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Charities special feature: misnamed beneficiaries
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# Journal

Journal of the Law Society of Scotland

Volume 66 Number 11 – November 2021

# Whose rules?

Three options are on the table for the future regulation of the profession. Will its independence be compromised?

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# Editor

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## Regulation stakes

As I write, COP26 is well into its stride. While last month's Journal set much of the scene from a lawyer's point of view, it gives me pleasure to bring you this time round the opening address by former Irish President Mary Robinson at the UK law societies' own climate conference just ahead of the UN event. See p 5 for an account, as succinct as it is powerful, of climate change injustice, whether the profession is giving enough of a lead, and changing our own mindset as individuals.

But other issues also demand our attention, not least the Scottish Government consultation on our future regulation as a profession. Given the options presented, all the indications are that this will be a further and perhaps final round in a contest about independence. Not that anyone, at least overtly, is against the independence of the legal profession. But independence is invoked on both wings of the debate: on the one side those such as Esther Roberton who believe that the public interest demands the independence of the profession's regulator from the profession itself, and on the other the Society and those in the profession who invoke the same public interest in maintaining that protecting the individual from the state is incompatible with any form of Government influence in relation to the regulator.

If a way were to be found of reconciling these views, some additional financial cost might be a price worth paying. But when professional legal services are already said to be beyond the means of much of the population, any solution that adds to the regulatory cost, which will of course be borne by the profession, would have a further public interest factor against it. Lawyers are entitled to be sceptical about claims that a new regulator, of whatever powers, will be cost neutral due to savings made by streamlining complaint handling.

In reality the choice as to which form of independence prevails is not so black and white, with each consultation option having built-in mechanisms to try and preserve both. Views on whether these attempts succeed, and the respective mischiefs that may arise from each option, may be crucial when it comes to the final political choice.

All the debate about regulation becomes a bit pointless if there is no profession left to regulate. Unlikely, you think? Ask the criminal legal aid sector, whose numbers continue to decline week by week in the face of pressures including better prospects in the prosecution service, but who still seemed to be at the back of the queue when it came to achieving a settlement ahead of COP26. To date, the Government appears to have underestimated the resolve of the sector to hold out for a more secure future. How long before, if you will pardon the expression, the penny drops? J

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.66 NO.11 – NOVEMBER 2021

## Perspectives



## Regulars



## Features



## Briefings



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## In practice



**ONLINE INSIGHT**

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

### Foreign marriages: implications in family law

Cases are increasingly coming before the UK courts regarding multiple marriages, foreign divorces and haq mehr. Exploring these, Khalda Wali believes women are becoming more confident about asserting their rights, and practitioners should be aware of the issues.

### Variation in a vacuum?

The Sheriff Appeal Court has ruled that the minute to vary procedure should be available in a childcare dispute even where there is no order to vary. Nadine Martin considers the decision and finds the court's reasoning sensible.

### Scottish Legal Walks back in their stride

Graeme McWilliams enjoyed the camaraderie at the recent Glasgow and Edinburgh Legal Walks, which between them have raised several thousand pounds for the Access to Justice Foundation.

### Automatism and civil claims

Roz Boynton protests that whatever the place of automatism in the criminal law, to allow it as a defence in a civil claim arising from a road traffic collision undermines the policy of the law.

OPINION

# Mary Robinson

An edited version of Mary Robinson's keynote address to the Lawscot COP26 Conference on 29 October, hosted jointly by the UK Law Societies

Lawyers and climate change – leaders or followers? I will answer that question towards the end of my remarks. But at least the verdict won't be as bad as when the IBA came to Dublin in 2012 and asked me to be one of their guest speakers. I recall saying that the IBA, and lawyers generally, were completely behind the curve on climate change and needed to step up.

To my surprise, the IBA responded wonderfully, particularly the International Human Rights Institute under Dr Helena Kennedy, and produced an important report called *Achieving Justice and Human Rights in the Era of Climate Disruption*. I have kept in touch with the IBA and I have seen great progress. The IBA formed the Climate Change Justice and Human Rights Task Force, and more recently published a model statute, which is aimed at helping citizens to launch legal challenges against governments for failing to take action over changes. And we have seen a huge increase in litigation in recent years.

But I don't think lawyers have generally spoken enough about the justice dimensions of climate change, and that's something I feel very passionate about. There are at least five layers of injustice we need to be aware of.

First of all, climate change affects the poorest countries and communities, and the small island states, and indigenous communities, disproportionately and much earlier. Yet they are the least responsible. It amounts to a racial injustice as well.

Secondly, within that is the gender injustice of the different social roles, often even lack of rights, of women. Yet they have to put food on the table; they have to make their communities resilient. And they do.

Third is the intergenerational injustice. Young climate activists have been calling us out on that, and they are absolutely right.

The fourth is a subtle but very important one: the injustice of the different pathways to development of different regions. Industrialised countries that built their economies on fossil fuels, now have to wean themselves off as rapidly as possible, but with just transition for the workers involved, to ensure that green jobs are focused very particularly in those communities. It will need resources, a Just Transition Fund as some have already set up.

The fifth is the injustice to nature herself: the loss of biodiversity, the extinction of species. UN reports since 2019 have revealed just how serious that is, and that we're on track for a 2.7˚C rather than a 1.5˚C world temperature rise, which would be disastrous.

There's a madness in all of this, and lawyers should wake up.

So what's my verdict on all of this, and where lawyers are? Are they really leaders? I'm impressed at what the Law Society in Scotland has done to be accountable for its emissions, and reduce its emissions. That's certainly leadership. But I have to say, lawyers are not leaders – yet. Because far too many lawyers still don't have the mindset that we are in a crisis, a climate crisis. It's important that we all have that mindset, and it's particularly important that lawyers do, because you can be very effective in so many ways: not just in litigation, but in policymaking, in advising, and so on.

What do we all need to do? I always urge that each one of us – judges, lawyers, whoever – need to take three steps.

First of all, we need to make the climate crisis personal. That is, you've got to do something today that you weren't doing yesterday. You've got to recycle more carefully; you've got to change your diet maybe, or change the way you travel. But own the crisis. You'll feel better if you own it.

Secondly, get angry with those who aren't doing enough – governments, cities, business, investment, and all of those who should be taking more responsibility.

Thirdly, and this is the most important, we have to imagine this world that we need to be hurrying towards. It is going to be a very healthy world, because we won't have air pollution, fossil fuel pollution, indoor and outdoor, that kills between 8 and 9 million people a year. We'll go back to the early COVID days of very good light, and hearing the birds. We won't just have cities that have gardens, and trees, but also farms, vertical farms. We'll have farming that will be regenerative. We'll have countrysides that will be regenerated in an exciting way. All of this is a future that we have to keep talking about if we are serious about getting there in a hurry.

I'm very much a chair of the elders now, somebody who wants to bring hope in any talk that I give. So I want to end with the words of Nelson Mandela, words that are very appropriate to the COP in Glasgow: "It always seems impossible, until it is done."

**Mary Robinson is Adjunct Professor of Climate Justice at Trinity College Dublin, former UN High Commissioner for Human Rights, and a former President of the Republic of Ireland**

CORRESPONDENCE

# RoS's growing arrear

## Older transactions prejudiced

Perhaps understandably, not much mention has recently been made of the issue of the title registration arrear in first registration ("FR") and transfer of part ("TP") applications. Whilst Registers of Scotland ("RoS") are to be commended on their speedy response to the pandemic and their rapid rollout of digital registration, this issue has not gone away and, indeed, a recent policy change at Meadowbank House gives rise to serious concerns.

The total arrear now stands at 94,649 cases, having increased steadily ever since 2018 when the new Keeper Jennifer Henderson undertook to clear what she then declared to be the unacceptable arrear of 40,000 cases. Some 53,000 of the current arrear cases relate to applications lodged prior to the pandemic, between 2017 and 2019.

RoS have, again understandably, struggled to make any headway against clearing the backlog of cases. Their latest policy, however, introduced at the start of this year, can only be described as discriminatory as it favours one set of customers, those lodging new FR and TP applications in 2021, over applicants who submitted their applications as long ago as 2017.

The rationale behind this policy is stated to be "ring fencing" the arrear to prevent new cases entering the arrear, which RoS believe will free up staff resources to begin to make an impact on clearing the older part of the arrear. While this may make perfect sense from the RoS point of view, it appears to have been done without any consideration or consultation of those affected, i.e. those who paid registration dues in 2017-2019 and are still awaiting their title.

Perhaps those solicitors with outstanding applications from these years should make their views known to RoS in the strongest terms? I can only imagine the censure from SLCC which would fall on the head of any solicitor who took money for a job in 2017 and had still not completed it!

The effect of this policy after nine months of operation is already clear. Although many more recent applications are being processed and completed, the overall arrear has still risen from 79,056 cases in March 2021 to 94,649 cases at the end of September. Meanwhile, RoS's own figures show that the number of cases cleared from the 2017-2019 part of the backlog over the four month period from the beginning of May to the end of August totals less than 2,500. At that rate, clearing even the pre-pandemic part of the backlog would take almost seven years.

Finding a solution to this crisis is now urgent. The Keeper has made various promises to clear the backlog, none of which have materialised. At the same time, the politically inspired 2024 Land Register completion project has been given priority in RoS pronouncements. Completion is still only 46.7%, with the latest month's addition of 0.1%. It is obvious to everyone that this project is unachievable and should be ditched immediately. All efforts should be concentrated on clearing this unsustainable backlog.

***J Keith Robertson, Kingussie***

BOOK REVIEWS

# Brooke's Notary 15th edition

NIGEL READY
PUBLISHER: SWEET & MAXWELL
ISBN: 978-0414089044; £295

This classic treatise is the go-to text for anyone wanting to find out about how notaries (primarily but not exclusively English ones) undertake their work in the premier common law jurisdiction. It is a masterpiece of English and comparative law with breadth, depth and substance, and will be of significant interest also to those who practise in systems such as Scotland.

The sheer scope is obvious from the list of contents. Topics of interest to commercial lawyers across the UK include chapter 7, "Bills of Exchange, Promissory Notes and Cheques"; chapter 9, "Affidavits, Declarations and Ship Protests"; chapter 10, "Bond and Debenture Stock Operations and Share Issue Ballots"; and chapter 11, "Execution and Proof of Documents for use outside the United Kingdom". The anti-money laundering section has been updated and expanded.

Its practical nature is patent from chapter 12, which contains various precedents or styles, including a number in foreign languages. The appendices are particularly useful, setting out relevant legislation, various US Uniform Acts and the Hague Convention of 5 October 1961.

Ready takes account of the trend since COVID-19 towards remote notarisation, and of post-Brexit changes to cross-border enforcement of instruments. Since 1988, he has written six new editions. That fact is testament to his stamina and expertise, and this edition shows those abilities put into action.

***Michael Clancy, secretary of the UK & Ireland Notarial Forum. For a fuller review see bit.ly/3wjgcB2***

# The Dark Remains

WILLIAM McILVANNEY AND IAN RANKIN
CANONGATE: £20; E-BOOK £8.54

"*The Dark Remains* came to light when William McIlvanney's family found detailed notes for an unfinished Laidlaw book... They asked Ian Rankin to write it."

***This month's leisure selection is at bit.ly/3wjgcB2***

***The book review editor is David J Dickson***

BLOG OF THE MONTH

## ukconstitutionallaw.org/

"The cumulative effect is a highly unconvincing judgment that reads the Scottish devolution settlement unnecessarily narrowly".

The Scottish Government's approach to devolved powers in the UNCRC Bill was controversial, but the UK Supreme Court has created its own controversy with its construction of the saving provisions of the Scotland Act. Cambridge academics Mark Elliot and Nicholas Kilford find the decision troubling, and of "potentially profound significance not only for the devolution settlements themselves but for our understanding of the wider constitutional landscape".

***To find this blog, go to bit.ly/3CPoeV6***

# Candy camera

Time to defend your reputation, folks. The Americans are out to steal the credit for the deep fried Mars bar.

Good sports really, four delegates to COP26 allowed themselves to be videoed sampling a selection of Scottish delicacies – and guess what turned out to be the most recognisable to them. "Midwestern fair food", our famous calorie pile-on was labelled. Who came up with it? "It's gotta have been an American, or a wayward Scot who went to the US". Send for an IP lawyer!

Most dishes went down well, especially the Cullen Skink ("Skunk?" one tried to recall the name a moment later), followed by the Lorne sausage, despite a doubt over a "square sausage on a round bun". And haggis, if you "don't market what's in it" – nothing new there.

None came close to pronouncing Irn-Bru ("Ern Bra?"), and the secret ingredient must be "several packs of sugar", though the "cream soda" flavour got the thumbs-up.

But of the cranachan – which was also rated: "It's the first Scottish food we've had that makes me think they have summer."

Video pinned (for the moment) at twitter.com/USAmbUK

PROFILE

# Craig Cathcart

Craig Cathcart is a senior lecturer at Queen Margaret University's Business School and convener of the Society's Regulatory Committee

**1 Tell us about your career so far?**

I completed my law degree and diploma, and then ended up becoming a trading standards officer. The variety was tremendous, and I got to work with many dedicated people. Some years later, a university was looking for a lecturer with a specialism in consumer protection, and somehow I got the job. Lecturing or tutoring deepens your subject understanding. I now major in mediation and negotiation, and have worked in places from Belfast to Shanghai.

**2 How did you become involved with the Society?**

I was passionate about the idea of helping ensure that trust in the solicitor profession stays strong, standards remain high, and clients get the help they need, when they need it. I also had experience of governance work, and as a director of Citizens Advice Edinburgh. My initial interest was probably via the policy committees.

**3 What main issues do you think the Society has to address at the moment?**

We urgently need to improve the complaints system. I hope there will be early reforms to speed up the gateway and eligibility stages. However, wider reform is needed. The consultation on legal services reform is also a key priority. We have to show the major role which lay members play in the Society and in regulatory decisions. We have an effective system of co-regulation that delivers high standards and consumer confidence. I want to use the consultation to push for changes the Regulatory Committee has championed for years: proper entity regulation, addressing the unregulated legal services market, greater powers against wrongdoing.

**4 What is the principal message you would send to the profession regarding the review?**

Get involved. The consultation will benefit from a wide range of voices being heard.

***Go to bit.ly/3wjgcB2 for the full interview.***

WORLD WIDE WEIRD

## 1 Cameo role

bit.ly/3bGjGUZ

Nine potential recruits to the Gulf Shore Police Department in Alabama were shocked to find Hollywood legend Morgan Freeman, 84, on the interview panel.

## 2 Fin distinction

bit.ly/3EE5KY3

Police in Sussex have admitted that an officer called to a dispute in a ground floor flat mistook a paddling pool full of goldfish for sharks.

## 3 Growing arms and legs

bit.ly/3nYjsRR

Motorist David Knight was ordered to stump up a £90 fine for driving in a bus lane after a camera mistook the slogan "knitter" on a woman's t-shirt for his KN19 TER registration.

TECH OF THE MONTH

## Evernote

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Evernote is an app which allows you to store all your notes in one place while also being able to add extras such as photos, files and lists to them. There's a powerful search function to locate the information you need quickly, and you can sync the data to all your devices, to be readily available even when offline.

evernote.com/

PRESIDENT

# Ken Dalling

The current consultation on legal services regulation could usher in the Roberton proposal for a Government-appointed regulator. If you see this as a threat to an independent legal profession, please make your voice heard

Some months ago I shared with you my view that "solicitors are great". That view has only been reinforced during my virtual trips around Scotland engaging in constituency visits. It is heartening to find from such engagement the continuing shared ethos of excellence, client and civic service that so well defines our profession.

So many of those in remunerated occupations like to be regarded as professionals, and there certainly has been movement since I was told at university that only Law, Medicine and the Church were professions. But there surely are key aspects of the profession of the law that should be acknowledged and even treasured.

In this time of stakeholders and consumers, it is instructive to bear in mind that when clients access legal services they may be seen to do so not as consumers but as citizens. Solicitors don't merely sell their services for consumption: they make available their skills to allow rights to be protected and vindicated – and they do so within a network of ethical rules that serve not only the individual but also society as a whole. For all the duties owed to clients, higher duties are owed to their fellow professionals, to the court and, yes, even to the country.

## Roberton revisited

As you read this, the consultation of the Scottish Government on the future regulation of legal services will still be open. Remember the Roberton report? Well, please revisit its content and recommendations. I mention both as they are not entirely related. The current regulatory model with significant lay engagement, a standalone Regulatory Committee with a lay convener and the oversight of the Lord President, was commended as showing "little evidence of wrongdoing". (I mention the role of the Lord President though the Roberton report didn't!)

Scotland, we were told, is "home to a well educated, well respected legal profession with a high degree of public trust". That trust, both external and from solicitors, means that a great number of solicitors working in areas which are not reserved – both in Scotland and internationally – still offer to be regulated by the Law Society of Scotland. This is a sign of their trust in the "Scottish solicitor" brand and shows their clients that they deserve the clients' trust. Despite all of this, the main recommendation from Ms Roberton, who made it clear that the recommendation was hers alone, was that solicitors should have no role in regulation and that the Government should appoint an "independent" regulator. Oxymoron anyone?

In conversation with my new Zimbabwean chum Sternford Moyo, President of the International Bar Association, he expressed surprise that the Scottish Government hadn't dismissed the prime Roberton recommendation out of hand. Scotland, he told me, was a jurisdiction to which others looked when considering legal excellence. The rule of law required an independent legal profession as well as an independent judiciary. Even if the Scottish Government could be trusted to regulate the profession, such a move was simply a bad one that others, with less pure hearts, would follow. What would make it worse was that they could point to Scotland by way of justification for a path that would be detrimental to the rule of law in their jurisdiction.

## Dubious precedents

Other jurisdictions, though not many, have severed the regulatory from the representational roles of their law societies. Not always successfully. As one Past President of the Law Society of England & Wales observed to me, implementing Roberton would mean "imposing English failure on Scottish excellence". There's that word again, but it's a reference to what our country has now, not what Roberton would give us! You can take it he wasn't a standard bearer for the idea. And all of this is before we even start to consider the cost of a new regulator. The Roberton report suggests there would be no additional cost to the profession, and therefore to the public who are in all things our paymasters. Really? Not only does the current model enjoy the support of those it regulates, it uses the volunteered resources of many dozens of lay members on regulatory committees. I doubt that a Government-appointed regulator could count on that. Our close comparator for non-Law Society regulation is with complaints handling and the Scottish Legal Complaints Commission. Spiralling costs despite diminishing complaints. Nothing to be optimistic about from that, then.

So what to do? Well, the Society will be submitting a robust but measured response to the consultation. There will be those who support a change and I respect that view, as I respect Esther Roberton's. I just say that the case for a new single regulator change has not been made and that such a proposal is a dangerous one. If, like me, you see things differently and treasure an independent profession, please consider having your voice heard.

