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Journal

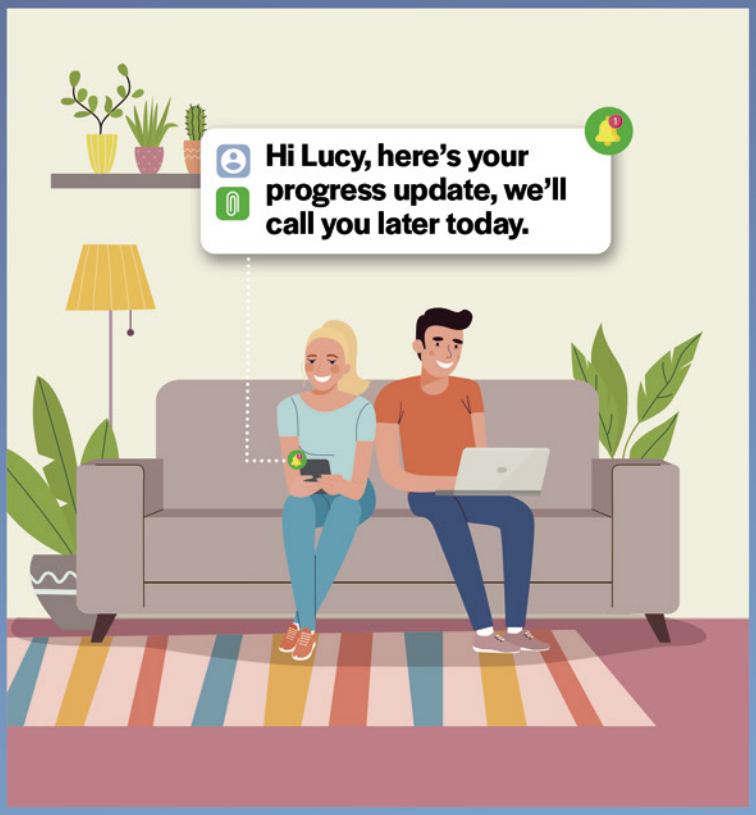
Journal of the Law Society of Scotland

Volume 66 Number 4 – April 2021

Uber and out

The Supreme Court found for the Uber drivers, but will it help others in the gig economy?

How do you communicate with your clients?



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Truth and power

We are, after all, in election season. Despite concerns as to whether the Scottish Parliament election could properly be held at this time, and MSPs passing a special Act to cover a possible postponement if the COVID-19 situation remained too problematic, in a few weeks' time we will have a new Parliament, and across the UK there will be similar tests of the political temperature.

So democracy lives on. But in what state of health? The outlook is not an encouraging one.

Nationally, the Prime Minister and Government stand accused of repeatedly dispensing with both truth and accountability. Further, the constitutional balance that protects the rule of law, and therefore democracy itself, is under serious threat from the proposals to restrict the effect of judicial review, proposals which depart from the conclusions of the recent independent review but which perhaps follow submissions from Government departments that the Government refuses to publish. Too much of the mainstream media is too close to the Government to want to hold it to account, and even the BBC is facing questions over the level of scrutiny it applies, and over the influence of political appointments at senior levels.

Meanwhile in Scotland, Holyrood hardly covered itself in glory with the politicised inquiry into the Scottish Government's handling of the Salmond investigation and litigation – around which the report did at least uncover some serious failings, accountability for which has to date been lacking. And our election appears at times to be fought on the basis of how to game the voting system – a system that was supposed to prevent an unrepresentative Government – to engineer a particular majority in the Parliament.

When the atmosphere of public debate increasingly contains a toxic element, with a common currency of online threats and abuse, especially (and all the more regrettably) if the target is female or from a minority ethnic group, you have to ask where it will all end.

Answers are not easy to find, nor will change be brought about quickly, or without a supporting swing in public opinion, which remains deeply divided. Those who wish to take a stand against present trends may face a long and difficult road. The reality of our "post-truth politics" – the label says it all – is that many people will believe only what they want to, however much contrary evidence is staring them in the face.

But we have to believe things can improve. The alternative is likely to be a continuing decline that will go on eating away at the fabric of society. It would be a start if the outcome of the coming election is a proper reflection of the balance of opinion – and the new Government recognises, and acts on, its responsibility to show a lead. J

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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In practice

ONLINE INSIGHT

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

Tackling offending: not "soft" or "hard", but "clever"

Iain Smith calls for a new approach to dealing with offenders whose behaviour stems from childhood trauma, one that recognises the futility of attempting to punish people out of pain or addiction.

Beyond COVID: what next for the courts?

Charles Hennessy sketches out a model for sheriff court ordinary actions that would modernise procedure taking on board what we have learned during COVID-19.

Diversity, traineeships and legal practice

An address by Sheriff Frank Crowe at a recent equalities workshop, outlining his own career story, changes in employment practice and some advice on the issues facing intending lawyers today.

Being faith-friendly: an employer's guide to Ramadhan

As we enter the Muslim holy month of Ramadhan, Musab Hemsi suggests how employers can seek to support employees who wish to observe it, and indeed religious festivals generally.

Balance of blame: some factors in play

Thomas Mitchell considers some problems of apportionment of blame in road traffic cases, where different and difficult issues can impact on causation.

OPINION

Richard Henderson

By proposing to go further than the Faulks report in limiting the potential of judicial review, the UK Government is embarking on a serious assault on the delicate balance in the UK constitution between the executive, Parliament and the courts

The Conservatives' 2019 election manifesto promised a Constitution, Democracy and Human Rights Commission to consider measures including reforming judicial review and "ensuring that it is not abused to conduct politics by another means or to create needless delays". The Commission idea appears to have been quietly forgotten, although not so HMG's interest in judicial review.

In establishing the Faulks review in July 2020, the Lord Chancellor promised judicial review reform to "ensure this precious check on government power is maintained, while making sure the process is not abused or used to conduct politics by another means".

There was obviously a bee buzzing around inside the governmental bonnet.

Having received the Faulks review report in January, HMG published both the report along with its own consultation – Judicial Review Reform – on 18 March 2021. The consultation is open until 29 April; HMG really is in a hurry with this one.

Reactions to the Government's announcement of a consultation have been unenthusiastic. One respondent noted that the Faulks review remit "largely reflects that it was asked to fix a problem that doesn't exist", while another said that "The review has exposed as false the Government's argument that judicial review is being misused for political ends. But the Government appears unwilling to give up. The public consultation it now proposes will examine issues which the review has already examined but decided – presumably for very good reasons – to make no recommendation on."

Launching the consultation, the Lord Chancellor praised the Faulks review's recommendations, but added that "the Government would like to go further to protect the judiciary from unwanted political entanglements and restore trust in the judicial review process". The review had said in effect "it ain't broke", but the Government's response is that it is going to fix it anyway.

"If it ain't broke, don't fix it" may be the counsel of complacency, but change especially in complex and sensitive matters is best thought through in advance. Before the consultation launch there was concern that the Government might use the Faulks review seriously to inhibit or restrict the courts' ability to review the legality of the Government's own actions. Prescient indeed.

Among the Government's aims are introduction of an effective ouster clause, something for which Faulks does not offer support, although the Government may have seemed to try to spin the contrary. Faulks concedes that Parliament does indeed have the power to legislate in such way as to limit or exclude judicial review. However, Faulks counsels that the wisdom of taking such a course and the risk in doing so are different matters. "Indeed, the panel considers that there should be highly cogent reasons for taking such an exceptional course."

Whatever happens this is a real problem, and not just for England & Wales. Scotland falls squarely within the Faulks remit, prompting both the Law Society of Scotland and the Faculty to enter strong cautionary advice. As Liberty succinctly reminds us all, "Government is responsible for making policy, Parliament is responsible for making law and the courts are responsible for upholding the rule of law." Judicial review is essential to ensuring that power is kept in check and is essential also therefore to upholding the rule of law.

About 10 years ago, when it was seeking the abolition of the Administrative Justice & Tribunals Council, and with that also any independent monitoring of government activities in the administrative justice system, the Government was accused of preferring to mark its own homework. The proposals in this new consultation are a development on that same theme of avoiding scrutiny. With this consultation, however, the Government sets out a much more serious assault on the delicate balance of our constitution, seeking to make things easier for itself by altering the fundamental geometry in which liberties are protected.

As Joshua Rozenberg has said, "Ministers would no longer need to worry about exceeding their powers: if courts rule against them, they would simply ask Parliament to put things right. Better still from the Government's point of view, Parliament could stop the judges interfering next time by ousting their jurisdiction. An effective ouster clause has always been the elusive unicorn of administrative law: these proposals will bring it tantalisingly close." Our constitution depends upon the maintenance of the delicate balance between Parliament, executive and courts. Adjusting that balance will always present risk. But if you are not careful, the risk is that in adjusting the balance you create imbalance. It does not seem that HMG has thought this one through.

Richard Henderson is convener of the Law Society of Scotland's Administrative Justice Committee

VIEWPOINTS

LSS: regulator only?

In a letter to the Scottish Law Agents Society ("SLAS") in 1999, Martyn Evans, director of the Scottish Consumer Council, stated that "if consumers are to be confident that the procedures are entirely fair,... the way forward should be to establish an independent body to deal with complaints about solicitors in Scotland". The Law Society of Scotland, which at the time dealt with all complaints, both service and conduct based, was not independent of solicitors; no doubt unsuccessful complainers felt it was biased, representing the interests of those against whom their complaints had been made.

Echoing Mr Evans's comments, in June 2007 the Scottish Legal Services Ombudsman, Jane Irvine, said: "Clients simply do not believe an institutional 'members' ' body can deal with consumer complaints fairly." So the Scottish Parliament established the SLCC, operational in October 2008.

Ms Irvine noted that "in the year 2006-2007 the Law Society of Scotland received 3,623 complaints". By comparison, in 2018-19 the SLCC received 1,326. Last year there were 1,036. Only 1,100 are predicted for 2020-21, and 1,200 for 2021-22. This despite the time limit for complaints having been trebled to three years.

The SLCC has an annual budget of around £4,000,000 and employs around 60 staff, taking more than 11 full working days to process each complaint, at a cost of £3,300. This is startlingly inefficient.

The *raison d'être* of the SLCC is to address an alleged public perception that the Law Society cannot deal fairly with complaints against its own members. This concern would surely evaporate were solicitors no longer members. As regards representation of the profession, the task is already sufficiently accomplished by a plethora of diverse and active legal societies such as the Family Law Association and local faculties such as the Glasgow Bar Association. SLAS is our oldest purely representative national body, dating from 1883. It is still going strong and looks after its members well.

However, the Law Society was far more efficient than the SLCC in processing complaints. The solution must be that it should revert to doing so, losing its representative role and retaining a solely regulatory function in order to address the mischief that Evans and Irvine identified. This would also remove the conflict of interest which, ironically, a society of lawyers presently has to try to accommodate.

Andrew Stevenson, secretary, Scottish Law Agents Society

Testator capacity: the tricky cases

The article "Wills and executries: learning the hard way" (Journal, March 2021, 44), provides a timely reminder of the mental capacity minefield. Of course, in this regard, the Law Society of Scotland's Vulnerable Clients Guidance is immensely helpful.

The article cites the case of a client giving away his questionable mental state only during the small talk after he had given instructions for his will. This may not be all that uncommon. I had a number of such cases, in one of which the client, as he was departing, and *à la* the fictional Lieutenant Columbo, informed me that he was speaking in his capacity as "the president of Scotland". Another that I remember well was, while taking his instructions, being alerted to my client's unhealthy mental state by his instruction to incorporate something vile and outrageous into his will.

However, it is necessary to remain mindful that, in this labyrinthine area of the law, testamentary capacity is valid during a lucid interval.

George Lawrence Allen, Edinburgh

BOOK REVIEWS

Fake Law: The Truth About Justice in an Age of Lies

THE SECRET BARRISTER
PUBLISHER: PICADOR
ISBN 978-1529009941; PRICE: £20 (E-BOOK £9.99)

This is the second book penned under the *nom de plume* The Secret Barrister ("SB"). I remain fairly certain it's a he. SB's central theme, which should resonate with all lawyers, is his concern that many citizens feel irredeemably disconnected from the legal system and its players.

Legal principles are succinctly explained; then the grotesque travesties, voiced usually by politicians (of all parties) and the media, are expertly dismembered. SB applies the quiet voice of reason: if you try to remove fundamental protections from X, how can you complain when the system tries to do the same to you or yours?

Whatever the answers (the epilogue suggests some possibilities), I am 100% with SB in his wish that every student, journalist and politician should understand the principles of our legal system, and that politicians in particular ought to understand fully the practicalities of the laws they make.

Tom Johnson

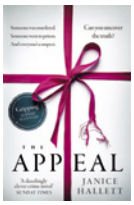
Walker and Walker: The Law of Evidence 5th edition

MARGARET ROSS, JAMES CHALMERS, ISLA CALLENDER
PUBLISHER: BLOOMSBURY PROFESSIONAL
ISBN 978-1526614455; PRICE: £138

"The text is the leading one on evidence and this latest edition will assuredly ensure it remains so."

Read the review by David J Dickson, solicitor advocate at bit.ly/3fU4DtX

The Appeal



JANICE HALLETT
VIPER: £12.99; E-BOOK £ 3.79

"To lawyers the layout of this novel may be a bit of a busman's holiday. It is all the better for it... A real whodunnit!"

This month's leisure selection is at bit.ly/3fU4DtX
The book review editor is David J Dickson

BLOG OF THE MONTH

consoc.org.uk

Against some rather fevered recent debate over the dual role of the Lord Advocate, Dr Nick McKerrell of Glasgow Caledonian University points out that it does have advantages, which should be carefully considered before pushing ahead with any reform.

For example, "because of the Lord Advocate's role as a member of the Government the entire criminal justice system is subject to legal scrutiny over its human rights compliance".

One correction though: James Wolffe QC is not a Lord.

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

Fool's gold

April Fool news releases are all very well, but best not attempted when you are defending mass litigations based on your alleged past deceptions.

Volkswagen didn't spot the backfire potential when it made out that it was changing its name in the USA to "Voltswagen" as it shifted to electric cars. Nor did it help that the news slipped out a couple of days early and VW started confirming the story in response to press enquiries.

"Volkswagen's sense of humor was fitted with a defeat device", tweeted one commentator, in a dig at the Dieselgate scandal from which the company has been battling to restore trust – now hit again, as was VW's share price. The Securities & Exchange Commission is thought to be considering action.

Nor did lawyers for the claimants see the funny side, Shazia Yamin of Leigh Day claiming to be "stunned" that VW had put money and effort into a prank rather than offering a settlement.

A car crash of a joke, you might say.

PROFILE

Lynsey Walker

Lynsey Walker is a partner and solicitor advocate at Addleshaw Goddard, and from 2017-21 the Society's co-opted board member with less than 10 years' PQE

1 What led you to apply to join the board?

Having spent my career to date at the same firm, I was mindful that there was a vast amount about the profession of which I had no direct experience. I was interested in an opportunity that might allow me to look at the wider issues facing solicitors in Scotland. I had also heard frequently of the benefits to be gained from enhancing your experience of corporate governance.

2 What are your main impressions from serving as board member?

For most of my time, I was the only member who was not also a member of Council. While this was initially a bit daunting, I quickly realised that there was often a benefit of having someone at board without this additional role. In particular, I felt it gave me an objective perspective on certain issues that might already have been discussed in detail at Council or committee level, which I found helpful at times.

3 What issue was most significant for you while on the board?

Serving throughout the Independent Review of Legal Services Regulation and during the publication of Esther Roberton's report in October 2018 was an invaluable and thoroughly interesting experience.

4 What would you say to someone not sure if they should apply?

I would recommend anyone who is interested in gaining board experience, particularly within the profession you have a vested interest in, to consider applying. It might feel like you are putting yourself out of your comfort zone, but I have heard it said many times that if an opportunity becomes available, the best thing you can do is to say yes, then learn how to do it later!

Taken from a blog by Lynsey Walker: find it at bit.ly/3QQxoQe, with a link to the application form for the position. The deadline is 22 April 2021.

WORLD WIDE WEIRD

1 Not just the ticket

The mayor of the Lithuanian capital Vilnius has taken his frustration over motorists parking in bicycle lanes into his own hands – by driving an armoured personnel carrier over a Mercedes, in an arranged stunt to deter offenders.
bit.ly/39QsgQB

2 Send for LEGO Batman?

French police are investigating a massive LEGO theft ring that may involve international brick burglars, targeting sets that are popular among collectors.
bit.ly/2eteRWZ

3 Crowd trouble

At least three couples in Kigali, Rwanda, have been forced to spend their wedding night in a stadium, with their guests, after police broke up gatherings exceeding the number allowed under COVID-19 rules.
bit.ly/39qqvmK

TECH OF THE MONTH

Portal

iOS, free: portal.app

If you struggle to sleep, Portal might be the app for you. It combines sounds and images in a way that helps you relax and unwind. You get more than 40 varied loops of audio and video, so you can sit in a field of barley, gawp at a sped-up starscape above Nepal's Ama Dablam or meditate before Lake Kawaguchi in Japan. Available in the Apple Store.

PRESIDENT

Amanda Millar

Why March brought at least some good financial news; a reminder of the possibilities around flexible traineeships; but with basic equality and protection of rights, there is still #NoRoomForComplacency

So .... April. Spring is definitely here, along with the lighter nights. At the time of writing I continue to await my blue envelope, but I'm relieved to know that many of my colleagues and family have already been vaccinated, some having had both doses. I am fortunate to be young enough, well enough to continue to wait my turn, albeit with eager anticipation.

March brought delivery of a couple of positive financial changes for the profession not seen for over a decade. The 5% across the board increase in legal aid rates for this year came into effect on 22 March. My thanks again to Lawscot colleagues, Legal Aid Committee members and bar associations for their work bringing this about. As I have consistently said, this is a positive step on the road to tackling a generation of underfunding.

Last month's column highlighted the deep concern about the budget approach adopted by the SLCC. On 31 March SLCC announced a planned 5% reduction in the levy across the board, and 20% for those less than three years qualified. These proposed reductions show some acknowledgment of the concerns we raised and here's hoping this is an indicator of a change in attitude from the Commission.

#NoRoomForComplacency

I am writing this the day after the publication of the independent report by the Commission on Race and Ethnic Disparities.

I have spoken and written throughout this presidential year of #MuchStillToDo and of the need to avoid complacency about rights hard won being set or complete. In maintenance of that spirit this month, I spoke at the FJSS (Fair Justice System for Scotland) Equalities Workshop about the work of the Society in this area. Workshop contributions from our Racial Inclusion Group convener Tatora Mukushi and head of Education Rob Marrs evidenced actions being taken.

I hosted a round table for the Independent Human Rights Act Review chaired by former Lord Justice Sir Peter Gross. The attendees from across the profession exhibited their knowledge and passion and the importance of human rights, and left the panel with much to ponder.

Could flexible traineeships help?

As part of my member engagement I was delighted to have a virtual lunch meeting with many of our Fellows. Their continued passion and motivation to be involved with and support their profession was inspiring. If you have stepped away from practice and your practising certificate but are interested in staying connected with the Society and likeminded colleagues, perhaps becoming a Fellow is for you?

I know they will use their networks to highlight and support the promotion of traineeships, and in particular flexible traineeships.

With greater demand this year, we see flexible traineeships as a positive way of boosting traineeship numbers and longer term sustainability of the profession. The standard traineeship is usually full time and two years in length, working in a number of seats during the traineeship. However, a traineeship can take different forms and can include a part time traineeship, a traineeship with one or more secondments, and a shared traineeship. This can take the form of, for example, a trainee working two days a week in one firm and three days a week in another, or 12 months in one firm and 12 months in another. In addition, a traineeship can be in any area of law and can cover just one area of law. There is a lot less red tape than people might expect.

We often hear from firms who are keen to take on new talent into the firm or organisation but don't necessarily have the finances or work available for a full time member of staff, so a shared traineeship or part time traineeship would be a great choice for them.

In reality few flexible traineeships exist, and one of the reasons for this is that people simply don't know about them. Another factor is that if a firm wants to share a trainee, it's difficult to find another firm that may also want to share and make an arrangement that suits all. That's one of the reasons we have partnered with Hey Legal, as it provides a forum online so solicitors can enter into discussions to see if sharing a trainee can work for them. If any firms want more information on flexible traineeships, see our web page or email legaleduc@lawscot.org.uk

#MuchStillToDo #NoRoomForComplacency

Amanda Millar is President of the Law Society of Scotland – President@lawscot.org.uk Twitter: @amanda_millar

denovo

What the best High Street law firms do...

Part 2 – How to get a positive referral

One difficulty faced by High Street law firms and regulators when entering the debate about improving client experience, is that often clients have no point of reference. What is a high-quality legal service? Furthermore, clients may focus on the outcome of their case, which often is not indicative of the quality of service received.

We all know the main drivers of complaints are lack of communication on progress, and issues about feeing. To build out positive referrals, firms must focus on providing excellent communication on both fronts.

Nowadays, customer experience is more important than ever, alongside quality legal work. A strategy to gain significant numbers of positive referrals starts with challenging your firm's culture: every member of the team is encouraged to question the status quo and you adopt technology in everything from client communications to your internal operations.

How to get positive referrals

As we mentioned, people often struggle to assess the quality of services provided, focusing more on outcomes. So, we reached out to Ian McNaull, Director of Operations at Jones Whyte Law, to find out how they are achieving positive word of mouth referrals, as well as 4.7 out of 5 stars from hundreds of clients on Google Business Reviews.

Why is customer experience so important to Jones Whyte?

"The first thing to say is that Google reviews are the tip of a very large iceberg. The question 'How to get a positive referral?' can only be answered by asking the more important question, 'What do our clients value and how will we deliver that?' No business can hope to grow and sustain their market position without making great customer experience a primary objective. The virtuous circle created by serving clients well, making it easy to achieve and rewarding our people for doing so, and sharing these benefits with future clients, is a simple but crucially important way of working for us at Jones Whyte."

What steps have you taken to create a client first culture?

"There are two things of primary importance to us: our clients and our people. We have found that if we focus on the experiences and points of value for both groups, we deliver much better client experience at the same time as building a culture that makes Jones Whyte a great place to work. The two are very much interlinked.

"We are acutely aware that excellent customer experience is never a 'complete' task: it is an ever-present part of daily life in the firm. We can always do more, and we can always be better. As any business has experienced, we do get pieces of feedback that we've fallen short of client expectations. Acknowledging this reality helps support a culture internally that we address our shortfalls and systemise our approach to learning from, and fixing, these issues. This culture is something we must continue to sustain if we are to evolve to the changing needs of our clients."

What role does technology play in helping improve your working practices?

