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Journal

Journal of the Law Society of Scotland

Volume 66 Number 8 – August 2021

Right message?

Why the latest Supreme Court decisions on actionable loss from negligent professional advice should prove to be helpful

W. GREEN

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Defence questions

Amid all the discussion on how technological capability, successfully developed for court business during lockdown, can and should be deployed in the longer term, we should not overlook the serious problems in simply dealing with cases in the here and now, especially on the criminal side.

Everyone knows that a huge backlog of criminal work has built up, and Scottish Courts & Tribunals Service is at least being upfront about case throughput. Its monthly figures on cases processed, broadly speaking, have recently been showing solemn trials – using the cinema jury system – back to previous levels in both High Court and sheriff court, though petition numbers indicate that cases in the pipeline continue to grow. Summary trials, more recently restarted and still affected by in-court social distancing rules, are yet to return fully to those volumes.

SCTS knows it has to do more, and is planning an additional 16 solemn and summary trial courts daily across the country from September, while also continuing with the virtual arrangements, particularly for civil business, that have helped free up courtroom availability. And we are told the Scottish Government is putting substantial extra resources into the courts and the prosecution service to tackle the backlog.

As already stretched defence firms have regularly pointed out, the big unanswered question is where are additional resources for representation of accused to come from? Were they consulted about the extra courts, and if not, why not? That last question is also being asked about the plans to suspend trials for up to three weeks during the COP26 conference, to free up police resources. So far as concerns police witnesses, defence lawyers say that if asked, they could have helped identify cases where these would not be needed. But cases will be delayed again.

Time is being needlessly lost as it is. Tales are common of custody courts where accused are delivered in batches, and the papers in different batches, so that hours are wasted waiting for both to be available at the same time. The extra Government funding for defence firms, while welcome, will not add to their capacity in the short term, and better efforts will have to be made to optimise the use of both courts' and agents' time if the authorities are serious about cutting the backlog.

Unfortunately we already hear also of cases coming to trial that collapse because so much time has elapsed that co-accused have died, even police are unable to identify accused, and so forth. What are the chances of that situation improving in the foreseeable future? Difficult decisions lie ahead for prosecutors, with public confidence at stake.

Finally, on the subject of freeing up more defence time in the interests of justice, could something be done about the burden of SLAB admin? J

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VOL.66 NO.8 – AUGUST 2021

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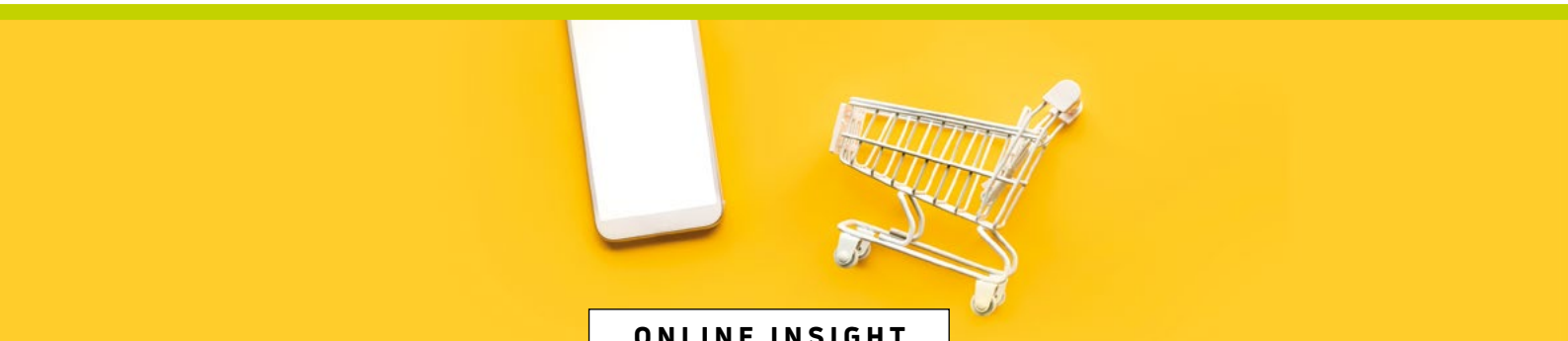


ONLINE INSIGHT

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

Competition and consumer law: time for a shakeup

Gordon Downie provides an overview of the planned major reforms to the UK's competition and consumer protection regimes, now out to consultation.

State aid in the post-Brexit age

The UK Government's Subsidy Control Bill will provide the post-Brexit successor to EU state aid rules – but, as Roger Cotton and Jamie Dunne explain, marks a less significant shift away from the EU regime than might have been expected.

Liquidated damages and the effect of termination

A Supreme Court ruling has brought welcome clarity for the construction sector on the drafting and application of liquidated damages clauses, particularly where a contract is terminated, Kirstin Beattie believes.

SSSC hearings: why the move to opt-in

The Scottish Social Services Council (SSSC) recently changed to an opt-in hearings process for fitness to practise cases. Christopher Weir explains the benefits.

OPINION

Andrew Stevenson

Negotiated proposals for interim reforms to the legal complaints system have not been met with general support on consultation: while many are to be welcomed, others give rise to serious concerns

The Scottish Government's consultation on "Complaints against lawyers and legal firms in Scotland" closed on 20 February. The Scottish Law Agents' Society lodged one of many responses. The analysis of responses was published in July.

On the whole SLAS favours the proposals, although many lack the detail necessary to enable a concluded view to be expressed. Those proposed measures which would accelerate the complaints process are indeed to be welcomed, assuming that they are accompanied by appropriate safeguards. It is a sensible proposal, for example, that where a lawyer offers a reasonable sum in settlement at an early stage, a complaint process could be terminated whether the complainer likes it or not.

Some of the proposals do give rise to serious concerns, however.

First, hybrid issue complaints were declared incompetent by the Inner House in *Anderson Strathern v SLCC* 2016 SLT 967. SLAS opposes the proposal now to admit this species of complaint, because it increases the potential compensation payable by solicitors. The consultation acknowledges that admitting hybrid complaints would "impact on legal services providers who could then be subject to both disciplinary and compensatory outcomes if a complaint is upheld".

This expansion, amounting to double jeopardy, represents a further encroachment by a system running in parallel to the sheriff courts but in which claimants never have to pay expenses and in which there is no recourse to the sheriff or the Sheriff Appeal Court. Under both the 1980 and 2007 Acts, all appeals lie only to the Court of Session. Deep pockets may be required; it is as if the Courts Reform (Scotland) Act 2014 never happened.

Currently, complainers may recover compensation of as much as £5,000 from the Law Society or the Discipline Tribunal in a conduct complaint, or as much as £20,000 from the SLCC in a service complaint. One can justify a complaints process remote from the courts where it is dealing with low value claims. Yet even the SLCC's existing powers admit claims that are by no means low; hybrid complaints will inflate them further. Claims of that magnitude belong in court. It is ironic that a lawyer facing a claim for compensation is excluded from the same sheriff court in which they are entitled to represent another citizen faced with a similar claim for damages for negligence, breach of fiduciary duty or similar.

Secondly, the consultation refers, with apparent approval, to the principle that "polluter pays". However, this approbation rings hollow when we consider that under the present system the polluting complainer never pays and there is no commitment to change that.

It was because SLAS sees the unfairness in this scot-free pollution that it has previously proposed that a modest sum such as £50, refundable in the event of success, be paid by those inclined to complain. It is irrational that a client who sues a lawyer for £5,000 has to pay the sheriff clerk £109, whereas a potentially far higher value complaint to the SLCC costs the quasi-pursuer nothing whatsoever, and with no risk of a liability in costs, even if the complaint is frivolous, vexatious or without merit. So too in an argument with someone other than a client. So, for example, in a dispute over fees due to an expert instructed on behalf of a client, it is not uncommon for the expert to threaten to complain to the SLCC rather than litigate in the sheriff court.

Thirdly, the consultation raises the possibility that, to facilitate "informed consumer choice" in the instruction of legal services, publicity could be given to solicitors about whom complaints are made (even if such prove to be baseless, it would seem). Naming and shaming lawyers in these circumstances is wrong. Clients may be mad, bad or dangerous to know, feeling wronged and resentful even before their initial meeting with a lawyer. That is not the solicitor's fault. Some areas of practice, such as defending those facing bankruptcy or eviction, are inherently risky and stressful, often ending badly despite the best endeavours of the agent. Also, the citizen who is perceived as being a complaint in waiting may struggle to engage a solicitor at all. If the fact of their having complained to the SLCC is to be made public too, the sound of alarm bells will merely be amplified.

Many of the proposals in this consultation are to be welcomed. More than anything, however, it would be refreshing to have some time without endless and proliferating reviews, reports and research exercises whereby the increasingly wearisome topic of regulation never settles down or goes away.

Andrew Stevenson is secretary to the Scottish Law Agents' Society

VIEWPOINTS

The editor's pick of some recent Twitter posts

Legal aid support fund
The SSBA welcomed being involved at an early stage in developing a simplified revised fund, and are delighted that payments should commence this month. Early and constructive dialogue with Bar Associations and the Law Society was key to resolving this. ***@scotscrimbar***

Belarus
#Endangeredlawyers #Belarus The CCBE expresses its serious concern over the recent disbarment of lawyers in Belarus, simply for carrying out their legitimate activities as lawyers. ***@CCBEinfo***

Post Office scandal
Further investigations should take place to assess whether lawyers may have committed professional misconduct in handling of Post Office Horizon case, legal researchers say: [bit.ly/3Chcc71] ***@lawsocgazette***

Court (dis)organisation
I understand that the Edinburgh Sheriff Custody Court did not finish [the previous day] until 2045. Simply unacceptable and completely unnecessary. This is being replicated to a varying extent daily across the country. ***@DarrylLovie***
[Start of a thread which retweeted this:]

After 17:00 and there are still 11 custodies (25% of the total for today) not even in the building at Edinburgh Sheriff Court today. No updates. No ETA. Risible performance again from all involved. Nine solicitors sitting waiting. Abject discourtesy & disregard shown to us all. ***@EdinBarAssoc***

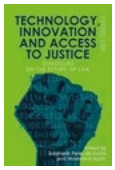
Of counsel
Whilst offering congratulations to the individuals involved [in a promotion to "of counsel"], the importation to Scotland of the American term "of counsel" is potentially confusing. Here, "counsel" means a member of @FacultyScot: see e.g. Rule 1.3 of the Court of Session. ***@RoddyQC***

The right response?
Just finished week as duty solicitor. My observations... every single case featured either mental health, drugs and/or alcohol. Most cases involved elements of vulnerability. Simply highlighted the imbalance of treating people in courts rather than hospitals! ***@tonybonelegal***

Sex offence cases
It's ridiculous that this [excluding juries from sex offence cases] is even in contemplation. How on earth can the administration of justice in a modern inclusive civic Scotland seek to undermine such a pillar of liberty? Deeply worrying but not surprising. ***@vgmcgovern***

Love of the job
Want to know what I love about advice. It's not the debt, benefit, housing issues. I can do that stuff blindfolded and do triple backflips and somersaults and spin on my head. Its the people, the stories, the experiences and knowing I can help them. That shit never gets old. ***@Advice_Scotland***

BOOK REVIEWS



Technology, Innovation and Access to Justice

EDITED BY SIDDHARTH PETER DE SOUZA, MAXIMILIAN SPOHR
PUBLISHER: EDINBURGH UNIVERSITY PRESS
ISBN: 978-1474473866; PRICE: £95

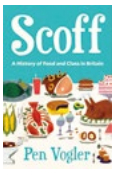
We should never let a good crisis go to waste. At some point, one hopes, we will move out of crisis mode, and be able to contemplate whether the increased use of technology has wrought any long-term benefits to the practice of law; in particular, the possibility of a systemic and wide-ranging revolution in the way in which justice is delivered.

This process can only be improved by books such as this impressively wide-ranging collection of essays, which seeks to describe some of the changes already made, or in contemplation, in various jurisdictions; to assess whether these have enhanced access to justice; and to examine how to address challenges which might arise as we go forward.

The international and multi-disciplinary nature of its contributors introduces the reader to developments and proposals with which they may not be familiar. There is also a lucid and entertaining analysis of what the legal profession might do to prepare itself for the oncoming changes, particularly as – needless to say – we do come in for a tiny bit of a kicking here and there.

This collection represents an invaluable contribution to our state of knowledge about developments in relation to digital justice. I would imagine that just about all of us would be better informed for reading it.

David A Dickson. For a fuller review see bit.ly/3uurb7A



Scoff: A History of Food and Class in Britain

PEN VOGLER
(ATLANTIC BOOKS: £8.99; E-BOOK £7.47)

"Highly readable, dip in and snack on this enjoyable, yet thoughtful book."
This month's leisure selection is at bit.ly/3uurb7A

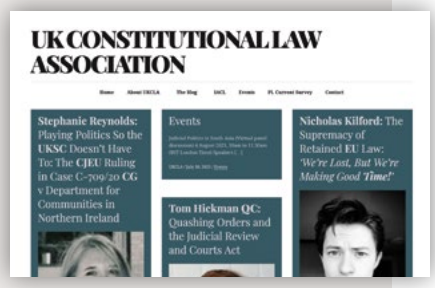
The book review editor is David J Dickson

BLOG OF THE MONTH

ukconstitutionallaw.org

While the Judicial Review and Courts Bill only partially applies to Scotland, Professor Tom Hickman QC's blog is of interest in arguing that the proposed means by which court orders on judicial review might be restricted in effect, increase rather than limit judicial power.

A judge would be empowered to order that an *ultra vires* act, which would otherwise be struck down, be given temporary or even permanent effect. "Parliament is therefore a loser of this reform. It will be ceding legislative power to the courts".
To find this blog, go to bit.ly/3frZvwo



Show us your deductibles

Around £5.6 billion in business expenses could be going unclaimed with HMRC each year, due to uncertainty over what qualifies, and fears of penalties. Research by The Accountancy Partnership supports the claims – and has turned up some bizarre items that have passed the HMRC test of any reasonable costs that arise as a direct result of the business.

Client entertaining has led to entrepreneurs expensing lap dances and a trip to Victoria Falls National Park in Zimbabwe, for example. Others have claimed for two live lobsters, a tantric workshop session, an adult-size pink tutu, and the costs of a cremation. (One fears that last entertainment did not end well.)

Further items that have apparently passed HMRC scrutiny include materials to decorate a car as a space rocket, a mass purchase of sex toys from China, a Venus flytrap plant, a fart machine and a full Lederhosen outfit. (Extra creativity might be needed to put in such claims for a legal practice, mind you.)

Which of these might have been purchased in combination must be left to the imagination.

PROFILE

Keith Hamilton

Keith Hamilton is solicitor and risk manager at The Heineken Company (UK), and convener of the Society's Practising Certificate Committee

1 Tell us about your career so far?

I followed an unusual route to qualification in 2014. I spent the previous 20 years in the car industry, eight of them as head of business with franchises such as Porsche, Ferrari, Maserati and Bentley. After qualifying I spent three years in commercial litigation and then had an opportunity to gain experience in-house as a turnaround and risk manager with Heineken, where I have been for three years or so.

2 What led you to become involved with the Society?

Prior to starting my traineeship I was fortunate to spend three years as a lay member of the Edinburgh children's panel, which I found a challenging but very worthwhile voluntary experience. After qualifying I wanted to develop this voluntary experience to try and expand my skillset and give something back to the Society, and felt that my experience as a solicitor and in business might be beneficial at a committee level.

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

The functions delegated to the Practising Certificate Committee are governed by the Regulatory Committee. Each of the applications and supporting documentation we receive within the remit set are interesting and sometimes complex, and no two are ever the same.

4 What is your top tip for new lawyers?

Often said – but keep things simple, use plain English and get to the point. Take some time to try and understand your client and their needs and this will help put into context why they are asking for your advice. Join a committee: it will help with networking and will boost your CV.

Go to bit.ly/3uurb7A for the full interview.

WORLD WIDE WEIRD

1 Gilding the lavvy

A Russian police colonel suspected of leading a gang that took bribes in return for transport permits was found to have a lavishly decorated house – including a golden toilet – when he was arrested.
bit.ly/3xibFFV

2 Pie to die for

A New Zealand man escaped with a supervision order after he was caught driving while disqualified when he chose to get behind the wheel to go 200m to buy a hot pie.
bit.ly/37iTihJ

3 Chewing the flat

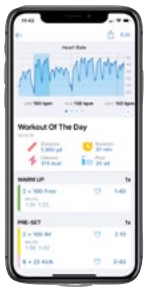
Police were called to a property in Burgess Hill, West Sussex, where housemates had come to blows over one complaining at another for chewing too loudly. No further accusations were made.
bit.ly/37ykJ7v

TECH OF THE MONTH

Swim.com

Free. Apple Store and Google Play.

If the heroics of Britain's Olympic swimmers have inspired you to take to the water, then check out swim.com. The app gives you handy training tips so you too can make a splash like Adam Peaty and Duncan Scott.



PRESIDENT

Ken Dalling

Clamour for political action to increase conviction rates means altering the balance between Crown and accused that the justice system has developed over time, putting at risk the presumption of innocence

I'm at a party (remember those?) and introduced to a stranger as a criminal lawyer. What often follows is a question about how I can live with myself "defending the guilty". The answer, which may seem obvious when explained, is that I don't defend the guilty – I defend the innocent. That's what the presumption of innocence means. That's a good thing, and a cornerstone of a civilised society that respects the rule of law. Right?

An accused person, in whatever situation, is not convicted on an allegation. There's a process: that may involve a trial with evidence led and, in more serious cases, a jury. In many cases an accused may accept their guilt, to whatever extent, and a trial will not be needed. When that happens, the "guilty" are entitled to representation to ensure a just and proportionate outcome. But what about those accused who deny their guilt and go to trial?

In Scotland we have a proud tradition of independent prosecution in the public interest. An accuser need only make a statement of complaint to the police, who will investigate before reporting the matter for consideration of prosecution to the Crown Office & Procurator Fiscal Service. It would be wrong to require the complainer to prosecute their own case, and surely impartial justice is preferable to a lynch mob. Inevitably witnesses require to give evidence and that will never be a welcome experience for them, but arrangements to provide support will be made.

However, not every complaint of criminality is well founded. There are any number of reasons why, but experience tells us that human beings, accused and accusers, are not infallible. People can get things wrong. Some exaggerate. Some lie.

If a case goes to trial, it is the jury's responsibility to determine guilt. That is their role, their role alone and their only role. The suggestion that any category of trials has a "low conviction rate" is an oxymoron. The conviction rate is the result of individual cases, each prosecuted with the resources of the state to an eventual outcome. Frankly, to say otherwise is as much an insult to those good people who give of their time to perform public service as jurors, as to those able advocates depute and procurators fiscal who prosecute.

Sexual crime is particularly abhorrent. Society could not perpetuate without consensual sexual interaction and it is, perhaps, that fact which makes sexual wrongdoing provoke in us all particular revulsion, and particular compassion towards the victims. But, what about the presumption of innocence? How can we label a complainer a victim while the accused is presumed innocent? Well, that's not easy, but we do, and we have to be very careful.

Juries aren't asked to determine the accused's innocence. They are directed that, if a majority of their 15 decide in favour of a guilty verdict, they will convict. That is a bare majority determining proof of guilt beyond reasonable doubt. If eight of the 15 are not so decided, they must acquit – in effect confirming the presumption of innocence which has been maintained – but they can return a verdict of not guilty or not proven.

We cannot know exactly how juries go about their work. We must have faith in them doing so as directed by the judge or sheriff, consistent with an oath to "well and truly try the accused and return a verdict in accordance with the evidence". What we do know is that our justice system, with checks and balances, has been developed wisely and has stood the test of time. Behavioural research of mock jurors also shows that removing the availability of not proven would incline individual jurors towards a guilty verdict. But if an accused is presumed innocent and the Crown has to prove guilt, why would anyone want to make a change which would alter that balance?

If there is a clamour for politicians to streamline the process so that an accusation is as good as a conviction, that needs to be recognised for what it is. Or perhaps that would be a step too far, and unnecessary when all that is required is a "delivering for victims" message. There is nothing ambiguous about the words "not proven". There is no basis for saying those words are other than well understood by juries, and that they will be yesterday, today and tomorrow.

In the 1964 appeal of Hugh McNicol, Lord Clyde said that for over 200 years the not proven verdict had been available as a third voice in the law of Scotland and, in his view, no convincing argument had been advanced to justify its destruction. Has that changed in the last 50 years? Who knows, but the very recent survey of the profession suggests there is strong support for its retention.

None of us wants to be the victim of a crime, but nor would we want to be an accused who is presumed guilty. Perhaps by writing in this column I am preaching to the converted, but at least it is good to know that we are on the same page.

Ken Dalling is President of the Law Society of Scotland – President@lawscot.org.uk

People on the move

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Jemma Richardson and Edwina de Klee of Anderson Strathern

ANDERSON STRATHERN, Edinburgh, Glasgow, Haddington and Lerwick, has promoted **Jemma Richardson**, deputy head of the Residential Property department, to partner, and appointed **Edwina de Klee**, who joins from GARRINGTON PROPERTY FINDERS, as purchase and new business manager in the same team.

BALFOUR+MANSON, Edinburgh and Aberdeen, has appointed **Sylvia McCullagh** as an associate in its Residential Property team. She joins from GILSON GRAY.

JOPSEPH G BOYD & CO COURT LAWYERS, Edinburgh, has moved to new offices at 41-43 Bread Street, Edinburgh, EH3 9AH.

BOYD LEGAL, Edinburgh and Kirkcaldy, has appointed paralegals **Fiona Brown**, accredited paralegal in wills and executries, and **Angie Clay**, who specialises in residential conveyancing, to its Kirkcaldy office.

BTO SOLICITORS, Glasgow, Edinburgh and Helensburgh, announces the appointment of **Donna Brennan** as legal director in its BTO RAEBURN HOPE office in Helensburgh, where she will manage the firm's Wills, Estates & Succession Planning team. She joins from MORTON FRASER where she was head of the Glasgow Private Client team. **Irene Henderson** has been promoted to associate in the Residential Conveyancing team, also in the Helensburgh office.

CMS, Edinburgh, Glasgow, Aberdeen and globally, has announced the promotion to of counsel of **Claudia Russell** (Construction, Edinburgh), **Kirsty Nurse** and **Keith Simpson** (both Banking & Finance, Edinburgh), and **Jane Fender-Allison** and **Madeleine Young** (both Construction Disputes, Glasgow).

DWF, Glasgow, Edinburgh and globally, has appointed five newly qualified solicitors across its Employment, Real Estate, Insurance and Corporate Law teams in Edinburgh and Glasgow: **Katherine Lynch**, **Sara Baskin**, **Hope Donnachie**, **Katy Smith** and **Nicole Hannah**.

EVERSHEDS SUTHERLAND, Edinburgh and globally, has appointed **Euan Smith** as an employment partner in its Edinburgh office. He joins from PINSENT MASONS.

GIBSON KERR, Edinburgh, has appointed **Nadine Martin** as an associate. She joins from HARPER MACLEOD.

GILSON GRAY, Glasgow, Edinburgh, Dundee and North Berwick, has appointed two solicitors in its Dundee office: **Lisa Martin**, associate in Private Client and Residential Property, who joins from ROLLOS LAW, and **Adam Smith**, solicitor in the Commercial Real Estate team, who joins from THORNTONS.

Stephen Hughes, advocate, has joined ARNOT MANDERSON ADVOCATES from OPTIMUM ADVOCATES.

THE LAW PRACTICE, Aberdeen, has appointed **Sarah Newnham** as a senior solicitor in its Residential Conveyancing team. She joins from TAGGART MEIL MATHERS.

McCARRYS SOLICITORS (formerly IAN McCARRY SOLICITORS), Glasgow are delighted to announce that they have moved to new office premises at 1944A Maryhill Road, Glasgow, G20 0EQ. All contact details remain the same.