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

• *Details of the consultation can be found at www.gov.scot/publications/legal-services-regulation-reform-scotland-consultation/ The consultation closes on 24 December 2021.*

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# People on the move

Intimations for the People section should be sent to peter@connectcommunications.co.uk

To advertise here, contact Elliot Whitehead on +44 7795 977708; journalsales@connectcommunications.co.uk

BALFOUR+MANSON, Edinburgh and Aberdeen, announces the retirement of litigation partner **David Flint** on 31 October 2021, after more than 40 years in legal practice.

COMMERCIAL LEGAL CENTRE LLP, WS, 36 Tay Street, Perth announces the retiral from private practice of its partners, **Alistair G Napier** and **Mrs Joanne Smith**, and the closure of the practice from 31 October 2021.

DLA PIPER, Edinburgh and globally, announces the appointment of dual qualified **Allan Leal** as a partner in the Finance practice, based in Edinburgh. He joins from BURNESS PAULL, where he was a partner.

GILSON GRAY, Edinburgh, Glasgow, Dundee and North Berwick, has taken over Dundee legal firm BAILLIE SHEPHERD. All Baillie Shepherd employees have joined Gilson Gray, including directors **Alan Baillie** and **Peter Shepherd**, and court solicitor **Ken Glass**.

THE KELLAS PARTNERSHIP, Inverurie, has announced the promotions of **Catherine McKay** (Private Client) and **Dan McFarlane** (Residential Property) to associate.

KERR STIRLING LLP, Stirling and Falkirk, have as at 1 April 2021 promoted **Russell Spinks** (Commercial Property) and **Marc Quinn** (Private Client) to partner; and **Matthew McKeown** (Commercial Property) to associate. **Andrew J Ion** has ceased to be a partner but remains with the firm as a consultant. **Graham Sutherland** and **Des Coyne** have joined the firm as a senior property solicitor and a senior private client solicitor respectively.

LINDSAYS LLP, Edinburgh, Dundee and Glasgow, intimate that, with effect from 31 October 2021, **Ross Hadden** will retire from the firm. Lindsays wishes him a long and healthy retirement.

Lindsays has promoted the following paralegals to senior paralegals: **Cheryl McCourt**, **Christine Jamieson** and **Sandra Reid** (all Glasgow), **Fiona Yuill** and **Patricia Adams** (both Edinburgh), and **Tracey McCardle** (Dundee).

MACDONALD HENDERSON, Glasgow, has announced the promotions of **Laura McKnight** to director, and **Hilary Malone** to associate director, and the appointments of **Ryan Macready** (who joins from GILSON GRAY) as a senior solicitor, and **Christopher Wheeler** as a corporate analyst, all in its Corporate team; the appointment of **Gordon Lennox**, who joins from SCULLION LAW, as a director, and **Peter McEwan** as senior solicitor, both in the Private Client team; and the appointment of **Callum McInnes**, who joins from BTO SOLICITORS, as an associate in the Commercial Property team.

ALLAN McDOUGALL SOLICITORS, Edinburgh announce that as of 1 November 2021 **Alexandra Robertson** (formerly of WATERMANS SOLICITORS) joins the firm as an associate.

**Tom Marshall**, solicitor and solicitor advocate, of TOM MARSHALL LAW LTD, Burntisland, has retired from practice with effect from 1 November 2021.

MILLER SAMUEL HILL BROWN, Glasgow, has appointed **Siobhan Kelly** as consultant and head of its Family Law department. She joins from BELTRAMI & CO.

SCULLION LAW, Glasgow and Hamilton, has promoted **Charmaine Trainor**, who joined the firm as a receptionist in 2012, to executive director and head of Client Care.

SHEPHERD & WEDDERBURN, Edinburgh, Glasgow, Aberdeen, London and Dublin, has promoted 16 associates to senior associate: **Neil Casey**, **Nathaniel Buckingham** and **Leigh Herd** (all Property & Infrastructure Disputes); **Laura McMillan** and **Andrew Winton** (both Commercial Disputes); **James Bulpitt** and **Katy Fitzpatrick** (both Banking & Finance); **Alexandra Lane** and **Emma de Sailly** (both Rural); **Pamela Binnie**, **Siobhan Dunphy**, **John Townsend** and **Emma Guthrie** (all Property); **Magdalena MacLean** (Planning); **John Vassiliou** (Immigration); and **Gillian Moore** (Employment). The firm has also promoted 12 new associates: **Abby Doig** and **Lucy Mulreany** (Banking & Finance); **Roddy Forgie** (Media & Technology); **Dan Boynton** (Pensions); **Sarah Leslie** (Employment); **Kara Gallagher** and **Alistair Kennedy** (both Infrastructure); **Gabby Ives**, **Craig Brodie** and **Scarlett Leigh** (all Property); **Kirsten McKinnon** (Private Wealth & Tax); and **Thomas McFarlane** (Commercial Disputes). All the promotions take effect from 1 October 2021.

SHOOSMITHS, Edinburgh, Glasgow and UK wide, has moved its Glasgow office to The Garment Factory, 5th Floor, 10 Montrose Street, Glasgow G1 1RE (t: 03700 86 3000).

International firm SPENCER WEST LLP has launched a Scottish practice, led by former DLA PIPER Banking & Finance partner **David Morton**, assisted by former FENWICK ELLIOTT Construction partner **Jonathan More** as business growth director, based at 57-59 Bread Street, Edinburgh EH3 9AH (t: 020 7925 8080; e: david.morton@spencer-west.com).

STIRLING & MAIR LTD, Johnstone, has announced the promotion to associate of **Ashlee Waton** in its Conveyancing team.

THOMPSONS, Glasgow, Edinburgh, Dundee and Galashiels, has appointed **Craig Snee** as senior solicitor and head of its Dundee office. He joins from DIGBY BROWN.

THORNTONS, Dundee and elsewhere, has appointed **Karen Cornwell**, who joins from KENNEDYS, as a legal director in Dispute Resolution & Claims, and **Ruth Pyatt**, who has moved to Scotland from East Anglia, as a legal director in Wills, Trusts & Succession Planning, both in its Dundee office; recently qualified corporate solicitor **Aadil Anwar** also to the Dundee office; and corporate solicitor **Sabihah Ahmed**, and **Andrew Wallace**, an associate in the Employment team who joins from BALFOUR+MANSON, both in its Edinburgh office.

YUILL+KYLE, part of the MACROBERTS GROUP, has appointed **Denise Loney** as its new managing director. Formerly director at ALSTON LAW, which joined the SIMPSON & MARWICK stable earlier this year, she succeeds **Stephen Cowan**, who will remain as a consultant to help with the transition.

Chair Colin Graham welcomes the new appointments at Thorntons

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Tailored finance products can meet specific needs for funds

Braemar Finance has been working with the legal profession for a number of years, and in that time we've been witness to pandemics, economic cycles (stability and turbulence); technological developments, and changes in government funding and client expectations.

What has not changed is the need for funding to satisfy growth ambitions. In this article we provide a practical, real-life case study that demonstrates how we helped a solicitor during the pandemic. We also explain more about the various products Braemar Finance offers and how they can be used to grow your business.

## Case study

**Who?**
An established firm of solicitors recently acquired by a legal group.

**Why?**
They were seeking loan funding over as long a term as possible to finance the refresh of IT equipment, including "soft" costs (engineer, software, etc) and to help with working capital.

**Solution**
Standard £100k business loan over four years with cross-company guarantees.

## Products

### *Business loans*

Our unsecured business loans are available when you need to borrow funds to invest, injecting cash when you need it.
The product can be used for a variety of purposes, including:

- buyin/buyout;
- refurbishments;
- IT revamp;
- equipment;
- website development;
- insurances and training;
- security systems.

### *Consolidation and refinancing loans*

If you have several existing agreements, credit card balances or other regular finance repayments, a consolidation loan may be the way forward. A consolidation loan would combine your existing debts into one single monthly payment over a term that suits and can be used to free up your cash flow.

### *Personal loans*

Personal loans are unsecured and can be used for virtually any purpose other than for the purchase of property.

Our bespoke packages are designed to accommodate your needs, allowing you to budget with confidence as the payments are fixed throughout the term of the agreement.

### *Tax loans*

Our popular tax loan facility is designed to help manage this recurring expense. Popular with many professionals, our unsecured tax loans permit you to spread the cost of your tax demand into more affordable monthly payments.

Tax demands can be received in various formats, dependent on your circumstances. We can fund personal tax, corporation, capital gains, crossover tax and inheritance tax; in addition, we will consider consolidation of existing agreements.

Payment can be made directly to HMRC or to a bank account of your choice, allowing you to have your tax bill paid on time, avoiding any HMRC late payment penalties.

### *Hire purchase*

Hire purchase allows outright ownership of the asset and enables you to spread the cost over a term that suits you.

In addition, the asset may potentially be claimed against your taxable profit, under your Annual Investment Allowance, which is a tax benefit.

Furthers benefits of hire purchase include:

- easier cash flow budgeting as repayments are fixed;
- capital preservation – existing funds can be used elsewhere;
- interest charges can be offset against profits for taxation;
- outright ownership on completion of the agreement.

### *Leasing*

If you want to maximise the use of your equipment without the responsibility of owning it, leasing will give you the freedom and flexibility you need.

With affordable monthly payments, leasing is a tax efficient method of acquiring the assets your business requires.

***For more information on how Braemar Finance can help grow your business, visit www.braemarfinance.co.uk/legal or call a member of the team on 01563 898 303 who will be happy to help.***

# Who gets to make the rules?

How should the legal profession be regulated? Legislation is on the horizon to decide this perennial issue, but first the Scottish Government is seeking views on three possible models. Peter Nicholson presents a potted version of the consultation

You may feel that we have been here before. A consultation has opened on the future of legal services regulation in Scotland. This latest Scottish Government exercise, however, is closer to being the precursor to new legislation that could have a far-reaching impact on the profession. It is one that practising lawyers should be taking an interest in, and letting their views be known.

Sharply opposing views have been aired since Esther Roberton's review in 2018 recommended a single new regulator covering all branches of the legal profession, independent of the profession and taking in the functions of the Scottish Legal Complaints Commission. She believes that her approach would put Scotland at the forefront of modern professional services regulation; but it is strongly opposed by the Law Society of Scotland and Faculty of Advocates, who see a threat to professional independence since appointments to the regulator would be made by, or by those capable of being influenced by, the Government. How, then, is the Government proceeding?

Three contrasting alternative models are proposed, one reflecting the Roberton proposal; one involving a market regulator similar to the present position in England & Wales; and one that can be seen as the present system with added transparency, all as outlined below.

Before detailing these, the consultation sets out the regulatory principles and objectives that it intends should apply – essentially those identified by Roberton, along with the human rights PANEL principles of participation, accountability, non-discrimination, empowerment and legality. The objectives should be uncontroversial, but consultees are asked to rate the importance they attach to each. They include protecting and promoting the public interest; supporting the rule of law; independence and adherence to professional principles; access to justice (including choice, affordability and understanding); a culture of prevention, quality assurance and compliance; collaboration between provider and consumer interests; the better regulation principles; and promoting competition.

## Model 1: Roberton

Esther Roberton's model is the first option. A new, single independent regulator would be responsible for entry, standards, monitoring, complaints and redress in respect of all branches of the legal profession. The Society, Faculty and equivalent regulators would become professional membership organisations, working with the regulator and representing their members' interests, providing CPD (as approved), professional services and guidance, and pursuing their interests in law reform. But the regulator would be the rollkeeper for all legal professionals and be responsible for all aspects of regulation including issuing practising certificates, setting practice rules and professional standards, financial inspections, complaints handling, the client protection fund, and establishing a reconstituted disciplinary tribunal.

The regulator's chair would be appointed through, and only be removable by, the Scottish Parliament; its board would have equal numbers of legal and non-legal members (the former perhaps appointed by the Lord President; the latter perhaps by ministers), and would require to embed a consumer voice.

Funded by a levy on regulated individuals and entities, the paper dares to suggest that the cost would be no more than the current framework, a simpler complaints process helping to achieve savings.

## Model 2: Market regulator

The second option parallels the current position in England & Wales. The professional bodies would retain their regulator roles – to be carried out by an independent statutory regulatory committee within each authorised regulator – but be authorised and overseen by an independent market regulator, to which the regulatory committees would report. The paper points to the Society's Regulatory Committee as the model, but Council members would not be allowed to sit on it. The SLCC would also continue to operate.

Appointed in a similar way to the option 1 regulator, except that ministers would appoint the chair through a public appointments process, the market regulator would have three main roles:

- to authorise the regulators, with the ability to act or make recommendations to counter gaps, geographic or sector related, in service provision;
- to monitor, counter and mitigate risks within the sector, through "a broad regulatory toolkit";
- to act as an impartial economic regulator, aiming to align and balance professional and consumer/client interests.

While it would set minimum entry standards, quality assure CPD, and carry out research into the legal services market, individual regulators would set

*"Complaints is one area on which there is more consensus on the direction of reform. Here the paper sets out a lengthy list of regulatory principles"*

their own entry standards, develop codes of conduct and standards in line with set criteria, regulate entities or practitioners as appropriate, and retain PII and client protection responsibilities.

The regulator would be accountable to the Scottish Parliament.

When it was mooted at the time of the 2010 legal services legislation, the Scottish Government decided that a body of this nature was excessive in a jurisdiction the size of Scotland. Funded by a levy on those regulated, the present paper again predicts no increase in costs, though the only indications as to how this would be achieved are that "a very small staffing complement" would be required, additional bodies could in future be regulated and therefore billed, and the complaints system would be less complex.

Issues around professional independence can also be expected to be raised with this model.

## Model 3: Enhanced accountability and transparency

This model is the closest to the present regime, but with enhanced accountability and transparency through the other professional bodies having to constitute regulatory committees similar to the Society's, each one embedding a consumer voice (through a mechanism to be decided).

Further changes would be a focus on entity and corporate regulation, and an ability to seek to regulate in other jurisdictions. A joint working group would assess and make recommendations to the Scottish Government and the Financial Conduct Authority as to future regulation of claims management companies in Scotland; it would also review reserved activities and the definition of legal services, and make recommendations based on changes in the market.

Were this model to be adopted, the Society would find itself ahead of the game, having its Regulatory Committee already in place, and with no new external oversight to come to terms with.

## The broader picture

Complaints is one area on which there is more consensus on the direction of reform. Here the paper sets out a lengthy list of regulatory principles, derived from Roberton. Catching the eye are a reference to mediation as "a key process which should be built upon"; the levy for entities being on a financial turnover basis; and a simplified and restricted appeals process, with no appeal in respect of service issues or compensation awards.

*"The paper acknowledges that depending on the favourite option, the role of the Lord President in approving professional rules may change. It asks for views on the importance of his role"*

We could also see a single Discipline Tribunal emerge, incorporated into the Scottish Tribunals (which would assist in the collection of financial penalties). And the Scottish Parliament might at last be given a say in approving the complaints handling budget.

The paper acknowledges that depending on the favoured option, the role of the Lord President in approving professional rules may change. It asks for views on the importance of his role, whether in future it should be a "consultative" or a "consent" role, and whether he should have a role in the appointment of legal members to regulatory committees (under models 2 and 3) and in arbitrating any disputes between the committees and their relative professional bodies.

Regardless of the model pursued, the Government wants the regulatory framework to incorporate a greater emphasis on quality assurance, prevention of failures that usually lead to consumer complaints, and continuous improvement for the benefit of the profession and consumers.

It also sees the reforms as an opportunity for Scottish regulators to simplify their rules, with the aim of reducing their length and making them more proportionate and consumer friendly. This is not fleshed out.

The paper asks whether "legal services" should be defined in legislation, without itself attempting a definition; whether the activities reserved to solicitors should be expanded, reduced, or left untouched; and whether the descriptions "lawyer" and "advocate" (and any others) should be protected in the same way as "solicitor".

With the 2010 provisions enabling licensed legal services providers never having been brought into force, it raises the question whether the required majority ownership by regulated professionals remains appropriate given the UK and international market in which Scottish firms now operate, as well as the increased interest in employee or community ownership. Alongside this, entity regulation is proposed, including a fitness test for entities.

A few other miscellaneous matters: the paper covers fitness to practise – whether the current criteria are adequate, whether they should be applied at more career points than the present admission and re-admission stages, and whether there should be a test for non-lawyer owners or managers. It follows up the Roberton report warning against creating legislative barriers to new services provided through legal tech – should legal tech be considered "legal services", and therefore regulated, and if so, how? Finally, is the client protection fund working, and should it be transferred to any new regulator?

## Opposing views

The Competition & Markets Authority, which takes an interest in the provision of legal services, favours Roberton's independent regulator model. To quote its research report of March 2020, this is seen as "the best way to ensure that regulation can protect consumer interests", including by promoting competition, improved choice and innovation, the better regulation principles, and independence in regulatory decision-making. In a brief final chapter acknowledging the CMA's report, the Government comments that it will respond to the CMA when it responds to the consultation, since views are being sought on many of its recommendations.

The central issue remains: should the present regulators – the Society, the Faculty, and the Association of Commercial Attorneys – retain their functions as such, or hand them over in whole or part to a new body, independent of the professions but appointed by bodies connected with the state? The latter outcome is backed by Roberton, the CMA, and also the SLCC, which has called for "fundamental reform" to create a system that is "independent, accountable and transparent". On the following page, Lorna Jack, for the Society, sets out its objections in principle to that approach, as does the President in his column this month.

Those who wish to read the paper for themselves, and to express their own view, can do so at www.gov.scot/publications/legal-services-regulation-reform-scotland-consultation/

They have until 24 December to respond.

# Reform please, but not the review

Lorna Jack sets out the Society's objections to reform along the lines proposed in the Roberton report

"One of the first questions to be asked is why regulate, and the next one is what mischief are you trying to prevent."

Three years ago, on the pages of this Journal (March 2018, 12), Esther Roberton asked these two key questions as she embarked upon her Scottish Government-commissioned review of legal services.

In her final report to ministers, she struggled to evidence any such mischief. "Scotland is home to a well educated, well respected legal profession with a high degree of public trust", she wrote; "there is little evidence of significant wrongdoing in the current model".

Even now, as the Government sets out its three options for reform, including one which strips the Law Society of Scotland of all its regulatory powers, it is not clear what problem is trying to be solved. Independent research showed that over 80% of the Scottish public trust the solicitor profession, far higher levels than seen south of the border. Complaint numbers are effectively reduced – at the same level as 10 years ago, despite solicitor numbers increasing by 18% over that decade.

Indeed, the Roberton review came about, not because of a market failure or an outcry from consumers: it happened because the Society itself asked for changes to the 40-year-old legislation which so often holds us back from acting in a proportionate and timely way.

