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Journal

Journal of the Law Society of Scotland

Volume 65 Number 12 – December 2020

Double life

The Journal Employment Survey 2020: pros and cons of homeworking across the profession, and the search for the right balance

W. GREEN

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Residential Tenancies

Peter Robson; Malcolm M Combe

4th Edition

Residential Tenancies is the go-to resource for landlord and tenant law as it applies to housing in Scotland. Its accessibility and all-inclusive content make it a useful addition for legal practitioners, students and housing welfare advisors.

This 4th edition has been fully updated to reflect major legal changes in the private rented sector and includes coverage of the recently introduced private residential tenancy, the default lease in the private rented sector. A detailed exposition on the difference between leases and licences on both sides of the Anglo-Scottish border is also covered.

Financial Provision on Divorce and Dissolution of Civil Partnerships

Alan Bayley; Ruth McCall

2nd Edition

This title remains the essential, fingertip guide to all major financial provisions on divorce, comprising extracts from authorities on the subject with examples of how it operates in practice.

Written for lawyers, by lawyers **Financial Provision on Divorce** is a convenient and practical text, easy to use and includes reference to pertinent quotes from the key authorities, linked to the relevant case law. This text looks at all the new legislation in this area and covers the increasingly important topic of pension sharing. With everything you need for advising clients in one place, this title is extremely helpful and saves valuable time spent on detailed research.

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Employing flexibly

Whether and to what extent to allow working from home is a question that has increasingly faced legal sector employers in recent years, and one that has met with mixed responses.

During this year's COVID-19 restrictions there was no choice. But now that our faltering return towards normal business should accelerate with the vaccination programme, what can employees expect?

Perhaps the question employers should be asking is, how can we get the best from our people? As our lead feature on the Journal's 2020 employment survey shows, this does not permit a blanket answer.

Some are more than happy to continue working from home, and believe they are more productive that way; others the reverse. Perhaps the majority believe it benefits them to be able to do part and part, often by increasing the proportion of time spent at home if that previously featured. What is also significant is that more people recognised a detriment than saw a benefit to their health or wellbeing from being entirely home based, from which we can reasonably conclude, I suggest, that most can be trusted to propose their own best outcome to optimise their performance.

Yet not all employers have taken this on board: the survey reveals that there are some who expect all staff to be back in the office, as before, once this is possible. With only a small minority saying they cannot work from home, why should this be? Some respondents gave their employers credit for trying to be fair through the crisis; others expressed resentment at their treatment. If there is an overall message from the survey, it is that to get the best from your people, treat them as individuals and trust them to pull their weight.

Final countdown?

This issue happens to be the 200th under my name as editor. (I worked on a few before that.) Shortly before I started, there was a cover feature predicting eventual catastrophe in the criminal courts if the defence sector continued to be underfunded and failed to attract enough new blood. The only surprise (if it is such) to criminal lawyers today is that the Government still fails to appreciate the extent and urgency of the problem that has now developed. The despair at last month's limited response to the plea for additional support was real, and heartfelt. However the situation looks in another 200 months, I will not be here commenting on it. Will the defence bar be?

It would be nice to conclude with some upbeat thoughts about this year; perhaps the best that can be said is that the end is in sight. I hope you will all feel the benefit of a good Christmas break.

Contributors

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

Lisa Reilly is a senior solicitor with Brodies LLP

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Lindsay Ogunyemi is a director, and co-author **Emma Keil** a senior associate, with DWF

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.65 NO.12 – DECEMBER 2020

Perspectives

Regulars

Features

Briefings

Law Society of Scotland full Council list: Pages 40-41

In practice

Brexit, *Schrems II* and international data transfers

Laura Irvine warns of the need to keep an eye on events until we see how data transfers abroad will be regulated after 31 December.

Charities and the Equality Act

Charities who take positive action to benefit a group with a shared protected characteristic should benefit from a Supreme Court ruling upholding a decision furthering that object, as Sophie Mills explains.

Online pricing: the CMA is watching

Gordon Downie and Scott Rodger look at how the Competition & Markets Authority is homing in on activities related to resale price maintenance, particularly regarding online sales practices.

Insolvency: HMRC moves up the rankings

Altered insolvency rules now give HMRC an improved ranking as against floating charge holders and unsecured creditors regarding taxes collected on its behalf, as Andrew Ronald describes.

Brexit and family law: where are we now?

Lisa Girdwood reviews the current state of play regarding areas of family law where regulations will cease to apply with the end of the Brexit transition period.

OPINION

Emma Jardine

Since late spring, the prospects for fair treatment of prisoners during the pandemic have sadly receded – it's time to revive the positive intentions, and act on them

Howard League Scotland last contributed to the Journal in May 2020. (Yes, that does feel like a lifetime ago.) At that point, we believed the picture looked promising in our prisons, but being realistic and pragmatic souls, we acknowledged we'd need to ensure that any gains weren't squandered, that questions continued to be asked and that assurances were kept. As Scotland's leading independent penal reform charity, it's our job.

Late spring was an age when we were being kind to each other. Articles reminded us that people in prison were human beings, that they were as frightened of the pandemic as everyone else and should be extended the same public health protections.

Such articles didn't even get the usual backlash. It all felt less divisive. We were all pulling together "to fight the viral enemy" and "flatten the curve". We searched our thesauruses for metaphors, and blithely imagined a new normal of always doing the right thing, at the right time. Layers of bureaucracy and lengthy approval processes appeared to evaporate, as we all got to the heart of the matter: saving lives came first, and everything else second.

As summer advanced, however, things weren't looking so rosy. Where were the potentially lifesaving, restricted dial, mobile phones required to maintain vital family contact? Well... they were in some prisons, but not in others. Technical difficulties abounded. Delays were understandable, it was said, given the size of the task.

But that was OK... virtual visits had been rolled out across the entire estate. Not everyone's loved ones knew quite how it all worked or had enough data, but they were available to all, and we should look at the uptake figures later to see how many people actually participated.

Smaller scale prison inspections resumed, with prisoners and prison officers alike praised for their handling of the health crisis. Two prisons were found not to be following guidelines regarding access to fresh air... this one was rectified when HM Inspectorate for Prisons in Scotland highlighted that this sat "uncomfortably with human rights legislation".

And who could possibly argue with an emergency release of 348 prisoners to reduce overcrowding, support single cell occupancy and slow the spread of infection – but it was not the most vulnerable prisoners, such as pregnant women or those requiring 24 hours a day social care.

In short, despite the headlines, not everything was quite as positive as it seemed. Questions remained unanswered, and not all assurances were being kept. Our work was far from done.

Fast forward to December 2020 and the country is in the second wave of the virus. An outbreak of infections at HMP Barlinnie is significantly higher, and potentially more serious, than anything we saw in the first wave. One in four of those in custody is being held on remand. Regime restrictions amount to prolonged solitary confinement for many. The court system backlog will take years to work through. The number of people on home detention curfew remains stubbornly low, and at current completion rates it will take more than five years to clear waiting lists for programmes which would support parole applications. The prison population is predicted to keep rising and is already at 94% of its pre-pandemic level. We're almost back to where we started.

That's why we need to progress a second emergency release without delay. The Cabinet Secretary himself said in evidence to the Justice Committee on 18 August, that for "humane and public health reasons" the prison population couldn't be allowed to return to pre-pandemic levels.

This needs to happen, as new ways and decisive action already seem a thing of the past. Early in the pandemic we had quick decision making and arguably slow implementation. Now it feels like slow decision making and implementation at some unnamed time in the future.

Or perhaps it's less structural and more personal than that. Maybe we've simply run out of kindness, as we slip back into asking the familiar questions around why we spent so much public money giving prisoners mobile phones. Looking back, perhaps late spring was as good as it was going to get. It was full of promise, that prisoners wouldn't get left behind and forgotten about. It's just as well that it's Howard League Scotland's job not to allow that to happen.

Emma Jardine is policy and public affairs adviser with Howard League Scotland, an independent Scottish charity relying on membership fees and donations alone
w: howardleague.scot
e: emma@howardleague.scot

VIEWPOINTS

More experiences reported in the Journal employment survey (feature, p 12)

Some varied employment experiences during and since lockdown...

We have had a very small number of redundancies but all staff and partners are on reduced income – gradually increasing – until our fee income normalises. We expect this to be early 2021.
(Partner, small/medium sized firm)

Pay freeze has been in existence every year due to abysmal legal aid remuneration.
(Solicitor, smaller firm)

Economic picture was previously fairly bleak; it is now worse. We have until now sustained a policy of no compulsory redundancies but it is extremely precarious as to whether that can continue.
(In-house)

I was unemployed from 23 March having left my previous position to start a new role. That role was cancelled on the day that I was due to start. I accepted the position with my current firm on a reduced salary simply to have a job.
(Solicitor, smaller firm)

Not everyone expects to continue to work flexibly...

During the last lockdown, we all required to work from home; however, we are now expected to be in the office full time.
(Solicitor, smaller firm)

I didn't previously work from home. I would like to continue doing so however the firm will be expecting us back in the office once the restrictions are lifted. I will be asking for a change to my working arrangements.
(Senior position, large firm)

Worked from home whilst children were off school (tough) but when husband (teacher)'s holidays began I went into office along with my colleagues, as was expected to do so. Bosses found work for us that "could not" be done from home.
(Solicitor, smaller firm)

Stress is still a problem for many, and employers may not be helping...

Stress is exacerbated by the lack of business support and childcare responsibilities. My employer expects that as I am a keyworker my husband will care for my children. He earns more than me and also has a stressful job. I am looking for alternative employment as I am not prepared to cope with this indefinitely.
(In-house)

Our job is stressful at the best of times but the additional worry of trying to keep everything going through COVID-19 has been exhausting and has had an impact on everyone's mental health. On a positive note, we have all stuck together and tried to support each other and I think that this is something which will have a very beneficial impact on the firm in the long term.
(Partner, small/medium sized firm)

I left employed work to work for myself as a way of reducing stress.
(Experienced female solicitor)

In normal times, role can be quite stressful but has been manageable. With closure of nurseries and my work demands remaining the same however work became incredibly stressful, more than I have ever experienced in my career, having a significant detrimental effect on my mental health.
(In-house)

BOOK REVIEWS

A Practical Guide to the Law of Prescription in Scotland

ANDREW FOYLE
PUBLISHER: LAW BRIEF PUBLISHING
ISBN: 978-1912687640; PRICE: £39.99

In his preface, the author is at pains to point out that this is not intended to be an academic work but one aimed at civil law practitioners. That is as may be, but a work such as this has been much needed given the challenges to previously accepted views in recent years. The law is stated as at 1 December 2019.

As stated in chapter 1, the book focuses on "negative prescription". In eight chapters, it covers the basic law before getting into the meatier issues as to when the clock starts to run, and interruption and suspension. As the author states, in some marginal cases, the way an action is pled can be crucial. There is a very useful analysis of the so-called "discoverability test" which has caused concern in recent times.

The author deals with the rationale behind the proposals for reform which led to the Prescription (Scotland) Act 2018, not yet in force. As he states, transitional arrangements will require careful consideration.

This is an easy to read book on a subject which can hardly be described as simple to understand. In achieving that result, the author is to be commended. I should have liked the book to have contained an index; against that, there is good use of footnotes throughout.
Professor Stewart Brymer, Brymer Legal Ltd.
For a fuller review see bit.ly/3qpidPP

Annotated Criminal Procedure (Scotland) Act 1995

SHIELS, BRADLEY, FERGUSON AND BROWN
PUBLISHER: W GREEN
ISBN 978-0414078031; PRICE £102

"As always, the authors give an authoritative analysis of the Act and discussion of the most relevant case law."
Read the review by David J Dickson, review editor, at bit.ly/3qpidPP

Women Don't Owe You Pretty

FLORENCE GIVEN
(CASSEL: £12.99; E-BOOK £7.99)

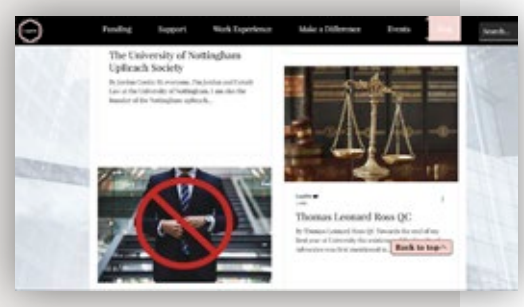
"Florence Given is the big sister you never realised you needed, and her novel will make you see the world... through a completely new perspective."
This month's leisure selection is at bit.ly/3qpidPP

BLOG OF THE MONTH

legable.co.uk

Legable is a new website dedicated to making the legal profession available to everyone, no matter their background. It includes sections on funding, support, work experience – and blogs, with personal experiences from aspiring and practising lawyers.

Tanzina Islam's "A Graduate's Reflection on Why 'The Model Lawyer' Does Not Exist", tells of her struggles and lack of confidence as someone who felt she did not fit in. Her message? "Don't try to fit the cookie-cut-out of what you think a lawyer should be."
To find this blog, go to bit.ly/2JEJJUK



No defying the gods

Criminal lawyers would have less to do if the curse of Pompeii could be extended.

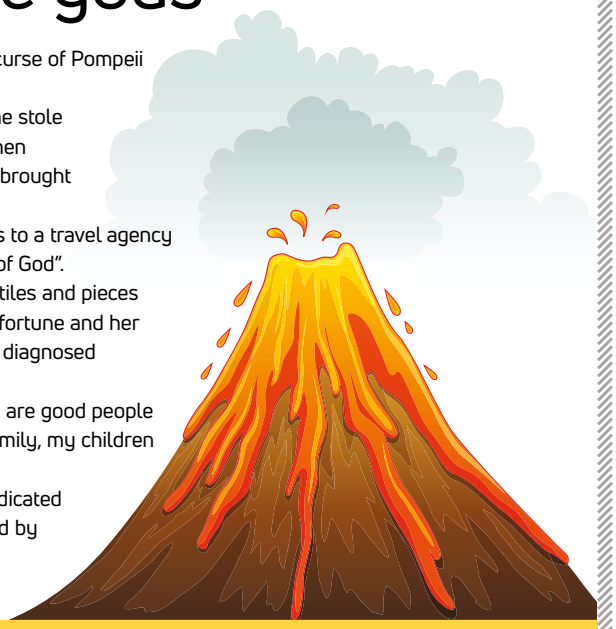
A Canadian tourist has returned artefacts she stole from the ruins of the Roman city destroyed when Vesuvius erupted in 79AD, claiming they have brought her 15 years' bad luck.

Signing herself "Nicole", she sent the objects to a travel agency with a letter of apology, begging "forgiveness of God".

Now 36, she feared the theft of two mosaic tiles and pieces of ceramic had led to her family's financial misfortune and her having a double mastectomy after twice being diagnosed with breast cancer.

"We can't seem to ever get ahead in life. We are good people and I don't want to pass this curse on to my family, my children or myself anymore", she wrote.

She is not alone. Pompeii has a museum dedicated to returned stolen artefacts, often accompanied by confessional letters.



PROFILE

Fiona Robb

Fiona J Robb (one of two Fiona Robbs at the Society) is director of Professional Practice, leading a team of solicitors offering free, confidential support and advice on the rules and guidance

1 Tell us about your career so far?

I started with J & F Anderson (now Anderson Strathern). I worked in litigation for many years, before joining the Society in 2003. It's 30 years since I was admitted, and I'm lucky to have lovely colleagues who joined me in a small virtual celebration. They are an amazing bunch.

2 What are the most significant changes you have seen?

I have to comment on the huge impact of the digital revolution. I for one am grateful for the technology at our fingertips this year. But I know that with it, many solicitors are under increased pressure to be available virtually 24/7. We need to look after ourselves and each other and preserve a work-life balance. The Society proactively supports wellbeing and members can find some useful resources on our website.

3 What are you most proud of in your career?

The pandemic has affected businesses, finances, families, physical and mental health, but through it all the profession has rallied. The numbers of calls and emails we received more than doubled, demonstrating solicitors' commitment to their clients: criminal solicitors continuing to attend courts, civil agents adapting to online hearings, and conveyancers pulling out all the stops. I recently heard of a relieved client getting keys for their new home at 11.30pm!

4 How do you plan to spend the Christmas holidays?

I succumbed to the lure of a lockdown puppy, so the holidays will be a great time to start training, and of course I am looking forward to getting my daughters home. I hope all my colleagues have a well earned and peaceful break.

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

WORLD WIDE WEIRD

Cartoon villains

A string of cartoon characters including Mickey Mouse, Bugs Bunny and Buzz Lightyear were listed as due to appear at Stoke-on-Trent Crown Court after a system test was posted live in error.
bbc.in/37utY7V

That's a dear doo

A Belgian racing pigeon has sold for a feather-ruffling £1.4 million after a bidding war between two mystery Chinese bird fanciers.
bit.ly/2Vr5Qtt

After COVID, the robots

Tourist bosses in Yokohama, Japan, have unveiled a 60ft walking robot modelled on the "Gundam" cartoon, that they hope will help attract visitors back after the COVID-19 shutdown.
bit.ly/3VtFMjj

TECH OF THE MONTH

Wakeout!

IOS, free trial; £5 monthly sub

If you're keen to keep fit while it's dark outside and you're working from home, Wakeout could be the app for you. It features a series of easy, mini-workouts you can do around the house; no gym equipment is required.
Reviewed at bit.ly/3wweLbq

PRESIDENT

Amanda Millar

Lawyers at home as well as abroad are suffering from Government failures to respect their work and its needs, to the detriment of the rule of law, and society as a whole

So ...the last article of 2020: Christmas is on its way, swiftly followed by our full break from the EU.

Hopefully 2021 will bring vaccines and an opportunity to rebuild.

Last month was interspersed with attendances at the IBA conference, hearing from current and former leaders from across the world with many highlighting the importance of the rule of law, the benefit of respecting it and the potential damage to negotiating ability, reputation and credibility when criticising the behaviour of others. The circumstances in Hong Kong, and the treatment of lawyers in Iran, Turkey and elsewhere remain a concern.

Governments must show respect

The facts that UK politicians are being called out by the IBA President for "damaging rhetoric", that the UK Government has produced little by way of planning information on Brexit (despite sending emails in late November highlighting "getting ready can take longer than you think"), and that both Westminster and Scottish Governments continue to fail society by failing to adequately fund legal aid to ensure access to justice, should be an embarrassment to all our politicians. Pandemic backsliding is posing a combined threat to our democracy, human rights, and the rule of law.

We live in a country with world leading legal professions, well regarded and looked to throughout the world for guidance, standard setting and high values. Sadly, the same regard does not appear to exist internally. The risk of loss of our hard won and justified reputation will be significant. It will impact on the ability to negotiate trading agreements that follow our EU departure, and so impact the economy. It will impact our credibility in the world, and so may damage the influence that many of our legal experts are able to bring to ensure meaningful collaboration and improvement in the world and at home.

Our members are being hampered from advising business due to lack of a "deal" or clarity on whether there is to be a "deal". What we know about the Brexit planning can be found on the dedicated section of our website (www.lawscot.org.uk/brexit/). These members and businesses are already managing and coping with the threats of the global pandemic we are all facing this year, and to expect last minute managing of Brexit brings a disrespectful expectation of further resilience from a profession which has already shown a high level of under-resourced goodwill to keep the justice system, property and business sectors running or protected since March. These highly trained, high value contributors to society deserve more respect, involvement and resource.

Worthy winners

Congratulations again to all members who were deserving winners at the Scottish Legal Awards for their contributions to society, business and the profession.

The winners include Iain Smith for the Law Society-sponsored category of Lawyer of the Year. Iain's work on being trauma informed has brought thought and opportunities for improvement to the lives of so many. Also, as Chair of the Year, Elaine Motion, an outstanding lawyer with recent high profile challenges to government behaviour. Both wonderful leaders and promoters of the benefit to our society of independent legal professionals upholding the rule of law.

Many of us will have a break over the upcoming Christmas period, and if you do get some time away from work I hope you find rest, safety and joy. If this period is a challenging one for you or people you know, and you can, please reach out, check in and take care (www.lawscot.org.uk/members/wellbeing/). Just because we can't be together doesn't mean we can't be connected.

Stay safe, and here's to 2021 bringing more positivity than 2020.

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 0131 561 0021;
elliot@connectcommunications.co.uk

APPLEBY, Jersey and globally, has appointed Scottish solicitors **Mark Watson** and **Benjamin Bestgen** (who joins as an associate) among six appointments and promotions in its Corporate team in Jersey.