David McNaughtan and **Craig Murray**, advocates, of COMPASS CHAMBERS, have been appointed to the role of Crown counsel by the Lord Advocate, **Dorothy Bain QC**.

Mr Murray has already commenced his appointment and Mr McNaughtan will begin in August. During their time as advocates depute, they will not be available to accept any other instructions.

THE SCOTCH WHISKY ASSOCIATION, Edinburgh has welcomed **Laura Lee** as legal counsel in their Legal team. She joins from DAC BEACHCROFT. Senior legal counsel **Kenneth Gray** retired at the end of July after 21 years with the Association.

WATERMANS LEGAL announces the appointment of **Dianne Millen** as head of Family Law. She joins from MORTON FRASER.

WATERSRULE LTD, Stirling and Tillicoultry, has promoted **Grant Storrar** to director.

WRIGHT, JOHNSTON & MACKENZIE, Glasgow, Edinburgh, Inverness, Dunblane and Dunfermline, has appointed **Magnus Mackay** as a partner in Private Client in its Inverness office. He joins from STRONACHS.

Magnus Mackay from Wright, Johnston & Mackenzie

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THE PROS & CONS OF OUTSOURCED CASHROOM SERVICES

Advantages, disadvantages and how to overcome them.

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Outsourcing a cashroom is quite normal now, especially since the pandemic. Partly due to the cost and time savings that outsourcing provide for legal practices and the need to maintain a finance function when a business needs to adapt. Outsourcing is an extremely effective solution when fighting for survival in tough economic times but that is not to say it is the best solution for every firm. Just like hiring your own cashier, outsourcing has advantages and disadvantages.

Accessing Expert Advice

When teaming up with an outsourced cashroom, you can be confident that experienced and qualified individuals are handling your finances in an objective manner. Services are tailored and scalable to bring you the right expertise at the right time for greater flexibility.

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Outsourcing is often much more cost effective than having an in-house cashroom to handle your finance function. Outsourcing eliminates several cost layers and you only pay for the services you need - when you need them. Firms can choose full outsourcing, co-sourcing, or needs-based deployment to address temporary staff shortages such as holidays or long-term absence.

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With a team of cashiers in place, law firm owners can also be rest assured that the cashroom responsibilities will be completed on time. In fact, you can expect higher quality and consistent results that include powerful analytics to help you better understand business performance. Suspicious activity is also immediately reported to the business owner, which reduces the likelihood of fraud or financial penalties.

Avoid Unexpected Costs

Unexpected costs can occur sometimes when outsourcing. This could arise from a genuine misunderstanding about the scope of work or that you need to pay for additional services or software licenses that were not contemplated at the start of the agreement. This is easy to avoid, when choosing an outsourced cashroom service, make sure that the fees structure is clearly explained. You may be offered the choice of fixed fee accounting so that your monthly costs always stay the same, and you can budget for it. You must receive a Letter of Engagement outlining in detail what both parties expect from each other, what services will be provided and what your obligations are. This will be your point of reference, in case of any disagreements about services or costs. Your agreement should include reviews to consider any changes in your business needs and/or changes in the quantity of work that you are outsourcing.

Keep Control

If you are someone that likes to have direct control over all business activities outsourcing your cashroom might feel like some control is taken away from you. You shouldn't have to change your existing processes and may wish to avoid services that make you change. New arrangements will be unfamiliar for you and your staff and changing to an outsourced service may be a big enough step at the beginning. In which case look for someone that can work with your existing processes and gradually introduce more efficient ways of working. You should still be very much involved and aware of everything that is happening with your accounts. A professional outsourced cashroom service will not put their needs above yours and will be flexible in the processes required to meet your firm requirements. They will be transparent about everything, so your working relationship will be clear.

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Paul McRobb,
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The cost of bad advice

The Supreme Court has revisited the principles to be applied in determining the actionable loss in cases of professional negligence. Richard McMeeken believes the judgments will prove helpful in practice – and underline the importance of terms of business

Much of my early career was taken up with arguing cases for professional negligence on behalf of banks and building societies against valuers, on the basis of the House of Lords decision in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd; South Australia Asset Management Corporation v York Montague* [1997] AC 191 ("*SAAMCO*"). In *SAAMCO*, Lord Hoffmann drew a distinction between a duty to provide *information* for the purpose of enabling someone else to decide on a course of action, and a duty to *advise* someone as to the course of action that they should take.

If the duty was to advise, the adviser was liable for all foreseeable loss arising as a consequence, but if the duty was to provide information then the adviser was only liable for the consequences of that information being wrong, not the wider financial consequences of the transaction.

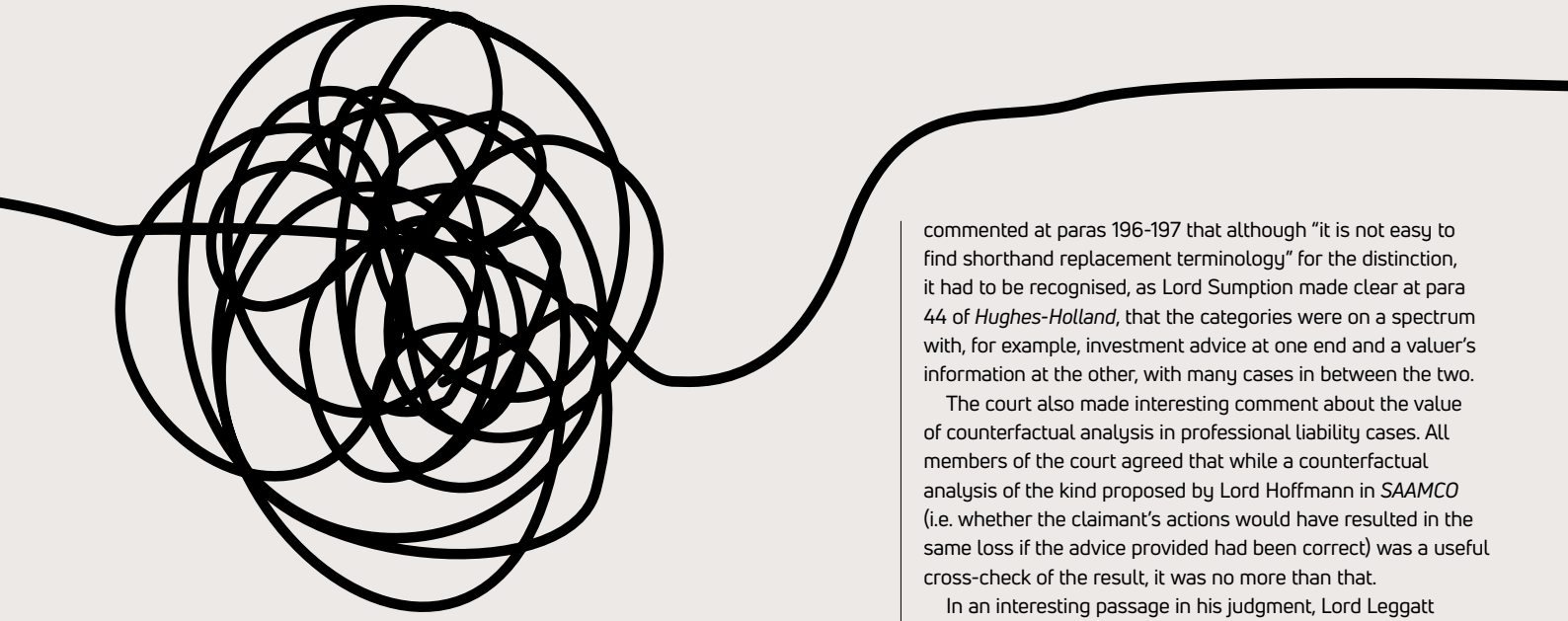
To take a simple valuation example – a property is worth £8 million. The valuer negligently values it at £10 million, causing the lender to lend more than they otherwise would have done. The market crashes by 50% and the property sells for £4 million. According to *SAAMCO*, the valuer's maximum liability is £2 million (i.e. the difference between the wrong and correct valuations), rather than the £6 million which is the maximum loss possible as a consequence of the lender having entered into the transaction. In other words, the *SAAMCO* rule (often referred to as a "cap") ensures that the valuer is responsible only for the consequences of the lender having too little security due to the wrong valuation, with the remainder of the loss being attributed to the market collapse and, therefore, something outwith the valuer's duty.

It was always very difficult to explain to clients that their recovery of loss would be restricted as a consequence of the *SAAMCO* principle: they generally regarded it as unfair that they would not be fully compensated for their loss. Further, *SAAMCO* was not widely accepted as correct. Some commentators, such as Professor Jane Stapleton, considered that the court adopted the wrong approach to determining the scope of the defendant's duty, saying: "What makes the valuation wrongful is that it is careless, not that it is not true" ("Negligent Valuers and Falls in the Property Market" (1997) 113 LQR 1). Others criticised the cap itself, saying that there were fairer and more realistic approaches to establishing recoverable loss.

A true distinction?

However, *SAAMCO* is, of course, not simply applicable to valuer cases. It applies to all cases where economic loss is caused to one party as a consequence of negligence by a professional adviser. More recently, in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, the Supreme Court has had to consider the *SAAMCO* rule in the context of negligence by a solicitor.

In that case, Lord Sumption discussed the problems that arise as result of applying the rather rigid distinction between "advice" cases and "information" cases established by the House of Lords in *SAAMCO*. He acknowledged that most "information" given by a professional adviser is "usually a specific form of advice", and that "most advice will involve conveying information. Neither label really corresponds to the contents of the bottle".



At paras 40 and 41 of his judgment Lord Sumption explains what each category of case entails and reiterates the principle in *SAAMCO*. However, it was clear from his judgment that the misleading nature of the "labels" as terms of art was likely to lead to difficult cases and wrong results.

Recently the Supreme Court has had the chance to consider the *SAAMCO* rule again in two cases, *Manchester Building Society v Grant Thornton LLP* [2021] UKSC 20 and *Khan v Meadows* [2021] UKSC 21. The Supreme Court had a larger than normal constitution of seven Justices who heard both appeals.

The appeals were in very different areas of practice. The first was in the context of advice given by professional accountants. The second was in the context of professional advice given by medical experts. However, each concerned the proper approach to the scope of an adviser's duty of care and the extent of liability of professional advisers in the tort of negligence, and the same principles therefore applied in both cases. The majority judgment was given by Lord Hodge and Lord Sales (with Lord Reed, Lady Black and Lord Kitchin agreeing). Lord Leggatt and Lord Burrows gave separate but concurring judgments, while differing on certain aspects of the relevant test.

SAAMCO reconsidered

All the Justices agreed that the distinction between "advice" and "information" cases should be abandoned. Lord Leggatt considered (at para 92 of *Grant Thornton*) that "it seems to me that it would be desirable to dispense with the descriptions 'information' and 'advice' as terms of art and to focus instead on the need to identify with precision in any given case the matters on which the professional person has undertaken responsibility to advise and, in the light of those matters, the risks associated with the transaction which the adviser may fairly be taken to owe a duty of care to protect the client against".

At para 22 the majority of the court agreed with the proposal to dispense with this distinction, while Lord Burrows commented at paras 196-197 that although "it is not easy to find shorthand replacement terminology" for the distinction, it had to be recognised, as Lord Sumption made clear at para 44 of *Hughes-Holland*, that the categories were on a spectrum with, for example, investment advice at one end and a valuer's information at the other, with many cases in between the two.

The court also made interesting comment about the value of counterfactual analysis in professional liability cases. All members of the court agreed that while a counterfactual analysis of the kind proposed by Lord Hoffmann in *SAAMCO* (i.e. whether the claimant's actions would have resulted in the same loss if the advice provided had been correct) was a useful cross-check of the result, it was no more than that.

In an interesting passage in his judgment, Lord Leggatt examines the problems with a counterfactual test, saying (at para 101) that: "One source of difficulty is the intrinsic vagueness of counterfactual propositions... In order to yield a determinate answer to a counterfactual question, assumptions need to be made about how precisely the counterfactual world is supposed to differ from, or remain similar to, the actual world." He demonstrates his point with an analysis of the different assumptions and approaches to loss that were proposed by commentators following the *SAAMCO* decision and how they could each easily lead to different results.

Accordingly, the court concluded that it was not always helpful to apply a counterfactual test and, where one was applied, it was just a means of checking that the right result had been reached. In other words, the analysis is not really part of the test, but rather subordinate to it.

Different approaches?

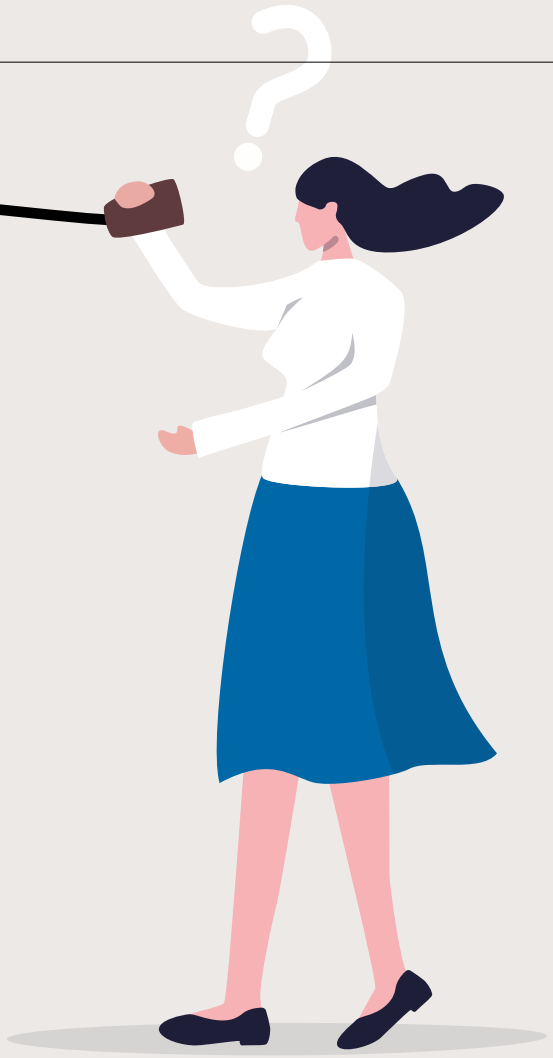
The majority of the Supreme Court held that the correct approach in such cases was to focus on identifying the purpose to be served by the duty of care, judged on an objective basis by reference to the reason why the advice was being given. One looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represents the "fruition of that risk" (para 17).

In that context, the court referred to the famous "mountaineer's knee" example given by Lord Hoffmann in *SAAMCO*, where a doctor negligently advises a mountaineer about to undertake a difficult climb that his knee is fit for the task. The mountaineer goes on the climb, which he would not have undertaken if the doctor had told him the true state of his knee, and suffers an injury which "is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee". Lord Hoffmann's reasoning was that the doctor was not liable for the injury because the injury would have occurred even if the advice had been correct.

Lord Burrows' reasoning was similar to that of the majority, while putting greater emphasis on the policy of achieving a fair and reasonable allocation of the risk of loss between the parties. Lord Leggatt reached the same result but preferred to frame the scope of the duty principle as an aspect of causation. The majority and Lord Burrows distanced themselves from a causation-based approach, saying that it potentially gave rise to confusion by distracting from "the primary task of identifying the scope of the defendant's duty" (para 5).

However, there is little to choose between the judgments, and Lord Leggatt (at para 97 of *Khan*) queries whether there is any substantive difference between his own

"The majority and Lord Burrows distanced themselves from a causation-based approach, saying that it potentially gave rise to confusion"



explanation of the correct analytical approach and that of the majority, saying that: "It is common ground between us that it is always necessary to determine whether (or to what extent) the claimant's 'basic loss' is within the scope of the defendant's duty of care. Lord Hodge and Lord Sales call this 'the duty nexus question' which they formulate as whether there is a sufficient nexus between the loss and the subject matter of the defendant's duty. I understand the word 'nexus' to be another term for what I refer to, more prosaically, as a 'causal connection'."

Lord Burrows suggests that the "duty nexus" approach taken by the majority is a novel approach to the law of negligence, and considers that a more conventional approach is appropriate, outlining seven questions at para 79 of *Khan* which he considers to be crucial.

How the principles applied

Following these principles, the Justices arrived at the same result in each case. *Khan* was a straightforward case. First, there was no reason why the scope of the duty principle did not apply to clinical negligence cases, as argued by counsel. Dr Khan had incorrectly advised that Ms Meadows was not carrying a haemophilia gene. As a consequence of that advice, she conceived and gave birth to a son who not only suffered from haemophilia but also from autism, a condition unrelated to haemophilia. Meadows argued that she would have terminated the pregnancy had she known, rather than give birth to a child with haemophilia, and that Khan was liable for all the consequences of her negligence including the costs arising from a disability unrelated to her son's haemophilia.

On a straightforward application of *SAAMCO*, the doctor was only liable for the costs associated with bringing up a child with haemophilia. She was not liable for costs associated with his autism which was causally unrelated.

"In the immediate wake of the Grant Thornton *decision, some commentators have suggested that it will make a solicitor's job more difficult"*

The facts of *Grant Thornton* were not straightforward, and related to advice given by Grant Thornton to the effect that "hedge accounting" could be used to give a true and fair view of Manchester Building Society's financial position. On that advice, the society carried out a strategy of long-term interest rate swaps as a hedge against the cost of borrowing money to fund its lifetime mortgages business. However, the misstated accounts hid volatility in the society's capital position. When Grant Thornton realised that it had made a mistake, the society had to restate its accounts which showed insufficient regulatory capital, meaning that it had to close out its interest rate swap contracts early at a cost of £32 million.

On the basis of the principles outlined above, the appeal was allowed and Grant Thornton was liable for the loss suffered by the society in breaking the swaps early. Whether the society could employ hedge accounting in order to implement its proposed business model was the advice the society had asked for; the advice given in that regard had been negligent and the exposure to regulatory capital demands was one of the risks which the advice was supposed to guard against. Accordingly, Grant Thornton had breached its duty to the society, but the society was contributorily negligent to the extent of 50% due to what the court referred to as an "overly ambitious application of the business model by the society's management".

Richard McMeeken is a partner and solicitor advocate with Morton Fraser

Look to the terms of business

In the immediate wake of the *Grant Thornton* decision, some commentators have suggested that it will make a solicitor's job more difficult because they will, in any case, have to consider what risk the defender had a duty to take care against and whether the loss suffered is the "fruition of that risk", which may involve a number of factors and assumptions in more complicated cases.

From my perspective the Supreme Court's clarification simplifies matters. The judgment will be of assistance to practitioners and will avoid us having to try and fit cases into the straitjackets of "advice" and "information" when neither label seems to suit the allegedly negligent professional advice. That was never much of a problem in valuation cases such as *SAAMCO*, but was always a difficult question in cases such as *Hughes-Holland* where a solicitor's negligence was concerned.

Finally, it is important to remember that while the Supreme Court's analysis was primarily based on tort/delict, the same principles will apply to breach of contract by professional advisers, and the scope of a professional adviser's duty will often be provided for in that contract (frequently in the form of terms of business). For practitioners the emphasis put by Lord Sumption in *Hughes-Holland* on the importance of terms of business or the client retainer remains, and this decision provides a reminder for all professional advisers of the importance of drafting terms of business which properly identify the advice to be given, or (sometimes crucially) not to be given, in particular cases.

Time to push for family ADR

Replying to Professor Sutherland, Ian Maxwell argues that we should use the Children (Scotland) Act 2020 to seek a paradigm shift towards mediation in resolving disputes between parents

In her article "Avoid Lawsuits Beyond All Things" (Journal, July 2021, 18), Professor Elaine Sutherland raises various questions about the pilot scheme for mandatory information meetings about alternative dispute resolution (ADR) created by s 24 of the Children (Scotland) Act 2020.

She argues that s 24 as it stands will mean that if one parent fails to attend this mandatory meeting, the court will be prevented from making a s 11 order about contact or residence. Although a failure or refusal may delay matters, it is surely going to be possible for the other parent to request a s 11 order and ask the court to drop the meeting requirement on cause shown?

This matter will no doubt be resolved in the forthcoming pilot scheme regulations, taking Scotland one baby step forward towards encouraging more people to mediate.

Route away from court

At Shared Parenting Scotland we always suggest that parents avoid rushing to court, but we usually hear that family mediation has been flatly refused by the other parent. As noted below, mandatory mediation has been effective elsewhere and we feel it should not be ruled out in this country.

In Scotland the court route still predominates, with around 3,500 cases raised every year to resolve disputes between parents, compared with about 2,500 family mediations and a much smaller number using other methods (solicitor mediation, collaborative law, arbitration etc).

Surely it is preferable for more parents to be guided into less confrontational, cheaper and faster routes towards settling these matters.

In our 2019 report *The Way Forward for Family Law in Scotland*, we suggested that the new Scottish legislation could provide the opportunity for a paradigm shift in what parents and children can expect from the law and from each other.

We remain optimistic that the changes in the 2020 Act, alongside the Family Justice Modernisation Strategy and current moves to cope with pressures on court business caused by the pandemic, will help Scotland shift towards ADR.

From alternative to mainstream to compulsory

Perhaps we should stop labelling mediation as an "alternative" dispute resolution method, given the advantages it offers over litigation. One step towards that might be to introduce a requirement to actually engage in mediation.

Australia and New Zealand have a mandatory requirement to attempt mediation before commencing court proceedings, with exceptions such as where there has been domestic abuse.

Nordic countries encourage parents to solve their disputes out of court, though only Norway has mandatory mediation for all separating couples. Denmark has a mandatory pre-trial counselling or mediation session. In Finland and Sweden mediation is offered on a voluntary basis outside court processes.

Mandatory mediation before court was surprisingly successful in a pilot carried out in the Hampden Family Court in Massachusetts between 2014 and 2017. From the 154 cases in the pilot, 97 resulted in whole or partial settlement.

Court staff identified appropriate cases, and the two-hour mediation sessions took place in a private conference room in the court building. When agreement was reached, the court checked and signed it off. The mediation was free and the majority of cases involved young, never-married parents with parenting issues and problems in communicating.

Each mediation session involved a lead mediator accompanied by two law students who had completed a semester-long mediation course. It therefore provided valuable experience for these students. None of the parents objected to having three people in the room, and the students' presence sometimes helped to calm the mediation. No participants complained about being mandated to attend; all were told that they had to attempt mediation, settlement was voluntary and they were in control of the outcome.

Another interesting pilot started in Alaska in 2009 to relieve the pressure on family courts. Self-represented parents were required to attend an Early Resolution Program (ERP) hearing before a settlement judge along with court mediators. By 2014, 634 of the 793 cases given an ERP hearing had settled fully (80%). A subsequent evaluation showed that ERP cases were three to four times shorter than a control group, and six to seven times less costly than typical divorce and custody cases.

Both of these pilots exempted domestic violence cases from mandatory mediation. A very recent study in Washington DC comparing traditional litigation with shuttle and videoconference mediation found that "in cases with parents reporting concerning levels of intimate partner violence, when both parents are independently willing to mediate, mediation designed with strong safety protocols and carried out in a protected environment (shuttle or videoconference) may be an appropriate alternative to court".

Time to try out new ideas

While one cannot assume that the mediation experiments described above will work as well in Scotland, the success with various levels of compulsion and a range of different approaches to dispute resolution should encourage us to try some new ideas.

The forthcoming Scottish pilot of mandatory information meetings for alternative dispute resolution is one small move towards keeping family disputes out of court – let's hope it is just the first step towards this worthy goal.

Ian Maxwell
Shared Parenting Scotland

Licensing the great outdoors

Special arrangements during COVID for allowing hospitality facilities outdoors have added to, rather than created, contentious issues in this area of licensing law. Stephen McGowan tracks the developments

One of the features of life as a licensing lawyer since lockdown struck in March 2020 has been grappling with a significant cohort of temporary arrangements for the use of hospitality facilities in the great outdoors. As bars, pubs and restaurants have railed against the fettering of their trading abilities by activating external space, in many cases just to keep their business afloat and staff in paid employment, it is fair to say that the related law has perpetuated in flux.