Some argue for a fundamentally new regulatory approach because they see the Society as "lawyers regulating lawyers". Whether this is an innocent misunderstanding or a deliberate misrepresentation, such an argument could hardly be more flawed.

Each and every regulatory decision at the Society is taken by or overseen by a committee made up of at least 50% non-solicitors. Together, this network of non-solicitor volunteers ensure that the public interest sits at the very heart of the regulation of solicitors in Scotland.

It's a common model, both here in Scotland and internationally. The concept of a professional body regulating its members is what we see with chartered accountants, surveyors and teachers. For the legal profession, it's a system we see in most European countries, Ireland, Canada, Australia and many states in the USA.

## The mischief factor

Yet, if the Government's proposals do not solve a mischief, they definitely risk creating some. The option of a politically appointed and politically accountable regulator should strike fear and concern into all those who care about the rule of law and the independence of the legal profession from the state.

Solicitors often have to challenge the power of government and, as we have seen of late, even Parliament. It would be wrong and dangerous for the state to be involved in deciding who can become a lawyer or removing the right to legal practice.

Yet the first option in the consultation risks just that. It is why the International Bar Association is already interested in the ramifications of what is being proposed. It shows the huge risks to Scotland's reputation internationally.

There are practical issues too. The size of the legal services market in Scotland makes it particularly sensitive to regulatory costs. As a Law Society, we have controlled costs on solicitors, including implementing a £2.2 million financial package in response to COVID. Meanwhile, the independent Scottish Legal Complaints Commission has increased its costs by 50% in just 10 years, despite the same numbers of complaints as it dealt with in 2011.

Any new costs ultimately have to be met by clients. It all risks undermining the competitiveness of the Scottish legal sector, just as we all work to recover from the economic effects of the pandemic.

So, risks to the rule of law, risks to the international reputation of the profession and risks to the competitiveness of the legal sector. And for what purpose? For what mischief? What's the justification for taking these kinds of risks?

Let's be clear: regulation needs reformed, urgently. The bulk of legislation covering the regulation of legal services is outdated and has failed to keep pace with modern legal practice. The complaints system in particular is slow, complicated, cumbersome and expensive. We need new enabling legislation that works for the legal sector and the public, but it is reform of the processes which we need, not fundamentally new structures.

It is about protecting what works and making the improvements which are needed and long overdue. In this consultation, all solicitors need to argue for the right reforms that mean regulation that works for the public and works for the profession in the decades to come.

**Lorna Jack** is chief executive of the Law Society of Scotland

# Good legal software suppliers listen to you.

Those that do not may well find their ears are burning. It's not just about buying an off-the-shelf, one size fits all package. Legal software should be designed and built around *your* needs.

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That means you should be an integral part of the process. If you're not, it's a bit like investing in a modern day version of the Sinclair C5 - world leading technology - but, ultimately, just not fit for purpose.

Many practice management and accounts software suppliers will tell you that you are the focus of their design and development. Does yours walk the walk?

So, what are the signs of a supplier that listens? It boils down to three very basic approaches.

### Joined-up support.

Once you've signed up for the software, you'll need support and assistance of various types. In an ideal world, you should have options: telephone support, face-to-face support, onsite and online training. More importantly, you should have a dedicated individual who acts as your go to person. Someone who manages the relationship, solves problems and seeks out your views.

Those are the basics to meet your needs. However, it's a two sided coin. Any software supplier worth their salt recognises that all that telephone, face-to face and online contact provides them with a mine of information.

That information covers your likes and dislikes about the product as well as your potential future needs. If the information goes unused or ignored, it is worthless. The better suppliers take it seriously and use it to fashion future versions of their product around what you want.

### Making a point of finding out what you want.

Support, training and managing the relationship are all well and good. How can suppliers go beyond that? Regular events such as user group meetings or client conferences - call them what you will - are as good a place to start as any.

This type of symposium provides the opportunity for you to have your say directly to your software supplier. It's your chance to air your gripes and ask for changes and improvements to be made. It's also your chance to take a look at what the techies are planning to do next with their product.

That's good for them too. It allows them to gather information to feed into their development cycle, to prioritise new additions and test out their ideas for the future. No-one likes to be a guinea pig for untested new products.

### Getting you involved.

Joined up support and seeking your views at regular events are a powerful combination, designed to help you and your supplier get it right and cement relationships. So, how can your supplier go the extra mile?

That's where a developer forum comes into its own. This is your opportunity to become directly involved in the software development process. You will have the chance to test out new improvements and versions before they are publicly released.

Being this close to the process also gives you free range to air your views on how the product can be shaped to meet your needs in the company of your peers as well as the software developers.

It's not for the faint-hearted but it will ensure that whatever future shape your practice management software takes, it will have been designed with your needs at its heart.

These key components are the mark of a supplier that listens. How's yours doing?

**Find out more about LawWare. Contact us: 0345 2020 578 or innovate@lawware.co.uk.**

**Mike O'Donnell.**

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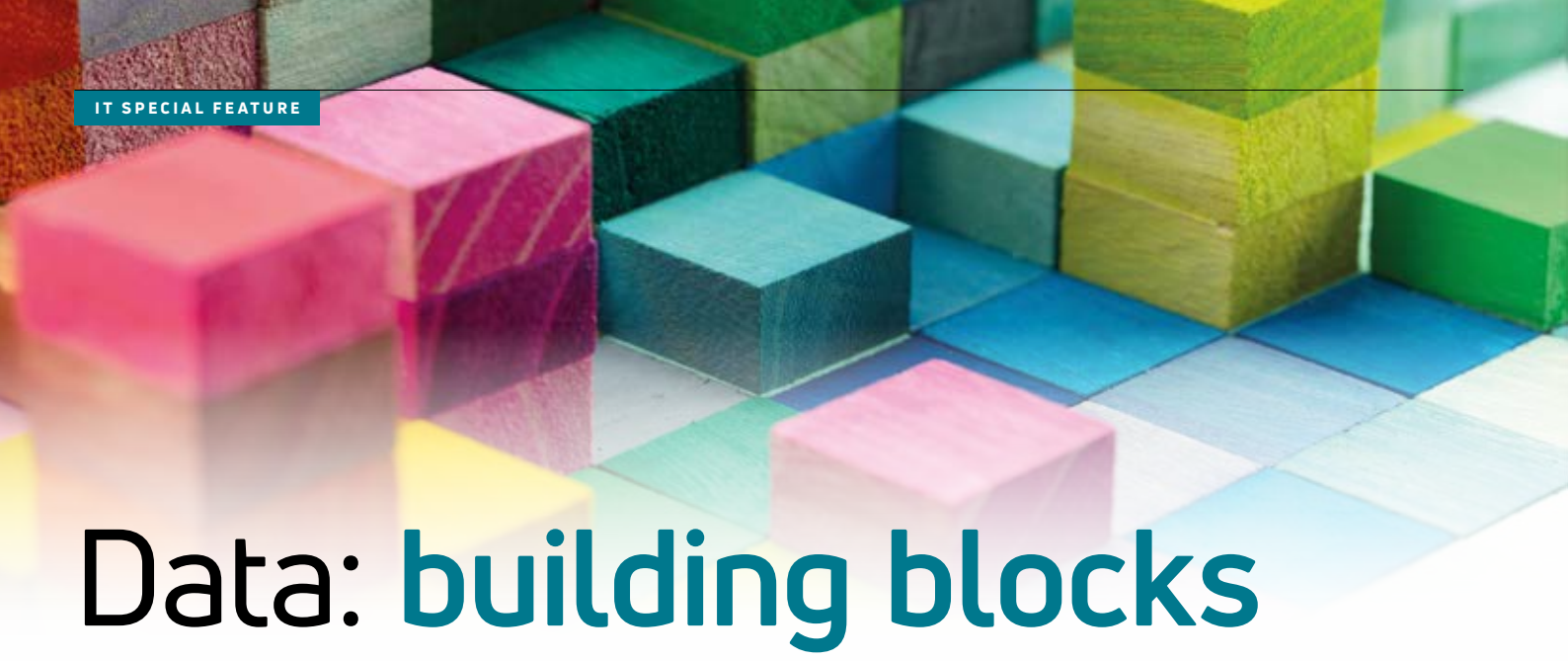

# Data: building blocks for success

This year's Journal IT special feature brings you some highlights from the Law & Technology Conference, beginning with the value of data in relation to both business efficiency and client satisfaction. Peter Nicholson reports

Successful law firms are harnessing data, both for the profitable running of the business and to optimise the client's experience.

These were among the key takeaway points from this year's Law & Technology Conference, held by the Law Society of Scotland on 30 September. The online event, which hosted more than 300 attendees, featured a wide ranging mix of presentations and panel discussions including those highlighted in this feature.

"Seizing the data opportunity" was the title taken by Alexandra Lennox of Lawtech UK, who explained how data can allow better, more informed decisions. Structured data on new matters, for example, and the capacity required for each, can assist in forecasting business capacity demand and planning headcount. Data on court actions can enhance litigation strategy and assessment of risk in relation to different outcomes. Those who act for insurers can use data on elements of claims to help detect those that are potentially fraudulent.

But it doesn't need a massive IT capability to get started, nor need it be complicated. "Think big, but start small," Lennox advised. Asking people to fill in a form – with questions tailored for easy understanding – can allow you to collect data in a structured format. And once you have insights and learning points, share them. (For how far this might be done, see p 22.)

## The client experience

How does this relate to the client experience? The theme was taken up by Lauren Watson of Legl. Starting from Thomson Reuters research findings in 2020 that clients favour customer service and a good working relationship with their legal service provider more than specialist knowledge, she maintained that clients increasingly favour firms that are willing to invest in building long term, trust based relationships and deepening their understanding of clients' business operations.

Traditional benchmarks such as KPIs or PEP might be less reliable measures of success when firms need to provide insight into multidimensional future trends. Client feedback can be used to design strategies that will deliver exceptional results in future, providing data that can help you cultivate a client-centric mindset. Lack of data, on the other hand, leads to gaps in knowledge and missed opportunities.

The firms who find themselves in the strongest position now, Watson told us, are the ones who invested in client-centric technology before COVID-19, not those who are scrambling to adjust now. The latter can leverage the technology, but must be mindful of its underlying philosophy – collecting data and maintaining a long term, client-centric perspective is an absolute necessity when doing so.

It's important to remember, she emphasised, that while technology can cut costs, its blind application has the capacity to alienate clients. Leading firms implement tech-enabled legal services in a way that improves the client experience. Streamlined and standardised digital onboarding, for instance, can quickly assess a client's goals and direct them to an adviser who can achieve these.

The truly client-oriented firm knows when to rely on technology and when to provide a personalised service, and "this can really leverage employees to do more high value work for clients".

## Firm-wide processes

Watson added that decentralised client management is very unlikely to feature in a well designed client experience. Successful firms are moving away from bespoke disconnected processes with limited communication between departments; and centralised client management also facilitates regulatory compliance.

It isn't just about onboarding, but every step in the client lifecycle. Digitising invoicing and online payments improves payment times and cash flow, and is the sort of "low-hanging fruit" that reduces admin while heightening client satisfaction. The firm that wants to maintain an edge can invest in client-centric designs for everything including the firm's website. In-house IT departments can gather client data for analysis; but this can also be outsourced.

Concluding, Watson said the pace of adoption of technology in the legal sector was now "incredibly impressive", and demonstrated firms' ambitions to keep striving to improve.

### "What works best for clients?"

A case study on tech in a small firm was provided by recently established Glasgow immigration firm Meliora, in a breakout session led by Clio, billed "Meeting changing client needs". Imogen Harris from the firm told us that they provide a lot of advice over the phone, or by WhatsApp – because their clients use it anyway and these methods work best for them (and their interpreters).

Technology helps Meliora stay competitive, as well as being more economical and environmentally friendly, and faster. The firm has no paper files, which "makes everyone more efficient". Its processes prompt advisers of the next steps in a case; and in legal aid cases can generate reminders of these around the time approval should come through.

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# The trends that will shape law firms in 2022

There's one thing that legal firms who are growing their revenues do more of than other firms: embrace cloud-based and client-centred technology.

That's just one of the conclusions from practice management software provider Clio's brand-new *Legal Trends Report*. Just released for 2021, the *Legal Trends Report* looked at technology adoption among firms seeing considerable revenue growth in recent years. The "Growing firms" group identified within the report had on average increased their revenues by 135% since 2013.

Following on insights from last year's report, which showed significant levels of technology adoption among law firms, this year's research indicates that new technology-enabled capabilities are part of a longer-term shift that will be further driven by consumer demand for more remote-enabled legal services.

## The key actions of growing firms

The *2021 Legal Trends Report* observed that when comparing the growing firms to others, these firms had adopted cloud-based, client-centred solutions at much greater rates than other firms. Overall, the growing firms cohort were:

- 41% more likely to use online client portals;
- 46% more likely to use online client intake and client relationship management (CRM) solutions;
- 37% more likely to be using online payment solutions.

The success of these firms underscores the importance of understanding how to effectively harness the benefits of these flexible technologies in an ever-tightening and highly competitive market.

## Measuring success

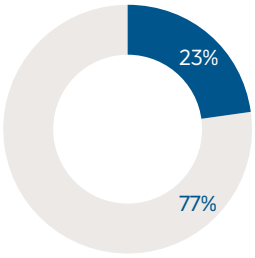
Another of the most striking differences in technology adoption among growing firms observed in the *2021 Legal Trends Report* was their use of firm reporting tools.

As a whole, growing firms are twice as likely to be using reporting tools as shrinking firms – a difference that reached as high as 175% in 2019.

The takeaway from this data is that growing firms are more likely to increase their revenues because they have access to the information and insights that help them assess how their business is performing, which also allows them to focus more attention on planning for additional, ongoing growth over the long term.

### Clients look for more remote options today

In 2018, only **23%** of consumers were open to working a lawyer remotely

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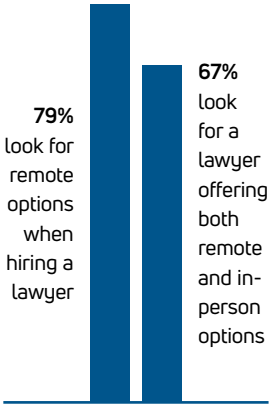


2021

## Client-led change

The increased adoption of technology is not only a change seen on the side of growing firms. It also reflects a massive change in legal client attitudes and expectations.

In 2018, only 23% of consumers were open to working with a lawyer remotely. Now, as uncovered in the *2021 Legal Trends Report*, much of this change is client-led:

- 79% of consumers see the ability to work remotely with a lawyer as a key factor in choosing who to work with;
- 67% said they would look for a lawyer offering both remote and in-person options when searching for an lawyer;
- 58% want the option to have a consultation through video.

These are just some of the findings from Clio's recent *Legal Trends Report*, which has been published annually for six years. Now widely considered the trusted resource for insights into the current and future state of legal, it comprises the aggregated and anonymised data from tens of thousands of legal professionals and surveys from both lawyers and consumers. Clio constructs a holistic picture of the legal industry today, and what the future trends are likely to be.

If you're seeking to grow your law firm, the insights contained in this industry report could prove invaluable.

The *2021 Legal Trends Report* is available to download for free at clio.com/ltr-scotland.

**Clio is a legal practice management and client intake software and is an approved supplier of the Law Society of Scotland. To learn more about how Clio supports growing law firms, and how it can support innovation at your law firm, visit www.clio.com/uk.**

denovo

# Technology won't solve everything...

A word from Steven Hill, Denovo's Operations Director

Back in November 2019 we launched CaseLoad. This was a new vision of how legal software could make a difference to legal operations, which we knew was considered a largely non-fee-earning, undefined role.

This was pre-pandemic, but law firm leaders, legal departments and the wider legal community were already feeling pressure do things more efficiently and effectively. The financial constraints forced legal professionals to rethink how they were doing business.

As we reflect on the past year and a half, we think about how circumstances inspired leaders from all industries to rethink how they work. This includes turning to technology to address problems in ways they never had before. Even in a change-resistant field like legal, the economics become undeniable at some point. Now more than ever, legal departments are ripe for disruption.

## First responders

When the pandemic hit, businesses responded in many different ways. Some made the mistake of getting rid of (furloughing) their legal operations teams, whereas others invested further. Now, as we see signs of recovery, businesses are hiring faster. The drive to succeed is undeniable and legal operations lie at the heart of how successful a law firm can become.

Not only is the legal operations field itself growing, so is its fuelling of legal technology. In the first half of 2021 alone, venture capital and private equity firms invested heavily in legal software companies. Take Smokeball in the US an example: it has just raised $30 million in a private funding round. It's clear we're at the cusp of massive transformation. This moment is loaded with possibility as everything is up for discussion. The question is, "What's next?"

## Step up

Because of the pandemic, there's no more denying the need for digital transformation. As the legal industry looks at this opportunity for renovation, legal operations professionals will lead the change. At its core, that discipline is all about making things better. Now is the time we step up and make things better not only for law firms but businesses as a whole.

But the answer to making things better isn't in technology alone. The reality is, technology won't solve everything. So, for the legal operations professional, there are three areas we must focus on moving forward to maximise technology and make things better for legal.

**1. Adoption**

We'll likely face an uphill battle when it comes to adopting technology in the legal world, because legal is based on tradition and precedent. So, it's not necessarily a lack of belief in technology, but more a desire to stick with the status quo. To increase adoption, legal operations professionals should consider two principles. First, the technology should make things markedly easier and better than the old way. Secondly, if you don't involve everyone, it won't work. The tools you implement need to be as intuitive as possible. We need to focus on adoption, because without it you are missing out on the valuable data these tools can offer.

**2. Process improvement**

Technology is only as good as the processes already in place. Now is the time to start rethinking processes. For example, litigation is a notoriously difficult process with a lot of risk – it's rigid, time-consuming, introduces friction and delays. To truly solve the problem of litigation we must start thinking about dealing with matters differently. Because if all we do is apply technology to an already broken process, we'll just exacerbate the problem.

But if you begin thinking about litigation matters differently, you can truly unlock the power of technology. When you collect data differently and have the system force your next move, things can start to move quickly, and you end up in a position of strength during the negotiation with the other side. Legal operations can take this line of thinking elsewhere and begin to show the real impact of legal technology.

**3. Community**

Something that can be lacking is a sense of community within the legal world. Real transformational change requires people learning from each other, sharing information, and solving problems together. That is how you create new standards and best practices – that is how we're going to fix what is really broken about legal operations in many organisations. True change for legal will come by the power of our community.

In times of pressure and restraint, like we've seen the past year and a half, companies are forced to rethink their priorities and processes. We've learned new ways of doing things. More importantly, we've learned to be okay asking questions and rethinking how we do what we do. For legal operations, and legal as a whole, now is the time to see true transformation in our industry. The opportunities are endless, from contracting to data and more. Legal can become a business partner rather than a cost centre, and I believe legal operations professionals will lead the way.


