively easy to look south of the border for comparative material. The fact that he looks elsewhere in the English speaking world (Ireland, New Zealand and South Africa) is a strength of Dr Brown's work. The comparative study is the main focus of Dr Brown's book, but there are two other aspects which deserves to be recognised and applauded: first, his summary of research on the realities and psychological effects of rape, correcting the myth that acquaintance rape is somehow less serious than stranger rape; and secondly, the notice he takes of literature written from a feminist perspective.

Sheriff Alastair N Brown
For a fuller review see bit.ly/3t2McH9

A Prince and A Spy



RORY CLEMENTS
(ZAFFRE: £14.99; E-BOOK £7.19)

"A true thriller, carrying the reader with a superbly crafted tale along at pace."

This month's leisure selection is at bit.ly/3t2McH9
The book review editor is David J Dickson

BLOG OF THE MONTH

lawscot.org.uk

With schools only slowly reopening, homeschooling pressures on working parents will continue for a little while longer (this month's Ask Ash also covers the subject).

Practical suggestions for employers can be found in this blog from Andrew Laing, a senior solicitor in COPFS and its Health and Wellbeing Champion. "A loud and ongoing 'no guilt' message needs to come from leadership", he concludes. It's important that "we all hear positive messages again and again, which show us that our efforts are recognised".

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

Off the pace

RollOnFriday like to stick their necks out with their league tables of the best and worst law firms to work in, and this year's caught our eye – especially the employee comments from the latter. Mostly London, of course, so they wouldn't apply to your own workplace, dear reader... would they?

"There is very much a 'look-at-me' culture, encouraging narcissism, presenteeism and running around preening yourself... a finishing school for psychopaths."

"[Firm culture] all goes back to the clique that is in charge and the atmosphere of a medieval monarch's court."

"The firm habitually promotes individuals who in other walks of life would be terminated for improper behaviour."

"The dinosaur partners still run things... Here's hoping that the WFH revolution is about to kickstart real change."

But bottom came a firm charged also with incompetence, including a marketing letter to an unchecked mailing list. "The letter was sent by post to in-house lawyers who had left, retired or died."

PROFILE

Nick Taylor

Nick Taylor is convener of the Society's Rules, Waivers & Guidance Committee, a regulatory subcommittee

❶ Tell us about your career so far?

I was a pretty sub-par student and a rather disinterested trainee at Alex Morison & Co. I joined McGrigor Donald in 1996 in the Commercial Property team and started to enjoy being a lawyer and getting some responsibility. They sent me to London, and then Belfast in 2000, where I requalified and practised for a few years before coming back to Scotland. I'm currently a partner in the Real Estate division at Addleshaw Goddard.

❷ What led you to become involved with the Society?

I'd like to say it was a burning desire to give back to the profession, but it was done out of self-interest. The firm was encouraging extracurricular professional activities as part of a development programme. The Society had committee vacancies, so I thought that would tick the box. I was also in charge of the firm's trainee development programme for Property and thought there would be some overlap with Admissions Committee work.

❸ Has anything surprised you about committee work or the Society?

The immensely high quality of the people involved in the Society, both staff and volunteers, and the quality of the work undertaken was a bit of a revelation. There is an enormous effort and resource applied to making sure that fairness and propriety are achieved and the interests of the profession and the public correctly and proportionally balanced.

❹ Would you recommend being on a committee, and why?

Yes. (1) It's very interesting and rewarding. (2) You get to meet and work with hugely clever and talented people. (3) Your understanding of the larger profession will multiply tenfold. (4) It counts for CPD, so that becomes a worry of the past.

Go to bit.ly/3t2McH9 for the full interview

WORLD WIDE WEIRD

① Doc appearance

A plastic surgeon in California who was up on a motoring charge claimed to be available for trial by video link from his operating theatre, while surgery was in progress. The judge refused to go ahead.
bit.ly/385zLSJ

② Up before the beaks

The daily courtroom list at Manchester Crown Court on Monday 1 March showed the presiding judges in the respective courts as Mr Justice Goose, Mr Justice Dove and Mr Recorder Duck QC.
bit.ly/3kxxZMA

③ Karachi if you can

Police in Karachi, Pakistan have formed an armed rollerblading unit to get to crooks quicker after a wave of theft and harassment in the city's crowded streets.
bit.ly/3ccvrFh

TECH OF THE MONTH

Wysa

iOS, Android, free

If you're feeling a bit under the weather as lockdown restrictions continue, the Wysa app could give you a boost. It's a penguin-shaped chatbot that listens as you talk about your feelings. It then offers mental health advice, self-care tips and exercises based on the issues you discussed with it.

PRESIDENT

Amanda Millar

In the month of International Women's Day, the Society is supporting its #ChooseToChallenge theme – and challenging the SLCC over its draft budget, prospective MSPs over their policy priorities, and governments over the importance of the legal sector

So ... snowdrops on the out already and nearly at grass cutting time, rain permitting!

This month the Scottish Legal Complaints Commission's budget will be laid before the Scottish Parliament. The Society has highlighted again its deep concern and disappointment at the approach it is taking. At the start of the pandemic last year, the SLCC (which like no other public organisation is funded entirely by private funds) ignored the challenges of the pandemic to those it serves and who fund it – our clients and members – and went ahead with an increase. A year later, despite a drop in complaints, it is not proposing a reduction in levy but a freeze. We hear and read so much of being expected to do more with less: what, apart from badly drafted legislation, justifies this public body suggesting with a straight face that it should be allowed to do less with more?

Last month I spoke at an EU event in Brussels (from Perthshire, before anyone shouts "How come she gets to travel"!) about the challenges to our profession following the Trade and Cooperation Agreement between the UK and the EU. We continue to engage with governments on the concerns of legal services and the users of legal services, about the importance of the sector and client protection. I also highlighted that the Scottish legal sector was a jurisdiction open to working with its European counterparts.

We are hosting a round table this month between Iain Stewart MP, Under Secretary of State for Scotland, and members from across the profession to discuss these issues and to highlight challenges and opportunities.

More highlights

I have also met with Scottish solicitors from around the globe as part of my all-constituency engagement ambition. The value of the Scottish solicitor profession and the standard of its training must never be underestimated or diminished. Scottish solicitors deliver skill and value wherever they go and I am thrilled that a benefit of this pandemic for me has been the ability to meet, hear and learn from so many of them. From the feedback received, the opportunity to help them feel included while miles away has been an additional bonus that must be built on.

On the subject of quality training and the Scottish solicitor skill, it was a privilege to introduce eight members of our profession to Lady Wise for admission as solicitor advocates with rights of audience in our highest civil courts. Congratulations again to Naomi, Jane, Erin, Alasdair, Nikki, Kirsten, Suzanne and Emma. You are a credit to yourselves, your supporters and your profession.

In the month that hosts international Women's Day (#IWD), in a 12 months like no other, which across society has had a disproportionate impact on women – with cross-generational caring responsibilities, home schooling, household management, income concerns, and career development concerns where working from home is not their ideal – the Society has continued with the recent necessary theme of doing it differently.

This year's theme is #ChooseToChallenge and I appreciate all the members, covering a range of career stages, who wrote articles on this topic. All the posts will be published on the Society's website over the week of International Women's Day (from Monday 8 March), so if you missed them on social media you can catch up by reading the News and Events pages online.

As the Scottish Parliament election approaches (pandemic permitting), the Society has published its *Our Priorities* document, setting out the 40+ priority areas on which we will be pressing for progress over the next parliamentary session. While the Society will be raising these with political parties and incoming MSPs, the power to make change comes from the voices of you, our members. I encourage you to speak to your candidates and encourage them to read this document, and if they believe in a modern, dynamic, inclusive society with global ambition as we do, then urge them to act on the priorities that we believe will aid delivery and sustainability of these ambitions.

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

People on the move

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

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

ABERDEIN CONSIDINE, Aberdeen and elsewhere, has announced the following seven promotions:

to associate, **Sarah Jack** (Commercial Real Estate, Glasgow, right); and to senior solicitor, **Megan Hannah** (Family Law, Glasgow), **Erin Shand** (Corporate & Commercial, Aberdeen), **Tom Main** (Family Law, Aberdeen), and in Residential Conveyancing, **Stevie Kelman** (Banchory and Stonehaven), **Jordan Watt** (Peterhead and Ellon), and **Mairi Innes** (Perth and Dundee).

BALFOUR+MANSON, Edinburgh and Aberdeen, has announced two further promotions in its Litigation team: **Adelle Walker** to senior associate, and **Lauren Smith** to associate, both from 1 March 2021.

BTO SOLICITORS LLP, Glasgow and Edinburgh, is delighted to announce the recruitment of **Angus Wood** as a partner in its Commercial Dispute Resolution practice, based in the Glasgow office. Dual qualified to practise in Scotland and England, he joins from MACROBERTS, where he was a senior associate.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, announces the appointment of **Caroline Stevenson** as partner and head of its Financial Services Regulatory team. Dual qualified, she joins from WOMBLE BOND DICKINSON, where she was a legal director in the Financial Services team.

COMPLETE CLARITY SOLICITORS and SIMPLICITY LEGAL, Glasgow, announce the promotion of **Craig Chisholm** and **Shannon Gaughan** to senior solicitor, and the appointment as solicitor of **Dionne Hunter** (formerly with KINGSLEY WOOD & CO) and **Susan Grierson** (formerly with THE GLASGOW LAW PRACTICE). The firms' previous legal assistants, **Scott Stevenson** and **Siobhan Brown**, have been taken on as first year trainees, and **Kirsten Bruce** has joined as a first year trainee.

DENTONS, Edinburgh, Glasgow, Aberdeen and globally, has appointed **Claire Armstrong**, an investment funds and corporate finance partner in the firm's UK Corporate practice, to the newly-created role of Scotland managing partner.

DENTONS' Scottish private client team is joining SHEPHERD & WEDDERBURN from 1 April 2021. The 20-strong team, led by partners **Eleanor Kerr** and **Alexis Graham**, will continue to be based primarily in Glasgow.

DWF, Glasgow, Edinburgh and globally, has appointed **Ann Frances Cooney** as a partner based in the Glasgow office and leading its Employment practice in Scotland. She joins from ADDLESHAW GODDARD, where she was a legal director and head of the Glasgow Employment team.

INNES & MACKAY, Inverness, has appointed **Laura Cormack**, who first joined the firm over a decade ago as a legal secretary, as a director.

JONES WHYTE, Glasgow is delighted to announce the promotion of **Phulah Pall** to associate, and head of Immigration.

LEGAL SERVICES AGENCY (LSA), Glasgow, welcomes four new trustees: **Grant Carson**, director of Housing & Employment Services at Glasgow Centre for Inclusive Living, **Kirstie Cusick**, social movement development manager at SAMH, **Mhairi Reid**, evidence and influencing coordinator at the Life Changes Trust, and **Peter Beckett**, retired, whose expertise is in risk management, financial acuity, and effective process management. All have an overriding commitment to promoting access to justice.

LINDSAYS, Edinburgh, Glasgow and Dundee, intimate that, with effect from 30 March 2021, **Douglas Millar** and **Ken Stanley** will retire from the partnership. Lindsays wishes them both a long and healthy retirement.

ALLAN McDOUGALL Solicitors, Edinburgh have appointed **Alice Bowman** as a solicitor in the Employment Law team. She joins from THOMPSONS.

Andrew Phillips has been appointed compliance officer at the SCOTTISH FOOTBALL ASSOCIATION from 1 March 2021, succeeding **Clare Whyte**. Dual qualified in the state of New York, he joins from JONES WHYTE, where he practised as a solicitor advocate in criminal and regulatory defence.

SHEPHERD & WEDDERBURN, Edinburgh, Glasgow, Aberdeen and London, has appointed accredited specialist **John Vassiliou** as an associate in its Immigration team. He joins from McGILL & CO, where he was a partner.

SIMPSON & MARWICK, Edinburgh and North Berwick, has merged with ALSTON LAW, Glasgow. The Alston Law brand will continue for all litigation and debt recovery services, but property and conveyancing services, including remortgages, will now be part of Simpson & Marwick. **Denise Loney**, the outgoing managing director of Alston Law, will remain as a director with Simpson & Marwick.

Catherine Smith, advocate has joined COMPASS CHAMBERS from ARNOT MANDERSON ADVOCATES.

TENEU LEGAL has opened as a new immigration practice that its founder and principal, **Blair Melville**, hopes to run as a social enterprise. It is based at 2/2, 21 Thistle Terrace, Glasgow G5 0SJ (t: 07877 347695).

THORNTONS, Dundee and elsewhere, has announced the appointment as managing partner of **Lesley Larg**, an intellectual property specialist and partner with the firm, and a board member for several years. She will succeed **Craig Nicol**, who will stand down on 31 May 2021 after 10 years as managing partner, seven of them jointly with **Scott Milne**.

WOMBLE BOND DICKINSON, Edinburgh and internationally, has promoted **Richard Pike**, in the Private Client team in Edinburgh, to partner as one of 31 promotions across the firm's UK offices.

Womble Bond Dickinson has also appointed **Clare Lamond** as a managing associate in its Real Estate practice in Edinburgh. She joins from DWF.

Final call for the office?

The office is dead, right? Not so fast...

Many legal firms were quick to ditch bricks and mortar and adopt remote working. Others are now choosing a hybrid approach, opting to keep a physical base for occasional visits. Either way, it seems the traditional model won't be returning any time soon. If you are looking for innovative, hybrid working solutions, call us.

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What does the future hold for the legal office?

The first lockdown came on so rapidly that the effect was almost seismic for most firms. Working from home was what happened in the evening and at weekends and only affected the few.

Firms adapted as quickly as they could but for some it was easier than for others.

Here we are 1 year down the line and many of us haven't been back into the office since. So, what does that mean for the office building?

Big shock.

Santokh Chhokar, Senior Partner at Chhokar & Co. recalls the onset of lockdown:

"It all came as a big shock to us. You would never have thought that having your abilities to travel and associate freely would be restricted so severely in Britain."

He continued: "Some of our team absolutely loved the idea of homeworking and adapted quickly. Others were more wary and tested the waters with circumspection."

> *We recognise that a more hybrid approach to the office of the future may be the way forward.*
> **Santokh Chhokar**

"There is no doubt in my mind that the cloud aspect of our practice management software came into its own. It enabled us not only to carry on our work but also to recognise that a more hybrid solution to the office of the future may be the way forward for us."

Trial run.

Sneddon Morrison were ahead of the game. With uncertainty looming, Partner Eric Lumsden and his team trialled homeworking and then implemented it smoothly when the first lockdown arrived. Eric stated:

> *We don't need premises anymore and have already disposed of one. We may retain just one shop front office.*
> **Eric Lumsden**

"Of course, we had teething troubles, but we quickly resolved them and our team hit the ground running. Our cloud-based practice management system and other communication tools delivered the goods for us and the whole experience led me to take a long hard look at whether or not we need all our offices when things return to "normal"."

Back to the future?

Blair Cadell, have a different take on things. Managing Partner, Andrew Macdonald, believes the future of the office is assured:

"Delivering certain types of legal services remotely can be done effectively. However, our practice is a major provider of property and personal legal services which work best with the personal touch, and whilst use of Zoom or Teams video links have their place, in-person communications particularly for more elderly clients or those with complex requirements, will remain central to our strategy beyond the pandemic."

> *Whilst use of Zoom or Teams video links have their place, in-person communications will remain central to our strategy.*
> **Andrew Macdonald.**

Andrew added: "The key issues in our line of work are mutual trust and reliability. Face-to-face contact in an office environment is the best way to cement lasting, personal relationships."

Roundup.

Maybe it'll be back to normal before we know it. Whatever the case, there is no doubt in my mind that the law office of the future will be different. The challenges are technology, communications, recruitment, induction, storage and, if / when these can be dealt with effectively, then perhaps the office is no longer a place, but rather an experience?

To find out how cloud-based legal software can help you plan your future office, contact us on 0345 2020 578 or innovate@lawware.co.uk. Mike O'Donnell, LawWare Ltd.

Climate action: positive steps for progressive lawyers

Do you feel you should be doing something to reduce your business carbon footprint, but don't know where to start? Kirsty MacArthur offers some practical advice on the value of having a commercial climate change strategy

Images > Jade Starmore

I get a wave of panic and inertia when I think about climate change. I am not alone in that, and do you know what? It's OK to experience that feeling. Global heating is the biggest challenge of our time, so it isn't surprising that we feel overwhelmed. However, it is not OK to do nothing about it.

It is much more convenient to look to Government agencies, or just anyone else, to do something, but we all need to act to mitigate climate change.

We are all busy right now, whether supporting struggling clients through COVID, looking out for the mental health of our teams, friends, or family, or navigating home schooling.

It needs to be easy for people to make a positive change for the planet.

What can I offer? I worked as an environmental lawyer for many years before taking the leap into consultancy. My business made the transition to being carbon negative in 2019 (we have offset our emissions by a factor of two, at a cost of just over £2,100). We want to help others so we can all get carbon emissions down to zero quicker.

For us the long term plan had to be authentic to our business. With strong family ties to Argyll, we bought land and planted almost 30,000 native trees to create Lochgair Woodland. This will sequester 10,000 tonnes of CO_2 over the next 100 years. (Read about our story: link in digital edition.)

We are sharing our experience and knowledge to make it easier for time strapped businesses to make practical changes. This article is a practical guide, designed to help others make the move to net zero carbon or beyond. I hope it helps.

What do lawyers bring to the table?

As professional advisers, lawyers have a role to play helping clients avoid costly pitfalls. Just like health and safety and cybersecurity, climate change is an important risk that must be addressed in procurement questionnaires and contracts.

Climate change risks include physical risks such as security, business interruption caused by extreme weather, and flooding resulting in supply chain failures or reduced value of business assets.

There are climate change liability lawsuits for greenhouse gas emissions, which I will not go into here; suffice to say, on a very basic level, there is a negative reputational risk for businesses that fail to act. Others have made their move (Google, Microsoft, ScottishPower Renewables). You do not want to be the last person at the party.

So, let's get to work. First, look at your own business. (This advice will work equally well for clients; however, I suggest law firms will want to feel confident about their own position before advising others.)

Measure your carbon footprint

You need to know how much greenhouse gas you are emitting to understand your business impact on the planet (your carbon footprint). This will help you see where your emissions are coming from, and formulate the best plan for reducing them.

To get to grips with this, you need information on electricity and gas consumption, vehicle mileage, flights, and waste volumes, for example for the past year. All these are business costs that will be documented in your company finances. (Aside from understanding your emissions, it is a useful exercise that may help you identify more affordable, greener energy suppliers.) You will then need to find a carbon management consultant to guide your next steps.

You've measured your emissions; now manage them

Ideally, we want to be able to manage emissions down to zero. For most businesses this is not possible. I believe technology and innovation will eventually enable this to happen, but for now, we must do what we can. It starts with drafting a carbon management plan.

A meaningful carbon management plan will set year-on-year targets to reduce emissions. This might be from energy efficiency in offices, reducing waste, and travel.

Starting with offices, many businesses are tied to leases and energy-inefficient buildings. Find out how you can make changes to save emissions and business costs by getting in touch with Zero Waste Scotland. They have loans available for energy efficiency upgrades. Landlords may be interested in getting involved, to increase the desirability of their properties.

Turning to vehicles, moving any fleet vehicles to electric is more affordable with funding available from Energy Savings Trust for charge point installation grants and secondhand electric vehicle loans.

Flights could be one of the fastest ways to make a dent on your carbon emissions. They are one of the worst emitters of pollution, so how about introducing a "trains over planes" policy? (And

we all know how to use Teams and Zoom now.)

With energy use, try turning down your office heating by 1 degree – and your hot water thermostat while you're at it. Small changes can make a big difference over time. And change your energy supplier to one that uses 100% renewable energy.

Tackling waste has been fun for us. We opted for a wormery to tackle some of the food waste on site (thankfully our office has a balcony on the River Kelvin, so the worms remain an outdoor feature).

Emissions you cannot reduce (yet)

It's now time to look at offsetting. This is only for emissions we can't reduce. Offsetting without making meaningful reductions to your emissions is referred to as greenwashing: throwing money at the problem without making the tough behavioural changes.

Offsetting is going to look different for everyone. For us, offsetting had to have a distinctly Scottish flavour; it had to be tangible, nature based, and involve the land. Read about how we did it: link in digital edition.

You may be keen to act quickly and move on, safe in the knowledge you have done the right thing. Alternatively, you may want a tailored approach that shows your clients your company values, using the opportunity to unite your team behind a common, greener vision of the future. Workshopping this with your colleagues is an exciting opportunity for team collaboration. Ask them to vote for the offset projects close to their heart. It could be tree planting, or you might feel strongly about clean water supplies or renewable power projects in Africa.

This approach will raise awareness in your team about what you are doing, and perhaps encourage discussions on how to do more. It will certainly help attract new recruits (it has for us).

However you proceed, it is important to research offsetting schemes that are verified. This will give you confidence as to the security and longevity of your chosen projects. If you don't know where to start, avoid recreating the wheel and have a look at our carbon management plan to get discussions going.

Once your carbon is managed, make sure you get a process in place, a "how to" that you can easily repeat annually. Oh, and don't forget to sign up to the Race to Zero campaign and tell your team and clients all about your brilliant work.

526 woodland creation projects, 40% of them in Scotland, have registered with the UK's Woodland Carbon Code.

"We as lawyers are in a unique position as trusted advisers to bring about positive change"

Ready to do more?

This is for the more competitive among us! Once you have a plan for your business, you can go deeper and look at what your suppliers are doing. If you think about it, your true carbon footprint includes your supply (or value) chain as well.

You can use your purchasing power to advise suppliers that you will be preferencing suppliers based on their carbon awareness and whether they offset. This will need time to implement fairly, but communicating your intention will clearly signal your plans.