Allan Argue, formerly of CARPENTERS, has started his own practice, ARGUE & CO LEGAL, specialising in personal injury claims and employment law, at First Floor, 9 George Square, Glasgow G2 1QQ (t: 0141 378 4145).

BALFOUR + MANSON, Edinburgh and Aberdeen, has announced the retirement of partner and family lawyer **Anne McTaggart**, a solicitor since 1976, who formerly practised at McINTOSH McTAGGART, Aberdeen.

BTO SOLICITORS, Glasgow and Edinburgh, has appointed **Stephen Humphreys** as a consultant in its Litigation department, with a special focus on social housing litigation. He joins from SHEPHERD & WEDDERBURN, where he was a partner.

BURGES SALMON, Edinburgh and UK-wide, has hired dispute resolution practitioner **Ewan McIntyre**, who will be based in its Edinburgh office. He joins from BURNESS PAULL, where he was a partner for eight years, before which he was head of Litigation at MORTON FRASER.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has promoted to partner **Ruaridh Cole** in its Funds team.

GIBSON KERR, Edinburgh, has appointed **Beverley Cottrell**, who joins from MOV8 REAL ESTATE LTD, to a newly created role as head of Property, and **Karen Sutherland**, previously with SCOTTISH CHILDREN'S REPORTER ADMINISTRATION, as a solicitor in the Family Law team.

KILPATRICK & WALKER, Ayr is pleased to announce the appointment of **Harry Stewart Peter Sheddon** as an associate with effect from 12 October 2020. He joins the firm from McCORMICK & NICHOLSON, Newton Stewart.

MILLER HENDRY, Perth, Dundee and Crieff, has appointed recently qualified solicitors **Fiona Kelly** to its the Court department, and **Erin Peoples** to its Residential Property department, both based in Dundee. **Shona Douglas**, of the Residential Conveyancing department of the Crieff office, has recently been promoted to paralegal after becoming a Law Society of Scotland accredited paralegal.

Ashleigh Morton, formerly with RUSSEL & AITKEN, Falkirk, has started her own practice, MORTON BRODY LAW, PO Box 21768, Falkirk FK1 9GQ (t: 07368 136435), specialising in children, family, debt, housing and employment matters.

MURRAY ORMISTON LLP, Aberdeen are pleased to announce the appointment of **Morag Stevenson**, from 1 September 2020, and **Sarah McPherson**, from 1 December 2020, both as associates in the Family Law department.

Magdalen A Ogilvie, sole practitioner with FORRESTER OGILVIE & CO, Edinburgh, has retired from practice.

David Rennie, former managing partner of STRONACHS, has joined MANSEFIELD INVESTMENTS LTD, Aberdeen, as legal counsel.

The directors of THE SCOTTISH BARONY REGISTER have appointed **Alastair Shepherd**, a partner in COULTERS, Edinburgh, as custodian of THE SCOTTISH BARONY REGISTER from 1 December 2020. He succeeds **Alastair Rennie**, who has retired. See article on p 37.

SHEPHERD & WEDDERBURN, Edinburgh, Glasgow, Aberdeen and London, announces that **Gillian Carty** has been elected chair of the firm, succeeding **Paul Hally** who has completed two terms since 2014. An accredited specialist in insolvency law and licensed insolvency practitioner, she steps up from leading the Commercial Disputes & Regulation division.

SIMPSON & MARWICK, Edinburgh and North Berwick, has appointed **Jill Andrew** as a director. She joins from SHOOSMITHS, where she was principal associate.

STEWART & WATSON, Turriff and elsewhere, announces the appointment of **Catherine Bury**, an accredited specialist in agricultural law, as an associate in the Agriculture team in its head office in Turriff. She joins from LEDINGHAM CHALMERS, where she was a senior associate.

THOMPSONS SOLICITORS SCOTLAND, Glasgow, Edinburgh, Dundee and Galashiels, has promoted mass litigation lawyer **Amy Haughton** to associate.

URQUHARTS, solicitors, Edinburgh, intimate that on 31 October 2020, **James Baird WS** retired as a consultant to the firm. The partners and staff wish him a long and well earned retirement.

Amanda Wilson, previously a partner at THORNTONS, Dundee, has started her own practice, AMANDA WILSON FAMILY LAW, at Office 12, 4th Floor, Dundee One, 5 West Victoria Dock Road, Dundee DD1 3JT (t: 01382 219004). She is an accredited specialist in family law, a trained collaborative lawyer and an arbitrator with the Family Law Arbitration Group Scotland.

WOMBLE BOND DICKINSON, Edinburgh and internationally, has promoted **Richard Pike**, a dispute resolution private client lawyer, to partner in its Edinburgh office, one of 31 promotions across its UK offices.

WRIGHT, JOHNSTON & MACKENZIE LLP, Glasgow, Edinburgh, Inverness and Dunfermline, has acquired the business of J GIBSON ASSOCIATES LTD, Edinburgh, whose founder **Jeff Gibson** is stepping down from the business.


Ready for lift off?
Thinking about starting up on your own?
If you are, you'll need a practice management system that works from day one to protect your interests.
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Launching your own law firm? A little practical advice.

The world certainly changed in 2020. Covid and lockdown made us take a fresh look at the way we work and, for many, that meant branching out on their own.

Many solicitors found their practice decided to move to virtual working to save overheads. Others, were faced with unemployment and decided to set up on their own.

So, if you are considering making the leap, it's essential to take off on the right foot. Consider these things:

Keep your head out of the clouds
Plan. Failing to plan is the same as planning to fail. Balance the euphoria of starting a new venture with a down-to-earth, well-constructed business plan.

There are many good guides available from reputable sources to help you. The Law Society of Scotland's guide is as good as any and will help ensure you don't overlook things like accounts rules, Making Tax Digital and professional indemnity cover.

The key components of a good business plan include:

- An analysis of your market
- A financial / funding plan
- Your practice areas
- Your legal business format
- An analysis of your competition
- Above all, a marketing strategy

That done, turn your attention to the more practical and tactical matters involved in setting up a firm.

Website.
Your website is your shop window. The golden rule for a good site is get an expert to build it. DIY or well-meaning amateurs don't cut the mustard. Skimping in this area will cost you new business.

Insist upon several key things. A prominent call to action containing your contact details is the most important. Following that should be a clear indication of the services you provide and your location and, of course it must look just as good on a mobile as it does on a laptop.

It doesn't stop there. Your site needs optimising so that it appears on the first page of Google. That's another job for a specialist.

Legal case management software.
This is also an absolute must. You'll need a mechanism for storing clients' legal documents, recording your time and maintaining your accounts. There are many suppliers in the marketplace, so shop around and look for the best software for your needs. As a minimum requirement, your supplier should be able to deliver:

- Case and Matter Management.
- Time Recording & Billing
- Legal Accounts Software
- Email & Document Management
- Strongroom
- CRM & Marketing
- Microsoft Office Integration.
- Management Reporting
- Risk Management & Compliance

Look out for systems that claim to be integrated – not all are. You don't need the hassle of using one system for case management, another for accounts and paying additional costs for Microsoft licences. Also check out the data returns policy of your suppliers. It's your data, so there should be no charge for this.

Don't forget the hardware.
Whilst you might not need full office facilities if you begin by working from home, consider what else you may need. Using a laptop means you can take your office wherever you go but don't forget things like a scanner, a printer and possibly a tablet.

Talk to your bank... NOW!
You can't start a law firm without a business bank account. And don't be surprised if your Bank says "no" when you ask for one. Shop around all the banks for the best deal.

Get help?
When you start out, you may be on your own. As your practice grows, that may well change but it is not the only way forward.

Services are available online that can provide paralegal support, virtual receptionists and legal secretarial and accounting assistance.

If you are thinking about starting out on your own, please contact us on innovate@lawware.co.uk or 0345 2020 578 for support and guidance.

Mike O'Donnell, LawWare Ltd.

Homeworking: a journey

Working from home has been a blessing for some, a curse for others – but for many, the search is for the best balance. Peter Nicholson reports on the 2020 Journal employment survey, which tried to lift the lid on lockdown

2020: a landmark year in people's minds as it approached – and the year no one expected as it turned out. A year of startling change, much of it enforced; and one of sharply contrasting fortunes, dealt by the lottery of life. Much has been written about its impact; what new light could this year's Journal employment survey shed?

Home comforts?

It is no surprise that this year's experience looks set to have a dramatic effect on working patterns, but the scale of the change is notable. Pre-COVID, only 18% of our respondents routinely worked from home, whether all (less than 2%) or part of the time, and three quarters of the latter will do so more in future. Nearly 64%, however, did not previously work from home but are likely to continue doing so, with up to 25% saying this will be full time. Fewer than one in 40 say they cannot work from home, but some employers are still insisting that people go back to the office as restrictions lift.

Inevitably, homeworking suits some better than others – and more so in some respects than others. Survey responses show:

- Better work-life balance? Yes, 57.8%; no, poorer: 17.3%.
- Easier to concentrate? Yes, 34.8%; no, harder: 29.1%.
- Fewer interruptions? Yes, 52.7%; no, more: 15.5%.
- As easy to contact others through IT? Yes, 49.8%; no, better being in the same location: 39.3%.
- Better for your physical and/or mental health? Yes, 26.4%; but outweighed by the 33.5% who said not so good.
- Overall, do you work more efficiently and effectively from home? Yes, 29.6%; no, less so: 25.8%; it makes little difference, 27.5%.

It is striking that one in five of those who felt homeworking gave them a better work-life balance, also believed their mental or physical health was suffering. Your comments indicate that many are now searching for the right balance between home and office. The main reason is the effect on mental wellbeing of feeling isolated at home, and missing the interaction with colleagues that comes with office life. Some also feel the lack of administrative support, and/or the difficulties of managing, supervising and developing staff.

As for home circumstances, whether or not the kids are off to school can make all the difference. And at least one person got on less well if their partner was also using home facilities. Some rejoice at not having to commute; for others it helped demarcate the working day.

"Apologies for the conflicting answers," one associate wrote. "Some days I wish I could go into the office and other days I'm glad I don't have to. I think some time in the office and some at home is the most optimal way to work going forward." Another explained: "I have selected both better and poorer work-life balance as whilst I can have a better balance I also work longer hours and in the evenings as a result of being at home."

Other comments included:

- "Each day varies to be honest, some days I am incredibly motivated and other days very easily distracted." (In-house solicitor)
- "Not commuting makes a huge difference to wellbeing." (Another in-houser)
- "Working from home is making me severely depressed." (Non-equity partner)
- "Certain things are easier to do at home but the lack of variation (just sitting in front of a screen all day) is relentless." (Non-practising position)
- "When technology fails it is harder to resolve matters quickly from home." (Senior solicitor)
- "Everyone working from home is very inefficient, and very depressing." (In-house solicitor)

Business impact

How has the pandemic affected employers? As table 1 shows, respondents reporting redundancies at their workplace have almost doubled, from less than 18% to nearly 34%, while those reporting headcount growth (28%) dropped by two fifths. Although only 12% had personally been furloughed, 43% stated that some solicitor colleagues had been, and 58% said the same of non-solicitor staff. Almost a third (31.5%) were subject to a pay freeze (up from 6.6% last year), 25% have taken a cut (7.8% last year), and more than 27% are on voluntary or compulsory reduced hours.

Most employers do appear to have tried to preserve jobs. They froze pay, or cut it temporarily (usually by 20%), if not working hours, rather than lay people off. Vacancies went unfilled. At least one firm gave the choice of a pay cut on the same hours, or the same pay for extra hours. Some are now restoring pay cuts, and even reinstating missed salary rises or bonuses; and while there are still some fears over redundancies, fewer than 7% of respondents admitted to having these. One not-for-profit introduced a voluntary exit scheme in the hope that would suffice.

"Overall I'm satisfied that the firm acted prudently and I've been rewarded for my hard work," said one senior associate who was given a deferred lump sum and bonus payments instead of their annual rise. An associate commented: "I think [my firm] has tried its best to be open, transparent and honest with us all... Across the board we all took a pay cut and as of November it will go back to 100% pay. I expect there will be job losses in due course but it is doing its best to avoid this."

The response

Thank you to all 743 respondents who took part in the survey – fewer than last year but showing similar patterns and trends.

This year's gender breakdown is 65% female and 33.4% male, a slightly wider gap than last year, with six others who chose a different identity. Around 35% work in-house, slightly more than with the whole profession, while at 10.5% legal aid practitioners are down 2% from last year. Again there was a relatively low takeup among new lawyers, with just 17% having been qualified less than four years.

Table 4, covering the most common employee benefits in the profession, shows a similar pattern to recent years, the movements for pension provision perhaps reflecting the higher proportion of in-house lawyers responding this year. Table 5 shows dispute resolution work as the most common practice area for both females and males, with commercial property the closest challenger.

For the most recent comparable reports, see Journal, December 2019, 16, and Journal, October 2018, 16.

Table 1. Has your organisation experienced any of the following over the past 12 months?
(all sectors)

	%	change on 2019
Non-solicitor (or support) staff on furlough	57.6	N/A
Solicitors on furlough	43.1	N/A
Redundancies	33.8	+16.0
Pay freeze	31.6	+25.0
Headcount growth	27.8	-18.9
Bonuses reduced, suspended or scrapped	26.2	+17.2
Reduced working hours/ days – voluntary	15.9	+13.8
Reduced working hours/ days – compulsory	11.4	+10.9
Benefits reduced, suspended or scrapped	7.2	-0.1
Merger or takeover	4.5	-13.3
Bonuses introduced or increased	4.3	-6.8
Benefits introduced or increased	2.6	-6.4
Compulsory overtime	2.6	+0.4
Don't know	7.4	-14.4

Table 2. Salary spread, in percentages, by years' PQE: female
(full time or self-employed, all sectors)

YEARS' PQE	< £30,000	£30,000-39,999	£40,000-49,999	£50,000-59,999	£60,000-69,999	£70,000-79,999	£80,000-89,999	£90,000-99,999	>£100,000
0-2	6.4	61.3	25.8	3.2	3.2	0	0	0	0
2-4	0	46.1	42.3	11.5	0	0	0	0	0
4-10	1.4	21.9	46.6	20.6	5.5	0	2.7	0	1.4*
10-20	3.5	7.0	22.1	20.9	18.6	10.5	7.0	3.5	7.0**
>20	5.9	2.9	18.6	13.7	13.7	10.8	9.8	3.9	20.6***

Table 3. Salary spread, in percentages, by years' PQE: male
(full time or self-employed, all sectors)

Years' PQE	< £30,000	£30,000-39,999	£40,000-49,999	£50,000-59,999	£60,000-69,999	£70,000-79,999	£80,000-89,999	£90,000-99,999	>£100,000
0-2	5.9	29.4	29.4	17.6	11.7	0	0	0	[1 resp]
2-4	0	26.7	40.0	20.0	6.7	0	0	6.7	0
4-10	2.9	5.9	29.4	26.5	11.8	8.8	0	0	8.8*
10-20	4.9	4.9	9.8	24.4	9.8	14.6	12.2	0	19.5**
>20	3.2	6.4	7.4	8.5	9.6	12.8	7.4	11.7	33.0***

* Breakdown is £100,000-£149,999: 1.4%F/0%M; £150,000-£199,999: 0%F/2.9%M; £200,000-249,999: 0%F/2.9%M; £250+: 0%F/2.9%M
** Breakdown is £100,000-£149,999: 3.5%F/12.2%M; £150-£199,999: 1.2%F/4.9%M; £200-249,000: 1.2%F/0%M; £250,000+: 1.2%F/2.4%M
*** Breakdown is £100,000-£149,999: 14.7%F/17.0%M; £150-£199,999: 2.0%F/5.3%M; £200,000-249,999: 2.0%F/5.3%M; £250,000+: 2.0%F/5.3%M

One public body is making a small weekly payment over winter to all homeworking staff for additional heating costs.

Some were more equal than others. "The firm furloughed as much staff as they could... the people who were not furloughed were working on an increased workload for less pay," one senior solicitor recorded. Such situations were compounded, another respondent observed, if those kept working on reduced pay still had to incur childcare costs. And one associate has a definite grievance: "My pay was reduced by 33% for six months, and I was expected to work full time hours during this time, on 66% of my usual part time pay."

Some have fallen between stools when it comes to support. Fee paid tribunal chairs had no work during lockdown, and no earnings because they were not classed as employees – but being paid through PAYE were not eligible for self employment support either.

Some, of course, have been exceptionally busy, including property solicitors since the market restarted, and Government lawyers.

Table 4. Which benefits do you currently receive?

(top responses, all sectors; last year's position in brackets)

1	More than 25 days' holiday per year (excluding public holidays) (1)	49.4%
2	Smartphone/tablet (3)	42.8%
3	Cycle to work scheme (2)	41.7%
4	Pension (defined benefit) (6)	38.4%
5	Training support (work related) (4)	36.2%
6	Ability to buy/sell annual leave (8)	31.2%
7	Private health care (5)	28.5%
8	Life or health insurance, including critical illness cover (7)	27.5%
9	Cash bonus (individual performance) (9)	23.6%
10	Employee assistance (10)	22.2%
11	Cash bonus (firm performance) (12)	20.6%
12	Pensions (money purchase) (13)	15.5%
13	Childcare/crèche or vouchers (11)	14.1%
14	Other assistance with transport including season ticket loan and parking permit (14)	13.8%
15	Pension (stakeholder) (16)	13.1%
	No benefits	6.2%

Legal aid troubles

In view of the difficulties facing the legal aid sector, we analysed their experiences this past year. Only 10.5% of respondents take on legal aid cases to any extent, the most common areas being family (55%), dispute resolution (37%), criminal defence (32%), mental health (27%), and housing (19%).

Of those working full time, one in six (16%) earn less than £30,000 a year, and five out of eight (62.5%) less than £50,000, compared with below 44% across the whole survey. At 19%, they were as likely as most in private practice to have been furloughed, and 45.6% have seen their earnings decline over the past year while a further one in three (33.3%) have seen no change (whole survey showed 23.2% and 35.9% respectively). Stress figures were higher than average, though not markedly so, but 27.6% admitted to frequently or constantly having money worries, compared with 11% overall.

Still unequal

Has the gender balance been affected? The Next 100 Years project reported that women fared less well than men through the lockdown, finding themselves taking on more of the additional childcare and perhaps more likely to be put on furlough. On our survey, 8% of women, but 5% of men had been on furlough for up to three months, but equal numbers at 5% had been on longer furlough. And more men than women (32% against 22%) had seen earnings decline over the year, though the balance was the other way among those reporting no change (40% women; 29% men).

Across the board, among full time earners 8.5% of women, but 20.9% of men, were in the six figure brackets, and of those with more than 20 years' PQE, 41.1% of women, compared 25.5% of men, earned below £60,000: tables 2 and 3. The gaps are down slightly on last year.

While some respondents specifically pointed to the COVID situation as having increased their stress levels, overall percentages for problem stress have not changed much – but women are almost twice as likely (27.4% against 14.7%) to have discussed their problem with someone else, and men more likely (14.3% against 10.5%) to have chosen not to, or not to know who to turn to (4.9% against 3.6%).

Round the corner

Are things likely to improve over the next 12 months? The balance of sentiment is negative, but much more so in the public sector, where hardly anyone expects an improvement and around half a further worsening, as compared with private practice where the balance is around 10% negative in small firms (though with more don't knows) and 6% in large. The commercial in-house sector manages to take a more positive view, despite forebodings about Brexit, with 6% more who foresee an improvement than a deterioration. We can only hope the optimists are proved right.

For some more individual comments, see Viewpoints, p 6

Table 5. Which practice areas do you currently work in?

Sectors with more than 10% response.
(Respondents were able to select all sectors that applied. Last year's position in brackets)

All females		All males	
Dispute resolution (1)	19.3%	Dispute resolution (3)	28.9%
Commercial property (3=)	19.3%	Commercial property (1)	21.3%
Private client (2)	16.9%	Company and commercial (2)	18.4%
Residential property (5)	14.2%	Private client (5)	16.7%
Administrative and public (6)	13.8%	Regulation and compliance (7)	15.5%
Company and commercial (3=)	12.1%	Residential property (4)	15.1%
Regulation and compliance (7)	11.4%	Administrative and public (6)	13.8%
Family law (8)	10.8%	Accident and injury (-)	10.9%
Housing (-)	10.1%	Family law (-)	10.9%

FWA Frasia Wright Associates

Now we are... 25!