***If you are a legal operator or someone working in the legal profession and would like to speak to Steven to get free, no obligation advice, please email info@denovobi.com or call us on 0141 331 5290. To learn more about Denovo, visit www.denovobi.com.***

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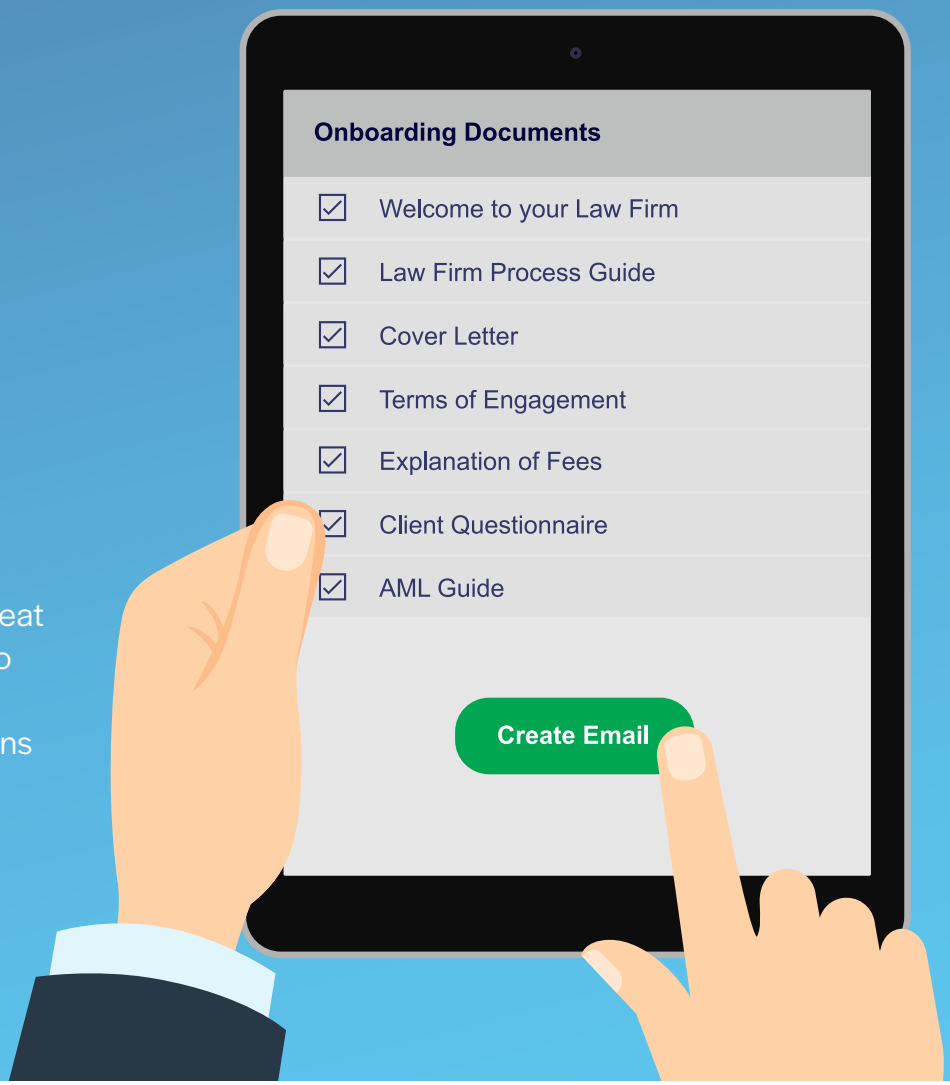


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# Investing wisely: heads together

A panel session at the conference on getting the most from your tech spend produced a range of insights on planning and implementing IT projects

How to get the most from your tech spend? That was the topic for a panel session chaired by Gregor Angus of Amiqus, and featuring Sarah Blair, director of IT at Thorntons; Kevin Todd, head of IT at Jones Whyte; and Craig Allan, senior legal counsel at NatWest's Outsourcing, Technology & IP legal team.

But where is the profession now, after the great leap towards digital enforced by the pandemic? Blair recognised the progress but sounded a note of caution: videoconferencing and e-signatures are not digital transformation, she maintained – just the bottom layer of a pyramid at the summit of which is a different customer offering, with digital capability being used to create recurring revenue: "different services, subscription models, that type of thing".

Allan believed that while working from home had broken the back of innovation, "What was tomorrow's problem is now tomorrow's table stakes." Repeating the familiar mantra that people want more for less, he would look for solutions that allow us to offload work that doesn't drive much value – for example, diligence review tools.

Todd also highlighted clients' different value propositions on what they now expect from a law firm. They are seeing other traditional industries such as banking delivering more digital offerings, and the law needs to look at that as well.

## Getting buy-in

Involving the right people in your project is very important. As a supplier, Angus reported that his best experiences had been where firms set up a project team at the outset to decide what they needed and how it would work, and got buy-in from the people it would impact. Todd, who had seen projects fail due to people issues rather than the IT, highlighted the need to involve individuals at all levels – which would also "foster a better culture of change", helping in the longer term as well.

Blair added the need to set the right expectations, and not oversell. At the same time, people must realise that it isn't about bringing in tech to do things the same way: there must be an expectation of a "change project", or you are setting yourself up to fail. From an assessment of projects that had and hadn't worked well, she had learned that "leadership is the number one factor, certainly in terms of success" – which means "the right voices telling the right stories". And while you need to involve those who are keen on tech, a message from someone known as less enthusiastic, but who has been sold on the idea can be even more powerful. She further urged us to harness the "amazing mindsets" of the young coming into the profession, who may not know about office systems but are constantly using tech.

There was also agreement about the need to have a "healthy relationship with failure", learning from it and not sweeping it under the carpet – something that may not come naturally to lawyers. "Getting something wrong isn't failure if you use it to change tack and come to a solution that works," Angus assured us.

## Focus for the smaller firm

Among the audience questions was, what should smaller firms with limited resources focus on?

"Don't just assume that because you are limited in resources or budget, it puts you at a disadvantage," Blair advised. Smaller operations can be more nimble, having fewer layers of governance, so change can happen faster. You probably don't need the big expensive solutions; "Find out what's relevant to you – what are the things that are going to make an impact on you and your clients." Talk to people and use the online resources that are there: "Just do a little research and you'll find the stuff that will make an impact."

Todd emphasised the need to be clear about the problem you are trying to fix and why you need to make the change, to get proper demonstrations once you have narrowed down your choice, and to address questions of development and maintenance of the software: will your provider take care of this, or do you need to upskill or hire staff yourself?

Allan's tip was to work out your "areas of friction". What would make the most change for the smallest outlay? You might not even need to spend money: he instanced a case where an audit of working practices revealed training needs in order to use existing packages efficiently.

A final message from the panel was the importance of collaboration in developing solutions. Regulators are keen to collaborate because it leads to better and safer working practices, and certainly the Society's Lawtech Group is always keen to hear of new ideas.

To conclude with a point made by Allan near the start, you need an open mindset, and to know that things won't be perfect at the outset: "That's fine as long as you are learning and working towards something a bit better each time." Day 1 success may be something that works and doesn't crash the whole system; day 365 should be totally different and allow you to assess whether you are getting the desired return on investment – while still looking to see whether you can make further refinements.

IN ASSOCIATION WITH

Legl

# Key trends in legal tech adoption for UK law firms

Since the onset of the COVID-19 pandemic, firms have witnessed unique changes to their operating practices. Contributing factors on a macro level include the adjustment to remote work, a sharp uptick in client demand for online legal services, and new compliance regulations that have cropped up in response to this shift to digital operations.

The uncertain pandemic landscape has permanently shifted the way that law firms do business. The phrase "new normal" has been bandied about for months. But there seems to be little consensus on what that means, or on what makes one firm thrive in the current climate while another fails. Law firms seeking to remain competitive are taking the disruption of the pandemic as an opportunity to re-evaluate their priorities.

UK law firms are starting to think critically about where technology can be deployed to **unlock more billable hours**, to **automate back-office functions**, to **improve the quality of the legal services delivered**, and to **bring a modern client experience**.

At Legl, we have discussions with law firms every day around their use of the software tools implemented to enhance or automate their business processes. We have identified three key takeaways from the more than 150 law firms with whom we work on a daily basis:

• **Cloud-based tech is no longer an outlier.** According to the SRA, "over a third of businesses and almost half of people who use legal services say that they want online legal services. Nearly a third of all legal services are now online or by email, at least in part. In conveyancing services, this increases to over half". At Legl we particularly see that the case and practice management systems that we integrate with are still on premise, but all are moving or have some ambition to move to the cloud over the next few years.

• **Law firms are seeing improved ROI with increased digital adoption.** A Thomson Reuters report noted that 74% of senior partners at UK law firms state that their firms "should be investing more in technology". Jennifer Swallow, Director of LawTech UK, highlighted earlier this year that law firms can expect £2-£5 ROI for every £1 invested in legal tech. Leveraging cloud-based legal tech frees up billable hours to use for client demands and for business development. This technology automates many processes that were previously manual, with lost time and a higher rate of mistakes when doing data entry.

• **Regulatory bodies are encouraging digital solutions – from e-signature and document witnessing, to digital identity verification.** From the Land Registry to DCMS, to the legal regulators from LSAG to the SRA, guidance continues to come out that encourages firms to use technology as a basis for making their risk-based decisions (CDD) and for doing business. For example, HM Land Registry's new Safe Harbour Standards explicitly support digital ID verification and set out guidelines for conveyancers to ensure firms will not be deemed negligent in their CDD efforts.

While there remains little consensus about the long-term effects of the pandemic, here at Legl we've seen that some of these foundational shifts have created a knock-on effect for much faster SaaS technology adoption. With our cloud-based platform we have helped law firms to digitise their client lifecycle management initiatives to improve efficiency and to create more compliant operations.

***You can find out more about Legl's digital CDD, onboarding and payment workflow solutions at www.legl.com***

# Open Legal – are you in?

LawtechUK seeks value for the legal sector from collaborative data sharing

A concept of Open Legal, similar to Open Banking? The idea may seem unlikely at first blush, but is a serious project and was promoted at the conference with an invitation to interested parties to join in.

It is one of the ambitions of LawtechUK, the Government-backed initiative to support the IT-based transformation of the UK legal sector. Director Jennifer Swallow, in the first keynote of the day, described data sharing as a "step change to data structuring, access, portability and use, towards shared sector goals".

Lawtech sees access to legal data as "one of the great opportunities for the legal community today", and is partnering with the Open Data Institute to establish a set of recommendations and a pledge of commitments for the legal sector to act on, via a steering group to take the lead, and working groups to identify the practical challenges and opportunities.

Its *Report 2021* explains: "Data helps organisations, clients and customers to make better decisions, improve efficiency and productivity, identify new revenue lines, reduce risk, and improve customer acquisition and market advantage... Realising this value will require changes to data collection and accessibility."

Her colleague Alexandra Lennox later explained the project as intended to "improve the use of and access to legal data and build a strong, fair and sustainable legal marketplace", benefitting both business and society.

*"Collective effort from organisations, government and regulators is needed to establish common approaches"*

What it does not mean, a question and answer session heard, is exposing client data to outside view. Rather, it has uses including as a facilitator in negotiations, for example if you can say "in 85% of cases, issue X raises Y". It is data driven rather than relying on the formula "in my experience".

Lawtech knows it has to overcome significant reservations surrounding the idea among legal firms, who in addition to concerns about confidentiality, may not see the value, or lack the expertise, or don't want to "be the first", or worry about the regulatory side.

But its report carries the key message: "Collective effort from organisations, government and regulators is needed to establish common approaches, governance and standards to enable responsible, secure and equitable access to data and unlock its benefits."

MITIGO CYBERSECURITY

# Why cyber risk management is not the same as IT support

Cybercrime is sophisticated. Methods of attack constantly evolve. Security should be at the top of your risk register. Firms must adopt cyber risk management systems and not assume that their IT function has it covered.

**Ask yourself these questions.**

## 1. Who is currently undertaking and documenting your cybersecurity vulnerability risk assessment?

This is a legal requirement and is the essential first step towards security. It should be undertaken periodically by someone with cyber risk management experience who knows the current methods of entry and forms of attack, such as email account takeover and ransomware. It provides an assessment of your vulnerabilities. It must include scanning and probing for vulnerabilities in your technology and its current configuration. It must also include assessing the risks associated with people and the way they use the technology; your systems of work; your interaction with clients and suppliers; the platforms you rely upon; and much more.

## 2. Who is configuring your security?

Your vulnerability assessment provides visibility of risk. A cybersecurity professional can now configure your technology appropriately. This is a specialist job – configuration must provide protection without interfering with functionality. Firewalls, antivirus, email setup, logins to cloud platforms, personal devices, remote connections, backups, access rights, user privileges, logs, and detection alerts, are on a long list of areas requiring attention. Equally important are the other organisational controls and governance necessary to protect against the risks identified.

## 3. What about legal and professional requirements?

Does your security adviser know how to comply with your legal obligations to secure personal data, and the obligation to review all measures on an ongoing basis? Do they know your regulatory obligations (protecting client funds, confidentiality, running the practice in accordance with proper governance and risk management principles etc)? Are they satisfying your record keeping obligations?

## 4. What about staff cybersecurity awareness training?

You must make staff aware of the dangers which exist, the tricks used to gain access to credentials and systems. Over 60% of breaches are caused by staff error. So regular training is essential, as well as a legal obligation. And test that the training is working, by simulating attacks.

## 5. Have you got the right policies and procedures in place?

Defining and communicating policies and procedures helps prevent security incidents. It is also another legal obligation. Have staff sign for a cybersecurity staff handbook as part of training, then everyone knows the rules and what is expected of them.

## 6. Are you buying security software which you do not need and which is not solving your security problems?

Buying additional software will rarely solve security problems. It just creates a false sense of security.

Worse still, we find many firms have been persuaded to purchase a patchwork of expensive security software and ad hoc deployments with overlapping functionality. In most cases, their existing technology had perfectly good protection built in, if only it were correctly configured.

## 7. Who is helping you reply to questionnaires and assessing your own supply chain?

Firms are increasingly asked to satisfy clients and insurers about security arrangements. Your security professional should be able to take care of this. They should also be advising you on the type of questions you should be asking of those with whom you share your clients' data (such as counsel).

## 8. Who is providing ongoing assurance that security controls remain appropriate and effective?

A basic principle of risk management is that assurance be independent. It is neither sensible nor fair to expect your IT people to be cybersecurity experts or to mark their own homework. Nor will their professional indemnity insurers when a breach occurs.

Assurance is not a one-off check. Over time, your technology will change, as will the threats, forms of attack and methods of extortion. Testing and auditing your security configuration and controls must be undertaken on a regular basis to ensure your defences still protect you. Again, checking the effectiveness of your security measures on an ongoing basis and recording this in writing is now a legal obligation.

**If you still think your IT support are the right people to be looking after your cyber risk management, you are now lagging behind the field and are likely to suffer a breach.**

**Managing cyber risk is an important board level responsibility. It is time to stop hoping you are secure and start proving you are secure.**

***This article was produced by Mitigo. Take a look at their full service offer: www.lawscot.org.uk/members/member-benefits/professional-legal-services/mitigo-cyber-data-security/***

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# The language of family law

Terminology matters in the emotionally charged world of child and family disputes. Ashley McCann introduces the Family Law Language Project, which aims to educate the public through promoting constructive rather than adversarial terms

"All I need is a sheet of paper and something to write with, and then I can turn the world upside down." Nietzsche's words sound notes of caution and optimism, aware that our words can make a difference for better and worse. This is especially true for the family lawyers among us, who can turn the world upside down just by sending a letter that starts "We have been instructed by [x] in relation to your separation".

When children are involved the stakes are higher still. As family lawyers we strive to use accessible, non-confrontational language that can forge the way for cooperative, child-focused discussions about the future. Still too often, though, that approach does not mirror parents' expectations or understanding of family justice.

Instructions to "take the kid gloves off", and talk of "custody battles" and "denying access", are not uncommon, despite the latter terms being out of commission in Scotland since 1995. Our replacement terms of "residence" and "contact" are better, but still sub-optimal in the view of many. One criticism is the hierarchy they create in the minds of parents and children, whereby the resident parent's relationship with the child is perceived as being closer and more important than that of the parent with contact. Another is that they suggest parents do not have parity of rights and responsibilities, with the resident parent having unilateral decision-making powers.

In reality, the difference between residence and contact is largely a matter of semantics, but semantics matter in family law. In recognition of that, residence and contact orders were replaced with "child arrangements" orders in England & Wales in 2014, the idea being that this language is child-focused and promotes a sense of equality between parents, improving the dynamics of their co-parenting relationship as a result.
A similar reform was debated by the Scottish Parliament Justice Committee as the Children (Scotland) Act 2020 made its way through the Parliament, but only as a probing amendment, thus the terms remain unchanged.

## The importance of words

In its 2020 Report, *What About Me?*, Family Solutions Group (a subgroup of the Private Law Working Group in England & Wales) recognised the power that language has in family law situations and identified specific problems, some of which are just as prevalent in our jurisdiction. This included a general misunderstanding of terms by the public, for example thinking that "co-parenting" means an equal split in the time a child spends with each parent. Another is the adversarial layout and language used in court documents (e.g. John Smith v Jane Smith) that can further pitch parents and families against one another.

The Scottish Government's Family Justice Modernisation Strategy, published in September 2019, sets out its intention to prepare a policy paper for the Family Law Commission on simplifying and clarifying the language used in family courts, including in interlocutors, to help litigants and children. The detail of what, if any, further changes are coming in Scotland remains to be seen. What we do know is that learning about and educating our clients on the importance of the words we use can help in the meantime.

## About the Family Law Language Project

The Family Law Language Project launched this month with the aim of helping to improve the understanding and use of language in any scenario where family legal matters are discussed, written about or experienced throughout the UK. The project has produced a website which will provide helpful content around common family law terms, and will further promote its aims by using social media platforms to help identify and inform people about the language used in family law. This could be, for example, by identifying the misuse of a family law term or the use of unhelpful or aggressive language in any form of media, including online sources, in the press or on television.

The project recognises that everyone has something to learn about the language of family law and everyone has something to contribute. In addition to the website and social media campaigns, the project is encouraging people to share their views and experiences directly.

Any discussion around family law should acknowledge that we live in a multicultural and international society, and while the project is currently focused only on the English language, it is hoped that in time, it will be delivered in other languages in order to reach, and make a difference to, a wider audience.

Details of the project's website and social media accounts are set out below and we encourage you to follow the project, get involved and share your views.