We all remember the sheer delight for the trade, and their customers, when beer gardens reopened in the summer of 2020. Since that time these arrangements have continued to highlight (in some cases) very disparate views, especially as to what some might refer to as the "use and abuse" of occasional licences – temporary licences which can be obtained under the Licensing (Scotland) Act 2005, and which are most commonly associated, especially now, with outdoor facilities.

However, the use of occasional licences was a hot topic pre-COVID. Back in 2010 the ability was given to Parliament (see s 13 of the Alcohol etc (Scotland) Act 2010) to create additional rules surrounding occasional licences by way of regulation; no such regulation has appeared. On 23 April 2019, the Scottish Government released a mini-consultation on this issue, which specifically sought views on whether there should be limits introduced in relation to the duration of an individual occasional licence, or limits on overall numbers issued.

The law of occasional licences

The 2005 Act allows the use of one occasional licence up to a maximum of 14 days. However, it is historic convention since the days of the Licensing (Scotland) Act 1976 that these licences can be run consecutively, thus creating a longer pattern of trading. Typically, occasional licences are used for very short, specific events such as festivals, or celebratory events such as weddings and so on. But they are also used in this "back to back" fashion to allow premises to trade in outside areas across long parts of the year.

Occasional licences are used where a premises has obtained a provisional licence and is awaiting the formal confirmation of that licence, and they are also used in advance of provisional or full premises licences being granted, in some cases allowing a premises to trade for many months under these temporary licences. These examples are widespread across all licensing board areas, with few exceptions.

The 2005 Act does not require that there be "an event" in order for an occasional licence to be sought. Notwithstanding that, some licensing boards have imposed this as an expectation, or even black and white rule, as a part of their local licensing policies. It should be noted that there are special rules which apply to members' clubs – but for the purposes of this article I am focusing on outdoor spaces.

The 2019 consultation outcomes

In the lead-up to the April 2019 consultation, some raised concerns that the use of consecutive occasional licences was a circumvention of the licensing regime. The consultation sought views on the unused powers introduced in 2010, such as applying limits to the number of licences one applicant could seek, how many could apply to the same set of premises in a 12-month period, and so on. The consultation attracted a large number of responses, including views such as:

- concern over the availability of alcohol;
- should be for short term use only;
- limits could interfere with mobile bar businesses;
- limits could mean local businesses withdrawing support of community events;
- longer term use of occasional licences is unfair on permanent premises;
- ease of obtaining occasional licences "normalises" alcohol consumption.

No further action was taken, so these views have sat on the shelf since 2019. Of course, in March 2020 the world changed, so if there had been any legislative outcomes from the consultation in the pipeline, they were trapped in the licensing phantom zone.

Lockdown – and the rise of outdoor spaces

As we entered early summer 2020, it became apparent that the risk factors in transmission of the virus were markedly different in outside spaces. In June of that year, the Scottish Government issued a formal update to the Guidance to Licensing Boards under s 142 of the 2005 Act, encouraging boards to look creatively at applications for occasional licences to support outdoor hospitality.

"So we now had a large number of outdoor spaces which had never been used before, such as the temporary tents on Union Street"

Outdoor spaces such as beer gardens were then allowed to reopen as of 6 July, subject to licensing permission. The Chief Planner confirmed, at the same time, that temporary structures or use of land to provide outdoor hospitality would not need planning permission and that the typical 28 day rule – the maximum a space can be used without needing permission – should be ignored.

Finally, on 13 July, the then Housing Minister, Kevin Stewart MSP, issued a letter confirming that building regulations in relation to temporary structures for outdoor hospitality provision were also relaxed, meaning such structures would not require building warrant approval.

The result of all of this was an explosion of applications for occasional licences for areas that hitherto had never been used for outdoor hospitality: pub car parks, private land, pavement areas, rear courtyards and other pop-ups. Licensing boards up and down the country reacted incredibly, many creating bespoke or streamlined processes to support their licensees getting up and running again. Licensing standards officers and Police Scotland also responded in kind, doing their best to cope with the statutory reporting processes for the hundreds of such applications lodged all over Scotland. In my own experience, I think almost all of the proposals I was asked to deal with were supported and granted, with just a very few exceptions.

Adjusting to new facilities

So we now had a large number of outdoor spaces which had never been used before, such as the temporary tents up and down Aberdeen's Union Street. It is perhaps no stretch to imagine that, in some cases, these facilities had detractors. Areas which would never have been given a licence pre-pandemic, were now licensed. In some cases, local residents or other businesses were unhappy, although it should also be said for balance that many supported the use of the areas to help steer their local pubs and bars through the hard times.

As the months moved on, there were far ranging conversations amongst the higher-ups in local authorities about the concept of "place" and the commercial use of public spaces. We also saw a few high profile cases where such areas attracted media attention – perhaps the most famous being the Draft Project, a pop-up outside bar facility adjacent to Aberdeen's Soul club venue. There were scenes of great jubilation after David Marshall's heroics in goal against Serbia to send Scotland to Euro 2020 (2021!), allegedly in breach of social distancing rules. As the area was being traded from consecutive occasional licences, the next one due to be issued was taken to hearing to allow the licensing board to explore the concerns, and ultimately granted.

Consecutive occasional licences: *Keasim Ltd v City of Glasgow Licensing Board*

There is so much more which could be said about the interaction of the neverending iteration of coronavirus regulations and how this impacted the licensed trade generally, as well as in relation to outdoor spaces, but the Draft Project example brings me back to the consecutive use of occasional licences.

This dark corner of licensing law is on the verge of benefitting from some judicial light. We are imminently to have the written reasoning of Sheriff Reid in the case of *Keasim Ltd v City of Glasgow Licensing Board,* unreported to date, but decided in favour of the appellant on 8 June 2021. I believe this may have been the first appeal in relation to an occasional licence under the 2005 Act, so it is a decision of some interest to the licensing community.

The case surrounds the refusal of consecutive occasional licences for an outdoor hospitality facility known as Festival Village, in the Candleriggs area of Glasgow. Issues amongst the pleadings included whether an "event" is needed to justify an occasional licence, and whether consecutive use over some months was circumvention of procedure. Sheriff Reid quashed the refusals and ordained the board to grant the licences, with his reasoning to follow. Examination of that reasoning has evaded the deadline for this article, but will no doubt be ventilated in conferences and seminars once available.

Finally, it is worth noting that the temporary waivers in relation to planning and building regulations look set to extinguish in March 2022. Licensing lawyers and planning advisers alike are urging clients to liaise with their local authorities now, so that those who wish to retain such facilities on a more permanent basis have the appropriate consents in place.

Stephen McGowan is the author of the recently published* McGowan on Alcohol Licensing Law in Scotland*, Edinburgh University Press (2021); 624 pages; hardback, £295; paperback, £140. Readers can activate a 30% discount by ordering online from the publishers using the code JLS30.

Stephen McGowan, partner and head of Licensing (Scotland) at TLT LLP

In care, in family?

Children in care have gained new statutory rights designed to keep siblings together and connected. Alison Reid explains how these came about, and the impact of bringing an appropriate test case before the courts

Clan Childlaw, the law centre for children and young people in Scotland, learns from time to time of issues where the law does not work for young people. Clan will then aim to tackle these issues to protect the rights and improve the lives of children and young people, whether that means changing the law or making sure the law is implemented.

Clan has had some success in changing the law. Issues such as information sharing, sexual offending, and disclosure of childhood offending have been progressed by intervening in ongoing litigation in the Court of Session and Supreme Court. But what happens if an intervention is not possible? What if progressing individual cases resolves the issue for the young person being represented but does not solve the same issue for others?

This article explores the challenges of achieving a change in the law through the lens of Clan's recent Supreme Court case, *ABC v Principal Reporter* [2020] UKSC 26, a case involving the rights of brothers and sisters in children's hearings. It describes the factors which led to the law being changed and considers what could be learned to help other issues be advanced in the future to make the law better.

Brothers and sisters: a lack of protection

Relationships with siblings are among the most important and longlasting in our lives and can provide a source of resilience at a time of change. The reality is that if brothers and sisters are looked after by the state, there is a high chance they will live apart and the time they spend together be limited. Uncertainty and disruption to these relationships is a painful source of distress for children and young people.

Whereas the Children (Scotland) Act 1995 required local authorities to promote contact between children in their care and those with parental responsibilities and rights, there was no mention at all of siblings. There was no obligation to keep siblings together when looked after by the local authority, nor to consider the views of siblings.

There was no obligation on children's hearings to consider contact with siblings or to give brothers and sisters the chance to be involved in decision-making, despite the fact such procedural rights are protected by article 8 ECHR.

More specifically, a child did not have the right to attend the hearing of their brother or sister, did not have a right to see documents relating to arrangements for contact, and did not have a right to appeal any decision made, even when the decision could restrict their ability to see their brother or sister. This is what happened in ABC's case.

ABC v Principal Reporter

ABC was aged 14 years. His brother was aged seven years. ABC attended at the children's hearing of his brother in September 2017 and was asked to leave. The children's hearing proceeded to make a condition that regulated the contact between the brothers. The question whether this was a breach of his article 8 ECHR rights was considered by the Outer House in March 2018, the Inner House in October 2018 and then by the Supreme Court in November 2019.

The judgment was handed down on 18 June 2020. The decision was that there was no breach of article 8. However the Supreme Court recognised that the case had "served to uncover a gap in the children's hearings system" (para 52).

Sector-wide work

Alongside case work, Clan Childlaw and partners worked hard to raise awareness of the omission of specific sibling rights which was causing brothers and sisters to become estranged when in state care.

After first writing about the issue in this Journal in December 2012, Clan wrote a guide to the existing law which identified how legislation could be amended to protect children's sibling relationships. An amendment Clan proposed to the bill that became the Children and Young People (Scotland) Act 2014 was rejected by MSPs. With colleagues in the Children's Rights Strategic Litigation Group, Clan explored the kinds of cases that might lead to greater recognition of sibling rights.

In 2017, Clan and others joined forces to create Stand Up For Siblings, a Scotland wide partnership aimed at improving and changing legislation, policy and practice. At the launch event in March 2018, First Minister Nicola Sturgeon welcomed the initiative.

At the same time Clan was delivering training on how to apply the current law in relation to siblings. The training series, supported by Scottish Government, culminated in a sector-wide conference in March 2019 at which the Minister for Children and Young People announced that the Scottish Government now intended to change the law.

Clan continued to highlight the issue through participation in BBC Radio 4's programme *File on 4*, and on BBC Scotland's *The Nine*. And very significantly, Clan was delighted that the issue was one of the foundations of the Independent Care Review published in February 2020.

Shaping the 2020 Act

Clan Childlaw published a roadmap for changes to the law and advocated these in the public consultation reviewing the 1995 Act. Some were included in the bill published in September 2019. In June 2020 (just after the Supreme Court judgment had been handed down), MSPs supported amendments advocated by Stand Up For Siblings to strengthen provisions for siblings in care.

The minister welcomed the Supreme Court's decision that there was no breach of article 8 ECHR, but said that the Scottish Government wished to move from "compliance to excellence" in relation to the rights of siblings at children's hearings. This was the news that many families had been waiting for.

Following further consultation, amendments on participation rights in children's hearings were included, the Children (Scotland) Act 2020 was passed, regulations and rules of procedure were drafted, and the new provisions came into force on 26 July 2021.

What was the outcome?

- New legal duties for local authorities to promote relations and direct contact between a child in their care and their siblings, to have regard to the views of siblings before taking decisions, and to place siblings together or near each other where appropriate.
- New legal duties for children's hearings and sheriffs to consider the inclusion of a measure regulating contact between the child and siblings or relevant persons the child is not living with, when making, changing or continuing a compulsory supervision order for a child.
- New procedural rights for brothers and sisters in children's hearings, including the right to be notified of a hearing, to be provided with relevant paperwork, to submit papers, to be able to attend the hearing, to be represented and to seek review of decisions after three months.

In recognition of the range of relationships children with care experience may have with the character of a sibling relationship, the new provisions are applicable both where the siblings have a parent in common and where children have lived together and their relationship has the character of one of siblings.

Taken together, the new provisions mean sibling relationships will have to be prioritised when decisions are taken about children and young people in everyday social work practice. National Practice Guidance on implementing the new local authority duties has been developed to support this.

Children's hearings practice should become much more consistent, and siblings will be able to know their rights and what to expect. A new SCRA practice direction sets out how the new status of "individual afforded an opportunity to participate" will work in practice, with two routes to acquiring the new status – either the reporter will determine this when arranging a children's hearing for a child, or a pre-hearing panel will decide this on the request of an individual.

Lessons learned

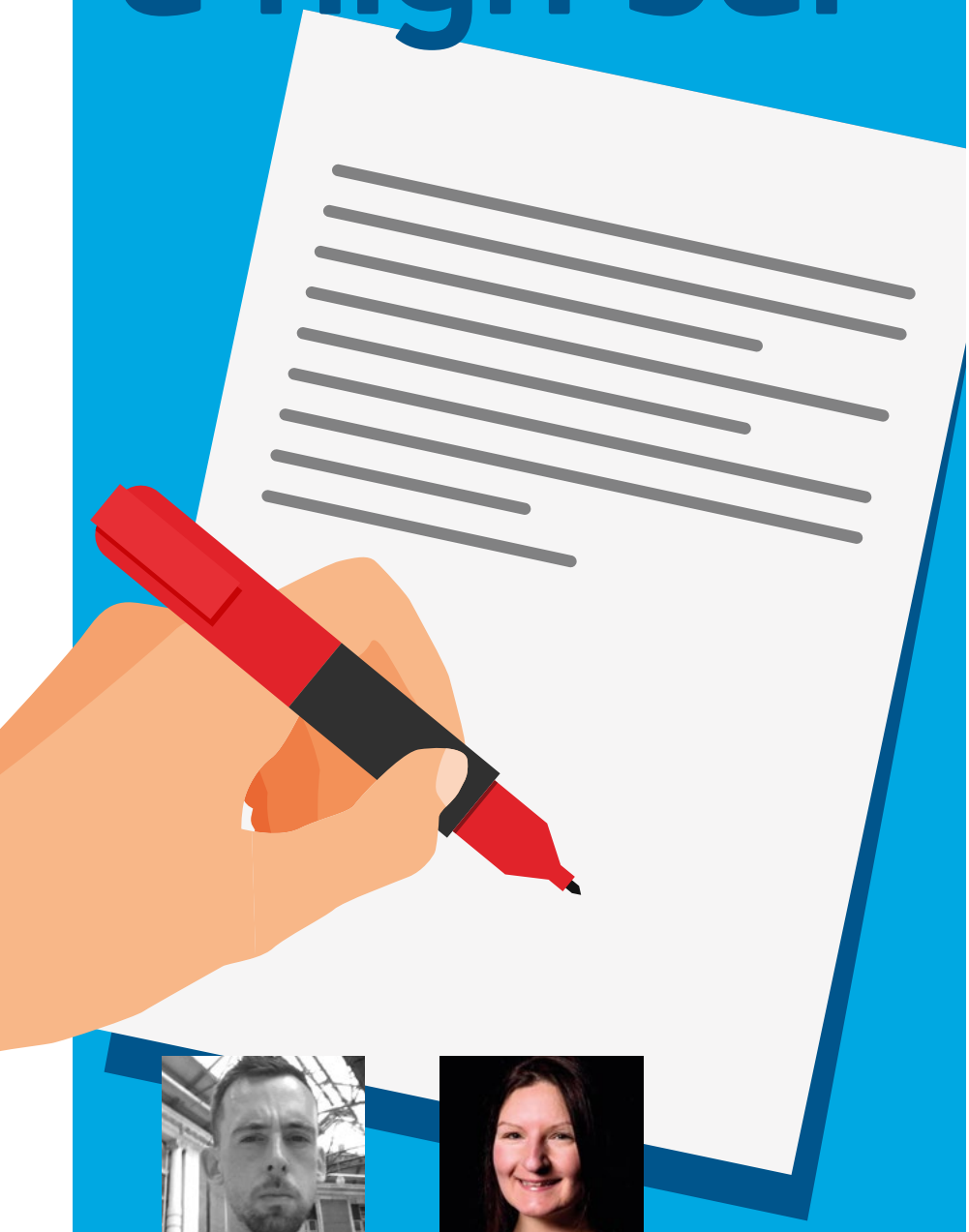
It is difficult to distinguish exactly which activity or activities achieved the outcome, given that so much of the work was progressed in collaboration with many others. Therefore, it is hard to identify definitively the key components required for success. Here though are a few thoughts which could help achieve other changes to the law:

- **No surprises:** Engage with decision makers around the issue and try to work with them to find a solution in the first instance.
- **Envisage and articulate the issue:** Try to identify what sort of case is needed to bring about systemic change, and share your thoughts with others. This increases the chance that the right case can be found and progressed.
- **Work with others:** Combining a strategic case with engagement with others seems to have merit. The Stand Up For Siblings coalition, political engagement, people with lived experience speaking out, and engaging with the Independent Care Review may all have been just as important as the strategic litigation.
- **Be realistic about the time and resource needed:** Undertaking legal work and collaborative work is time consuming, especially if, like Clan Childlaw, you are working with young people in a child-centred way.
- **Don't underestimate the importance of publicity:** Even if a case is lost, the impact can still be significant. Make the most of the opportunity to gather support for change through legislation, or simply to let people know about the issue and help future challenges.
- **Be brave:** It is easy to feel stuck and unable to see the route to resolution.

On reflection, there was no easy pathway to change. This may of course change with the creation of new opportunities for strategic litigation: for example, in the children's sector, those included in the UNCRC (Incorporation) (Scotland) Bill. However, in the meantime, the combination of working collaboratively and engaging with ongoing work at the same time as identifying and progressing a case, has had some success in making the law better for those in need.

Alison Reid
is principal solicitor and chief executive, Clan Childlaw

Executor removal: a high bar



Duncan Adam
DPLP tutor,
University of Dundee

Yvonne Evans
senior lecturer,
University of Dundee

Two recent cases in the Court of Session, discussed here by Duncan Adam and Yvonne Evans, illustrate the issues that can arise between executors, and the high threshold for a successful petition for removal

All executry practitioners will be conscious of the patience, tact and diplomacy required when dealing with bereaved clients and family members. Death can ignite or inflame painful and difficult family dynamics. When executors find it difficult or impossible to co-operate with each other, this can lead to stalemate in administering the estate.

Removal of an executor is a serious matter, requiring a petition to the Outer House. Two recent cases, both decided by Lady Poole, show the difficulties in persuading the court to take the extreme step of removing an executor due to ineffective and/or improper administration of an estate. Here we review the two cases, discuss the legal and practice issues arising, and consider the requirements for a successful action to remove an executor.

Campbell v Campbell [2021] CSOH 3

In this case the petitioner was one of the late James Campbell's sons and a beneficiary under his will.

The respondents were the other son and his wife. The respondents had acted as attorneys for James Campbell during his lifetime and were also appointed his executors. As attorneys the respondents had provided Campbell with a great deal of assistance, and during that time and during the administration of his estate incurred expenses, which were reimbursed from the estate. They also made payments to their sons, which they averred were in implement of Campbell's wish that his grandsons should receive money from his estate, although there were no such legacies in the will nor were any informal writings produced.

The petitioner queried the extent of the estate confirmed to, several of the expenses claimed by the respondents and the payments made to the grandsons. This was despite his having been found by Lady Poole to have removed a bank book containing information that the executors would have required when investigating the extent of the estate and to respond to some of his queries. The petitioner first raised an action for count, reckoning and payment against the respondents and obtained decree. There followed a negotiation and the parties appeared to have come to terms; however they seem subsequently to have reached an impasse, resulting in the present action being brought.

Ciarrocca v Ciarrocca [2021] CSOH 59

Ann Ciarrocca died in September 2017, leaving a will appointing two of her three sons, Andrea and Paolo, as executors, and dividing her estate equally between the three sons.

Initially, the brothers worked amicably to divide the estate. Ann Ciarrocca previously lived in a flat in London, and had sold half of the flat to the third son, Marco in order to fund her move to Edinburgh. It was eventually agreed that the entire London property should be sold, but this was not actioned and the property continued to be let. In 2019, Andrea attempted to have the estate's half share of rental income paid directly to him. The London agents refused and continued to pay to the executry solicitors, Campbell Smith, until the Law Society of Scotland advised them to withdraw from acting and the London agents continued to hold the half share.

The fate of the Edinburgh property was even more problematic, as there were proposals for either Paolo or Andrea to take the Edinburgh property and transfer cash to the other brothers. In late 2018, Andrea returned to Edinburgh from abroad and started living in the Edinburgh property, without the agreement or knowledge of his brothers, and changed the locks. No rent was paid, and Andrea continued to live there until July 2020 when the petition was brought.

Finally, the personal effects and contents of the property, of low monetary value but of sentimental value, were mainly retained by Andrea. Following all of the acts outlined above, Paolo set out to remove Andrea as executor. Despite indications that Andrea might step down voluntarily, it eventually ended up at proof.

Trust law issues

Executors are trustees and owe fiduciary duties to beneficiaries. Scots law has restrictive rules on when trustees can be removed. Section 23 of the Trusts (Scotland) Act 1921 allows the court to remove trustees on the grounds of insanity, incapacity, absence from the UK or "disappearance" for six months. In any other case, to remove an executor an application must be made to the Court of Session to exercise the *nobile officium*.

The court must be convinced that there is no other viable option. It is clear from case law that there must be more than poor or slow performance, disagreements between executors and beneficiaries, or "mere negligence": *MacGilchrist's Trs v MacGilchrist* 1930 SC 635. There needs to be a more fundamental breach of fiduciary duties, such as complete refusal to carry out duties, or an insurmountable conflict of interest between the trustee's duties and their personal interests: *Shariff v Hamid* 2000 SCLR 351; Scottish Law Commission Discussion Paper No 126 on *Trustees and Trust Administration*, paras 4.25-4.26.

Practice issues

The issues raised in both *Campbell* and *Ciarrocca* may not be unfamiliar to executry practitioners, and while problems cannot be entirely avoided, there are some things that can be done to reduce their likelihood. Clients should choose executors they trust and who are likely to be capable of dealing with the administration of an estate; and they ought to appoint more than one executor, and an odd number or even a *sine qua non* executor where there is any discretion or the testator thinks there is any scope for disagreement.

Often executors do not fully understand their roles or believe they have far wider discretion to act than the will or the law gives them, so it is worth explaining their duties at the outset and, if necessary, to remind them of their duties during the course of the administration.

> *"A failure by an executor to act, or to act properly, usually causes delay and may lead to deadlock"*

Key question: who is your client?

When dealing with the estate administration, it is also important to bear in mind who you represent. In most cases, you will represent the executors. As *Campbell* illustrates, if there is more than one executor you will almost certainly be acting for them as a body. Consequently, where one executor fails to provide instructions, gives conflicting instructions or terminates their instructions to you, you may well have to withdraw from acting, which is something that executry practitioners may be reluctant to do.

A failure by an executor to act, or to act properly, usually causes delay and may lead to deadlock. As a result, you may also wish to consider withdrawing from acting where executors are not following your advice, not least because you are likely to come under pressure and be vulnerable to criticism from beneficiaries who may not understand the reasons for any delays or difficulties. You might have become the only link between different factions in a longrunning family feud.

Although the beneficiaries may not be your clients, that does not mean that you do not have a professional duty to them. Of the published synopses of complaints made to the SLCC about executry administrations, more than half of those were made by third parties. (Not all were upheld.)

It is perhaps stating the obvious, but if you are acting for the executors then you cannot also act for the beneficiaries, even where, as is often the case, they happen to be the same people.

Malversation of office: a high threshold

In *Ciarrocca* we see blatantly inappropriate actions by an executor, such as occupying a property without the agreement of the co-executor and without payment of rent, which allowed him to let out his own residence for personal gain. His making a unilateral decision on contents, and keeping the majority himself, was also a clear abuse of position and the attempted diversion of estate rental income a breach of his fiduciary duties. Overall, Lady Poole was convinced that the actions had obstructed the administration of the estate and had been detrimental to the other beneficiaries. As a whole, the actions amounted to malversation of office and removal was sanctioned as the only feasible solution.