Frasia Wright Associates is celebrating 25 years of... recruiting lawyers, building trust!

December 2020 marks a milestone for Scotland's leading legal-only recruitment agency.

Frasia Wright, Managing Director, has been involved in legal recruitment since 1988. She has worked in both New York and London and is today recognised as having the longest track record in Scottish legal recruitment, where her name is synonymous with professional integrity and confidentiality.

After working with a national recruitment agency in both their offices in New York and then Glasgow, Frasia saw a gap in the legal recruitment market for realistic recruitment advice. From there Frasia Wright Associates was created and it is with great pride that, 25 years later, our approach and values have cemented our place in the legal recruitment industry, as Scotland's leading legal recruitment agency exclusively placing lawyers.

"I set up Frasia Wright Associates in December 1995, working from home and to give me more flexibility with my two sons, who were one and two at the time," Frasia comments. "Who knew that would be the norm now, and I am thrilled that all the team here are supported to manage their work and personal commitments too!

"Twenty five years ago I felt there was a gap in the legal agency market for realistic recruitment advice that was commercially aware and ethical, and I was passionate about creating a business that was trusted by our people, our candidates and our clients. And that is still what we are about today. It's been a rollercoaster with many challenges and opportunities along the way, and as we move through uncertain times we know there will be twists and turns, but with a great team we will take them together."

Over the last 25 years, it has been our pleasure to work with lawyers throughout their careers – from starting out as NQ lawyers, assisting on their chosen career path, to returning to us as recruiting partners, now responsible for the direction of the new generation of lawyers. It has been a challenge to continually meet the needs of the changing face of the legal profession, and we have loved every minute of it. Like us, our clients have also been on a journey of business development, through mergers and demergers, expansion into new areas of business across the UK and overseas, recessions and navigating through a year none of us will forget with COVID-19, but we will get through this!

Check here to see what some of our clients had to say about us: www.frasiawright.com/after-25-years-what-do-our-clients-have-to-say-about-us/.

Our business is spread across Scotland, so instead of organising a formal event to mark this anniversary, we have decided to donate to LawCare, a charity we are proud to support in their mission to support legal professionals experiencing mental health and wellbeing issues.

Frasia Wright

MITIGO CYBERSECURITY

Cybersecurity in a year of crisis

A must read for law firms, their leaders and everyone responsible for security and business resilience

When this year has seen a global pandemic, urgent concerns about climate change, and the uncertainty of Brexit consume much of our lives, TV and the press, some business leaders may have taken their eye off the growing threat posed to businesses in general – and law firms in particular – by the proliferation and increasing sophistication of cybercrime.

The emergence of new and disturbingly effective methods of cyberattack during the last 12 months only serves to demonstrate the ingenuity of the criminal gangs responsible, and why cyber risk controls comfortably in place last year may well no longer be secure. As methods of attack continue to evolve – and they most certainly will – so must our defences and controls.

Doubled opportunities for ransomware

One of the most frightening forms of attack, ransomware can leave firms operationally crippled, waste billable hours, and seriously damage or even destroy client relationships.

Previously the malware usually got into your system when someone clicked on a link, letting in the ransomware that automatically found data and files to encrypt. Now, criminals can automatically scan firewalls, looking for ports and vulnerabilities to gain access. And with so many people currently working remotely on poorly configured connections and devices, they are hitting the jackpot.

Worse still, the way the attack progresses has also changed. Once you've been breached, the bad guys no longer just go straight to the encryption stage. They often take their time examining confidential client and proprietary data.

Then they steal the material they think will cause you maximum pain if it's made public. Which gives them two ransom opportunities. First, they demand payment for the decryption key. Next, they threaten to release publicly, piece by piece, the confidential data they've stolen about you and your clients. Unless, of course, you pay up.

The critical thing to understand here, is that even if you have perfectly configured backups, they will still not be enough to protect you and your clients. No surprise, then, that amounts demanded as ransom, and the amounts actually being paid out, have shot up. You need seriously to consider additional protection.

Multi-factor faking

Another thing that's evolved is how very easily people can sign into and misuse your email account.

A while ago, crooks would usually get hold of your email address and password via phishing attacks or by buying your credentials on the dark web. Then they could log in, send and receive emails as if they were you, spy on your mail, steal information, divert payments and so on.

Office 365 Multi-factor authentication (MFA) was designed to put a stop to this, preventing anyone else from logging into your account unless they had second factor authentication, usually a code sent by text to your mobile phone. So far, so protected. But not any more.

2020 has seen new ways of getting around MFA. Notably, fraudsters can now accurately mimic the 365 login page. So you think you're typing into Office 365, but in fact, it's a fake cover page. Which automatically inputs your credentials into the real Office 365 page, except on the fraudster's computer.

When the text with the code comes through to your mobile, you do the same – why wouldn't you? And the criminals have successfully logged in as you. Free to do what they want. And

when they've enabled the optional 60-day validity period, they've given themselves 60 days' access.

Growth of the criminal ecosystem

Of all the many routes there are to cyberattack businesses, the exponential growth of ransomware is arguably the most telling. So let's pick up the story again and take a look at where it's heading. This is a high stakes game, and given the kind of data held, law firms are at existential risk.

So why the rapid growth? Well, it's becoming more easily achievable. It can be hugely profitable. And the chances of criminals being brought to book are almost non-existent.

Attack tools are now freely available, as are low cost Ransomware as a service (Raas) kits. So aspiring cybercrooks no longer need high levels of technical knowledge to get involved. Affiliate ransomware platforms offering Raas provide easy market entry, and especially with more remote working, ample opportunity for good returns.

At the same time, there has been an increase in so called "big game hunting" – the process we mentioned earlier – where more thoughtful and focused attacking gangs more closely examine the opportunities that successful breaches provide for financial gain, whether by theft of money or by high value ransom.

Lower ranking criminals add to the risk, using the Raas model to function as "lead generators", earning a cut or commission by passing on the opportunity to the big boys, who will be better able to fully exploit the financial blackmail potential of the breach.

The cost of ignoring the problem

Ransom inflation, as we indicated, is compounding the problem. Research suggests that by the middle of this year, the average ransom being paid was $178,000 (close on £138,000), rising sharply for larger organisations.

This is no surprise: the exfiltration of high value data (the "steal then encrypt" model) results in criminals having much greater negotiating power over their victims, so that firms feel under greater pressure to give way to ransom demands to prevent their own and their clients' confidential data from public release, even when system recovery from backups is possible.

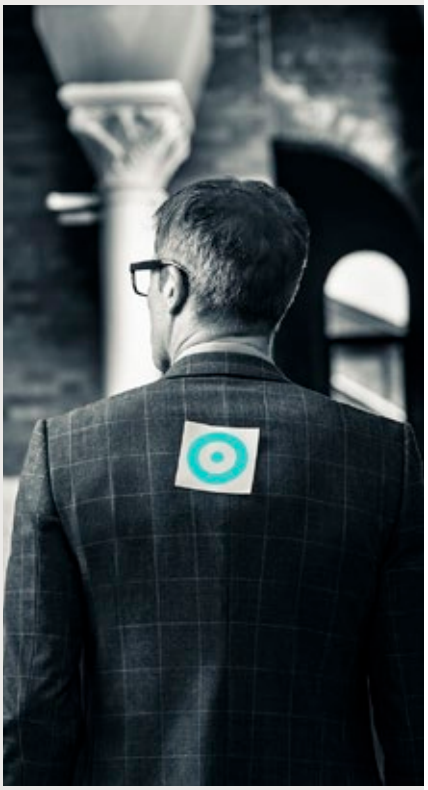
From the attacker's business perspective, the ransomware to payment 'conversion rate' has gone up very substantially, including for the smaller Raas players who are also now seeking higher ransom returns.

A market that's here to stay

Given the amounts of money involved, the sophistication of organised cybercrime gangs shouldn't come as a shock. This is a thriving market. And like any successful business, these operations now have their own PR machines, with websites and press releases announcing breaches, naming names, and the theft of data – threatening to make it public, if ransoms aren't paid.

This market, again, like any other, has its own dynamics. And analysis shows that the "market share" of different ransomware players and affiliate programmes has changed throughout the year. Big players like Sodinokibi (aka REvil), Maze and Phobos saw their share of total attacks go down due to the incursion of smaller players and the emergence of new entrants to the market.

This speaks to two somewhat disturbing issues. One, that this is an established market that is not going to go away. And two, that the proliferation we spoke of is accelerating.



Protecting your practice

The rise in the volume and sophistication of cyberattacks in the legal sector and the accompanying threat to business operations are of increasing concern to the Law Society of Scotland.

Solicitors need to be mindful of their regulatory obligations to protect client funds and data. They should run their firms in accordance with proper governance and risk management principles, and comply with statutory obligations to protect personal data.

Effective cybersecurity is not just a technology issue. Rather, the biggest vulnerability lies in the day-to-day practices of people. So effective configuration of technology must be accompanied by proper training and effective policies and controls.

Firms should question their reliance on third party IT providers to provide security. In addition, many firms are taking no, or inadequate, steps to test or audit their policies, processes and systems, which should be reviewed regularly, and where possible, by someone independent.

This, in turn, raises the question of the ability of some senior leaders to protect their firms against cyberattacks. Who plays the role of figurehead or senior "cyber champion" in your law firm – responsible for dealing with cybercrime and the steps that need taking?

Successful cyber attacks are now happening with increasing frequency against firms of all sizes. Leaders of law firms have a responsibility to satisfy themselves that the right measures are in place and regularly reviewed to protect the firm, their partners and clients. They should not be relying on generalist IT support. Savvy leaders already know this.

This article was produced by the Society's Strategic Partners Mitigo. Take a look at their full service offer on our member benefit page.

The Hague Convention: a 40-year evolution

It is 40 years since the Hague Convention set out a code for international child abduction law. Lisa Reilly describes how its application has evolved with our understanding of children's maturity, and with the concepts of habitual residence and consent

On 25 October 1980, the Hague Convention on the Civil Aspects of International Child Abduction was ratified, giving effect to a multinational commitment to securing the return of abducted children across international borders.

In the ensuing 40 years, the Convention has ensured the return of thousands of children to their home states which, as far as measures of success go, is pretty remarkable. It was a precursor to the 1989 United Nations Convention on the Rights of the Child, article 11 of which provides that parties must combat the illicit transfer and non-return of children overseas by promoting bilateral or multilateral agreements. There are currently 101 signatories to the 1980 Convention, making it one of the most widely endorsed international instruments.

Over time, the way in which the Convention is applied has evolved, echoing a growing recognition of the importance of children having their voice in cases affecting them. Other interesting developments include how habitual residence is determined (the gateway test for the engagement of the Convention), and whether there may be some scope for refinement of the defence of consent.

"Attitudes on whether to consider the views of younger children have changed a great deal in the last 40 years"

Voice of the child

During the drafting stages of the Convention, proposals to include a defence on the basis that a child might object to being returned to the country of their habitual residence were met by mixed views. After some debate, article 13 was included. It provides that: "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

But in the early days of the application of the Convention, the courts took a cautious approach when considering the views of younger children – perhaps unsurprising given that, in the 1980s, children's voices in cases that affected them were little more than a whisper.

The Convention itself stipulates no age of presumed maturity for a child to express a view, but in the now fairly historic case of *Re R (Abduction: Hague and European Conventions)* [1997] 1 FLR 663 it was observed that 10½ was "an age which one would normally consider as being on the borderline" in this respect. Global statistics available then show that only 5% of objecting children were under the age of eight.

Attitudes on whether to consider the views of younger children have changed a great deal in the last 40 years. As our understanding of the psychological impact of decisions on the welfare of children has evolved, so too has our insight into

the ability of very young children to express views about the arrangements made for their care. Until recently, only children aged 12 or over were presumed old enough to express a view in cases affecting them. But that presumption was removed by the Children (Scotland) Act 2020, and the court rules now make it explicit that taking the views of a child will only be dispensed with if that child is under five and on cause being shown.

The importance of a relatively young child's views in such cases was highlighted recently in *W v A and X* [2020] CSIH 55, in which the court placed considerable weight on a 10-year-old girl's objection to returning to Poland, resulting in a return order being refused following an appeal to the Inner House. The child had been removed from Poland by her mother a few days after a local court refused her application for relocation, and the child's father petitioned the Court of Session for her return to Poland. The child made clear during an interview with a child welfare reporter that she did not wish to go back to her home country.

Despite this, the court at first instance ordered her return, so the mother appealed. The Inner House observed that the court had not met the expectation that it should "engage with the stated reasons for the child's concerns, with due weight afforded to them". Although the Inner House acknowledged that the nature of a child's objections, or the manner in which they are expressed, could mean that the court should attach little weight to them in the overall balancing exercise, the child's objections in this instance were found to have been authentic and independent. The decision at first instance was overturned and the return order refused, allowing the child to remain in Scotland – in accordance with her wishes.

Habitual residence

Recognised as the gateway test for application of the Convention, the "left-behind" parent must establish that the child who has been abducted or unlawfully retained was *habitually resident* in the state he or she left when the wrongful removal or retention took place.

In the early stages of the Convention the courts took a legalistic approach to the determination of a child's habitual residence, and courts in England & Wales applied a test derived from taxation statutes (*R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309).

A significant shift in this approach came in 2013 with a series of UK Supreme Court decisions being handed down. The most significant among those decisions was *A v A (Children) (Habitual Residence)* [2013] UKSC 60, in which the court took the opportunity to clarify that habitual residence is a matter of fact and not a legal concept like domicile. The court adopted the Court of Justice of the European Union test that habitual residence is in "the place which reflects some degree of integration by the child in a social and family environment", and so focused on the child's actual situation.

This approach was taken further by the Supreme Court in *AR v RN* [2015] UKSC 35, where it was stated beyond doubt that habitual residence is a matter of fact and it is the "stability" of the child's residence, rather than any degree of permanence, which matters. A child's habitual residence may shift if the child becomes integrated in a new environment, and that can occur very quickly even in the absence of shared parental intention that it should do so.

In fact, parental intention is just one of many factors to be considered. So a child might move to Scotland with one parent from another Hague Convention state for what the other parent in that state imagines is for an agreed period of time. The parent in Scotland refuses to return the child at the end of the agreed period, which is an unlawful retention. But by then the child has become integrated in Scotland and their habitual residence has shifted. This may be an unintended consequence of the welcome shift from a legalistic to a facts-based analysis of the meaning of habitual residence.

The defence of consent

The issue of whether the left-behind parent has consented to their child moving to, or staying in, another state – and whether they have in fact given their express permission for such a move – is a complex one and often gives rise to contested cases.

Article 13(a) of the Convention provides an exception to the obligation to return an unlawfully retained or abducted child, if the person opposing the return establishes that "the person... or other body having care of the person of the child... had consented to or subsequently acquiesced in the removal or retention".

Re P-J (Abduction: Habitual Residence: Consent) [2009] 2 FLR 1051 established that such consent must be "clear and unequivocal", and while consent can be given for removal at an unspecified time in the future, that consent must still apply at the time of the child's actual removal.

But what amounts to clear and unequivocal consent seems to be highly subjective. This issue was considered by the Inner House in *YS v BS* [2019] CSIH 50. In this case, the parties lived as a family in Italy until January 2019, when the mother fled to Scotland with the children under cover of darkness. The removal was covert and clandestine, but the mother relied on article 13(a) as her defence, namely that the father had consented to the removal. The dichotomy between the clandestine nature of the removal and the existence of consent was explored by the court in the context of a written note, apparently consenting to the children's removal to Scotland. According to the father, it had been fraudulently created, but in any event was written many months before the removal, after which the parties had reconciled.

Although reliance on the defence of consent might have suggested that there was no need for the mother to remove her children in a clandestine manner, the Lord Ordinary held that the consent *was operative* at the point of removal. The Inner House upheld the decision, but did not review a much older case involving the defence, *Zenel v Haddow* 1993 SC 612, a decision which has been criticised because it found consent established, even though the parties involved had completely forgotten about the "agreement" which gave rise to the defence in the first place.

Further evolution to come

Over the past 40 years, decisions made under the Hague Convention have evolved so that the voices of children play a more significant part in the decisions that affect them, and in the facts-based, pragmatic approach that has emerged to the analysis of habitual residence which lies at the heart of these decisions. The Convention is a dynamic and living instrument shaped by the cases litigated under it. Will we see further evolution of this instrument and how it is applied? That is inevitable around the consent defence and the way in which it interacts with the changing, and unique, circumstances of families who live their lives across international boundaries.

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Signed away? Privatisation and human rights

Why should realisation of human rights depend on the public or private status of a service provider? That has been the experience with contracted-out services, but was not the intention behind the Human Rights Act, argues Eleanor Deeming

Private providers now play a significant role in the delivery of our public services. Generally, people have no choice in whether the particular service they need is provided directly by the public sector or by a private party under contract with a public body. What does this mean for the protection of our human rights? What can we do in Scotland to ensure that our human rights laws recognise and respond effectively to the reality of private sector involvement in public life?

This issue came into sharp focus in Scotland last year following the court's decision in *Ali v Serco Ltd* [2019] CSIH 54. Now, with new laws being introduced in Scotland to incorporate a wider range of international human rights directly into domestic law, there is a need to ensure our human rights laws can operate effectively within a contracting-out culture.

Functions of a public nature

Section 6 of the Human Rights Act 1998 ("HRA") provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The definition of "public authority" includes "any person certain of whose functions are functions of a public nature" (s 6(3)(b)). The HRA therefore applies not only to "core" public authorities, for example the NHS and the police, but also private parties when exercising functions of a public nature. This reflects the well established principle of human rights law that a state cannot contract out of its human rights obligations.

The HRA was drafted at a time when the private and voluntary sectors' role in providing public services had been steadily increasing for decades. The parliamentary debates on the Human Rights Bill highlight the clear intention of Parliament to give a wide interpretation to s 6. The Government wanted the HRA to apply in what it saw as "a realistic and modern definition of the state so as to provide correspondingly wide protection against an abuse of human rights". Although the precise scope was to be left to the courts to determine, Parliament was clear that the assessment should be based on the nature of the function being performed, and not the legal status or form of the body itself.

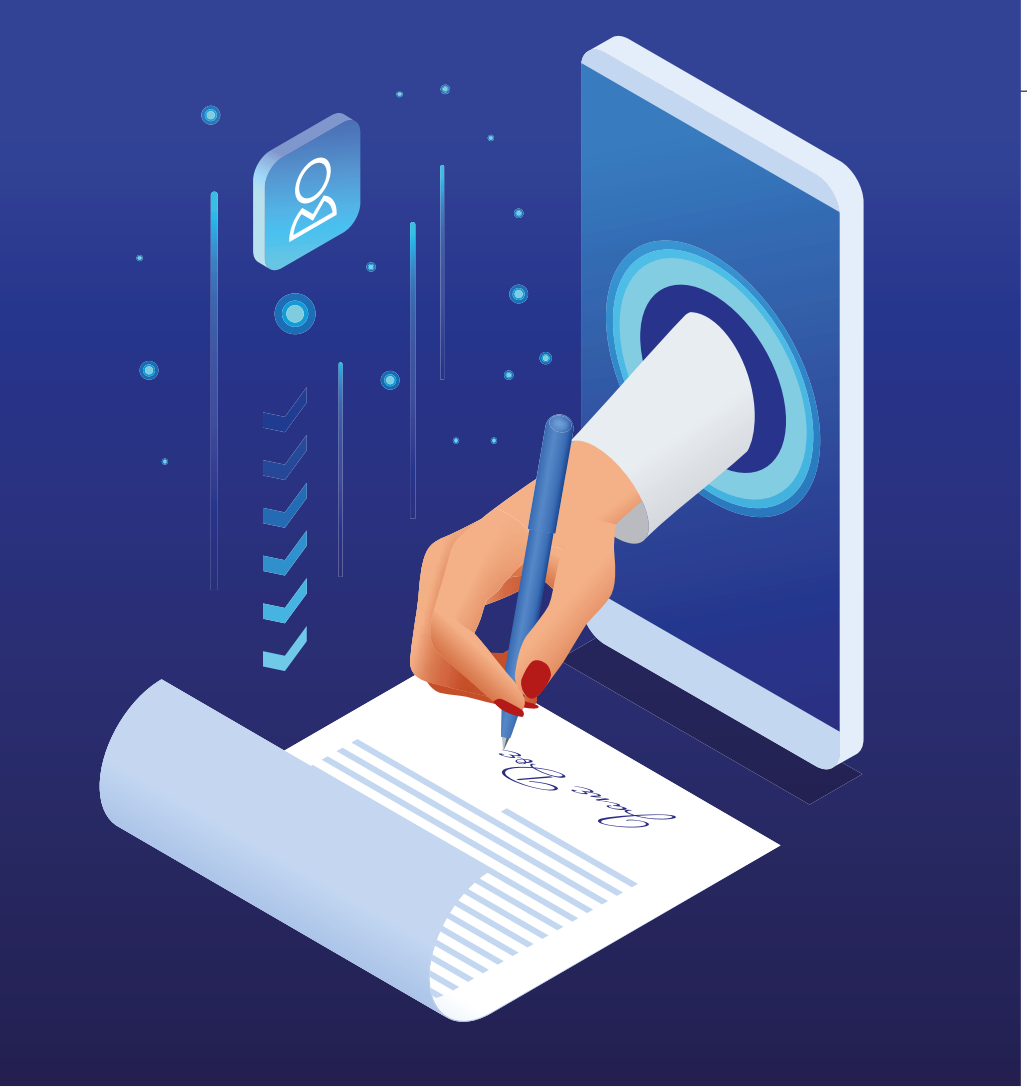
Why does it matter?