**Ashley McCann**, associate, Gillespie Macandrew LLP

**Website:** www.thefamilylawlanguageproject.co.uk
**Instagram:** thefamilylawlanguageproject
**Twitter:** @TheFLLProject
**YouTube Channel:** The Family Law Language Project
**LinkedIn Page:** The Family Law Language Project

***If you would like more information, or would like to contribute to the project, please contact us at info@thefamilylawlanguageproject.co.uk***

# ADR in family law: a portfolio approach

Anne Hall Dick urges family lawyers to consider the various forms of ADR training to enhance their client offering, available through a portfolio of modules

Important innovations are afoot in family law. The Children (Scotland) Act 2020, s 23 requires Scottish ministers to make funding available to meet the cost of ADR for private law disputes about arrangements for children. Section 24 provides for a pilot scheme to ensure that, with some exceptions, any parent seeking a court decision about their children will first have to attend a meeting to be given information about all the processes in which such a decision may be made. The pilot will be launched during 2022.

The objective is to ensure parents make informed choices as to whether arbitration, collaborative practice, mediation or family conferencing could be a better option than litigation.

This might feel like a duplication. Law Society of Scotland guidance about rule B1.9 on communication underlines that a solicitor providing advice on dispute resolution procedures should "be able to discuss and explain available options, including the advantages and disadvantages of each, to a client in such a way as to enable the client to make an informed decision as to the course of action and procedure he or she should pursue to best meet their needs and objectives, and to instruct the solicitor accordingly".

However, research by Glasgow University into the use of separation agreements disclosed as respects ADR that "Interviews with parties revealed that it is often purely by chance that they find themselves (or their estranged spouse) being advised by someone who engages in these alternative methods".

## Portfolio modules

A powerful way to ensure your clients get full, informed and well calibrated advice about ADR is for you to train for the various processes that solicitors can conduct – mediation, collaborative practice, and arbitration.

**Anne Hall Dick**, Inkdance Family Mediation; Portfolio trainer

e: anne@inkdancemediation.co.uk

Those undertaking training in these areas provide extremely positive feedback. The most common comment from the training for mediation and collaborative practice is "all family lawyers should do this".

This training is provided (appropriately enough) by a collaboration between Consensus, the organisation for collaboratively trained professionals (www.consensus-scotland.com), and CALM, the association for solicitors accredited as family mediators by the Society (www.calmscotland.co.uk). It takes the form of a portfolio made up of day and half day ADR training modules plus two days of training in collaborative practice or three days for mediation.

There are modules in Theory and Practice of Negotiation and Adult Dynamics which have to be taken by any solicitor intending to train in either collaborative practice or mediation, ahead of the two or three days' training as appropriate. For mediation training, solicitors first have to do further day and half day modules, in Advanced Negotiation, Child Development, and Children's Reaction to Separation.

The training is delivered in this way to allow the fresh information and perspectives to be digested and integrated in advance of the specific mediation training. The mediation training can be completed within a year. The day and half day modules can be spaced out over up to three years.

## From the trainers

A Portfolio trainer, psychotherapist and collaborative consultant Myra Eadie, comments: "My work involves collaborating with lawyers, financial advisers and clients to enable separating couples to understand and manage the process and emotions involved in creating a family in two homes. In the Adult Dynamics module and core collaborative training my colleague Brenda Capaldi and I provide insight into the underlying emotions, automatic interactions and games played and displayed during a crisis or change. We demonstrate how this insight can benefit clients and professionals alike."

Kevin McKenzie, financial planner with Acumen Financial Planning, adds: "Financial affairs can often become complicated, especially when different types of pensions are involved. I am now a trainer for Consensus Scotland and keen to help expand the multi-discipline skillset here in Scotland as far as possible when couples restructure their finances, to ensure the most secure future possible for them and their children."

Ewan Malcolm, a mediator with CALM when a partner in Drummond Miller, and now CEO of Relate London North West & Hertfordshire and CALM's director of training, was one of the creators of the Portfolio training. He reflects: "By building on the valuable experience of conflict that family lawyers bring, we put into practice the underpinning theories of negotiation and mutual benefit fundamental to mediative approaches. The Portfolio training is also filled with relevant research and rigorous communication skills that enhance any practitioner's toolkit."

FLAGS, the organisation for family law arbitration by advocates or solicitors (www.flagsarb.com), provides excellent training, information and support for those interested in arbitration.

It has been increasingly recognised since the 1980s that the transition through separation represents a major reconfiguration of family relationships, legal, financial and psychological. It is a complex, three dimensional journey.

For some families, fostering problem solving will be the best route to a healthy post-separation life; for others, the protection of the court process will be a necessary element. Choosing the right process is one of the most important decisions to be made.

***Details of the Portfolio training programme from Nicos Scholarios at MSMLaw (ns@msmlaw.co.uk), or Karyn Lennon at Blackadders (karyn.lennon@blackadders.co.uk)***

# Breach of warranty claims: a hot topic

Forensic accountant David Bell, who has seen an increase in breach of warranty claims, considers what typically gives rise to a claim, and some grounds on which claims may be open to challenge

As forensic accountants we are involved in a wide range of commercial and civil disputes and there is often no particular pattern to the frequency of certain types of cases we are instructed in. The natural ebb and flow of instructions might mean you work on more loss of profits cases over a period, followed by an increase in business valuations, which might then be brushed aside by a flurry of unfair prejudice claims by minority shareholders. It keeps things interesting.

However, what has come into focus over the past 18 months or so is the number of breach of warranty disputes we're seeing. There has been a noticeable increase in post-transaction breach of warranty instructions.

## The current landscape

Breach of warranty claims and other post-transaction disputes are certainly not new: they've always been around. And the involvement of a forensic accountant is often needed, whether as a formal expert witness in litigation, giving an initial opinion in an advisory role, or in an expert determination capacity. But it appears the current landscape is lending itself to an increase in such post-transaction disputes.

A buoyant deals market means there are more deals in that post-transaction period when completion accounts are yet to be agreed, earn-out calculations are in play, deferred considerations are up for grabs, and the clock is ticking on the period in which a breach of warranty claim can be intimated. And we're certainly not in a normal trading period either, if there is such a thing. We have the uncertainty and unpredictability in trading performance caused by the impact of the pandemic, the impact of Brexit, and current supply chain issues to name but a few. With an increased number of deals being done, tension in the market, and an increased likelihood that an acquired company falls short of its trading and profit forecasts, it follows that there is an increased likelihood of deals ending up in dispute.

The recent downturn in many sectors caused by COVID-19 will have resulted in many pre-pandemic assumptions within sellers' forecasts being incorrect. Buyers who find themselves with an acquired company that is loss making or performing below expectations may seek to recover value from the deal, and one option available to them might be to claim against the warranties given by the sellers. Whether a breach of warranty claim is successful will depend on what has in fact happened, the actual warranties given, and the drafting of the share purchase agreement (SPA) – the devil is in the detail.

**David Bell** is a chartered accountant and managing director in the forensic accounting team at Quantuma Advisory. He regularly acts as expert witness in commercial disputes and as an adviser in financial quantification, valuation and accounting disputes

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## Calculation of damages

By way of a brief recap, the remedy in a breach of warranty dispute generally is an award of damages that compensates the claimant (the buyer) by putting it in the position it would have been had the warranties been true. This is generally calculated as the difference between the value of the business at the date of completion as warranted by the seller, and the actual value including the breach: value as warranted against value as is.

Importantly, the nature of any alleged breach, and the value of the alleged breach, need to be properly understood as they can impact the claim in different ways. If the breach relates to a one-off cost, it may impact the claim on a pound for pound basis; however if it relates to an overstatement of the underlying trade and profits, the value of the claim may be based on a multiple of EBITDA (earnings before interest, taxes, depreciation and amortisation), if that was the mechanism upon which the purchase price was calculated.

If it is the latter, it is important to fully understand exactly how the purchase price was arrived at and calculated. Was the pricing structure based on a negotiated and agreed multiple of EBITDA, or was it based on a high-level global offer, negotiation and acceptance? Is there a predetermined multiple that should be applied to the loss? You then have the question of whether the agreed price reflected the true market value of the business as warranted, or did it represent a bad bargain for one of the parties?

## Typical areas of claim

There's no doubt that no two cases are the same, but what we are currently seeing are common themes in the types of claims being made in breach of warranty disputes. Typical or

common areas of claim can be in relation to the following:
- stock valuations being overstated;
- debtors being overstated and not recoverable;
- work in progress being overstated;
- creditors not being complete;
- provisions being understated;
- relationships with key customers or suppliers;
- contracts not being up to date;
- breach of laws or regulations;
- the accounts not representing a "true and fair view" of the business.

The above list would most likely contain much the same things before the pandemic as it does now. But customers, suppliers and other counterparties being impacted by the pandemic results in pressure being put on the business, with the result that there is a far greater chance that one, some, or all of the above areas come under increased scrutiny by the buyers when trade tightens after a deal has completed.

## The merits of each item being claimed

Giving an opinion on each specific item being claimed and whether it is valid depends on the exact details of each individual amount. One of the fundamental things to keep in mind is the date of completion and whether the issue in question was then known by the sellers, or whether the benefit of hindsight has been used when constructing the claim.

Below are some examples of where claims might be open to challenge:

- **What was known about at the date of completion?** A claim based on a debtor balance that was understood to be good at completion date but subsequently became unrecoverable due to the debtor going into liquidation some months later is likely to be open to challenge based on the use of hindsight.
- **Items specifically covered in the disclosure letter pre-completion:** Where something like slow-moving stock has been identified by the sellers in the disclosure letter and has been assigned a value, claims by the buyer over such stock are going to be challenged.
- **Lack of supporting evidence:** As basic as it sounds, if there are claims for costs that the buyers say they have had to incur, their robustness is strengthened by third party evidence of the value of the costs, and that they have had to be paid.
- **Double counting between claims:** claiming both that a provision (liability) for unrecovered work in progress is understated by a certain value, and that the work in progress balance (asset) is overstated by the same value, results in an alleged breach being double counted: you shouldn't be claiming for both.
- **Accounting policies under "true and fair" accounts:** Claiming that the accounts upon which the completion price was based are not "true and fair". This has been seen when the buyer changes the accounting policy of the acquired business post-completion to align with its own accounting policy and there is an impact on reported profits. Before pursuing such a claim you should check what accounting policies were disclosed as part of the due diligence process, were included in the disclosure letter pre-completion, or were contained within the SPA. There's also the question of generally accepted accounting policies, materiality, and the auditor's view on whether the accounts were true and fair.

The merits of each element of a claim need to be considered carefully, including the calculation and quantum; the veracity of the underlying financial records, data and evidence; the accounting aspects; and not forgetting its context in accordance with the SPA and the warranties.

## Looking forwards

With the inclusion of specific COVID-19 warranties now appearing in SPAs, might there be further grounds for claims on the horizon? Taking furlough claims as an example, how sure can sellers be that their furlough claims were accurate and not open to challenge from HMRC? Time will tell.

The pandemic and recent events have created a very unpredictable market, yet there is still a buoyant and active deals market. It is unlikely that we are going to see a drop in the number of deals that end in dispute, not in the near future anyway.

# When the name doesn't fit

Charities rely heavily on bequests. But what happens when the testator gets the name wrong, or the charity's identity has changed? Alan Eccles considers the position in light of a recent Court of Session decision not to give directions

In *Brownrigg's Executor (Vindex Trustees Ltd), Petitioner* [2021] CSIH 46, the Inner House considered the treatment of a legacy to a charity under a will where it transpired that the name of the charity was incorrect in the will. While considering the circumstances faced by the executor in this case, it also provides an opportunity to reflect on the wider issues of "lost" legacies that can arise following the restructuring, merging and incorporation of charities.

## The background

In this case, the deceased, who had survived her husband and had no descendants, left an estate worth about £1.3 million. The will provided for a legacy to a friend, with the residue to be divided among a political party and three charities.

One of the charities specified was the "Nelson Mandela Educational Fund, South Africa". Following the death, the executor had been unable to identify a charity by the name of the Nelson Mandela Educational Fund. After investigation, the executor ascertained there was a "Nelson Mandela Children's Fund" in South Africa. It was further noted that, at the time of the making of the will, it was the longest established South African charity bearing Nelson Mandela's name.

## Petition for directions

The executor petitioned the court for directions as to whether a share of the residue could be paid over to the Nelson Mandela Children's Fund.

The court considered the rules on interpretation of wills where a beneficiary has been wrongly designed. This was a case where that appeared to have happened. There was no evidence that there had ever been a "Nelson Mandela Educational Fund". That would have taken matters in a different direction, where a legacy potentially could be "lost", to which we will return later.

On the matter of interpretation, the court rehearsed that an incorrect designation is not fatal to a legacy, the situation being one of the longstanding situations in which extrinsic evidence can be considered to unlock the true identity of the beneficiary. As a situation which has allowed the use of evidence beyond the four corners of the will itself, this case did not need to explore the rules on will interpretation that have been evolving since *Marley v Rawlings* [2014] UKSC 2 (see, e.g. *Gray's Executors v Manson's Executor* [2017] CSOH 25, and most recently *Downey's Executrix* [2021] SC EDIN 60).

While the intended charity had apparently been wrongly designed, it was perhaps a case where the executors could "'see through' the erroneous description and perceive the true identity of the intended legatee" (para 8). If the executor was able to identify (with reasonable certainty) the correct charity notwithstanding the misdescription, it could then proceed on the basis of using its discretion in the management of the estate.

## Executor judgment and robust advice

The court determined that, as the executor could with reasonable certainty identify the correct charity, the case involved "matters concerning the administration of the executry estate [that] fall to be resolved by the exercise of the executor's managerial discretion and good judgment. The court does not consider that it should adjudicate or give advice on the matter" (para 13). Accordingly, it was up to the executor to make a judgment about making over the share of the residue to the Nelson Mandela Children's Fund.

While the court decided it should not, in the circumstances, give directions, it concluded that it was reasonable for the executor to have made the petition to the court. The court also noted that the executor's intended course of action (on paying to the Nelson Mandela Children's Fund based on it being the true charity) was fortified by having sought the opinion of counsel. It highlights that in more complex matters surrounding legacies and will interpretation, an executor should seek appropriate advice to base their proposed actions, the duty to obtain and consider advice being a key one for executors. In executor duties, the workings under a course of action are in many ways as important as the chosen course of action.

## Difficult decisions

The outcome of this case might place some executors in a difficult and somewhat lonely position. Those executors will need to consider whether there is reasonable certainty underpinning their next move. However, in refusing the petition, the court in many ways empowers executors and underlines the importance of their role as decision-

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makers. Executors can, and have to, exercise judgment. An executor is not simply following the instructions of beneficiaries or relying on the court for guidance. The decision provides an affirmation of the decision-making powers of an executor.

There will nevertheless be difficult cases where executors, cognisant of their duties – and (potential personal) liability – will seek reinforcement from the court for their proposed course of action in an estate. That could especially be the case where rather than having any challenge from prospective alternative beneficiaries, those other parties are standing by and watching. They are not providing an active competitor, nor actively supporting the executor's proposed next step. Estates with the potential for difficult judgment calls can also merit the consideration of obtaining trustee indemnity insurance.

In *Brownrigg's Executor*, the court considered it was appropriate to have petitioned the court and the expenses of the procedure were charged to the estate. That will give comfort to executors that in those more difficult cases they should not rule out seeking directions. Seeking directions will, itself, be part of an executor acting carefully and prudently. But this decision shows that in some cases the court does not consider directions are required; and in some cases the court could find the executor personally liable for costs of the petition. It is not always easy being an executor.

## "Lost" legacies: a general issue

In this case it appeared to be possible to identify the correct beneficiary. The executor could work to "see through" the problem and, without court sanction, find the solution. While distinct from the factual position presented, the case provides an opportunity to reflect on situations where the proposed recipient charity no longer exists.

The will in this case provided a mechanism by which, had a charity named in the will (correctly or otherwise but still identifiable) ceased to exist, the executor had sufficient power and discretion to redirect the entitlement to another, similar, charity. The particular clause in the will (following a fairly common approach to these types of clauses) also covered a charity being "wrongly designed". We should note that in *Brownrigg's Executor*, the opinion of counsel obtained by the executor concluded that such a clause was only triggered and should be used where the executor could not identify the true beneficiary – where it could not "see through" the wrong designation. This is a point for will drafters and executors to consider. What do such clauses cover and when do their powers become usable by an executor?

A charity could cease to exist through dissolution, merger or even the incorporation process for a trust or unincorporated association to become a Scottish charitable incorporated organisation. As we have seen, the power in question was not triggered in this case. It could have been triggered had the Nelson Mandela Children's Fund been dissolved in the period between the will being made and the death.

But what happens where a will does *not* contain that form of wording and a charity no longer exists? In that situation, the legacy might fail unless there was a general charitable intention evinced (or might be apparent: see, e.g. *Pomphrey's Trustees* 1967 SLT 61; *Tod's Trustees* 1953 SLT (Notes) 72). It might then fall to other beneficiaries under the will or fall to be distributed according to the laws of

*"There will nevertheless be difficult cases where executors, cognisant of their duties – and (potential personal) liability – will seek reinforcement from the court for their proposed course of action in an estate"*


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intestacy. In extreme situations, it could pass to the Crown.

If any of these happen, the legacy will not pass as the deceased intended. Indeed, the generous bequest might fall into entirely the wrong hands as far as the deceased is concerned – especially under the laws of intestacy.

## Time for reform

When these cases arise, Scots law falls back on trying to identify a general charitable intention supported by a favouring charity where appropriate. Scotland does not have anything akin to the register of mergers – a statutory method of linking dissolved charities to a successor for the purposes of otherwise failed legacies – which exists under English law. The register of mergers rules transport the entitlement to the legacy from the defunct charity to the successor, something that would not automatically happen in Scotland. In Scotland, a saving provision in this type of situation is the wording found in the will. And the will in question might not have the necessary wording. It might then require a court petition to confirm what should happen to the legacy.

There is an ongoing review of Scottish charity law. This might provide a neat opportunity to consider a solution like a register of mergers to avoid the uncertainties and risks that the law creates around charitable legacies. These are uncertainties and risks which are coming into greater focus as charities consider more modern and robust governance structures. This is particularly apparent for unincorporated associations and trusts that are actively considering becoming a Scottish charitable incorporated organisation, a process that sees the closure of the existing charity, creation of a new charity and a transfer of assets and liabilities. On assets, legacies in wills of living people fall into the category of *spes successionis,* with limitations on their transfer as a right or entitlement which has yet to materialise.

*"There is an ongoing review of Scottish charity law. This might provide a neat opportunity to consider a solution like a register of mergers "*

A statutory answer to this will give greater certainty over legacies and reduce barriers to unincorporated charities adopting improved governance and legal structures.