In *Campbell*, however, the petitioner was unsuccessful. Lady Poole did not consider that the respondents had acted in bad faith or that their errors amounted to malversation of office. While Lady Poole did not dispute that the respondents had made mistakes in the administration of the estate, she acknowledged that they had done so while unrepresented and had taken steps to correct some of their errors and shown willingness to correct others. The respondents had also demonstrated that they were keen to come to terms with the petitioner and to complete the administration of the estate. Lady Poole, by refusing to grant the petition *in hoc statu*, did leave it open to the petitioner to try again if further difficulties were encountered.

As people's financial and family circumstances become more complex, so does estate administration, and executors often require legal assistance. Even where the executors act properly, where there is family disharmony or mistrust they (and their agents) can become the focus of criticism as one side seeks to discredit or harm the other. Where executors do not act properly or do not act at all, the difficulties are compounded. Nevertheless, it is clear from Lady Poole's decisions that resolving disputes in administration by asking the court to remove an executor is not something that can easily be achieved.

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The Cloud: let's keep IT simple

Cloud computing is just a way of saying that someone else is keeping your data safe

There are quite a few memes online about "The Cloud" –
"Whoa... computers can fly now!"
"Drops laptop in toilet... no probs, I've got cloud backup!"
"Look up there... that's where computers come from!"
The list goes on...

Defining the cloud

I looked up the definition of "cloud computing" on Wikipedia. I'll not bore or bamboozle you with what the internet has to say about it, because it's actually really simple. Most of us have a good idea of why it's important to have all our important files saved on the cloud, but for many law firms it still seems to be something we're not 100% sure about. I think I know why...

It's NOT because lawyers are technophobes. It's because the legal market is a tough one. It is a highly regulated industry where the fear of being sued for malpractice or losing your licence is constant. If there is an aversion to adopting new technology, like case management on a cloud server, it comes from that and not from any genetic predisposition that lawyers supposedly must change the way they work. To crack this, tech companies like us need to understand that and reassure you, the lawyers, that these concerns about security, etc, are being addressed.

So... what is the cloud, really?

Cloud computing means that instead of all the computer hardware and software you're using sitting on your desktop, or somewhere inside your law firm, it's provided for you *as a service* by another company and accessed over the internet. Exactly where the hardware and software are located and how it all works doesn't matter to you, the user – it's just somewhere up in the nebulous "cloud" that the internet represents.

Cloud computing is just a buzzword. For some, it's just another way of describing IT outsourcing; others use it to mean any computing service provided over the internet. However we define cloud computing, there's no doubt it makes most sense when we stop talking about abstract definitions and look at a simple explanation.

In short...

When you send all your digital files to the cloud, whether it's your photos on your phone, your music, your emails, whatever, you're really just sending your "stuff" to someone else's much bigger computer. It's effectively a massive case file box to keep your firm's data, etc, but because you can't see it it's hard to visualise. If you can imagine what you would normally store in boxes in your office (you know, those archive boxes that are stacked high in the back of the room you're sitting in now?!), or in folders on your laptop. Take all that stuff and put all of it in this much bigger virtual box. You can even add the odd firm picnic photo to the cloud!

You are effectively renting the storage you need to host the masses of files and content you work on. You are doing this securely. It also means you can then access that content from anywhere, on any device at any time. And before you know it, the cloud just starts processing and saving all that stuff for you. That's honestly it.

Where is the cloud?

I mentioned that it doesn't matter to you where your cloud server is. But, for your own piece of mind, we work with an award winning company called Fasthosts. They are based in the UK, operating 24/7 from their dedicated UK data centres. They keep over a million domains running smoothly each day. They provide you with your own dedicated virtual cloud server. Neither Fasthosts nor Denovo can access your data; we only support you. Fasthosts only deal with hardware and have no interface with your cloud and/or system data. For additional security, your operating server in data centre A always has a duplicate running in data centre B. If your server or data centre was to break down, you have a duplicate ready to take its place.

How can I move quickly and securely?

Moving to the cloud quickly really depends on the size of the firm and legacy data in place. If a data conversion was involved, it would take a bit more time. For firms who don't have cloud in place they would be able to onboard reasonably quickly, within a few weeks, with some guidance, remote training, and support.

It is also entirely possible to move to the cloud remotely. A cloud server can be provisioned and configured really quickly these days. You have the added bonus of eliminating the waiting time for hardware to be delivered and installed. Once in place, firms will have a secure and robust system which will future proof their business data.

Need help?

It's important to reiterate that every situation is unique. The best thing any firm needing help can do is get in touch with us and have a chat about what they want to achieve in either the short or long term.

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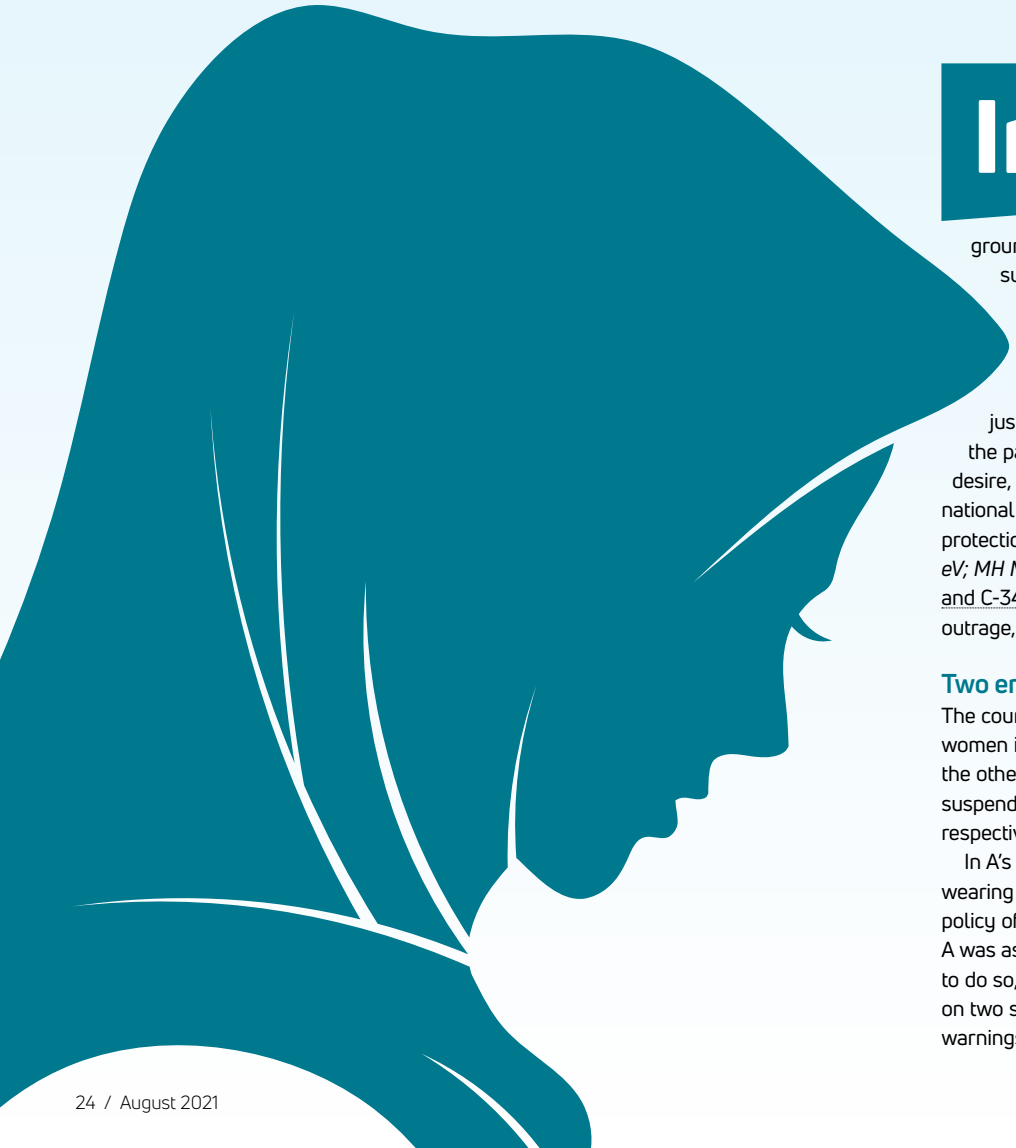
Some are less equal

The CJEU has sparked outrage by holding that an employer's rule that has the effect of banning Muslim women from wearing a hijab at work may be justified. Ahmed Khogali argues that even a seemingly neutral rule can have a discriminatory effect



In a landmark ruling in a contentious case, the Court of Justice of the European Union has held that a prohibition on wearing any visible form of expression of "political, philosophical, or religious beliefs" in the workplace may give grounds for an employer to ask an employee to remove such "form of expression", including the hijab, in a situation where the employer needs to present a neutral image towards customers or to prevent social disputes.

The CJEU went further to explain that justification must correspond to a genuine need on the part of the employer, not just a mere preference or desire, and in reconciling the rights and interests at issue, national courts must consider any provisions relating to the protection of freedom of religion. The decision, *IX v WABE eV; MH Müller Handels GmbH v MJ* (Joined Cases C-804/18 and C-341/19) (15 July 2021), sparked international public outrage, but what did the CJEU actually decide?

Two employee claims

The court heard joined cases brought by two Muslim women in Germany, one a special needs carer (A) and the other a beauty shop cashier (B), after they were each suspended for wearing an Islamic headscarf at their respective workplaces.

In A's case, her employer, WABE eV, took the view that wearing a headscarf (or the hijab) did not correspond to its policy of political, philosophical, and religious neutrality. A was asked to remove her headscarf. Following her refusal to do so, WABE temporarily suspended her from her duties on two separate occasions and issued her with a series of warnings. A brought an action before the Arbeitsgericht

Hamburg (Hamburg Labour Court) seeking an order that her employer remove, from her personal file, the warnings relating to her wearing a hijab in the workplace.

B's employer, MH Müller Handels GmbH, also asked B to remove her headscarf. Following B's refusal to do so, she was first transferred to another post in which she could continue wearing her headscarf, but was subsequently sent home and instructed to attend her workplace without any "conspicuous or large-sized signs" of any political, philosophical, or religious beliefs. B brought an action before the German courts seeking a declaration that that instruction was invalid, and compensation for damage suffered. Her claim was upheld, but her employer appealed the decision on a point of law to the Bundesarbeitsgericht (Federal Labour Court).

The national courts decided to refer to the CJEU questions regarding the interpretation of Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation. In its judgment, delivered by the Grand Chamber, the court explained that articles 1 and 2a of the directive must be interpreted as meaning that an internal rule of an undertaking which prohibits workers from wearing *any* visible signs of "political, philosophical, or religious beliefs" at the workplace does not constitute, with regard to workers who observe a certain dress code based on religious precepts, direct discrimination on grounds of religion or belief, provided the rule is applied generally and without distinction.

Slightly misleading headlines

The essence of the court's judgment is not quite as it appears in the tabloids, but nevertheless, it is potentially gravely dangerous, as the judgment could effectively exclude Muslim women from public life, or render them invisible.

Despite reasonable, and justifiable, outrage and criticism of the CJEU ruling, the court was faced with an incredibly difficult decision over two competing rights – whether the hijab prohibitions in the workplace represented a violation of the freedom of religion, or were allowed as part of the freedom to conduct a business and the wish to project an image of neutrality to customers.

The court considered that in A's case, while the factual assessment was for the referring court, the rule appeared to have been applied in a general and undifferentiated way as her employer also required an employee wearing a religious cross to remove it. In such circumstances the rule would not constitute direct discrimination on the grounds of religion or belief.

The court then examined whether the rule amounted to indirect discrimination on the grounds of religion or belief. It pointed out that such a prohibition was liable to have a much greater effect on people with religious, philosophical, or non-denominational beliefs which require a manifestation, such as a hijab. Moreover, the court was mindful that some workers will be treated less favourably and marginalised based merely on their religion or belief, which would, in such a case, amount to direct discrimination, which cannot be justified.

It held that a prohibition on wearing *any* visible form of expression of political, philosophical or religious beliefs in the workplace *may be* justified, in limited circumstances, by the employer's need to present a neutral image towards customers or to prevent social disputes. It went further to state that the justification *must* correspond to a genuine need on the part of the employer.

Lastly, the court held that domestic and national provisions protecting the freedom of religion may be considered as more favourable provisions, such as are permitted by article 8(1) of Directive 2000/78, when examining the appropriateness of a different treatment indirectly based on religion or belief. In this regard, the court held that, as a starting point, when considering a measure intended to ensure that the application of a policy was appropriate within the meaning of article 2(2)(b)(i) of the directive, the various rights and freedoms in question must be considered. It was for the national courts, having regard to all the facts, to take into account the various interests involved in the case, and to limit the restriction on the freedoms concerned to what was strictly necessary.

The CJEU held that national courts must ensure that when several fundamental rights and principles enshrined in the Treaties are at issue and conflicting, the assessment of observance of the principle of proportionality must be carried out in accordance with the "need to reconcile the requirements of the protection of the various rights and principles at issue, striking a fair balance between them". The CJEU, therefore, left this assessment to the member states and their domestic courts, allowing a margin of discretion in achieving that reconciliation. In both cases, it will now be up to the German courts to have the final say on whether a hijab ban in the workplace would constitute religious discrimination. The Scottish courts are yet to test whether such a move would be discriminatory.

"The ruling gave these Muslim women an ultimatum: the freedom of religion, or the freedom to choose an occupation"

Critique of the judgment

The problem with the CJEU's reasoning is that wearing a cross is directly analogous to a Muslim wearing the word "Allah" (which is also extremely common), or a Jew wearing the Star of David. Indeed, this is a fairer and more accurate comparison. As a starting point, there is no specific religious obligation on a Christian to wear the cross, a Jew to wear the Star of David, or a Muslim to wear the word "Allah".

People of faith, who choose to exercise their absolute right to freedom of thought, conscience, and to practise a religion, cannot be thought of and treated as one homogenous group. The ruling gave these Muslim women an ultimatum: the freedom of religion, or the freedom to choose an occupation and the right to engage in work.

This is because the hijab is not just a visible symbol or a manifestation of a religious belief. From a religious point of view, the hijab is considered in relation to the obligation (maintained and observed by many Muslims) for a woman to cover her hair in public. The hijab does not have to look a certain way, or be a particular design, colour, texture, or material. The purpose of wearing a hijab is not intended to signify: "I am a Muslim." Its sole purpose is to cover the hair in order to observe a religious obligation, and any garment which achieves this is adequate, acceptable, and amounts to a "hijab".

The CJEU evaded the central question and issue which was referred to it by effectively stating:

1. There are two competing rights.

2. It is vital to strike a fair balance between two competing rights.

3. It may be possible for employers to ban the hijab (in limited circumstances) where there is an internal policy requiring neutrality in relation to the wearing of visible signs of political, philosophical, or religious beliefs in the workplace.

4. If a company's internal policy is applied in a general and undifferentiated way, then this does not amount to direct discrimination.

However, in the case of a hijab, and by the very nature of a hijab, it may constitute indirect discrimination.

The CJEU ruling was littered with vague phrases such as that the ban must be for a "legitimate aim" and a "genuine need" on the part of a company to achieve neutrality in respect of the wearing of visible signs of political, philosophical, or religious beliefs in the workplace. However, the CJEU did warn, perhaps in recognising the dangers associated with its ruling, that employers must have "regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition".

"With great power there must also come great responsibility. The CJEU bottled it"

With great power there must also come great responsibility. The bottom line is that the CJEU bottled it and it left the central question to be answered by the German domestic courts (effectively referring the case back with some minimal guidance), evading the responsibility of ruling on an incredibly important, but difficult and contentious issue.

A major cause for concern

The judgment has already been met with a backlash from those who fear the ruling could lead to discrimination.

It applies the decisions in 2017, in *G4S Secure Solutions* (C-157/15) and *Bougnaoui* (C-188/15), when the CJEU ruled that companies may ban staff from wearing hijabs or other visible religious symbols, under certain conditions. This upset faith groups on the one hand but was welcomed by politicians on the right on the other hand, as a long-awaited judgment ricocheted into the French and Dutch election campaigns at the time. In those decisions, the first on the issue of Muslim women wearing the hijab in the workplace, the CJEU ruled the hijab could be banned, but only as part of a general policy barring all religious and political symbols, and warned that customers could not simply demand that workers remove hijabs or headscarves if the company had no internal policy in place which sought to bar religious, political, and philosophical symbols. Again, this ruling failed to recognise that religious individuals cannot be thought of and treated as one homogenous group.

The Open Society Justice Initiative said it was concerned that the ruling "may continue to exclude many Muslim women, and those of other religious minorities, from various jobs in Europe". Maryam H'madoun, speaking on behalf of the Initiative, went further to warn employers to tread carefully, as "they risk being found liable for discrimination... if they can't demonstrate a genuine need for a religious dress ban".

She added: "Laws, policies, and practices prohibiting religious dress are targeted manifestations of Islamophobia that seek to exclude Muslim women from public life or render them invisible... discrimination masquerading as 'neutrality' is the veil that actually needs to be lifted. A rule that expects every person to have the same outward appearance is not neutral. It deliberately discriminates against people because they are visibly religious."

The truth of the matter is that hijab bans for Muslim women in the workplace have been an extremely contentious issue in Germany for years, mostly regarding aspiring teachers at state schools, and trainee judges. On a slightly separate note, I cannot help but commend the two English junior barristers who launched a range of hijab court attire for Muslim lawyers.

In the rest of Europe, courts have also examined in what circumstances hijabs can be banned in the workplace. In 2014, French courts upheld the dismissal of a Muslim day care worker for wearing a hijab at a private creche that demanded strict neutrality from employees. Moreover, France, which has the largest Muslim population in Europe, prohibited the wearing of headscarves in state schools in 2014. On the other hand, Austria's constitutional court ruled that a law banning girls aged up to 10 from wearing the hijab in schools was discriminatory.

On 18 July 2021, the Turkish Foreign Ministry slammed the new ruling, referring to it as a sign of rising Islamophobia. "The CJEU decision, at a time when the Islamophobia, racism and hatred that have taken Europe hostage are rising, disregards religious freedom and creates a basis and legal cover for discrimination," the ministry said.

The courts are once again in the spotlight, as the German domestic courts have the final say on the central issue. We can only hope that they make the right decision: to protect the right to freedom of religion, and to include hardworking, talented, Muslim women in public life.

Ahmed Khogali is a trainee solicitor with Maguire Solicitors, Glasgow

Body donation: practice points

Following last month's article on the impact of "opt-out" organ and tissue legislation on body donation, Michael Kusznir considers how practitioners can best advise clients wishing to donate their body

The Human Tissue (Authorisation) (Scotland) Act 2019 introduced "deemed" consent for organ and tissue donation on death. This may impact on clients who wish to donate their body for medical/anatomical science and research on death (see Journal, July 2021, 16).

What is the issue?

If a deceased's family were not aware, at the time of death, of the deceased's wish to have their body donated, deemed consent could allow for organ or tissue donation. Once organs or tissues are donated, unless it is just corneal transplant, the body cannot be accepted for donation.

What does this mean for me?

Practitioners should be aware of the opt-out organ and tissue donation system introduced by the 2019 Act and its implications for testators wanting to ensure their wishes are implemented.

What can I take away?

Clients need to talk to their family throughout their life about their wish to donate their body and consider opting out. Problems arise when family members are in dispute, often leaving a deceased's wishes unimplemented.

What is the new regime?

The 2019 Act introduced a system of opt-out organ and tissue donation for those who die in Scotland. There are exemptions for (a) adults with incapacity, (b) those who have lived in Scotland for less than 12 months before their death, and (c) children under the age of 16.

Interestingly, children from the age of 12 can make a formal body donation declaration, just as they can make a will following the Age of Legal Capacity (Scotland) Act 1991.

Organ donation is generally only actionable for those patients who have been in intensive care. Body donation does not have this requirement. There are however upper and lower limits for BMIs of deceased who can be accepted, and recent surgery or certain conditions can make an individual ineligible.

Should my client opt out?

This is a live issue for those who wish to donate their body. The 2019 Act does not provide a legislative opt-out for those signed up to donate their body, nor is this perhaps practical given the current lack of a central donation register.

Michael J D Kusznir is an associate solicitor in Burnett & Reid LLP's Private Client team

For those who would not consent to organ or tissue donation but wish to donate their body, the suggestion is they should opt out.

Not opting out would allow a testator flexibility – their wishes may change, or they might not be accepted for body donation.

Can my client be pre-approved for donation?

Unfortunately, it is not possible to confirm at the point of declaration whether the body will be accepted. Bequest coordinators can provide general advice on which conditions may prevent donation.

What should happen on death?

The executor, next of kin or attending doctor should *immediately* contact the university's bequest coordinator following death. Delays can mean that the body is less likely to be accepted.

Universities generally work to a 50 mile limit, give or take, for collection of the body; otherwise the family may need to arrange the transportation direct. There is a degree of flexibility, however, in that the donation can be transferred to a different medical school. For example, Dougal Douglas retired to Glasgow's West End but prepared a declaration to Aberdeen Medical School.

Is there a cost to donating?

Some clients may choose body donation because of concerns over rising funeral costs. The university will provide a free direct cremation, following the use of the body for up to three years. A minority of items can be retained for longer if they are of specific interest.

Can an attorney or guardian authorise donation?

No: it is *delectus personae*. It cannot be delegated to an attorney or guardian, even if there are explicit powers. Individuals should make the relevant declaration when they have capacity.

Is stating in a will a wish to be donated sufficient?

Very rarely, and wills are often only read after the funeral has passed.

Your client should complete, sign and have witnessed (in triplicate) the university's declaration of bequest form. One copy should go to the university, another for storage with the will and another for the client's personal papers. They should also advise their GP of their wishes so it can be added to their notes.

Sentencing deconstructed

In addition to the latest criminal appeal decisions, mainly on sentencing, attention should be paid to the Scottish Sentencing Council's new Guideline on the Sentencing Process

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

There are a few cases this sultry summer to whet the appetite and gloss over when having a staycation in the back garden, but first I should mention the new Scottish Sentencing Council guideline.

Guideline on the Sentencing Process

I don't know if those of you who appear in court have ever thought during an idle moment what goes through the sentencer's mind before passing sentence.

In the bad old days the defence agent would barely have sat down after delivering a carefully crafted plea in mitigation, before hearing the Sphinx-like incumbent on the bench intone "Six months' imprisonment" without further explanation, and you knew you would have to face that awkward post-court meeting in the cells with the client seeking answers for his inexplicable situation.

Fear not, from 22 September you can rely not only on a few words of explanation to accompany the sentence but also seek solace that an eight stage process has been completed before the sentence is passed 10 seconds after you stopped speaking. A longer delay than that, in the summary courts at least, was always perceived as indecision, although past masters such as Sheriff Irvine Smith QC used pregnant pauses and the theatrical dynamics of voice to bring the accused, and more often the accused's mother, to a frenzy before delivering the six months punchline.

Back in the noughties, when I was a judicial trainer, I attended a training event in Northern Ireland designed to school judges in the intricacies of the Criminal Justice Act 2003 sentencing process. A flow chart was provided which was a helpful *aide memoire* when the inevitable appeal was marked. The scribbles on the chart were there for all to see where the methodology of the process had gone awry – often due to poor arithmetic skills, as their Lordships struggled through a procedural minefield.

These guidelines explain the whole process and run to 19 pages, but they are fairly intuitive.