The House of Commons Public Administration & Constitutional Affairs Committee report *After Carillion: Public sector outsourcing and contracting* highlights that there are now private markets for public services that simply did not exist 30 or 40 years ago. The extent of private sector involvement in our public services has also been highlighted by the response to COVID-19, which has relied heavily on the private sector in a number of areas.

There are mixed views around appropriate levels of private sector involvement in the delivery of public services; however, the fact of their involvement is clear. Ensuring that, where appropriate, private providers are brought within the scope of the HRA seeks to avoid a two-tier system of rights protection. Levels of rights protection should not differ according to the legal status of a provider.

Any uncertainty over the application and scope of the HRA creates unintended and unequal outcomes for people. It also undermines the vision that human rights should be central to public service delivery. During the introduction of the HRA, the phrase "bringing rights home" did not only mean that people would now be able to rely directly on their Convention rights in domestic courts: it sought to create a wider human rights culture. It was hoped human rights would become a driver in the development of law and policy, and run central to the delivery of public services.

Those involved in the delivery of public services must be clear about their obligations, and accept those obligations. Similarly, in delegating responsibilities to private parties, "core" public authorities (for example central government) should be confident and explicit about where human rights responsibilities rest, before concluding agreements with third parties.



Interpreting s 6: a restrictive approach

In the absence of a statutory definition for the terms "public authority" or "functions of a public nature", the courts have been charged with the task of interpreting the HRA to reflect a fair distinction between public and private functions. With some notable exceptions, the courts have tended to adopt a narrow and restrictive approach to interpretation. The leading case of *YL v Birmingham City Council* [2007] UKHL 27, in which the House of Lords found that a private care home was not exercising functions of a public nature, presented an opportunity to widen the scope of application. The decision, by a 3-2 majority, came under much criticism as a missed opportunity.

In general, the courts' treatment of s 6(3)(b) reveals a tendency to consider the institutional character of a body, for example its status as a for-profit company, rather than the nature of the function being performed by that body. This is seemingly in direct conflict with the intentions of Parliament and Government during the passage of the Human Rights Bill through Westminster.

The *Serco* case

The Scottish Human Rights Commission intervened in *Ali v Serco Ltd*. The case concerned Serco's policy of changing locks on the homes of asylum seekers whom it deemed had reached the end of the asylum process. Evictions and lock changes were to be carried out without a court order. Serco, a private company, was contracted by the Home Office to provide accommodation and essential services to asylum seekers.

The Inner House of the Court of Session found that these circumstances did not give rise to violations of articles 3 and 8 of the ECHR. Crucially, drawing heavily on *YL*, the court also found that Serco was not exercising functions of a public nature under s 6 HRA and was therefore not obliged to comply with Convention rights.

A provision compromised

The Joint Committee on Human Rights ("JCHR") has twice looked in detail at this issue, releasing reports in both the 2003-04 and 2006-07 sessions. The JCHR, citing the restrictive interpretation of s 6 by the courts and the changing nature of private and voluntary sector involvement in the delivery of public services, found that this central provision of the HRA had been significantly compromised, creating a gap in human rights protection.

In its 2006-07 report, the JCHR considered several possible options to remedy the situation. The Commission believes there is potential to adopt a mix of these options in our future human rights laws in Scotland.

Human rights leadership in Scotland

A national conversation around how best to give effect to a wider spectrum of international human rights is taking place in Scotland. The National Taskforce on Human Rights Leadership, of which the Commission is a member, is working to establish a statutory framework for human rights that will incorporate internationally recognised human rights – economic, social, cultural and environmental – into Scots law.

Alongside this, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, which incorporates the UNCRC into Scots law, was introduced in the Scottish Parliament on 1 September 2020. The approach to defining public authorities in the UNCRC Bill mirrors the approach taken in the HRA.

We now have an opportunity to provide clarity and learn from the pitfalls experienced in attempting to hold private parties to account under the Human Rights Act.

In putting forward views on the UNCRC Bill to the Scottish Parliament's Equalities & Human Rights Committee, the Commission recommended careful consideration be given to the definition of "public functions" in the bill. Drawing on the recommendations of the JCHR, the Commission proposed:

- strengthening the definition of "public functions", explicitly recognising that functions are public when they are performed under contract or other agreement with a public body which itself is under a duty to perform that function;
- developing clear interpretative guidance to assist the courts. The Commission suggests that the dissenting opinion of Lady Hale in the *YL* case, which includes a list of factors that would be highly relevant in determining whether a public function is being performed, would form a strong basis for any guidance;
- ensuring that future bills of the Scottish Parliament providing for the delegation of public functions clearly identify the human rights obligations attached to those functions;
- producing separate public procurement guidance on the inclusion of explicit contractual terms in Government contracts, making clear where a private body is performing public functions.

We must recognise the extent of private sector involvement in the delivery of our public services and respond appropriately. The realisation of human rights cannot turn on whether a service is contracted out. Private companies deliver many essential services, and they must be held to the same human rights standards as their public sector counterparts. Rights holders deserve no less.

Eleanor Deeming is legal officer with the Scottish Human Rights Commission

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Can your client experience become a Toy Story?

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Today's consumers are not only becoming empowered by technology – they also have more options than ever before. As a result, brands must adapt to this new business paradigm, and fast.

Consumers' expectations are seemingly skyrocketing, with a recent report suggesting that 66% of customers say it takes more for a company to impress them with new products and services than ever before. And, like any other major business strategy, a Customer Experience initiative needs strong leadership to be brought to fruition.

That's why so many businesses have turned their focus to Customer Experience rather than Customer Service. Law firm leaders should be poised to lead the charge in 2021 and orchestrate a game plan that addresses this important aspect of, not modern law firms, but modern business.

First, here are a few stats to get you thinking...

86% of buyers will pay more for a better brand experience, but only 1% feel that companies consistently meet expectations.

96% of customers say customer experience is important in their choice of loyalty to a brand.

Are you aware of these stats? Do you care? If so, are you acting on or ignoring them?

Creating a Toy Story?

As someone who managed a global marketing portfolio for one of the biggest experiential brands in the world for 10 years, I feel that I have enough clout to give some advice on this topic.

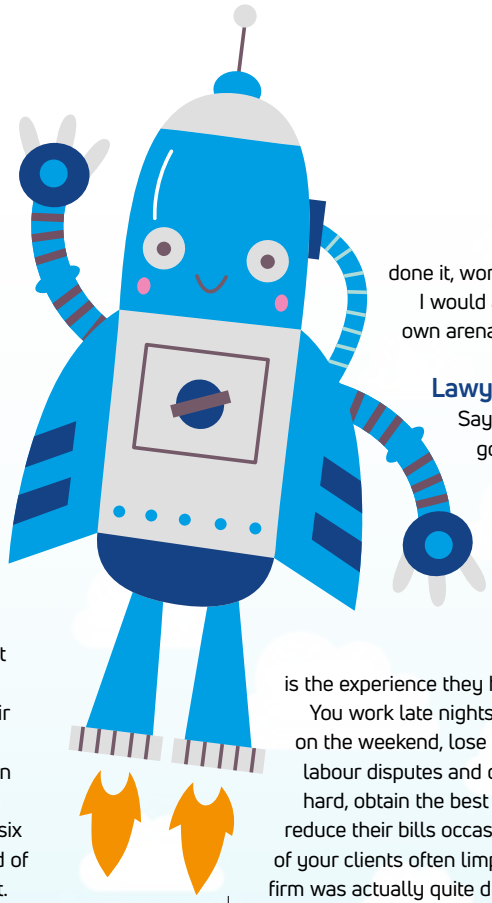
Growing a toy retail brand from one store in the West End of London to more than 180 globally, didn't happen because there was a lack of companies selling our product. Far from it. The evolution that business went through happened right in the middle of Amazon's meteoric rise to global retail domination. Unable to compete, you have no choice but to focus on your USP (we all have at least one!). In our case it was all about creating an environment exploding with tangible fun, magic and theatre – creating a feast for the senses, something the likes of Amazon could never compete with. Equally, we would place the bulk of our attention on the one area that would get people talking – the customer journey.

We decided to go beyond trying to compete, fix the problem, slash prices or hand out discounts. We wanted to create memories. After all, we had bricks and mortar; Amazon didn't!

From the moment you step over the threshold, be that physically or virtually, into any business, speak to a member of the team or engage with the brand online, you must remember one thing – every little thing you do is going to affect people's perception of you.

For me it was about being "The Finest Toy Shop in the World". Whenever you thought about our brand, it gave you a good feeling. That's marketing in a nutshell, by the way. It's the art of getting people to change their minds – or to maintain their mindset if they are already inclined to do business with you. Every little thing you do and show and say – not only your advertising on your website – is going to affect people's perception of your brand.

Reading this, you might be thinking that offering an experience like that is (buzz) lightyears away from the reality of working in the legal industry. But why?



In a legal market inundated with choices, it's now not enough for businesses to rely on unique selling points or brand strength. Almost more than a service, you must sell an experience. And that experience begins with your relationship to the client.

Is a legal firm different from a toy retailer?

You sell a product and service; your objective is to be the best in your field of expertise; you want to build a loyal customer base; you are competing against some big players who are spending more money and telling more people about their product. Sounds pretty similar to me.

What's the expectation in 2021? Amazon recently stated that their record click to delivery to the door for food in London is six minutes. My next Google search consisted of "Amazon + Time Travel"! An incredible stat.

Now, the customer most likely to be receiving that order is a millennial whose expectation becomes just that. When next month it's 30 minutes, if it ever will be, they are going to be happy, but not over the moon.

What everyone in the legal profession needs to recognise is that their competition extends further than the new firm who have set up shop at the opposite end of the high street. Amazon, Deliveroo, ASOS, and Hamleys are now their competition. So, when someone calls to speak to a fee earner, how long do you think is it acceptable to them to wait for a response. In their head, "Food... six minutes, returned call...?" You need to act now, to compete.

Figures released in 2020 show that:

- Fewer than **10%** of customers who call a law firm will actually get to speak to a lawyer.
- More than **40%** of people who leave a voicemail or fill out a web form wait two or three days before they hear back.

In short: most law firms don't have the best reputation when it comes to customer experience. This is a big problem as well as an opportunity.

Get inspired!

So, where should law firm leaders be looking for inspiration? Colleagues, other law firms, senior figures who have lived the profession for 40-odd years? Surely, they must know how clients want to be communicated to: they've been there, done it, worn the three-piece suit?

I would argue you have to look outside your own arena to make a significant change.

Lawyers do good!

Say it with me! Your job is a force for good and you can make someone's life better. That's just a fact. Your aim is to give sound advice, and in most cases law firms will deliver on that expectation. However, your client has no real method of assessing the quality of the service they receive. What they will assess is the experience they had.

You work late nights for your clients, take their calls on the weekend, lose your hair over their divorces and labour disputes and contract negotiations. You fight hard, obtain the best possible outcomes, and even (gulp) reduce their bills occasionally. Even after all that, how many of your clients often limp away thinking that using your firm was actually quite difficult, even jarring – unreturned calls, uncertainty about progress, the "surprise fee", etc. Why should the level of customer experience for purchasing rattan garden furniture on Amazon or a toy from Hamleys be a better experience than when you are going through a divorce – potentially one of the most stressful periods of your life?

Whether the customer experience was positive or negative, how would you know? Do you ask?

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Intervening *for* equality

The Equality & Human Rights Commission recently used its power to intervene in an appeal against a refusal to grant permission for judicial review, where important points about the test for permission were raised, as Cameron-Wong McDermott explains

On 16 October 2020, the Inner House of the Court of Session delivered its opinion in an appeal brought by a prisoner ("S") against a decision of a Lord Ordinary to refuse him permission to proceed with his judicial review: *S v The Scottish Ministers* [2020] CSIH 64. Using its legal powers, the Commission intervened in the appeal to raise important points about the role and importance of the public sector equality duty ("PSED", explained further below) in policy formulation by public authorities, as well as the proper approach to the article 8 ECHR rights of prisoners.

This article will briefly set out the facts of the case and the Inner House's opinion. It will explore the underlying reasons driving the Commission's decision to intervene in this case.

Background

S is a prisoner serving a life sentence at HMP Shotts. Until about 2017, S used videoconferencing to facilitate contact with his elderly grandmother, who is cared for in a nursing home. S's grandmother suffers from dementia and is frail; it was accepted that she is disabled within the meaning of the Equality Act 2010 and could not travel to visit S in prison.

S challenged decisions of the prison authorities to refuse him exceptional escorted day absence ("EEDA") to facilitate contact with his grandmother outside of the prison. Applications for EEDA are governed by the Prison Rules, and in considering an application the prison governor must have regard to supplementary guidance issued by the prison authorities.

The refusals were challenged on several grounds, but for present purposes it is only necessary to mention two of them. In relation to the supplementary guidance for EEDA applications, S argued that the prison authorities failed to comply with the PSED under s 149 of the 2010 Act, and also with the specific equality duties under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

Under s 149(1), public authorities must give due regard to the need to (i) eliminate discrimination and any other conduct that is prohibited by or under the 2010 Act; (ii) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (iii) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The specific duties, which assist public authorities to meet their general duty, require public authorities listed under the regulations to assess the impact of new or revised policies against the requirements of the PSED. This is known as an equality impact assessment ("EIA"). In developing any policy they must consider evidence relating to persons who share relevant protected characteristics: reg 5.

S also argued that his rights under article 8 ECHR had been breached (in that regard he relied in addition on article 14).

On 24 March 2020 the Lord Ordinary refused permission for the petition to proceed. On the question of the PSED, the Lord Ordinary said that the guidance published by the prison authorities on the operation of the EEDA scheme had been the subject of an EIA. He went on to say: "The petition is not an appropriate vehicle for raising what are essentially theoretical questions under [the 2010 Act]. These have no practical relevance in the circumstances of the present case". Finally, the Lord Ordinary did not consider that the refusal decisions were sufficiently serious to engage S's Convention rights.

Why did the Commission intervene?

The Commission was granted permission to intervene in S's appeal against the Lord Ordinary's decision to refuse permission for the judicial review to proceed.

Ultimately the Commission decided to intervene at the

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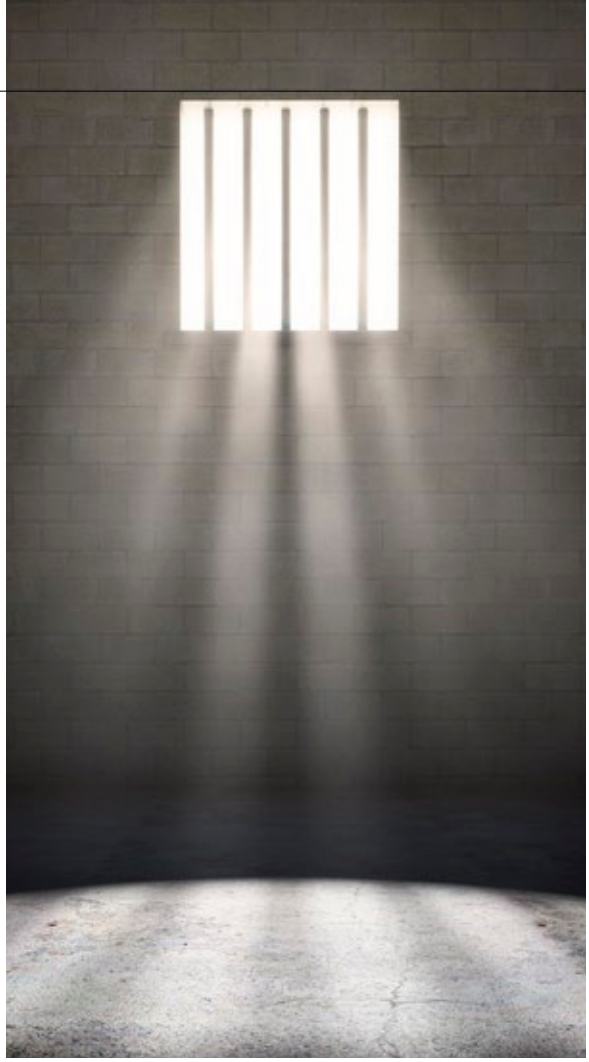

appeal stage because it was concerned by several aspects of the Lord Ordinary's decision. These concerns are set out in the following paragraphs.

In the Commission's view, the Lord Ordinary failed to give proper or adequate consideration to S's argument under the PSED.

Having regard to the importance of the role of the equality duties in formulation of the supplementary guidance underpinning the scheme for EEDA, the Commission considered that it was not appropriate for the Lord Ordinary simply to dismiss the petition for judicial review because it concerned "spent and historic decisions that are no longer of any practical relevance". There were potentially wider circumstances in which that guidance might continue to apply in future situations, for example if S (or indeed other prisoners) made applications for EEDA to visit disabled relatives.

In addition, it noted that the document relied on by the prison authorities to demonstrate that they had carried out an EIA of the supplementary guidance failed to comply with the requirements for an EIA set out in the 2012 Regulations. It appeared that the Lord Ordinary had taken the Scottish Ministers' submission that the document was a complete EIA at face value. In the course of the appeal hearing, the ministers produced what purported to be a complete EIA, though it was noted by the court that the document did not make reference to disability.

In stark contrast to the situation in England & Wales, the Scottish courts have been asked to consider the requirements of the PSED in relatively few cases. The Commission is therefore concerned that the jurisprudence in relation to the PSED is less well developed in Scotland than it is in England & Wales, and that, as a result, practitioners are less familiar with it and may feel reluctant to develop – or to respond to – arguments based on the PSED.

"If the test for permission is too rigidly applied, it is likely to pose a significant access to justice issue"

The intervention also reflects the Commission's concern about the approach taken to S's human rights arguments. In this respect, it argued that the Lord Ordinary was wrong to say that the EEDA refusals were not themselves serious enough to engage S's article 8 rights. Relying on *Lind v Russia* (2010) 50 EHRR 5, it was argued that the weight of authority favoured the proposition that a refusal of leave to visit an ailing relative did constitute an interference with a prisoner's right to respect for family life.

Finally, the Lord Ordinary's decision reflected a concern held by some practitioners that the test for granting permission for judicial review, introduced by the Courts Reform (Scotland) Act 2014, s 89, is being applied too rigidly by courts. In *Wightman v Advocate General for Scotland* [2018] CSIH 18, the Lord President clarified that the test is "certainly intended to sift out unmeritorious cases, but it is not to be interpreted as creating an insurmountable barrier which would prevent what might appear to be a weak case from being fully argued in due course". If the test for permission is too rigidly applied, it is likely to pose a significant access to justice issue, since it will mean that fewer human rights/equality law based judicial reviews will be explored at a substantive hearing.

The Inner House's opinion

On 16 October, the Inner House allowed S's appeal and granted him permission to proceed with his judicial review. The Commission's written intervention is set out and summarised at paras 12-15 of the opinion.

In reaching its conclusion that the petition had a real prospect of success, the court found that in spite of the difficulties which S would have to overcome if his case was to succeed, it would be "going too far too fast to hold at this stage that those difficulties are insurmountable".

The court also found that it would be too hasty to say that the petition had no practical consequences for S (or for other prisoners who might be affected by similar circumstances), since the supplementary guidance was likely to apply in respect of any future applications for EEDA.

