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Journal

Journal of the Law Society of Scotland

Volume 65 Number 5 – May 2020

Leader for hard times

Incoming President Amanda Millar knows she faces a tough job, but believes in seeking opportunities even in these challenging months

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A new era

Hello from somewhere behind your screen. Yes, I know many of you like to pick up your paper magazine as a break from the online world, but this month's edition of the Journal is another sign of our very much altered reality. It too is affected by the shutdown, and this is our way of trying to keep delivering the regular content.

Solicitors have been hit hard. The Society's widely welcomed £2.2 million support package for the profession comes in response, it states, to 90% of firms facing reduced turnover (some very severely reduced), and almost a quarter of solicitors in private practice having been furloughed. Such figures, sadly, must mean real distress and financial hardship for many readers.

Despite the daily discussions of when and how the lockdown will begin to be lifted, it seems unlikely that we will see full resumption of business life for some weeks if not months yet, or that when we do, there will be any early return to the level of activity of that age BC (Before COVID) just a couple of months ago.

How are we to travel to work safely? Share a room, or office facilities, safely? Meet clients, or go to court safely? So many questions, reflected across virtually all types of business, have to be answered before our freedoms can be restored, and I haven't even mentioned our social lives.

There is a clear onus on employers in the legal sector, as in every other, to respect individual employees' vulnerabilities and needs as they seek to open up again. Since in most cases those who still have work have been able to operate from home, that really should not cause a major issue.

The shock to the economy will be felt for a long time to come, and I do wonder how conventional thinking can deal with the scale of Government borrowing and support that already has been and will continue to be required. It is not a good sign that ministers have begun to speak in terms of furloughed workers becoming "addicted" to their status. How can a free market operate in what will remain a significantly unfree society while restrictions continue?

An enlightened approach might recognise an opportunity to rethink the whole system of support offered by our society for those in need, as happened following the ultimate World War 2 victory whose anniversary we celebrate this month. It might consider how those economic, social and cultural rights that have to date remained on the margins of our legal order could be given more substance. These are admittedly very big questions. But the beginning of a new era, which is where I believe we could be, should be the time to address them. J

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is an independent Scottish charity working for prisoners' rights

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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In practice

ONLINE INSIGHT

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An access to justice success story?

Iain Nicol welcomes the coming into force of the Success Fee Agreement Regulations but, in this commentary, highlights that the legislation contains a lot of detail to master.

COVID-19 and Brexit: a two-way effect

Underlying the COVID-19 situation is the question whether to extend the Brexit transition period. But the end of that period could also impact on the UK's ability to tackle future waves of infection, Peter Sellar believes.

Liquidators' remuneration: a tale of two reporters

Stuart Clubb hopes that reporters examining liquidators' accounts will take note of a recent sheriff court judgment, and keep more closely to their proper role than is sometimes seen in practice.

Unsigned, unsealed, undelivered?

Kyle Dalziel calls for urgent clarification of Home Office policy regarding the requirements for mandates to act for asylum-seeking clients during the COVID-19 lockdown, and some fairness in its approach.

Tradecraft: some executry points

In a further article covering "tradecraft" matters of etiquette and how to avoid blunders, Ashley Swanson recalls some situations that have arisen in wills and executry practice.

OPINION

Alison Edmondson

Does the comparative slowness with which Scottish courts moved towards remote hearings indicate an attitude in government that courts are not an essential service? If so, the difficulties arising from the lockdown provide a platform for citizens' education to the contrary

Extraordinarily, Scotland's citizens currently find themselves without full access to civil justice.

Following lockdown on 22 March all civil court business was suspended. There appeared to be little momentum to reinstate any form of civil justice until energetic representations were made by the Law Society of Scotland and Faculty of Advocates to the Scottish Courts & Tribunals Service. SCTS initially emphasised the complexity of change and the need for patience. Since then SCTS has published plans for the staged resumption of some types of business. Access to civil justice remains severely curtailed. This raises two questions.

First, why has it taken so long to achieve even limited resumption of court services? Before I answer, let me say that SCTS is right to be approaching matters carefully. It does not want to expose its staff to unnecessary health risk. Remote hearings cannot easily replicate parole evidence. SCTS digitalisation has been underresourced. Not all citizens are digitally included. The efficient administration of remote justice sits uneasily with the needs of vulnerable litigants. These are complex considerations. Nevertheless, court services in other jurisdictions have moved more swiftly to a more comprehensive reintroduction of business. The "why" remains.

I think we were recently given the answer to this underlying "why" in a different context. Ben Christman and Malcolm Combe critiqued the funding policies for the court service in a paper summarised at Journal, February 2020, 5. They highlight that the Scottish Government believes that litigants receive the majority of the benefits of litigation, viewing civil justice as a private dispute resolution service. A cultural perception that civil courts are merely a consumer product might go some way to explaining the current approach. Organisational culture affects outcomes, and the current situation suggests an immediate need for rapid recalibration.

As Christman and Combe point out, "civil justice is not a product for an informed consumer to choose at will: it is a constitutional fundamental and a human right". Indeed, access to civil justice is such an important part of the fabric of a functioning society that article 6(1) of the European Convention on Human Rights recognises a "right to court" to assert civil rights.

This brings me to the second question: why is concern about the (hopefully temporary) curtailment of this constitutional fundamental confined to the legal profession? Courts matter in peaceful society. There is a compelling social imperative to maintain the administration of civil justice. It often matters most to the least powerful members of society. Yet those working in the court system are not widely esteemed as daily participants in preserving our peaceful freedoms. We hear very little inspirational rhetoric about the value of our courts in our national discourse.

Lord Reed expresses the point in *R (UNISON) v Lord Chancellor* [2017] UKSC 51: "At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country... Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced... In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other."

It was evident in the commotion surrounding the *Miller* and *Cherry* cases last year that understanding of the rule of law, the separation of powers, and the functioning of our parliamentary democracy is largely confined to a small cohort of lawyers and political enthusiasts. This gap in our collective social consciousness is dangerous: it leads us to complacency or disregard for the structures that sustain our democracy. But this space is something we as a profession can fill, collectively and individually. Lord Reed's characterisation of the courts is a big, positive vision that we can communicate. That communication ought, I suggest, to take place in everyday conversation, in the media, on social media and perhaps also in a form of citizens' education on these matters, included in the school curriculum.

People don't use courts because they want to: they use courts because they need to. We should use the temporary suspension of civil justice to inspire wider appreciation of its worth.

Alison Edmondson is a director with SKO Family Law Specialists

A good news update

I am grateful to all the readers who contacted me after my article was published in the April Journal (at 13).

Since I came out of hospital at the beginning of April, my story has also been covered in several local papers and the Glasgow *Evening Times*. I have been inundated with kind wishes and nice messages from other lawyers, friends, acquaintances and people whom I hardly know. It has truly been humbling.

I am happy to say that I am now recovering well at home from suspected COVID-19. I have been really well cared for by my husband, Antonio. Every day I am getting better, stronger and I have now returned to work.

I would like also to update readers on how we got on with the various projects and plans I outlined in the article.

Our team has been amazing. We managed to complete many of the projects that I set out in the article. We have reviewed and archived nearly 2,000 files; we have audited and updated processes, and revised our styles; we have dealt with historic problem files, ingathered debts, negotiated payment extensions with suppliers and, really critically, we have billed and recovered 50% of our usual monthly turnover (with a week to go).

We managed to hold on to our full team without anyone going on to furlough until Easter.

Since then, we have begun to furlough. We analyse our data to determine who and when. The team has been really brilliant at understanding and accepting that we are doing all we can for the benefit of the business, which in turn will benefit all of us.

It's been really difficult. I don't have all the answers; nobody does, but I am so very grateful to our team and promise that we will work hard to bring them back into the business as soon as we can.

Had we put the business on to furlough in March, none of this would have happened. Time will tell whether this approach has been the right one, but from where I'm sitting, I am pleased that we did it this way.

Now back to my time in hospital. I received such good care and as our way of saying thank you, we have launched a free will promotion which is available to anyone who works for the NHS or is a carer.

We have also partnered with Marie Curie for the sixth consecutive year to write free wills for anyone who is over 18 and considers leaving a legacy to Marie Curie in their will.

As I write, the promotion only launched three days ago and so far we have had 75 enquiries.

We are embracing all the new technologies to allow us to do this entirely remotely, and the promotion is bringing a lot of positivity and energy at a much needed time.

It is really important to give something back and I hope that in a small way, Scullion LAW are doing our bit. It's been heartening to read of other acts of kindness from within the legal profession as we support our communities. I pray that we all stay safe, well and that this ends soon.

Please spread the word about our free will promotion – details at scullionlaw.com / 0141 374 2121.

Many thanks.

Nicholas Scullion, managing director, Scullion LAW

A Practical Guide to Public Law Litigation in Scotland

DRUMMOND, McCARTNEY AND POOLE
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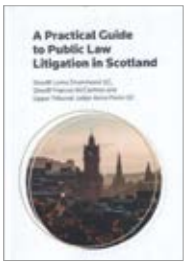
ISBN: 978-0414065239; £59



This slim volume demonstrates why print publication of legal texts should survive in this digital age. Where better to find discussion of the practical application of the rules and authorities than in a convenient volume?

Notwithstanding its title, the text focuses primarily on judicial review. There is a chapter on funding, including legal aid and, topically, protective expenses orders. Discussion of the substance of judicial review is a useful summary, even if fuller analysis can be found elsewhere. More valuable still are the chapters which follow. There are particularly useful discussions of innovations such as time limits, and permission to proceed.

The view of experienced practitioners on what is likely to happen at the hearings is the type of topic unlikely to be found elsewhere, and a concluding miscellany of issues may well assist when something not envisaged crops up. A useful appendix includes a style of petition and of answers.

For succinctness it is not possible to improve on this summary by the writer of the foreword, no less than Lord Carloway: an "excellent exploration of the subject from a highly realistic viewpoint".

R Craig Connal QC, Pinsent Masons. For a fuller review see bit.ly/35EQZ73

Toffee

SARAH CROSSAN
BLOOMSBURY: £7.99; E-BOOK £2.19

"Written in verse,... *Toffee*... is a compelling story, relevant equally to teens, adults, parents and those with older parents."

This month's leisure selection is at bit.ly/35EQZ73

The review editor is David J Dickson

thesecretbarrister.com

Virtual court hearings are in demand, and probably essential in our present situation, but do they lack something?

In this guest blog a barrister describes a hearing before a judge, for a client she has never met, and tries to "pinpoint why it feels like there is a barrier to communication". She sums up: "Stripped bare of human interaction, I have found the job unrecognisable."

Look out also for the link to a family judge's blog about their experience.

To find this blog, go to bit.ly/2WwoofX

Hit the paws button

Back to those work video meetings from home, and this time it's the animals' turn. Especially the dogs. Well, they do have this habit of barking. But, as Twitter users like to caption photos of their cute faces, "But how else will your colleagues know there's a squirrel outside?"

More underhand is to provoke the human into making the noise. "My favourite trick is making my human yelp in the middle of a meeting by nibbling his calf with my puppy (needle sharp) teeth," indicates a worryingly devious mind at such a young age.

"I heard a car engine and it might be someone I love" is the sort of optimism we could all do with at this time.

And yes, we know they can swing everything your way when they manage to get on screen. Or maybe a cat is the answer. Check this from Australian author Christopher Ruz: "DO NOT APOLOGISE WHEN YOUR PETS JUMP INTO THE FRAME ON ZOOM CALLS. Was just in a conference with the CEOs of a major US org and Muffin jumped on my lap and the whole conversation stopped, IS THAT A CAT, SHOW ME THE CAT! Everyone needs cats in these trying times."

PROFILE

Phil Yelland

The Law Society of Scotland's Executive Director of Regulation, Phil Yelland, talks to us as he looks forward to retirement after 30 years at the Society

1 Why did you decide to join the Society?

I joined the Society from private practice because I was looking for a change. My skills seemed to point me towards applying for a job in what was then the Complaints Department. There were three of us in those days dealing with around 350 complaints each, and the decisions were made by Council.

2 What are the biggest changes you have seen at the Society over the years?

The biggest physical change was the move from Drumsheugh Gardens to Atria One, a change for the better despite Drumsheugh's history. But perhaps the biggest change came when Lorna Jack arrived – the first non-solicitor chief executive, bringing very different ideas from her perspectives in business.

3 What have been the highlights for you personally?

I have worked with and met a lot of really interesting and fantastic people. I guess the highlights – not sure everyone would say this – are being involved in two parliamentary enquiries into regulation, and on a couple of occasions representing the Society at events abroad. I was proud that last year we brought the International Conference of Legal Regulators to Edinburgh.

4 How do you plan to spend your retirement, and what will you miss about the Society?

I am not going to sit and do nothing. I hope to use my knowledge to help others in some way. Looking after grandchildren will also feature, as will being involved in cricket administration and coaching, and I hope to travel more.

I will miss not just the people I have worked with daily, but also the many Council and committee members I have met down the years.

Go to bit.ly/35EQZ73 for the full interview

WORLD WIDE WEIRD

1 Fowl move

City authorities in Lund, Sweden, are spreading a tonne of chicken manure in a park to discourage people from gathering to celebrate the spring festival Valborg during the COVID-19 pandemic.
bit.ly/35xsQQg

2 Betting the house

The Quebec Court of Appeal has cancelled a mortgage over a house, granted in favour of his opponent by a man who incurred a gambling debt of $517,000 in three games of rock-paper-scissors.
bit.ly/3frbiZZ

3 Slippery customer

It took a 5-4 majority decision of the Washington Supreme Court to find that a woman who stole a snowmobile was guilty of "theft of a motor vehicle" in terms of the relevant statute in that state.
bit.ly/2W40WHY

TECH OF THE MONTH

Down Dog

iOS, Android – free (membership available)

If you're confined to the house, a colleague recommends this for yoga (beginners and pre-natal are options), to relieve any working from home aches and pains – but ballet and high intensity workouts are available too.
downdogapp.com

PRESIDENT

John Mulholland

These are difficult times in which to hand over the presidency, but I am heartened by the way the Society and the profession have faced the COVID-19 crisis and I am confident that as a profession we will pull through

I wish you the warmest welcome to my last column as President. I would have said that I am writing with a tinge of sadness, but I don't think now is the time for a lot of personal reflections on the last year. As we approach the presidential handover, I would like to look ahead with as much optimism as the situation allows.

We are confident that the financial package announced at the end of April will help to alleviate some of the financial pressure paying your professional fees might bring at this time. We thought very hard about the best solution. We know our members face a sharp and significant downturn across many areas of practice and this has a direct and immediate effect on the financial viability of businesses. We took the decision at the very start of lockdown that, as a membership organisation, to do nothing was simply not an option. We have taken a series of tough financial decisions to attempt to provide a measure of support for our members across the profession. The package was measured and proportionate, and as a whole sought to provide support to different sections of our profession.

The decisions were not easy. They have implications for the Society and all of us. A number of different opinions were voiced at all stages of the discussion. The views were expressed with an understanding of the seriousness of the situation but with the best interests of the Society and profession at their heart. The package was approved by an overwhelming majority of Council, who represent the many and diverse interests of the profession. We encouraged comment from and dialogue with our members and we have answered the questions which have been posed about the thinking behind our proposals.

The decision to provide a holiday from the client protection fund contribution was challenging. However, we are in no doubt that given the extremely healthy reserves held by the fund, we are easily in a position to provide the same level of protection that our clients have always enjoyed.

Taking solutions forward

I am certain that during May, measures will be announced which will signal the easing of lockdown and a return to work. We should take forward the new ways of working that we have had to adopt in the past months. As always the profession has embraced these new ways of working and has been proactive in seeking solutions to the problems we have encountered. Our willingness to work collaboratively with the Government and our partners in the legal system has in no small measure helped find an interim solution to the conveyancing crisis and to restart court business. We must continue to work in this positive way.

We recognise that worrying about our family and businesses and the isolation that lockdown has brought will have an impact on our mental health. We hope the work the Society started in partnership with See Me, the national programme to end mental health stigma and discrimination, will help with that. We will continue to invest in and develop our Lawscot Wellbeing offering in response in the coming months. We have been looking out for each other during this difficult time, and I hope that will continue.

We will survive

Finally, on a personal level I wish I was handing over the reins to Amanda Millar in happier times. However the leadership of our Society and profession is in the safest hands. I know Amanda will adeptly navigate our exit from lockdown and beyond.

I do wish to say a very special thank you to our chief executive Lorna Jack, the Senior Leadership team, Council and committee members and all the staff at the Society for keeping me right and making my term as President such an honour and a privilege. I have been humbled by the amount of work that is done for us that we rarely get to see.

The final thank you of course must be to you, the members of the profession, who have provided invaluable support and encouragement to me throughout the year. It is impossible to express adequately how important that has been, especially in the most recent weeks. I have no doubt that we will continue to be a thriving, varied and independent profession whatever challenges we are faced with. I hope that you stay safe and well and wish you every continued success.

John Mulholland is President of the Law Society of Scotland – President@lawscot.org.uk Twitter: @JohnMMulholland

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Sir Crispin Agnew of Lochnaw QC has retired from practice after 38 years at the Scottish bar.

ANDERSON STRATHERN, Edinburgh, Glasgow and Haddington, has announced the appointment as a partner of **Siobhan McGuigan**, who joins from BLACKADDERS to head the Private Client team in the firm's Glasgow office.

BELLWETHER GREEN, Glasgow, has appointed as a consultant **Emily Wiewiorka**, a commercial contracts, IP and data lawyer who is returning to private practice after working in-house, then running her own business and maintaining part time advisory roles with various tech companies.

BRODIES LLP, Edinburgh, Glasgow and Aberdeen, has announced the retirement of partner **Julian Voge** (corporate and commercial), and consultant **Andrew Dalgleish** (tax and trusts), who have each served for more than 35 years with the firm. Brodies has appointed **Jennifer Matthews** as an associate in the Contentious Construction team, based in the Edinburgh office. She joins from ABERDEIN CONSIDINE.

BTO SOLICITORS LLP has announced the promotion of four senior associates and two associates, from 1 April 2020. The new senior associates are **Emma Barclay** (Corporate team, Glasgow), **Debbie Reekie**, a solicitor advocate and accredited specialist in family law (Edinburgh), and **Eileen Sherry** and **Mark Hastings**, both based in Glasgow in the Insurance group. Promoted to associate are **Jamie Robb** (Professional Liability team, Edinburgh), and **Rhona McKerracher** (Insurance group, Glasgow).

BURGES SALMON, Edinburgh and UK-wide, has appointed dual qualified employment lawyer **Katie Russell** as a partner in its Edinburgh office. She joins from SHEPHERD & WEDDERBURN, where she was a partner.

BTO Solicitors LLP

CLYDE & CO, Edinburgh and globally, announce the retirement of **Gordon Keyden**, senior equity partner in Scotland, after over 40 years of service. He was managing partner of SIMPSON & MARWICK from 2012 to 2016, and played a key role in the merger with Clyde & Co in 2015. He now takes on a role as consultant.

CONNELL & CONNELL, WS, Edinburgh is delighted to announce the appointment of **Richard Murray** as a partner in its Private Client team. Richard joins from TC YOUNG LLP, Glasgow and Edinburgh, where he was a partner.

DENTONS, Edinburgh, Glasgow, Aberdeen and globally, has appointed **Brian Hutcheson** as a partner in its UK Real Estate practice. Based in the Glasgow office, he joins from MORTON FRASER, where he was a partner.

DICKSON MINTO WS, Edinburgh and London intimates that, with effect from 26 April 2020, **Fiona Moira Akers** retired as partner of the firm and that, with effect from 27 April 2020, **Craig Davidson Roberts** was assumed as partner of the firm.

Russell Eadie, solicitor and experienced employment lawyer, has joined NAVIGATOR EMPLOYMENT LAW, Edinburgh from RRADAR SCOTLAND LTD.

JAMESON + MACKAY, Perth & Auchterarder has incorporated as JAMESON + MACKAY LLP with effect from 1 April 2020. Also with effect from that date, **Robin Stewart Watt** retired as a partner and the firm is delighted to announce that **Jennifer Kirkwood** became a member. The members are **Alison Ramsay**, **Stephen Inglis** and **Jennifer Kirkwood**. The firm is also pleased to announce that **Victoria Buchanan**, an accredited specialist in personal injury, has joined its Court department from HARPER MACLEOD, and that **Charlie McCall**, a registered conveyancing paralegal specialising in residential conveyancing, has joined from BLACKADDERS. **Megan Joiner** has left the firm.

LEDINGHAM CHALMERS, Aberdeen, Bridge of Don, Inverness, Stirling and Edinburgh, has appointed agricultural and rural lawyer **Gary Webster** as a partner in its Inverness office. He joins from MACLEOD & MACCALLUM, where he was a director.
The firm has also announced two promotions in its Aberdeen headquarters: **Emma Somerville** of the Family Law team to senior associate, and **Dara Kinloch** of the Private Client team to associate, both effective 1 April 2020.

LEFEVRES, Edinburgh, Glasgow and Aberdeen has appointed personal injury solicitor **Iain Nicol** as a legal director. He moves from BALFOUR + MANSON, where he was a partner.

LEVY & McRAE SOLICITORS LLP has appointed **Peter Anderson**, one of Scotland's

most experienced commercial litigation lawyers. He joins from ADDLESHAW GODDARD, and was formerly partner and senior partner at SIMPSON & MARWICK.

LINDSAYS, Edinburgh, Glasgow and Dundee, has announced the following promotions: to partner, **Lauren Pasi** (Personal Injury team) and **Darren Leahy** (Commercial Property team); to senior associate, **Sharon Drysdale** (Rural team); and to associate, **Kirsty Preston** (Private Client department) and **Julie Malone** (Residential Property team).

MACLEOD & MACCALLUM LTD, Inverness, Invergordon and Portree, are delighted to announce the promotion of their associate **Scott Dallas** to director, heading their Private Client Department, from 1 April 2020.

MACNABS, Perth, Blairgowrie, Pitlochry and Auchterarder, has announced the appointment of family law solicitor **Megan Joiner**, formerly of JAMESON & MACKAY.

Shepherd & Wedderburn: Thomson, Morrison, Rochester, Hall, Cowan, Charlton

PINSENT MASONS, Edinburgh, Glasgow, Aberdeen and globally, has promoted the following Scotland-based lawyers: to partner, **Kathryn Wynn** (data protection, Edinburgh); and to legal director, **Rachel Warner** (upstream oil and gas projects) and **Fiona Kindness** (corporate finance), both in Aberdeen.

