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Journal

Journal of the Law Society of Scotland

ume 67 Number 5 – May 2022

Inside track

Incoming President Murray Etherington tells of clients making his job, of seeing the profession from the inside – and of living a little dangerously

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Editor

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Ball in their court

For many years the received wisdom – and likely truth – was that lawyers taking action for better rates for legally aided work were unlikely to command much public sympathy. "Legal aid fat cats" was an easy cliché for those sections of the press that half the time seem to think the money goes direct to the accused.

Politicians in Government were being only human in catching the mood and pushing the profession's case, however well presented, to the bottom of the in tray. So warnings that ministers were sowing the seeds of long term decline, which would one day catch up with them, were doomed always to fall on deaf ears. That day would always be someone else's problem.

No longer. Last month I concluded a brief observation on where we are with the comment: "Some time soon, something in the system will surely give." Hardly had I done so than the Scottish Solicitors' Bar Association announced that its members would no longer act in summary prosecutions for the complex "coercive control" type of domestic abuse cases that are liable to arise under the recent flagship, and groundbreaking, legislation targeting such conduct. These, the SSBA said, were just too complex to run under fixed fee rates that were never intended for cases requiring such levels of investigation.

We might have expected some public backlash. Most likely, even now, only a minority are aware of the crisis facing the defence bar and the risk that there will soon not be enough lawyers to represent all those brought before the courts. Instead, however, we have the Scottish Women's Rights Centre, representing those with perhaps the greatest interest in seeing swift and effective justice, coming out in support of the profession.

"We are understanding of the challenges being faced by the criminal bar in Scotland regarding their ability to properly represent clients in these cases", it said in a statement, recognising that legal aid must be adequately funded to ensure access to justice and "to ensure that the system, for protecting survivors and women affected by violence and abuse, is effective in practice".

Possibly wrongfooted by the SSBA's move, the Scottish Government appears unsure what to do next, and to be saying as little as possible in public. That cannot continue for long; certainly the longer its inactivity persists, the more intractable the problem will become.

I throw out one suggestion as at least an initial move that might show goodwill and get cases moving again, while leaving for further discussion the overall rates on offer: identify those types of summary case that take more than a given number of hours' work on average, and set an enhanced fixed fee. Even that may take a bit of haggling, but what alternatives are being proposed? For everyone's sake, most especially the vulnerable in need of protection, let's see some action. J

Contributors

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

Heather Thompson (co-author with **Claire Scott** and **Kevin Winters**) is a partner with Brodies LLP

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Elizabeth Rimmer is chief executive of LawCare

Rachael Bicknell is a mediator and founder of Squaring Circles

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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ONLINE INSIGHT

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

Litigation funding and the Post Office scandal

The new Scottish rules for group actions allow a type of case that may benefit from litigation funding, as is illustrated by the litigation in England arising from the Post Office Horizon software. Frances Sim and Alison Webb discuss.

ESG: holding businesses to account

The risk of litigation when a company fails to meet ESG (environmental, social and governance) standards is growing, with the rise of activist groups with increasing access to funding, as John MacKenzie explains.

Possession is not nine tenths of the law

A recent case has highlighted the effectiveness of express confidentiality provisions in protecting sensitive business documents retained by departing employees, reports Innes Clark.

Biometrics in the workplace

Loretta Maxfield and Andrew MacQueen explain the strict legal standards that apply when an employer seeks to make use of employees' biometric data, and suggest appropriate safeguarding procedures.

Ramadan: the need for team support

Shumail Javed explains how having a supportive employer and workplace is of great importance to Muslims working while observing the strict requirements of the holy month of Ramadan, which has just concluded.

OPINION

Ian Maxwell

Whatever the merits of the petition before the Scottish Parliament, calling for full legal aid for all parents contesting access to their children, it raises legitimate concerns that deserve the Government's urgent attention

There is an interesting petition – PE1917: Provide full legal aid to all parents fighting for access to their children – currently under consideration by the Scottish Parliament Citizen Participation & Public Petitions Committee. The petition calls on the Scottish Government to provide full legal aid to all parents fighting for access to their child/children regardless of income.

The Scottish Government's written response to the committee points out that (a) that would be expensive, and (b) the current merits and means tests in Scotland "allow the scope of legal aid to remain one of the most inclusive in Europe". It restates the Government's intention to bring forward a legal aid reform bill in this parliament.

The response doesn't exude much sense of urgency.

Setting aside, therefore, our view at Shared Parenting Scotland that it is usually better not to go to court at all if possible until all else fails, we fully understand the frustration with the current system captured in the terms of petition PE1917. It is drawing to the attention of the committee entirely legitimate concerns that deserve Scottish Government attention now rather than later.

First, there is an "inequality of arms" phenomenon when one party has legal aid and the other has not. If one party is funded by the public purse there is a perception that there may be advantage, for example, in prolonging correspondence about trivial or non-existent matters or stalling on good faith negotiation that will lead to settlement. This not only wears down the finances of the non-legally aided party, who may incur a substantial fee for every solicitor's reply, but far more important is that the longer the correspondence can be strung out, the more it may damage the relationship of the child with the other parent as a new status quo sets in.

Secondly, we suspect it is not commonly known by legislators, unless they have personal experience, just how expensive even an average family court case can become, quickly running into tens of thousands of pounds for a non-legally aided party. We have seen typical costs of £30,000-£50,000 in cases that raised no great legal issues or safety concerns about either parent. We have also seen more complicated cases topping £100,000 even in the sheriff courts.

While it has been a matter of some pride within the Scottish Government that we continued to make legal aid available for family cases after it was stopped in England & Wales, the cut-off point is not generous in the context of average family law case costs. The marginal cost for a party being a few pounds over the resources threshold can be catastrophic.

The choice for many parents in that situation is to give up, sometimes walking away from their children completely, or to represent themselves as a party litigant.

In our recent monthly meetings up to half of attendees are considering becoming, or have already become, party litigants.

We are aware of a number of party litigants who have been largely successful, though all will admit that running their own case became effectively a full time preoccupation. Others have struggled to contain their emotional turmoil – often expressed as "having to prove my worth as a parent: it's like being on trial" – within the detached procedures of a courtroom.

It is also a fact that parts of Scotland are already effectively legal aid deserts, with solicitors not taking on family law cases, or imposing their own rationing system of a few cases a year.

Our view, expressed separately to the Scottish Government, the Scottish Legal Aid Board and to the Evans Review of Legal Aid, is that legal aid can play an important role in supporting alternative, less adversarial routes to helping parents resolve their disagreements after separation or divorce. Parents need support in putting the broad welfare of their children first, exactly at the time when they may be least able to do it amid the disruption of their relationship breakup. We are currently running a pilot of the New Ways For Families skills training that has a good record in resolving high conflict disputes.

Our children and their parents really need less court, not more. Parenting should not be means tested. In the meantime, however, fundamental issues of child welfare as well as access to justice have been identified by this petition. Even if its headline call for legal aid for all is unlikely to succeed, we urge the committee to remind the Scottish Government that it is sitting on a family law crisis.

Ian Maxwell, National Manager, Shared Parenting Scotland

VIEWPOINT

Breaking the bias?

The theme for this year's International Women's Day was #breakthebias. The focus was on establishing "a world free of bias, stereotypes, and discrimination".

When I began studying law at the University of Aberdeen in 2006, the majority of my class were female, but when it came to applying for jobs, the vast majority of partners in the profession and of people in power were men. The imbalance was clear.

Throughout my years of studying, I encountered many different personalities. Some urged women to behave more like men in order to "get on"; others encouraged individuality and consideration of what you brought to the table outwith the confines of gender.

The conversation around how far women have come, and what more needs to be done to move towards true equality, cannot be confined to International Women's Day. We need to make sure it continues past 8 March each year.

RTA Law LLP has always been led by women. Brenda Mitchell, senior partner, started the business in 2011 and I was promoted to partner in 2018. We are a niche personal injury practice representing vulnerable road users who have been injured. We are also unusual in being a female led firm. That is a rather depressing statement to make in 2022, but I am thrilled to be part of breaking the bias.

Being a small team, we want to encourage individuality and promote people's strengths, no matter their gender or sexual orientation. We all bring something different, and if you place everyone in a box stating what they ought to be able to achieve, you will never see or be able to develop someone's full potential.

In 2022 and beyond, I would love to see more women actively encouraged to "break the bias", and for negative terminology around strong women in leading roles no longer to be deemed acceptable. Words such as "feisty", "fierce" and "bossy" are all too often applied to paint successful women in a negative light.

Other small changes can be made to everyday practice. Every hour I will receive an email addressed "Dear Sirs". These come from insurance companies, other solicitors and the courts. That practice in itself is a bias, assuming that law firms must be run by men and therefore all correspondence should be so addressed.

At RTA Law, we seek to address the individual we are emailing by their name. This removes the need to address by gender and thereby make subconscious bias assumptions. Where a generic email address is provided, we simply address all correspondence using the company name.

Such changes should not be seen as "groundbreaking" or "forward thinking". In 2022 your gender should not define you or your role within a company. It is one thing to support IWD each year, but more needs to be done to change daily processes to bring about actual change.

We all must work together to push for true equality in the workplace and for it to be commonplace to have law firms led by women. There is no set paved route to follow; simply we must all do more to halt the impact of unconscious bias and focus on individuals' strengths and qualities.

As the late Ruth Bader Ginsburg said, "Fight for the things that you care about, but do it in a way that will lead others to join you."

Jodi Gordon, partner, Road Traffic Accident Law (Scotland) LLP

BOOK REVIEWS

The Confederate Jurist

The Legal Life of Judah P Benjamin

WILLIAM C GILMORE
PUBLISHER: EDINBURGH UNIVERSITY PRESS
ISBN: 978-1474482004; £75 (E-BOOK £75)

I accepted the invitation to review this book out of curiosity, as much as anything else. It introduced me to a fascinating story.

Benjamin successfully challenged the jurisdiction of the English courts in *R v Keyn* (1876) 2 Ex D 63, usually known as *The Franconia*, a prosecution of a ship's master for manslaughter. Criminal jurisdiction is one of the most basic aspects of international criminal law and the book's author Bill Gilmore, Edinburgh University's Emeritus Professor of International Criminal Law, has also made significant contributions to the law of the sea.

The number of prestigious appointments Benjamin held, and his professional success in both America and England, indicate that he was a man who combined great intellectual gifts with remarkable ability and a large dose of determination.

In this compelling book, Gilmore comments that his legacy is more as a distinguished jurist than as a somewhat flawed and controversial politician. That must be right; but, as told here, Benjamin's is an inspiring story of what can be achieved by a lad o' pairts from humble beginnings. The book is short but engrossing, and comes highly recommended.

Sheriff Alastair N Brown.
For a fuller review see bit.ly/3w7uuBP

Berlin Exchange

JOSEPH KANON
SIMON & SCHUSTER: £18.99;
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"A delightful narrative develops, with twists and turns on the way... an engrossing story."

This month's leisure selection is at bit.ly/3w7uuBP
The book review editor is David J Dickson

BLOG OF THE MONTH

www.lawscot.org.uk

The number and variety of blogs appearing on the Society's website makes it worth a regular visit. This very personal tale from Laura Meldrum must have taken courage to share.

Having suffered no fewer than three miscarriages since her successful delivery, she reflects on the meeting of personal trauma with workplace stress through her then role as an employment lawyer, the supportive team environment which helped her share her mental health issues, and the flexible response needed even for the same person at different times.

To find this blog, go to bit.ly/3MRD5Ty

Behave or the bunny will get you

For most of April, hundreds of criminal cases in Polk County, Iowa, were being prosecuted by the Easter Bunny, the *Iowa Capital Dispatch* reports.

Seemingly an attorney was reassigned to a different set of cases, and their old cases were transferred to Bunny – Easter *Santa* Bunny to give its full name – as a "placeholder" until a digital transfer could be completed. A supervisor said the office "took extra steps" to make sure members of the public didn't see any reference to the Easter Bunny, and the name should only have been visible to internal users, but, you know, IT.

The only practical effect, it was said, was that some defendants might see that information online and not know who to contact about their case. Yes, enquiries would have gone down a rabbit hole. With its ears bitten off it couldn't have taken their calls anyway.

PROFILE

Arlene Gibbs

Arlene Gibbs is a principal solicitor at Aberdeenshire Council, a vice convener of the In-house Lawyers' Committee and a judge in this year's In-house Rising Star Award

1 Tell us about your career so far?

I graduated during the 2009 recession. Traineeships were few, so I worked for a couple of years with Aberdeenshire Council in a non-legal role before securing a traineeship in 2011. When I qualified, I moved to Aberdeen City Council, returning to Aberdeenshire in 2015 to advise on a niche area of planning law. In 2020 I took up my current role as principal solicitor for the Democratic Services team, a really diverse and interesting role.

2 How did you get involved with the In-House Rising Star Award?

I joined the In-house Lawyers' Committee in 2018, first, to help raise the profile of the in-house community, and secondly, to develop professionally and expand my network. I have never looked back. Supporting in-house trainees and newly qualified solicitors including through the Rising Star Award allows me to give something back to the profession which has so greatly supported me over the years.

3 What main issues should the Society/the profession be addressing at the moment?

As a supervising solicitor, I am acutely aware of the need to ensure that our trainees and NQs are properly supported. The early years of a legal career can be intense and demanding, especially if working remotely, so it is essential that the Society and profession work together to ensure support is in place.

4 If you could change only one thing for the profession, what would it be?

I would like to ensure that those coming into the profession have a good understanding of the full breadth of career opportunities there. Initiatives like the Rising Star Award really help to raise awareness of the fantastic talent and brilliant work going on outside of private practice.

Go to bit.ly/3w7uuBP for the full interview. Read Arlene Gibbs' blog for those "Considering a career outside a big firm"

WORLD WIDE WEIRD

1 Tot Gear

A four-year-old boy crashed into two parked cars in Utrecht, Netherlands on joyriding in his mum's car – in his pyjamas. Police labelled the child a "new Max Verstappen".
bit.ly/3kHFK5Y

2 Holy catrimony

Deborah Hodge, 49, from Sidcup, south east London, has "married" her cat India in an attempt to stop landlords forcing her to give her up. She fears being evicted after losing her job and wants "any future landlords to know that we come as a package".
bit.ly/3sbwgUC

3 Taking a cheap shot?

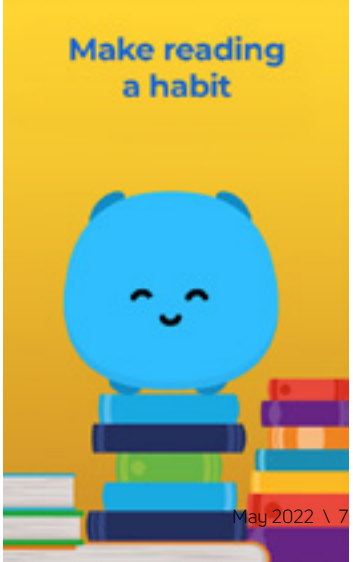
TikTok user YouBoyMoyo posted a video asking for followers to "call the police", claiming "I've been robbed" after being billed £39 for two vodka lemonades at a club in London's Mayfair.
bit.ly/3sbw87S

TECH OF THE MONTH

Bookly

Free: Google Play and Apple

If you're a book lover, then try Bookly. The app breaks down your reading habits into fun and informative stats. You can also set goals for finishing books, play ambient sounds while reading, and add your own rating, thoughts, and quotes.



PRESIDENT

Ken Dalling

We have learned much from the changes enforced by the pandemic, including what works best between the old and the new. (We can also learn why some columns are worth reading to the end!)

Some thoughts on change.

Change is good and, if not, it is certainly inevitable. The COVID pandemic that we seem at long last to be putting behind us was not of our choosing. The changes that were forced on us all in the weeks, months and years since March 2020 have not always been easy to accept or live with, but accepting the good faith of those directing those changes did, perhaps, make some of them easier to take on. The old proverb that we should change the things we can, accept the things we can't and have the intelligence to know the difference is one worth remembering.

No matter the challenges presented by the first and subsequent lockdowns, between them and after them the steps taken by the profession to get back to a sense of normal have been nothing short of remarkable. Yes, the same can be said for many, and of course health workers have been on the real front line; but solicitors sitting at the centre of life, liberty and commerce stand apart. We have – you all have – gone above and beyond again and again to ensure that civic life, private life, politics, government and the courts continued to function. I think we should all be very proud of that.

We made it work

The changes to our way of life and ways of working were often unwelcome, but we have learned from those changes. Moving forward it is great to think that we can keep what has been shown to be of value and, having taken the benefits of sub-optimal processes when we had no choice, get back to those processes which, tried and tested, we have not yet been able to improve. Hopefully for those who can, homeworking and hybrid working will deliver a benefit to work-life balance and, with that, enhanced wellbeing. For those who can't change the way they work, maybe just being able to return to it will have helped.

From the very start of lockdown, the criminal courts continued to function, in particular dealing with those arrested and prosecuted from custody. Defence solicitors were there in court, meeting and advising clients, then representing them before the sheriff. Hub courts were set up to allow a concentration of effort, and for those of us, like me, whose local court was not a "hub", at least when we were on the road, the road was empty! Then came virtual courts and virtual custody courts, at least in "pilot" form.

"Dialling in" to a procedural hearing is something that is still with us and is likely to remain. Civil hearings which are not procedural are for now virtual by default – to allow a concentration on clearing the criminal backlogs – but with an option to request an in-person hearing. The virtual custody pilots are over or at least paused.

Justice, whether in the criminal or civil forum, must be real and accessible. Where technology is to lend a hand, that technology must be adequate in extent and quality. In her evaluation of the Falkirk virtual custody pilot, Sheriff Principal Lewis made a particular point of commending those solicitors who had by their efforts and experience facilitated the operation of the system despite those very resourcing issues. It is good that in times of trouble alternative processes were introduced and made to work, but it is better still that optimal processes return.

Some thanks (and more)

In my first column, I said that solicitors were great. You have been and you still are. So too are those who support you within the Law Society of Scotland in terms of staff and volunteer committee members. My experience as an office bearer has only enhanced my respect for our justice partners – the Crown, SCTS and the judiciary. It has been a privilege and pleasure to serve as the President of the Society. I thank all of those within the Society, the profession and beyond who have supported me. The next change is towards the presidency of Murray Etherington, ably supported by Sheila Webster as President-elect 2023-24, and indeed by me – I hope. Enjoy it all, Murray. You will be penning your final column before you know it.

Just one last thing. My wife doubts that anyone actually reads this part of the Journal. So prove her wrong please. Email me on ireadthecolumn@gmail.com. Just tell me who Kipper is and I will send the first and, if there is one, the 50th correspondent a bottle of champagne.

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

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People on the move

BLACKADDERS, Dundee and elsewhere, has announced the promotion of **Dale Ross** to partner in the Private Client team, **Emma Sadler** to associate in the Family Law team in the Glasgow office, and **Robyn Lee** to senior solicitor in Private Client in Dundee. **Douglas Sneddon**, a partner since 1986, retired on 31 March 2022.

BRODIES LLP, Edinburgh, Glasgow, Aberdeen and Dingwall, announces the promotion of seven new partners:

Aberdeen and Highland-based family lawyers **Susie Mountain** and **Sarah Lilley** (pictured); **Ryan Bowie** (Land & Rural Business, pictured) and **Stuart Murray** (Projects); Edinburgh-based **Bob Langridge** (Tax) and **Kenneth Pinkerton** (Charities & Third Sector); and English-qualified property disputes and telecommunications specialist **Lucie Barnes**.
In addition, insurance and risk lawyers **Lynn Livesey** (Glasgow) and **Ed Grundy** (Edinburgh) step up to legal director and associate level respectively; and renewables specialist **Isabella van Green** (Edinburgh) becomes an associate. Brodies also announces the relocation of its Highlands office from Dingwall to Clava House, Cradlehall Business Park, Inverness IV2 5GH.

BROWN & McRAE, Fraserburgh and Turriff, intimate that with effect from 31 March 2022 **Karen Paterson** has retired from the firm after 42 years. Brown & McRae wish Karen a long and happy retirement. The firm would also like to announce the promotion of associates **Staci-Ann Buchan** and **Mhari Ritchie** to partner, effective as of 1 April 2022.

CLYDE & CO, Edinburgh, Glasgow, Aberdeen and globally, has promoted insurance lawyer **Andrew Tolmie**, based in Edinburgh, as one of 23 new equity partners across its global network, effective 1 May 2022. Consultant **Gordon Keyden** retired from the firm on 30 April 2022 after more than 45 years' service including as managing partner of Simpson & Marwick at the time of its merger with Clyde & Co.

CMS, Edinburgh, Glasgow, Aberdeen and globally, has announced the promotion of five new partners in Scotland as part of a 60-strong global round: Edinburgh-based **Bruce Harvie** and **Kate Darracott** (Corporate), **Kirsty Nurse** (Finance) and **Will Anderson** (Litigation & Arbitration); and in Aberdeen, **Rosalind Morgan** (Environment, Health & Safety).

JAMES & GEORGE COLLIE, Aberdeen and Stonehaven, are delighted to announce they have appointed **Kathryn Murdoch** as a senior associate, joining from BURNETT & REID.

CURLE STEWART SOLICITORS LTD, Glasgow has appointed commercial and media lawyer **Angela McCracken** as a consultant.

DENTONS, Edinburgh, Glasgow, Aberdeen and globally, has promoted three new partners in Scotland: **Linzi Hedalen** (Contentious Construction), **Adam Knowles** (Corporate), and **Owen McLennan** (Corporate Funds, pictured), all based in the Edinburgh office, among nine new partners in the UK, Ireland & Middle East region, all taking effect from 1 May.