The Inner House's analysis of the merits of the appeal is short. Notwithstanding, the Commission is pleased that the court has affirmed the Lord President's statement in *Wightman*, and applied it to S's petition for judicial review.

The Commission is grateful that the court allowed it the opportunity to intervene in this case. Many aspects of S's petition for judicial review turned on their facts, and it ought to be stressed that the Commission was neutral on the merits of S's applications for EEDA. It however believed that the appeal had wider strategic importance, having regard to the Lord Ordinary's interpretation of the test for permission, as well as the Prison Service's application of the PSED to the scheme for EEDA. Taking into account its strategic litigation policy (see bit.ly/39ajjaW), the Commission believed it was important to exercise its statutory powers to raise awareness of these issues. As the case moves on to a substantive hearing, it believes it has achieved its objective, and accordingly its involvement in the case is now at an end.

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Jury still out on verdicts

The debate about the "not proven" verdict has reached the Holyrood election campaign, but this month's leading cases concern self defence, disclosure – and the appropriate sentence where a massive embezzlement was repaid

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

That bastard verdict

Following the emergence of the verdict of not guilty in 1728, Sir Walter Scott later coined the above term in relation to the "not proven" verdict, and controversy over the three verdicts has come to the fore over the years.

In a diversion from COVID-19 and another referendum debate, it is interesting to see that "not proven" may be a topic of contention at next year's Scottish Parliament elections.

When I was appointed procurator fiscal at Hamilton in 1996, one of my first public duties was to attend the AGM of PETAL, a charity set up by Joe and Kate Duffy following the acquittal on a not proven verdict of the man accused of murdering their daughter Amanda. I found Mr Duffy and his late wife to be dignified, well informed and interested in promoting the abolition of this verdict. What astonished me was that at least six or seven other local people said they had suffered the loss of a relative followed by a subsequent acquittal by not proven.

A campaign and review by the Scottish Office came to nothing, following a consultation in 1994, and various peripheral reviews have suggested reducing the jury from 15 to 12, but none of these piecemeal changes can reform the system where in a funny sort of way the checks and balances are seen by most of the legal profession as being OK – perhaps because they place undue faith in corroboration as a safeguard.

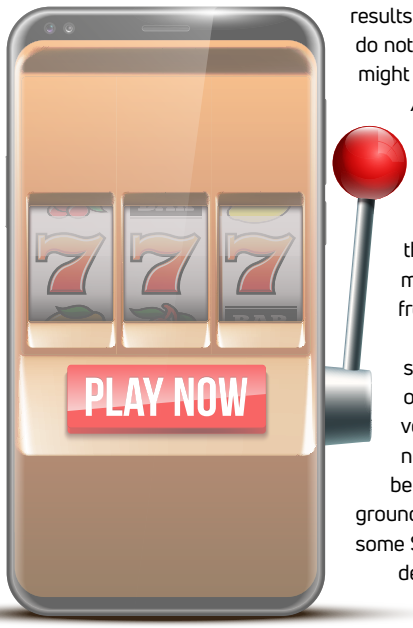
In *Al Khawaja and Tahery v United Kingdom*, ECHR Grand Chamber, 15 December 2011, cases about the admission of hearsay evidence in statement form, reference was made to Scots law and the principle of corroboration which protected accused persons; but concern had been expressed by Lord Gill in *N v HM Advocate* 2003 SLT 761 that s 259 of the Criminal Procedure (Scotland) Act 1995 had supplanted the common law which enabled the court to exclude evidence thought to be unreliable, whereas under English law the judge had discretion to reject the statement of a witness in certain circumstances in the interests of justice.

The English system deploys a qualitative rather than quantitative approach at the "no case to answer" stage (compare *Williamson v Wither* 1981 SCCR 214 and *R v Galbraith* [1981] 1 WLR 1039), and there is a power to exclude evidence thought to be unfair. There are only two verdicts and there must be a unanimous verdict or a 10-2 majority for guilty or not guilty, otherwise the prospect of a retrial arises. By comparison, an 8-7 majority verdict for guilty does not seem like the case has been proved beyond reasonable doubt. If the judge considers the jury's guilty verdict to have been unreasonable, this can only be raised on appeal (under the 1995 Act, s 103(3)(b)).

The Justice Secretary's response has been to consider matters fully once the independent jury research published in October 2019 has been considered.

For my own part, after a few years on the bench I resolved in summary trials to abandon recourse to the not proven verdict and restrict my verdicts to guilty or not guilty. If the case was not proved, or worse, barely got off the ground, an acquittal followed and reasons were given.

It is more complicated in the jury context, although for 30 years we have told the 15 men and women that there is no difference between two of the three verdicts: each results in an acquittal. We do not mention that a juror might abstain (*Allison v HM Advocate* 1984 SCCR 464), and we cannot say that one verdict of acquittal carries a greater emphasis than the other. There must be some confusion from these directions.



What I would like to see is a return to the old Scots way of two verdicts, proven and not proven. Juries could be reduced to 12 on grounds of cost and space – some Scottish courts were designed by architects who thought we only had a jury of 12 in Scotland (!) – and we keep it at eight for guilty, with no retrials unless the provisions of the Double Jeopardy (Scotland) Act 2011 can be invoked on a fresh evidence basis.

Betting is a mug's game

In another life I might have been a bookmaker, but fortunately at an early age I realised you had to study horseracing form avidly to turn a profit. I still enjoy watching racing, but never bet. Once I was reading a background report in an embezzlement case where a plea of guilty had been tendered but the agent said he would "keep his powder dry" until the sentencing diet. I noted the accused was not addicted to drink or drugs, but turned the page to discover "however he is addicted to fruit machines". There was nothing social workers could offer by way of therapy, and no means of paying off the losses.

I was interested to read the appeal against sentence *Conway v HM Advocate* [2020] HCJAC 48 (28 October 2020), a case referred from the Scottish Criminal Cases Review Commission. The appellant had pled guilty by s 76 letter to obtaining £1,065,085.32 by fraud from his employers Dundee City Council, through his position as an IT officer, over nearly seven years. He was sentenced to five years four months' imprisonment, reduced from eight years on account of the early plea.

The matter was referred after further information that the entire sum had been repaid. Only £7,337.58 had been recovered at the time of the investigation. The appellant had consented to the recovery of his pension and lump sum totalling £258,966.15, and to confiscation which recovered £49,000 in equity from his home. The council had recovered £335,923 from its insurers, and William Hill Bookmakers had made an *ex gratia* payment of £500,000. They had treated the appellant as a VIP client, and as a result of their conduct had run into problems with the Gambling Commission which ordered repayment to defrauded victims.

The appellant was then 51, and had kept appropriating money in the hope of a big win to pay off all the losses. He was a first offender and had co-operated fully with the police. He had been referred to agencies, stopped gambling and had forfeited 30 years of pension rights. In a supplementary report the sentencing judge suggested that on the new information he would have set the headline figure at seven years, reduced to four years eight months. He would have taken no account of the money recovered from insurers. The court had more difficulty with the William Hill payment, but accepted their dealings with the appellant had been dishonourable and exacerbated matters.

After considering a full range of previous cases the court concluded that sentence had

been excessive and substituted six years' imprisonment, reduced to four.

Wearing an IRA T-shirt

While the appellants in *Ward, MacAulay and Walker v PF Glasgow* [2020] SAC (Crim) 006 (18 November 2020) had their convictions quashed by the Sheriff Appeal Court, this was due to a lack of corroboration only. It was not denied that at a football match they wore T-shirts depicting a paramilitary figure wearing a black beret and sunglasses with his mouth covered by a camouflage scarf and the Irish tricolour flag in the background. Only one officer from the Police Service of Northern Ireland was led to explain that such a figure was consistent with being a member of the IRA. The court made clear that had a second officer given evidence in this context, the circumstances would have amounted to a deliberately provocative gesture towards opposing supporters and as such amounted to a breach of the peace.

Self defence

This plea is not straightforward. In a dynamic, fast moving incident, conduct between the parties may lead to different considerations applying during the various stages of the fracas.

In *Thomson v HM Advocate* [2020] HCJAC 49 (17 September 2020), the appellant was convicted of (1) an assault by brandishing a broken bottle, (2) possessing a broken bottle as an offensive weapon, contrary to s 47(1) of the Criminal Law (Consolidation) (Scotland) Act 1995; and (3) brandishing a broken bottle at the complainer, contrary to s 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The jury deleted from the assault charge the words "repeatedly punch and kick him on the head and body, strike him on the head with a bottle or similar item". A plea of self defence had been entered to all charges.

The complainer was walking an elderly lady home when an altercation arose in a group including the appellant. The complainer intervened, and pushing and shoving ensued between him and the group. It was said that the complainer fell to the ground, was punched and kicked, and hit with a bottle thrown by the appellant. He got to his feet, whereupon the appellant broke another bottle against a wall and threatened the complainer until passers-by told him to "leave it". The complainer had separately been charged with assaulting a female in the appellant's company.

The sheriff directed the jury that self defence was not open to the appellant in relation to charges 2 and 3, as he had armed himself with a weapon. The court indicated the sheriff had erred in directing that fear of an attack cannot provide a reasonable excuse for possessing a weapon. A "waiter's friend" – a corkscrew and penknife combination – had been found by police at the locus; the complainer admitted he owned one but said it must have fallen out of his pocket in the assault. The jury's deletions indicated they did not wholly believe the complainer, perhaps tending to the view that he had produced the implement, and the directions amounted to a miscarriage. The court quashed the convictions on all three charges, and tantalisingly did not feel the need to consider the second ground of appeal, that the appellant could not be convicted of both charges 1 and 3 as they each concerned the same *species facti*. A rare opportunity was missed to stop the Crown from needlessly overloading the libel with duplicate charges.

Disclosure

Disclosure is the cornerstone of the modern criminal justice system. Gone are the days when each party prepared its own case and precognosced witnesses. The growth of human rights and the need for the Crown to disclose more than a list of witnesses coincided with reductions in legal aid. In the result, the defence rely on the Crown to produce a summary at the outset, and witness statements and relevant productions to prepare their case. The multi-media police report is still some way off, and the system's hope for more early pleas is unrealistic until the agent can show the client glorious technicolour footage of the crime being committed in an attempt to stir their hazy or non-existent recollection.

In *McCarthy v HM Advocate* [2020] HCJAC 52 (13 February 2020) an appeal was taken after the Crown and police stated to the defence that the information sought did not exist. Concern was expressed over the time the appellant had remained in custody awaiting trial, although the court highlighted there had been two changes of legal representation.

The appellant was indicted on drugs supply charges over two years before, and had a preliminary hearing in September 2018. A bland defence statement was lodged denying the charges; no information was sought to be disclosed. There was reference to a special defence of coercion, but it was indicated the defence were ready for trial.

A preliminary issue minute about the search warrant was lodged prior to trial in January 2019 but refused as too late. A bill of advocation and a petition to the *nobile officium*, both described as incompetent, followed. Counsel and agents withdrew from acting at the trial diet "due to differing views on the conduct of the defence", and new dates were set for March. At the PH a special defence of coercion was allowed to be received although late; this described a man known only as Lee as the driving light. It was agreed to adjourn the trial until July. On that date the new defence team withdrew due to "a breakdown in trust" with the client and a new trial date was fixed for November 2019.

In October a supplementary defence statement was lodged indicating that although the accused's defence was one of coercion, he had also been "the victim of entrapment by a state agent". Two female names were given, and information requested.

By letter in January 2019, the Crown had stated that "at no time preceding... arrest was any covert police officer deployed to engage with [the appellant] or any other covert tactic deployed... no officer supplied drugs to any female from Renfrewshire". Following further enquiries, the Crown confirmed that no surveillance had been used. The search warrant used to recover drugs, cash and paraphernalia from the appellant's home had been obtained on the basis of intelligence received.

The court was critical of the original *pro forma* defence statement and indicated that if an accused wished the Crown to make proper disclosure in what is intended to be a balanced statutory scheme, they should comply with the obligations set out in the scheme, namely to provide as much information as possible. The court was left with no basis apart from the appellant's own musings that the information sought existed. The Crown said it had no such information, so the application and appeal failed.

Their Lordships were clearly shocked in February 2020 that the trial had not proceeded and ordered that the case be given priority to ensure it proceeded at the next calling. I presume with the belated publication of this opinion it has now taken place.

Corporate

EMMA ARCARI, ASSOCIATE, WRIGHT, JOHNSTON & MACKENZIE LLP

Just how transparent do companies need to be when tendering for contracts? According to *AC Whyte & Co v Renfrewshire Council* [2020] CSOH 82 (4 September 2020), local authorities have significant flexibility when interpreting the "transparency" requirement in the Public Contracts (Scotland) Regulations 2015.

AC Whyte sought damages following the award of a contract to a company that did not meet the minimum turnover stated in the invitation to tender (ITT), relying instead on the capacity of third parties.

The tender proceedings

The ITT, for property improvement works, was issued by Renfrewshire Council. In accordance with the European Single Procurement Document (Scotland) ("ESPD"), candidates

required to have a minimum annual turnover of a revised figure of £10 million for the past three years in the business area covered by the contract. Where the candidate was a consortium with no individual member meeting that requirement, the council would have a discretion to consider whether any alternative proposals could be considered equivalent. The ITT further stated that where the tenderer was to be a consortium, the contract would be entered into with the lead organisation and all members of the consortium, who would be jointly and severally liable.

A contract was entered into with one tenderer, Procast. Procast had originally stated it was not seeking to rely on the capacities of third parties, but had submitted three ESPDs for itself and two other entities. In response to a council query Procast stated that it was tendering as a consortium on the "'Lead Provider' model", with itself as lead. Requested for evidence of annual turnover, Procast responded that the combined annual turnover of the three companies met the requirement, providing unaudited financial statements.

The claim for damages

AC Whyte claimed the council breached its obligation to act in a transparent manner (reg 19(1)) because: (1) it failed to enquire into any inter-company trading between Procast and the other entities, and therefore did not have sufficient information to satisfy itself regarding the ITT requirement; (2) the award of the contract to Procast was not made in accordance with the ITT; and (3) at the time of the award, the council did not possess information essential for a proper decision to be made.

The pursuer further argued that, in breach of the ITT, the contract had been entered into with Procast on its own, and that this had happened although no single member of the consortium met the turnover requirement on its own.

Lord Tyre granted absolvitor in favour of the council.

In relation to inter-company trading, Lord Tyre considered that, as the ITT did not provide for any adjustment of turnover, there was no obligation on the council to investigate the matter and it could not be manifest error to fail to make any inquiry/adjustment for such trading.

He further held that the authority had a discretion in terms of the ITT to award the contract to a tenderer who did not meet the turnover requirement. In any event, the question as to that discretion did not arise as the council was entitled to rely on Procast's self-certification that the requirement was met. The council was also entitled, if it so wished, to regard the information and documentation supplied by Procast as sufficient and as an "alternative proposal" in terms of the ITT. Contracting with Procast alone was "a failure by the council to secure an advantage", and not a failure to assess competing bids.

Commentary

Authorities will be relieved at the extent to which they can exercise discretion without breaching the transparency requirements, even in relation to contradictions in their own ITT. It is notable that in this case the council's argument (that the inclusion of the clause requiring the contract to be entered into with all consortium members was a mistake), was accepted. Bidders, however, may be concerned at the extra difficulties in attempting to foresee exactly how authorities will reach their decisions. If the ITT wording cannot be relied on, what certainty do bidders have?

At least in this case, the usual procurement procedure took place in that it was publicly advertised and bidders had a chance to (a) bid and (b) challenge the tender where they considered it had not been made in accordance with the procurement regulations. This was, of course, all pre-pandemic.

Since the start of the pandemic, much has been made in relation to the award of large so-called secret contracts to relatively unknown entities, often with little to no obvious experience in the public sector and, occasionally, with background links to politicians (labelled the "chumocracy" approach), taking advantage of the urgency provision in the regulations. Practitioners and the public alike will be waiting with interest to see the outcome of the seemingly inevitable judicial review applications.

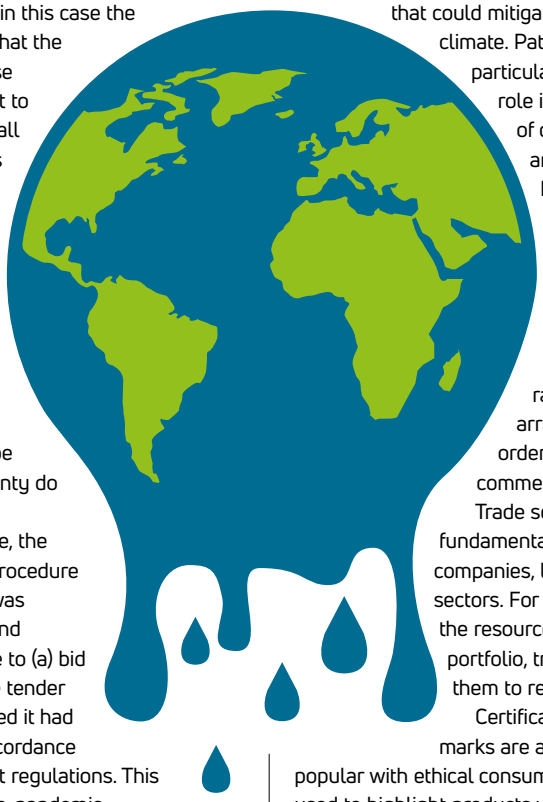
Intellectual Property

ALISON BRYCE, PARTNER, DENTONS UK & MIDDLE EAST LLP

Though the current pandemic has led to record lows in greenhouse gas emissions, we have witnessed a global rise this year in the dramatic effects of climate change. From increased local flooding in the UK to a longer and more deadly wildfire season in California, we still need a fundamental adjustment to the way we live. This article explores the role that intellectual property rights could play in driving the pace of change.

What IP is relevant?

The intellectual property system is designed to stimulate and disseminate the new technologies that could mitigate damage to the climate. Patent protection in particular plays a crucial role in the development of climate solutions, and is often more heavily scrutinised than other IP rights. However, typically technologies attract a web of multiple IP protections and require a range of licensing arrangements in order to be effectively commercialised.



Trade secrets are fundamental to innovative companies, large or small, in all sectors. For companies without the resources for a large IP portfolio, trade secrets allow them to remain competitive.

Certification and collective marks are already proving popular with ethical consumers. Marks can be used to highlight products which emit high and low levels of carbon during production, or which have been produced locally and do not attract large carbon footprints.

Why are patents key?

The patenting system is well designed for encouraging development of advanced technologies.

To obtain patent protection for innovative works, inventors must satisfy that their creation is novel, involves a technological step forward in their field and has an industrial application. As part of the application, the inventor agrees to disclose their work publicly and they must be able to describe how a skilled reader would be able to carry out the invention in practice. This means that when the exclusive rights period expires, the information is disseminated across society and the technology can become more widely used.

The patent system is fundamentally underpinned by the idea of balancing interests: the private interests of those investing in and generating new technologies (through a period of exclusivity) against the broader societal interest in disseminating the knowledge.

Environmental considerations are included in this balancing. National laws give patent offices the power to exclude technologies that would cause damage to the environment if commercially exploited, a key overlap between IP law and environmental policy.

Offending sectors

Though it is likely that the patenting system will play a key role in encouraging the development of green technologies, it has also served as an aid to some of the worst offending industries. It has produced groundbreaking technology which has simultaneously advanced society and majorly contributed to the worsening of the greenhouse effect. The diffusion of energy technologies which fuelled the industrial revolution, agricultural equipment which cleared much of our rainforests, and new industrial chemicals which polluted our atmosphere, all evidences this. In order to reverse this impact, we require this same framework to produce the necessary green technologies.

Encouraging innovation, or barrier to dissemination?

It is commonly maintained that IP rights provide incentives to create and commercialise new inventions and are the driving force behind technological advancements. The exclusivity period afforded to rights holders enables them to commercialise the product and recoup the often costly investment of research and development. This is particularly the case with bio-pharmaceutical companies.

Yet in the case of green technologies, speed and flexibility are essential. The patent system, especially, is not built for speed: applications are published 18 months after filing, and granted patents expire after 20 years. This is a significant speed bump in the road of research, when time is often of the essence. In this regard we are starting to see policy makers push for IP reform in specific environmentally impactful sectors, with a particular emphasis on encouraging industry and national collaboration and sharing.