***Alan Eccles, partner, Bannatyne Kirkwood France & Co***

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The organisation receives no state funding or large grant programmes and is dependent on donations and legacies from individuals who support the aims of the charity. If you believe in equality, human rights, and the right of individuals to control their own lives, consider supporting Humanist Society Scotland's work through a legacy donation.

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## It's Good 2 Give

Email lynne@itsgood2give.co.uk
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Find us at www.itsgood2give.co.uk or contact Co-Founder Lynne McNicoll lynne@itsgood2give.co.uk

## Positive Action in Housing

Tel 0141 353 2220
Email home@positiveactionh.org
Web www.positiveactionh.org

# Help rebuild lives

Positive Action in Housing is an independent, anti-racist homelessness and human rights charity (SC027577) dedicated to supporting women, children and men from refugee and migrant backgrounds to rebuild their lives. We believe in a society where everyone has the right to live safe and dignified lives, free from poverty, homelessness or inequality.

By empowering people with information, advice and targeted practical support we enable individuals to achieve independence. Through proactive casework, we challenge unfair decisions and processes that make people's lives harder.

## Prostate Scotland

Prostate Scotland,
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Registered Scottish Charity No: SC037494

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Email info@roomforrefugees.com
Web www.RoomForRefugees.com

# Temporary shelter for refugees forced to flee their country

Room For Refugees is a community hosting network that offers safe, temporary homes and pastoral support for insecurely-housed refugees, asylum seekers and vulnerable groups - families, the sick, the elderly and unaccompanied asylum seeking children with no recourse to public funds. Our biggest demands for hosting are in Glasgow, Edinburgh, London and surrounding areas.

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## LifeCare Edinburgh

LifeCare Centre
2 Cheyne Street
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*"My volunteer is a blessing"*
**- Fiona, VIP.**

*"He has become my best friend".*
**-Rob, volunteer**

# Case management review?

Review of case management decisions, interest on unpaid legal aid accounts, and cautionary tales of cases that went wrong are among the decisions that feature in this month's civil court roundup

## Civil Court

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

There have been relatively slim pickings for procedure enthusiasts in the last few months. The sheriff courts have been very quiet in that sense, particularly the All Scotland Personal Injury Court which published no decisions between June and September. I have no idea why that should be so. Many recent decisions from the Court of Session relate to petitions for judicial review, and while of varied subject matter, few raise court procedural points.

### Case management

We are gradually adopting judicial case management in most civil cases, but what is the position if a judge makes a case management decision that you do not like? *Dickson v Dumfries & Galloway NHS Health Board* [2021] SAC (Civ) 26 (27 July 2021) was a personal injury claim. It appears to have commenced life as an ordinary PI action under chapter 36 of the OCR but came to a case management hearing under chapter 36A by "some hybrid procedure following the OCR... largely as a result of the pandemic". I suspect sheriff court practitioners will have become familiar with "hybrid procedures" adopted in various courts during COVID.

The appeal was against the sheriff's decision to allow proof before answer where the defenders sought a debate on the ground that the action was *ex facie* time barred. The important question of principle is whether such a decision is susceptible to appeal. Do sheriffs have an unfettered discretion to decide how to case manage any case, or on what grounds could a decision be successfully challenged?

This case is likely to be treated as setting a standard. It is worth reading fully but, putting it shortly, the court looked at the rules about case management in PI cases and observed that although there was no equivalent to the rule about debates in options hearings, the rules imply that a debate will only be fixed if it is clear that there is a real purpose to be achieved: "We consider that a debate should not be fixed if the issue raised does not go to the heart or root of the case. The issue should be material or substantial... A debate should be fixed only if that step has an ability to limit the scope or extent of any proof or indeed challenge the whole basis of a party's case."

The case management decision by the sheriff was not a question of law, but an exercise of discretion. The appeal was not a rehearing but a consideration of whether the court could be satisfied that the grounds for interference were met, and "the appeal court cannot interfere unless the sheriff has gone wholly or plainly or demonstrably wrong". In this case, the SAC thought that he had, allowed the appeal and remitted the case for a debate to be fixed. The outcome of other cases may be much more difficult to predict.

### Reduction of decree

In *McLeod v Bank of Scotland* [2021] CSOH 76 (23 July 2021) the pursuer, a party litigant, sought reduction of a sheriff court decree in absence against him for recovery of possession of his house over which he had granted a standard security. He said that he had not received a calling up notice, but gave no explanation for not defending the proceedings. He made various arguments about the background circumstances including allegations of fraud on the part of the defenders. His action was unsuccessful, the court having regard to the approach of Lord Woolman in *Jandoo v Jandoo* [2018] CSOH 14. A court decree is not to be lightly set aside. There is no precise test, but the pursuer must show that (1) the decree ought not to have been granted on the merits; (2) there is a reasonable explanation why they did not enter the proceedings; and (3) the whole circumstances of the individual case justify reduction.

### Presumptions

In *McLeod*, the court referred to the "presumption of regularity" which established the procedural propriety of the decree despite allegations that there had been some defect in the original proceedings. I cannot recall coming across this presumption as such, but it is worth having a look at the authorities on presumptions generally, which can be found in Walker and Walker on *Evidence* (5th ed), chapter 3. Another presumption worth having in one's armoury is that proof of posting an item raises a presumption of its receipt by the addressee, albeit the presumption is rebuttable. This was discussed in detail last year in *Peter J Stirling Ltd v Brinkman Horticultural Service UK* [2020] CSOH 79.

### Pleadings

An old-fashioned battle about parties' averments cropped up in *GI Properties Ltd v Royal Bank of Scotland* [2021] CSOH 78 (3 August 2021). The pursuers had a loan facility from the bank and there was a dispute about the terms surrounding their commercial relationship. Oral promises and representations were said to have been made, thus creating a complex factual and legal matrix. Both parties took the case to debate. The court had to pick its way through the pursuers' lengthy pleadings which, amongst other things, incorporated a section of a witness statement giving the witness's view about what he thought the commercial arrangement was. Lord Summers observed: "It is rarely appropriate to insert quotations from witness statements in pleadings... The pleadings should give notice of the facts the pursuer proposes to prove and the propositions which it is said can be derived from these facts".

> *"The case management decision by the sheriff was not a question of law, but an exercise of discretion"*

Regarding the defences, the pursuers argued that the use of "Not known and not admitted" in relation to matters which should have been within the defenders' knowledge, and the use of bare denials of other matters, could be treated as implied admissions. The court rejected both arguments, referring to the authorities on these points. Ultimately, the court found the pursuer's averments to be confusing and irrelevant and dismissed the action.

### Legal aid

The decision of the Sheriff Appeal Court in *Scottish Legal Aid Board v Ormistons Law Practice Ltd* [2021] SAC (Civ) 22 (11 June 2021) looks likely to have reverberations in the future and will have been of real interest – but little comfort – to hard pressed legal aid practitioners. At first instance the sheriff granted declarator that SLAB was bound to pay statutory interest on the shortfall between what it originally paid the solicitors and the subsequent taxed account. The issue was said to affect many thousands of legal aid accounts.

In a lengthy and detailed judgment, analysing the full statutory background of legal aid, the legislation regarding late payments and the relative European directive, the Sheriff Appeal Court reached the view that "the relationship between the parties is not in the nature of a commercial transaction as defined and envisaged by the directive", and SLAB was not required to pay interest.

It was noted that the Court of Session had reached a different view in relation to counsel's outstanding fees in a case where the liability to pay interest had been conceded by SLAB.

# Briefings

In a postscript the SAC said: "Considerations of consistency and, indeed, fairness would lead to the expectation that the solicitor branch of the legal profession should also have the benefit of the directive in respect of remuneration for fees and outlays from the fund overdue for payment. In our view, that is a matter that requires to be addressed by Parliament." Don't hold your breath?

## Summary decree

In *Graeme W Cheyne (Builders) v Wilson* [2021] SAC (Civ) 24 (3 August 2021), the Sheriff Appeal Court refused an appeal against the grant of summary decree in a commercial action. The pursuer built a house for the defender and raised the action to enforce an adjudicator's award. The defender counterclaimed for declarator that the award was invalid. The Appeal Court stated: "The various defences asserted by the appellant in his defence to the principal action and in the submissions before us represent... the very type of contrived or technical defences which the Court of Appeal... has cautioned the courts to examine with a degree of scepticism. The sheriff was correct to so examine the defences and to conclude that they had no real prospects of success."

The test for such an appeal to be successful is worth highlighting: "We are not persuaded that in granting the respondent's motion for summary decree the sheriff either erred in law or was plainly wrong."

## Things go wrong

Two unfortunate cases are a painful reminder that things do go wrong. In *Kosno v Robertson* [2021] CSOH 79 (4 August 2021), a personal injury case in the Court of Session, the pursuer enrolled a motion for interim damages in terms of rule 43.11. The defender intended to oppose it and efforts were being made to identify a suitable date for a hearing. The gory detail is not explained, but no opposition was lodged, and the motion was enrolled as unopposed and was granted on 21 June. The defenders tried to rectify matters by contacting the court with the appropriate form of opposition and asking for the interlocutor of 21 June to be treated as *pro non scripto*.

The move was not insisted on before Lord Weir, who confirmed that he did not regard it as competent: "In [*MBR (Iran) v Secretary of State for the Home Department* [2013] CSIH 66)] at para 21, the court, under reference to a passage in Lees, *Interlocutors* (2nd ed), at p 35, drew attention to the very limited circumstances to which the power to hold interlocutors *pro non scripto* has been confined. None of those circumstances arise in the instant case. Indeed, it might be thought instructive that the text... is silent on any common law power of the court to *recall* (my emphasis) its own interlocutor."

Ironically, had it been open to the court to decide on rule 2.1 relief, it would have granted relief. There had been a simple oversight against a background of correspondence, unknown to the court at the time, from which it was plain that parties were making arrangements for an opposed motion to be heard at a time when both senior counsel were available, and had identified a date only a few days after the motion was actually enrolled. Prompt steps were taken to address the consequences, and "The error was a human one which I would have been prepared to excuse."

Secondly, in *Murphy v Ogilvie Construction* [2021] SAC (Civ) 27 (2 July 2021), another personal injury case, decree of dismissal by default was granted against the pursuer following a number of failures to comply with the timetable. The motion for decree was not opposed and the appellant's solicitor did not respond to promptings from the other side and the court, including a hearing on the motion itself despite the lack of opposition. Before the Sheriff Appeal Court, it was explained, amongst other things, that the solicitor was under significant pressure and stress due to his domestic arrangements during COVID.

The decision makes uncomfortable reading for court lawyers. The court was at pains to say that wider considerations came into play in these circumstances. Compliance with the rules was essential to the efficacy of the personal injury procedure: "it is appropriate to consider not only the explanation now provided on behalf of the appellant, but the broader interests of justice... The appellant has not overlooked the rules and the purpose of the rules but has ignored the rules. The court has interests of its own to protect which involves not only the just resolution of disputes but also the effective and efficient progress of personal injury actions by requiring that the rules of court are followed... there will be circumstances where the court must apply a sanction to mark any serious and sustained failure to comply with the rules".

*"It has been interesting to observe in recent cases the different ways in which evidence has been taken and legal arguments heard"*

## Permission to appeal

Section 113 of the Courts Reform (Scotland) Act 2014 makes provision for appeals from the Sheriff Appeal Court to the Court of Session. Permission may be granted, but only if the appeal would raise an important point of principle or practice or there is some other compelling reason for the Court of Session to hear the appeal (s 113(2)). The latest case to consider this section was *JK v Argyll & Bute Council* [2021] SAC (Civ) 25 (24 June 2021), in which the sheriff had granted powers to a welfare guardian which had the effect of depriving the adult of her liberty.

Section 113(4) makes the section subject to any provisions about appeals in other legislation, and the Adults with Incapacity (Scotland) Act 2014, s 2(3) provides that any decision of the sheriff principal may be appealed "with leave of the sheriff principal to the Court of Session". Accordingly, the qualification in s 113(2) does not apply. That did not help the proposed appellant, however. The court considered whether it was appropriate to grant leave but was not persuaded that it should:

"we conclude that the appellant has failed to establish a substantial and arguable point of law, or conflict in judicial opinion".

## Hearings

It has been interesting to observe in recent cases the different ways in which evidence has been taken and legal arguments heard. The current consultation on remote hearings will no doubt prompt tales of good/bad experiences across the profession, but meantime here are just a few random examples. More mature court practitioners may want to look away now.

In *Warner v Scapa Flow Charters* [2021] CSOH 92 (3 September 2021), a tragic PI case about a man who died while diving from a boat off the north coast, parties had agreed a detailed and extensive joint minute, some evidence was given orally and heard principally by WebEx, and some was given by adoption of written reports or previous statements either in supplement of or in substitution for oral evidence. There were eight medical witnesses of fact, all of whose evidence was agreed as per their statements or reports. A demonstration of the equipment and evidence from an expert, together with the evidence of the defender, was taken in person on the first day of the proof. Written police statements taken shortly after the accident (nine years before) were used extensively. The proof appears to have lasted about six days and submissions were made in writing, amplified orally via WebEx.

Not all cases are given this treatment which, apart from anything else, obviously involved considerable thought and preparation, not to mention close cooperation between the opposing parties. By contrast – and no criticism implied – in *Morrison v Oakden* [2021] CSOH 96 (29 September 2021) the pursuer had fallen from a horse and there was a hotly contested dispute about liability and quantum. It seems that all the factual and medical evidence – five witnesses for the pursuer and four for the defender – was given in person, and submissions were made orally.

In *VMS Enterprises Ltd v The Brexit Party* [2021] SC GLA 49 (28 July 2021), a commercial action in Glasgow, proof was heard over three days. There were 11 witnesses. It was conducted remotely via WebEx, with parties participating simultaneously from various locations between Glasgow and London. Signed written statements of all witnesses were exchanged and lodged in advance. The content was deemed to constitute the evidence in chief of the signatories, subject to supplementary examination in chief, cross-examination and re-examination, all under reservation of issues of competency, relevancy and admissibility. This evidence was supplemented by oral testimony of each witness given remotely.

Finally, in *McKay v MCE Insurance Co* [2021] SC GLA 42 (7 June 2021), the court undertook a telephone hearing on the pursuer's motion for certification of a skilled witness. It was refused.

*"The toolkit includes a new model whistleblowing policy and employment handbook for climate-conscious employers"*

# Employment

MARK HAMILTON, PARTNER, DENTONS UK, IRELAND & MIDDLE EAST LLP

COP26 has returned climate change to the foreground. As part of tackling the issue, should employers be incorporating net zero clauses into their employment contracts?

With COP26 generating global attention, there is mounting pressure on companies and individuals to respond to the climate crisis. While businesses have been criticised for contributing to the crisis, many have put reducing emissions and becoming net zero at the forefront of their environmental, social and governance ("ESG") agenda. However there are calls for this commitment to be extended into all aspects of business. The Chancery Lane Project, a pro bono initiative which develops contracts and model legislation to help combat climate change, has recently published a Net Zero Toolkit to address this demand.

Its authors describe the Net Zero Toolkit as "a set of practical tools to help professionals implement climate-conscious clauses in their organisation". The intention is for companies to take a proactive, inclusive approach to incorporating a net zero focus in all areas of their business. The Project has published model clauses and policies spanning a wide range of areas, including commercial transactions, construction, dispute resolution, intellectual property and insurance. Businesses are encouraged to adopt the clauses in full or adapt their existing contracts and policies. The toolkit includes a new model whistleblowing policy and employment handbook for climate-conscious employers.

## Green employment contracts?

"Elliot's Handbook" is the Project's template employment handbook, which it describes as setting "a tone for ambitious climate action involving every employee". Handbooks are certainly used to set the tone of an organisation, and this handbook aims to explain the employer's wider framework for achieving net zero, while also making individual employees responsible for helping to achieve this.

The model clauses within the handbook cover a wide range of topics. It begins with the company's general commitment to achieving net zero, and the central role individual employees have in this. It also sets out more specific and tangible requirements of employees. While the intention is admirable, given the traditional scope of employment contracts some of these clauses are likely to be perceived by many as unusual and potentially intrusive, and therefore unlikely to be adopted by the mainstream for some time.

The expenses policy is a prime example. It begins by stating that meetings with clients should be virtual by default to avoid unnecessary travel. With the adoption of hybrid working as the norm across many sectors, this is unlikely to raise eyebrows. One clause states that annual appraisals may include consideration of the business journeys taken.

Another clause, however, states that employees should choose vegetarian or vegan options from menus when entertaining clients. If employees choose a meat dish, they will not be able to claim expenses. It is likely many will see this as invasive, irrelevant to an employee's ability to perform their role and encroaching on personal choice.

The model clauses on travel are also likely to be controversial. For example, to contribute to "improving air quality in the communities we live and work in", employees will not be allowed to park diesel cars in the company car park. Would such a policy actually reduce the use of diesel cars, or risk pushing employee parking out to nearby streets and thus upset neighbours? Employees are also given additional holiday entitlement if they elect to take their annual leave domestically rather than travelling abroad. Employees may feel their employer should have no say in their choice of car or how they decide to spend their annual leave.

While the logic is clear, it seems unlikely these measures will see widespread adoption soon, given the potential impact on employee relations.

## Collective accountability

The Project itself is conscious of its limitations, characterising many of its model clauses as "ambitious". The toolkit is best viewed as encouraging debate rather than an end product. It illustrates that employers can incorporate a net zero focus in their employment policies, albeit a more gradual approach discussed with employees may be needed. It is likely that some ideas in the toolkit which seem unusual or intrusive today may be less controversial in 10 years' time.

Reaching net zero targets will be a challenge for most companies. However,

following the focus on COP26, employers and individuals are aware that everyone within a business has a role to play in achieving net zero, from the board down to individual employees. Companies are increasingly being challenged by counterparties and NGOs to provide evidence of steps they are taking to reduce or address their carbon impacts. The adoption of model clauses of this kind can help respond to those challenges. Moving forward, employers should consider whether incorporating climate-conscious clauses into their employment contracts could make a valuable contribution towards achieving net zero.

## Family

SAVITA SHARMA,
CONSULTANT,
MORTON FRASER LLP

The Domestic Abuse (Scotland) Act 2018 defines domestic abuse as abusive behaviour towards a partner or ex-partner. Behaviour directed at that person's child is also considered to be domestic abuse.

Section 11(7A) and (7B) of the Children (Scotland) Act 1995 confirms that the court shall have regard to matters concerning domestic abuse in so far as they relate to the welfare of a child; however it provides little framework on how to ensure in practice that allegations are consistently investigated by the court. The subsections do not create a presumption against contact for the perpetrator of abuse: abuse is a factor in the wider welfare test.