DICKSON MINTO WS, Edinburgh and London, intimates that with effect from 30 April 2022, **Colin James McHale** and **Andrew George Todd** retired as partners of the firm and that, with effect from 1 May 2022, **Michael Jon Robertson** and **Lara Katie Watt** were assumed as partners.

GILSON GRAY, Glasgow, Edinburgh, Dundee and North Berwick, has promoted private client associate **Joe Davies** to partner.

HARPER MACLEOD, Glasgow, Edinburgh, Inverness, Elgin and Lerwick, has appointed immigration specialist **Ashley Fleming** as a senior associate. She joins from BINDMANS, London.

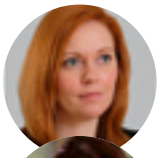
KENNEDYS, Edinburgh, Glasgow and globally, has appointed liability expert **Lesley Allan** as a partner in Scotland. She joins from CLYDE & CO.

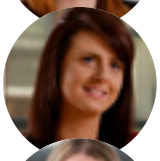
LINDSAYS LLP, Edinburgh, Dundee and Glasgow, wishes to announce that, with effect from 31 May 2022, **Paul Harper** will retire from the firm. Lindsays wishes him a long and healthy retirement.

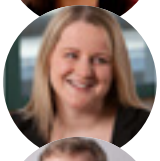
PINSENT MASONS, Edinburgh, Glasgow, Aberdeen and internationally, has promoted six Scottish-based lawyers to partner in a 23-strong promotion round, effective 1 May 2022: **Geraldine Kelm** (pictured), head of account management for Vario Flexible Services in UK and Asia Pacific; **Katherine Metcalfe** (Health & Safety, Real Estate), **Cameron McCulloch** (Financial Services), **David Ross** (Energy & Infrastructure) and **Brian Thumath** (Energy), all in the Glasgow office; and in Aberdeen, **Claire Scott** (Employment, pictured).

Senior associates promoted to legal director are **Shonagh Brown** (Banking, Aberdeen), **Sarah Munro** (Employment, Edinburgh) and **Fiona Rossetter** (Construction Advisory & Disputes, Glasgow).

SHEPHERD AND WEDDERBURN, Edinburgh, Glasgow, Aberdeen and London, has announced the following promotions from 1 May 2022: to partner (all pictured), **Alison Rochester** (Media & Technology), **Susan Swan** (Infrastructure), **Leigh Herd** and **Nathaniel Buckingham** (both Property & Infrastructure Disputes), and **Stephanie Hepburn** (Commercial Disputes); to legal director, **Amie Bain** (Pensions), **Lisa Renwick** (English Property Unit), **Daniel Bain** (Property & Infrastructure Disputes), **Christopher Garden** (Commercial Disputes), **Phil Harris** (Private Wealth & Tax), and **John Townsend** (Glasgow Property); and to associate, **Gillian Buchanan** (Edinburgh/Aberdeen Property), **Lily Manser** (Commercial Disputes), **Katie McNab** (Rural), **Thomas Keenan** (Banking & Finance), **Matthew Lamberton** (English Property Unit), and **Daniel MacKinnon** (Glasgow Property.







TLT LLP, Edinburgh, Glasgow and UK wide, has appointed business immigration expert **Joanne**

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Hennessy as a partner in its Glasgow office. She joins from PINSENT MASONS to manage a team including **Hannah Eades**, who moved to TLT as senior associate from Pinsent Masons in February 2022.

VIALEX, Edinburgh, has appointed **Scott Moncur** as head of Financial Services & Sustainable Development. He joins from MEDICI LEGAL ADVISORS.

WATERMANS, Edinburgh and Glasgow, has appointed **Darren** and **Alistair Lee**, who join from KELLER WILLIAMS, as directors, leading the Estate Agency division of the company alongside **Tzana Webster**, who has also been appointed as a director.

WOMBLE BOND DICKINSON, Edinburgh, Aberdeen and internationally, has promoted **Chris McLauchlan** (Banking), **Lisa Dromgoole** (Contentious Construction & Engineering) and **Emily Pike** (Private Client) from its Edinburgh office to partner, among 10 partner and three legal director promotions UK wide.

Darren and Alistair Lee, Watermans

All you need to know about the Recovery Loan Scheme

Government assistance is still available in the form of the Recovery Loan Scheme ("RLS") and there is still time before it ends on 30 June 2022 to take advantage of the scheme by getting in touch with Braemar Finance – or another approved provider – without delay.

In this short Q&A Braemar Finance answers the key questions about this scheme...

What is the RLS for?

The RLS supports access to finance for UK businesses as they continue to recover and grow following the COVID-19 pandemic and can be used for multiple business purposes, including managing cash flow, investment and growth.

It's designed to support businesses that can afford to take out additional finance and is even available to firms that have already taken out a CBILS, CLBILS or BBLS facility.

What are some of the key features?

- The maximum facility provided under the scheme is £2 million per business. Minimum facilities start at £1,000 for asset finance, and £25,001 for term loans.
- Term loans and asset finance facilities are available from three months up to six years.
- Businesses are required to meet the costs of interest payments and any fees associated with the RLS facility.
- RLS gives the lender (Braemar Finance) a Government-backed guarantee against the outstanding balance of the facility. As the borrower, you are always 100% liable for the debt.
- If you're borrowing £250,000 or less, we won't ask for any form of personal guarantee.
- If you're borrowing more than £250,000, the requirement for personal guarantees will be at our discretion; however the amount that can be covered under a personal guarantee via RLS is capped at a maximum of 20% of the outstanding balance of the RLS facility after the proceeds of business assets have been applied, and no personal guarantees can be held over Principal Private Residences.

Is my business eligible?

There are a number of eligibility criteria – your firm must:

- prove it has been impacted by COVID-19;
- be UK-based;
- have a viable business proposition;
- have an annual turnover of no more than £45 million.

www.braemarfinance.co.uk

Sector switch

A private client lawyer through and through, incoming President Murray Etherington can nonetheless claim to have seen the wider profession from the inside – and to have a strong office bearer team for his year

After the legal aid sole practitioner comes the private client leader in one of our national firms. The presidency of the Law Society of Scotland certainly reaches across the practice sectors.

Come the end of May, it will be in the hands of Murray Etherington, head of department at Thorntons and a real enthusiast for his calling. In fact he has known he wanted to be a lawyer ever since primary six, despite not having a legal or other professional family background.

Not that he immediately turned to private client work. A diminutive but outgoing character, Etherington found his true place in the law only on returning to the Diploma after a spell in banking following his degree, and discovering the client dimension. "At university, the client's not really there. You study lots of legislation and case law but they never put the client front and centre. That happens in the Diploma, and the minute the client got involved, I would describe the law as becoming technicolor or 3D – it became really interesting, and that's I think where my interest in private client came from, because it's not just transactional but about building relationships, long term relationships with people. I really enjoy building relationships."

Now in his ninth year at Thorntons, for the past five years he has led a department that currently turns over £10 million through its 150 staff. "It's quite a big job but I'm surrounded by very interesting, very able and very supportive colleagues."

To add to the chalk and cheese contrast with his predecessor Ken Dalling, he cheerfully admits: "I've never been in court, ever! [Lord Advocate] Dorothy Bain laughed when I said I hadn't been in court as a witness or indeed the accused! And one of the reasons for wanting to be President is that I feel chamber practitioners have been somewhat underrepresented – there have been lots of litigators, which you would understand, but I would like to fly the flag for chamber practice."

Insight work

He should not, however, be thought of as having a narrow outlook. One key position Etherington has held, which he believes has given him a key insight into the workings of the Society as well as of legal firms, is convener of the Insurance Committee. "It really has been incredibly rewarding, both within the Society but also professionally. The big focus is the Master Policy, and risk management has become a huge factor in that, because that allows us to make it self sufficient and something that insurers want to get involved with. So I take the risk management information I have been hearing about back to my business and I don't just talk the talk, I walk the walk in the department as well, and it's been phenomenal and way more exciting and challenging than I initially thought. Through the Insurance Committee you also get the chance to speak at Council on various points and it gives you a bit of a profile."

As Vice President for the past year, he has had much to do also with the contentious matter of the Scottish Government's regulatory consultation. Like everyone at the Society, he recognises that its future direction hangs on the Government's conclusions. Among other things these will shape the Society's next five year strategy, due by the autumn: "You can't get away from the regulatory aspect. We do need to wait and see what the Scottish Government is going to say around that, because that will obviously have a major impact on where we are and what we do."

Left to its own devices, the Society would not be radically altering direction. "Nothing has massively changed from the strategy that we had in place, but it's obviously necessary for it to be reviewed and with Diane McGiffen coming in as chief executive she will have different priorities, but my take on it very much is that it's more nuance than rip it up and start again."

Constant issues

Despite his lack of court exposure, legal aid practitioners need not fear about Etherington not having their back. "You

can't become President of the Society without understanding the impact of legal aid and the lack of support for legal aid over the last decade if not longer," he immediately responds when asked what he sees as the main issues of the coming year. He will of course be well supported on the subject. With Dalling as Past President and incoming Vice President Sheila Webster, a commercial litigator, he is intent on making his term "a team year rather than a me year". That will include his predecessor continuing to have a high profile in his areas of strength: "Ken is incredibly knowledgeable on legal aid, incredibly passionate about it as well; he's an absolute Trojan."

But Etherington is realistic about what can be done to influence the Government. "I've watched Ken go in to bat in various meetings with ministers and Government officials. I don't know how much more we can make the points to Government and make them listen. Ken in particular has tried as hard as anyone, and in terms of supporting the profession we managed to get the trainee fund through last year, but the big issue we have is that it's not a level playing field. The Crown are being far better funded than the defence, so people are leaving the defence bar. I suspect that until the Government starts seeing that people can't be represented – and solicitors have been incredibly resilient and doing a lot more than they get paid for – it maybe isn't an issue for them. But at some point the finger is going to come out of the dyke and it's going to be a real problem. I've seen Ken explain this time after time in very clear English to people, but it just does not seem to resonate."

Legal aid apart, Etherington names the SLCC as another main issue for his year of office. Challenging its apparent position that complaints are a growing problem, he explains: "I have watched what we have achieved on the Insurance

"We need to wait and see what the Scottish Government is going to say around [regulation], because that will obviously have a major impact on where we are and what we do"

"It's not about me: it's about how the Society can progress, how we make best use of assets"

Committee; I have looked at the numbers in terms of complaints going down, claims going down; I've watched the profession become far more engaged on a risk management platform; and yet I see press releases and comments from the SLCC that sound as though we are slipshod and the profession not doing their job, and equally the Society not doing a regulatory job, and I just don't find that at all.

"I think we need to work with the SLCC to get them to focus on what's important, and that is a complaints system that works for the consumer and for the solicitor, rather than them trying to broaden their remit, which seems to be their focus." It's a growing concern, he says, because "In the last few months we have probably seen an increase in the rhetoric. Partly that may be due to there being a message about regulatory change, but for me it has to be based on evidence and I'm not seeing an awful lot of that evidence."

Routes to qualify

Looking at the profession in Scotland as a whole, Etherington believes its general health is quite strong at present. "Firms came through COVID far better than we initially anticipated. There are a lot of jobs out there for young solicitors as well, so it's good to see that the route from trainee jobs through to NQ jobs is strong as well. So by and large it's a very positive picture at this time."

Is the recruitment market, with the current war for talent, not creating its own problems, I ask him? Does it suggest a need for more new solicitors, and for alternative routes to qualification to be opened up if not enough traineeship places can be made available? Etherington professes himself "a big fan" of alternative routes into the profession, having seen paralegal colleagues go on to qualify.

"If there was a different route to the Diploma where we could put them through training that way in-house, I would be all for it; that would be incredibly useful. The more we can open that up, that goes to the heart of diversity, being able to get different types of people into the profession. So alternative routes to coming though for me goes almost hand in hand with the diversity angle, and whether we have the current job market or not is something we should be looking to push anyway." The Society is working on it, so watch this space.

Coming to an event near you?

With his enthusiasm for getting to know people, Etherington is keen to get around the country and meet solicitors face to face, something he believes members would welcome again despite the lockdown benefits from Zoom meetings. "I know it's difficult to find the time when you are working long hours and then the Society comes along and wants to speak with you, but I think from the roadshows that I did as Insurance Committee convener it was incredibly important to go out to areas that maybe hadn't been visited before, or not in a long time, and speak to people and listen to them. Listening is the most important factor because the men and women on the ground, at the coal face, can tell us what it is that they need, and if we as a member association can understand what our members need, then we can put things in place for them and that should again help with engagement.

"So for me looking at how we get back out and speak to our members, both online and offline, is something that I'm really keen to do this year and see how we can get the engagement levels up. Because we've been through a really tough couple of years and even in my day-to-day work I'm seeing more people stressed, maybe not having the same ways of decompressing that they had previously, so to be able to give people opportunities to speak, for us to recognise there are challenges, to put in place support, that is really important."

While he would like to restore in-person contact, he recognises the benefits from hybrid working and is determined that the Society looks carefully at how it operates now that COVID restrictions have eased – recognising the significant cost savings that have resulted from reduced travel and other spending. "I don't want us to be wasting members' money. The question of why are we doing something and what is the cost, is something that I really want to bring to the role, because it's what I bring in my day-to-day job, challenging whether something is the right thing to do, and if it is, is it the right way of doing it. Because nowadays there are multiple channels we can use and some may be much more cost effective than others. So actually I think it's quite exciting, quite interesting to be there, because you are able to shape what the future might look like."

"I suppose I just feel very humble that I've been given the opportunity to become President," he concludes. "It's not about me: it's about how the Society can progress, how we can make best use of our assets here and how we can put ourselves on a footing where the profession feels represented and supported. We are never going to please all of our members all of the time, but if I can leave them feeling at least comfortable with our direction of travel, that would be good!"

Live wire

Although he has lived in Dundee since he began his law degree there, after taking a liking to the University of Dundee campus on a visit, Murray Etherington was schooled in Dumbarton and remains "proud to be a Glasgow boy", certainly as respects retaining his loyalty to Celtic FC.

A father of two, his spare time is otherwise taken up with "incredibly bad" golf, and child-centred pursuits such as climbing and video games.

"I'm pretty standard to be honest," he says self-effacingly. "The only thing is if I go on holiday I tend to do daft things. I was in Cape Town in November and I went swimming with sharks; the year before when I was in America I tandem skydived from 18,000 feet. I like to do things like that, but only once a year... The closer you are to death the more alive you feel, you know!"

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Non-doms: some taxing issues

The rules on the taxation of people resident but not domiciled in the UK have been much in the news lately, but are not well understood. The authors explain who can claim the status, and the factors to consider

The UK's tax code is arguably one of the longest and most complex in existence, and few would expect to see it making headlines in the media. That said, one aspect of the code, the taxation of a non-domiciled UK resident, has been the subject of varied media comment following reports on the use of the regime by individuals either close to, or part of, the UK Government.

The rules on taxation have always been an area that divides opinion. When you add to that the tendency for some of those rules to be over-simplified in media reports, this can make it difficult to separate fact from fiction. Taking account of recent events, it seems sensible to take a close look at the set of rules, which are not well understood.

Domicile and residence

Before looking at the detail, it is important to have a clear understanding of the concepts of domicile and residence. While the terms will be understood by many, they are worth revisiting.

Everyone in the world will have a particular domicile, i.e. they will have a country that they consider to be "home". Consequently, it is only ever possible for an individual to have one domicile – there is no scope for a "home away from home" for domicile purposes. Domicile is a singular legal concept and is the subject of a complex set of rules. For UK purposes, everyone acquires a domicile at birth which is normally the country that one's father calls home. It is difficult for someone's domicile to change, but there are some situations where that can happen.

Domicile is relevant to other legal questions, as well as tax, for example which legal rules apply to succession on a person's death when they have connections with more than one jurisdiction, but for now, we will only consider the tax aspects of domicile.

With this in mind, "residence" is now added to the mix and it is one's residence, established through the Statutory Residence Test ("SRT"), which determines when one becomes UK resident for tax purposes. Under the SRT an individual is likely to be UK tax resident if they:

- spend 183 days or more in the UK during a tax year; or
- have a home in the UK, and do not have a home overseas; or
- work full time in the UK over a period of 365 days (this does not need to coincide with the tax year).

Even if someone does not meet any of these criteria it is still possible for them to be considered UK tax resident. The rules are lengthy, with different criteria depending on the different links a person has to the UK.

It is very possible for someone to be resident in the UK for tax purposes but not to be domiciled here, i.e. they intend to return to their country of domicile in the future. Where that is the case, an individual will be classed as UK resident, non-domiciled ("RND") and become the subject of particular tax rules.

The tax rules around UK non-doms

Anyone who is resident in the UK for tax purposes would normally have to pay income tax and capital gains tax ("CGT") on their worldwide income and gains as they arise, in the same way as any normal UK taxpayer – known as the "*arising basis*". UK RNDs can elect, subject to certain criteria, to be taxed under a different regime whereby their UK income and gains would continue to be taxed under the arising basis, but any foreign income or gains would only be subject to UK tax to the extent that it is remitted to, i.e. enjoyed in, the UK – the "*remittance basis*".

It is important to point out that the way a UK RND is taxed for income tax and CGT purposes has no bearing on the way inheritance tax is applied on their death.

Historically the remittance basis applied automatically to a UK RND, but that is no longer the case – anyone looking to make use of this must elect to do so. The remittance basis may be considered to afford a taxpayer an advantage in that any foreign income and gains which are not brought into the UK will be

out of scope for UK tax, but there is no "free lunch" for tax purposes. This can only be claimed for "free" for the first seven years that a UK RND is resident in the UK; after that they will need to pay a special charge of £30,000 (the "Charge") for each tax year that they seek to claim the remittance basis. This will increase to £60,000 after 12 years of residence.

Once a person has been resident in the UK for 15 out of the past 20 years, they are automatically treated as UK domiciled for tax purposes and can no longer use this regime, subsequently being taxed on their worldwide income and gains on the arising basis.

An additional point to note is that the Charge would need to be paid along with any tax on income and gains actually enjoyed in the UK. This means that it may not be beneficial to all UK RNDs to use the remittance basis, and it is up to the UK RND to weigh up whether they should make the claim, seeking appropriate legal and tax advice to make that decision.

As a consequence of claiming the remittance basis, UK RNDs are required to forgo certain benefits available to most UK taxpayers, including the ability to make use of certain allowances (such as the personal allowance) that would otherwise be available to them, which could in turn increase their tax liability in the UK.

They will also need to incur the professional and compliance costs that are associated with using the remittance basis.

The remittance basis deals with all UK income and gains of a UK RND. The question is, what happens to any foreign income and gains? As mentioned earlier, that wealth is simply out of scope of UK income tax and CGT rules. The likelihood is that it will be the subject of tax in a foreign jurisdiction, e.g. the country of an individual's domicile or where the wealth arises or is enjoyed.

It may be that the foreign jurisdiction applies different tax rates to that of the UK, making it better (or worse) for the individual concerned.

Setting to one side public attitudes, that would be an entirely legitimate tax planning method from a UK law perspective.

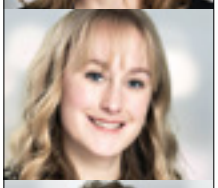
A note of caution

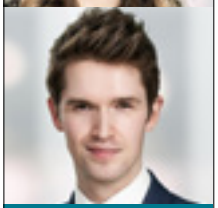
Tax rules rarely lend themselves to easy reading and, as a result, can be oversimplified in the media. It is also worth noting that public attitudes to taxation tend to be varied and will not necessarily accord with what is permissible, and tax efficient, estate planning.

Against that background, it is worth pointing out that the rules concerning the remittance basis have been amended various times over the years and, as a result, have become increasingly difficult to navigate. Subject to specialist advice being taken, it would be entirely appropriate tax planning for a UK RND to make use of the remittance basis, if that was deemed to be in their interests.

What next?

Successive Governments have reviewed the tax rules for RNDs and the use of the remittance basis, and a significant reform was introduced in 2017, limiting RND status to a maximum of 15 years. The shadow chancellor, Rachel Reeves, has said that Labour would replace the current system with a short-term scheme for temporary residents. The likelihood of further changes to the RND regime, whatever Government is in power, should be kept in mind in any planning that is undertaken for non-doms.





Heather Thompson is a partner, and **Claire Scott** and **Kevin Winters** are senior solicitors, in the Personal & Family practice at Brodies LLP

denovo

Outsourcing your cashroom – it's a business model, not a service

It's a concept lawyers used to get fired up about. Some law firms loved it; others hated it, or at the very least found the thought too daunting. It appeared nothing divided a room full of legal professionals faster than the idea of sending some services out of house. Although some still argue against it, outsourcing is now more important than ever for virtually every type of law firm.

Acceptance

Pre-pandemic, having every member of staff working in the office was almost considered sacrosanct. Fast forward to 2022 and agile/home working has not only been adopted but is becoming a necessity. Now that law firm leaders see that this model can work, there is no going back. As a result, many are more open to exploring versatile infrastructure requirements.

The overwhelming advantages of outsourcing have always spoken for themselves. But more lawyers now accept that the work can still get done, even if someone is not sitting right next to them. Many are drawing up plans to outsource work to third parties, viewing them as an extension of their own team – a team that just works elsewhere.

Outsourcing is a business model

Many law firms now base their entire business plan around the delegation of functions to external service providers, taking the view that outsourcing is not simply a way of cutting costs: it is a business model.

One who can speak from personal experience is Amanda Wilson, managing partner of Amanda Wilson Family Law, based in Dundee.

Amanda outsources our Cashroom services. She explains why: "One of the reasons for me leaving a 'Big Firm' to set up my own practice in 2020 was so I could focus on doing what I enjoy – the client work. However, I was very aware that I had been spoiled by being part of a big organisation. Many of the compliance aspects of the job were done for me. I was also comfortable with the technology and support available there. I knew that I wanted to have a similar setup when I launched my own practice.