"We have found that tolerance for low-technology solutions is falling amongst both clients and our team here at Jones Whyte. Excellent data management, automation of tasks and high-speed response times are required in almost all aspects of how our firm operates, and Denovo's CaseLoad is at the centre of making these things happen. A huge number of law firm activities are transactional in nature, and being able to use technology to systemise and automate these is still a key differentiator in this sector.

"Data-driven decision making is also increasingly important to improving our working practices. We are by no means the finished article, but we feel that having a coherent data structure is the foundation of gaining rapid insight from all areas of the firm, from marketing and sales to matter management to financial control. By reducing the time spent arranging data, we can spend more time on understanding what it means and how to improve our client and employee experience using new technology available in the market."

How do you plan to improve client communication in the future?

"Automation of work is at the heart of this. We want to make it easy for our people to talk to our clients. By automation we don't mean automated marketing emails, but the ability for the repetitive and time consuming elements of all our processes to be removed, to break down the barriers that prevent great communication happening naturally. We are building processes into our Denovo system to tell us when a client needs further communication and what we ought to be saying, making it an easy medium to be able to communicate on seamlessly. We are also in talks with Denovo about introducing The Link App. It's a communication tool which lets the client feel in control. The app integrates with CaseLoad and allows instant messaging, digital client onboarding, case milestone tracking and document sharing."

Next steps...

Interested in learning more about how Denovo can help improve working practices to assist with client communication? Email info@denovbi.com or call 0141 331 5290 and see why some of the most successful law firms in Scotland use Denovo as their whole practice management software solution.

People on the move

ANDERSON STRATHERN, Edinburgh, Glasgow and Haddington, has merged with NEIL RISK SOLICITOR & ESTATE AGENT, Lerwick, from 1 April 2021. Founder **Neil Risk** becomes a partner at Anderson Strathern and head of the firm's Shetland office. Anderson Strathern has also appointed **Alison Pryde** as a tax director in its Private Client team. She joins from GILLESPIE MACANDREW.

BLACKADDERS, Dundee and elsewhere, has announced 14 promotions including the appointment of **John Dargie** as a partner in Private Client at the Aberdeen office. Aberdeen partner **Peter Robertson** recently retired after 37 years in private practice, at Blackadders and previously at ADAM COCHRAN.

Other promotions include: in the Private Client team, **Jamie Robertson** to legal director, residential property; **Stewart Dunbar** to legal director, private client; **Rachael Delaney** to senior solicitor, private client; **Nikki Scott** and **Jacqueline Cameron** to senior paralegal, estate and executry administration; and **Joanne Urquhart** to paralegal, estate and executry administration; and in the Business Services team, **Nicola Brown** to legal director, dispute resolution; **Suzi Low** to legal director, corporate & commercial; **Azeem Arshad** to associate, commercial property; **Dario Demarco** to associate, corporate & commercial; **Richard Wilson** to senior solicitor, corporate & commercial; and **Rebecca Thompson** and **Susan Currie** to senior solicitor, dispute resolution.

In addition, **Neil Pickthall** has joined the firm as chief operating officer from SSE RENEWABLES, succeeding **Bob Murdach**, who has retired.

Clockwise from top left: Natalie Dissake, Amy Walsh, Kathleen Martin, Marina Harper, Paul Macdonald, Craig Ramsay, Laura McCorquodale and Andrew Mackenzie

BRODIES, Edinburgh, Glasgow, Aberdeen and Dingwall, has appointed three lawyers to its planning law practice: senior associate **Sarah Stewart** joins from BURNESS PAULL and will be based in Aberdeen; in Glasgow, associate **Kendra Richardson** moves from Brodies' Energy & Infrastructure practice; and English-qualified **George Sismey-Durrant** has joined the Edinburgh office as a senior solicitor from NORTON ROSE FULBRIGHT.

BTO SOLICITORS, Glasgow and Edinburgh, has appointed **Gregor Mitchell** as head of its Private Client team based in Edinburgh. He joins from MORTON FRASER.

Kenneth Cloggie, advocate, has joined BLACK CHAMBERS from ARNOT MANDERSON ADVOCATES.

JAMES & GEORGE COLLIE, Aberdeen, has appointed **Louise Armstrong** as a family law solicitor in the firm's Stonehaven office, KINNEAR & FALCONER.

Thomas Davidson announces that he has retired from the Law Society of Scotland as a reporter to the Professional Conduct Committee, with effect from 26 March 2021. He wishes to thank present and former colleagues for their support, courtesy and wisdom.

DELANEY GRAHAM LTD, Glasgow intimates that **Jane Collins-Whyte** has joined the firm as senior associate and head of the Private Client department, from CANNONS LAW PRACTICE.

DUNDEE NORTH LAW CENTRE has relaunched as DUNDEE LAW CENTRE to cover the whole of the city and its immediate surroundings, expanding its operations and with a revamped website, dundeelaw.org, and social media accounts.

ERGO LAW LTD, Edinburgh announces that **Natasha Wyllie** has joined the specialist employment law firm as a solicitor. **Laura Clouston** has completed her paralegal qualification in employment law and moves to a joint specialist paralegal/business manager role in the firm.

GILLESPIE MACANDREW, Edinburgh, Glasgow and Perth, has promoted **Ashley McCann**, **Austin Burns** and **Patrick Munro** to associate, and **David Halligan**, **Gillian Wilson**, **Melissa Strachan** and **Susan Henretty** to senior solicitor. **Claire Kinnaird** and **Emma Doig** in the firm's specialist tax team have been promoted to tax manager and tax senior respectively.

GILSON GRAY, Edinburgh, Glasgow, Dundee and North Berwick, has acquired East Lothian-based PRACTICAL LEGAL SOLUTIONS, to add to its property practice. **Gill Maclean**, the founder and former owner of Practical Legal Solutions, joins **Gilson Gray** as a consultant, based in the North Berwick office.

HARPER MACLEOD LLP, Glasgow, Edinburgh, Inverness, Elgin and Lerwick, announces the promotion of eight new partners: **Natalie Dissake** (Debt and Asset Recovery), **Amy Walsh** (Business Development), **Kathleen Martin** (Private Client), **Marina Harper** (Personal Injury), **Andrew MacKenzie** (Dispute Resolution), **Laura McCorquodale** (Dispute Resolution), **Craig Ramsay** (Corporate) and **Paul Macdonald** (Corporate).

JUSTRIGHT SCOTLAND, Glasgow, is delighted to announce the promotion of **Andy Sirel** in February 2021 to partner and legal director. Andy is responsible for supervision of legal casework and also heads the firm's SCOTTISH REFUGEE AND MIGRANT CENTRE.

LAURIE & CO, Aberdeen, announce that senior associate **Stephanie Mann** has been promoted to partner from 1 April 2021.

LEDINGHAM CHALMERS, Aberdeen, Inverurie, Inverness, Stirling and Edinburgh, announces the promotion of three senior solicitors to associate: **Sarah McCaffery** (Litigation team, Inverness), and **Mhari Michie** and **Pamela Sargent** (both Commercial Property, Aberdeen); and in the Aberdeen Residential Property team, the promotion of **Claire Ogston** to senior associate and **Claire Woodward** to senior solicitor. **David Geddie**, who joined Ledingham Chalmers in 2019 with the transfer of Simpson & Marwick Aberdeen's Estate Agency team, has retired as a consultant but continues as a property adviser with Ledingham Chalmers Estate Agency.

LINDSAYS LLP, Edinburgh, Dundee and Glasgow, is delighted to announce the promotion of **Louise Norris** as partner with effect from 2

April 2021. Louise is part of the firm's Commercial Property department and is based in the firm's Glasgow office at 100 Queen Street.

MACROBERTS, Glasgow, Edinburgh and Dundee, has appointed an expert Anti-Money Laundering team, headed by ex-Law Society of Scotland AML specialist **Fraser Sinclair**.

MBM COMMERCIAL, Edinburgh and London, has announced the following promotions: in the Corporate team, **Caroline Urban** to director, based in the London office, **Hannah Brazel** to senior associate, and **Laura Currie** to assistant company secretary; and in the Dispute Resolution team, **Iain McDougall** to director and **Jamie Apted** to senior associate.

MITCHELLS ROBERTON, Glasgow, announces that **Donald Reid** has stepped down as chairman and partner in the firm from 1 April 2021. Appointed chairman in 1997, he will remain as a consultant and as Dean of the Royal Faculty of Procurators in Glasgow. Managing partner **Morag Inglis** takes up the role of chair.

The firm further announces that Professor **Roderick Paisley** of the University of Aberdeen joins as a consultant.

Donald Reid and Morag Inglis

PINSENT MASONS, Glasgow, Edinburgh, Aberdeen and globally, announces that two solicitors based in their Scottish offices are among 19 new partner promotions effective from 1 May 2021: dual qualified legal director **Rona Kostulin** (Energy Property, Glasgow), and English qualified legal director **Ronan Lambe** (Energy, Edinburgh). Five senior associates in Edinburgh and Glasgow across Finance & Projects and Risk Advisory Services are among those promoted to legal director: **Scott Duncan**, **Laura Crilly**, **Graham Young**, **Jennifer McCormick** and **Natalie Colaluca**.

SCULLION LAW, Glasgow and Hamilton, has appointed **Nicola Buchanan** as a senior associate in its Family Law team. She joins from BLM.

TLT, Glasgow, Edinburgh and UK-wide, has appointed commercial litigator and solicitor advocate **Peter McGladrigan** as a legal director in its Edinburgh office. He joins from SHOOSMITHS, where he was latterly a senior associate.

URQUHARTS, Edinburgh, intimate that with effect from 31 March 2021 **Roderick M Urquhart** (below) has retired from the firm. The remaining partners and staff wish him a long and happy retirement after 40 years at the firm set up by his great-grandfather, **Andrew Urquhart**, in 1876.

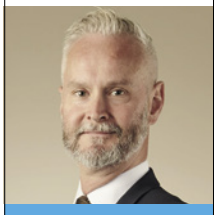
Uber: more journeys to come

Hailed as a landmark, how much does the Supreme Court's decision in *Uber* actually change? David Morgan regrets that other workers will still have to establish their own cases, unless and until the Government promotes much-needed legislative clarity

Such was the importance of the litigation involving the employment status of Uber drivers that I first reported on this case more than four years ago (Journal, January 2017, 18). At that stage, it was just the entry level judgment of the Employment Tribunal sitting at London Central, which had decided that Uber drivers had the status of "workers". This set hares running in the employment law community even then and, over five years since the litigation began, we now have the final word from the Supreme Court.

Uber has finally lost its appeal: [2021] UKSC 5. In February, the Supreme Court unanimously upheld the original tribunal ruling that the claimants are "workers" for the purposes of working time and national minimum wage protection.

The end of the longrunning litigation involving Uber does not, however, mean the end of similar litigation for those engaged in the so-called "gig economy". Until there is legislative intervention once and for all, these disputes look set to continue.



David Morgan is a partner in Burness Paull LLP and an accredited specialist in employment law

A question of status

The "prize" of these claims was to secure worker status for Uber drivers. On that, the lead claimants, Farrar and Aslam, were successful for themselves and around 30 fellow drivers in London. This case did not plead the "gold standard" protection of full-blown employee status. The boundaries are increasingly becoming blurred, and we may see litigation in future asserting employment status and protection from unfair dismissal.

Uber initially downplayed the implications of the Supreme Court's judgment, suggesting that contracts and practices had evolved significantly since 2016. However, Uber confirmed in late March 2021 that, going forward, it would classify its 70,000 drivers in the UK as workers, meaning that they would, for the first time, be entitled to benefits including sick pay, holiday pay, national minimum wage protection and auto-enrolment in a workplace pension scheme (if they meet the earning thresholds).

In short, the Supreme Court finally rejected the argument with which Uber had persisted that its drivers were self employed, independent contractors. Uber's case was that it was just a technology platform providing a service to the drivers to connect them with passengers, and therefore acting as an agent in the drivers' business relationship with the passengers. Uber contended that it was not in the business of transportation services but, rather, a tech platform business providing an app for use by the drivers and customers.

Throughout the progress of this case through the courts, the judiciary resisted this argument in varying degrees of cynicism, from finding at tribunal level that the "notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous", to the Court of Appeal's scathing remarks about Uber's contractual wording containing a "high degree of fiction". Uber was once again unsuccessful at the Supreme Court.

Statutory interpretation, not contractual

We have for many years known from the evolving jurisprudence in relation to employment status that the courts will

look behind the wording of the written contract, to give effect to the practical reality of the working relationship between the parties. What was most interesting from the Uber ruling is that the Supreme Court took that even further by saying that it would be inconsistent with the purpose of the legislation being interpreted to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker".

For the Supreme Court, this would reinstate the mischief the legislation was enacted to prevent in the first place. Importantly, the Supreme Court held that it was critical to understand that the rights asserted by the claimants (working time, national minimum wage, etc) were not contractual rights, but were created by legislation.

Accordingly, the task for the Tribunal was primarily one of *statutory* interpretation, not contractual interpretation. The court adopted a purposive interpretation of the legislation, which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions. This is because they are in a subordinate and dependent position in relation to the organisation (in this case Uber) which exercises control over their work. It is clear from the legislation that employers cannot contract out of the statutory rights provided, and the Supreme Court found that these rights are "manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it".

Contracts in the back seat

The Supreme Court also relied heavily on the fact that Uber tightly confines and controls the transportation service which it operates. Ultimately, the drivers are in a position of subordination and dependency. They have little or no ability to improve their economic position through entrepreneurial skill. The only way that the drivers can do so is by taking on further hours and meeting Uber's requirements through their contractual terms. Lord Leggatt, who wrote the unanimous judgment, said: "The question... is not whether the system of control operated by Uber is in its commercial interests, but whether it places drivers in a position of subordination to Uber. It plainly does."

Adopting this purposive approach to the legislation, the Supreme Court gave a back seat to the documentation purporting to regulate the relationship between the parties. While this resonates with other leading cases such as *Autoclenz v Belcher* [2011] UKSC 41, the key shift in the reasoning is that the written contract can no longer be the starting point to the test as this could give perverse results, since the balance of power is in favour of the contracting "employer".

"The drivers are in a position of subordination and dependency. They have little or no ability to improve their economic position through entrepreneurial skill"

Carry on gigging

What does the Supreme Court judgment mean for the wider gig economy and employment status generally? Regrettably, I think that it does not change a great deal. What we now know from the Supreme Court is that the legislation was not broken. It was in the *enforcement* of that legislation that the claimants were let down. Through numerous appeals and considerable cost over five years, ultimately Messrs Farrar and Aslam were successful in obtaining a remedy. In turn, they have also

applied pressure on Uber to change its practices for other drivers.

However, these cases turn heavily on their individual facts. Any other individuals engaged in the gig economy aggrieved about their employment or worker status would similarly need to take their case through the tribunals and courts in order to get a remedy. Surely, it is neither commercial nor acceptable to expect workers to have to enforce their rights at such cost and delay.

Until now, the response of the operators in the gig economy was to tighten up their contractual wording in order to limit control and subordination. Most often, this was achieved by inserting an apparent right of substitution. One of the few cases in which this succeeded involved Deliveroo. The Central Arbitration Committee (CAC) and High Court both refused to afford worker status to Deliveroo riders as their contracts allowed them to send a substitute for the services (which seldom happened in practice). We await the judgment of the Court of Appeal as to whether, particularly in light of *Uber*, this was correct.

As these cases are so fact specific, has the law really changed at all? Whether dealing with plumbers, lap dancers, taxi drivers, car valets or bicycle couriers, in order to get a determination and remedy these cases will continue to be debated and litigated, applying years of case law, up to and including *Uber*. And *Uber* did not even answer the more modern challenge of "multi-apping", that is, where individuals log on to multiple apps at the same time to provide their delivery or driving services.

In the scheme of things, therefore, has the gig economy lost its appeal? I think not. As customers, we have become heavily dependent on platform based technology. In lockdown, we could not have done without a continuous network of parcel deliveries. After the NHS, these workers were truly essential. Uber denies that its prices would go up because of this ruling. This seems unlikely given the added costs which will be loaded on to its business model, but the market should correct itself as other operators follow suit.

When I last wrote on this topic, I also argued in favour of the flexibility of the gig economy and the desire for drivers to pick and choose gigs to suit their modern working lifestyle. However, that attraction will still be there for drivers – they will just now benefit from statutory protections for working time and national minimum wage to boot.

Employment status 2.0

So, what next for the gig economy? TUC figures show that around 5 million people in the UK were employed in the gig economy in 2019, a figure that is likely to have increased during the pandemic. I think that a better question to pose for the legal profession is: what next for the law of employment and worker status generally? The provocation I set in 2017 remains. Until such time as there is legislative intervention, we are going to continue to see decades of expensive and time consuming litigation. This is not sustainable. In my view, the Government must step in once and for all to provide a clear and proper legislative framework to identify employment or worker status. Easier said than done, I know.

The Taylor Review of Modern Working Practices in 2017 and the "Good Work Plan" the following year were as rich in aspiration as they were bereft of any detail or clear answers. Clearly, no one is willing to take on the hospital pass of drafting definitions for an area which the courts have struggled with over the years. Some commentators have suggested that the boundary between worker and employee is now so blurred that it might make more sense simply to have two categorisations.

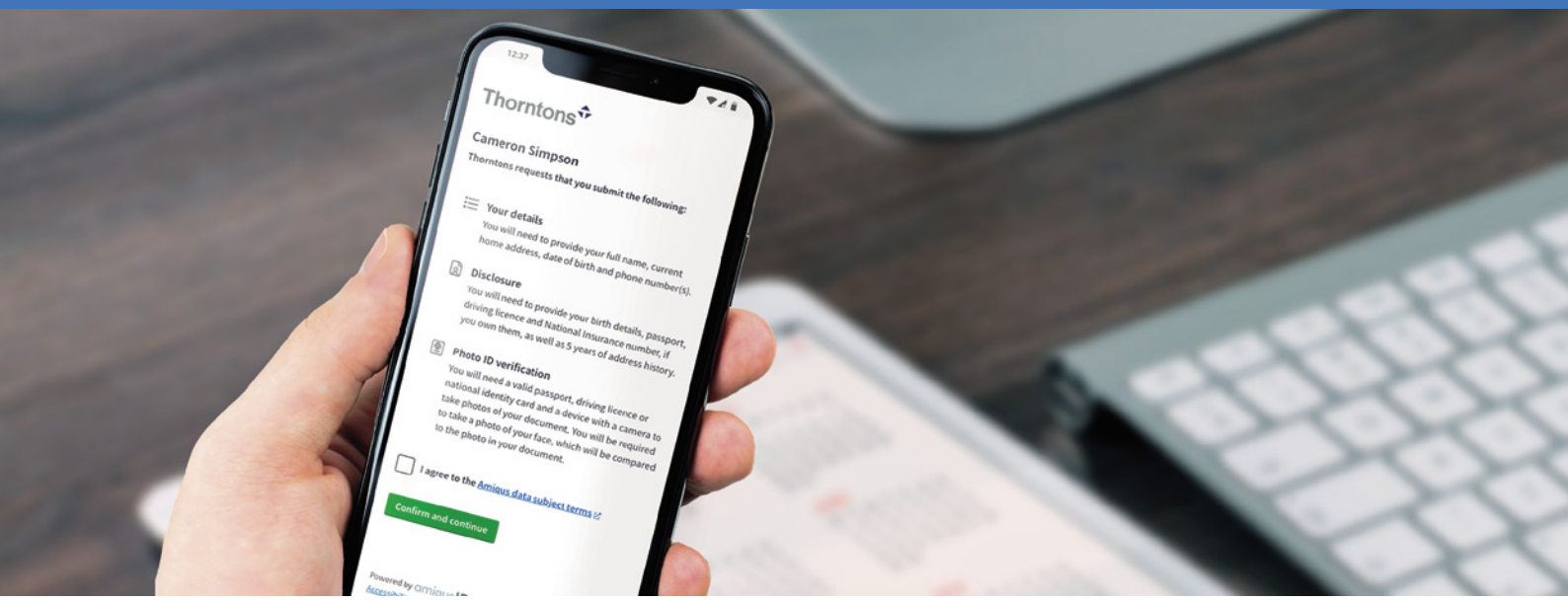
Ironically, despite the paradigm shift away from the written contract in *Uber*, one solution might be to move to a more standardised form of wording for contracts, with self-employed at one end of the spectrum and employment at the other. This would close down the ability of so-called "armies of lawyers" to draft away statutory protections.

However, even with standardised wording, there will still be room for abuse and interpretation. This might be solved by having a separate regime for enforcement of workers' rights outside of the judicial system. A bespoke labour relations body might be established for this purpose. Alternatively, enforcement could be passed to HMRC, which already looks after breaches of national minimum wage and, more recently, IR35 and off-payroll working (after an audit and assessment has been carried out by the putative employer). The CAC, which is principally concerned with trade union recognition disputes, is also a sophisticated adjudication body which, with additional resource, might be tasked with providing a quicker resolution of these disputes. However it is addressed, this is as much an opportunity as a threat for the Government to step up to bring much-needed clarity and certainty for workers and employers alike.

Uber: the decisive factors

The Supreme Court found that the drivers were "workers" for the following five key reasons:

1. When a ride is booked, it is Uber that sets the fare and the driver cannot charge more. Uber therefore dictates the pay for work done.
2. The contract terms are imposed by Uber and drivers have no say in them.
3. Once a driver has logged on to the app, their choice regarding acceptance of rides is constrained by Uber. Uber monitors the rate of acceptance and cancellation, and penalties are imposed if targets are not met.
4. Uber exercises significant control over delivery of the service. One of several methods is the use of a rating system. Any driver who falls below the average rating is subject to review and their services may be terminated.
5. The driver has no control over their interaction with their customers, and Uber takes active steps to prevent drivers establishing relationships directly with customers.



How Thorntons complete their client ID and verification process in minutes

LISA MANNION, an associate solicitor in the residential conveyancing team at Thorntons, explains how Amiqus is helping her team to provide an excellent client experience while reducing workloads and reducing unbillable hours.

Lisa joined Thorntons in 2013 as a trainee solicitor, having graduated from the University of Dundee. She assists both companies and individuals, and deals with all aspects of residential conveyancing including purchases, sales, remortgages, security work and title transfers.

"When I first started at Thorntons, there was a regular stream of clients in our reception bringing their personal documents to be copied, certified and filed for fee earners by our reception team. We would also receive principal ID by post from clients, which they would send to us at their expense, which we had to copy and return by recorded mail.

"Our way of working has now changed through the implementation of our new case management system. We have now been able to eliminate the need for paper files. Our processes have become streamlined, and in terms of ID our dedicated team can instruct ID requests to clients by email in a matter of minutes using Amiqus.

"When Amiqus made it possible for clients to provide ID digitally, and from the comfort of their own home, it massively sped up the process for clients and also improved our client conversion times and rates."

