21st century rights: more Conventions into law
P.16

The snail and the tiger: 200 years of *Session Cases*
P.18

Better network: updating Code agreements
P.22

Journal

Journal of the Law Society of Scotland

Volume 66 Number 6 – June 2021

Court reinvented

How much should civil courts rely on remote hearings in future? How much will they need to? A major conference has discussed these questions

He left the building...

Are you thinking about leaving yours?

Whether your firm is looking at fully embracing remote working or maintaining a limited office presence, you'll need a practice management system that keeps you all connected.

LawWare: cloud-based practice management software designed for hybrid working.

0345 2020 578 innovate@lawware.co.uk lawware.co.uk

lawware
software for the legal profession

Law Society of Scotland

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

President: Ken Dalling
Vice President: Murray Etherington
Chief Executive: Lorna Jack

Online resources
www.lawscot.org.uk (home page)
www.lawscot.org.uk/members/journal/
www.lawscotjobs.co.uk

Subscriptions
Practising Certificate (inclusive cost) £565;
Non-Practising Members (UK and Overseas, inclusive cost) £315; Annual subscription UK £84; Overseas £108; Trainees Free

Editorial
Connect Publications (Scotland) Ltd

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

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

Review editor: David J Dickson

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

Other Connect Publications contacts,
telephone 0141 561 0300

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

ISSN: 0458-8711
Average circulation:
Print edition Jul 19-Apr 20: 13,788
Digital edition May-Jun 20: 13,626
Audit pending

abc

Click here to see Peter's welcome message

Editor

Email > peter@connectcommunications.co.uk
Read > www.lawscot.org.uk/news-and-events/blogs-opinions/
Follow > twitter.com/jlsed

Now screening?

How will the pandemic experience and the rapid development of remote court hearings affect the future conduct of civil litigation? That was the subject of an important day-long conference held in May, with top level presentations from across the legal profession.

It should be recognised how far we have come in a very short time. What was expected to take years of developing and rolling out new IT was achieved in months. Nor should we be surprised that with such a pace, difficulties have arisen that courts, litigants and their representatives have had to work through between them in real time.

The extent to which these problems can be overcome, and remote hearings deliver – and, crucially, be seen to deliver – justice, remains controversial. Both the Society and the Faculty of Advocates report a clear pattern of opinion from member surveys that remote hearings work well for procedural matters but not for proofs. Debates and appeals fall somewhere in between. Quite strong views have been expressed about returning to in-person hearings as the default for all key stages of a case.

Future planning should take account of wider considerations such as the ability to conduct negotiations while at court, and the very real concerns for judicial wellbeing, and for the training and integration of new members of the profession. But we also need to recognise the new working patterns that will continue after the pandemic, and the ways in which remote hearings do make the courts, and therefore justice, more accessible to some people.

Certain constraints are bound to come into play, which dictate the need for a constructive approach. On the one hand, advocates of more far-reaching change appear to recognise – wisely – that progress must be based on consensus. On the other, it will be a long time before levels of outstanding business, necessarily for this purpose taking criminal and civil work together, permit the full relaxation of the special measures adopted on account of the pandemic, even assuming that is otherwise desirable – and there have been many comments that aspects of what has been adopted should be preserved for the longer term.

No one, at least, is content to rest with the position we have reached now. It is to be hoped that the same spirit of collegiality and cooperation that enabled the collective delivery of the means to keep the courts running through the pandemic, will come into play to shape a model for the future that will stand the test of time. Equally importantly, those involved may well need to free their thinking from the tramlines of traditional procedures and methods of conducting litigation. J

Contributors

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

Kavita Chetty is head of Strategy and Legal at the Scottish Human Rights Commission

Daniel Bain is a senior associate, and **Colin Archibald** a partner, at Shepherd & Wedderburn

Emma Newlands is health and wellbeing manager at Brodies LLP

Craig Brown is a partner with Patten & Prentice, and **Iain Sim** is a lecturer at Strathclyde Law School

Scott Foster is a management consultant to the legal sector, and a former banker

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.66 NO.6 – JUNE 2021

Perspectives

Regulars

Features

Briefings

Property deals when you need an EWS1: Page 34

In practice

ONLINE INSIGHT

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

Trust and company services: managing AML risk

Ian Wattie offers an overview, with some practical tips, of recently published supplementary guidance on the provision of trust and company services by law firms, in relation to the Money Laundering Regulations

CVAs and landlord interests: when unequal is not unfair

Amy Flavell and Stuart Taylor describe why a challenge by landlords of retail chain New Look to its company voluntary arrangement, brought on grounds of irregularities and unfair prejudice, was dismissed by the High Court

COVID-19 and tenant insolvencies

Caroline Summers outlines the two new insolvency regimes enacted last year which provide further options for insolvent corporate tenants, along with some current trends in CVAs and administrations

VAT relief and hospitality: an unintended extension

David Pedley sets out how temporary VAT relief intended to support the hospitality industry during the COVID-19 pandemic has also unwittingly been given to activities outside that industry

OPINION

Campaign for Complainer Anonymity

Scots law is out on a limb in not granting complainers in sexual offence cases the automatic right to anonymity, and we have founded a campaign to have this remedied as a matter of urgency

Complainers in sexual offence cases have no automatic right to anonymity in Scots law. While this is a fact, it is one that is often met with surprise – even disbelief.

The reality is that, while complainers in many other jurisdictions around the world do have an automatic right to anonymity, no such right exists in Scotland. As founders of the Campaign for Complainer Anonymity (CCA) we believe that this is highly problematic.

Scotland is an outlier on this. For example, in England & Wales, the Sexual Offences (Amendment) Act 1992 provides that complainants in relation to a large number of sexual offences are automatically granted anonymity. The relevant sexual offences are listed in the Act. If someone is a complainant in relation to one of these offences, the anonymity provisions will apply.

The Act when first introduced imposed a restriction on the publication of a complainer's name, address, or picture in a "written publication" or "relevant programme" to be broadcast in England & Wales during that person's lifetime, if it was likely to lead members of the public to identify the complainant. The introduction of the Youth Justice and Criminal Evidence Act 1999 broadened the scope of the 1992 Act, prohibiting the publication of any material likely to lead a member of the public to identify an individual by means of jigsaw identification.

It is important to understand that this Act does not protect Scottish complainers. Scottish publishers *are* prohibited from identifying complainants in English or Welsh sexual offence cases. However, no Scottish statutory or common law offences are included in the list of sexual crimes to which a right of complainer anonymity attaches. This means that Scottish complainers do not have the same rights as complainants in England & Wales.

It is not only England & Wales that provides such protection to complainers – jurisdictions including the Republic of Ireland, Australia, New Zealand, Bangladesh, Canada and Hong Kong all offer complainers some degree of protection in their respective legal systems.

So, how is complainer anonymity protected in Scotland? A convention exists that the identity of complainers is withheld from publication. The media are also bound by the Editors' Code, which provides that complainers should not be identified by the press "unless there is adequate justification and they are legally free to do so". Journalists may therefore be ethically constrained from publishing information which can lead to the identification of complainers. Significantly, however, this is an ethical code, and is not legally enforceable in our courts. Equally, while the media may be bound by journalistic ethics and longstanding convention, in an age of social media it is increasingly concerning that there is no legally enforceable right to complainer anonymity in Scotland.

Orders made under s 11 of the Contempt of Court Act 1981 can be used by the Scottish courts to protect complainer anonymity. An order can be made which allows the court to withhold a name or other matter in connection with the court proceedings. However, these orders are not automatic and, in practice, are not commonly used in sexual offence cases. In 2018-19, eight contempt orders were made. In contrast, 2,086 sexual cases were prosecuted that year. This leaves Scottish complainers in a legally vulnerable position.

This is why we founded the Campaign for Complainer Anonymity (CCA). The CCA is a collaboration between Glasgow Caledonian University law students and staff. Since launching in October 2020, we have been researching the rights of complainers in other jurisdictions. The CCA wants to understand what works well in other parts of the world and what pitfalls we need to avoid. By conducting this comparative research, we want to ensure that Scots law in this area becomes an example of best practice.

We also believe that public legal education is important. We are raising awareness about the precarious position of complainer anonymity in Scots law, explaining why reform is necessary. This will include outreach work via our dedicated campaign website and through our social media channels and podcasts.

We are calling on Holyrood to close this legislative gap as a matter of urgency. Given that four of the five main Scottish political parties included some degree of commitment to reform in their manifestos, we hope that change is within our grasp. We believe that complainers in Scottish sexual offence cases deserve the automatic legal right to anonymity, and we want to change the law.

If you want to learn more about the campaign, please visit the website or follow us on Twitter: @Campaign4CA

Seonaid Stevenson-McCabe, lecturer in law at Glasgow Caledonian University

Annabel Mackay, LLB student at Glasgow Caledonian University

Faiza Ashfaq, LLB student at Glasgow Caledonian University

CORRESPONDENCE

A Scots "pre-nup"?

Tom Quail's article "Pre-nups: questions of protection" (Journal, April 2021, 18) was opportune and interesting, but invites some comment.

What is undesirable is the current trend of supplanting the Scottish phrase "ante-nuptial contract of marriage" with the English phrase "pre-nuptial agreement". While, of course, both phrases mean an agreement that details the parties' respective conditions for, and terms of, their intended marriage, under Scots law there is a contract, that is, an agreement enforceable, except to the extent that it is judged "not fair and reasonable at the time it was entered into" by the court, whereas under English law there is a mere agreement, unenforceable except to the extent, if any, to which it is adjudged fair and reasonable.

In this way the approaches of the Scottish and English courts are essentially antithetical. "The approach of English law to nuptial agreements differs significantly from the law of Scotland." In England, "A court... is not obliged to give effect to" such agreements (*Radmacher v Granatino* [2010] UKSC 42, paras 2, 3). Incidentally, the single dissenting Justice, Lady Hale, erred in stating that "the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled" (para 137). When, in the 1950s, I embarked on my legal career, a disproportionate amount of my time was engaged in the drafting of ante-nuptial contracts of marriage. Since then, they may fairly be said to have fallen more or less into desuetude, and there is still relatively little demand for them.

These contracts, like so many in 19th-century Scotland when such contracts were common amongst the upper classes, were by no means confined to parties whose assets and finances were in marked imbalance. Lady Hale's understanding is also erroneous because such agreements routinely embody diverse family matters. This is why the article is wrong to confine itself to "the business owner/wealthy individual and the less wealthy other party", and to assert that "The agreement is primarily to provide the wealthy client with protection."

However, my principal criticism is the author's relaxed approach to the question of legal advice. I am of opinion that each party to an ante-nuptial contract of marriage must always take truly independent legal advice, and that to state that "it is only appropriate that the reasonable legal costs of the other party requiring to take independent legal advice should be met" by the "wealthy client", is not in accordance with the spirit of "independent" legal advice.

Importantly, the article affirms that "the solicitor consulted should have a knowledge of family law matters". Drafting an ante-nuptial contract of marriage is a complex and difficult assignment, in many cases involving the laws relating to divorce, separation, taxation, pensions, inheritance, companies, trusts, domicile, jurisdiction, and more: *experto crede*.

George Lawrence Allen, Edinburgh

BOOK REVIEWS

Scottish Land Law 3rd edition, Volume 2

WILLIAM M GORDON AND SCOTT WORTLEY
PUBLISHER: W GREEN/SCOTTISH UNIVERSITIES LAW INSTITUTE
ISBN: 978-0414017832; PRICE: £100

Scottish Land Law is now split into two volumes. The second consists of parts IV, V and VI (chapters 19-31). This edition has been cleverly revised and updated by, amongst others, the editor, Professor Kenneth G C Reid.

Chapter 24 on real burdens, and chapter 26 on judicial variation and discharge of title conditions have been produced entirely by Craig Anderson, and chapter 31 on community rights to buy by Jill Robbie. These are new additions. Each of the other chapters has been expanded and updated, taking into account all changes up to June 2020.

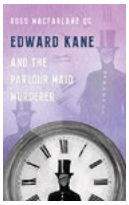
There is a whole section on rights in security. The detailed discussion of adjudications and charging orders is of great assistance when faced with such an entry just before a transaction is about to settle.

The section on restrictions on use of land is required reading for any property law practitioner, with a detailed explanation of the Title Conditions (Scotland) Act 2003. The new chapter 24 is indispensable to anyone taking a case to the Lands Tribunal.

This volume may have been long awaited, volume 1 having been published in 2009, but it certainly does not disappoint. It is essential reading and will be used regularly as a reference point to legal issues arising in daily property transactions. It is also written in a very straightforward manner accessible to even the inexperienced solicitor.

Melanie Roberts, Melrose & Porteous.
For a fuller review see bit.ly/3gb9cP6

Edward Kane and the Parlour Maid Murderer



ROSS MACFARLANE QC
(SCOTLAND STREET PRESS: £9.99; E-BOOK £9.19)

"This is a rollicking good tale, which will bring many a smile, [but with] a good few twists and turns."
This month's leisure selection is at bit.ly/3gb9cP6

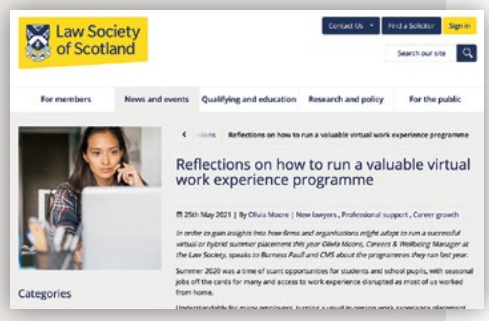
The book review editor is David J Dickson

BLOG OF THE MONTH

www.lawscot.org.uk

Is it possible to run a summer work experience programme when most people are still working in a virtual or hybrid environment? This blog highlights the experience of two firms who did so successfully last year and are running further schemes in 2021.

While they have had to modify their previous approaches, each has found aspects that work as well if not better virtually, including improved consistency of delivery and the removal of what might be location barriers for some.
To find this blog, go to bit.ly/3fFHJJc



Spirit of the law

With travel restrictions lifted right across Scotland at last (it might be tempting fate too much to say "finally"), the police will be spared having to dish out fixed penalties for being in the wrong place – and deal with any more odd excuses such as the BBC uncovered in a freedom of information request.

In case you wondered, visiting another council area to go ghost hunting in a derelict property is not a permitted exemption to a COVID travel ban. Neither is experiencing a "spiritual awakening" (of yourself or some other being), or relieving boredom by driving to North Berwick for a takeaway. And there must be other ways of placing a bet than taking the ferry from Stranraer.

Of course some people are caught because they just get themselves in a mess. Not only by getting stuck up mountains, as has happened to a fair few – the prize idiot award goes to whoever let their car roll into the River Nevis. No doubt that cost them more than just the fine.

PROFILE

Brian Yates

Brian Yates is a lay member of the Society's Appeals & Reviews and Rights of Audience Committees, both coming under the Regulatory Committee

1 Tell us about your career so far?
I am a scientist and chartered engineer who used to travel the world installing machinery. In parallel I worked voluntarily in the consumer field, chairing Consumers' Association/Which? for 13 years. In later life I have done regulatory fitness to practise work.

2 What led you to become involved with the work of the Society?
My business interests in Edinburgh reminded me of the different legal system in Scotland. My solicitor thought I could bring an external and diverse view to Society committees.

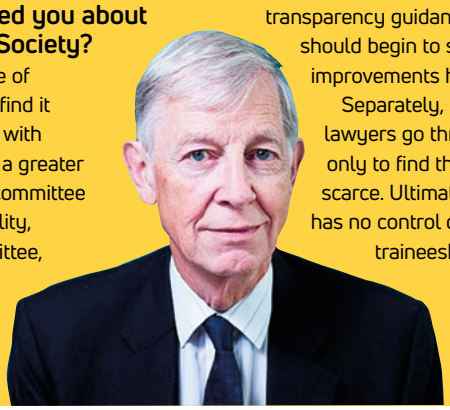
3 Has anything surprised you about committee work or the Society?
The Society has a slight image of conservatism but in practice I find it dynamic and eager to engage with members. I had expected that a greater proportion of conveners and committee members would be lay. In reality, as with the Regulatory Committee, the subcommittees have 50% solicitor, 50% non-solicitor members.

4 What are the main issues you think the Society has to address at the moment?
Access to advice, transparency, and competition need addressing.

While the Society has been approved by the Scottish Government as a regulator, it is awaiting full authorisation to regulate new types of businesses such as can be formed elsewhere in the UK.

Solicitors should be more open about pricing. I heard some being likened to upmarket dress shops, with friendly knowledgeable staff but no prices on the clothes. With the Society's price transparency guidance, consumers should begin to see improvements here.

Separately, too many potential lawyers go through years of study only to find that traineeships are scarce. Ultimately the Society has no control over diploma or traineeship numbers.



Go to bit.ly/3gb9cP6 for the full interview

WORLD WIDE WEIRD

1 It catches mice too

A cheese loving drug baron in Liverpool was caught after police identified his fingerprints from a picture he shared on an encrypted messaging service of his hand holding a pack of his favourite Stilton.
bit.ly/3yYoxx2

2 Hedge fund

A Fife man has been reunited with his wallet, stolen on a night out 20 years ago and finally found in a hedge – complete with cards including video rental and ringtone cards, though not, sadly, his £60 cash.
bit.ly/3cbKdu3

3 Top legal tips

A Belgian lawyer was surprised – but very amused – to find a recipe for asparagus in the official gazette containing legislation and royal decrees, in amongst the medical product pricing laws.
bit.ly/34FYYd6

TECH OF THE MONTH

MeandR

iOS, £1.99

If you've been walking to stay healthy during the past 18 months, and want to keep strolling in the future, then the MeandR app might be for you. It gives you challenges and distances to cover in your local area. Perfect for burning off the lockdown calories!

PRESIDENT

Ken Dalling

The Society has worked tirelessly through the uncertainties of COVID and, with a new Government and Parliament, will strive to preserve the integrity of the justice system – and keep pressing for necessary support for the legal aid sector

Solicitors are great! There, I've said it and, without any sense of hubris, I am sure that I will be saying it many times to many people over the next 12 months.

We are, each of us, facilitators and problem solvers whose assistance is essential to the running of every aspect of civil society. We bring expertise and support to all, from the captains of industry to the destitute, not just to make their lives easier but to make their lives work. Be it the purchase of a property or a business, inheritance planning, civil or criminal litigation or, indeed, any other of the myriad circumstances in which our help is needed, there will be a Scottish solicitor delivering for their clients somewhere – on the phone from their office or home, in person in their office, their client's home or in a police station, prison or court – every minute of every hour of every day of the year. As is well said by the motto of the Society, *Humani nihil alienum*, there is no aspect of the human condition that is alien to a Scottish solicitor.

We live in an uncertain world, which is constantly changing. With uncertainty comes worry and, probably for most of us, the worries of COVID and the disruption of lockdown have been horrible – whether that was because we couldn't work or because we were the only ones doing so. In particular the closure of the courts and of Registers of Scotland was not something that Past President John Mulholland would have seen coming when it hit three months before the end of his tenure. Despite his excellent work during that time there remained a lot for Amanda Millar to do. Be under no illusion, both she and John have worked tirelessly, supported by Lorna Jack and the Society's staff, Council and committee volunteers. Our aim has been to ensure that the voice of the profession, as well as due consideration for the interest of its clients, has been at the centre of all that has been needed to cope with the disruption and to see a way out of it. (I had rather hoped that Amanda would have fixed it all before it was my turn, but it seems that even her considerable talents have limitations!)

Leading towards the light

Just maybe there is light at the end of the COVID tunnel. Scotland has a newly elected Government and Parliament, which will hope to lead us there. Newly elected, or re-elected, politicians seem always to have new priorities but I trust that certain core principles will remain unchanged.

Whatever may be the driver for change (or "modernising" as is the term often used to justify change), the need to preserve access to justice and, with it, the integrity of our system of justice is paramount. There have been many changes already made to our practices in the civil and criminal processes. Many of these have been an improvement for all users; they have brought savings in time and trouble. There will, I hope, be many more. None of them, however, should be at a cost to the solicitor or their client.

And on the subject of cost, what about legal aid? If I am right about the worth of the solicitor, how come publicly funded advice and representation has been so undervalued for a generation? Why have successive administrations done so little to ensure that solicitors are reasonably remunerated for their work, and that to the extent that the reality of legal aid deserts is upon us? Others will have to answer that – and I would encourage the questions be asked.

What I say is that the evidence of underfunding is obvious and something more must be done, and done quickly. The increases provided for recently by the former Cabinet Secretary Humza Yousaf are only a start. I look forward to working with his successor Keith Brown to ensure that improvements happen. Meantime, as I write this, the Society is constructively engaged with civil servants to ensure full distribution of the allocated resilience fund monies, as well as promised trainee support. I will be happy if, by the time you read this, that is old news!

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

COURT OF JUSTICE
OF THE EUROPEAN UNION

The Court of Justice of the European Union seeks Freelance Translators through contract notices

The Court of Justice wishes to procure translations into English of legal texts in certain official languages of the European Union

Czech (CS)	Spanish (ES)	Lithuanian (LT)
Danish (DA)	French (FR)	Dutch (NL)
German (DE)	Irish (GA)	Polish (PL)
Greek (EL)	Italian (IT)	Swedish (SV)

The contract notices are published
in OJ 2021/S 101-265564 of 27/05/2021

The procurement documents are accessible at the address:

https://curia.europa.eu/jcms/jcms/p1_268713/en/

Requests for information by email should be sent to:

FreelanceTenderEN@curia.europa.eu

People on the move

ABERDEIN CONSIDINE, Aberdeen and elsewhere, has announced 10 promotions including two new partners. **Leanne Warrender** in Residential Conveyancing, Aberdeen, becomes a partner, as does **Laura Browne** (Banking Litigation, Glasgow), who moved from partner to consultant two years ago.

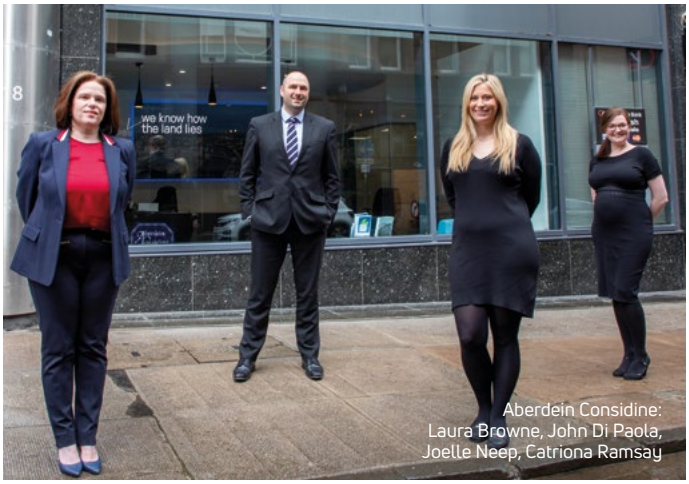
Kayleigh MacLaren (Corporate Property, Aberdeen) has been promoted to director; **Eleanor Comfort** (Dyce) has been promoted to senior associate, as have **Catriona Ramsay** (Employment), and **John Di Paola** (Banking Litigation), both in Glasgow. **Joelle Neep** (Banking Litigation, Glasgow) becomes an associate, and **Katie Hutchinson** (Westhill) and **Danny Anderson** (Corporate, Aberdeen), become senior solicitors. **Tahir Bashir**, lender services operations manager in Newcastle, is promoted to associate director.

BANNATYNE KIRKWOOD FRANCE & COMPANY, Glasgow, are pleased to announce the appointment of **Alan William Eccles**, formerly a consultant with the firm, as a partner of the firm, effective as from 1 May 2021.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has appointed **Bob Ruddiman** as head of Energy. He joins from PINSENT MASONS, where he held senior leadership positions including heading the Global Energy Sector team.

CAESAR & HOWIE, Bathgate, Livingston, Falkirk, Alloa, Bo'ness and Whitburn announces the retiral of its senior partner, **David Haig Borrowman** on 31 March 2021 after 45 successful years with the firm. David will continue to be associated with the firm as a consultant. The partners and staff wish him a long, happy and healthy retirement. **Graham Pattison Irvine** has been appointed senior partner from 1 April 2021.