How to have a carbon conversation

We as lawyers are in a unique position as trusted advisers to bring about positive change. Whether as traditional advisers, in-house legal, seconded, trainees or board members, we bring an inherent understanding of business risk, and climate change is the biggest risk of our time.

Lawyers are brought in for our expertise and knowhow in particular areas; our strategic advice is sought after and valued. As such it is absolutely appropriate for you to ask what your company or client is doing about climate change and how it is reducing its carbon footprint.

For newer lawyers, this might feel a bit bold; for more experienced lawyers it might feel out of place to voice a concern on a topic that is not your area of expertise. Fret not. Climate change is on everyone's radar in one way or another and we are all learning. What will be awkward is if clients ask first and we don't have the knowledge to talk authoritatively about it.

COP26 is coming, and all eyes will be on Scotland: investors, future clients, world leaders, decision makers. It is key that law firms and their clients have a clear understanding of their own carbon story.

There may not be an obvious initial opportunity, but team meetings and boardroom agendas are the perfect place. Get carbon and sustainability on the agenda so an awareness of the risks and opportunities can start to percolate through daily thinking and business operations.

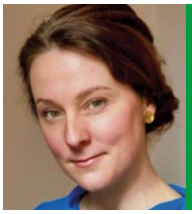
It might feel uncomfortable for some as the full picture of our emissions emerges, and it should! We have work to do, but then so does everyone. We can't walk away.

Make your move!

Calculate your carbon. Actually do it. Even on an individual level, just take that first step. Do not hyperfocus on micro details; getting it broadly right is better than it going in your "to do" pile. Try the WWF carbon calculator. (Others are available.)

I love the analogy of the climate crisis being like a relay race. If none of this has provided you with an impetus to make a positive carbon change, perhaps try thinking about the baton we are passing on to our kids. Extinction of television-worthy, rare and beautiful species is just one part of it. If the mental load of climate change is overwhelming for us, the enormity of the task will be beyond repair by the time our children are making the decisions. That is not acceptable for any of us. I for one want to feel confident we have faced the situation head on and done what we can.

Restoring peatlands, a key carbon sink and biodiversity resource, to stop them releasing carbon is a Scottish Government priority



Kirsty MacArthur
is a director of MacArthur Green
www.macarthurgreen.com

Post-pandemic flexible working: not so remote

Remote working during the pandemic has shown how people want flexibility – but also that many miss the office. Nikki Slowey suggests how employers, including legal firms, can use this to their advantage as restrictions ease

COVID-19 has shaken up our working patterns like never before, but employers needn't fear the repercussions. It's true that people want more flexibility. But the vast majority want relatively small adjustments, such as a bit more homeworking or slight changes to start and finish times. Very few want to reduce their hours.

Our research, a survey of 1,002 Scottish non-furloughed working adults carried out by Jump Research, shows that 61% of Scots worked from home at least some of the time during the first wave of the pandemic, and nearly a third (29%) flexed their hours too, as they juggled work with homeschool, childcare, and other personal responsibilities.

While the pandemic necessitated these changes, and they have often been far from ideal – flexible working does not usually materialise overnight, or come with simultaneous childcare duties – the experience has proved to employers and employees that it is possible to work in different places and at different times and still meet business objectives. In fact, more than three quarters (76%) of 204 Scottish business leaders and managers we surveyed credit flexible working with helping their business survive the first wave of the pandemic.

Business case

It's well established that flexible working benefits business as much as the individual. Our research with business leaders shows 70% think flexible working improves staff loyalty, 67% say it increases productivity and engagement, and 66% say it reduces staff sickness and absenteeism. This backs existing findings that flexibility also helps companies recruit and maintain talent, reduce costs and improve employee mental health, wellbeing and work-life balance: CIPD factsheet on flexible working; ACAS research paper (links in digital edition).

Increased demand

It's true that people want more flexibility as a result of the pandemic. More than half (55%) of Scottish workers say they are considering requesting more flexibility, while 27% say they will definitely request it. But the type of flexibility they want is usually fairly small. Our research shows 45% would like more homeworking, 32% want flexitime (small amends to start/finish times), 21% would like compressed hours and 19% want occasional ad hoc changes. Only 13% want part-time hours and only 5% want a job share.

Some employers worry that embracing flexibility will result in large numbers working part-time with no one in the office. Our research shows this is a myth. Going part-time means reducing income, and not everyone wants to or can do this. Also, we know from feedback during the pandemic how much people have missed the office.

Hybrid future

Everyone's talking about a blended approach to home and office working. And many organisations are thinking about working hours as well as location. Among employers we surveyed, 61% said they expected to offer staff more homeworking after the pandemic, while 45% expected to offer more ad hoc adjustments and 44% said more flexitime. Greater flexibility is clearly here to stay, so how do businesses move off a crisis footing, reacting to Government guidance, on to something strategic – and practical – that truly works for employees and employers?

We've put together the guidance on these pages to help. Or you can visit flexibilityworks.org for information on how we can support your organisation, and free resources on how to work remotely, or manage remote workers.

Case Studies

Brodies

Pre-pandemic, just under a quarter of the firm's 750 colleagues had formal flexible arrangements, while many others worked flexibly informally.

However, the move to homeworking last March, and the way colleagues quickly adapted, have changed opinions towards flexible working further, says its People Engagement Director Kirstie Maclennan.

"There's been no impact on client delivery, which together with the benefits of working more flexibly, such as no commute, or being able to put washing on, walk the dog or get outside with your kids while it's daylight, has definitely changed people's views. The general consensus is that we will have a more blended approach between home and office working going forward, and that so long as client needs are met, it doesn't matter when or where we work. That's a hugely positive mental shift," she reports.

Wellbeing is a key priority and has accelerated in the last year. In the wake of further school closures, Brodies is supporting parents by allowing them to reduce their hours while schools are closed without reducing pay.

Maclennan comments: "Every one of our colleagues plays an important part in our firm's success, so it is important that we look after them."

DWF

Global legal business DWF employs about 150 people in Scotland and is beginning work on a post-COVID workplace strategy for its 4,000-strong international workforce.

Caroline Colliston, a corporate tax partner based in Edinburgh, said agile working was encouraged extensively pre-COVID, but the office, face-to-face meetings and traditional hours were still the "default" way to work.

Now, she says, "Our pandemic experience has proved we *can* deliver everything remotely and more flexibly, but not everyone is able to. On team calls some younger people in particular were more obviously struggling with homeworking: they missed the social interaction of the office and some were working from their bedroom or in shared accommodation."

The firm is asking for input from staff and forming employee focus groups to see how people want to work in future. Office space, working hours and travel are among topics to be discussed to inform the new workplace strategy.

Colliston adds: "Internally, most people want a blended approach between home and the office, while externally, I think law firms are starting to realise that their clients have lives too, and might have their own reasons for wanting a more flexible approach.

"It's clear we're not going back to the way things were. Now we have to work out the detail: how do we keep that sense of being a team, ensure line managers can fully support remote and office-based employees, and train and develop staff effectively? The benefits of flexibility – from wellbeing to productivity – depend on us getting these right."

Shoosmiths

Shoosmiths announced a new strategic approach to flexible working last summer, in part because of its experiences during lockdown.

At the time, CEO Simon Boss said: "The pandemic has brought about a seismic shift in how we work, and we've adapted to this with enhanced agility. It's not a case of going back to the old ways of working – we have chosen to embrace the change and do things differently, building on everything we've learned over the past few months."

Principal associate Jennifer Wright, based in Glasgow, joined the firm last August. She confirms: "Shoosmiths' attitude to flexible working was a major factor in my decision to join them. I am empowered to make decisions about how and when I work, so long as client service delivery is maintained. I work full time but use flexibility to better accommodate my personal life, whether that's exercise, cooking or walking my dog. Although I am looking forward to getting back into the office, I don't plan to go back to working the way I did before. A blend of remote and office working is far more appealing for my own work-life balance."

Shoosmiths' new strategy includes four working principles: an enhanced client experience that could be flexible; individual autonomy and responsibility for employees who can choose how best to get their job done; an assumption that flexible working requests will be approved unless there is a compelling business case otherwise; and a focus on output and performance, not when and where people work.

How to manage hybrid teams so everyone feels valued and motivated

1. Find out what people want and canvass ideas – People often want only small amounts of flexibility, and come up with team solutions themselves.

2. Be clear about who is available when and where – Use digital diaries and e-signatures as reminders.

3. Set up a team protocol – Involve the whole team in discussions about objectives/deliverables and how, when and where people are working and how to contact them. The team can agree how frequently everyone needs to meet face-to-face, formally and informally, and set core hours/slots for this. The protocol helps everyone feel included and informed, and can be reviewed regularly as circumstances change.

4. Invest in training and support for line managers – They may feel nervous, and training will ensure they establish positive, two-way communications. The onus should be on both sides to check in/update.

5. Model good behaviour from the top down – Ensure you have senior buy-in, and normalise flexible working by showcasing executive flexible work patterns.

6. Good communication – whether it's personal, or all-company, greater communication and honesty has helped firms weather the pandemic. Wellbeing is fast rising up corporate agendas and it all starts with being able to have a conversation.

Nikki Slowey is co-founder of Flexibility Works, which supports employers to develop more flexible workplaces

How to ensure you deliver for clients

1. Smooth team dynamic – Use the tips above to ensure teams working on external accounts know when colleagues are available and how to get hold of them quickly. Encourage colleagues to check in with each other and ensure the client knows who to contact.

2. Only agree flexibility when it works – Flexible arrangements should work for the employee *and* employer. If they don't, discuss alternatives that could.

3. Think about the opportunities – Shifting hours earlier or later can help match international clients. Or, perhaps you can afford to add some part-time senior strategic support when full-time would be beyond your budget. This can create training opportunities for junior employees too.

4. Remember clients are likely to be working flexibly too – They may need your team to work differently. Find out how they are working now.

5. Consider your reputation – Increasingly, organisations with more ethical practices are winning more business. Show how you consistently meet customer needs while also being a modern, flexible and caring employer.

Singled out: discrimination for living alone

Married status is among the protected characteristics under the Equality Act, but what can single people do when faced with workplace discrimination? Sam Middlemiss argues that despite its lack of recognition, the issue deserves to be treated seriously

The #MeToo and #BlackLivesMatter movements have placed a strong focus on equality for victims of harassment and discrimination. It therefore seems an opportune time to examine a longstanding area of inequality, namely discrimination against single workers. This arises from the fact that they are currently disadvantaged when compared with the treatment of non-single workers.

This commentator believes that this is an anomaly in the law that needs addressed quickly. This type of discrimination has become known as singlism (B DePaulo, *Singled Out*, St Martin's Press, New York, 2007), and the disadvantage suffered mainly consists of being excluded as a protected characteristic under the Equality Act 2010. The Act does not protect single workers, the divorced or those who were in a civil partnership which has been dissolved. The unfairness derives from the fact that the Act does prohibit discrimination in the workplace because of an employee's marriage or civil partnership status: S Middlemiss, "Relationship Problems: Employer's Liability for Marital Discrimination?" (2015) 44 CLWR (1) at 51-70. This article will consider the legal treatment of this category of worker under equality law and the case for reform.

According to the Office for National Statistics, the number of people living alone in the UK has increased by a fifth over the last 20 years, from 6.8 million in 1999 to 8.2 million in 2019, driven mainly by an increase in men aged 45 to 64 years living alone. Scotland has the highest proportion of one-person households at 35.0%, and London the lowest at 23.9%. These figures illustrate that single people are on the increase in society and in workplaces in the UK. With this in mind, this article will show that single people can often be treated less favourably than their colleagues who are in formal relationships. It will consider the impact on single workers of this unequal treatment, and their available legal redress, which is limited.

Singlism involves stereotyping, stigmatising, and discriminating against people who are single. However, before considering the legal position, it is important first to consider such research as has been undertaken to date into this problem in the workplace.

Dearth of research

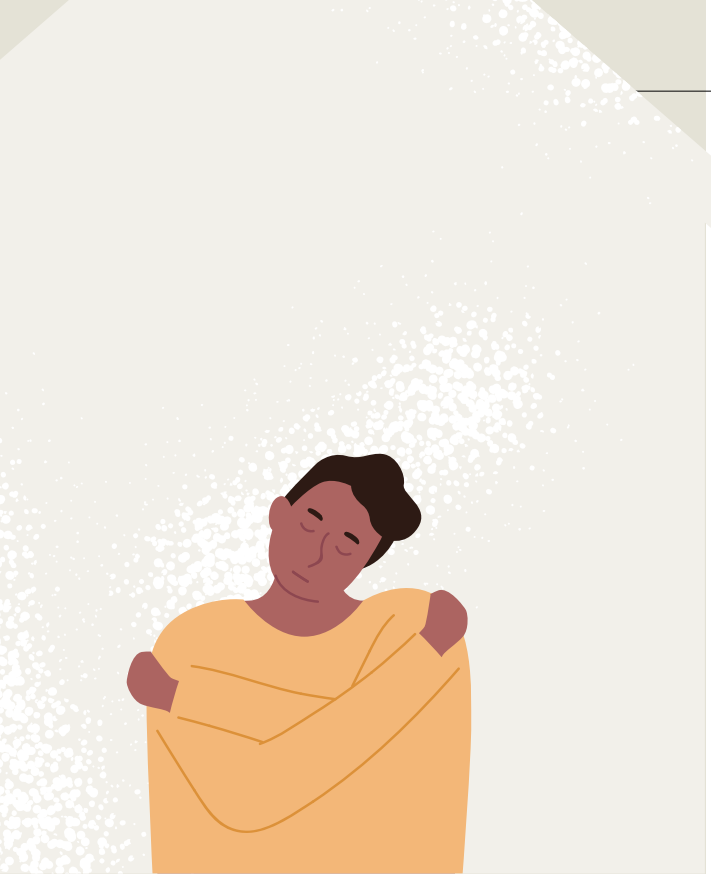
Unfortunately, there has been very little research into experiences of singlism at work in the UK. "Academic research on 'singleness' is surprisingly sparse and relatively underdeveloped, with few empirical investigations" (T Hafford-Letchfield, N Lambert, N Long, "Going Solo: Findings from a survey of women ageing without a partner and who do not have children" (*Journal of Women and Ageing*, 2016: bit.ly/3uUVQcc).

There have been only a couple of surveys undertaken in the UK to date. The first was carried out by a media company called Carat in 2006. It undertook a telephone survey of 4,000 people which revealed, among other things, that six out of 10 single workers claimed to have experienced some form of discrimination in the workplace because they were not romantically attached (*The Guardian*, 23 January 2006).

The most common forms of discrimination against singles complained about related to working hours and the social aspects of the job. It was found that 34% of single workers were expected to work more at weekends, 29% had to work longer hours, and 27% to attend more out-of-hours social functions than their colleagues in relationships. One in five said they had been expected to travel more for work than their colleagues in formal relationships. Interestingly, two thirds of single men said they had experienced at least one instance of discrimination, compared with 48% of single women. Younger single workers claimed to have it worse. Of those contacted, 70% of 16 to 24-year-olds said they had experienced discriminatory attitudes based on their single status, compared with 58% of 25 to 44-year-olds and 45% of 45 to 64-year-olds.

This research highlights the high incidence of discrimination against single workers and the nature of the workplace discrimination they suffer, with younger workers being particularly affected. (See also BBC Worklife, "How to say no at work when you don't have kids", 15 August 2017.)

Interestingly, the issue of whether someone has children can come up in the scope of considering the experience of single people at work. Clearly, being single does not preclude someone from having children. There has been some research into a different but related issue, namely the plight of childless workers. A survey of 25,000 workers by Opportunity Now found that two thirds of childless women



aged between 28 and 40 felt they were expected to work longer hours than colleagues with children. (Opportunity Now is a programme of the UK-based organisation Business in the Community (BITC). It functions as a separately governed initiative of BITC and is a business led, membership group for employers who are committed to creating an inclusive workplace for women.)

In the US, a survey was carried out in 2017 by Suffolk University. The researchers found that single workers were more likely to be sexually harassed by colleagues than their married counterparts: 42% of women who had always been single said that a co-worker had made unwanted sexual advances, compared with 30% of married women who reported being sexually harassed.

There is clearly a need for further research on a broader scale in both jurisdictions, given the high incidence of the behaviour identified in these studies.

Limits of marital protection

There are few cases involving discrimination against single workers, for the good reason that there is no protection for them under equality law. Most of the cases arise under the legal provisions dealing with discrimination against married workers or those in a civil partnership, so it is worth outlining the relevant law.

Discrimination on the grounds of marital status was originally unlawful under s 3 of the Sex Discrimination Act 1975. It is now covered by s 8 of the Equality Act 2010, which extends also to civil partnership. Section 8(1) states that a person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner. (Civil partnerships were originally introduced for same-sex couples to formalise their relationships. However, in recent times the right to enter into this arrangement has been extended to opposite-sex couples in most jurisdictions in the UK.)

While fewer claims on this ground are brought compared with the other protected characteristics, it is a type of claim that is not available to workers who are not married or in a civil partnership. It covers those who are married in a legally recognised union (different and same sex) and those who are in a civil partnership (of different or the same sex). It excludes anyone who is single, divorced, widowed or cohabiting. However, as will be seen, it is uncertain whether it excludes those who are engaged to be married. Thus, employers do not have to curb making assumptions about single workers that they are free and willing to be taken advantage of. This might involve overloading single workers with assignments that involve them having to undertake excessive domestic or overseas travel, or work unsociable hours.

In *Hawkins v Atex Group Ltd* [2012] ICR 1315 a claim for marriage discrimination was unsuccessful because it also involved discrimination against a separate single employee. In this case the claimant, a marketing director, was married to the chief executive officer of a company. She lost her job as a result of an instruction from the chairman that no member of the chief executive's family should be employed by the company in an executive or professional capacity because of concerns about perceived conflicts of interest. The CEO's daughter was employed by the company as the global human resources manager, and she was also dismissed. Given that, the dismissal of the claimant was held not to be discrimination because of marriage. Clearly, where a single worker is included in an employment decision that adversely affects a married worker it will invalidate any claim of marriage discrimination.

In *Pemberton v Inwood* [2018] ICR 1291 (CA), the decision was made to dismiss a church minister because

his marriage had broken down. The issue was whether the dismissal amounted to marriage discrimination. It was decided that where an employer would not have so treated an unmarried person (unmarried partners), they had treated the married person less favourably. This was almost certainly because of their conscious or subconscious attitudes to or assumptions about marriage, and this was direct marriage discrimination. Again, single workers are the appropriate comparators in claims of marriage discrimination.

Similar logic was used in the EAT decision in *Gould v St John's Downshire Hill* UKEAT/0002/20/BA.

And the engaged?

Interestingly, if someone is single but engaged to be married, they might be able to bring a claim under s 8. This is illustrated in *Turner v Stephen Turner* ET/2401702/04, where a woman was dismissed when her forthcoming marriage to her employer's son was announced. It was held she was discriminated against, contrary to the protection of married persons under s 3 of the Sex Discrimination Act. The case was decided by reference to articles 8 and 12 of the European Convention on Human Rights. The Employment Tribunal decided that when s 3 was considered in the light of these articles, it applied not only to married persons but also to those about to get married.

"What the review of the case law has shown is that there are very limited legal options under the Equality Act for workers who face discrimination because they are single"

An unsuccessful claim on a similar ground was made in *Bick v Royal West of England Residential School for the Deaf* [1976] IRLR 326. A woman who announced her intention of getting married to her employer was dismissed. The Employment Tribunal acknowledged that it was the intention of the statute to penalise employers who dismissed female employees when they were about to get married. However, they decided that the discrimination against her took place on a day when she was not married and had simply announced her intention to be married. The protection otherwise afforded to married persons did not apply. The correctness of this decision was cast in doubt by the *Turner* decision considered above.

Other options?

In *Gan Menachem Hendon Ltd v De Groen* UKEAT/0059/18/00, an Orthodox Jewish nursery dismissed a teacher when people found out she was living with her boyfriend without being married, something that was generally frowned on by the Orthodox Jewish community. After the discovery was made, the school asked her to write to the parents of her pupils and say that she had changed her living arrangements and was no longer living with her boyfriend, which was untrue. She refused to do this and was dismissed. The Employment Tribunal held that she had suffered from both sex discrimination and religious discrimination. However, the nursery appealed and the Employment Appeal Tribunal decided that only the sex discrimination and harassment claim could be upheld.

Dr Sam Middlemiss is formerly Reader at Robert Gordon University, Aberdeen

What the review of the case law has shown is that there are very limited legal options under the Equality Act for workers who face discrimination because they are single.

The single worker could claim discrimination under the Act, but it would be difficult to pursue a claim if the discriminatory action taken by the employer is taken against all single workers and not because of a particular protected characteristic. As has been shown in the research, single workers can be particularly liable to be harassed. The difficulty of bringing a harassment claim would be in showing that it was not only because of their single status but also because of one of the nine protected characteristics covered by the Act. There could be other actions that could be pursued under employment law in the UK, such as unfair dismissal or harassment under the Protection from Harassment Act 1997. However, these options are limited and will not be considered here.

Still at square one

The following quote identifies the process by which legal changes in a discriminatory context often take place.

"All serious forms of prejudice and discrimination go through a similar process of going unrecognised, then getting dismissed and belittled once people start pointing them out, and in the best cases, eventually getting taken seriously" (B DePaulo, "Singlism: How Serious Is It, Really?", *Psychology Today*, 9 September 2018). This form of discrimination would seem to be at the first stage of this process. For example, Acas in their 2017 guidance on *Marriage and civil partnership discrimination: key points for the workplace* make no mention of discrimination against single workers.

If there was a will amongst legislators in the UK to change the law to protect victims of singlism, this could be achieved pretty simply by an amendment of s 8 of the Equality Act to include single workers. Unfortunately, in the current political climate it will be difficult to persuade the legislators and policy makers that this change is desirable and necessary. As DePaulo also comments, identifying the challenge ahead: "I think there will be progress in getting singlism taken seriously, but it may be slow and unsteady, with setbacks as well as advances."