Lisa Mannion, associate solicitor, Thorntons

"I remember hearing my estate agency colleagues on the phone to clients, talking with excitement about Amiqus and how easy the system was to use. Much like our personal injury colleagues, our estate agency team cannot carry out any work for a client until such time that their ID checks are complete. When Amiqus made it possible for clients to provide ID digitally, and from the comfort of their own home, it massively sped up the process for clients and also improved our client conversion times and rates.

"There has also been a change in client expectations. The incoming generation of first-time buyers now expect to deal with their solicitor online. With Amiqus we can facilitate that from day one and in doing so, provide a quality service which is our ethos. It has also been really helpful for clients who are overseas or who don't live close to our offices. This means we can widen the scope of our own client base which is amazing.

"Using Amiqus has definitely assisted us in facilitating homeworking; however the decision to use Amiqus was already part of Thorntons' strategy to meet clients' changing expectations. Clients don't want to pay for parking and make unnecessary trips into town any more, and as lawyers, we want to spend our time helping people when we're prepared and at our best so it works both ways."

7x
faster client ID and verification process

98%
of surveyed clients found Amiqus easy to use

99.5%
of surveyed fee earners like using Amiqus day to day

Find out more at amiqus.co/journal

amiqus

Enforcing IP in the digital age

E-commerce platforms can carry a threat to IP rights holders, but may also offer quick ways to challenge a counterfeit listing. Chris Martin considers the courses open to rights holders to strengthen their position

As many businesses and their solicitors will be all too aware, enforcing IP rights against an infringer can be prohibitively expensive, laborious and, in some cases, ineffective. However, online platforms offer quick and relatively easy to use ways of removing counterfeit listings. This is even more valuable around key calendar sales dates, allowing counterfeits to be taken down just before an important calendar event.

All of the main forms of unregistered and registered IP rights (trade marks, patents, registered and unregistered design rights, and copyright) can be used for online takedowns of counterfeit listings. Registered designs and trade marks typically have higher success rates, due to the combination of ease of visual comparison and being a registered form of IP.

The process is far from consistent. Typically, the infringing article is compared visually against the IP right, and the decision is made as to whether or not the listing should be taken down. Listings can be taken down *en masse*, using a *prima facie* infringement review. This of course drastically reduces the time, effort and cost of the takedown, but businesses should be cautious. The other edge of the sword is that the infringer can equally make use of the takedown process themselves, often with disastrous consequences. Furthermore, any request for a takedown carries with it a risk of action from the infringer to seek recourse.

Some of the issues that prevent businesses achieving a takedown include trade marks being registered in the wrong class of goods and services, IP registered in a different territory, or a third party having registered their IP first. Furthermore, if both parties have registered IP, it can be difficult for an online platform to reach a decision, as it appears to the platform that both parties have valid IP, and they do not have the expertise to reach an informed decision.

However, some platforms, such as Amazon, are more sophisticated in how they assess IP. Amazon has a program for assessing patent infringement (the Neutral Patent Evaluation). In an evaluation, a neutral evaluator will assess whether the listing infringes a patent. If the evaluator finds that the listing is likely to infringe, Amazon will remove that product from the platform. Both the business requesting the removal of the listing and the infringer must pay for the cost of evaluation, with the successful party being refunded. Where sellers (alleged infringers) choose not to participate in the evaluation, the listings will be removed at no cost to either party. The expectation is that, given the cost and potential risk, many will choose not to participate. Listings are removed around 21 days from the owner's initial submission.

The Chinese angle

Many businesses have concerns that enforcing IP in China is challenging. Given the powerful nature of registered IP for online takedowns, businesses should consider putting IP in place in China, even if the sole purpose of the IP is to effect takedowns. Given the relative ease with which Chinese design patents, and utility models (a patent with a shorter term) can be obtained, it is essential to monitor competitors' IP rights and consider challenging their IP to then make takedowns easier.

Regarding prior art as evidence of potential invalidity, Chinese patent applications or patents may carry more weight with the Chinese courts or the Patent Office than other forms of evidence, because (a) they are written in the local language, and (b) their date of publication is accepted at face value. Therefore, obtaining registered rights in China can offer businesses a quicker route to IP enforcement, by being used as evidence of prior art to invalidate an infringer's IP, and being used to effect a takedown.

Registered Chinese rights, such as patent applications, can be used as evidence of copyright. Using the patent application in this way means that (a) the patent does not need to be granted to enforce it, and (b) it is easier for the platform to do

Dr Chris Martin is a Registered Patent Attorney with Lawrie IP, Glasgow, which advises on IP matters across a range of industry sectors

a visual comparison of the images in the patent application against the infringing product.

Some e-commerce platforms are deemed to be international platforms, and as such it may be possible to use IP rights in one territory to effect a takedown, despite the listing relating to another territory. For example, it may be possible to use a UK/EU registered design right to take down a listing that is for sale in China, because it is on an international platform.

Improving the position

Trade marks

Adding territories to existing rights should be considered, where possible, or applying for separate protection where the word and/or logo marks are not currently registered.

Seeking to register a 3D trade mark in territories where there is no registered, or unregistered design protection, may assist with online takedowns in instances where the counterfeiter has not used the brand itself. Where this is achievable, it may be a useful alternative in territories where valid registered design protection is not an option due to an earlier disclosure. With a 3D trade mark, earlier use is usually a benefit as it can assist in overcoming an objection that the shape itself is not sufficiently distinctive.

It is important to note that not all shapes can be registered as trade marks, and there are some restrictions to what can and cannot be registered. For example, if an examiner considered that the shape of the 3D mark was entirely functional or resulting from the nature of the product itself, they might raise an objection to the registration. One further restriction would be that the list of goods included in the application would, in most territories, have to be restricted to the product itself, so it may be unlikely to obtain protection for a broad list of goods, or for any services, with a 3D mark.

Designs

Registered designs should be put in place. If it is not possible to register designs, consider modifying current products to allow new registered design rights to be obtained, and new unregistered design rights to be created.

Confirmation of unregistered design right should be obtained in each territory, where possible, and documented.

Registered designs can be used to effect online takedowns on at least some of the main e-commerce platforms. Interestingly, while copyright or trade marks are used in some cases to have image(s) removed from a listing, in some instances a registered design is more likely to result in the entire listing being taken down.

In order to enforce a Chinese design patent, it is necessary to obtain an evaluation report. It is best to request it routinely as part of the registration process and before enforcing Chinese design rights.

Patents

Patent applications should be put in place, and if a product is already in the public domain, consider modifying the product to allow new patent rights to be obtained.

Copyright

Maintain good records and accessibility of copyright so that it can be used to effect a takedown quickly.

Copyright is, in some cases, the most useful IP right for effecting online takedowns, and it is not necessary to register copyright in order to use it in this way. It is, however, important to document copyright should it be needed to effect a takedown. Therefore, we recommend that all technical documentation, photographs, etc relating to a product, including trade marks, are up to date and easily accessible.

Copyright can be particularly useful if a third party uses generic wording on a product, if it can be shown that you potentially own the copyright in the generic wording.

Conclusion

If businesses are active on e-commerce platforms, they should be made aware of what IP rights they currently have, and encouraged to document their IP in a way that makes it easier to enable online enforcement to be actioned quickly and effectively. Registered forms of IP, particularly trade marks, registered designs and patents, should be put in place to strengthen online enforcement options and in view of their defensive effect against retaliatory takedown attempts. Businesses should consider modifying the function and/or appearance of products where it is practical to do so, as this will potentially allow new valid IP rights to be obtained. Registered IP, whilst being enforceable in the traditional sense, should be considered even when the only purpose of the IP is for removing online counterfeit listings.

Pre-nups: questions of protection

Tom Quail discusses the objectives of a pre-nuptial agreement, the provisions to be included and the considerations in trying make the agreement resistant to successful challenge

Pre-nuptial agreements are commonly talked about in relation to wealthy individuals where there is a focus on protecting the individual's wealth. However, in relation to a family business, separation or divorce can impact on both the individual and the business, which may be required to fund a significant capital payment to a separated spouse. A pre-nuptial agreement can provide a degree of protection to the family business as well as to its owner.

Unlike a separation agreement, in a pre-nuptial agreement there is no heads of terms. Prior to drafting a pre-nuptial agreement, the following need to be considered:

- the objectives of the agreement for both the business owner/wealthy individual and the less wealthy other party;
- the contingencies the agreement should cover;
- the impact of the legal provisions;
- the risks of the agreement; and
- the details/clauses to be included in the agreement.

Objectives: protection

With a family business owner, the objective is to provide protection to the individual's assets/investments acquired prior to the marriage, which have flowed from their interest in the family business. During the marriage there may well be a restructure of the business as it moves from a sole trading business to a limited company, and what was previously not matrimonial property could due to restructuring become matrimonial property. One of the primary objectives of the agreement is to ensure this does not occur.

The benefits to the other party signing the agreement should be considered. If you are advising the wealthy individual, consideration could be given to transferring the family home into joint names on marriage, or making payment of a significant capital sum. Reflecting that in the agreement provides a benefit to the less wealthy party. It may also go some way to allaying the concerns of the solicitor advising that individual.

The purpose of a pre-nuptial agreement is not to address the inequality of wealth, but to protect the wealth acquired prior to marriage and to protect the family business.

Tom Quail
is head of Family Law at Wright, Johnston & Mackenzie LLP and an accredited family law specialist, family law mediator and a solicitor advocate

Contingencies: death?

Should the agreement cover separation and death, or simply separation? Ordinarily it would be separation. However, if your client is owner of a business and a shareholder in the family business, the shareholding would form part of their moveable estate. In the agreement, it may be prudent for the couple to discharge their legal and prior rights, otherwise the shareholding may form part of a claim on the estate, which could have implications for the business. If you do not exclude the shareholdings from moveable estate, you are not protecting the owner of the business or the family business.

Whilst this could set up a potential challenge to the agreement, the Family Law (Scotland) Act 1985 focuses on sharing assets built up during marriage through the income and efforts of the parties. As the interest in the family business has not been built in this way, this would allow you to push back on any challenge.

Law of financial provision

In drafting the agreement, consider the five principles for sharing of matrimonial property in terms of s 9 of the Act.

A fair sharing of matrimonial property involves identification and valuation of assets at the date of separation. In the absence of an agreement, assets acquired during the marriage except by gift or inheritance would be matrimonial property. With the presumption of equal sharing you would be left with a special circumstances argument, which might or might not be successful. It would be highly unusual on separation to receive credit for 100% of the pre-marital asset investment. As the marriage continues, you have to account for the economic advantage and disadvantage, and the burden of caring for children, as well as any loss of financial support on divorce whether this be for a short period of time or whether it could result in serious financial hardship.

The issue of resources is often overlooked in proposals to reach an agreement. Consideration should be given as to whether in the agreement a pre-marital asset should be excluded from resources. It could be argued that this might form the basis for challenging the agreement as not being fair and reasonable in terms of s 16. However, parties are free to contract; it is a question of balance.

Once a couple marry, they have an obligation to support each other financially. This is different from the principle of continuing financial support. It is important to advise the client of the obligation to aliment and to take account of the grounds for divorce. If your client has to wait two years before being able to raise a divorce action, there could be a period of between two and four years where the wealthy spouse requires to support the other financially.

Risks of an agreement

There are all sorts of reasons an agreement can come unstuck. It is difficult if not impossible to draft a solid, watertight agreement. The benefit of the agreement is that it provides a degree of certainty, but that certainty is not absolute.

Consider the limit of your firm's insurance cover. The wealth of your client may exceed your insurance cover. It is essential in any letter of engagement to limit the extent of your liability.

Scots law will accept a pre-nuptial agreement, whereas the English courts treat such an agreement differently. There is always a possibility, taking account of the wealth of your client, that on separation there is an attempt to litigate a financial award in England, if there is an English connection. However, in view of the recent decision in *Villiers* [2021] EWFC 23 this is now less likely.

Financial provision on divorce is set out in ss 8-14. Should you exclude those provisions? If you were intending to do this, you would have to set out what would occur on separation. My view, unless you intend to set up an alternative framework, is not to exclude the statutory provisions. To exclude those provisions may well represent the basis of a challenge to the agreement. A challenge may be more likely, and because of the unusual nature of such an agreement, may well be more likely to be successful, particularly if there has been a long marriage.

Legal challenge: fair and reasonable?

A pre-nuptial agreement can be challenged any time up until divorce on the basis that it is not fair and reasonable. The principles a court will consider are set out in *Gillon v Gillon* 1995 SLT 678:

- The agreement will be examined for both fairness and reasonableness.
- Examination will relate to all relative circumstances leading up to and existing at the time of signing the agreement, including amongst other things the nature and quality of legal advice.
- Evidence that an unfair advantage was taken by one party may have a bearing on deciding whether the agreement is fair and reasonable.
- A court is not unduly ready to vary or adjust an agreement which has been validly entered into.
- The fact that the agreement has led to an unfair or unequal division of assets does not give rise to an inference of unreasonableness.

The actings and behaviour of both parties will be considered. Taking legal advice is not enough; the quality and nature of the legal advice will be scrutinised. It is essential that the other party is given an opportunity to take legal advice. The agreement is primarily to provide the wealthy client with protection. Accordingly, it is only appropriate that the reasonable legal costs of the other party requiring to take independent legal advice should be met.

You may be asked by your client to recommend another solicitor who can legally advise the other party. Bearing in mind the decision in *Murray, Petr* [2019] CSOH 21, the other party should not be influenced on the solicitor from whom that person takes advice. However, on the basis that the quality and nature of the legal advice will be considered in a challenge, the solicitor consulted should have a knowledge of family law matters.

Jurisdiction

There should also be considered which country would decide or which law would apply in the event of separation. Depending on where the parties live, or subsequent to separation, there may be other jurisdictions that will be entitled to decide on matters. The consequences of Brexit are not known. For example, your client and spouse live all their life in Scotland, but after separation one of the parties moves to France. The spouse in France raises divorce proceedings. Your client raises divorce proceedings in Scotland. Scottish courts may deal with a *forum non conveniens* argument; however, the French court may regard the dispute as a matter for French law. Some continental countries regard being first in time with proceedings as the determining factor. The French court may deal with the divorce in parallel to the Scottish court.

Including a provision in the agreement that any dispute will be determined by Scots law may not guarantee the position, but it may well influence it.

Cross-border issues

If you are acting for a client who has a connection with Scotland and England you may wish to consider having agreements prepared in both jurisdictions. I appreciate there is a costs issue, but if your client is of significant wealth, and the family business is of significant wealth and importance, the benefits may well outweigh the costs.

Hopefully with these factors having been taken into consideration, the preparation of the agreement with the usual clauses of separate property will ensure that when you move from a blank sheet to a final agreement, you have an agreement which achieves its objectives, provides certainty, is fair to both parties, and is less likely to be challenged or, if challenged, for that challenge to be successful.

Beware of the wolf!

Has your legal software supplier been taken over?

If so, you may have received assurances of no changes, continued support and no price hikes. That doesn't mean you're out of the woods. Large software corporations can be like wolves in sheep's clothing. So, before prices go up and end-of-life notices go out, consider an independent supplier that prides itself on building trusting, long-term relationships.

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Lockup: are you cracking the WIP?

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

IN ASSOCIATION WITH LAWWARE

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

Huge problem?

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

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

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

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

Get the basics right.

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

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

Begin as you mean to go on.

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

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

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

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

Mike O'Donnell.

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Out of the mouths of babes

In her second article on the Children (Scotland) Act 2020, the author discusses the amendments to align part 1 of the 1995 Act better with contemporary interpretation of the child's right under the UNCRC to express a view, regardless of age

The Children (Scotland) Act 2020 received Royal Assent on 1 October 2020. Once in force, it will make comprehensive changes both to the substance of family law and to the ongoing management of court proceedings.

Some of the most significant amendments relate to "family court cases" (including residence and contact disputes) raised by private individuals under part 1 of the Children (Scotland) Act 1995. To date, the provisions relating to the child's right to be heard in such cases remain as enacted in 1995. They broadly involve the court in acquiring and taking account of children's views when reaching a decision. However, today, article 12 of the United Nations Convention on the Rights of the Child ("UNCRC") is understood as entitling children to participate actively in a process that involves greater dialogue between them and the adults making decisions about them.

In amending part 1, the 2020 Act creates a number of new legal duties as respects ensuring children's participation in family court cases. The three core duties are outlined below. Also provided is the author's table of the amendments to part 1, for ease of future reference.

1. Enabling children to express views in their preferred manner

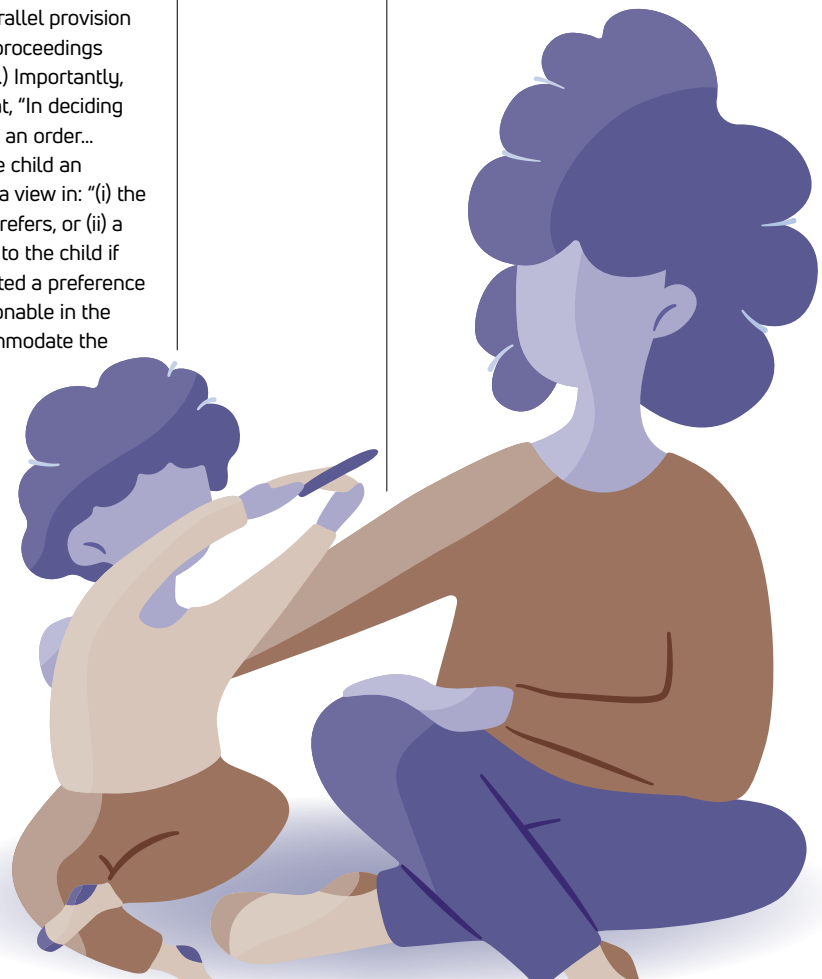
Section 11(7)(b)(i)-(iii) of the 1995 Act provides that children must be given an opportunity to indicate if they wish to express a view and, if so, the opportunity to do so. The court should have regard to such views, taking into account the child's age and maturity. By s 11(10), a child aged 12 years or more is presumed of sufficient age and maturity to express a view.

These provisions are repealed by the 2020 Act. In their place, s 1(4) creates a new s 11ZB, entitled "Regard to be had to the child's views". (Sections 2 and 3 respectively make parallel provision in relation to adoption proceedings and children's hearings.) Importantly, s 11ZB(1)(a) provides that, "In deciding whether or not to make an order... the court must" give the child an opportunity to express a view in: "(i) the manner that the child prefers, or (ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference".

Subsection (1)(a)(i) represents a new approach to the expression of views by children. Subject to limited exceptions, where a child intends to express a view, the court must now enable that in the manner the child wishes.

Its purpose is to make the process for children expressing a view more accessible and less intimidating. Once it is in force, the court will require to ascertain, first, whether a child wishes to express any view (the current duty) and, secondly, if so, how the child would like to do that (the new duty). A range of viable options, appropriate to that child's age and circumstances, will require to be offered in order to facilitate an authentic choice as to how to express their views.

A child may, for example, want to



speak to the decision-maker in the court case, or complete an F9 form, or convey a view by email or through a teacher or youth worker. Also, s 21 of the 2020 Act places a new duty on Scottish ministers to ensure availability of child advocacy services for children in family court cases, and this is likely to become a growth area of professional practice. Where a child does not express a preference or asks for something the court cannot reasonably accommodate, s 11ZB(1)(a)(ii) allows the court to select a manner of expressing a view that is "suitable to the child" instead.

Once a view has been obtained, the court's role remains as in the current law, namely, to "have regard to any views expressed by the child, taking into account the child's age and maturity" (s 11ZB(1)(b)). The court need not comply with the duty in s 11ZB(1) if satisfied that either "(a) the child is not capable of forming a view, or (b) the location of the child is not known".

2. Children to be presumed capable of forming a view

The presumption noted above, regarding a child of 12 or more being presumed able to form a view, is replaced with s 11ZB(3): "The child is to be presumed to be capable of forming a view unless the contrary is shown."

In other words, *all* children should be presumed to have the ability to form and express a view. This new presumption introduces a radically different approach in family court cases. It is supported by UNCRC article 12, which requires that children "capable of forming [their] own views [are given] the right to express those views freely in all matters affecting" them.

Neither article 12, nor guidance issued by the international watchdog, the UN Committee on the Rights of the Child, specifies a minimum age for the capacity to express a view. The contemporary rationale is that article 12 requires respecting all children as rights-holders from their earliest stages. Research has long indicated that biological age is not the sole determining factor of such capacity. Many factors, including personal experiences, environment, and levels of support provided, have been observed to affect a child's ability to form or express a view (see, e.g. G Lansdown, *The evolving capacities of the child*, Innocenti, UNICEF/Save the Children, Florence (2005), section 2).

Research also supports the view that very young children, as well as those with profound and multiple learning difficulties, are often capable of using a range of communication methods to convey "understanding, choices and preferences": UN Committee on the Rights of the Child, General Comment No 12, *The right of the child to be heard*, CRC/C/GC/12 (2009), para 21, which also refers to "non-verbal" forms of communication, such as play, body language, facial expressions. It is worth noting that every children's organisation in Scotland submitting views that informed the passage of the 2020 Act supported the creation of this new pro-capacity presumption.

The Sheriff Appeal Court recently commented on these prospective provisions, making a (perhaps controversial) observation about the ability of younger children to express views by indicating that it "might be that a child under three years would not have formed a view" (*LRK v AG* [2021] SAC (Civ) 1, at para 12). Once the Act is in force, there is likely to be considerable debate about the new presumption.

Most importantly, s 11ZB(3) places the onus on any person contending that a child lacks capacity to demonstrate this. The wording ("unless the contrary is shown") indicates that, in some cases, expert evidence may be required to rebut the presumption. Section 11ZB(1) provides that the child's "age and maturity" remain factors to which the court must have regard when considering the substance of any view expressed.