Aberdein Considine: Leanne Warrender, Danny Anderson, Kayleigh MacLaren



Aberdein Considine: Laura Browne, John Di Paola, Joelle Neep, Catriona Ramsay

CLYDE & CO, Edinburgh, Glasgow, Aberdeen and internationally, has announced the promotions of **Alison Tyler** and **Ann Bonomy** to legal directors in Edinburgh and Glasgow, respectively, as part of its 2021 promotions round.

COLLEDGE & SHIELDS, Dumfries, announce that **Hannah Stokes** has been promoted to associate with effect from May 2021.

DAC BEACHCROFT, Glasgow, Edinburgh and UK wide, has re-elected **John Maillie**, a partner in the Glasgow office, for a third consecutive three-year term as location head for DAC Beachcroft in Scotland, beginning on 1 May 2021.

DENTONS, Edinburgh, Glasgow, Aberdeen and globally, has appointed Edinburgh-based partner **Brian Moore** as divisional leader for Corporate, covering the practice's operations across the UK and Ireland. His appointment is part of a wider restructuring within the UKIME region under Abu Dhabi-based **Paul Jarvis**, who became UKIME chief executive on 1 May.

DLA PIPER, Edinburgh and internationally, announces the appointment of **Stuart Murdoch** as partner in its Edinburgh Litigation & Regulatory practice. He joins from BURNESS PAULL, where he was also a partner.

DRUMMOND MILLER LLP, Edinburgh and elsewhere, has announced the following promotions: to partner, **Sharon Fleming** (Private Client, and head of the Bathgate office), **Sarah Jack** (Immigration), and **Ailsa Meiklejohn** (Conveyancing and Property); to senior associate, **Anna Rani** and **Lorna Hale**; and to associate, **Carrie Burrows** and **Aine McShane**.

INKSTERS, Glasgow and elsewhere, have grown their consultant solicitor practice with three new appointments: **Stephanie Christie-Carmichael**, based in Glasgow, who joins from EBS TRUSTEES and deals with executry and estate administration and succession planning; **Jackie Jobson**, who has established an office for Inksters on the Isle of Eigg, where she lives, and now covers dispute resolution for Inksters in the western Highlands & Islands; and **Sarah Windsor**, based in Inverness, who joins from INNES & MACKAY and deals exclusively in family law matters.

Stephanie Christie-Carmichael and Jackie Jobson from Inksters

MacDonald Lynch

JACKSON BOYD, Glasgow, has announced the promotion to partner of **Laura Macdonald**, head of the Employment team, and **Alan Cameron** (Dispute Resolution); to senior associate, **Dave Berry** (Personal Injury); and to senior solicitor, **Jennifer Rowlinson** (Personal Injury).

KIPPEN CAMPBELL LLP, Perth, is delighted to announce the appointment of **Robert Simon Macduff-Duncan WS** as a partner with effect from 1 May 2021. Robert was formerly a senior associate with Kippen Campbell and will assume responsibility for the firm's Residential & Commercial Property department.

LEXLEYTON, Glasgow, Edinburgh, Manchester and London, has appointed newly qualified **Calum MacLean** as a solicitor in its Glasgow Employment Law team.

LINDSAYS, Edinburgh, Dundee and Glasgow, has appointed **Mike Piggot** to its Dispute Resolution team in Dundee. Newly qualified, he has also worked for several years with the DUNDEE CITIZENS ADVICE BUREAU.

LYNCH & CO, Glasgow has been rebranded MACDONALD LYNCH under a new team led by **Elaine MacDonald**, a former associate at AUSTIN LAFFERTY LTD, Newton Mearns, who becomes a partner along with **Colin Carr**, who was a consultant to that office. Founder **Gerry Lynch** will remain as a consultant.

MACKINTOSH & WYLIE LLP, Kilmarnock, Stewarton and Irvine, is delighted to announce the assumption of **Karen Stewart**, head of the Private Client department, as a partner from 1 May 2021.

MACROBERTS, Glasgow, Edinburgh and Dundee, has moved its Edinburgh office to 10 George Street, Edinburgh EH2 2PF (t: 0131 229 5046; f: 0131 229 0849).

MASSON GLENNIE, Peterhead and Fraserburgh, announce the appointment of **Louise Kershaw** as a partner in their Private Client team and **Andrew Mackey** as an associate in their Court department, with effect from 1 April 2021.

MORTON FRASER, Edinburgh, Glasgow and London, has appointed **Jenny Dickson**, a partner in the Litigation team as its chairman, succeeding **Maggie Moodie**, who retired in April. She also succeeds her as head of the firm's Public Sector practice.

Morton Fraser has appointed **Martin Minton** as a senior solicitor to its Agricultural & Rural team. He joins from INKSTERS.

PETERKINS, Aberdeen, Inverurie, Huntly and Keith, intimate the retiral of **Graham George Matthews** from the partnership with effect from 30 April 2021.

PINSENT MASONS, Edinburgh, Glasgow, Aberdeen and internationally, has appointed Glasgow partner **Rosalie Chadwick** as global head of Oil & Gas.

RAESIDE CHISHOLM, Glasgow are delighted to announce the appointment of **Alison Gourley** as a senior associate in Residential Conveyancing with effect from 19 April 2021. She joins from MITCHELLS ROBERTON.

Scott Colquhoun has been appointed legal director – Scotland for TAYLOR WIMPEY UK LTD from 1 April 2021.

SHELTER SCOTLAND has appointed **Andy Knox**, formerly principal solicitor at LANARKSHIRE COMMUNITY LAW CENTRE, as national legal services manager.

SHOOSMITHS, Edinburgh, Glasgow and UK wide, has confirmed the appointment of seven solicitors and two paralegals across its teams in Glasgow and Edinburgh. **Lauren Miller**, who joins from SHEPHERD & WEDDERBURN, becomes a legal director in the Glasgow based Real Estate team. Also in Glasgow, **Geraint Hughes**, previously with BRODIES, joins on 1 June 2021 as a senior associate in the Planning team; and **Eilidh Durkin** joined in March from DWF as an associate in the Corporate team.

In Edinburgh, **Courtney Clelland** returns to Shoosmiths as a senior associate in the Dispute Resolution & Litigation team after several years working in Jersey. **Nina Oliver**, previously with DENTONS, is appointed as an associate in Real Estate (construction); and **Grace Watson** and **Samantha Mackie** join as associates in the Employment team, from DWF and LAW AT WORK respectively. **Alice Gray** (Planning) and **Gillian Todd** (Real Estate) have been appointed as paralegals in Edinburgh.

SIMPSON & MARWICK, Edinburgh, has appointed **David Coutts** as head of its new Family Law practice. He joins from TURCAN CONNELL, where he was head of the Glasgow team.

TLT LLP, Glasgow, Edinburgh and UK wide, has announced the promotion of five lawyers to partner, including Glasgow-based financial services disputes lawyer **Louise Chopra**, effective 1 May 2021. **Lucy Harrington**, a property and commercial contract litigator based in TLT's Glasgow office, is one of 11 associates promoted to legal director.

Michael Walker, head of Casework & Information Governance at the SCOTTISH CRIMINAL CASES REVIEW COMMISSION, has been named as the Commission's next chief executive, succeeding **Gerard Sinclair**, who retires in September after more than 18 years in post. Mr Walker began working with the Commission as a legal officer in 2001.

Court, but not as we know it

An important conference has been held on the future of civil litigation given the technology developed during COVID-19, with discussion focusing on how extensively remote hearings should be used longer term. Peter Nicholson offers an overview

How should our civil courts take forward the changed ways of operating as a result of COVID-19? Are remote hearings here to stay, or should we return, in whole or in part, to traditional in-person hearings when that is possible? More than 200 people attended an online conference organised by the Judicial Institute for Scotland on 10 May to hear and share views and experiences.

Opening the proceedings, the Lord President, Lord Carloway said the purpose was not to achieve any particular agenda, but to provide a focal point for beginning to consider what new methods should be retained or improved, and what previous practices, especially in-person hearings, reinstated. Reasonable people would disagree about the distance and direction of travel.

He also observed that the justice system was the concern not only of its direct participants, but also litigants, who wanted quick and fair resolution.

More than a dozen papers from a range of interests had been prepared and circulated in advance, and throughout the day these were spoken to, supplemented and the focus of questions from attendees. An official report on the day will be published; this feature attempts meantime to provide a montage of the views expressed.

Good, in parts

What has been the experience of legal professionals to date? Surveys reported to conference show a pattern emerging. The Law Society of Scotland found more than three quarters of solicitors who responded (78.5%) in favour of remote hearings continuing, but whereas over 90% agree that procedural hearings "work particularly well remotely", only 25% said the same of first instance debates, 15% with appeals, and a mere 3-5% agreed as respects court or tribunal evidential hearings. Asked which aspects "do not work at all well remotely", answers ranged from fewer than 5% for procedural hearings, through 12.5% for debates and 16% for appeals, to 66-68% for evidential hearings – which suggests that at least with debates and appeals, a large body in the middle find less of a difference.

The Faculty of Advocates reported a similar spread, with less overall enthusiasm for remote hearings. While 91% of members surveyed agreed that they are "a useful addition" to the options for court hearings, just under half supported them becoming the default for procedural hearings, below 20% did so for hearings of legal argument, and fewer than 5% for witness evidence. In addition, 72% believed they should only be used with parties' consent.

Conference was told that 76% of sheriffs believe virtual courts have made their job more difficult.

Perceptions matter

Why should this be? There is an element of frustration with the technology – "we are still at the bottom of a very substantial curve in this regard", the Sheriffs' Association observes, referring to connectivity issues as well as lack of familiarity.

Technical problems apart, however, many practitioners claim to find their job more difficult with remote hearings, whether conducting the hearing itself or from losing other benefits of being at court.

A paper from the Society, presented by personal injury lawyer Gordon Dalyell, focused the issues. Leaving aside inconsistency of approach across different courts (which is being addressed), a large majority of survey respondents found witness examination and cross-examination more difficult, and felt it was harder for the judge or sheriff to assess credibility, and that clients' interests were disadvantaged. Practical problems arose in communicating confidentially with client and/or counsel (the "tug on the gown" in court). Many also found it harder to communicate effectively with the court, and disliked the additional written submissions in advance.

Several speakers addressed assessment of credibility. Individual judges denied they found this more difficult with remote proofs, but the Sheriffs' Association reported "real concerns" at least with the quality of evidence. The Society maintains that whether or not solicitors' impressions are correct, "The perception is all important as justice needs to be seen to be done"; and that there is a risk of losing confidence in the system.

Further sentiments expressed at conference include that impromptu discussions on settlement or future conduct of the case are unlikely with remote hearings – despite best efforts these often take place only when parties are faced with the reality of court.

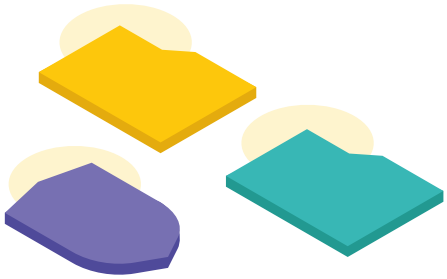
Access to justice: jury out

Rightly, presenters highlighted the need to safeguard access to justice. Here there are arguments both ways. It also has two distinct aspects: open justice, through scrutiny by media and the interested public, and access by the individual to the impartial forum that the court provides.

The Society's survey found 24% who believe that remote hearings increase access to justice; relatively few thought the opposite (a subset of an 11% stating "other reasons" for an overall detrimental effect). For litigants, Faculty suggests that whereas remote hearings will not speed up the process (still being dependent on judicial resource), there is a potential adverse impact on the less technologically literate or those with limited IT; they may affect litigants' trust in the process, and prove more costly given the additional written advocacy. Founding on the "principle that a change to remote hearings should be positively justified before it is made", Faculty maintains that "investigating these poorly understood aspects could be of critical importance".

Set against that, those who are geographically remote from the court might well benefit – provided the tech is adequate – including through being able to access specialist courts or judges; and there was wide agreement that expert evidence taken this way minimises disruption to the expert's diary, and therefore cost.

As regards the public, remote hearings enable large numbers to observe proceedings – Lord Tyre reported that the Hearts/Partick promotion and relegation case attracted 950 attendees, leading him to pose the question whether there should be a separate category of cases for remote hearings. But having to apply to the court in advance for a link, Faculty suggests, is not truly open justice. Whether viewing through technology makes it easier or harder to follow what is going on appears to depend on your point of view.



"A large majority of survey respondents found cross-examination more difficult"

Lady Wise noted a report that journalists favour remote viewing, as it saves travelling and waiting time. "It is clear that allowing the media and the public to continue to view proceedings remotely would be in the interests of open justice," she concludes, while also recognising that certain implications still need to be scrutinised in detail. Perhaps, as Faculty concludes on this aspect, citing the live streaming available from the UK Supreme Court, technology is better viewed as "complementary rather than customary". That in turn would require the courts to be much better equipped than they are now.

Views from the bench

Judges offered a range of assessments from their experience. Giving the perspective of the Sheriff Appeal Court, Sheriff Principal Anwar noted various pros and cons and concluded: "Remote substantive appeal hearings have a place and will prove to be a very useful 'tool in the box'. In my view, the SAC should retain a discretion as to whether to convene a remote or physical substantive appeal hearing. That would allow a degree of flexibility which can take account of the views of the parties, issues of convenience and any particular issues which may arise in relation to party litigants."

Specialist courts such as the commercial and personal injury courts, she continued, were "well placed to take advantage of remote hearings, including evidential hearings", as had become the default. Child welfare hearings might work well in some cases, but their remote conduct required further research and consultation (Lady Wise had particular concerns over these). Ordinary proofs required active case management for remote hearings, and procedural changes needed to be considered.

Concluding, the sheriff principal affirmed her belief in the opportunities from new technology, and the need to "guard against the desire to simply return to old practices".

From the Commercial Court, Lord Tyre hoped that many of the efficiency practices adopted for remote hearings would be retained, whatever was decided in relation to proofs in general – and noted further considerations that might favour greater use of Webex (short proofs; witnesses at a distance; open justice), not only in commercial actions.

Sheriff Wendy Sheehan, President of the Sheriffs' Association, however noted that the Association's positive observations about remote hearings came with "significant caveats" – the greater administrative burden, the need for improved technology, and the occupational health issues for sheriffs. There were concerns not only about quality of evidence, but issues of contempt and prevarication, and cases involving interpreters or multiple parties. Summary sheriffs reported difficulties in engaging with parties and attempting early resolution. With cases such as adoptions and children's referrals, "multiple concerns arise".

Inner House judge Lord Pentland, while fully behind the supporters of in-person advocacy (remote appeal hearings, in his view, have been "sub-optimal"), attached particular importance to the court as a "place": "The court as a physical place supports the public's acceptance of the legitimacy and authority of the court, and the law itself." This was particularly demonstrated by the Inner House hearing in the prorogation case. In addition to its public education benefits, "It is difficult to imagine reporters being able to convey to the public this dramatic assertion of the authority of the law, without the reporters themselves being at the *site* of justice, to bear witness to it and *show* it."

This has constitutional significance: the court needs to impact on public

Don't streamline – transform

To set against the cautious approach of some presenters, a paper by Richard Susskind – who else? – sought to challenge thinking that simply reflects established ways of conducting litigation.

The challenges posed by coronavirus – maintaining a sufficient level of service while courts are closed, and dealing with the accumulated backlog – sit for Susskind alongside the longstanding one of litigation taking too long, costing too much, and the process being "unintelligible to all but lawyers", an access to justice problem in itself: most people cannot afford to go to court.

Whereas for most lawyers and judges technology is a means to streamline existing practices, for Susskind it should bring about "transformation... to allow us to do things that previously were not possible (or even conceivable)".

His presentation recognised how "adaptable and resourceful" judges and lawyers had been when faced with the pandemic, and their better than expected view of remote hearings, while acknowledging the difficulties some people have encountered, the tiredness, and problems with documents.

Not only procedural matters have been found well suited to remote hearing, in his view: small money claims, minor criminal offences, commercial disputes and civil appeals can be added to the list. "Contrary to early thinking..., it is mistaken to believe that remote hearings are ideally suited to high volume, low margin cases, while traditional physical courts are the places in which to argue and settle the lower volumes of high value cases. There is no direct mapping between the value of a case and its suitability for remote treatment."

Another important question: "When we ask what types of cases and issues can be settled by remote hearing, are we trying to determine when remote hearings can be said to be better than physical hearings; or as good as physical hearings; or not as good but 'good enough' (and when is good enough good enough?); or not as good but, with some investment and imagination, likely to be good enough, as good, or better? The commentary is currently silent on this issue, in so far as I can see. As a matter of urgency, that silence must be broken."

But we need more data, so that policy making can be evidence based.

To those who ask, "What about justice?", Susskind questions what justice actually means. He identifies seven separate strands, from substantive (fair decisions) through to sustainable (sufficient resource). Objections to remote courts tend to focus on open justice and procedural justice (he questions whether experience bears this out); but a "more nuanced conversation" is needed; and their widespread continuing use needs "deep discussion rather than dismissive emotional appeals to justice".

Returning to his transformative agenda, Susskind regards remote hearings as "but a first step in our migration away from the settlement of legal disputes exclusively in physical spaces". Beyond lie online judging ("paper hearings", to some), and what he calls (as in his most recent book) the "extended court", in which as well as carrying out their primary adjudicative function, courts provide services including systems to help users, especially non-lawyers, understand their rights and obligations; guides to the forms of resolution available; and facilities to encourage settlement.

While this may sound radical, "I simply do not believe that improving and optimising our current court processes will be sufficient to overcome the intolerable access to justice problem, as compounded by the backlog that is building because of the virus". But since courts will have their hands full just dealing with current backlogs, alternative resolution platforms should be encouraged.

Concluding, Susskind believes court services should be simultaneously planning for the short, medium and long term, the last of these projects comprising the radical redesign of our courts to create something "better than what we have today". And it should start with a blank sheet.

consciousness in the same way as, say, Holyrood or 10 Downing Street. Otherwise "The courts would lose stature in comparison to executives and legislatures at the local and national levels."

Concluding by quoting the Lord President's comment from summer 2020, "The court is not just a physical space. It is a public service," Pentland added: "The question is how best to ensure that the quality of that service is maintained and enhanced."

Kay McCorquodale of Scottish Courts & Tribunals Service ("SCTS"), however, put the quote in its fuller context. Lord Carloway called it a "misconception" to regard the court as a building, and continued: "Virtual courts and online services should, and now will, be viewed as core components of the justice system, rather than short-term, stopgap alternatives to appearances in the courtroom."

Default position?

What outcomes can we foresee from all this? Both the Society and Faculty have called for the default position for proofs to revert to in-person hearings, Faculty via a joint statement of the UK and Ireland Bars which identifies many of the same issues as reported by the Society. "[Our] universal sentiment... is that remote hearings deliver a markedly inferior experience", the Bars state. And they have wider concerns including the effect on the training experience; and the isolation – "in marked contrast to the usual collegiality of our respective Bars" – which is having a negative impact on wellbeing.

"The conference heard that the goodwill of the profession might evaporate if there is any attempt to proceed other than by consensus"

The Bars' unanimous conclusion is therefore that remote hearings can become the default position for short or uncontroversial procedural business, and their use "will be vital in tackling accrued backlogs... However, for any hearing that is potentially dispositive of all or part of a case, the default position should be 'in-person' hearings. Remote hearings should be available as an option in such cases where all parties (including the court) agree that proceeding in that way would be appropriate".

The conference further heard that the goodwill of the profession might evaporate if there is any attempt to proceed other than by consensus. This was accepted; indeed a panel of presenters readily agreed with a questioner

who asked whether Scotland being a small jurisdiction with people who knew each other had helped in working things out thus far.

But the backlog...

Those who hanker for a return to more in-person hearings will nonetheless have to face up to certain realities flagged up in McCorquodale's paper. SCTS modelling predicts that, even with additional trial capacity, criminal case backlogs in the sheriff and High Court will take three to four years to clear. For that time, particularly while physical distancing remains, "there will be a continued need to maximise the levels of both civil and criminal business that can appropriately be undertaken by virtual means".

Longer term, SCTS anticipates that virtual hearings will continue to be integral to civil proceedings, particularly with procedural matters or where the court is not local to the lawyers or clients. "This will, however, always be at the discretion of the judiciary". (The weight to be given to parties' preferences also attracted various observations at conference.)

SCTS believes that although different from traditional hearings, virtual courts can still enable a comprehensive factual enquiry, scrutinise evidence, and deliver justice – while increasing efficiencies and improving access to justice, both for parties and observers. The anxiety some suffer with technology is acknowledged; but this should diminish with experience. Technical issues arise in fewer than 1% of cases, and are usually due to individuals' errors or poor connectivity. (This appeared somewhat at odds with frustrations reported by others.) If virtual hearings take longer, they also call for more effective judicial case management. Regular breaks may be needed, but occur also in physical hearings.

The majesty of the courtroom? Dress code and court etiquette and practice are retained. Complex or sensitive hearings? Witnesses may feel less intimidated, and credibility can still be assessed. (Note the views reported above on this point.) Potential additional benefits are less waiting and travel time, flexibility in hearings, and creative ways of presenting evidence, as well as efficiency over document bundles.

For the future, SCTS will "work [in partnership] with agencies across the system to ensure that innovations are retained and developed". It will involve considerable investment, but the goal is to create a better system – "a modern, flexible, digitally enabled justice system in which all users have a role to play".

Best of both?

Reading between the lines, one could detect a belief on the part of the court authorities, and perhaps some senior judges, that remote hearings should have a greater role in the longer term than many practitioners yet feel comfortable with. Reconciling these standpoints will be a central focus of the discussions that lie ahead. And, as speakers of different views commented, much more evaluative work is needed before we make anything approaching final decisions.

Wrapping up the conference, Lady Dorrian, Lord Justice Clerk, observed that while there should be no sacred cows, we do have sacred principles that must not be lost. Sometimes remote hearings will suit all concerned, and we should be open to the possibility of live, virtual and hybrid hearings.

For her, there were three areas with issues of particular concern: open justice; access to justice (for which the traditional system also raised issues); and welfare and morale. "They say you can't have the best of both worlds," Dorrian concluded. "But that is no reason not to try."

Human rights, 21st century style

The new Scottish Government is likely to take forward a proposal for a new human rights law to address pressing social and environmental challenges. Kavita Chetty describes the background, and the far-reaching implications

In the wake of the last global crisis of the magnitude we are now experiencing, namely World War 2, societal attitudes changed, priorities shifted, and laws evolved. The atrocities of war and the fight against fascism gave rise to the recognition of the need for checks on state power and minimum standards of dignity to be afforded to all human beings. International human rights law was developed and state, regional and international level institutions grew around it.

The 21st century twin crises of COVID-19 and the environment are now acting as catalysts to evolving our domestic legal human rights framework in Scotland beyond the Human Rights Act 1998, to a much expanded list of protections drawn from international human rights law.

In March of this year a National Taskforce on Human Rights Leadership, established by the Scottish Government and co-chaired by a cabinet secretary, recommended that the UN treaties on economic, social and cultural rights, women's rights, disabled people's rights, and the rights of black and ethnic minority people be all incorporated into Scots law. It also recommended that the right to a healthy environment, as well as rights of older people and equality for LGBTI people, be included in a new statutory framework. The Taskforce report has 30 recommendations in total, which relate to both the content of a new human rights law and how it will be developed and effectively implemented.

It is anticipated the new administration will take the recommendations forward and a human rights framework bill will be consulted on later this year, following relatively fast in the footsteps of the UNCRC (Incorporation) (Scotland) Bill – the first Holyrood legislation to take a UN treaty and place it on a statutory footing for devolved areas.

Far-reaching impact

COVID-19 has spotlighted the structural inequalities faced by people working in low paid sectors of the economy, older people, disabled people and their carers, women, and black and minority ethnic people. The framework responds to this by providing specific, tailored protections for those who are the most likely to experience violations of socio-economic rights.