RAEBURN CHRISTIE CLARK & WALLACE, Aberdeen, Ellon, Inverurie, Stonehaven and Banchory, has promoted **Allan Mackenzie**, a commercial property lawyer based in Aberdeen, to associate.

RAESIDE CHISHOLM, Glasgow are delighted to announce the appointment of their senior conveyancing associate **Claire Reid** as a director, with effect from 1 April 2020.

SHEPHERD & WEDDERBURN LLP, Edinburgh, Glasgow, Aberdeen and London, has promoted two of its lawyers to partner and four to legal director, effective 1 May 2020. The newly assumed partners are construction law specialist **Lauren Thomson** and corporate finance specialist **John Morrison**, while rising to legal director are **Alison Rochester** (head of the Trade & Commerce team), **Lucy Hall** (Banking & Finance team), **Neil Cowan** (Banking & Finance team) and employee share incentive specialist **Gavin Charlton**.

URQUHARTS, solicitors, Edinburgh, intimate that with effect from 1 April 2020, **Alison Grandison** has joined the firm as a partner in its Residential Property department. She was previously a senior associate with SIMPSON & MARWICK. On the same date, **James Baird** became a consultant to the firm.

WEIGHTMANS, Glasgow, Edinburgh and UK-wide, has opened a new private client practice in Scotland with the appointment of family law specialist **Noel Ferry** to its Glasgow team. He joins as a partner from TURCAN CONNELL.

Challenge of a lifetime

Amanda Millar has a perhaps unenviable task in becoming President of the Law Society of Scotland this month, but she is determined not to be swept along by events, and to pursue the opportunities she believes exist even now

WORDS: PETER NICHOLSON

Incoming Presidents of the Law Society of Scotland have often, with reason, spoken of the challenging times that lie ahead. None can have had more reason to do so than Amanda Millar.

With, to the Society's knowledge, 90% of our firms facing reduced turnover, and a quarter of solicitors in private practice on furlough, due to coronavirus, she can fairly claim that the present time is "truly the challenge of a lifetime: one that people who are practising now will never have encountered before". Certainly it far exceeds even the economic shock following the 2008 credit crunch.

As Vice President this past year, Millar has already seen a spread of events from the Society's platinum anniversary celebrations, to the "visibility issues around 100 years of women in law" (a cause close to her heart), to working alongside President John Mulholland on emergency support measures as the COVID-19 crisis unfolded.

That last exercise has delivered a proposed 20% cut in the next practising certificate fee and accounts fee, plus a zero client protection fund contribution. "As is invariably the way, you do get mixed reviews but mostly it has gone down incredibly well," Millar reports. "The Society is acknowledging the challenges to the profession and doing what it can, and we will continue to do what we can. It is about maintaining the viability of the legal profession, but also our ability to regulate, promote, safeguard and meet all those statutory duties which we must not lose sight of."

Giving extra

Asked what it means for the Society, she replies that the specifics are still being looked at, but while tough choices will have to be made, "what we've delivered in the package is what we believe can be delivered at the moment". The Society has furloughed some staff, and all CPD events have been cancelled, but further choices will have to follow.

"The circumstances here are unprecedented, but people are pulling together, that's very much the feeling I get"

She does believe, however, that the crisis has brought the profession together in the effort to mitigate its effects. "The circumstances here are unprecedented, but people are pulling together; that's very much the feeling I get. On the financial package, the level of active positivity that has resulted is quite surprising: it's a sign that everybody acknowledges what is going on and the efforts that are being made, and that's really important."

The same applies to the volunteers on the Society's committees, many of whom have gone the extra mile and more (see next feature) in working with Government and others to address the challenges facing their particular sectors. "They already take time out of their working lives in average circumstances, and many of them have taken even more time to deal with these issues and provide the support necessary from a legal perspective in developing the legislation in these incredibly challenging times, when lots of these members are also looking to their own family and firm responsibilities.

"I'm overwhelmed by the level of step up to the plate that's coming from many of our members in relation to the challenges to be faced and their willingness to help everybody meet these as far as possible. And it's a big privilege for me to have the opportunity to represent such a fantastic group of people, both solicitors and also the lay members for the contributions that they make."

Particular concerns

Millar declines to predict what professional life might look like once restrictions are lifted, except to say that there will be no going back to how things were just a couple of months ago. "I don't believe anybody, not just the legal profession, can go back to where we were in February – we are going to have to deal with a new normal."

It is clear, though, that much more is likely to be done through technology. Millar has sat on the LawscotTech advisory board for some two years (describing herself as "the non-techie in the room"); its work will become even more important in trying to develop areas of technology relevant to the profession, "and hopefully given the challenges we've encountered there will be increasing engagement of the profession in relation to that".

At the same time she has a real concern, as someone strongly committed to the role of lawyers and the rule of law in society, that basic

A voice for the voiceless

Amanda Millar has committed herself during her career to ensuring that the voices of the underrepresented are heard. Initially she taught subjects including social welfare law at Strathclyde and Glasgow Caledonian Universities. In practice for 20 years as a Perth-based litigator, she ultimately specialised in mental health and adults with incapacity, becoming the first solicitor to be accredited as a specialist in both these areas.

First elected to Council in 2010, her committee work includes seven years on the Client Protection Committee, two on the Audit Committee, five on Professional Practice and six years on the Mental Health & Disability Subcommittee. She steps down as convener of the Rules, Waivers & Guidance Subcommittee on becoming President. Beyond the profession, she has given of her skills and experience to the third sector as an SCVO Policy Committee member, as board member and then chair of Mindspace Ltd, and as the first non-executive chair of Changing the Chemistry, which focuses on improving diversity of thought on boards.

She lives in Perthshire with her wife Joyce and their dog Darcy, and in her home life she enjoys cooking, eating and supporting Liverpool FC.

rights are not set aside in the desire to move on. "One particular difficulty is that when people are dealing with emergencies, there is always the risk that human rights or other protective issues are seen as less important, and we must be vigilant that the new normal does not get us to the point where rights that had been put in place and protected are in any way lost or diminished."

That applies with equal force to her desire to see a profession that is as diverse and inclusive as possible. As may be well known by now, Millar is the first from the LGBT+ community to assume the presidency, and while not wanting to be seen as a "flag bearer", she recognises the importance of being there as a role model. "At the present time I think this is even more important, because we live in the reality that we still have many young people who need role models to believe that they can do what they are capable of doing and to be their whole selves when deciding what to do with their own futures."

That said, it is also important to her to be seen as someone who has been elected on merit. "The reality is I have been elected by my peers to be President of the Law Society of Scotland, and I don't believe that the people who elected me did so because I was going to fill a diversity box. I am confident having gone through a contested election that they believed I have the skills to represent the Society to the best of my ability. I have a range of diverse characteristics. There isn't anybody in the world who doesn't."

Drive to deliver

Looking to the Society's more regular agenda, matters other than the pandemic will be waiting to be dealt with. This year may or may not see the Government's consultation on the future regulation of the profession, following its attempt to identify a consensual approach to the key recommendation of the Roberton report for a new independent regulator, but as far as Millar is concerned the Society as regulator "will continue to meet the high standards and continue to develop in the time that I am in position as President".

She adds: "Those issues must be considered alongside the challenges that are being faced at the moment, both by members and by the public, and where the report gave no evidence of mischief to justify a need for an independent regulator there is a need for all to be flexible, think differently and improve how we respond to changes in the legal services market."

This year is also when the *Leading Legal Excellence* strategy concludes its five year term; what might succeed it may now be rather different from what would have been anticipated until recently. "That will continue to be reviewed given the very changed circumstances we find ourselves in," Millar assures us. "As far as the principles are concerned, we're obviously continuing to adhere to our existing strategy and work through that. I think it's fair to say the work done by the Society since the lockdown is ongoing evidence of the desire, passion and delivery in relation to *Leading Legal Excellence*."

Seeking the positives

One thing she is determined the Society will not be doing is just responding to whatever events unfold. "There will be an element of that, but it will also be important from my perspective to continue to have active ongoing engagement, and that means not being caught on the back foot, as far as possible in circumstances as unpredictable as these. That's part of the task of leading an organisation that is looking to lead legal excellence and meet responsibilities in relation to members, and also meet responsibilities in relation to promoting and safeguarding the interests of the public."

And even in our present situation there will be opportunities to be grasped. "While these are really challenging, really difficult times for everybody, and we can't underestimate the horrors in relation to what people have experienced in this crisis, from every crisis there will come both challenges and opportunities and it's about being able to show the level of flexibility and willingness to engage in all the conversations so that people come out the other side in as positive a way as possible."

She concludes: "As you'll have gathered I'm a fundamental believer in the rule of law, in the independence of the profession, and taking a crisis and seeing from that an opportunity, so my focus is about maintaining, it's about developing, it's about leaving a legacy where people are able to continue to see the value of a viable legal profession in a meaningful civil society."

COVID-19: countering a crisis

The Society's committees have faced exceptional challenges in seeking ways to mitigate the effects of the COVID-19 lockdown. Peter Nicholson reports on some of the significant work undertaken, and continuing, to help practitioners

The business effects of the coronavirus shutdown are severe, and will become the more so the longer this situation lasts. But without the emergency legislation and other arrangements to cushion the initial blow, things would have been much worse for many practitioners.

Law Society of Scotland staff and volunteer committee members were heavily involved in many areas, and put in long hours working with Government and public bodies to devise suitable measures. This feature attempts to give a flavour of what has been achieved to date, and priorities for the next phase of work.

Public Policy Committee: overview

Convened by former President Christine McLintock, the Public Policy Committee has oversight of the Society's specialist policy subcommittees and is responsible for policy development concerning law reform proposals. It coordinated the response to the introduction at great speed of sweeping powers to enable the UK and Scottish Parliaments to deal with the pandemic.

The bills raised important issues around legislative scrutiny, and protection of human rights and of the vulnerable. The Policy team responded with remarkable speed: the Scottish bill was published on 31 March, and the Society had an extensive briefing in the hands of MSPs ahead of it being debated and passed on 1 April – a feat commented on favourably in the chamber.

"The committee has been keeping an eye on the fast paced introduction of legislation to deal with the pandemic, and providing support where we can to the Policy team and the relevant subcommittees," McLintock confirms. "As ever, the Policy team have excelled in producing timely work of fantastic insight and quality."

She adds that the committee's first videoconference meeting "worked brilliantly", and given the need for the Society to reduce costs as part of its coronavirus response, this will likely become the "new normal".

There remains other urgent work: "Brexit continues as a pressing issue, so policy subcommittees also continue to work hard on transition and post-transition issues. Work is under way to set up a Private International Law Reference Group to facilitate discussion and to explore solutions to cross-border issues arising during and after transition."

Property: digital solutions

Perhaps the most urgent issues at the beginning of the shutdown faced the Property Law Committee. Convener John Sinclair relates how the closure of the application record at Registers of Scotland had a profound impact on solicitors in the process or on the verge of settling transactions – and of course their clients, some of whose panic-stricken pleas for help quickly circulated online.

"Our response was to provide immediate guidance to our members, and to work with RoS to find a way of allowing some settlements to proceed," he recalls. "The complexities came in dealing with other stakeholders, particularly lenders (working through UK Finance), and putting the solutions in the context of the wider Government guidance and the priority to keep people safe."

While the legislative remedies were principally developed between RoS and Scottish Government, the committee provided detailed input into the draft bill, and discussed changes during the various stages. Since then it has worked very closely with RoS on the proposals for extended advance notices and electronic submission, ensuring a degree of co-ordination between their respective sets of guidance.

Sinclair adds: "Over the last few years, our committee has been used to working constructively and openly with RoS in discussing many issues relating to registration. This meant that when RoS put forward their proposals for interim measures there were existing lines of communication to allow for rapid discussion and bringing others, such as UK Finance, into the discussion.

"There are still a number of areas where further solutions are required, including the current inability to register a deed in the Sasines Register, and so whilst a huge amount has been achieved, there is still further work required."

He expects weekly calls with RoS to continue, to discuss the closure of the application record, the operation of the interim measures, and further proposals to open up the functioning of the Land Register.

"Brexit continues as a pressing issue, so policy subcommittees also continue to work hard on transition and post-transition issues"

For the future, as regards commercial and particularly lending transactions, Sinclair hopes that the new measures in place for electronic submission of applications will enable many of those transactions to proceed. For residential transactions however, the general shutdown and Government regulations and guidance will be the principal factor.

"The longer the restrictions last, and the bigger the impact of the shutdown on clients, the harder, and slower, the return to 'normal' is likely to be."

On the other hand, the ability to submit advance notices for transfers of part, and to submit applications for land registration electronically, are all benefits. "We would hope that these (and other) improvements are retained and developed further after the restrictions are lifted."

Civil courts: pushing for a restart

Closure of the courts has also had a massive impact, and the Civil Justice Committee under Iain Nicol has spent many hours on the problems – and proposed solutions – reported by practitioners, firms and bar associations across the country.

Prescription and limitation has been a particular concern, and a detailed proposal has been submitted to the Scottish Government for consideration in the next Coronavirus Bill.

At the same time regular dialogue continues with Scottish Courts & Tribunals Service as it gradually lifts the restrictions on court business (see also the feature on p 20). "The dialogue is intended to help the court system focus on the most important areas of work to address, recognising that things cannot go back to normal overnight," Nicol explains.

He notes that while agents are able to make some progress with their cases, they are hampered by the lack of court staff working remotely. And as all proofs have been adjourned for several months, along with most procedural hearings, routine processing of civil business has largely ground to a halt. With only 10 hub courts operating out of 39 sheriff courts, and paperwork in the closed courts building up a huge backlog, "It will take weeks if not months to get back to 'normality'."

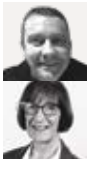
In addition the committee, together with the Professional Practice Committee, has been overseeing the work of the Success Fee Agreement Working Party, set up to work with the Scottish Government on part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 and the Success Fee Agreements Regulations which came into force on 27 April.

(For a separate article by Iain Nicol on the regulations, see this month's additional online copy.) The working party's proposed style agreement has been brought into line with the regulations, and can be accessed at www.lawscot.org.uk/news-and-events/law-society-news/success-fee-agreement-regulations/

Civil legal aid: operating changes

On civil legal aid, Patricia Thom and her committee have been liaising and negotiating with SLAB and the Scottish Government on changes to operating procedures and regulations to ensure that applications can be progressed without the need for face-to-face contact with clients, work necessitated by the lockdown can be paid, and quicker payments made of interim accounts to assist with solicitors' cash flow.

With most firms having to furlough staff, "they have valued the ability to interim fee the Board at far earlier stages than would normally be the case", she states. However the committee is having to continue to press the Government to progress the changes to the regulations.



Criminal law and legal aid: cash crisis

With criminal defence firms facing immediate and critical cash flow issues, the Criminal Legal Aid committee under Ian Moir worked sometimes almost round the clock, negotiating new ways to make interim claims to SLAB in all criminal matters. Concessions were also secured to allow written pleas triggering ABWOR, to allow another agent to be instructed in a custody case, and soon regulations will allow the duty solicitor to assist in an ABWOR case.

"It has to be acknowledged, the effort and spirit of cooperation and support to the profession from SLAB during our work with them in this time of crisis," Moir comments. "Long may it continue!"

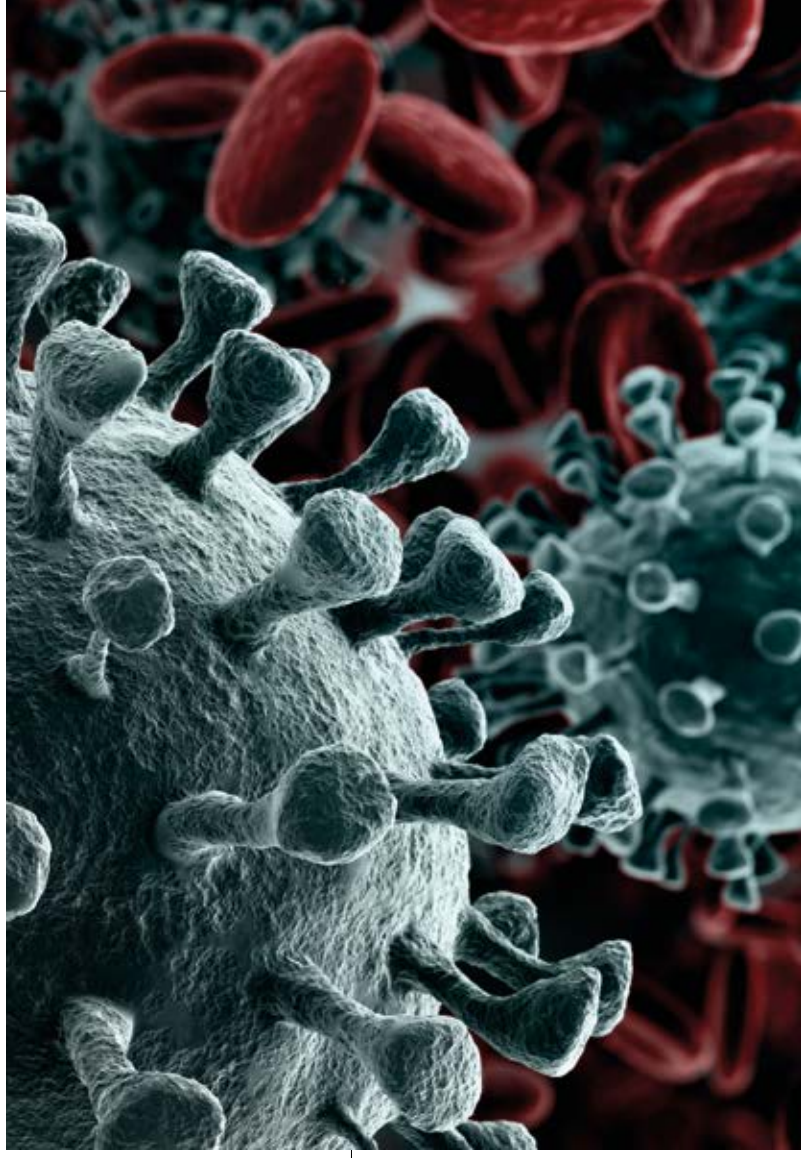
At the same time, Debbie Wilson's Criminal Law Committee was spending "an exceptional amount of time" dealing with the Coronavirus (Scotland) Bill, and not only the contentious judge-only solemn trials provisions which were dropped in the face of concerted opposition. Substantial changes were enacted dealing with early release of prisoners, evidential matters, extension of time, and community service.

The Society then set up a working group, including judiciary, members from across the legal profession and lay interests, which explored alternative proposals to dispensing with juries and produced a paper in response to Government consultation on the options. Discussions have continued and replacement legislation is still awaited.

A further working group has been tasked with looking at all other aspects of criminal business; it continues to press for commitments to plan ahead to deal with the backlog of court business and to start safe operational practices in court. Many practitioners have spoken about chaotic and, as regards danger of infection, high risk scenes at courts as the effects of the pandemic began to be felt.

"Several weeks in, the arrangements for necessary

"Safety of all attending the courts is paramount, but there is a need for better communication about the arrangements now and planning for the future"



criminal court business remain ad hoc," Wilson observes. "Safety of all attending the courts is paramount, but there is a need for better communication about the arrangements now and planning for the future."

Both conveners are alarmed at the growing backlog of criminal cases and the length of time untried accused are being held on remand. Here the "new norm", Wilson believes, will protect the safety of the public, including court officials, by using remote technology where possible. "Getting as much criminal business up and running utilising the closed courts is essential."

Work also continues to consider how solicitors should conduct police station interviews. At the moment the Society's advice remains that solicitors should not attend interviews if they do not feel it is safe to do so. It is continuing to engage with Police Scotland, who have published guidance on this for non-police personnel, with a view to ensuring the provision of safe and secure systems for undertaking interviews in accordance with all NHS and Scottish Government advice.

Despite the concessions achieved from SLAB, Moir estimates that most firms will be experiencing at least a 75% drop in income at the moment. "We must get the system moving again... We must get the written pleas up and running so we can accelerate some of those cases where they are capable of resolution."

As the Journal went to press, he was anticipating news, following further "very positive" meetings, about some summary criminal business restarting safely in the very near future.

Mental health and disability: practicalities

"From mid-March onwards, the extra workload generated by COVID-19 has been intense," reports Adrian Ward, whose role as convener "amounted to something approaching a full time job" over the ensuing month.

For solicitors in the sector, social distancing has presented significant challenges in dealing with people with impairments of capacity, mental illness, or other vulnerabilities and disabilities. Also, pre-existing difficulties in obtaining necessary medical reports have been exacerbated, and court processing of guardianship applications has generally been restricted to urgent interim orders. Any such restrictions are inherently discriminatory, Ward points out, where the result is deprivation of effective support to the adult. Similarly, powers of attorney have been unable to be registered when needed, perhaps on an emergency admission to hospital.

The committee successfully sought a reduction, from two years to six months, in the duration of temporary modifications to the mental health legislation, and resolved with the Public Guardian an issue over review of guardianship accounts which was delaying remuneration.

As a significant practical matter, in response to requests from the profession the committee drafted, and agreed with OPG, guidance by which execution of a power of attorney could competently be done remotely – based on a precedent where Ward had had to deal with an overseas granter.

At time of writing, a response is awaited from Scottish Government to a draft of temporary statutory amendments that would, among other things, enable a power of attorney certified by a solicitor to become operable on presentation for registration, rather than waiting for completion of the process.

Ward concludes with a few observations. His committee colleagues have commented that: "We may well be learning lessons for the long term, beyond current restrictions, and that things are perhaps unlikely to return to where they were. In the era of electronic communications, virtual meetings and interviews, and so forth, can requirements for people to be 'personally present' be relaxed satisfactorily?"

In addition, two aspects of the current situation are significant in relation to people with relevant disabilities. "First, society as a whole is gaining an insight into some aspects of life that are permanent for people with relevant disabilities, such as restrictions on movement, and inability or difficulty in attending personally for a wide range of purposes. At the same time, however, in relation to such matters the differentiation between non-disabled and disabled people is reduced. It may be that some aspects of this better understanding and reduction in differentiations can be carried forward beyond the current crisis."

Licensing: back of the queue

Finally, spare a thought for the licensing lawyers, who were also heavily involved with Government ahead of the Scottish bill, but whose clients look set to be the last to have their shutdown restrictions lifted.