Hopefully, this article will play a part in persuading people of its importance.

Stronger shade of green

The Environmental Rights Centre for Scotland is a year old, and looking to expand its advice service for individuals and organisations, which has already highlighted the scale of need for access to justice on the environment

The Environmental Rights Centre for Scotland (ERCS) has just celebrated its first birthday. Our vision is of a Scotland where every person's right to live in a healthy environment is fully realised.

We are told that some of Scotland's environmental laws are world-leading, but we also know they are often poorly implemented. Moreover, the unequal impacts of COVID-19 have demonstrated how human rights and environmental protection are inextricably linked. This has put pre-existing aspects of environmental rights in the spotlight, from global biodiversity loss to the importance of local access to good quality green space. And the climate emergency has not gone away!

Systemic environmental governance problems include poor enforcement of environmental and related planning law; limited public participation in the planning system; and access to justice being prohibitively expensive and in breach of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The environmental governance gap is exacerbated by Brexit, with the loss of oversight of the European Commission and the European Court of Justice. Now more than ever, we need a dedicated organisation to increase the understanding and capacity within communities and civil society of legal rights and remedies in environmental matters, and to advocate for policy and law reform.

Meeting the need

Out of this crucible of unmet need and with the support of Scottish Environment LINK, the forum for Scotland's voluntary environment community, the Environmental Rights Centre for Scotland was formed.

Our mission is to assist members of the public and civil society to understand and exercise their rights in environmental law and to protect the environment. We will do this through:

- public education to increase awareness of legal rights and remedies in environmental matters;
- advice, assistance and representation to improve public participation in environmental decision-making;
- advocacy in policy and law reform to improve environmental law and access to justice on the environment; and
- strategic public interest litigation to enforce progress on key environmental issues and tackle systemic environmental problems.

Over the last year, as well as the mundane but necessary tasks of gaining charitable status, business planning and fundraising, we were able to pilot an advice service. Communities' concerns included loss of green belt, overdevelopment in conservation areas, impact of wind farm constructions, damage of hill tracks on the landscape, avoidance of environmental impact assessments, breaches of planning controls, permitted development rights, statutory planning appeals, habitats regulations and damage to ancient woodland. For environmental organisations, we were able to advise on repeat planning applications threatening wild land area, planning applications for commercial peat extraction, the dilution of public participation in environmental decisions following temporary modifications to planning regulations, and criminal liability for climate protest actions.

We have also contributed to the National Taskforce for Human Rights Leadership on the incorporation of a human right to a healthy environment in a new Human Rights (Scotland) Act, and keenly await its recommendations due next month.

What next?

Having evaluated our pilot advice service, we are excited to be recruiting now for an in-house solicitor to provide free comprehensive legal advice in a way which is practical, meaningful and easily understood. They will also play a critical role in the development and implementation of our public education programme and advocacy to improve access to justice on the environment.

As well as working to secure the incorporation of a human right to a healthy environment in Scots law and supporting its effective implementation, we look forward to a consultation on an Environmental Court as part of the requirements of the UK Withdrawal from the European Union (Continuity) (Scotland) Act. A specialist court or tribunal creates an opportunity to develop expertise, reduce costs and increase the speed of dispute resolution to achieve better outcomes for communities and the environment. We also advocate for reform of reg 15 of the Civil Legal Aid Regulations to ensure individuals and groups can access legal aid for public interest environmental cases and address legal aid caps. Together these two initiatives would go a considerable way to achieving full compliance with the Aarhus Convention and reducing barriers to public interest litigation.

The first year of ERCS has been an exciting journey in finding our feet within the environmental sector, making connections with other rights-based organisations and introducing ourselves to community networks – all via Zoom, and building a team virtually who have not yet physically met!

This next year will be one of confidently being able to support communities for environmental justice:

- by working to address the unequal distribution of environmental problems and promoting everyone's right to a healthy environment; and
- by advocating for fair, timely and affordable access to legal action as a last resort.

For further information on the Environmental Rights Centre for Scotland, visit our website: www.ercs.scot, or contact Shivali Fifield sfifield@ercs.scot.

Shivali Fifield
is chief officer at the Environmental Rights Centre for Scotland

denovo

The real reason the legal industry has been slow to adopt e-bundling

It was late 2020 when we received a request from one of our law firm partners about support filing an e-bundle. We were taken aback slightly. Not because the request was outwith the realms of possibility, but because it had not come from the solicitor directly, but from the court to the solicitor and then to us. This is the same court that, historically, has had an unyielding commitment to the paper archetype.

No matter how this request came to us or the reasons why, we knew we had to act fast! We went on the hunt for a solution to help lawyers create court bundles quickly, efficiently, and completely compliant.

Slow adoption to e-bundling

In reality, courts have been moving towards e-bundles for some time. Yes, some are modernising faster than others, but it would be wrong to continue describing courts or the legal industry as a whole as laggards. A persistent assumption in the world of legal tech is that the industry is technology averse, or at least risk-averse and doesn't want to try anything that would change its business model.

The real reason that e-bundling has not been fully adopted is because a lot of digital products out there don't actually work. They are cumbersome, non-compliant and don't mirror the way paper court bundles are created. Our experience is that lawyers and courts are very willing to adopt technology, especially nowadays, as long as it can meet their needs... and do it well.

Bundledocs – a digital tool to go paperless

We reached out to Bundledocs, who explained the top three reasons why their product has been built to truly replace paper with electronic court bundles. We fed this back to the client, who gave us the green light, and we immediately initiated an integration.

1. INSTANT ELECTRONIC COURT BUNDLES

- **No extra work.** Bundles created with Bundledocs will automatically produce your bundle in electronic format. Once complete, you can easily download in PDF, save against your client matter in CaseLoad, send, and even (gulp!) print.
- **Power of electronic bundles.** Even if you are required to print your final bundle, having an electronic copy available will always come in handy. For example, each bundle produced in Bundledocs is automatically bookmarked and the index (which is automatically generated) is fully hyperlinked too – one click and you're there. Better still, they offer inbuilt OCR functionality, so your final e-bundle is fully text searchable.
- **Create court bundles on the go.** As you're no longer tied to your desk and printer, you can create complete electronic bundles wherever you are. Work seamlessly with your case management system from any location, on any device, at any time.

2. COMPLETE COMPLIANCE

- **Instantly archive electronic bundles.** Solicitors should keep files for a lengthy period after completion – the Law Society of Scotland suggests 10 years for most litigation. Having the ability to save electronic records is great for those who want to reduce paper storage while following good practice.
- **Works with your system.** Bundledocs makes it even easier to archive electronic court bundles through the integration with CaseLoad. Documents are organised into a neat, sectioned booklet in minutes: all your court documents in one place – simple, easy to use, time-saving and massively efficient.

3. MAXIMISE SAVINGS

- **Reduce unnecessary printing costs.** Using tools like Bundledocs, you no longer need to print bundles unnecessarily. Produce electronically, collaboratively work with others, electronically share with anyone that needs a copy, and only print where you need to.
- **Work with anyone.** Do you need to work with colleagues in different offices? Or share bundles with clients? Or even collaborate with the other side? There are a range of features available to make document production simple – and save you time and money too.
- **Changes are instant.** Build your bundle up over time, make changes as you go, and save all the last minute stress. Make a change? Your page numbering is instantly updated with a single click. With no limit to the number of changes you can make, you can draft again and again until you get it just right.

What does that mean in practice?

It means that lawyers are now taking much less time to create bundles. Bundledocs takes all the pain out of ensuring that bundles are created on time and paginated properly. It simplifies a time-consuming task that until now required too much manpower and supervision, and negatively hit your profit margin. Not to mention the environmental impact.

No going back!

We can't see how we can go back from this point. E-bundles present no disadvantages, since no one is prevented from printing out their bundle if they want to. Digital delivery simply shifts the cost of this (environmentally questionable) practice to those who want it. It also removes the costs of distributing heavy bundles physically.

Interested in learning more about CaseLoad's integration with Bundledocs and how it can help solve your electronic document bundling woes? Email info@denovbi.com or call 0141 331 5290 and see why some of the most successful small to medium sized law firms in Scotland use Denovo as their whole practice management software solution.

There are two types of lawyers...

In time paper files will seem like smoking in the office, something we can't quite believe was routine practice!

Nowadays printing and taking hours to wade through piles of paper to create a case bundle isn't the smartest way to work. It takes time, effort and hits your profit margin, along with the environmental impact.

The CaseLoad and Bundledocs integration means you can be more efficient, with no printing, giving you more time and greater data security.

Case Management

E-bundling

No Printer

Email **info@denovobi.com**
Call **0141 331 5290**
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denovo + bundledocs

Child contact and protection from domestic abuse

Is legislation designed to protect children in Scotland from domestic abuse when contact orders are sought, achieving its purpose? For Gillian Baker, a recent decision illustrates that women's experiences of abuse are often marginalised

This year marks 15 years since the Children (Scotland) Act 1995 was amended so that family courts were required to have particular regard to the need to protect children from domestic abuse before making any s 11 order. The recent judgment of the Sheriff Appeal Court, *LRK v AG* [2021] SAC (Civ) 1, delivered by Sheriff Principal Pyle in January 2021, highlights the problematic approach taken by one sheriff to the requirement to consider the effects and risk of domestic abuse before awarding contact.

The case concerned an application for a contact order by a non-resident father to his daughter, then aged seven. A three-day proof at Livingston Sheriff Court took place in 2019, at the end of which the sheriff pronounced an interlocutor *ex proprio motu* adjourning the proof to another date in order that interim contact could take place. That interlocutor was successfully appealed (reported at 2020 SCLR 325; 2019 Fam LR 147), on the basis that it was incompetent for the sheriff not to issue a judgment following the proof. It is that subsequently issued judgment, awarding supervised contact, which was the subject of this appeal.

The grounds of this successful appeal focused on criticisms of the sheriff's approach to two critical matters: s 11(7A)-(7E) of the Children (Scotland) Act 1995; and the requirement to obtain the views of the child in terms of s 11(7)(b) of the Act. It is the first of those two issues that this article considers – i.e., the "abuse" and "cooperation" provisions under s 11(7A)-(7E).

Findings on abuse

The abuse perpetrated by the child's father on the mother in this case was established by a conviction that attracted a 12 month prison sentence, and his subsequent breach of a non-harassment order resulting in a prison term of five months. The abuse included his attempting to coerce the mother to eat dog faeces, putting petrol through the door of the house in which she and the child lived and threatening to set fire to that house with her and the child inside.

A finding by the sheriff that the father had perpetrated violence and other domestic abuse towards the appellant was unavoidable in the face of his convictions. The sheriff also concluded that the abuse "must have affected" the child adversely, and that the father had not cared about the impact on the child at the time he perpetrated the abuse. To this extent the sheriff partially addressed s 11(7A), finding as he did that (1) there had been domestic abuse, and (2) it had affected the child.

Protection from abuse

Thereafter gaps emerged in the sheriff's approach to the domestic abuse provisions. Despite his initial acknowledgment that the child had been affected by domestic abuse, the sheriff went on to conclude that the court "no longer needed to protect the child from domestic abuse". Key to this conclusion was the rationale that the domestic abuse was "historical", by dint of the fact that the parties had separated. In this respect, the Sheriff Appeal Court held that the sheriff erred in stating that "domestic abuse is no longer a factor [because] the historical abuse is not... sufficient to prevent an award of contact being made".

Sheriff Principal Pyle outlined that the sheriff's failure to take into account the relevant matters in s 11(7B) warranted the Appeal Court's interference. In particular, no consideration had been given to para (c), the ability of a parent who has carried out abuse to care for, or otherwise meet, the child's needs, and para (d), the effect that any abuse, or the risk of it, might have on the mother's ability to carry out her responsibilities to the child. The Appeal Court noted that the sheriff also failed to consider, as he was obliged to do by s 11(7D), the appropriateness of requiring the parties to cooperate with one another in pursuance of the contact order awarded in favour of the father. After consideration of the other key ground of appeal, the sheriff's failure to consider the child's view, the sheriff's decision was recalled, and the case remitted back to another sheriff.

"Rooted in the past"

The lower court's judgment in *LRK v AG* highlights the dangers of viewing past domestic abuse as merely a historic matter of little current relevance. Family lawyers will be familiar with the reductive characterisation seen in this case of domestic abuse being "rooted in the past". It ignores victims' lived experiences of domestic abuse, which include the continuation and escalation of abuse after separation.

Such decisions are based on the assumption, contradicting the research, that when an abusive adult relationship stops, the abuse stops too. Deeming such abuse irrelevant in a child contact case is also, as the Sheriff Appeal Court has now made abundantly clear, an error of law. It ignores the evidence of the risk of ongoing abuse after the parents separate. In *LRK v AG*, the child's father had also breached a non-harassment order, granted after the parties separated, and had been imprisoned because of it.

Ignoring experiences of abuse

Most importantly, *LRK v AG* also demonstrates the error that can befall judicial decisions when mothers' experiences of domestic abuse are ignored or dismissed. Sheriff Principal Pyle was critical of the sheriff's judgment, which

mentioned "very little on the mother's views on contact", and dismissed the social worker's evidence that the mother was "extremely fearful" of the child's father.

While caution is often the initial response to allegations of domestic abuse in contact cases, subsequent decisions generally adopt the "normative starting point" (Kirsteen M Mackay, "The approach in Scotland to child contact disputes involving allegations of domestic abuse," *Journal of Social Welfare and Family Law*, 40:4, 477 (2018)) of an award of supervised, supported or time restricted contact, with incremental increases being monitored by a series of child welfare hearings. Concerns about contact expressed by (mostly) mothers, and children's views on contact, are usually interpreted through a lens that assumes contact is best for them. Distress is sometimes normalised despite the definition of abuse at s 11(7C) including "*any*... conduct giving rise... to... distress". Despite the prevalence of domestic abuse and its known harmful effects on children (see panel for references), it is questionable whether its effects on its victims (including children) are any better understood in family law practice 15 years on from the protective legislation.

Opportunity for change

Research in Scotland has identified inconsistent approaches within the profession to the abuse provisions, and inadequate understandings of the dynamics and effects of domestic abuse among the judiciary (Richard Whitecross, *Edinburgh Law Review* 21:2, 269 (2017)). Building on these findings, I am currently conducting a qualitative study into child contact cases in Scottish courts involving allegations of domestic abuse (see author details for an invitation to take part).

Drawing on data gathered from in-depth interviews with mothers and solicitors, emerging results reinforce key findings from other jurisdictions (Adrienne Barnett, "Domestic abuse and private law children cases: A literature review", Ministry of Justice, 2020). Crucially, a *de facto* presumption in favour of contact is so strong, and domestic abuse and the lived experiences of women and children who are (mostly) its victims are afforded such low status, that domestic abuse is marginalised.

The Children (Scotland) Act 2020 introduces further amendments to the 1995 Act that centre on improving children's participation and extend special measures for the protection of parties who are victims of domestic abuse. These changes provide opportunity for renewed efforts to understand and address domestic abuse more effectively in the context of post-separation contact. A deeper understanding of how parents and children experience domestic abuse would end responses that, as in this case, ignore victims' fear of their abusers and force them to explain why they do not feel safe around their violent abusers. (For an example, see *LRK v AG* at para 5, quoting an exchange between the sheriff and the appellant.)

Practices and attitudes that require agreement on contact (no matter how well intentioned) have no regard for the power and control that abusers have over those they abuse. Responses to dispute resolution that work well even in high conflict cases are not suitable or safe as responses where risk needs to be assessed, and conspire to marginalise child welfare concerns relating to domestic abuse (B Archer-Kuhn, *Journal of Social Welfare Law* 40:2, 216 (2018)). To dismiss domestic abuse as irrelevant to parenting capacity is to prioritise abusers' rights to parent over their responsibility not to abuse and denies children the protection of the law. J

Domestic abuse and its effects

In 2018-19, 60,641 cases of domestic abuse were reported to the police in Scotland, 79% of which were perpetrated by men towards female intimate partners or former partners: Scottish Government, *Crime and Justice: Domestic abuse recorded by the police in Scotland, 2018-19* (2019). Actual incidence is likely to be much higher, as only 19.5% of people report domestic abuse to police: *Scottish Crime and Justice Survey 2014-15: Partner Abuse* (2016).

For the effects on children, see S Holt, H Buckley, S Whelan, "The impact of exposure to domestic violence on children and young people: a review of the literature" (2008) 32(8) *Child Abuse & Neglect* 797; E Katz, "Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed by and Resist Regimes of Coercive Control" (2016) 25(1) *Child Abuse Review* 46; E Katz, "Coercive control, domestic violence and a five-factor framework: Five factors that influence closeness, distance and strain in mother-child relationships" (2019) 25(15) *Violence Against Women* 1829; E Katz, A Nikupeteri, M Laitinen, "When coercive control continues to harm children: Post-separation fathering, stalking and domestic violence" (2020) 25(4) *Child Abuse Review* 310.

Gillian Baker
is a solicitor and PhD candidate at Edinburgh Napier University, undertaking a study examining mothers' experiences of contact cases involving allegations of domestic abuse in Scottish courts. The research involves telephone interviews with solicitors who practise family law in Scotland. If you would be willing to participate in the study, please contact **gillian.baker@napier.ac.uk**

A new welfare test: *plus ça change?*

The Children (Scotland) Act 2020 makes the most significant amendment to part 1 of the 1995 Act in 25 years. This article, the first of two by the author on the 2020 Act, discusses its re-enactment and augmentation of the welfare test

Why change – and why now?

The Children (Scotland) Act 2020 received Royal Assent on 1 October 2020. Its substantive provisions are not yet in force. Its passage follows two significant policy developments in the field of Scottish family law.

First was the 2018 Scottish Government review of the operation of part 1 of the Children (Scotland) Act 1995, which involved a lengthy public consultation.

The second development was the creation, in 2019, of a new Family Justice Modernisation Strategy, the aim of which was to refine both the legal principles and practical processes governing family court cases. "Family court cases" is the Scottish Government's term for family proceedings raised by private individuals under part 1 of the 1995 Act. Typically, such cases involve disputes over residence and contact, although a range of other orders can also be sought in terms of the current s 11.

Many of the amendments made by the 2020 Act are intended to align the 1995 Act better with the contemporary interpretation of article 12 of the United Nations Convention on the Rights of the Child ("UNCRC"). Article 12 is concerned with the child's right to be heard, and to participate in decisions concerning them. The changes relating to the UNCRC are particularly noteworthy at this time because a bill to incorporate this Convention fully is currently at stage 2 before the Scottish Parliament. (That bill now provides that it will come into force 12 months after Royal Assent.) The new responsibilities in respect of children's participation are discussed more fully in the author's second article.

Where family court cases are concerned, the 2020 Act also provides additional safeguards for vulnerable parties and witnesses, and for increased training and regulation of professionals appointed by the court to liaise with children and families involved in proceedings. These include child welfare reporters, curators *ad litem* and contact centres. However, one of the most significant changes made to the 1995 Act (there are others relating to public family law legislation) is the reworking of what has long been termed the "welfare test", currently found in s 11(7)(a) and (b).

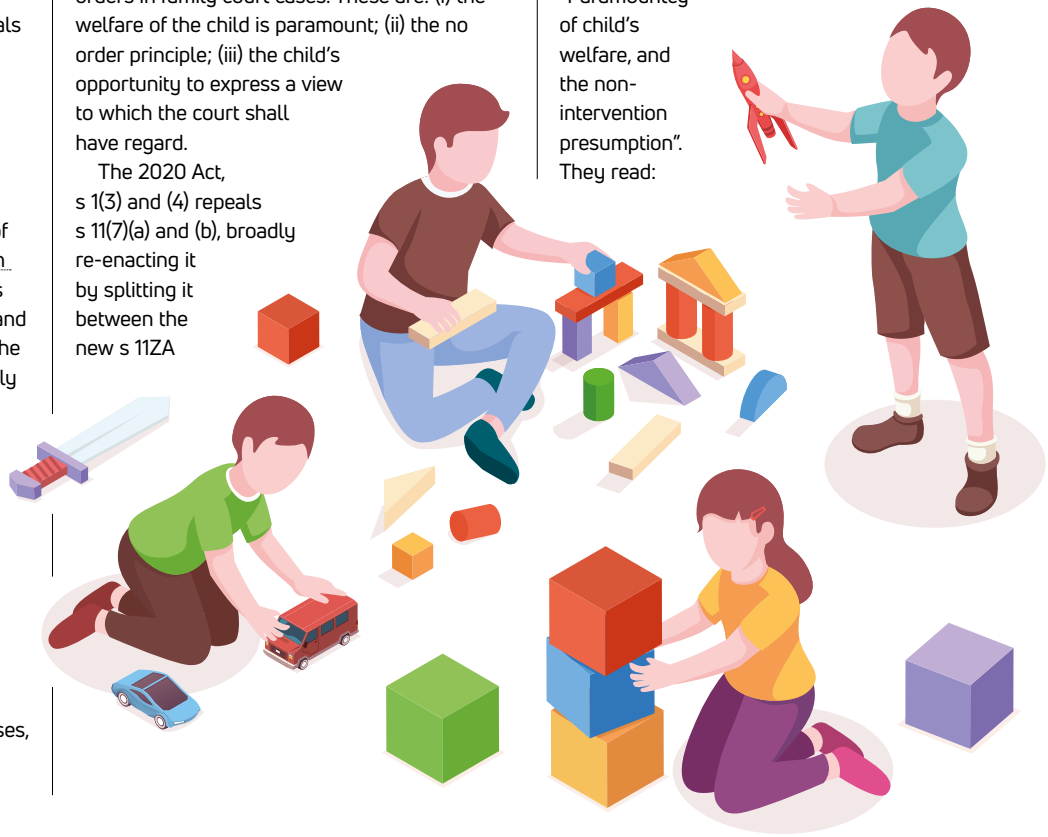
The welfare test: before and after

This current welfare test, aptly termed "the child lawyer's mantra" by Elaine Sutherland (*Child and Family Law*, Thomson/W Green (2008), p 431), provides three well-recognised steps for courts deciding whether to grant orders in family court cases. These are: (i) the welfare of the child is paramount; (ii) the no order principle; (iii) the child's opportunity to express a view to which the court shall have regard.