The pandemic has also highlighted the interrelationship between humans and our natural world and has been a time of increased urgency for dealing with the climate and nature emergencies. The recommendations set out by the Taskforce are in many ways a direct response to some of these challenges – recognising that social, economic and climate justice issues need tackled in a mutually dependent and reinforcing way.

The potential reach of this new legislation cannot be overestimated. The international standards and norms which will be housed within the legislation will permeate through all areas of domestic law and policy. In particular it will impact on law and policy geared towards social rights and protection of the environment – housing, social security, health and social care, mental health, planning, environmental law; and the list goes on. Litigants will be able to draw down on the suite of international protections through provisions not too dissimilar to those of the Human Rights Act.

In brief, the position of the Taskforce is that there should ultimately be duties on Scottish ministers, and all those providing public services, to comply in full with the treaty rights and obligations, and other recommended rights. Furthermore, the framework is to contain a clause for courts and tribunals which links the interpretation of the rights to the underpinning value of human dignity and to the international legal interpretation of the rights.

There are numerous other recommendations, many of which speak to how the framework, guidance and capacity building should be developed in a participatory way, how people need a greater awareness of the rights they have in law, and strengthened implementation and monitoring of rights through a variety of means, such as reporting and impact assessment. Finally, there is a recommendation that further consideration is given to how access to justice will be strengthened and provided for under the framework.

There is much to unpack, and much to develop further over coming months and years to put this new law on to the statute book and implement it in full. The Taskforce report nonetheless will provide a backbone to the policy aspiration of a human rights law which is aimed at being internationalist; maximalist (providing the widest protection within devolved competence); and multi-institutional – placing human rights responsibilities in the hands of the Parliament, government at all levels, and the courts, as well as our justice system more broadly.

"There is much to unpack and much to develop further over coming months and years to put this new law on to the statute book and implement it in full"

Socio-economic rights and legal action

In terms of the justiciability of rights and remedies available through the courts, there are some particular recommendations worthy of reflection. The rights to be protected in the framework are predominantly socio-economic rights. They relate to issues which are often systemic in nature, perpetuated by numerous actors, and affect large swathes of the population. It will be essential then that cases are brought in the public interest and there is not an overreliance on citizens having to battle their way through the legal system to seek redress on an individual basis. Court remedies must also seek to reflect this challenge and be appropriate for the type of violations which may be litigated under such a framework law.

The Taskforce recommends that the new legislation explicitly allows for bodies with "sufficient interest" to bring proceedings on behalf of claimants. This recognises that the "victim test" under the Human Rights Act 1998 is restrictive, and the public interest is better met with more expansive rules of standing which allow for civil society organisations and others representing the public interest to raise proceedings. Whilst the rules of standing in Scotland have significantly evolved since the leading case of *AXA General Insurance v Lord Advocate* [2011] UKSC 46, and the subsequent Courts Reform (Scotland) Act 2014, to include those acting with genuine concern for the public interest even in the absence of any private right or interest of their own, it is arguable that making this explicit further strengthens the position. In any event the principle is further bolstered by the recommendation that the Scottish Human Rights Commission is also given powers to raise proceedings – strengthening its currently limited legal powers.

The report also accounts for the structural nature of the challenges the rights seek to address through its recommendation on remedy. While the report is not prescriptive about what should be set out in the legislation, it does recommend that there should be further consideration of "how the framework could provide for the full range of appropriate remedies under international law to be ordered by a court or tribunal when needed, including targeted remedies which could provide for non-repetition of the breach (such as structural interdicts)". Structural remedies as envisaged by the recommendations would potentially give a strong role to the courts in overseeing compliance with measures to be implemented to achieve the realisation of the rights.

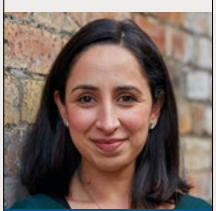
Accessible remedies?

We all know, however, that getting to the point of a court ordered remedy of this nature entails a long route to justice with many barriers and hurdles along the way. This was a strong theme coming from the engagement work with communities as part of the Taskforce process. As one participant put it: "We know that 'fighting the system' to achieve redress wears down the most capable lawyers in law centres. Imagine how hard that is if you don't have that technical skill and are in crisis."

As part of the Taskforce work, the Scottish Human Rights Commission provided an analysis of international human rights law which set out how the incorporation of human rights into domestic legislation needs to ensure the existence of accessible, affordable, timely, and effective remedies. It is apparent that our current system falls short of these international standards in a number of ways.

Assessing Scotland's justice system against these standards raises many questions around access to advice and advocacy, the accessibility of the judicial process, the availability of legal aid and overall costs of litigation, the lack of non-judicial inquisitorial routes to remedy and the suitability of judicial review – to name but a few. The Taskforce recommendation is to give consideration to all of this. If taken forward this opens up a space for some real constructive, and potentially transformative, dialogue about reforms to our justice system based on how people experience the current system and how redress is provided through both judicial and non-judicial means.

Significant change to Scotland's human rights legal framework lies ahead. Galvanised by the years of austerity, the loss of rights protections through Brexit, and now COVID-19, it has been recognised that the Human Rights Act 1998, while providing a solid foundation, can be built on through additional protections for socio-economic rights. Through the experience of the pandemic we have also seen that focused attention on the rights of those who are most impacted in society is required to address deep-rooted inequality. This new framework law seeks to bring about not only legal change, but culture change too – ranging from the courts to frontline services. The report implicitly recognises, though, that a rights-based culture will best thrive in the shadow of the law where there is strong accountability through the justiciability of rights. The legal profession as a whole will play a central role here in the necessary evolution of human rights law in Scotland to secure a fairer society for all.



Kavita Chetty
is head of Strategy and Legal at the Scottish Human Rights Commission

200 years, and counting

Session Cases, the hallowed series charting the progress of Scots law since the 1820s, is celebrating its bicentenary. Emma Toner, the current editor, and Jackie McRae, chair of its publishers, told the Journal why it retains a leading position today

Words > Peter Nicholson
Library photos > Courtesy of the SSC Library

Donoghue v Stevenson has been voted the favourite Scottish case in 200 years of law reports. The enduring appeal of the Paisley snail, and its status across the common law world, may not come as a surprise. It was the interest from around the globe in their online poll that took its organisers aback to a greater extent.

The occasion was the bicentenary of *Session Cases*, the rows of venerable volumes that form the centrepiece of most Scottish law libraries. The poll was the brainchild of its publishers, the Scottish Council of Law Reporting ("SCLR"), to commemorate the event.

The evolution of law reporting, and the first case in the first volume edited by Patrick Shaw, *Strang v McIntosh*, decided on 12 May 1821, are chronicled in an article on the Council's website. With the exception of the *United States Reports* covering the US Supreme Court, *Session Cases'* double century is believed to make it the longest running common law series.

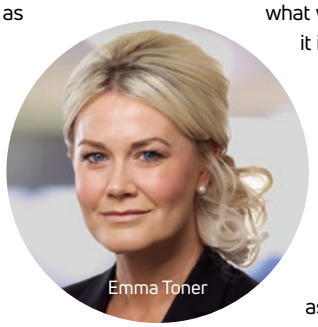
Throughout that period, its status as the most authoritative Scottish reports has been secured, first, by having practising counsel (solicitor advocates are also now eligible) prepare and edit the reports, and secondly by having all published reports, including the headnotes, revised by the judges who decided the particular case.

The first volume, and its *Session Papers*

Law reports in the modern era

Current editor Emma Toner, advocate, has been in post since early 2020, after serving since 2013 as a reporter and from 2016 as deputy editor. She believes that two centuries on, law reports continue to play a central role. "When we look back over the 200 years we can see that *Session Cases* developed because of the importance of decisions being made publicly and a record being kept of those, and in its contribution to the evolution of precedent. For me the important part about law reporting, even though we now live very much in a digital age, is accessibility to decisions, to the law.

"Someone can pick up a report and without having to read the full 40 pages or whatever of a judgment, they can see at a glance what is the point of the case, what is it about, is it something that is going to be useful."


Emma Toner

Solicitor Jackie McRae, about to complete a two-year term as SCLR chair, agrees. The reporters are "our guides and interpreters" to the case law; and the most memorable reports "almost define the profession". Referring to the poll, she adds: "The enthusiasm, the level of involvement that generated went far beyond what we could have hoped for. And it indicates how central the law reports are to the profession. They really are the tools of our trade, they fix legal principles in our minds, and they also capture the imagination."

With the solicitor profession now so specialised, do many practitioners have as much need for law reports as they might once have? "I think most lawyers have an interest in the development of the law, reading of the law and understanding how it all fits together," McRae replies. "As a family lawyer, although there has become a degree of specialisation in my work, you have to have an appreciation of other areas of law to function effectively. The law reports become critical because you can't be an expert in everything. Well crafted law reports should help you understand and interpret aspects of the law you perhaps haven't studied in detail before."

Editor's role

Looking at the volumes on the shelves, *Session Cases* has clearly experienced both fat and lean years over its lifespan, but Toner has seen a stable and healthy number of cases coming through during her time – even with the pandemic, which hit just after she became editor. "To be honest it hasn't really held anything back; it's just different ways of communicating with reporters and in particular with judges. In terms of volume of decisions which are reportable, there is no discernible difference at the moment that I can identify."

While the leather bound volumes are still published, and still being collected, SCLR moved relatively early to digitise its processes – and the *Session Cases* archive, the whole series being accessible via the main case law databases. It also recently engaged in a recruitment drive for reporters, resulting in the present team of 10 plus Toner and her deputy, Timothy Young, advocate. "There are different areas of practice amongst the reporters, which from my perspective is pretty handy because I try and allocate cases to reporters on their practice area. It's not always possible but I find that way a good way of doing it across the board."

That leaves Toner with the task of reading all the decisions published on the Scottish Courts website from the Court of Session and High Court, and now also the Sheriff Appeal Court – *Session Cases* has had to keep adapting in the last 20 years to accommodate the Privy Council, the UK Supreme Court in place of that and the House of Lords, and now also the SAC, whose decisions are, unusually, given a status defined by statute. She admits the reading can be quite onerous, "but you keep more on top of things that are coming out of the court as and when they are happening, so I do get some satisfaction from it, absolutely".

By and large it is her decision what is reported. "From time to time I'll perhaps run it past the deputy editor. But usually it tends to be quite clear when a case is really just turning on its particular facts and doesn't raise any issue of novelty or legal principle."

Jackie McRae and Angela Grahame

The snail and the tiger

Both Toner and McRae are confident that *Session Cases* enters its third century in good health. Indeed it continues to explore new ways to fulfil SCLR's objects of public benefit and advancement of education. An example is the return to real time reporting in the recent seminal constitutional cases of *Cherry* and *Keatings* – reporters sat in court and prepared daily summaries of the arguments which were posted online. "That kind of immediacy of reporting was something we thought would be helpful," McRae explains. "There's a real focus on relevance and utility and how we can add value to practice in what is a very fast moving environment now."

Toner concludes by returning to her point about accessibility. "Going forward with law reporting, and in particular with *Session Cases*, my hope would be that what *Session Cases* is doing and in what we produce we are enhancing accessibility and through doing that we are enhancing people's understanding, whether practitioners or not, of the law, where it's going, where it's developing. I think it's particularly important, when we look back over the 200 years so far, to look at that as a record for the generations to come as well."

To finish where we began, what did each vote for as their own favourite case? Toner admits to being a *Donoghue v Stevenson* fan: "As a historic report on the law it's clearly an interesting case, not least because it recast the modern law of negligence and the neighbourhood principle. And it's probably the most influential Scottish case across the common law."

McRae's choice is less well known: *Scott & Sons v Del Sel* 1922 SC 592, a case she read as a first year law student and which has stuck in her mind. This was due to Lord Sands, in a dispute over whether a contract was frustrated by Government action, conjuring up the illustration of a milkgirl unable to deliver her wares due to a tiger escaping from a travelling circus. "There was never a tiger. There was no milkgirl. But the image – and the doctrine of frustration – stays with me."

Such is the power of the law report. Here's to the next 100 years.

SCLR: for the public benefit

While the principal concern of the Scottish Council of Law Reporting is the publication of *Session Cases*, as a registered charity its objectives are wider, including "to provide public benefit in Scotland and elsewhere and to promote the advancement of education and the advancement of human rights, conflict resolution or reconciliation".

Dedicating its resources to these ends, it contributes to publishing other legal materials (supporting the late Andrew Hajducki QC's textbook on civil jury trials, for example). It holds, and publishes online, the annual Macfadyen Lecture with domestic and international judges speaking on important and topical themes, recent lecturers including Lady Hale and Judge Ian Forrester QC. In addition it now supports the Lawscot Foundation and the Faculty Scholarship scheme, and in 2020 funded a postgraduate research scholarship to mark the bicentenary.

The Lord President, the Law Society of Scotland and Faculty of Advocates each put forward two trustees to its nominated and *ex officio* board. When the current chair, Jackie McRae, solicitor, steps down in June 2021, the vice chair, former Vice Dean of Faculty Angela Grahame QC, will take her place and Christine McLintock, a former President of the Society, will become vice chair. The secretary, Anthony Kinahan, has long experience in legal publishing and business management and "steers the Council really well through all sorts of challenges", McRae says.

denovo

What the best High Street law firms do...

You're throwing money away by not managing your leads

Picture the scene: a partners' meeting.

"We could do with more fees?"

"Yes, totally, every penny counts."

"The key is new business. How many enquiries do we get a month?"

If the answer is "No idea", then read on.

Handling enquiries

You've done the hard work. Whether it's from your website, your reputation, your location, or returning clients, enquiries are coming in. But what happens next? You basically have three options:

- **Option 1:** No plan. You don't know the number of enquiries, the source, or if they ever become real business.
- **Option 2:** Manual. You try to create a process, but it's work in itself, and it relies on people to make it work.
- **Option 3:** Leads management. You have one system that can manage enquiries with automated responses and reports.

Why bother? Let's put some figures against this, using 100 enquiries of the work you really want.

- **Option 1:** no one monitoring or knowing. Let's say 5% of enquiries become a file. At £500 a file that's £2.5k in fees.
- **Option 2:** you are trying to keep track and that brings some success. 10% success = £5k.
- **Option 3:** you know what's going on, tracking enquiries, following up leads. You improve conversion to 33%. That gets you £16,500 of new business.

What these figures show is that understanding and converting your existing opportunities could transform your business. We all want to be option 3, right? So, how do we do it?

Denovo Leads Management software propels you into option 3

Here is a real life example showing how a law firm moved from option 1 to 3 with Denovo software. We asked Ross Yuill, Director at The Glasgow Law Practice, how they did it.

How did GLP used to convert enquiries?

We were doing a poor job at this, which meant we were overlooking one of the most important aspects of running our business successfully. We were taking notes on paper, spreadsheets, post-it notes, you name it. Often the details would get logged in our case management system or the message would get passed on to a fee earner, but on the odd occasion it wouldn't. Even when it did there was no structure to how we actually handled the enquiry. There was inevitable delay in responding to the client and on many occasions we were simply throwing money away.

When did you realise you had to change?

I remember asking the other partners about our conversion rate in a meeting. In all honesty none of us had a clue. That was the moment. We were doing a lot right to get enquiries – good brand, good website, good reputation, bits of marketing here and there, but we needed a way to turn those enquiries into fees. We contemplated investing in a receptionist, but the spend wasn't going to be sustainable long term. We needed a smarter, more cost effective solution and that's what we found with Denovo's Leads Management software.

Was it easy to switch from manual to online process?

Change is always tricky to implement. We were using Denovo's CMS anyway, just not in the most effective way. We upgraded to their CaseLoad platform and started managing leads through the system. Their support team trained our staff within a few days. They followed that up with simple video tutorials which we could refer to whenever we needed them. That made the whole process simpler. It was non-disruptive which, for a busy High Street firm, is one of the most important factors when changing anything.

How are you now using Leads Management software?

Denovo gave us a simple tool to manage and follow up with potential new clients before a matter is even created. It allows our team to add a potential client, or lead, to CaseLoad the moment they call or email in, and to add notes and essential details while they're on the phone. Creating a new lead is less time intensive than setting up a new pending matter and leaves the more advanced data entry for when the lead converts into a client. Less time is spent creating records for those who may or may not become clients, but all data is preserved and transferred to the matter once a lead does convert. Leads are kept separate from our existing matters to make it easy to differentiate between active and potential clients. We no longer have to retain our leads in a separate system – it's all in one place. Maintaining all potential and active clients within the same system makes it easy to stay organised, streamline and report all facets of our practice.

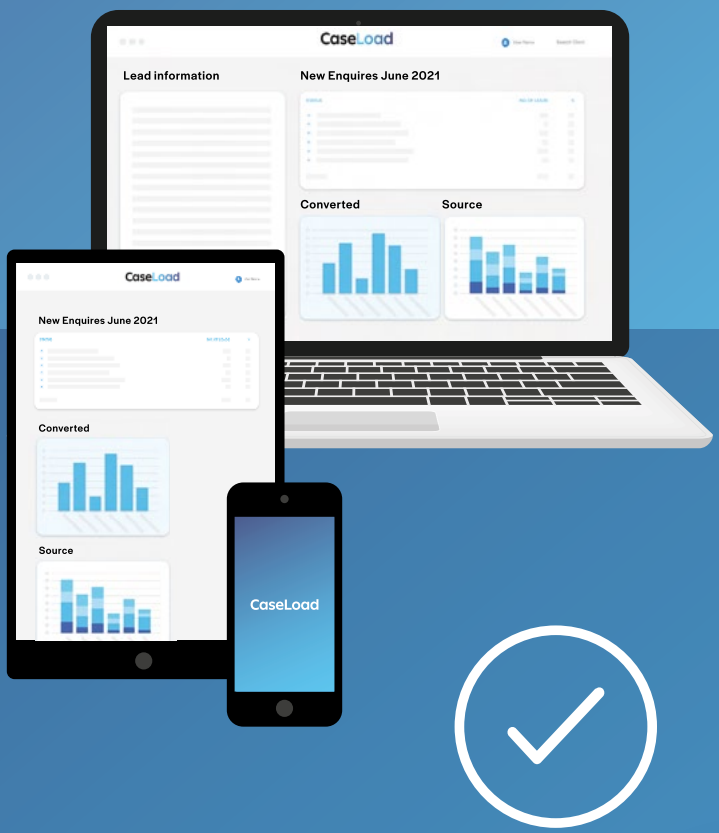
Now, when a lead comes in, we can interact with them through automated document production and email management, before converting them to a client which transfers all information over to the new client and matter.

Next steps...

Email info@denovbi.com or call 0141 331 5290 and see why some of the most successful law firms in Scotland use Denovo to handle their enquiries

Are spreadsheets, note pads and post-it's costing you new clients?

Automate, streamline and never lose another lead with CaseLoad.



Our Leads Management software is simple to use. It will make sure you handle new business leads efficiently and stop you losing money.

By putting a system in place that can streamline your enquiries and automate communication, you make it easy for everyone in your office or working remotely to stay up to date on a potential case.

This system literally helps firms generate cash.

Leads Management

Document Automation

Email Automation

KPI Reports

Email **info@denovobi.com**
Call **0141 331 5290**
Visit **denovobi.com**

denovo

Powering up the network

In the first case of its kind in the UK, the Inner House has provided important guidance on renewal of agreements under the Electronic Communications Code, with a decision favourable to development of digital infrastructure

In *EE Ltd and Hutchison 3G UK Ltd v Duncan* [2021] CSIH 27 ("*Duncan*"), the Inner House has provided some much needed guidance on the renewal of existing agreements under the Electronic Communications Code.

The Code regulates the legal relationship between mobile network operators and site providers – those on whose land or buildings operators install and operate electronic communications apparatus, such as masts and antennae.

The Code is contained in sched 3A to the Communications Act 2003, as amended by the Digital Economy Act 2017, and came into force in December 2017. It replaced the Code contained in the Telecommunications Act 1984; the UK Government's policy document intended it to "pave the way for future technological evolution" and "provide a robust platform to enable long-term investment and development of digital communications infrastructure".

The two companies ("EE and H3G") appealed against a decision of the Lands Tribunal for Scotland (2021 SLT (Lands Tr) 1) dismissing their application for an order to terminate an existing Code agreement and replace it with a new one. The existing Code agreement, a lease, had been entered into when the old Code was in force. Its original term had expired and it was continuing from year to year by operation of tacit relocation.

The Code and subsisting agreements

Disputes regarding the interpretation and application of parts of the Code have resulted in a number of tribunal and court decisions, most of which have concerned the acquisition of rights by operators to install and operate apparatus on new sites. The decisions of the Tribunal and the Inner House in *Duncan* are the first in the UK concerning the renewal of existing agreements under the Code, and the outcome is particularly significant for operators and site providers who are parties to existing agreements entered into when the old Code was in force.

One of the main reforms made by the new Code (para 24) was the introduction of a "no scheme", or "no network", assumption for *determining* the consideration payable by operators to site providers under Code agreements (i.e. the rent payable for sites). The aim of this reform, as stated by the Government, was to reduce consideration to "a rate that is more relevant to the nature of modern digital communications infrastructure rollout, and will work to encourage greater investment and improved network coverage".

The reforms also introduced a new right to assign Code agreements to other operators (Code, para 16); and new rights to upgrade apparatus on sites and share apparatus with other operators, subject to certain conditions (para 17). These rights were introduced with the aim of facilitating quick and cost-effective deployment of new technology in the context of, as the Inner House noted at para 14, a "widespread acceptance of the importance of digital communications in respect of economic growth, productivity gains and social interaction".

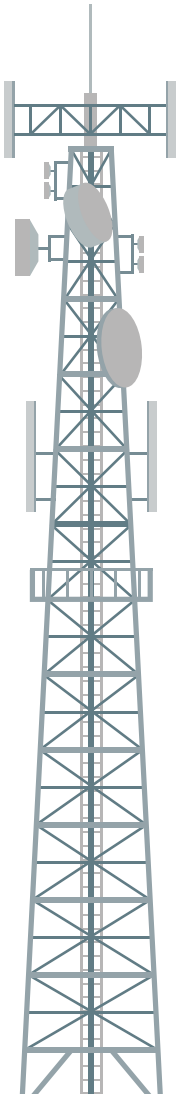
Those reforms do not apply retrospectively, though. The Government's policy document stated that it would "bring forward a clear and robust set of transitional provisions to set out how and when existing agreements transition to the new Code". In terms of those provisions, "subsisting agreements" (agreements entered into for the purposes of the old Code and still in force when the new Code came into force: 2017 Act, sched 2, para 1(4)), have effect as agreements under the new Code, subject to the modifications made in the transitional provisions (sched 2, para 2(1)).

In terms of those modifications, the new rights to assign agreements, and to upgrade and share apparatus, do not apply to subsisting agreements: sched 2, para 5(1). These continue in accordance with their terms, including existing financial terms, but subject to certain parts of the Code, including the provisions relating to termination and modification of Code agreements. Those provisions include paras 33 and 34, which were considered by the Tribunal, and then the Inner House, in *Duncan*.

Renewal of agreements under the Code

Where the original term of a Code agreement has expired or is due to expire, either party may, in terms of para 33 of the Code, give notice to the other party requesting a change to the agreement, or requesting that the existing agreement is terminated and replaced with a new agreement (a so called "paragraph 33 notice"). If the parties do not reach agreement on the proposals in the notice within six months after the notice is given, an application may be made to the Tribunal for an order under para 34.

The orders that may be made include an order, under para 34(6), to terminate the existing agreement between the parties and replace it with a new agreement. EE and H3G sought such an order, having given notice under para 33 requesting the



termination of the subsisting agreement between the parties and its replacement with a new agreement.

Paragraph 34(9) provides that the terms of a new agreement under subpara (6) are to be such as are agreed between the parties. However, by para 34(10), if the parties are unable to agree the terms, the Tribunal must specify the terms on an application by either party. The provisions of the Code relating to determination of consideration, and the new rights to assign, upgrade and share, are applicable to the new agreement: Code, para 34(11).

Paragraph 34(13) provides: "In determining which order to make under this paragraph, the [Tribunal] must have regard to all the circumstances of the case, and in particular to –

(a) the operator's business and technical needs,

(b) the use that the site provider is making of the land to which the existing code agreement relates,

(c) any duties imposed on the site provider by an enactment, and

(d) the amount of consideration payable by the operator to the site provider under the existing code agreement."