The Act does not repeal s 2(4A) of the Age of Legal Capacity (Scotland) Act 1991, which states that "a person twelve years of age or more shall be presumed to be of sufficient age and maturity" to have capacity to instruct a solicitor. In retaining this age presumption, a clearer distinction has now been made in law between the ability that most children will possess to form a view in family proceedings on the one hand and, on the other, the higher capacity benchmark required for instructing a solicitor.

"In other words, all children should be presumed to have the ability to form and express a view"

3. Explaining decisions to children

The new s 11F of the 1995 Act, inserted by the 2020 Act, s 20, provides that an explanation "must" be given when "the court decides whether or not to make an order" under s 11(1) (e.g. a residence or contact order). An explanation also needs to be given whenever the court decides to "vary or discharge" (i.e. alter or terminate) a s 11(1) order. Interim orders are explicitly covered. When the court "decides to decline to vary or discharge an order made under section 11(1)", an explanation need only be given if the court "considers it appropriate to explain that decision to the child concerned" (s 11F(1)(c)).

While this new provision does not require explanations to be given in the manner the child prefers, s 11F(2) does require that they be conveyed "in a way that the child can understand". By s 11F(3), the court is only excused from the duty to provide an explanation on being "satisfied" that one or more of the following applies: "(a) the child would not be capable of understanding an explanation however given, (b) it is not in the best interests of the child to give an explanation, or (c) the location of the child is not known".

Section 11F(3) invites two obvious questions. The first concerns exactly how the lack of capacity to understand any explanation is to be assessed. Here the words "however given" in para (a) are helpful, as they suggest that a range of communication methods should be considered before a decision is taken not to explain an outcome to a child. This can be expected to be the case even if a child is very young or has significant learning difficulties.

The second question is when it might not be in the "best interests of the child" to be given an explanation. For example, children may be unwell, or particularly upset by the circumstances surrounding the family breakdown. Or, sensitive details about the adults' relationship may have influenced the court's decision and it might be thought better not to disclose those details. However, the occasions on which it would be inappropriate to give

any appropriately worded explanation to the child about the decision are, it is suggested, likely to be the exception rather than the rule.

Section 11F(4) enables the court either to (a) "[give] the explanation to the child itself, or (b) [arrange] for it to be given by a child welfare reporter".

Section 11F gives no detail on the content or length of the explanation required for children, or the timescale for providing this. Secondary legislation may do this in time. However, in the context of the imminent incorporation of the UNCRC into Scottish law, a reasonable interpretation suggests two requirements: first, that any explanation would involve "explaining how [the child's] views were considered", and secondly, that it would include reference to the "weight given" by the court to the child's views (para 48(a) of the UN General Comment referred to above).

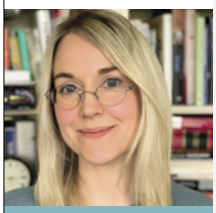
Other new duties concerning child participation

In addition to the above core duties, the 2020 Act also creates other, additional requirements in respect of children's participation in family court cases.

For example, s 18, inserting new s 11E in the 1995 Act, requires the court to consider the child's best interests (and their views) before allowing any person access to "private information" about the child. Section 11E(6) defines this as "information in which the child could have a reasonable expectation of privacy". The 2020 Act also places, for the first time, a duty on courts to investigate failure(s) to obey court orders, through s 22, creating new 1995 Act, s 11G. This new duty includes a broad requirement to seek the child's view about any such failure, with the child's capacity being presumed.

An important step

Given that the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill is likely to become law in 2021, the changes the 2020 Act makes to the Children (Scotland) Act 1995 are most welcome. They represent an important step in the journey towards ensuring Scots law becomes compliant with the UNCRC, which requires listening to children of all ages in family court cases.



Dr Lesley-Anne Barnes Macfarlane lectures family law at Edinburgh Napier University. This article follows on from her 2019 report commissioned by the Scottish Parliament Justice Committee and her recent briefing on the Children (Scotland) Act 2020 for the Judicial Institute for Scotland

CHILDREN (SCOTLAND) ACT 1995, PART 1 * ** *

Current law	*Law after Children (Scotland) Act 2020 in force*
(i) welfare of the child concerned is paramount consideration (s 11(7)(a)) (ii) no order unless court considers that it would be better for the child that the order be made than that none should be made at all (s 11(7)(a)) (iii) child given opportunity to express a view to which the court shall have regard (s 11(7)(b)): • give child opportunity to *indicate if wish* to express view • if so, give *opportunity* to express • *taking account of age and maturity*, to have regard to such views (s 11(7)(b)(i)-(iii) • *child aged 12 years or more presumed* of sufficient age and maturity to express view (s 11(10)) (iv) protection from abuse provisions (s 11(7A)-(7E)) (v) co-operation in matters affecting the child consideration (s 11(7D))	(i) welfare of the child concerned is paramount consideration (s 11ZA(1)) (ii) no order unless court considers that it would be better for the child that the order be made than that none should be made at all (s 11ZA(2)) (iii) have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose (s 11ZA(2A)) (iv) protection from abuse provisions (s 11ZA(3)(a)-(d)) (v) co-operation in matters affecting the child consideration (s 11ZA(3)(e)) (vi) consider effect of the court order on parents' involvement in upbringing of child *and* on the child's important relationships (s 11ZA(3)(f)(i), (ii)) (vii) regard to be had to the child's views (s 11ZB): • give the child concerned *opportunity to express view in manner the child prefers* (s 11ZB(1)(a), with limited exceptions to this provision) • have regard to any views expressed by the child, *taking into account age and maturity* (s 11ZB(1)(b)) • *children to be presumed capable* of forming a view unless the contrary is shown (s 11ZB(3)) (viii) increased protections ("special measures") for broader group of persons to be deemed vulnerable witnesses/parties (ss 11B, 11C) (ix) appointment of curator only where necessary to protect child's interests – and review appointment every six months (s 11D) (x) duty to consider child's best interests and views (child to express view in manner of preference/child presumed competent to express views) when allowing any person access to private information about child (s 11E) (xi) *provision of explanation of decision to child* in a way that the child can understand (limited exceptions) (s 11F) (xii) duty to investigate failure to obey s 11 order – including seeking the child's perspective in respect of failure (child to express view in manner of preference/child presumed competent to express views) (s 11G)

** considerations are listed in the order in which they appear respectively in the current, and amended, 1995 Act*

*** the s 11 orders (e.g. residence, contact etc.) remain unchanged*

**** text in blue indicates considerations that are unchanged (albeit there are some amendments to expression in the re-enacted provisions). **Red** text indicates the three new core duties discussed in this article in respect of children's participation.*

FFI: the future for family business lawyers

Ken McCracken of the Family Firm Institute believes that advisers to today's family businesses need a multi-disciplinary approach such as the FFI can facilitate

Post-COVID, post-lockdown, post-furlough; post-Brexit, post-Holyrood election, and post a possible independence referendum, family-owned businesses will continue to be the backbone of the private sector in Scotland.

The large ones like William Grant & Sons, Walkers Shortbread, Baxters, Stewart Milne and Robertson Group, along with hundreds of family-controlled SMEs spread across every town and community, will be a fundamental driver of economic growth, prosperity, and stability.

This is hardly news, since families have been in business for most of recorded history, but what has changed is that advising these clients is now a distinct field of knowledge and practice. Business families are increasingly aware of this, and advisers need to decide, "Are we *really* in the family business market?"

Growth of the organisation

The change started in 1986, when the Family Firm Institute (www.ffi.org) was founded as an organisation for advisers, consultants, educators, and researchers. FFI now has nearly 2,000 members in more than 80 countries, and 80% of them are professionals from various fields including law, accounting, banking, and financial services.

In 1989, the Family Business Network (fbn-i.org) was founded by families for families. FBN is now a federation of 32 member associations spanning 65 countries, including the Institute for Family Business in the UK (www.ifb.org.uk).

More recently, other family business associations have entered the market, through which the owners and leaders of these enterprises are gaining access to new information about how successful multi-generational family businesses across the world are organised.

Clients now recognise that there is a measurable difference between a specialist adviser who speaks the language of their specialism, and the specialist who can also speak fluent family business. Business families seek help with the task of developing a next generation who understand the rights and responsibilities of ownership, whether or not they choose a career in the family business. The senior generation would also like to discuss the challenges of retiring and passing on control, when they still want a life of purpose.

The current family owners and the board of directors would like to hear about the best way to ensure that the constitution of a business is matched by a family constitution that contains the family's vision and values and provides guidance in potentially sensitive areas like employment and remuneration for family members.

In the midst of these inter-generational dynamics, what type of incentive scheme will align the interests of valued non-family managers with the aspirations of both generations of the owning family? Bear in mind that family businesses regularly attribute value to non-financial returns on investment, such as continuing a legacy, maintaining family cohesion, and an attachment to a particular type of business, place, or community. The challenge is how to quantify achieving these returns for the purpose of the incentive scheme.

Resource for advisers

There is no getting away from the fact that new research and ideas are disrupting the family business market, and clients want to know the go-to firms for advice. Being in the market obviously means being up to date with the latest thinking in the field. Here, FFI provides its members with many opportunities for learning and collaboration.

- The FFI Global Education Network (www.ffigen.org) offers Certificates in Family Business Advising and Family Wealth Advising that are the product of more than 30 years of practice and research.
- Cross-pollination of ideas, expertise, and perspectives among members takes place at conferences, seminars, and online. This year's conference is a blended virtual and in-person event in London in October.
- The *Family Business Review* is the leading scholarly publication devoted exclusively to exploring the dynamics of family-controlled businesses and family offices.
- The weekly *FFI Practitioner* (www.ffipractitioner.org) provides thought-provoking analysis, trends, and research affecting all professional advisers who work in this area.

The current position is that many legal firms advise family businesses because it is difficult not to; there are just so many of them. In future, a family business service will not feature in the strategy of every firm; some will focus on listed companies, or on sectors where family ownership is less abundant, like tech startups, or they will continue the conventional, organisational division between corporate and private client work.

These are strategic choices, and like every other sector the prize in the family business sector will be won by firms who invest in training staff and developing new market leading services. These firms will also lead the way in creating multi-disciplinary practices that cater for the broad needs of these clients. Such practices will comprise a group of advisers from different professions of origin who have learned how to understand the needs of family businesses.

FFI's vision is to *Educate, Connect, and Inspire*. It is the most influential global network of thought-leaders in this field and should be the organisation of choice for lawyers who want to advise family business clients.

Ken McCracken (ken@m-fbc.com) is a family enterprise consultant. He is a Fellow of the Family Firm Institute and a member of its board of directors.

Conference boat comes in

Ahead of the Society's 2021 Annual Conference, which runs online from 26-30 April, the Journal spoke to some of the principal speakers, for some tasters of the choice on offer – from business to boats

Business: the essential element

The effects of the COVID-19 pandemic will be with us for a good while yet, not least in the impact on the business environment. Tuesday's programme reflects that, with a focus on the economy.

Tracy Black, director of CBI Scotland, is one of two panellists in the main session. She is clear that while, after a difficult decade, Scotland needs a recipe for enduring economic success, neither government nor business can deliver that alone. "We need to ensure that Scotland remains competitive by sending out clear signals about its status as a great place to live, work, and do business. Setting out a long-term tax strategy, reducing red tape and business costs, and promoting an open, data sharing culture where innovation can thrive, would all help in that goal."

With the Holyrood election fast approaching, she calls for the economy to be front and centre of the political debate. "A strong economy that creates growth and good jobs is the only sustainable way of raising wages, improving living standards and ultimately securing prosperity for all Scots."

One thing the pandemic has shown, she continues, is how fundamental business is to our way of life. "People's jobs are about so much more than paying the bills – they create social connections, support good mental health and provide a sense of purpose."

Despite the economic damage from the pandemic, with resulting loss of livelihoods, Black has a positive outlook. "There has also been real innovation. Firms have done amazing things to keep operations going and deliver for customers – some that will continue well into the future. Increased flexible working and working from home are clearly here to stay. Both deliver huge benefits in terms of reducing time lost to travel, promoting work-life balance and lowering stress, without harming overall productivity. But that doesn't mean the era of the office is over. From training to collaboration, having a physical space to bring workers together remains an important part of working life."

And professional services will play a crucial role in the recovery. "With Scottish firms increasingly looking to global markets for trade and investment, our world class legal sector is essential to smoothing negotiations and contracts, as well as showcasing the UK's hard-won reputation for fairness and rule of law."

Racism: curse of our society

Conference opens on the Monday with a day dedicated to diversity, inclusion and wellbeing, beginning with a five-strong – and evidently diverse – panel covering wellbeing, issues for working parents, discrimination and bias, and the profession's own equality deficit. But perhaps it will be a Friday keynote speaker who really makes us face some uncomfortable truths about our society.

Debora Kayembe, recently elected rector of Edinburgh University, has spent her life campaigning against barriers arising from gender, injustice and racism – first as a girl growing up in the Congo and seeking an education and a legal professional qualification, then in working to expose international business corruption in her country, and then after leaving for her own safety and seeking asylum in the UK, challenging the level of racism she found here.

Debora Kayembe

Tracy Black, CBI Scotland

"The most shocking thing I saw when I arrived in England was the condition of refugees and asylum seekers. I couldn't find humanity in the way I was treated as a person, as a human being. It was shocking for me to see a very respected country like Britain treating people the way I was treated, and some people were treated worse because their level of education made it so difficult for them to adapt."

After initially working to support migrants and refugees with language difficulties, Kayembe decided to re-enter legal practice. On being told that her original qualification would not be recognised in England, but would in Scotland provided she lived here, in 2011 she came north. Though not at present in practice, she has a full working life doing policy work with the Royal Society of Edinburgh, running her own charity, Full Options, which lobbies for social reform and racial justice, and now also as rector.

Sadly, she has continued to suffer racist abuse in Scotland. Asked what our society should be doing to combat racism, she responds: "The only way we can do it is through dialogue and tolerance. We need to open up to the other, listen to them, what is the motivation behind what they are doing, and get them to learn to know us. We have to have the occasions, the

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"The reason that I travelled all the way from the Congo, to England, to Scotland, is because I wanted to reach out, I needed to reach out, by breaking the barrier that was in front of me"

opportunities, to sit at a table and discuss these issues."

She cites the "charrette" programme in North Carolina in the 1970s to smooth the path to school desegregation. "Encountering, speaking to one another, that is what will bring this down. Otherwise if you are just living in exclusion, in indifference, you are not going anywhere."

As rector she wants to encourage students into voluntary work, "to fight their own bigotry, because more people giving themselves to others could reduce bigotry, and at university level it's a perfect place to teach students how to be giving themselves to our society to make a better world".

Breaking barriers will therefore be the theme of her conference address. "The reason why I travelled all the way from the Congo, to England, to Scotland, is because I wanted to reach out, I needed to reach out, by breaking the barrier that was in front of me. We need to break this barrier, and try to reach out to others. This is what I will be sharing."

Trauma awareness: all benefit

Conference Thursday turns to Scots law, with the afternoon dedicated to the emerging subject of trauma awareness. Headlining this is defence solicitor Iain Smith, named Lawyer of the Year 2020 for his efforts to increase understanding of how childhood traumas can impact on future behaviour – and how the justice system should respond.

It's something Smith asserts is relevant to every lawyer. "The reality is childhood adversity not only affects our clients, it affects our colleagues. For those dealing with conveyancing it's said that house transactions are among the three most stressful events people ever incur in their life, and understanding trauma will allow you to respond in an empathetic fashion to someone who is feeling fraught, a bit nippy. Ultimately those who are aware of it will be better solicitors."

Smith himself is a relatively recent convert, dating from his acquaintance with a film called *Resilience*, which revealed to him the science of the impact of trauma on the young brain. "It provided an explanation – not an excuse – for why an awful lot of people enter the justice system. So people who on one view are choosing to take heroin, are in fact still feeling trauma and pain by taking drugs effectively to escape. They have poor self regulation; often that is founded in overactive stress in childhood that they can't control because their cortisol levels are so high."

With that understanding, "it's a futile system that we have which is focused on retribution and punishment. In my view we want to repair those harms rather than punish them, because you can't punish anyone out of addiction".

One of this month's online articles explains Smith's position further. At conference he will give a brief interview and then join a panel discussion with experts from home and abroad. First, however, there will be a screening of *Warriors: Revisiting the boys of Ballikinrain*, about the experiences of boys in a children's home, and afterwards a Q&A session with BAFTA-winning director Stephen Bennett.

Harriet Beveridge

And finally... comic with a boat

Pushing the boat out a bit, as it were, conference ends on the Friday with a lighter keynote on a serious theme. Harriet Beveridge, self-styled "executive coach, broadcaster and comic", labels her presentation "Will it make the boat go faster?" – which, it happens, is her business brand and the title of her co-authored book.

How did it come about? "The book I co-wrote with Olympic gold medallist Ben Hunt-Davis. It tells the story of a fairly mediocre British rowing crew who by doing some quite interesting things came round and got gold. Their mantra with everything they did was to ask, 'Will it make the boat go faster?' That's the essence of what we bring to individuals and organisations, helping them define what their gold medal is, and make their boat go faster."

Iain Smith

"People fascinate me", she adds. "Ben's a pretty normal guy, who achieved something extraordinary. I'm not sporty. I use his story as an inspiration to do things in my life."

Coach *and* comic? She insists they are really very similar. "Comics will call out how daft we are as a species and how funny is the difference between what we should do and what we actually do. It's the same in my performance coaching work: it's the calling out."

Beveridge is no stranger to the legal profession, which she also finds endlessly fascinating. "The requirement in the technical work is to be perfect, correct, accurate, and I find that quite often spills over into other areas, so I work with quite a lot of senior lawyers who have a perfectionist streak that is getting in the way of them moving forward. I think also that lawyers are big worriers, which again makes sense, because they need to cover all bases, but that fear can be a block and a barrier."

What can people expect to gain from her talk? "Three things. Number one is pragmatic strategy. I want people to walk away with things they can do immediately to help their organisations flourish, their teams flourish, and themselves as individuals. So it's highly practical. The next is around energy. It's been a really tough year, so it's about walking away with a spring in your step. And the third is inspiration. I hesitate to use that word because it sounds very cheesy, but Ben's story I find pretty inspiring.

"My intention is to round it off on the Friday afternoon to make sure people leave with that energy and that practical action going forward – and hopefully raise a smile as well."

What's not to like?

For the now final programme, attendance options, and to book, go to the CPD and training page on the Society's website.

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Of dockets, and much more

Dockets, sentencing questions, the complainer's rights in s 275 applications, bail appeals, and delay due to the COVID-19 lockdown are among a wealth of matters considered in our latest roundup from the criminal courts

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

There have been a healthy number of appeal cases reported since my last article, so I will try and do justice to as many as I can within the editor's wordcount. As ever there are a few themes.

Dockets

I don't think many of us understood the significance of s 288BA of the Criminal Procedure (Scotland) Act 1995 when it was introduced as a late stage amendment to the Criminal Justice and Licensing (Scotland) Act 2010. For a long time it seemed to involve prejudicial material which for one reason or another could not form part of a charge and after such evidence as there was had been led it was withdrawn from the libel by the prosecutor.

More recently dockets have had a corroborative sting in their tail. In *HM Advocate v Adams* [2021] HCJAC 19 (30 August 2019; published 16 March 2021) the respondent had been indicted on five sexual offences, including rape against the same complainer covering a period from 1999 to 2011. The docket narrated that he had been charged at Liverpool Crown Court in February 2017 with a penetrative sexual assault and rape, allegedly in January 2016. His guilty plea to the sexual assault but not the rape was accepted. Their Lordships ruled that this was entirely proper. There was no element of forcing the respondent to reveal the previous conviction unless he did not accept his guilt of the matter. Reference was made to Lord Ericht's decision in the unreported case of *HM Advocate v Murdoch* (28 August 2018), which appears to be essential reading. Time for another edition of SCCR unreported decisions.

In *SB v HM Advocate* [2021] HCJAC 11 (21 January 2021) the appellant had been charged with a variety of historic physical and sexual offences involving two vulnerable teenage girls. A co-accused was acquitted and the appellant faced two charges of indecent assault and rape arising between 2003 and 2006. A docket narrated other sexual acts, including rape involving the complainers, between 2006 and 2017 at *loci* in Scotland and England. The trial judge referred to the docket in his introductory remarks; before his charge the jury were given a clean copy of the indictment with the remaining charges and without the docket. Nothing was said about the docket in his directions. The court did not accept that the jury were left with the impression that the docket referred to further charges against the appellant and held there had been no misdirection.

Corroboration to supplant defence of consent

The circumstances of two charges of sexual assault were considered in *AA v HM Advocate* [2021] HCJAC 9 (9 February 2021). In the first the complainer was intoxicated and in the second she was asleep. The charges proceeded on a *Moorov* basis and the appeal focused on an alleged misdirection in relation to the first charge by failing to address the issue of reasonable belief in consent. This would involve establishing absence of belief by corroborated evidence. The trial judge was of the view that reasonable belief was not a live issue. The Appeal Court confirmed this and refused the appeal. The need for "formal proof" did not arise where reasonable belief could not be inferred because the complainer showed signs of obvious intoxication (*Maqsood v HM Advocate* 2019 JC 45 at para 16).

Sentencing

Since the inception of the Scottish Sentencing Council, and indeed before, I have the feeling that sometimes the Appeal Court seems to battle with sentences that are perhaps too long and tries in a small way to reduce prison numbers which are increasingly held up by long-term prisoners serving very long sentences.

In *HM Advocate v Jones* [2021] HCJAC 8 (2 February 2021) the respondent pled guilty by s 76 letter of driving a single decker bus dangerously on a country road, at speed and repeatedly on the wrong side of the road. His bus collided with an oncoming car, killing the husband and wife occupants. Four bus passengers were also injured, one seriously. The Crown appealed the sentence of four and a half years, reduced to three on account of the plea.

The respondent had made an admission and apology at the outset. While driving too fast for the conditions, he had not exceeded the speed limit. He might have been dazzled by the sun prior to the collision. He had previous convictions for speeding and careless driving. He had expressed genuine remorse and had caring duties for his wife. The sentencing judge assessed the case as falling at the high end of level 3 of the Sentencing Council for England & Wales Definitive Guidelines. While the Crown argued for a higher sentence, the court did not regard the sentence as outside the range which any judge would have considered appropriate. The main factors in relation to speed were the weather and the locus. The English guidance, while a useful check, was not applicable in Scotland and should not be followed with slavish adherence.