The 2020 Act, s 1(3) and (4) repeals s 11(7)(a) and (b), broadly re-enacting it by splitting it between the new s 11ZA (welfare and the no order principle) and s 11ZB (child's opportunity to express a view). It also augments the welfare test with other factors to which the court must have regard. Accordingly, once the Act is in force, advising clients in such proceedings is likely to become a more complex undertaking for family lawyers. The decision-making process is also likely to become more onerous for courts.

New s 11ZA: paramountcy, and non-intervention

The first two parts of the existing welfare test are re-enacted (almost verbatim) in subss (1) and (2) of s 11ZA, which is entitled "Paramountcy of child's welfare, and the non-intervention presumption". They read:



"(1) In deciding whether or not to make an order under section 11(1) and what order (if any) to make, the court must regard the welfare of the child concerned as its paramount consideration.

"(2) The court must not make an order under section 11(1) unless it considers that it would be better for the child concerned that the order be made than that none should be made at all."

Section 30 of the 2020 Act then adds new s 11ZA(2A): "When considering the child's welfare, the court is to have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose."

It does not appear that s 11ZA(2A) represents a departure from the current practice of courts to avoid delay in family court cases wherever possible. Arguably, it only makes explicit in statute an aspect of current good practice. Its insertion in the 1995 Act may place more of a burden on courts in their written judgments to refer to the particular steps taken to secure expeditious resolution in complex or lengthy family court cases. It could be viewed as placing more of an onus on lawyers, and parties, to avoid delay wherever possible.

Prescribed matters

Next, s 11ZA(3) sets down a list of specific factors for the court to consider in its decision-making process. These factors do not mirror the sort of substantive checklists used in other jurisdictions. In England, for example, s 1(3)(a)-(g) of the Children Act 1989 requires the court to consider a list of specific factors such as the child's physical, emotional and educational needs, age, sex and background, his or her wishes and the capacity of a parent to meet those needs.

In contrast, the factors contained in the 2020 Act are largely future-focused, meaning that they require a consideration of the potential impact that the court's order might be expected to have on the parents and children involved in the case. However, deciding what is best for the child is, as before, left to the wide discretion of Scottish courts. Section 11ZA(3) specifies four "matters" to which "the court must have regard" in "considering the child's welfare and whether it would be better for the child to make an order than not". Not all of these are new. Two will be familiar (protection from abuse, and co-operation), having been repealed from s 11 and re-enacted in s 11ZA.

The four matters found in s 11ZA(3) are split, rather unhelpfully, between six paragraphs, as follows:

1. The need to protect from abuse. The current protection from abuse provisions (1995 Act, ss 11(7A)-(7B) are broadly reinstated in s 11ZA(3)(a)-(d).

2. Co-operation in matters affecting the child. Section 11ZA(3)(e) requires regard to be had to: "whether it is, or would be, appropriate for an order to require that two or more persons co-operate with one another with regard to matters affecting the child".

This subsection essentially re-enacts the current s 11(7D). The key difference is that the new provision refers to "persons" rather than "relevant persons". Currently, "relevant persons" are defined in s 11(7E) as parents or those having parental responsibilities or rights.

In using "persons", s 11ZA(3)(e) might render the co-operation provisions more widely applicable to, for example, wider family members, who might be involved in, or on the periphery of, a family court case, and perhaps even the child.

3 and 4. Effect on parents, and on other important relationships. Section 11ZA(3)(f), found in the 2020 Act, s 16, further adds: "(f) the effect that the order the court is deciding whether or not to make might have on – (i) the involvement of the child's parents in bringing the child up, and (ii) the child's important relationships with other people".

"Where family court cases are concerned, the 2020 Act also provides additional safeguards for vulnerable parties"

As with the preceding matters, "the court must have regard" to these two (new) matters. The first concerns the issue of parental participation in a child's upbringing. It is hard to predict what impact, if any, this provision will have in family court cases. With the second, the "important relationships" might be with other family members – but they may also be non-familial including, for example, a child's peer friendships.

The main question raised by para (f) is whether it places a specific onus on courts, and by extension family lawyers, to make enquiries into the two matters set out? This remains to be seen.

New s 11ZB: the child's views

The third part of the current welfare test, that regard be had to the child's views, is re-enacted in new s 11ZB.

The most significant, and radical, changes made by the 2020 Act to the detail of the welfare test relate to the child's participation. The full range of sections providing for greater participation by children in family court cases will be discussed in the second article. Broadly speaking, however, the new s 11ZB(1) makes two significant changes to the 1995 Act. First, it creates a general obligation on decision-makers to facilitate the communication of views by children in the manner that children themselves prefer. Secondly, s 11ZB(3) will replace the current age presumption of 12 years for capacity to form a view, with a presumption that *all* children can form views, regardless of age. That places the onus on any person challenging a child's capacity, by stating that children are "to be presumed to be capable of forming a view unless the contrary is shown".

A further new provision, s 11F of the 1995 Act, inserted by the 2020 Act, s 20, requires that the court's decision in (almost) every family court case be explained to the child(ren) involved. Significantly, s 11F(2) provides that explanations must be conveyed "in a way that the child can understand". As outlined in the second article, the court is excused from the duty to provide an explanation in only very limited circumstances.

Plus ça change...

Once the 2020 Act is in force, part 1 of the 1995 Act will become significantly more complicated in layout than it currently is. As discussed here, the welfare test has been reworked and supplemented by the 2020 Act, with its components now scattered around the amended part 1.

However, at its heart, the welfare test embodies a focus on three main things: first, the paramountcy of welfare; secondly, non-intervention in family life; and, thirdly, the importance of children's participation when decisions are made about them. The essence of this test, on which family lawyers have long relied, has been preserved. As the French say, "*Plus ça change, plus c'est la même chose*" – the more things change, the more they stay the same. And, where the crux of the welfare test is concerned, notwithstanding considerable amendment and rearrangement, this certainly appears to be the case.

Dr Lesley-Anne Barnes Macfarlane lectures family law at Edinburgh Napier University. This article follows on from her 2019 report commissioned by the Scottish Parliament Justice Committee and her recent briefing on the Children (Scotland) Act 2020 for the Judicial Institute for Scotland.

Conference calls

We preview the Society's 2021 Annual Conference, which is taking advantage of its online format by offering events spread over a week, with the option to choose which days to book for

President Amanda Millar sets the scene:

This year's Law Society of Scotland annual conference will be, like so many other developments in the last year, unique. First, it will be held entirely online. Members and colleagues will be able to choose from a whole week's worth of keynote speeches, panel discussions and participative breakout sessions. Secondly, it will take place against the backdrop of the pandemic, which has caused such disruption to our professional and personal lives.

My term as President will conclude at the end of May, and it is no exaggeration to say it has also been unique, for many reasons. I am hugely encouraged at the way members and firms have set about managing the huge changes thrust upon them. It is testament to the quality of the legal profession in Scotland that many of the greatest fears we had in March 2020 have not come to pass. The resilience and efficiency shown have been truly inspiring. There are still many challenges, but as we move (we hope) towards the exit from this pandemic, there have been some fantastic developments that will help ensure the profession is well equipped to thrive in the years ahead.

Amongst these, there is far greater understanding and cognisance around our own and others' wellbeing. No one has been immune from wellbeing challenges, and perhaps counterintuitively while we have been separated from colleagues, friends and family, I am confident many colleagues feel closer to each other than before. A big part of that is down to the need we have all had at times to help each other through tough days.

Wellbeing, diversity and inclusion are themes close to my heart, and will be the first of many sessions at the conference. We will run more than 30 different sessions on a wide range of topics, legal and non-legal. Each day will have a different theme. I encourage members to book a place; be assured that if you can't attend when the day comes, all the sessions will be available online to anyone who purchased a ticket, to watch and enjoy at your convenience. What's more, you can purchase a ticket for the entire week, or for a single day if you prefer.

At time of writing we have a host of leading thinkers and speakers confirmed, with more names added weekly. It truly will be a smorgasbord of learning and engagement opportunities that is unique (that word again!) in the legal calendar. This year, of all years, we hope to see a large and diverse group of colleagues attend to take part in an active group of peers learning from each other and sharing their insights, thoughts and hard-won experiences for the betterment of the profession across Scotland – be it in-house colleagues, sole practitioners, big firm partners or all points in between. There will be something for everyone. I look forward to seeing you there.

The conference, day by day

Musab Hemsi

Monday 26 April: Diversity and inclusion; wellbeing

As Amanda Millar has noted, the first day focuses on diversity, inclusion and wellbeing – all matters on which the constraints of working under lockdown have had a major impact, in different ways.

After her presidential welcome, she joins a panel session embracing these issues, also featuring Yvonne Brady of Shepherd & Wedderburn, Musab Hemsi of LexLeyton, and Naeema Yaqoob Sajid, solicitor and founder of Diversity+.

A choice of workshops before and after lunch will then explore particular issues in depth.

Timings: 10.30-12.15; 2-2.45


Tracy Black, CBI Scotland

For the up to date programme, and to book, go to the CPD and training page on the Society's website

Tuesday 27 April: The economy

Tuesday's session gets down to business, opening with a panel discussion on the economy featuring, among others, Tracy Black, the CBI's director for Scotland. What is the best way to reboot the economy following COVID-19? Can we learn from the 2009 or earlier recessions? Is this our best chance to positively disrupt and reshape the economy? How should law firms position and ready themselves for the "new economic reality"? Look out for some insights.

Again there is a choice of workshops. Before lunch, it's a three practitioner panel on best practice for high street firms, or consultant Scott Foster leading on essential financial questions. Afterwards, the intriguingly titled "Lawyers, COVID, and Lewis Hamilton" (it's billed as how to stay competitive in the race) competes with cultivating a business development mindset.

Timings: 10.30-12.15; 2-2.45

Wednesday 28 April: EU withdrawal and international law

Big name speakers feature on the Wednesday programme, which examines the impact of EU withdrawal but also brings you the first workshops on particular practice areas.

Former Attorney General Dominic Grieve QC is first to the podium. His opening address is followed by a panel discussion where he will be joined by two leading Scottish public lawyers, solicitor advocate Christine O'Neill QC of Brodies; and Elaine Motion of Balfour+Manson. With the Society's Michael Clancy in the chair, they will review experience to date with the Trade and Cooperation Agreement, and what that foretells for Scottish lawyers and their clients looking ahead.

Workshops then offer a choice between Gillian McCluskey of MacRoberts, on the international agreements currently supporting


Dominic Grieve QC

business, and (it is hoped) a commercial law session.

After lunch, the post-Brexit theme continues for family lawyers, when Rachael Kelsey and John West of SKO discuss cross-border cases with Janys Scott QC. Meanwhile for criminal lawyers Krista Johnston (Martin Johnston & Socha) and Laura Irvine (Davidson Chalmers Stewart) face up to the impact of technology on criminal advocacy.

Timings: 10-12.15; 2-2.45

Thursday 29 April: Scots law – developments and court work

Thursday follows a different format, with morning workshops, a lunchtime film (*Warriors*, with maker Stephen Bennett) and a plenary afternoon session on criminal law.

First up, Keeper of the Registers Jennifer Henderson joins two property lawyers to talk e-conveyancing and the next steps for the property market; Jodie Blackstock of JUSTICE leads the alternative session.

The next pairing is "How to market yourself in the digital age", with Simon Allison and Jack Boyle of Blackadders offering practical tips for your online presence, alongside "Judging: could it be your future?", with career coach Manjula Bray aiming to improve your chances when applying for judicial office.


Jodie Blackstock, legal director, JUSTICE

Trauma awareness in criminal justice is a cause dear to the heart of Iain Smith, "Scottish Lawyer of the Year 2020", and he headlines the afternoon session, in interview and then in a panel discussion also featuring Sheriff David Mackie and others working on offenders and offender-related projects, in Scotland and elsewhere. This is a session not to be missed by anyone wanting to help others break their cycles of offending.

Timings: 10.15-12.30; 1.30.2.30 (film); 2.45-4.2

Friday 30 April: Keynotes

Friday sees conference week come to a grand finale, with no fewer than four keynote addresses, alongside forward-looking sessions on IT and new ways of working.

Assuming they go ahead as scheduled, the day falls less than a week before the Scottish Parliament elections. The first headline speaker will be election guru Sir John Curtice, casting his seaweed over where public opinion might be headed – including the Westminster scene and the prospects for that perennial political football, the second independence referendum.

Also confirmed, as we go to press, are Lord Hodge, Deputy President of the UK Supreme Court; and Deborah Kayembe, human rights lawyer and new rector of Edinburgh University. A session titled "Scottish lawyers' stories" should offer further interesting perspectives, the lawyers being Stephen Cullen, principal with Miles & Stockbridge, Washington DC, and Jeff Langlands, general counsel with BT Global and a director of EE Ltd.

The conference having to


Sir John Curtice

go virtual is not preventing the Society offering both a networking session and wellness classes during the lunch break. And the day's workshops offer several more attractions: a COP26 themed panel session entitled "Law, sustainability and technology"; "Adapting to new ways of working", hosted by Master Policy brokers Lockton; "Key issues in Scots law of cohabitation"; a partners' panel; and an in-house panel.

To round it all off, the closing keynote, "Will it make the boat go faster?", with Harriet Beveridge, executive coach, broadcaster and comic, should bring the event to an entertaining close.

Timings: 10-12.45; 2-4

Nuts and bolts issues

This month's civil court roundup shows the courts having to pronounce on a series of technical matters, which appear to have caused difficulties for practitioners

Civil Court

LINDSAY FOULIS, SHERIFF AT PERTH

Agreements before proof

There are a number of provisions in the ordinary cause rules which require parties to meet with a view to limiting the issues in dispute at a forthcoming proof. In light of this the observations by Sheriff McGowan in *Goodwillie v B & Q plc* [2021] SC EDIN 2 (9 December 2020) are worth bearing in mind. He expressed concern that practitioners might think that recording agreement on matters at a pre-trial meeting obviated the need for a formal joint minute of admissions. Further, any such agreement should be disclosed to the court before proof commenced if at all possible.

A written agreement made clear the extent of the matters agreed. For example, an agreement that a document was what it bore to be did not mean that the content was true and accurate. Sheriff McGowan further observed that an averment that the defender failed to comply with a duty normally does not provide fair notice of the case for liability being made.

Skilled witnesses

The operation of the principles in *Kennedy v Cordia (Services)* 2016 SC (UKSC) 59 was highlighted in *Widdowson v Liberty Insurance* [2021] CSOH 15 (4 February 2021). The court had to apportion liability between a number of wrongdoers. The central question was the relative culpability and causative potency of their actions. Lady Wise considered the expert evidence reasonably useful in putting what happened into context and explaining what should have been done in the circumstances from a medical perspective. It helped her understanding in the progression of the injuries. It provided skilled evidence of the complexities of the case and how it should have been dealt with. However the decision on the issue of apportionment was for the court.

Time bar

I reported the decision at first instance in *LM v DG's Exr* at Journal, March 2020, 29. Sheriff Drummond's decision was appealed to the Sheriff Appeal Court, whose decision has been issued at [2021] SAC (Civ) 3 (23 December 2020). The court agreed that the issue of fairness in an action raised with the benefit of ss 17A-17D of the Prescription and Limitation (Scotland) Act 1973 could only be determined through the leading of evidence. However, since if a defender satisfied the court that it was not possible for a fair hearing to take place, the action would not be permitted to proceed, such an issue required to be dealt with *in limine*. It could not be reserved to be determined in a proof at large. Accordingly a preliminary proof on the issue of fairness was appropriate.

Use of affidavits in proofs

It may be reading too much into the observation of the Sheriff Appeal Court in *Argyll Community Housing Association v George* [2021] SAC (Civ) 9 (4 February 2021), but in upholding the decision at first instance the court observed that while the affidavit of a witness did not cover a specific issue, their oral evidence supplemented its terms. This tends to suggest that when affidavits are used in proofs, it is open to a party to ask questions to elicit evidence in addition to what is contained in the affidavit.

Final judgment

There is a postscript to the decision of Sheriff Principal Stephen in *The Parachute Regiment Charity v Hay*, reported in the last article. An application for permission to appeal to the Inner House was refused: [2020] SAC (Civ) 24 (20 December 2019). The sheriff principal held that her previous decision to refuse to allow the defender to appeal to the Sheriff Appeal Court out of time and after an extract had been issued was not a final judgment which could be appealed to the Inner House. It meant that there had never been an appeal competently before the Sheriff Appeal Court. The decision was not one on the merits; it was simply an interlocutory decision.

Sheriff Principal Stephen further observed that there was no mileage in an argument that the interlocutor the defender had sought to appeal was invalid because it bore an incorrect date. Very few interlocutors were signed and issued on the date the decision was made by the court, due to the volume of business and pressure on judiciary and staff. She also observed that there were differences between the information provided to the court in support of the original application and that put forward in support of the present application. This was unsatisfactory.

Sheriff Principal Murray came to the same decision in *Colquhoun v Gell Leisure* [2021] SAC (Civ) 4 (31 August 2020). He further reiterated that bad faith as an exception to the issuing of an extract barring an appeal focused on the actions of court staff and the improper issuing of the extract decree.

Permission to appeal

In *D v M* [2020] SAC (Civ) 25 (2 December 2020) Sheriff Principal Turnbull determined that an interlocutor directing that a proof, previously allowed, should begin of new could only be appealed with permission.

Appeal to the Inner House

In *D McLaughlin & Sons v Linthouse Housing Association* [2021] SAC (Civ) 10 (28 January 2021), the Sheriff Appeal Court confirmed that the reference in s 113(1) of the Courts Reform (Scotland) Act 2014 to final judgment meant that it was not competent to seek permission to appeal to the Inner House an interlocutor pronounced following a debate in which decree

Update

Since the last article *Finlayson v Munro* (September 2019 article) has been reported at 2020 SLT (Sh Ct) 287, *Davidson v Clyde Training Solutions Ltd* (November 2020) at 2020 SLT (Sh Ct) 302, *XY Council v S* (November) at 2020 SLT (Sh Ct) 311, *Keatings v Advocate General for Scotland* (September) at 2021 SLT 8, *Rivers Leasing Ltd v Patrick* (January 2021) at 2021 SLT (Sh Ct) 1, *Akmal v Aviva Insurance Ltd* (September 2020) at 2021 SLT (Sh Ct) 27, *Siteman Painting and Decorating Services Ltd v Simply Construct (UK) LLP* (July 2019) at 2021 SLT (Sh Ct) 34, and *Parachute Regiment Charity v Hughes' Executor* (January 2021) at 2021 SLT (Sh Ct) 53.

was pronounced in terms of one crave but proof before answer was allowed in respect of the remaining craves. The subject matter of the proceedings had not been disposed of by the interlocutor for which permission was sought. In any event the court was not satisfied that the appeal would raise an important point of principle or that there were other compelling reasons to grant permission.

Appeals

There are a few matters to pick up from Lord Doherty's decision in *W v W's Exr* [2021] CSIH 1; 2021 SLT 205. He distinguishes between an interlocutor pronounced of consent or on a joint motion and one pronounced on an unopposed motion. In the latter case, the opponent can appeal the interlocutor. He also observed that in determining whether failure to comply with rules should be granted relief and whether such a course was in the interests of justice, the interests of the litigants and the court had to be considered. This involved consideration of whether the failure was a single one or one of a number. The history of a litigation and the need for finality were also relevant. The merits of a party's position were of considerable significance.

Family actions

In *K v G* [2021] SAC (Civ) 1 (14 January 2021) Sheriff Principal Pyle, delivering the opinion of the court, made a number of observations regarding the requirement to ascertain the views of a child. First, it was not dependent on the matter being raised by a party. The court had the duty to take these views. (The impression given by the court is that the views of a child of school age should be taken.) The court further considered that, both under s 11(7)(b) of the Children (Scotland) Act 1995 and the prospective s 11ZB, the child's views might require to be taken even if that was not in their best interests.

One final observation should be made. In disposing of the appeal, the court seemed to indicate that the matter could be determined at a child welfare hearing. In this case the appeal was taken from a decision after proof. Accordingly the suggestion that the matter might be considered at a child welfare hearing might run contrary to the Sheriff Appeal Court's observations in *K v K* 2018 SLT (Sh Ct) 418.

Motions in the All Scotland PI Court

In *Gardiner v Abellio Scotrail Ltd* [2021] SC EDIN 5 (8 January 2021) Sheriff McGowan allowed an unopposed motion to be granted, notwithstanding the provisions of chapter 15A had not been complied with. He observed that he considered the requirements of the chapter to be mandatory. "Court days" meant when the sheriff clerk's office was open for civil business. If at certain times of the year, agents' offices were closed but the clerk's office was open, the agents might have to face the consequences. The decisions of practices could not impinge on the work of other agents or the court. Nor could the rules be bent to accommodate them.

In *Dougan v Parkdean Resorts UK* [2021] SC EDIN 4 (6 January 2021) the issue Sheriff McGowan ultimately had to determine was whether a revised motion had been opposed. The defender's initial motion was to have the sheriff's interlocutor granting an unopposed motion treated as *pro non scripto*. A motion had been intimated and opposition intimated. The motion was not however lodged and the pursuer's agent did not intimate that it was not being proceeded with. A second motion was then intimated and lodged but the defender's agent was on leave and did not lodge opposition. After the second motion was granted as unopposed, a further hearing was assigned.