"Work in that area for firms has been decimated," comments convener Archie MacIver. "Our proposals have assisted in certain areas – e.g. holding remote hearings and building in a greater degree of flexibility in the system – but some councils are simply not accepting applications, so despite our best endeavours we have been stymied in those parts of the country.

"Time will tell, but it seems pretty clear that the hospitality sector will be at the back of the queue. It may still be some time before anything even remotely approaching normality is achieved."

COVID-19: some practice updates

Some updates to the summary in the April Journal of changes in regulation and practice agreed by the Law Society of Scotland in response to the coronavirus restrictions

Readers are reminded to check regularly the Coronavirus Updates web page, accessed from the Society's home page www.lawscot.org.uk, which sets out where and how changes in regulation and practice will operate for the duration of the COVID-19 emergency.

What follows is a summary of some of the main changes since the article at Journal, April 2020, 42.

Client ID

Three methods have been set out for identifying and verifying clients where no physical contact is possible:

- client identity verification software, from a reliable service provider;
- videoconferencing tools, following a procedure set out on the web page;
- email and third party validation, where another professional is able to confirm an established relationship with the client and is willing to review the due diligence documentation.

However, it is important to note that the regulations have not been relaxed in the current situation, and it remains the case that if due diligence cannot be completed, or any "red flags" cannot be addressed, the solicitor should not proceed with the transaction.

Court attendance

Solicitors who are willing and are able to attend at court are advised to ensure that they are aware of the terms of the protocol for court users that has agreed between SCTS and COPFS: see bit.ly/2yAPN8D

Solicitors' own health and safety should be their primary concern and there is no requirement to attend court if, in line with current NHS and Scottish Government guidance, they feel it is unsafe for them to do so.

Specialist accreditations

In addition to the automatic extension by 12 weeks of specialist accreditations due to expire on or before 30 June 2020, the scheme for accreditation of family and commercial mediators has been amended to permit the extension of accreditations by up to three calendar months. Any mediators whose accreditation is extended during the lockdown period will be contacted and advised of the extended date of expiry of their accreditation.

Accounts certificates

Due to the accounts certificates rules and in order to protect members' compliance, the Society will continue to request that practice units submit their accounts certificates in accordance with the timescales set out in the rules. The content and format of the certificate have recently been reviewed and the process has now been moved online for all firms.

The Society is aware "that this is an extremely challenging time and your priority must be the health and safety of yourself, your colleagues, family and friends. If, as a result of the current circumstances, you are having difficulty completing your accounts certificate, obtaining signatures or you have any other issues or queries, please do not hesitate to contact us at fincomp@lawscot.org.uk".

To speak to a member of the team, call Kerry Allan on 0131 476 8355.

Notaries public

Any document which has to be executed in the presence of a notary must be signed by the deponent when the notary is physically present. Until such time as there is a legislative change, it is not possible for a solicitor to notarise a document remotely.

Information and support for businesses, for solicitors, and for trainees and students, is available at the same page.

ELSEWHERE

- The Crown Agent has published a letter outlining the updates made to COPFS processes during COVID-19. COPFS has produced a user guide and an installation guide for their Secure Disclosure System, to which the letter refers.
- Applications to the UK Government Bounce Back Loan scheme, offering loans of between £2,000 and £50,000 through accredited lenders to SMEs affected by the pandemic, opened on 4 May. The UK Government will guarantee 100% of the loan, which will be interest-free for the first 12 months. The total term of the loan will be six years. Businesses which are already receiving support through the Coronavirus Business Interruption Loan Scheme (CBILS) can transfer their funding to the Bounce Back scheme.
- Applications for a second phase of COVID-19 funding announced by the Scottish Government opened on 30 April. Among other features this extends the Small Business Grant scheme to provide, in addition to a 100% grant on the first property, a 75% grant on all subsequent properties; and offers £2,000 grants to those who became self-employed since April 2019 and are therefore ineligible for UK support.
- Registers of Scotland has created a system to allow the electronic submission of applications to register traditional deeds in the Land Register of Scotland. This application is by way of a new digital portal on the Registers of Scotland's website, which should be consulted for more detailed guidance including its policy to control the flow of applications.

The "new normal" legal practice

Life will be different after the lockdown, and now is the time to plan how to make your business more efficient and agile

What will the "new normal" look like for the legal profession in 2020? That technology will play a significant role is self-evident. We are facing protracted social distancing measures in our personal life and workplace, and to get through this we see that people in their social lives and organisations in their day-to-day business life are now, more than ever, adopting technology to help them adapt to the changes and do what they need to do.

Governments across the world are already beginning to consider their lockdown exit strategies. We should be doing the same and planning how to come out of the other side of this dark time stronger, more agile and ready to take our teams, customers and businesses forward.

Making a case for better technology

Just as before the lockdown, every firm owner or managing partner must be able to take the pulse of their business. Now more than ever, you need to know your business KPIs, so that you can make informed, data-driven decisions to drive success and profitability, because, thanks to technology, your competitors certainly will be.

Moreover, you need to look after your team by giving them the right tools to perform to the best of their ability whilst maximising their efficiency.

Our clients tell us we have created a product that can do just that. We called it CaseLoad, because that's what we were told you want help to manage. But it does so much more than just managing caseloads.

So, what makes CaseLoad special?

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Additionally, with the introduction of DocuSign you can now complete approvals and agreements in minutes or hours – not days – from almost anywhere in the world, quickly and securely accessing and signing documents.

We recently joined forces with Amiqus ID to create an integration that allows Amiqus to communicate workflows, risk assessments, and client data with CaseLoad. That means you'll save yourself duplication of effort and time on the admin front and can dedicate it to your clients to provide the level of service that they expect.

We also purchased two Hey Legal licences for all of our new and existing partners to use for a period of 12 months – free of charge. The objective? To give lawyers the opportunity to save money and time, and to introduce new ideas and thinking into the law firms they work with through the diverse topics covered by Hey Legal.

An investment in the future

There is, of course, the concern of a potential economic downturn to consider when making any decision for the future. Inevitably, some firms will have to tighten their belts, looking to cut overhead costs where they can. At this point, many partners may begin to wonder whether paying for technology is the best use of the firm's money when the focus might be elsewhere. We get it and we empathise with you. That's why we are here, to help, not to make introducing tech difficult and impossible to afford.

Your investment in the best possible case management software available is well worth it. Once you've streamlined your business processes, your quality of service will drastically improve, customer satisfaction will be greater, and, we would hope, business profits will soar.

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A tale of two systems: COVID-19 and the courts

The response of the Scottish courts to the COVID-19 shutdown has been compared unfavourably with that in England, where much more business has continued. Naomi Pryde compares the two systems and suggests some priorities for improvement

The ongoing coronavirus pandemic has affected all of us, in particular how we work. All but "essential" workplace offices are closed, and the vast majority of lawyers find themselves working from home. However, pandemic or not, the administration of justice must go on.

There are those who feel that justice in England, unlike in Scotland, has largely gone on "business as usual". I am dual qualified and operate a split Scots/English law practice, and prior to lockdown, spent half my time in London. I have therefore been fascinated by the different approaches taken by HM Courts & Tribunals Service (HMCTS) and the Scottish Courts & Tribunals Service (SCTS) in facing the same challenges. Why has there been such a disparity? Is the English system, and its rules, more adaptable? Or has HMCTS simply been more reactive and responsive to practitioners' needs?

As the Law Society of Scotland (LSS) Council member for England & Wales, I volunteered to use my detailed understanding of the two systems to produce a review to identify the real differences, looking at topics including court rules, service of documents, electronic filing, sheriff and county courts, remote hearings, and the day-to-day operation of the Court of Session and the High Court. I also spoke to numerous practitioners on both sides of the border. I'm grateful to everyone who took the time to give me their views.

Space does not permit me to reproduce all of my research here, but this article seeks to provide a high level overview of my findings.

Initial approaches

On 17 March, the Lord Chief Justice of England & Wales stated: "it is of vital importance that the administration of justice does not grind to a halt... Our immediate aim is to maintain a service to the public, ensure as many hearings in all jurisdictions can proceed and continue to deal with all urgent matters".

In stark contrast, the Court of Session issued an email to civil court practitioners the following day, stating: "All proofs, proofs before answer and civil business involving witnesses will be discharged and will not be proceeding until the end of April 2020 when the position will be reviewed." SCTS advised that it would only deal with "urgent" or "essential" court business, without clearly defining these terms.

Civil litigators in Scotland were horrified, and both the Faculty and LSS immediately entered into dialogue with SCTS. In an open letter, Vice Dean of Faculty Roddy Dunlop QC stated that SCTS's "mothballing" of civil business was extremely concerning and urged it to review its approach.

The views I gathered from solicitors helped inform a detailed letter from LSS to SCTS. Many compared SCTS's approach extremely unfavourably to that of HMCTS, and could not comprehend why there was such a marked difference.

Naomi Pryde is head of Commercial Litigation in Scotland with DWF LLP.

How flexible?

The English Civil Procedure Rules (CPR) and Family Procedure Rules provide for "considerable flexibility". A Remote Hearings Protocol has been implemented for the county court, High Court (including the Business and Property Courts), and Court of Appeal (Civil Division). This states that there will no adjournments or stays (the English sist) unless "absolutely necessary". Judges have been encouraged to make as much use as possible of telephone and video hearings. Skype for Business has been installed on the laptops of the judiciary and HMCTS staff, and a cloud video platform is being used in some civil and family hearings. The courts have offered guidance for remote hearings, such as: submitting recordings in 30-minute segments, bandwith guidance, appropriate document sharing systems, and remote etiquette (e.g. using "mute" function). A telephone helpline can assist those having technical issues when joining remote hearings.

In fairness to SCTS, it took on board the profession's concerns and collaborated with LSS and Faculty. It has clarified the scope of "urgent" or "essential" business, and assessed whether other business could be carried out remotely and what phased steps could be taken. On 17 and 29 April it issued welcome guidance about the restarting of civil business in the Court of Session and sheriff courts. Indeed on 21 April, Scottish legal history was made when Lord Carloway, Lord Menzies and Lord Brodie heard the Kezia Dugdale defamation appeal in a virtual court with remote links. Journalists were able to watch on a secure closed link.

Afterwards Lord Carloway commented: "The technology worked well from the court's perspective and the hearing captured the ambience of a physical courtroom. The judiciary fully support the promotion of virtual cases where it is technologically possible and appropriate in the current situation."

Similar Inner House hearings will take place until at least 10 May. SCTS said virtual courts could become a permanent feature.

The challenge faced by both jurisdictions is the principle of open justice. In England, Practice Direction 51Y confirms that remote hearings are capable of facilitating open justice and should, as far as possible, remain public. If a media representative is able to attend remotely, proceedings will remain "public"; in any event, private hearings will be recorded. A hearing is made public by projecting a screening of the remote video within the courtroom. It may also be live streamed. As mentioned, Scotland provided a secure link for journalists to attend the virtual hearing.

Many hearings are of course already streamed: some Court of Appeal and all Supreme Court hearings. On 24 March, the Supreme Court conducted its first ever remote hearing which could be followed on social media accounts including Instagram (hashtag #VirtualCourt). It has also provided an online guided tour facility during the lockdown.

Electronic service?

A number of post offices are closed, postal delivery is increasingly delayed, the track and trace service is not fully operational, sheriff officers/process servers are limited in the work they can do, and social distancing measures mean it is not always possible to obtain a signature on delivery. Accordingly, many firms in both Scotland and England have announced that, due to office closures, until further notice they will not accept service by hand, post or fax, and all communications should be sent by email. This approach, whilst pragmatic, is not strictly in compliance with court rules in either Scotland or England & Wales.

In Scotland, documents can be served, in short, by personal service, by post or by a party's solicitor accepting service on their behalf, though service of a summons or petition requires solicitors to meet face to face. None of these methods are ideal in present circumstances. There is still no court-sanctioned process we are aware of for service to be accepted electronically; parties can agree between themselves but we do not know what the court's attitude will be when the COVID-19 situation is over. Although service is permitted by email in England & Wales, and is for some firms common practice, it requires the express consent of both parties (*Barton v Wright Hassell LLP* [2018] UKSC 12).

There are undeniable advantages of email service, including cost savings, speed, security (emails can be encrypted and password protected), and ease of evidencing. It is respectfully suggested that both jurisdictions should look at updating their rules of service to reflect modern practice.

Filing of documents

In Scotland, documents are normally filed by a court runner physically lodging the papers. One dual qualified practitioner commented to me that this system seems "archaic" in comparison to the English system.

The exception is the Court of Session Commercial Court (the rules of which, as I understand it, are loosely based on the CPR), where documents are routinely lodged by email direct to the commercial clerk. The court is considered more sophisticated in its uses of technology than other sections of the Court of Session. Indeed, technology is an important feature. The judges' court diaries are available electronically, enabling the date and time of any subsequent hearing to be fixed immediately. Most documents required during an action can be emailed. Interlocutors, once signed, are emailed to the solicitors. Documents and legal authorities required during a hearing are expected to be lodged in electronic format.

Schedule 4 to the Coronavirus (Scotland) Act 2020 introduced new rules allowing the signing and lodging of most court and tribunal documents electronically. This will be in force until 10 May 2020 unless extended. However I can't help but wonder why this can't continue after lockdown? In England, the courts accept the e-filing of documents and this is routinely done.

"Whilst the pandemic presents an unprecedented challenge, it can also be viewed as an opportunity"

Pragmatic approach

Courts in England have approached cases during COVID-19 in a pragmatic fashion: see in particular *O'Driscoll v F.I.V.E. Bianchi SPA* and *Muncipio de Mariana v BHP Group plc* [2020] EWHC 928 (TCC). In *BHP*, the court discerned that it would take significantly longer to prepare evidence by means of remote hearings and granted the extension sought. The judge identified the following principles in relation to adjournment and remote hearings:

- The continued administration of justice is important.
- Disputes can be resolved fairly, remotely, and there should be rigorous examination of this option.
- Courts may be prepared to hold hearings remotely in previously inconceivable circumstances.
- Decisions as to whether a fair resolution can be achieved are case specific.

On time extensions (considering *Heineken v Anheuser-Busch* [2020] EWHC 892 (Pat) and Practice Direction 51ZA.4), the judge identified these principles:

- Existing deadlines should be met, where possible.
- Legal professionals will be expected to make appropriate use of modern technology, and lawyers and experts to go further than in normal circumstances (putting up with inconveniences and using imaginative, innovative working methods).
- The court may be willing to accept evidence and other material which is less polished and focused.
- The court will avoid requiring compliance with deadlines which are unachievable, even with proper effort.
- It is recognised that things take longer via remote working.

Courts in England have made it clear that practitioners are expected to step up to dealing with the challenges imposed by COVID-19, not just in innovation/technological terms but also in terms of collaboration.

At the time of writing, I do not believe there are any reported decisions dealing with COVID-19 in Scotland, but I respectfully suggest the principles outlined above are eminently sensible and should therefore be highly persuasive.

Opportunity for progress

Scotland is no stranger to innovation; whether it's the telephone or the television, Scots have changed lives around the world by being bold and innovative. Sadly we aren't seeing much of this innovation in our court system. Practitioners have worked hard to promote Scotland as a forum for the effective resolution of disputes and a viable alternative to England. It is therefore essential for the future of Scottish litigation that the Scottish courts are fit for purpose and for the modern day. Whilst the pandemic presents an unprecedented challenge, it can also be viewed as an opportunity, for all jurisdictions, to invigorate their court systems and bring them into the modern day.

Why we need kindness in the law

Kindness is the focus of Mental Health Awareness Week, which takes place this month. LawCare's Elizabeth Rimmer suggests that in our present situation it should be given additional importance in the legal workplace

The last few weeks have been difficult, but have also brought out the best in us. Children's drawings of rainbows in windows, thousands of people signing up to be NHS volunteers, neighbours offering to do each other's shopping, Captain Tom and his unbelievable fundraising efforts, and the weekly #clapforcarers have shown just how much kindness matters in a crisis.

Our positive connections and interactions with people are one of the greatest predictors of our happiness. Our nervous systems respond positively to kindness; helping other people and connecting with them signals feelings of pleasure, safety and warmth to our brain. Humans have evolved to behave in ways that promote the survival of our species, and kindness and looking out for others have been crucial. From around 18 months old, children have a natural instinct to be kind, to pick up something that someone has dropped or to give hugs or kisses to someone who looks sad, for example.

Kindness in the legal workplace?

Kindness is not always seen as a priority in the legal workplace, especially as it contrasts with the cut and thrust and competitive nature of the law. In the past few weeks you may have experienced some kindness from your colleagues, or you may not. At LawCare we have seen two sides of the coin. On the one hand we have heard from legal professionals who have not been allowed to work from home, or have had little to no communication or reassurance from their managers. On the other hand, some of us have had the opportunity to see people we work with in a different light. On Zoom calls, in more casual clothes with their kids, pets, or books on a shelf behind them, they may have seemed more approachable, more human.

Colleagues may have been more understanding about deadlines or times of meetings, asked you how you are coping, or spoken about their own situation at home more. Many organisations have made sure to check on members of staff, or offer virtual opportunities for connection and chat outside of work calls.

We know that many lawyers are not happy – all the research and data produced over the last few years from a range of sources suggests that stress and anxiety are common. Could more kindness in the legal profession be the answer to tackling some of these issues and creating happier workplaces? A study from the journal *Emotion* showed that kindness in the workplace can create a ripple effect throughout the whole organisation, resulting in a happier workforce, with employees experiencing greater job satisfaction, autonomy and feeling more competent at their jobs.

So what does being kind in the workplace look like, and how can we practise it?

Respect

Musician Jon Batiste said: "You're never too important to be nice to people." It doesn't matter how busy or stressed you are: you should always treat colleagues and juniors with respect, by listening, saying please and thank you, sometimes picking up the phone rather than sending emails. Sadly we know at LawCare this just doesn't happen in some legal workplaces – we often hear from tearful or anxious lawyers who have been shouted at, ignored, undermined or talked down to.

Being respectful in the workplace benefits everyone, and the research supports this. Recent *Harvard Business Review* research found that respect was the most important quality in a leader, and other research has shown that the most likeable leaders who expressed warmth were also the most effective leaders. Treating people well means they will be more likely to want to work for you and do well for you – and civility is contagious, so if leaders model this behaviour it will filter down to the rest of the organisation, resulting in a happier, healthier, more motivated workforce and better retention rates.

Compassion

Compassion is a huge part of kindness. Learn how to step into someone else's shoes for a moment, and understand that

everyone is dealing with a wide variety of issues at work and at home that you might know nothing about. These are challenging times, so ask people how they are feeling, how they are coping with their workload, what you can do to help. When something goes wrong, try to find out why in a sensitive way, rather than blaming, and forgive people for their mistakes. We all make them!

Praise and gratitude

Lawyers are often very competitive, detail-focused, and legal work is often about winning or losing. We frequently forget to celebrate our successes and instead focus on what went wrong, even if in many cases it's very minor. At LawCare we often get calls from legal professionals who are still thinking about a mistake they made years ago. To try and address this we all need to make sure we are giving credit where credit is due, saying "well done" or "thank you" beyond just giving a bonus. This will help people feel truly valued and help prevent workplace-related anxiety building, which can occur when staff aren't getting positive feedback from their colleagues or managers.

Help others

One of the greatest ways to demonstrate kindness is by helping others. In the workplace that might look like volunteering to help with a project to someone who's overwhelmed, offering to show someone how to do something technical, suggesting a five minute brainstorm to a colleague who seems to be at a dead end, or sometimes it might take the form of mentoring or reaching out to build a connection with someone. We all have unique skills that can help others, and it also benefits us to help other people, making us feel valued and giving us a sense of purpose.

Making kindness a priority in the workplace will make the law a happier and healthier place to work. Kindness is contagious; frequent acts of kindness at every level in the workplace will lead to more engaged and connected staff. Try being friendly, generous or considerate today. Kindness matters more than ever.

Elizabeth Rimmer is chief executive of LawCare

LawCare support

LawCare offers a free, confidential emotional support service to all legal professionals, their support staff and families in the UK and Ireland. We're here to listen, with helpline calls, emails and webchats answered in confidence by trained staff and volunteers who have first hand experience of working in the law. We also have a network of peer supporters and offer information and training to legal workplaces.

If you need to talk, call our free, independent and confidential helpline on 0800 279 6888, email support@lawcare.org.uk or visit www.lawcare.org.uk. You can check out our new wellbeing hub at www.lawcare.org.uk/wellbeing

Kindness is the theme of this year's Mental Health Awareness Week, from 18-24 May 2020.

No time to lose

The leading Supreme Court decisions on prescription have been applied in ways that seem harsh on pursuers, but is it necessary to read them so strictly? David Johnston QC offers an alternative analysis

"A brief history of (the law on) time" by Alyson Shaw (*Journal*, March 2020, 26), discussed prescription and latent damage claims affected by s 11(3) of the Prescription and Limitation (Scotland) Act 1973. As she makes clear, the recent case law has shifted the balance decisively against pursuers. They might reasonably ask: "How did it get so late so soon?" Here are some further thoughts.

As interpreted by the Supreme Court, prescription starts to run under s 11(3) once the pursuer is aware as a matter of fact that he or she has sustained loss. In *David T Morrison & Co Ltd v ICL Plastics Ltd* 2014 SC (UKSC) 222, the case of the explosion at the ICL factory, it was simple to apply that test: the pursuer was aware of loss on the date the explosion occurred. The issue was more difficult in *Gordon's Trustees v Campbell Riddell Breeze Paterson* [2017] UKSC 75, a case of economic loss, where the loss arose from the pursuers' solicitors serving defective notices to quit. Again, however, the Supreme Court held that the question was when, objectively, the pursuers became aware that they had sustained loss.

Awareness of what?

Gordon's Trustees in particular has led the way to some troubling decisions on economic loss in the context of professional negligence. Take the case of *Midlothian Council v Blyth & Blyth* [2019] CSOH 29. There the council entered into a contract for construction of a housing development which was built on land above former mine workings. Tenants of the houses fell ill owing to gas emanating from the mine workings. On the advice of consulting engineers, the development had been constructed without any gas membrane. It was found to be inherently defective, the construction expenditure was wasted, and the whole development had to be demolished. The council was of course aware that it was incurring expenditure on construction. The judge held that objectively the council was therefore aware of the loss which it subsequently sought to recover.