- **The headline sentence** (the one that is never imposed)

1. Assess the seriousness of the offence: culpability (including age/maturity of offender) and harm caused.

2. Select the sentencing range, using any specific guidelines there might be.

3. Identify aggravating and mitigating factors – beware that the voluntary consumption of alcohol and drugs has been nudged from not being a mitigating factor into item 9 of 11 "non-statutory" aggravating factors (cf s 26 of the Criminal Justice and Licensing (Scotland) Act 2010, which put in statutory form the law stated in *Brennan v HM Advocate* 1977 JC 38).

4. Determine the headline sentence.

- **Other considerations**

5. Take into account a plea of guilty.

6. Consider time spent in custody.

7. Consider ancillary orders.

- **Impose sentence**

8. Pass the sentence and give reasons.

Although in the past I have been seen as perhaps inhabiting the opposite end of the sentencing spectrum from Genghis Khan, I have been all for a better consistency of outcome and timeous reasons for the sentence passed.

In future, when the depute fiscal reads unabridged from the police report, I will scribble down the numbers 1 to 8 and note key points, remembering always that if a plea of guilty has been tendered the headline sentence is the dividend, the plea element the divisor, and the outcome the quotient. Punters understand this, as they know that no one ever pays the full price for a sofa from a well-known furniture warehouse.

On the other hand if the case goes the full distance, the witnesses are adduced, the accused observed and possibly heard in evidence and the whole enormity of events revealed, the sentence imposed may exceed the theoretical headline one.

Murder appeals

There are a few appeals in which to consider the principles deployed by the Appeal Court.

MacDougall and Smith v HM Advocate [2021] HCJAC 32 (22 June 2021) and *Smith v HM Advocate* [2021] HCJAC 35 (1 July 2021) both arise from murder convictions.

In *MacDougall* the accused were convicted of the murder by stabbing of a female. The first appellant, a male, as actor was sentenced to life imprisonment with a punishment part of 23 years; the second appellant, a female, to life imprisonment with a punishment part of 21 years reduced to 20 years and two months to reflect a prior period on remand. Each had incriminated the other at trial and neither had given evidence. The deceased was killed near to the house of a drugs dealer and there was a drugs background to the circumstances. The knife had been produced by Smith from her handbag and MacDougall was seen on top of the deceased as if attacking her. The conviction appeal centred on an apparent misdirection as to whether Smith could have been the actor, although there was ample evidence of prior concert and no direct evidence to support that analysis. Similarly Smith's conviction appeal was refused.

So far as the sentence appeals were concerned, the court was of the view that the precedents quoted were more serious and sinister than the present case, and reduced the punishment parts to 20 years for the first appellant and 18 years reduced to 17 years and two months for the second.

In *Smith* the appellant had been convicted of murder by stabbing the deceased in the neck. The conviction appeal focused on the withdrawal of provocation from the jury and raised the question about displaying horrific images to the jurors. The appeal was refused as the appellant had only been subject to verbal abuse, had come to the scene armed with a knife and suddenly stabbed the deceased fatally. The trial judge said that without the appellant's evidence it was not clear what was in his mind at the time. The punishment part of 18 years which had been imposed was wisely not appealed. The court cautioned against the repeated showing of the video and suggested that such evidence should be the subject of a considered case management decision.

Comparative justice

A reference back to the Appeal Court by the Scottish Criminal Cases Review Commission, *Armstrong v HM Advocate* [2021] HCJAC 34 (24 June 2021) concerned the principle of comparative justice.

The appellant, who was 24 at the time, was convicted of attempting to murder the complainer in 2018 by assaulting him to his severe injury, permanent disfigurement, permanent impairment and danger to life. He had been sentenced to an extended sentence of 13 years of which 10 were custodial. There had been five co-accused, four of whom had been convicted of attempted murder. Their ages ranged from 16 to 21. Sentences of between 10 and 14 years were imposed with custodial terms of seven to 11 years.

The appellant had been a member of a gang; the complainer was a member of a rival gang. When he went with members of his gang to the appellant's house and damaged it, the appellant and his co-accused gave chase. The complainer fell and was brutally attacked, struck with a metallic object by the appellant and punched and stamped on when on the ground. The appellant had 18 previous convictions and

had been drinking and taking cocaine prior to the incident. He had been the first to catch the complainer.

Three co-accused had their sentences reduced on appeal on 7 January 2000: *Thomson, Dodds and Renton v HM Advocate*, unreported, where the court in its *ex tempore* opinion said *inter alia* that there was no basis for extended sentences.

An appeal by the appellant subsequent to this decision was refused as no comparative justice point was taken. Their Lordships were concerned that the point had not been raised earlier and that the appeals had not been heard at the same time. Reference to English Sentencing Council Guidelines (2009) would have classed the case as a level 3 attempted murder with a starting point of 15 years.

In terms of the draft guideline by the Scottish Sentencing Council on Sentencing Young People, regard has to be made for their youth and immaturity and it was not surprising the teenage co-accused had their sentences reduced. The present case was more similar to Renton's, who was 21 at the time and had dropped a paving slab on the complainer as a *coup de grace*. The court regarded his sentence of seven years on appeal as extremely lenient. It considered that in the present case an extended sentence was justified as Armstrong had been the prime mover and had an extensive record, but reduced the overall sentence to 11 years with a custodial element of eight years.

These cases show the attitude of the Appeal Court and their reasons for the sentences imposed. They appear not to be slow to reduce sentences if excessive, and sentences of co-accused must be compared closely to ensure justice in the round.

Dangerous driving

In a lengthy opinion the Sheriff Appeal Court dealt with a case which arose out of a driver hitting the central reservation barrier of the A74(M). The case is *Wilson v Procurator Fiscal, Dumfries* [2021] SAC 4 (8 April 2021). Fortunately neither the appellant nor his wife were injured in the incident, nor were other vehicles damaged.

Police arrived on the scene and noted 30m of the central crash barrier were damaged. The appellant approached the police and said he had crashed the car and ended up on the hard shoulder. He later confirmed he had been the driver when formally required to do so by the police under s 172 of the Road Traffic Act 1988. He was cautioned and told the officers he had been driving up from Manchester Airport on return from holiday and must have dozed off. He was then charged.

The sheriff held the statement was admissible, as suspicion did not properly crystallise until the appellant indicated he had fallen asleep. The appellant did not give any evidence. The Appeal Court confirmed the statement was admissible, as when the appellant admitted being the driver it was not clear whether an offence might have occurred, or what sort. The appellant was then cautioned and asked a neutral question from which an admission was made.

The appellant had been fined £500 and disqualified for a year until he resat the full driving test.

The moral, as ever, as per your insurers, is to say nothing after an accident other than comply with the statutory request.

Family

NIKKI HUNTER, ASSOCIATE AND SOLICITOR ADVOCATE, MORTON FRASER LLP

A divorce involving a lottery win of £11,065,500 is bound to attract attention, but this case is noteworthy for the extent to which the attempt to deprive one spouse of their share was unpicked by the court.

In *HAJ v NJ* [2021] CSOH 67 (22 June 2021), the pursuer and first defender were married on 3 April 2015 and separated on 4 October 2018. Wife (W) raised an action of divorce against her husband (H) seeking, amongst other things, an order under s 18 of the Family Law (Scotland) Act 1985 setting aside the transfer of £5,995,000 from H to his parents on 29 August 2019.

Six months after the parties married, H won £11,065,500 in the EuroMillions. At the date of separation, the remaining winnings (amounting to over £9 million) were held in H's name. Between August and September 2019 (after the parties had separated but before the divorce action had been raised), H transferred £8 million to his parents. When the action was raised, H's parents entered the process (as second and third defenders) to assert that they had an interest in a large proportion of funds held by H at the date the parties separated.

Whose winnings?

H's position was that the winnings were not matrimonial property, and even if they were, they should be shared unequally in his favour. He initially pled that the funds in his account at the relevant date were gifted to him by his parents. This averment was subsequently withdrawn. His position on record at proof, and in submissions made on his behalf, was that the funds belonged to his parents and he was holding them as their agent. However, this was entirely inconsistent with his evidence, which was that the funds belonged to "the family" (he and his parents – which excluded his sister, his wife and his children). This was inconsistent with his parents' position, which was that the funds belonged to them because the funds used to purchase the lottery ticket belonged to them and therefore the winnings did also.

Five professional witnesses (two solicitors, two banking managers and an accountant) spoke to their understanding that it was H who had won the lottery and that the winnings belonged to him. H's mother, in a scene worthy of any

television drama, accidentally referred to the lottery proceeds as her son's money during her evidence and then tried to correct herself! Not to mention the evidence of a relationship manager with HSBC, whose evidence was that on 30 January 2020, H's mother told her that the money in her account belonged to her son, that he was going through a messy divorce and she wanted to hide the money but had received a "freeze order" through the courts.

The court had granted an interim interdict on 23 January 2020 against alienation of funds by H or anyone on his behalf. On 16 September 2020, the court pronounced an order prohibiting H's parents from "intromitting, disposing or otherwise transacting with money and property".

Despite these orders, H's mother unsuccessfully attempted to intromit with the funds on a number of occasions, attempting to transfer £8.7 million on 29 January 2020, requesting that funds be released to her on 27 October 2020, and attempting to withdraw £250,000 (this time with H's assistance) on 12 November 2020.

Effective order

Against that background, it is perhaps unsurprising that H was described as "a most unsatisfactory witness", and his mother "an extraordinarily poor witness". Lady Wise went so far as to say: "it is rare in my experience for litigants to be exposed quite so devastatingly". She determined that the lottery proceeds belonged to H and that the remainder of the winnings held by him at the relevant date constituted matrimonial property. W was awarded 50% of the total matrimonial property, resulting in a capital sum of £4,800,676, with interest at the judicial rate from the date the summons was served.

Of course, that would have been a toothless order standing the fact H had divested himself of 95% of the assets he held at the date the parties separated, had it not been for the order sought under s 18.

On considering the conclusion to set aside the transfer of £5,995,000 from H to his parents, Lady Wise was "entirely satisfied" that the test had been met and granted the conclusion. She reminded us that it is not strictly necessary to prove that it was the *intention* of the transaction to defeat in whole, or in part, the claim (of W), because it is the *effect* of the transaction on W's claims that requires examination in terms of the statutory test.

While the vast majority of cases don't usually involve lottery wins and the many, many silver bullets that existed here, this case is an example of the far-reaching powers available to the court under the 1985 Act.

In this case, it literally recovered millions for the wife.

Human Rights

ELAINE GOODWIN,
SENIOR SOLICITOR,
ANDERSON STRATHERN LLP

The case of *Hurbain v Belgium* [2021] ECHR 544 is a recent decision which has reinforced the "right to be forgotten" in terms of article 8 of the European Convention on Human Rights.

Background

In 2004 *Le Soir*, one of Belgium's leading French-language newspapers, published an article about a car accident that caused the death of two people and injured three others. This article was subsequently stored in *Le Soir's* electronic archive. The article mentioned the full name of the driver, G, who was convicted in 2000. He served his sentence and was rehabilitated in 2006.

In 2012 G raised an action against Patrick Hurbain, as editor in chief of *Le Soir*, in order to anonymise the article. G argued that the article should be anonymised in terms of his right to respect for his private life under article 8. The domestic courts subsequently held that G was entitled to have the article anonymised. The Court of Appeal concluded that the most effective way to ensure respect for G's private life, without disproportionately affecting Hurbain's article 10 right to freedom of expression, would be to anonymise the article on *Le Soir's* website by replacing G's full name with the letter X.

Hurbain then lodged an application with the European Court of Human Rights ("ECtHR") on the basis that the order for anonymisation was a breach of his right to freedom of expression under article 10.

Justified interference

When considering Hurbain's application, the ECtHR did not dispute that the civil judgment against him constituted an interference with his rights under article 10. However, the ECtHR determined that the domestic courts were correct in concluding that the article should be anonymised.

In reaching this decision, the ECtHR took into account the Court of Appeal's assertion that the electronic archiving of this article could give G a "virtual criminal record", which could cause indefinite and serious harm to his reputation. The domestic courts also took into consideration the fact that G had already served his sentence and been rehabilitated. Further, as a significant period of time had passed since G's conviction, a convicted offender may not have an interest in being confronted with his or her offence in order to ensure reintegration into society. The ECtHR agreed with the Court of Appeal's assertion that the article was not newsworthy as it related to a historic event which concerned G, an individual who was not a public figure. As such, identifying him in the article did not enhance the public interest aspect.

Accordingly, by a majority of six to one the ECtHR chamber agreed with the domestic court's decision to anonymise the article. When balancing G's article 8 right to respect for his private life against Hurbain's article 10 right to freedom of expression, it was determined that the article's anonymisation was the most effective and proportionate measure in the circumstances. Further, this measure would not affect the text of the original article. As such, the ECtHR determined that the decision of the domestic courts was consistent with article 10, and specifically the interference with Hurbain's article 10 rights was proportionate and in pursuance of the legitimate aim of ensuring G's reputational protection. There was therefore no violation of Hurbain's article 10 rights.

Comment

Although the ECtHR confirmed that its decision has not imposed an obligation on the media to check their archives on a systematic and permanent basis, it is evident that this case has strengthened the "right to be forgotten". This decision has the potential to affect decisions of the Scottish courts which require to take judgments from the ECtHR into account. Publishers and the media ought to give careful consideration to this decision should they receive post-publication requests to remove names or identifying information from archived articles. Should a media outlet find itself in the same position as Hurbain, it appears that the courts will take into account striking the right balance between the rights of the individual and the rights of the media, and whether any interference with article 10 is proportionate and in pursuance of a legitimate aim. The extent to which the Scottish courts will take *Hurbain* into account is yet to be seen. However it is a case that is best not "forgotten" about...

Pensions

JUNE CROMBIE,
HEAD OF PENSIONS
SCOTLAND, DWF LLP

In *R (Enterprise Managed Service Ltd) v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1436 (Admin) (27 May 2021), the claimant sought judicial review relating to the Local Government Pension Scheme (Amendment) Regulations 2020 (SI 2020/179).

The claimant had negotiated an outsourcing contract with a local authority for the provision of services and had become an admission body in the Local Government Pension Scheme

("LGPS") in order to meet requirements to give contract employees access to that pension scheme. It challenged the lawfulness of reg 1 of the 2020 Regulations, which gave retroactive effect to amendments to the Local Government Pension Scheme Regulations 2013 (SI 2013/2356) ("LGPS Regulations").

Under the LGPS Regulations, with effect from 14 May 2018, at the end of an outsourcing contract under reg 64, one result of the actuarial valuation then completed could be a surplus position; an exit credit payment would then have to be made to the exiting admission body. This was the case even if at the time the contract was negotiated the LGPS Regulations did not contain any provision to make exit credit payments and the local authority took all or some of the pension risk by bearing all of the costs and the risk in relation to the contractor's liabilities to the pension fund through the life of the contract (commonly known as pass-through arrangements) – so any exit credit payment would be a windfall to the contractor.

This was later recognised as an oversight, and provisions allowing for certain factors to be taken into account when assessing whether there is an exit credit, and the amount of any exit credit (which could be zero), were introduced on 20 March 2020, but with retrospective effect to 14 May 2018. This meant that any exit credits that would have been payable between 14 May 2018 and 20 March 2020 but had been withheld and not paid, might not be payable.

Justified extinction

When the claimant's contract expired in June 2018, a surplus of £6,518,000 was identified, but was not paid out by the LGPS administering authority.

The claimant alleged that its rights under article 6 of the European Convention on Human Rights had been breached by the retrospective extinction of the claim it had raised for payment.

Noting that a key question was whether there was a sufficiently compelling public interest in making the 2020 Regulations retrospective, thus preventing payment not only of exit credits which were anticipated but also of those which had actually fallen due but had not been paid, the court held that the defendant was justified in correcting its own policy error with retroactive effect for a number of reasons, including:

- Exit credit payments can, at least in some cases, be fairly characterised as a windfall where parties made their economic bargain on the basis of pension risk which they knew about, but without any adjustment for the possibility of exit credits (which did not exist at the time this contract was entered into), or where the surplus would or could arise from the performance of a fund which, though notionally associated with the admission body at the point of admission to the LGPS, did not come from that body in the first place.
- The effect of paying exit credits which had already fallen due when the 2020 Regulations came into force would be to diminish the ability of the LGPS funds to provide pension benefits, creating a real risk of future deficits which ultimately would fall on taxpayers.
- The benefit of the windfall would be for commercial companies.

Scottish comparisons

The position in Scotland is not the same. The possibility of exit credit payments was also introduced in 2018, but there are no such amending regulations to restrict exit credit payments. This position was raised by the claimant as part of its argument on article 6. However, Bourne J indicated that the claimant could not "rely on the absence of any equivalent to the 2020 Regulations in Scotland for the inference that the regulations have no compelling justification". He preferred the contention by counsel for the defendant that in Scotland, "similar concerns have not arisen, there being a significantly lower level of outsourcing of services by local authorities".

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Stronger nudge on pensions

The UK Department of Work & Pensions seeks comments on its draft regulations for delivering a "stronger nudge" to pensions guidance from trustees and managers when individuals seek to access pension flexibilities applying to occupational pension schemes. See www.gov.uk/government/consultations/stronger-nudge-to-pensions-guidance

Respond by 3 September via the above web page.

Workplace parking

The Transport (Scotland) Act 2019 introduced a discretionary power for local authorities to implement workplace parking licensing (WPL) schemes. The Scottish Government seeks views on detailed regulations for such schemes. See consult.gov.scot/transport-scotland/workplace-parking-licensing-regulations/

Respond by 6 September via the above web page.

Gaelic

The Scottish Government seeks views on its third Gaelic Language Plan, as required by the Gaelic Language (Scotland) Act 2005, promoting the acquisition of skills in Gaelic and expanding the respect for and recognition of the language. See consult.gov.scot/learning-directorate/gaelic_language_plan/

Respond by 9 September via the above web page.

Social Housing Charter

The Housing (Scotland) Act 2010 imposed on Scottish ministers the duty to set standards and outcomes that social landlords should achieve for tenants and other customers. Views are sought on the Scottish Social Housing Charter, last revised following review in 2016. See consult.gov.scot/social-housing-services/scottish-social-housing-charter-review/

Respond by 9 September via the above web page.

Adult support and protection

The Scottish Government's Adult Support and Protection Code of Practice and its Guidance for Adult Protection Committees, issued under the Adult Support and Protection (Scotland) Act 2007, were last revised in 2014. Ministers seek views on updating and refreshing these in line with relevant changes in policy and legislation. See consult.gov.scot/health-and-social-care-integration/adult-support-and-protection-updated-guidance/

Respond by 28 September via the above web page.

... and finally

As noted last month, the Scottish Government seeks views on prohibiting large shops from opening on New Year's Day to allow workers the day off (see consult.gov.scot/economic-development/new-year-s-day-trading-for-large-retailers/ and respond by 24 August); and the UK Government seeks views on new powers to block a company's market listings if deemed a risk to national security (see www.gov.uk/government/consultations/consultation-on-a-power-to-block-listings-on-national-security-grounds and **respond by 27 August**).

This does however mean that in Scotland, aspects identified and intended to be resolved by the 2020 Regulations in England, and confirmed by the outcome of the judicial review in the *Enterprise* case, remain potential challenges and issues for local authorities and contractors in relation to outsourcing contracts in Scotland.

Criminal Law

GILLIAN MAWDSLEY,
POLICY EXECUTIVE,
LAW SOCIETY OF SCOTLAND

In March 2021, the Lord Justice Clerk's Review Group published its report on *Improving the Management of Sexual Offence Cases*. This cross-justice, comprehensive review was set up to consider how to improve dealing with serious sexual offence cases within the Scottish criminal justice system.

Background to the review

The volume of sex offence cases has substantially increased, now constituting 75% of the COPFS High Court workload, a trend expected to continue. The review's aim was: "to improve the experience of complainers by considering if the trial process should be modified or modernised".

The proposals took a broad approach, focusing on court and judicial structures, procedure and practice. Crucial to making any changes was the need to respect the rule of law and not to compromise the rights of the accused in terms of article 6 of the European Convention on Human Rights.

Systemic practical and legislative changes have already been made to allow evidence to be taken on commission and/or involve the use of special measures. On their own, such practices have not been enough. Importantly, complainers should not suffer increased trauma by the inevitable repetition of their experience in the somewhat stressful adversarial criminal justice system. At the same time the courts cannot cope with the significant increase in case numbers. The review concluded that the way in which sexual offences are progressed could be improved.

What to improve

Criticisms of sexual offence cases tend to command newspaper headlines. It is important that there is a measured and reflective response on what can and should change to improve the criminal justice system. Inevitably that focuses mainly on the criminal legal profession.

Publicity when the review was published emphasised the jury question in discussing possible alternative methods, reflecting partly on comparative justice systems. The review group were, not surprisingly, divided on any conclusion. In contrast, the Law Society of Scotland's position remains clear in opposing any proposed introduction of judge only trials for sexual offences or otherwise. Consideration of the jury research work led by Professor James Chalmers and others, and the continued debate on the not proven verdict, will no doubt continue before any fundamental changes can be made. Rather than that being the focus of this article, recommendations were made where there could be earlier and successful changes.

Delay: The court backlog has of course increased due to the COVID pandemic. Additional courts are being brought in from September. Business being processed in the High Court, according to Scottish Courts & Tribunals Service, is 12% above pre-COVID rates. While this is welcomed, it is recognised that 2020-21 has been frustrating and stressful for all involved within the criminal justice system, be it complainers or accused, some of whom have been on long periods of remand. All have been waiting for that uncertain date when their trial starts.

Communication: Several review strands could broadly be grouped as communication where enhanced provision of information and advice would help to inform complainers about what to expect from the system and to manage their expectations. That process must not depend on postcode lotteries. Clarity is needed from their first engagement with the justice system, continuing through to trial and post-court. The suggestion as to independent legal representation (ILR) has a definite positive role.

Creating publicly funded ILR would help support and inform the complainer. There are increasing numbers of applications being made under s 275 of the Criminal Procedure (Scotland) Act 1995, reflected in the plethora of reported appeal cases. These applications, if granted, allow for intimate and sensitive questioning as to the complainer's private life and may affect their rights under article 8 of the European Convention. Ensuring that complainers are supported and understand the nature of such applications, and advocating for their interests, needs to be balanced with the right to a fair trial and for the accused to challenge the evidence. Equality of arms must be ensured in achieving justice for all concerned.

A specialist court?

The review suggests that consideration is given to establishing a specialist court to try sexual offences. This would involve the pre-recording of the complainer's evidence and adopting what is described as trauma-informed practices and procedure. Exactly when that aspiration, if agreed, could be achieved is uncertain. There are implications for the scope of such a court, the prosecution of other serious non-sexual offences, and the identification and qualifications of those permitted to appear in such courts.

The review correctly recognises the role of training, including specific training for all legal practitioners, defence and Crown, and the judiciary. As cases become more complex, complete with evidential challenges, reviewing, identifying and consolidating the skills required – including oral, academic and written – appears timely.

What the prosecution of sexual offences will look like in 2026, when the current Parliament concludes, is unknown. The review will promote deeper discussion that should include the legal profession, which itself should not stand still in being able to respond to changes being brought forward. Public opinion may not allow the status quo to remain.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Kenneth Stewart Gordon

A complaint was made by the Council of the Law Society of Scotland against Kenneth Stewart Gordon, solicitor, Aberdeen. The respondent acted in a conflict of interest situation in relation to the sale of part of a controlling shareholding in a company. Although the respondent recognised that there was a conflict of interest and referred the purchasing company to another firm, he continued to represent that company in relation to other business and the Tribunal found that the role he accepted gave rise to a risk of his having a conflict of interest; he did not exercise sufficient caution to prevent that happening; and a conflict of interest did arise. It concluded that the conduct was a serious departure from the standards of competent and reputable solicitors, but was not reprehensible. There was insufficient information before the Tribunal for it to hold that there had been a breach of fiduciary duty to the client.