Sheriff McGowan concluded that the second motion had not been opposed: the opposition had been intimated to the original motion. The second motion, albeit in the same terms, was of different practical effect, as the accompanying minute of acceptance of tender was amended. In terms of OCR, rule 15A an opposed motion hearing had been triggered with the lodging of the motion and the opposition thereto. If that did not occur, the motion procedure came to an end. That was the fate of the original motion, and the second motion was unopposed. Such a strict interpretation was required for the purposes of certainty.

It was observed that etiquette dictated that the pursuer should have intimated that he was not proceeding with the initial motion. It might be worth amending the relevant rule to include such a requirement, as the scenario in this case can be envisaged occurring again. I suspect agents may concentrate on the terms of the motion rather than the submission and accompanying document when the motion is in the same terms as one recently intimated.

Housing actions

In terms of s 16 of the Housing (Scotland) Act 2014 the functions and jurisdiction of the sheriff were transferred to the First-tier Tribunal in relation to actions arising from regulated tenancies, part VII contracts in terms of s 63 of the Rent (Scotland) Act 1984, and assured tenancies. The issue before the Inner House in *SW v Chesnutt Skeoch* [2021] CSIH 11 (9 February 2011) was what fell within the ambit of "arising from". The First-tier and Upper Tribunals had determined they did not have jurisdiction to reduce an assured tenancy *ope exceptionis*. Lord Doherty, delivering the opinion, concluded that "arising from" included a power to entertain all defences to such actions which would be available before a sheriff. Thus, contrary to the view taken by the tribunals, they did have jurisdiction on that issue.

Expenses

In the appeal before the Sheriff Appeal Court in the action by *Cabot Financial UK v Weir* [2021] SAC (Civ) 2 (13 January 2021) the issue was what could be recovered if an award of expenses was made on an agent/client, client paying basis, and in particular, whether a success fee under a speculative fee agreement could be recovered. The court considered the three bases of taxation, namely party/party; agent/client, third party paying; and agent/client, client paying. The first was the least generous regarding recovery; the last the most generous.

The "process rule", that the expenses to be charged against the other party were to be limited to the proper expenses of process, applied to the first two bases of taxation. The court was also of the opinion that the rule applied to taxation on the last basis. Recoverable items in a judicial account were limited to items and work properly characterised as expenses of process and not extrajudicial expenses, and were still limited to those which were reasonable. There remained a difference between a judicial account and a client account. The success fee was not recoverable. An award of expenses on an agent/client, client paying basis did not amount to an absolute indemnity of the successful party's expenses.

As a postscript, the court did not certify the appeal as suitable for the employment of senior counsel, notwithstanding the issues argued were not free from difficulty.

Actions to constitute a claim

In *Jordan v O'Reilly* [2021] SC EDIN 8 (4 December 2020) the pursuer sued the executor who had been confirmed to the estate of a surviving partner of the dissolved firm with whom the pursuer had been employed. The estate had been wound up and the office of the executor had terminated. Sheriff Fife concluded that the action was competent for the purpose of constituting a claim.

Legal aid

The issue in *Bovey, Noter* [2021] CSIH 3; 2021 SLT 117 was legal aid fees payable to senior counsel in preparing for and attending a hearing before the Inner House on an application for permission to appeal from the Upper Tribunal. The decision itself involves a detailed examination of the relevant provisions and I do not intend to refer to these in detail here. The comments of the Inner House regarding reasonable remuneration being an important element of access to justice are perhaps relevant in the current climate.

Briefings

Corporate

EMMA ARCARI, ASSOCIATE, WRIGHT, JOHNSTON & MACKENZIE LLP

Thanks to the recent judgment in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31, all sorts of creditors may now be able to capitalise on the increased remedies available to them following this Supreme Court decision. It greatly reduces the scope of the so-called "reflective loss" principle that had been extended through case law over the years and, for determined and well-resourced creditors, who can prove what has been done by those traditionally shielded by corporate structures, there is now a way around the principle.

Sevilleja v Marex

Sevilleja owned two companies (registered in the British Virgin Islands) which were involved in foreign exchange trading. Marex was a creditor of both companies. Marex obtained a judgment against the companies but, following the issue of the judgment, Sevilleja allegedly arranged for funds held by both companies to be transferred elsewhere. He then placed the companies into liquidation, leaving Marex unable to recover the amounts due under its judgment debt.

Marex claimed the liquidation process was effectively on hold, that claims notified to the liquidator were not being investigated by him, and that no real efforts were being made to locate the missing funds or to take action against Sevilleja.

Marex therefore raised an action against Sevilleja personally, for inducing or procuring the violation of its rights in relation to the judgment, and also for causing Marex to suffer loss by unlawful means. In the Court of Appeal, Sevilleja had successfully argued Marex's claim was barred by the "reflective loss" principle. In short, Marex was a creditor of the companies, it was essentially those companies that suffered the loss and therefore only those companies could bring such a claim. So far, so familiar...

However, having examined the previous decisions behind the principle, the Supreme Court significantly reduced its application to shareholders only.

Reflective loss

The Supreme Court considered *Prudential Assurance v Newman Industries (No 2)* [1982] 1 Ch 204 and *Johnson v Gore Wood & Co* [2002] AC 1, which were said to have established the principle. *Prudential* laid down a rule of company law that prevented shareholders from bringing claims for the diminution in share value (or in distributions to shareholders) where that loss was actually reflective of the loss to the company. This was held to be the case whether or not the company recovered its loss in full, and in accordance with *Foss v Harbottle* (1843) 2 Hare 461, which, in short, held that the only person who can seek relief for an injury done to a company, if the company has a cause of action, is the company itself.

The Supreme Court noted that *Johnson* "purported to follow" *Prudential*. However the majority also noted that the reasoning, particularly of Lord Millett, in *Johnson* was considered to take a wider approach than that originally advanced in *Prudential* and, effectively, acted as an enabler to subsequent, more controversial, cases and the "reflective loss" principle.

Holding that the reflective loss principle should be limited to shareholders only, the Supreme Court overturned Court of Appeal decisions extending its application to creditors. It is worth noting however that the rule only *just* remains for shareholders, with three out of the panel of seven on the Supreme Court favouring doing away with the principle altogether.

Lord Hodge thought that the expansion of the principle that reflective loss cannot be recovered has had "unwelcome and unjustifiable effects on the law", and that, if the facts alleged by Marex were true, its application would result in great injustice.

The decision also covered the exception to the prohibition in *Giles v Rhind* [2002] EWCA Civ 1428, where a former shareholder director brought proceedings against a defendant who had conducted business in competition with the company (in breach of contractual obligations to the company and the claimant). The company was unable to sue due to the impecuniosity caused by the defendant's wrongdoing. The claimant sought to recover losses including to the value of his shares. The Court of Appeal held that, where the wrong had made it impossible for the company to pursue a remedy against the wrongdoer, an exception existed to the reflective loss prohibition. However, the Supreme Court deemed that *Giles* was wrongly decided: the remedy in that situation was a derivative action.

What does this mean?

The decision has many implications. It creates a "bright line" rule, namely, that the reflective loss principle is now limited to shareholders who bring claims for the loss in value of their shares or distributions (where the company has a right to pursue a claim and the loss is a consequence of the company having suffered loss). The effect of the rule brings with it certainty as opposed to the unknown and increasing exceptions previously developed by case law in this area.

Boards are always supposed to consider when losses (and potential litigation) should be pursued for the benefit of the company as a whole, in order to avoid becoming exposed to risk themselves (e.g. through derivative actions). However, going forward, and in the right set of circumstances, creditors of a company who can prove wrongdoing (and Marex has still to prove Sevilleja's wrongdoing), can now recover directly from misbehaving directors. No longer are they kept within the bubble of the usual insolvency process.

Intellectual Property

ALISON BRYCE, PARTNER, DENTONS UK & MIDDLE EAST LLP

A recent copyright decision at the Intellectual Property Enterprise Court has found in favour of an employer in a dispute relating to the ownership of literary works or software created by the employee. It serves as a timely reminder of the distinction between authorship and ownership of works created through the course of one's employment.

In *Penhallurick v MD5 Ltd* [2021] EWHC 293 (IPEC) (15 February 2021), the claimant asserted ownership of copyright in eight works of software, all of which related to a technique he called "virtual forensic computing" or VFC. The works comprised various versions of the software as well as a graphic interface and a user guide.

The claimant had conducted research into VFC during his MSc degree and produced a thesis on his VFC method prior to commencing employment with MD5. He was employed by MD5 between November 2006 and April 2016, where he developed the VFC software to assist with forensic casework supplied to MD5 by the police. The decision as to ownership of the works turned on whether the software, interface and guide were created within the course of his employment.

Authorship v ownership

On the evidence, the judge concluded there could be "no doubt" that making the software was the central task for which the claimant was paid. It was acknowledged that he wrote part of the work at home in his personal time; and even that it was likely that he wrote part of the software before having express permission from MD5 to devote the majority of his time to doing so. However, it was concluded that all the works were created with MD5's knowledge and encouragement, and were directed to making and improving their VFC software product. In addition, there was held to be a binding agreement between the parties in 2008 which assigned to MD5 the ownership of the existing copyrights as well as the rights in the software yet to be written.

This decision highlights the key distinction between authorship and ownership. The general rule is that the first owner of copyright will be the author, but where a work is made by an employee in the course of their employment, it will be the employer. Therefore, though the claimant was the author and creator of the software code, MD5 was the owner in the first instance. The important question is whether the work can be said to be carried out during the course of the author's employment. This is a question of fact, though case law has suggested a number of factors which can be taken into account:

- the terms in the employment contract;
- where the work was created – for example, in the office or at home?;
- when it was created – for example, during or outside normal working hours?;
- who provided any materials used (computer, software, equipment, etc);
- whether the employee was working subject to direction or on their own initiative;
- whether they could have refused to create the work;
- whether the work produced is "integral" to the business.

Unlike in the case of employees, if you commission work from a third party, the contractor will own the copyright in the absence of an agreement to the contrary. In such cases it is essential to address ownership directly in any legal agreements. The law permits the assignation of copyright in works which have not yet been created, which allows greater flexibility when drawing up such agreements. It is important to note that a common mistake by the commissioning party is the belief that if they have paid for the work, they will own it. In such cases, the courts have been known to imply licences to use the work, but this is not guaranteed. In any event, you would only be able to argue for an implied licence where all the circumstances suggest that the copyright owner expected you to use their work in the way you were going to, even though this was never discussed and was not written down anywhere.

Beware the remote worker

An important takeaway from this case is the comments regarding the employee's homeworking. It was noted that the fact that work was carried out at home was a relevant consideration in assessing whether it could be said to be carried out during the course of the author's employment. As we witness a rise in remote working, employers need to consider intellectual property carefully. This valuable business asset may be at risk away from traditional controlled workplace environments.

It should be noted that where remote working does not entail any change to employment, copyrights will likely continue to be owned by the employer. However, if an employee's obligations are subject to change due to remote working, it may be necessary for employee contracts and copyright policies to be updated to include specific clauses on ownership suitable to the working from home model.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Government subsidy regime

The UK Government seeks views on its proposed approach to establishing "a bespoke UK-wide [Government] subsidy control regime". The new regime should "facilitate strategic interventions to support Government priorities, including supporting the economy's recovery from COVID-19" and, *inter alia*, strengthen the economic bonds of the Union. See www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk

Respond by 31 March via the above web page.

Minimum pension age

HM Treasury is going ahead with raising the normal minimum pension age, the minimum age at which most pension savers can access their pensions without incurring an unauthorised payments tax charge, from 55 to 57 years. Firefighters, police and the armed forces are exempt but views are sought on any other protections that might be granted. See www.gov.uk/government/consultations/increasing-the-normal-minimum-pension-age-consultation-on-implementation

Respond by 22 April via the above web page.

Dangerous dogs again?

It is now 30 years since the passing of the Dangerous Dogs Act. Although the headline measure was the ban on four particular breeds, including the pit bull terrier and other "dogs bred for fighting", s 3 deals with threatening behaviour or attacks by any type of dog and s 4 with the destruction of those dogs. Views are sought on further steps that might be taken against the real offenders, the owners. See consult.gov.scot/justice/criminal-law-dealing-with-dangerous-dogs/

Respond by 30 April via the above web page.

Reducing carbon

The Scottish Government seeks views on enhancing the range of support mechanisms provided through the Low Carbon Infrastructure Transition Programme for development and delivery of large-scale low and zero carbon energy infrastructure projects. See consult.gov.scot/energy-and-climate-change-directorate/low-carbon-infrastructure-transition-programme/

Respond by 30 April via the above web page.

Discipline Tribunal expenses

The Scottish Solicitors' Discipline Tribunal seeks views on its practice in awarding expenses. See news item on p 38, and www.ssdt.org.uk/media/530403/expenses-consultation.pdf

Respond by 14 May by email to enquiries@ssdt.org.uk

Agriculture

ADÈLE NICOL, PARTNER, ANDERSON STRATHERN LLP

In this briefing I discuss the latest amendments to the Agricultural Holdings (Scotland) Act 1991, which concern the ability of tenants to give up their tenancy for value.

The Agricultural Holdings (Relinquishment and Assignation) (Scotland) Regulations 2020 are made under part 3A of the 1991 Act, the new ss 32A-32W inserted by the Land Reform (Scotland) Act 2016, s 110.

From 28 February 2021, a tenant of a 1991 Act tenancy can offer to relinquish their tenancy in exchange for compensation, or under certain conditions, assign the tenancy. These provisions apply to any 1991 Act tenancy created before 27 November 2003, or a tenancy after that date where a lease specifically states it to be a 1991 Act tenancy. Relinquishment (but not the assignation rights) applies to limited partnership tenancies, but given that most, if not all such arrangements will be running from

year to year, it is difficult to imagine why a landlord would buy them out.

Relinquishment

A tenant may serve on the landlord a notice of intention to relinquish (NIR) their tenancy. The form and content of the NIR are set out in s 32D and sched 1 to the 2020 Regulations. Some restrictions apply, such as where the tenant has failed to comply with a written demand requiring rent to be paid, or to remedy a breach of lease conditions; or where a landlord has served a notice to quit which has not yet expired or is under consideration by the Land Court. Conversely, s 32F imposes restrictions on notices to quit where a tenant has served a NIR.

Once the NIR has been served, a valuer is appointed by the Tenant Farming Commissioner (TFC) within 14 days. The land must be valued as if it is (i) sold with vacant possession, and (ii) sold with the tenant still in occupation, taking certain factors listed in s 32J into account, including the likelihood of the landlord otherwise getting the land back in hand. Either party can object to the appointed valuer; this will be dealt with by the Land Court.

The compensation payable by the landlord is calculated following a five step process set out in s 32L, taking into account the value of tenant's improvements and landlord's dilapidations claims. Within eight weeks the valuer must serve a "notice of assessment" (NA) on the landlord, detailing the value attributable to the relinquishment, which can be appealed to the Lands Tribunal by either party. If there is no disagreement, payment of the compensation by the landlord (which must be within six months of the date on which the tenant's right to withdraw the NIR expires) will end the tenancy: s 32T.

Assignation

Sections 32R-32S provide for the landlord declining to accept the tenant's NIR. The landlord may serve a notice of declinature (ND) to the tenant, TFC and valuer; or may withdraw their acceptance of a valuer's decision before the expiry of six months from the date on which the tenant could have withdrawn the NIR. Under section 32U, where a landlord ultimately does not accept the NIR, the tenant may within one year assign the lease to an individual who is a "new entrant" (NE) or "person progressing in farming" (PPF). There is no requirement that the voluntarily agreed assignation price be the same as the determined relinquishment compensation value, or that the landlord be notified of the assignation price.

Definitions

Regulations 8-11 set out the definitions for NE and PPF.

A NE is a person who satisfies the following:

- does not hold land/will not have held a relevant interest at any point in the five years prior to the assignation date;
- does not, by virtue of the assignation, become the holder of more than one relevant interest.

A PPF is a person who satisfies the following:

- does not hold two or more relevant interests; and
- will not, by virtue of the assignation, become the holder of more than two relevant interests.

A person is deemed to hold (or have held) a "relevant interest" if they (or any legal person of which they have or have had control, but excluding when acting as executor or other person *ex officio* for a tenant) are or were:

- a tenant under a LDT, MLDT, 1991 Act tenancy or SLDT (of more than three years for a NE or with more than one year still to run at the date of assignation for a PPF), or a small landholder of more than three hectares, or a crofter on a croft of more than three hectares, or the owner of more than three hectares in total (or for a PPF, the owner of more than one individual holding of three hectares) of agricultural land, *and*
- hold or held a share of 50% or more in that relevant interest.

There are no age restrictions for NEs, nor any restriction on the size or success of an existing holding that would prevent a second relevant interest being taken on by a PPF.

The Tenant Farming Commissioner has published a guide on the relinquishment and assignation process: landcommission.gov.scot/our-work/tenant-farming/relinquishment-and-assignation

Family

ELAINE E SUTHERLAND, PROFESSOR EMERITA, UNIVERSITY OF STIRLING

It is trite law that proxy marriage – that is, where someone stands in for one of the parties – is not permitted in Scotland. The Marriage (Scotland) Act 1977 requires that the parties should be present at the ceremony, regardless of whether it is civil, or religious or belief, in nature (ss 13(1)(b) and 19(2)(b)).

In *A v K* [2011] CSOH 101; 2011 SLT 873, declarator of nullity was refused in respect of a marriage conducted by telephone where the bride was in Scotland and the groom and the witnesses were stated on the Pakistani marriage certificate as being in Pakistan. The court concluded that the marriage was celebrated in Pakistan and, thus, that it was not open to challenge for failure to comply with the formal requirements of Scots law.

What has not yet been tested in court is the precise meaning of being "present" and, in particular, whether a marriage would be valid where the ceremony was conducted remotely, in Scotland, with the celebrant, the parties and the witnesses coming together online from (possibly as many as five) different locations.

In response to the COVID-19 pandemic, a number of jurisdictions in the US, including California (Executive Order N-72-20, 31 July 2020) and New York (Executive Order No 202.20, 18 April 2020), made provision for "remote marriages". The necessary paperwork is lodged electronically and the ceremony itself is conducted using audio-visual technology.

In the absence of express provision, it seems unlikely that a Scottish registrar would solemnise a marriage in this way, but what of a religious or belief celebrant who did so? Would the marriage be valid?

All in the "present"

While the place at which a civil marriage should be conducted is regulated (1977 Act, s 18), there is no similar restriction placed on religious and belief marriages. All that is required is that the celebrant, the parties and the witnesses should be "present" (s 13(1)). Where they join the proceedings remotely from different locations there will be less opportunity for the celebrant to assess the capacity of the parties (e.g. whether either is drunk or drugged) and the authenticity of their consent, but it is certainly arguable that they are all present in the sense that they are in attendance.

The 1977 Act does not anticipate marriages being conducted remotely, and there are a number of possible difficulties with its application in that context. First, the marriage notice that each party is required to lodge

prior to receiving the marriage schedule contains a question about where the marriage will take place (s 3 and form M10). Giving false information may be an offence (s 24(1)), but it will not necessarily invalidate the marriage.

Secondly, ministers and deacons of the Church of Scotland and celebrants from prescribed religious and belief bodies must follow the form of ceremony of the relevant religious or belief body (s 14(a)). It is unlikely that any of these bodies provide for a remote ceremony. Nominated and temporarily authorised celebrants are required to use a form of ceremony that "is in no way inconsistent with" certain declarations specified in the 1977 Act (s 9(3) or (3A) and s 14(b)). Nonetheless, it may be quite possible to follow the prescribed form of ceremony in an online setting.

A third difficulty stems from the statutory requirement that "immediately after the solemnisation of the marriage", the marriage schedule should be signed by the parties, the witnesses and the celebrant (s 15(1)). Again, satisfying that requirement may be possible, with one solution being to use a courier to take the marriage schedule to the parties and the witnesses, in turn, for signature.

Perhaps most significant of all is the fact that, provided a marriage is registered, its validity is not open to challenge for failure to comply with the formal requirements (s 23A(1)). However, that saving provision only applies in respect of a ceremony at which "both parties were present". Again, it seems, everything turns on what is meant by "present".

Elaine E Sutherland is a Professor at the University of Bergen, Professor Emerita at the University of Stirling, a Distinguished Professor of Law Emerita at Lewis & Clark Law School, Portland, Oregon, and a member of the Child & Family Law Committee of the Law Society of Scotland

Data Protection

LAURA IRVINE, PARTNER, DAVIDSON CHALMERS STEWART

Further to my article in the December 2020 Journal where I set out the difficulties that may arise if the UK left the EU without an adequacy decision, the EU Trade and Cooperation Agreement which was finalised on 24 December 2020 provided us with a bridging mechanism which meant that data transfers from the EU/EEA to the UK could continue without additional safeguards until either (a) an adequacy decision was granted, or (b) for up to six months.

At the same the EU GDPR was retained in UK law and became what is known as the UK GDPR. This has not changed the law in any substantive way, but has changed the way we must refer to it in contracts, agreements and privacy notices etc.

Briefings

Draft Adequacy Decision

The latest update is that on 19 February 2021 the EU announced that it had taken the first steps towards the approval of an adequacy decision for the UK in relation to the transfer of personal data under the GDPR, and in relation to the transfer of personal data for law enforcement purposes under the Law Enforcement Directive.

The EU Commission has drafted its decisions, which can be found here, and they will now be considered by the European Data Protection Board and a committee representing the EU member states as part of the comitology procedure. This will hopefully lead to the decisions being adopted, allowing personal data to flow between the EEA countries and the UK without additional safeguards.

It was hoped that as the UK had implemented the GDPR, the EU Commission's assessment would be a straightforward one, finding that the UK had adequate safeguards in place to provide EU citizens with adequate rights and protections under data protection law. But there were various concerns raised, including the UK state surveillance arrangements which had been criticised by the European Court of Human Rights in October 2020 (see *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* C-623-17). Other concerns had been raised about the ability to change data protection law built into the Data Protection Act 2018 and the potential for data subject rights to be weakened.