"However, as a sole practitioner starting from scratch, I wasn't sure if that would be possible from a cost perspective. After making enquiries, I was delighted to find that by outsourcing key roles, it was. I think many lawyers can be put off by the thought of outsourcing, but I couldn't run my business without it, nor would I want to.

"As lawyers, I am sure many of us *could* try to dabble in cashroom procedures. But why bother? That is not for me, and I knew it would end up being a false economy. I was already impressed by Denovo's case management, which I began to use when I launched my new business. I liked that they could also offer me the cashroom facility. It meant I could have the one supplier for both – having everything fully integrated is key to how I run my business. I was impressed that they have very experienced SOLAS qualified cashiers who have worked in private law firms. I also found the cost to be good value for money and wouldn't dream of trying to do the cashroom aspect myself."

No looking back

She adds: "Ultimately, outsourcing saves me time and a lot of grief! I can relax knowing that my cashroom is being handled by experts who know what they are doing better than me. I don't need to recruit my own cashier, which saves more money and time. My business is more efficient and fully compliant. But what really sold the concept is how friendly and great the Denovo team are. Jacqui and the team keep our postings correct and are always free to give advice. They get back to me quickly about any queries I have. Which is handy, as I tend to have lots!

"I like to think I run a modern legal practice. Denovo systems help by allowing me to run an agile, paper free practice. I genuinely feel like the Denovo team are part of my own team. There is always someone available to support me, whether with postings or technology. Everyone is very down to earth and friendly, but they really know their stuff, too.

"I've adopted this approach with other key areas as well, such as my HR and payroll support, website, and PR. By doing this, making the jump from working at a firm with over 500 people to just two hasn't been the shock to the system you might think. I have a great team of inspiring professionals around me, who I trust completely. I include the Denovo team in that. The work they do in the background frees me to focus on my client work and growing the business. Anyone else thinking of making the jump should seriously consider outsourcing. You won't look back!"

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"They keep me right regarding compliance. With their assistance I passed my first Law Society inspection."

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Landowning farmers are being approached with tempting offers to sell to businesses for commercial tree planting. What points should they bear in mind in any deal? Catherine Bury has some thoughts

Trees: it's not (all) about the money

I have had personal experience of an interesting new phenomenon in the last few months. A well known company of land agents was separately cold calling two of my farming clients in the same rough geographical area, enquiring as to whether they were interested in selling their entire agricultural land holdings to a company that intends to plant commercial forestry.

It seems there are companies that are actively interested in taking advantage of the Scottish Government's ambitious plan for planting trees to offset carbon emissions, and approaching farmers direct. The farming press is full of stories about this type of approach and its implications, but as many opinions as I have myself about the political, sociological and even economic consequences, the purpose of this article is to concentrate on the practical aspects that should be considered by the lawyer dealing with this type of situation. The money being offered is very good, but there are a few issues that need to be taken into account before the farmer gets carried away.

Who is the purchaser?

The intended purchaser in my two transactions is a company I have never heard of, with a name that does not reveal much and a "care of" address in London. I can't say that it is my standard practice to investigate the purchaser in any sale, but an apparently anonymous company relatively new to the scene and offering a large premium attracts the attention.

Perhaps the new RCI register will help this kind of assessment, and I know that land agents with experience of these companies will have more information than is easy to find via a search engine. It could be an existing commercial woodland company extending its reach, or perhaps a new company involved in carbon offsetting on behalf of commercial clients.

I would certainly recommend that any farmer receiving such an approach consults an experienced land agent, who will at the very least be aware of the premium prices being offered by these companies and be in a position to negotiate the price being offered and the practicalities of the areas being sold and/or retained. From my experience those prices seem to be as much as double a rough calculation of agricultural value, the land being sought often being perceived as slightly lesser quality hill ground.

Control of surrounding land

It appears to be land that is of interest to these purchasers, leaving the farmer with the farmhouse, agricultural buildings and yard in their ownership. As with any other sale of part of a farm, it is crucial that the rights to use water, drainage and other services are reserved in favour of the farmer if any of these derive from sources or connections located within the area to be sold. Similarly, a discussion should be had about physical access to the farm building and the retained land: is the farm access road to be sold or retained, and how is access to the farm to be maintained uninterrupted as far as possible? The ideal would presumably often be for the forestry area to have its own access, if possible.

In addition to existing services, consideration should also be taken of any new rights for services that may be required by the farmer in future, for example if it is decided to develop the steading buildings. I am aware that this sort of approach might cause a bit of difficulty with the forestry company, who might well be concerned about new pipes and cables being installed within new tree plantations. This point should be carefully considered in order to ensure that any plans for the retained property are not made impossible by the sale. Should the sale property be fenced, and if so, by whom?

One of my clients was concerned about what would happen if the forestry company decided not to plant trees or was unable to do

"I would certainly recommend that any farmer receiving such an approach consults an experienced land agent"

so due to problems such as with local authority permissions or grants. He was concerned that the empty fields might be used for solar panels or new buildings, and these might well interfere with his plans to sell the farmhouse in future. My client initially requested a right of pre-emption over a few specific fields which were deemed to be important, but this request was rejected; instead he accepted a no build restriction on these same fields in the disposition in favour of the purchaser.

Agricultural subsidies and schemes

The farmer's agricultural adviser will be aware of any land management schemes the farmer is contracted into, their requirements and their termination dates. These may relate to land use and/or improvements such as planting, drainage or fences. Any ongoing scheme would require to be declared to the purchaser with a request that they fulfil the obligations for the remaining period.

Land maintenance ("LMF") forms transferring the sold fields from the famer's farm code to the purchaser will require to be completed, signed by the seller and delivered to the purchaser at settlement, unless it is agreed that the sale will include a period of leaseback, as below. LMF forms are lodged with the Scottish Government and allow it to understand who owns and who is in control of (i.e. tenanting) which fields, with the understanding that most farmers will use this evidence of control to claim agricultural subsidies if they are an active farmer. It is unlikely that the purchaser of land for forestry will be claiming subsidies, but the forms will require to be completed and lodged in every sale.

Leaseback

In my experience it is likely that the purchasing company will allow the farmer an agricultural lease of the land being sold for a period of some months at a nominal rent. This is presumably to tie into the planting season and also may take account of local authority permissions and payments of grants. The draft lease will almost certainly be provided by the solicitors acting for the purchaser/landlord and should be checked carefully for the rent, the duration and the clause which specifies the use that can be made of the farm. If the farmer runs a mixed livestock and arable operation, the lease should allow that to continue.

A normal agricultural lease places the responsibility for the ongoing repair and maintenance of fences, drains, roads and other farm infrastructure (fixed equipment) on the tenant, by operation of law. The landlord is required to bring these items into a good state of repair before the lease starts. In order to give my clients comfort that their new landlord would not approach them for "dilapidations" due to apparent lack of repair and maintenance of fixed equipment at the end of the lease, a back letter was drafted to sit alongside the lease confirming that the obligations of the lease with regard to fixed equipment would not be enforced. The fixed equipment was to be treated "as seen", and neither side would have any obligation in that regard. The back letters were signed by the seller/tenant and countersigned by the purchaser/landlord to avoid any implication that there was any pressure being placed on the seller/tenant to sign anything.

No guarantees

My experience is that land agents will carry out their own extensive research into the farms that interest them and on the ground before approaching the owners. Therefore I would suggest no guarantees are given to the purchaser regarding the suitability of the land for trees, the suitability of the access and public roads for transporting timber or any other similar issues.

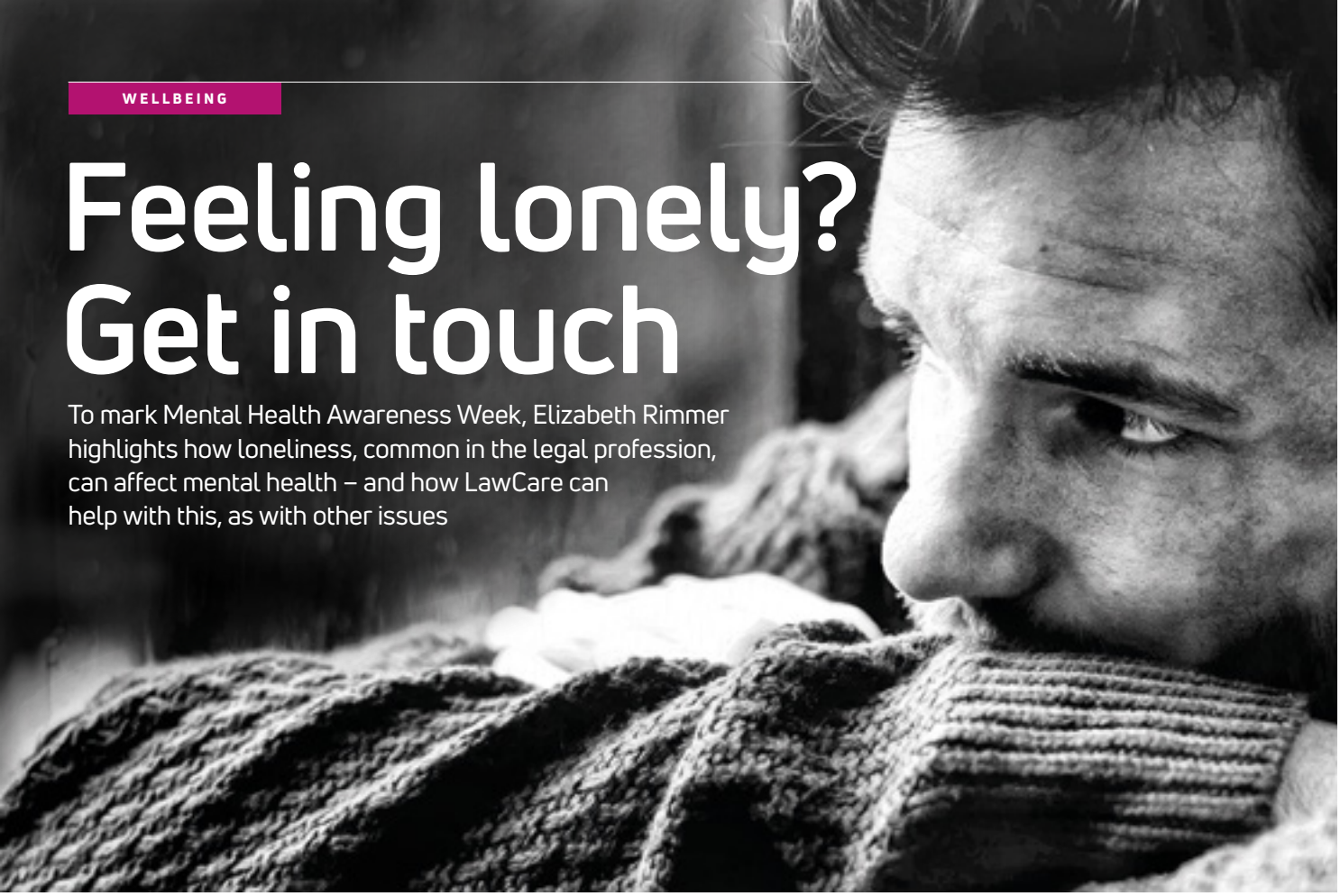
The best route?

There are many financial and other pressures facing farmers, and it is easy to see why selling land for forestry is an attractive proposition. They can use the sale proceeds to plough back into any land and buildings they retain, or use the sale price to purchase as new; in a free market they can sell to whomsoever they choose. If policy objectives begin to dictate, any Government controls on the expansion of tree planting on agricultural land would likely be targeted through more controls on forestry grants. But with the ever increasing pressure on agriculture to reduce its carbon footprint, farmers should also be careful they don't sell, with their land, a good method of being able to do so themselves.

Catherine Bury is an associate with Stewart & Watson, Turriff

Feeling lonely? Get in touch

To mark Mental Health Awareness Week, Elizabeth Rimmer highlights how loneliness, common in the legal profession, can affect mental health – and how LawCare can help with this, as with other issues



Most of us spend more time working than doing anything else, particularly in the legal profession where long hours are endemic, allowing little time for social connection.

Many lawyers who contact LawCare feel lonely. Loneliness arises from either a lack of social relationships or a lack of close emotional bonds with those we have relationships with. It can occur because we don't have the opportunity to interact meaningfully with colleagues very often, we live alone and rarely see others, or it may be that we just don't have people we feel close to or share values with in our everyday lives or have time to pursue those connections.

The pandemic has exacerbated feelings of loneliness and isolation. Many lawyers have reported that the downside of working from home has been feeling isolated from work, their teams and their manager due to limited interaction with colleagues and lack of opportunity to build real and meaningful relationships at work.

While it is normal to feel lonely occasionally, long-term loneliness is associated with an increased risk of certain mental health problems, including depression, anxiety and increased stress.

Connection and peer support

The way to combat loneliness is through connection. Humans are hard-wired to connect – we are tribal and social animals. We are biologically programmed to need other humans, and a feeling of belonging and connection drives our happiness. Connection exists between people when they feel seen, heard and valued, when they can give and receive without judgment and when they derive sustenance and strength from that relationship. Some may find it difficult to know who to turn to when they are finding things hard. We may not have anyone that we can really talk to and, even if we do, it may not be easy or helpful talking to a friend or family member. We might not have spoken to them in a while because we've been so busy at work. We may feel they won't understand, or feel afraid to unburden ourselves or let go in front of them.

At LawCare, we have a network of around 90 trained peer supporters, people who work in, or have worked in, the legal profession who may have been through difficult times themselves and can offer one-to-one support, friendship and mentoring over two or three telephone calls to those who need it. They understand life in the law and all its challenges – this is what makes our support service unique and our supporters well placed to help other legal professionals: they use their own lived experiences to help others.

Getting emotional support from people who have similar experiences can improve wellbeing, increase self-esteem and confidence, provide hope that we can move on from a difficult situation and help us manage it better. A review of over 1,000 research studies on peer support found that it helps people feel more knowledgeable, confident, happy, and less isolated and alone.

One of our supporters, Simon, explains: "Life doesn't run in straight lines. It's important for people to know that they can talk openly, confidentially and without ever feeling they're being judged, no matter what the issue is that is troubling them, be it stress, anxiety, addiction or anything else. Being able to speak with another member of the legal profession helps too. All of this is uniquely available at LawCare."

Andy, a Scottish lawyer (not his real name), contacted us for support this year. He says: "I was very fortunate to discover that my employer had a connection with LawCare. That meant I knew about LawCare when a good friend made me aware of their peer support scheme. As I recover from a long struggle with mental health problems, my peer supporter is proving to be a very helpful connection and I really value the fact that he can relate at a personal and professional level. It's very encouraging to speak with a fellow lawyer who has been there and is happy and successful on the other side of his own struggle."

Applying for peer support

If you feel a peer supporter could help you, visit www.lawcare.org.uk/peersupport and complete the form. One of our team will be in touch to discuss your needs and see if we can match you with an appropriate peer supporter depending on your circumstances and their availability. We expect to reply within two weeks of your application and it may take up to one month to allocate a peer supporter. Anything you discuss is confidential: we will only break your confidentiality if we are concerned you are at immediate risk of harm to yourself or others.

LawCare also provides a free, confidential helpline on 0800 279 6888. You can also email support@lawcare.org.uk or access online chat and other resources at www.lawcare.org.uk

Elizabeth Rimmer is chief executive of LawCare

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Peace dividend: Mediation for insolvency disputes

Mediation provides opportunities for insolvency practitioners and defender directors to negotiate better outcomes, Rachael Bicknell argues

It has recently been observed that insolvency practitioners in Scotland are enjoying the "calm before the storm". Corporate and personal insolvencies are predicted to rise post-COVID, exacerbated by the global uncertainty caused by supply chain disruptions, the energy crisis and the war in Ukraine. As insolvencies increase, so too will disputes involving insolvency practitioners, including claims against former company directors.

Insolvency disputes can be varied, complex and multi-faceted. Office holders have duties to maximise recovery for creditors. It is therefore imperative that in bringing any claim there is an expectation of increasing rather than depleting the money available for creditors. For defender directors, mediation affords an opportunity to have claims against them resolved quickly and in a private and confidential forum.

Mediation has very high success rates – the Civil Mediation Council and CEDR report settlement rates (for all commercial mediation) in excess of 90% either on the day or in the days following the mediation. In England & Wales, insolvency disputes are routinely mediated. The value of mediation for insolvency disputes is finally becoming recognised north of the border too, perhaps driven by the increase in claims being funded or purchased by third party funders, many of whom seek resolution by negotiation or mediation wherever possible. So, why mediate insolvency disputes?

Commercial process

Mediation is a commercial process, not a legal one. It is an opportunity for parties to reach a commercial settlement that they can live with. It allows them to retain control of the outcome and take into account factors that would not be relevant to a judicial decision. For example, it enables both sides to build into a settlement agreement the defender director's ability to pay, and to agree instalments or some other creative repayment plan. Further, research shows that a paying party is more likely to comply with a settlement agreement they have negotiated themselves than one imposed on them by a judge. Reaching an agreement in mediation therefore also decreases the likelihood of the insolvency practitioner requiring to take enforcement action, which may be throwing good money after bad.

For insolvency practitioners, a commercial process also means an opportunity to maximise recovery for creditors at minimal cost, particularly if the mediation takes place pre-litigation or during its early stages. Successful outcomes are often negotiated without significant legal costs having been incurred in presenting a claim to court. A commercial process can also be of benefit to insolvency practitioners, who often lack documentary evidence such as contemporaneous company books and records, which, depending on the claim, can be imperative for proof in court; and to defender directors who cannot rely on a lack of books and records as a defence to certain claims such as repayment of their director's loan account.

Managing litigation risk

Mediation manages litigation risk on both sides. Claims in the context of an insolvency, for example gratuitous alienation, unfair preference, wrongful trading and fraud, routinely involve complex factual investigation and disputed matters of law. For these complex claims, the litigation risk can be high and prospects of success difficult to predict. Winning in court can be far from certain, and legal costs on both sides can even exceed the value of the claim.

Multi-party claims

Mediation is well suited to multi-party disputes where all parties can get round the table to reach a commercial deal. It is not unusual for an insolvency dispute to involve, for example, claims against multiple former company directors who are all blaming each other, or competing claims between insolvency practitioners and HMRC or other third parties. Not only does this serve to increase costs; it increases the time it is likely to take to resolve claims in court. Mediation offers an opportunity to resolve multi-party claims without having to pursue multiple claims in court.

Emotional imbalance

Mediation manages the emotional imbalance between the defender director and the insolvency practitioner. Defender directors often have a strong sense of unfairness, injustice or even outrage. Rightly or wrongly, they can see themselves as the victim of wrongdoing by former co-directors or inappropriate advice from professional advisers. On the other hand, the insolvency practitioner has a job to do and, for them, the dispute is all about the money and maximising recovery for creditors. This is not to say that they do not have empathy or even sympathy for the defender director: often they do. But that cannot affect their legal duty to prioritise recovery for the creditors.

Of course, disputes in this field are not restricted to claims against directors. There can be claims against former office-holders for breach of duties, such as the claim raised by the liquidators of Rangers against the former administrators. In addition, there can be claims against professional advisers of the insolvent company or other third parties. In all cases mediation offers the parties a quicker, convenient and cost-effective way of resolving disputes out of court, and an opportunity for better net financial outcomes for the parties involved.

Rachael Bicknell is a mediator and founder of Squaring Circles

St James's Place

A new strategic partnership

St. James's Place ("SJP") has become the Law Society of Scotland's strategic partner, providing financial planning expertise to Scottish solicitors and their clients

The Law Society of Scotland has created a five-year partnership with SJP, a UK-wide network of financial advisers, to help solicitors keep abreast of developments in wealth management and financial planning.

SJP will provide articles, practice area updates and CPD training for Scottish solicitors on all aspects of financial planning, including wills and estate management, trusts, tax planning, retirement planning and financial wellbeing. Resources will be available for members as individuals, business owners and for use in advising clients.

SJP is a network of 4,556 financial advisers from around 2,500 firms across the UK, which collectively manage £154 billion in client money. The company was chosen following a tender process and it stood out for its focus on face-to-face interaction with clients, which it has retained since the company was launched in 1992.

Solicitors have been met with growing demand from clients requiring specialised financial advice in areas such as family disputes or following personal injury settlements, alongside lifelong matters of growing and preserving wealth for the next generation.

Family structures are often less simple than they were a generation ago, with "blended" families and remarriage common, while clients may have varied sources of income from businesses, property and international assets, which requires ongoing financial advice.

Getting to know St. James's Place

We sat down with Rachel Stewart, Principal of an Associate Partner Practice, to understand more about SJP and the role of an adviser.

Rachel retrained as a financial planner in 2019, following a nearly 15-year career in law, and set up her own SJP Partner Practice, Traprain Financial, based in East Linton.

What made you want to become a financial adviser?

I'd worked as a lawyer since 2005, mostly on contractual law either in-house or in private practice, and I had studied stochastic modelling and worked with a pensions actuary service during my legal career. So, financial planning wasn't a million miles away and an area that really interested me.

What's financial advice all about?

For me, financial advice isn't really about money at all: it's about loved ones, preparing for the future, managing through sickness and health.

But there's a lack of financial education which prevents people from thriving through life's challenges. Wanting to increase people's understanding and confidence around their money is a big motivation for me. When working as a solicitor, it would have been valuable to understand financial planning in greater detail to provide a more holistic service to my clients. That's what's so exciting about this partnership. It's fantastic to see SJP partnering with the Law Society to support members in their financial education and wellbeing journeys.

Why SJP?

Compared to other financial-planner networks, at SJP it's clients who are absolutely first and foremost – which is the way it should be.

During my work as a solicitor, I felt that many financial adviser firms missed out a crucial part in their interactions with clients, by not asking them what their motivations were and what they aimed for.