Subparagraph (13)(d) is disapplied where the existing agreement is a subsisting agreement: 2017 Act, sched 2, para 7(4).

Subparagraph (13)(a) was central to the Tribunal's decision in *Duncan*.

"The UK Government recently consulted on changes to the Code, recognising that the policy aims are not being fully realised"

The Tribunal's decision in *Duncan*

The Tribunal considered that the requirement to have regard to "the operator's business and technical needs" set a "high bar" for the order sought by EE and H3G, and that their application did not clear that bar. The Tribunal decided that the application did not set out a sufficient justification for the termination of the subsisting agreement and its replacement with a new agreement, and refused the order sought.

In reaching that decision, the Tribunal commented that the application did not specify any particular need for a new agreement, for example that a third party wanted to install apparatus at the site and that EE and H3G were prevented from allowing that by the existing agreement. It also commented that there was no suggestion that any change was required to give the existing agreement business or technical efficacy, or to better serve consumers of telecommunications served by the site. There required to be something unduly onerous or restrictive in the existing agreement to justify its termination and replacement with a new agreement (2021 SLT (Lands Tr) 1, at 16 and 17).

The decision on appeal

On appeal, the Inner House accepted EE and H3G's argument that the Tribunal had set the bar higher than the Code intended. Lord Malcolm, delivering the opinion of the court, stated that "we part company with the Tribunal in its assertion that the operators required to do more than point to the current arrangements as being out of step with the minimum rights available under the new code, for example in terms of assignation, upgrading, sharing and rent" (para 23).

He added: "Parliament has identified certain minimum rights for operators, including sharing/upgrading abilities and reduced outlays resulting from valuation on a no scheme basis. The view was taken that these are required if network operators and infrastructure providers are to be in a position to deliver the modern low cost electronic communications system which Parliament wants and which business and the public at large expect" (para 24).

As regards the Tribunal's approach to the requirement to have regard to "the operator's business and technical needs", Lord Malcolm commented: "Too much was imported into the term 'needs'. It does not exclude the general business and technical opportunities afforded by, for example, agreements which reflect the new code's approach to matters such as sharing and upgrading facilities, and 'no scheme' valuations. The tribunal's analysis would severely curtail the legislative intention to create the opportunity to bring old agreements into line with new code arrangements" (para 28).

He considered that "absent some particular contra-indicator, it is not easy to see how or why a tribunal could reasonably prefer to prolong an old code agreement rather than update it in accordance with the new code rights" (para 26).

The Inner House allowed EE and H3G's appeal, quashed the Tribunal's decision and sent the application back to the Tribunal for further procedure in accordance with the guidance in its judgment.

What's next?

The UK Government recently consulted on changes to the Code, recognising that the policy aims of the Code are not being fully realised. The consultation document noted (para 4.9) that when the Code was enacted the Government had "intended to create a 'steady phasing in of new Code rights' through transitional arrangements that would make clear 'how and when new agreements transition to the new Code'", but that "it is possible that the current position might benefit from some simplification in order to fully realise [the Government's] original policy intention".

The Government's response to the consultation is currently awaited, but it announced in background briefing notes to the Queen's Speech (pp 66 and 67) that proposed reforms to the Code will be included in a forthcoming Product Security and Telecommunications Infrastructure Bill. It is possible that changes will be made to the Code to emphasise that subsisting agreements may be terminated and replaced with new Code agreements after their contractual terms have expired.

In the meantime, the Inner House's judgment, and its clear guidance on the approach to be taken in applications such as the one in *Duncan*, should go a long way to realising the aims of the Code regarding the transition of old Code agreements to new Code agreements, the phasing in of the new rights to assign, upgrade and share, and the reduction of consideration.

Daniel Bain, senior associate, and **Colin Archibald**, partner, at Shepherd & Wedderburn, acted for EE and H3G in the application and subsequent appeal discussed in this article

Wellbeing first

Changes brought about through the pandemic have put wellbeing at the centre of how we operate as legal practices – but how do we build from there? Start with communication, Emma Newlands advises

The events of the past year have offered us all an opportunity to take stock of what is important and to strive to look after ourselves, and each other. While a focus on wellbeing is not new, the physical distance of colleagues, working in isolation over a prolonged period, has put wellbeing at the core of how a law firm operates.

Addressing wellbeing is not a one-off exercise: it requires putting a framework in place that achieves what is best for colleagues, recognising individual needs, while also considering what is best for clients. This article will explore these considerations, as well as how navigating the return to offices plays into mental health and wellbeing considerations.

Time for a system reset

Out of challenge comes the opportunity to make things better. The legal sector has an opportunity to press the system reset button, and to rebuild our working practices, putting wellbeing at the core of what we do. If the past year has taught us anything, it is that the way in which we work *can* be adapted, even if change was previously thought to be too difficult or too disruptive.

While a focus on mental health and wellbeing is not new, the circumstances in which we find ourselves are. Imposed distances between colleagues, families and friends, working in isolation over a prolonged period, following rules on everyday things that we previously took for granted – these changes have intensified mental health struggles that existed pre-pandemic, and created new challenges for others too.

While the conversation around mental health has opened up considerably, there is always more we can do, particularly in the workplace. Keeping those conversations going is critical. The more open we are, the more barriers we can break down.

Consideration for mental health and wellbeing has to be part of the conversation every step of the way, particularly as we look at the long-term implications of the pandemic for working life. Last month, the BBC reported that almost all 50 of the UK's biggest employers had confirmed that their workforce would not be brought back to the office full time. A hybrid approach is being considered by many as a long-term option, but does it work for everyone?

For every colleague that is looking forward to the prospect of returning to the office, there will be another who is wary about the use of shared spaces, whether that is working in an office alongside others, or rejoining the home-to-office commute via public transport. Personal situations may have changed too: new responsibilities as carers, relationships, illness or loss, are all factors that impact on an individual's wellbeing and their ability to function in the same way as they did previously.

So how can we as a sector move the wellbeing conversation forward? Addressing wellbeing is not a one-off, tick-the-box kind of exercise. It is embedded in our culture and respects our value of care. It means putting a framework in place that guides our policies, and equips our leaders through training and development while recognising and supporting our colleagues' individual needs.

Communication is key. Listening to each other, and understanding the pressures faced by colleagues, is an important first step. Respecting the needs of individuals while considering how the business can function and what is best for clients, is also key, and will drive developments like policy change and training requirements, as well as some of the more visible contributors to wellbeing in the physical office environment. With that in mind, there isn't an off-the-shelf framework that will work for all, and it is already evident that lots of different models and solutions are emerging as we plan to return to offices when the Government guidelines allow. What is positive, is the level of engagement between businesses in Scotland, and in particular the legal sector, where firms are happy to share experiences and discuss some of the challenges that we may all face in the weeks and months ahead.

The pandemic has provided an opportunity to break from practices that seemed immovable 12 months ago. We, as a sector, have a responsibility to make these changes. If we take the time to listen to each other, the next steps in the wellbeing journey will be positive ones.

Emma Newlands is health and wellbeing manager at Brodies LLP

Lockup: are you cracking the WIP?

Lock-up is often an uneasy subject of discussion at partners' meetings. But there is no getting away from it – it is something all law firms should be managing effectively.

IN ASSOCIATION WITH LAWWARE

By now, you'd think the penny would have dropped for legal practices. However, a number of surveys over recent years show that the problem may well be getting worse.

Huge problem?

Recent surveys suggest that over one-third of UK law firms have lock-up in excess of 150 days. Even the average level is around 130 days. No self-respecting managers in non-legal businesses would find this state of affairs acceptable.

Let's get the definition correct before looking at the problem and its potential solutions. Lock-up is defined as the sum of unbilled work in progress and debtors (excluding VAT).

It doesn't sound so bad when you say it quickly, but excessive lock-up can have serious side-effects. If you have an annual turnover of £1million and lock-up of 150 days, that's £410,000. Or more accurately, it means you don't get paid for work until 5 months after completion. That doesn't help you pay your staff and overheads and it will cut into your drawings savagely.

It gets worse. You are, in effect, bankrolling your clients meaning you may have to borrow from your bank. So, how can you resolve the problem?

Get the basics right.

It always pays to be open with your clients about billing from the get go. You can do this by:

- Agreeing the bill for the work at the outset so that there are no nasty surprises for clients.
- Agreeing interim billing at key stages of the work.
- Making it as easy as possible for clients to pay you – credit cards and even PayPal can assist.
- Ensuring all bills submitted are for immediate payment – why give 30, 20 or 10 days' grace when it's due now?
- Asking for a payment up-front – this can particularly help with new clients whose credit history may be unknown.

Begin as you mean to go on.

These points are all very well when you're instructed. What can you do to reduce lock-up once the work has commenced?

- Invoice immediately on completion.
- Invoice when you reach one of the interim work points.
- Put in place a strong, disciplined credit control system.
- Consider using an independent credit controller to collect late payments.
- Ensure partners and staff play their part in chasing and collecting bills.
- If the work timescale has been extended through no fault of your own, discuss an interim arrangement.
- Stop ongoing work if the previous fee has not been paid.
- If a client has a history of late payment, consider whether you really want their business.

It's all about cashflow management. On your balance sheet and P&L your firm may look healthy and profitable. But remember, businesses go bust not through lack of profit, rather through inability to pay the bills.

To find out how legal accounts software can help you crack the WIP, contact us on 0345 2020 578 or innovate@lawware.co.uk.

Mike O'Donnell.

lawware
software for the legal profession

Doing justice with benefit fraud

Questions of justice in relation to benefit fraud are raised by cases such as the first appeal covered in this month's briefing, which also features a full bench decision on *Moorov* and two further sentencing appeals

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

Fewer opinions have been issued from the High Court, but fortunately the Sheriff Appeal Court has chimed in with a couple of cases of interest.

Benefit fraud: always the woman blamed

While not disagreeing with the outcome of the appeal in *RA v HM Advocate* [2021] HCJAC 27 (23 April 2021), where a mother of six children had the sentence of 12 months' imprisonment (discounted from 18 months for an early plea) affirmed in respect of a £55,000 benefit fraud stretching over a six-year period, the unsatisfactory nature of these prosecutions has bothered me for my entire career.

I recall as a lowly depute fiscal in Glasgow in the 1970s groaning inwardly as the buff Ministry file landed on my desk. At that time we were advised that the Department would not report cases for prosecution for frauds of less than £2,500. Allowing for inflation since 1978 of over 400%, that would equate to a sum in excess of £12,500 today. However I learned a few years ago that as part of a "get tough" measure by HM Government, files alleging frauds of £2,000 and above were being submitted for proceedings.

It is a fraud on the public purse, and occasionally one hears of someone feigning long-term disability while competing in triathlons etc. The Department's reach appears limited, and I have never seen such an accused appear in a suit and be reasonably well off.

The present case, like many seen in court, arises when a single woman claims benefits and does not change her claim when her partner returns to the household, or more often flits in and out of her life. It was a serious case of claiming tax credits over a period of five years and eight months while failing to declare that the appellant was living with a partner in full time employment.

The father of the eldest child was deceased; a former partner had been physically and emotionally abusive towards the appellant and failed to provide financially for her. Her new partner, the father of the youngest child, was apparently willing and able to care for all the children in the event of a custodial sentence.

Their Lordships looked to the guideline case of *Gill v Thomson* 2010 SCCR 922 at para 19, where the court, selecting from the opinion of Lord Lane CJ in *R v Stewart* [1987] 1 WLR 559 (clarified and updated in *R v Graham* [2005] 1 Cr App R (S) 115) indicated that custodial sentences of up to 12 months will usually be sufficient where the overpayment is less than £20,000. In *Graham* the court said: "such offences are easy to commit and difficult and expensive to detect... social security fraud is increasingly prevalent... there will be cases in which courts will be justified in taking the view that a sentence should contain a deterrent element" (Owen J at para 9).

The Appeal Court otherwise ignored the English Sentencing Guidelines Council, which has produced a "Definitive Guideline" on "Sentencing for Fraud – Statutory Offences".

Subsequently benefit cases of £20,000 and above were prosecuted on indictment, latterly to avoid the presumption against short sentences legislation for summary prosecutions, meaning that a custodial sentence was always on the cards.

Relatively few of these prosecutions proceed to trial, possibly in light of *Pennycuick v Lees* 1992 SCCR 160, which held admissible questioning by Department investigators. Usually discussions between Crown and defence centre around the amount of the fraud, with the defence agent trying to persuade the Crown to accept a figure below the magic *Gill v Thomson* £20k. Some negotiation is inevitable, as in some situations the accused would have had a legitimate claim to other benefits if the full circumstances had been disclosed.

Section 35(1) of the Tax Credits Act 2002, under which this prosecution was mounted, states: "A person commits an offence if he is *knowingly concerned* in any fraudulent activity undertaken with a view to obtaining payments of a tax credit *by him or any other person*" (my emphasis). Yet I have never experienced a spouse or partner being prosecuted along with the woman. Sometimes in such cases I notionally halved the figure charged to reflect the household benefit obtained by the missing accused.

The appeal report indicates that the appellant was making repayments of £100 a month to the Department of Work & Pensions. The social work report stated that she was unlikely ever to be able to repay or significantly reduce the amount defrauded. These repayments overshadowed any non-custodial sentence that might be imposed by the court.

Such accused women have no money to pay a fine and the amounts involved take far longer to pay than the two years or so afforded by imposing a compensation order. An unpaid work CPO is not realistic, since the backlog is such that the hours imposed in all criminal cases will not be worked off until 2027!

In some cases I have faced a single parent female accused where a man or men have walked in and out of their lives as they have been the main carers for any children. In one case the accused tried to keep it all afloat by holding down several cleaning jobs starting at 6am and running until 10.30pm, with help from her mother and older children to look after the children when at work. A jail sentence was not merited due to the amount involved, but a short period of curfew from midnight to 5am for a few months got over the sentencing dilemma, leaving the Department to claim the outstanding sum for the rest of the woman's life.

My final thought on this unsatisfactory area of law and sentencing is this. Since RA paid the ultimate price and was sent to jail, will she, having paid her debt to society, still have to keep paying off the £55,000 at £100 a month to the DWP on her release?

Moorov: a full bench

A five judge bench is always eagerly anticipated, particularly since there have been relatively few in recent years. In *Duthie v HM Advocate* [2021] HCJAC 23 (30 March 2021) their Lordships put to rest any uncertainty which might remain about the nature of offences which might be prayed in aid when the Crown is seeking a conviction on a *Moorov* basis.

The appellant was convicted of rapes involving two complainers occurring eight years apart. In all the appellant had been convicted of 29 charges, most occurring during his relationships with seven women over a 15 year period. The rapes concerned a former partner in 2003 and twice on a different partner in late 2011. The other charges consisted mainly of physical assaults, some to injury, against all seven women.

To secure a conviction the Crown had to rely on mutual corroboration, but at the "no case to answer" point at trial, it submitted that all the

charges including the physical assaults formed part of a course of humiliating, degrading and controlling conduct within domestic relationships.

The trial judge determined that the rape charges had to be considered separately from the others, but that the jury were entitled to view the domestic setting as a special, compelling or extraordinary circumstance as would allow for the application of mutual corroboration notwithstanding the time gap.

At appeal the advocate depute submitted that the trial judge had erred in compartmentalising the offences. The whole offending had to be looked at together. In the context of a domestically abusive relationship, the act of penetration could be a sexually violent one designed to achieve coercive control. That illustrated an underlying purpose between the physical and sexual assaults. Changes in society's appreciation of the effects of domestic abuse had been reflected in the Domestic Abuse (Scotland) Act 2018. Time was the most flexible component in *Moorov*.

The Appeal Court disagreed with this approach and reiterated the settled law on mutual corroboration: it applied where there were similarities in time, place and circumstances in the crimes such as demonstrated that the individual incidents libelled were component parts of one course of conduct pursued by the accused. Expressions of how the law might be changed could not detract from what the law actually was, as vouched by earlier full bench decisions and the institutional writers. The Crown's central contention that testimony about physical assaults could afford corroboration of rape was rejected.

As regards the rape charges with the eight year gap, it was for the accused to satisfy the judge on the absence of a sufficiency of evidence. A "no case to answer" submission could be sustained only when "on no possible view" could it be said that the individual incidents were component parts of a course of conduct persistently pursued by the accused. Where a case lies in the middle ground, the jury should be properly directed so that they are aware of the test which requires to be applied in determining whether offences separated by time can be held to be corroborated under the *Moorov* principle.

Where a lengthy time gap between charges is involved, there is no rule that there must be special, compelling or extraordinary circumstances before the appropriate inference can be drawn of a course of conduct persistently pursued by the accused.

In refusing the appeal and in general terms approving the trial judge's approach that the rape charges had to stand alone and be considered on a *Moorov* basis by the jury, the court overruled the decision in *CS v HM Advocate* 2018 SCCR 149 where convictions on rape charges 11 years apart had been quashed as the trial judge had given the standard *Moorov* directions. These were said to be lacking further guidance to the jury in "long *Moorov*" cases, namely a clear mention of the need for some special or compelling feature of the conduct such that the jury would be entitled to apply the doctrine despite the significant time gap.

I get the feeling that this case was a trial run by the Crown to see if the rule in *Moorov* could be stretched by the courts. In light of this decision it will be a matter for the Scottish Government whether to legislate to extend the reach of the 2018 Act. It only applies to offences committed after 1 April 2019. Section 1 was a breakthrough, creating the offence of controlling behaviour. Previously such conduct only featured in divorce cases. It remains to be seen what impact it will have in rape cases in years to come.

Sentencing

As ever there are a few sentencing cases to consider this month.

In *Dewar & McLean v HM Advocate* [2021] HJAC 28 (27 April 2021) the Appeal Court deal with two appeals against sentence involving offences of spitting at police officers during the coronavirus pandemic. General guidance was given last year in *HM Advocate v Lindsay* 2020 SCCR 324.

Dewar pled guilty to a s 76 indictment libelling a drunken, racially aggravated contravention of s 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and a charge of assault by spitting a police officer on the face. Both offences took place in December of last year. Police officers had been called out to the locus and initially intended to take him home but he took exception to this and his conduct culminated in assaulting the woman officer.

Sentence for the first charge of nine months' imprisonment reduced to six months on account of the early plea was accepted, but appeal was taken against 22 months discounted from 33 months on the second charge. Defence counsel pointed out that in *Lindsay* a sentence of four months had been increased following a Crown appeal to 10 months discounted from 15 months. In that case the charge was culpable and reckless conduct to the danger of life by coughing in the faces of two police officers, and the accused had an "appalling" record with numerous convictions for police assault.

Dewar had a bad record too, with persistent offending dating back to 2006, three sheriff and jury convictions involving violence and nine convictions for police assault. While the Appeal Court thought the sheriff was correct in taking a serious view of the matter, the headline sentence selected was more than twice that in *Lindsay*. It was not helpful to draw fine distinctions between the two men. Accordingly the sentence was reduced to 15 months, discounted to 10 months.

McLean pled guilty to shouting and swearing at police officers, assaulting them by spitting on two of them, and struggling whilst in the police car, endangering its occupants. He was sentenced to nine months' imprisonment reduced from 12 months on charge 1, and 18 months reduced from two years on each of charges 2 and 3. The first and third sentences were to run concurrently but sentence on the spitting charge was ordered to run consecutively, making a total of three years.

It was noted that McLean had a less extensive record than Dewar or Lindsay, but he had served a five year High Court sentence for drugs and firearm charges. The headline sentence of two years was too high, and the offences all arose in a single course of conduct so a consecutive sentence was inappropriate. The Appeal Court substituted nine months on charge 2 and made all three sentences concurrent, 18 months in total, with the supervised release order imposed by the sheriff remaining in place.

I have to say on a practical level police officers should have been offered the vaccine as soon as it became available to the elderly and health workers. They are very much on the front line, like defence agents, and have to deal with all manner of people without any triaging taking place.

Meanwhile in the Sheriff Appeal Court, in *Procurator Fiscal, Hamilton v Donnelly* [2021] SAC (Crim) 2 (9 March 2021) there was a Crown sentence appeal where a sheriff admonished the accused and decided not to impose a non-harassment order in a case involving assault to injury on his ex-wife, aggravated under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

The accused had been convicted after trial in February 2020, but there were delays in obtaining a background report, exacerbated by the pandemic. On the date for sentencing the trial sheriff was at court but said to be unavailable, and the remand sheriff dealt with the matter without the benefit of a social work report, and with minimal papers and information. The Appeal Court, after obtaining a report from the trial sheriff, imposed a community payback order with a requirement to undertake 160 hours of unpaid work. The sheriff had not explained as required by statute why a non-harassment order was unnecessary, and an order was imposed.

While there are circumstances where a different sheriff might sentence in a colleague's case, where a trial has taken place this should only occur where the sheriff is unavailable, and it is not reasonable or practicable to adjourn.

Briefings

Corporate

SOPHIE GRAHAM,
SENIOR SOLICITOR,
WRIGHT, JOHNSTON
& MACKENZIE LLP

"If you must play, decide upon three things at the start: the rules of the game, the stakes, and the quitting time." (Chinese proverb)

In *Green v Petfre (Gibraltar) Ltd t/a Betfred* [2021] EWHC 842 (QB), Betfred did not adequately state the "rules of the game", i.e. the contract, to their detriment.

It was held that if onerous contractual terms are unclear, they will be deemed unfair to the consumer and consequently not incorporated.

The facts

In the small hours of 26 January 2018, Andrew Green had played a side bet in "Frankie Dettori's Magic Seven Blackjack", an online game provided by Betfred. Some time after he stopped playing, betting chips to the value of £1,722,500.24 were recorded on screen. He tried to cash in his winnings according to the online instructions, but was met with an error.

On contacting Betfred he was informed that there was a glitch with the game and they were unable to make payment. A fault in the development of the game meant that where play continued without a break, it gave much better odds of a player winning than Betfred intended. According to Betfred, at some point, if play did not cease, the player would have held only winning cards. Betfred argued it was not obliged to pay Green's winnings in these circumstances, since the terms of their contract with players excluded such liability. Green commenced proceedings.

Green relied on clause 2.4 of Betfred's terms and conditions, which stated: "Customers may withdraw funds from their account at any time providing all payments have been confirmed." In addition, he argued that as respects the clauses which purported to limit Betfred's liability: (a) there was no malfunction of "software" which entitled Betfred to avoid liability to pay winnings, "software" in the contract referring to software downloaded in order to access and play the game, not the game itself; (b) they were not sufficiently notified to him so were not incorporated into his contract with Betfred; (c) if incorporated, pursuant to the Consumer Rights Act 2015, and at common law, clauses of this nature required to be clear, fair, and transparent, which these clauses were not, and therefore could not be relied on.

Betfred's defence was: (1) clause 2.4 referred to withdrawal of monies placed by the customer, not "chip balances"; (2) there was a defect in the game, and under clause 4.4 this excluded Betfred's liability; (3) due to the defect, the end user licence agreement (EULA) also excluded liability to pay out; (4) the rules of the game, incorporated by reference or necessary implication in the gaming contract by a clause in the EULA, excluded liability for payment in the event of a malfunction; and/or (5) the parties were operating under a mutual mistake which voided the gaming contract between them.

Decision: terms no defence

Mrs Justice Foster formed her answer round three issues: (1) the meaning; (2) the incorporation; and (3) the reliance on exclusions of liability.

(1) The terms and conditions were, on the face of it, held not apt to cover the circumstances. If they sought to exclude liability to pay on an ostensibly clear win, i.e. Betfred's obligation to pay out a winning player, they would have to be much clearer on the page.

(2) Referring to *Interfoto Picture Library v Stiletto Visual Programmes* [1988] 1 All ER 348, the judge concluded that whatever the meaning of the terms intended to be incorporated, inadequate signposting to the exclusions of liability, and a failure to highlight the effect and meaning intended, resulted in the terms not being sufficiently brought to Green's attention so as to be incorporated in the gaming contract with him. Particular mention was made (at para 167) of the "iterative presentation in closely typed lower-case" which meant that the relevant clauses were buried in other materials that the player had to scroll through.