This is good news for all organisations who rely on data flowing between the UK and EU/EEA: the EU Commission found an essentially equivalent level of protection was available in the UK, paving the way for the adequacy decision. It is hoped that this decision will provide some certainty, in the area of data transfers at least.

Review

The adequacy decisions will be reviewed after four years to ensure that the UK continues to provide essentially equivalent protection. Commitment to the European Convention on Human Rights and the EU Charter is noted by the EU Commission as important to its adequacy decision. Any deviation from that commitment, and any changes that the UK makes to data protection law which weakens protections for data subjects over the next four years, will be taken into account at this review.

There is also still the possibility that the decision will be challenged, as Max Schrems has now done successfully twice in relation to the two partial adequacy decisions relating to transfers to the US. Both Safe Harbour and the Privacy Shield have been struck down by the EU Court of Justice, so the UK must be wary of a challenge from his organisation or similar. It is therefore also to be hoped that this "certainty" is not short lived.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

John Charles Nason Craxton

A complaint was made by the Council of the Law Society of Scotland against John Charles Nason Craxton, Dumbarton. The Tribunal found the respondent guilty of professional misconduct (1) singly, in respect that he (a) acted in breach of his common law obligation not to facilitate fraud and in doing so acted in a dishonest manner, and (b) in two transactions, acted in breach of his common law duty to act with the utmost propriety to his lender clients, withheld information about fraud, that he was acting for both the seller and purchaser, that he failed to carry out his obligations under the CML Handbook and in particular he had not informed them that funds were being returned to the control of the borrowers who were in fact a front for Edwin McLaren (who was subsequently convicted of an extensive course of fraud in relation to the properties); and (2) *in cumulo* with each other, that he acted in contravention of rules 3 and 5 of the Solicitors (Scotland) Practice Rules 1986, rules 2, 5(a) and 5(e) of the Code of Conduct 2002, rules 1, 3, 4, 6 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008, regs 7, 8, 9, 11 and 14 of the Money Laundering Regulations 2007, and s 330 of the Proceeds of Crime Act 2002.

The respondent's name already having been removed from the Roll of Solicitors in Scotland at his request in terms of s 9 of the Solicitors (Scotland) Act 1980, the Tribunal prohibited the restoration of the respondent's name to the roll.

It was admitted by the respondent that he facilitated Edwin McLaren's fraud. He discussed with Mr McLaren the scheme of buying distressed sellers' properties in early 2008. He accepted instructions from Mr McLaren in the knowledge of his plan. He admitted that Edwin McLaren was the driving and controlling force of all instructions he received and that the purchasers were nominees. At no stage did he meet any of the sellers or purchasers. In all of the transactions, the dispositions with covering correspondence were taken to the sellers by an employee of the estate agency run by Edwin McLaren. In the transactions where the respondent represented only the seller, he contacted Edwin McLaren to confirm when the sellers received the net free proceeds. In two of the transactions, the respondent acted for the purchasers and their lenders. He admitted being aware that the purchasers were nominees of Edwin McLaren. He was aware that part of the loan funds would be ultimately paid on to Edwin McLaren.

The Tribunal was satisfied that the admitted facts demonstrated that the respondent had breached his common law obligation not to facilitate fraud, and in doing so he had acted in a dishonest manner. The admitted facts in transactions 1 and 2 established that the respondent was in breach of his obligation to act with the utmost propriety when dealing with the lenders. He had withheld information about the fraud from them, including that he was acting for both the seller and purchaser, that he had failed to carry out his obligations under the CML Handbook, that part of the loan funds was ultimately destined to be paid to Edwin McLaren, and that the purchasers were nominees for McLaren. The Tribunal was also satisfied that in the course of facilitating this fraud, the respondent had acted in contravention of the other practice rules averred.

The Tribunal was extremely concerned about the safety of the public and the reputation of the profession. The admitted facts and misconduct demonstrated that the respondent was not a fit and proper person to be a solicitor. The respondent should not be allowed to have his name restored to the roll in future and so the Tribunal considered that an order in terms of s 53(2)(aa) of the 1980 Act was appropriate.

Hilary A B Macandrew (s 42ZA appeal)

An appeal was made under s 42ZA(10) of the Solicitors (Scotland) Act 1980 by Rosalyn MacDonald against the determination by the Council of the Law Society of Scotland in respect of a decision not to uphold a complaint of unsatisfactory professional conduct made against Hilary A B Macandrew, Grant Smith Law Practice, Turriff (the second respondent). The appeal was defended by the first respondents.

The appeal related to six heads of complaint. The second respondent had represented the appellant in relation to family law matters. The appellant's complaints alleged failures by the second respondent to obtain information about financial assets, failures to lodge documents with the court, charging for work which was not carried out, misleading the appellant regarding the expertise of an advocate and failures to provide terms of business to the appellant. Having carefully considered matters, the Tribunal was of the view the substance of these complaints was not made out and that a competent and reputable solicitor could have acted in the same way as the second respondent. The first respondents' subcommittee was entitled to take the view that it did. Therefore, the tribunal confirmed the first respondents' determination in respect of the complaints.

Access by prescription: challenge of proof

A recent Court of Session case highlights the difficulties that can arise in establishing that a prescriptive servitude right of access has been created

Property

FRANCESCA ALLANSON, SOLICITOR, PROPERTY LITIGATION TEAM, ANDERSON STRATHERN LLP

In Scotland, the Prescription and Limitation (Scotland) Act 1973 provides that a person can acquire a servitude right of access over a neighbouring property by virtue of the legal doctrine of positive prescription, if access is exercised for a continuous period of 20 years openly, peaceably and without judicial interruption.

A prescriptive servitude right of access is a real right in land – one binding on future owners of both the benefited property and the burdened property – and is created through the passage of time rather than in a written deed. As a result, while such a right may not appear on the Land Register, it may nevertheless have a significant impact on the use and enjoyment of the properties involved.

It can, however, be difficult to establish that a prescriptive servitude right of access exists, as it is not only necessary to demonstrate that access has been exercised for the requisite 20 year period, but also that the benefited party has taken access as of right, as opposed to doing so simply because this has been tolerated or permitted by the owners of the neighbouring property.

The difficulties which can arise in establishing that a prescriptive servitude right of access has been created are demonstrated in the recent case of *Soulsby v Jones* [2020] CSOH 103 (17 December 2020). In this case, the pursuer sought a declarator from the court that he had – by virtue of positive prescription – acquired a servitude right of access over the defenders' garden for the purposes of maintaining his property.

The background

The pursuer led evidence that he and the previous owners of his property had taken access over the defenders' property since at least 1966 to inspect and maintain the western side of his property. The pursuer's position was that regular maintenance to his property was required given its close proximity to the sea, and evidence was heard from several tradesmen whom the pursuer and the previous owners of his property had engaged over the years to clean the windows, to paint and to carry out modest repairs to the western side.

Despite the tradesmen admitting that they always sought permission from the owners of the neighbouring property before taking access over their garden, the pursuer's position was that access had been taken as of right and, given that access had been exercised for a period of over 20 years, an unchallengeable prescriptive servitude right of access had been created.

The defenders, on the other hand, argued that the occasional nature of the access which had been taken over their property for the purposes of inspecting and maintaining the pursuer's property suggested that the pursuer was not taking access by right, but with their tolerance or permission.

The court's decision

While the court did comment that some of the evidence from the pursuer's witnesses was not very precise, it was satisfied that access had been taken over the defenders' property for the purposes of window cleaning between five and 10 times a year throughout the prescriptive period, as well as at other intervals for painting and carrying out repairs to the pursuer's property. Nevertheless, the court considered that such access was of a transitory nature, and could therefore not be regarded as asserting a servitude right of access for that purpose.

In this respect, the nature, quality and frequency of the access taken were critical to establishing that a prescriptive servitude right of access had been created and, in this case, the pursuer was unable to persuade the court that a prescriptive servitude right had been created, notwithstanding that it was accepted that access had been taken over the defenders' property for a period of over 20 years.

As to the question whether access had been exercised as of right or by tolerance, the court was of the view that it was for the pursuer to demonstrate that the nature and frequency of the access taken justified a conclusion that it was exercised as of right – a requirement on the pursuer to prove positively that his neighbours were not merely tolerating his access would be unworkable.

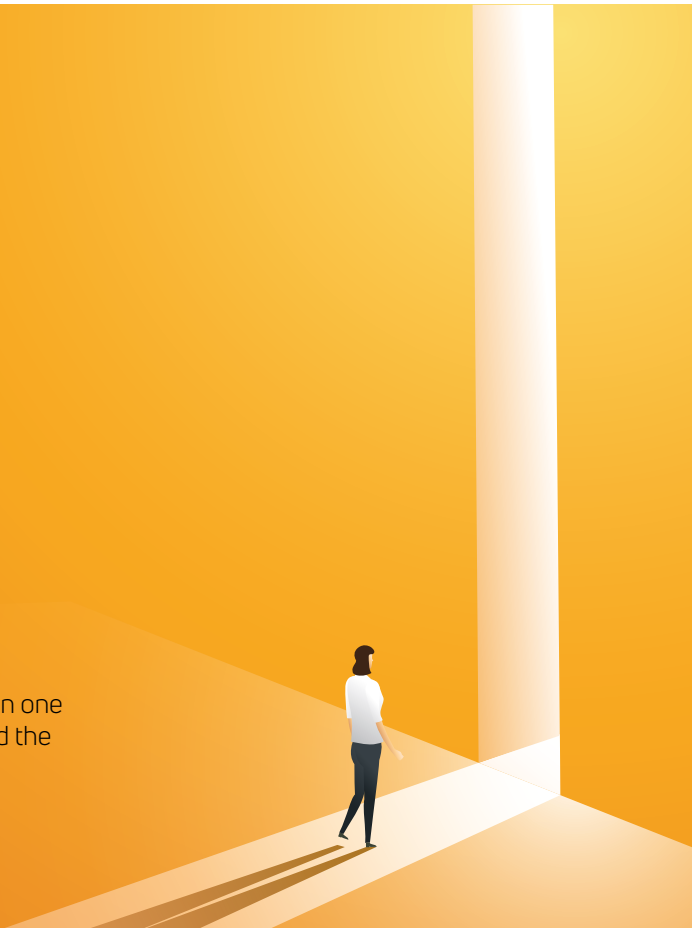
Significance

The decision in this case highlights the difficulties of establishing a prescriptive servitude right of access, as well as the precision and quality of the evidence which is needed throughout the prescriptive period in cases where a person is seeking to demonstrate that an off-register real right in land has been created and binds future owners of the burdened property. In this respect, careful consideration must be given before raising a court action for declarator, since the evidence in each case will be assessed on its own merits, as well as in the context in which the servitude right is claimed to exist.

Finally, it is worth noting that the pursuer, along with his mother and grandmother before him, had owned his property since 1966 and yet was ultimately unable to establish that a prescriptive servitude right of access had been created. As such, it would likely be even more difficult for parties who have owned their property for less than the 20 year prescriptive period to gather sufficient evidence to establish the existence of a prescriptive servitude right. J

Francesca Allanson is a member of the Law Society of Scotland's Property & Land Law Reform Committee, and has a particular interest in access issues

Moving in-house as an NQ



A solicitor who moved to a sole in-house lawyer position when one year qualified reflects on her decision and her experience, and the key differences that she noticed moving from private practice

In-house

KRISTINA MUTCH, SOLICITOR, THE DATA LAB

When I decided to move from private practice to an in-house role, I wasn't sure what to expect. Throughout university the focus had been on securing a traineeship in private practice, and my friends and I had followed the same route, completing traineeships and taking on NQ roles within commercial firms. After a year as an NQ in an IP and commercial team, I decided that despite enjoying my role, I was interested in experiencing working in-house. I have now been working as a solicitor at The Data Lab Innovation Centre for almost two years.

These are the key changes I experienced when moving from private practice to in-house as an NQ solicitor, along with the advice I would give to anyone considering a similar path.

1. Change in support and resources

The obvious change, particularly in a move to a smaller organisation, will be in the legal support and resources available to you. Within The Data Lab (now virtual) office, I am the only member of the legal "team". As The Data Lab is part of the University of Edinburgh, I am fortunate to have great support from the wider legal services team at the university whenever needed, but day to day I will largely be working alone providing advice across the business's activities.

Initially, the prospect of not being surrounded by other solicitors to rely on for immediate advice and reassurance was slightly daunting. As a trainee and NQ solicitor in private practice you become accustomed to sitting within a group of more experienced solicitors who you can rely on to quickly check over an email or to ask the numerous questions that pop up throughout the day. This of course provides an invaluable learning experience, but it can make it difficult to assess your own abilities and whether you can stand on your own two feet.

After a couple of months adjusting to working more independently, this has become one of the aspects of my role which I really enjoy. Being trusted to make the right decisions and manage my workload has been a confidence boost and allowed me to overcome the "imposter syndrome" I felt in the initial weeks.

My advice to anyone considering a move to in-house in the early stages of their career would be to find out what support will be available to you when you do need that second opinion. Although there are drawbacks to not working as closely with other legal experts, working on a more independent basis will allow you to develop as a solicitor in different ways and force you to become more proactive in finding new learning opportunities.

2. Approaching risk

As a trainee and NQ solicitor in private practice, the "commercial awareness" which is so often spoken about had seemed a somewhat abstract concept at times. Becoming part of an organisation and essentially having one "client" means this commercial awareness is ingrained in your day-to-day work.

I have found that working in-house has given me a better appreciation of my role to

support the business and its goals, in addition to minimising risk. Being part of an organisation has given me clearer insight as to where being overly risk averse or perfectionist is, in some cases, not practical or desirable. Understanding the background to each issue or the relationships with the other parties to a contract has allowed me to judge better where to draw the line and where extended negotiations will only cause deadlines to be missed or key relationships to be strained.

With any move in-house it will take time to adjust to a potentially new approach to risk and to understand fully the organisation's motivations and where those risks lie. In those early days, getting as much insight as possible into the business and its relationships as well as understanding the background to previous transactions and issues can make this a smoother transition.

3. Culture

Finally, in moving from private practice to in-house, you can of course expect to experience a shift in working culture, both in terms of the working environment and your relationship to your colleagues.

As opposed to in a traditional law firm, where you will be largely working within your practice group, working within an organisation will, in many instances, involve working with and providing advice to colleagues across the whole organisation in all different business functions and levels of seniority. Again, what was an initially daunting prospect has turned out to be another positive aspect of the job. The insight into a variety of projects and roles, along with the opportunity to work with a diverse range of people, keeps the work interesting and means there is always a new question to be dealt with or problem to be solved.

Adapting to any new job will of course depend almost entirely on the culture of the organisation. As the motivation to transition to working in-house will often partly come from a desire to experience a different working culture, it is important to understand whether that new working environment will meet your expectations before making a move. I was lucky that pre-COVID, I could pick up a lot from my interview being held within the office. Experiencing the hub of noise and activity, and the general laid back feel of the office, prepared me for a slight culture shock but one which I was keen to experience. In virtual interview situations it will be more difficult to pick up on the culture of an organisation by any means other than asking questions. Over lockdown, we have had successful interviewees ask to have an informal chat with the team in which they will be working, which has given them a good opportunity to assess the "feel" of the organisation before accepting the role.

Choosing your path

There are obvious advantages to both working in private practice and in-house. Figuring out which route to take can be a difficult one. For me, moving in-house early in my career has felt like the right decision and I am glad not to have let those initial doubts get in my way. If you think a change to in-house is for you, do your research to find a role that is the right fit and allow yourself time to adjust to a new environment and different way of working.

Trainee numbers hit by pandemic

The number of traineeships offered by solicitors fell by 27% from 591 to 434 in the 2019-20 practice year, due to the coronavirus pandemic, according to Law Society of Scotland figures.

However, the Society has seen a higher than usual number of traineeships beginning in early 2021, which suggests that some may have been deferred, rather than lost.

In-house traineeships managed to hold steady at 73, accounting for 17% of traineeships begun.

Admissions fell by 14% from 545 in 2018-19 to 467 in 2019-20, reflecting the impact of furloughed trainees who were unable to complete the admission process.

Virtual ceremony for solicitor advocates

Eight solicitors granted extended rights of audience in the civil courts have been introduced to the Court of Session at the first virtual ceremony held for the purpose.

The new solicitor advocates are: Jane Davey, Highland Council; Suzanne McGarrigle, Harper Macleod LLP; Emma Forrester and Naomi Pryde, DWF LLP; Nikki Hunter, Morton Fraser LLP; Kirsten Thomson and Erin Grieve, Addleshaw Goddard LLP; and Alasdair Sutherland, Burness Paull LLP.

Tribunal reviews expenses practice

The Scottish Solicitors' Discipline Tribunal is consulting on possible changes to its practice in awarding expenses.

The tribunal still awards expenses calculated by reference to the Society's former table of fees, abolished in 2005, and at a unit rate (£14) which has remained unchanged since 2008, though expenses are awarded on the relatively generous agent and client, client paying basis. The tribunal proposes to continue to allow expenses to follow success as a general rule, and on the same scale.

It seeks views on that issue, and on how expenses should be calculated. The consultation is at www.ssdt.org.uk. Responses are due by 14 May 2021.

Racial Inclusion Group launches

The Society has launched a Racial Inclusion Group, convened by Tatora Mukushi, a solicitor with Shelter Scotland.

The group will promote a better understanding of the lived and professional experiences of its Black, Asian and Minority Ethnic (BAME) members, and offer recommendations on how to improve racial inclusion across the profession. It will draw on the *Profile of the Profession* survey and other data sources, carry out research with BAME law students, trainees and solicitors, and speak to other stakeholders within the profession, reporting to the Society's Council, with recommendations, later this year.

OBITUARIES

ANTHONY SCOTT WOODS, Musselburgh
On 17 February 2020, Anthony Scott Woods, Musselburgh.
AGE: 57
ADMITTED: 2015

CATHERINE MONTGOMERY BLIGHT (retired solicitor), St Austell, Cornwall
On 12 April 2020, Catherine Montgomery Blight, one-time employee of Midlothian County Council and latterly Scottish Gas Board, both Edinburgh.
AGE: 85
ADMITTED: 1956

WILLIAM IAN KENNEDY HUNTER (retired solicitor), London
On 24 July 2020, William Ian Kennedy Hunter, one-time employee of Vacuum Oil Co Ltd and latterly employee with The Laird Group Ltd, both London.
AGE: 91
ADMITTED: 1955

HUGH CAMERON SHIRRA (retired solicitor), Airdrie
On 3 February 2021, Hugh Cameron Shirra, formerly sole partner of the firm Shirra & Co, and latterly consultant of the firm Lindsays, both Glasgow.
AGE: 75
ADMITTED: 1976

DAVID GEORGE FREW, Glasgow
On 16 February 2021, David George Frew, sole partner of the firm Frew & Co Solicitors, Glasgow.
AGE: 66
ADMITTED: 2013

Notifications

ENTRANCE CERTIFICATES ISSUED DURING JANUARY/ FEBRUARY 2021
ALDERSON, Emma Katherine
ARGO, Rebecca Jo
BAIG, Anzal
BENTLEY, Daisy Annabel
BRUCE, Megan Nicola
BUCHAN, Iain James
CHRISTISON, Denny
DIAMOND, Ryan Joseph
FISHER, Gabrielle Ann
FOWLER, Claire
GRIFFIN, Fiona Susan
HENDERSON, Lucy Ann
HUSSAIN, Sanna
KOCHAR, Monica
KONOPATE, Nicholas Benjamin
McANAW, Matthew John
McBRIDE, Eve Catherine
McGIRR, Hannah Elizabeth
McGUIRE, Matthew Edward
MACKINNON, Eve Aislinn
MACLEOD, Kathleen Christina
MAZZUCCO, Michael David
MELLIS, Rory Alexander
MERTON, Alex James
RICHMOND, Andrew
SAEED, Adil
SHEPHERD, Sarah
SWAN, Finlay Kenneth
SWEENEY, Eabha
THRALL, Kieran Alexander
WALKER, Amy Karen
WARD, Rachael Nicole

APPLICATIONS FOR ADMISSION JANUARY/ FEBRUARY 2021
ALLAN, Christine Catherine
ANDERSON, Ian Ruaridh
ANDERSON, Megan
BELL, Mitchel Kyle
BRAND, Mhairi Catriona
CAMPOS RIO, Carol
CARGILL, Ross Ian
CRAINE, April Alison
CURRIE, Jill Barbara
DAVIDSON, Emma Christian
DUCKETT, Carly Suzanne
FRANKLIN, Michael James William
FRASER, Sean
GAMEIRA LIMAO
OLIVEIRA, Lourenco
GIBSON, Ross Balfour
GKIKA, Myrto
GRAHAM, Lesley Anne
GREEN, Susannah
GREENHORN, Camilla Ann
GRIFFITHS, Debbie Joanna
HEDLEY, Calum Iain
HEPBURN, Holly
HERD, Louise Mary
HIGH, Sarah Ruth
HOLBREY, Simon Christopher
HOLMES, Sarah Charlotte
KENNEDY, Fiona Margaret Mary
LAMB, Pamela Jean Booth
LIMA SEVERO NUNES, Guilherme
LIVINGSTON, Michael
McCLUSKEY, Justine Hannah
McGOUGAN, Fiona Margaret
MACKAY, Iain Lewis
MacNEIL, Alexander Ian
McQUEEN, Alanna Davidson
MOSTAFA, Adeeb Al
NAISMITH, Heather Catrina Margaret
OLIFF, Harry Douglas
PARCELL, Daniel Stephen
POTHAN, Jane Lesley
PRATT, Aimee
PULLAR, Thomas Lee
RIDLEY, Adam Porter
ROSS, Owen Noel
STRAIN, Lauren McCann
SUTHERLAND, Amy Elizabeth
THOMPSON, Ross Hodgson Allan
TOLLAND, Sarah
TRAYNOR, Daniel Owen
WARRILLOW, Nicholas Piers
WILSON, Carol-Anne
WOOD, Kieran Donald

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/.