The Tribunal was not satisfied that the respondent had failed to act with integrity. Although he had failed to act in the best interests of his client, the conduct was not sufficient to reach the conjunctive test of a serious and reprehensible departure from the standards of competent and reputable solicitors. The conduct was not likely to bring the legal profession into disrepute. The Tribunal had concerns about the respondent's involvement in the transaction in question. However, its decision was based on the agreed facts in the joint minute and the averments of misconduct contained in the complaint. The Tribunal considered that the case was very close to the boundary between unsatisfactory professional conduct and professional misconduct. It remitted the case to the Society under s 53ZA of the Solicitors (Scotland) Act 1980 for consideration of unsatisfactory professional conduct.

Heat networks: the key to low-carbon heating?

A new Act of the Scottish Parliament is intended to encourage the use of heat networks to help the drive to cut carbon emissions. But what are they, and how is the legislation intended to work?

Property

JUDITH STEPHENSON, PARTNER, SHEPHERD AND WEDDERBURN

The built environment contributes 20% of the nation's greenhouse gas emissions, making it a key player in tackling the ambitious challenges we face on the journey to a low or net zero emissions society.

How we heat (and cool) our buildings is a crucial element in reducing carbon emissions. But there is no single answer that will deliver the required emissions reductions to achieve government targets. Location, along with available stock and infrastructure, will determine the best combination of solutions in different areas, and a variety of distribution, generation and resource options are available. District heating and heat networks have a big part to play in cutting carbon emissions, but we are still far from a fully joined-up strategy that provides a clear path for individuals and organisations to follow.

Regulating heat networks

The Scottish Government has taken a step towards a comprehensive strategy, with the passing of the Heat Networks (Scotland) Act 2021. The Act (still to be brought into force) sets up a regulatory and licensing system for district and communal heating, with the aim of accelerating its use in Scotland. The Scottish Government's aim is that low carbon technologies such as heat networks will supply heat to 35% of domestic and 70% of non-domestic buildings by 2032.

What are heat networks?

Instead of providing individual systems within buildings to heat water and provide space heating, heat networks are centralised sources of energy that deliver heat to buildings, in the form of hot water or steam, through an infrastructure of insulated pipes. Heat networks can use a variety of heat sources such as combined heat and power (CHP), gas boiler, renewables and recovered waste, and are often more efficient than individual fossil fuel heating systems. Heat sources can be changed at the centralised energy centre to better align with climate change targets, without having to disrupt the heat users. This is in contrast to the disruption it would cause a property owner if, for example, they wished to change the heating system in their property from gas to a biomass or geothermal system.

Small-scale communal heating systems have been successfully utilised at development sites at Slateford Green and Lasswade Road, Edinburgh, and on a larger scale at the Queen's Quay multi-use development site built on the former John Brown shipyard, Clydebank. The network installed at Clydebank is the first large-scale water source heat pump scheme of its kind in Scotland and will make a significant contribution towards climate change targets for West Dunbartonshire Council.

Duties of operators under the Act

There are already more than 830 heat networks in Scotland, but so far the sector has been unregulated. The regime set up by the Act will provide greater consumer protection, by requiring operators to:

- have a licence before they can set up a heat network;
- apply for consent to develop a new heat network or expand an existing one; and
- obtain consent to operate a heat network.

"Small-scale communal heating systems have been successfully utilised at development sites in Edinburgh"

Licences are likely to be liable to standard sets of conditions, to be produced and published by the licensing authority. Licences will continue in effect until revoked by the licensing authority, or surrendered by the holder. The licensing authority will have powers to modify or attach special conditions to licences, which may be revoked if the holder can no longer perform the required activities, or breaches a condition of the licence.

It is possible, perhaps even likely, that the person or organisation that constructs the heat network will not be the operator, so the Act provides for obtaining consent to construct, or to operate, or both. It will be an offence liable to a fine up to the statutory maximum of £10,000 to provide a heat network without a licence. The licensing authority for this purpose is the Scottish ministers or another body designated by them.

Powers of operators under the Act

It is well known that public utility providers enjoy a wide range of statutory powers that make it easier for them to carry out their activities. The Act gives heat network licence holders similar rights and powers, such as the ability to choose routes for pipes and a right to access for surveys and repairs.

These include the right to compulsorily acquire land required in connection with the construction or operation of a heat network, or to obtain a servitude right required. Such acquisition will be able to proceed under existing compulsory purchase procedures.

In addition, licence holders will have "network wayleave rights" allowing them to install apparatus on, under or over any land, and for access in order to maintain and repair. A wayleave can be acquired by agreement

with the landowner, or if they do not agree, by application to Scottish ministers. Landowners can make representations to ministers before such a wayleave is granted.

Licence holders will also be entitled to enter land, on giving notice, to survey it to determine whether it is suitable for construction or operation of a heat network. This includes sinking boreholes and investigating subsoil and minerals. It will be an offence intentionally to obstruct a licence holder from carrying out a survey (carrying a fine of up to £1,000 on conviction).

Finally, licence holders will benefit from "network land rights" that include powers to enter land for installation, inspection, maintenance, alteration and replacement of apparatus, and any incidental works, including clearing trees and shrubs. Such activities may, however, be curtailed if the land is occupied by a statutory undertaker, where it could obstruct or interfere with that undertaker's work, unless the licence holder has the undertaker's permission.

Compensation may be payable for damage or disturbance caused by a licence holder while carrying out a survey or work.

Registers of licences and wayleaves

The Act contains provisions that will allow Scottish ministers to require a register of wayleaves to be set up. While it is not currently intended to create this register, it may be considered in the future.

However, the licensing authority does have to prepare and maintain a register of heat network licences – a public register available for inspection free of charge. This will be a useful source of comfort for consumers, who will be able to get independent confirmation that their operator is both authorised and regulated.

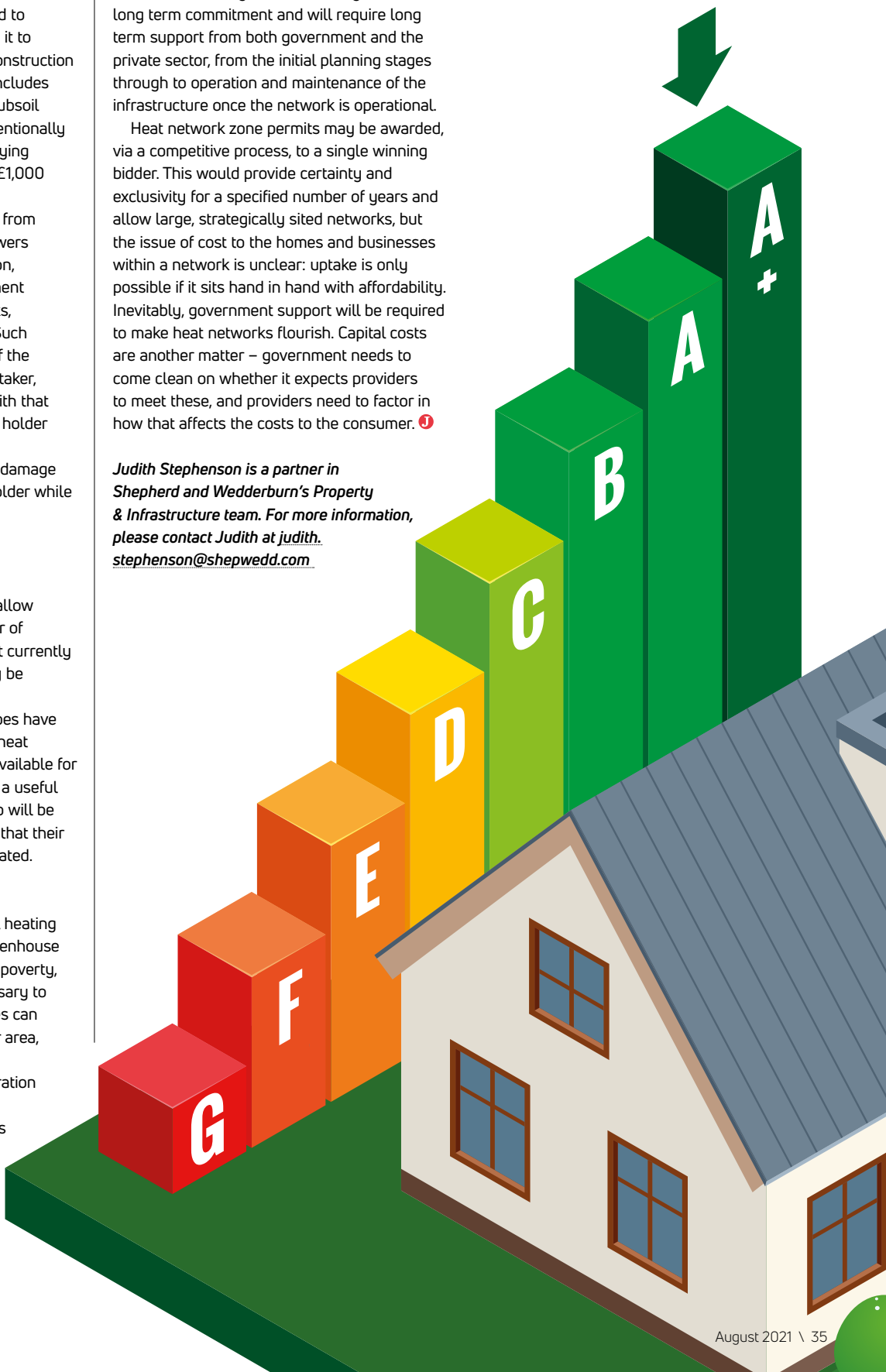
A network of networks?

District heat networks and communal heating systems can deliver reductions in greenhouse gas emissions and help alleviate fuel poverty, but community support will be necessary to help them proliferate. Local authorities can designate heat network zones in their area, identifying areas that are particularly suitable for the construction and operation of a heat network.

District or communal heat networks generally work best in urban areas and new-build developments, which are heat-dense. But heat networks depend on the existence of appropriate infrastructure in the area. The installation of district heating systems and their ancillary infrastructure can be complex, time-consuming and often requires a significant cost outlay at the beginning of a development. The use of a district heating network on any site is a long term commitment and will require long term support from both government and the private sector, from the initial planning stages through to operation and maintenance of the infrastructure once the network is operational.

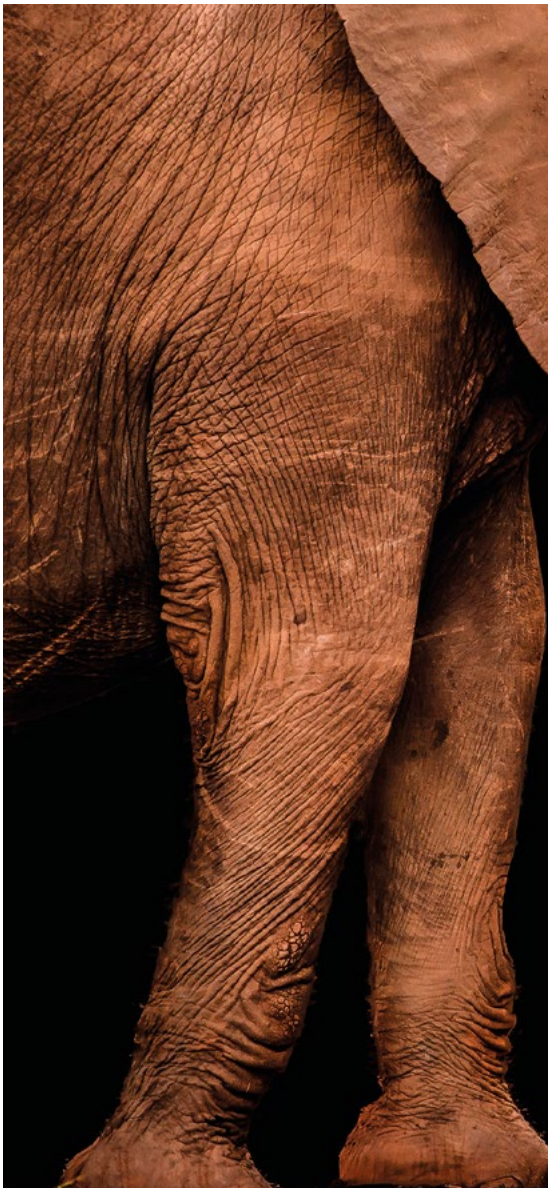
Heat network zone permits may be awarded, via a competitive process, to a single winning bidder. This would provide certainty and exclusivity for a specified number of years and allow large, strategically sited networks, but the issue of cost to the homes and businesses within a network is unclear: uptake is only possible if it sits hand in hand with affordability. Inevitably, government support will be required to make heat networks flourish. Capital costs are another matter – government needs to come clean on whether it expects providers to meet these, and providers need to factor in how that affects the costs to the consumer.

Judith Stephenson is a partner in Shepherd and Wedderburn's Property & Infrastructure team. For more information, please contact Judith at judith.stephenson@shepwedd.com



Power of the nudge

Behavioural economics – understanding influences on choices – is something that lawyers can adopt to enhance their negotiating skills, and one in-house legal team is applying it also within the team



In-house

MARLIESE PERKS, LEGAL COUNSEL, NATWEST GROUP

Context is important in the choices we make in everyday life. If I had been asked last year whether I was in control of my own choices, I'd have answered with an emphatic yes. And yet, aged 17, I found myself signing up to be an organ donor when I'd gone online only to apply for my driving licence. Aged 23, I didn't give much thought to my auto-enrolment into a firm pension scheme. Nowadays, I find myself adding extra treats to my basket while standing in the supermarket queue, saying yes to the Starbucks promotion, and never quite getting around to changing my energy provider (even if there are cheaper options out there).

Sound familiar? We probably all think that we are in control of our choices but, in reality, subtle influences (or nudges) impact our behaviour without us even realising it. Why is this? The science behind this is a discipline called behavioural economics which we've been leveraging in our team over the last year.

There are many situations in our day-to-day roles where we are looking to achieve a certain outcome – for example, making an improvement or change. For most of us in those situations, we rarely have the authority to require that others take action or buy into the change simply because we tell them to. Instead, it's important for us to leverage our influencing skills and exercise soft power in order to nudge others towards our desired outcome.

Applying behavioural economics is a helpful discipline to continue building on these influencing skills and complement those behaviours. For example, in our team we have used behavioural economics to enhance the proposition that we offer to our stakeholders and make team processes even better.

What is behavioural economics?

The principles of economics assume we make decisions rationally in line with our longer term goals. If we were rational, we'd start saving early for retirement, eat healthily and arrive at work fully engaged and motivated. Behavioural economics on the other hand acknowledges that as humans we act instinctively, making many decisions out of habit or as a result of our cognitive biases.

Let's take a look at some of the key biases and how we can easily leverage them in the legal profession.

Herding

What it is: we all have a natural desire to stay with the crowd and we don't want to stand out. This means that our behaviour is heavily influenced by what we understand to be the norm. For example, HMRC found that the percentage of UK citizens paying their tax on time was increased substantially by the simple addition of "9 out of 10 taxpayers pay their tax on time" on the top of the letter requesting payment, with payment rates increasing further when this was tied to a local area or postcode. We don't want to be an outlier, so we are more likely to follow the herd.

How we can leverage this: When influencing a colleague or client to make a desired decision, use your experience to your advantage by highlighting the norm. For example, "most stakeholders have taken the approach that...". You can also effectively use this in negotiations to highlight the approach that you have seen agreed with other counterparties you've negotiated with. In our team we have used herding to encourage colleagues to do those admin tasks that fall down to-do lists by calling out a constituency who have completed them, tapping into the bias that we want to fit in with the crowd.

Anchoring

What it is: We have a bias towards being overly reliant on the first piece of information that we are given. For example, in the retailer TK Maxx, labels show the original retail price of the item above the TK Maxx price. We are more likely to buy the item against that backdrop because we feel like we are getting a bargain, versus the price alone in another shop without an anchor.

How we can leverage this: Anchoring is very powerful in negotiations, particularly in relation to liability caps. By suggesting a figure first to

"anchor" the discussions, you can influence the counterparty to suggest a more palatable level of liability. Likewise, when advising stakeholders on proposed positions, switching up the order in which we give information provides an opportunity to influence. For example, instead of saying: "Party A has offered a liability cap of £500k but the organisation typically looks for liability caps of around £1 million", try "Our expectation around liability as an organisation is £1 million minimum. Party A has only offered £500k here." Anchoring the information this way will make the lower liability cap much less palatable.

Status quo bias/Default bias

What it is: This is the natural preference towards things staying the same. This is the reason I have failed to change my energy provider, as I'm more likely to accept the proposed renewal price than seek out a new provider. You will often see this leveraged by marketers who will try to tap into our bias by labelling the choice that they want you to make as the "most popular option" or auto-opting us in for the default. The UK Government's policy around pension auto-enrolment is based around this preference for the default, and so too is the Scottish Government's recent move to an opt-out system for organ donation.

How we can leverage this: When updating our template contracts, we leveraged default bias by pre-populating areas of our contract templates (such as interest rates and timeframes for notice periods) with suitable positions that worked for our organisation. Those we are negotiating with are less likely to amend these due to default bias than if we left unpopulated blanks. Likewise, in our team, when establishing changes to team processes, we've been keeping colleagues' bias towards the status quo in the front of our minds. To counter this, we have been ensuring that we are highlighting the incentives from the outset to encourage a change.

Loss aversion

What it is: This is the tendency for us to feel more pain from losses than we do from equivalent gains. For example, imagine you found £20 in the street. You would feel happy for a few hours, imagining what you might spend it on. Contrast that with how you'd feel if you lost £20 – the pain of losing lingers far longer. The pain of losing out is almost twice the joy of gaining.

How we can leverage this: When providing legal advice, loss aversion can be used to encourage clients to make intelligent risk decisions by highlighting what they stand to lose if they take a particular course of action.

Retaining choice

It's important to note that the examples above don't remove the choice for the individual; rather they simply leverage natural biases to encourage a particular choice. Cass Sunstein, one of the leading professors on this topic, noted in his work that "putting healthy food at eye level counts as a nudge; banning junk food does not".

Applying this to the legal profession

As legal advisers, we know that strong influencing skills are important to help us achieve good outcomes for clients and to build our relationships with them. The ability to add use of these "nudges" to this skillset and leverage behavioural economics can allow us to add another tool to our influencing toolbox, grow our personal influence in those relationships and help us drive the right outcome. Using subtle influencing cues can encourage stakeholders we work with to make desirable decisions around risk as well as allowing us to remove unnecessary friction. These little tweaks can make a big impact, and they don't cost us a penny to apply. It's a win-win.

If you'd be interested in learning more about how we're applying this in our work at NatWest Group, please feel free to contact me at marliese.perks@natwest.com

Profession stands up for rule of law against PM

The Law Society of Scotland and Faculty of Advocates have both spoken out about further critical comments from the UK Government about professional lawyers.

In a broadcast interview last month, Prime Minister Boris Johnson attacked the Labour Party as having "consistently taken the side of left-wing criminal justice lawyers against the interests of the public".

In response, Society President Ken Dalling asked what maligning lawyers' professionalism was intended to achieve, beyond "casting aspersions on the commitment of criminal defence lawyers who dedicate their skills, experience and time to protecting and upholding the legal and human rights of people in this country".

Asking Mr Johnson to "reflect carefully on his language", he continued: "This country's commitment to upholding the rule of law is something for which we are rightly renowned throughout the world. I cannot imagine what damage it does to our global reputation to hear our Prime Minister suggest that criminal defence lawyers are in some way acting contrary to the interests of the public."

Also deploring the comments, Faculty said they "appear to be part of a strategy to undermine the rule of law". Its statement added: "Lawyers represent their clients without associating themselves with the merits, or the politics, of their client's position. They do so because that is their duty. The nature of this duty does not change whether the lawyer is prosecuting or defending a case. The Prime Minister knows this and yet sees fit to make political capital from a baseless mischaracterisation. In so doing, he risks damaging the system of criminal justice irreparably.

"Moreover, the current rhetoric around lawyers is irresponsible and risks serious consequences."

Lawscot Foundation celebrates first graduates

The first six students supported by the Lawscot Foundation to complete their law degree courses celebrated their graduations in July.

Set up by the Law Society of Scotland in 2016, the Foundation supports academically talented students from less-advantaged backgrounds in Scotland through their legal studies.

The six who graduated were the first successful applicants in 2017. They are Alisha O'Callaghan, University of Edinburgh; Declan Dundas, University of Dundee; Emily Simpson, Robert Gordon University, Aberdeen; Jordan Scott, University of Dundee; Laura Noble, University of Abertay, Dundee; and Natasha Kabir, University of Edinburgh.

Two are moving on to the Diploma in Professional Legal Practice in the coming academic year, one is undertaking a masters degree, and three are still planning their next steps.

Offering congratulations, Christine McLintock, chair of the Foundation, commented: "Our students have impressed us every step of the way, especially given the challenging backgrounds that they have contended with. We are incredibly proud to have played a part in helping our students reach this stage and we wish them every success, wherever their careers take them."

Scotland to host Adult Capacity Congress

Scotland is to host the World Congress on Adult Capacity from 7-9 June 2022. The organisers have decided that the Congress should go ahead as a live event at the Edinburgh International Conference Centre.

The website, with link to register interest, is at www.wcac2022.org Actual registrations open in October. It is accepted that commitments may come later, when people can see how progress out of the effects of the pandemic is proceeding.

Scottish solicitor Adrian Ward is president of the organising committee.

Normally held biennially, the 2020 event due to take place in Buenos Aires was cancelled because of COVID-19, but the Argentine capital will now host the Congress in 2024.

ICCA now set for September 2022

The 25th Congress of the International Council for Commercial Arbitration (ICCA), hosted in Edinburgh with the Scottish Arbitration Centre, has been further rescheduled for 18-21 September 2022.

Originally due last year, the global meeting was hit by COVID-19 and rearranged for September 2021, but the organisers have decided in view of continuing travel restrictions to postpone for a further year. Registered delegates will automatically have their registrations and, where relevant, their accommodation transferred.

For further details visit icca2020.scot/

SLAB commits to EHRC equality review

The Scottish Legal Aid Board has signed an agreement with the Equality & Human Rights Commission, committing to improving its assessment and review of the impact of its policies on people with protected characteristics to put equality considerations at the centre of its work.

Made using the EHRC's enforcement powers under s 23 of the Equality Act 2006, the agreement follows the EHRC raising concerns that SLAB was not always sufficiently assessing the impact of its policies on different groups in terms of the public sector equality duty.

Chief executive Colin Lancaster said: "We have already embarked on a large scale programme of review of our policies guiding how we apply the legal aid schemes, and assessing the equalities impacts of those policies is a core element of this work.

"But we recognise that there is more we need to do... Over the next two years we will be following our agreed action plan across a range of work streams to ensure equality is at the heart of our work."

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key work in July is highlighted below. For more information see the Society's research and policy web pages.

Misogyny and criminal justice

The Independent Working Group on Misogyny and Criminal Justice ("IWG") was set up to consider how the Scottish criminal justice system deals with misogyny. This followed the debates at bill stage on the Hate Crime and Public Order (Scotland) Act 2021, when it was agreed to consider whether there are gaps in the law that could be addressed by a specific criminal offence, or a statutory aggravation and/or a stirring up of hatred offence.

As part of its work, the IWG invited the Criminal Law Committee to provide written evidence. The committee's view was that if there are any proposed developments or changes to the criminal law, a need must be demonstrated. Following the principles of good lawmaking, any new law must be necessary, clear, coherent, effective and accessible. That includes a need to prescribe the scope of the offence, in other words the misogynistic behaviour that is intended to be included. Equality also requires consideration of similar behaviour directed towards men.

COP26

COP26, the UN Conference of the Parties, will take place at the SEC in Glasgow between 31 October and 12 November 2021. Thousands of delegates including many heads of state are expected to attend.

The Society's Working Group on COP26 & Climate Change organised an event on 6 July looking at the policing of COP26 from a strategic, operational and legal perspective, in conjunction with the Member Services team. It attracted more than 80 attendees and considered the police management of risks in relation to COP26, which extends to events prior to and outside of the Glasgow venue. A further event focused on the practical implications is planned for September.