This decision seems very odd. The point of s 11(3) is, after all, to postpone the commencement of prescription until the pursuer has certain knowledge. On the face of it, it seems strange that knowledge of expenditure which gives no indication whether the construction work is defective should have the effect of triggering the start of the prescriptive period. The decision seeks, however, to apply the principles set out in the judgment of the Supreme Court in *Gordon's Trustees*.

We therefore need to examine the terms of that judgment more closely. In *Gordon's Trustees* the solicitors were instructed to serve notices to quit to take effect on 10 November 2005. The notices were ineffective, and the tenant did not move out. The pursuers sustained loss through being unable to recover vacant possession of their land, which they had hoped to develop. The loss included the legal expenses they incurred, as well as loss of the development value of the land.

Some elements of the judgment are straightforward. First, it is necessary at the outset to identify the loss: here that was the inability to obtain vacant possession of the land on 10 November 2005 (see para 24). Secondly, that "loss" is different from the heads of loss: s 11(3) is about awareness of "loss, injury or damage", not the particular heads of loss (see para 21). Thirdly, s 11(1) states the ordinary rule, that an obligation to make reparation becomes enforceable on the date when loss occurred; s 11(3) postpones that date to the date of awareness of the loss. But the subsections are concerned with the same loss (see para 20). Fourthly, on that approach the Supreme Court concluded that loss for purposes of s 11(1) occurred on 10 November 2005. And it concluded that loss for purposes of s 11(3) occurred on the same date, because the pursuer knew of the loss (failure to obtain vacant possession) on that date (see para 24).

"The Prescription (Scotland) Act 2018 seeks to address the problems these cases raise, but it is not going to do that quickly"

Understanding "loss"

If the judgment ended there, matters would be quite straightforward. But it does not. Two parts of the judgment are problematic. The first is that at the end of para 21 the court says this: "It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure."

The reference to incurring expenditure has prompted defenders in cases such as *Midlothian Council* (and others, such as *Loretto Housing Association Ltd v Cruden Building & Renewals Ltd* [2019] CSOH 78) to rely on such things as initial construction expenditure to identify the starting date for prescription.

It seems at least possible that the court did not intend to refer generally to expenditure of any kind at all. The words quoted may be intended to refer back to what is said in para 19 about expenditure incurred as a result of breach of contract. But the generality with which they are expressed has opened the door for defenders to advance a much broader line of argument.

The second problem is that the examples the court gives in order to explain the law are difficult to follow. Take this passage, from para 22: "Thus a person may begin a legal action and incur expenditure on legal fees on the basis of negligent legal advice or he or she may purchase a house at an over-value as a result of the negligent advice of a surveyor. In each case the person may be aware of the expenditure but not that it entails the loss." The difficulty with these examples is that the court explained in para 21 that the critical question is when a pursuer becomes aware of loss, not particular heads of loss. But these examples are concerned

precisely with heads of loss: where a lawyer has given negligent legal advice, expenditure on legal fees may well be a head of loss, but it is not the loss itself. Where a surveyor has given negligent advice in relation to a house purchase, the price paid for the house may be a head of loss, but the loss itself is the purchase of the house at an excessive value.

The difference between these two approaches is even clearer if we return to the *Midlothian Council* case. Here the judge held that the council was aware of the expenditure it had incurred between 2007 and 2009. That was wasted expenditure. The council knew about it, so it knew about the loss. The decision reads across the two problematic passages from *Gordon's Trustees* mentioned above and it reasons from them to the conclusion that, at the time it incurred the expenditure, the council knew about the loss (see para 22). But, given the tensions identified above in the reasoning in *Gordon's Trustees*, this conclusion does not appear to be necessary. The essential point is to recall the distinction between "loss" and heads of loss in *Gordon's Trustees*. What are the heads of loss here? They are such things as expenses on professional fees; decanting tenants; demolition; and rebuilding. Depending on how the claim is formulated, they might include the cost of initial construction. But none of these is the same thing as the "loss". If one asks what the "loss" is here, it is the fact that housing constructed on this particular land without a gas membrane was inherently defective. When did the council know of that "loss"? Only in 2013 (see paras 19-20), less than five years before it raised proceedings.

It is obvious that the fact that the council knew it had paid for construction work does not mean that it knew that it had a claim arising out of the construction work. Why should the exercise of statutory interpretation of the 1973 Act take an entirely different and counter-factual approach? To focus on a head of loss such as construction expenditure appears to make little sense, since it is hard to understand why knowledge of something which gives no indication whether construction work is defective should trigger the start of the prescriptive period. On the approach suggested here, however, the difficulties are removed by focusing on "loss", as s 11(3) requires, and not being distracted by particular heads of loss, such as expenditure.

David Johnston QC is an advocate with Axiom Advocates, and author of *Prescription and Limitation*

Delayed remedy

The Prescription (Scotland) Act 2018 seeks to address the sorts of problems these cases raise, but it is not going to do that quickly. The Scottish Government is expected soon to consult on transitional and commencement provisions. Any change in the law is likely to be several years away. By way of comparison, the 1973 Act came into force in July 1976, three years after the Act received Royal Assent. A lot of cases yet will be decided on the basis of the current wording of s 11(3) as interpreted by the courts. The arguments above, if right, may mean that the picture is not quite as bleak for pursuers as it first appears. But any delay involves risk: pursuers have no time to lose.

Some late news

Since the preceding text was written, another decision on s 11(3) has been issued: *WPH Developments Ltd v Young & Gault LLP (in liquidation)* (CA30/19), Sheriff Reid, Glasgow Sheriff Court, 8 April 2020. Plans drawn up by the defender architects had wrongly shown the boundary of a development site; relying on the plans, the pursuer property developer constructed boundary walls on land which it did not own. Did prescription run from the date the pursuer incurred the expenditure on building the walls?

The sheriff's decision contains a close analysis of *Gordon's Trustees* and *Midlothian Council*, to which it is not possible to do full justice here. It must suffice to highlight four points. First, s 11(3) is concerned with a pursuer's actual or constructive awareness: to determine that, it is not appropriate to make use of hindsight, which is a different thing. Secondly, awareness that expenditure has been incurred is not necessarily the same as awareness of the occurrence of loss. Thirdly, the approach that equates these, which derives from *Gordon's Trustees*, is based on *obiter dicta* rather than on the true ratio of that case (an argument similar to the one set out above). Consequently, *Midlothian Council* was wrongly decided.

ODR: the next leap forward?

With COVID-19 related delays hampering already slow and expensive court processes, online ADR is gathering momentum globally, Rachael Bicknell claims

John F Kennedy famously stated in 1959: "When written in Chinese, the word 'crisis' is composed of two characters – one represents danger and one represents opportunity." (The quote has been described, more recently, as a linguistic *faux pas*.) The danger he was referring to became the Cuban Missile Crisis.

Sixty-one years later, a very different crisis is changing the world. Social distancing restrictions have catapulted the global legal profession into the 21st century by forcing the universal use of technology. Scottish courts, especially sheriff courts, have been slow to adapt, with only very limited business yet capable of being dealt with remotely. Most Scottish tribunals are closed to existing and new business.

Mediators have been quick to move their face-to-face practice to Zoom. Suddenly, online alternative dispute resolution ("ODR") is in the spotlight.

Online options

ODR combines ADR processes, technology and impartial independent experts. It is recognised internationally as a specialised and highly effective form of ADR. Its origins date back to the 1990s when it was created to resolve disputes resulting from online transactions and interactions between parties in different jurisdictions. In 2013, Lord Neuberger, then President of the Supreme Court, said in a speech on Judges and Policy: "We may well have something to learn from online dispute resolution on eBay and elsewhere." The eBay Resolution Center now handles over 60 million disputes each year, while courts have been slow to adopt online or hearing-free models.

All methods of exploring the resolution of a dispute with the assistance of technology are ODR. It can involve advanced technologies and processes such as machine learning, artificial intelligence and cognitive computing which are being developed and promoted to resolve specific types of disputes. More importantly for the practice of law, it is the movement online of face-to-face mediation, arbitration and other resolution processes, using videoconferencing combined with secure onboarding, e-signing of agreements, document sharing and online communication, to deliver fair, proportionate and effective redress for commercial and civil disputes.

The momentum of global ODR continues to increase in many jurisdictions in Europe, the US, Canada, Australia and New Zealand, in the public and private sectors. Hong Kong has recently announced a scheme as part of its measures to support individuals and businesses affected by the COVID-19 crisis. The tragic loss of life and collapsed businesses are undoubtedly the "danger". But there is also an "opportunity" for disputes lawyers in Scotland.

"Social distancing has catapulted the global legal profession into the 21st century by forcing the universal use of technology"

Opportunity factors

First, ODR (and ADR) gives lawyers an opportunity to better serve their clients and society as a whole. Access to justice is problematic for many businesses and individuals in Scotland. Litigation, even in the commercial courts with judicial case management and specialisation, is disproportionately expensive, slow and uncertain. A dispute which runs to proof is unlikely to cost much less than £100,000. For many disputes, that figure is conservative. Legal costs for commercial disputes will often run to several times that figure, resulting in parties spending as much time arguing about the costs as over the claim.

Secondly, ODR gives lawyers an opportunity to grow their client base and their income. There are a huge number of commercial and civil disputes in Scotland which get nowhere near law firms due to the cost of taking legal advice, commencing and running litigation.

Other professionals are assisting clients with all sorts of disputes and attempts to negotiate resolutions. Professional bodies such as the RICS offer well regarded dispute resolution services for a wide range of property disputes. As we enter what is predicted to be the biggest recession in centuries, litigation is going to be a non-starter for an even greater proportion of Scottish businesses. Research from the US reports that by using ODR, parties can save as much as 80% of the costs of litigation in as little as 20% of the time. The economics of ODR mean that claims that were previously unaffordable or cost-prohibitive can be progressed or pursued.

Thirdly, ODR gives lawyers an opportunity to make face-to-face dispute resolution more efficient and cost effective. The background to a dispute can be explored in more detail using online processes such as videoconference, secure and confidential discussion "channels", or parties uploading video statements explaining the dispute from their perspectives.

This allows the neutral expert to clarify key elements in more detail and to hit the ground running when the face-to-face dispute resolution process starts.

It is difficult to argue that ODR will not be at the core of the future of dispute resolution. The world today is very different to how it was even two months ago. The new normal will see a continued use of remote working with the use of technology, and lawyers will need to embrace ODR. In the long run it will result in more work and happier clients. And for the sceptics, some wise words from a pioneering Scot, Alexander Graham Bell: "When one door closes, another opens; but we often look so long and so regretfully upon the closed door, that we do not see the ones that open up for us."

Rachael Bicknell is founder and director of dispute resolution service Squaring Circles

squaringcircles.uk

Things are improving in our prisons... aren't they?

Howard League Scotland welcomes the moves to release certain prisoners to reduce the problems caused by COVID-19, but believes that Government actions must be closely monitored to ensure that promises are kept

After years of Howard League Scotland campaigning to reduce Scotland's woefully high prison population, the unprecedented circumstances of the COVID-19 crisis have brought an unwelcome urgency to its calls. Whilst acknowledging the tragedy that triggered Government action, we welcomed the Cabinet Secretary's announcement on 21 April that the first wave of prisoners would be released under provisions contained in the Coronavirus (Scotland) Act 2020.

At last, our (evidence-based) pleas were being heeded. It was recognition that, aside from the problems of overcrowding in normal conditions, prisons were the perfect breeding ground for the COVID-19 infection; that social distancing was almost impossible; and that the issue was a public health one, not simply a prison health one. People have often spoken of prisons as "incubators" (usually meaning of crime, or addictions). Right now, that could be all too literally true.

The picture looked promising: whilst prison visits had been suspended, alternative means of communicating with family via videoconferencing and mobile phones were being explored. The presumption against the granting of home detention curfew had been dropped. Regime restrictions were being mitigated by increased phone credit, suspension of TV rental charges and the maintenance of prison wages for those unable to work. A remote prison monitoring framework was being adopted to ensure that prisoners' human rights were upheld.

Pressure, formal and informal, in writing and on social media to the Cabinet Secretary, Justice Committee, and HM Inspectorate of Prisons in Scotland, had not been in vain. The amplification of messages from the UN Commissioner for Human Rights, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the World Health Organisation had reaped the benefits we had hoped for.

So, are things really improving?

Howard League Scotland is determined that any gains made are not squandered by taking them for granted, or as importantly, by not interrogating them properly. This means it is necessary to keep asking the important questions and checking that assurances are kept.

Where are the mobile phones which were promised?

Prison visits were suspended on 24 March and the mobile phones required to maintain family contact have been purchased, but due to "legal, security and operational reasons" are not yet in use. This does not support the Council of Europe Committee's statement of principles, under which "any restrictions on contact with the outside world, including visits, should be compensated for by increased access to alternative means of communication (such as telephone or Voice-over-Internet-Protocol communication)".

We're on it.

Where are the prison-specific COVID-19 related data?

On 27 March, the Scottish Prison Service (SPS) website reported that 111 individuals across 10 establishments were self-isolating. These two figures were then updated daily. On 15 April, the daily figures of numbers of individuals self-isolating and the number of establishments affected were augmented by the figure of how many individuals had confirmed COVID-19. While this information continues to be published on a daily basis, as we have repeatedly pointed out this only becomes useful in gauging whether the situation is improving or deteriorating, if we have prison-specific data. Under acknowledged pressure from us, the Cabinet Secretary stated on 24 April that he will liaise with SPS over whether this data can be published.

We'll keep pushing.

How will conditions in prisons be monitored during COVID-19 when prison inspections have been suspended?

We've fed into HM Inspectorate's remote monitoring framework, highlighting the need for independent assessment of information reported by SPS, and await publication of the liaison visits framework. It will need to pay particular attention to ensuring that the voices of prisoners in isolation are represented; that levels of self-harm are correctly reported; and that an appropriate distinction is made between solitary confinement and medical isolation. We're also conscious of the level of discretion afforded to individual prison officers in the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 and that checks and balances will be required to safeguard against its abuse.

We're watching.

More questions

How many people are being released on home detention curfew each week, now that the presumption against doesn't apply? How much use is being made of prison governors' right of veto to emergency releases? What is being done to minimise the use of remand, given that untried prisoners are excluded from early release?

Howard League Scotland will ensure that these questions are answered and will monitor progress in the weeks ahead.

Howard League Scotland is an independent Scottish charity relying on membership fees and donations

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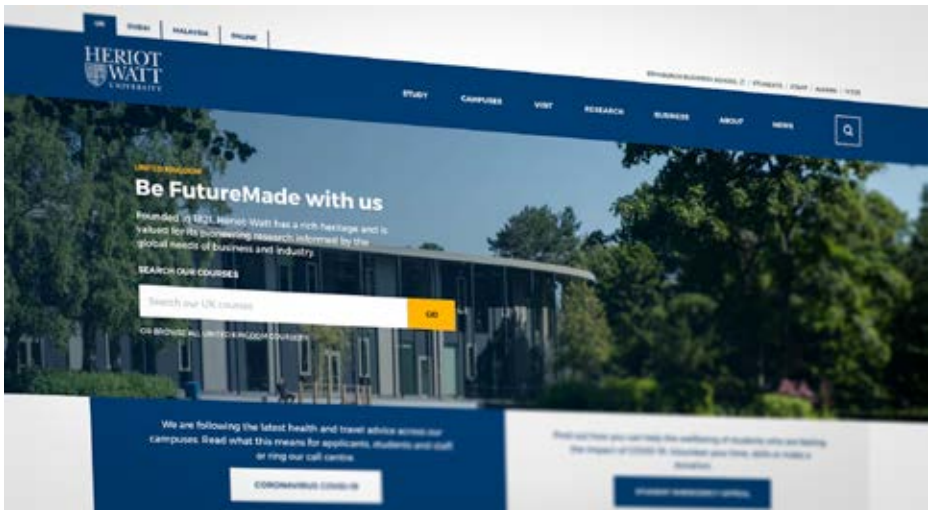
Steps to restraining the press

This civil courts roundup begins with a judicial review of an order by a sheriff postponing the reporting of a parental rights case, in which the court sets out the proper approach, including the provision of clear reasons for any order made



Civil Court

LINDSAY FOULIS, SHERIFF AT PERTH

Reporting restrictions

In *BBC, Petrs* [2020] CSOH 35 (19 March 2020) Lord Doherty considered the operation of s 4 of the Contempt of Court Act 1981. His Lordship observed that if a court considered there were grounds for making an order postponing the report of any proceedings, it should make an interim order. That order required to make clear why the court considered that the requirements of s 4 were satisfied. Its making would be intimated to interested parties, who could make application for its recall.

Considering whether to make such an order, the court should first consider whether reporting gave rise to a substantial risk of prejudice to the administration of justice. If such a risk was perceived to exist, would an order in terms of s 4(2) eliminate that risk? If it would, the court required to consider whether that risk could be overcome by some less restrictive means. If the order was the only means, the remaining question was whether the degree of risk was tolerable when balancing the interests of fair trial and freedom of expression/open justice.

"Substantial" risk of prejudice in s 4 meant "not minimal". In deciding whether the order was necessary to eliminate the risk, consideration had to be given to any less restrictive means by which prejudice could be avoided. The reasons given for the order had to indicate why reporting would give rise to substantial and unacceptable risk to the administration of justice and why no lesser measure would suffice. Such specification was to ensure the court applied the correct test and to inform interested parties why the order was necessary.

His Lordship also observed that if judges at first instance, on reflection, considered their decision was mistaken, the correct approach was to explain why the decision was made but acknowledge that that reasoning might be ill founded. If a mistake was made, it was better to acknowledge that to facilitate its correction.

Jurisdiction: consumer contract

In *Heriot-Watt University v Schlamp* [2020] SC EDIN 15 (24 February 2020) the issue was whether the contract to pay fees was a consumer contract. Sheriff Ross determined that it was. He took the following principles from both legislation and authorities. The individual circumstances of a contract are of central importance. A student undertaking a course may, but may not, be a consumer, depending on the purpose and content of the contract for the supply of educational services. The status of consumer is an objective and functional definition depending on all the circumstances, particularly the contract terms and the nature of the goods or services. A person cannot be deprived of the status of consumer by reason of general knowledge or occupation. The definition of consumer is applied by reference to the capacity of the contracting parties, particularly whether the party is acting for the purpose of a trade, profession or business. The purpose of the exception is to protect the weaker party. Only contracts to satisfy a person's own needs in terms of private consumption are protected as consumer contracts. A defender has no onus to establish being a consumer. If the contract was not concluded exclusively with either a private purpose or a trade, business or professional purpose, the contracting party is a consumer unless the latter purpose predominates.

Jurisdiction: monetary value

The pursuers in *Leafrealm Land v City of Edinburgh Council* [2020] CSOH 34 (18 March 2020) sought *inter alia* declarator of ownership of a strip of land and interdict. The question arose whether the action fell within the privative jurisdiction of the sheriff court. The pursuers had averred that the value of the strip of ground exceeded £100,000 and thus the action could be entertained in the Court of Session by virtue of s 39 of the Courts Reform (Scotland) Act 2014. The true value of the land could not be ascertained until proof, as it constituted a ransom strip. In finding against the pursuers after proof, Lady Wolffe determined that cause had been shown why the action should not either be dismissed or remitted to the sheriff court.

Personal bar

In *Troup v West Lothian Council* [2020] CSOH 29 (10 March 2020), the defenders sought to argue that a compromise agreement entered into by the parties to conclude proceedings before an employment tribunal barred the present claim for damages for personal injury based on negligence and breach of contract. Such agreements were binding. However the two actions were different in character and the grounds of the present action had been excluded from the compromise agreement.

Update

Since the last article, *A & E Investments v Levy & McRae Solicitors* (March article) is now reported at 2020 SLT 133, *Friel v Brown* (March) at 2020 SLT 303, *Promontoria (Henrico) v Ltd v Friel* (March) at 2020 SLT 321, *Autauric v Glasgow Stage Crew* (March) at 2020 SLT 330, *LRK v AG* (November) at 2020 SCLR 325, *Jaworowska-Dziewirz v Wojciechowski* (January) at 2020 SLT (Sh Ct) 37, and *M v DG's executor* (March) at 2020 SLT (Sh Ct) 11.

Interlocutors

In terms of OCR, rule 12.2 a sheriff can correct any clerical or incidental error in any interlocutor or note attached to it. In *CWR v LVBR* [2020] SAC (Civ) 3 (25 February 2020), following a proof on financial provision a sheriff issued two judgments. The sheriff had been invited to issue a judgment on issues but thereafter bring the matter out procedurally to pronounce an interlocutor which gave effect to the decision on the issues. The Appeal Court doubted whether this Court of Session practice could be readily adopted in the sheriff court when regard was had to the Ordinary Cause Rules.

The second judgment contained two errors. An arithmetical one could quite easily be corrected by the operation of rule 12.2. The second amended two findings of fact and law, two paragraphs in the note and substituted a new paragraph. The purpose of this was to achieve a certain net figure payable to the defender. The court held that this went far beyond what was envisaged in rule 12.2.

Summary decree

In *Grier v Chief Constable, Police Scotland* [2020] CSOH 33 (20 December 2019) the pursuer sought summary decree. The action was one of damages for unlawful and malicious conduct on the part of the defender's agents resulting in alleged wrongful detention, arrest and prosecution. Lord Bannatyne referred to the observations regarding such motions made by Lord Rodger in *Henderson v 3052775 Nova Scotia* 2006 SC (HL) 85. These were, first, that the procedure envisaged an issue capable of being determined in summary fashion without the need for prolonged examination of matters of fact or law. Such motions were not to replace debates on questions requiring more detailed and extensive legal argument. Further, if there were actual disputed issues of fact to be resolved, the appropriate forum was a proof. The complexity of the dispute, with extensive averments and numerous complex issues of fact and law, rendered resolution by summary decree impossible.

Prior criminal convictions

The use and significance of s 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 was considered in *Towers v Flaws* [2015] CSIH 97; 2020 SLT 259, a recently issued opinion from 2015. The first defender had been convicted of a contravention of s 1 of the Road Traffic Act 1988. The effect of s 10 was to allow the pursuers to introduce the conviction into the proof and rely on it to reverse the burden of proof. To do this, the content of the libel was compared with the averments of negligence on record. If they matched up, the onus, so far as these matters were concerned, fell on the defender. There was no question of challenging the evidential basis of the conviction, and averments regarding its soundness were excluded.