Local self-government

The Society produced a stage 1 briefing on the European Charter of Local Self-Government (Incorporation) (Scotland) Bill. It agrees with the assessment that to give public international law the same legal authority as domestic law, it must be incorporated into domestic law.

It further notes that a reporting cycle of once every five years may be too long to provide proper scrutiny; and there may be an impact on local authority budgeting if finance is to be set aside in anticipation of raising petitions for judicial review. It asks why the Human Rights Act process for dealing with remedial orders has not been adopted; and notes that the implementation period set out may be too short if practices, rules and regulations have to be reviewed and staff training undertaken.

Scottish charity law

The Charity Law Committee responded to the Scottish Government's Strengthening Scottish Charity Law Survey. It broadly supported proposals to increase transparency and accountability in areas including annual reports and accounts, registers of charity trustees, and requiring an ongoing territorial connection for all charities in the Scottish register. It also reiterated previous calls for a comprehensive review of the Charities and Trustee Investment (Scotland) Act 2005, something that also features in the Society's *Our priorities for the 2021 Scottish Parliament elections*.

Future UK-EU relations

The Environmental Law Committee responded to the House of Lords EU Environment Subcommittee's call for evidence on future UK-EU relations. It highlighted that the effect of the Trade and Cooperation Agreement ("TCA") generally on environmental protection and climate standards remains uncertain. While the preamble acknowledges the parties' commitment to high environmental standards and tackling climate change, and the TCA includes certain protections based on recognised environmental principles, there is uncertainty as to when regression of standards would trigger the formal procedures for rebalancing and dispute settlement. Nor is it yet clear whether or to what extent the devolved administrations or legislatures will play a role in policy and decision making relating to the TCA, including in dispute resolution.

COVID-19 legislation

A number of committees contributed to a response to the Scottish Parliament's COVID-19 Committee's call for evidence. The response comments on the emergency legislation in relation to parliamentary scrutiny and the rule of law, respect for human rights, devolution, and other public health legislation. It recommends a review of the law regarding health emergencies, and suggests inter-governmental collaboration on the creation of a Standing Advisory Committee on Pandemics, as well as a quadripartite parliamentary group to share experience, best practice and knowledge. It also discusses equality and human rights safeguards and priorities to inform the Scottish Government's 2021 COVID strategy.

Angiolini review

The Criminal Law Committee responded to the call for evidence on Dame Elish Angiolini's final report on complaints handling and other issues in relation to policing (see p 47 of this issue).

The report is very thorough and wide ranging. It highlights some troubling issues which have been raised in various cases. This stresses the need for thorough, speedy and independent investigations conducted in the public interest. The committee supported many of the recommendations, including the need to streamline and clarify the complaints process, identify clearly who is responsible for investigating complaints against senior officers, ensure that the Police Investigation and Review Commissioner has effective powers, and improve the investigation of deaths in police custody.

Static homes licensing

The Licensing Law Committee responded to Holyrood's Local Government & Communities Committee's call for views on the licensing of static homes with permanent residents, which considered the effectiveness of the current licensing system for mobile homes parks and how well it protects residents.

Current legislation presents a system that is both unwieldy and complicated to understand. The response considers it not fit for purpose. A working group should be set up to report on current practices and make recommendations for consolidated legislation to streamline the system and make it more manageable.

Digital trade and data

The Trade Policy Working Group and Privacy Law Committee responded to a House of Commons International Trade Committee inquiry into digital trade and data, covering areas including digital trade and data provisions in free trade agreements, concerns around data security and privacy, the environmental impact of digital trade, and relevant legal frameworks. The response highlights the symbiotic relationship the legal sector has with digital trade as with most other sectors, and details some of the challenges and opportunities from the expansion of digital trade, particularly as a result of the pandemic.

ACCREDITED SPECIALISTS

Commercial leasing law
Re-accredited: DAVID WILLIAM JOHN BELL, Harper Macleod LLP (accredited 26 January 2001).

Employment law
LAURA IRENE SALMOND, BTO Solicitors LLP (accredited 5 February 2021).

Re-accredited: DEBORAH MILLER, MacRoberts LLP (accredited 11 February 2011); JAMES INNES CLARK, Morton Fraser LLP (accredited 29 March 2011).

Family law
Re-accredited: RICHARD B SMITH, Brodies LLP (accredited 22 March 2006); LESLEY JANE GORDON, BTO Solicitors LLP (accredited 10 February 2011).

Family mediation
Re-accredited: SHONA TEMPLETON, MTM Family Law LLP (accredited 11 February 2015).

Housing and residential tenancy law
CATHERINE DAWN McQUARRIE, TC Young LLP (accredited 12 February 2021).

Medical negligence law
DARREN JAMES CRILLEY DEERY Drummond Miller LLP (accredited 5 February 2021).

Personal Injury law
Re-accredited: DAVID SHORT, Balfour+Manson LLP (accredited 14 January 2003).

Election of members of Council 2021

Council elections are due to take place this year in the following constituencies:

- 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 and Selkirk: two seats
- England & Wales: one seat

Information and nomination forms can be obtained from the registrar, David Cullen by email: davidcullen@lawscot.org.uk; completed nomination papers must be received by 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.

MONEY LAUNDERING

New AML guidance: what you need to know

An important revision and update of the Legal Sector Affinity Group anti-money laundering guidance was released on 20 January 2021. In this article, the Society's Graham MacKenzie explains the background and context of the new guidance, and highlights the key changes

Approved guidance, such as that of the Legal Sector Affinity Group (LSAG), is a fundamental constituent of the UK anti-money laundering regime. It is intended to convey the wider intention, risk-based nature and spirit of the Money Laundering Regulations to businesses regulated for AML purposes.

It is there to add colour to the underlying regulations. It helps legal professionals understand how to comply with their AML obligations by offering more focused, practical advice, guidance and support across all the main aspects of the UK regime.

The guidance also serves to set out the Society's supervisory expectations of firms. Practice units are not required to follow the guidance; however, the Society will consider whether firms have complied with this guidance when undertaking AML supervisory inspections and you may be asked by us to justify a decision to deviate from the guidance.

In addition, compliance with approved guidance may provide a possible legal protection for businesses. Essentially, those contemplating civil or criminal action under the Money Laundering Regulations, the Proceeds of Crime Act (POCA) or the Terrorism Act 2000 (TACT) must consider the ability of the business to demonstrate compliance with authorised guidance.

Why has it been updated now?

This significant rework and extension of the guidance from the last iteration in 2018 reflects the increasing prominence and complexity of AML risks, issues and challenges in the legal sector.

These factors, along with increased AML supervisory oversight, mean that it has become even more important to set out clearly our supervisory expectations on firms and give the profession up-to-date, practical and in-depth support to help them comply with their obligations. The changes that have been introduced are intended to support solicitors in this increasingly demanding area of practice. The revised guidance can be accessed through this link: bit.ly/LSAGAML

New guidance: the key changes

Key compliance principles introduced

The new guidance has seen the introduction of 36 High-Level Compliance Principles, which, along with the underlying regulations, should be seen as the building blocks to a strong AML risk control framework within the firm.

These cover all the key AML considerations, and addressing the areas covered in them will really help your practice comply with its AML obligations. Documentary evidence of adherence to these principles will help to demonstrate compliance in any future AML inspection of your practice.

The rest of the guidance document is then built around these principles. The top of each following section repeats the principles that are most applicable to that section, giving in-depth, practical advice in order to help you implement and embed good AML controls at the heart of your business.

Enhanced AML governance and policies, controls and procedures

This section seeks to highlight what strong AML governance and control within your firm may look like. This includes what should be documented in AML policy/procedures and guidance around the roles and responsibilities of both the senior management or partnership of the firm and the specific duties of the MLRO/MLCO. Again, some of this guidance is prescriptive, as per regulatory requirements, and some may depend on the size, nature and risk profile of your firm.

Risk assessment expanded

A risk-based approach is fundamental to the UK AML regime and is an area of AML control that the profession consistently asks for more guidance around. With this in mind, LSAG thought it important and appropriate to greatly expand from the previous version of the guidance, with clear sections relating practice-wide, client and matter level risk assessment.

A robust (and documented) practice-wide risk assessment lies at the heart of AML control at any firm. A question I often pose to MLROs is: "How can you manage AML risk in your business, if you haven't given consideration to what inherent AML risks your business is actually exposed to?" Only once a practice has adequately assessed and documented these risks can it start to consider the extent of the AML policies, controls and procedures it needs to put in place to mitigate these risks. This can range from due diligence procedures through to what training it should give to staff.

Within the boundaries of regulatory requirements, a good-quality, documented, practice-wide risk assessment may also allow practices to ease AML controls in areas of the business less exposed to AML risk, potentially reducing AML-related resource and cost pressures. This is the essence of a risk-based approach.

The guidance further details the risk factors firms should consider across practice-wide, client and matter risk assessments, and highlights the requirement to link risk assessment outcomes to the level and nature of due diligence undertaken on clients and matters.

Client due diligence (CDD) rewritten

This new section highlights that CDD is far wider than simply verifying and documenting a client's identity. It is about gaining and documenting a sufficient understanding of the client's background, sources of funding and the purpose and nature of the matter you are being engaged in. These elements of CDD are critical in determining money laundering risk and therefore safeguarding your business – in many ways actually more so than simply verifying that a client is who he/she says they are.

It also sets out our supervisory position regarding "longstanding relationships". While "knowing the client and their background" will, of course, be helpful in taking a risk-based approach and undertaking holistic due diligence, a personal or longstanding relationship with a client does not negate or rescind the client due diligence requirements of the regulations.

In our experience, the profession often finds source of funds/source of wealth checking to be challenging, complex and difficult to apply in practice. This section therefore significantly

expands guidance in this important area, giving definitions, the circumstances when such checking must or should apply, and what evidence should be documented. It also gives expanded guidance on enhanced due diligence: in what circumstances it is required, and what "enhanced" checks may entail, tailored to specific circumstances of the client/matter.

Technology section added

This is a brand new section close to my heart, both because I wrote it and because it is a hugely significant development in the context of the guidance.

In a modern age, it is clear that non-face-to-face clients/transactions can no longer be viewed as automatically high risk (although this remains a significant risk factor for consideration). It is also clear that the RegTech movement is becoming an increasingly secure and sophisticated way of undertaking identity verification, checking beneficial ownership records, or performing sanctions, PEP and adverse media checking.

While firms can still continue to use traditional documentary means, such as passports etc, technology may in fact be lower risk than traditional means in some circumstances. That bold assertion does not come without caveat – anyone using AML technology must understand and be trained in its functionality, limitations, the quality and accuracy of the underlying data it uses and what any back-end results actually mean. The broad functionality and use within the firm should be documented. It is not enough simply to run a check, put it on file and "tick the box". RegTech is not a substitute for holistic AML due diligence incorporating an understanding of the nature, purpose and background of the client/transaction.

Legal professional privilege (LPP) extended

This section has been extensively revised by an independent expert, to concentrate on the practical issues, considerations and documentation relating to LPP in a situation where the solicitor is considering submission of a suspicious activity report. This has been undertaken by grouping together relevant resources in one document, a refocus on the circumstances of the underlying retainer and first principles, and the construction of a practical framework to aid and guide you through what is inevitably a challenging position for any practitioner to find themselves in.

Next steps

This article serves only as a short summary of key changes. Firms should still familiarise themselves with the content of the actual guidance and review/update their internal AML policies, controls and procedures accordingly. We will of course allow firms adequate and ample time to do so, particularly given the unprecedented economic pressures caused by the current pandemic.

I hope, too, that the document will serve practitioners in the longer term, by acting as a useful reference tool to be used as and when firms require assistance on a given AML issue.

N.B. The words document, documented, documenting, documentation and documentary appear 14 times across this article, not including this paragraph – for a reason. It is vital that practitioners can evidence the steps they have taken to mitigate and control AML risk within their business. Submission of relevant, contemporaneous AML-related file notes and records can make a huge difference to AML inspection outcomes.

Graham MacKenzie is head of Anti-Money Laundering at the Law Society of Scotland. The Society is part of the Legal Sector Affinity Group.

FROM THE ARCHIVES

50 years ago

From "Aberdeen Young Lawyers' Association", March 1971: "There was a good attendance at the Second Annual General Meeting of the Aberdeen Young Lawyers' Association... The retiring Chairman, Mr Patrick P. Davies, outlined the achievements of the Association over the past year. In particular, he mentioned that membership had now grown to a satisfactory level and was representative of a fairly high proportion of the younger members of the legal profession in Aberdeen... He... considered that one of the most important areas of the Association's activity was in acting as a link between law students in the university and the profession."

25 years ago

From "The Cullen Review: Reform of Procedure in the Court of Session", March 1996: "Among other possible modes of inquiry, his Lordship has considered but rejected *in hoc statu* 'court-annexed arbitration'. He has also considered that compulsory mediation is not appropriate. He does, however, observe that 'in an extreme case where the court considered that the parties had not given adequate consideration to an alternative means of resolution it might decline for the time being to order inquiry'. The hypothetical situation is clearly one that could place agents and counsel in a sensitive position."

OUTREACH

Schools outreach: a virtual revolution

The pandemic has brought challenges and opportunities for the Society's schools outreach work

The last 12 months have been hugely challenging for every sector of society. However, while we all wish COVID to be a distant memory, we are hugely varied in the ways it has affected our lives.

It soon became clear that this virus was less of a health concern for younger people, but that the lockdowns would have a huge effect on them now and in the future. Successive exams have been cancelled, months of school have been missed, proms cancelled, part-time jobs unavailable. Almost everything I would have taken for granted as part of being a teenager was changed or cancelled.

However, as organisations and businesses adapted, many cancellations changed to virtual alternatives. What could we salvage?

Our team at the Society was keen to continue as much of our schools outreach programme as possible, but we had to completely rethink how to deliver it.

With school leavers still making UCAS and job applications, we wanted to provide pupils with opportunities to stand out from the crowd and evidence their interest in law. We adapted our offering and learned along the way.

Our debating tournament

Over the last 20 years, we have held the Donald Dewar Memorial Debating Tournament for school pupils. Heats take place across Scotland and the grand final in the Scottish Parliament chamber in June.

The pandemic took hold when we were about to stage our semi-finals, but after a period of researching technologies and videoconferencing options, we agreed with schools that the debates could take place virtually. The judges watched online, then decided which teams went through to the final.

For that final, the Deputy Presiding Officer recorded a message that all competing teams could tune in to watch. It was brilliant to see the debaters complete the tournament and, of course, the winners have the trophy and status of being Scotland champions during a year they won't forget.

This year, the entire tournament will be delivered virtually. Going forward, the technology means we can hopefully encourage even more schools to enter, regardless of geography or poor weather. That said, we can't wait to get back to real-life debates and having our final in the Parliament chamber again.

Street Law

Our award-winning Street Law programme, sponsored by Pinsent Masons, is one of our flagship outreach initiatives. Focusing primarily on low progression schools, we train law students to "teach" law to high school pupils over a term. The interactive lessons can include crime, mock trials, employment law, contract law, and social media abuse: topics of interest and relevance to young people.

Lessons have always taken place in schools, and training in the Society's offices. We felt, though, that this was too important to cancel, so again we migrated to a virtual programme.

We are indebted to the Street Law trainers, who were adaptable and flexible, and had to rethink how to deliver the interactive programme. We are delighted to say we were one of the first countries to do so, and shared our experiences with other participating programmes around the globe at a recent conference.

As with the debating tournament, we are really keen to get back into classrooms, but operating this way has enabled us to extend our reach, particularly to schools in the Highlands & Islands, where there are no law students to teach the programme. It looks likely that we can adopt a hybrid of real life and virtual lessons in future, which is a great outcome.

Summer school

At the start of 2020, we decided to run another summer school for pupils interested in studying law. Aimed particularly at pupils from low progression schools, it would provide a blend of networking and learning opportunities. We had to change the date, and the delivery method, but the online programme kicked off in July.

We couldn't believe the enthusiasm from pupils – and the number signing up. We offered a place to everyone who applied to the Lawscot Foundation for funding, and worked closely with universities' widening participation teams to target pupils from less advantaged backgrounds.

In the end, more than 70 registered (typically, 20 or so who live locally enough attend the summer school at the Society's offices). We secured fantastic speakers to deliver a programme focusing on civil and criminal law, with interactive sessions, virtual tours of the Faculty library and the Parliament, and guidance on applying to university. The pupils were engaged, interested and asked questions throughout, through the magic of the chat function.

We intend to run the summer school virtually in future. It hugely boosted the numbers who could attend, and every pupil asked questions and had them answered.

I am personally delighted we have managed to keep these programmes going over the last 12 months. It's important that we did. Many pupils rely on these experiences for future UCAS and job applications. With many other opportunities and experiences being cancelled this year, it's important that those who can offer opportunities to young people do so. It's also been great to see so many firms and organisations offering virtual placements and internships – they really do make a difference.

For case studies, see the article online. For more information about any of our schools outreach programmes, or assistance in delivering an internship online, email us at careers@lawscot.org.uk

Heather McKendrick is head of Careers and Outreach at the Law Society of Scotland

The joy of **cheques**

Lockdown's passing, but lock-up is always with us. How can it be managed well? Stephen Gold asks

Chancellor Rishi Sunak is rebalancing the books, and his desire for cash is mirrored in every part of the economy. Though the profession has had a pretty good war, law firms are no exception.

We can take different routes to higher profits: win more work; cut overheads; boost productivity; increase prices. But one of the most effective is often neglected: get paid more quickly. Surveys show that the average firm's lock-up is 150 days. When you think about it, that's a startling figure. Try telling your hairdresser (remember them?): "Thanks, I'll pay you in five months if that's OK", and see what they do with the scissors. Conveyancers seem to have little trouble applying the "no fee, no key" rule, so why not all?

Law firm leaders tearing their hair out as they scan printouts of unpaid bills and WIP, should look at two issues in particular. First, performance suffers when there is no obvious link between what partners take home and their record on cash collection. I once attended a presentation by the CEO of an American firm, who explained, glasses glinting, that in his firm it was very simple: if a minimum amount of cash had not been generated by the end of the month, no partner was paid drawings. Miraculously, it had been years since this happened. You may think his approach is too draconian, and runs counter to your firm's culture. But you would have admired his suit. I'm aware of a Big Four accounting firm which takes a similar approach: payment of partners' quarterly bonus depends on cash-in targets being met. Whatever balance you strike, there must be a direct link between performance and reward.

Secondly, there is no substitute for structure. Does your firm have a well-articulated policy on billing and cash collection? Is it enforced? A few simple rules go a long way.

An example: payment is due in 30 days; a letter before action must go at 45 days; and a writ at 60 days. Exceptions must be approved by the practice area head or managing partner. This is fine as far as it goes, but how do you enforce it? In one client firm, partners had been left entirely to their own devices, and so performance was uneven. We solved the problem very simply, by making it mandatory that each partner sit down with the managing partner, or practice area head every month, to account personally for the bills that were unpaid, and commit to action. It was made clear that they were on the hook to deliver payment, and the bill stayed on the list until they had, but they were also offered support and mentoring. Personal accountability, scrutiny and confidence-boosting measures had a startling effect. Within three months, lock-up had reduced by 40%. How well partners manage cash should always be a prominent appraisal measure.

Don't fear the response

There is a widespread fear that pressing for payment destroys client goodwill. It's a myth, popular with lawyers who lack confidence in the value of what they do. In fact, the opposite is true. Clients allowed to pay, as the song goes, this year, next year, sometime, never, think their lawyers are either fools incapable of running an efficient business, or that they have too much money to care, or both. It's not a good look. Not unreasonably, clients ask, "Should I rely on these people to look after my affairs, when they don't seem able to look after their own?" A clear, unambiguous policy is very helpful to partners uncomfortable having the conversation. It enables them to say, "I'm bound by the rules of the firm, and don't have discretion to change them."

The same applies to payments to account of fees and outlays, and interim billing. There are certain kinds of work, especially contentious matters, where large amounts of unpaid WIP are an unacceptable risk. If clients resist reasonable requests, it's an early red light that maybe you shouldn't be acting.

In these times especially, there may be good reasons for giving clients more time, allowing discounts, or even agreeing to write off. But these should be informed decisions, reached thoughtfully and with a keen commercial eye. They can't be the consequence of sloppiness, or spinelessness. Partners may feel awkward at first in being more assertive, and need support, but with success comes confidence, empowerment and control, not to mention an agreeable bulge in the wallet.

You may remember there used to be establishments called "pubs", serving what were known as "drinks". The grittier variety were fond of displaying signs proclaiming: "In God we trust. You pay cash." *In vino veritas*, indeed.

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

RISK MANAGEMENT

Wills and executries: learning the hard way

On behalf of Lockton, Alan Calvert and Ed Grundy return to the subject of wills, executries, trusts and tax, with some cautionary tales of errors and oversights that have led to claims

In an earlier article (Journal, August 2020, 46), the authors and Lockton published a first principles take on common issues faced by private client solicitors. This article provides some examples of claims faced and the key lessons to be learned from each.

Our day-to-day work defending professional negligence claims throws up several issues in relation to wills, trusts, executries and tax which we see with relative frequency.

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

1. Taking instructions

Obviously it is fundamental to ensure that full and appropriate instructions are taken which accurately reflect the testator or trustor's wishes and are recorded. Without that, claims are almost inevitable. Below are some examples of where practitioners have been accused of getting it wrong.