(3) Under s 64 of the Consumer Rights Act 2015, consumer terms and conditions must be fair and transparent – expressed in clear, intelligible language. A term is prominent if it is brought to the consumer's attention in such a way that the average consumer would be aware of it. Under s 62(4), "A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."

Foster J concluded that the terms did not comply with the statutory obligation of fairness. Such an unfair notice was not binding on the consumer.

Comment

What are the lessons to be learned from this case? The combination of the obscure language, the context of the contract and the lack of adequate signposting to the exclusion clauses resulted in a departure from the obligation of fairness to the consumer.

While this is nothing new, it is an important reminder for commercial lawyers to take a step back from their drafting and apply the statutory test to ensure clear intelligible language, with sufficient signposting to bring exclusion clauses to the consumer's attention that their clients do not have a nasty surprise later. J

Agriculture

ADÈLE NICOL, PARTNER,
ANDERSON STRATHERN LLP

Below I discuss the latest guidance provided by the Tenant Farming Commissioner (TFC) in relation to agricultural holdings, and the recently passed Dogs (Protection of Livestock) (Amendment) (Scotland) Act 2021.

TFC's guidance

As TFC, Bob McIntosh has released a number of guidance notes to assist tenant farmers, landlords and their agents, with the overarching aim of preventing disputes escalating, or indeed arising in the first place. His latest guidance covers general statutory compliance in relation to agricultural holdings, and specifically, the responsibilities of both landlords and tenants particularly in relation to inspections and certifications required for buildings.

Compliance table and checklist

Following a useful summary of the various compliance regulations requiring to be considered for agricultural holdings, the guidance note sets out a "Compliance Table" and "Checklist".

The table lists the numerous tests and thresholds required to be met by landlords and tenants in order for agricultural properties to be deemed "fully compliant". These include electrical inspections, smoke detectors, fire risk assessments and asbestos inspections, to name a few. Next to each of these obligations are the steps to be followed by parties both prior to the start of a new lease and throughout its duration, with links to further information.

The checklist is also in the format of a table, but rather than providing information on tasks required, it sets out the statutory timescales and limits for the fulfilment of these requirements in relation to both dwellings and agricultural buildings. The final column provides useful information about what action, if any, is required to be taken in relation to each compliance obligation and by which party.

Tolerable and repairing standard

First, it is worth noting that these tables will be of substantial assistance to landlords, tenants and agents alike. Not only do they set out the majority of the necessary compliance considerations for both parties in a uniform and easy-to-read document, but they also provide an element of clarity on the requirements incumbent on each party in order to ensure that both the tolerable and repairing standards are met.

It was recently announced that agricultural buildings would, by 2027, also be subject to the repairing standard. Although this change is some

years away, it is prudent that both parties understand what their roles and responsibilities may include with regard to meeting this new standard, particularly because leases for agricultural holdings are often lengthy and many will likely be ongoing when the standard takes effect.

The guidance is mostly silent on which party will be deemed responsible for ensuring the repairing standard is met for agricultural properties, although it has been speculated that the responsibility will fall to landlords. Unlike private residential properties, agricultural holdings often provide tenants with rights to sublet the property, and the requirement for standards to be met by landlords rather than tenants in these circumstances would be rather unjust.

For example, the TFC has suggested that the landlord should be responsible for the installation and replacement of smoke, heat and carbon monoxide detectors, and the tenant responsible for checking and maintaining these throughout the lease. If however the tenant has sublet the property for a number of years, it would perhaps be more appropriate for the tenant to be principally responsible for installation and replacement. Perhaps further guidance on these specific scenarios will be provided in due course, but until then it would be sensible for parties to agree who is responsible for what when the higher repairing standard becomes applicable to agricultural properties, in order to avoid either party taking on unduly onerous obligations.

Protection of livestock

The Dogs (Protection of Livestock) (Amendment) (Scotland) Act 2021 received Royal Assent on 5 May. Its purpose is to increase penalties for owners or persons in control of dogs that chase or attack sheep, or allow their dogs to be "at large" in a field or enclosure where sheep are present. Of course this excludes dogs defined as "working dogs". The Act increases the maximum penalty from a fine of £1,000 to £5,000, or imprisonment for up to six months, and empowers courts to make orders such as preventing a convicted person from owning a dog, while also providing the police with greater powers in relation to livestock worrying offences.

The negative impacts caused by worrying livestock have gained much attention in recent years, with one research group finding: "on average, each incident results in 1.58 sheep being killed, a further 0.51 having to be destroyed, a further 1.72 being injured, 0.34 ewes aborting, 1.02 instances of mis-mothering and 28.04 sheep being stressed but physically uninjured".

Such information, combined with the fact that at present only around one in three dog attacks are reported, has led to this necessary statutory development. It is hoped that the increased sanctions will decrease incidents of livestock worrying, a welcome relief to both farmers and their animals.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Clearer pension benefits

The Department for Work & Pensions seeks views on proposed regulations and accompanying statutory guidance introducing simpler annual benefit statements for use by defined contribution workplace pension schemes used for automatic enrolment. See www.gov.uk/government/consultations/simpler-annual-benefit-statements-draft-regulations-and-statutory-guidance

Respond by 29 June to pensionstatements.consultation@dwp.gov.uk

Child contact centre services

The Scottish Government seeks views on the use of its powers under the Children (Scotland) Act 2020 to regulate child contact centres. See consult.gov.scot/justice/regulation-of-child-contact-centre-services/

Respond by 12 July via the above web page.

Child welfare reporters etc

The Scottish Government seeks views on establishing registers of child welfare reporters, curators *ad litem* and of solicitors who may be appointed when an individual has been prohibited from conducting their case themselves. Those acting in these roles either under the Children (Scotland) Act 1995 or in children's hearings court proceedings will be affected. See consult.gov.scot/justice/registers-of-child-welfare-reporters/

Respond by 12 July via the above web page.

Threats to the state

The Home Office is consulting on policy approaches to changes to legislation relating to countering state threats. The aim is (1) to modernise existing counter espionage laws (e.g. the Official Secrets Acts), (2) to create new offences, tools and state powers, and (3) to address cybercrime. See www.gov.uk/government/consultations/legislation-to-counter-state-threats

Respond by 22 July via the above web page.

UK internal market

The Competition & Markets Authority seeks views on draft guidance on exercising its new function, the Office for the Internal Market. See www.gov.uk/government/consultations/draft-guidance-on-the-operation-of-the-cmas-uk-internal-market-functions

Respond by 23 July to ProjectOIMExternal@cma.gov.uk

Guilty mind for homicide

The Scottish Law Commission has published a discussion paper exploring the mental element in murder and culpable homicide (DP No 172). The review is wide ranging and comments are sought on, among other things, whether the division between murder and culpable homicide is appropriate, whether there should be statutory redefinition of the crimes, and whether the defences of self-defence, necessity, coercion, provocation and diminished responsibility are appropriately defined and applied. See www.scotlawcom.gov.uk/publications/archive/discussion-papers-and-consultative-memoranda/

Respond by 27 August via the above web page.

Employment

MUSAB HEMSI,
PARTNER, LEXLEYTON

On 6 May 2021, in *Wisbey v Commissioner of the City of London Police* [2021] EWCA Civ 650, the Court of Appeal delivered a unanimous decision that the provision in the Equality Act 2010 dealing with remedies in a case of unintentional unlawful indirect discrimination is compatible with EU law.

The facts

The findings in fact of the London Central Employment Tribunal in the decision at first instance are important to contextualise the Court of Appeal's rationale.

Alexander Wisbey, a police officer in the City of London force, was an authorised firearms officer ("AFO") deployed to the Tactical Firearms Group. Throughout his employment as a police officer, he had had a form of defective colour vision. This had no obvious effect on his ability to

discharge his duties, but it led his employer to remove him from both his AFO role in March 2017 and, later, from advanced driving duties as well.

Following a series of further colour vision tests he was reinstated to both roles in February 2018.

Since as a matter of statistical fact, about 8% of men and only 0.25% of women suffer colour vision defects, Wisbey made a claim of unlawful indirect discrimination in the Employment Tribunal. He contended (among other things) that the requirement to pass certain colour vision tests in order to remain authorised for firearms and advanced driving duties, and not be removed from such duties, unlawfully discriminated against men on the ground of sex.

His claim for unlawful indirect sex discrimination in removing him from rapid response driving was upheld. The tribunal declined to make an award of compensation for injury to feelings in light of the evidence. It found that the unlawful indirect sex discrimination was unintentional in the sense that the employer did not know, in applying to Wisbey the various colour vision requirements for driving, that he would be put at a particular disadvantage as a man, and did not intend that consequence.

Arguments on appeal

At the Court of Appeal hearing, Karon Monaghan QC and David Stephenson, for Wisbey, argued that s 124(4) and (5) of the Equality Act 2010 was not compatible with Council Directive 2006/54/EC (the "Recast Directive"), the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Their contention was that the Equality Act provisions imposed an additional threshold before a court could give consideration to awarding compensation in an unintentional indirect discrimination case.

Section 124(4) and (5) anticipates that even where loss has been sustained in consequence of unlawful indirect discrimination, there may be no award of compensation because the requirement to consider making a declaration and/or a recommendation first may lead to a decision not to award compensation. In other words, the "consideration" requirement gives a steer to Employment Tribunals that other remedies are likely to be better or more appropriate than compensation in this sort of indirect discrimination case. It was submitted that this effect was illustrated in this case, as the tribunal's judgment, having first considered the question of a declaration and a recommendation, made no award for injury to feelings.

The Court of Appeal did not agree, instead preferring the submission of Ijeoma Omambala QC for the police. It held that there is no prohibition in the Equality Act on awarding damages in such cases. The requirement to consider first whether to make a declaration or a recommendation before awarding compensation did not make vindication of domestic or EU law rights more difficult.

The ratio was succinctly and clearly articulated by Lady Justice Simler at para 40: "If, after consideration, a tribunal decides that a declaration and a recommendation are appropriate, nothing in the terms of the statute precludes a tribunal from also awarding compensation, still less requiring a tribunal to reach a conclusion that loss sustained by reason of the unintentional indirect discrimination should nevertheless be uncompensated for that reason. The prohibition on awarding damages for unintentional indirect discrimination was repealed by Parliament and has not been reintroduced in any way by the EA 2010. The "consideration" requirement is not and is not to be read as an obstacle to an award of compensation where compensation is due. There can be no doubt that employment tribunals have discretion under s 124(5) to award compensation once the other remedies have been considered and, importantly, if loss and damage have been sustained as a consequence of the indirect discrimination suffered, it is to be expected that compensation will be awarded. Moreover, such compensation should be both adequate to compensate for the loss and damage suffered and proportionate to it."

Comment

It is noteworthy that the court rejected an assertion that discrimination claims and other employment-related claims which could form a basis of an indirect sex discrimination claim are approached differently. The court placed no credence in the argument that the order in which remedies must be considered forms an obstacle, such as to make those remedy considerations incompatible with the dissuasive and effective purpose of the Recast Directive, the Charter or the Convention.

The level of discretion afforded to tribunals to award compensation for injury to feelings once the other remedies are considered in such cases was not impinged; it is simply the case that a claimant must provide sufficient evidence of such injury to justify an award.

The decision serves as a reminder to practitioners that the desired remedy does not automatically follow liability in indirect discrimination claims. With a tribunal statutorily bound to consider non-pecuniary remedies first, a claimant who successfully demonstrates they have been unintentionally indirectly discriminated against by their employer must then present appropriate evidence of injury to feelings. Failing to do so may lead to a tribunal exercising discretion solely to utilise its power to issue a declaration, and possibly recommendation(s), without going so far as to make an award of financial compensation in restitution of injury to feelings. The ability to exercise that discretion did not, in the Court of Appeal's view, depart from the remedy's effectiveness or dissuasiveness. J

Sport

BRUCE CALDOW, PARTNER, HARPER MACLEOD LLP

Prior to COVID-19 engulfing workplaces across the land, and furlough, working from home and health and safety becoming the key focus of most employers, employment status was the key topic focusing the mind of HR professionals. Whether this concerned the status challenges dominating HR reporting or the recent extension of IR35 legislation to the private sector, whether someone was an employee, a worker or genuinely self-employed was a key issue and required considerable attention. It remains so now in 2021, not merely with IR35 taking hold, but with the recent decision of the Supreme Court in *Uber BV v Aslam* [2021] UKSC 5.

The decision conveyed various points, seeking to provide a definitive and easily understood assessment of when an individual is not self-employed and instead has worker status. The contract and its terms have a part to play, but it is not the starting point and does not constrain parties as has traditionally been argued. The assessment, it is now said, is to look more at the relationship in practice and assess it for what it is, when carried out, and not focus merely on the documented terms of the relationship.

Whilst no one factor is determinative of the existence of a worker or employee relationship, "control" is very important and the extent to which control is exerted over the individual, by the business, will be very much key to determining the person's applicable employment status. The decision also has application to the question of whether someone is an employee, where the concept of mutuality is an imperative question.

The *Varnish* truth

In sport, the highest profile status challenge of recent years was brought by disgruntled

former professional cyclist Jess Varnish, in a decision predating the Supreme Court's ruling in *Uber*: *Varnish v British Cycling* (UKEAT 2022/22/LA). Could *Uber* lend weight to arguments brought by athletes and change the landscape of how employment law is perceived to apply to athletes and sports persons?

The decision in *Varnish* analysed Varnish's relationship with British Cycling and in doing so, on one reading of the judgment, significant emphasis was placed on the documentation in place between Varnish and British Cycling. In *Uber*, the focus was not necessarily on the paperwork in place. In both cases, however, there was an assessment of what was happening in practice; in *Uber* the conclusion reached was that such was the level of control over the individuals, and such was the existence of many facets in the relationship that were consistent with a worker relationship, the documentation was inconsistent and not truly reflective of the relationship in practice. The well established principles from *Autoclenz* [2011] UKSC 41 allowed a focus on the practice, where the documentation was not reflective of what occurred in practice.

In *Varnish*, however, one of the, if not the, key findings was that in reality, Varnish was not performing "work" for British Cycling. Instead, she was pursuing her sport seeking to perform at the highest level, through the grant aided relationship made possible by UK Sport, supported by British Cycling. There was no bargain of wages, or remuneration, for work. This reality did not – and does not – hinge on the documentation in place, or the labels attached to aspects of the relationship, in marked contrast to a typical working relationship.

Beware of ballwatching

It is more likely that the *Uber* judgment will be useful to critiquing other relationships within sport, including in relation to performance support roles, such as coaching, analysis, operations and medical, where self-employed consultant style relationships can still often be found, and the intended exclusion of workplace rights agreed between parties when relationships commence.

With IR35 now applicable to private sector relationships from April 2021, employers in sports will need to take care to reassess any atypical relationships and ensure that status assessments are performed both for the purposes of employment rights and also for the purposes of taxation. Whilst employment rights assessments and taxation assessments are performed for different reasons, employers in sport who do not carefully control atypical relationships could easily be met with both employment rights claims and also difficulties with HMRC for the payment of tax and national insurance at appropriate rates.

Not only must relationships be carefully designed on paper and in reality: the relationships must be consistently carried out in practice in accordance with their original design and intent. Employers in sport, like all sectors, should continue to be vigilant and routinely audit their workplace relationships, to avoid incurring unforeseen difficulties.

IP and artificial intelligence

How should the law deal with computer-generated intellectual property? A response from the IPO to submissions received offers some pointers to the direction of change

Intellectual Property

ALISON BRYCE, PARTNER, DENTONS UK, IRELAND & MIDDLE EAST LLP

Artificial Intelligence (AI) is widely recognised as having the potential to impact the future of every industry in the world. The ability for machines to simulate human intelligence is ever progressing and has reached a point where the law may need to adapt in order to accommodate its innovation. This article will analyse and evaluate the current legislative framework in light of the emergence of AI and will summarise the changes that may need to be implemented in order for intellectual property (IP) law to stay relevant.

What is AI?

AI is defined by the *Oxford English Dictionary* as "the theory and development of computer systems able to perform tasks normally requiring human intelligence". In respect of acquiring intellectual property protection, therein lies both its triumph and defeat – namely, that although there are works created by AI, they are in effect "authorless". The machines that create the works through AI may themselves be owned by legal persons, but the argument is that these systems work so independently and even creatively that the developer can no longer be classed as the author of the works created.

This leads to the questions that will be considered in what follows. Should patent law allow AI to be identified as the sole or joint inventor? To what extent does the current law and practice cause problems for patent and copyright protection for AI inventions in the UK? And, would a failure to amend IP law stifle innovation?

What does the current UK law say?

Current UK patent law (under the Patents Act 1977) requires that an "inventor" be a natural person (i.e. a human) for a patent application to be granted. This was confirmed by the High Court recently in *Thaler v Comptroller-General of Patents, Designs and Trade Marks* [2020] EWHC 2412 (Pat). Dr Stephen Thaler applied for patents in his own name but listed DABUS (the AI system he created) as the inventor. He argued that where inventions are derived from AI systems, the owner of those systems should be the default owner of any patents.

However, the High Court disagreed. It held that while it may be the case that machines are capable of being "inventors" *per se*, they are not capable of holding property rights and therefore are not capable of being listed as such on patent applications. The judge did suggest that Thaler himself could have been listed as the inventor, given that he owned the machine that did the inventing, but there is an argument that even if this were permitted, it would not reflect technological reality and this is what the law should accommodate. With an appeal outstanding, it remains to be seen how this case will be determined.

However, it is not only the inventor requirements under s 7 and s 13 of the 1977 Act that are causing debate. There are several exclusions on patentability and it has been argued that these make it difficult to obtain patent protection for AI-generated developments ("core AI invention"). In the response to submissions received on the Intellectual Property Office's ("IPO") call for views on artificial intelligence and intellectual property, it was noted how AI inventions are typically assessed as any other computer-implemented invention by the IPO. Under s 1 of the 1977 Act, "a scheme, rule or method for performing a mental act, playing a game or doing business, or a program for a computer" are all excluded from patent protection. Case law has confirmed that a computer-implemented invention can be patentable provided it makes a "contribution" to its relevant field, but nevertheless it remains a challenge for core AI inventions to meet the tests for patentability.

"The argument is that these systems work so independently and even creatively that the developer can no longer be classed as the author"

Turning to the issue of copyright, it has been argued that the current law on computer-generated works under the Copyright, Designs and Patents Act 1988 is unclear, particularly the requirement for originality. For a work to be original, it must not have been copied and must have resulted from sufficient skill, labour and judgment. However, case law has linked originality to human creativity, and AI creators have called for clarity.

What has the Government said?

In its response on the call for views for AI and IP, the IPO distinguished between the potential reforms to patent and copyright protection.

As regards patent protection, the IPO has recognised that although it may be possible for an AI system to devise an invention autonomously, it is nonetheless agreed that the AI itself should not own the intellectual property rights pertaining to that invention. Nevertheless, the IPO has acknowledged that patent protection is key to encouraging

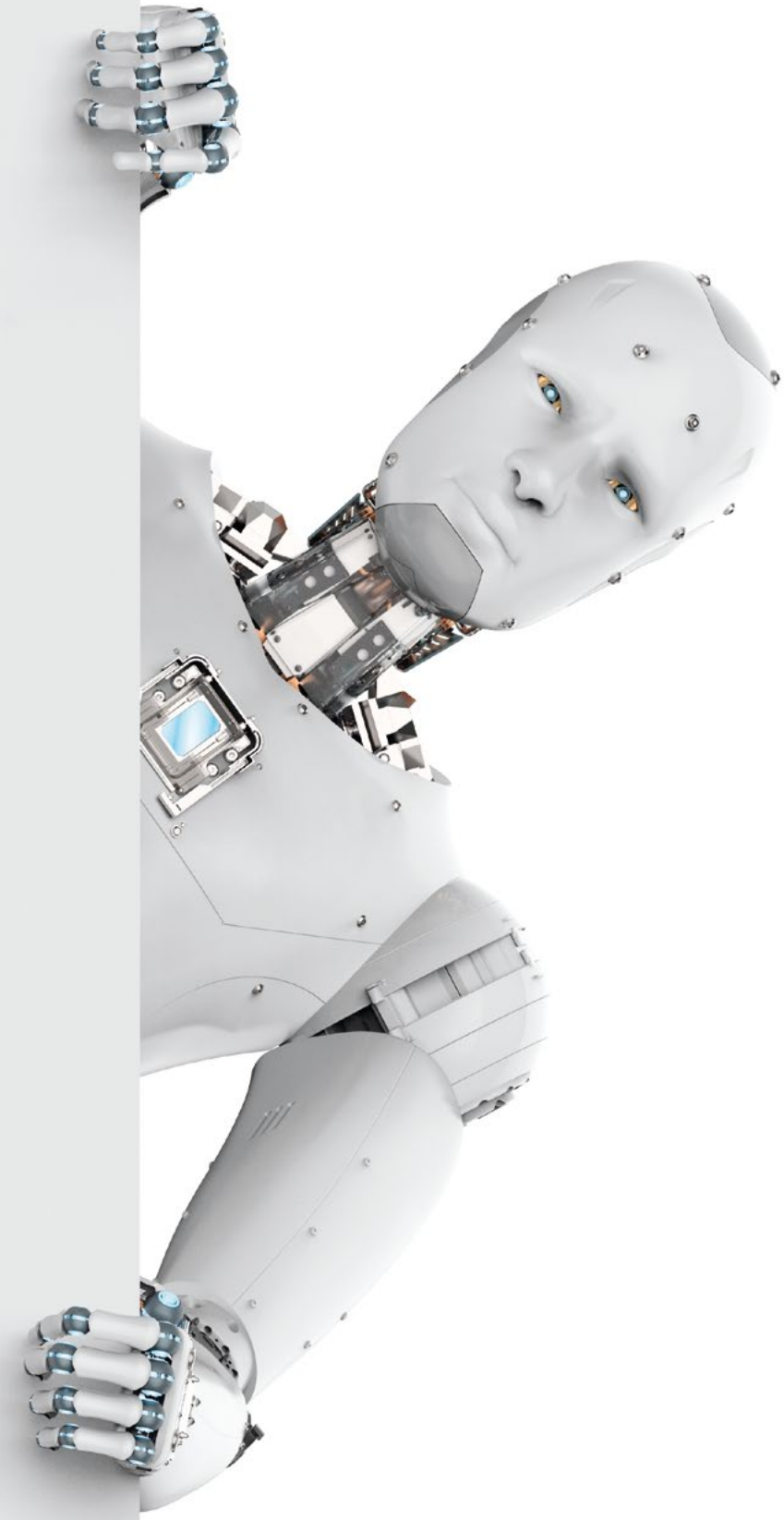
people to invest in AI research and therefore, in deciding who should own these rights, a number of possibilities have been suggested. However, what is clear is that the current inventorship criteria hinder patent protection for AI inventions and the IPO has pledged to consult on this point. Turning to the issue of patent exclusions, the IPO has agreed that patent application outcomes should be more predictable, and that there should be greater clarity surrounding patent exclusion practice. It has promised to publish enhanced guidelines on this point.

Unlike with patent protection, the IPO is less convinced that legislative reform is required for copyright protection. The majority of works generated by AI (the ones with human creative input) are already protected under s 9(3) of the 1988 Act as a "computer-generated" work. Where works are generated exclusively by AI, the majority of respondents to the IPO's call for views felt that human creativity should be prioritised and that there should be no copyright protection at all. However, the IPO has promised to consult on this point. It has also agreed that the current approach to computer-generated works (as regards the requirement for originality) is unclear and should be reconsidered.

What could future reform look like?

Given that the IPO has admitted that current patent and copyright protection for AI generated work is far from perfect, it seems likely that change is imminent. Whether this is drastic legislative reform or something less radical remains to be seen. However, in the case of patent protection, among the possible options are: changing the inventorship requirements to include non-natural persons; allowing AI to be identified as a joint inventor; or extending the "made for hire" doctrine that applies to works created in the course of employment to AI generated works. In the case of copyright protection, the possible changes that have been tabled are: amending the requirements for computer-generated work; amending the definition of "author" to include AI; or creating a *sui generis* right for works created solely by AI (with no human creative input).