Drive for collaboration

Events like COP26 in Glasgow next year are an example of a modern push for collaboration in this field. COP26 will bring parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change, and will likely spell an increased global scrutiny on IP rights and on collaborative rights frameworks.

In order to alleviate the impact of modern society on the environment, global IP frameworks will be required to work collaboratively. Yet this will not come without challenges. For example, many patenting technologies in developing countries are already free of enforceable patent rights. Yet a lack of patenting restrictions alone doesn't always result in equitable access to new technologies. The partnership or involvement of the inventors is also required. Valuable knowhow and background IP protections will simultaneously need to be shared in order for the collaboration to be effective. Events like COP26 are likely to encourage legislators to increase collaboration, to enable speedier diffusion of green technologies across the world.

Ultimately the commercial exploitation of intellectual property will play a defining role in the fight against climate change. We very much expect this focus on collaboration to be a key challenge for the legal profession in the next few years. J

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Single-use plastic

The Scottish Government proposes the introduction of market restrictions which effectively amount to a ban on the most commonly littered single-use plastic items found on European beaches. See consult.gov.scot/zero-waste-delivery/introducing-market-restrictions-on-single-use-plas/

Respond by 4 January via the above web page.

Early medical abortion

Due to the COVID-19 pandemic, in March 2020 the Government put in place measures allowing eligible women to take both pills required for an early medical abortion in their own homes after a telephone or video consultation with a doctor or nurse, without an initial in-person appointment at a hospital or clinic. It now seeks views on whether to continue this arrangement once there is no longer a significant risk of COVID-19 transmission. See consult.gov.scot/population-health/early-medical-abortion-at-home/

Respond by 5 January via the above web page.

Child protection

The current National Guidance for Child Protection in Scotland, which describes the responsibilities and expectations of everyone who works with children, young people and their families, was published in 2014. The Government seeks views on draft revised guidance. See consult.gov.scot/child-protection/consultation-on-the-revised-national-guidance/

Respond by 17 January via the above web page.

Post-Brexit financial regulation

HM Treasury is consulting on what reforms are necessary to the UK regulatory framework for financial services in the post-Brexit world. See www.gov.uk/government/consultations/future-regulatory-framework-frf-review-consultation

Respond by 19 January via the above web page.

Cleaner air

The Government's first Cleaner Air for Scotland strategy was published in 2015. Views are sought on the content of the second iteration. See consult.gov.scot/environmental-quality/cleaner-air-for-scotland-2/

Respond by 22 January via the above web page.

Employment injuries

Mark Griffin MSP seeks views on his proposed Scottish Employment Injuries Advisory Council Bill. The Council would shape, inform and scrutinise social security payments available to people injured in the course of their employment. See www.parliament.scot/parliamentarybusiness/Bills/116429.aspx

Respond by 1 February via the above web page.

.... and finally

As noted last month, the Government and COSLA seek views on their "Digital strategy for Scotland" (see consult.gov.scot/digital-directorate/digital-strategy-for-scotland/ and **respond by 23 December**); and the Keeper of the Registers seeks views on intended increases in fees (see consult.gov.scot/registers-of-scotland/registers-of-scotland-fee-review-2020/ and **respond by 24 December**).

Briefings

Agriculture

ADÈLE NICOL, PARTNER,
ANDERSON STRATHERN LLP

It is safe to say that part 2 of the Agricultural Holdings (Scotland) Act 2003 (Tenant's Right to Buy Land) caused some consternation among agricultural landlords at the time of its introduction. In practice, I am unsure to what extent the provisions have been used. *North Berwick Trust v Miller* SLC/220/06 touched obliquely on the issue of right to buy: the landlord argued (unsuccessfully) that the existence of the right was preventing it serving an incontestable notice to quit.

I know of only one case where a purchase has been carried through using the provisions. There will have been many instances of farms being sold to, or deals being done to buy out, the sitting tenant but in practice I think there have been few situations where the actual provisions have been used. However, they were considered by the Inner House in *Sweeney, Noters* [2020] CSIH 65.

The case concerned a longrunning feud between the Sweeney and Urquhart families. It centred on land in Inverness owned by a company, West Larkin Ltd (WLL), which after a chequered history was in liquidation. It was formerly owned by the Sweeneys. The Urquharts claimed they had occupied the land as agricultural tenants since 1990. The Sweeneys contended that the lease had terminated or was no longer an agricultural tenancy. If the Urquharts were agricultural tenants they would be entitled, if the land were offered for sale, to purchase it for about £28,000. The Sweeneys believed the open market value with vacant possession would exceed £1 million.

WLL's liquidator agreed to sell the land to Amanda Urquhart, who had petitioned for the winding up, under the right to buy provisions at agricultural value. Not surprisingly, the Sweeneys opposed this disposal at what they saw as a knockdown price.

Joseph Sweeney sought an order that the liquidator challenge Urquhart's right to buy the land, and rectification so that his name was listed in WLL's registers of members. Separately Donalda Sweeney sought assignation of a debt from Urquhart, who opposed both notes.

After debate, Lady Wolffe dismissed Joseph Sweeney's note and granted Donalda Sweeney's. The unsuccessful party in each action appealed.

To challenge or not?

The history is complicated, but briefly Urquhart's contention was that the land had been leased to her parents since October 1990 for 25 years at a rent of £1,250 per annum. In an action by the Urquharts in 2001, the sheriff granted summary decree declaring that they had an agricultural tenancy and interdicted Owen Sweeney from interfering with their use and possession of the land. The sheriff principal upheld that declarator but recalled the interdict. The Inner House subsequently held that there was an agricultural tenancy.

The winding-up petition was based on an unsatisfied decree for expenses in an action challenging a transfer of shares in WLL. In a third action, unresolved at the time of winding up, Urquhart sought rectification of WLL's register of members to list her as a member.

Right to buy notices had been registered by Urquhart or her predecessors in 2006, 2011 and 2016. The liquidator did not challenge the last notice, and agreed to sell the land to Urquhart in terms of part 2 of the 2003 Act. In his note Joseph Sweeney argued that the liquidator should challenge this notice.

At first instance Lady Wolffe found that the liquidator's decision that a challenge to the notice was not in the interests of the general body of creditors, was reasonable, taken in good faith and one open to him in the exercise of his powers.

The liquidator made his decision on the following factors:

(1) The Keeper would not generally rescind a notice of interest without a court order.

(2) The outcome of any challenge was uncertain.

(3) The parties' history suggested that any court proceedings would be robustly defended.

(4) The cost of any litigation would be significant.

(5) The land was only valued at £27,000.

Sweeney's note submitted that Lady Wolffe had applied the wrong tests, and failed to consider the strength of the case and an offer of funding from another member of the Sweeney family.

Grounds for interference?

The Inner House considered the question of the liquidator's responsibility rather than the validity of the right to buy. A court would only interfere if a liquidator's decision was "so utterly unreasonable and absurd that no reasonable man would have done it". Given the history, the animosity between the parties and the value of the asset, that test had not been met.

Although it was maintained for Sweeney that there was a strong argument that the agricultural tenancy had been abandoned, the liquidator stated that Urquhart would vigorously contest any such challenge on the bases that (a) given the earlier Inner House decision, strong evidence would be required to show that agricultural activities had been abandoned, neglect not being sufficient (*Wetherall v Smith* [1980] 1 WLR 1290); (b) the registration of the three notices had not been queried; (c) Urquhart was WLL's only substantial creditor and did not wish a challenge to be made.

The Inner House found that having regard to the whole picture, the liquidator was entitled to determine that success was far from assured were a challenge to be made. The costs were substantial, the funding of such challenge problematic and the financial return in doubt. The liquidator's decision to uphold the notice and proceed with a sale to Urquhart could not be characterised as "utterly unreasonable and absurd".

The case was complicated by the relationship between the parties, the ownership of the shares, the fact that the actions of a party who held shares in the company resulted in the landlord going into liquidation, and that party also being the party entitled to exercise the right to buy. The challenge to the registration of the right might well have been more robustly pursued without the complications of the liquidation.

Sport

BRUCE CALDOW, PARTNER,
HARPER MACLEOD LLP

As with many sectors and industries, the employment of sports people and people working in sport can have many nuances and differences born of the practices, approaches and attitudes prevalent and that have been established over time. High performance athletes supported to meet their ambitions through UK Sport-administered grant funding are neither employees nor workers (see, e.g. *Varnish v British Cycling* UKEAT/0022/20), while both touring and club-attached professional golfers are typically self-employed, in business in their own right.

In team sports such as rugby and football, whilst the contract of employment, typically negotiated for a fixed term and with the involvement of an agent and solicitor on either side of the bargain, is sacrosanct and all important, a series of international and domestic regulatory rules and considerations add to the usual mix of commercial and taxation considerations.

Before the seminal case of *Bosman*, player registration rules in football were all-important, dealing not with the contract, but the registration of the player. The FIFA Regulations on the Status and Transfer of Players (RSTP) have long overlaid the relationship between player and club, providing a system of regulation that offers greater protection to club and player alike, particularly when cross-border or international movement occurs. With the ability to regulate and resolve disputes such as Andrew Webster's acrimonious departure from Hearts for Wigan, FIFA and sport-specific rules have provided stability in a world in which instability of employment and player movement are the norm.

Clarity for coaches

Now, recognising that football coaches are important in the football community and play a vital role in the development of the game, FIFA has determined that the hitherto less regulated status and employment relationship of coaches should be addressed, in a revised RSTP, bringing a "minimum labour framework" for coaches. This, FIFA intends, will provide a "higher degree of legal certainty" in the coach's employment relationship with a club or association, and allow "the relevant FIFA bodies to decide employment-related disputes involving coaches".

The new rules will define a "coach" as someone performing duties related to the training and selection of football players, in addition to tactical aspects. Although only applicable to employment relationships of "an international dimension" between coaches and professional clubs or associations (meaning differing national status of the parties) as with the body of the RSTP and the rules on players, associations may look to cascade principles to domestic coaching relationships.

The rules will provide clarity on the form of employment contracts (listing essential elements that must be provided for); provisions for contractual stability (mirroring those in place for players, rules will govern respecting the contract, stopping tapping up and providing consequences for unilateral termination); address "overdue payables" due to coaches and ensure remuneration is paid promptly (a key tool to reinforce contractual stability between players and clubs); and for FIFA's decision-making bodies to have jurisdiction over disputes including enforcement mechanisms.

FIFA's council is expected to formally approve and adopt these reforms at its December 2020 meeting. Clubs, coaches and their advisers will need to keep pace with these developments, in addition to likely changes to the immigration regime underpinning movement of coaches across different countries.

Protections for women

At the same time, FIFA is also to adopt global minimum standards for female players, particularly regarding maternity and associated protections. FIFA is seeking to introduce an appropriate regulatory framework suitable to the needs of the women's game, adopting various key measures. These will include mandatory maternity leave (of at least 14 weeks, payable at a minimum of two thirds of the player's contracted salary); reintegration of players on return and with "adequate medical and physical support"; and with the requirement that no female player should ever suffer a disadvantage as a result of becoming pregnant.

It is hoped that these measures, which will supplement and strengthen existing domestic equality laws, will secure greater employment protection for women in football, at a time when the game is experiencing unprecedented growth and exposure internationally and in Scotland. Being part of a sport-specific regulatory regime, sport-specific dispute resolution and sanctions should also help to enforce and police the enforcement of these rules, avenues of enforcement often being difficult and challenging when using domestic laws alone.

It was not long ago that the tennis star Serena Williams expressed her concern for female sports people being hindered by the commercial view taken by sponsors and stakeholders of pregnancy and maternity leave. Measures such as FIFA's new sport-specific regulations should prompt more sports bodies and stakeholders to consider what existing imbalances are faced and what can be done to address these, in their individual sports.

Scottish Solicitors' Discipline Tribunal

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Steven Lilly

A complaint was made by the Council of the Law Society of Scotland against Steven Lilly, solicitor, Wishaw (formerly Kilwinning). The Tribunal found the respondent guilty of professional misconduct in respect that he breached his duty to act honestly and with integrity and breached rules B1.2, B1.14.1 and B6.12.1 of the Practice Rules. The Tribunal ordered that the name of the respondent be struck off the Roll of Solicitors in Scotland.

In the full knowledge that he had not lodged a petition to the *nobile officium*, the respondent told a client a petition had been lodged, that there was to be a hearing on interim liberation and then passed the same information on to a colleague for that to be transmitted to the client. This was dishonest.

In a separate case, the respondent provided his bank details instead of the firm's to a client. The Tribunal accepted the respondent's explanation that he provided the wrong details to the client because of a genuine error. However, this mistake was reckless. Thereafter, he retained the funds in the knowledge that he had no entitlement to them. This lacked integrity.

The respondent's actions constituted a serious and reprehensible departure from the standards of competent and reputable solicitors and he was guilty of professional misconduct. He was a danger to the public and a risk to the reputation of the profession. The only suitable disposal was strike off. The Tribunal awarded £1,000 compensation to a secondary complainer in respect of loss, inconvenience and distress arising from the misconduct.

Alan Niall Macpherson Mickel (s 42ZA appeal)

An appeal was made under s 42ZA(9) of the Solicitors (Scotland) Act 1980 by Alan Niall Macpherson Mickel against the determination by the Council of the Law Society of Scotland in respect of a decision to uphold a complaint of unsatisfactory professional conduct made by David Turner, advocate (the second respondent). The first respondents censured the appellant and directed him to pay £2,750 compensation. The second respondent did not enter the appeal process. The Tribunal quashed the determination, the censure accompanying the determination, and the direction.

The appellant was a partner in Hamilton Burns between 2002 and 2014, and a director of Hamilton Burns WS Ltd between 1 November 2014 and 29 December 2015. He retired and became a consultant with the company between 30 December 2015 and 23 May 2017. Hamilton Burns WS Ltd instructed Edinburgh agents to deal with a case. The Edinburgh agents instructed counsel. Counsel's fee note was issued on 14 December 2015, two weeks before the appellant retired. Reminders were sent to the company. The appellant responded to two of these. The second respondent's complaint was that the appellant failed to settle his fee and failed to provide a satisfactory explanation for not paying.

The Tribunal found that in terms of the scheme, the "instructing solicitor" was Hamilton Burns WS Ltd, not the appellant. There was no professional responsibility on the appellant to pay the fee in these circumstances, or to make arrangements to ensure it was paid. The Tribunal considered cases where it had found professional misconduct when solicitors had failed to pay counsel's fees. It noted that in all these cases, the solicitors were sole practitioners. They had a personal professional obligation to pay because they and their firm were one and the same for this purpose. Conduct issues could arise from non-payment of counsel's fees, particularly when principals had responsibilities in relation to their firms. However, no responsibility or obligation arose in the particular circumstances of this case. If the appellant was under a duty to make an explanation to Faculty Services Ltd, the response he gave was satisfactory. A competent and reputable solicitor could have acted in the same way as the appellant.

Only "part of" the story

Why do more solicitors not challenge the offer of a "part of" legal report on the purchase of a new build, when it would not alert them to part of the plot having already been sold off?

Property

WILLIAM MACRAE, MEMBER, LIDDLE & ANDERSON LLP

I would like to raise what I believe to be a risk in conveyancing practice which appears to be overlooked.

When a new build is purchased from a volume builder, it is often the case that the builder will not provide a legal report, but rather insist that the purchasing agent obtain a legal report for themselves. When this occurs, the searchers as a preference offer a "part of" legal report. My firm always refuses this, as I understand that a "part of" legal report does not detail break-off writs from the subjects being searched. In other words, that limited legal report would not alert you to an instance where either a part, or all of the plot you are buying has already been sold off to someone else.

My firm's view is that the most basic reason for the search is to check that the seller still owns the subjects at the time of the search. As a "part of" search does not show that, it cannot be an adequate search.

Plan-based assurance

My firm recently acted in the purchase of a house in a 633-house development in Edinburgh. Our searchers quoted over £400 for a full search and estimated it would take around five hours to complete. As we had asked for it for the next day, they would not be able to do this either in time, or at a price that would be acceptable to ourselves or our client.

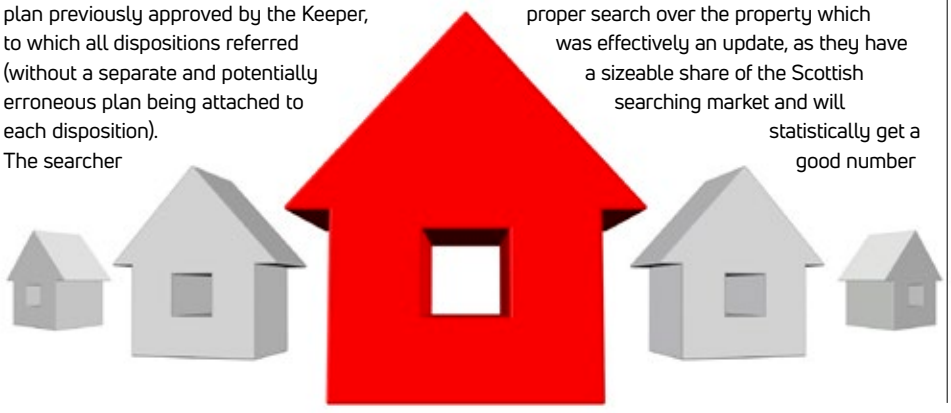
In that particular case a compromise was reached, as luckily the site had a development plan previously approved by the Keeper, to which all dispositions referred (without a separate and potentially erroneous plan being attached to each disposition). The searcher agreed to provide us with all applications pending against the site which, together with our examination on ScotLIS of all break-offs already registered, could allow us to be reasonably sure that we had adequately assured ourselves that the property had not been sold off in part or whole to another person before our registered advance notice, which was also going to show on the search. I spent just under an hour on the phone with them going over 315 previous entries to ensure those applications could be found elsewhere on the development plan.

However, the foregoing effectively hinged on a pre-agreed development plan to assure us that, for example, the next door plot did not have a plan which overlapped with our plot, and is clearly not a proper solution to the issue.

What if...?

When I discussed this issue with senior individuals at our searchers, I was amazed to find that my firm was, in their words, "the only firm in Scotland that are their clients" who have this issue and who do not accept a "part of" search for new build plots. As I understand that they are a market leader in providing searches, that leads me to understand that the vast majority of Scottish conveyancers are either (a) not fully appreciating the fatal inadequacies of the "part of" legal report, or (b) know the issue and are "winging it" in the hope that the seller hasn't sold off the plot already and has not made an error in their deed plans resulting in an overlap with a previously sold plot.

I tried to explore with our searchers the possibility of them keeping a running ongoing search on a big site such as this, and then providing a product to buying agents of a proper search over the property which was effectively an update, as they have a sizeable share of the Scottish searching market and will statistically get a good number of searches out of that product rather than having to start from scratch each time. They could then presumably take a view on that. However, off the cuff it did not appear this was attractive to them as no one else seems to be concerned.



I wrote to the Law Society of Scotland's Conveyancing Committee, which responded: "As a generality, a 'part of' search in the context of a residential development [is] likely to be standard practice, however [they are] unable to provide advice on what was required in an individual circumstance and therefore it [is] always a matter of the solicitor's professional judgment as to what they believe is necessary in each and every transaction."

Should a builder make a mistake/commit fraud in double conveying the same plot, or more likely make a mistake in their plot plans and sell off a part of "your" plot to a previously purchasing neighbour, and you obtain a "part of" search, you will only find out when your application gets bounced. Depending on occupation of the subjects, this will either be hard to sort out, or in the worst cases impossible. No doubt the lender and purchaser will then turn back to the conveyancer for recompense.

Basic protection

Given the ever growing pressure we are under as conveyancers, I am strongly of the view that we should seek to restrict the potential for claims on us. There seem to me to be two obvious ways of sorting this with little issue:

(1) it becomes a universal norm that the solicitor acting for a builder in a volume development undertakes in their standard missive to supply a continuation of a full legal report, no doubt also passing the cost to the purchaser; or

(2) conveyancers lobby their search providers to run a main search for such sites themselves, and sell at a reasonable price an update when requested.

Why should conveyancers have to choose either to pay an extraordinary amount, or to risk a potentially large claim, to cover arguably the most basic point in the conveyancing process – ensuring the seller owns what they are seeking to sell?

Barony Register in new hands

Alastair Shepherd succeeds Alistair Rennie as Custodian

Property

ALISTAIR RENNIE
AND ALASTAIR SHEPHERD

The Scottish Barony Register opened for business on 28 November 2004. It was created to fill an information black hole as regards ownership of the dignities of feudal baronies which resulted from the provisions of s 63 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 which came into effect on that date, "the appointed day".