Often, advisers were more focused on providing solutions in the form of specific products.

So, I really like SJP's prioritisation of face-to-face interactions with clients – as that's the way you really get to know them and understand their goals.

When I set up my business, I decided to align with SJP because of that ethos – and because clients know that they have support not only from my financial planning, but also the backing of a big, well-established, well-respected organisation.

For more information about the Law Society of Scotland and SJP partnership programme, visit www.lawscot.org.uk/sjp

Will writing involves the referral to a service that is separate and distinct to those offered by St. James's Place. Wills and trusts are not regulated by the Financial Conduct Authority.

Hearings for the child

An overview from Children's Hearings Scotland on efforts to ensure quality decision-making, the focus on the child at the hearing, and the proper role of legal representatives – all as feedback is invited to improve the system

I became head of Practice and Policy at Children's Hearings Scotland ("CHS") last autumn, and in that time I've come to really appreciate what goes into the role of a panel member. One of my key ambitions is to develop a more child friendly feedback and complaints process so that we can learn from the experience of all those who attend hearings, and work closely with all our key partners to improve the experience for children, young people and their families.

I have been struck by the scale of what we ask of panel members in terms of the complexity they face in hearings, as well as the need for empathy and their ability to communicate with children and families to encourage them to open up during a hearing. Then they have to evaluate and assess all the information before reaching a decision which they consider to be in the child's best interests. It's an incredibly important role, and in my view panel members make some of the most difficult decisions in public life in Scotland.

The children's hearing system is part of Scotland's legal and welfare system which combines welfare and justice for children and young people. Established following Lord Kilbrandon's influential report, which specifically recommended an alternative to court based decision making for children and young people, a hearing is a legal tribunal, and the 2,500 panel members are volunteers who give up their time freely to help make high quality decisions for children and their families.

Children's hearings are tribunals where children, families, professionals and panel members work together to identify what help children and young people need to reduce offending, protect them from harm and help them achieve their full potential. Panel members make legally binding decisions as to whether compulsory measures of supervision are needed to address risks to children and young people's welfare and ensure their needs are properly met.

Selection and training

Panel members must be representative of the community they serve, and we recruit on that basis. Our volunteers have a wide range of backgrounds and experience which can add a richness and quality to hearings, while also creating the opportunity for much better insight into the issues facing children and young people who come before a hearing. We recruit every year through a rigorous process which ensures that we select the best candidates. Many panel members have lived experience and we make sure they are encouraged and supported to participate.

Panel members undergo an extensive period of training when they are recruited, culminating in a professional development award verified by the Scottish Qualifications Authority. The training focuses on dealing with the range of complex issues, such as childhood trauma, which they will encounter in hearings. The training ensures they have an appropriate knowledge of the law and procedure and best practice in children's hearings. Successful panel members are appointed for a three year term, which can be renewed subject to their continued commitment to attend hearings and maintain appropriate skills and knowledge.

Those who are qualified to chair children's hearings must also demonstrate that they possess sufficient knowledge of the legislation and practice to do so effectively. They must also demonstrate appropriate skills to manage hearings and involve all members in deliberations and decision making.

"The vast majority of legal representatives who attend hearings are excellent and they add real value to the proceedings"

Child-focused approach

Hearings have to promote equal treatment for all, be fair and open, and ensure that decisions are taken in the best interests of the child. The approach is always child-centred and the ethos of the hearing should allow for that open and honest discussion, particularly making sure the child or young person is able to express their views to the panel, or have their views represented. Hearings should be collaborative and non-adversarial. It goes without saying that those involved in hearings must do everything possible not to cause additional stress or trauma to the child.

Hearings can be stressful for children and their families, and so the focus is very much on facilitating a conversation and listening to the opinions of everyone who attends. In that way, panel members can obtain the information they need to help them make the decision they believe to be in the best interests of the child, which must always be the central focus, even where that sometimes may not be

what the child or their family wants.

COVID has brought real change to the system, with virtual and blended hearings becoming part of our daily lives now. This has resulted in some significant challenges in terms of the technology and indeed learning how to operate effectively in that environment. Our volunteer panel members have put in a herculean effort over the last two years to continue to support children and families, which is a real testament to the commitment in the community.

We continue to work with the Scottish Children's Reporter Administration (SCRA) and children's services to ensure that children remain properly safeguarded in the virtual hearings world. Virtual hearings are here to stay. They can improve access and provide additional options for participation for children, families and professionals, and anything that makes a hearing less stressful for a child is a good thing.

Role of the legal representative

The vast majority of legal representatives who attend hearings are excellent and they add real value to the proceedings. Panel members genuinely recognise and appreciate the contribution they can make to the experience for the child and family, particularly in offering good counsel and helping to manage their expectations.

On occasion, however, we see more combative approaches. While these may be appropriate in court, a children's hearing must be a place where the ethos is far more about listening to the views of the child and others so the panel members can make high quality decisions.

Similarly, court based practices like cross-examination are not appropriate in the context of a hearing. While a legal representative may have genuine concerns about the content or opinion of other professionals, those are not matters to be fought out at a children's hearing. That can be done outside the hearing setting if possible; otherwise the panel only needs to understand that there is a difference of opinion and what that is. It is possible to disagree within a hearing, but this should be done in a respectful way that honours the rights of the child and does not needlessly increase the stress levels for all those involved. The last thing anyone in a hearing wants is to traumatise a child, many of whom have already experienced multiple adverse childhood experiences.

In some cases, there may be a perception that because panel members are volunteers, they are less skilled than paid professionals attending hearings. This is seldom the case. Panel members undergo extensive training and are subject to quality assurance systems. There are many other examples of volunteers across Scotland that also provide an exemplary level of service – for example, mountain rescue volunteers. Few would say they are lacking in specialist skills, as they save the lives of hundreds of lost and injured hillwalkers every year.

"A children's hearing must be a place where the ethos is far more about listening to the views of the child and others"

Feedback welcome

CHS is committed to keeping The Promise to Scotland's children to make the improvements identified in the Independent Care Review. At the heart of this commitment is a deep understanding of what matters to children and their families, listening to them, understanding the impact of trauma and poverty and doing everything possible to make the hearings a positive experience for all those involved.

While I'm relatively new to this post, one aim I'm really keen to achieve is to develop a more child friendly feedback and complaints process.

What we can learn from feedback and complaints has a real value for us as an organisation, because it can help to shape future policy development and feed directly into practice and learning for our panel community. We will be developing this work throughout the year. The Promise has set us a challenge to improve the hearing system, and that undoubtedly means change. We will continue to learn and adapt as we move forward. If I could make one ask of legal representatives in hearings, it would be to do everything possible to support the hearings system's overall goal of reducing additional stress or trauma to the child. Please treat everyone with respect.

I would welcome your feedback on how we can continue to improve the hearing experience for all those involved.

Stephen Bermingham,
Head of Practice and Policy,
Children's Hearings Scotland
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Suitable representative?

Conflict of interest prevents claimants' solicitors being a suitable representative party in group proceedings, a judge has held, leading this month's roundup of civil evidence and procedure decisions

Civil Court

CHARLES HENNESSY, RETIRED SOLICITOR ADVOCATE, PROFESSOR AND CIVIL PROCEDURE EXPERT

Group proceedings

The first reported case in relation to group actions under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 was *Thompsons Solicitors Scotland v James Finlay (Kenya)* [2022] CSOH 12 (2 February 2022). The rules for group actions are in RCS, chapter 26A. This case concerned two applications under the rules. The first was under rule 26A.5, seeking permission for the claimants' solicitors to be named as the representative party in whose name group proceedings could be brought; the second was under rule 26A.9, for permission to allow such group proceedings in relation to claims on behalf of workers at Kenyan tea plantations who had allegedly suffered injuries while in employment there. Only the second application was opposed.

Lord Weir was addressed fully on the applications, and amongst other things was referred to a case, and the practice, in Canada relating to multi-party actions, as well as the Scottish Civil Courts Review and the Taylor review of expenses. The first question was whether the lawyers themselves would be permitted to be a representative party. The rules contain provisions about who can be named as such, but, without casting any aspersions on the lawyers, Lord Weir considered that the potential for an apparent conflict of interest (the lawyers being both the party/client and the agents) would not make the applicants a suitable person to act in the capacity of a representative party. He did however take the view that the nature of the proceedings and the issues that might arise would make these claims suitable for group proceedings in terms of the rules. An alternative representative party would be required to enable that application to be granted.

If you are interested in reading more about issues arising in similar types of proceedings, I recommend *Mass Tort Deals* by Elizabeth Chamblee Burch, published by Cambridge University Press. Like many such American books, it is an exhaustive and exhausting read, but it contains fascinating, and rather alarming, insights into the conduct of mass litigations in the United States.

Extempore judgments

In the sheriff court, an extempore judgement is one pronounced "at the conclusion of any hearing in which evidence has been led". There are rules about what it must contain and whether a note must be done: OCR, rules 12.2 and 12.3. In *McLeish v McLeish* [2022] SAC (Civ) 12 (9 March 2022), a divorce action in which evidence was led over many days and in which significant financial claims were made, the Sheriff Appeal Court commented on the practice. Evidence had concluded in December 2020 and the case had been continued for "issue of determination" (as the judgment puts it) about 11 weeks later. The sheriff gave a decision on that date.

The SAC said that the written decision produced on that date was not an extempore judgment, and an interlocutor and note in accordance with rule 12.4, which relates to reserved judgments, should have been issued. I do not know how often extempore judgments are issued nowadays, but they always seemed to me to be rather unsatisfactory, unless an urgent decision was necessary, or the issues were simple and clear and the decision was very straightforward.

Oral testimony

I think it worth commenting in some detail on a few cases in which oral testimony has been under specific scrutiny and different methods of presenting witness evidence to the courts have featured. More flexible (some would say enlightened) approaches to proof of fact have meant that there is scope for uncertainty about the nature and extent of evidence required in some civil litigations. Credibility and reliability of witnesses are still of fundamental importance, but nowadays the courts are faced with a variety of sources of evidence which all have to be weighed in the balance.

In *Henderson v Benarty Medical Practice* [2022] CSOH 28 (24 March 2022), the pursuer sued her medical practice for various alleged breaches of duty which led to a delay in her treatment and necessitated life changing amputations. The critical issue for proof centred on the content of one single telephone call and whether the pursuer had cancelled an appointment with her practice on a particular day.

Evidence was led from six witnesses (in person, I think), and in addition there was evidence from five witnesses who had given written statements (not affidavits, I think), the contents of which were not challenged. A detailed description of the evidence led takes up 30 pages of the judgement. Ultimately the court concluded that the pursuer's recollection of the telephone call was not accurate and the evidence of the person who took the call was preferred.

Lady Wise prefaced her careful analysis of the evidence with reference to the English case of *Gestmin SGPS SA v Credit Suisse (UK)* [2020] 1 CLC 428, which contains numerous valuable observations about human memory and its reliability. She also referred to other Scottish cases in which *Gestmin* has been cited with approval. "While it continues to be acceptable to take the demeanour of a witness into account in appropriate circumstances, it is the consistency of a witness' evidence both internally and taken with the other evidence, that tends to provide the best guide to reliability."

In *AB v English Province of the Congregation of Christian Brothers* [2022] SC EDIN 7 (11 January 2022), Sheriff Dickson heard evidence in an abuse case from a forensic psychologist led by the defence as an expert, who spoke in general terms to the reliability of human memory. The pursuer's case related to events that had allegedly taken place about 40 years ago. The expert had not met the pursuer and could not comment on any aspect of *his* memory of the abuse that he said he suffered.

After referring to *Gestmin*, the sheriff took the view that "the general evidence about the operation of a person's memory and, in particular, that memory can decline and be vulnerable to distortion and suggestion, were matters within judicial knowledge". He considered that the expert's evidence was inadmissible and went on to accept the pursuer's evidence on crucial matters.

Evidence

In *CB v Principal Reporter* [2022] SAC (Civ) 14 (28 March 2022), one of the issues the Sheriff Appeal Court had to consider was whether the allowance of evidence in chief by a signed written statement from two witnesses in a children's hearing was unfair. The witnesses simply adopted the statements as their evidence in chief and were then subject to cross-examination.

The court said: "We do not accept that evidence in the form of a written statement is necessarily of an inferior quality or less reliable

than evidence given orally in court. It could be argued that evidence in the form of a written statement that has been carefully considered by the witness could be of a better quality than instant answers to questions in court... That having been said, the process by which such a statement is prepared is a relevant factor in assessment of the credibility and reliability of that evidence. It is not difficult to think of factors or circumstances which could cause a sheriff to conclude that evidence presented in such a way could not be relied upon... If a party is intending to present evidence in chief [in this way], it is important that the party seeking to do so has careful regard to the process by which such a statement is prepared to avoid unfairness and to minimise the risk of such a statement being considered... unreliable or incredible due to issues relating to the preparation of the statement."

While that may well have been an appropriate and expedient way of proceeding in that particular case, the dangers (and possible abuses) caused by carefully constructed witness statements which are the words of the statement taker and not those of the witness have already been highlighted in numerous cases in England which should serve as a warning. I doubt if anyone relishes the prospect of large parts of a proof being taken up with exploring how statements were taken from witnesses.

In *Benkert UK Ltd v Paint Dispensing Ltd* [2022] CSOH 17 (11 February 2022) the pursuer sought damages of £29.6 million from the defenders for causing a fire at the pursuers' industrial premises. The defenders denied liability and, in any event, argued that any liability was limited by the terms of their contract with the pursuer to £3,225. The way in which the evidence was heard was varied and interesting. The proof was conducted remotely. Evidence in the form of witness statements and oral testimony was given by an (unspecified) large number of witnesses. Three witness statements were agreed to be the entirety of their evidence. Expert evidence in the form of written reports and oral testimony was given by three witnesses, and in the form of a report, supplementary report and oral testimony by one other expert. The experts held a lengthy telephone conference and provided a joint report explaining in detail their areas of agreement and disagreement. At the proof the evidence of three of the experts was taken concurrently.

The pursuer succeeded on liability, but Lord Tyre also held that any liability on the defenders was limited by the parties' contract to the princely sum of £3,225. I am sure there were good reasons for the case following this procedural course, but if the contractual limitation of liability issue had been decided before the merits were explored, it seems that it would have saved a substantial amount of time, effort and resources.

Finally on expert evidence, it is interesting to note the postscript from Sheriff Campbell in *McKenzie v The Highland Council* [2022] SC EDIN 8 (16 February 2022). The pursuer was injured while participating in a training course. There were competing expert reports and the parties had agreed that these would stand as the "core" (*sic*) of their examination in chief. Apparently, the supplementary questions in chief for one expert took up many hours of court time. The sheriff was not entirely enchanted by this, stating: "The court gives encouragement to parties where possible to agree that expert reports can be treated as evidence in chief in order to promote efficient use of time at proof and to bring focus to the disputed issues and for skilled witnesses to address any new information in oral evidence. Reasonable supplementary examination in chief ought to be exactly that, supplementary."

Appeals

In *AW v Principal Reporter* [2022] SAC (Civ) 6 (25 October 2021), there were two related appeals from the determination of a summary sheriff that grounds of referral had been established in respect of two children. The appeal was based on arguments about "sufficiency" of evidence of the conduct complained of, but the appellant's counsel ultimately conceded there was no merit in that submission. The Sheriff Appeal Court then took the opportunity to comment on other general matters, which will serve as a useful reminder to practitioners engaged in this type of case.

First, it restated the correct approach to be taken in appeals of this nature, under reference to the authoritative case of *S v Locality Reporter Manager* 2014 Fam LR 109, an Inner House decision, and other cases quoted at length in the judgment. Secondly, it reviewed the law on the appropriateness or otherwise of naming the alleged perpetrator. Finally, it commented on the standard of proof where grounds of referral contain an allegation of criminal conduct. The leading case on this point remains *Scottish Ministers v Stirton* 2014 SC 218.

The competency of an appeal from the SAC to the Court of Session was considered in the case of *Frank A Smart & Son v Aberdeenshire Council* [2022] SAC (Civ) 13 (28 March 2022), which started life as an appeal from the decision of a sheriff exercising their statutory function under the Environmental Protection Act 1990. After a debate the sheriff had decided to repel the appellant's preliminary pleas and allow a proof. That decision was appealed. The SAC refused that appeal: [2022] SAC (Civ) 5 (14 January 2022), and the pursuer sought permission to appeal to the Court of Session under s 113 of the Courts Reform (Scotland) Act 2014.

However, such appeals can only be taken against a "final judgment in civil proceedings", and the SAC had little difficulty in finding that neither the decision of the sheriff nor that of the SAC were final judgments. For good measure, the SAC expressed a view as to whether, if appeal had been competent, it would have satisfied the test for such appeals set out in s 113(2)(a) – namely that the appeal would raise an important point of principle or practice. The SAC said: "An important point of principle or practice is one which has not yet been established. It does not include a question of whether an established principle or practice has been correctly applied... or disagreement with the conclusions of the Sheriff Appeal Court and the sheriff."

Undefended actions

In *Moneybarn No 1 Ltd v Harris* [2022] SAC (Civ) 11 (14 February 2022) the pursuer raised an action against the defender who had defaulted on payments for a car under a conditional sale agreement. The remedies sought were the familiar ones of payment, recovery of possession etc. The action was undefended and the pursuer minuted for decree in absence. The sheriff refused to grant decree and made various observations about the terms of the craves. The pursuer appealed. The SAC noted that it had dealt with a similar issue in *Cabot Financial UK v McGregor* [2018] SAC (Civ) 47 and *Santander Consumer (UK) v Creighton* 2020 SLT (Sh Ct) 61, and granted the appeal subject to an agreed adjustment to the order in which the craves were set out.

"The extent to which a sheriff may refuse to grant [decree in] an undefended action is something we regard as settled law. It is no part of the sheriff's function to advocate for a non-compearing party whose remedy, in the event of injustice, is to take part in the action before the court. A sheriff may only refuse to grant a decree as craved in the event of its incompetency or there being a want of jurisdiction".

Simple procedure

A matter of important practical significance was raised in *Cabot Financial (UK) v Bell* [2022] SC FAL 9 (8 March 2022), where Sheriff Livingstone was not satisfied that the claimants had properly served a simple procedure action on the respondent when they said that they had done so by Track and Trace and had lodged a confirmation of formal service form. Rule 18.2(4) of the Simple Procedure Rules states: "(4) After formally serving a document, a Confirmation of Formal Service must be completed and any evidence of delivery attached to it." The sheriff took the view that there had to be proof of receipt of the document and that the rules required such proof.

This contrasted with the view of two other sheriffs, in *Cabot Financial (UK) v Finnegan* [2021] SC DUN 34; 2021 SLT (Sh Ct) 237 at Dundee Sheriff Court and *Cabot Financial (UK) v Donnelly* [2021] SC LIV 39; 6

WLUK 142 at Livingston Sheriff Court. Sheriff Livingstone concluded that: "the clerks at this court will continue to look for Track and Trace documentation as evidence of receipt, or indeed any other such evidence as claimants may be able to provide (e.g. a letter acknowledging receipt of the claim form) in simple procedure cases". I understand that this decision is being appealed and I will reserve any further comment until the appeal has been reported.

Case management

N v Astora Women's Health LLC [2022] CSIH 6 (23 February 2022) was one of the lead cases in group proceedings against five defenders who were being sued for damages in respect of alleged defects in vaginal mesh products. The pursuer had asked the Lord Ordinary to order Astora to state whether it had assets or insurance cover sufficient to meet any liabilities in damages and expenses arising from these claims. The Lord Ordinary said she had no power to make such an order, and refused it. She said that her case management powers were concerned with how best to address and resolve the merits of the claim. The pursuer appealed that refusal.

The Inner House observed that the general approach hitherto has been to respect the privacy of indemnity agreements. Efforts to obtain such orders in English courts had ultimately been rejected there. The court considered the case management powers available to the court under RCS, chapter 42A and the general power under rule 42A.10 to make such order as is "necessary to secure the efficient determination of the action". This does not give the court jurisdiction to make an order of a different nature, and "one which would run counter to the general rule that personal financial and insurance information is private". The court was also asked to make the order on the basis of its inherent general power to do what is necessary to discharge its function and to address abuses of process, but saw no merit in that argument.

Holiday ideas?

There may be little procedural significance in the case, but I could not help closing with a brief reference to *Tierney v GF Bissett (Inverbervie)* [2022] SAC (Civ) 3 (9 December 2021), a claim for payment for works carried out in relation to the construction of a luxury dog hotel in Aberdeen. Fear of a backlash from wealthy canine lovers, and Aberdonians, prevents any further comment.

Employment

ELOUISA CRICHTON, COUNSEL, DENTONS UK, IRELAND & MIDDLE EAST LLP

Artificial intelligence ("AI") is everywhere, and is now used so frequently that we may not even think about it. Algorithms, automated decision-making and machine-learning technologies are increasingly used by organisations to help make decisions about individuals. Alongside the many benefits, there are legal issues to be wary of. We focus on where AI may breach the Equality Act 2010 in the workplace and beyond. Data protection considerations are outside the scope of this article.

The recently released Commission on Race & Ethnic Disparities report (the "CRED report") acknowledged that AI can contribute to racial inequality. The Government has announced that the Office for AI will publish a white paper later this year on regulating AI, covering issues such as how to address any potential racial bias in algorithmic decision-making, and the Equality & Human Rights Commission ("EHRC") will provide guidance on how to apply the Equality Act to any AI decision-making. We expect this will go wider than race and consider all protected characteristics (age, sex, race, religion, sexual orientation, gender reassignment, marriage/civil partnership, pregnancy/maternity and disability).