Aspects of assessing evidence

In *T v English Province of the Congregation of Christian Brothers* [2020] SC EDIN 13 (30 January 2020), a case for damages based on historic abuse, Sheriff McGowan observed that matters such as inherent probability, namely the more serious the allegation the less likely it had occurred, the risk that memory had been affected by the passage of time, the loss of other sources of evidence, and prejudice, were all relevant factors to be taken into account when assessing evidence. There might, as a result, be a marked deterioration in the quality of justice. He referred to the observations from Lord Drummond Young in *B v Murray (No 2)* 2005 SLT 982 at paras 21-24. However, a court still had to determine matters on the basis of the evidence before it.

Commercial actions

The critical issue for Lord Doherty to consider in *W M Morrison Supermarkets v LEM Estates (in liquidation)* [2020] CSOH 31 (11 March 2020) was whether any of the pursuers' adjustments sought to enforce obligations different to those sought to be enforced in the summons. This raises an interesting contrast with ordinary procedure, where such an issue only arises if such an attempt is made after the record closes. After considering the adjustments, his Lordship observed that whilst in commercial actions parties were encouraged to use abbreviated pleadings, where issues of prescription arose a pursuer should take care to make reference in the summons to each obligation sought to be enforced. This could be done by incorporating a report into the pleadings *brevitatis causa*. If such an approach was attacked as lacking specification, the relevant parts of the report could be identified.

Legal aid

In *Ormistons Law Practice v Scottish Legal Aid Board* [2020] SC EDIN 11 (6 January 2020), in case readers have missed it, Sheriff Holligan determined that the defenders were under an obligation to pay solicitors statutory interest on an account rendered under the legal advice and assistance scheme.

Expenses

In *Clarke v Keenan* [2019] SC EDIN 74; 2020 SLT (Sh Ct) 17 the pursuer in an action for damages arising out of a road traffic accident sought expenses from the defender, who did not enter the process, the defender's insurers having entered the action as party minuter. Sheriff Braid refused the motion *in hoc statu*. He considered that there was no authority that it was competent to award expenses against a party who had not entered the process and thus had not contributed to the expenses incurred. An unsuccessful party was only liable for the expenses he had caused the successful party to incur. An order could be made against the defender in respect of the expenses of raising the action and taking decree in absence.

Sheriff Braid further observed that the correct approach in such instances was not to endeavour to obtain an award of expenses to create a right of recovery. Instead the court should make such order as was consistent with existing law and practice. Thereafter insurers could exercise what remedies they had open to them. Motions for decree or joint minutes required to be framed by reference to what could be justified, as opposed to acceding to the requests of insurers.

Employment

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The Coronavirus Job Retention Scheme (CJRS) went live, as planned, on 20 April. The number of employees reported as furloughed is in the millions. The first reimbursements were due to be made on 30 April. Payments will take four to six days to be processed, to allow HMRC to carry out fraud checks. HMRC will consider criminal proceedings where appropriate.

As at 1 May, the CJRS is extended until 30 June 2020 (from an initial end date of 31 May).

Any entity with a UK payroll (through PAYE) can claim, so foreign companies employing people in the UK through PAYE will be eligible.

While almost all employers were confirming furloughs in writing, this is now a requirement. You must keep evidence of the written confirmation for five years. Ideally, employers should also seek written agreement, although this does not currently appear to be being insisted on, despite the terms of the Treasury direction.

Workers covered

Employers can claim for furloughed employees who were on PAYE payroll, and notified to HMRC on a real time information (RTI) submission, on or before 19 March 2020. This was amended from an earlier date of 28 February. Employees who were employed as of 28 February and on payroll (i.e. notified to HMRC on an RTI submission on or before 28 February), but were made redundant

or stopped working for the employer prior to 19 March, can also qualify if the employer re-employs them and puts them on furlough.

Employers may furlough "workers" who are not employees (sometimes called "limb (b) workers") if they are paid through PAYE. If not paid through PAYE, they may be able to claim independently under the Self-Employment Income Support Scheme (SEISS). Agencies can furlough agency workers if they are paid through PAYE (though, as the guidance says, they should first discuss this with the end client).

Fixed-term employees can have their contracts renewed or extended during furlough and the employer will remain eligible for the scheme grant. As you would expect, the grant stops for a fixed-term employee whose employment ends.

Furloughed workers can do volunteer work, and employers can help them find such work without jeopardising their claim under the scheme. They can also undertake training.

A furloughed employee is also entitled to take on a new job, not just continue an existing second job, provided that is not in breach of their contract. It appears the first employer can waive any obligation not to take additional employment, but it would make sense to state expressly that this is only for the furlough period.

Employers may furlough employees on and off, subject to the three-week minimum furlough period (which applies for each period of furlough).

Employers may also furlough employees who hold tier 2 visas; this will not constitute a breach of the minimum salary threshold.

Guidance also now confirms that the scheme covers company directors with an annual pay period, provided they meet the relevant criteria.

Annual leave and bank holidays

Since the Government announced the CJRS, questions have been raised regarding how furlough and annual leave interact. Long-sought clarification arrived when the Government updated its guidance (on 20 April) to state that employees *can* take holiday leave whilst on furlough leave.

Employees are entitled to their usual holiday pay for holidays taken whilst on furlough, in accordance with the Working Time Directive and the Working Time Regulations. If employers are paying employees at 80% of wages during furlough, they will be obliged to top up the grant to full normal pay for any holiday days.

As regards bank holidays, the guidance states that, if the employee usually works bank holidays, the employer can agree that this is included in the grant payment. If the employee usually takes bank holidays, the employer will either have to top up to their usual holiday pay, or give the employee a day of holiday in lieu.

The Government's policy approach on annual leave and furlough remains under review. It has confirmed that furloughed workers planning to take paid family-related leave will be entitled to pay based on their usual earnings rather than the furloughed pay rate.

First judgment

In what must be the first judgment on the CJRS (all hearings were carried out remotely), the High Court issued directions to the administrators of Carluccio's Ltd in relation to furloughing employees. In doing so, it confirmed that administrators are able to furlough employees under the CJRS and how funds paid out by the scheme are to be treated.

That administrators can utilise the scheme is in itself not breaking news. The Government's guidance expressly states that administrators will be able to access the CJRS provided there is a "reasonable likelihood of rehiring the workers". The High Court confirmed that this could (and most likely would) involve employees resuming work having transferred to a buyer following a business sale. The judgment goes on to consider in detail the existing statutory mechanism that administrators can use to make furlough payments. Critically, funds paid out by the scheme are effectively protected from other creditors and therefore can be used exclusively to pay the furloughed employees.

Both administrators and employers should welcome the proactive approach demonstrated by the High Court in this case. It is hoped that this approach is followed in other cases to find practical solutions to the questions posed by the CJRS.

Wage costs

Employers can now claim for obligatory "regular payments". This includes past overtime, fees and commission payments that the employer is obliged to pay. This would seem to include things like regular shift premiums too, although there is still debate about that. Employers may not claim for discretionary bonuses and tips.

Employers can claim for enhanced maternity, adoption, paternity and shared parental pay under the scheme (subject to the normal scheme requirements applicable to ordinary wage costs).

They cannot claim the cost of non-monetary benefits, including taxable benefits in kind. Similarly, they cannot include benefits provided through salary sacrifice (including pension contributions) in the reference salary. Redundancy pay is expressly excluded, but there is no mention of notice pay.

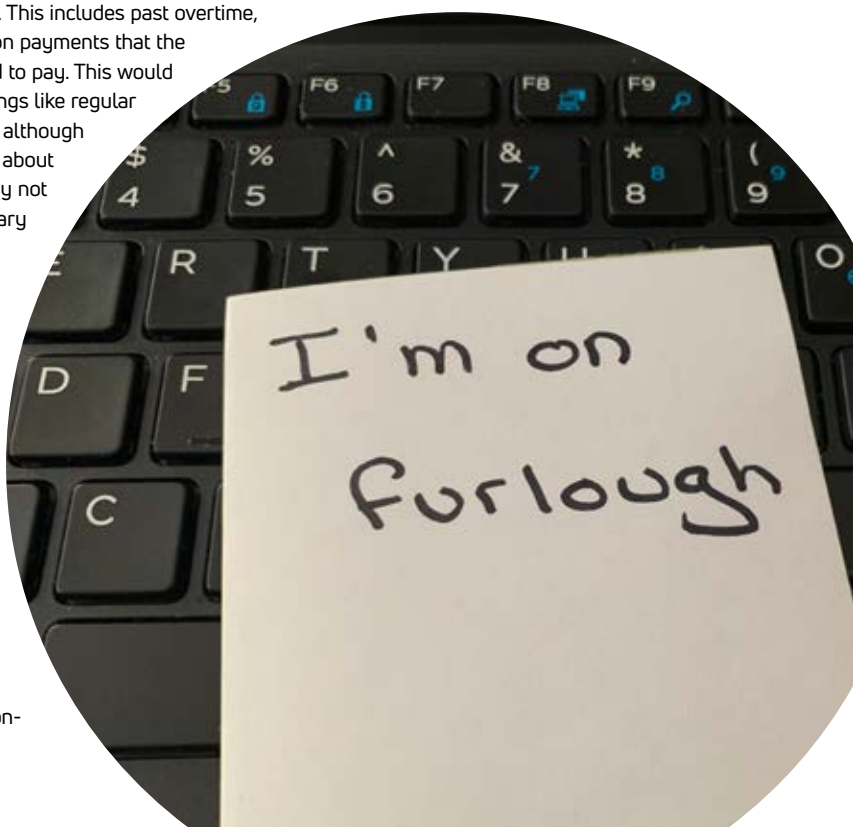
Next steps

Has your business (or your clients' businesses) considered what its next steps will be when the CJRS ends? If you would have to consider large numbers of redundancies, have you considered the collective consultation timetable?

With no certainty over how long the current restrictions on movement will last, employers need to plan for the worst while hoping for the best.

As a reminder, if a business proposes 20 or more redundancies within a 90-day period, it will trigger the obligation to consult collectively for a period of at least 30 days before the first dismissal takes effect. If a business proposes 100 or more redundancies within a 90-day period, the collective consultation period increases to 45 days.

If your business (or your clients' businesses) does not recognise a trade union, and does not have a standing body of appropriate representatives, collective consultation requires you to organise an election of employee representatives. Bear in mind that the relevant legislation sets out prescriptive rules on the election process. There are challenges as to how these elections (and subsequent consultation) will take place remotely. This means there is even more reason to start preparing early and to gear your clients up to doing so.



Family

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Practitioners working with older and vulnerable adults may have particular concerns given the impact of the pandemic on this group and the need to protect the rights of incapable persons during the crisis.

The Coronavirus (Scotland) Act 2020 addressed immediate considerations by modifying the time limits in the Adults with Incapacity (Scotland) Act 2000 so as to stop the clock on existing orders and s 47 certificates. The Law Society of Scotland has also provided guidance for practitioners on implementing power of attorney (PoA) instructions using remote communications.

Further proposals dealing with more substantive issues have now been put forward to the Cabinet Secretary for Health and Sport by Society President John Mulholland on behalf of the Mental Health & Disability Committee. (The writer has no connection with the committee and writes in a personal capacity.)

Registration of powers of attorney

Practitioners are reporting an increase in the number of instructions. However, a PoA cannot come into operation until it has been registered with the Office of the Public Guardian (OPG). While the OPG has transitioned to homeworking, and registrations are continuing, not all PoAs meet the criteria for expedited registration.

The proposed interim solution is to allow a PoA to be capable of operation following *presentation* to the OPG, rather than registration. Under the proposed amendment, authority to act would take effect when the PoA is sent to the OPG, accompanied by a certificate signed by the solicitor who prepared it stating that the PoA is suitable for registration and it is appropriate for the attorney to have authority to act. It is envisaged that a form of certification would be provided, as well as more detailed guidance.

Guardianship and intervention orders

However, not everyone can grant a PoA. The "stop the clock" provisions assist existing guardians and interveners (although the committee raises an important point about judicial oversight of shorter orders and deprivation of liberty). However, there remain significant practical and procedural concerns about new guardianship applications. At time of writing it is unclear what constitutes an "urgent" application to the sheriff court, making it difficult to advise clients. Nor can any application be made without the three statutory reports. Even where social workers/psychiatrists are available to prepare them, conducting in-person assessments during lockdown raises obvious issues of risk and access.

The committee proposes, first, that a sheriff "shall" determine any application for interim orders within three days of receipt by the court. Secondly, application procedure would be modified such that (i) one medical report would be sufficient; (ii) a suitability report for a welfare application may come from a "person with sufficient knowledge", rather than a mental health officer (MHO); and (iii) reporters' enquiries may be conducted remotely.

While much may depend on guidance about appropriate reporters and the response of sheriffs, beyond the pandemic this may also facilitate debate about reporting requirements, given the issues with availability of MHO reports even before the pandemic.

Social work powers

The 2020 Act modified s 13ZA of the Social Work (Scotland) Act 1968 to remove the need to comply with the requirement to take account of the views of the adult, relatives and interested parties in terms of s 1(4) of the 2000 Act. This will only take effect if regulations are passed. While ministers have said this will only happen if absolutely necessary, the committee expresses concern about the human rights implications. The proposals accordingly include a provision that no powers conferred by the 2020 Act may be exercised so as to amend the terms of, or alter the effect of, s 1 of the 2000 Act.

Advance statements

Advance statements set out an individual's wishes about future medical treatment. The extent to which such declarations are binding in Scotland is not settled, as there is no authority and no statutory provision (in contrast to England & Wales). It is likely that most practitioners would advise clients that such a statement would be regarded only as an indication of their wishes.

In the current crisis, treatment decisions may need to be made in urgent and rapidly changing circumstances. While they acknowledge it may be undesirable to legislate on this topic in the short term, the committee has proposed a statutory framework for advance statements to the effect that a valid and operative advance statement shall be binding subject to certain exceptions.

In conclusion, these proposals cover a range of practical and principled issues facing individuals seeking to plan ahead, care providers, and those responsible for incapable adults. It is hoped that they will inform a necessary public and professional debate on these important issues, and it will be of interest to see how this develops in the coming weeks.

Human Rights

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The COVID-19 pandemic has seen the UK and Scottish Governments impose the most comprehensive restrictions on freedom of movement ever experienced by UK citizens. For the first time, as a matter of law, the public are not permitted to leave their homes without a "reasonable excuse", as enshrined in Scotland by the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. At the time of writing it appears that the measures have widespread public support and it is generally accepted that such restrictions are necessary to control the spread of the virus. That said, there have also been reports of police officers adopting apparently draconian approaches to enforcement and going beyond the letter of the law in their attempts to promote social distancing generally.

While this note cannot hope to address comprehensively the varying human rights issues arising from the lockdown, it will attempt to provide a brief overview of some of the key issues and legal concepts engaged. Focus is restricted to ECHR article 5, although it goes without saying that the measures are also likely to engage the rights to freedom of assembly (article 11) and private and family life (article 8) at very least.

Freedom of movement

Article 5 prohibits "deprivation of liberty". The Strasbourg court has previously confirmed that detention within one's home can amount to deprivation of liberty (*Guzzardi v Italy* (1981) 3 EHRR 333). As Strasbourg has consistently set out, deprivation of liberty is a matter of degree and is fact specific: see also the Supreme Court's decision in *Cheshire West* [2014] AC 896. It is suggested that the extremely restrictive approach currently in place is such as to amount *prima facie* to a deprivation of liberty.

Having established this *prima facie* breach, one must consider whether the breach is permitted within the ECHR framework. Two potential justifications arise, neither of which appear to be wholly satisfactory. Article 5(1)(e) provides for the "lawful detention of persons for the prevention of the spreading of infectious diseases". *Enhorn v Sweden* (2005) 41 EHRR appears to envisage that such restrictions would be applied to those who

were infected. On that basis, Alan Greene has suggested it may not be competent to justify a deprivation of liberty against *all* citizens by way of article 5(1)(e) (blog, strasbourgobservers.com, 1 April 2020). In that event it would be open to the UK Government to exercise article 15, which allows derogation from the protected rights in times of emergency. However, as Hickman, Dixon and Jones have pointed out (coronavirus.blackstonechambers.com, 6 April 2020), this would require a possibly unpalatable acceptance by the Government that the measures in place infringe article 5 rights.

Assuming that the measures do fall within the scope of article 5(1)(e), one must still consider whether they meet the requirements of legality, necessity and proportionality.

Legality

There are two issues to consider regarding legality. First, are the legal measures restricting citizens' movements lawful? Secondly, are those "enforcing" the measures acting within the scope of the law?

On the first point, there is an ongoing debate regarding the regulations. Put simply, on one hand there are those, such as Jeff King of UCL, who argue that the restrictions on movement are within the scope of the emergency powers afforded to the UK Government by the Public Health (Control of Diseases) Act 1984 and the more or less identical provisions in the Coronavirus Act 2020 as respects the Scottish ministers (ukconstitutionallaw.org, 1 April 2020). On the other hand, Hickman and others argue that neither of these pieces of primary legislation explicitly authorise measures which would apply a general restriction on the population leaving their homes. Without addressing those arguments in detail, I would simply observe that if there is a question mark over the vires of the subsidiary legislation creating these restrictions, it would surely be preferable for the powers to be explicitly authorised by Parliament.

Turning to enforcement, it is vital that police officers to not overstep their powers under the regulations. The police are entitled in terms of reg 7 to take such action as is necessary to enforce the regulations. However this is subject to the list of reasonable excuses provided at reg 8(5). It goes without saying that the police's role is to enforce the law, and not any wider Government advice. The regulations do not limit the number of times a person may leave the house per day, provided they have a reasonable excuse, or what purchases they make during a food or drink shop, or driving to a location in order to exercise. Police officers must be vigilant not to stray into "enforcing" Government guidance rather than the letter of the law. Such actions would be both unlawful and have a harmful effect on the public's general consent to policing of the lockdown.

Necessity

Actions which engage Convention rights should be necessary in order to be justified as an infringement. Currently the weight of scientific opinion appears to be in favour of the lockdown provisions and the Government has expressed a view that they continue to be required.

In order to monitor ongoing necessity, reg 2(2) requires a three-weekly review of the restrictions by the Scottish ministers and reg 2(3) requires their termination as soon as they are no longer necessary. These provisions should provide some comfort, but a question mark may hang over how necessity is demonstrated as the infection rate declines: drawing clear lines as to what measures remain necessary during a transition back to normality may not be easy.

Proportionality

Proportionality – the requirement to go no further than necessary when engaging Convention rights – is, again, applicable both in terms of the underlying legislation and in practical enforcement. Currently, it appears to be generally accepted that the restrictions remain proportionate, but as we move into a de-escalation or transition phase the arguments as to which restrictions remain proportionate may become more acute.

Similarly, the power in reg 7(1) to "take such action as necessary" to enforce the regulations, as well as reg 7(4) authorising the use of "reasonable force", must be read in light of this requirement. It is plain that any enforcement should begin with the least restrictive measure possible.

Pensions

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Claiming employer contributions

At the time of writing, HMRC has issued seven updates to the original guidance on the Coronavirus Job Retention Scheme (CJRS), first published on 26 March. Several other guides have now been published, including guidance on the extent to which employers can claim for employers' pension contributions under the CJRS.

Broadly speaking, an employer can apply for a grant that covers 80% of the usual monthly wage costs of furloughed employees, up to £2,500 a month, plus the associated employer national insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution) on that subsidised furlough pay.

The pension contributions that can be claimed are limited to the level of mandatory employer contributions under the statutory automatic enrolment regime, even where the contributions paid are greater than and/or not being made to an auto-enrolment pension-type arrangement.

So, to work out the claim under the CJRS for pension contributions, HMRC explains:

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Capacity and mental health law

Sandra McDonald, former Public Guardian for Scotland, has been commissioned by the Scottish Mental Health Law Review under John Scott QC to review capacity and significantly impaired decision making practice by practitioners and clinicians. See bit.ly/35gaBBw or email sandra@ex-pg.com, and **respond by 29 May.** The submission deadline for the main review (consult.gov.scot/mental-health-law-secretariat/review-of-mental-health-law-in-scotland/) has also been extended **to 29 May.**

Public authority data sharing

The consultation on which public bodies should be listed under the Digital Economy Act 2017 as able to use the information sharing powers in the Act to reduce debt owed to, or fraud against, the public sector (see consult.gov.scot/digital-directorate/public-authorities-sharing-data/) **has been extended until 15 June.**

Justice in climate transition

The Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 contains some of the most ambitious statutory emission reduction targets in the world. The Just Transition Commission has been established to provide Scottish ministers with "practical, realistic, and affordable recommendations for action" that will secure a "just transition", taking account of economic and social disadvantage. See consult.gov.scot/just-transition-commission/just-transition-commission-call-for-evidence/ **Respond by 30 June via the above web page.**

Freeports

In the wake of Brexit, the UK Government is proposing to set up 10 freeports across the UK to boost trade by way of "tariff flexibility, customs facilitations and tax measures". The proposals consulted on here are concerned with UK-wide policy, though it is expected that the Scottish Government will develop its own plans for the one or two ports to be sited in Scotland. See www.gov.uk/government/consultations/freeports-consultation **Respond by 13 July via the above web page.**

Impact of COVID-19

Holyrood's Equalities & Human Rights Committee is closely monitoring the impact of COVID-19 emergency powers and other measures on equalities and human rights. Areas of concern include mental health provisions, school pupils with additional support needs, social security and socio-economic impacts, rurality and criminal justice. See yourviews.parliament.scot/ehrc/impact-covid-19-pandemic-equalities-human-rights/ **Respond at any time up to 1 January 2021.**

(1) you start with the amount you are claiming under the CJRS for your employee's wages;

(2) you deduct from that the minimum amount your employee would have to earn in the claimed period to qualify for employer mandatory contributions under the automatic enrolment regime – this is £512 a month for periods before 6 April 2020 and £520 a month for periods on and from 6 April 2020; and

(3) multiply by 3%.

Grants for pension contributions can be claimed by employers under the CJRS up to the cap, calculated as above, provided the employer pays the whole amount claimed to a pension scheme for the employee as an employer contribution.

No statutory override

There is currently no legislation which provides for a furlough override of any contract or trust provisions which apply to member and employer contributions and accrual of benefits under pension schemes. Employers would be well advised to check scheme-governing documentation to establish how furloughing would be treated under the relevant scheme provisions, and whether contributions and benefit accrual continue and, if so, on what basis in the circumstances. Scheme amendments may require to be made if the statutory minimum automatic enrolment requirements are to be adopted, unless there is further legislation which provides that the statutory minimum becomes the overriding position for furloughed workers. Employment contract terms should also be checked.