HM Advocate v Gatti [2021] HCJAC 7 (2 February 2021) was heard on the same day by a slightly different bench. The respondent, when aged 20, had caused death by driving at an excessive speed (42-47mph) in a 30 mph zone, on the wrong side of the road, having consumed alcohol, and colliding fatally with a 15 year old female pedestrian. He was sentenced to four years six months' detention, reduced from six years for the plea, with nine months consecutive for attempting to pervert the course of justice by leaving the scene, concealing the number plates, and trying to avoid the determination of his alcohol level. Once traced, he co-operated with the police, saying he had panicked after the accident. He was previously of good character, had expressed remorse and had only recently passed his driving test.

The Crown submitted by reference to the English guidelines that sentence should have been categorised in level 1, not level 2, attracting between seven and 14 years. The court reiterated what was said in *Jones* and that an overanalytical approach should not be applied to the guidelines. The judge had taken account of the respondent's youth and immaturity and had correctly considered a level 2 sentence was appropriate. A level 1 sentence was for a very serious offence, the sort which had caused Parliament to increase the maximum penalty to 14 years.

A third Crown appeal was however successful in *HM Advocate v JB* [2021] HCJAC 16 (10 March 2021). The respondent pled guilty on indictment to two sexual offences involving girls under the age of 13. One charge involved sending sexually explicit messages (grooming) and the other a sexual assault. The sheriff imposed a community payback order with a three year supervision requirement. The court took issue with the criminal justice social work report where the respondent had blamed a victim, and which concluded he had a pattern of "misinterpreting the innocent behaviour of young female children", casting him as a victim of his own "lack of internal controls" rather than as an exploitative and manipulative offender. The sentence was quashed and 12 months' imprisonment imposed, reduced from 18 months for the plea, resulting in the sex offenders' notification arrangements being increased from three to 10 years.

Sentence backdating

A regular accused would often be described rather insensitively by his agent as "not the sharpest tool in the box", or more correctly as having learning difficulties. This might not

prevent the client from being able to calculate the payout on a 10p Heinz 57 accumulator at the bookmakers, or subtract from 501 at darts. With these transferable skills many appeals have been insisted on, and a number have shown the numerical and logical limitations of the judiciary by comparison in the dark world of backdating sentences.

I was attracted to *Anderson v HM Advocate* [2021] HCJAC 18 (2 March 2021), as among other charges to which the accused pled guilty were shipbreaking with intent to steal. He was also charged with possession of a knife in a public place, both aggravated by being committed while subject to an undertaking to appear at the JP court.

These crimes attracted sentences of 15 months' imprisonment, discounted from 18 months, to run concurrently from the date of imposition, 16 December 2020 as the accused had originally been bailed on those matters. Two subsequent bail contraventions were also charged for which the accused had been remanded. The sheriff decided that the first bail offence merited 90 days' imprisonment, discounted to 75 days, and the other 120 days, discounted to 100 days. These periods would reflect the amount of time spent in custody since 18 August 2020, so the appellant would be admonished. This was contrary to the principles set out in *Boyd v HM Advocate* 2011 SCCR 39, that the sentencer should backdate the sentence to the proper date, or if this was not possible, double the time served on remand to equate to the "good behaviour" regime implicit in a short custodial sentence.

Surprisingly, the Appeal Court did not backdate the totality of the sentences to 18 August as it wished to reflect the consecutive element adopted by the sheriff. It agreed to allow the consecutive sentences of 75 and 100 days to run from 18 August, giving a nominal release date of 13 November, to which was added a *cumulo* sentence of 15 months' imprisonment for the substantive offences to run from 13 November rather than 16 December 2020.

Section 275 applications

There are two cases of note this month, each with a different angle from recent cases on s 275 of the 1995 Act.

In *RR, Petr* [2021] HCJAC 21 (7 October 2020; published 18 March 2021) the petitioner was the complainer in a rape case who had not been aware of a s 275 order having been granted. She was only told months later when the Crown sought to precognosce her. She sought to reduce the order as being "wrong, unjust and contrary to law". The right of the complainer to intervene in such cases was unnecessary if correct procedures were followed, and the Crown was instructed to review the s 275 application in light of the representations received. The court was clear that the legislation was drafted in such a way that the complainer should be contacted by the Crown as a matter of course to seek her views in order that any such application could be considered taking these into account.

In a related theme, in *Darbazi v HM Advocate* [2021] HCJAC 10 (3 February 2021), a case involving digital penetration contrary to s 2 of the Sexual Offences (Scotland) Act 2009, after sundry procedure during which a defence statement was lodged stating that the appellant was not the perpetrator, a change of agency took place. On the adjourned trial diet a defence of consent was tendered but was refused by the sheriff as too late. The appellant was convicted but the Appeal Court quashed the conviction as, notwithstanding the lateness of the application, the refusal amounted to a miscarriage of justice by precluding the appellant from leading his defence (possibly allowing the Crown to cross-examine on the earlier defence statement).

Bail appeals

There are not many cases about bail, so *Russell v HM Advocate* [2021] HCJAC 24 (24 March 2021) is welcome. The petitioner sought redress for the sheriff not considering his application for review of bail. The petitioner had appeared on 6 May 2020 and had been refused bail. At some stage he appealed the refusal to the Sheriff Appeal Court but the application was refused. Subsequently an application for review of bail by the sheriff was refused as incompetent. Trial was adjourned due to COVID; an application for review of bail was deemed incompetent. On a referral by the Sheriff Appeal Court, the High Court disagreed with the sheriff that he was bound by *HM Advocate v Jones* 1964 SLT (Sh Ct) 50 at 51 or *Ward v HM Advocate* 1972 SLT (Notes) 22. It remitted the case to the sheriff to deal with, stating that the reference in *Renton & Brown*, para 1.20.1 was inaccurate and the approach in para 4.1.5 of the *Criminal e-Bench Book* was to be favoured. Where a review of bail is sought, the sheriff can deal with the matter, unless the initial order was granted on a successful appeal.

Delay

COVID has delayed and frustrated many things, such as my return to the golf course to right a bad swing I have had for the last 50 years. I understand as the criminal justice system gets back to normal, "current" cases should be cleared by 2025 and community payback hours worked off by 2027, which may be a talking point at the Holyrood election in 2026.

Meanwhile in *CS v HM Advocate* [2021] HCJAC 6 (29 January 2021) the appellant was aggrieved that he was still being prosecuted on indictment for allegedly having a knife in his possession in Paisley in March 2019. He was granted bail after full committal and indicted to a first diet in January 2020. The matter was adjourned on defence motion for further investigations; at the continued diet trial was fixed for 27 February, a diet adjourned on defence motion due to the non-availability of a witness. A diet fixed for 4 May could not take place due to the lockdown and new diets were fixed administratively for 31 July and 23 October 2020. The 12 month time bar was initially extended by agreement to 8 May, and then by the Coronavirus (Scotland) Act 2020 to 8 November 2020. At a hearing on 30 October the sheriff extended the time limit to 15 January 2021 when it was anticipated remote jury trials would have started.

At appeal the defence submitted the sheriff had insufficient information before him on which to adjourn the case in terms of *Swift v HM Advocate* 1984 JC 84. Their Lordships concluded the circumstances that had arisen were no fault of the Crown, and arrangements to restart jury trials as soon as practicable had been publicised by the Scottish Courts & Tribunals Service, which had worked with the Law Society of Scotland and Faculty of Advocates. The sheriff had acted correctly and with sufficient reason to extend the time bar in terms of *Swift* and *HM Advocate v Early* 2007 JC 50. It was noted earlier adjournments had been at the instance of the defence.

CCTV

The Sheriff Appeal Court dealt with *Wishart v Procurator Fiscal, Kirkcaldy* [2021] SAC (Crim) 1 (1 December 2020), which arose from a road traffic trial before a justice of the peace. The appellant had allegedly sped off after a collision and was charged with failing to stop etc. There were no eyewitnesses but CCTV evidence had been recovered. The footage was led without objection. A certificate under s 283 had been served and not objected to. It was quite clear the CCTV footage gave a location and time. The court was content the CCTV disc had been properly served. Even if that procedure had been flawed, there was ample evidence from the witnesses led.

Briefings

Finally... a work in progress

I read the petition to the *nobile officium*, *Procurator Fiscal, Kilmarnock v Motroni* [2021] HCJAC 17 (3 March 2021), with horror. A stated case has been requested. All I will say at this stage is that it is important for agents and judges to scrutinise libels at the outset, and if anything dodgy jumps up like the Crown seeking extraterritorial jurisdiction in Italy (other than in a docket), the point should be taken then and there in terms of s 144(4) of the 1995 Act, or its solemn equivalent, otherwise anything might happen!

Licensing

AUDREY JUNNER, PARTNER, MILLER SAMUEL HILL BROWN

During World War 2, Britain's licensed trade remained largely open for business despite the best attempts of the Luftwaffe to destroy the country's infrastructure. In the past 12 months, a virus has succeeded where the Third Reich failed: large swathes of Scotland's hospitality sector are under threat due to the burden of severe restrictions. The seemingly ever-shifting controls on civil liberties are without precedent in a modern democratic society; and while it is impossible to argue with the need to take robust measures to control the spread of COVID-19, the licensed trade has endured restrictions whose rationale has on occasions been hard to detect.

At the very core of the licensed trade's grievance is the lack of an evidential foundation for the continued closure and restrictions. For example, data published by Public Health England last November indicated that, over a five-day period of testing, fewer than 2% of those testing positive for the virus had visited a hospitality venue. There is also attraction in the argument that closing licensed venues or restricting their opening hours is likely to fuel gatherings that are more likely to promote the spread of the virus than a well controlled environment such as a pub.

Judicial challenges

Might the hospitality sector vindicate this perceived injustice in the courts? So far, only one attempt has been made by licensed businesses to assail the Scottish Government's decision making. In *KLR & RCR International Ltd v Scottish Ministers* [2020] CSOH 98 (11 December 2020), hospitality operators and the owner of a short-term letting business petitioned for judicial review of the Scottish Government's failure to move Edinburgh from "level 3" to "level 2". The reclassification would have resulted in looser trading restrictions and had considerable commercial benefit.

The petitioners argued that the Scottish Government had failed to follow its own criteria for allocating local authority areas within "levels". There was also a lack of evidence to support the decision. Lord Ericht held that ministers had been entitled to consider a range of factors and place weight on an increase in case numbers (albeit modest) together with concerns that opening up more services as the Christmas period approached would carry a significant risk of increased transmission. The petitioners' motion for interim suspension of the decision was refused.

In this case there was no assault on the legislation itself. Nevertheless, it provides a clear signal that, during a fast moving public health emergency involving a steep scientific learning curve, the courts are unlikely to interfere with political decisions taken in conjunction with expert advisers. In *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, a challenge to lockdown restrictions in England (and referred to in *KLR*), the Court of Appeal gave short shrift to a raft of arguments. The claimants contended that the Government had followed the advice of one group of scientists and had not paid attention to others, less restrictive measures would have addressed the spread of the virus more proportionately, and various articles of the European Convention on Human Rights had been violated. In the opinion of the Court of Appeal, the lockdown legislation was "quintessentially a matter of political judgment... and is not suited to determination by the courts".

A breach in the dam?

According to the Scottish Government's skeletal timetable, Scottish hospitality venues are due to reopen on a phased basis starting on 26 April, but the trade will continue to struggle financially until something approaching pre-pandemic normality is restored.

The incentive to challenge the restrictions therefore remains, but the decisions in *KLR* and *Dolan* appear to constitute a road block. However, the "lockdown" regulations are not invincible. In *Philip v Scottish Ministers* [2021] CSOH 32 (24 March 2021), Lord Braid held that the ban on public worship amounted to a disproportionate interference with the rights secured by article 9 of the ECHR. Had ministers evaluated and properly rejected less restrictive measures that would achieve the same level of health protection? In the Lord Ordinary's opinion (at para 114), if one activity is considered to present an acceptable risk, then it is legitimate to ask why another comparable activity is not. The hospitality sector has yet to receive a proper explanation as to why, despite all the mitigation measures it has put in place, licensed premises pose a virus transmission risk greater than, say, retail.

Planning

ALASTAIR McKIE
PARTNER, ANDERSON STRATHERN LLP

This briefing covers the latest developments in the extensive programme of Scottish Government ("SG") reforms to the planning system, including the ongoing rollout of the Planning (Scotland) Act 2019 and related policy changes. SG work also includes legislation to maintain a functioning planning system during the COVID-19 pandemic and support economic recovery. These will be of immediate relevance to all solicitors involved in property development.

National Planning Framework 4

SG is continuing with the rollout of NPF4 which, when approved by MSPs, will have an enhanced role in planning decision-making and for the first time will form part of the development plan, containing a suite of SG's national planning policies. SG has been undertaking extensive consultation and engagement. One key change to be included in NPF 4 is targets for the use of land for housing as part of a strategy for Scotland's spatial development.

Planning (Scotland) Act 2019

Local place plans ("LPPs")

The 2019 Act introduces LPPs, which may be prepared by a community body. An LPP is a proposal as to the development and use of land; it may also identify land and buildings the body considers to be of particular significance to the local area. A planning authority, before preparing a local development plan, must publish an invitation to local communities to prepare LPPs, with information on assistance available. An authority preparing its local development plan must take account of any registered LPP within its district. SG is undertaking consultation on LPPs which closes on 25 June 2021. While not forming part of the development plan, it is considered that LPPs where relevant will be a material consideration in planning determinations.

Mediation

Mediation has long been considered as having a limited but positive role in planning disputes. The Act defines mediation as including any means involving an impartial person of exploring, resolving or reducing disagreement, and provides that ministers may prepare guidance on the promotion and use of mediation in relation to:

- preparation of local development plans and related evidence reports;
- pre-application consultation;
- assisting in determining an application for planning permission;

• any other matter related to planning that ministers consider appropriate.

Guidance may include provision about the form of mediation to be used in a particular circumstance, and the procedure to be followed. SG has recently concluded a consultation on mediation.

Pre-application consultation

The Town and Country Planning (Pre-Application Consultation) (Scotland) Amendment Regulations 2021, due to come into force on 1 October 2021, introduce a number of important changes to consultation before an application for identified categories of development (including "major" or "national") can be submitted to a planning authority. A minimum of two public events (currently one) will be required, and the prospective applicant must at the final event provide feedback in respect of comments received regarding the proposed development. The Act requires that an application for planning permission is submitted within 18 months of the date of submission of the proposal of application notice.

Short-term let regulation

The Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021 came into force on 1 April. Made under s 17 of the 2019 Act, they enable a planning authority to designate all or part of its area as a short-term let control area. A change of use of a dwellinghouse to use for providing short-term lets is then deemed to be a material change of use requiring planning permission. The regulations do not apply to short-term letting outwith a control area, and there is continuing uncertainty as to when a material change of use has occurred with a particular property used for short-term letting. SG is providing guidance that may assist. These regulations were intended to operate along with the licensing of short-term lets under the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021; this order was withdrawn following concerns expressed by MSPs but it is understood that it will be re-laid later in the year.

Permitted development rights

The Town and Country Planning (General Permitted Development and Use Classes) (Scotland) Amendment Order 2020 came into force on 1 April 2021. This includes new classes 18B and 22A, which permit the change of use of an existing agricultural or forestry building to use as a dwelling, or to use for a flexible commercial use, in each case together with certain building operations reasonably necessary for such conversion. Flexible commercial uses are uses within classes 1, 2, 3, 4, 6 or 10 of the Town and Country Planning (Use Classes) (Scotland) Order 1997.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

New plan for immigration

The UK Home Office seeks views on its New Plan for Immigration policy paper which sets out the intentions "to build a fair but firm" asylum and illegal migration system. See www.gov.uk/government/consultations/new-plan-for-immigration
Respond by 6 May via the above web page.

Preventing radicalisation

The UK Government's review of its controversial Prevent programme "for supporting people vulnerable to being drawn into terrorism" has launched a further wide ranging consultation on the strategy. See www.gov.uk/government/consultations/independent-review-of-prevent-call-for-evidence
Respond by 26 May via the above web page.

Patient Safety Commissioner

Scottish ministers are committed to establishing a Patient Safety Commissioner for Scotland and seek views on what that role should involve. See consult.gov.scot/healthcare-quality-and-improvement/patient-safety-commissioner-role-for-scotland/
Respond by 28 May via the above web page.

Miners' strike pardons

Following the report of the independent review into *The Impact on Communities of the Policing of the Miners' Strike 1984-85*, the Scottish Government accepted in principle the recommendation that it should legislate to pardon miners convicted for strike related matters. Views are sought on the criteria. See consult.gov.scot/safer-communities/miners-strike-pardon/
Respond by 4 June via the above web page.

Medication addiction

In response to a public petition and in light of policy developments in England, the Scottish Government established a short life working group on Prescription Medicine Dependence and Withdrawal. That group has taken evidence on the scale of this problem in Scotland and views are now sought on its recommendations, which address issues of concern regarding medication for chronic pain and for mental health problems, and of drug related deaths. See consult.gov.scot/health-and-social-care/prescription-medicine-dependence-and-withdrawal/
Respond by 4 June via the above web page.

Local place plan regulations

Most provisions for local place plans, which provide proposals for the development and use of land, were added to the Town and Country Planning (Scotland) Act 1997 by the Planning (Scotland) Act 2019. The Government now seeks views on detailed regulations for the preparation, content, submission and registration of such plans. See consult.gov.scot/local-government-and-communities/local-place-plan-regulations/
Respond by 25 June via the above web page.

... and finally

As noted in last month's column, the Scottish Solicitors' Discipline Tribunal is undertaking a review of its practice in awarding expenses (see www.ssdt.org.uk/media/530403/expenses-consultation.pdf and respond by 14 May).

Emergency temporary legislation

A number of temporary measures have been continued by regulations under the Coronavirus (Scotland) Acts of 2020. The Scottish Parliament has agreed to regulations that extend the Acts until 30 September 2021; no further extensions are available. The effect of this extension is that where any planning permission, listed building consent or conservation area consent is due to expire by 30 September 2021, that date will be extended until 31 March 2022.

Publication of planning documents online rather than at physical locations will be allowed until 30 September 2021, and committee meetings (including meetings of a local review body) can take place without public attendance until then. The current suspension of physical pre-application consultation public events, and their temporary replacement by virtual events, is also extended to that date.

Briefings

Scottish Planning Policy (SPP)

Following a consultation last year SG published a revised SPP 2020 and a new PAN 1/2020, effective 18 December 2020. These are significant policy changes and relate to SG's response to *Gladman v Scottish Ministers* [2020] CSIH 28. In that case a shortfall in the five-year effective housing land supply meant that the presumption (in favour of sustainable development in terms of SPP) should apply to create a "tilted balance" in favour of residential development. SG has now reworded the presumption in favour of development that contributes to sustainable development, so it can be applied in a more straightforward way. SG has removed references to development plans as "out of date", and the direct link with calculating the land supply to the presumption, replacing them with a more straightforward policy. SG will undertake further work to inform an updated approach to housing land audits within the new system. SG also supports the use of the "average method" to determine whether or not there is a five-year land supply, as a reasonable benchmark to be taken into account in assessing applications. These revisions to SPP and PAN 1/2020 are understood to be subject to a judicial review in the Court of Session.

Insolvency

ANDREW FOYLE, SOLICITOR ADVOCATE, JOINT HEAD OF LITIGATION (SCOTLAND), SHOOSMITHS

It is often overlooked that the appointment of a judicial factor ("JF") to the estate of a firm of solicitors under the Solicitors (Scotland) Act 1980 also entails the factor's appointment to the estates of the individual partners of the firm.

Whilst a judicial factory has similarity to bankruptcy, it is not the same. In the context of a firm of solicitors, the question might arise as to the position of creditors of the individual partners (as opposed to those of the firm). Can such creditors continue to be the pursuer of individual partners in their personal capacity, or does the JF's appointment over their estates now require a claim to be made to or against the JF instead?

It is not a point that is commonly encountered. However, it was considered in *Cabot Financial UK Ltd v MacLennan* [2021] SC ABE 6, a judgment dating from September 2018 which has only recently been published.

The pursuers were assignees of a debt due by the solicitor defender under a credit card. There was no suggestion that the credit card was for business purposes and the case proceeded on the basis that it was personal to the defender. The pursuers raised proceedings against the defender seeking payment. In due course the defender averred that she was subject to the appointment of a JF in respect of a law firm in which she had been a partner and she sought to convene the JF as a third party. Her case against the JF was, in short, that her personal estate vested in the JF and that it was accordingly to the JF that a claim must be made.

The JF entered appearance in the action and resisted liability on the grounds that her function, whilst covering both the firm and the individual partners' personal estates, was to deal with creditors and clients of the law firm only. It remained for the individual partners to deal with their personal creditors.

JF's special position

It was established by *Ross v Gordon's JF* 1973 SLT (Notes) 91 that a creditor of the firm had the ability to sue the JF for payment, provided they did so in the court at which the JF was appointed (which in terms of the 1980 Act would be the Inner House of the Court of Session). The question of whether creditors of the partners personally had that right was considered by Lord Hodge in *Macadam v Grandison* [2008] CSOH 53, where it was commented that:

"It is not clear to me that creditors of a solicitor can recover debts due by him in his private capacity by suing the judicial factor appointed under s 41 of the 1980 Act. This is because the role of such a judicial factor is to settle the solicitor's liability to clients and others incurred in connection with his practice. While the judicial factor may make provision from the factory estate to allow the ward to meet his obligations in the interest of preserving that estate, it is not clear that creditors of the ward may sue the judicial factor in respect of the ward's obligations, which have not arisen from his practice as a solicitor. They may sue the ward and, if their debts are not paid, seek sequestration of his estates under the Bankruptcy (Scotland) Act 1985."

In *MacLennan*, the court noted that the pursuer had made no positive case against the JF, and the JF strongly argued in favour of the principle set out in Lord Hodge's dictum.

The court agreed with the JF and held that the position set out by Lord Hodge represented the legal position. A JF appointed to a legal firm is appointed for the specific purpose of winding that firm up for the benefit of its clients and creditors. That is an important distinction between a JF appointed under the 1980 Act and JF appointments more widely. The JF therefore has no liability to make payment of the personal debts of an individual partner and no decree could be granted in favour of a creditor for them.

The creditor's remedy was instead to sue the individual partner. In the event of non-payment, the creditor might then sequestrate the estate of the partner. If that happened, the trustee in sequestration would inherit not the estate as a whole, but rather a right to an accounting from the JF and to the reversion from the individual's estate once the JF had completed her work.

Tax

CHRISTINE YUILL, PARTNER, PINSENT MASONS

As the COVID-19 pandemic continues, the Government delivered a budget focused on alleviating the tax burden on the sectors hardest hit by lockdown and encouraging investment in a stagnant economy. Businesses have welcomed the changes, but it remains to be seen whether they will be enough to kickstart the UK's economic recovery.