Impact on employers

Bias and discrimination can unfortunately be found in AI tools, often stemming unintentionally from the humans who program them, or inherent bias in the datasets used to "train" the technology. For example, in the work context, an automated recruitment system could discriminate if it:

- favours one gender over another (including scoring language more typically used by male candidates more highly than language more commonly used by females);
- values length of service in past roles disproportionately over experience/skills (which could lead to age discrimination risks); or
- does not recognise overseas qualifications on a par with those from the UK (potentially exposing an employer to race discrimination claims).

There are examples of individuals whose disability impacts on their ability to complete multiple choice tests satisfactorily, despite them being able to answer the question using free text. Any automated decision-making process that does not build in triggers for human checks and reasonable adjustments for disabled individuals could breach the Equality Act.

We know that diverse teams work well, but that does not always play out in recruitment decisions. AI may recommend a candidate for recruitment that surprises an organisation. This could leave the recruiters wondering whether the AI tool has got it wrong, or whether it has instead shone a spotlight on potential bias in the human decision-making process, left unchecked until now.

In an employment setting, AI often has significant consequences for individuals and it is not uncommon to see claims arising from its use.

Impact on society

The Equality Act also applies beyond employment, covering education, the public sector and the provision of services to clients, customers and the public. AI's influence can be more opaque when it is used in society, with the impact often being small for individuals but far-reaching when we zoom out.

For example:

- AI can be used to filter applications for a range of services, from education courses to financial products.
- US research highlighted the disparate impact of facial recognition technologies on women and certain racial groups, some having an error rate of more than 30% for darker-skinned women compared to less than 1% for lighter-skinned males.
- Concerns have been raised about targeted advertisements online for products, jobs and services, for example AI tools resulting in job adverts for mechanic jobs being advertised to predominantly male users, and nursery nurse jobs to predominantly female users.

Taken in isolation, an individual may not realise that an error in face recognition or having sight (or not) of a particular advert has occurred, or is an example of discrimination, but across the population we can see the scope for far-reaching consequences as access to opportunities and support is influenced in part by protected characteristics.

What next?

AI can be a mechanism for achieving more equitable decision-making and reducing bias. To ensure AI is a positive tool, we need big-picture safeguards in place. The European Network of Equality Bodies produced a report highlighting the role of equality bodies, such as the EHRC, in regulating and ensuring that AI tools produce non-discriminatory outcomes. The UK Government's response to the CRED report stated that the EHRC will advise on safeguards and produce guidance to explain how to apply the Equality Act to algorithmic decision-making. The further guidance to be issued by the EHRC and Office for AI will hopefully assist employers in their use of AI, and also provide a safety net for society.

Family

ELLEN CROFTS,
SENIOR SOLICITOR,
MORTON FRASER LLP

We don't often see reported cases around relevant date disputes, and particularly not ones that have gone to appeal, but in *McLeish v McLeish* [2022] SAC (Civ) 12 the court was invited to hear evidence on the couple's living arrangements so as to determine what date would be applied to determine the date of valuation of their net matrimonial property, for sharing. There was a lengthy gulf between their two dates, and we can assume there was a considerable financial implication.

Parties to a marriage shall be held to cohabit with one another, only when they are in fact living together as man and wife. Under the legislation, the relevant date is defined as the date on which the parties ceased to cohabit. Case law has provided dicta in relation to relevant factors that the court may take into account in the event of a dispute, such as the parties' living, sleeping and financial arrangements, how they carry out domestic duties, how they socialise together, practical and emotional support, and presenting themselves as a couple.

Reviewing findings in fact

At first instance in *McLeish*, the sheriff had found in favour of the wife's argument that the parties had continued to live together until 2019 after the husband had left the family home in 2016, and that his attendance in her home by invitation did not detract from continued cohabitation.

The husband appealed, arguing that the sheriff had erred in law by making findings in fact that the couple cohabited until 23 January 2019. His position was that while he did regularly stay overnight in the wife's property, he did not have a key, attended by invitation and the parties had ceased to cohabit on 22 October 2016. It was submitted by the husband that there could be "no cohabitation without habitation", and that attending someone's property by invitation did not constitute habitation: an essential requirement of "in fact living together" was that the place (or places) where the parties were said to be living together were fully accessible to both parties.

In a cross-appeal the wife maintained that there was no material before the sheriff to support a finding in fact to the effect that the husband stayed overnight at her property regularly "at her invitation".

The judgment confirmed that the intentions of the parties were not determinative, and matters had to be looked at objectively. There was no requirement for either party to communicate to one another that the relationship was over, and the ultimate determination of the issue had to depend on the particular circumstances of the case.

It was observed that there was no suggestion by the husband that any material factor was left out of account by the sheriff. The sheriff had made findings in fact on a number of relevant factors, including residence at the wife's property and elsewhere, financial arrangements, sleeping and living arrangements, sexual relations, holidays, refurbishing their property in Spain, socialising, attending events, practical and emotional support and presenting themselves as a couple. The SAC observed that the sheriff had the benefit of hearing evidence on these relevant factors over the course of six days. In the absence of some identifiable error, such as a material error of law, or the making of a critical finding of fact which had no basis in the evidence, or a demonstrable misunderstanding of the relevant evidence, or a demonstrable failure to consider relevant evidence, the SAC confirmed it would interfere with the findings in fact made at first instance on the basis that the sheriff had gone plainly wrong, *only* if it was satisfied that the decision could not reasonably be explained or justified. The husband's appeal was refused on the basis that the sheriff had made no error of the type which would entitle the Appeal Court to interfere with his decision.

Contrasting outcomes

However, and arguably sitting rather uncomfortably with the refusal of the husband's appeal, the SAC was persuaded that there was merit in the wife's submission that the sheriff erred in finding in fact that the husband stayed overnight at the wife's property "at the wife's invitation", and it was prepared to overturn the sheriff's decision in that respect. The judgment notes that the wife's clear evidence was that the husband's attendance overnight at her property was not by invitation and that the sheriff had accepted the wife's account in relation to the marital arrangements and living arrangements over the husband's, where his evidence differed from or contradicted hers. On that basis, the SAC found that the sheriff had gone plainly wrong in a manner that could not be reasonably explained or justified.

It is interesting to see the contrast in how the SAC treated the appeal and cross-appeal and in the outcomes for the parties. This case highlights that in some instances it can be quite tricky to determine when cohabitation ceases where the parties continue to respect close ties on social, physical and financial arrangements even though they have separate accommodation.

Pensions

COLIN GREIG, PARTNER,
DWF LLP

The dashboard concept

With changes in the labour market – Government estimating that on average people will have 11 jobs during their careers – and the introduction of automatic enrolment, it was thought likely that this will lead to an even greater number of people reaching retirement with multiple pension arrangements or "pots".

As far back as 2014, the Financial Conduct Authority in its *Retirement Income Market Study: Interim Report* (MS14/3.2) suggested the creation of a virtual pensions dashboard stating: "A Pensions Dashboard would allow consumers with several pension pots to have a clear understanding of their accumulated pension wealth. This is likely to benefit increasing numbers of members in future with the introduction of automatic enrolment. Consumers with a better understanding of their accumulated pension wealth should make better informed decisions when taking their benefits."

With the Money & Pensions Service estimating there to be 52 million adults in the UK who could use a dashboard service to find and view their pension information, and with these individuals requiring to be connected with up to an estimated 43,000 providers and schemes (Pensions Dashboards Programme Progress Update Report: April 2020, p 7), the scale of what is being attempted should not be underestimated.

Legislation

After many years of deliberation and consultation with relevant stakeholders, it seems that dashboard obligations may become a reality for some from spring next year. The Pension Schemes Act 2021 included substantive provisions relating to pension dashboards to be brought fully into force by commencement order made by the Secretary of State for Work and Pensions – and under powers in force from 11 February 2021 the DWP published on 31 January 2022 indicative draft Pensions Dashboard Regulations 2022. These draft regulations provide for a mandatory staging timetable for pension schemes and their providers to connect to the dashboards infrastructure.

In terms of the draft regulations, the first staging window will commence on 1 April 2023 (with the deadline date being the last day of the window on 30 June 2023), and will apply to all personal and stakeholder pension providers with 1,000 or more policies, and master trusts with 20,000 or more deferred and active members (in the annual scheme return to

TPR in year April 2020-March 2021). Further staging windows are outlined, broadly based on reducing policy or member numbers, through to a window commencing 1 October 2025 for relevant schemes with 100-124 deferred and active members (in the annual scheme return in year April 2020-March 2021).

Interestingly, the staging window indicated for all public sector and collective defined contribution schemes is scheduled for 1 April to 30 April 2024.

Preparation is key

Clearly, in advance of staging much will need to be done by providers and schemes to ensure that they can meet their staging obligations. The Pensions & Lifetime Savings Association ("PLSA") has highlighted actions that schemes should be taking now so that they are suitably prepared. In summary, those include:

- Identify your scheme's staging date or dates.
- Familiarise yourself with the new requirements.
- Plan ahead as to how you will meet the new requirements, including on budget and resource.
- Meet and discuss with your administrators and providers to understand their plans to connect your scheme to the dashboard infrastructure.
- Update administration and other relevant contracts to include dashboard connection services.
- Check to what extent member data is held in appropriate digital format/what is required to make it so.
- Establish what steps are being taken by administrators/providers to check accuracy of member record data and what elements they plan to compare against any incoming "Find" requests.
- Ask administrators/providers to report on completeness of pensions income data to meet dashboard data requirements.
- Consider additional support for members using the dashboard and how that can be provided efficiently; and
- Consider member communication strategy and adjustment of scheme communications to reflect the availability of the dashboard.

There is much to be done in the coming months by Government, regulators (FCA/TPR), trustees and providers if the staging timelines in terms of the draft regulations are not to slip. Undoubtedly, there will be legal and practical challenges to address and overcome to move the dashboard initiative forward. It is hoped that will be possible given the tight deadlines and not insignificant cost to schemes and providers in seeking to put themselves in a position to meet anticipated requirements before finalised regulations and guidance are available.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Equipment and adaptations

The Government seeks views on updating the 2009 guidance on provision of community equipment and housing adaptations. These cover a very wide range of sometimes expensive equipment and adaptations to, e.g. bathrooms and kitchens as well as the provision of ramps and stairlifts. See consult.gov.scot/mental-health-unit/equipment-and-adaptions-guidance-review/

Respond by 6 June.

Transport tribunals appeals

Views are invited on regulations allocating functions to the First-tier Tribunal for Scotland General Regulatory Chamber and amending the rules of procedure for appeals relating to low emission zone schemes, workplace parking licensing schemes, and the prohibition of dropped footway parking, pavement parking and double parking. See consult.gov.scot/justice/allocating-new-transport-appeals-to-grc/

Respond by 14 June.

Data sharing

Views are sought on when and how Social Security Scotland should share personal details about vulnerable claimants with other Government departments and also with local authorities so they can carry out their duty to investigate. See consult.gov.scot/social-security/safeguarding-data-sharing-2/

Respond by 17 June.

Children's care and justice

What legislative changes are desirable to meet the aim of advancing the rights of all children "towards positive outcomes and destinations, especially those who may need legal measures to secure their wellbeing and safety"? See consult.gov.scot/children-and-families/childrens-care-and-justice-reforms/

Respond by 22 June.

Electricity Act 1989

The Government seeks views on increases to fees for certain applications under the Electricity Act 1989 relating to consent for construction of generating stations and for installation of overhead lines. See consult.gov.scot/energy-and-climate-change-directorate/changes-to-fees-electricity-act-applications/

Respond by 23 June.

Single-use plastics

It is estimated that in Scotland we use on average 18.4 tonnes of resources per person, well above the 6-8 tonnes considered sustainable. This consultation focuses on carrots and sticks to reduce the prevalence of single-use plastics. See consult.gov.scot/environment-forestry/single-use-items/

Respond by 30 June.

Taxing low-income trusts

HM Revenue & Customs seeks views on its proposals to remove trusts and death estates from income tax where the tax liability would be less than £100. See www.gov.uk/government/consultations/income-tax-low-income-trusts-and-estates/income-tax-low-income-trusts-and-estates

Respond by 18 July.

... and briefly

As noted in the January issue, Scottish Tory MSP Jamie Greene seeks views on his proposed Victims, Criminal Justice and Fatal Inquiries (Scotland) Bill (see www.parliament.scot/bills-and-laws/bills/proposals-for-bills/proposed-victims-scotland-bill and respond by the new **extended date of 1 June**).

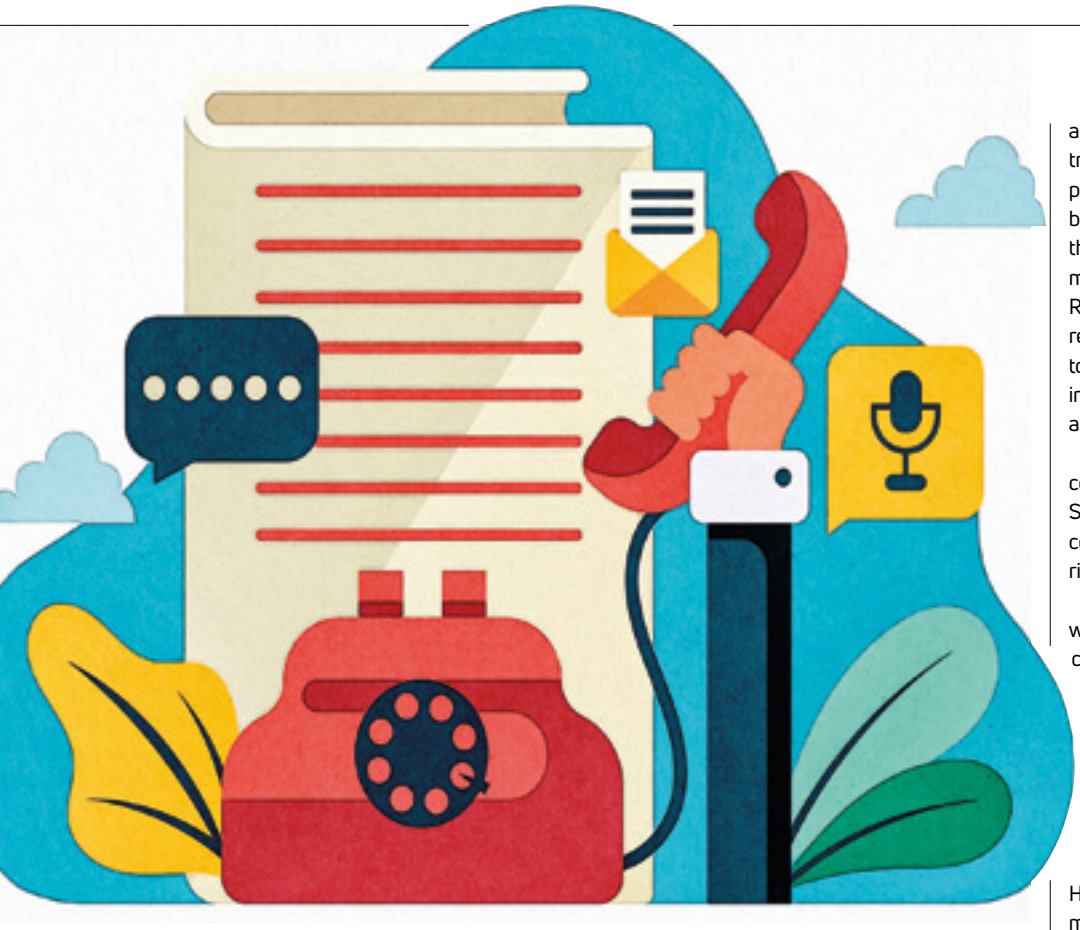
Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Kenneth John Baillie Stewart MacLeod

A complaint was made by the Council of the Law Society of Scotland against Kenneth John Baillie Stewart MacLeod, MacLeods WS, 13 Lombard Street, Inverness. The Tribunal found the respondent guilty of professional misconduct in respect of his breaches of rule 3 of the Solicitors (Scotland) Practice Rules 1986, rules 1, 2, 3, 6, 7 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008, and rules B1.2 and B1.9 of the Law Society of Scotland Practice Rules 2011.

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



the respondent to pay £5,000 by way of compensation to the secondary complainer.

At the respondent's suggestion, the respondent's client, the secondary complainer, provided funds to company 1 by way of an investment or loan. The respondent acted for Mr X, company 1 and the secondary complainer. Their interests were in conflict. This conflict existed long before the respondent became a director of company 1. The respondent was heavily involved in the financing and provision of business and financial advice to company 1. He invested in the company himself. He was appointed as a director of the company in June 2011. The respondent did not advise the secondary complainer of this highly relevant information. He failed to advise him of Northern Constabulary's objections to Mr X as manager of an HMO. This information was given to the respondent on the basis that it was not to be disclosed more widely. The respondent was therefore in a difficult predicament but this was created by his own decision to act in a conflict of interest situation. The respondent's explanation regarding the witness protection scheme appeared fanciful. However, even on the basis this explanation was correct, it was insufficient to overcome the need to make some disclosure to the secondary complainer, and/or to withdraw from acting for both clients. The respondent was in possession of information which was potentially damaging to his client, the secondary complainer, but he could not or did not tell him about it. In addition, the respondent failed to tell the secondary complainer about the trading difficulties encountered by company 1 and Mr X. He failed to advise the secondary complainer of the dissolution of company 1. Throughout, the respondent failed to give independent advice to the secondary complainer. His failure to advise the secondary complainer could only have been to protect himself and company 1/Mr X. The respondent's conduct breached the practice rules regarding trust and personal integrity, independent advice, acting in the best interests of his clients, conflict of interest and disclosure of interest, and effective communication. His behaviour constituted a serious and reprehensible departure from the standards of competent and reputable solicitors. He was accordingly guilty of professional misconduct.

Martin Grahame Hogg

A complaint was made by the Council of the Law Society of Scotland against Martin Grahame Hogg, solicitor, Cumbernauld. The Tribunal found the respondent guilty of professional misconduct *in cumulo* in respect of breaches of rules B6.7.1, B6.7.3, B6.11, B6.23, B6.15.1, B6.4.1, B6.13.2 and B6.13.3, all of the Society's Practice Rules 2011.

The Tribunal censured the respondent.

Solicitors must keep proper accounting records (rule B6.7.1). The respondent breached this rule. He did not balance his client account for a period of years. He operated another client account without reconciling it. Solicitors must balance the firm account monthly (rule B6.7.3). The respondent breached this rule, and as a result it was not possible to ascertain the true financial position of his practice unit for a period of years. Solicitors must deal with credit balances (rule B6.11). The respondent breached this rule in respect of six accounts. Solicitors must comply with the Money Laundering Regulations and demonstrate that to their regulators (rule B6.23). The respondent failed to maintain procedures to meet his obligations including client due diligence and risk assessment procedures.

A practice unit shall deliver accurate accounts certificates to the Society (rule B15.1). The Society is entitled to rely on the information contained with accounts certificates to monitor risk and target regulatory activity (rule B15.2).

The respondent breached these rules and was reckless by completing inaccurate accounts certificates. Solicitors must remedy breaches of rule B6 promptly (rule B6.4.1). He failed to do so. Cashroom managers have specific responsibilities (rule B6.13). The respondent breached his obligations by failing to use reasonable endeavours to acquire and maintain the competencies and skills of a cashroom manager and discharge his duties. He was accordingly guilty of professional misconduct.

Benjamin Nephi Hann

A complaint was made by the Council of the Law Society of Scotland against Benjamin Nephi Hann, Hann & Co Solicitors, 83 Princes Street, Edinburgh. The Tribunal found the respondent guilty of professional misconduct in respect of his conduct which led to conviction for a domestically aggravated contravention of s 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010.

The Tribunal censured the respondent.

The respondent pleaded guilty to the offence. He was fined £400. The basis of the plea was that the respondent had repeatedly attended at his wife's home uninvited, repeatedly loitered outside her home, left flowers for her, repeatedly sent messages to her via text message and social media, repeatedly posted messages on social media to her and repeatedly attended at places where he knew or suspected she would be present.

The respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors and called his integrity into question. The conduct occurred in the context of a complicated relationship which had started in difficult circumstances and ended in a very turbulent fashion. However, the respondent had exercised very bad judgment in continuing to contact his wife. Society today rightly views domestic incidents seriously and a failure to act with integrity in this context negatively affects the reputation of the profession.

Property and VAT: The ground shifts again

HMRC has made a further attempt to restate its policy on VAT in relation to early termination fees and compensation payments. The Tax Law Committee has considered how it might be applied

Property

NICOLA WILLIAMS, DIRECTOR, BURNESS PAULL AND MEMBER, LAW SOCIETY OF SCOTLAND TAX LAW COMMITTEE

HMRC's recent announcement (RCB 2/22) of a revised policy on the VAT treatment of early termination fees and compensation payments will be relevant to you if you advise clients:

- in the property sector, in particular landlords or tenants; or
- who enter into commercial (e.g. supply or construction) contracts.

The change in policy applies (meaning all businesses must follow it) from 1 April 2022, and HMRC's VAT manual has been updated. HMRC's attempts at clarifying the VAT treatment of termination and compensation payments (whether or not outside the scope of VAT) have caused confusion since it announced a new policy in September 2020 (in RCB 12/20), before suspending that in January 2021. Following input from the professions and property industry bodies, HMRC's views have evolved.

HMRC's current view

The guidance introduced by RCB 2/22 is long on deliberation (discussion of case law and possible arguments either way), but short on practical examples, especially with respect to the property sector. This note sets out some practical examples.

The general idea behind HMRC's new policy is to treat payments made to terminate a contract as VATable if there is a "direct link" to be found to a past VATable supply (on the basis that it is further consideration for that supply). HMRC says (at VATSC05910): "the question will be, why isn't other income it has received in connection with that supply also within the scope of VAT?" The past concept, familiar to many practitioners, that if a payment can be said to be compensation it is not VATable should no longer be assumed to hold good without considering whether the payment forms part of the (broadly construed) price for the supply.