In the event that employee pension contributions are paid under salary sacrifice arrangements, special calculations will of course be required if contributions are to be made to the pension scheme under those sacrifice arrangements.

Pensions Regulator easements

In a defined contribution pension scheme where the employer's contribution is more than the statutory minimum, The Pensions Regulator (TPR) recognises that employers may look to make reductions possibly even to the statutory minimum level. Before reducing pension contributions, employees may require to be consulted, with a minimum consultation period of 60 days. TPR encourages as much consultation as is possible. However, TPR has confirmed that under regulatory easement, to endure until 30 June 2020, it will not take regulatory action where there is a failure to comply with the 60 days, in cases where all the following conditions are met:

- staff have been furloughed and a claim is being made for them under the CJRS;
- the proposal is to reduce the employer contribution to the defined contribution scheme in respect of furloughed staff only (and existing rates will continue for non-furloughed staff);
- the deduction will only apply for the furlough period; and
- affected staff and their representatives have been written to, to describe the intended change and the effect on the scheme and the furloughed staff.

If these criteria are not met, TPR expects full compliance with the consultation rules.

Employers would be well advised to seek legal advice before looking to make any such changes, as there are several issues that may need to be addressed as part of such an exercise, e.g. changes may need to be made to employment contracts. The documentation governing the pension scheme may not permit the reduction of employer contributions, or require that a particular process be followed and completed to implement such a change.

TPR has noted that it appreciates this is a challenging time for employers and, in light of that, it will be taking a proportionate, risk-based approach towards enforcement decisions, with the aim of supporting both employers and savers.

It is to be hoped that in these difficult times the implementation of the CJRS will afford to employers some relief in relation to their ongoing pension liabilities. Whilst the CJRS and TPR easements should go some way to assisting employers, employers need to be sufficiently informed to take full advantage of them.

Secure digital signatures: moving forward in a crisis

Secure digital signatures using the Law Society of Scotland's smartcard offer a safe way to progress transactions during the coronavirus restrictions, and the profession now has the opportunity to transform the way it does business

Property

JANA BERGER, SMARTCARD CO-ORDINATOR, LAW SOCIETY OF SCOTLAND AND PROFESSOR STEWART BRYMER, BRYMER LEGAL LTD AND UNIVERSITYOF DUNDEE

The current situation around the COVID-19 pandemic presents a massive challenge for the legal profession in how to conduct business and transactions when the usual means of doing so are no longer available. Electronic communications are of course a way to deal with it, but there has historically been a reluctance to simply transfer everything to email and attachments.

The core of the issue is this: How do I trust what I see in front of me? And how do I prove its validity? These questions are perfectly fair. However, some of the arguments solicitors encounter when using their digital signature are not the answer. Replies like "We are not set up to accept digitally signed offers", and "The law has not yet been changed to permit digital signatures", not only illustrate the reluctance, but a downright misunderstanding of the inherent value and possibilities digital signatures have to offer. The purpose of this article is to "debunk the myths" and set the scene for the broader use of secure digital signatures.

Legislative backdrop

We, in Scotland, were not the first jurisdiction to introduce smartcards for members of the legal profession. Other countries in Europe pioneered the initiative, especially Italy and Spain. The Law Society of Scotland saw the benefits of the smartcard, and in particular the secure digital signature, and took steps to introduce these here. This resulted in the Requirements of Writing (Scotland) Act 1995 being amended by the Land Registration etc (Scotland) Act 2012 and the Electronic Documents (Scotland) Regulations 2014, with the result that Scots law now confers equivalent status and standards of validity on documents created in electronic form in compliance with the new law to those given to paper documents (with the exception of wills and testamentary writings, which must be created and signed in traditional form).

There remained a doubt about whether it was competent to scan in your "signed on paper" document and deliver it by email. In addition to permitting execution in counterpart, the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 removed this doubt, with the result that electronic delivery is competent for documents created and signed on paper as well as for electronic documents.

What is a qualified electronic signature?

Everyone is familiar with simple electronic signatures already – typing your name at the bottom of an email is exactly that. There are several levels of electronic signatures, and depending on what is being signed, different types can be utilised. The Technology Committee of the Law Society of Scotland has published a guidance note on electronic signatures: www.lawscot.org.uk/members/business-support/electronic-signatures-guide

The highest level of electronic signature is a qualified electronic signature (QES) – which is the type of digital signature that is issued with the Society's smartcard. It is "qualified" because several stringent conditions need to be fulfilled to obtain one. One of these conditions is that the means to use this signature, i.e. the underlying certificate on the chip and the PIN code needed to apply it, are under the sole control of the signatory at all times. This means that only the signatory actually named in the QES can sign the document in question. In addition, once the signature is applied, the document is basically set in stone. The secure digital signature, the one that counts, is embedded in the bits and bytes of the document in its electronic form. Any attempt

to change the document or its content will invalidate the signature and it will show as such. This is the essence of the security afforded.

Pen versus keyboard

As to proving the validity of the applied signature, every electronic signature can be interrogated, be it by checking the metadata of an email header or double clicking on the signature line in an electronic document. The difference is the amount of information available. Metadata from an email will show IP address and timestamp, but it will not prove the name of the person who really typed it up and sent it off. QES interrogation provides all sorts of information, e.g. validity status, signatory, timestamp, underlying certificate data. In addition, all this information does not disappear when the mail server gets cleaned later on: it is part of the signature and available as long as the document exists. What's more, no set-up is required to validate a QES on the computer. Where previously recipients looked to check that the document was signed at the bottom of the page, they now simply click the signature on the screen.

It is fair to ask: Why do we still trust that a paper form sent in the mail is really coming from a law firm? Because it says so on the letterhead? How can we prove the wet signature at the bottom is really that of a solicitor? Because the name appears in print below the line? Because it's always been this way?

Less than 40 years ago, paying in cash was the norm for everyday transactions, be it at the grocer's, the cobbler's, or the pharmacy. Now, everyone has a debit card with chip and PIN, and uses it for one specific purpose. The smartcard with its digital signature is no different. The profession needs to move away from the notion that only paper is true and a pdf scan of a signed document is the maximum electronic involvement possible. We all need to view the current crisis as a challenge (and an opportunity), and embrace it to move forward. Will it be as easy as flicking a switch? Probably not. Workflows will have to be restructured or at least tweaked, the idea of only trusting paper and wet signatures must be re-evaluated, and going back to the way things were before, once this crisis is over, is simply not going to be an option. However, despite the initial hurdles, this is an opportunity for the legal profession in Scotland to transform the way it does business in the time to come.

The future is digital: the future is now!

For more details and step-by-step guides on how to apply and verify the smartcard's digital signature, see the Society's website at www.lawscot.org.uk/members/professional-support/smartcard

PSG: progress during the pandemic

An update from the Property Standardisation Group, including documents dealing with COVID-19 related matters

The Property Standardisation Group is delighted that Kirsten Partridge, partner at CMS CMNO joins the PSG as of 1 May 2020, replacing the inimitable Douglas Hunter as he retires from practice. Douglas joined the PSG in 2002 shortly after it was founded, when Hamish Hodge, one of the co-founders, retired. We will greatly miss Douglas's contribution over the last 18 years and are grateful to him for sharing his depth of knowledge and transactional experience. Just as importantly, we'll miss his humour and fantastic attention to detail. We welcome Kirsten and are looking forward to the new dynamic in our collaboration as the PSG anticipates its 20th birthday in 2021.

COVID-19 documents

The PSG continues to support the profession during the COVID-19 lockdown and we are meeting virtually to progress our projects. We have created a COVID-19 page on the website to store transactional documents which may assist at this time, including:

- two rent concession letters: one for paying rent monthly and the other documenting a reduction or suspension of rent;
- trust clause wording and guidance, which may be useful with the partial closure of the Land Register application record and the consequent delays in getting dispositions registered;
- a power of attorney allowing solicitors to sign documents on behalf of clients, which may be particularly useful during lockdown;
- guidance on changes to consider to the offer to sell in light of lockdown, looking particularly at any time limits in the missives. The registration clauses will need to be reviewed, for example amending the post-completion clause to refer to registration of the disposition within 14 days after the date on which either the application record for the Land Register of Scotland fully reopens, or the document can be submitted via the digital submission system, rather than 14 days after completion.

Offer to grant a lease

In addition to our COVID-19 drafting, we have published an offer to grant a lease, to be used alongside the PSG leases. The offer mirrors the format of the PSG offer to sell. It is drafted on the basis that the draft lease annexed to the offer is one of the suite of PSG leases and uses terminology consistent with the PSG leases.

The offer to grant a lease provides optional wording:

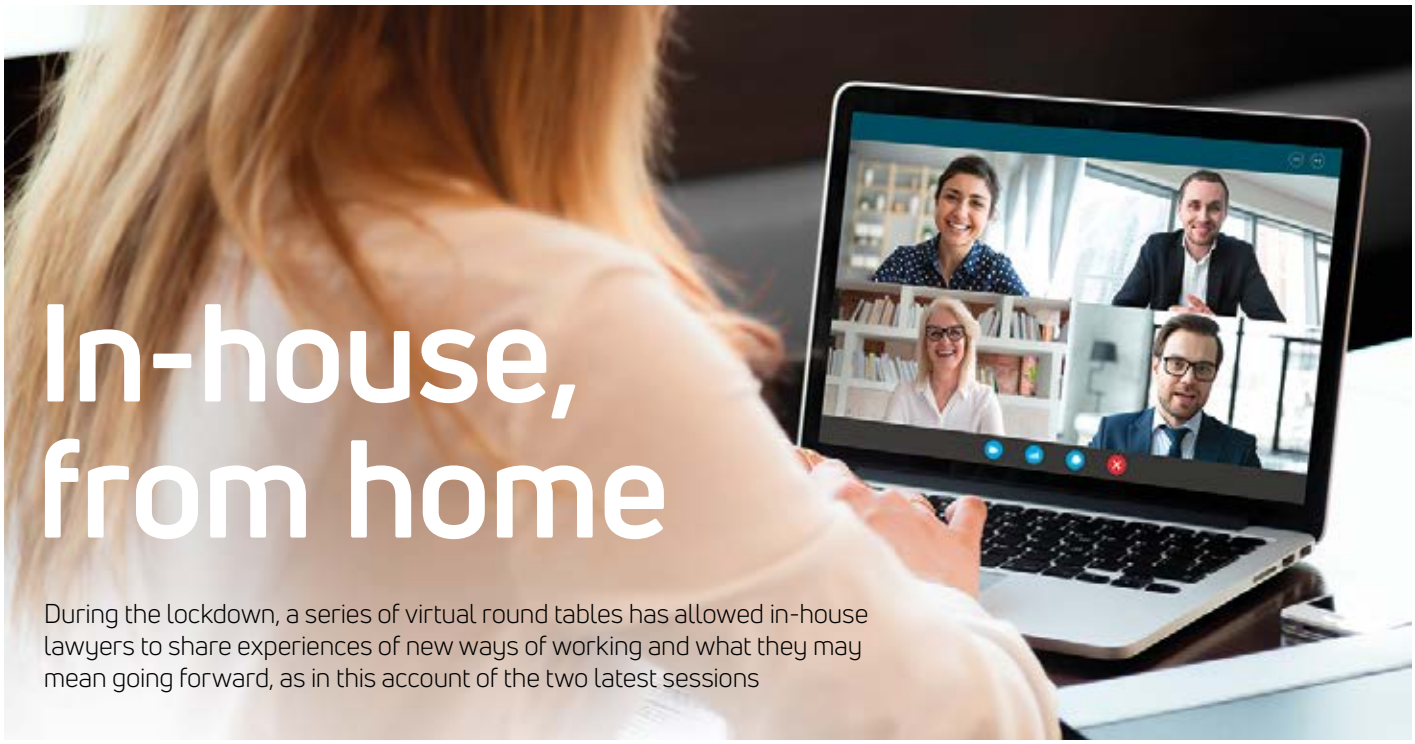
- for suspensive conditions;
- for a side agreement to be issued on the grant of the lease;
- for the tenant carrying out fitting out works in accordance with the terms of the draft PSG licence for works annexed to the offer;
- for a rent deposit to be paid and documented using the PSG deposit agreement;
- for a guarantor of the tenant's obligations using the PSG guarantee;
- for a rent-free period.

The PSG consulted widely before finalising the offer to grant a lease and we are grateful to our consultees for their input, improving the final version of the document.

Community right to buy land

We have updated the offer to sell to include drafting for the latest community right to buy under part 5 of the Land Reform (Scotland) Act 2016: the right to buy land to further sustainable development, with drafting similar to the wording for the right to buy abandoned, neglected or detrimental land. We have moved all of the community interests wording into a part of the schedule, as the wording has become so lengthy.

As ever, we welcome your comments on the documents or suggestions for future projects. Contact details for the PSG members can be found on the PSG website: www.psglegal.co.uk



In-house, from home

During the lockdown, a series of virtual round tables has allowed in-house lawyers to share experiences of new ways of working and what they may mean going forward, as in this account of the two latest sessions

In-house

BETH ANDERSON, HEAD OF MEMBER ENGAGEMENT – IN-HOUSE LAWYERS, LAW SOCIETY OF SCOTLAND

One of the main themes from the first in our series of virtual round tables for in-house lawyers was collaboration. In our second and third sessions, held during April, an impression of relative positivity continued, with the standout word of the second event being "pragmatism" and the third concentrating quite strongly on finding a way forward.

Joined by around 20 in-house counsel across the two events, again I gained an insight into how different sectors, in-house teams and jurisdictions have reacted to the coronavirus crisis.

Home and abroad

Similar to the first, these two sessions kicked off with participants sharing their experience of how their teams were adapting to the current situation. In particular, there were some interesting insights from those working across a number of jurisdictions. The effects of COVID-19 were obviously felt much earlier in other countries, and in-house solicitors with colleagues (or even supply chains and customers) elsewhere in the world clearly had a better sense of what was to come before many of us. Chinese operations were hit early and mobilised quickly. Italian colleagues queried why their Scottish counterparts were still travelling into the office, and some businesses took early decisions to mandate working from home policies as a result.

One participant particularly highlighted the benefit of having a global operation from a wellbeing perspective. As colleagues who had "been there, done that" were able to share their own strategies for coping with confinement, there was a sense that the challenge of adapting to lockdown was lessened slightly. Another commented on cultural differences. In China, 100% compliance with authority is simply expected. The almost unquestioning obedience with which our own population has also complied with a set of unprecedentedly strict curbs on behaviour has perhaps been helped along by watching things unfold elsewhere in the weeks and months before.

For those with and without international colleagues, there was an *almost* universal agreement that the move to homeworking for office-based staff had been relatively painless. Those in-house solicitors with colleagues working in manufacturing, processing and frontline services did, however, underline the uncomfortable "them and us" feeling between those who were now likely to enjoy more flexible working policies for the foreseeable future, and those whose roles simply don't allow for it. Not everyone has equal access to this new "benefit", and there will be an ongoing challenge around treating colleagues fairly.

One participant shared that a recent internal system upgrade had been instrumental in ensuring that the team moved relatively easily to remote working. Had the pandemic hit even last year, the organisation would have faced serious challenges.

Two solicitors working in the public sector commented that while their teams and organisations had been relatively traditional in their approach to working practices, this crisis had created the perfect opportunity for operational and mindset change. For both, attitudes had shifted quickly and, from a practical perspective, technology had relatively easily kicked in to take the place of paper and face-to-face meetings. Another public sector solicitor shared a more problematic transition for the team. They simply did not have the technology to get all colleagues working at normal capacity. She was, however, keen to stress that essential services were most certainly still being supported. The things that had to get done, were getting done.

Getting the job done – that thread

ran significantly through our second session, with participants coming back time and again to the theme of pragmatism. As one participant put it, there may be a perfect legal answer, but in the current circumstances colleagues generally required a quick answer and a significantly more pragmatic one. Governance was mentioned often, and the need not to let it get in the way. As part of this pragmatic approach, reliance on good working relationships (both internal and external) and good faith has been more important than ever. The in-house team cannot be seen as a blocker, especially not now. The crisis may ultimately become an opportunity for the in-house legal team to demonstrate an ability to get work done faster, smarter and more efficiently.

"There was almost universal agreement the move to home working for office-based staff had been relatively painless"

How to move on?

In our third round table session, the discussion rounded out with participants sharing their positive perspectives and some ideas about moving out of lockdown. One participant commented that his organisation had made "five years of cultural change in the space of a few weeks". In practical terms this meant that the business was already looking at office floorspace – simply put, they would no longer budget for one desk per staff member.

Another participant agreed. As a startup, she was part of a dynamic and tech-savvy team. The crisis hadn't had a huge impact on an already agile group of colleagues, but the enforced homeworking had actually resulted in increased productivity. The business was actively considering whether they needed to move back into their shared office space once restrictions were lifted. For finance colleagues, this bold new future of increased remote working would translate into all-important cost savings.

For one organisation, agile working had only really been introduced at the start of 2020. There had been apprehensive discussions about trust and autonomy amongst colleagues. This unique situation had propelled the project forward "at supersonic speed", and meant the team could take advantage of a number of changes they had wanted to make anyway. Concerns around clunky technology and a general lack of IT expertise had not borne out in reality.

The final thoughts in our third session related to more immediate post-lockdown plans. Rotas, shift patterns, office layouts and occupancy levels were all discussed. These, in themselves, indicated a cautious optimism towards restrictions being lifted. All agreed that getting back to a normality of sorts would take far longer than implementing lockdown had taken and there was still no clear path towards this. However, just as those with colleagues outside the UK had shared the ripple effect of the early impact of the pandemic, encouragingly, they were also able share how things (in China at least) were now returning to something close to pre-lockdown.

Normality will resume for us all in time. However, it seems it will be a "new normal" and some of the things we've learned to improve during this enormously challenging time will remain.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Neil Brennan Barnes

A complaint was made by the Council of the Law Society of Scotland against Neil Brennan Barnes, solicitor, Glasgow. The Tribunal found the respondent guilty of professional misconduct in respect of his failure to settle fee notes, and his breach of rules B1.9.1 and B1.14.1 of the Law Society of Scotland Practice Rules 2011. The Tribunal censured the respondent.

The respondent failed to settle his Edinburgh agent's fee notes for a long period, failed to communicate with that company effectively about two accounts and failed in his duty to act with other regulated persons with mutual trust and confidence. The Tribunal considered carefully the level of culpability in the case and was satisfied that it met the test for professional misconduct. The long period of time during which the secondary complainer had sought a response from the respondent was critical. The Tribunal also noted with concern that in the one case, the respondent had received money from SLAB and did not pass on the element due to the secondary complainer. Even if there had been a dispute regarding payment, he retained the funds and did nothing about it. The Tribunal considered that the misconduct was at the lower end of the scale and the finding of misconduct and censure was sufficient to mark the gravity of the offence, protect the public and uphold the reputation of the profession.

Martha Anne Rafferty

A complaint was made by the Council of the Law Society of Scotland against Martha Anne Rafferty, Berlow Rahman Solicitors, Glasgow. The Tribunal found the respondent guilty of professional misconduct in respect of her conviction of a charge under s 7(6) of the Road Traffic Act 1988 together with two previous convictions under s 5(1)(a) and s 7(6) of said Act. The Tribunal censured the respondent and fined her £10,000.

The Tribunal noted that the offence followed a car park collision when the respondent was parking before attending court. She failed to provide a breath test at the police station. Failing to cooperate with the police in relation to providing a specimen of breath in these circumstances was a serious and reprehensible departure from the standards of competent and reputable solicitors. She was required by law to provide a sample and failed to do so. This conduct was likely to bring the profession into disrepute. It brought her integrity into question and was therefore in breach of rule B1.2 which provides that a solicitor's personal integrity must be beyond question.

The Tribunal was concerned that this was the respondent's third conviction for road traffic matters. It considered that it would not be appropriate simply to censure her again. The Tribunal imposed a fine of £10,000 to mark the seriousness with which the Tribunal viewed the respondent's conduct in the context of the previous findings of misconduct.

Welcome for £2.2 million support package

A broad welcome has been given by solicitors to the Law Society of Scotland's £2.2 million package of financial support in response to the coronavirus.

The three elements of the package comprise:

- reducing the 2020-21 practising certificate fee by 20% (subject to agreement at this month's AGM);
- reducing by 20% the accounts fee paid by law firm partners;
- reducing to zero the client protection fund contribution for law firm partners (the Society believes the fund has the reserves to meet all valid claims over the next 12 months).

Balancing these measures, the Society has furloughed 20% of its own staff, put a freeze on recruitment and plans other savings for the current operating year.

President John Mulholland said: "We know that 90% of law firms have faced a reduced turnover as a direct result of coronavirus. Almost a quarter of solicitors in private practice have been furloughed, including over 200 trainees. This is why the Law Society is responding with a significant package of financial support at this critical time. It means individual solicitors will save up to £380 compared to last year and save many law firms tens of thousands of pounds.

"I want to be clear: this has not been an easy package to agree and has required tough choices to be made. We will be cutting deep into the Society's reserves. It will require several projects to be paused. However, this package underlines the Law Society's determination to do all it can to help and support the profession weather this storm."

While some solicitors questioned whether the package went far enough, other comments posted on Twitter included: "Wholly unexpected but very much appreciated"; "a very welcome initiative"; "a sign that the Society appreciates how things are on the high street".

SYLA AGM goes online

The Scottish Young Lawyers' Association will hold its AGM online on 28 May 2020 at 6pm. It will take place over Zoom, due to COVID-19 and in accordance with the recent amendment to its constitution. Dial-in details will be emailed to those who have signed up to attend 24 hours in advance.

For more details on standing for election, and to sign up, visit www.eventbrite.co.uk/e/syla-virtual-agm-2020-tickets-104027878184

Advice flags COVID-19 AML risks

The UK Legal Sector Affinity Group, which includes the Law Society of Scotland, has jointly published an advisory note highlighting key anti-money laundering risks and challenges for the legal profession associated with the COVID-19 crisis. It also includes information to help the profession comply with ongoing obligations under the Money Laundering Regulations.

The note covers some of the particular risks and vulnerabilities that criminals may seek to exploit during the upheaval; challenges and factors to consider in respect of non-face-to-face identification and verification, and associated digital identity services; and other issues in respect of policies, controls and procedures, data protection and information security.