Corporation tax

The Chancellor confirmed that the corporation tax rate will remain at 19% for the time being, rising to 25% from April 2023. The small profits rate will also return, albeit in a much more limited form; only companies with profits of £50,000 or less will be allowed to remain on the 19% rate. Relief will also be available for businesses with profits under £250,000, ensuring that they also pay less than the full 25% rate.

Certain related taxes will also be amended in connection with the planned corporation tax hike. The diverted profits tax rate will rise to 31% from April 2023 to ensure that it still disincentivises profit shifting. The Government also plans to lower the bank surcharge, to ensure that the combined level of bank taxation does not damage the UK banking industry. The new surcharge will be revealed in the 2022 budget.

The new Finance Bill also introduced several enhanced capital allowances, available for companies making investments in plant and machinery. The most generous of these is the "super-deduction" – a 130% first-year allowance available on all assets which would normally qualify for the 18% "main rate". For assets which qualify for the "special rate", a lower first-year allowance of 50% will be available.

This super-deduction is, and is meant to be, a quick injection to help restart the economy, not surgery to reconfigure the UK's business tax landscape. The enhanced allowances announcement has been welcomed, though it will add considerable complexity to the system as the enhanced allowances will need to be factored in when the assets are subsequently sold.

The Government also intends to extend temporarily the period over which businesses may carry back trading losses from one year to three years for company accounting periods ending between 1 April 2020 and 31 March 2022.

Freeports

The Chancellor has also announced the designation of eight English freeports, with more to follow in the future. Discussions are continuing with the devolved administration for the creation of freeports in Scotland, with the expectation that two will be designated from potential sites including Aberdeen, Dundee, Montrose, Rosyth, and Cromarty. Businesses operating within the freeports will benefit from a number of tax advantages, including a 100% capital allowance on plant and machinery used primarily within the freeport, full business rates relief, and an exemption from LBTT on the transfer of land or property used for a commercial trade. Businesses constructing or renovating non-residential buildings or structures within the freeport site will also benefit from an enhanced 10% rate of structures and buildings allowance.

VAT

In a move no doubt intended to prolong the survival of the industries hardest hit by the COVID-19 pandemic, the Government has chosen to extend the temporary reduced rate of 5% VAT for the tourism and hospitality sectors. This is set to rise to 12.5% on 1 October 2021, with the return to the standard rate taking place on 1 April 2022.

Businesses which took advantage of the VAT deferral scheme last year can now opt into the VAT deferral new payment scheme, which will allow them to make the deferred VAT payment in up to 11 interest-free instalments. Those who wish to take advantage of the scheme must opt in before 1 July 2021, and early adopters will be able to pay in the maximum number of instalments, so it is important not to delay.

Income tax

Scottish taxpayers will continue to pay income tax at the current rates, with all income thresholds except the top rate increasing in line with inflation.

Business rates

It was announced in advance of the UK Budget and after the Scottish Budget that the business rates holiday in Scotland is to be extended for a further 12 months for the retail, hospitality, leisure and aviation sectors until 31 March 2022.

Businesses across the country will be also able to claim an income tax or corporation tax deduction equivalent to any repayment of coronavirus support or relief made to a public authority, including business rates relief repayments.

Immigration

DARREN COX,
SOLICITOR,
LATTA & CO

Few people in the UK will be unaware of Shamima Begum. The so-called "ISIS bride's" bid to return to the UK has been at the forefront of the British media and has polarised political and legal debate.

For those unaware of Begum's circumstances, after she left the UK at 15 years old for Syria in order to join ISIS, the then Secretary of State for the Home Department ("SSHD"), Sajid Javid, deprived her of her citizenship in 2019. She first challenged the decision in the Special Immigration Appeals Chamber ("SIAC"), the

tribunal responsible for considering immigration appeals where national security is in issue. This resulted in a determination in relation to a number of preliminary issues: that the decision depriving Begum of her citizenship would not make her stateless; that the SSHD had not breached his policy on human rights abroad; and that her inability to participate effectively in her appeal did not meant that she should be allowed to return to the UK to pursue it in person.

The Supreme Court's judgment in *R (Begum) v Secretary of State for the Home Department* [2021] UKSC 7 (26 February 2021) deals primarily with the Court of Appeal judgment made on appeal from the SIAC which, in particular, had overturned the third part of the SIAC's judgment and held that Begum should be allowed to return to the UK to participate in her appeal. Both SIAC and the Court of Appeal ("CoA") had agreed that Begum would be unable to have a fair and effective hearing while she resided in Syria. Despite having accepted that she could not "play any meaningful part in her appeal", the SIAC held that there was "no universal rule" that all appeals against deprivation of citizenship decisions had to be effective. The rights of the individual in question had to be balanced against the national security interests.

Flawed approach

Lord Reed, with whom all the other Justices agreed, identified a number of significant errors in the CoA's judgment in allowing the SSHD's appeal. One aspect of the judgment deals with the scope of appeals against the refusal of "leave to enter" applications and appeals against deprivation of citizenship respectively. Begum had sought leave to enter in order to return to the UK to appeal against the deprivation of her citizenship. The UKSC held that appeals could only be brought on narrow grounds under s 6 of the Human Rights Act 1998. The appeal could not, for example, be brought on grounds that the SSHD's decision was not in accordance with his extraterritorial human rights policy, which goes beyond what is contained in s 6 of the 1998 Act. The SSHD policy is not a "rule of law"; it is guidance. As to the deprivation appeal, grounds of appeal are limited to s 6 and traditional administrative law grounds (whether the decision would make Begum stateless, whether the decision of the SSHD was perverse or whether he erred in law in some other respect).

The judgment is scathing on the CoA's assessment of the requirements of national security. Its error in this respect was its substitution of its own assessment for the SSHD's without any, or adequate, evidence. The CoA had considered that there would be safeguards in place to alleviate national security risks on Begum's return, for example by arresting and charging her on arrival and making her subject to a terrorist prevention and investigation measure. In so doing, the CoA failed to pay the SSHD's risk assessment the respect it deserved. The question of what is in the interests of national security is a matter of policy rather than law, and therefore the responsibility of a democratically accountable politician. Crucially, the SSHD would also have available to him wide-ranging advice and evidence to qualify him, given his daily involvement in national security matters, to make this assessment.

Lord Reed was equally damning of the CoA's approach to balancing Begum's fair trial rights against national security issues. In line with the SIAC's reasoning, where the public interest is such that a case cannot fairly be heard, then it will not be heard. It did not matter that Begum would be unable to exercise her right to a fair and effective hearing from Syria. The interests of national security trumped her individual rights in this regard. The appeal therefore had to be stayed until she could effectively participate without increasing the risk to public safety. Lord Reed acknowledged that there was no "perfect solution" to this issue, but national security interests had to prevail in the circumstances.

Difficult position

Where does this leave Shamima Begum? It has to be said that her prospects of successfully appealing against the deprivation decision have weakened considerably. Her two options are: either pursue an appeal from abroad in a hearing in which she will be unable to participate; or wait indefinitely until she is in a position to participate. In any event, the grounds against which she can challenge the deprivation decision are narrow and the SIAC's preliminary rulings are indicative of the difficulties she will face in establishing before it that the SSHD's decision was unlawful. J

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Mark Richard Thorley

A complaint was made by the Council of the Law Society of Scotland against Mark Richard Thorley, Thorley Stephenson Ltd, Edinburgh. The Tribunal found the respondent guilty of professional misconduct in respect that he (a) inserted into a minute of agreement a provision requiring the signatories to refrain from making any complaint or raise any proceedings against the solicitors representing the other party; (b) required that the secondary complainer sign a letter of discharge agreeing to withdrawal of the complaints already made to the SLCC; and (c) wrote a letter threatening to raise court proceedings in the event that the secondary complainer did not withdraw a new complaint to the SLCC. The Tribunal censured the respondent.

The way the respondent dealt with this matter was not appropriate. The minute was an agreement about a separating couple's money and finances. This was not the correct place to deal with a complaint. The Tribunal accepted the respondent's evidence that he was trying to meet the best interests of his client; however, he sought to insert a clause into the minute of agreement that was in his interest. He did so without proper consideration of the full implications. The Tribunal considered that while to some extent, the interests of the respondent and his client were aligned, in that neither wished to deal with a complaint, full and proper consideration of the client's interests would have counted against such a clause as drafted.

The client's best interests lay mainly in having the financial arrangements between her and the secondary complainer resolved. The clause introduced potential for derailment of that agreement. The clause in this case was very wide and could potentially cover future actings, even if that was not what the respondent had intended. There were other ways of resolving the complaint without introducing a clause into the client's own minute of agreement. The Tribunal considered that in introducing his own interests, the respondent's personal integrity could not be said to have been beyond question (rule B1.2). He had allowed his independence to be impaired (rule B1.3) and had permitted his personal interests to influence his actings on behalf of his client (rule B1.4.2). Having considered the whole circumstances, the respondent's conduct did amount to a serious and reprehensible departure from the standards of competent and reputable solicitors.

The conduct was at the lower end of the scale of professional misconduct. It was an isolated incident involving only one case. There were no findings of unsatisfactory professional conduct or professional misconduct against the respondent. He had shown remorse and had been transparent when giving evidence to the Tribunal. He had a long career without incident. With all that in mind, the Tribunal was of the view that censure was sufficient penalty. J

When the "twa kingdoms" collide

The ruling against the Scottish Government on the COVID-19 regulations preventing church worship might be thought momentous, but has received surprisingly little coverage

Human Rights

BRENT HAYWOOD, PARTNER AND SOLICITOR ADVOCATE, LINDSAYS LLP

From 8 January until 24 March 2021 the Scottish Government's COVID lockdown regulations had the effect of imposing a blanket ban on any gathering for public worship in Scotland. This impacted all religious organisations. For Christians this meant it was illegal to go to church.

Not since "the Killing Time" (1680-88) had there been such restrictions placed on the church. In early February 2021 a group of 27 evangelical Christian leaders were granted leave to seek a judicial review of the blanket ban. After the case was up and running a Roman Catholic priest was given permission by the court to join the challenge. What led these church leaders to take such action?

The announcement that places of worship would be shut was met with a mixture of bewilderment and disbelief by my clients. Could the state really just flick a switch and shut the church? Before looking to the court for help, a detailed letter was sent to Scottish ministers. The petitioners' plea was that the state might reconsider what it had done. Did the state realise that it had crossed the line between the secular and the spiritual, that it had gone against the doctrine of the "twa kingdoms" embedded by statute into the Scottish constitution, and that a blanket ban on worship was bringing it into a struggle with article 9 of the European Convention on Human Rights? If it looked elsewhere it would also see that it was out of line with nations like France, Germany, USA and South Africa, not to mention the rest of the UK.

This plea was met with a resounding "no" from the state. The Government's response, which was discussed in court, was: "We do not agree that the steps taken violate the legislation you cite nor that they are either disproportionate or have serious implications for freedom of religion. The steps taken are ones which the Scottish ministers can rightly take. As you know, it is open to the state to regulate the secular activities of churches including, as here, for the purpose of protecting public health."

It seemed as though the state did not understand what the church leaders were trying to say, that notwithstanding all the considerations of public health relating to a pandemic, people being prevented from practising their religion constituted a disproportionate interference with both the constitutional rights of the Scottish people and their human rights enshrined in the Convention.

No good reason

In his judgment issued on 24 March ([2021] CSOH 32) Lord Braid found in favour of the petitioners. He ruled that the regulations had the effect of preventing worship and to that extent did involve a spiritual matter. The Scottish ministers had not discharged the burden of showing that less restrictive measures had not been available. No good reason had been advanced for the rejection of other options such as reducing numbers, or allowing churches to be open only for prayer. The judge observed that online platforms provided an alternative to, but did not constitute, worship. Ministers had not adequately explained why some activities such as jury centres in cinemas were able to continue safely, but not places of worship. The petitioners were entitled to have the regulations declared unlawful.

A moment's reflection on this decision might make the reader think that this sounds rather momentous. The Government's blanket ban on gathering for worship in Scotland was declared unlawful by the courts! Yet, with one notable exception, this outcome seems to have received only modest coverage in the Scottish media.

Interesting, then, that from England, on 26 March the legal commentator Joshua Rozenberg made the following comment: "A successful challenge to regulations made under the Coronavirus Act 2020 this week received surprisingly little coverage. What makes it particularly unusual is that it was brought under article 9 of the Human Rights Convention, which protects freedom of religion... Braid's 70-page ruling is not binding outside Scotland. But it is of persuasive authority and well worth reading."

Scotland was once known as the land of the Book. It seems to me that in times past *Philip v Scottish Ministers* would have been "the talk o' the steamie". Perhaps it is wishful thinking, but I wonder if the significance of this case might outlast the memories of the political noise that concertinaed it in a week that saw a First Minister keep her job and a former First Minister mount a comeback. The Leviathan will be largely unaffected by all this, but well done to the saints who on this occasion stood up to it.

Brent Haywood, who acted for the original 27 petitioners

People-centred, remotely

Can you work 100% remotely, from Stornoway, as an in-house counsel for a global company focused on people development? Yes you can, and this month's interviewee revels in it

In-house

HELENA MACLEOD, LEGAL COUNSEL, INSIGHTS

Tell us about your career path to date?

My journey began as a trainee at the Crown Office & Procurator Fiscal Service in 2010, where I gained invaluable experience, particularly in court work. Although I really enjoyed my traineeship, on qualifying I wanted to experience working in other areas because I wasn't sure about focusing solely on criminal law as my career, and I love learning new things.

After a short time with a criminal defence firm, I applied for my first in-house role at the University of Aberdeen. I was surprised but incredibly pleased when they offered me a temporary position. I worked there for six months before moving into oil and gas, where I remained for the next five years.

I became conscious that I had never worked in private practice, and was keen to expand my experience within that environment. I wanted to work as part of a team where I believed I would have the opportunity to grow as a lawyer, extend my knowledge and learn new skills, so I was delighted when I was offered an associate position with an international firm in Glasgow.

Although I did gain amazing experience and learned a huge amount, when the opportunity to become legal counsel at Insights as remote worker came up, I jumped at the chance. I had just started a relationship (with the man I would eventually marry) and there was a possibility of me moving to Stornoway, so remote working would be ideal. Additionally, Insights seemed to have a great culture, a good variety of work and a fantastic product – which I have grown to get behind and love.

What were the main differences you found between your in-house and private practice roles?

Private practice provided the opportunity to work for, and help, a wide variety of interesting clients. It was a fast paced, adrenaline-fuelled environment (my colleagues worked hard and played hard), and with billable hours you could tangibly see that you were increasing profitability for the firm, which was very satisfying. I was given very challenging but really enjoyable secondments, including working in a London fintech startup, which even had a prosecco tap in the office! All the experience gained helped me grow professionally and personally and I am pleased that this pattern of learning and growth has continued in my current role.

Working in-house enables one to really get to grips with the whole business, build good relationships across the company and oversee projects from start to finish, all of which I find very rewarding. I feel a great sense of achievement when solving a problem for the business or concluding a really complicated negotiation. I also appreciate the steady, flexible working hours and routine which give me a fantastic work-life balance.

Tell us more about your current role and how it feeds into Insights' overall aims?

Insights' overall aim is to create a world where people truly understand themselves and others, and are inspired to make a positive difference in everything they do. This applies to employees and clients alike. As legal counsel, it is part of my role to ensure Insights achieves this aim by providing advice about new products and services, assisting in contract negotiations, drafting templates and providing advice on data protection and general legal enquiries.

Since the Legal team provides legal advice and carries out most of the contracting work with clients, other teams are able to focus confidently on their goals and helping their clients effectively. Everyone at Insights works as a team to ensure that clients are able to access Insights' unique and life-enriching products and services. Our services are aimed at assisting people to understand themselves and others better, thereby making the working experience richer and happier. The legal team is just one cog in the wheel.

Insights has a huge focus on relationships, team bonding and creating a positive working environment. All employees have a role in promoting this culture which flows through the company.

Insights specialises in personal profiling. How has this impacted on the way you work, and would you recommend the approach to other in-house legal teams?

In short, yes, absolutely. Personal profiling provides the basis for all employees to have deeper personal awareness of their

strengths and weaknesses, as well as tools for understanding and appreciating colleagues. The aim is to provide a working environment where staff understand the way you work, think and typically react in certain work situations. You and your colleagues are far more likely to have a productive, contented, happy working environment and work experience when you understand each other.

For example, the Insights personality profiling taught me that I predominantly lead with "earth green", which means I am more productive when others show they care about me. My colleagues know this and take it into account when we work together. Equally, when I see that a colleague leads with "fiery red", I know they are primarily target driven, task focused and like quick results, so when writing an email to them, I try to make it short, concise and with action points to facilitate their working style.

Your head office is in Dundee but you work from home in Stornoway. How do you find remote working 100% of the time? What are the pros and cons and how do you compensate for any cons?

As a company, Insights recognises that to gain access to the best talent, you shouldn't restrict your recruitment pool to one area; this is why they have so many remote workers. Remote workers are very much part of the Insights team and huge effort is made to include them in all events.

Stornoway is an amazing place and the Island of Lewis has some of the most beautiful scenery in the country. Remote working enables me to enjoy island life while pursuing my Insights legal career.

Another pro of working remotely is that there is no daily, timewasting, repetitive commute, which means I can spend more time with my family before and after work. I feel really connected with my team, even though I am many miles from most of them and keep in contact via videoconferencing calls, emails and Skype.

You do miss out on some of the fun events that are organised in the office. Insights focuses on making work fun, and often has events, quizzes and competitions in the office to build team spirit and enable teams just to have some fun together. Not being there for these is a shame. However, since COVID-19, I've managed to participate in some events tailored for remote working which I've really enjoyed and appreciated. For example, there was a challenge before Christmas where employees were encouraged to go walking throughout the day to keep healthy and improve wellbeing. We would participate in "walking meetings", where instead of sitting at a desk during calls, we were outside, enjoying the fresh air and getting our step count up. It is something I had never thought of before, but it was a fantastic idea – especially when nights were so dark!

What else sets Insights apart from other in-house teams?

Insights deeply understands that employees have a life outside work and takes the view that achieving a successful work-life balance is hugely important in the grand scheme of things. In addition to personal profiling, there is also a focus on wellbeing, mental health, self-care and a flexible approach to work – all making for a staff team who are inspired to offer their best.

What are the key challenges for your Legal team this year?

One of the key challenges we faced was how to adapt to, and thrive under, the lockdown restrictions. For example, we changed our face-to-face workshops and events so they could be delivered to clients completely online. We had to adjust to lockdown pretty quickly, and Legal supported the business throughout this change, conducting all client negotiations virtually, adapting our products to online delivery, and servicing client relationships completely online.

In addition, we had to prepare for Brexit and its implications, particularly in respect of personal data.

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

When I was at university, I always envisaged a legal career as starting in a law firm, picking one specialism and progressing through the ranks. I've now come to realise that there are many routes to having an enjoyable and prosperous career, while at the same time achieving a work-life balance.

At university and during my traineeship, I was unsure how easily solicitors could switch from one area of law to another. I was delighted that I was able to branch out from criminal law to other areas. I really enjoy working in-house; it is becoming more recognised as a viable career choice (many companies now offer in-house traineeships). I have valued my in-house roles because I have increased my knowledge in so many different areas and have not had to pick one specialism and stick with it, although I admit there are certain areas where I have more specialist knowledge than others. Every day is a learning opportunity.

What is your most unusual/ amusing work experience?

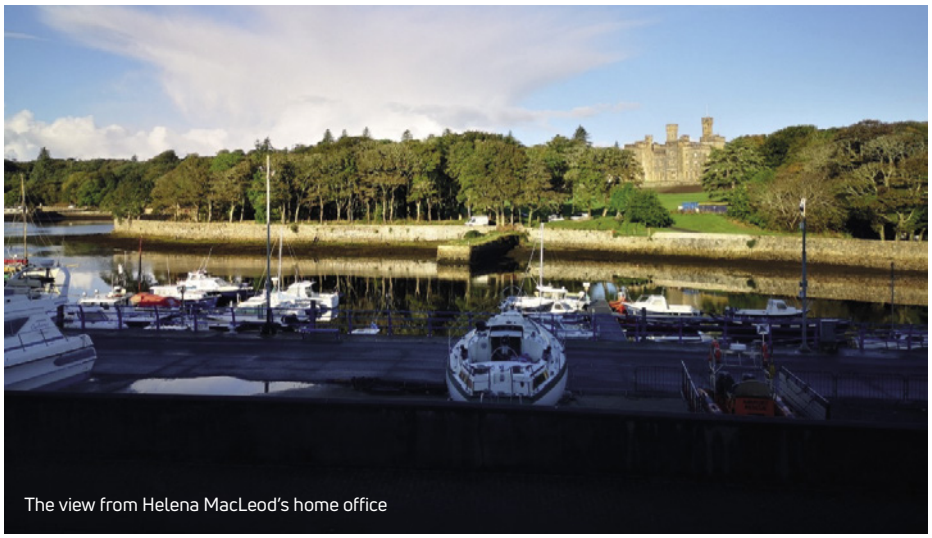
Since Insights puts huge emphasis on team bonding and colleague relationships, it often provides fun and generous opportunities to facilitate that. When I started there, one of the most enjoyable team events was a Global Legal team day trip to Edinburgh, where we looked around the shops, had a tour of the Signet Library and enjoyed a lovely meal in an Edinburgh restaurant before heading back to our hotel in Dundee. A very enjoyable working day indeed!

Although it was a fun day, the goal was to enable the team to foster good relationships and bond together. The theory was that the more you know your team, the more you are likely to reach out to them when you need help and to provide help to team members when they need it. It is easier to email someone you know well, than someone that you barely know. It definitely helped me know my team better and become more comfortable reaching out for assistance or running something past colleagues.

Finally, what do you love doing when the working day is done?

I enjoy going for a long walks along the white sandy beaches of Lewis, or round the Lews Castle grounds. Prior to lockdown, I enjoyed finishing my walk with a nice meal at one of the harbour restaurants. Lewis is a beautiful place and I'm blessed to be able to work from here.

Questions put by Hope Craig, In-house Lawyers' Committee member



The view from Helena MacLeod's home office

SLCC proposes levy cuts after budget revisions

A 5% cut in the general levy, and 20% for lawyers in their first three years of practice, has been agreed by the Scottish Legal Complaints Commission following responses to its budget proposals for the year from 1 July 2021.

The SLCC originally proposed standstill levies, but its budget plans were criticised given that complaint numbers had fallen during the COVID-19 pandemic. While it rejected some of the comparisons produced as misleading, it said it had revised its figures in the light of emerging data on complaints received and projected; projected costs, following changes in Scottish Government pay policy; increased efficiency and productivity, with the elimination of a case backlog; and its overall financial position, including reserves.

The final budget will be laid before the Scottish Parliament shortly, but the proposed reductions would mean fees (on the Journal's calculations) in the region of £468 for principals, £160 for those in their first three years, £380 for other private practice, £123.50 for lawyers outside Scotland, £114 for in-house lawyers, and £180 for advocates.