While these changes may appear unproblematic, each involves some level of legislative reform, which opens another can of worms: to what extent should there be consistency between the UK IPO and other international bodies such as the European Patent Office? Does amending one legislative framework whilst neglecting the others simply paper over the cracks and actually increase the burden on patent and copyright applications? The IPO will be responsible for balancing these questions against the importance of offering patent and copyright protection in order to encourage innovation within the field of AI.



EWS1: another hurdle for the lawyer

Since the Grenfell Tower tragedy the EWS1 form has emerged as a potential issue in the purchase and sale of a flat in a tall block. But what does it involve? The authors share a recent learning experience

Property

CRAIG BROWN, PARTNER, PATTEN & PRENTICE, AND IAIN SIM, STRATHCLYDE LAW SCHOOL

The authors recently were involved in a conveyancing transaction which at the outset seemed straightforward, but which quickly was complicated by the uncertainty that surrounds EWS1 forms.

They have prepared this note to help practitioners better understand the purpose of EWS1, the applicability of the EWS1 guidance, the logistics of instructing EWS1 surveys, lender issues, and client care considerations.

What is EWS?

A residential building's EWS (external wall system) comprises the outside wall, cladding, insulation and fire break systems.

Following the Grenfell Tower tragedy, the UK Government issued guidance for the EWS of residential buildings that stand 18m and higher. The guidance put in place a process whereby suitably qualified persons assess a building's EWS and then issue a so-called EWS1 form.

The systems that are of particular concern are aluminium wall cladding systems, as these are now known to be especially combustible.

The transaction

The client had instructed that an offer be made on an investment property, on the south bank of the River Clyde.

The building is a stepped design; the outer flats occupy part of the building that is four storeys (below 18m), while the inner flats extend to eight storeys (above 18m). The building is of double brick construction, with cavity wall insulation.

At the point the offer for the property was issued, the client also was in advanced discussions with a major lender in respect of a mortgage product.

The seller's home report contained a statement that an EWS1 form would not be required, as the property has no visible cladding. The lender then instructed a valuation survey, which seemed to confirm that position. It stated: "The external wall system, including any cladding and any attachments (if applicable) for the subject block are understood to have been subject to a review. It is understood that an acceptable statement confirming compliance with MHCLG guidance/EWS1 form exists for the subject block following review by a suitably qualified independent professional advisor with the level of expertise described in the notes on the EWS1 form".

In spite of this, the lender adopted the position that an EWS1 form would be required. In response, the relevant section of the home report (together with an explanatory note from the surveyor) was sent to the lender. The lender in turn sought clarification from the valuation surveyor, who reverted: "The statement is felt applicable. It is the external wall system requiring assessment including any balconies/attachments."

While this statement was perhaps somewhat Delphic, the lender nonetheless took it as confirmation of its position. The client appealed to the lender's specialist EWS1 team, unsuccessfully.

The client had become caught between opposing viewpoints as regards the applicability of EWS1.

When EWS applies

The EWS guidance applies to residential properties above 18m (such as blocks of flats), whether privately owned or held by housing associations.

The guidance extends to student accommodation, care homes and houses in multiple occupation (HMOs), but, curiously, does not apply to short-term accommodation such as hotels. Practitioners should note that this guidance is not law, albeit it seemed to the authors that at times this was lost on some of the stakeholders!

The guidance is also lender specific in terms of its interpretation. In this transaction, for example, when the lender informed the client that an EWS1 form would be required, a second lender was approached. That lender instructed its own valuation survey, which reached a different conclusion, that an EWS1 form would not be required.

If that were not confusing enough, the surveyor who prepared this subsequent valuation was drawn from the same online firm of chartered surveyors that had prepared the first!

EWS: whose word?

As noted, the EWS process envisages a "suitably qualified person" conducting a fire-risk assessment of a building's external wall system, before issuing an EWS1 form.

The guidance is silent as to what constitutes a "suitably qualified person". Yet again, there is evidence that lenders are adopting different approaches. Accordingly, before a client incurs a substantial outlay (more on that anon), it would be prudent to confirm that a lender will accept an EWS1 from the client's surveyor.

On 8 March the RICS published fresh guidance for surveyors, which details the criteria that should be used to help decide whether a particular building requires an EWS1 form. These include its height, the type of cladding, and (in some circumstances) how much of it there is on the building. There are also criteria pertaining to balconies and combustible materials.

While practitioners will doubtless welcome this development, it does not as yet appear to be helping to deliver a uniformity of approach (as illustrated by the diverging views of two surveyors and two lenders).

EWS1 logistics

Perhaps unsurprisingly, the seller's solicitor took the view that the buyer should meet the cost of any EWS1 survey that might be required by a lender.

Practitioners should treat this as a commercial negotiation point, however. How badly does a client want to buy a property? Is a seller going to walk away from a willing buyer with funding structured pending the issue of an EWS1 form? It is certainly always worth trying to push back on the seller, or to seek an agreement to split the cost.

It is important (as already noted) that practitioners should instruct a surveyor from whom a lender will accept a signed EWS1 form, and that surveyor's indemnity should be checked.

In Scotland there are only a few firms that can undertake EWS1 surveys. This has led to two unfortunate consequences, namely long lead times for the surveys (in this case almost two weeks), and high costs.

On the former point, practitioners should issue instructions as early as possible. On the latter, clients should expect to pay anything between £800 and £5,000 for the survey and the issuing of the form.

EWS1 forms

Once issued, an EWS1 form lasts for five years, after which it must be renewed.

Practitioners also should be mindful about who an EWS1 form protects. Unlike certificates of insurance, where several interests can be noted on the same policy, with EWS1 a separate form requires to be issued for each interested party.

In order for a lender to be able to rely on the surveyor's indemnity, they will insist that a form be issued in their name. However, for a client to have a similar protection for their deposit, a second form will be required. With that comes an additional charge, usually 50% of the cost of the first certificate.

Client care issues

In any conveyancing transaction both client and practitioner require to keep a number of plates spinning.

On the practitioner's side, in addition to the standard tasks of negotiating missives, examining title and drafting deeds, there are also anti-money laundering regulations to comply with. On the client's side there are the mechanics of the move to arrange, the financing of the transaction, the transfer of utilities and the arranging of insurances. In addition they require to instruct a solicitor and deal with their queries and requests. Time is short on both sides.

The requirement to obtain an EWS1 form in satisfactory terms, when the guidance on what constitutes "satisfactory" is far from clear, adds a complicating factor to transactions that can often already be overcrowded with complications.

"Flatted dwellings with combustible cladding systems will routinely receive a nil valuation for mortgage lending purposes"

The added workload and responsibility with EWS1 brings increased cost and the question of who is to meet that cost. Setting aside who should pay for the surveyor's time which, as seen, is considerable and a point for negotiation between purchaser and seller, there is the cost of time spent liaising with mortgage lenders, facilitating access for inspection and engaging surveyors who, in a busy property market, have limited availability.

With the vast majority of conveyancing work invoiced on a fixed fee basis, a practitioner will either see their already reduced profit margin wiped out entirely or the cost will be passed on to the client. This may be a cost to the client's time as they shoulder the responsibility for arranging the survey, or a monetary cost if done by their solicitor, who will almost certainly view this as an additional service worthy of extra charge.

The end result? Frustration and annoyance at the additional time and expense, and the probability of delay in completing transactions.

The future

Looking forward, reform is on the horizon and perhaps, in time, legislation will follow. Rather than EWS1 forms being carried out on a flat-by-flat basis, one form will soon cover all flats situated in one building. This should lower overall cost and may also see factors and property managers shoulder the responsibility for maintaining a valid EWS1 form for an entire block.

Lenders and property owners have an interest in the process being streamlined but also carried out responsibly. From a lending perspective, banks and mortgage lenders must have an assurance that they are receiving proper security in exchange for their loan and that the asset they are investing in has a positive valuation. Flatted dwellings with combustible cladding systems will routinely receive a nil valuation for mortgage lending purposes. Clients not only require their investment to have a positive value but require this to be safe for themselves, their families and their tenants. There is therefore little doubt that the EWS1 process plays an important role; in its present format it just requires considerable tweaking.

While that tweaking is awaited, legal professionals must adapt, as they do. If stress is to be minimised (for both practitioner and client), early identification of the issue is essential. This begins with a pre-offer examination of the home report, and offer clauses that put a seller on notice at the earliest juncture that an EWS1 will likely be required. Thereafter, when mortgage instructions are received, it is critical that early engagement with a lender takes place to ensure their requirements are clarified and satisfied.

With any conveyance, a satisfactory outcome relies on all stakeholders playing their part and responding diligently. In the past this may have relied simply on purchasing and selling solicitors getting on with things; however, the addition of further professionals into the mix means the team is only as strong as its weakest link. This leaves the EWS1, in its present guise, a source of considerable friction which has the potential to leave the practitioner's relationship with their client as combustible as the cladding may be. Thankfully, in the case of the authors' transaction that was not the case.

Briefings

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

William Murnin

A complaint was made by the Council of the Law Society of Scotland against William Murnin, solicitor, Greenock. The Tribunal found the respondent guilty of professional misconduct in respect that he (1) knowingly issued fee notes and took funds from client ledgers which were unjustified and excessive, and improperly overcharged clients up to a total in excess of £200,000; (2) created a deficit on the client account up to an amount in excess of £200,000; (3) failed to render fee notes; and (4) submitted inaccurate accounts certificates up to and including 30 April 2010.

The Tribunal ordered that the name of the respondent be struck off the Roll of Solicitors in Scotland.

The respondent improperly overcharged a number of clients in a total in excess of £200,000. As a consequence of the overcharging, the respondent created a deficit on the client account. He failed to render fee notes to seven clients. He authorised and signed inaccurate accounts certificates. His conduct was dishonest. The principles of honesty and integrity are fundamental to the profession. Members of the profession are in a very privileged position and members of the public must be able to trust that solicitors will carry out their duties and obligations in an honest and trustworthy manner. Dishonesty with clients' money is one of the most serious matters that concerns the Tribunal. Solicitors belong to a profession which requires high standards of ethical conduct. Members of the public must have confidence that solicitors are trustworthy and honest and that their integrity is beyond question. Solicitors must comply with the accounts rules. They must render fees to clients. Failure to do so demeans the trust the public places in the profession. Accounts certificates are one of the means by which the Society monitors compliance with the rules and risk to client money. The Society is entitled to rely on accounts certificates as showing the matters which have been identified and the measures taken to deal with them.

William Criggie

A complaint was made by the Council of the Law Society of Scotland against William Criggie, 137 (2nd Floor) Sauchiehall Street, Glasgow. The Tribunal found the respondent guilty of professional misconduct individually and *in cumulo* in respect of his breaches of (a) rules B6.7.1 and B6.7.2, (b) rule B6.20.1, (c) rule B1.7.1, (d) rules B6.23.1 and B6.23.2, (e) rule B6.11, (f) rule B6.18.7, (g) rule B6.7.3, (h) rule B6.5.1, (i) rule B6.18.7 and (j) rules B1.9.1 and B1.9.2, all of the Law Society of Scotland Practice Rules 2011.

The Tribunal censured the respondent and directed that any practising certificate held or issued to him should be subject to such restriction as will limit him to acting as a qualified assistant to and being supervised by such employers as may be approved by the Council of the Law Society of Scotland for an aggregate period of two years. The Tribunal also directed the respondent to pay £1,000 by way of compensation to the secondary complainer.

During the period libelled in the complaint, the respondent had been a partner/director of his former firm/company and had also acted as money laundering reporting officer, cashroom manager, complaints partner and client relations partner. The respondent failed to keep properly written up accounting records in relation to a trust. His firm borrowed money from the trust in circumstances which contravened the Society's rules and in a conflict of interest situation. He failed to comply with anti-money laundering rules. He failed or delayed unduly in disbursing historic client balances. He failed to cooperate with Society inspections. He failed to keep properly written up accounting records to show the true financial position of the practice unit. He failed to render three fee notes. He failed or delayed raising an action and failed to communicate with a client. The Tribunal was satisfied that the respondent's repeated failures over a significant period of time represented a serious and reprehensible departure from the standards of competent and reputable solicitors. Accordingly, he was guilty of professional misconduct.

Paul Anthony Garrett

A complaint was made by the Council of the Law Society of Scotland against Paul Anthony Garrett. The Tribunal found the respondent guilty of professional misconduct in respect that he appeared before sheriffs at Paisley and Hamilton and dishonestly held himself out to be a solicitor when he was aware that he did not have a practising certificate and was therefore unqualified, in breach of practice rules B1.2, B1.13.1 and B1.14.1, and failed to communicate with his professional body in breach of rule B1.2.

The Tribunal ordered that the name of the respondent be struck off the Roll of Solicitors in Scotland.

It is essential that solicitors act honestly and with integrity. The respondent's conduct in appearing in court twice without a practising certificate was dishonest. He misled other regulated persons and the court. The court system works because of the trust placed in representatives. To appear without a practising certificate was a gross breach of that trust and deceived the court. On one of the occasions on which he appeared, the respondent conducted a summary trial, a matter which was likely to have been of considerable importance to his client who placed his trust in the respondent. The clients were placed at risk. They were unprotected by professional indemnity insurance or the Master Policy. The respondent compounded these failings by failing to cooperate with his regulator in its investigation. This behaviour was a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore constituted professional misconduct.

Sverre Nils Aaen

A complaint was made by the Council of the Law Society of Scotland against Sverre Nils Aaen, formerly of Aaen Peach Ltd, 81 St Vincent Street, Glasgow. The Tribunal was not satisfied that all the facts in the complaint, which concerned an allegedly misleading fee quotation for a conveyancing transaction, had been proved beyond reasonable doubt. Having determined the facts which had been established, it considered that these did not amount to professional misconduct. The Tribunal found the respondent not guilty of professional misconduct. However,

it recognised that the standard of proof in relation to allegations of unsatisfactory professional conduct is that of balance of probabilities. In these circumstances, the Tribunal considered that the respondent might be guilty of unsatisfactory professional conduct and remitted the complaint to the Society under s 53ZA of the Solicitors (Scotland) Act 1980.

Quinton Muir

A complaint was made by the Council of the Law Society of Scotland against Quinton Muir, D & J Dunlop, 2 Barns Street, Ayr. The Tribunal found the respondent guilty of professional misconduct, *singly* in respect that (i) in delaying and acting on the secondary complainer's instruction to raise and proceed with a divorce action within the period October 2013 to October 2017, the respondent failed in his obligation to proceed with the instruction within a reasonable time; (ii) in failing to communicate with the secondary complainer in the period January 2015 to February 2017, the respondent failed to communicate effectively with her; and *in cumulo* in respect that (i) in failing to instruct sheriff officers/tracing agents to attempt to trace the husband in 2014 and thereafter, the respondent failed to act in the best interests of the secondary complainer; (ii) in failing to advise the secondary complainer that the instance had fallen in October 2014 and he could not serve the action, the respondent failed to act in her best interests; and (iii) in failing to serve the divorce action by exhibition on the walls of court and allowing the instance to fall, the respondent failed to act in the best interests of the secondary complainer.

The Tribunal censured the respondent and fined him £10,000.

The main overriding averment of misconduct was the one which related to the delay between October 2013 and October 2017 in acting on the secondary complainer's instruction to raise and proceed with a divorce action. A solicitor is expected to carry out instructions adequately and competently within a reasonable time. The Tribunal asked itself whether it was reasonable that in a four year period the respondent had failed effectively to commence a divorce action. In considering this question, the Tribunal took the view that the other averments of misconduct were all steps within this broad encompassing averment. Due to periods of inaction on the part of the respondent, a failure to seek instructions and a failure properly to identify that the instance of this writ had fallen, the respondent had failed to raise and proceed with a divorce action for a period of four years. The Tribunal determined that this period of time, taking into account all of the contributory factors, amounted to a departure from the standard to be expected of a competent and reputable solicitor that could only be classed as serious and reprehensible. This in itself amounted to professional misconduct. The respondent's failure to communicate with the secondary complainer was also professional misconduct in itself. The Tribunal concluded that four other averments of misconduct were more appropriately considered as misconduct *in cumulo*. Two other averments of misconduct were not found to have been established.

Graham Robert Bryson

A complaint was made by the Council of the Law Society of Scotland against Graham Robert Bryson, Bryson's Legal Services, 1534 Maryhill Road, Glasgow. The complainers alleged that the respondent was guilty of professional misconduct in a number of respects. It was said that he failed to act in the best interests of his clients and communicate effectively between 29 January 1998 and 1 January 2014, by failing to notify trust share registrars that the secondary complainer had been assumed as a trustee. It was claimed that the respondent failed to act in the best interests of his clients and communicate effectively by failing between 12 October 2012 and 1 January 2014 to notify trust share registrars of the death of Ms B. It was alleged that the respondent failed to act in the best interests of his clients and failed to act with integrity by failing to submit tax returns to HMRC in respect of the trust for the years ending April 2009, 2010, 2012 and 2013 and failed to deal with penalty notices, and brought, or was likely to bring, the profession into disrepute. It was said that the respondent had failed and/or unduly delayed between 12 January 2012 and 1 January 2014 to undertake work in the administration of the Ms B estate to enable confirmation to be obtained and in so doing failed to act with integrity and acted in a way which brought, or was likely to bring, the profession into disrepute.

The Tribunal considered that the respondent's conduct represented a departure from the standards of conduct to be expected of competent and reputable solicitors. However, it did not consider that the departure was serious and reprehensible. The Tribunal had regard to its functions of protecting the public and upholding the reputation of the profession. The respondent's conduct did not involve a lack of integrity or create a risk to the public or bring the reputation of the profession as a whole into disrepute. However, it might constitute unsatisfactory professional conduct, which is defined as professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional service. Accordingly, the Tribunal found the respondent not guilty of professional misconduct and remitted the case to the Society under s 53ZA of the Solicitors (Scotland) Act 1980. The secondary complainer's claim for compensation would be a matter for the complainers to deal with as part of the remitted complaint.

In practice

Society's new office bearers step up

Ken Dalling and Murray Etherington have taken up office as the Law Society of Scotland's President and Vice President for 2021-22.

Stirling solicitor Ken Dalling has served on the Society's Council since 2010, representing solicitors in Alloa, Falkirk, Linlithgow and Stirling, and joined the board in 2017. He has convened both the Client Protection and Anti-Money Laundering Committees, and served on the Senior Solicitor Advocate Accreditation Committee and the Professional Practice Committee.

Murray Etherington was appointed head of Private Client at Thorntons Law, Dundee, in 2016. First elected to Council in 2015, he convenes the Insurance Committee. He became a member of the board on taking up office as Vice President.

Society wins workplace diversity rating

The Law Society of Scotland has been named one of the UK's Top 100 Most Inclusive Workplaces for 2021 by the National Centre for Diversity.

The Society placed 93rd on the Top 100 index, which recognises companies across the private, public and charity sectors that are best at promoting equality, diversity and inclusion, and fairness in the workplace through policies that deliver transformational change.

Chief executive Lorna Jack commented: "As we begin Pride month, we are delighted to have been included in the UK's Top 100 Most Inclusive Workplaces index, demonstrating our year-round commitment to being a fully inclusive and diverse workplace.

"We have strived to ensure that our company policies reflect that commitment, putting inclusion at the heart of everything we do in order to champion equality and diversity in our working environment and ensure everyone is treated fairly, irrespective of gender, race, disability or sexual orientation. We aim to lead the change that we encourage across the legal profession and being included in this index is a fantastic recognition of that work.

"Yet there is always more that we can do. That is why we have recently begun working towards being awarded the National Centre for Diversity's accreditation as Investors in Diversity. We hope that our action plan for this will ensure that we can climb even further up the index listings."

Trainee pay pegged for another year

The recommended rates of pay for trainee solicitors remain unchanged for a second year, due to the ongoing economic impact of coronavirus, the Law Society of Scotland has confirmed.

Council agreed that the recommended remuneration rates for trainees will be held at £19,500 for first-year and £22,500 for second year trainees, for the year from 1 June 2021. More than 95% are paid these rates or more; trainees must be paid at least the national living wage.

Legal aid trainee fund launches

The Scottish Government's £1 million fund to support legal aid traineeships in Scotland has opened to applicant firms. The Society will manage the fund on behalf of the Government.

To be eligible, firms must derive at least 20% of their business from legal aid work and trainees hired as a result of grants must spend the majority of their time on legal aid cases. Applications will be considered on a first-come-first-served basis. The grants will fund new legal aid traineeships only. For more information, see www.lawscot.org.uk/traineeshipfund/ ***[Stop press: the fund was quickly oversubscribed and there is a waiting list]***

Discipline Tribunal vacancy

There will be one vacancy for a solicitor member on the Scottish Solicitors' Discipline Tribunal this autumn. The criteria to be used in considering applications are:

- the candidate's experience of conveyancing, wills, trusts and executry work;
- the candidate's knowledge of the Society's practice rules, especially the accounts rules regime.

All candidates applying for this vacancy must hold a current unrestricted practising certificate from the Society. All applications will be considered by the Society's Nominations Committee, which will make a recommendation to the Society's Council. Council then makes the final recommendation for the appointment to the Lord President.

An application form can be obtained from David Cullen, registrar by email at davidcullen@lawscot.org.uk

The deadline for receipt of all applications is 5pm on Friday 9 July 2021.

Will Relief Scotland: 2021 campaign

Will Relief Scotland invites solicitors to take part in its 2021 campaign, which runs for the month of September. Solicitors make wills for clients without charging a fee, in return for a donation towards four Scottish-based international relief charities.

Since it began in 2016, the campaign has raised a total of £131,417, and Will Relief Scotland thanks all who have taken part. Further information at willreliefscotland.org; contact mairi.ferrier@blythswood.org (t: 01349 830777).

ACCREDITED PARALEGALS

Civil litigation – debt recovery
KIRSTY ROBERTSON, Innes & Mackay.

Residential conveyancing
JILL BORTHWICK, Cullen Kilshaw;
SHIRLEY McEWAN, Murray, Hamilton & Chalmers.

Wills and executries
FIONA BROWN, Boyd Legal Ltd.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key work in May is highlighted below. It was a quieter month for submissions as a result of the Scottish Parliament elections and the start of the UK parliamentary session. For more information see the Society's research and policy web pages.

Child welfare reporters register

The Society's Child & Family Law Committee met with Scottish Government officials to discuss the current consultation on the register of child welfare reporters, curators *ad litem* and solicitors to act where self-representation is not allowed, to be created under the Children (Scotland) Act 2020, ss 9, 17 and 7 respectively. The Act also sets out training, qualification and complaint processes.

The proposals for the register may have a significant impact on members working or looking to work in these areas. As well as an appointment, periodic appraisal and re-appointment process (affecting existing and new reporters), significant training requirements are raised by the paper, and issues around payment and complaints. These are the main issues that will be considered in the Society's response to the consultation, which closes on 12 July. Members may want to respond, or provide views to policy@lawscot.org.uk.

Meanwhile, the Society recommends that solicitors who carry out these additional functions consider the impact of the changes on their practice.

Professional Qualifications Bill

The Professional Qualifications Bill had its second reading in the House of Lords on 25 May. It revokes the EU-derived system for recognition of overseas professional qualifications following the post-Brexit transition period and replaces it with a new framework. It also sets out a framework to enable action to be taken in the public interest if it is judged that a shortage of professionals has arisen in a profession, and places an obligation on regulators to ensure transparency regarding routes of access to the profession for international candidates.

In a short briefing the Society generally welcomed many of the provisions, as well as the Government's undertaking to respect regulator autonomy, and also the devolution settlement where professions' functions fall within devolved areas. Its main concerns relate to the wide regulation-making power conferred and a lack of a corresponding requirement to consult, particularly when some of these powers have the potential to impact on the Society's own admissions regulations.

Marine law

The Marine Law Committee responded to two consultations issued by the Maritime & Coastguard Agency. The first consultation was on the draft Merchant Shipping (Radiocommunications) (Amendment) Regulations 2021 that propose to implement an up-to-date version of chapter IV of the International Convention for Safety of Life at Sea 1974 (SOLAS) into UK law and give direct effect to future changes to chapter IV. The second consultation related to the implementation of the safety related requirements in the Merchant Shipping (Polar Code) (Safety) Regulations 2021.