The overall theory behind the policy makes sense in many cases. For example, on a mobile phone contract where the amount payable to cancel is the same amount as the total of the amounts due each month for the minimum term, less the months already paid, it is easy to see how this amount could be seen as an amount related to the acquisition of the services – as it is an amount the customer must pay in order to have the right to have services supplied for a period (even if in the end they choose to cancel and not use the services for the full period). Note that this same point applies even where the amount to be paid to terminate does not exactly match what would otherwise have been paid across the term. This is because the supplier has contracted to get at least this minimum return for supplying the services/providing a right to have the services supplied for a period.

However, not all payments are further consideration for supplies made. HMRC gives an example of car hire, and payments made by a hirer because they have crashed the car. While these are "linked to" the supply of the car, they are not further consideration for the hire. Rather, the payment is because of an unexpected event and the supplier does not provide (or have an obligation to provide) anything for the extra payment made. Similarly, fines and penalties which are set at a level designed to be punitive (as opposed to being simply an additional, higher, charge in return for a continuing or further supply) are not VATable.

VAT on certain typical property transactions

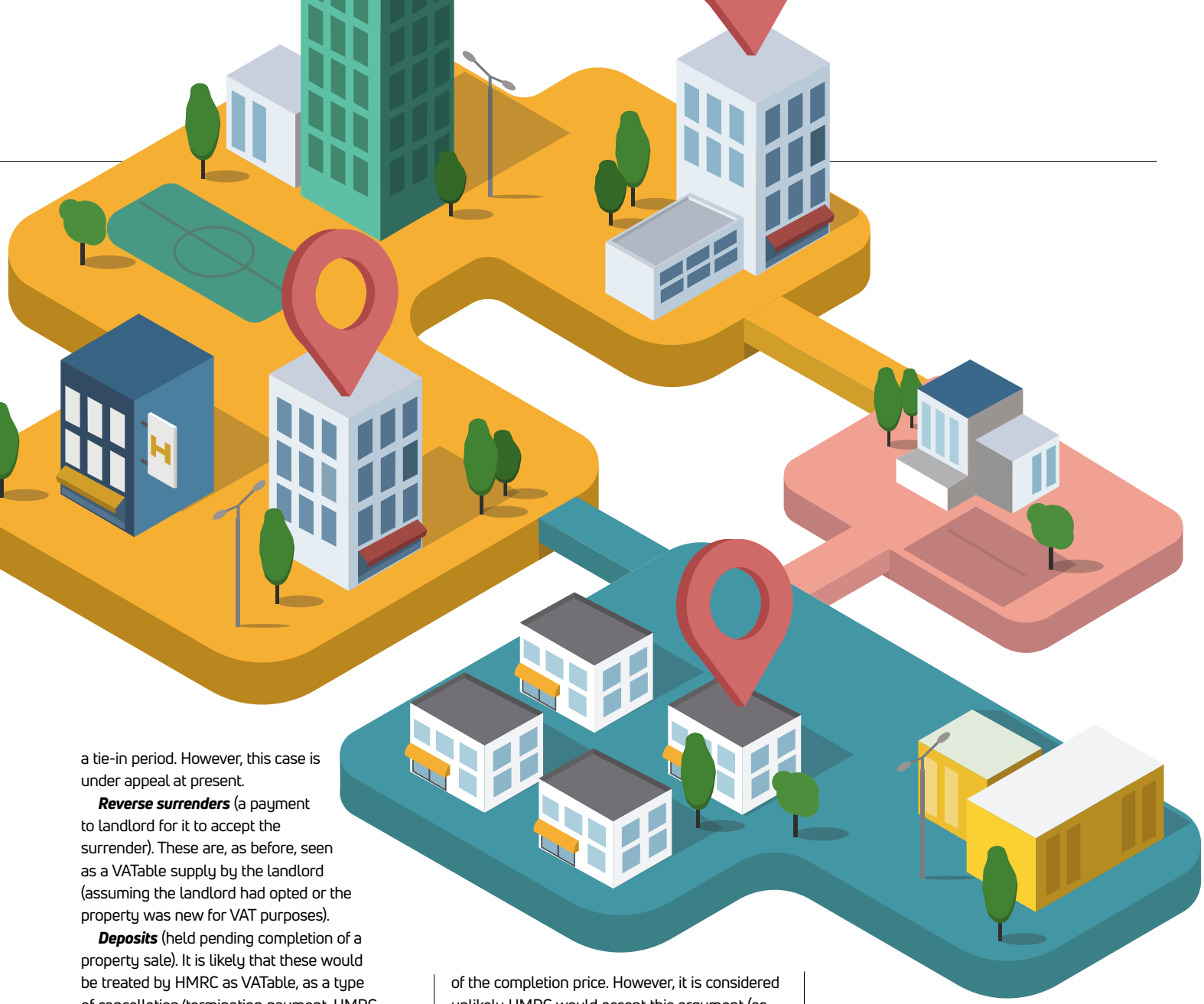
The new guidance only expressly covers dilapidation payments. We have set out below what we consider to be the likely position HMRC would take, based on the principles behind the new policy.

Dilapidation payments at the end of a lease. These are outside the scope of VAT (unless linked to lower rentals, which would be difficult to establish). HMRC accepts such payments are for damage to the property "rather than for use of the premises and would be beyond what the landlord agreed the tenant could use the premises for". Note that VAT Notice 742 has not been updated with any qualification around lower rentals. If HMRC intends this qualification to be a serious consideration, it would be useful for there to be a link from VAT Notice 742 to this new guidance, as many property lawyers may only look to that notice.

Break rights. These will be VATable (assuming the landlord has opted to tax the property). Previously, this would have been considered outside the scope if a break clause was included in the lease[1]. Now, HMRC would likely consider the payment to the landlord to be part of the overall payments for the supply of the premises and so subject to VAT if the rent was. It is possible that an alternative argument could be made if there were no correlation between the break right payment amount and the landlord's expected return, but it is unlikely HMRC would accept this.

The case of *Ventgrove v Kuhne & Nagel* [2021] CSOH 129, a Court of Session case, provides some support for an argument here. It was decided in late December 2021 while HMRC was in limbo over its (suspended) 2020 RCB. The case involved a lease at the end of its minimum period and a sum had been paid to the landlord, in accordance with the lease's terms, to end it. The question was whether the lease had been validly terminated and this turned on whether VAT was due on that payment (because if so it would also have been required to be paid to the landlord in order to terminate the lease).

The court held VAT had not been due; it noted that HMRC had not (given the suspension of the RCB) changed its policy that VAT was not due where a break right was built into the lease, nor had there been any relevant case law deciding otherwise. The court noted (at para 21) that the two EU cases relating to compensation for termination/cancellation of minimum term phone contracts (which had precipitated HMRC's RCB) were not directly in point; here, the minimum term in the lease had been exceeded, the rent did "not correspond to the amount of rent that the landlord would have received had the lease run for its full term of 10 years", nor was this a payment of an amount calculated by reference to costs for the supplier of a failure to comply with



a tie-in period. However, this case is under appeal at present.

Reverse surrenders (a payment to landlord for it to accept the surrender). These are, as before, seen as a VATable supply by the landlord (assuming the landlord had opted or the property was new for VAT purposes).

Deposits (held pending completion of a property sale). It is likely that these would be treated by HMRC as VATable, as a type of cancellation/termination payment. HMRC announced a change of position on deposits for "no shows" (e.g. where a hotel room is booked but the individual does not use it and the supplier retains payment made in advance), with effect from 1 March 2019 (RCB 13/18). Prior to that, these were treated as compensation so outside the scope.

The alternative argument to the position HMRC would likely take is that the forfeiture of a deposit is a payment to discourage default rather than to compensate a supplier for lost income, meaning it should not be classed as VATable. A distinction that can be made in the case of a deposit, as opposed to other termination payments, is that there is no other supply made to which the deposit can be linked. A distinction could also be made between "no show" payments (e.g. where the price of a stay in a hotel room is forfeited) and deposits on a property sale – a would-be property purchaser is promising to perform an agreement to buy a property and the deposit acts as a disincentive to fail to perform (i.e. a penalty), which is different to paying for goods or services which you then choose not to use. In retaining the deposit on a property sale, the would-be supplier is not ensuring they get a certain economic return on a supply – this can be seen in the fact that the deposit is only a fraction of the completion price. However, it is considered unlikely HMRC would accept this argument (as it effectively rejected this in its 2019 change regarding "no shows").

Practical tips

Clarity and (where necessary) apportionment. As always with VAT, it will be important to document *how much* is being paid and *for what*. This will be especially important in property situations where a tenant is unable to recover VAT charged to it. For example, we know that HMRC has accepted that dilapidations payments (generally) continue to be outside the scope of VAT. However, other payments such as break payments may not be. For a tenant exiting a lease, this means it will be important that it documents the amounts paid to its landlord and what each element is paid for, and resists calls to simply pay one lump sum which does not identify the various components that lie behind it. Without a reasonable apportionment, the risk is HMRC will seek VAT on the entire amount.

Deposits. On a contract being entered into and a deposit collected, the VAT amount on the deposit should be collected and held too (by, usually, the stakeholder). If the sale fails to complete, the would-be seller will be required to issue a VAT invoice to the would-be buyer for the forfeited deposit, and to account for the VAT in their next VAT return. Previously, VAT would have been requested with a deposit in most cases anyway (on the basis that the transaction itself was expected to be VATable when it completed), but there may have been cases where it was not collected until the transaction completed. Now in these instances, if the outcome is forfeiture of a deposit there will be a need to charge VAT (at least if following the likely HMRC view outlined above), and collecting this from the (no-longer) purchaser may prove more difficult than it would have been at the time the deposit was paid; it would be wise to collect it upfront.

Contracts. Consider VAT provisions in new contracts (and existing ones before making any new types of payments) – suppliers should ensure they have an ability to charge VAT to the customer (and not end up funding the VAT themselves). Any drafted on a "VAT inclusive" basis or silent on VAT will not allow this.

[1] HMRC's previous policy that if a break clause had been included in the lease, the payment under it was not VATable, was recorded in the arguments in *Lloyds Bank plc* (LON/95/2525). In *Lloyds*, no break clause had been included in the lease so HMRC argued, successfully, that VAT was due (as the landlord had opted) on the grant of the right to break.

Beyond the day job

The immediate Past President of SOLAR, and legal manager with Perth & Kinross Council, talks about the two roles and the rapid changes of recent times

In-house

GEOFF FOGG, PERTH & KINROSS COUNCIL AND PAST PRESIDENT, SOLAR

Tell us about your career path to date?

I started at Perth & Kinross District Council in 1987 and then transferred to the unitary Perth & Kinross Council in 1996. My intention had been to stay for about three years, but counting has never been my strength. I gradually realised and appreciated the terrific variety of work and the opportunities available. I also appreciated working for client services, the established relationships that allowed, and working closely with colleagues across different professions and disciplines. I became a legal manager in 2005 and I was given a wider remit in 2017.

You've recently stepped down as President of SOLAR. How did you first become involved?

SOLAR is the Society of Local Authority Lawyers & Administrators in Scotland. It has existed in its present form since the current local authority structure was introduced in 1996. Every Scottish council is a member, as are some other public sector bodies and partner organisations. SOLAR has around 10 different specialist groups and an executive committee.

I first became involved shortly before major reforms to the Town and Country Planning (Scotland) Act were passed in 2006. Meeting SOLAR colleagues to discuss common concerns about those changes and learning from them was of tremendous help. I then became co-chair of SOLAR's Planning Group and held that post for about 10 years.

What were your priority areas of focus as SOLAR President?

In addition to the President's post, we have both junior vice president and senior vice president's posts. This provides a good opportunity to understand what the President's role will entail. You won't be surprised to hear that in April 2019 I hadn't foreseen the global pandemic arriving the following year. Then in March 2020 I cleared out of my office in a hurry for what I thought would be a four to six-week stint at home. As our understanding of the pandemic changed, so did the priorities.

Over the past two years, my priorities for SOLAR were much like those in our council's legal services and those of my own team: what were our immediate priorities? How could we continue delivering services effectively? Was the legal framework adequate? And so forth. At the same time, most people were working remotely, sometimes in challenging circumstances. It was important to provide an opportunity for colleagues across the country to share concerns and experiences.

Much of the work in my year was reactive. Unfortunately, I did not have the normal challenge for a SOLAR President of organising an end of year conference, but we hope this will resume next year.

How important is it to find time to look beyond the busy "day job"? What sort of areas would you encourage in-house solicitors to get involved in?

I would say it's important. Despite some media portrayals, it seems to me that most committees and voluntary organisations are delighted to have a solicitor or two in their ranks. Many of us are familiar with assessing constitution documents and other governance arrangements; we have some familiarity with data protection and the role of OSCR. Working for clubs and the third sector can be hugely rewarding either as a complete change to one's day job or because it does link back to the day job. I won't direct further: most of us have hobbies, or encounter causes or receive requests from time to time.

But I also realise that with a day job, families, carer commitments, or other responsibilities, additional undertakings aren't always possible and that's okay too.

What was your main driver for working in the public sector and the areas of practice that you have concentrated on?

As I've mentioned, the main driver for me was the quality and variety of the work and the opportunities it has given me. I have worked in several areas, for example litigation, as a clerk in the former district court and in employment law. Over the past 20 years I have been particularly involved in the council's role as planning authority. That used to mean participating in planning inquiries, but they are less common now. It has given me more than a few trips to Parliament House and it has been a privilege working with some excellent members of the Scottish bar along with Edinburgh agents over the years.

How have you and your team changed the way you work in recent years? What have the successes and challenges been?

One of the biggest changes must have been the move to more digital-based working. That was crucial in adapting so quickly to enforced remote working and must be considered a success. Now we are moving to hybrid working and establishing just what this means and considering the different challenges associated with this.

World news can be relentlessly hard to take in at the moment and this can be a great source of anxiety. Do you have any thoughts on how lawyers can look after their own mental and emotional wellbeing?

That's such an important question that I am cautious in responding to it. The protection of mental and emotional wellbeing is not an optional extra. Many years ago, I worked on a case with a brilliant employment lawyer who told me he'd learned far more from his unsuccessful cases than from those he had

"The necessity for remote working because of COVID meant that technological opportunities have had to be seized"

won. He was absolutely right but, equally, those successes should not be dismissed too quickly either, nor any of the more mundane day-to-day achievements.

It is now more accepted that people should be able to reach out for help, and that it is a strength and not a weakness to do so. But I suspect there is still more to be done on that front. We see excellent work carried out by our colleagues or external partners most weeks; it's not wrong to share that observation, whether directly with them, with their manager or both. A supportive environment is vital for mental and emotional wellbeing and we all have a part to play in achieving this.

What are the key challenges for in-house teams? How does the future look for in-house lawyers?

Key challenges must be in matching or exceeding the expectations of client services, usually with limited staff and time. Their expectations can be high and may need to be managed and priorities agreed. We operate across such a range of areas and in areas of constant change, a challenge which is obviously not confined to the in-house lawyer.

Despite increasing budgetary pressures, I think the future for in-house lawyers looks good. We are a sizeable proportion of the profession in Scotland, and I think there is now a better understanding of the in-house and public and private sector roles. I am grateful to all those who have worked, and who continue to work on the Society's In-house Lawyers' Committee and otherwise supported the work of the Society which has helped strengthen our profile and fostered that understanding.

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

I mentioned recently to a trainee that I was admitted shortly after the introduction of the Sasine Register in Scotland – and then worried that this had been accepted without question. When I acquired a practising certificate in 1987 we were respected as a profession – and we still are. Clients needed assistance then and they do now. I suspect the level of trust across all professions has reduced over time though.

Although there are many constants, the amount of change has been enormous. We have seen both criminal and civil legal aid budgets restricted to a dreadful degree over the past 20 years. This does not affect my own work directly, but it is still a cause of concern. Otherwise, those short respite periods enjoyed while letters or internal memos were delivered ended as instantaneous electronic communication arrived. On a positive note, the necessity for remote working because of COVID meant that technological opportunities have had to be seized. A colleague has just secured a warrant from a sheriff through Webex, without leaving her desk. The sheriff was isolating because he had COVID and was working from home. This is unremarkable now, but it would have been astonishing just over two years ago.

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

I'd have to know the form of in-house career, as my experience is limited to the public sector and a local authority. If it was in my sector, I would strongly encourage them. I might say that when I began I would occasionally be asked why I was working in-house, but now private sector practitioners are more likely to ask if there is an opportunity for them to join me.

A good in-house lawyer? I do think it helps if you have a commitment to the public sector and a desire to make a difference.

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

That's easy – I want both! There is a lot of knowledge held in-house and when it comes to delivering training for non-solicitor colleagues, we know them well, the challenges they face, and we can tailor their training around this. But I would not want to be without access to private practice expertise either. At times there is a need for either the greater specialisation or expertise which private practices may possess.

What is your most unusual/amusing work experience?

You've stumped me here. I wonder if I have confronted the unusual so often that I am no longer sure what it is? Fortunately, there is still a lot of fun had and amusing experiences encountered. I'm not sure I can recall the most amusing now, but it is also possible that I'd better not recall it!

Finally, what do you love about your role, and what do you love doing when the working day is done?

I do love the diversity of the issues to be covered in any one week, the challenges they present and the people I work with to accomplish this.

When the day is done, although my childminding days have long since passed, I seem to have switched to child's dog-minding days. Short walks with him are a great part of the logging off process!

Paisley snail lives on

Ninety years on from the House of Lords decision in *Donoghue v Stevenson*, the Society is hosting "The Immortal Snail" conference on 26 May 2022 (online) to mark the celebrated ruling, which laid the foundation of the modern law of negligence in common law jurisdictions across the world.

More than 30 speakers representing over 15 jurisdictions from Australia to Zimbabwe will discuss the case of the "Paisley snail" and its impact.

As an added bonus, the Society has partnered with Paisley-based drinks company Buddies Gin, which has produced a limited-edition *Donoghue v Stevenson* bottle of gin to celebrate the anniversary. These are available to order.

You can see the full conference programme and sign up to attend at www.lawscot.org.uk/immortalsnail

SLCC to review letters following appeal

The Scottish Legal Complaints Commission has promised to implement changes to its communications after the Court of Session allowed an appeal against a final determination by the SLCC.

Three judges held ([2022] CSIH 22) that Beltrami & Co, which had been subjected to a lengthy list of complaints from a client, none of which were upheld, should have had an opportunity to make further representations before the determination, departing from the recommendation of the SLCC's investigating officer, that one aspect of the firm's response to the complaints amounted to inadequate professional services.

Advising the firm that the client did not accept the investigating officer's proposed settlement, the SLCC's letter stated: "If there is any new information which you have not yet provided please do so within the next 21 days, otherwise it may not be taken into account."

The court held that in terms of the statutory procedure, either party must have an opportunity to make representations to the determination committee on the findings or recommendations in the investigation, when its views were challenged. That was "something quite different" from the opportunity to provide new or further information.

In a statement, the SLCC said it "respects what is said in the opinion and welcomes the clarity from the court on these matters. We will swiftly implement the changes required in line with this decision".

Registration details change

The Society's Registrar team has changed its name to Member Registration to better reflect the team's role and duties. The new email address for contacting the team about queries related to practising certificate renewal, the SLCC levy and all other registration matters is member.registration@lawscot.org.uk

The new details will show when the team contacts members this month in relation to the SLCC levy for 2022-23. Please update your records with the new contact details. Members may also wish to ensure the new email address is whitelisted by their IT support to ensure they continue to receive emails.

Eleven members returned to Council

Five new members will join the Law Society of Scotland's Council following this year's call for nominations.

In Glasgow, new members Amna Ashraf, Beatrice Nicholas and Jean-Paul Kasasula will join returning members Austin Lafferty and David Mair.

Two new members, Jaclyn Robertson and Ross Taylor, will represent solicitors in Cupar, Dunfermline & Kirkcaldy.

Euan Mitchell returns to represent solicitors in the Perth constituency, while Peter Walsh will continue as member for Greenock, Kilmarnock & Paisley.

Sheekha Saha and Vlad Valiente have been reappointed as joint conveners of the Society's In-house Lawyers' Committee.

Each of these members will serve a three-year term from 1 June 2022.

SYLA AGM takes place on 26 May

The Scottish Young Lawyers' Association annual general meeting will take place on Thursday 26 May 2022 at 6.30pm. The meeting will be held both in-person, at Shepherd & Wedderburn's Edinburgh office and virtually via Zoom. Attendees should sign up in advance via Eventbrite.

The AGM will elect a new committee for 2022-23. Members wishing to stand for election should submit an application to mail@syla.co.uk by 20 May 2022, along with completed nomination form. For full details see the online news for 4 May.

SYLA welcomes members from all areas of Scotland, from any background and at any level.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key areas from the last few weeks are highlighted below. For more information see the Society's research and policy web pages.

Scottish Mental Health Law Review

The Society is considering the Review's consultation paper, which seeks views on proposals for changes to mental health and incapacity legislation. The Review is due to provide a final report to ministers by the end of September 2022.

The proposed recommendations could lead to fundamental changes to mental health and incapacity law in Scotland. Members with an interest or working in these areas of practice may want to respond to the consultation, or provide views to policy@lawscot.org.uk. The consultation closes on 27 May 2022.

National and local planning

Following its response to the Scottish Parliament's inquiry on the draft National Planning Framework 4 ("NPF4"), reported at Journal, February 2022, 40, the Planning Law Committee submitted a fuller response to the Scottish Government's consultation as well as a response to the consultation on local development plan ("LDP") regulations and guidance.

The responses highlighted the need for greater clarity as to the status of the various aspects of NPF4 as forming part of the development plan, and noted that the uncertainties meant that the LDP proposals could not be assessed in full. There also remains uncertainty as to the interaction between the NPF and LDPs.