Access the note at www.lawscot.org.uk/news-and-events/law-society-news/covid-19-lsag-advisory-note/

Notifications

ENTRANCE CERTIFICATES ISSUED DURING MARCH/APRIL 2020

ALCORN, Paul Donald
ASGHAR, Safina
EVANS, Danielle Gail
HAFIZ, Madihah
McINTOSH, Lauren
McLEOD, Fezile Bongiwe
RASUL, Sohaib
REILLY, Martin Joseph
ROBBINS, Mark John
SAVAGE, Gillian

AGM to run as virtual meeting

Due to the COVID-19 pandemic, the Society's 2020 annual general meeting will be held via audio and videoconference only, on Thursday 28 May at 5.30pm. There will be no physical meeting.

All members are invited, but anyone wishing to attend must register in advance. To do so, please email registrar@lawscot.org.uk by Friday 22 May at 12 noon. Only by registering will you receive the audio and video call details.

The agenda and supporting information are available on the Society's website. The President, John Mulholland, will give an address reviewing his term in office and chief executive Lorna Jack will update members on the current operational plan.

Members will be invited to vote on the approval of the annual report and accounts, the re-appointment of the auditors, and the proposed reduction to the practising certificate fee for 2020-21. There will also be a discussion on draft practice rules amending rule D.5 on incorporated practices.

Advance voting is allowed, and will be open online from 12 noon on Tuesday 19 May until 12 noon on Tuesday 26 May.

Members will receive an email when voting opens.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key areas are highlighted below. For more information see www.lawscot.org.uk/research-and-policy/

Adults with incapacity

The Mental Health & Disability Subcommittee has been monitoring the changes made under the Coronavirus Act 2020 and the Coronavirus (Scotland) Act 2020 to the legal framework for adults with incapacity. In addition to issuing the Society's own temporary guidance, the subcommittee believes there is an opportunity to build on this through legislative reform, and laid out proposed amendments to the Adults with Incapacity (Scotland) Act 2000 in a letter to the Cabinet Secretary for Health and Sport.

Described in the family law briefing on p 31, these proposals aim to provide maximum support to the health and care sectors in response to priorities articulated by those sectors. The subcommittee views them as vital in safeguarding vulnerable members of society.

Solemn criminal trials

In order to respond to the Scottish Government's discussion paper, the Society set up a working group chaired by the Criminal Law Committee convener, with members representing COPFS, defence solicitors, local bar associations and solicitor advocates together with academic, lay and judicial representation and support from the Faculty of Advocates.

Its response informed a briefing issued to the Cabinet Secretary for Justice and MSPs. While the Society does not view retaining the status quo as feasible, it does not support the introduction of judge-only trials during the COVID-19 pandemic, and is not generally in favour of any adjustment to sentencing powers. It believes that the option to retain current court facilities but enable social distancing during jury trials provides the basis for a practical, workable solution. In conjunction with this, the Society supports having a smaller number of jurors, preferring a minimum of seven and allowing for up to two jurors to become ill during a trial. However, it does not support a reduction from 15 jurors for High Court trials.

Medicines and Medical Devices Bill

The Criminal Law Committee responded to the Public Bill Committee's call for evidence, having previously sent out a briefing at the second reading in March.

It recognised that the bill provides opportunities for the pharmaceutical industry, given that it is a major piece of post-Brexit legislation. However, as the bill supports the development of medicines and medical devices, it stressed that scrutiny is required given the implications arising from the potential use of these powers. Achieving the balance between patient safety and access to medicines and medical devices is down to secondary regulations, where further clarification is essential. The committee requested it be noted that during the UK exit discussions there was recognition of the need to develop common frameworks that respected devolution in Scotland, Wales and Northern Ireland. These are highly regulated areas of policy implemented by EU directives, regulations and decisions and were transposed by UK and Scottish Acts and subordinate legislation, as well as administrative, non-statutory arrangements.

In relation to the creation of criminal offences where a person breaches certain notices, it is noted that the penalties applied differ across England, Scotland and Wales. The Society's response advocates a consistent approach to sentencing provisions.

Energy Efficient Scotland

The Property Law Committee and Property & Land Law Reform Subcommittee responded to the Scottish Government consultation which outlined proposals aimed at improving energy efficiency and reducing the demand for heat in owner occupied homes.

These proposals form part of a range of wider issues concerning housing stock quality. It is important to consider where the responsibility lies for improvement of housing stock and how individual owners can be encouraged to keep their property in good repair. Recent work on tenement maintenance, and cladding, raises similar issues. The committees noted that the proposals have the effect of charging individuals to make improvements to their property in order to achieve a Scottish Government aim. It is important that sufficient support is put in place for individual homeowners, and that it is recognised that in some cases there may be significant costs involved in bringing a property up to the required standard.

Energy efficiency is a key feature for future housebuilding. However, the importance was stressed of having sufficient resource and knowledge within local authority planning and housing departments to support housebuilders to deliver appropriate outcomes.

The Policy team can be contacted on any of the matters above at policy@lawscot.org.uk
Twitter: @Lawscot

SLCC insists on levy rise

Solicitors will have to pay an increased general levy for 2020-21 to the Scottish Legal Complaints Commission, despite an urgent appeal from the Society for a cut to recognise the financial pressures facing the profession.

The SLCC's final budget for the year from 1 July confirms the proposed 3.5% rise, bringing a general levy of £492 (up from £475) for principals in private practice, £400 (up from £386) for employed solicitors, £189 (up from £183) for advocates, and £120 (up from £116) for in-house lawyers. Its only concession is to offer to accept the levy in two instalments, subject to a formal agreement, which would allow the professional bodies to consider flexible arrangements for collection.

Chief executive Neil Stevenson commented: "Over the past few years we have made significant improvements in our efficiency, but each year these have been outstripped by the increased number and complexity of incoming complaints, as well as other costs. Our current prediction is that this trend will continue."

He added: "We know any increase is always unwelcome, and particularly so at this time, but the number of complaints has continued to rise and many drivers of cost in our system have been above CPI. We are obliged by law to make sure that the levy is 'sufficient to meet our expenditure'."

In response the Society accused the SLCC of being "tone deaf" to the financial crisis facing the profession.

OBITUARIES

JOSEPH FRIEL (retired solicitor), Uddingston
On 23 March 2020, Joseph Friel, formerly partner and latter consultant of the firm Friels, Uddingston.
AGE: 87
ADMITTED: 1953

THOMAS GRAHAM BANNIGAN (retired solicitor), Glasgow
On 28 March 2020, Thomas Graham Bannigan, formerly sole practitioner and latterly director with Liu's Legal Solutions Ltd, Glasgow.
AGE: 83
ADMITTED: 1959

JAMES HALDANE TAIT SSC (retired solicitor), Edinburgh
On 9 April 2020, James Haldane Tait SSC, formerly partner of the former firm Robson McLean, Edinburgh.
AGE: 89
ADMITTED: 1953

DONALD RUSSELL (retired solicitor), Alloway
On 18 April 2020, Donald Russell, formerly partner of the firm Lawson, Russell & Co, Prestwick.
AGE: 68
ADMITTED: 1975

WORLD WAR 2

Why should the legal profession remember?

As we mark the VE Day anniversary, we should recall the actions of lawyers in authorising the atrocities of the Nazi regime, and how we should now work to ensure that law is not misused in this way again, Gillian Mawdsley writes

The 8 May 2020 commemorates the 75th anniversary of the end of World War 2 and the downfall of Nazi Germany. This date is important not only for those who survived such turbulent events, but for those of us whose knowledge of the Nazi regime derives from the chilling testimonies of those survivors. As their number declines, we owe responsibilities to them to remember the Nazi atrocities epitomised by the Final Solution, with the wholesale discrimination against and elimination of groups such as the Jewish people.

The "unimaginable horror" of discovering sites like Belsen as the war approached the end, must not be allowed to repeat.

We reflect on the role that members of the legal profession undertook in implementing these policies then, as we seek now to fulfil our statutory responsibilities to work in the public interest and promote the rule of law in creating a fairer Scotland. The legal profession must learn from our German predecessors to ensure that genocidal regimes cannot recur. Our roles in legal scrutiny illustrate how we can support measures to prevent such oppression.

Law and the Final Solution

The actions of the legal profession in Germany were crucial.

The judiciary, traditionally tasked with upholding rights, ensured that the policies of National Socialism were applied in German courts. Those such as Roland Freisler, the People's Court judge, acted as judge, jury and prosecutor.

Lawyers drafted and implemented the new laws that excluded Jewish legal colleagues from practising professionally, thereby offering business opportunities to other colleagues. More than half of the delegates attending the Wannsee Conference in 1942 to co-ordinate and resolve specific questions around the implementation of the Final Solution were lawyers, or had had a legal education.

Though many lawyers were complicit in the new regime, there were those who lost their lives in opposing it, such as Adam von Trott zu Solz, a Hitler bomb plot conspirator.

Ultimately, more than 400 decrees and regulations were passed in the Third Reich affecting the Jewish people, depriving them of their rights, livelihoods and assets. These were achieved with "legal" authority derived from the Enabling Act (the "Law to Remedy the Distress of the People and the Reich"), emergency legislation passed on 23 March 1933. Though such laws might be considered to be fundamentally immoral, the legal philosopher Hart argued that "the courts [had] no alternative but to apply a properly enacted statute however evil its aims may be. A victim of such law may rebel on moral grounds but, legally speaking, he has no case; he must, at his own risk, choose between his (legal) duty to obey the law and his (moral) duty not to do or abet evil" (from the account of this debate in "On the validity of Judicial Decisions in the Nazi Era" (1960) 23 *Modern Law Review* 260).

What can we do?

Turn now to COVID-19, where scrutiny of the legislation being passed by the Government is critical. We respect the "emergency" justification for restrictions on our individual liberties such as freedom of movement, screening and isolation, prohibiting events, shutting down of courts and delaying trials. However, such powers carry an inherent risk of abuse by increasing executive power, enabling governments to make decisions and in impeding access to information restricting effective oversight. The effects of isolation and discrimination on vulnerable groups such as the elderly can be clearly seen.

Heed warnings from Nazi Germany, where the Supreme Court took no action as lawyers were convinced of the legitimacy of what was happening and supported the regime. Scrutiny of draft legislation now – and as we return to the "new normal" – is vital.

On a positive note, crucial in Scotland's fight against discrimination, an important milestone was reached with the introduction of the Hate Crime and Public Order (Scotland) Bill. This bill consolidates by modernising our mismatch of existing hate crime laws and adds to the number of groups afforded protection. However hatred arises, be it anti-Semitism or racism, sexism or gender orientation, it cannot be tolerated. This keynote legislation should ensure its eradication.

On 8 May 2020, we recall how lawyers and the law assisted in forming and delivering National Socialism policies. As flags are waved and veterans such as Captain Tom Moore are lauded, don't forget that without lawyers, whether in the civil service implementing Government policies, in practice or in court, the Final Solution might never have been achieved. As the US Supreme Court Justice Stephen G Breyer stated in *Lawyers Without Rights: The Fate of Jewish Lawyers in Berlin after 1933*, "it is important that we and future generations remember the misuse of laws in Germany and how it permitted a society to effectively purge a significant group of lawyers solely because of their religion...It is about misuse of law".

Gillian Mawdsley, Policy team, Law Society of Scotland

CYBER SECURITY

How to videoconference – and stay safe

With videoconferencing now a standard way for law firms to run meetings, David Fleming, chief technology officer at Mitigo, explains how to maintain proper security

As the COVID-19 pandemic broke, people began to work from home and firms moved to ways of remote working, there was a rush to dust off existing videoconferencing applications and download freeware online. This was quickly followed by stories that spread panic about the security risks of virtual meetings.

Here's a brief summary of the guidance we give our clients to stay secure. If you have any doubts, consult an expert.

Service choice

We focus first on the conferencing application you are already paying for (this may well be Microsoft Teams, which is widely distributed with Office 365). But, ultimately, it does differ by business: you need to choose the service that meets your requirements, which for law firms, must include a high level of security.

1. Start with a risk assessment: The choice (and often the cost) should be aligned to the risk and damage which could result if your virtual meetings were accessed or compromised by cybercriminals. There are bank grade solutions that may be required, but this is generally disproportionate.

2. Avoid free tiers of service: The cost of upgrading to business versions that have great security features may be modest, so use them.

3. Upgrade your application: If you are using a "legacy" application, make sure you upgrade to the latest version of the software. Many solutions require you to download an application on your local machine. This needs to be brought up to date, as older versions will have known security vulnerabilities which are easily exploited by criminals.

Videoconferencing etiquette

Like any software which is accessed remotely, it is the way it is used and configured that makes the biggest difference to security. We find that the security features are almost always left at the default setting or even disabled altogether, leaving you wide open to attacks.

1. Secure your access credentials: These need to be strong and not reused elsewhere. Cybercriminals use information gathered from previous data breaches to access conference services where the same passwords/codes are being used. If you believe they have been compromised, change them immediately. Highly sensitive meetings should have unique passwords and not rely on one-click links.

2. Greet your guests: Before you launch into your conference call, make sure you have the correct attendees. You can control attendees and enforce a "lobby" entry on most videoconferencing software, where you can allow users to enter the meeting as they present their identity. Where possible, get each attendee to greet everyone, and check out attendees whose cams are not switched on. Consider locking entry once your meeting has started.

3. Service configuration: This can vary from having to "accept" attendees into the meeting, to whitelisting the computers that have "permission" to join any meeting. This is the key control to keep the security risks of videoconferencing within your risk appetite, so take specialist advice here.

Data and privacy

Consider the impact of a data breach on you and your clients, and how you mitigate the risks by managing data and information as part of the process.

1. Consider your audience: The content you present on a videoconference can be easily recorded by the attendees. Consider the control you have on attendees, especially when presenting highly confidential or personal data.

2. Privacy settings: Some service providers may actually be using the platform to gather information about you and your clients/contacts. If you can't manage this through privacy settings, you should change providers.

3. Data loss prevention: Some services are designed to facilitate data sharing and collaboration across internal teams. Make sure you understand how to configure guest users' access and permissions to these services. Again, this is a crucial aspect of security, so get expert advice.

Spying and spoofing

Cybercriminals adapt their approach to match the opportunity. They know that suddenly, confidential conversations are happening virtually, giving them the motivation to phish for access credentials and deliver malware, via videos or attachments, to "spy" on you via your laptop.

1. Scrutinise inbound requests: Fraudsters are actively phishing for videoconferencing login credentials. You should maintain a "zero trust" mindset for inbound requests to join meetings or enter credentials. Always question the validity of these kind of requests, and verify if you have doubts.

2. Anti-virus (AV) software: Cybercriminals' use of spyware will increase during this pandemic. Keep your AV software up to date and well configured to mitigate against this malicious software.

3. Connection security: While paid-for services will have a level of encryption, law firms should consider making internet connections more secure, for example with the use of virtual private networks.

Mitigo is part of the Society's Member Benefit scheme, offering technical and cybersecurity services. Find out more at www.lawscot.org.uk/members/member-benefits

Platinum edged: the year that was

The current COVID-19 turmoil, and the uncertain outlook ahead, overshadow what was a year of some achievement in 2018-19, as revealed in the Law Society of Scotland's newly published annual report

Much of the 2018-19 operating year focused on the review and reform of legal services regulation, following the publication of the *Fit for the Future* report in late 2018. The Society continued to engage with members, stakeholders and Government, and joined the Scottish Government's working group on the matter.

In addition, 70th anniversary celebrations, Brexit and Anti-Money Laundering Regulations all played key roles in the Society's work. The Lawscot Foundation secured two new sponsors and welcomed eight new students to the scheme, bringing the total number of students supported to 25; and an exciting new partnership with RARE was entered into, piloting a contextualised recruitment system to help improve the chances for less-advantaged young people to get into a career in the legal sector.

John Mulholland, President

"This report is being published at a time of extreme financial challenge for the legal sector, with court work suspended and the sudden halt to the property market. Firms have been furloughing staff and deferring traineeships, seeking to control costs, with much uncertainty around what the long term impact of this pandemic is going to be. The outbreak has inevitably and dramatically changed our planning for next year. Our priority is to do all we can to support and guide our 12,000 members through these difficult and unprecedented times.

"Throughout our last operating year, the review and reform of legal services regulation in Scotland continued to play a major part in our work. We continued to advocate for change that will better serve the public and the profession than the creation of a single regulator of legal services, one of the Legal Services Review report's main recommendations. We engaged extensively with our members, stakeholders, other professional bodies and MSPs and we sit on the Scottish Government's working group, whose aim it is to reach a consensus on models which will deliver reforms to legal services regulation. We expect the agreed models to be put out to consultation by the middle of this year.

"We provided advice and guidance on Brexit throughout the year, and produced a series of webinars looking at the impact of the UK's departure from the EU on Scots law and legal practice. We will continue to provide that support and guidance throughout the transition period.

"We welcomed a 3% rise in legal aid fees in April 2019, but it's important that this is recognised as a short term rise and a step towards a more appropriate rate of remuneration for solicitors. Building a fairer and simpler legal aid system is essential, and in our response to the Scottish Government consultation on legal aid reform, we highlighted the importance of making the legal aid system more efficient and easier to navigate for members of the public and solicitors alike.

"Of course we also celebrated the Law Society's 70th anniversary, and it was an honour to have been Vice President and then President through the period of celebration."

Lorna Jack, chief executive

"Our profession is currently facing a historic challenge, with the coronavirus pandemic requiring flexibility, resilience and innovation from our members across Scotland and beyond.

"At the Law Society, we have responded by looking carefully at our own costs, furloughing staff through the UK Government Job Retention Scheme, freezing staff recruitment and re-balancing our budgets to reduce discretionary spend. Meanwhile, our staff continue to work with our President and Council to provide members with a wide package of support and guidance. We have a clear statutory objective to ensure Scotland has a strong, varied and effective legal profession. This will remain our top priority over the coming year.

"Back in January, we kicked our platinum celebrations off by welcoming more than 200 women to our offices at Atria One to have their photograph taken as part of the First 100 Years project.

"Further events followed throughout the year, culminating in our platinum themed annual conference in October.

"While not quite meeting all of our ambitious membership growth targets, our numbers did increase across all categories, with practising members surpassing the 12,000 mark for the first time. We also launched two new categories – Legal Technologists and Fellows, the latter for retired members.

"We continued to take our responsibilities as an anti-money laundering (AML) supervisor extremely seriously and made significant progress against the objectives we set out for ourselves in response to our 2018 review by the Office for Professional Body Anti-Money Laundering Supervision (OPBAS).

"And we delivered a major project to integrate the Journal Online website into our own, improving the way in which we are able to share news, updates and information with our members."

"Our profession is currently facing a historic challenge, with the coronavirus pandemic requiring flexibility, resilience and innovation from our members"

Craig Cathcart, Regulatory Committee convener

"In the interesting times in which we live, the committee has continued to give

17

17 new claims were made against the Client Protection Fund in 2018-19

0 rejected in full
14 agreed in full
1 partially agreed
1 withdrawn
1 was carried forward to 2019-20
£206,000 was paid

12,244

12,244 solicitors at end of year - **54%** female and **46%** male
545 newly admitted solicitors - **346** female (**63%**) and **199** male (**37%**)
Non-practising members/retained on the roll - **2,218**

159

159 consultations responded to across the Scottish and UK Governments and the European Commission
We commented on **25** bills passing through Holyrood and Westminster

416

416 conduct complaints received 2018-19
409 investigations closed
493 active investigations at year end
131 suspended files at year end

7,600

7,600 telephone queries and **3,800** written queries from solicitors dealt with by our Professional Practice team
Our GDPR web pages got **24,400** unique views
108 CPD events held and **160** modules made available online
Our CPD team had **3,450** face-to-face engagements at hosted events
We had **2,499** registrations for Online CPD, including **1,800** for online risk management

thought to how 21st century regulation should look, supporting the profession and protecting the public interest through consistent, accountable and proportionate measures.

"The first half of our operating year focused on the Legal Services Review report, which published in late 2018. We welcomed much of it, including the recommendations for improved regulation of entities and broader cross-border regulation. We especially welcomed its recognition that the current complaints system is not fit for purpose, being costly, complex and time consuming. Many of the proposals in the report reflected the suggestions which have been pursued by the committee for some time.

"However, the committee believed the report failed to provide a convincing argument or detailed evidence to support the core proposal of creating a new single independent regulator of legal services. We now look forward to the Scottish Government consulting further and the committee having the opportunity to submit additional proposals ahead of new legislation.

"Anti-money laundering has continued to be a key area of focus, and the committee ensured delivery of an action plan to implement recommendations made by Office of Professional Body Anti-money laundering Supervisors (OPBAS). We formed a new standalone regulatory subcommittee to deal with this complex landscape and oversee the specialist work required.

"Other key areas of work have included improving the current complaints process, and our work on price transparency within the legal services market. We also responded to several consultations, as ever balancing the professional and public interest, and seeking to achieve public confidence in how we regulate our vital legal profession. You can read the full report on my first year as the Regulatory Committee's convener at www.lawscot.org.uk/annualreport."

Graham Watson, Finance Committee convener and treasurer

"The past few months have been quite exceptional and have had a significant and detrimental impact on the financial position and future financial prospects of the Society. The pre-COVID-19 budget for the Society assumed a breakeven position for the financial year ending 31 October 2020, with a modest contingency for unforeseen events. As a result of the crisis, the Society has been forced to take immediate action to reduce its cost base and conserve cash.

"Since receipt of most of the Society's income predates the crisis, it is still the expectation that with careful cost control, a broadly breakeven position, prior to recognising the effects of the pandemic on the Society's investment portfolio, will be the outturn this year. Of course, given that the final position will involve a snapshot of the value of the investment portfolio on 31 October, it is quite possible that a significant deficit will be reported if global stock markets do not see a post-COVID-19 rebound by the year end.

"Of much greater concern is the effect of the crisis on the Society's financial position beyond 31 October 2020. The forward picture looks very challenging, especially in view of Council's decision to reduce 2020-21 fees due from members. The Society's scope of work and its associated cost base for the following year, will require additional scrutiny and careful management as a consequence of providing this much needed relief to members, in order to deliver an acceptable financial outturn for 2020-21."

View the full annual report and accounts at www.lawscot.org.uk/annualreport

When never means **NEVER**

Here she goes again, talking about payment instruction fraud! But Gail Cook of Lockton is still seeing Master Policy claims where fraudsters have successfully targeted firms' client accounts, and recounts two such cases

"Not again, I hear you say. Give it a rest. Don't you have anything else to write about?