On the first consultation, while the Society considers it appropriate for the Government to retain the power to make regulations to prevent an unwanted amendment to SOLAS from becoming UK law, the measures concerned will nonetheless be international legal obligations with which UK ships will be required to comply regardless of UK law. It is important that these obligations are respected and that in the event of divergence, steps are taken to raise awareness of the situation within the sector.

On the second, the Society supports the proposed approach, but thinks that corresponding awareness-raising of the changes will be critical to their success. There may be a significant increase in vessels transiting through the Northern Arctic routes in years to come as a result of the decline in polar ice. There also need to be suitable opportunities for consultation and scrutiny of any future proposed changes to Chapter XIV of SOLAS and for the UK to be part of the consultation and negotiation process.

ACCREDITED SPECIALISTS

Agricultural law
Re-accredited: MARGO KYLE McGILL, Lockharts Law LLP (accredited 22 April 2016).

Construction law
LEIGH ANNE HERD, Shepherd & Wedderburn LLP (accredited 9 April 2021); PHILIP MORRISON, Clarion Solicitors Ltd (accredited 19 May 2021).

Crofting law
Re-accredited: JEREMY PETER BENFIELD, MacPhee & Partners LLP (accredited 13 May 2011).

Employment law
SIMON JONATHAN ROSS MAYBERRY, Leyton Legal (Scotland) LLP (accredited 12 April 2021); SCOTT STEWART MILLIGAN, Harper Macleod LLP (accredited 27 May 2021).

Re-accredited: DAVID JAMES WALKER, Morton Fraser LLP (accredited 25 January 1996); CAROLINE ANN CARR, BTO Solicitors LLP (accredited 9 March 2001); LINDSEY JANE CARTWRIGHT, Morton Fraser LLP (accredited 15 March 2011); PAMELA JAYNE MACAULAY, National Westminster Bank plc (accredited 25 January 2016).

Family law
BRIAN JAMES ROONEY, Rooney Family Law Ltd (accredited 19 March 2021); KHALDA WALI, LKW Solicitors Ltd (accredited 23 April 2021); KAREN LYNSEY NICOL, MacRoberts LLP (accredited 19 May 2021).
Re-accredited: FIONA JANET CAREY, Brophy Carey & Co Ltd (accredited 23 March 2001); RICHARD BRYAN SMITH, Brodies LLP (accredited 23 March 2006); JENNIFER GALLAGHER, Lindsays LLP (accredited 10 January 2011); MICHAELA LOUISE HINCHIN, MTM Family Law LLP (accredited 13 January 2011); GRANT ALEXANDER KNIGHT, TC Young LLP (accredited 31 March 2011).

Family mediation
Re-accredited: ROBERT LISTER GILMOUR, SKO Family Law Specialists LLP (accredited 30 April 2009); SHONA MARY TEMPLETON, MTM Family Law LLP (accredited 11 February 2015); DEBORAH ELIZABETH REEKIE, BTO Solicitors LLP (accredited 19 April 2018); JENNIFER CHLOE SMITH, Harper Macleod LLP (accredited 19 April 2018).

Housing and residential tenancy law
MARY-CLAIRE KELLY, Clan Childlaw Ltd (accredited 23 April 2021).

Incapacity and mental disability law
Re-accredited: ALAN MARK RALSTON, Wright & Crawford (1906) Ltd (accredited 15 April 2016).

Insolvency law
JAMES SEMPLE LLOYD, Harper Macleod LLP (accredited 30 April 2021).
Re-accredited: GARY JOHN MOFFAT, Burness Paull LLP (accredited 18 January 2016).

Medical negligence law (defender only)
KELLY FRANCES SERVICE, National Health Service Scotland (accredited 17 March 2021); ELAINE ROSE COULL, National Health Service Scotland (accredited 16 April 2021).

Personal injury law
CALUM ANDREW FIFE, Keoghs Scotland LLP (accredited 13 April 2021); CASEY ELSPETH THOMPSON, DAC Beachcroft Scotland LLP (accredited 19 May 2021).
Re-accredited: IAIN WILLIAM NICOL, Lefevres (Scotland) Ltd (accredited 26 March 2003); DAVID NELLANEY, Digby Brown LLP (accredited 8 April 2016).

Professional negligence law
Re-accredited: TIMOTHY JAMES EDWARD, MBM Commercial LLP (accredited 16 March 2006).

Trust law
Re-accredited: MARTIN STUART CAMPBELL, Anderson Strathern LLP (accredited 26 May 2016).

AGM REPORT

AGM hears of a challenge met

Staff, members and volunteers performed beyond themselves in meeting the challenges of COVID, the Society's AGM heard. It also approved the various motions presented. Peter Nicholson reports

Scottish solicitors will pay a practising certificate fee of £517.50 in 2021-22, 10% less than the pre-pandemic cost in 2019-20, following approval of the proposal put by Council to the Society's annual general meeting on 27 May – once again held virtually.

The reduction follows the 20% cut for the current practice year, and was set to provide some continuing support during the recovery phase from COVID-19.

The accounts for 2019-20, adopted by the meeting, showed the Society making a surplus of £410,000 – a year when it was funded by the higher fee but had its activities curtailed for more than half the year. The 20% fee cut was made through budgeting for a loss of £1.5 million in 2020-21.

Reviewing the year, President Amanda Millar said it had been spent facing up to the challenge of COVID. She had put her name forward to become the first visibly LGBT President, but it was clear what would dominate by the time she took office. She had also wanted to stand up for the profession, the consumer and for the rule of law and access to justice – all of which had remained true, though as respects the last two she had not expected to have to fight for them "quite so close to home, quite so regularly".

Support for members had been required at "never before seen levels" (Lorna Jack told the meeting that enquiries to Professional Practice more than doubled to 28,500), as everyone tried to adjust to new rules and ways of working. The expertise of the Society's staff, volunteers and committees had never been more important, and they had outdone themselves in their contribution.

Solicitors also had to find time to take care of themselves and look after their own wellbeing, otherwise they would not be able to take care of their clients.

In a "sink or swim" scenario, the President was incredibly proud of how the profession had swum in very difficult circumstances. Our principles had been tested, but retaining them remained a fundamental part of our civil society, and they could not be sacrificed on grounds of expediency.

Chief executive Lorna Jack recorded how the Society had remained focused on "leading legal excellence" despite the disruption: its priority had been to emphasise the importance of the legal profession, and what members had needed from the Society to continue to support their clients. However it had still taken forward the bulk of its original operating plan, and completed more than half of the set goals.

It could now carry out remote inspections of practices, CPD had switched to a comprehensive online programme of training, and online member engagement had attracted more people from across the country and beyond.

And despite all the difficulties for the profession, membership had still grown, to over 12,300 solicitors at the year end, along with now more than 2,600 student associates.

Gender-neutral constitution

The meeting unanimously passed three constitutional resolutions: one to replace male-gendered references to solicitors with gender-neutral terms; one to extend the England & Wales Council constituency to include Scottish solicitors working in Northern Ireland; and one to allow presidential duties to be carried out by the Past President or another member appointed by Council, should the President and Vice President both be temporarily unavailable.

Draft amendments to the practice rules to amend the signature requirements for accounts and AML certificates, and the timing of the latter, all in line with current practice, and provide for charges for AML reinspections or reinvestigations where Council considers these necessary, attracted no comments and will be taken forward by the Regulatory Committee.

For more on the Society's year 2019-20, see the annual report.

Honorary membership for Malawi supporter

The meeting opened with the presentation to retired solicitor Colin Cameron of honorary life membership of the Society, for his commitment to the people of Malawi over more than 60 years.

As he admitted in his thanks, Cameron did not set out for the then colony of Nyasaland, on qualifying as solicitor in 1957, from any altruistic motive, but for the sole purpose of a salary with which he could afford to marry his wife Alison. Travelling via South Africa, he had his eyes opened to apartheid, and against his expectations found Nyasaland to be little different in practice. However he and Alison became involved with the local people, to the extent that he played a key role in negotiating the country's independence in 1964. He became the only European in the first Malawian cabinet, only to resign months later when Prime Minister Banda reintroduced detention without trial.

Eventually returning to Scotland, he established his own legal practice in Irvine, retiring in 2003, but always retained close links with Malawi, and on a change of Government in 1994 was invited to become Honorary Consul to Scotland, serving until 2009. On the Scotland-Malawi partnership, which he was instrumental in creating, he said: "I feel that other similar countries could do well to follow that same model."

Paying tribute, the President described Colin Cameron as "a true ambassador for the profession, showing the impact and influence a Scottish solicitor can have on a global stage".

Alison and Colin Cameron with students supported by a fund set up in their name

How do you manage the bank manager?

Scott Foster's insider tips on how to bring your bank manager onside when seeking business finance

I spoke very recently with one senior partner who had a tough time back in 2008 with a downturn in the housing market due to the financial crisis. He told me quite candidly: "I wish that I had learned, early on in my career in running a law practice, how to manage my bank manager."

During my time banking the legal market in Edinburgh, it was clear some firms and their managing partners had worked that out really quite well. One said to me and a colleague of mine that "I would never ask a bank for money when I really need it... I would have done so long before that point!" (I know that although long since retired, he will read this and have a quiet chuckle to himself.)

Honestly, he was right with these thoughts. The smart thinking behind this strategy was knowing when was the correct time to put the funding in place, and what it would be utilised for to help develop his practice.

What bank managers respond to

1. Let us start with stating the very obvious: have a clear idea of your finance needs and exactly what the funding will be used for.

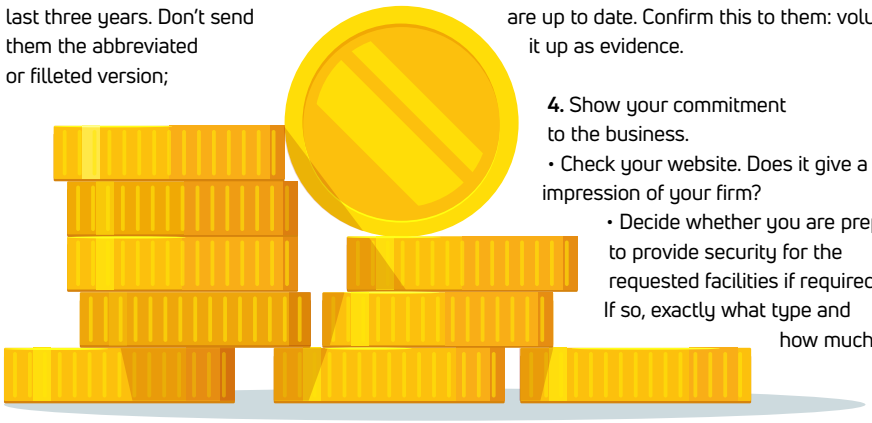
- Choose a suitable lender and establish the type of funding you are going to seek. The catchall pot of the big overdraft facility is really a thing of the past.
- Establish *who* you are meeting, and what their background is. Check them out on LinkedIn.
- Establish *what* information you need to give them. Typically, this will be:
- • full financial accounts for the last three years. Don't send them the abbreviated or filleted version;
- • current management information (MI), including aged debtors and creditors, work in progress (WIP) and fee earner breakdowns; business plans and cashflow forecasts; and if need be personal asset and liability statements.
- Send these in advance. There is nothing worse than being handed information like this at the meeting.

2. Put in some preparation time for the meeting or call.

- Know your business and be ready to answer questions on sales, departments or fee earner performance, costs, WIP, debtors and creditors, and future plans and requirements (which are reflected in your business plan and cashflow forecasts in particular).
- It is worth always thinking about things in percentage terms. For example, "Our Private Client team generates 40% of our turnover." If you turn over £1 million a year, you would like to think they can fathom that 40% equates to £400,000.

3. Demonstrate that you understand the financial information you are providing. Take an external sector specialist in with you.

- Explain any figures differing from the previous years, such as positive or negative swings or variances in performance.
- Share your terms of engagement and pricing structure.
- Consider what are your firm's trading positives and negatives.
- Completing a SWOT analysis (strengths, weaknesses, opportunities, threats) may help.
- Check that your HMRC tax and VAT payments are up to date. Confirm this to them: volunteer it up as evidence.



4. Show your commitment to the business.

- Check your website. Does it give a good impression of your firm?
- Decide whether you are prepared to provide security for the requested facilities if required. If so, exactly what type and how much?
- Understand the value of what the lender already has.
- Consider what personal funds you have available to invest yourself. This shows your support for the business and means the lender is not being asked to take the majority of the risks.
- Talk the lender through your firm's personnel: who has the experience and capability to manage the staff and finances?
- Who are the management team and what is their track record in running a profitable business?
- Explain in detail how your cashflow is calculated and then managed. Support this with evidence such as your aged WIP and costs.
- Know your key performance indicators (KPIs) and which ones are most relevant to the meeting. Which KPIs are you most and least confident of achieving?
- Be prepared to discuss your firm's policies, recruitment, training and other risk minimisation measures, especially on topical issues such as fraud and cybersecurity.
- Be clear on your firm's strategy and what your competitive edge is versus that of your identified competitors.

Make their life easier

Put something credible and well thought through in front of the bank manager, and the greatest commodity a business needs will in all likelihood be made available to them – time!

Just in case you were wondering how that senior partner and his firm that I referenced at the start were now doing 13 years on, the answer is very well, thank you – debt free with cash reserves building nicely, giving him and his stakeholders the flexibility to develop and grow their business still further. He has worked out just how to "manage his bank manager".

Scott Foster
is an independent management consultant, focusing on the legal sector, and a former banker
e: scottf31.sf@outlook.com; LinkedIn: bit.ly/3ehHTTW

RISK MANAGEMENT

Letters of engagement: one size does not fit all

Some thoughts on issuing client engagement letters and making sure they are tailored to the individual client and piece of work

A solicitor's drive to go the extra mile for their client, especially in challenging times such as the current pandemic, is understandable. It is a competitive market. Clients expect – and demand – first class service and support from their solicitor. During the pandemic, clients have required assistance navigating a plethora of new, challenging and often urgent legal issues and disputes.

It has been a time of change for practitioners on many levels: new working practices, new means of communicating with clients and colleagues, new ways of accessing and storing documents. These changes are likely to be lasting, with many firms electing to adopt a hybrid remote working model moving forward.

With change comes increased risk. Practitioners have long recognised the need to take proactive steps to manage risk. A well drafted letter of engagement is an essential part of every practitioner's risk management toolkit, as it is crucial to manage a client's expectations from the outset. Many complaints and professional negligence claims arise because the solicitor has failed to adequately define the scope of their engagement with the client.

In this article, we offer guidance on good practice and practical tips when drafting letters of engagement, with a focus on mitigating risk as we emerge from the pandemic.

Minimum content – a good start

Firms are generally aware of the *minimum* information required for their letter of engagement, often referred to as their "terms of business". Rule B4 of the Law Society of Scotland Practice Rules 2011 outlines the information that must be included. For example, if the practice will benefit from a share of the interest payable on invested client funds, this must disclosed.

The letter must also explain how the client can cancel their engagement with the firm within 14 days under the Consumer Contract (Information, Cancellation and Additional Charges) Regulations 2013 and the Consumer Rights Act 2015.

Most standard letters of engagement comply with the Society's rules and this is a good start, provided that the letter is concise and easy to read. Ideally, lengthy standard terms and conditions should be attached in a separate document for ease of reference. In reality though, a standard letter of engagement, covering only the basics, will have a limited impact in terms of minimising the risk of complaints and claims. One size does not fit all.

Additional content: good practice

It is simply not practicable to draft a letter of engagement from scratch every time an instruction is received and accepted. The most effective letter of engagement, in addition to containing the information required by the Law Society of Scotland, will also be tailored to the individual client and the specific piece of work to be undertaken. Careful thought should be given to the key terms of engagement, outlined below.

> *"It is important for practitioners to consider the extent of their remit so they can clearly define the advice and services that will be provided"*

Scope of engagement

Perhaps the most important section of a letter of engagement – from a risk management perspective – is the definition of the scope of the work that the solicitor has agreed to undertake. It is important for practitioners to consider the extent of their remit so that they can clearly define the advice and services that will be provided and also, crucially, any advice and services that will *not* be provided. If an area of advice is specifically excluded – either because it falls outwith the practitioner's area of expertise or because the scope of the work to be undertaken has been restricted with reference to an agreed fee – it is important not only to highlight this exclusion but to direct the client to an alternative source of advice for the issue in question.

Where advice and/or services are specifically excluded from the scope of the solicitor's remit, care should be taken throughout the instruction not to comment on these excluded areas. Avoiding this protects both the practitioner and the client.

Unfortunately, it is still common for practitioners to include only a short, generic description of the work, e.g. "your divorce", or "advice re partnership". Such descriptions should be avoided as they will provide little assistance to the solicitor in the event of a dispute regarding the scope of the solicitor's contractual obligations or duties of care. A client, rightly or wrongly, might assume and subsequently assert that the solicitor was responsible for a wider range of matters. A well drafted letter of engagement – which sets out any specific exclusions clearly – will serve to minimise any risk of misunderstanding.

Lines of communication

The letter of engagement should clearly define who the client is. Where the solicitor acts for more than one client, the letter should record, following consultation with the clients, whether instructions can be accepted from all parties or whether there is one representative of the group who is authorised to provide instructions on their collective behalf. This is essential for avoiding miscommunication.

The solicitor should also say *how* they intend to communicate with the client. At present, this will likely be by electronic means, but it is important to clarify the point. As a result of the pandemic, practitioners are less likely to meet clients in person or indeed to correspond via post. Virtual meetings via Teams and Zoom can be effective – and convenient – but are not suitable for all clients. Remote working can, inadvertently, lead to less interaction, as clients may be less inclined to contact their solicitor with queries or for updates. Providing clearly defined lines of communication – identifying the partner responsible for the instruction and the assisting fee earner along with their direct contact details – is important, more so now than ever.

GDPR

As with client communication, compliance with the General Data Protection Regulation (GDPR) should be reviewed in light of the pandemic-driven changes to working practices. Law firms, as data controllers, must ensure that they process and store their clients' data lawfully. They must be transparent about how data are used and held. Firms are required to publish this information on their website in the form of a privacy notice. The letter of engagement should include specific reference to the GDPR, the firm's privacy notice, and instructions on how to access it. It is good practice to highlight in the body of the letter how the client's personal data will be stored and used, including what will happen to documents and data held when the instruction is at an end.

Timescales and costs

Where appropriate, the letter of engagement should outline the likely timescales for completion of the work, the various steps involved and the agreed or estimated cost of the work. Doing so can help to manage the client's expectation. Should there be a delay that is outwith the solicitor's control, this should be communicated to the client, in writing, as soon as possible so that the expected timeframe can be reworked.

It is also important to make the client aware of any steps they will be required to take or timescales they will need to meet, e.g. when it comes to providing copies of documents or returning signed deeds.

Liability cap

Law firms often include liability caps in letters of engagement in an attempt to limit their liability to the client, but there is no guarantee that a liability cap will be enforceable. It will be unenforceable if it is not fair and reasonable to the client.

Fairness is assessed by reference to various factors, including the type of work undertaken and the type of client. A liability cap is likely to be viewed as unfair if it was not brought to the client's attention or if the client was not afforded an opportunity to consider the proposed cap and take independent legal advice if necessary.

Lockton, the appointed broker for the Master Policy Professional Indemnity Insurance, recommends that firms do not seek to cap liability at a level below the cover provided in terms of the Master Policy – currently £2 million.

Repeat instructions

One exception to the requirement to issue a letter of engagement relates to repeat instructions from regular clients to carry out the same type of work. If there is doubt about whether the work instructed is sufficiently covered by a previous letter of engagement, it would always be safer to err on the side of caution and issue a new one clearly setting out the terms of the new work.

Housekeeping

At the end of the letter of engagement, it is advisable to include a section on "Next steps". Is the client required to sign and return the letter of engagement? Is the client required to confirm in writing that the terms are accepted? Guidance should be provided and diary reminders set to check that the client has returned the signed letter or has otherwise confirmed their acceptance of the terms outlined.

One of the positives of remote working is that it is much more likely that the letter of engagement will have been issued by email. This means that there will be an email chain (hopefully saved to the file) confirming that the letter of engagement was sent to the client. From a risk management perspective, it is important to ensure that a signed copy of the letter is returned or an email has been received in response confirming that the terms of engagement are accepted.

Practitioners are short on time and under increasing pressure to meet client demands and financial targets. Issuing a generic "one size fits all" letter of engagement is often viewed as a quick "tick box" exercise. That is not however an effective means of minimising risk. The importance of issuing an appropriate, tailored letter of engagement cannot be overstated.

This article was authored for Lockton by Lindsay Ogunyemi of DWF

COP26

Climate change, inequality and the profession

This further article from the Society ahead of the COP26 conference looks at the connection between climate change and inequality, and the responsibility on the legal profession to play its part in addressing both

As we approach the delayed COP26 conference, in Glasgow in November 2021, the Society's COP26 and Climate Change Working Group has been working on raising awareness of climate change issues of significance to the profession. Here, we explore the relationship between inequality and climate change, with a focus on the legal profession.

The COP26 conference is committed to urgent climate action to identify progress towards the goal of limiting global warming to well below 2°C, while pursuing efforts to limit the increase to 1.5° as set out in the binding 2015 Paris Agreement on climate change. As COP26 is a globally significant event for Scotland, UK and the world, this is an important opportunity to consider the relevance of inequality and our responsibilities as individuals, lawyers and the wider legal profession.

Effect of climate change

While all countries feel the impact of climate change, they are not equally affected. Many developing countries have been affected by the impacts of global warming, especially those countries relying on natural resources that have limited capacity to deal with landslides and floods. Countries have "common but differentiated responsibilities", in that all states are responsible for addressing the global environmental destruction but do not have equal responsibilities. This inequality between states has enhanced the injustice caused by climate change that needs to be addressed collectively.

What is inequality?

Inequality is a term with which most of us are very familiar, especially those who deal with discrimination and employment law. The need to combat inequality underpins and permeates much of our legal work, whether in advising clients on relevant legislation or by contributing to Government policy development. Its importance is vital when ensuring respect and dignity for all in our society, in maintaining fairness and upholding the rule of law, and in supporting the values, in our case, of our Scottish legal system.

When defining inequality, we may refer to the "protected characteristics" that include sex, race, religion and belief, and age. Inequality is traditionally associated with vulnerability, where climate change has and is continuing to have a significant impact on parts of our society.

For instance, climate change is recognised as affecting women, who constitute the majority of the world's poor. They depend on food and income from the land, and natural resources such as water, forest and energy resources on which they depend for survival are under threat. Age is a factor too, as older adults may be affected through rising temperatures where heat exposure increases the risk of illness and death among those already living with chronic health conditions.

Inequality should also be understood in the context of the distribution of wealth, as it carries significant economic and societal importance affecting political decision making and the allocation of resources. This is an important theme when we consider our role in Scotland and our citizens as one of the rich and developed countries.

What should we do to behave in a fair manner?

The Society's *Report on the COP26 and Working Group Survey of the Profession*, published in December 2020, recognised that climate change will have significant long-term impacts on us all. Though the COVID-19 pandemic has required our immediate focus, allocation of time and resources, and has had significant impact, there was a telling observation made that there "will always be something 'more important' that needs immediate attention that will always come before climate change until one day... [there are] no more days left to deal with it".

Society agrees about the need to address climate change. Though there may be plans for the next few years, it is the longer term 'how' that remains uncharted. Many of our activities, including the use of technology, generate greenhouse gas emissions. There is biodiversity loss. To meet climate change ambitions, there will need to be changes to the ways we do things, and that will have consequences for all of society, including the workforce. Changes may come at a cost; we along with other countries must bear the economic and political costs, notwithstanding the potential effect on commercial viability.

Co-operation at all levels is required. That starts from individual actions by seeking different methods, looking to greener ways of undertaking activities, seeking ways to collaborate and influence others domestically and internationally through our actions. If nothing is done, the gap between our rich nations and the impact of inequality will be felt more acutely, with an estimate of 132 million people being pushed into poverty over the next 10 years, reversing any progress made to date.