Nationality and Borders Bill

The UK's legal immigration system has been reformed by the ending of free movement within the EU and the introduction of a new points-based system. The Nationality and Borders Bill, which had its second reading on 19 and 20 July, is intended to tackle illegal migration, asylum, and to control the UK's borders.

This is an important and controversial bill. Although the preceding white paper was entitled *A New Plan for Immigration*, the bill is not about immigration law, but nationality and asylum law. The nationality provisions are relatively uncontroversial. However the Society's second reading briefing raised a number of issues about the asylum provisions, including the potential for clause 10 to reduce the prospect of families being able to use one of only two safe and legal routes currently available to asylum seekers; and that the change clause 29 makes to establishing the grounds of "well founded fear" of persecution contradicts more than 20 years of consistent and considered judicial application.

The briefing highlighted a conflict between clause 38, which would criminalise helping an asylum seeker to arrive in the UK *even if not for gain*, with the duty to render assistance under article 98 of the UN Convention on the Law of the Sea.

It also challenged the broad regulation-making power the bill grants the Secretary of State, including the ability to amend primary legislation not only from the UK Parliament but also the Scottish Parliament, without a corresponding requirement to consult and where appropriate seek consent from the devolved administrations.

Child contact centres

The Child & Family Law Committee responded to a Scottish Government consultation on regulation of child contact centre services. The Society supported such regulation, considering it important that standards for the sector are both sufficiently robust to protect the welfare of the children involved, and flexible enough to meet the individual needs of families and the local services available across Scotland. It also highlighted the implications of the duty under s 11 of the Children (Scotland) Act 2020 for solicitors to refer only to regulated child contact centres, and the need for accurate information around the status of a contact centre to ensure compliance with this duty.

Property developer tax

The Tax Law Committee responded to an HM Treasury consultation on *Residential Property Developer Tax: consultation on policy design*. Considering the models set out, the committee expressed the view that a sales tax model may be more appropriate than a profit-based model, which excludes deductions and losses and which will in some cases (for example, build to rent) create a tax point before there is any realisation of an asset. This could create funding issues for developers, is not usually considered the most convenient point at which to impose a tax, and could adversely impact on build-to-rent developments being instigated and therefore distort supply of housing in that sector.

The committee also noted that the criterion for the tax appears to be based on a two-part test of: (i) the relevant level of absolute profit; and (ii) the nature of the activity being undertaken. It highlighted a lack of clarity as to whether there is a third component, based on the type of company or business activity involved.

ACCREDITED PARALEGALS

Civil litigation – family law
CARLY RUSSELL,
Hilland McNulty Solicitors.

Criminal litigation
MHARIA GIURI,
Bruce McCormack Ltd.

Remortgage
LAUREN SPINK,
LESLEYANNE DAVIES,
RACHEL EDWARDS,
all Your Conveyancer.

Residential conveyancing
CARA BURNETT, McLean & Stewart LLP; TONI HEWAT, Burness Paull; ELIZABETH McDOWALL, The McKinstry Company; SAMANTHA BRODIE, Frederick & Co Solicitors Ltd.

Wills and executries
KIRSTY ALLAN,
Melrose & Porteous.

OBITUARIES

CHRISTIAN JOSEPH JURGENSON, Edinburgh
On 23 June 2021, Christian Joseph Jurgenson, formerly partner of and latterly consultant to the firm DMD Law LLP, Edinburgh.
AGE: 63
ADMITTED: 1983

ALEXANDER DOUGLAS MOFFAT WS, Edinburgh
On 13 July 2021, Alexander Douglas Moffat, sole partner of Alexander Moffat & Co WS, Edinburgh.
AGE: 75
ADMITTED: 1969

CRAIG RICHARD GRIMES, Glasgow
On 14 July 2021, Craig Richard Grimes, partner of the firm Anthony Mahon Ltd, Glasgow.
AGE: 54
ADMITTED: 2009

HUGH GERARD SHORT, Dunfermline
On 22 July 2021, Hugh Gerard Short, partner of the firm Ross & Connel LLP, Dunfermline.
AGE: 68
ADMITTED: 1976

LEGAL AID

SLAB not liable for interest – but should be: SAC

The Sheriff Appeal Court has ruled against a claim for statutory interest on unpaid legal aid fees due to solicitors – while commenting that the matter requires legislative attention

Payments of solicitors' fees by the Scottish Legal Aid Board do not attract statutory interest under the Late Payment of Commercial Debts (Interest) Act 1998 if not made within 30 days, the Sheriff Appeal Court has ruled.

Sheriffs Principal Mhairi Stephen QC, Duncan Murray and Craig Turnbull gave the decision in allowing an appeal by SLAB in a case brought by Ormistons Law Practice Ltd: [2021] SAC (Civ) 22 (11 June 2021). The claim concerned interest of £23.59 on a balance of £131.70 found due by the auditor following a taxation, but the case was said to affect "many thousands of legal aid accounts".

At first instance the sheriff had held that "commercial transaction", in the EU directive on which the Act was based, was wider than a contract; that as the directive was expressed to cover the legal profession and also public authorities, and the pursuers were in business, the relationship between them and SLAB in this case could properly be described as a commercial transaction; and that the mischief the directive was intended to address covered the late payment of money owing to the pursuers.

On appeal SLAB argued that the sheriff erred in concluding, first, that the schemes for payment of legal advice and assistance, and assistance by way of representation, fell within the directive; and secondly, that if they did, the 1998 Act could be construed in a manner that gave effect to the intention of the directive. The solicitors argued that on a purposive construction there was no violation of the terms of the directive in applying it to SLAB's obligations under the Legal Aid (Scotland) Act 1986; and it was fundamental to both the directive and the 1998 Act that there was no requirement that the services were provided to the debtor.

Beyond the scheme

Sheriff Principal Stephen, delivering the opinion of the court, said it was necessary to look first at the structure and context in which the parties operated. Although "commercial transaction" was a broader concept than a contract, fulfilment by the creditor of contractual and legal obligations was a precondition of entitlement to interest. The directive did not regulate transactions with consumers, and "If, as it appears to be, the scope of the directive is limited to payments made as remuneration for commercial transactions, then it is doubtful whether payments made by a public authority as remuneration for services provided by solicitors to a client as part of a consumer contract fall within its scope. The LAA [Legal Advice and Assistance] scheme is a statutory scheme by which the Board is obliged to make payments from the fund... if called upon to do so by virtue of the solicitor submitting a claim for fees and outlays properly incurred in acting for a client in receipt of LAA."

Dealing with the respondents' argument she continued: "as no goods or services are being provided by the respondent to the Board, the relationship between the parties is not in the nature of a commercial transaction as defined and envisaged by the directive... Instead, the relationship is one of regulated indemnity for payment of fees and outlays reasonably and necessarily incurred on behalf of the client... Any services provided are by the solicitor to the client, that being a consumer transaction which is excluded from the directive".

"The claim concerned interest of £23.59 on a balance of £131.70..., but the case was said to affect 'many thousands of legal aid accounts'"

Further, SLAB's obligations to the solicitor arose not as a result of a commercial transaction between the parties but in terms of the statutory framework of the 1986 Act and associated regulations. "In our opinion, that framework sits outwith the scope of the directive."

In any event there was a fundamental difficulty for the respondents in interpreting the 1998 Act in a manner which encompassed the statutory legal aid scheme. "To read into ss 1 and 2 a statutory scheme for the provision of legal aid would be to alter the fundamental wording and purpose of the legislation."

Fairness required

It followed that the appeal had to be allowed. "However," Sheriff Principal Stephen observed, "the matter does not end there." Referring to *Smith v Scottish Legal Aid Board* 2012 SLT 694 – in which SLAB conceded a liability to pay interest on a claim for payment of counsel's fees – she commented: "It appears to us that the application of the directive was not seen as controversial in the context where a public authority is making payment of fees incurred by counsel. It undoubtedly creates an unattractive and surprising anomaly that the Board accepts that they are liable to pay interest on counsel's fees but should not be liable for interest on the fees and outlays paid to solicitors as a result of our analysis in this case...

"Considerations of consistency and, indeed, fairness would lead to the expectation that the solicitor branch of the legal profession should also have the benefit of the directive in respect of remuneration for fees and outlays from the fund overdue for payment. In our view, that is a matter that requires to be addressed by Parliament."

Peter Nicholson, editor

The Scottish Legal Walks are back!

After last year's enforced interruption, the Legal Walks to raise funds for Scottish advice charities return next month. This article describes the work of the prime mover, the Access to Justice Foundation

The Access to Justice Foundation (ATJF) is delighted to welcome back the Glasgow Legal Walk on 28 September and the Edinburgh Legal Walk on 11 October 2021.

These events are great fun and an excellent way to meet up with other members of our profession, not-for-profit organisations, students and, indeed, their dogs! They are however fundraising events, and all funds raised are distributed to Scottish charities providing legal support and services to the most vulnerable in our society. For more information, visit atjf.org.uk/legal-walks

Back in 2013, Rebecca Samaras, ATJF trustee for Scotland, and Ruth Daniel, CEO of ATJF, were involved in setting up the first ATJF fundraising event in Scotland. The first Edinburgh Legal Walk kicked off with an inspiring address from Lord Tyre on access to justice, and proceeded from the University of Edinburgh's Old College Quad past various historical and legal landmarks in Edinburgh. ATJF and its events have come a long way since then, and eight years on, the Legal Walks have become annual events held in Edinburgh and Glasgow.

Around £40,000 has been raised to date in Scotland by ATJF through event fundraising, and all donations have been distributed to Scottish advice charities, so what is raised in Scotland stays in Scotland.

The Go the Extra Mile for Justice challenge was launched last year in place of the postponed Scottish and other Legal Walks, and due to its success has continued to run throughout 2021.

ATJF is also registered as a charity in Scotland, and is supported by ATJF Scotland whose committee members have been appointed from a broad section of Scottish organisations, all committed to ensuring access to justice for all. ATJF is seeking designation as a Scottish prescribed charity eligible for pro bono costs orders in terms of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Although no Scottish prescribed charity has yet been designated by the Lord President to receive pro bono costs, the Foundation is a strong candidate and hopes to achieve designated status in due course.

Social justice initiative

The impact of COVID-19 on social welfare legal advice organisations led to a group of independent funders working in partnership with representative bodies to form an alliance for social justice by creating the Community Justice Fund (CJF). ATJF, as one of the funders, was tasked with hosting and distributing this vital funding which distributed substantial sums to several Scottish charities adversely affected by the pandemic. For more information about the CJF and other campaigns, including a list of charities who have received funding, see atjf.org.uk/community-justice-fund-grants

After the success of the first wave of CJF funding, a second wave is underway, to be distributed by the end of the summer. Acknowledgment of the work carried out and the continued support shown by the Law Societies of Scotland, Northern Ireland, and England & Wales has been welcomed by ATJF Scotland, and more broadly, by ATJF.

If you're unable to join a walk, but wish to sponsor an event, or donate to the ATJF, please contact lauracassidy@atjf.org.uk

ATJF hosts online events that give attendees the chance to engage directly with specialist legal advice agencies working on the front line. It is delighted to confirm its first Scottish virtual Q&A event at 9am on Wednesday 15 September, with Kirsty Thomson, partner/managing director at JustRight Scotland, one of its CJF grant recipients. You can register for this Zoom meeting.

This year marks the 20th anniversary of the annual Pro Bono Week event, from 1-5 November, which offers an opportunity to recognise and support the voluntary contribution made by the legal profession across the UK in giving free and much needed legal assistance to those in need: see probonoweek.org.uk/

So why not come join, sponsor, or follow us, or get in touch!

Rebecca Samaras, ATJF trustee for Scotland, Director of Pro Bono and Clinical Legal Education at the University of Edinburgh Law School, committee chair of the Access to Justice Foundation Scotland, and member of the Law Society of Scotland's Access to Justice Committee (e: rebecca.samaras@ed.ac.uk)

Graeme McWilliams, Fellow of the Law Society of Scotland, and committee member of the Access to Justice Foundation Scotland (e: gmmcw@aol.com)

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RISK MANAGEMENT

Risk management post-COVID-19

Solicitors should re-examine their systems and procedures to identify risks arising from changed ways of working since the pandemic, as it seems that courts and regulators will be unimpressed by excuses related to remote working

The modern working world is more virtual than ever, and whatever and whenever the fuller return to offices might be, the landscape has been changed permanently. Solicitors now face new manifestations of existing risks, and identifying and minimising them is key for preventing claims and complaints.

This article considers risk management "post-COVID-19". We have identified key areas, and while there are undoubtedly more, we view these as the ones where risk has been increased in the last 16 months and for the future, and consider how to manage that risk through proper management and robust systems.

While some claims and complaints do arise from getting the advice or law wrong, consistent SLCC analysis has shown that well over 50% of complaints stem wholly or in part from poor communication. All of the key post-COVID risk areas set out below are linked to communication failures in some form.

Terms and conditions

The initial stage of the firm-client communication and relationship should be to clearly define the scope of work in the letter of engagement and any other document containing the relevant contractual terms and conditions of the client relationship. Now more than ever it is worth regularly reviewing any standard T&Cs and ensuring they are fit for purpose. Standard terms which might suggest where, or how, work is to be done may need to be reviewed and updated in light of legal developments (e.g. data protection), and more recently, to acknowledge that most professionals are now working from home to some degree. More than ever before, T&Cs or letters of engagement should be revisited regularly during the course of a job to avoid "mission creep".

Where possible, T&Cs should specify an upper limit for any exposure to compensation in the event of a claim. It is important for this limit to reflect the nature and value of the work being undertaken, and that it is appropriate in terms of insurance cover and the limit your insurers will pay in the event of a successful claim.

As an example, the authors have seen a claim where liability wasn't appropriately capped, and the professional faced a claim approaching £18 million arising from a piece of work where they were paid £30,000 in fees and the limit of their insurance was £8 million. Fortunately, given those alarming and no doubt stressful figures, we were able to defend the claim in full, but this provides a stark example of the importance of fixing and communicating scope of work and liability caps as far as possible. It is also important to have a process in place for considering and then approving any non-standard services or caps, as these could have a potential impact on the firm's insurance coverage.

"Putting forward a defence to a claim or complaint is always more challenging when having to rely on what the solicitor can remember"

Firms should also ensure that limits are reasonable and have discussions with the client in advance of any cap being imposed. The Law Society of Scotland considers that liability should not be capped below the minimum level of Master Policy cover (currently set at £2 million), and also that doing so may in fact be considered unsatisfactory professional conduct (see also para 4.05 of *Law, Practice and Conduct for Solicitors*).

Even where a professional has properly defined the scope of work, then appropriately capped liability at the outset, "mission creep" through undertaking further work outside the original scope, for which new T&Cs should have been provided, can undermine all the good groundwork laid. Finally in relation to T&Cs, it's important to consider whether third parties might seek, or be entitled, to rely on advice that the professional has given, and whether there should be a specific provision regarding their ability to do so. This is particularly important in relation to multi-party projects, and should be considered at the time of engagement and regularly thereafter.

Record keeping

The importance of record keeping cannot be overestimated, and the authors often represent firms where the solicitor will be adamant that certain advice or warnings were given but there is no evidence of it within their files. With more remote working, there should be an even greater emphasis on good record keeping, ensuring that conversations, decisions and instructions are properly noted in what could be perceived to be a more informal work setting. Wherever possible, advice given verbally to a client should be repeated in writing. Putting forward a defence to a claim or complaint is always more challenging when having to rely on what the solicitor can remember of what happened, or what their usual practice would likely have been. Reminding colleagues about the importance of keeping good records and confirming instructions always has been, but increasingly will be, key to defending the firm later on.

The authors acted in a claim made against a firm instructed in a property transaction. The firm was told at the outset that its builder client had obtained various permits and licences and the firm was not needed for that element of the work. However, it transpired that incorrect permits and licences were obtained, which led to a large claim against the builder. The builder then made a claim against the firm, asserting that they had instructed it to obtain the permits and licences. The lack of a file note or other written record made the defence of the claim particularly difficult, and it became a question of whose evidence was preferred by the courts. A contemporaneous record showing the instructions would have allowed the claim to be resisted, but instead its absence proved fatal to the defence.

Supervision and training

Where working practices are changing dramatically, firms should consider whether their systems of supervision and training are appropriate. The challenge of ensuring that trainees or junior colleagues are appropriately trained and supervised has to be met.

In the majority of workplaces, junior colleagues may be missing out on "in person" checks and training, as well as the opportunities to receive "training by osmosis" by simply observing more experienced colleagues at work. Additional training, more effective systems of work and more deliberate supervision may be needed to minimise risks, while also providing training more appropriate to the modern working environment.

The case of *Boxwood Leisure Ltd v Gleeson Construction Services Ltd* [2021] EWHC 947 (TCC) highlights some dangers and the importance of adapting systems of work, supervision and training. Briefly, in this case a trainee solicitor was instructed to raise court proceedings, and although they sent a number of court documents to the defendant solicitors, they failed to include the vital claim form. The error was noticed eventually, but the claim form was then served four days late. The defendants successfully argued that as the claim form was not submitted in time, there could be no claim. The client whose action was lost may well now look for compensation from their solicitors for failing to preserve their claim.

The difficulties of remote working were relied on in mitigation, and it was suggested by the solicitors that it would not have occurred during "normal" working times when dates would have been "properly diarised, or someone would have noticed during the course of our day-to-day engagement, interaction and meetings which have been absent for so long". While acknowledging the impact of COVID-19 on the supervision of junior colleagues and that it "could allow mistakes to slip through the net", the court held that this did not reduce the duties incumbent on solicitors.

While the case was heard in England, it is likely a similar approach would be taken in Scotland and that courts will not be sympathetic to disruption caused to the "regular" working environment by the pandemic.

The lesson for all professional services firms is that they must adopt and follow robust systems for diarising dates and supervision of colleagues, fit for the conditions in which we now find ourselves. The checks which were in place in the physical office must be reviewed, updated and properly adapted to the virtual working environment. Additional training and more effective systems of supervision may need to be put in place to minimise these risks. Failure could lead to potentially serious and expensive claims against any professional services firm.

Data breaches and fraud

Cybercrime and fraud appear to have been rising inexorably over the last 18 months, and it seems clear that working from home has increased risks for solicitors. Similarly with risks arising from data protection issues such as data breaches. With remote working certainly more prevalent in the post-COVID-19 world, these increased risks are likely to continue, as professional fraudsters seek to take advantage of any potentially vulnerable systems. Firms should be aware of the risks and should have effective systems in place to help prevent data breaches or fraud, such as a robust and multi-step central process for checking bank details for money transfers, which may be instructed "from home" and so are potentially more vulnerable.

The authors acted in a typical case, where a firm received correct bank details for a transfer, only for a second email to be sent with different details by cybercriminals who had intercepted the emails. The firm did not verify the second instruction by telephone or otherwise, and £450,000 was sent to the criminals and could not be recovered. The claim for negligent failure to confirm the instruction was clear and was paid, but distress was caused to those involved in the transaction and for the firm.

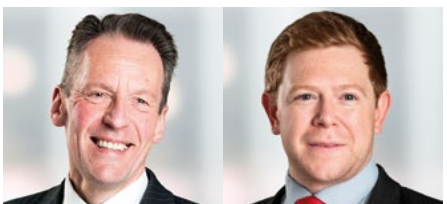
Despite this trend, legal software provider Access Legal has found that of 3,500 firms surveyed, over 40% had not updated cybersecurity policies since March 2020, with 49% responding that they had not undertaken a data protection impact assessment.

Firms should re-examine IT systems to identify data risks and guard against deliberate attacks, while also conducting training and establishing work systems to minimise the risk of accidental data breaches through incorrect email recipients, for example. It seems that the courts and regulators will be unimpressed by excuses around COVID-19 and remote working, so if it is found that a business had insufficient protections in place to alert it to fraud or data breaches at an earlier stage, it will have difficulty in defending a claim for resulting losses.

Conclusions

While the conduct of firms will be judged in the context of events at the time to some degree, *Boxwood Leisure* shows that solicitors should not rely on being able to plead the inevitable and understandable difficulties of COVID-19 to excuse a slip in standard of service.

Although most professionals will likely return to a more "normal" office working environment, it is inevitable that remote working will remain part of the picture for many. Devising and adopting efficient and adaptable systems to manage new and existing risks are vital to manage client relationships, training and supervision for junior colleagues' development, and for the avoidance of claims and complaints.



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

CIVIL LITIGATION

Civil court hearings: **seeking common ground**

Written submissions? Telephone conference? Webex hearing? Jonathan Deans would like to see more standardised practice across Scotland's sheriff courts, ideally with a mix of all three

The conversion of civil court business during the coronavirus pandemic from in-person hearings to remotely held court appearances has, barring some early teething problems, been a resounding success. Most civil hearings are now conducted by telephone conference or video link, and the increased flexibility this gives to practitioners has led to some calls for this practice to continue post-pandemic. However, for solicitors who conduct cases across Scotland (rather than simply their local sheriff court), the fact that the sheriff courts across the country have vastly divergent practices is cause for concern, especially for practitioners in bulk litigation firms.

When civil courts began to resume, all the sheriff courts started by conducting procedural hearings by telephone conference.

While there are some issues with parties talking over each other and the inability to take visual cues from the sheriff, these telephone conferences have the advantage of giving parties a set time slot for their case and a swift way to deal with procedural matters. Some courts, such as Glasgow Sheriff Court and Paisley Sheriff Court, still conduct most of their hearings by telephone conference. A procedural matter is assigned a 10-minute slot and the cases are spaced 15 minutes apart. These often run late, but the delay is to be expected and is usually not significant.

As the pandemic continued, many of the courts switched to using Webex, a videoconferencing platform. Edinburgh Sheriff Court now runs weekly ordinary cause and simple procedure courts by Webex. Hamilton and Airdrie run ordinary cause courts by Webex but continue to use telephone conferences for simple procedure matters.

Webex: some downsides

While the use of Webex is an effective tool which simplifies matters for the court and emulates an in-person court, there are many administrative disadvantages to practitioners. Frequently, the link to the video call is not sent out to certain parties, and parties must chase the court for the login details. If the court cannot be contacted, the case will be missed entirely. Many sheriffs are aware of this issue and merely continue the case if a party does not appear, but others have dismissed cases for a party's failure to attend the hearing. A solution to this problem would be to have a password-protected link to the video call placed on the court's website, with the password changing every week. If a solicitor did not receive the password, they would be able to obtain this from another solicitor or by calling the court.

Another disadvantage of the Webex platform is that practitioners must dial in to the call at 10am and wait through the other cases on the rolls, paying attention for when their case is called. This can take up a lot of valuable time. While this is similar to how in-person hearings were conducted, remote hearings provide an opportunity for flexibility which should not be squandered. For litigators with a significant caseload, it is common to have multiple cases calling for procedural matters at the same time, in different courts. As such, it is sometimes necessary to instruct a separate law firm to enter an appearance on an agency basis. Unfortunately, some of the law firms that previously carried out agency work are unable to do so when the case is conducted over Webex. It is not economical for them to sit through many other cases for a single agency fee and they are often only able to do so if they are instructed for multiple cases.

A place for writing

Aberdeen Sheriff Court in particular has taken a slightly different tack. While telephone conferences are used for procedural hearings, Aberdeen has focused more on written submissions. For procedural matters which don't require lengthy submissions, written submissions are a quick and easy way to determine the matter. Sensibly, the court also allots time for a hearing, which may not be necessary, in case the sheriff is unable to decide on written submissions only. It is normal for the parties to receive an email from the court in the days running up to the hearing, detailing whether the sheriff has decided the matter on the written submissions, or believes that oral submissions should proceed at the hearing. This approach has been the most convenient for practitioners and minimises court time and expense.

The best way to conduct the remote courts would likely use a mixture of all three measures. Written submissions should be utilised for procedural matters, with time allocated for a telephone conference if the court requires oral submissions. Webex should be used for hearings which require lengthy submissions, such as opposed motions and expenses hearings, where the ability to take visual cues from the sheriff is an important consideration.