The LDP consultation response noted that it is important that the regulations contain sufficient information to provide certainty and clarity in the law, in particular the regulatory framework for new LDPs. It also highlighted the importance of consistency between the content of the guidance and the regulations. The draft regulations lack clarity and detail, and the response particularly highlighted concerns in relation to the Evidence Report and Gatecheck procedures.

Find out more online.

Heritable securities: default

The Society responded to the Scottish Law Commission *Discussion Paper on Heritable Securities: Default and Post-Default*. It supported the majority of the proposals.

It was noted that it may be unnecessary for security holders to be subject to a duty to conform with reasonable standards of commercial practice when exercising a standard security, as they are already subject to various requirements and it seems unlikely that creditors would act in a manner which might lead to devaluation of the security property.

The proposed simplification by getting rid of the distinction between calling up and default notices was welcomed, and the response noted that there would be merit in the form of the default notice being prescribed by legislation. It commented on the arrangements for service, including in relation to service on trustees and where a person's address is unknown.

Read the full response online.

Online Safety Bill

The Society published a briefing on the bill in advance of its second reading in the House of Commons. The bill establishes a new regime to address illegal and harmful content online with Ofcom as the online safety regulator. It also imposes legal requirements on providers of internet services and search engines.

The briefing noted that action is needed to address online harms and recognised that this is a complex task, given the need to balance the interests of various groups, protect freedom of expression and ensure that citizens, particularly children or other vulnerable users, can use the internet safely. Online harm is widespread, and in the longer term international cooperation is likely to prove more efficient than any single country's initiative.

Several new offences would apply to Scotland, for example in connection with information notices. The briefing highlighted the importance of an awareness raising campaign for the public and for operators.

While the bill seeks to provide specific protections for those vulnerable due to their young age, the briefing noted that these are not extended to other potentially vulnerable groups including those with mental and intellectual disabilities. It also noted the need for the regulator's functions and duties to be properly and adequately coordinated with those of other bodies and entities that have relevant roles.

Convention on International Mediation

The Society submitted a response to the Ministry of Justice consultation on whether the UK should become party to the Singapore Convention on International Mediation 2018 and implement it in UK domestic law.

This UN Convention is a private international law agreement which establishes a uniform framework for the effective recognition and enforcement of mediated settlement agreements across borders. It provides a process whereby someone seeking to rely on a mediated settlement agreement can apply directly to the competent authority of a party to the Convention to enforce the agreement. Only in limited circumstances can the relevant authority refuse to do so (such as the agreement being void or having been subsequently amended).

On balance the Society agrees that the UK should accede to the Convention. Read the full response online.

Sheriff Appeal Court changes

Sheriff Principal Marysia Lewis of Tayside, Central & Fife has been appointed President of the Sheriff Appeal Court, following the retirement of Sheriff Principal Mhairi Stephen, the court's first President. Sheriff Principal Craig Turnbull has become Vice President on the retirement of Sheriff Principal Duncan Murray.

Sheriff Principal Lewis was formerly a partner with Ledingham Chalmers LLP; Sheriff Principal Turnbull served a term as managing partner of MacRoberts.

Sheriff Nigel Ross has been appointed Sheriff Principal of Lothian & Borders.

John Scott QC among new senators

Solicitor advocate John Scott QC is one of five new judges joining the Court of Session and High Court bench from 16 May 2022, along with Sheriff Lorna Drummond QC, Jonathan Lake QC, Michael Stuart QC and Andrew Young.

Advocates in Aberdeen

Duncan Love, a partner with James & George Collie, has been elected President of the Society of Advocates in Aberdeen, succeeding Ken MacDonald of Brodies. Martin Sinclair of Mackinnons and Neil Smith of Burness Paull have become vice presidents.

Notifications

ENTRANCE CERTIFICATES ISSUED DURING MARCH/APRIL 2022

CAPON, Rebecca Margaret Linda
EMMERSON, Amy
HENDERSON, Kate Louise
MACLEAN, Molly Anne
MARTIN, Chevaughn Caitlin
MITCHELL, Claire Louise
NEWMAN, Nicole
SHEARER, Gemma Alison
SMITH, Eilidh Jane
TRAVERS, Eve-Anne
YOUSAF, Raza Jan Tahir

APPLICATIONS FOR ADMISSION MARCH/APRIL 2022

AHMED, Justine Jamie Anne
ALDERSON, Emma Katherine
ANDERSON, Katherine Elspeth
ANDERSON, Samantha
BALNIONYTE, Agne
BRUCE, Kirsten Jessica Eleanor
CARTER, Kirsty Katie-Morag
CLARK, Kirstin Eilidh
COUTTS, Rebekah Usha
CRAWFORD, Chloe Hope
DENHEEN, Olivia Jane
GARDINER, Sophie Victoria
GARLAND, Iona Eilidh
GHUMRO, Imtiaz Ahmed
GRAY, Michael Sutherland
GREEN, Gillian Maureen
GRIFFIN, Laoibhse
HANNON, Patrick Thomas
LAL, Priya Javed
McANAW, Matthew John
McDONALD, Laura Angela Jamieson
MARSHALL, Georgia Jessica
MICHIE, Gavin James
MILLER, Corrin Frances
MUIR, Annabelle Ross
PENNIE, Fraser Kenneth
RICHMOND, Andrew
TIGHE, Lauren Catherine
WATSON, Kirsty
WUERSCH, Anne Seraphine

In practice

ACCREDITED SPECIALISTS (JANUARY-APRIL 2022)

Arbitration law
Re-accredited: SHONA McNAE FRAME, CMS Cameron McKenna Nabarro Olswang LLP (accredited 1 February 2012).

Child law
CLAIRE DONNELLY, Lanarkshire Law Practice Ltd (accredited 21 February 2022); LYNSEY BROWN, Harper Macleod, DONNA McKAY, Brodies LLP (both accredited 8 March 2022).
Re-accredited: AMANDA ELIZABETH MASSON, Harper Macleod LLP (accredited 15 December 2012); LYNNE COLLINGHAM, TC Young LLP (accredited 15 December 2016); LISA ANNE IRVINE GIRDWOOD, Brodies LLP (accredited 26 January 2017); MARISA ANNE CULLEN, Family Law Matters Scotland LLP (accredited 24 March 2017).

Commercial leasing law
CHRISTOPHER ALEXANDER NOBLE, Harper Macleod LLP (accredited 22 February 2022); ANNE CAMPBELL McGREGOR, Anderson Strathern LLP (accredited 17 March 2022).

Commercial mediation
RACHAEL LOUISE BICKNELL, Squaring Circles (accredited 26 April 2022).
Re-accredited: PAUL KIRKWOOD (accredited 20 December 2018).

Construction law
CLAIRE RICE, Brodies LLP (accredited 12 January 2022); FRASER HOPKINS, BTO Solicitors LLP (accredited 22 February 2022); ANDREW JOHN LITTLE, Burness Paull LLP (accredited 25 February 2022); LAURA JANE WEST, CMS Cameron McKenna Nabarro Olswang LLP (accredited 29 March 2022); KATHRYN MARGARET MOFFETT, CMS Cameron McKenna Nabarro Olswang LLP (accredited 8 April 2022); KATHLEEN McGRATH, Construction Legal Services Ltd (accredited 13 April 2022).
Re-accredited: ANNE CHRISTINA STRUCKMEIER, Addleshaw Goddard LLP (accredited 15 November 2011); LOUISE SHIELS, Brodies LLP (accredited 22 February 2012); ANDREW DAVID PYKA PHILIP, Scottish Power Ltd (accredited 23 May 2012).

Debt and asset recovery
DEBBIE MORAG BROGAN, Morton Fraser LLP (accredited 22 March 2022).

Discrimination law
Re-accredited: STEPHEN CHARLES MILLER, Clyde & Co (Scotland) LLP (accredited 1 February 2007).

Employment law
EWAN STAFFORD, Harper Macleod LLP (accredited 6 January 2022); PAMAN VEER SINGH SUMAL, Law at Work Ltd, ROBIN JONATHAN FIDLER TURNBULL, Anderson Strathern LLP (both accredited 12 January 2022); ELISE JEAN TURNER, Morton Fraser LLP (accredited 26 April 2022).
Re-accredited: GILES IAN WOOLFSON, McGrade & Co Ltd (accredited 13 January 2012); GINA MARY WILSON, Kellogg Brown & Root (UK) Ltd (accredited 25 January 2012); GEOFFREY ALAN CLARK, Burness Paull LLP (accredited 24 April 2012); BRIAN JAMES CAMPBELL, Brodies LLP (accredited 26 January 2017).

Family law
NICOLA JEAN BUCHANAN, Scullion Law Ltd (accredited 25 January 2022); SANDI MARIE ANNE SHIELDS, Colledge & Shields LLP (accredited 31 January 2022); LAURA McLEAN, Harper Macleod LLP (accredited 21 February 2022); ELLEN CROFTS, Morton Fraser LLP (accredited 2 March 2022); LYNSEY BROWN, Harper Macleod LLP (accredited 8 March 2022); PENELOPE ELIZABETH GALLOWAY, Elizabeth Welsh Family Law Practice (accredited 11 March 2022); FAYE LOUISE DONALD, Raeburn Christie Clark & Wallace LLP (accredited 17 March 2022); Dr CATHERINE DIANNE MILLEN, Watermans Legal Ltd, ELAINE MARY PROUDFOOT, Turcan Connell (both accredited 4 April 2022); FIONA LYNNE COUTTS, Raeburn Christie Clark & Wallace LLP (accredited 26 April 2022).
Re-accredited: SUSAN JANE WIGHTMAN, Kippen Campbell LLP (accredited 29 January 1997); JUDITH ANNE MEIL, Taggart Meil Mathers (accredited 24 January 2002); KAREN GAILEY, Family Law Matters Scotland LLP (accredited 15 February 2007); NICOS SCHOLARIOS, MSM Solicitors Ltd (accredited 12 March 2010); JENNIFER CHLOE SMITH, Harper Macleod LLP (accredited 12 January 2012); EWEN JOSEPH MACDONALD, Anderson Shaw & Gilbert Ltd (accredited 12 April 2012); LYNNE COLLINGHAM, TC Young LLP (accredited 13 January 2017).

Family mediation
RACHAEL EVALYN NOBLE, Brodies LLP (accredited 8 March 2022); SARAH ANN LILLEY, Brodies LLP, KAREN SANDRA WYLIE, Gibson Kerr Ltd (both accredited 11 March 2022); ANGELA PATRICIA WIPAT, Thorntons Law LLP (accredited 22 March 2022); LINDA ANN WALKER, Harper Macleod LLP (accredited 25 March 2022); JENNIFER QUINN, The PRG Partnership (accredited 26 April 2022).
Re-accredited: MORAG FRASER, Fraser Shepherd (accredited 7 July 1995); MARGARET JANE LANG, Russel + Aitken (Falkirk + Alloa) Ltd (accredited 7 July 1995); SHAUN ARTHUR GEORGE, Brodies LLP (accredited 21 January 2004); GERALD THOMAS McWILLIAMS, Cowan & Co (accredited 19 February 2004); SHONA HOUSTON SMITH, Balfour + Manson LLP (accredited 31 March 2016); LESLEY JANE GORDON, BTO Solicitors LLP (accredited 12 April 2016); CATHERINE MARY MONAGHAN, Moore & Partners LLP (accredited 18 October 2018); FIONA JANE CAMPBELL, Macleod & MacCallum Ltd (accredited 6 March 2019); FIONA JANET CAREY, Brophy Carey & Co Ltd (accredited 8 March 2019).

Housing and residential tenancy law
ALASTAIR WOOD McKENDRICK, TC Young LLP (accredited 25 April 2022).

Immigration law
CHIGBO HUMPHREY NDUBUISI, Drummond Miller LLP (accredited 31 January 2022).
Re-accredited: STUART ALISTAIR McWILLIAMS, Morton Fraser LLP (accredited 17 March 2017).

Intellectual property
THOMAS IFAN GWYN THOMAS, Harper Macleod LLP (accredited 6 April 2022).
Re-accredited: EUAN FINDLAY DUNCAN, MacRoberts LLP (accredited 10 February 2017).

Medical negligence
MICHAELA JILL GUTHRIE, Balfour + Manson LLP (accredited 1 February 2022); CAROLYN SOPHIE JACKSON, Balfour + Manson LLP (accredited 2 March 2022); SUSITH DILANKA DEMATAGODA, Peacock Johnston (accredited 21 March 2022); LORNA ALISON HALE, Drummond Miller LLP (accredited 22 March 2022).
Re-accredited: ROBERT EDWARD WILSON, Anderson Strathern LLP (accredited 22 December 2016).

Medical negligence (defender only)
Re-accredited: MORAG SHEPHERD, National Health Service Scotland (accredited 17 March 2017).

Personal injury law
CAITLYN MACCABE, Digby Brown LLP, JILLIAN CHESHIRE MACKENZIE, Thompsons (both accredited 1 March 2022); GARY ROSS, Digby Brown LLP (accredited 3 March 2022); MOHSEN SALEEM DIN, DAC Beachcroft Scotland LLP (accredited 8 March 2022); KATHLEEN-ERIN LAWSON, Thorntons Law LLP, EMMA THOMSON, Gildeas Ltd (both accredited 17 March 2022); STEPHANIE MARGARET WATSON, Thorntons Law LLP (accredited 23 March 2022); JUSTINE LIANNE REILLY, DWF LLP (accredited 12 April 2022); LAUREN JANE MARR FETTES, Thorntons Law LLP (accredited 13 April 2022).
Re-accredited: JULIE ELIZABETH HARRIS, Allan McDougall McQueen LLP (accredited 11 September 2006); DARRELL ELIZABETH KAYE, Digby Brown LLP (accredited 10 April 2012).

Professional negligence
LOUISE MARGARET KELSO, Brodies LLP (accredited 28 January 2022).

Regulation of professional conduct
JOHNSTON PETER CAMPBELL CLARK, Blackadders LLP (accredited 6 January 2022); ROBERT KING, Clyde & Co (Scotland) LLP (accredited 11 March 2022).

ACCREDITED PARALEGALS

Civil litigation – family law
SAMANTHA ROBERTSON, Scullion Law.

Civil litigation – reparation law
JILLIAN LAWSON, Thorntons Law LLP.

Residential conveyancing
SUSAN SHAND, Harper Macleod LLP; ARLENE RICHARDSON, Russel & Aitken LLP; STUART PETTIGREW, Lanarkshire Law Practice Ltd.

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RISK MANAGEMENT

Scope is the key

Recent leading decisions developing the "scope of duty principle" have made it all the more important to set out clearly the extent of your instructions, and any limitations on liability, in your letters of engagement

1. Risk management: ever more important

All solicitors in Scotland must complete a minimum of one hour compulsory risk management CPD. Particularly in the post-COVID-19 landscape and beyond, the risks which must be identified, understood and mitigated against are increasing in number and severity.

For many of us, monitoring and managing client risk is part of our day-to-day activities. We consider each course of action from every potential angle to ensure our client's position is protected at all times. But the importance of also doing your part to mitigate the risks to yourself and to your employer/firm cannot be overstated. Most professional indemnity claims and complaints arise not from legal mistakes, but from poor risk management and administration.

In recent years, a number of landmark cases on the scope of a professional's duty to their client have had (and will continue to have) repercussions across the profession. This has made it more important than ever to consider how risks can be avoided or mitigated by more careful consideration before issuing letters of engagement.

2. The developing law on scope of duty

Those practising in the field of professional negligence claims will be familiar with *South Australia Asset Management Corp v York Montague Ltd* (popularly known as "*SAAMCo*"). For almost 24 years, *SAAMCo* has been the leading authority on the "scope of duty principle", i.e. the principle that, for damages to be recoverable for negligence, there must be a link between the loss suffered by a client and the scope of the duties owed to them by the (allegedly) negligent party.

Many have struggled to condense the *SAAMCo* principle into a universal statement of law, and its application has, at times, been difficult to predict. After two and a half challenging decades of *SAAMCo*, the true importance of the scope of a professional's duties was reconsidered by the Supreme Court in *Manchester Building Society v Grant Thornton LLP* ("*MBS*"). The court cast aside the "information" versus "advice" distinction, which had previously been used to distinguish between cases where a professional was responsible for an entire course of action and ones where they were responsible only for losses related to the particular information provided. Instead, the Supreme Court reiterated that the focus had to be on precisely identifying the matters for which the professional had assumed responsibility.

This landmark case from 2021 revamped the *SAAMCo* principle by placing it into a newly expressed six-part test for determining liability for negligence:

1. Is the loss or damage actionable in negligence?
2. What are the risks to the client against which the defender has a duty of care? (the "scope of duty" question)
3. Did the defender breach their duty of care?
4. Is the loss for which damages are sought the consequence of the defender's negligence?
5. Is there a sufficient nexus between the particular element of the loss for which damages are sought and the scope of the defender's duty of care? (the "duty nexus" question)
6. Is any element of the loss too remote from the defender's negligence, or does it have another legal cause?

The scope of duty principle is embodied in parts 2 and 5 of the above test. This test applies to all forms of negligence, but in the context of professional negligence, part 2 requires the court to consider the relationship between the professional and their client and to consider exactly what risks the professional's advice was intended to protect against. Part 5 then requires consideration of whether a particular loss falls within the scope of that duty.

The impact of this decision is potentially significant.

The ripples have already been felt as far away as Trinidad & Tobago, where earlier this year, in *Charles B Lawrence & Associates v Intercommercial Bank Ltd*, the Privy Council applied *MBS* to restrict the losses recoverable by a lending institution to those which fell within the restricted scope of the professional adviser's duty of care – $625,000 of a potential transaction value of $15 million. It must be noted, however, that this case would likely have been decided in the same way under the original principles set out in *SAAMCo*.

These recent developments highlight the importance to the profession of carefully considering the purpose of your instruction and ensuring that is clearly documented for posterity.

3. How do letters of engagement help manage the risk?

Professional obligations

In practical terms, all solicitors in Scotland must consider whether they are obliged to comply with practice rule B4.2 by issuing terms of business providing their client with various items of required information, including an outline of the work to be carried out. At a minimum this will ensure compliance with regulatory requirements, but a carefully drafted letter of engagement can have other significant benefits.

Terms and conditions (disputes, payment of fees)

Ensuring a robust letter of engagement is issued can protect you and your firm from future claims and disputes. Clearly defined fee arrangements and payment policies can also serve as a useful point of reference in the unfortunate event that relations sour.

All standard terms and conditions should be reviewed to ensure they remain appropriate and fit for purpose, particularly as regards recent legislative changes (think GDPR) and in light of the changing world of work (think two years of pandemic-imposed remote working!).

Lockton has produced a guide to letters of engagement, available at www.locktonlaw.scot/news/letters-of-engagement-guide.html, so consider also reviewing the terms of your letter of engagement against that.

Importantly, give consideration to whether your letter of engagement can limit financial exposure in the event of a claim. Practice managers ought to ensure any limit of liability is assessed with reference to the terms of insurance cover available and that advice is taken on agreeing any non-standard caps on liability.

Limit scope

There are lessons to be learned from *MBS* and similar cases in terms of explicitly stating exactly what work will and will not be carried

out, and under what circumstances, in the course of providing legal services to your client.

The key starting point is to establish in clear terms what you are undertaking to do for your client. Thereafter, work out what is *not* intended to be included within your instructions. These elements are the foundation of assessing the scope of your duty of care to your client.

Consider, in particular, whether there is a risk that it might be argued you were obliged to warn your client about certain risks or issues which are beyond the nature of the work actually being undertaken. If so, think about expressly excluding advice on such areas from the scope of the services being provided. A common example of this might be an express exclusion of advice about the tax consequences of a transaction.

Any limitations on and exclusions of liability should be expressly set out in the letter of engagement in clear and explicit terms. Ambiguous terms are likely to be construed by the courts in favour of the weaker negotiating party (likely the client rather than the professional), so consistency with the limitation clauses and wider contract must be ensured. Terms and conditions must also be reasonable in all the circumstances (including the identity of your client and nature and extent of your relationship with them), to avoid falling foul of regulations on unfair contract terms.

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

Importantly, revisit your letter of engagement on a regular basis during the course of your instruction in order to avoid "mission creep". Ensure the terms of business you originally issued remain fit for purpose as the transaction or instruction develops. Keep meticulous and consistent records of all discussions around the scope of your work and ensure evidence of those discussions is put to your clients in writing wherever possible.

This article was authored for Lockton by **Rachael Jane Ruth** and **James Jerman** of Brodies

FROM THE ARCHIVES

50 years ago

From Editorial: "What is a Fair Fee?", May 1972: "There are many things wrong with the competitive fixing of fees. The first is that the purchaser of a relatively low-cost house may lose the hidden subsidy at present built into the scale of charges. The second is that it tends to start off the solicitor-client relationship on the wrong foot with each negotiating against the other... Finally, competition leads to the development of two unnecessary, and we suggest undesirable, attributes...; one, the need for the solicitor to 'sell' himself as an individual practitioner...; and two,... the fostering of an intensified commercial sense of fee-consciousness on the part of the solicitor."

25 years ago

From "Solicitors Surfing the Net", May 1997: "In the short term, solicitors must consider the benefits of using the Internet to sell property... why not open up the market by making the information available over the Internet? The technology is relatively straightforward and... would be a significant weapon in the fight against the major institutions who want to dominate the estate agency business... The Internet provides the opportunity for solicitors to tell the public about the job they do. It also provides an opportunity for us to market ourselves in such a way as to cast aside the traditional image. There is hope for us yet."