"This year, the changing external context for the SLCC, like many other organisations, has been significant, and we have had to rapidly amend our projections and plans as the consultation took place", the SLCC stated.

It explained the bigger reduction for new lawyers as a response to "some of the specific challenges we have seen highlighted regarding those early in their careers, and this complements support provided by Scottish Government directed at addressing concerns about lawyers entering the legal services market at this time".

The Law Society of Scotland welcomed the decision, but President Amanda Millar commented: "However, this needs to mark the start of a much-needed change in attitude from the SLCC. It cannot be right that it costs more for doing less, given complaints against solicitors are lower than three years ago. This is clearly unacceptable at a time when the legal sector is working so hard to survive the economic fallout of COVID-19."

AGM set for 27 May

The Society's annual general meeting will be held on Thursday 27 May 2021 at 1730. The agenda will be set by Council at its meeting on 29 April. It is anticipated that this AGM, as was the case last year, will be entirely held by remote access through the Society's audio and video system. The formal papers will be issued in May.

OBITUARIES

KATHLEEN BAKER MORE, Edinburgh

On 16 February 2021, Kathleen Baker More, partner of the firm George More & Co LLP, Edinburgh.
AGE: 45
ADMITTED: 1999

RODNEY STEVENS, Glasgow

On 23 February 2021, Rodney Stevens, formerly of the firm Finnieston, Franchi & McWilliams and latterly sole partner of the firm Stevens & Co Solicitors, Glasgow.
AGE: 53
ADMITTED: 2007

THOMAS HENRY SHANKS (retired solicitor), Lanark

On 26 February 2021, Thomas Henry Shanks, formerly partner and latterly consultant of the firm Davidson & Shirley, Lanark.
AGE: 90
ADMITTED: 1956

JOHN ANTHONY McLOONE, Aberdeen

On 2 March 2021, John Anthony McLoone, formerly partner of the firm Cohen & Co and Plenderleath Runice and latterly consultant with the firm Grant Smith Law Practice Ltd, Aberdeen.
AGE: 60
ADMITTED: 1983

Notifications

ENTRANCE CERTIFICATES ISSUED DURING FEBRUARY/MARCH 2021

ANDERSON, Katherine Elspeth
ANDERSON, Megan Ailsa
ASHFORD, Grant
BARR, Pauline
CARMICHAEL, Emily Morrison
CROSS, James Kerr
FORSYTH , Ewan Anderson
GUTHRIE, Christy Nicole
KERR, Brogan Joan
LIVINGSTONE, Lauren
LOMBARDI, Frances Clare
McBURNIE, Beate Katja
McGRATH, Caroline
PETERSEN, Emma
RENWICK, Lauren Mhari

APPLICATIONS FOR ADMISSION FEBRUARY/MARCH 2021

AHMED, Raeesa
ALEXANDER, Caitlin Jessica McEwan
BAIN, Hayden Thomas
BANSAL, Virvardhan
BELFORD, Joanna Margaret
BELL, Dale
BENNETT, Ebony Jane
BOSWELL, Khloe Joanne
BOYLEN, Lucy Anne
BROWN, Rory David
CAHUSAC, Jonathan George Woodd
CAMPBELL, Kerrie
CHENG, Kelvin
CONACHER, Eildh Jayne
CORRIGAN, Mairead Clare
DEVINE, Rebecca
DICKSON, Jessica Alexandra
DONACHIE, Josey Patricia
DUNLOP, Michael Stephen
EATON, Jessica
FERGUSON, Jasmine
FINGLAND, Fiona Iona Heather
FROSTWICK, Lara Lesley
GALLACHER, Dean John
GIBSON, Hannah Elizabeth
HAMPSEY, Ross Hugh
HANIF-KIDD, Sobia
HOSSAIN, Mumotaz
IDREES, Sanah Anwar
JOHNSTON, Gemma Mairi
JONES, Antonia Elizabeth McPike
KADIYSKI, Dimitar Ivanov
KELLY, Nicola Jane
KHALID, Abdullah
LAIRD, James
LAU, Kylie
LAURIE, Melissa Lugton
LENNOX, Lisa Woods
LI, Ningzhou Lemon
McCLEARY, Emilia Patrycja
McDIARMID, Lindsey Olivia
McINTOSH-FARELLY, Ella Lois
McKAY, Kenneth Harris
McLEAN, Holly
MAJEED, Zaema
MATHIESON, Cameron Robert
MEDLOCK, Ruth Ying Hei
MESBAH, Navid
MILLER, Madeleine
MILSOM, Robert Ian
MITCHELL, Kirsty Beth
MIZEN, Lauren Jane Clarke
MUIR, Connor Ben Ronald
MUNRO, Claire Louise
PARKER-SMITH, Charlotte May
RAHMATULLAH, Nhabeela
RAZAQ, Sheereen
REILLY, Kirstie Courtney
ROBERTSON, Alexander John Ritchie
ROBERTSON, Frazer Thomas
RUTHERFORD, Kerri Rebekah
SEGER, Tobias Max
SMITH, Lauren
STEEDMAN, Kerry Christina Linda
SUPER, Matthew Paul
THIAM, Donde Ba
TODD, Simon Daniel
TORLEY, Julie Ann
WALLACE, Rachel Russell
WARD, Karly Louise
WEBSTER, Kimberley
ZABIR, Maaria Annam

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

Legal aid solicitor support

The Legal Aid Committee has worked to ensure practical support for legal aid practitioners through the pandemic. Three main areas of support were agreed with Scottish Government. First, a fee increase of 10% over two financial years: regulations introducing a 5% increase to all fees for civil, children's and criminal legal aid came into effect on 22 March. Representations were made to the Justice Committee supporting the increase, placing it in the wider context of fees unchanged for a decade, and in some cases a generation.

Applications to the legal aid resilience fund opened on 10 February and closed on 31 March. Decision letters have highlighted several issues, particularly where firms have been refused on the basis of a projected increase in the number of grants or in projected income, despite all the difficulties faced through the pandemic. The Society has written to and spoken with the Cabinet Secretary for Justice and received a commitment that the criteria and process for this fund will be reviewed. The Society is clear that if the fund does not provide the support needed to firms affected by the economic shock of the pandemic, this element of support will need to be revisited.

The traineeship fund for the legal aid sector will launch shortly, with 50% funding for up to 40 trainees.

Hate Crime Bill

The Hate Crime and Public Order (Scotland) Bill completed its eventful and high-profile progress on 11 March. The Society has been much involved. "Stirring up" of hatred offences will now apply to additional characteristics listed in the bill: age, disability, religion, sexual orientation, transgender identity and variations in sex characteristics.

The Society has recognised that the bill has had considerable scrutiny, and amendments have improved on clarity, though it would still have preferred the inclusion of a defence that did not differentiate among the characteristics, creating a hierarchy or perception of hierarchy among victims. There are fears that the freedom of expression provisions will not be easily understood, with a lack of clarity about what comprises hate crime.

An educational campaign should take place, starting at school and included in the school curriculum, to promote public awareness and understanding of the law.

Domestic abuse

The Criminal Law Committee issued a stage 3 briefing on the Domestic Abuse (Protection) (Scotland) Bill, which, while reiterating points made previously regarding the proportionality and resourcing of the new measures, also emphasised its support for the "reporting" amendment, which the committee had proposed and which was accepted at stage 3. Its purpose is to monitor and record how often and in what circumstances the new measures are used.

An implementation group will identify what is needed to put this legislation into working practice. This will be important, as the Act really only provides a framework for the new notices and orders; much will lie with its practical application and the way in which Police Scotland operate the Act, which is part of training requirements going forward.

Human Rights Act review

The UK Government appointed an Independent Human Rights Review Panel in December 2020 to consider how the Human Rights Act is working in practice and whether any change is needed. The terms of reference focus on the operation of the Act rather than the substantive rights in the Convention or whether the UK should remain a signatory.

In its response to the call for evidence, the Constitutional Law Committee expressed the view that there is functioning dialogue between the UK courts and Strasbourg; that more evidence is needed to justify a change to the framework in ss 3 and 4 of the Act relating to interpretation of the law and declarations of incompatibility; and that overall, the case for changing the application of the Act has not been made.

Redress for abuse survivors

The Civil Justice and Charity Law Committees issued a stage 3 briefing on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill.

Comments included the need for more detail around scheme contributions, the potential for adverse impact on charity governance and public confidence in the charity sector, concerns about the existence of a waiver which requires the survivor of abuse to abandon civil proceedings, and views on the bill's provisions relating to payment of legal fees as amended at stage 2.

Fewer SSDT cases: report

A marked fall in new cases, possibly due to the effects of the coronavirus pandemic, has been reported by the Scottish Solicitors' Discipline Tribunal in its annual report for the year to 31 October 2020.

New complaints during the year fell from 35 in the previous year to 18; the average is about 30. Findings of professional misconduct were made in 16 of the 29 cases decided, with one further complaint withdrawn and three not guilty verdicts. Nine appeals were heard from Law Society of Scotland decisions regarding alleged unsatisfactory professional conduct, two of which were allowed.

Regarding disposals, one solicitor was struck off, two had their practising certificates restricted for two years each, nine were censured and fined, and four simply censured.

The tribunal notes that "Although overall cases are down, the trend of cases becoming more complicated with regard to their subject matter and procedure has been reflected in the figures again this year."

Tribunal chair Nicholas Whyte, whose term of office expires in September 2021, commends tribunal members, and parties, for adapting to virtual hearings, which "have proved to be very effective".

The report is at www.ssdt.org.uk/reports/

ACCREDITED PARALEGALS

The following have recently become Law Society of Scotland accredited paralegals:

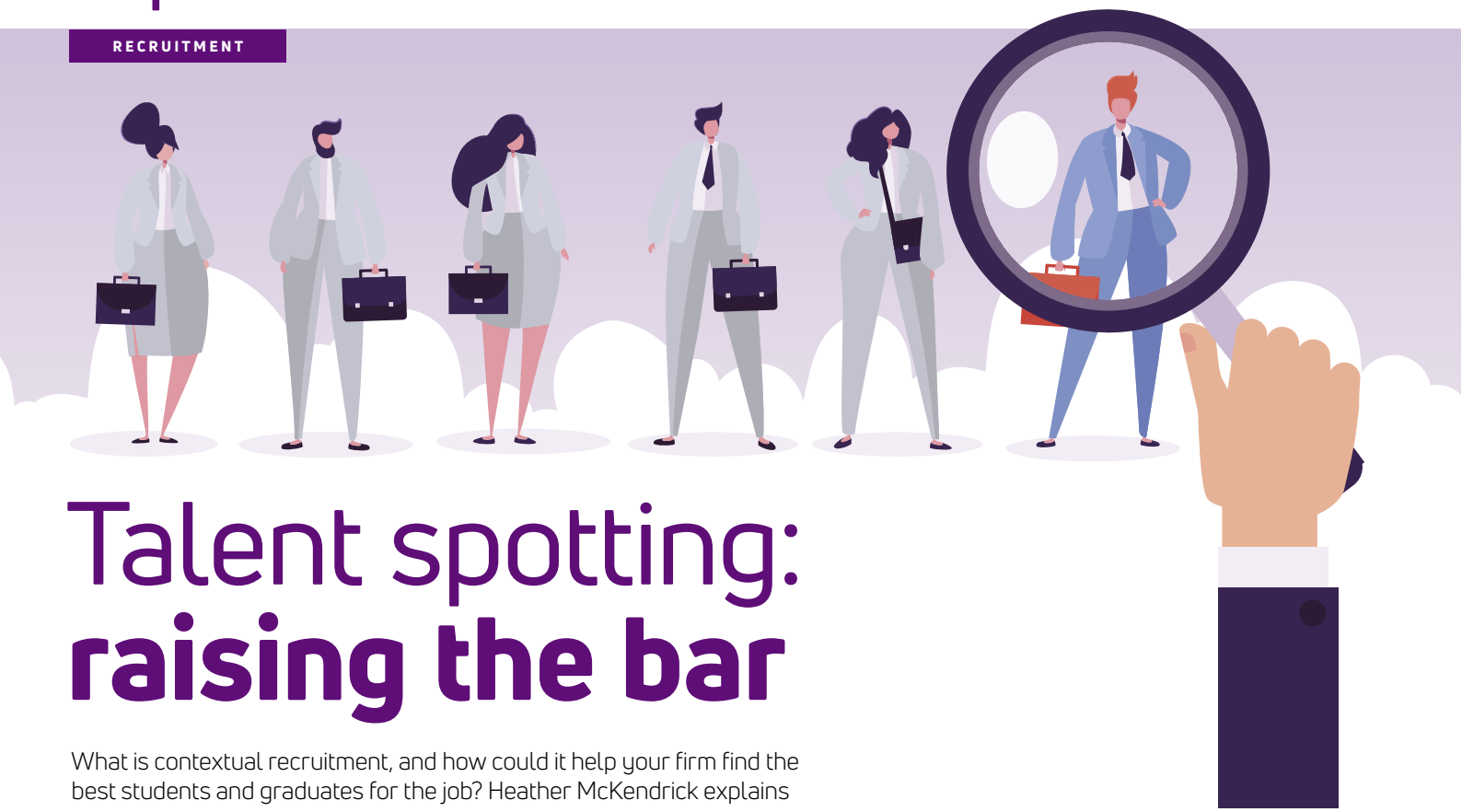
Civil litigation: family law, wills and executries
JENNIFER McKELLAR, MSM Solicitors

Civil litigation: reparation law
VICTORIA CAIRNS and LISA DAVIE, both Scottish Government

Criminal litigation
MARINA MACDONALD, Public Defence Solicitors Office

Residential conveyancing
ALLANA BUTLER, Gillespie Macandrew
JACQUELINE CURRAN and ARLENE HALL, both Anderson Strathern
SUZANNE PANCHAL, The Glasgow Law Practice
JENNIFER RUTHERFORD, Lindsays

RECRUITMENT



Talent spotting: **raising the bar**

What is contextual recruitment, and how could it help your firm find the best students and graduates for the job? Heather McKendrick explains

At the Law Society of Scotland we often find that firms and organisations are keen to improve their diversity methods when it comes to recruitment of trainees and interns, but aren't sure of the best way of doing so. We also know the recruitment process itself is time consuming and the best candidates are often difficult to discern among a tranche of applications from people with very similar qualifications and experience.

Some companies have used blind recruitment to try and help the situation, removing details such as name, address, school and university from the application when it is reviewed. While there are likely some benefits to this approach, I'd argue it could make it harder to find the "outperformers". These are the candidates who have done incredibly well within the context of their circumstances and exactly the type of people who will bring great benefit to your business.

We know from speaking to firms that the hardest candidates to make decisions on are those lost in the middle – a raft of students who all have similar grades and applications that are impossible to differentiate between. Indeed, most application forms or CVs will not find these outperformers either.

However, a contextual recruitment system will. This is one of the reasons firms are turning to contextual recruitment to unearth these talented applicants. Even better, using this system could actually make it easier to run the whole recruitment process.

Contextual recruitment uses software to enable you to:

- identify candidates with the most potential, who have outperformed their peers or shone in challenging circumstances;
- recruit a more diverse workforce;
- demonstrate a tangible commitment to social mobility.

How does contextual recruitment work?

Diversity in recruitment specialist Rare has developed a contextualised recruitment system (CRS) to allow employers to use data to identify candidates with the most potential. Some of Rare's legal clients include Clyde & Co, Clifford Chance, Pinsent Masons, Shepherd & Wedderburn, Ashurst and Linklaters.

However, we understand that many firms and organisations simply don't hire enough graduates to justify investing in this system on their own. Therefore, the Society has teamed up with Rare to deliver a bespoke system for firms – meaning the cost is proportionate depending whether you take on one trainee or intern, or 10.

If you start using the contextual recruitment system, you run your application system as normal. When an application is submitted, you send a link to an applicant to complete the Rare form. This is not mandatory, but encouraged. The Rare form will then ascertain the following information:

- school and grades achieved, specifying the year;
- home postcode when at school age;
- eligibility for free school meals;
- whether first generation at university;
- significant time spent working during school or university;
- whether in care, or a carer, or a refugee.

The tables on these pages show the additional information you will gain about each applicant, which can then be taken into account when deciding who to interview. If an applicant has a number of flags, then their performance should be considered in that context and that may identify an exceptional candidate who might otherwise have been overlooked. This is not designed to give people an advantage – simply to level a playing field.

Heather McKendrick is head of Careers and Outreach at the Law Society of Scotland

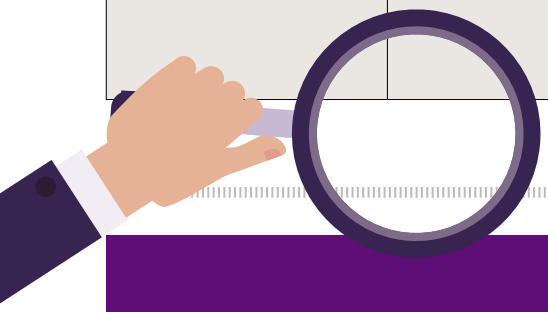
A number of Scottish firms are already utilising this system and seeing really positive results. It's a really practical way of helping to make a huge difference for promoting diversity in the legal profession. The costs start at £300 + VAT. Please email careers@lawscot.org.uk to find out more.

A. Without contextual recruitment

Name	Highers (top 3)	University	Work experience
Joe Smith	BBB	University of Edinburgh	No relevant work experience

B. With contextual recruitment

Name	Highers	School average	School percentile	Performance index
Joe Smith	BBB	DDD	8%	+32%
Socio-economic flags	**Academic flags**	**Personal flags**	**University**	**Work experience**
⚑	⚑⚑	⚑	U of Edinburgh	• No relevant work experience • First generation at university • Eligible for free school meals



CASE STUDIES

Deborah McCormack, Head of Early Talent, Pinsent Masons

Pinsent Masons made the decision to adopt a contextual approach to recruitment in 2015, integrating Rare's contextualised recruitment system (CRS) into our application process for early talent opportunities from 2016.

At that time, we were acutely aware that the legal profession needed to attract, recruit and retain talent from a more diverse pool, including from lower socio-economic and ethnically diverse backgrounds. Working with Rare was part of a wider diversity and inclusion strategy. Other elements included working with a broader range of universities, expanding our PRIME work experience programme, sponsoring Street Law and partnering with diversity and inclusion organisations like Aspiring Solicitors.

The CRS delivers two outputs to employers: flags to measure disadvantage and a performance index to measure candidate performance against peers. Adopting a contextual approach allows us to consider applications from all candidates fairly, as we are better able to understand the circumstances in which they have achieved academic success.

Other influencing factors that the CRS identifies include: time in local authority care; working more than 16 hours per week while studying; caring responsibilities; refugee status; and being the first person in a family to attend university.

If another firm was to ask us whether we would recommend adopting a more holistic approach to recruitment of early talent, we would say absolutely! Our data show that using the CRS has enabled us to have a bias-free application process: the chances of being invited to assessment stage are the same for individuals regardless of their background.

Martin Glover, HR director, Morton Fraser

At Morton Fraser, diversity and inclusion are at the heart of how we operate. Diversity of life experience and diversity of thought are key to the delivery of a culture of innovation and high quality service demanded by our clients. That is just one of many reasons why we use the contextualised recruitment system from Rare to help ensure we attract talent from all areas of society. Having the widest possible diversity in our workforce, allied to an inclusive culture where people feel they can actively participate and belong, is the hallmark of our employee experience at the firm.

We have used contextual recruitment for two years now, via the Society's partnership with Rare, and have recently finished recruiting our intake of graduate law trainees with some very encouraging results. For the intake just completed, 40% of applications for a traineeship came from people with some form of social disadvantage, up from 25% last year. Of those appointed, 33% had some form of social disadvantage, up from 12.5% last year.

What these statistics show is that we are able to tap into areas of talent from which our traditional approaches to recruitment excluded us. The talent pool comprised of people with social disadvantage is strong, as evidenced by the number of offers we make to people in that category. What is also encouraging is the increasing numbers of talented people in that pool who are encouraged to make an application to us for their legal traineeship. The number of job offers we make is testament to the quality of talent in this pool.

We will examine further how successful our recruits from this talent pool are as time goes on and we will do this by looking at job offers following completion of training, as well as feedback from supervising partners, clients, and of course the people themselves. For now though, this has been a very positive experience for us and one that we will continue to explore.

RISK MANAGEMENT

COVID and the march of time

On behalf of Lockton, Gillian Harman and Phoebe Crane consider the risk management issues presented by time limits and deadlines, some of which have been brought into sharper focus as a consequence of COVID-19 and working from home

While time in lockdown has, for many, felt eternal, the clock has continued to tick. Time limits and deadlines for solicitors in many legal sectors have remained, despite the novel and challenging circumstances we have faced.

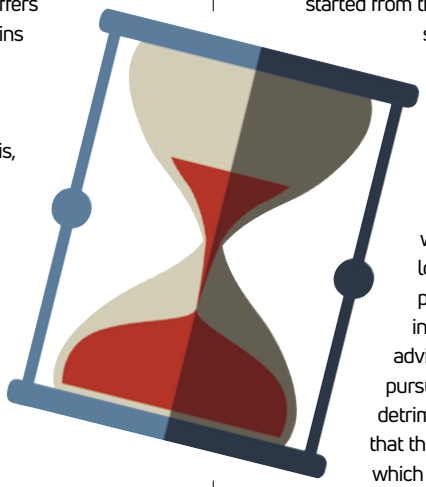
Step back a year in time – the majority of solicitors were unsure what working from home would be like. A variety of changes had to be made to the way in which the traditional solicitor worked. A year on, and these changes are now the new way of working.

One issue which has not changed, however, is the uncertainty which competing authorities create in assessing prescriptive periods. If anything, this is proving increasingly difficult as we await the outcome of the appeal in *WPH Developments Ltd v Young & Gault* [2020] and the commencement of the Prescription (Scotland) Act 2018, for which workable transitional provisions remain elusive. Meanwhile, we remain fully reliant on the existing Prescription and Limitation (Scotland) Act 1973 and recent judicial interpretations.

Not what the doctor prescribed...

Section 6 of the 1973 Act, in broad terms, extinguishes certain claims that are more than five years old, with time running from the date the pursuer suffers a loss. When that period begins is still a contentious issue, as is the interpretation of s 11(3), which postpones the start of that period until the pursuer is, or is deemed to be, aware of the loss.

The Supreme Court in *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] (the Stockline Plastics factory explosion case) adopted a strict approach towards pursuers, deeming the clock to run as soon as they knew they had suffered loss, injury or damage, irrespective of knowing the cause or who might be responsible.