Therefore, when a party makes allegations of domestic abuse in child-related proceedings there is often no formal process to find the truth of those allegations within those proceedings until proof. Separate criminal enquiries may be made and can then be relied on; however in many cases allegations of domestic abuse are unreported and therefore undocumented, or there may be a significant delay before a criminal trial takes place. In the absence of formal guidance, the court will consider domestic violence allegations and how they relate to orders sought by the parties, with some sheriffs perhaps taking a more conservative approach in light of outstanding criminal charges or historical abuse allegations than others.

In a recent sheriff court case, *A v A* [2021] SC GLW 018, the court relied on criminal proceedings before refusing interim contact in the family proceedings, considering that no child welfare report was required. After proof, the sheriff accepted evidence of both controlling and violent behaviour by the defender and ordered that no contact should take place as it was not in the child's best interests. In contrast, in *K v G* [2021] SAC (Civ) 1, the sheriff's decision was successfully appealed due to his failure to take account of the possible effects of abuse or the risk of abuse. The sheriff had considered the domestic abuse perpetrated by the father as historic and therefore irrelevant to the question of contact.

So how would the court consider allegations of domestic abuse in a more consistent manner before a proof and where it is asked to consider contact on an interim basis?

### England & Wales approach

In England, domestic abuse allegations within children proceedings are dealt with rather differently, since the introduction of Practice Direction 12J, "Child Arrangements & Contact Orders" ("PD12J"), in October 2017. The practice direction includes definitions of domestic abuse (recently updated to include coercive and controlling behaviour as a result of the Domestic Abuse Act 2021), and also sets out how allegations of domestic abuse should be dealt with by the court prior to any involvement of Cafcass (Children & Family Court Advisory & Support Service).

One key component was for allegations of domestic violence to be set out in a schedule called a Scott schedule, to which the other party responded, after which a judge would consider whether a fact finding hearing was necessary to determine the truth.

However, in practice PD12J was not being followed, or was inconsistently followed, and it was found that the process relied heavily on specific events of domestic abuse in isolation of the nature of the parties' relationship, meaning that abuse such as coercive control was rarely acknowledged to exist or simply minimised. These profound difficulties were considered in detail in four conjoined appeals all concerning domestic violence in relation to child proceedings and the application of PD12J, *Re H-N and Others (domestic abuse: finding of fact hearing)* [2021] EWCA Civ 448.

The Court of Appeal held that restricting parties to a schedule might not allow the court to see a full picture of repetitive abuse, and that another method of presenting allegations to the court might be necessary, such as concise narrative statements; or further investigations might be needed to establish the best way to detail domestic violence to the court where a more contextual approach should be adopted. In its conclusion the Court of Appeal confirmed the overall importance of "modern thinking" and "proper understanding of the nature of domestic violence" within the judiciary when considering child matters.

### Commentary

This appeal has highlighted the importance of having a more contextual understanding of the nature of the relationship between the parties, and that will now be highly persuasive when looking at domestic abuse and its impact on future childcare arrangements. This is particularly important where allegations of coercive control are being made by one party. Perhaps borrowing the suggestions above may allow a different approach to be adopted within the context of children proceedings in Scotland.

## Human Rights

ROSS CAMERON,
ASSOCIATE,
ANDERSON
STRATHERN LLP

In *Wilson v Commissioner of Police of the Metropolis* [2021] UKIPTrib IPT_11_167_H, the claimant, Kate Wilson, complained that her rights guaranteed by articles 3, 8, 10, 11 and 14 of the European Convention on Human Rights had been violated by the respondents, the Metropolitan Police Commissioner and the National Police Chiefs' Council.

### Background

From 2003 to 2009, a police operation was in place to collect intelligence about public disorder by political activists. Mark Kennedy was an officer deployed to work undercover and infiltrate the activists. His deployment was authorised under the Regulation of Investigatory Powers Act 2000 ("RIPA") and allowed him to form "personal relationships" with the activists. Shortly after his deployment, Kennedy entered into a sexual relationship with the claimant, representing himself as a fellow activist and not disclosing his true identity. In addition, the claimant's political activities and personal life were subject to covert surveillance by Kennedy and other officers over a prolonged period.

When Kennedy's true role became public, the claimant argued that her treatment by him violated articles 3 (freedom from inhuman or degrading treatment) and 8 (right to respect for private and family life); and that she also suffered infringements of articles 10 (freedom of expression) and 11 (freedom of assembly and association), as well as article 14 (Convention rights to be secured without discrimination on the ground, *inter alia*, of sex).

### Admissions

The respondents admitted that Kennedy's deception in entering into a sexual relationship amounted to inhuman and degrading treatment; that the relationship constituted a violation of the claimant's article 8 right; and that its use as a means of obtaining intelligence constituted interference with her article 10 right. However, they disputed the gravity and extent of the infringements, arguing that surveillance of the

claimant was, barring these specific intrusions, necessary in a democratic society. They also denied any breach of rights under articles 11 and 14.

## Breaches

There is a positive obligation upon the state to ensure that breaches of articles 3 and 8 do not arise. The IPT found breaches of those positive obligations that were considerably broader than those admitted by the police. It held (*inter alia*) that while there was no evidence that sexual relationships were a deliberate tactic in undercover operations, the truth was closer to "don't ask, don't tell" (paras 209-226), and there had been a failure to take steps to prevent a sexual relationship from developing.

Although the IPT concluded that the RIPA regime at the time relating to undercover police activities was article 8(2) compliant, it held that the evidence of a pressing social need to justify interference with article 8 rights was thin. The principal justification for the surveillance was public disorder rather than serious criminality. The authorisations granted under RIPA were overbroad, and any attempts to balance the highly intrusive nature of the surveillance and the collateral intrusion into the claimant's life were wholly inadequate. Accordingly, the invasion of the claimant's private and family life could not be justified under article 8(2) and amounted to a breach of article 8.

In relation to article 14, the IPT held that the failure to guard against the risk of undercover officers entering into sexual relationships with targets had a disproportionately adverse impact on women. The respondents did not advance any justification for this differential impact and there was accordingly a violation of article 14.

The IPT also found that the respondents had breached the claimant's articles 10 and 11 rights. Details of her political activities were gathered, recorded and stored, amounting to a clear breach (without any justification) of her freedom to hold opinions and to receive and impart information and ideas without interference by public authority. Further, Kennedy had used his position to influence the claimant's political opinions and movements, and as such there was a breach of article 11.

## Commentary

This is a significant case in the context of human rights law in the United Kingdom. At para 344, the IPT stated: "This is a formidable list of Convention violations, the severity of which is underscored in particular by the violations of articles 3 and 14. This is not just a case about a renegade police officer who took advantage of his undercover deployment to indulge his sexual proclivities, serious though this aspect of the case unquestionably is. Our findings that the authorisations under RIPA were fatally flawed and the undercover operation could not be justified as 'necessary in a democratic society', as required by the ECHR, reveal disturbing and lamentable failings at the most fundamental levels."

While the IPT recognised that the respondents viewed their conduct through the lens of public order, that is not how it was experienced by the claimant, whose bodily integrity, privacy and political activities were invaded without lawful justification.

This is a decision that all police forces undertaking covert surveillance will have to be mindful of, and it will be interesting to see what the IPT deems to be a suitable remedy for the claimant. J

IN FOCUS

# ...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

### Building regulations

In pursuit of decarbonising the heating of buildings and reducing energy demand, the Government seeks views on proposed changes to energy standards (including electric vehicle charging infrastructure) in the Scottish Building Regulations. See consult.gov.scot/local-government-and-communities/building-regulations-energy-standards-review/

**Respond by 26 November.**

### Public body consumer duty

The Consumer Scotland Act 2020 requires the Government to establish Consumer Scotland to represent consumer interests. In that context, it seeks views on a new duty on public bodies to consider the impact of their policies on consumers. See consult.gov.scot/energy-and-climate-change-directorate/consumer-duty-for-public-bodies/

**Respond by 26 November.**

### Education reform

The Government seeks views on replacing the Scottish Qualifications Authority (SQA) and reforming Education Scotland. Responses will inform the work of Professor Ken Muir, the Government's independent adviser. See consult.gov.scot/learning-directorate/independent-education-reform-review/

**Respond by 26 November.**

### Local tax functions

Views are sought on draft regulations to transfer the functions of the Council Tax Reduction Review Panel and the valuation appeals committees to the new Local Taxation Chamber in the First-tier Tribunal for Scotland, and the relevant functions of the Lands Tribunal for Scotland to the Upper Tribunal. See consult.gov.scot/justice/local-taxation-vac-etc-transfer-of-functions/

**Respond by 28 November.**

### Crime statistics

The contract for conducting the Scottish Crime & Justice Survey, a key source of information, is due to be recommissioned. The Government is consulting on what improvements might be made to the survey. See consult.gov.scot/safer-communities/scottish-crime-and-justice-survey/

**Respond by 9 December.**

### Non-domestic rates

Views are sought on draft regulations relating to the requirements under the Non-Domestic Rates (Scotland) Act 2020 for assessors to publish a draft valuation roll and valuation notices before revaluation, the power for ministers to set the content of draft valuation notices, and a new two-stage appeals system. See consult.gov.scot/local-government-and-communities/non-domestic-rates-processes/

**Respond by 15 December.**

### Assisted dying

LibDem MSP Liam McArthur seeks views on his proposed Assisted Dying for Terminally Ill Adults (Scotland) Bill. See parliament.scot/bills-and-laws/bills/proposals-for-bills/proposed-assisted-dying-for-terminally-ill-adults-scotland-bill

**Respond by 22 December**

### A fair work nation?

The Government has a vision "that by 2025 people in Scotland will have a world leading working life where Fair Work drives success, wellbeing and prosperity". Views are sought on achieving this. See consult.gov.scot/fair-work-employability-and-skills/fair-work-nation/

**Respond by 23 December.**

### Legal services regulation

This consultation is fully described in the feature on p12.

**Respond by 24 December.**

# Briefings

## Pensions

COLIN GREIG,
PARTNER,
DWF LLP

Ahead of COP26, the DWP published on 21 October an open consultation, entitled *Climate and investment reporting: setting expectations and empowering savers*. It seeks views on the pension policy proposals on Paris Agreement alignment reporting, accompanying draft regulations and statutory guidance, and draft statutory/non-statutory guidance explaining DWP expectations on Implementation Statement reporting and the Statement of Investment Principles.

While the specific proposals may be very detailed and technical, as its title suggests and reflecting its subject matter, the consultation is aimed at a very wide range of stakeholders:

- pension scheme trustees and managers;
- pension scheme members and beneficiaries;
- pension scheme service providers, other industry bodies and professionals;
- civil society organisations; and
- other interested parties.

### Paris alignment reporting and related guidance

It is proposed that the Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 be amended to require trustees subject to those regulations to calculate and disclose an additional climate-related metric, a portfolio alignment metric setting out the extent to which their investments are aligned with the goal of limiting the increase in the global average temperature to 1.5 degrees Celsius above pre-industrial levels. These metrics, it is said, will help trustees understand how the companies they are invested in are placed to weather the transition to a low carbon economy.

The trustees concerned are, broadly, those of certain larger pension schemes, authorised master trusts and authorised schemes providing collective money purchase benefits.

Accordingly, the paper consults on:

- Draft Occupational Pension Schemes (Climate Change Governance and Reporting) (Amendment, Modification and Transitional Provision) Regulations and draft amendments to statutory guidance;

but also seeks views on related:

- draft non-statutory guidance explaining what it considers to be best practice in relation to Statements of Investment Principles ("SIP"), which describe for a relevant scheme its trustees' climate change and stewardship policies; and
- draft statutory guidance (to which relevant trustees are required to have regard) explaining expectations across the Implementation Statement ("IS"), which describes how the trustees have been implementing these policies.

All this is with a view, as is stated, to supporting pension schemes to "play their part in tackling climate change and protect their members' savings from environmental, social and governance risks".

### Implications for trustees

The consultation builds on the statutory requirements introduced with effect from 1 October 2021 in relation to identification, assessment and management of climate related risks and opportunities. Citing amongst other considerations:

- that transition consistent with the Paris Agreement is expected to lead to a fundamental transformation in the global economy affecting all types of pension schemes regardless of their portfolios;
- that an increasing number of the largest UK pension schemes have already voluntarily adopted net zero targets or signed up to frameworks which require net zero commitments; and
- some evidence that pension scheme members care about climate change and the impact it will have on their savings, environment and wider society,

the consultation makes clear that trustees retain complete primacy over any investment decisions they make as a result of alignment assessment, and suggests that the proposed reporting requirements can help trustees explain the rationale for their decisions.

While the alignment reporting requirements proposed do allow for some flexibility to reflect different circumstances of schemes and their portfolios (and availability or otherwise of the information required to complete assessment), undoubtedly alignment assessment and related activity will have a compliance cost, and it is to be hoped that that cost will be kept under review to ensure that it is reasonable and not disproportionate. Care will of course require to be taken to ensure that in any extension of the requirements to smaller schemes, the impact of compliance cost is recognised with appropriate and sensible adjustments being made.

### Clearer expectations

In terms of the draft SIP/IS guidance, its stated objectives are to:

- improve the quality of SIP policies (encouraging trustees to move away from boilerplate clauses and to explain how the policies in the SIP are in savers' interests);
- develop best practice for IS reporting (to help trustees understand what good practice looks like in relation to reporting engagement activities, voting behaviour and most significant votes);
- clarify that a scheme may use disclosures from other frameworks; and
- improve consistency across scheme reporting and products (by clarifying what is meant by key terms such as "most significant vote", indicating which information Government anticipates being most useful for members, and clarifying the target audience for the IS).

While there may be some devil in the finalised detail, this clarification of expectations in relation to compliance with regulatory requirements is most welcome and will be of assistance to trustees and their advisers.

## Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

### Scott Allan (s 42ZA appeal)

An appeal was made under s 42ZA(10) of the Solicitors (Scotland) Act 1980 by Robert Kidd against the determination by the Council of the Law Society of Scotland dated 9 January 2020 not to uphold a complaint of unsatisfactory professional conduct by the appellant, a party in a high value share purchase transaction, against Scott Allan, solicitor, c/o Shepherd & Wedderburn LLP, Aberdeen (the second respondent). The appeal was defended by both respondents.

The Tribunal upheld the appeal, quashed the determination of the first respondents, and made a determination upholding one head of complaint against the second respondent.

The Tribunal considered there was clear evidence that the second respondent was aware at least to some extent of his colleague's improper activity and involvement on behalf of another party to the transaction. The second respondent was aware that his colleague was continuing to act for that party. Therefore, the second respondent failed to act in the appellant's best interests between approximately November 2008 and November 2009 as, despite being aware that his colleague was providing advice to another party to the transaction, he did not inform the appellant. The second respondent failed to take appropriate steps to address the conflict of interest situation. At a subsequent hearing the appellant confirmed that no compensation was sought through the Tribunal proceedings.

### Iain Alexander Leslie

A complaint was made by the Council of the Law Society of Scotland against Iain Alexander Leslie, Leslie & Co SSC, Edinburgh. The Tribunal found the respondent guilty of professional misconduct *in cumulo* in respect of his contraventions of regs 7, 8, 14 and 19 of the Money Laundering Regulations 2007 and rules B6.7.1(c), B6.13.2 and B6.23 of the 2011 Practice

Rules. The Tribunal censured the respondent.

Four files presented significant issues in relation to money laundering procedures. It did not appear to the Tribunal that this type of transaction was unusual for the respondent. The Tribunal was particularly concerned by the steps taken by the respondent in one case to apparently avoid having to carry out money laundering checks on funds coming from China. The Money Laundering Regulations exist to protect society against criminal acts. Failure to comply with the regulations demeans the trust the public can place in the profession. Having regard to the whole circumstances of this case, the Tribunal was satisfied that the respondent's conduct was both serious and reprehensible. Given the close connection between each of the averments of misconduct, the Tribunal considered it appropriate that the finding was made on a *cumulo* basis.

## Theresa Mary McWilliams

A complaint was made by the Council of the Law Society of Scotland against Theresa Mary McWilliams, Trainor Alston Ltd, Coatbridge. The Tribunal found the respondent guilty of professional misconduct in respect that she (a) failed or unduly delayed, for a period of 10 months, to implement a mandate, and (b) failed to communicate effectively with Brodies Solicitors. The Tribunal censured the respondent.

The Tribunal noted that failure to implement a mandate breaches the Society's guidance. It also breaches rules B1.9.1 and B1.14.1. Solicitors must communicate effectively and act with other solicitors in a manner of mutual trust and confidence. Failure to implement a mandate is a breach of a solicitor's obligations. It hampers the new solicitor instructed in the matter. It inconveniences the client. It is prejudicial to the legal profession and its reputation and can cause harm to the public. The Tribunal was satisfied that the respondent was guilty of professional misconduct. However, the misconduct was at the lower end of the scale. The respondent had shown remorse and changed her practice. There had been no repetition of the conduct and there was no risk to the public. A censure was therefore sufficient sanction.

The Tribunal found that the secondary complainer had been directly affected by the respondent's misconduct and considered it was appropriate to award compensation. It ordained the respondent to pay £650 compensation to the secondary complainer.

## Graeme Bruce Murray

A complaint was made by the Council of the Law Society of Scotland against Graeme Bruce Murray, Graeme Murray & Co, Aberdeen. The Tribunal found the respondent guilty of professional misconduct in respect that he failed to communicate with Faculty Services Ltd on behalf of counsel, failed to respond to correspondence from Faculty Services Ltd and failed to make payment of the fee notes due to counsel.

The Tribunal censured the respondent and restricted his practising certificate for an aggregate period of two years.

On instructing counsel the respondent accepted a personal responsibility for counsel's fees. On four occasions he neglected his professional duty in this regard and failed to communicate effectively with Faculty Services Ltd. The respondent's conduct was serious and reprehensible and constituted professional misconduct.

The Tribunal censured the respondent and directed that for a period of two years, any practising certificate held or issued to the respondent be subject to such restriction as will limit him to acting as a qualified assistant to such employer as may be approved by the Society. The Tribunal made no award of compensation to the secondary complainer.

Publicity was deferred in this case. The Tribunal decided on 3 August 2021 that the decision could be published.

## Louise Elizabeth Sutherland

A complaint was made by the Council of the Law Society of Scotland against Louise Elizabeth Sutherland, solicitor, Milltimber. The Tribunal found the respondent guilty of professional misconduct singly and *in cumulo* in respect that she (a) failed to act in a trustworthy and honest manner where her actings were both fraudulent and deceitful; (b) inappropriately drew fees from the client account which were not justified and accordingly overcharged clients; (c) rendered fees for which there was no justification; (d) in respect of seven instances, knowingly and intentionally made entries where the narratives were misleading and masked the true financial position of the clients' account, the financial position of the firm and the audit trail; (e) rendered 120 fee notes where no work had been done to justify any fee; (f) did not keep properly written account records to reflect the true position with the client account; (g) dishonestly put through fees she knew she was not entitled to, in order to use the client account money for other purposes; (h) as cashroom manager or designated cashroom partner, did not appropriately discharge her responsibilities; and (i) caused or knowingly permitted the practice unit not to comply with the provisions of rule 6 of the Practice Rules 2011.