Jonathan Deans
is a solicitor with NewLaw Scotland LLP

Scratch my back?

The route to success is always a two-way street, says Stephen Gold

Nominative determinism is the theory that people tend to gravitate towards work that fits their name. With no visible aptitude for either mining or the jewellery business, I have doubts. But perhaps Mr and Mrs Hill of Virginia were trying to test it when, in 1883, they named their newborn son Napoleon. If they hoped it would help him inspire multitudes, they must have felt thoroughly vindicated. Young Napoleon went on to become the author of *Think and Grow Rich!*, still the world's biggest selling self-help book. Born in the township of Pound, he could well have spawned the equally plausible theory of geographic determinism.

Those with an "Aye, right" attitude to self-help books may greet Napoleon's declamatory style with a weary sigh. But he has sound advice on how to generate ideas, and maintain the discipline to see them through.

Here is one nugget: "Surround yourself with intelligent people, willing to help you in a reciprocal relationship". He wasn't the first person to have this insight. "Cast your bread upon the waters, for it will return after many days", says Ecclesiastes 11. Law firms are full of intelligent people, but often resemble an archipelago: lots of little islands, nominally part of a larger whole, but much of the time living independently of one another. It's well recognised. "Silo mentality" has become an ugly cliché. But eradicating it has proved a lot harder than naming it.

Counter-incentives

Reciprocity is humanity's cornerstone. If someone does us a favour, we are hardwired to want to repay them. One might expect law firms to be hives of collaboration, and within teams they are. But collaboration between teams, where each works consistently to create opportunities for the other, is much rarer. It's not hard to identify the reasons. As the world has become more complex, and client needs more sophisticated, professionals have become highly specialised. Generalists are now virtually extinct. Secondly, for all their leaders' high-level messaging about teamwork and valuing equally the different ways people can contribute to success, it's well understood in most firms that the route to reward, status and advancement is individual billing. In this environment, focusing only on one's own patch is a totally rational response. This approach has real consequences.

The Harvard academic, Professor Heidi Gardner, author of *Smart Collaboration*, encapsulates the difficulty: "Firms that collaborate earn higher margins, inspire greater client loyalty, and gain a competitive edge. But for the professionals involved, the financial benefits of collaboration accrue slowly, and other advantages are hard to quantify. That makes it difficult to decide whether the investment in learning to collaborate will pay off. Even if they value the camaraderie of collaborative work, many partners are hard-pressed to spend time and energy on cross-specialty ventures when they could be building their own practices instead."

Gardner's research shows conclusively that collaboration pays handsome dividends. Yet if firms do not provide a convincing answer to the question "What's in it for me?", all the academic evidence in the world will be of no effect. That's why, to have any chance, incentives to collaborate and practices which encourage it must be embedded in the firm's structures and processes. They can't be left to individual discretion.

Collaboration needs planning

Collaboration should accordingly be a key metric in appraisal and reward. If I know that my efforts to originate work for colleagues will directly benefit me, I am much more likely to engage. And if, by "casting my bread on the waters" I make bread for others, it's highly likely that over time they will do the same for me. Effective collaboration protects current business as well as generating new work. The more touchpoints we have with clients, and the more services we provide to them, the more likely they are to stay.

Firms serious about making collaboration a key component of their DNA, need to be strategic, and willing to commit sufficient time and resources. They might begin by planning a thoughtful, recurring series of meetings between teams that have the most obvious scope to collaborate, each team looking forensically at their and their counterparts' clients and connections to identify where the best opportunities lie. Encourage them to challenge as well as support one another. These meetings need to be a lot more than informal chats over a sandwich. They have value only if they result in meaningful activity. Record every commitment, and nominate people from each group to be on the hook for following up and ensuring promises are kept. There is excellent software available for helping firms to originate, track and measure activity.

Finally, encourage everyone to prioritise "What can I give to my colleagues?", over "What can I get out of them?" Altruism, far from being the opposite of self-interest, is one of the surest ways to advance it. Ask Napoleon.

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. e: stephen@stephengold.co.uk; t: 0044 7968 484232; w: www.stephengold.co.uk; twitter: @thewordofgold

THE ETERNAL OPTIMIST

Living up to the name

Preaching a positive outlook is all very well – but how do you keep it up day by day?

It's not easy being an "eternal optimist". I have my challenging days when things just don't go as I'd hoped, wished or expected, when people have disappointed me and systems have brought me to the edge of hysteria. Indeed, as I get older, I find the things that cause me these challenges are increasing rather than reducing. Remaining happy and optimistic on such days is an effort and I often just want to "kick the cat" (figuratively not literally), and rant at anyone who will listen. So why, then, do I persevere in trying to put a positive spin on things?

I could refer you to a variety of medical research papers and quote the statistics on why a good mental attitude leads to a longer and healthier life. Perhaps a piece on the business benefits and why clients, staff and introducers all react better to those displaying a positive attitude might persuade you. Touching on the philosophy of stoicism and the benefits it bestows might hit the right chord. The answer, though, is much simpler. What other choice do we have if we don't want to spend our days angry and frustrated?

Everyone has challenges in their day, period. The most successful (and often the happiest) people that I know have had to face overwhelming challenges and overcome them. Indeed it is often that journey that has led to their well-deserved success. It isn't the size of the challenge that is important, though: most of us will be as upset about a small family squabble as we are about larger business issues. It is about how we *choose* to react to issues that is important. That choice is the key part. Ultimately, if we take some time to consider what is happening, we can have a choice as to how we feel.

Easy to say...

It's not an easy choice, however, and each of us have to work out for ourselves how best to make it. For some it's about saying "It could have been worse"; for others it's embracing the learning and growing opportunities that challenges provide. Perhaps it's taking comfort in the simple words "This too shall pass". For the stoics (a philosophy I strongly recommend you read up on) it's about accepting the nature of things and taking comfort in the fact that you have simply done your best and have acted correctly by your own standards and values. ("If anyone can refute me – show me I'm making a mistake or looking at things from the wrong perspective – I'll gladly change. It's the truth I'm after, and the truth never harmed anyone" – Marcus Aurelius.)

However you do it, it won't be easy. Putting on a smile is a start (there is a lot of research on the positive benefits of smiling), as is using more positive language when discussing and considering the challenges themselves. It is, for me at least, a constant battle, but one that does become easier with time and practice. For those of you who enjoyed the recent Euros, let me leave you with a thought about the Tartan Army to put this piece in perspective. They were, by and large, just happy to be there, they enjoyed the experience and took pleasure in the small successes before they went home dreaming about the World Cup... perhaps not a bad analogy for a day in the office.

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

FROM THE ARCHIVES

50 years ago

From "Criminal Legal Aid", August 1971: "There is no doubt that the system under which legal aid in criminal proceedings falls to be granted by the court presents in practice a number of difficult problems. In solemn proceedings the grant of criminal legal aid is automatic subject to the financial condition. In summary proceedings, however, the first condition which the court must determine is whether the grant of legal aid is 'in the interests of justice'. The second criterion is the accused's financial position. There is no definition of the expression 'interests of justice' and this expression is interpreted by different sheriffs in different ways."

25 years ago

From "Judicial July", August 1996: "The first announcement was that Sheriff Hazel Aronson, QC, was to be appointed to the Bench... When four years ago she was made a temporary judge, the rumour and speculation machine went into overdrive. Would she break through the glass ceiling and be the first woman Senator?... pleasure at her elevation was seen in full measure when she was installed on 12th July. The Division was full to capacity. Contrary to convention, some of the junior Senators who were not on the Bench that day were in the gallery to witness and lend support to this first and memorable occasion in Scottish judicial history."

ASK ASH

Groundhog day again?

My job had variety before COVID; it's demotivating without it

Dear Ash,

I feel like I essentially have a different job since COVID. Before, I frequently had to travel around the country to attend different courts, and often to England to visit different offices. Although the travel was not always very glamorous, it did at least ensure variety in my role. Now our firm, like many others, has made clear that working from home is likely increasingly to be the new norm. Quite frankly, I'm getting tired of the sense of déjà vu, with the same setting every day and lack of variety; and unfortunately I'm not feeling very motivated as a result.

Ash replies:

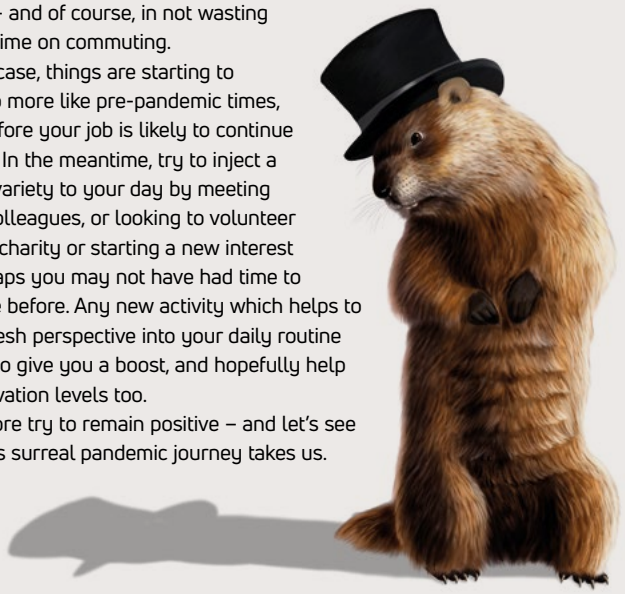
The sense of groundhog day is not uncommon, especially as we continue to navigate through the challenges and restrictions of the pandemic.

However, I would say that as with any new, unfamiliar territory, there will require to be a period of adjustment and settlement. You say yourself that you did not always enjoy the travel, and you therefore have to remind yourself of some of the previous negatives, including the early, often cramped domestic flights, overcrowded terminals and delays.

Try to focus on the positives of your current circumstances, including having greater flexibility and not having to rush home to have meals with your family/friends, or to rush to catch a bus or plane – and of course, in not wasting precious time on commuting.

In any case, things are starting to resume to more like pre-pandemic times, and therefore your job is likely to continue to evolve. In the meantime, try to inject a sense of variety to your day by meeting up with colleagues, or looking to volunteer at a local charity or starting a new interest that perhaps you may not have had time to undertake before. Any new activity which helps to inject a fresh perspective into your daily routine will help to give you a boost, and hopefully help with motivation levels too.

Therefore try to remain positive – and let's see where this surreal pandemic journey takes us.



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).

Notifications

ENTRANCE CERTIFICATES ISSUED DURING JUNE/JULY 2021

AHMAD, Attika Sabah
AHMED, Haleemah
AITCHISON, Sophie Anne
AITKEN, Gavin Ronald
ANDERSON, Bryon
ANDERSON, Stuart Alexander Campbell
ARNOTT, Joanna Louise
BARCLAY, Victoria Claire
BARR, Rachel Susan
BOWES, Abby Catherine
BRADY, Eve
BRAUNHOLTZ, Lily May
BROOKS, Heather Linda
CAMPBELL, Donald William
CHALMERS, Dave J R
CLAYTON, Chelsea
CLEGG, Kieran
COOK, Alexandra Jane
COOK, Amy Louise
CORR, Eliza Hope
CRAIG, Oliver
CROFTS, Findlay William
DRYBURGH, Beth Ann
DUFFY, Maureen
FITZPATRICK, Courtney
FLETCHER, Rebecca
FOWLER, Alexander
FRASER, Linzi
FYFE, Kirsty Mari
GATENBY, Iona Lucia Bronte
GILLESPIE, Anna Stewart
GREENER, Olivia Jane
HANCOCK, Beth Katie
HARES, Hannah Charlotte
HARPER, Sarah Elizabeth
HENCHER, Emily Marie
HENDERSON, Paul
HODGES, Jonathan James Alexander
IRVINE, Drake Andrew
JOSHI, Riya Sood
KAVANAGH, Sarah Diana
KEOWN, Jemma
LAWSON, Hannah Elizabeth Syrewicz
LENNON, Martin Patrick
LITTLE, Karen Jane
LUMSDEN, Euan Craig
LUTWYCHE, Jared Guy
McAVOY, Rebecca Anne Amos
McBRIDE, Jade
McCONDICHIE, Nicole
McDONALD, Danielle
McFARLANE, Caitlin Maria
MACKENZIE, Erin
McKENZIE, Kirsten
McLAUGHLAN, William
McMAHON, Anna
McNAMARA, Jonathan Duncan
McNEIL, Ritchie Jordan
McNEILL, Rebekah
McROBERTS, Dominic Thomas
MAGRATH, Hannah
MARR, Murron
MARTIN, Laura
MATTHEWS, Robert Christopher Alan
MELROSE-NIMMO, Aryan
MILLAR, Lara Alexandra Luke
MITCHELL, Ryan Robert
MORRISON, Shaun Fraser
MURRAY, Danielle Louise
MWANSA, Maya
NICHOLSON, Dru Fraser
NOBLE, Jennifer Ann
O'SHEA, Christopher John
PAREKH, Zack
PECK, Nadine Vivienne
PENNYCOOK, Lauren
PRICE, Jacob
RAE, Joanna Christine
RAMSAY, Chloe
ROBERTSON, Heather Jayne
ROSE, Euan David
RUTHERFORD, Blaine Derek
SAMARAS, Zoe
SANDERSON, Holly Alice
SAUNDERS, Faye Lauren
SCOTT, Claire Fiona
SCOTT, Ryan Charles
SHARPE, Katy Darcy
SLAYFORD, Holly Shona
SLEIGH, Arlene Jayne
SNOP, Patryk
SONG, Jee-Young
STEWART, Kirsty Fiona
STOTT, Beth Louise
TAYLOR, Abby
TREANOR, Shay Dermot
TURNER, Cameron Wallace
URQUHART, Ross Duncan
WALKER, David Daniel
WALSH-KIRK, Rosie Anne
WATT, Charlotte Lauren
WHEAT, Beth Olivia
WILLIAMS, Jamie Harvey
WILSON, Corie Rae
YOUNG, Iona Forbes
YUILL, Karen

APPLICATIONS FOR ADMISSION JUNE/JULY 2021

ANWAR, Aadil Shamoon
BARRAGÁN DE LA CRUZ, Maribel
BRITTON, Douglas Mitchell
BUCHAN, Iain
CABREY, Katie
COMRIE-BRYANT, Fraser
DONNELLY, Lauren Gail Louise
DOUGLAS-HOME, Richard
DUFFY, Rachel
FINNIGAN, Laura Elizabeth
FLOWERDEW, Sebastian Marc
GRAY, Laura Charlotte
HOLLIGAN, Thomas Daniel
HUNTER, Abbie Kate
KNOX, Fiona Patricia
LESLIE, Douglas Stuart
LIDDELL, Cheryl
LLOYD, Suzanne Mackay
MACINNES, Eilidh Morrison
MACIVER, Gillian Margaret
McKAY, James Robert
MacLARTY, Leanna Rhoda Mary
McNAB, Tonicha Louise
MAJID, Thara
MILLER, Cara Anne
MOORE, Iain James
PALMER, Kayleigh
PAUL, Emma Jayne
SANDHU, Nikita Kaur
SMITH, Fearghas Edward Douglas
STEVENSON, Catherine
SUTHERLAND, Sharron
TALIATZI, Aikaterini
TEVEN, Cara
THOMSON, Chloe Janet
THOMSON, Darren
WOODS, Brian Andrew
WOODS, Dylan William
YOUNG, Michelle Christine

Classifieds

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CATHERINE WATT PICK
Would any person holding or having knowledge of a will by Catherine Watt Pick, late of 36 Main Street, Davidsons Mains, Edinburgh EH4 5AA and formerly of Inverleith Row, Edinburgh who died on 20 February 2021 please contact Graeme Thomson, Balfour + Manson, 56-66 Frederick Street, Edinburgh EH2 1LS (graeme.thomson@balfour-manson.co.uk).

Ian Duncan Clewett
Anyone holding or knowing of a Will by Ian Duncan Clewett of Orkney and formerly Edinburgh (DOD 1/6/2021), please contact BTO SOLICITORS LLP, One Edinburgh Quay, 133 Fountainbridge, Edinburgh, EH3 9QG; 0131 2222956; sal@bto.co.uk.

Andrew Kerr (deceased)
Would anyone holding or having knowledge of a will by Andrew Kerr residing at 12 Parksail Drive, Erskine, please contact Lynne Thomson at lthomson@acandco.com or on 0141 292 6972.

Merger Edinburgh

Boutique would like to discuss merger with a small, profitable private client firm in Edinburgh. Currently practising in corporate law field but wish to wind down this practice in due course to focus on private clients. May provide a suitable exit strategy for principals of private client firm. Please reply to **journalenquiries@connectcommunications.co.uk** quoting Box no J2143

Investment

Independent Scottish solicitor wishes to provide development capital to small Scottish law firm in return for non-practising equity stake and commensurate share of profits. Please reply to **journalenquiries@connectcommunications.co.uk** quoting Box no J2144

Associates - Group Litigation, Edinburgh/ Glasgow

PGMBM is a unique partnership between British, Brazilian and American lawyers, with particular expertise in group litigation and is currently managing some of the largest claims in English legal history including claims arising from the collapse of the Fundão Dam, the largest environmental disaster in the history of Brazil. The firm is also at the cutting-edge of group consumer claims, representing thousands of affected clients throughout Europe and across the globe.

PGMBM, has grown globally, expanding out of its London offices into Europe and the United States.

The ideal candidate will have excellent management and preferably cross-border litigation experience with a keen interest in one or more of the following fields:

- Environmental protection and Human rights; and
- Data protection;
- Consumer product liability;
- Medical product liability;
- Competition law.

Our Senior Lawyers provide their insights, knowledge of procedure, an ability to develop a case strategy, as well as their existing knowledge applicable procedural rules of law.

We are keen on candidates who are looking to becoming a key asset on the firm's expansion plans in Scotland. This exceptional opportunity suits ambitious lawyers who enjoy working as part of a collaborative and dynamic team and share our passion for achieving justice for those we represent.

Responsibilities:

- Manage large, complex and contentious cases, including multi-jurisdictional disputes in a fast-paced environment;
- Work closely with partners and lawyers in your team to deliver high standard work;
- Advise on case strategy aligned with the clients' interests;
- Assist the firm in achieving its professional objectives;
- Develop and maintain relationships with external counsel, expert witnesses, financial partners and other external parties;
- Supervise junior associates and trainees and provide them with adequate mentoring and training;
- Contribute to PGMBM's business developments, including raising the firm's profile by partaking in marketing activities and contributing to the firm's publications.

What we are looking for:

- Associate and Senior Associate level lawyers with a strong technical skill with proven experience in complex litigation, preferably with experience in environmental protection, competition, data protection or consumer/medical product liability;
- Strong analytical skills with the ability to understand the clients' needs and an ability to adopt the best-case strategy;
- Excellent knowledge of the Scottish court procedure rules and managing proceedings in the Scottish courts;
- Great attention to detail and accuracy to produce work which is consistently of a high standard;
- Be highly organised and able to work well independently as well as collaboratively ;
- Experience of supervising and mentoring junior associates/paralegals;
- Strong interpersonal skills demonstrated by previous collaborative work with external and internal parties;
- Demonstrate flexible approach to work to ensure client deadlines are met and clients are communicated with efficiently.

PGMBM Employee Commitment

At PGMBM we believe in championing personal growth and achievements, but first and foremost, we're also a team, and a team is strongest when everyone feels that they are supported and valued as individuals.
We know that our team are the heart of PGMBM and that is why we make the following commitment to all our people:

- To be a meritocracy with a fair and transparent pay review process.
- To offer opportunities for internal promotion.
- To provide everyone with a fair and structured performance review process.
- To provide a learning environment that supports its employees in becoming experts in their roles.

On Offer:

On offer is a highly competitive salary and benefits package and the chance to join an ambitious and growing specialist litigation law firm.

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For a confidential discussion about this position or to apply, please contact: **David Thomson, Director.**
Edinburgh: 0131 450 7164 Glasgow: 0141 244 0260
Email: david@thomsonlrc.com

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A mission to change the way law firms operate, everywhere and forever.

Award-winning challenger law firm gunnercooke has launched in Scotland. The full service corporate and commercial firm was founded in 2010 to challenge, improve and evolve the way that lawyers work.

The gunnercooke model offers experienced lawyers the freedom and flexibility to build their own practice, in the way they choose. Each lawyer sets their own targets, deciding which clients to work for and which lawyers in the firm to do work with. Their earning potential is unlimited. Our role is to deliver a world-class support service, making it as easy as possible to maximise the opportunity which the model provides.

In a recent feedback survey, 95% of our lawyers said that they were happier at gunnercooke than in their previous firm.

> My clients immediately commented that I was more accessible to them, able to respond more quickly and no longer hidden behind gate-keeping secretaries and receptionists. It's a much more direct and efficient way of practice and allows me to have a much stronger relationship with clients than previously.
>
> Asad Ali, Corporate Partner

Join gunnercooke

If you're thinking about your next move and would like to discuss gunnercooke in more detail, you can have a confidential discussion with Thomson Legal:

David Thomson, Director
Edinburgh: 0131 450 7164
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Are you looking for something more from your legal career, perhaps an opportunity to rebalance and reprioritise your goals in life? Then this could be the firm for you!

This firm believe that today's business world is more about always being on, than always in. If you are a lawyer at the top of your game, the quality of your advice is far more important than where it is delivered. They have designed a model that not only challenged, improved and evolved the way legal services are delivered to businesses, but offered lawyers freedom and flexibility.

This commercial law firm built on the advice of industry experts are currently recruiting Partners. This firm is client focused and is centred around the clients and their needs. They are looking for experienced lawyers who can add value to the firm, as well as guide and support clients. The key clients are businesses; therefore, candidates should show a good understanding on how businesses work and what challenges they may face, whilst taking into consideration their aims and ambitions of their clients.

Our client is keen to hear from senior lawyers in the following disciplines:-

- Corporate
- Dispute Resolution
- Employment Law
- Real Estate

You will have broad ranging experience, and an impressive track record to date. A following is expected not least to demonstrate client development ability. The commitment and culture of this business is:-

- To inspire the greatest legal talent to join them and work in a way that gives you freedom, flexibility and ultimately, enable you to build stronger relationships with your clients.
- Today our client is one of the UK's fastest growing challenger law firms, providing a wide range of corporate and commercial legal services to businesses, banks and financial institutions.

The commitment remains unchanged – it will challenge, improve, and evolve the way that legal services are delivered and do it by building an environment for lawyers to both deliver great service to clients, and achieve personal happiness. For a confidential discussion, please contact Frasia or Cameron. (Assignment 8228)

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

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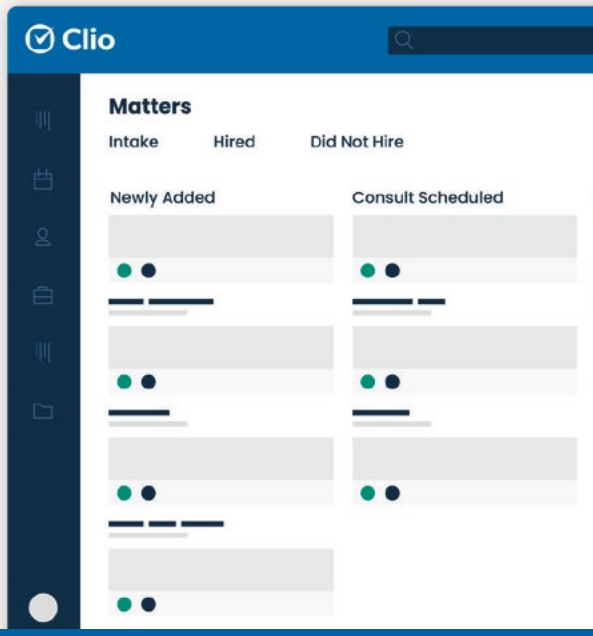

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*Statistics taken from Clio's *Legal Trends Report 2020*. 26% revenue increase observed in August 2020