We have seen the effect of COVID-19 on inequalities in our society. Just as for COVID-19, as lawyers we should reflect on the potential impacts of climate change in advising clients, planning for the future, influencing policy, and providing greener offices. Our decisions today affect that future. More importantly, the profession can seize this chance to address inequalities. Avoid the mistakes of previous industrial transitions, by building on the steps taken to date to transition to net zero by means of "collective national endeavour, especially in this year of COP26", as the Just Transition Commission recognised.

Now for the individual role, as Mary Robinson suggests, and our survey emphasised: "You've got to take the issue of climate change very personally, in your life and in your work. It has to somehow penetrate. Get angry with those who have more responsibility... Use your voice, your vote, your marching, and your teaching. It is the only way we'll see real change."

COP26 has given those in Scotland an opportunity to be heard and tackle inequality – let's embrace it.

The working group is interested in hearing from members as to what they may be doing which can be included in its news/wider communications planned leading up to COP26. If you wish to get your business involved, you can find out more about the Race to Zero Campaign, and visit the SME Climate Hub.

Gillian Mawdsley and Alison McNab are policy executives at the Law Society of Scotland

Fairness and justice:
nice and simple does IT

Stuart Duffin tells how one community law centre has worked to create the right mix of human and technology capability to reach out to vulnerable clients with limited IT capacity

The impact of COVID has meant vulnerable people struggling to access justice when they have needed it most. Demand for legal services from some of the most vulnerable has grown over the past year. But victims of domestic abuse, families on low incomes or benefits, and older people have struggled to access the justice system due to restrictions and the move to online legal services.

Recent figures show that domestic abuse has risen by 10% over the past year; however victims find it even more challenging to access the justice system adequately. And vulnerable clients have struggled to adapt to new technological demands from legal services, courts and tribunals.

Using lockdown to tackle the challenges head on, Dundee Law Centre revamped its online presence and back office tools to match our ambitions. Investing in technologies was obvious. Just as other industries have been disrupted by digitisation and smart technology, our business model, as a community not-for-profit law firm, suggested that pressures on legal process management would mean technology having a large effect on sustainable legal practices. So, we created the right mix of human and technology capabilities to redefine our relationships to benefit our clients. This illustrated just how important it is to find new ways of connecting with our clients and people in need, ensuring no one is denied access to justice.

Technology is not enough

Access to justice is the ability of people to gain an effective remedy (sometimes through the courts) to protect their rights. Technological developments can assist. However, this can be taken further by using technology to simplify complex legal information. The use of mobile apps and chatboxes to provide information, triage and signpost people increases information on their legal rights and options. The use of online courts and hearings has the potential to reduce costs, increase access to courts and tribunals, and ensure that people can access appropriate remedies easily.

However, I have reason to question whether the use of technology will really increase access to justice. Those who are most at risk of being unable to access justice (the poor and vulnerable) are less likely to be digitally literate. In Scotland, 34% of applicants for universal credit looked for help from the Citizens Advice Bureau because they could not access the internet. This illustrates the significant risk of digital exclusion. While technology is likely to increase access to justice for those who are digitally literate, it can leave others out.

Ninety per cent of adults have recently used the internet; but that does not mean they are digitally competent to participate in online hearings, courts or negotiations. Moreover, access to the internet does not mean regular or easy access. Digital skills, internet quality, financial resources are all necessary to engage fully in the digital legal system.

Even with digital competence, people cannot effectively solve their legal problems without legal expertise. Technology can be harnessed to provide people with all the information that they need; it cannot give them the legal expertise to apply the information effectively. The lay person is challenged to understand legal information without expert help. Technology must be supported by face-to-face legal guidance and legal advice. Without this, the use of technology to further access to justice will have the unintended consequence of further decreasing access.

Keep it simple

Technology and apps are additional tools, enabling resourceful use of solicitor time. COVID-19 has been challenging; but it has given us the opportunity to invest in our systems, enhance our delivery and outreach models, and learn how clients use technology. We have become more agile by moving to cloud-based CRM (customer relationship management) and softphone technology. As Joyce Horsman, principal solicitor, outlines, "We piloted guided sessions in partnership with other organisations throughout the city. In essence, a support worker helps the individual to navigate the technology. However, sessions are limited, and engagement is challenging."

We are looking forward to welcoming people to face-to-face meetings and continuing to provide quality legal advice and support when and where it is most needed. But by adapting we can deliver more legal services to vulnerable people, who now can reach us by phone, text, webchat, WhatsApp and Facebook. Simple apps, easy-to-use technology delivering for those with complex needs – and we should never forget how a telephone conversation can help to resolve many a legal enquiry.

James-Stuart Duffin, Dundee Law Centre

WORD OF GOLD

The truth is out there – isn't it?

Stephen Gold on cleaving to candour in a post-truth world

"Truth is like the sun", said the great philosopher, Elvis Presley. "You can shut it out for a while, but it ain't goin' away". "We can't go on together, with suspicious minds", he might have added, but it's remarkable how many of our most revered institutions seem suddenly to deserve our suspicion, and flinch in the sunlight's glare.

Few organisations have a more benign image than the Post Office. Yet the erstwhile bosses of Postman Pat are now exposed as responsible for ruining countless lives, as they continued to launch fraud prosecutions long after doubts emerged about their dodgy software. They have only now abandoned their efforts to maintain gagging clauses, preventing anyone compensated from speaking out. This scandal has led to calls for an end to private prosecutions. Only the state, we are told, with its robust checks and balances, and guaranteed integrity, should have the power to haul citizens before the courts. One can imagine how well this has gone down in the homes of the victims of the botched, allegedly malicious Rangers prosecution, recipients so far of over £25 million of taxpayer-funded compensation.

Never mind, there's always the BBC. Or at least there was, until along came Martin Bashir, with his phoney bank statements, ingratiating manner, and the freedom to operate in a supervisory environment equipped with not one, but two Nelsonian eyes.

The concept of objective truth is under sustained attack. Instead, we are encouraged to speak "our truth". "Post-truth", the *Oxford English Dictionary*'s word of the year in 2016, has been defined as "Relating to, or denoting circumstances in which objective facts are less influential than appeals to emotion or belief, in shaping public opinion". Recently, the concept of a right or wrong answer in mathematics has been condemned as inherently racist. Instead, it is apparently preferable to intuit the answers. One wonders what Einstein would have made of this, but it's likely he would have revisited his famous definition of insanity.

Things are no better across the Pond, where legislators running scared of the Trumpian mob continue to maintain that last November's election was stolen from him. As historian Timothy Snyder wrote of the storming of the US Capitol, "Post-truth is pre-fascism... When we give up on truth, we concede power to those with the wealth and charisma to create spectacle in its place. Without agreement about some basic facts, citizens cannot form the civil society that would allow them to defend themselves. If we lose the institutions that produce facts that are pertinent to us, then we tend to wallow in attractive abstractions and fictions... Post-truth wears away the rule of law and invites a regime of myth."

Honesty: what's your policy?

Good professionals understand the fundamental importance of integrity, but the way they promote themselves seems often to prioritise spectacle. "We're innovative!" "We're huge!" "We're the best!" It's vanishingly rare to see, "We're committed to truth and honesty in all our dealings with our clients and one another". Too prosaic, perhaps, or vulnerable to cynicism. Yet in a world where many similar organisations yearn to be thought of as distinctive, and strive, sometimes beyond credulity, to create points of difference, it's easy to overlook the enduring attraction of what used to be thought of as traditional values.

Trust is at the heart of all relationships worth having. It has been said that in business there are three kinds of people: the unsuccessful, the temporarily successful, and those who become and remain successful. The difference is character. It is possible to be temporarily successful through dishonesty, and that is why for some it will always be attractive. But that kind of outright crookedness is comparatively rare. More common, and in its own way as corrosive, is the moral failure to admit reality, face up to its consequences and make difficult, but necessary decisions.

The "Post Office-truth" prosecutions are an instructive case in point. No doubt all of its executives at the time would have described themselves as honest people, with a strong code of ethics. Paula Vennells, the chief executive between 2012 and 2019, is an ordained Anglican priest. Yet it was apparently too hard for too long to acknowledge that they had presided over an appalling injustice. The truth emerged despite, not because of them, and the stain on their reputations is now far greater than if they had elected to own up and make amends.

Of all the qualities necessary for leadership, and indeed for a successful life, the most important are the ability to see the world as it is, not as we would wish it to be, the courage to act accordingly, and the willingness, indeed the desire, to have our beliefs challenged. It's candour that marks out the greats, not infallibility. And that's the truth.

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

Profile: Craig Connal

Craig Connal, the first solicitor advocate to be appointed Queen's Counsel, says resisting specialisation has brought him a huge range of cases

I was fortunate to be made the youngest ever partner in McGrigor Donald at age 25. One of my early advocacy inspirations was my senior partner, the late, great, Alistair Hamilton. He specialised in high value, complex construction cases, in the sheriff court or arbitrations, and thought nothing of conducting the advocacy himself, often against both senior and junior counsel.

I became a solicitor advocate (civil) in 1996. Planning law was then a significant part of my practice and I thought an additional qualification might be helpful. Indeed one of my earliest appearances (with some bravado!) as a solicitor advocate was in the Inner House in a planning case which made law across the UK. When my partner, the late James Taylor was appointed a sheriff, I expanded my range.

Having always resisted specialisation has allowed me to appear in a very wide variety of cases, in equally diverse settings, including tribunals, inquiries of all kinds, Scottish Parliament committees and the UK Supreme Court, on topics from judicial misconduct, to Society-SLCC litigation, to the first contested inquiry under the Flood Protection (Scotland) Act, along with most commercial and property dispute types.

Most memorably, in 2002 I became the first solicitor advocate Queen's Counsel. When the legislation allowing rights of audience was passed, an official comment indicated that "at an appropriate time" solicitor advocates would be entitled to take silk. Nothing ventured, nothing gained! There were no published forms or rules then, so I simply sent the Lord President a collection of materials supporting my CV. In the legal village that is Scotland, my appointment became known to a partner in another firm before I heard! I have always been very conscious of the honour attaching to the "rank and dignity".

In 2004 I obtained higher rights in the criminal courts. That led to a spell as an *ad hoc* advocate depute. The old dog had to learn new tricks, such as dealing with juries, but it was a fascinating and rewarding experience. In 2006, following my admission in England & Wales, I also obtained higher rights in all courts there, perhaps the first solicitor advocate to be dual qualified in that way.

I have always been keen on a challenge and tackling new things. That combined with the nature of my practice has led me to appear in many novel or important cases which have reached the law reports. Space does not permit naming them all, but no summary would be complete without mention of *Stewart Milne v Aberdeen City Council*. A solicitor advocate leading in the Supreme Court broke new ground. It was a thoroughly enjoyable though nerve-wracking experience, perhaps not helped by the live feed allowing many in my office to watch every word.

That appearance lay behind my being named Solicitor Advocate of the Year for England & Wales in 2012, a most unexpected award.

As an enthusiast for advocacy I have always had a special interest in the art in all its forms. As convener of the Society's Civil Rights of Audience course since 2004, it has been my pleasure and privilege to watch and assist successive classes of budding solicitor advocates working their way to qualification. It is particularly gratifying to see them with their families and friends enjoying the admission ceremony at the Court of Session. I have also judged competitions including an international moot in The Hague involving students from all over the world, under the auspices of the International Criminal Court and the IBA, and the Jessup Moot, the world's largest mooting competition for law students, run in conjunction with the International Court of Justice.

Now retired as a litigation partner (while continuing to do some advocacy work), I have more time to devote to arbitrations, having in the past sat as an arbitrator on occasion. That allows me to observe advocacy from a different perspective. It is, however, one which is equally rewarding and which I plan to continue.

ADR service

Solicitors are reminded of the ability to become one of the Society's ADR specialists, and of the Society's service to appoint an adjudicator, arbitrator or mediator: see the ADR service page.

Notifications

ENTRANCE CERTIFICATES ISSUED DURING APRIL/MAY 2021

BAXTER, Isla Marie
BOYLE, Rebecca Deborah
BREERTON, Daniel Richard
BROWN, Jenna Sutherland
BUCKMAN, Walter Ronald Wylde
CAUNT, Rebekah Elizabeth
CHATIR, Zara Kirsty
CLARK, Kirstin Eilidh
DICKSON, Anna
DILLON, Kyle Berg
FALLON, Paul John
FYFE, Kimberley
GIBSON, Hannah
HAVERSTOCK, Emma
HUNTER BLAIR, Caoimhe
INNES, Alexander Innes Henry
KRZYZOWSKA, Jagoda Paulina
McGIBBON, Leah Summer
McKENZIE, Emma Marion
McSORLEY, Daniel James
MAH, Amelia Sze Jia
MARTIN, Olivia Dominique Garland
PHILLIPS, Melissa
RAWCLIFFE, Coral Ann
SAHEEL, Zenab
SLATER, Megan Anne
STEWART, Jamie Gordon
TANNOCK, Charlene
WELSH, Erin
WHITE, David William
WYLLIE, Wallis

APPLICATIONS FOR ADMISSION APRIL/MAY 2021

BAILLIE, Dawn Samantha
BASHIR, Haris
BAXTER, Hannah
BEATTIE, Bethany Anne
COLTMAN, Eilidh Margaret
DUFFY, Grainne Maire
EVANS, Danielle Gail
FLEMING, Katie Louise
GILFILLAN, Ruth
GRANT, Eilidh Blake
GRAY, Matthew Alan
JOHNSTONE, Catherine Holly
LANDELS, Morgan Scott
LEUCHARS, Catriona Ann
McCRUM, Cameron Ross
McGILLIVRAY, Rachel
MILNER, Katie Jayne
MURDOCH, Pamela
O'NEILL, Finn
RASOOL, Ambreen Zahra
REILLY, Martin Joseph
RITCHIE, Catriona Frances
SCHREIBER, Alasdair Campbell
STRACHAN, Rebekah Louise
TAYLOR, Heather Mary Antoinette
VOTYPKOVA, Lenka
WRIGHT, Kathryn Alice

In practice

THE ETERNAL OPTIMIST

Difficult, or just different?

What can you do to help yourself when faced with a "difficult" person?

With lockdown beginning to draw (hopefully) towards a close and things starting to return to the new normal, is it just me or does everyone seem a bit frayed around the edges? It feels like tempers have shortened and that news of conflict and discourse are on the rise wherever I look. The "We are all in it together" spirit may be being replaced by the "I don't like difficult people" brigade.

Why do we find people difficult? Is there a group out there who wake up every morning with the sole intention of finding a Scottish legal practitioner and making their life as challenging as possible, or is there something else at play? The older I get, the more I realise that there is no such thing as "difficult" people, only different ones, and the better we can understand these differences and the effects that they have on them and us, the less "difficult" they will seem.

So why are people different, and why do so many challenges arise in our interactions? I think there are four main reasons:

Culture. Our own firms have a way of doing things. It may be clearly voiced, or just a set of understandings that we all have, but it exists. They are our way, not the only way. When others have a different culture, challenges can arise.

Language. Probably best summed up as: "I know what I say but not what you hear." So many misunderstandings arise because of poor use or choice of language. Have you really explained the issue in terms that the other party can fully understand?

Processes. Similar to culture in that we all have systems that we use. Problems happen, though, when there is an imbalance between someone's expectations and realisation of that system. If I just say "push 1 for...", doesn't your blood begin to boil! So have you really managed expectations of your own processes?

Emotions. People do not act their best when they are under stress. The natural reaction to it is either fight or flight, and we will evidence this often as either aggression or avoidance when we deal with them.

Each of these areas is worthy of an article in itself. For the moment, though, just being aware that people are different and that there are reasons for it is a start. As important is the realisation that you can't change them: that is their job. What you can do, however, is to deal with things differently yourself.

A good start is simply that change of mindset from "difficult" to "different" when dealing with anyone who might be causing you stress. It is as simple as substituting one word for the other! You know they aren't doing it deliberately; they are just caught up in one of the issues above. It's not personal. Likewise, take a moment and just breathe if you begin to feel "frayed". Why? Well, too much stress isn't good for any of us (and solicitors have more than their fair share). It is, though, the body's natural reaction to challenging situations (our fight or flight reflex). To turn it off, just a minute of relaxed breathing will help dissipate that stress.

It can be frustrating for all of us when others are not acting at their best. What we can do, though, is look after our own health and wellbeing and be as understanding as possible of their differences.

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

FROM THE ARCHIVES

50 years ago

From "Commission on the Constitution", June 1971 (summary from the Society's evidence to the Royal Commission): "(i) The existing Government of Scotland from the point of view of the practising lawyer is not working so badly that drastic innovations, such as complete constitutional independence or a federal solution, require to be resorted to. (ii) Further developments towards the assimilation of the law and legal systems of Scotland and England are inevitable and desirable. The process..., however, should not be a one-way movement: the Scots law and the Scottish legal system have a number of features which could usefully be adopted in a common code."

25 years ago

From "The Disability Discrimination Act", June 1996: "Disabled people themselves have been at the forefront of the movement for equal rights... Spurred on by the passing in the US of the 1990 Disabilities Act, disabled people have been calling for similar civil rights legislation in the UK. Their call is supported by both opposition parties... Finally the government, which had previously expressed itself implacably opposed to anti-discrimination legislation, preferring instead a voluntary, persuasive approach, introduced its own Disability Discrimination Bill, which received Royal Assent on 8th November 1995."

ASK ASH

Dear Ash,

I have been feeling really anxious lately after it was recently confirmed that we would be expected to return to work in the office in a few weeks' time. I'm just not comfortable about going back: I've been working from home for over a year now and I'm used to not commuting. I've also put on a lot of weight during lockdown and have really low self esteem. It seems that some colleagues are happy about going back, and I don't want to be the odd one out, but I'm just not sure how I'll cope.

Ash replies:

Please do not assume you are alone in how you are feeling. Many of us have now got accustomed to our home office routines, and will have to endure a period of adjustment as we aim to resume pre-lockdown routines.

Some of your colleagues may be feeling just like you but may not feel able to voice their concerns openly, for the same reasons as you.

I'm sure most employers will be phasing any return to work in the office in any case. Therefore, speak to your line manager about your concerns and ask how the return to the office is likely to work in practice. You may be able to work from home the majority of the time even if the office is fully reopened. Employers are now increasingly realising the importance of providing such flexibility, where possible.

In terms of you being self conscious about your weight, again you are not alone! Many of us have gained lockdown pounds and will need time to break bad habits due to our enforced conditions. However, try to incorporate some regular exercise into your routine now that lockdown restrictions are easing. Even joining a gym class or meeting a friend for a regular walk might be a good start, and could help you to deal with your anxiety too?

We are hopefully coming out of the worst of the pandemic, in this country anyway; and the vaccination programme should provide a welcome boost towards resuming more "normality". Therefore try to take baby steps to ease yourself back to the life you had pre-COVID – though don't be hard on yourself as it will take time to adjust. After all, this is the life we have known for over a year now.

Send your queries to Ash

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

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

Classifieds

Classifieds

John Anderson and Sarah (Sadie) Allan McKellar or Anderson, deceased
Would any person holding or having any knowledge of Wills of John Anderson, who died on 7 April 2020 and Sarah (Sadie) Allan McKellar or Anderson, who died on 8 April 2020, both late of 7 Strath Carron, Law, Lanarkshire ML8 5LJ, please contact Pieri Graham Solicitors, 98 West George Street, Glasgow, G2 1PJ. Telephone 0141 332 2525.

MARTIN TRASTOUR ARMISTEAD – Would any solicitor or other person holding or having knowledge of a will by the late Martin Trastour Armistead, late of 45 Swanston Gardens, Edinburgh, EH10 7DF and formerly of 12/5 The Gallolee, Redford Road, Colinton Edinburgh EH13 9QJ and who died on 24 April 2021 please contact Karen Phillips, Balfour + Manson, 56-66 Frederick Street, Edinburgh EH2 1LS 0131 2001235.

Neil Campbell Mackay (deceased). Would anyone holding or knowing of a Will by Neil Campbell Mackay late of Little Tillymaud, Peterhead, AB42 0NT please contact Raeburn Christie Clark & Wallace LLP, 12-16 Albyn Place, Aberdeen, AB10 1PS, telephone 01224 332400, amy.watson@raeburns.co.uk.

Donald James Mackay (deceased)
Would any Solicitor or other person holding,or having knowledge of, a Will by the late Donald James Mackay, who died on 11th February 2021 and who resided at The Green, 19 Durine, Durness, Sutherland, IV27 4PN and sometime at 212 Balgownie Road, Bridge of Don, Aberdeen, AB22 8SA please contact Daniel Gunn at Arthur & Carmichael LLP, Solicitors, The White House, Cathedral Square, Dornoch, Sutherland, IV25 3SW or email: djg@arthur-carmichael.co.uk

IAN MITCHELSON LUMSDEN (DECEASED)
Would anyone holding or having knowledge of a Will by Mr Ian Mitchelson Lumsden of 53 Ravens Craig, Kirkcaldy KY1 1PU who died on 01 March 2021 please contact Stephanie Pratt at Thorntons Law LLP, 49 Bonnygate, Cupar, Fife, KY15 4BY or spratt@thorntons-law.co.uk.

Conveyancing Paralegal - Aberdeen City

The role is a full-time position and would suit an individual with previous experience, a keen eye for detail and able to work within often tight timescales.

We are a long established and growing business and keen to hear from those of you who wish to join our ongoing journey.

Please submit your CV to: FWalker@andersonbain.co.uk

Good Pay? Good Quality Work? Work Life Balance? Good Prospects - What's not to like?

If this sounds like something you would be interested in then 5 Partner Law Firm, Lockharts Law LLP, based in Ayr are looking for two Solicitors to join our Team. Requirements are PQE 2+ and a positive attitude.

- Real Estate Solicitor – commercial/residential/ agricultural
- Private Client Solicitor – Wills, Trust, Executry Work

Send your CV to StephenBradford@LockhartsLaw.com.

Partnership Opportunity

Profitable long-established West Renfrewshire practice seeks partner for continuing development. Would suit experienced solicitor looking for business opportunity. Merger considered. Significant current wills bank with strong private client, commercial and court business.

For enquiries and a confidential discussion please email journalenquiries@connectcommunications.co.uk quoting Box No J2142 in the subject line.

Celebrating over 25 years as **Scotland's only specialist recruitment company** dedicated to the placement of lawyers

MILLER SAMUEL HILL BROWN

Senior level Employment Law Opportunity

We are pleased to be working with Miller Samuel Hill Brown on this high-profile appointment to join the Employment Team headed up by Marie Macdonald.

You will join a fantastic team known for their friendly hands-on approach with acknowledged expertise in employment law. You will also have excellent exposure to a broad range of high-quality matters, including HR advisory, tribunal litigation, regulatory proceedings, data protection issues, contracts, policies and procedures, discipline and grievance and discrimination law. You will primarily deal with businesses and senior individuals and act on behalf of both employees and employers on contentious and non-contentious matters.

Offering real career progression within a supportive working environment, this newly-created role should be considered by anyone looking for a clear and defined pathway to partnership.

You will be responsible for a variety of employment matters across a range of sectors, developing and maintaining client relationships, providing advice on day to day employment law issues and acting in the defence and pursuit of employment tribunal litigation.

The successful candidate will have around 5 years' PQE in employment law with a strong interest and experience in dealing with all employment law matters. You will also be commercially minded, able to work as part of a team, think creatively and bring new ideas to the firm.

This is an opportunity not to be missed if you are an employment solicitor looking for a new challenge, and the chance to join a firm with roots tracing back to 1750.

For further information in complete confidence please contact Frasia Wright or Cameron Adrain via email frasia@frasiawright.com or cameron@frasiawright.com. (Assignment 12179)

This assignment is being exclusively handled by Frasia Wright Associates and all direct and third-party applications will be forwarded to them.

For more information: **www.mshblegal.com/**

celebrating 25 years Frasia Wright Associates 1995 — 2020

Frasia Wright Associates, The Barn, Stacklawhill, By Stewarton, Ayrshire KA3 3EJ
T: 01294 850501 www.frasiawright.com

REC Corporate Member