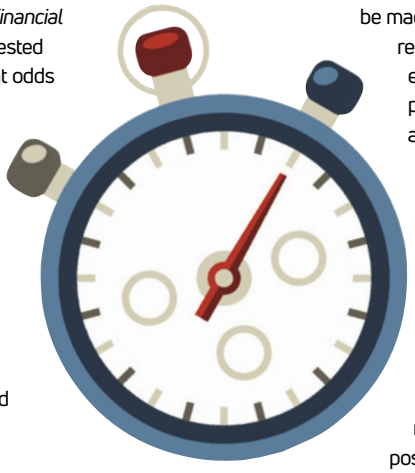


Gordon's Trustees v Campbell Riddell Breeze Paterson LLP [2017] extended this even to situations where knowledge of the loss was not as clear cut, such as in economic loss claims. It was not necessary for a pursuer to know they had an actionable head of loss: the prescriptive period started from the moment they were aware something had gone awry to cause a loss, expense or disadvantage.

The Lord Ordinary in *Midlothian Council v Raeburn Drilling and Geotechnical Ltd* [2019] went further, concluding that loss occurred as soon as the pursuer accepted and acted in reliance on the defender's advice and that, although the pursuer was unaware of the detriment at the time, the fact that they had incurred expenditure which later turned out be loss was enough to start the prescriptive clock.

The judicial interpretation in these cases has been suggested to be manifestly unfair to pursuers. The first instance decision by Sheriff

Reid in *WPH Developments Ltd* seemed a step towards redressing the balance, but has served to cause further confusion, not least because, in the 11 November 2020 decision in *Glasgow City Council v VFS Financial Services Ltd*, Lord Tyre suggested Sheriff Reid's decision was at odds with *Gordon's Trustees*.



To be on the safe side, solicitors acting for pursuers are then left having to raise protective proceedings to avoid time bar, while those on the defending side are left deciding whether to incur the cost of preparing a defence to a raised but sisted action which may never be taken further.

Significant risks may, however, attach to those who wait. If the start of the prescriptive period is wrongly identified by pursuers' solicitors, failing to bring protective proceedings could lead to a professional negligence claim against them. For solicitors acting for defenders, failing to identify a statable defence of prescription could be detrimental to their client's position and leave those solicitors exposed.

It is hoped that the impending appeal decision in *WPH Developments* and the eventual implementation of the 2018 Act will provide much needed clarity on the position but, in the meantime, the advice to solicitors continues to be to err on the side of caution and assume that prescription starts to run from the earliest date on which an occurrence of loss or ultimately wasted expenditure can be identified.

Serving documents timeously

It is not just in the context of serving proceedings that court timetables still have to be adhered to. While the COVID-19 pandemic has expedited the transition to paperless documents for many businesses, including the courts, solicitors should not assume that everything can now be done by email. Schedule 4, para 1(5) to the Coronavirus (Scotland) Act 2020 ("CSA"), as amended, permits the Lord President to direct for certain documents to be excluded from electronic submission, such as commissary documents. Additionally, para 1(3) provides that consent to electronic service on a party should be obtained prior to service. This is particularly important in the case of initial service of proceedings. Consent must be obtained and should not be assumed from previous conduct in relation to other types of court documents, as this could be challenged by the recipient. A successful challenge to service could lead to a delay in raising proceedings, which could be critical where there is a time limit involved.

It may be a good idea to agree a specific email address for service and test it in advance. This would also confirm that the recipient has access to the particular mailbox outside the office. If the receiving party does not confirm that service may be made electronically, thought will require to be given as to how else service can be effected, particularly when parties are working from home and there may be no one at the business address to accept service. If the business address is closed, it may not be possible to leave the documents in the hands of an individual and depositing the documents at the place of business may not be sufficient or possible. The message should be to consider the options well in advance and build in sufficient time in case instructions have to be taken (e.g. to accept service), or in case practical difficulties are encountered and a contingency plan is needed.

Issues can be multiplied when serving documents or proceedings on a partnership or whenever service is required on a number of parties. The preferred option would, of course, be to serve the documents electronically, in line with the CSA. If that cannot be agreed, then it may be sensible to arrange for service to be via the parties' solicitors, by seeing if they will accept service. Problems could arise here, as with service on any party, where a claim is being raised to beat the time bar.

It is also worth bearing in mind that some businesses, which have been forced to close during the pandemic may also, unfortunately, have been forced out of business and may never reopen. As ever, but all the more so in these uncertain times, an early check as to the current status of a prospective defender is a worthwhile step for pursuers' solicitors, to ensure that an action is worth pursuing, in case it saves a lot of wasted time, trouble and expense which your clients may not ultimately thank you for.

It is also important to note that courts have adopted individual arrangements and solicitors should be aware of the individual practices of each court. There is differing guidance regarding when matters should be progressed, such as when they are deemed to be urgent or not, and this should likewise be considered. The Court of Session issued a guidance note in January 2021 which suggests that when a solicitor is initiating an action which could become time barred, any emails should be marked as "urgent". At the start of the pandemic, the court had a specific urgent mailbox set up to assist with the management of urgent business, but that has been closed since 22 June 2020. It is vital to keep up to date with the relevant mailbox addresses of each court.

Points to consider

Steps to consider would be:

1. Ensuring that you keep up to date with COVID related changes, including those put in place by individual courts, which are constantly being updated. This can be done by attending webinars, regularly checking the position, holding regular team meetings to discuss recent changes, and keeping all team members informed and circulating any updates amongst the wider firm.

2. Assessing prescription when instructions are first received. Be clear on the facts to ensure the correct prescriptive period is applied; if in doubt, always take the earliest date. This should then be documented in a centralised, or at least double entry, diary system which can be remotely accessed by all relevant members of the team so everyone is aware of the timescales and can step in to deal if necessary.

3. Considering, planning and initiating protective proceedings at the earliest opportunity if a claim is at risk of prescribing. This will allow time for any problems that may be encountered while most people continue working from home and businesses remain closed.

4. Advising clients to have someone in the office periodically, to avoid court documents being missed, and a clear procedure to pass them to the correct person.

5. When an initial writ/summons is warranted/signeted electronically it is important to check that the correct email address is used for the relevant court. Emails can be sent using read receipts to provide confirmation of receipt. Alternatively, you may prefer to ask the court to confirm receipt. To ensure that a writ is received, particularly where there are issues of time bar, ensure that you diarise a follow-up call with the court to confirm.

Get with the times

Whilst the application of prescription remains in a state of flux, it is wise to err on the side of caution: even more so given the added practical difficulties which the current restrictions present. Communication amongst teams through a centralised diary system is essential to ensure that deadlines are clear and able to be crosschecked. An open dialogue and communication at the outset with relevant parties will ensure that timeous delivery of documents can be effected and that measures are put in place to prevent any delays in serving proceedings. When sending documents electronically, always assess whether sending with "urgency" is required, ensure that the recipient email address is correct and follow up to confirm receipt. The risk associated with missing deadlines will be minimised by adopting a heightened awareness of the relevant time limits and by following practical procedures to ensure that they are met in good time.

Gillian Harman is an associate, and Phoebe Crane a trainee solicitor, with BTO Solicitors LLP

Price transparency: **help, not hindrance**

Having price transparency in place over the past year has proved popular with clients and a good marketing tool, Austin Lafferty reports

Price transparency. Eh? How can you say what a divorce is going to cost, or an executry? I don't know how complicated or expensive your will is going to be until I find out what your assets and family life are. I don't know how long your court action will be. What if I undercharge or get stuck with a low fee and the work grows arms and legs?

These and more have been the objections to bringing in a scheme of advertising fees to the public and potential clients. And they all make sense. So why are we being forced down a price transparency road? First, the consumer lobby and the governments in the UK are determined to make the legal system more available, to empower ordinary citizens with knowledge of the cost of going to law before turning round and receiving a huge bill they didn't expect, and/or enduring a lengthy legal process all the time not knowing if the meter is going sky high. Those interests are also completely legitimate.

I am long enough in this business (40+ years) to remember the scale fee for conveyancing. I saw that being swept away on a tide of consumer protection, only to be replaced by something going at least partly in the opposite opaque direction. We could quote over the phone, and in terms of business letters set out our charges, but the general public carried on not much the wiser about what lawyers cost. No wonder the fat cat lawyer jokes have not abated, and whenever hard-pressed legal aid practitioners beg to get paid nearly as much as a plumber there is no public sympathy.

Clients? They like it

Where we are is this: under the need to require firms to expose their charging philosophy and some actual examples of pricing, we have Guidance. In England & Wales they have Regulation. So in Scotland we are already better off. The idea is to advertise on your website how you might charge for the work you do. It is not cast in stone: you can still quote individually and put a tailored fee for work in your terms of engagement; you can give a client the caveat that if the work exceeds what is expected you can ask for more. It is not handcuffs; it is a help.

I was like most initially – another Law Society bit of bureaucracy on top of the rest; surely they know how tough it is for us? But I am also a realist, and once the decision was made, I put on my management geek hat and got to it. I drafted a scheme and various worked examples – power of attorney, purchase, guardianship, divorce and the rest. As I wrote and calculated, it dawned on me that not only might I finish this to allow myself to avoid an ignominious exit from the profession for failing to do my duty, but that I was creating a marketing tool. Eventually when I sat back and admired my handiwork, it was already clear to me that this was a shop window to the firm: not creating barriers but breaking them down.

We posted the relevant page on our website – months ahead even of the original date proposed for the guidance to come into force, such was my enthusiasm. Since then, not only have we had no complaints (even with a small c) about the subject, we have actively been instructed by clients who saw the guide and followed through to contact us.

I appreciate it may seem like I am ending with "and they all lived happily ever after", and nothing in legal practice is quite that. I need to keep the page under my eye – increases in Registers of Scotland or court fees need to be edited in. Market forces are always there. And I assume the information will not please everyone.

But we needed to put this price transparency material into place. And do you know, if I go into John Lewis or online to Amazon to buy a telly, I want to know the price and not be left guessing or having to do a sum. We as lawyers serve the public just as much as retailers do – different skillset but same need for integrity, expertise and value for money.

Nothing to hide.

Austin Lafferty is a partner in Austin Lafferty Solicitors and convener of the Law Society of Scotland's Professional Practice Committee

Only connect

Face-to-face or remote? It's an enticing choice, not a dilemma, according to Stephen Gold

Two very different approaches to working life post-COVID emerged last month, from opposite ends of the banking sector.

David Solomon, the CEO of investment bank Goldman Sachs, has decreed that as soon as it's safe, everyone must return to the office and work there full time. Working from home, he says, is an "aberration". The firm, described affectionately by *Rolling Stone* as "a great vampire squid wrapped around the face of humanity", acknowledged in March that some of its young analysts may be "quite stretched", after a group of them revolted against being forced to work a 98-hour week. It seems that its offices are modelled on *Hotel California:* you can check out any time you want, but you can never leave.

Meantime, down the M4, comes news from Swindon. Nationwide Building Society has just announced that from now on everyone except branch staff can work from wherever they want in the UK. Chief executive Joe Garner said: "The last year has taught many of us that how we do our jobs is much more important than where we do them. We have listened and learned, and we are now deciding to move forward, not back. We are putting our employees in control of where they work." Earlier this month, Andrew Bailey, the governor of the Bank of England, said office working will never return to pre-pandemic patterns. But these two behemoths look like outliers. The consensus seems to be settling around a hybrid model, in which we split our time more or less equally between home and office.

Enormous attention has been paid to the changes in how work is done, but less to what COVID means for how we go about winning it. Does the fact that we can't meet and mingle mean that business development has to grind to a halt? Not at all. Strategically savvy firms have poured most of their rainmaking efforts into reinforcing their existing relationships. Clients forced to work from home, and grappling with unique adversity, have generally been more receptive to talking frankly about their business and private challenges. It's been a time above all for thoughtful, sensitive engagement. Lawyers who have made the effort to ditch the loudhailer, understand their clients' needs, show empathy, and be as easy as possible to deal with, will be rewarded with trust, loyalty and the lion's share of work in the years ahead.

Just checking in

We have always been cautious about crossing the line between business and personal, and that concern is still there, but COVID has changed the dynamic. This past year, we have been constantly exhorted to "check in" with our loved ones and friends, to make sure they are OK. It's the right thing to do with clients too. I do not mean by this the Niagara of gag-inducing "we're here for you" messages, which businesses of all kinds spewed out in the first days of lockdown. But taking a sincere interest in how our clients are coping will pay many dividends. It is a constant criticism of lawyers that they show little sign of wishing to engage with clients if there is no immediate prospect of a fee. This has always been stupid and shortsighted. Now, it will be much less tolerated. "What we did in the war" will permanently colour clients' views of us, for good or ill.

Jean-Paul Sartre observed that "Hell is other people", but he didn't have to endure the last year. There is a massive pent-up desire to socialise again. Even now, we should be talking to clients about meeting face-to-face, as soon as it's safe and legal. It will be a time for rejuvenating relationships, and forging new ones, as the "animal spirits" of business stir once again. The most enjoyable and productive meetings will be small scale. There will be few large networking events, but even fewer will mourn them. They have always been hit-and-miss, and often depressing, as anyone who has ever been forced to drink cava at room temperature will testify.

Once released, we will have the luxury of moving freely between the best of the real and online worlds. British Airways used to proclaim, "You can't shake phones on a deal", when promoting transatlantic business travel. That now seems prehistoric. There will be many times still when nothing beats being in the room. But the internet, combined with advanced, affordable video technology, has transformed our ability to market ourselves differently to a bigger, more diverse, yet precisely targeted audience. Never before have we had so many enticing possibilities. It is one of the vanishingly few benefits of this pandemic that they have arrived a decade early.

Stephen Gold was the founder and senior partner of Golds, a multi-award-winning law firm which grew from a sole practice to become a UK leader in its sectors. He is now a consultant, non-exec and trusted adviser to leading firms nationwide and internationally.
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twitter: @thewordofgold

THE ETERNAL OPTIMIST

To call or not to call?

Why do many lawyers duck making phone calls, when they are often the best means of communication?

On the second Tuesday of every month I catch up at 8am with a group of lawyers to share our thoughts and questions on what is happening in the legal world. Over lockdown it has proven to be a great support mechanism and a source of insight into the wider legal marketplace. This piece arose as a direct result of one of our recent conversations.

The legal market for many remains particularly busy. Practitioners' time is limited and the demands of the public increase constantly. Worse still, there are differences in communication preferences and platforms which further add to the challenges. By preferences I'm referring to whether it should be verbal or written communications and the tendency both with clients and solicitors to avoid telephone calls, thinking it is perhaps quicker for the practitioner or easier for the client. Platforms are even more challenging, with the myriad different ways that people can now communicate, so how do you ensure that messages aren't missed?

There are available a multitude of software based solutions that can help. Systems that can gather together all the communications from different platforms and channel them into one "feed", programs that can keep in touch with clients automatically, and apps that can schedule meetings and emails. All have merit and a place in a busy growing legal office. The view of the breakfast group, though, seemed to be fairly unanimous on one piece of technology, with some interesting insights into its benefits and why it isn't used more.

Why call?

Pick up the phone! Generally a call, although it may take a little longer, saves time in the long run. Only a very small percentage of information is passed through the written word: so much more through tone, intonation etc. Likewise, not everyone's proficiency with language is the same. How many disagreements have I had with my wife simply because we each had a different understanding of what "I'll make dinner" meant? A conversation will help cut to the core of the issues, maximise the chance of understanding being achieved and minimise the need for further communications.

So, why do we still hesitate to do so? The answers are many and varied, but I suspect are seldom to do with time management. Many, dare I say younger, clients just don't do telephone calls; it's not their favoured medium. With them there may be nothing we can do except adapt to the newer technologies mentioned above. For most clients, though, telephone is perfectly acceptable and it is we who resist it. I suspect for many it's through fear, or at least discomfort. Perhaps we dislike confrontation, or worry that we might not be able to answer a query. Most practitioners at some level will enjoy even the limited time that an email gives to research or consider a point and to frame a proper response. Likewise, some of us will feel emails allow us a protective barrier between ourselves and a challenging client.

My own experience, for what it is worth, is that anything more challenging than a confirmation email is better dealt with face to face, or over the phone. Issues avoided or delayed only ever get worse, and many can be prevented by good early direct communication. So, invest in the great systems that make the routine communications easier, but ask yourself, wouldn't a call be better?

Oh, and if you would like to join us on a Tuesday morning, drop me an email.

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

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

FROM THE ARCHIVES

50 years ago

From "Approach by Scottish Gas Board", April 1971: "A firm of solicitors recently advised the Council of a letter received from the Scottish Gas Board. The letter, which had been sent to property and estate agents and to solicitors, stated that the Board had introduced a commission payment scheme whereby property and estate agents who passed leads to the Board resulting in the sale of central heating systems would receive a commission payment of £9 per installation... The Council of the Society take the view that for solicitors to participate in such an arrangement could be regarded as unprofessional conduct."

25 years ago

From "The Child Support Act 1995", April 1996: "The [Child Support Act 1991] will have been in force for three years on 5th April 1996. During this time there has been a spate of supplementary legislation... It reflects the degree to which the government failed to recognise the difficulties inherent in the original composition of the Act. It is to be hoped that the welfare of practitioners who have to deal with legislation will now be taken into consideration and that no further enactments will be promulgated for some time."

PUBLIC GUARDIAN

Working with OPG

A note from the Society on the current impact of the pandemic

COVID-19 has an enormous impact on the Office of the Public Guardian's normal processes and procedures, as it has across the legal and justice sectors.

The Society has been liaising closely with OPG and has raised queries and concerns brought to us by solicitors. We have been assured that OPG is actively seeking ways to address these and manage the impact of delays brought about by the pandemic.

While there is currently a substantial delay in processing powers of attorney, dating back to mid-September 2020, OPG continues to offer an expedited registration (registration within five working days) where there is a genuine emergency. OPG publishes processing times for PoAs and details of the expedited process each week on its website: www.publicguardian-scotland.gov.uk/general/news

OPG is taking additional steps to address delays, which include:

- additional staff resources;
- scoping and introducing a new and innovative case management system which will improve efficiencies within the current registration process;
- plans to make the public register of adults with incapacity cases available online during 2021. This will make it easier for parties to search the register themselves to confirm whether, for example, an attorney or guardian has been appointed, make the process more effective, and free up OPG resources to tackle PoAs and other critical work;
- weekend overtime continuing for the foreseeable.

In respect of guardianships, solicitors must now take account of the "stop the clock" provisions of the Coronavirus (Scotland) Act 2020. These require new expiry dates to be calculated for guardianships which were in existence when the provisions came into force. Solicitors can read more in the Scottish Government's guidance.

Currently the OPG system continues to generate letters regarding expiry of guardianships based on the original expiry dates, which do not accommodate the 176 days added by the emergency legislation, although these letters are accompanied by leaflets which highlight the effect of the "stop the clock" provisions and advise the guardian to seek legal advice. Solicitors should be aware of this when advising guardians seeking to renew a guardianship order.

ASK ASH

Terror of the Zoom chat

I can't face online social calls and fear I'm becoming antisocial

Dear Ash,

As I have been working from home for some time now, I have been unable to interact with colleagues on a regular basis and I don't feel part of the social circle. I now feel very awkward and nervous when trying to speak to colleagues on a social basis across Zoom. I used to be quite outgoing and gregarious, but I feel that being isolated at home has changed me as a person and made me quite antisocial. I fear this will impact my longer term prospects at the firm, as I am just making excuses to avoid all online social events and when offices do fully reopen I may not have the same level of confidence.

Ash replies:

Being forcibly confined in our homes due to lockdown has inevitably impacted on our self esteem and confidence to varying degrees. We will need to find ways to readjust slowly to our growing freedoms, perhaps just like prisoners coming out of confinement. Therefore please do not give yourself such a hard time.

Digital interaction has been invaluable, but it still is quite a forced and artificial means of interaction. We have to make a specific effort to arrange Zoom calls, and this is not ideal as many of us prefer the impulsivity of human interaction – chatting to a colleague while making coffee in the office kitchen, or bumping into someone in the coffee shop and catching up. There is less pressure to make conversation, and this is not helped by having to juggle conversations in a home environment rather than in a neutral office space.

I suggest that you give yourself small, periodic challenges to readjust gradually, by for example arranging a 10 minute Zoom call with one office colleague every week. Perhaps do this at lunchtime while on a walk, to allow you to speak outwith the home environment.

Once you feel better about the first call, you should hopefully be able to increase the frequency of these; just go slow and steady and don't put too much pressure on yourself.

Also try to reach out to your GP about how you are feeling: there will inevitably be others who will be feeling just like you are and there may be specific support or coping strategies potentially available too.

Take care.

Send your queries to Ash

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

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

Classifieds

John McBryde (otherwise known as Ian John McBryde) (deceased)
Would anyone holding or having knowledge of a Will by John McBryde (otherwise known as Ian John McBryde) residing latterly at 106 Clermiston Drive, Edinburgh, EH4 7PX, please contact Marion Jenkins at marion.jenkins@murraybeith.co.uk or on 0131 376 5584.

Eileen Helen Fraser (deceased)
Would anyone holding or knowing of a Will by Eileen Helen Fraser of Auchercrag House, Commercial Road, Ellon, AB41 9BD, and sometime 43a Craigs Road, Ellon, AB41 9BG, please contact Raeburn Christie Clark & Wallace LLP, 75 High Street, Banchory, AB31 4GE, telephone 01330 822931, gillian.smith@raeburns.co.uk.

Iain Hunter (deceased)
Would anyone holding or having knowledge of a Will of the late Iain Hunter who residing latterly at 1 Mortimer Drive, Monifieth, Dundee, DD5 4JF and formely at 127D South Street, St Andrews, KY16 9UH, please get in touch with Gordon Lennox WS at Scullion Law on 01698 283265 or gordon@scullionlaw.com

Gavin Mark Sutherland Swanson (deceased)
I am trying to locate the principal Will of the late Gavin Mark Sutherland Swanson who resided latterly at Myrtle Cottage, Lucklawhill, Balmullo K16 0BQ. If anyone holds the principal Will for our late client please contact me at alisonbruce@rollos.co.uk

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LOOKING FOR A CHANGE?

We have been instructed on excellent opportunities for lawyers, at all level's of PQE, who are interested in working in the Channel Islands. The current roles are across a range of practice areas, which include:

- **Banking & Finance**
- **Corporate**
- **Dispute Resolution**
- **Funds**
- **Private Client**
- **Property**

To be considered for these opportunities, you will ideally have experience of working within a well-regarded commercial law firm and have relevant experience in the above areas.

The starting salary is significantly higher than the Scottish market, and a contribution to your relocation expenses would also be made. This is a great opportunity to progress your legal career with a top ranked firm and gain exposure to some of the best quality work in these sectors.

For an initial and confidential discussion about working and living in the Channel Islands, please contact Frasia, Cameron or Teddie on 01294 850501 or frasia@frasiawright.com cameron@frasiawright.com or teddie@frasiawright.com for further details.

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