It was decided by some parties involved in the market that the answer was to create a private register in which transfers of the right to a baronial dignity could be registered. A search in such a register would reveal any transfer of a dignity post-appointed day. After a feasibility study as to how this could work, the Scottish Barony Register was established as a company limited by guarantee in time to be in operation at the appointed day. Alistair Rennie, the then recently retired Deputy Keeper of the Registers of Scotland, was appointed Custodian.

Rationale for establishing the register

Some years ago an understanding was reached with the then Lord Lyon that, when he was dealing with a petition for arms based on ownership of a named baronial dignity, he could rely on certification from the Custodian that the barony existed and that from the evidence submitted to the Custodian the petitioner had a title to the dignity thereof.

It was obvious from the start that no absolute guarantee could be given by the register as to the validity of any claim, because there would be a number of things that the Custodian could not know. Equally obviously, there could be no compulsion to register, so why would people do so? The answer lay in setting terms and conditions as regards evidence that would make it difficult for any fraudster to comply with, and establishing a rigorous examination process to ascertain, as far as possible, that the evidence submitted is credible. As a further protection, the register will only accept applications from solicitors registered to practise in Scotland.

The Scottish Barony Register has become a recognised and trusted part of the process of selling/transferring baronial dignities. Purchasing solicitors invariably require a letter of comfort from the Custodian regarding any transactions that have been registered since the appointed day. As far as it is possible to tell, every transfer of a dignity occurring since that date has led to an application to register the acquirer's claim of entitlement to the dignity in the register. At the time of writing, the register contains details of transfer of 170 different dignities, some of which have been transferred more than once.

Change in Custodian

The trust placed in the register by the legal profession relies to a great extent on the experience and knowledge of the Custodian. The understanding entered into with the Lord Lyon was contingent on the Lord Lyon recognising that the incumbent of the post of Custodian was a "man of skill". That arrangement still subsists today.

Alistair Rennie has decided it is time to pass on the baton to a new Custodian. After careful consideration by the directors of the register, the new Custodian chosen is Alastair Shepherd, currently a partner in Coulters Legal LLP, but due to retire from private practice in April 2021, after 40 years as a solicitor with Brodies WS, Henderson & Jackson WS (and their many successor firms), and latterly with Coulters. He has been involved with the sale and purchase of barony titles since qualifying in 1981; he is a Writer to the Signet and notary public.

From 1 December 2020 the new Custodian can be contacted at 1 Monkrigg Steading, Haddington EH41 4LB, or custodian@scottishbarontregister.org. A new website is being set up at www.scottishbaronyregister.org, where in due course all appropriate forms and a note of fees charged will be published.

Alastair Shepherd does not intend to make any immediate changes to the way in which the register operates.

Use your experience

Get a varied experience at the start and develop your skills, and you never know where that may take you, says this senior local authority lawyer who has moved into tribunal work

In-house

JAN TODD, FORMER LEGAL SERVICES ADVISER, SOUTH LANARKSHIRE COUNCIL

Tell us about your career to date.

I have been lucky to have enjoyed a diverse and interesting career. I started in Yuill & Kyle in Glasgow, where I went from trainee to associate in a few years. As a small firm you had to do a bit of everything, and I didn't realise how much responsibility I had until I left when I had a six-month-old baby and was looking for a part time position. I found a job share position with Strathclyde Regional Council in its conveyancing team.

I found that I loved working in the public sector. I met some great people and learned one of the key lessons of working in-house – that everyone is a team player. Another lesson was that in local government nothing stays still for long. After three years I moved to South Lanarkshire Council in 1996 following reorganisation, and then got the post of principal solicitor community care, which was when I discovered a real passion for all aspects of the law related to social work. I have enjoyed 24 years at the council, and have been involved in many new areas of law as they developed, such as adults with incapacity and the Mental Health Act 2003. This led to me applying to and joining the Mental Health Tribunal as a legal convener in 2005, and later to joining the Housing & Property Tribunal, both positions which complemented my in-house work and developed my knowledge and skills.

You've recently retired from South Lanarkshire Council. What's your current focus?

I wanted to spend some more time, when not on tribunal work, travelling and enjoying life. I picked the wrong year for that, so have concentrated on my tribunal work which I find immensely satisfying. The Mental Health Tribunals carried on throughout lockdown and the Housing & Property Tribunal restarted hearings in July, with hearings mostly conducted from home via telephone conference calls. Like many lawyers, the house is my new office!

What skills or experience from your local authority role have helped you here?

Obviously working closely with social work services provided a great deal of experience that has helped with the Mental Health Tribunal, including an understanding of the services which support people with mental disorder and the benefits and limitations of alternative legislative regimes. My work with housing was relevant to the Housing & Property Tribunal, particularly time on an internal homeless appeals panel. Communication, analytical and leadership skills, and an ability to work closely with colleagues with different expertise also help.

I find my current role very diverse and fulfilling, but most of all still allowing me to use the law to ensure the rights of individuals are protected and they get a fair and just hearing.

Is it important for in-house solicitors to look beyond their day job?

I absolutely encourage all solicitors to look for opportunities that help them develop their knowledge and skills in any area they are interested in.

I got involved early on with a group called the Social Work Legal Officers Group, which provided an excellent source of information and networking, and became chair. It became part of the larger Society of Local Authority Lawyers and Administrators (SOLAR); I eventually joined the executive committee and then became President for nearly two years, an amazing privilege and pleasure which again developed me in ways I never thought I would. I am also a member of the Law Society of Scotland's Mental Health & Disability Committee, which has given me a chance to influence proposed changes in the law.

I would encourage everyone to find ways to give something back to your colleagues and the wider public where you can. No opportunity or experience is a wasted opportunity.

What impact do you think COVID-19 has had on local authority legal teams?

This has been an incredibly hard year for everyone, personally and professionally. Homeworking puts an extra strain on the IT capability of most organisations, and delays in downloading or internet reliability can put a strain on your endurance and patience! Your work-life balance can suffer as homeworking can lead to more difficulty switching off, and even to longer hours. Discussing issues and sharing problems with colleagues is much less spontaneous and of course there have been difficulties coping with staff shortages, as well as emergency legislation. We have all been missing face-to-face contact with colleagues and clients, and although many might have welcomed some more homeworking, no one I have spoken to has wished to work completely from home and many I fear are struggling as the pandemic has gone on.

Do you have any thoughts on how lawyers build good mental health, increase resilience and manage stress successfully?

Given what I have said above, I think building networks or reconnecting with existing networks is essential. Your teams need regular time together online, with maybe some social activities just to keep morale up. We might also try and ensure that meetings are not arranged over lunchtime, especially in winter, to allow people the chance to get outside while it is daylight. And can two work colleagues get together for a walk, if they live near each other?

Have you seen any positives coming out of the current crisis?

The pandemic has made all organisations rethink how agile working and homeworking can be part of the future. It has shown that we can perform most services remotely; it may not be optimal but by using videoconferencing, we don't need to all be in person at every meeting. We can offer more flexible work patterns that suit members of a legal team but also the organisation, which can save on paper and travel costs by moving to online participation in meetings. There will be different ideals and priorities for each individual. This may take some discussion for each team, but if lawyers can do anything, it should be to reach a

compromise that works for both parties!

What other key challenges face in-house teams into 2021?

If the biggest challenge wasn't budgets before COVID-19, it certainly is now, and the ever tightening of budgets that has been a feature of the last few years means that another major challenge will be to keep in-house lawyers motivated and to alleviate the stress from constantly facing cuts and reorganisation. The current investment in IT may provide solutions such as prioritising when you need to attend a meeting in person. We must also invest in and prioritise the mental wellbeing of employees.

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

When I started, part time was not really an option for most solicitors and now there are so many different permutations. It should not matter whether you have caring responsibilities or not: everyone has different reasons for wanting flexible working and getting the right balance can be extremely important for mental health.

Another main change in attitude is recognising how important mental health is. Most of us will be affected or will know someone during our lives and career who can be affected. With the right support and attitude you will get a highly trained and skilled member of staff back to work, when in the past this could go unnoticed or unsupported, leading to poor outcomes. As a manager I often had to consider how to support a colleague; just being there to listen is sometimes incredibly important and everyone can do that.

What advice would you give lawyers who want to start a career in-house?

Be passionate about what you do, and have desire to help your community or the goals of the public or your organisation. Be open to new areas of work: you may find you are working in areas you never imagined but are very suited to. Take time to understand your client departments. With mutual respect you can achieve more together, and that takes trust and time.

What are your thoughts on training in-house or in private practice?

In private practice I had a very varied and all round experience which has stood me in good stead. Wherever you train you should use it to get as much experience as you can. You will start to gain an understanding of what areas of work you like, but time has taught me that most experiences are valuable and skills learned in one area translate to many others.

What is your most unusual/amusing work experience?

Probably my most unusual experience came just a year ago as President of SOLAR. I was asked to give a talk at an International Symposium of Municipal Clerks. The talk was to be given after a dinner held in Warwick Castle, and I found myself delivering it in a medieval hall surrounded by knights in armour, having just watched a mock fencing duel by two of them! It was both a surreal and amazing experience, and one I would never have imagined my in-house role at a Scottish local authority would bring.

Finally, what do you love doing outside the day job?

Currently I am doing the few things you can do – Zoom calls with friends and family, walks and online yoga, and of course baking... If and when we can I will be found catching up with family and friends I have not been able to see – and with all those nights out to celebrate leaving South Lanarkshire Council and SOLAR.

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Graham Watson (Earlsferry)

Dundee solicitor is future President

Dundee-based solicitor Murray Etherington is in line to become a future President of the Law Society of Scotland.

A partner with Thorntons, he was the sole nominee to be Vice President for the year from 31 May 2021, and would then become President the following year. Council will confirm the nomination at its next meeting in January.

First elected to Council in 2015, he represents members in the Arbroath, Dundee and Forfar constituency. He also serves as convener of the Society's Insurance Committee.

Current President, Amanda Millar, said: "My warmest congratulations go to Murray on his nomination. As a member of Council for the past five years, and as a committee convener, Murray has shown his commitment to advocating for the profession within his constituency and beyond. He knows the kind of challenges we face, and how the Law Society has worked to support and champion members and protect the public interest through the current crisis."

Vice President Ken Dalling will become the next President on 31 May 2021.

SLCC catching up as COVID slows complaints

The impact of COVID-19 on the work of the Scottish Legal Complaints Commission is revealed in its annual report for 2019-20, covering the year to 30 June 2020.

Complaint numbers dropped in the last months of the year, which coincided with the first lockdown, leading to a total for the year of 1,036, down from 1,326 in 2018-19 and 1,227 and 1,155 in the two preceding years.

In his foreword, chief executive Neil Stevenson states that "even without that assistance we had exceeded the targets we had set internally for year end", and with savings against planned expenditure, "We now need to consider how all these factors may assist with budgeting and planning for next year".

Complaints closed at all stages fell from 1,549 to 1,402, and the number open at the year end was down from 685 to 436. The year also marked the end of the SLCC's four year strategy, over which, it reports, the average "journey time" for complaints has halved, as has the number of complaints in process through the elimination of "some of the backlogs we had at the start of our process". Due to a digital strategy already in place, the SLCC was able to keep working during lockdown.

Of complaints received, 1,013 concerned solicitors' firms and 23 advocates, of which 553 and 14 respectively (or 52%, similar to 2018-19) were accepted for investigation. The mediation stage saw 45 complaints closed (down from 80 in 2018-19, but a 67% success rate), the investigation stage 247 (up from 227), and the determination stage 198 (up from 138). At that final stage, 14 were upheld in full, 75 in part and 112 not upheld.

The SLCC's accounts for the year, also published, show net operating income of £284,000, compared with £5,000 the previous year, and an increase in reserves from £393,000 to £659,000. The average number of staff employed was 59, down from 61.

The annual report can be found at bit.ly/3quNwwa and the accounts at bit.ly/3tztoL7.

Legal aid spend up following fee rise

Legal aid spending in Scotland rose by £7 million in 2019-20, according to the Scottish Legal Aid Board's annual report for the year to 31 March 2020.

The increase, from £123.7 million to £130.8 million, reflects a rise in demand for certain services and the general 3% increase in fees from April 2019.

Criminal legal assistance expenditure increased by 3% to £75.8 million, driven by a higher spend on solemn criminal legal aid, which rose by £2.8 million to £33.1 million. Spending on summary cases fell by more than £1 million to £24 million. Advice and assistance and ABWOR together rose by £450,000 to £13.1 million.

Overall expenditure on civil legal assistance increased by £4.2 million, a figure that takes account of a £2.1 million drop in income from expenses in successful cases funded by SLAB, and lower income from contributions due to benefits changes that resulted in more people being eligible without a contribution, as well as the absence of income from the Money Advice Service. Civil advice and assistance and ABWOR rose by more than £2 million; grant funding fell by almost £2 million.

The report states that with accounting adjustments, the net cost of operations showed a bigger rise, from £117.1 million in 2018-19 to £139.4 million in 2019-20.

SLAB's administration costs rose by £770,000 to £12.44 million, largely due to higher staff and pension costs.

To access the report and accounts, go to bit.ly/36uNLoL

Any names for honorary membership?

Nominations for honorary membership of the Society for awarding at the annual general meeting in May 2021 are now open. A nomination can only be made for honorary membership if the nominee has ceased to practise as a solicitor. Nomination forms are available from David Cullen, registrar at davidcullen@lawscot.org.uk

The deadline for all nomination forms is 1700 on Friday 29 January 2021.

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/

Aligning with EU law

The UK Withdrawal from the European Union (Continuity) (Scotland) Bill, which completed stage 2 in the Scottish Parliament on 25 November, aims to continue to align Scottish law with EU law after 31 December 2020. The Society's Environment Law and Constitutional Law Committees proposed amendments to the bill.

The former dealt among other things with potentially overlapping functions of different public bodies; the latter's amendments helped prompt consideration of issues such as delegation of functions to public bodies, the criteria for Scottish ministers when using their powers to make regulations to keep pace with EU law, and ensuring sufficient parliamentary scrutiny.

UK Internal Market Bill

The Constitutional Law Committee issued a briefing in advance of the bill's second reading in the House of Lords and suggested amendments ahead of the committee stage. At that stage, part 5 of the bill was significantly amended to remove the clauses which contravened international law and the Withdrawal Agreement. During report stage, the Government accepted the premise of many of the Society's amendments promoted during committee stage. However, due to subsequent opposition amendments, the bill was restructured, removing the opportunity for those amendments. The bill will now return to the Commons and into the "ping pong" process, where Lords amendments may be rejected by the Commons and vice versa.

AI and intellectual property

The Intellectual Property Committee responded to an Intellectual Property Office (IPO) consultation on artificial intelligence (AI) and IP.

In preparing its response, the committee held a stakeholder round table, inviting participants from industry and academia with a particular interest in AI and machine learning to discuss pertinent issues with IP law specialists. The breadth of expertise from a variety of IP disciplines allowed the committee to identify and test the core themes set out below across a range of industries.

The response expressed support for the IPO's objective in ensuring that IP rewards people for creativity and innovation and promoting the value of a modern and effective IP regime in supporting the proper functioning of an innovative economy.

The committee was strongly of the view that overall, the existing IP frameworks adequately cater for AI. This was a consistent theme in the round table discussion across all areas of IP: while there are some areas in which clarification as to how the rules apply in the specific context of AI is necessary, the fundamental principles are not affected.

Coronavirus guidance

The Scottish Government has published a large amount of guidance on COVID-19, including a number of guides specifically aimed at different sectors. It issued a survey requesting feedback from key stakeholders who rely on this guidance, to help identify any issues and gaps.

The Criminal Law Committee responded to highlight the need for guidance in the context of criminal law, and for it to be produced contemporaneously with developments in the law. Individuals and businesses should not be subject to criminal law penalties, including fixed penalties, without understanding exactly how and why they have breached the law.

Review of CGT

The Office of Tax Simplification issued a consultation seeking views on capital gains tax, specifically the aspects that are particularly complex and hard to get right, and asked for suggestions for improvements.

The Tax Law Committee submitted a wide ranging response covering issues such as taxpayer awareness of liabilities, the strict application of time limits on disposals following matrimonial separation, and reliefs available to business owners.

Pressure continues for legal aid rise

The Society is continuing to press the Scottish Government for action on legal aid rates, following a massively disappointing response to pleas for urgent support for the sector.

A letter late last month from Community Safety Minister Ash Denham, offered 50% support for up to 40 traineeship places, but on fees extra money only for s 76 guilty pleas in solemn cases – previously agreed in principle in any event. Society President Amanda Millar accused the Government of taking solicitors' professionalism for granted, adding: "There is still a chance for the Government to act, but it needs to happen quickly."

Her remarks followed protest action by members of the Edinburgh and Glasgow Bar Associations over the custody court on the St Andrew's Day holiday, and an open letter in the *Herald* by Stuart Murray, President of the Aberdeen Bar Association.

The Society's Legal Aid co-convener Ian Moir has said solicitors have told him how "desperate" and "gutted" they felt at the response. As the Journal went to press, Justice Secretary Humza Yousaf was himself meeting the Society and the three bar associations, and tweeted afterwards that they put their points "very effectively & with great passion for the work you do". Further engagement follows.

ACCREDITED SPECIALISTS

Child law
STEPHANIE NICOLE SMITH, SKO Family Ltd (accredited 17 November 2020).

Family law
SARAH ANN LILLEY, Brodies LLP (accredited 17 November 2020).
Re-accredited: ASHLEY MARIE SIMPSON, Patience & Buchan (accredited 23 November 2015).

Intellectual property law
LYNN RICHMOND, BTO Solicitors LLP (accredited 17 November 2020).

Personal injury law
LAURA JANE McGEE, Newlaw Scotland LLP (accredited 17 November 2020).

Planning law
Re-accredited: ELAINE FARQUHARSON-BLACK, Brodies LLP (accredited 6 November 2000).

OBITUARIES

JAMES DOHERTY, Stirling
On 8 March 2020, James Doherty, employee of the City of Edinburgh Council, Edinburgh.
AGE: 48
ADMITTED: 1997

SHAUN ROBERT MACKINTOSH, Edinburgh
On 2 October 2020, Shaun Robert Mackintosh, formerly partner of the firm Peterkins, Aberdeen and latterly consultant of the firm Leslie & Co, SSC, Edinburgh.
AGE: 53
ADMITTED: 2002

SUSAN ELSIE MACKESSACK, Glenrothes
On 29 October 2020, Susan Elsie Mackessack, formerly employee of Fife Council, Glenrothes.
AGE: 60
ADMITTED: 1984

DENIS CONWAY LONEY (retired solicitor), Glasgow
On 15 November 2020, Denis Conway Loney, formerly sole partner of the firm DC Loney, Glasgow.
AGE: 89
ADMITTED: 1954

WORD OF GOLD

Works of friction

Dissent is the lifeblood of all great businesses – but blow up too many bridges, and nobody gets anywhere, as Stephen Gold warns

A balding, middle-aged man walks away from 10 Downing Street carrying a cardboard box full of his personal possessions. Critics note that there is no plant pot, which they take as symbolic of a harsh, uncaring personality. Thus ends the reign of Dominic Cummings, the Prime Minister's former special adviser. The man who predicted a "hard rain" would fall on the civil service has been washed away. In his wake, there is much talk of "reset", a move to a less confrontational style, infused with goodwill, respect and positivity. The message is clear: harmony good, conflict bad.

But hold on. Is it not the grit in the oyster that makes the pearl? Law firms are full of smart people with strong opinions. It's not only futile, but damaging to expect them to be places of sunlit harmony. Successful businesses, especially those whose chief asset is their intellectual capital, make no attempt to avoid conflict. There is a big difference between common purpose and grey conformity. Examples are legion of riches to rags companies where challenge to the leadership has been strongly discouraged. As I write, the Arcadia Group, led by Sir Philip Green, described as "an analogue man in a digital age", is on the point of collapse. An emperor whose life's work was selling clothes has been found to have none, but it seems nobody could tell him.

The myth of collegiality

Whenever I ask client firms to describe themselves, "collegiate" often appears high up the list. True *esprit de corps* is a huge asset, but it's always worth questioning whether what you see is the real thing. Collegiality is often a euphemism for tolerance of mediocrity, aversion to necessary confrontation, and settling for same-old, same-old. Do colleagues truly put the firm before self-interest? Do they think of clients as belonging to them or the firm? When did they last refer you a client, or take an interest in your practice area?