File notes

We see many claims where it is alleged that the testator's instructions have not been properly reflected in the final document. Accurate file notes are crucial when such a claim arises. An action was raised against a solicitor centred around the instructions given, which conflicted with a strong belief by a testator's daughter that her mother wanted a trust in place. However, a series of file notes clearly showed that the testator's instructions had changed, albeit without discussion with the daughter. The note of the final signing meeting clearly showed that the will had been discussed with the testator, that she understood its effect and that it fully represented her intentions. Where the final intentions are correctly reflected, whether the beneficiaries agree with those or not, it is extremely difficult for a beneficiary to claim for any perceived losses.

The claim was repelled, but without the saving file notes, the outcome was unpredictable, with a defence hanging solely on issues of credibility and background circumstances.

Possible undue influence

It seems obvious that instructions should be taken directly from the testator, but particular care should be taken where there is any cause to suspect the instructions are not the testator's. Claims arising from alleged "undue influence" remain regrettably common, and it is important that instructions are confirmed, to ensure the testator knows what is being disposed of and understands the legal effect of their bequests.

A claim arose where an experienced practitioner took instructions for a new will from a longstanding client, involving a trust for his grandchildren. Later he received an email from "the client", changing his instructions and making outright bequests to his son. This had been the format of a previous will, so the solicitor thought nothing further of it, revised his draft and sent that for signing. Crucially, the contents and effect of the will were not discussed with the testator in any detail. It transpired that the son had persuaded his father to make the change. When the testator died, a claim was raised by the grandchildren on the basis of undue influence, alleging the solicitor had not taken proper precautions.

Capacity

The "golden rule" in drafting is for the solicitor to be sure of the testator's mental capacity (solicitors should follow the Law Society of Scotland's guidance on vulnerable clients).

The risks are real, and we have encountered a lucky escape where a client appeared to have capacity throughout a meeting to instruct his proposed will. The solicitor assessed capacity at the outset, and remained satisfied until the end when the testator asked to be moved away from the radiator because they "were melting". While that is a common enough Scottish phrase, it was followed with, "I'm a Snickers you see so I can't be near the radiator." Suffice to say, the will was not drawn up at that time and a follow-up session was arranged after the testator had seen a medical practitioner.

Survivorship destinations

One of the most frequent claim types stems from survivorship destinations and practitioner oversight in that regard. These can obviously result in large claims by a disappointed beneficiary, often for the whole value of a property.

A claim was raised by a stepdaughter as disappointed beneficiary where a husband and wife intended to bequeath their half shares of a property differently, the wife to her daughter and the husband to his son, each from previous marriages. The solicitor was asked to evacuate a survivorship destination, but failed to do so. On the wife's death the property passed to the husband/stepfather, as surviving spouse. On his death it transpired he had left the whole property to his son, and nothing to the stepdaughter, who made a claim for half of its value on the basis that the survivorship

provision should have been evacuated per the clear wishes of her mother and stepfather while both were alive.

2. Drafting and signing

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

Avoid delay

Delaying meeting to take instructions, or drafting and finalising a will, is risky, and can result in claims from either an executor, say on the basis of increased tax payable, or a disappointed beneficiary where the delay prevents a bequest being made.

Such a claim occurred where a solicitor started the process of revoking a survivorship destination, then left the firm. His replacement arranged for it to be signed, but failed to lodge it in good time. Unknown to him, the evacuation was only lodged after the testator's death, so her share of the property had already transferred to her husband rather than brother as intended. The brother attempted an unsuccessful action to uphold the revocation and also claimed against the solicitors for half the value of the very expensive property. This could have been avoided by the departing colleague being required to give a thorough handover before leaving, including highlighting any urgent tasks such as this to ensure continuity.

Tax

Tax based claims arising from a will or trust drafted without the proper care or expertise are also relatively common, and can result in large inheritance or capital gains tax bills, or available nil rate bands being lost. Solicitors should take great care when providing tax advice; usually, it should only be given where such expertise exists within the firm, or has been sought externally. These claims are commonly both particularly complex and costly to resolve.

A claim arose where beneficiaries alleged that their mother instructed a solicitor to put in place a trust to protect them from the tax implications of the high value estate. The solicitor had little experience of such schemes and made several fundamental errors. As a result, substantially increased IHT and CGT bills were payable and an action was raised against the solicitor for resulting loss to the estate.

Wisely, many solicitors now expressly exclude tax advice in their engagement letters for standard wills, or recommend in writing that an accountant/tax lawyer is consulted, thereby spreading and reducing the risk profile.

Signing the will/trust

It seems obvious that wills and trust deeds need to be properly signed; however, there are various examples of this not being done. Claims have arisen where wills returned unsigned are sent for safe keeping without checking, only for the firm to discover the omission many years later on the testator's death. Checking signatures only takes a moment but can avoid serious claims down the line, so there should be no reason not to do it.

Bequests

Practitioners should obviously check that the testator has the right to bequeath all items in their will, and check properties for survivorship destinations. However claims can also arise from contingent bequests.

A testator loaned money to a friend prior to her will being drafted, then bequeathed the same money to her son, anticipating repayment during her lifetime. The loan terms were vague and the repayment trigger didn't occur during her lifetime. The son raised an action as a disappointed beneficiary, having not received the funds concerned. It took a number of years and significant legal fees to resolve the issue with a difficult original loanee and latterly his executors following his death.

3. Managing the trust or executry

Once the executry or trust is underway, in some cases we have seen a tendency to relax a little.

The basics

A claim arose where a solicitor failed to ensure that buildings insurances were in place at an executry property. A burst pipe caused serious damage of around £150,000 and the executor made a claim for the substantial decrease in the property value.

When preparing deeds of assumption and conveyance relating to new trustees, the basics must be carefully considered. Claims arise where the signing is defective, in one case resulting in the trust lapsing after the original trustee's death.

Both of these examples show that the basics are key, and sometimes the easiest things to overlook, even (and perhaps especially) if you're very experienced.

Distributions

Claims and complaints are relatively common where beneficiaries have been overpaid, or payment made to the wrong person.

Trustees raised a claim against a firm for recovery of incorrectly paid monies. Cheques were sent to a firm representing 12 beneficiaries, along with the scheme of division which clearly showed that only 10 were entitled to those funds. The firm distributed the funds, and when the mistake was identified the two unentitled beneficiaries refused to repay, leaving the firm to repay the trust and seek recovery from the two beneficiaries separately.

Delay

As a final example, claims can also arise from an executor/trustee against a solicitor for failing to make expeditious progress with the administration. In a particularly lengthy example, the solicitor had failed to obtain a grant of confirmation for over nine years. There were other issues with the estate, including that the original solicitor handling the executry had incorrectly assumed no IHT was payable. Significant interest and penalties accrued, regular and detailed records were not kept and it was particularly difficult to decipher and resolve the issues in the case.

Final thoughts

We again urge solicitors, no matter how experienced, to stop and think about what needs to be done in each will, executry and trust, however routine those steps may seem. Claims arise against practitioners at all levels, sometimes through the dreaded dabbling, and sometimes against very experienced practitioners who simply overlook something.

A suitable "first principles" process, questionnaire or checklist (such as Lockton's own) should be created and a system adopted which the entire business should be required to follow at all levels of seniority. As shown above, without these systems in place practitioners can face a very diverse range of claims. Sometimes issues are created by inattention or complacency and sometimes by other causes, but hopefully it will shine through that many of our examples could have been prevented through proper and robust processes. We reiterate that detailed file notes are vital, given that the testator's instructions are key to the whole process. The procedures and steps put in place will become second nature and the risk of claims can only be reduced.

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

PUBLIC GUARDIAN

OPG update

Two matters of practice advice from the Office of the Public Guardian

New guardians declaration form

From 29 March 2021, the OPG will be asking all lay financial guardians to complete a declaration form before an application is lodged with the sheriff court. Solicitors may use the form and issue it to clients right away. This will help promote familiarity with the form and raise awareness of the associated processes.

The purpose of the form is to engage with lay prospective financial guardians much earlier in the guardianship process, to (1) outline the responsibilities of the role, and (2) risk-assess their suitability.

Solicitors are asked to note this change to practice, as they will be instrumental in ensuring the court is provided with sufficient information to allow suitability to be fully assessed.

How will it work?

OPG asks that solicitors provide their clients with the declaration form at the outset or civil legal aid stage. The completed form should be returned to the solicitor and then sent to OPG along with intimation of the summary application.

OPG will then send a copy of the form to the court along with its letter outlining observations including whether the form was completed and returned. Where appropriate, OPG will direct the sheriff to any sections of the form which may promote the suitability of the prospective lay financial guardian, or which may flag concern in respect of their suitability.

If the form is not sent to OPG, it will write to the prospective lay financial guardian to ask that the completed form be returned five days before the court hearing date.

For further information, see the website or email: opgorders@scotcourts.gov.uk

Emergency measures for postal PoA submissions

As a result of current Government advice in respect of COVID-19, most of OPG's power of attorney staff are working from home and processing PoAs electronically. For the foreseeable future the majority of registrable PoAs will be processed electronically even when sent via the postal system.

In practice, this means OPG will process PoAs electronically when (1) the registration criteria are met, and (2) where an email address has been provided for the sender or granter. If an email address has not been provided, OPG will contact the sender to obtain this.

When a PoA is registered electronically:

1. OPG will email a PDF version of the certificate of registration, and a copy of the registered PoA, to the sender. The certificate will have a crest watermark running through it, as will each page of the PoA. (This certificate will be the same as the certificate issued via EPOAR.)

2. When the PoA is printed, each page will require to be signed by one of the following people: the granter, solicitor, stockbroker or an authorised person for the purposes of the Legal Services Act 2007.

3. If the granter or the specified person has not provided an email address, their documentation will also be emailed to the sender. It is appreciated this is not ideal; however given the circumstances this is the best solution that can be offered at present.

This is an emergency measure which allows OPG to maintain the registration service.

THE ETERNAL OPTIMIST

No going back

Even if we think we have a chance to reverse a forced change, would things really be the same as before?

My wife was made redundant just before lockdown from her sales role in the events industry. The likelihood of re-employment at the time was slim, especially with COVID looming so, with all credit to her, she has started her own business, working from home making traybakes (feel free to check out and give a like to "The MB Fairy" on FB and Instagram).

Wind forward to today, and she was recently headhunted for a new position similar to her last. To be honest, I was quite happy when I heard the news. For the last 12 months my home hasn't been my home, with traybakes and their paraphernalia everywhere, the smell of chocolate permeating the whole house and 4am interruptions to my sleep as the MB Fairy headed to the kitchen to cut traybakes. Oh how I have wished that things would just go back to normal! A 9-5-ish job with a company car, and my home returned to peace.

Then it hit me: there is no returning to normal. There never has been. Nothing ever stays the same: kids grow up; clients pass away or move on; businesses evolve. What we experience as "normal" is just our familiarity with the last change. Even if the MB Fairy returns to gainful employment (the process is not yet complete), it will simply bring with it a different set of issues, challenges and solutions. Perhaps the lesson in it all was not the changes forced on us: perhaps it was the way that she has bravely stood up to them and discovered a way to turn her hobby into an opportunity. I can't remember who said it, but the past is never as good as we remember and the future is seldom as scary as it seems. Maybe all we ever really need to do is roll up our sleeves and get on with it!

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

Handling police complaints: seeking fitness for purpose

Gillian Mawdsley provides an overview of Dame Elish Angiolini's report into the handling of complaints against the police, which calls for significant culture change

In November 2020, the final report of Dame Elish Angiolini's Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing was published. It reviews the effectiveness of the police complaints system put in place for Police Scotland in 2013, how well complaints are investigated, and the associated processes.

The scope of her highly accessible and comprehensive report can be seen in chapter 31, where Dame Elish outlines 81 wide-ranging recommendations, aimed at wholescale improvement to the system. These include new powers for the Police Investigations and Review Commissioner (pirc.scot/).

Her report recognises the need to streamline and clarify the complaints process, identify roles and responsibility for investigating complaints, and improve the investigation of deaths in police custody. The current system is obscure, difficult to navigate, complex and not user friendly. Too much reliance has been placed on remote process, responding by email or letter and not ensuring vital person to person interaction.

Basic requirements

The police complaints system in Scotland must be effective, fair, timely, transparent, and accessible to all. It must provide accountability from the police to the public. The public, which means all of us, must have confidence in Police Scotland so that, in turn, it commands trust and respect for its officers, staff and service responsibilities.

Matters go wrong in every organisation. Having a recognised system in which complaints can be raised and handled is essential to ensure that an explanation, apology, or redress is given where required; and as importantly, that the system itself improves, in the reflective cycle of reviewing its processes, learning from mistakes, and embedding that learning within its training.

Police Scotland has been subject to much criticism in some high profile cases that provide some context to the report. These include *Ruddy v Chief Constable of Strathclyde and the Lord Advocate*, a case involving damages over an allegation of police assault, that ended up at the Supreme Court: [2012] UKSC 57. Too much reliance was placed on procedural matters and not on the guiding principle of pursuit of justice in investigation of police complaints.

The continuing public inquiry into the death in custody of Sheku Bayoh also shows the need for speedy and independent investigations and the provision of family support. Paragraph 25.15 of the report identifies the need for free, independent legal advice for the affected family from the point of death where such tragic events arise.

Neutral and accessible

The report and the review of the complaints process are welcomed.

A system that is fit for purpose from the reporting of the initial complaint, clarity about the next steps, and short set timescales to resolution will help avoid any subsequent allegations of lack of scrutiny or due diligence.

Staff who are handling complaints must be trained, non-operational and function separately through a frontline professional standards department. Neutrality and objectivity of the process must be observed. Investigations must be robust, to satisfy police and complainer. Paragraph 28.14 of the report highlights a "focus on effective triage in the early stages".

Concerns to be addressed highlight continuing issues of accessibility, impacting on those who are the most vulnerable in society. These include people with "protected characteristics" and/or whose native language may not be English. Effective communication is about knowing how and where to complain. How is that information to be easily accessed?

There is a role for us, the legal profession. The report recognises a legitimate requirement to secure access to a legal representative. Avoiding a two-tiered system is important. The complainer must be able to complain, and the question of affordability of their representation must not arise.

Access to justice in this context means effective signposting and provision of independent advice and information to support these important reforms.

Towards a better culture

Paragraph 1.14 of the report sets out our expectation that police officers in the 21st century are "equipped with the skills to reduce, so far as possible, the threat of harm and danger to themselves and others arising from the perceived potential for violence and from other breaches of their human rights. Emotional intelligence, intellectual acuity, integrity and empathy should be in play, along with physical competence".

That highlights that development of experiential learning is required, contributed from the communities in which the police serve. Understanding about different communities and cultures will help encourage bilateral understanding and a culture of much needed openness, allowing all involved to explain their side of events.

For Police Scotland, transparency of process means equality and fairness on both sides. For the police involved in the complaints process and for the complainer, the system must be subject to the same sift mechanisms and assessment or that necessary consistency cannot be achieved.

The report is lengthy, recognising the scale of the task ahead. It represents an initial stage in a journey of much needed reform, requiring both legislative and other reforms but primarily about culture and understanding. Establishing an action tracker to progress developments on police reform seems a good idea to underpin and monitor that willingness to change.

Gillian Mawdsley is a policy executive with the Law Society of Scotland

In practice

SOLICITOR ADVOCATES

Profile: Christine O'Neill QC

Our first solicitor advocate profile to mark 30 years of the enabling law features one of the small number who have taken silk

I was admitted a solicitor advocate in 2009. I had a number of motivations for seeking rights of audience, not least my own conceit that I was capable of doing as competent a job as many of the counsel behind whom I was used to sitting. More positively, perhaps, I wanted to test and develop my own pleading and advocacy skills.

I was also encouraged by the example of solicitor advocates around me at Brodies – the late David Williamson QC and my partner Joyce Cullen in particular – who used their rights in different forums. I contemplated, sometimes quite seriously, seeking admission to the bar, but always came down decisively in favour of continuing to work with the wide range of colleagues and clients at Brodies. I have had nothing but support from the firm.

Another key driver was my specialising in public law, in which the key cases are by petition for judicial review and therefore exclusively in the Court of Session. To be able to litigate those cases myself, I would need higher rights. I had the luck of good timing, having qualified in 1999 just as it was becoming clear what a range of issues and disputes were going to arise under the Scotland Act 1998 and Human Rights Act 1998. By the time I was admitted as a solicitor advocate, there was also freedom of information legislation, and shortly afterwards the Equality Act 2010.

Between 2010 and 2020 I was one of the Scottish Government's standing junior counsel, and between 2016 and 2020 First Standing Junior. Those appointments were instrumental in developing my advocacy practice, giving me the opportunity to appear in a wide range of cases involving devolution, human rights, public procurement, and less familiar territory such as obtaining forced marriage protection orders. I also had the privilege of being instructed in several cases that made it to the Supreme Court, including the challenge to the Scottish Parliament's "named person" legislation, Gina Miller's challenge to the UK Government's triggering of article 50, and the debacle over Boris Johnson's prorogation of Parliament in 2019. Again, having the confidence and support of colleagues in the Scottish Government Legal Directorate – and ultimately the Law Officers – was key in helping me progress.

Another feature of doing mainly public law work is that I am often instructed by in-house counsel in bodies including OSCR, the SLCC and the Equality & Human Rights Commission.

I appeared for the first time as senior counsel in the Supreme Court in February, in an intervention for the Commission in an appeal about the regime for obtaining interim protection in Employment Tribunal claims.

One of the most valuable aspects, for me, of being a "junior" solicitor advocate was the opportunity to work with senior counsel. I learned a vast amount from all the seniors I worked with and – hand on heart – never minded having my homework corrected. Whether it was quite as rewarding for them is no doubt a different question.

Solicitor advocacy work can be challenging in terms of the time and effort involved, but no more so than the challenges colleagues across the firm face in delivering for clients. It is perhaps more nerve-wracking than some aspects of the job, and certainly I have never lost the "fear" of appearance work. I never look forward to a case so much as when it is over.

ASK ASH

Double demands

I'm struggling to keep up work along with homeschooling

Dear Ash,

I felt just about able to cope with the stresses of working from home during lockdown, but I am really struggling with homeschooling my young children too. The constant interruptions are making it difficult to focus on my work. I am falling behind on some of my work deadlines and this is causing me added stress. I'm concerned that if I raise this with my line manager, I will be seen as weak and unreliable.

Ash replies:

Juggling parenting duties with a full time job is something we are all finding challenging to varying degrees: please be assured that you are not alone.

These are surreal times, as we are expected to juggle numerous obligations within a confined environment without any external support. Every good employer will recognise the present challenges, and it is really important that you address the issue with your manager in order to avoid burnout.

Some employers have offered more flexibility for employees. For example, you could look to see if you could work more flexible hours by working at times when the children have finished their schoolwork or gone to sleep, or you could consider working across a shorter week? Just think about what would help you to fit around your current obligations and set out an outline plan to explore with your employer.

Times are hard just now, but you will not be alone. Consider talking to colleagues who have children of similar ages to find out what techniques they are using. There are also organisations which can offer help and advice if you need to talk about parenting challenges, such as the Children 1st Parentline.

Make sure you reach out and get the support you need, as there is no shame in seeking help, and you will be no use to either your employer or your children if you do not look out for yourself too.

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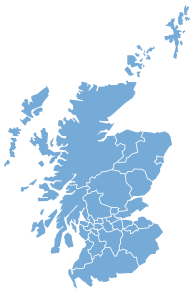

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Chief Executive

Salary: £98,870 - £107,908
Location: Glasgow
Closing Date: Wednesday 31 March 2021 @ 12 noon

Applications are invited for the post of Chief Executive with the Scottish Criminal Cases Review Commission (SCCRC), which was established in Glasgow on 1 April 1999 to review alleged miscarriages of justice in Scotland.

We are seeking a highly motivated and inspirational leader to take on the role of Chief Executive at the SCCRC. The role is one of a key leader and manager, tasked with shaping the strategic direction of the organisation in order to fully meet its statutory function in the most efficient and effective manner.

The Chief Executive is responsible for the overall management of the Commission and reports directly to the Board. The Chief Executive is also the Principal Solicitor and Legal Adviser to the Commission and Accountable Officer. The Chief Executive is responsible for the delivery of the Commission's core functions, ensuring that all resources are effectively managed and used efficiently and that all cases alleging miscarriages of justice in Scotland are dealt with independently and impartially.

The post holder must be credible with a broad range of stakeholders, including applicants, legal representatives, senior judiciary, Ministers and Government officials. The SCCRC has developed an exemplary reputation within the justice sector and this is an exciting opportunity for the right individual to consolidate our achievements to date and take the lead in formulating future strategies and success.

Qualifications

You will have an LL.B degree or equivalent and hold a relevant and current practising certificate. You will have a substantial (C. 10+ years PQE) amount of experience as a practising solicitor; with at least 5 years spent practising within the field of Scottish criminal law. You should be able to demonstrate an in-depth and up to date knowledge and understanding of all relevant criminal law legislation and authorities as well as court procedure and general human rights issues within a Scottish context.

Further details and the full information pack can be downloaded at www.sccrc.co.uk/jobs-at-the-SCCRC or obtained by contacting Mr Chris Reddick, Director of Corporate Services, Scottish Criminal Cases Review Commission, 4th Floor, 17 Renfield Street, Glasgow, G2 5AH. Tel: 0141 270 7030 or Email: creddick@sccrc.org.uk

It is intended that interviews will be held in April 2021. Details of the selection process and scheduled dates can be found in the information pack.

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(Assignment 11713)

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(Assignment 12066)

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Role details: You will be involved in a mix of civil and commercial litigation and will assist businesses on debt recovery to more complex matters such as contentious contractual issues. (Assignment 11985)

Casualty — Glasgow

Experience: 2 – 10 years' pqe

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Dispute Resolution and Litigation — Jersey

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Role details: You will be involved in a range of contentious and semi-contentious work and advise on both international and domestic cases, including investment fund, corporate and commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, regulatory investigations, employment disputes and advisory work. (Assignment 12053)

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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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Frasia Wright Associates, The Barn, Stacklawhill,
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