Of course we do, but in these articles we try to bring to you what is topical in the world of risk management and address areas which are pertinent to Master Policy claims. I am very sad to say that payment instruction fraud is currently very much on our radar, so I make no apologies for bringing it into focus again. It may only be seven months since our last Journal article on the topic, four months since our last fraud bulletin and a month since our article on fraud in a global pandemic, but the subject bears repetition.

Another reason why I am writing yet another article on this subject is that these are some of the most avoidable types of claim we see under the Master Policy, yet we continue to see a regular flow of matters arising.

And to make matters worse, the COVID-19 global crisis will bring the fraudsters out in force, using the pandemic as a route to perpetrate yet another ingenious fraud. This could, for example, take the shape of bogus emails on the topic of the virus, perhaps purporting to be from official sources, which will be the fraudsters' route in either to install malware or to gain access to information on transactions.

Solicitors' firms as targets

You know why you're being targeted – you're the trusted recipient of all sorts of confidential data and, most importantly, you hold large amounts of client money. You're in the firing line and you need to be aware of that every day and do all you can to protect yourself, your firm and your clients.

Traditionally, it has been conveyancing transactions which have been the target for these frauds, but we are seeing this broaden out into other areas like executry matters and commercial share sales.

Whilst we are not in danger of payment fraud claims overtaking residential conveyancing as the number one source of claims against the profession any time soon, that is no reason not to take these issues very seriously.

Firms should prioritise this risk, even if they have never been targeted. Don't put your head in the sand: this isn't going away. I speak to firms that have fallen victim to these scams and they are sick to their stomach when they realise they have been duped. The recent examples and advice here relate to client account payments which were made on the basis of email instructions. You should however, also continue to be aware that telephone scams are still going on, as well as the fact that your clients may also be targeted by these fraudsters.

Fraudsters rely on people to help their scams succeed. This is social engineering at a very sophisticated level, well planned and resourced.

"You know why you're being targeted – you're the trusted recipient of all sorts of confidential data and, most importantly, you hold large amounts of client money. You're in the firing line"

Recent experience

At the time of writing, we have had reported two separate frauds in as many weeks, each with their own alarming characteristics.

The first was a firm acting for a client in the sale of a property. The client lived some distance away and all correspondence on the matter was carried out over email. When the firm emailed the client with details of the proceeds of the sale and a request for bank details, an email came straight back providing those details. There was no indication that the email containing the bank details was anything other than genuine. There were none of the usual telltale signs like an amended domain name or bad grammar or spelling mistakes. Based on this email the firm then paid over the proceeds of the sale to the bank account detailed. It wasn't until they'd sent an email with a receipted fee note that the client contacted them to say that they had not received funds. Nor had they received the initial email requesting bank details, and of course had not sent an email advising said bank details.

A six-figure sum was paid away to fraudsters with little or no hope of recovery.

The second case was a more unusual one in that it involved fraudsters sending emails from within a solicitor's email account directly to the cashroom, requesting payments to be made. It concerned the payment of residue from a late client's estate and it was uncovered when the solicitor spotted emails in her email account which she herself had not sent.

In the email to the cashroom the case reference given in the email was correct and the wording of the email was such that it could easily have been genuine. However, it was not and the instruction was actioned and money was paid into the fraudster's account. The amount was not as large in this case but the firm were equally as distressed at having fallen victim to these frauds.

How to avoid falling victim

What actions can firms take to avoid falling for these sophisticated frauds?

As far as client account payment fraud is concerned I can answer that in a single sentence:

NEVER ACCEPT NOR ACT ON BANK ACCOUNT DETAILS PROVIDED OVER UNENCRYPTED EMAIL

Fraudsters rely on the fact that you will act on these hoax emails, but if you don't and you insist on further verification that does not involve email, then you will thwart their attempts to get their hands on your client account funds.

You might also introduce other procedures which do some or all of the following:

- Always take the client's bank details from the client in person or by telephone at the time of initial instructions – you can then use that information as verification should you receive email correspondence with bank details in the future.
- Always call or meet with the client to verify that the bank details they have advised over email are in fact correct. At the moment that meeting may be a video call, but that would still work. This verification could be for either an initial notice of bank details or a change in bank details during a

transaction. If telephoning the client, do so from a secure line and using a trusted telephone number.

• For internal payment instructions, make use of encrypted email or "off-network" systems for such instructions.

• Ensure that all staff in the firm are aware of these issues and trained in how to spot potential frauds. Ideally you would update and refresh this training regularly.

What insurance protection do I have?

Where a firm has paid away money from the client account other than on the explicit instruction of their client, the Master Policy professional indemnity cover will respond to that claim and will seek to do so quickly to allow you to conform with the rules around management of client funds. The firm will still be liable for the self insured amount in respect of the claim, and of course the claim will count against their record and will have a potential impact on future PI premiums.

While the Master Policy will respond to client account fraud, if the fraudsters target a firm's own bank account or assets, the Master Policy would not come into play. There are other insurances, like crime or cyber insurance, which would provide more appropriate protection for that situation. If you need advice on those covers, you should contact Lockton or your usual insurance broker for further advice.

In conclusion

There is much I could have included in this article on fraud – we haven't mentioned in any detail "reverse frauds", i.e. where your clients are the ones receiving fraudsters' emails (purporting to be from your firm) inducing them to make payments to the incorrect bank account. Nor have we expanded on the telephone scams that still exist, where fraudsters pretend to be calling from your bank persuading you to move money to a new account or reveal your passwords and security information so that they can move it themselves.

We have highlighted the client account payment frauds because that is where we see the activity at the moment. As we have mentioned, they are also the easiest of the frauds to thwart, to frustrate fraudsters' attempts to persuade you to pay away clients' funds.

Frauds of this nature cause chaos and leave a trail of financial and reputational destruction in their wake, to say nothing of the emotional damage they wreak on those individuals involved.

I would implore all firms to take these potential risks seriously and to introduce controls in their firm. But if you do nothing else, please NEVER ACCEPT NOR ACT ON BANK ACCOUNT DETAILS PROVIDED OVER UNENCRYPTED EMAIL.

Gail Cook is a client executive within Lockton's Master Policy team. She can be reached on 0131 345 5571 or by email: gail.cook@uk.lockton.com

FROM THE ARCHIVES

50 years ago

From "Professional Indemnity Insurance", May 1970: "Over the last decade the cost of professional indemnity insurance has probably increased proportionately more than any other item of expense incurred in connection with the practice of a solicitor... It would be possible for a professional man in his contract with a client to disclaim liability for his actings but such a course is unlikely to be recommended by the governing body of any profession... It may properly be argued that [the area of professional responsibility] has now become so wide that... consideration should be given to the introduction of some statutory limitation of liability."

25 years ago

From "Tax Matters", May 1995: "I cannot resist... the following statement from Customs and Excise *Business Brief:* 'With effect from 1st April 1995 live ostriches and fertilised ostrich eggs will be zero-rated. Current supplies of ostrich meat are zero-rated as food for human consumption or as animal feed stuffs'... this change follows consultation with relevant bodies, which include the splendidly named British Domesticated Ostrich Association. It is (genuinely) not known whether the date mentioned in the announcement is of significance. Perhaps it is a sad reflection on our tax system that we cannot be sure whether they are joking or not!"

Homeworking: lessons from a shutdown

Already being paperless made the move to homeworking easy for Archie Millar, but he believes all firms can benefit from the experience

I have previously written articles in this journal on the virtues of a paperless office with a cloud-based IT system. The coronavirus shutdown has only underscored these.

As a quick refresher, we have a server in the office which replicates once a day with an identical machine off-site. So, we host our own cloud. This means that if we can access the internet we can work on our cloud. We also work a paperless system, which means we can access all our files and stored data.

So when we were forced to close our office it meant that we could simply go home, switch on our computers and continue as before, using Facebook, WhatsApp or Zoom where necessary or if visual contact with our clients was desirable.

We redirected our landlines to our mobiles using the provider's app. So it really was a case of carrying on as before. The whole system acted as a disaster recovery plan which was implemented in the time it took us to get home.

All good stuff, but homeworking has made me think about the future.

As businesspeople we all have to remember that we are in business to make money, not to employ people and not to own large buildings but to provide a service as efficiently as possible for which we can charge fees.

So, let's look at homeworking and its benefits.

Get more done

In the interests of client confidentiality and security of data, the firm where I served my traineeship operated a ban on any documentation, firm or client, leaving the office. Now that problem does not exist because, as we work on the cloud, there are no data on anyone's laptop and there is no paper to leave the office. As soon as I switch my laptop off, the connection is lost and will not be restored until I log in again.

I have found from the experience of enforced homeworking that it is possible to process vastly more work in a day than would be possible in the office. Working from home means working alone, so there are fewer interruptions and it is much easier to prioritise and plan work.

Archie Millar is principal of MacRae, Stephen & Co, Fraserburgh

Communication with clients and other solicitors is as simple as it is from the office, using my mobile phone. I could use the provider's app but I have not learned that trick yet.

Supervision of staff could be a problem, but I can check up on any file at any time, which is a part solution. In any event as there is a constant flow of emails between us I do not see that as an insurmountable difficulty. If you are concerned that staff would not be working, just think of the amount of time which is wasted in the office in the form of gossip, communal tea making or staring out of windows.

You know who in your office is working and who is not. It will be the same with homeworking, and so is the answer: deal with it.

Like other people I have spoken to, I find it important to dress as I would for the office and to have that dedicated space, preferably a room, which can be treated as an office. I know it sounds silly but it gets your head in the right space, and many people working at home feel it is important.

So it works, and when lockdown is lifted it is my intention to allocate each appropriate member of staff a time when they can elect to work from home. If you are not convinced of the potential benefits of homeworking, this could become a disciplined way to slip into partial homeworking, perhaps linked with desk sharing and flexible working.

It doesn't stop there

But what about the bigger picture? We all know, or are part of, firms which occupy totally unsuitable premises. We were one of those until we reduced our space requirements and streamlined our systems, which enabled us to move to much smaller accommodation. The financial benefits were immediate and dramatic. They will move from the profit and loss accounts to the balance sheet more quickly than you could imagine. Among other measures, homeworking could reduce your accommodation requirements.

If we look at the even bigger picture, think of the reduction of time and miles spent commuting and the benefits that would bring to the environment, as well as increasing the quality of life for the homeworker. This is not pie in the sky: already there are calls from environmentalists like David Attenborough for homeworking to become much more widespread after lockdown is lifted.

Perhaps it is time for firms to be investigating the potential benefits and moving towards having a proportion of staff working from home.

As the pounds decline, the penny drops

The COVID-19 crisis will spark the necessary cultural change resisted in more comfortable times, says Stephen Gold

"When the tide goes out, you see who's wearing shorts and who isn't." (Warren Buffett)

"Depend upon it, sir," said Dr Samuel Johnson, "when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." COVID-19 has focused our minds on survival as not since World War 2. It is transforming our understanding of business resilience. The root of resilience is cash, but for many law firms it is an Achilles heel.

Recently, the software company BigHand surveyed 275 finance professionals in US and UK law firms of more than 100 lawyers. It found that 37% of UK firms underpriced, while 32% scoped poorly, and did not use the right level of resource. To stop profits leaking, 46% of UK firms planned to train lawyers in pricing practices, while 35% said they would take steps to improve time recording.

Training may be necessary, but is it sufficient? Don't 100-plus lawyer firms – and for that matter most smaller firms – already know in principle what they should be doing? It's not knowledge, but a cultural deficit that explains the gap between principle and practice. For that to change, three elements must be in place: consensus that change is needed; lawyers who are confident in the value they deliver; and a system of measurement, appraisal, reward and recognition which creates accountability, incentivises best practice and bears down on tardiness. Such is the task of leadership.

Going Dutch

For a different approach to these matters, let me take you to Amsterdam. I once attended an IBA conference there (remember conferences?) which included a session on managing cash. We were addressed by a US lawyer and CEO, whose spectacles and personality had the same steely glint. Asked by the moderator how his firm ensured that bills were rendered and cash collected on time, he said it was very simple: if monthly targets for cash in were not met, partners were not paid their drawings. There was a notable frisson round the room. Eyes widened. Bums squeaked. "How," asked the moderator, "do you enforce that?" "Simple," replied our speaker,

"One of the few upsides of this ghastly virus is that it has created a climate in which permanent change can be more easily accomplished"

with a thin smile. "We never have to."

Later, I had a conversation with the regional managing partner of a Big Four accountancy practice, and the same subject came up. His firm has a system where each team pledges to ingather a minimum amount of cash each quarter, and if it is not collected, the local board are not paid their quarterly bonus. Nobody wants to be the miserable wretch who has cost the board a payday, and so, as with our US friend, the situation arises once in the bluest of moons.

Turning crisis to advantage

When I discuss methods like these with clients, their most frequent objection is that it's too drastic, and not collegiate. You have to take the rough with the smooth. The argument has some force. Life happens, as is only too apparent. It's possible to do the right things, and still be ambushed by events. I'm all for supporting good colleagues through tough times. But on the other hand, what is collegiate about scoping poorly, under-recording time, billing late, being tardy about collection and leaking profit, while still collecting your monthly envelope? It is the opposite of collegiate.

A G Lafley, the CEO who transformed Procter & Gamble, once said there was no point in being in business if you did not play to win. He wasn't advocating that the end justifies any means: simply that without a winning mentality, a business is doomed to being either an also-ran, or extinct. There are different ways of measuring business success, but all others pale in comparison to success at the bank.

Every firm is different, and leaders must make a judgment on the right regime for them. In a profession which defends personal autonomy like the NRA defends the right to bear arms, there is often a gap between what managing partners would like to do, and what they feel they can do. One of the few upsides of this ghastly virus is that it has created a climate in which permanent change can be more easily accomplished. Even when things loosen up, making money will be tough, with activity reduced, and battered clients demanding easier terms. Lowballing will abound. The threat to incomes and jobs means there will never be a more opportune time to get buy-in for fresh policies, better systems, new ways of evaluating partners and staff, to nudge (or in some cases elbow) them into raising their game. In such an environment, there may indeed be a valuable place for training.

We think of ourselves as being at war just now, so it seems apt to invoke one of Winston Churchill's best pieces of advice: Never waste a good crisis.

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 trusted adviser to leading firms nationwide and internationally. t: 07968 484232; w: www.stephengold.co.uk; twitter@thewordofgold

APPRECIATION

Peter Carmichael Millar OBE, MA, LLB, WS

19 February 1927-16 March 2020

Peter Millar, who died on 16 March at the age of 93, was one of the best-known and most respected Scottish solicitors of his generation. He had a wide private client practice, for 27 years he was closely associated with the WS Society, and for eight of those years he was its head, as Deputy Keeper of the Signet. During his career he also held a number of other important positions in public life, and he organised one of the largest international conferences of lawyers ever held in Scotland.

Peter was born in Glasgow on 19 February 1927, the older of two children of the Reverend Peter ("Pat") Millar OBE, Minister of Balshagray Church in Glasgow, and his wife Ailsa. In 1933 the family moved to Aberdeen on his father's appointment as Minister of the West Kirk of St Nicholas. He was educated at Aberdeen Grammar School.

By the time he left school in 1944 the end of war was in sight, but he wanted to join the Royal Navy. In March 1945 he undertook officer training at HMS Raleigh in Devonport. By that time the commissioning of officers was greatly reduced, so he volunteered as an ordinary seaman and saw service on the eastern seaboard of the United States and in the Far East and Australia.

On being demobbed, Peter enrolled at the University of St Andrews, graduating with an MA in 1949. There he met his future wife, Kirsteen Carnegie. They married in September 1953, a happy union which lasted for more than 66 years until his death. They had four children: Anne, who predeceased him, Alison, Neil and Alastair. Kirsteen and these three survive him, along with three grandsons.

Peter considered studying theology and joining the Church, but he settled for the law, graduating LLB from the University of Edinburgh in 1952. He did however maintain close church connections for the rest of his life, and was an elder of St Giles Cathedral for many years. He served his apprenticeship with Davidson & Syme and qualified as a solicitor in 1954, being admitted as a WS that same year. Leaving Davidson & Syme he was offered, and took, a partnership in W & T P Manuel, which later became through amalgamation Aitken Kinnear & Co and then Aitken Nairn. He remained there throughout his career, until his retirement in 1992 as senior partner.

From 1964 to 1983 Peter served as Clerk of the WS Society. In 1983 he was appointed Deputy Keeper of the Signet, an appointment he held until 1991. He is the only person in the history of the Society, stretching back over 400 years, to have held both these offices. During his 27 years of service he directed, influenced or supervised the many important events and changes which marked that period of the Society's history. He was also one of the leading figures in the founding of the Edinburgh Solicitors' Property Centre in 1971, jointly underwritten by the WS and SSC Societies.

One of the most challenging and fulfilling experiences of Peter's career was when he was asked by the Law Society of Scotland to organise the Fifth Commonwealth Law Conference, held in Edinburgh in 1977 and attended by some 2,000 delegates. It was to have been held in Uganda but had been postponed because of Idi Amin's dictatorship there. It was an outstanding success in Edinburgh, as a result of which he was awarded the OBE in 1978. After this he was invited to other Commonwealth Law Conferences, representing Scotland at those held in Hong Kong, Jamaica, Cyprus, Vancouver and Melbourne.

Despite his commitment to his practice and to the WS Society, Peter found time for several other senior public appointments. From 1973 to 1985 he was chairman of the General Trustees of the Church of Scotland. From 1983 to 1991 he was chairman of the Mental Welfare Commission for Scotland, an appointment dear to his heart since his daughter, Anne, suffered lifelong mental disability.

In 1991 he was appointed as a chairman of tribunals, first of Medical Appeals (the first Scottish solicitor to be so appointed) and later of Pension & Disability Appeals. He continued these tribunal commitments until 1999.

Peter's recreational interests included golf, hillwalking and travel. His enthusiasm for golf went back at least to his time as a student in St Andrews, and he was a long-term member of the Bruntsfield Links Golfing Society, of which he was honorary secretary for six years from 1983, and of Muirfield (the Honourable Company of Edinburgh Golfers). In autobiographical notes he has left behind, he listed his career and leisure interests and added: "Apart from the above I have never been asked to do anything". He was a master of understatement.

Tom Drysdale,
Deputy Keeper of the Signet 1991-98

ASK ASH

Limiting those domestic interruptions

How can I reduce family intrusions into my homeworking?

Dear Ash,

I have been working from home since the coronavirus crisis escalated. However, although I am working long hours on my laptop, I am finding that my partner and children assume that I am available throughout the day due to my being in the house, and they don't really take work boundaries seriously.

My partner will frequently start asking about domestic issues when I am working and I often lose my train of thought. My children also want me to play with them and don't seem to understand that I have work to finish off or calls to take. I'm starting to feel under immense pressure in terms of work deadlines, but I don't want to let my family down either.

Ash replies:

Working from home certainly involves balancing work commitments within the demands of home life. Because you are physically present during normal working hours, your family will naturally, at times, feel that you are available to attend to their needs; and they will need some time to adjust to the realities of your work commitments.

You have to be able to have some time to focus purely on work issues without interruption, and the best way to do this is to find a space in your home where you can essentially close the door and deal with work. With younger children, you could try to explain to them that you are going to a virtual office and that you will be back to see them after a couple of hours. Try to ensure that when you down tools for a break, you look to spend a little time with your children to allow them to get the benefit of you being at home. This way, you can feel less guilty about work whilst still feeling that you can have some time with family.

Try to schedule meal times with your family and have lunch together with your partner and kids. You are entitled to a proper lunch break and spending this time with family should allow you to relax away from work and also to catch up on domestic issues.

Consistency with boundaries is not always going to happen, and the odd kids' demands or tantrums being heard in the background during work calls is becoming quite the norm; we are all in the same boat, so try not to worry!

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@connectcommunications.co.uk**. 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).

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In a world right now, where nothing is certain and most things are beyond our control, it is not always about what is immediately available to us but putting ourselves in the best position possible so that when normality has resumed, we are in the best place to move forward. This is one thing you can be in control of. It may seem counter-intuitive, but career positioning is something that is worth considering right now.

Some of the briefs we are currently working on in Scotland with partnership potential include:

EDINBURGH

Corporate
Would suit someone seeking the opportunity to experience UK wide and international transactions across various industry sectors with a great deal of client contact, responsibility and career development. (Assignment 11457)

Private Client
The ideal candidate will have an existing following and have proven ability to develop to business and establish strong client relationships. This is an excellent opportunity for an ambitious lawyer to join this high regarded firm. (Assignment 11330)

EDINBURGH / GLASGOW

Real Estate
A following is desirable, but the firm will also consider candidates who may not be able to quantify a following, but who have an extensive range of contacts and strong BD experience. The firm is collegiate, and inclusive and works hard to integrate new partners as seamlessly as possible. (Assignment 7511)

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Working closely with the existing partner and assist in mentoring the associates you will have the opportunity to be involved in a broad range of work, including separation agreements, child law, pension, surrogacy and adoption. (Assignment 11394)

Private Client
This role would suit someone at least 10 years' PQE with an interest in the opportunity to lead or develop a team. This firm offers a positive working environment and the role offers a competitive salary and benefits package. (Assignment 11542)

GLASGOW

Commercial Litigation
The successful candidate will be an experienced commercial litigator and will ideally have gained experience advising on a range of disputes including property, financial services and commercial contracts. (Assignment 11395)

If you are a senior lawyer interested in becoming a partner, or an existing partner, and want to talk about a clear pathway, please contact us in confidence and we would be delighted to chat through options and the market in general.

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

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GLASGOW, UK

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TO APPLY

This position is being handed exclusively by Thomson Legal. For a confidential discussion about this position or to apply, please contact:

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REQUIREMENTS

- Admitted to practice law in Scotland and/ or England and Wales (dual-qualification desirable). Ideally 5+ years post qualification experience (PQE) in technology/intellectual property/corporate/commercial contract work, in either a top-tier commercial law firm or highly-regarded in-house position.
- A demonstrable passion for science and technology and an understanding of the United Kingdom's science-to innovation communities and the exploitation of knowledge and intellectual property.
- Hands-on, energetic, intellectually curious.
- Personal credibility and the ability to inspire trust and respect of colleagues, displaying strong legal, commercial and business understanding with the ability to provide outstanding legal and commercial advice and support.
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