Conflict can be a powerful force for good. Dissent shakes our assumptions, and forces us to consider how to do things better. Steve Jobs, a truly great innovator, was notorious for being endlessly demanding, always questioning, never satisfied. But he strongly encouraged challenge, and the constant ebb and flow of ideas. Untroubled by COVID-19, he banned his staff from working from home, which he believed stopped creative collaboration in its tracks. The best businesses have a culture in which everyone is encouraged to speak their mind, and argue passionately for what they believe.

Rules of dissent

But there are rules. The most important is that whatever we argue for must be from the perspective of what is best for the business as a whole. Where dissent is motivated primarily by personal or sectional interest, at best it is a time and energy-sapping diversion; at worst, utterly destructive.

It matters, too, how we express dissent. Doing so with respect has become more difficult. On social media, in business, and in our personal lives, points of view are expressed in language that seems designed to generate more heat than light. In the face of bullying or emotive language, it is all too easy to abandon the field in favour of a quiet, if unhappy life. Words as well as actions have consequences. Just how much the performance of Home Office staff has improved as a result of being described by their current boss as "f***ing useless" is unclear.

Culture war or beneficial divergence?

We are encouraged to see those with whom we disagree as "the enemy", and society as being embroiled in a culture war. Hardly a day goes by without people being cancelled, no-platformed, gaslighted or fired because of non-conforming views. As Trevor Phillips put it in *The Times* on 30 November, "Instead of encouraging diversity, our elites are becoming the enthusiastic enforcers of a Stalinist conformity." In business, intolerance of difference is toxic. It creates factions, destroys trust and uses up precious energy in destructive battles for dominance.

A healthy culture starts at the top. A leader's task is to articulate values and set ground rules. In truly collegiate firms, argument over what is best for the business and how it can be improved is not just a choice, but an obligation. So too is mutual respect, thoughtful language, an understanding of nuance, and willingness to accept that even where there is disagreement on an issue, there may be points of agreement that can be used to build consensus. So though it may sometimes be uncomfortable, embrace dissent, and all the good it brings. As the American humourist Kin Hubbard put it, "The fellow who agrees with everything you say is either a fool, or he's getting ready to skin you."

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

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RISK MANAGEMENT

Conveyancing in the COVID era and beyond

Following last month's Lockton article on some historic causes of property-related Master Policy claims, Lindsay Ogunyemi and Emma Keil of DWF look at potential future issues with a focus on conveyancing in this COVID era and beyond

COVID-19 has shaken the legal world, and the tremors will continue for some time. Vaccine hopes are high, but it is clear by now that even after the dust settles and "normal life" resumes, the legal world will look very different.

Conveyancing and property services have, with the help of technology and legislative changes, continued to be provided throughout the pandemic, but there have been many logistical as well as risk management challenges.

In the professional indemnity world, conveyancing is largely viewed as high risk. Certainly, a high proportion of PI claims against solicitors arise from conveyancing transactions. For conveyancers, the need to focus on reducing and managing risk has, perhaps, never been greater.

What are the risks, and how can they be managed?

Remote working

Remote working, or working from home (WFH), is the new norm. When national lockdown restrictions were imposed in March, many solicitors had no option but to convert their kitchen/diningroom/garden shed into a makeshift office. Eight months on, what was viewed as a temporary solution to a unique problem is a way of working that is here to stay. Certainly, more flexible working combining home and office looks likely to continue.

Whilst WFH can have many benefits for firms and employees, it poses additional risks. Firms will need clear policies on WFH so as not to dilute any risk management procedures which apply when working in-office. Challenges in maintaining an adequate client service need to be addressed.

In a standard purchase transaction, for example, practitioners will engage the client, take instructions at the outset and throughout, adjust relevant documents with the other agents, review and report on title, attend to completion and thereafter to registration of title. Pre-COVID, each of these stages is likely to have been carried out in-office using established procedures, lines of communication and systems of supervision all designed to manage risk and ensure the client receives a good service. Remote working brings with it an urgent need for all office procedures and systems to be reviewed, adapted and, crucially, checked for efficiency.

Small things matter. For example, the quality of home printers or scanners can compromise the quality of annexations like plans. Scanning a document by low resolution scanner for a client to print at home, sign and re-scan at similar resolution may reduce legibility of coloured boundary lines to a point that the plan is unacceptable to the Land Register. (That is a real life example!) The lesson is to scrutinise not only final technical validity, but the overall quality of end product.

"Remote working brings with it an urgent need for all office procedures and systems to be reviewed"

Face-to-face meetings with clients are, largely, not possible at present. Practitioners must ensure that appropriate identity checks are carried out. Videoconferencing tools should be used, where possible. These can also ensure there is adequate and effective communication with clients. Now and moving forward, it may be necessary to build additional time into transaction timescales in order to deal with more protracted signing and pre-completion procedures, and amendments to the registration process.

Document management and storage of title deeds also need to be considered. It is important that any tasks that practitioners, working remotely, delegate to administration staff working in-office are clearly communicated and checked to mitigate the risk of documents being lost or sent to the wrong recipient.

Top tips

- An effective central diary system is essential, particularly with WFH when physical files and papers are out of sight and possibly out of mind.
- Ensure team meetings continue, even if not face-to-face, to ensure the team knows what is to be dealt with in the coming week and deadlines (e.g. for registration or submission of offers) are not missed.
- Studies suggest that we are much more likely to be distracted and make errors, reading information on screen as opposed to hard copy. Lack of IT equipment, printers etc in the home environment is a challenge, but continue to print title deeds or complex agreements for review, if at all possible.

Lack of supervision

Lack of supervision of employees is a regular factor in claims for professional negligence in property transactions. Supervision is undoubtedly more difficult when employee and supervisor are not in the same room. Practitioners should ensure that guidelines on how matters are dealt with and signed off by supervisors continue to apply to WFH, and are implemented. Communications binding on the firm, reports and certificates of title should continue to be checked by partners/senior employees, and junior colleagues should be encouraged to ask as many questions as they would in-office. It is important that junior employees feel supported and confident in asking for assistance when needed.

Residential conveyancers are currently experiencing a welcome boom following the easing of the restrictions, as homeowners and first time buyers seize the opportunity to move, while restrictions allow. Many firms have recruited additional staff to cope with current transactions. It is important that transactions are dealt with by appropriately skilled and supervised staff, particularly during busy periods when the risk of a mistake or omission is high. This risk is obviously exacerbated when people are under pressure and working alone at home.

Here again, keep in mind that the simple (in the office) action of asking a question of

a more experienced colleague, or getting a second opinion, is not so simple with WFH. If, for example, there's a possible issue in a title sheet, you can't look around to see if a colleague is available to chat. You can't then just walk over and speak to them. They need to see the document on screen, at the same time as you, and you then need to talk about the issue. Even with videoconferencing tools, remote pointing to a dubious boundary isn't quite the same.

The temptation for someone needing guidance to think it's all too hard and "take a view" is real.

Top tips

- Supervision is key – at the beginning, during and at the end of a transaction. With WFH, regular virtual meetings are recommended, and preferable to purely email communication.
- Post-completion checklists are essential and should be completed and signed off before a file is closed.
- Law firms will need to think about how they achieve and maintain regular contact with trainees to offer support. The Law Society of Scotland has published a set of hints and tips for supervisors and managers, as well as articles and blogs with suggestions for employers (see bit.ly/36hP6ix).

Fraud

Changing working practices give fraudsters opportunities to find new ways to operate. Property professionals need to be more vigilant than ever and alert to the risks. Remote working and fewer face-to-face meetings increase the risk of identity fraud. Fraudsters are extremely innovative and will quickly exploit any vulnerability caused by remote working.

Top tips

- Ensure that anti-money laundering guidelines are strictly adhered to.
- Bank account details should not be shared by email but confirmed ideally on the telephone or in person, even if done virtually.
- Communicate to all staff to be extra vigilant on these matters, as in times of disruption, such as this pandemic, fraudsters see an opportunity to increase their activity, for example by encouraging solicitors to open emails which could prove harmful to solicitors' systems.

Lender claims

Across the globe the pandemic has caused the loss of many lives and livelihoods. There have been redundancies and more will potentially follow when the furlough scheme ends. The unfortunate consequence is that individuals may default on their mortgage repayments. Professional negligence claims at the instance of lenders will follow.

Top tips

- Firms should continue to ensure that employees are provided with training on the UK Finance Mortgage Lenders Handbook (previously and more commonly known as the CML Handbook), and that they comply with its reporting requirements. Now would be a good time for some refresher training.
- Implementing a CML Handbook compliance checklist for each transaction may assist. Some firms may already have this or want to design their own, but the Society has produced a checklist which firms may find useful: see bit.ly/3q6WpRX

Legislative and procedural changes

A number of legislative changes have addressed practical issues posed by the pandemic, and further guidance affecting property transactions continues to be published. Practitioners need to stay up to date with legislation and Government guidelines and ensure that advice given to clients is compliant.

Property transaction procedures have also had to adapt, most notably registration. Registers of Scotland now operates an electronic applications system which has proved very successful and has been heralded as a better, more secure way of submitting applications. However, as with any change to established processes, particularly when the new process is a digital one, practitioners need to ensure that they provide employees with training on the new system and have appropriate internal guidance on its use.

Top tips

- Firms should issue specific guidance on the use of the new online system, including who is permitted to submit registration applications and the process for those being checked and approved pre-submission to avoid errors being made.
- Regularly review the Society's COVID update page on its website for information and any changes in guidance.

Mental health

The negative impact that the pandemic is having on mental health is unsurprising, and well documented. Lack of social interaction, isolation, uncertainty, worries about health and finances, threat of redundancy, anxiety about a return to work following furlough, pressures of juggling family life and work – these issues are affecting the majority of practitioners, in varying degrees.

Effective risk management extends beyond reviewing procedures, policies and processes. Poor mental health can lead to many work performance issues, which in turn increase the likelihood of claims. It is important that practitioners take care of their own mental wellbeing and look out for colleagues who may be struggling to adapt to the changes brought about by COVID-19.

Beyond COVID

Conveyancers have had much to adapt to in 2020. The profession has dealt well with these challenges and it is fortunate that, now the appropriate legislative and procedural changes are in place, services can continue to be offered effectively. Property is an area where new law and procedures are common, so practitioners are used to adapting to change. Conveyancing can be a risky business; however practitioners can take simple steps to reduce and manage the risks created by the remote and technology-reliant ways of working that have become essential during the pandemic and beyond.

This article was co-authored for Lockton by Lindsay Ogunyemi, director, and Emma Keil, senior associate, of DWF

FROM THE ARCHIVES

50 years ago

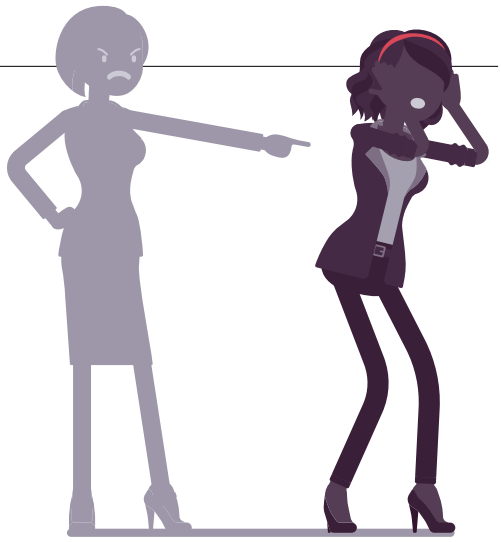
From *"Some Common Misunderstandings about Decimal Currency", December 1970:* "Despite... the minting of millions of ½p coins, and repeated assurances that they will be used in cash transactions for many years to come... the myth somehow persists that the new halfpenny is intended to be only a temporary feature of our coinage." (*The coin was withdrawn from circulation in December 1984.*)

25 years ago

From "Data Protection and the Practitioner", December 1995: "Any recent review of the prosecution list from a Data Protection Registrar Report reads like a Who's Who of well-known names. The Registrar has demonstrated her readiness to take court action where the Act is infringed, from city councils to video rental companies. The general public is the Registrar's main source of detection."

THE ETERNAL OPTIMIST

Taking on the inner critic



Stephen Vallance offers some ideas on dealing with the inner voice that makes you doubt your ability, and the tendency of some people to ask others before making any decision

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

I do a little teaching on the Diploma and on Trainee CPD courses, mainly on "soft" skills as you may have seen me write about over recent years. In addition to the joys of working with young bright minds, it is a constant reminder to me of the issues we all face in our working days, and a source of reflection on my own multiple shortcomings. Two of those issues came to my mind recently.

Silence your inner critic!

All of us have a little voice in our head. It's the one that tells us we aren't doing it right; it could have been better, or simply that we maybe aren't good enough. The critic is not fair. Its comments aren't based on fact or evidence. They are just the echoes of our fears and uncertainties. For some of us the voice is louder, for others an occasional whisper, but we all live with our inner critic's mutterings. Mine, I suspect, are a bit on the loud side, but what seems unfair is that my inner supporter is unusually quiet.

I'm human, ergo I make my mistakes. Hopefully they are seldom and of minimal impact, but I do give myself a hard time about them as I'm sure most of you do about yours. I have however also successfully accomplished many things and yet seldom dwell on them. Indeed I usually skip quickly past them when they happen, and worse, I too often shy away from praise or congratulations when offered, with the usual "It was nothing." While I'm quite happy with my position on the latter, I often ask myself, "How do I get rid of the former?"

That question has been the subject of many books, but here are a couple of suggestions that I try to focus on:

- Be aware of the inner critic, and listen *for it*, not *to it*. The inner critic has nothing good or constructive to say. Either ignore it, or imagine it coming from a ridiculous or comical figure to reduce its impact.
- Reflect when you can on all the things that you have done and continue to do well. In particular, when someone pays you a compliment, just say "Thank you; that was kind."

On a similar note, perhaps it's worth always remembering the struggles of others and how important it is to pay them a compliment when you can.

Be your own verifier

A little like our critics, there are those of us who are internal and those who are external verifiers. For example, my wife is the ultimate external verifier. When it comes to making decisions she will usually seek the opinion of those around her before a choice can be made. It is neither a good nor a bad characteristic (although it can be frustrating).

I suspect that most in the profession will tend towards the internal verifiers. We have to make lots of decisions in our day and it simply wouldn't be practical for us to seek external support for all of them. That doesn't though mean that we don't at times require a little external verification, and many of those around us in our firms, including our clients, certainly do.

Again, as with critics, half the battle is just being aware. Whether it's speaking with clients, trainees or staff, remember that if they sometimes need you to give them support in their decision making, that isn't always ignorance or reluctance: sometimes it's just a bit of verification. Conversely, with those who are good internal verifiers, leave them alone unless they clearly are asking for help.

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

Notifications

ENTRANCE CERTIFICATES ISSUED DURING OCTOBER/NOVEMBER 2020

BAMFORD, Kirstin Mairi
BROWN, Siobhan Catherin
BRUCE, Emma
CRAWFORD, Chloe Hope
DORRIAN, David Lindsay
DRUMMOND, Lucy Olivia
EL-ATRASH, Hanan
IQBAL, Amaal Maia
JORDAN, Laura Patricia
KEENAN, Julianna Frances
McALPINE, Fraser Henry
MARSHALL, Georgia Jessica
MUNRO, Alexandra Mairi
O'KEEFE, Declan
RENTON, Fiona Louise McCallum
ROBERTSON, Andrew Francis
SUPER, Matthew Paul
TOLLAND, Sarah
TUOHY, Clare Filippi
WILSON, Amelia Grace

APPLICATIONS FOR ADMISSION OCTOBER/NOVEMBER 2020

AITKEN, Kirsty Rosalind
ALI, Isra Jabbar
ALI, Saira
BARN, Lewis Fraser
BEDRULE, Constantin
BLACK, Catherine Lorraine
BOWIE, Euan Forbes
BRADLEY, Nicola Anne
BROLLY, Ashley Louise
BROWN, Benjamin Ian
BRYAN, Lewis Greig
CAMPBELL, Rachel Sarah
CAVANAGH, Hollie Kathleen Rose
CLYDE, Karen Lucy
CROMBIE, Dale Samuel
FARRIER, Rachel Helen
FERRAIOLI, Jade Agnes Edna
FITZPATRICK, Poppy Catherine
GIBB, Justyna
GRAY, Kirsty Margaret Campbell
HISLOP, Caitlin Flora Kennedy
HOEY, Claudia Maria Ayre
HOOMAN, Laura Anne
HOUSTON, Suzanne Lesley
ILES, Sean Hugh
INGRAM-SMITH, Rhea McNulty
INNES, Claire Louise
JAVED, Shumail
McCORMICK, Matthew Donald
MACDONALD, Lynn
MARSHALL, Hannah Elaine
MITCHELL, Lauren Margaret
MORRISON, Ruairidh Duncan
NEIL, Chloe Elizabeth
NEILSON, Fiona
NELSON, Kirsty Laura
NEWMAN, Keanu
PATRICK, Sarah
ROBERTSON, Victoria
SANDHU, Sonia
SMITH, Ellen Jemima Stuart
SPEIRS, Jamie
STEELL, Richard
THOMAS, Ben
TRAPP, Danielle Collette
WALKER, Maxine Nicole
WATSON, Olivia Rose
WRIGHT, Emma Elizabeth

ASK ASH

A friend in need

A friend at another firm is relying too much on me for advice

Dear Ash,

One of my friends has begun to rely on me consistently to help him with his legal work; and I'm getting irritated with him. He works in a separate firm, at a more junior level, and is therefore used to relying on guidance from other more senior staff while in the office. However, since lockdown he has been working more from home, and tends to contact me rather than his own manager as he doesn't want to appear as if he can't work independently. I was happy to help out with the odd query, but he is now increasingly relying on me on a daily basis to confirm, for example processes for lodging documents and drafting statements, and it is encroaching on my own working day. I don't want to jeopardise my friendship, but I can't continue like this either.

Ash replies:

Your friendship is clearly under strain – and likely to be further impacted if you don't address this issue promptly.

Although your friend is at a more junior level, he still needs to be clear on the boundaries in regard to the support you can provide going forward. Therefore arrange a time to have a coffee across Zoom, and just confirm the pressures you too are under, explaining how you will not be as accessible as you have been.

Also confirm that it is important for him to feel supported at work and that he raise any concerns with his own manager to ensure that he can ask questions as and when he needs; it may be that one of his colleagues could be his designated mentor and provide him with the support he needs.

Explain to him that everyone needs a helping hand once in a while, and whilst you are happy to provide this, it can't be something you can provide on a daily basis because of the challenges of your own job.

Hopefully by being open and honest you can make your friend understand your point of view; if he is a true friend then he will understand!

Send your queries to Ash

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

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

Classifieds

Catherine McKay (Otherwise Irene McKay), deceased
Would any Solicitor or other person holding or having knowledge of a Will by the late Catherine McKay, otherwise known as Irene McKay who died on 9th May 2020, and who resided formerly at 44 Bourtree Road, Earnock, Hamilton ML3 8PT, and latterly at Abercorn House Nursing Home, Hamilton ML3 7QH, please contact Kathleen McArthur at Wright, Johnston & Mackenzie LLP, Solicitors, 302 St Vincent Street, Glasgow G2 5RZ, telephone 0141 248 3434 or email: kmca@wjm.co.uk.

CAROLINE MARY MATHESON (deceased)
Would anyone holding or having knowledge of a Will by Caroline Mary Matheson late of Flat 12/1 Iona Street, Edinburgh, EH6 8SF and sometime of 16 Bothwell Street, Edinburgh please contact Lynsey Rintoul at Morgans, 33 East Port, Dunfermline, Fife, KY12 7JE (lynseyrintoul@morganlaw.co.uk)

ANNE CHRISTINA WHITING OR REID (Deceased)
Would anyone with knowledge of a Will of the above named who formerly resided at 61 Lochlibo Avenue, Glasgow, G13 4AE and who died on 27 August 2020, please contact Stewart Pettigrew at Frank Irvine Solicitors, 63 Carlton Place, Glasgow, G5 9TW on 0141 375 9000.

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SEASON'S GREETINGS

As the year draws to a close, we'd like to take this opportunity of thanking all of our clients and candidates for choosing to work with us...we've enjoyed every minute of it, and we look forward to working with you again in 2021. We wish you a happy, healthy and prosperous New Year.

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