CONFERENCE

WCAC: Seize the moment

With just a few weeks to go, Scottish practitioners still have a chance to register for a global conference on their doorstep covering the law on adult capacity

After years of planning, and navigating the recent unexpected hazards, we are less than a month from realising Scotland's unprecedented honour of hosting the 7th World Congress on Adult Capacity (EICC, Edinburgh, 7-9 June 2022).

It is a unique opportunity for Scots lawyers across all areas of relevant practice to enjoy a major learning experience regarding rapidly evolving practice around some of the most fundamental demands and challenges made to the essence of being a lawyer: the challenge to deliver just and human rights-compliant outcomes to and for all people having (or planning for) any of the hugely varied impairments of their abilities to act and transact effectively, and to exercise and safeguard their rights as other citizens can, in a free and democratic society.

As well as developing best practice, you will learn about all that is happening in Scotland, and across the world, to develop laws providing a suitable framework within which to meet those challenges appropriately. Best practice shapes the law, and law shapes best practice.

Common agenda

Scotland joins countries worldwide in working to the unifying agenda set by the United Nations Convention on the Rights of Persons with Disabilities. The Convention requires the full rights and status of people with disabilities to be respected and made real for them, where possible adopting principles of "universal design" to meet their needs, and where necessary building in reasonable accommodations. Failure to do so falls within the Convention's definition of discrimination on grounds of disability. Convention obligations include ensuring that all disabled people receive all the support they need for the "exercise of their legal capacity", and that maximum empowerment is balanced by appropriate safeguards. Delivering these sometimes conflicting concepts is the daily challenge for practitioners across all legal systems.

A key element is to ensure full access to justice, entailing unhindered access to suitable lawyers who are enabled to spend the often considerable amounts of time needed to enable such clients to convey to a lawyer, by one means or another, what they want in a particular situation. To do less violates both the Disability Convention and the European Convention. As an indication of what may be needed, see for example *Scottish Borders Council v AB* [2019] SC JED 85; 2020 SLT (Sh Ct) 4, where the sheriff commended a disabled person's solicitor for spending time frequently over several months in order to ascertain adequately, and articulate to the court, the client's own experience, position and wishes. Expect to return from the Congress freshly enthused, and empowered absolutely to resist any placing of budgetary or management convenience ahead of meeting the basic human rights of people most in need of empowerment and protection by the law.

Full programme

At the levels of policy and law reform, John Scott QC, chair of the Scottish Mental Health Law Review (Lord Scott by the time of the conference), has a prominent role and will lead a presentation by the review team, just a fortnight after conclusion of its current major consultation. Similarly prominent figures are among around 140 plenary speakers and presenters from some 29 countries and five continents whom you will have the opportunity to hear and – importantly – to interact with during the Congress. People from across the globe are converging on Edinburgh for the additional opportunities to meet new and familiar faces in person, and to participate fully in the event.

The full programme of plenary and parallel sessions is on the Congress website www.wcac2022.org, though look out for any final adjustments. The parallel sessions are gathered under five main themes:

- law, policy and practice review and reform;
- achieving respect for the adult's rights, will, and preferences (with subdivisions on guardianship, supported decision-making, legal capacity, advance decision-making and other sub-themes);
- rights, ethics and law during national emergencies;
- research and ethics;
- monitoring, regulation, remedies and enforcement.

Headings however do not do justice to the wealth of information, research and leading-edge thinking on offer.

Society backing

Achieving funding has been a particular challenge for the organisers, with potential sponsors saying normally they would support such an event, but have frozen such activity in consequence of the uncertainties they themselves face. The current budget is nevertheless adequately funded; and that the Congress is happening at all is thanks in particular to two of its sponsors. At an early stage, and despite its own challenges, the Law Society of Scotland committed to major sponsorship and funded initial commitments to get the Congress "off the ground". Then UK Government provided most generous underwriting and, again, remitted sufficient to cover basic costs. Sponsorship opportunities however remain: go to "Sponsors & exhibitors" on the website.

However, the best support that all practising lawyers can give is to register to attend, and join us as hosts when "the world is coming to Edinburgh". Places still remain. To avoid disappointment, go now to the "Registration" link at the website quoted above. J

Adrian D Ward MBE,
President of the
Organising Committee
adrian@adward.co.uk

Clio®

Why switch to cloud-based legal practice management software?

The pandemic profoundly impacted the way law firms work. Face-to-face client meetings were replaced by video calls, office chats happened on messaging services instead of at the watercooler, and work took place at the kitchen table rather than the boardroom. What's the common thread in all these scenarios? Cloud-based software.

Cloud-based software can be a huge benefit to law firms of all sizes. Yet, some firms are still hesitant about moving away from a managed IT solution or switching from a server to a cloud-based solution.

If you're thinking about switching to a cloud-based solution but uncertain if it's the right choice for your firm, here are some benefits to keep in mind.

Flexibility

Switching to a cloud-based system over a managed service can help law firm staff to work more efficiently and with a greater work-life balance.

Working at a firm that uses on-premise servers often means staff can only work from one physical location. However, with cloud-based practice management software, staff can securely access systems through a secure web browser or a dedicated app, as nothing is stored on local computers or hard drives. That means everyone at your firm can access what they need from any laptop or phone wherever they are: at the office, at home, when commuting, or at court.

Security

Security is paramount for cloud-based legal software providers, meaning systems are constantly being monitored for potential vulnerabilities, while code is reviewed and updated accordingly to ensure that software is always up to date. Advanced security features ensure that suspicious activity is consistently monitored. For example, Clio logs every IP address and relies on multi-factor authentication to help keep its systems safe.

Costs and convenience

The overall cost of on-premise technology adds up – the servers themselves, office floor space, electricity, IT support, and maintenance. Conversely, cloud-based software doesn't require any of the costs associated with having a physical server. Additionally, as on-premise servers are in a physical location, uptime can be inconsistent and at risk of damage by flooding, power outages, and fire: costly if needed to be fixed in an emergency.

Finally, with cloud-based practice management software for law firms, varying levels of support are usually available free or at an additional cost. With Clio, we offer 24/5, award-winning support to all our customers via live phone, in-app chat or email at no additional cost.

For over a decade, Clio has been the global leader in fully cloud-based legal software. To see how Clio's cloud-based solutions can work for your firm, schedule a free demonstration at clio.com/uk/lawscot-cloud

ARBITRATION

Arbitration: Delivering together

As the Law Society of Scotland announces a new collaboration with the Chartered Institute of Arbitrators, the Society's Fiona Menzies reminds solicitors why ADR and arbitration should always be on their mind

"The right... to apply or not to apply the arbitration clause in its discretion never was the right of the court in Scotland. If the parties have contracted to arbitrate, to arbitration they must go." These words from Lord Dunedin in a 1922 judgment summarise arbitration in Scotland as perfectly now as they did when they were delivered.

All solicitors in Scotland have a duty to be aware of, and advise clients of, the ADR (alternative dispute resolution) options available to them. It is because of this, in the year that Scotland welcomes the ICCA (International Council for Commercial Arbitration) Congress – in Edinburgh from 18-21 September – and after two years of unprecedented pressure on our court system, that the Law Society of Scotland is working to highlight the use of ADR, including arbitration, mediation and adjudication, to our members.

The Arbitration (Scotland) Act 2010 means that Scotland has one of the most modern arbitration systems in the world. It is important that practitioners are able to utilise this where appropriate, and that Scotland as a jurisdiction positions itself as a venue for ADR, domestically and internationally. Arbitration, and other forms of ADR, can be a flexible alternative, and in Scotland it offers a confidential process, appealing to many. It has also been relatively quick to respond to the post-COVID world, with the introduction of virtual hearings and bespoke IT systems. It is used in more areas than you may think (although adjudication remains key in construction disputes). However, it is still underutilised and there is potential for further knowledge, use and increased reputation.

Support for members

Key to promoting arbitration under Scots law, increasing the number of arbitrations and appointments, and Scotland as a seat, is knowledge and interest from the profession here in Scotland.

Engagement in ADR and arbitration, along with domestic and international opportunities, has certainly increased with the promotion of ICCA and the many related events, and it is hoped that local solicitors will harness this for their practice and embrace the opportunities. The Society and other organisations must also capitalise on being at the centre of the arbitration world this autumn and what it can do for our jurisdiction.

We want to support our members in realising the opportunities, and so we are collaborating with the Chartered Institute of Arbitrators ("CIArb") to help promote the use of arbitration and other forms of ADR. We believe that one of the best ways in which we can promote its use, and raise awareness, is to provide high quality training to enable aspiring professionals to acquire the necessary skills and knowledge in this field.

CIArb offers recognised training to aspiring and established ADR professionals. It has a global network with a membership of more than 17,000 professionals operating in 150 jurisdictions through 42 branches.

Alongside this, the Society offers accredited specialisms in both arbitration law and as an approved solicitor arbitrator. Our accreditations recognise solicitors who develop specialist knowledge; they also help the public choose a solicitor with the necessary expertise, particularly in more complex cases. Accreditation acts as a hallmark of expertise that clients can trust, increasing your potential for fees and referrals and strengthening profiles.

Specialism opportunities

Brandon Malone, chair of the Society's accreditation panel, elaborates: "To qualify as an accredited specialist in arbitration, solicitors must demonstrate experience in and knowledge of arbitration. We recognise that there is not yet a huge amount of arbitration in Scotland, so we are sympathetic to applicants who can demonstrate experience in other forms of adjudicative alternative dispute resolution, such as expert determination and adjudication. Those solicitors who qualify for accredited specialist status are then eligible to apply to become an accredited solicitor arbitrator. Solicitor arbitrators are members of the Society's Arbitral Appointment Referee Arbitrators Panel and are eligible to be appointed as arbitrator by the Society. The President of the Society is often named as the appointing body in commercial contracts, and regularly appoints arbitrators.

"To be eligible for solicitor arbitrator status, accredited specialists can either demonstrate their experience by providing two (anonymised) awards that they have issued, or by demonstrating that they have passed the CIArb exams in award writing and have obtained Fellow (FCIArb) status."

The two professional bodies are therefore delighted that, between us, we provide a range of training, qualifications and accreditations from entry level learning opportunities through to CIArb diplomas and on to specialist accreditation by the Society, giving practitioners here in Scotland opportunities to get involved and further their skills at all levels.

Malone, who is also ICCA 2022 chair, adds: "An estimated 1,000 arbitration lawyers will converge on the Edinburgh International Conference Centre for the XXVth ICCA Congress, and the eyes of the arbitration world will be on Scotland. It is therefore an excellent time to get involved in Scottish arbitration."

Find out more information on ADR by visiting the Society's website.

Fiona Menzies, member engagement manager, Law Society of Scotland

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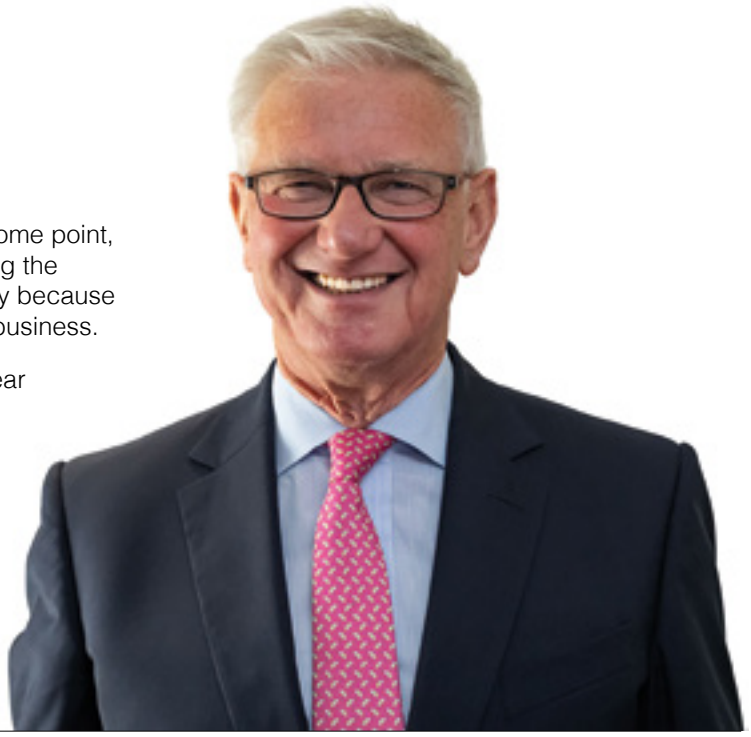

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ENVIRONMENT

Steps to turning green

Thinking about sustainability? Start by setting up a green team, Louise Farquhar advises in the first of a new quarterly series

As the climate emergency takes centre stage, employees and clients are putting a premium on sustainability. Firms have a professional duty to respond to the crisis, but those with strong environmental credentials also stand to gain a significant competitive advantage. Along with the cost-saving efficiencies born from increased sustainability, recent studies show employers fully engaged with sustainability attract and retain top industry talent. However, there is no place for greenwash. Sustainability must be embedded into the culture of a firm, with authenticity and genuine commitment.

People drive change, so the first step on any sustainability journey is the formation of an enthusiastic and empowered green team. This can take many forms, depending on the size and focus of the business, but is essentially a group of committed employees actively engaged in advancing sustainability in the workplace. The team will normally focus on operations and engagement, typically bringing forward and managing initiatives to lessen the environmental impact of day-to-day processes, as well as fostering an ethos of sustainability within the organisation.

Make no mistake – this is not an easy task. There are challenges on the path to sustainability, most notably creating a team of motivated people and maintaining their momentum. Here are some tips to get underway.

Build the team

Twelve is considered a maximum size for group functionality, as too many people can lead to difficulties in terms of discussions and decision making. Naturally, the formation of a green team will attract likeminded people interested in the environment, but diversity is the true key to success. A friendly recruitment email should aim to attract employees from across all departments, encouraging people who aren't necessarily knowledgeable about sustainability to take part. A keen interest is the most important qualification! For the green team to be truly effective, the support and direct input of senior management is critical. Having a partner on the team, for example, streamlines decision-making, enhances accountability and adds a relevant commercial slant to proceedings.

What about structure?

As with any team, good communication and collaboration are fundamental, so a comfortable approach within the group will yield optimum results. For most people, sustainability will be new territory, with brainstorming being a regular feature in meetings. Everyone is finding their way through the climate crisis, trying to discover the best route to take. With an openminded and organised leader at the helm, other members can take on specific roles if they have the expertise or are suitably motivated. Depending on working patterns, think about the most effective manner to meet, and take a hybrid approach if this is most suitable. Monthly meetings will keep everyone in touch and ensure tasks progress at a healthy pace, with subgroups coming together for specific projects if needed. Prepare agendas, track action points and remember to highlight achievements – being part of the green team should be fun and rewarding.

Find your starting point

Change always comes from a fixed point, so assessing where the workplace currently stands in terms of sustainable practice is the first undertaking for any green team. Benchmarking can take many forms: instructing an energy audit, waste assessment or supply chain appraisal are excellent places to begin. There are plenty of free online tools available to complete these evaluations. A carbon calculator can also be helpful to identify areas where the business is producing the highest emissions, with energy use and business travel being the most common offenders. Embarking on a more sustainable future is a worthy cause, and there is no judgment to pass on businesses that have few environmental positives *in situ* in the early stages. Don't be disheartened at the results of your initial findings – the point is to improve.

Stepping stones

Moving towards a more sustainable future can be daunting. To ease the transition, following on from the opening metrics, select the most obvious action points, bearing in mind that even the smallest steps can make a big difference. Choosing the most manageable areas to address will produce easy wins, boost morale within the team and encourage more sceptical colleagues to join in. Low hanging fruit is often found in energy consumption, recycling and printer use. Introducing reusable water bottles and keep-warm cups for staff is worth considering, as is shutting down all computers fully overnight. When the simpler options are realised, more ambitious plans can be identified and implemented, to engage fully with the crisis. And remember, sustainability is not solely about environmental protection: social justice is an integral facet of the concept. Aligning with a worthy community project will reap rewards for everyone involved and build meaningful relationships to last many years ahead.

Louise Farquhar is a lawyer and sustainability writer
www.louisefarquhar.com

ASK ASH

Right not to return?

How should I treat a colleague who never comes to the office?

Dear Ash,

Although the majority of my colleagues have resumed working partly from the office again following the pandemic, there are a number who have continued to resist coming into the office. I am beginning to resent having to make the effort to attend the office when some of the team are continuing to work online and are not making the effort to come in. One of my colleagues is now even asking me to print off papers and to hand these into her home on my way back from the office, and I'm starting to wonder why I'm bothering to comply with the hybrid working system when she has it so easy.

Ash replies:

Although I can appreciate that commuting to work may be raising certain challenges for some, it's also important to focus on the benefits of working from the office a few days in the week too.

On a personal level, I have found it enjoyable having the ability to again chat through ideas and issues with others in the office, and to go out to lunch with colleagues again too.

However, we have to recognise also that there are others who are still struggling with the idea of returning to such normalised working patterns again. Lockdown was forced on us and the repercussions are still being felt by some. Therefore it is important to have a certain degree of empathy for colleagues who have not been able as yet to return to the same pace of life.

Saying that, if you are noticing the increasing resentment towards colleagues choosing not to return to the office, even on a hybrid basis, then it is likely that management will also be reviewing matters.

I therefore suggest that you look to focus on the positives of your own working pattern; and if you don't feel able to deliver printed documentation to your colleague then just politely refuse. You are not obliged to go out of your way to deliver documents just because you are travelling to the office.

Send your queries to Ash

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

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

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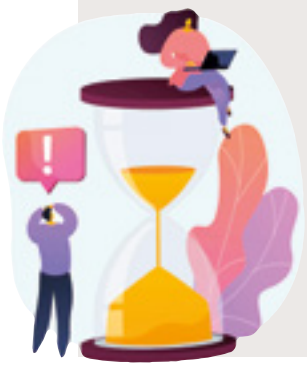
No charge for complaint handling

Terms of business should not seek payment for time spent



The Scottish Legal Complaints Commission asked for comment in a situation where a solicitor changed their terms of business letter. The addition stated that if a client complains to the SLCC, and the complaint is not upheld, the firm will pursue the complainer for the time spent in defending the complaint. This question was recently considered by the Professional Practice Committee and this is its response:

"The SLCC has raised a question as to whether it is appropriate in a terms of business letter to specify to clients that a solicitor proposes to charge for their time in dealing with a complaint which is not upheld. The question was considered by the Professional Practice Committee who agreed that it was inappropriate to charge for dealing with a complaint.

"The Professional Practice Committee is firmly of the view that there should be no provision made, in a terms of business letter or otherwise, to attempt to allow a solicitor's firm to charge a client for time spent dealing with a complaint. Whether a complaint is upheld or dismissed will not alter the Professional Practice Committee's position on this issue."

Julie Margaret Goldie
We should be grateful to hear if anyone holds or has knowledge of a Will by the late **Julie Margaret Goldie (Date of Death: 06 November 2021),** late of 8B Kintore Road, Glasgow, G43 2AX. If so, please contact Elizabeth J Coyle, Archer Coyle Solicitors, 513 Clarkston Road, Muirend, Glasgow, G44 3PN – telephone 0141 637 2434 – e-mail: elizabethcoyle@archercoyle.co.uk

Michael Henry Spence (Deceased)
Would anyone holding or with knowledge of a will by Michael Henry Spence latterly of Glengyle, 5 Argyll (otherwise Argyle) Street, Brechin, DD9 6JL (formerly of 2 Commercial Crescent, Ladybank, Fife) and who died on 27 March 2022 please contact Jennifer Gray at Murray Beith Murray (jennifer.gray@murraybeith.co.uk).

James Traynor Mooney - Deceased
Notice for missing Will of James Traynor Mooney late of 1/1, 416 Cumberland Street, Glasgow, G5 0SS who died on the 17th February 2022. Anyone knowing the whereabouts of his Will and/or any other Testamentary Dispositions made by him please contact Friends Legal Solicitors, 38 Queen Street, Glasgow, G1 3DX Telephone Number 0333 358 0683 referencing '626333E.001' as soon as possible.

Robert Pollock Crawford, Deceased
Would any person who has ever acted for the late Robert Pollock Crawford, who resided at Brackenhill Farm, Auchinleck, KA18 2LU, during his lifetime, and holds a Will, Titles or other documentation for the deceased, please contact Karen Stewart, Partner, Mackintosh & Wylie LLP, 23 The Foregate, Kilmarnock, KA1 1LE, Tel: 01563 525104, Email: kstewart@mackwylie.com

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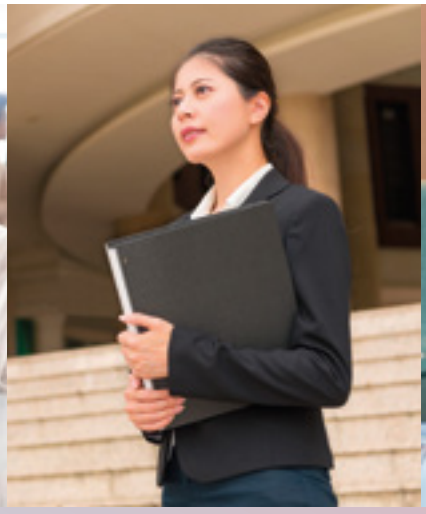

We have found that law firms are continuing to invest in senior level hires and we see this set to continue. A good firm will often create an opening for a prospective senior associate or partner of the right calibre who will help to grow its business or take it in a new direction. Our relationships at decision-making level ensures that we are able to present you to the appropriate people at the relevant firms at the right time.

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

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Edinburgh
Company Secretary (Assignment 13688)
Residential Property (Assignment 13305)

Edinburgh or Glasgow
Private Client (Assignment 13377)

Glasgow
Commercial Contracts (Assignment 13640)
Commercial Litigation (Assignment 13010)

Scotland (various locations)
Projects/Energy & Construction (Assignment 13315)
Corporate, Employment, Family Law,
Private Client & Real Estate (Assignment 12902)

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

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