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

The respondent admitted a dishonest course of conduct which had included the firm using clients' funds to keep the firm afloat. Solicitors are in a privileged position in holding clients' funds. The accounts rules exist to protect the interests of the client and ensure complete transparency, and security of these funds.

*"The respondent admitted deliberate overcharging ... this conduct was serious and reprehensible"*

The respondent admitted deliberate overcharging, creation of fictitious fee notes, and the creation of misleading client ledger narratives. This conduct was serious and reprehensible. The respondent was guilty of professional misconduct. Having regard to the protection of the public and the damage to the reputation of the profession, the Tribunal considered that strike off was the only possible disposal.

Publicity was deferred until the conclusion of associated proceedings against the respondent or intimation that none were to be brought. The Tribunal agreed on 3 August 2021 that the decision in this case could be published.

## Neil F McPherson (s 42ZA appeal)

An appeal was made under s 42ZA(10) of the Solicitors (Scotland) Act 1980 by Campbell Thomas against the determination by the Council of the Law Society of Scotland not to uphold a complaint of unsatisfactory professional conduct made against Neil F McPherson, solicitor, Kilmarnock (the second respondent). The appeal was defended by both respondents.

There were two grounds of complaint relevant to the appeal. The first head of complaint was that the second respondent had acted in a threatening manner towards the appellant, a journalist, by saying in a loud and menacing voice, "You better be careful Campbell, you better be very careful." The second head of complaint was that the second respondent arranged for the exit of his client from a non-public facing door of the court and inappropriately stated to members of the press that, "He wouldn't have done it for anyone else but Campbell Thomas", which the appellant had taken as a personal attack on himself.

The Tribunal analysed the Professional Conduct Subcommittee's determination and, applying the test in *Hood, Petitioner* [2017] CSIH 21, confirmed its decision not to uphold a complaint of unsatisfactory professional conduct against the second respondent. Publicity would be given to the decision. The Tribunal found the appellant liable in the expenses of both respondents and the Tribunal, but refused sanction for counsel.

### Walkers raise more than £7,000

Walkers taking part in the Glasgow and Edinburgh Legal Walks between them raised more than £7,000 towards the Access to Justice Foundation. For a full account, see the online article at bit.ly/3wjgcB2

# Annual plan sets out 32 projects

Supporting the legal profession, technological transformation and protecting the public interest lie at the heart of the Law Society of Scotland's annual plan for 2021-22.

The plan outlines 32 key projects across the Society's strategic goals to assure, support, influence, excel and evolve, and will deliver year 2 of the Society's interim two-year strategy which was developed in response to the COVID-19 pandemic.

Projects include:

- engaging with the Scottish Government's consultation on legal services regulation, working to ensure reform is considered a priority for legislation;
- IT transformation, with two major database and infrastructure projects underpinning the Society's performance, connectivity, security and resilience, and a new hybrid way of working;
- lessening its impact on the environment by agreeing and implementing a new carbon management programme;
- agreeing a five-year strategy for 2022-27;
- launching a work-based route to qualification as a solicitor.

Growing associate member categories, building on work around social mobility, and continuing to promote the benefits of increased diversity in the profession, focusing on gender equality, racial inclusion and disability also feature.

Describing the plan as "ambitious", retiring chief executive Lorna Jack (pictured) commented: "It's been an extremely challenging time for the profession since the pandemic began, and this is the second year in a row where the Society will be operating to a budget with a reduced practising certificate fee. The projects that are planned have been well thought out, and the Society remains committed to supporting the profession through this fragile economic recovery.

"As always, protecting the public interest is at the forefront of the Society's efforts, and one of the top priorities will be arguing strongly for the Society's regulatory role in the Government's consultation and review of legal services regulation."

She added: "I am confident that my successor will ensure that the team at the Society continue to drive forward these improvements which will bring tangible benefits for our members and the clients who rely on their advice and expertise."

***Find the plan at lawscot.org.uk/annualplan2022***

# Report highlights AML priorities

A continuing commitment to eliminating money laundering-related criminal activity is revealed in the Society's anti-money laundering report for 2021.

The report includes information relating to the work, structure and objectives of the Society's dedicated AML team, currently in the process of recruiting two additional full time experts; the Society's governance structure; AML assurance statistics and outcomes; the 2020 thematic review on trust and company service provision ("TCSP"); cross-sector joint working collaboration, intelligence and information sharing; promoting the reporting of breaches and concerns; how the Society fulfils its AML supervisory responsibilities; and its supervisory plans moving forward.

The results of the 2020 AML certificate, recently published, which focused on TCSP, client accounts and conveyancing as some of the higher-risk areas of legal practice, highlight pockets of greater risk across these types of transaction. For example, 3,061 conveyancing matters were conducted on behalf of clients whose business interests were known to be in a higher risk industry; 489 politically exposed persons were provided with a regulated service in 2020 by Scottish legal firms;

## PUBLIC POLICY HIGHLIGHTS

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

### National Care Service

The Society responded to two recent Scottish Government consultations relating to social care.

Its response to the proposals for a National Care Service for Scotland highlighted the complexity of the existing landscape of social care. Any proposed new approach to social care should be based on a clear, evidence-based review of existing provision, identification and analysis of current deficiencies, and include detailed proposals specifically addressing these. It also highlighted the need for careful consideration of issues of local decision-making, accountability and proportionality, and for any case for change to be linked to a demonstrable public interest justification and to improve outcomes for end users.

Any new legislation should contain clear and attributable rights and duties, and effective mechanisms for redress. With work ongoing to incorporate human rights conventions into Scots law, legislation must be based on and fully embed human rights principles. The response also highlighted the importance of transparent decision-making, robust complaints processes and accountability.

The consultation lacked detail in many respects, and further evidence should be produced to support the proposals, particularly in relation to the scope of the National Care Service.

The Society's response to the "Anne's law" proposals for adults living in care homes to maintain family and friendship connections also highlighted human rights considerations, and called for effective mechanisms to allow such adults to secure their rights.

A National Care Service Bill is expected in the summer of 2022.

### Nationality and Borders Bill

Following the bill's committee stage, the Society issued a statement citing concerns that the bill threatens to create a two-tier asylum system which could result in more unsafe and perilous journeys. Further criticism was made of the bill for removing the "for gain" element from the offence of helping an asylum seeker to the UK, which could mean anyone who has helped asylum seekers reach the UK facing charges. The Society has raised the question of how the proposals would impact on lifesaving organisations and ships' masters who save asylum seekers from drowning, as they are obliged to do under the UN Convention on the Law of the Sea.

The Society supports aspects of the bill which resolve historical injustices, including removing the discriminatory inability for mothers and unmarried fathers to transmit citizenship, but believes the registration process for this should be free. It also believes that nationality law should be amended to allow children born in the UK to become British citizens automatically, restoring a policy that applied before 1983.

Serious defects are also raised around provisions concerning citizenship of stateless minors. The Society urges replacing the age range of minors, set at five to 17 in the bill, with the UN Convention on the Rights of the Child definition that a child is every human being under the age of 18.

### Tax policy and the budget

Responding to a Scottish Government consultation, the Tax Law Committee considered that the need for a clear process to consult on and implement legislative change was a key priority for managing the devolved taxes in the current parliamentary session.

The committee confirmed its support for an early review of LBTT additional dwelling supplement ("ADS"): aspects of the legislation are unclear and a number of issues have arisen which would benefit from resolution or clarification. Some aspects of the ADS have the potential to create distort taxpayer behaviour, or at least create disadvantages in certain circumstances, contrary to the usual approach of the tax system.

The response outlined the need to ensure that revenue and benefits authorities are fit for purpose, and have the requisite powers to amend the law by way of regulation and the resource agility to respond and amend the system, how it operates, and its guidance as required. This requires strong strategic ability to consider how to use such powers, and responsiveness and agility to do so effectively and at the appropriate time.

Greater transparency and understanding for taxpayers will increase public and professional confidence in the management and administration of taxes. The response identified concerns about legislative drafting, quality of decision making, content of guidance, and poor communication with taxpayers and agents undermining the competency of the tax system. A lack of agility in the system is likely to have economic impacts for Scotland; it is important that priority is given to resolving these issues so that Scotland can maintain a strong position in the global economy.

The committee considered it crucial that priority is given to delivering a clear policy cycle for tax legislation, including an emphasis on "engagement and analysis".

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

and 108 companies with non-UK ownership were formed in higher-risk or secrecy jurisdictions.

Introducing the report, CEO Lorna Jack said: "As the professional body for Scottish solicitors, we couldn't be more alive to the threat posed to the profession and the public they serve from criminal activity, money laundering and terrorist financing.

"Taking a risk-based approach to this work allows us to be robust, fair and responsible – balancing the commercial realities and the environment in which the legal profession operates with our overarching legal responsibility to ensure our members are complying with their AML obligations."

## Solicitor advocate introduced

Andrew Mackenzie of Harper Macleod was introduced on 12 October as a solicitor advocate with civil rights of audience. Lady Wise administered the declaration of allegiance.

### ACCREDITED PARALEGALS

**Civil litigation – family law**
ALEXANDRA SCOTT,
Culley & McAlpine.

**Residential conveyancing**
JORDAN KIRK,
Taylor Wimpey;
EMILY MACDONALD,
Anderson Shaw & Gilbert.

### OBITUARIES

**ANNE-MHAIRI DUFFY, Dundee**
On 28 June 2021, Anne-Mhairi Duffy, partner of the firm Caird & Vaughan, Dundee.
AGE: 50
ADMITTED: 1995

**VINCENT CONNOR, Hong Kong**
On 5 October 2021, Vincent Connor, formerly partner and latterly employee of the firm Pinsent Masons LLP.
AGE: 57
ADMITTED: 1988
***A full appreciation is on p 52***

**IAN SMITH WATSON, Glasgow**
On 17 October 2021, Ian Smith Watson, formerly partner of Ian Smith Watson Solicitors (Scotland) Ltd, Glasgow and latterly consultant of the firm Rubens, Lochgilphead.
AGE: 67
ADMITTED: 1978

RISK MANAGEMENT

# Delegating means talking

Good delegation means both people ensuring clear understanding about what is to be done and when, and keeping in touch as to progress and any issues that arise

A former colleague I met recently at the Signet Library was telling me about an associate he trained under, who every few weeks would go through all 100 or so of this trainee's files for a housebuilder and send an email on each one saying simply, "Any update?"

It should be fairly clear to all of us that that is not an effective way to keep on top of those files. The associate obviously did not have much of a handle on what was going on with the transactions, and realistically could not have expected to get one from this scattergun approach.

Delegation is a great way of freeing up your own time to focus on more complicated tasks, as well as giving experience and learning opportunities to more junior colleagues, but it needs to be done properly. There are plenty of ways it can go wrong, be that through misunderstood instructions or both parties simply losing track of the task in question, but most can be avoided. Key to this are good supervision and making sure both parties are on the same page about what is required.

Whether you are the delegatee or the delegator, here are a few suggestions for how to make delegation work effectively for everyone.

## Delegatee

**1. Get clear instructions**

We would normally associate this more with client interactions, but getting clear instructions from colleagues is just as important. Make sure you understand what it is you are actually meant to be doing and how quickly it needs done. If you are unsure about any of it, it is always better to take time at the outset to ask for clarification, rather than to go off and waste time doing the wrong thing.

Timing is important too. You might not be told it, but the task could well be time critical and your colleague may have simply assumed you understood to do it straightaway. Issuing a notice or lodging court papers even a day late could result in a break option being missed in a lease or a time bar passing; and the costs of either of those could be huge. So find out at the outset how urgent it is.

**2. Keep the fee earner updated**

It can be tempting to think that no news is good news and if no one has asked you what is happening with a task, nobody needs to know. On the contrary, what you will almost certainly find is that the person who passed you the task really does want an update but is just too busy to ask, or even has forgotten who picked the task up.

Taking a proactive approach and dropping the responsible fee earner a quick line to let them know what is going on and when you expect to be finished will show that things are in hand and put their mind at rest. It is also an opportunity to flag up to them that the task is still underway, and to prompt them to tell you if any circumstances have changed or urgency has arisen.

**3. Speak up if something goes wrong**

What happens if something happens and you miss a deadline or send confidential papers to the wrong party? It can be tempting to bury your head in the sand or try to wish it away, but we all know that those strategies never work. Mistakes which get buried will only get bigger, and although it can be daunting, the truth is that you are much better speaking up quickly so that the situation can be fixed than waiting and hoping nobody will notice.

I once had to show up at senior counsel's house on a Saturday morning with three big boxes of papers in a taxi, because a trainee confided in me that he had forgotten to send them and was too afraid to tell his manager. If you realise something has gone wrong and it starts ballooning in your mind, think about whether there is someone else you can approach in the team who can help. Most things can actually be fixed, provided you bite the bullet and ask.

**4. Keep a list of tasks**

One of the things I was told most often when I started as a trainee was to keep a notepad and pen on my person at all times, because you simply never know when you will get asked to do something and need to write it down. The Notes app on your phone probably works well for impromptu things nowadays too, but the point is to get the instructions down in writing to avoid you forgetting about them later on, so a single physical notebook where everything is kept is a good way of doing that.

Bear in mind that the person asking may well think that once the instructions have been given they can score it off their list and not worry about it any more, without realising either that you have not understood what they wanted or that you never wrote it down and have already forgotten about it, so don't rely on them chasing you up later.

## Delegator

**1. Give clear instructions**

Remember that just because you understand what it is you are asking, does not mean that everyone else will too. If you have asked a trainee to register the disposition of a property, do they know that there is a standard security for registration too, and that because the purchaser is a company the security also needs to be registered at Companies House? (And while we're at it, do they know that the disposition has sat on your desk for two weeks and the protected period under the advance notice is running out?)

It might seem a hassle to have to explain procedures and timescales when you just want

the task out of sight and out of mind, but failure to specify what it is you need done will probably result in it not being done properly and a situation which you will then need to unpick. Conversely, explaining to the person what exactly it is you need is an investment for the next time you ask so you do not need to explain it again.

**2. Keep track of what you have delegated**

It can be tempting to score something off a list and forget about it once it has been handed to someone else, but we all have a responsibility to keep on top of the files we are working on and check for progress. If a client complains that they have been kept waiting or even that the work they instructed has become time barred, blaming the colleague the task had been delegated to will be a poor defence.

As we saw above, sending 100 "Any update?" emails on a Wednesday night is not an effective way of keeping on top of things. When you delegate a task from one of your files, make a note in your own note of work, of who is meant to be doing it and when you asked them. That will make it easy to keep track of how long it is taking and who you need to get in touch with to follow up.

**3. Be available for questions**

Giving clear instructions at the outset is crucial, but so is being available for questions as the task progresses. It might seem obvious that the colleague should come to you if they have questions or are having difficulty with what has been asked of them, but try to keep in mind the experience gap between you. It costs nothing to make it clear that you will be receptive to questions if they need to ask them, and may avoid them being put off doing so.

Of course a lot of tasks you would give to a more junior colleague might involve processes or firms you will not have used yourself recently, so it might be that you are not actually the person best placed for questions. If you do get asked about something with which you are not familiar, try to think about who else in the team or firm would be likely to know. Even if you cannot answer the question yourself, you will probably have a better idea of who can than someone who has only recently joined.

**4. Make delegation a learning opportunity**

We have all been trainees (or even apprentices), and even after qualifying will have continued to benefit from training and learning opportunities from colleagues which enabled us to develop our skills and understanding of what we were doing. The better that colleagues you delegate to understand how the tasks they are assigned fit into a case or transaction as a whole, the more effectively they can deliver what is needed of them and continue to contribute to the project as it goes along.

A simple way of doing that is to explain the reason behind any deadlines that apply to the task you are assigning, but you can go further by talking about what will be done with the work your colleague produces and how it might affect things further down the line. While it might feel like this takes up time unnecessarily, remember that it is an investment. It will encourage them to feel involved in the process and will make them more rounded and useful members of the team.

It is a great feeling to know that a task from your to-do list has been handed over to someone you are confident will do it both well and on time, but these relationships do not just appear overnight. Keeping the above in mind, whether you are the one receiving work or the one giving it out, should help make the delegation process work better for everyone.

***Kenneth Law is a solicitor and risk manager at Lockton***

**FROM THE ARCHIVES**

## 50 years ago

*From "European Economic Community" (memorandum by the Society's Council on the effect of accession on Scots law), November 1971:* "It is clear... that accession to the E.E.C. will involve some loss of sovereignty to the British Parliament. It may, however, be argued that this is a matter more of theoretical than of practical importance, having regard to such factors as (1) the close economic interdependence of the whole world in such matters as currency and rates of exchange, and (2) the accepted principle... that any decision of the E.E.C. affecting vital national interests must have the unanimous agreement of member states."

## 25 years ago

*From "Crime and Punishment Revisited" (address by Lord Justice General Hope), November 1996:* "since we live in what has been described as an elective dictatorship under which the government can... put through whatever measures it chooses... there can be no doubt that the judges are entitled to speak out at this stage and to voice their objections. This has nothing to do with the independence of the judges in the matter of sentencing. It is simply part of our democratic right, as citizens of this country, to say what we think, based on our knowledge and experience, about what is being proposed, in the hope that the dangers may be appreciated before it is too late".

CLIENTS

# Are you **listening?**

Don't wait for something to go wrong before you start listening to your clients, Linsay Leslie advises: put listening at the heart of your client relationships

It is a delight to have been asked to write this piece for the Journal, sharing my experiences and thoughts on the relationships lawyers have with their clients and the power of client listening.

Years ago, during my decade as a lawyer in private practice, talking about client listening would have seemed fluffy to me – touchy, feely, marketingy stuff.

My "aha" moment came later. Working on bids and legal directory submissions, I realised the impact of true, unbiased, unfiltered client listening.

When pitching for work, lawyers want to show clients they are the best in their field, but often don't really know what their clients love and what ticks them off; what they really need their lawyers to do or stop doing; and where their clients sit on the scale from satisfied to loyal.

More often than not, a bid written by lawyers will spout blue chip client names, reel off enviable deal lists and proudly explain the firm's services and sector expertise. All impressive stuff, but one of the first edits I usually make is highlighting how many paragraphs start with:

- "We"
- "Our"
- "The firm"
- "We believe"
- "We know that", etc etc.

"Remember, it's not about you, it's about the client," I say.

## Becoming a trusted partner

One of the joys of my work is helping lawyers find *their* "aha" moment: helping firms go beyond being excellent lawyers, to being a vital and irreplaceable part of their clients' business.

David Maister said in his must-read book, *The Trusted Advisor*: "It is ironic that a business in which the serving of clients depends so heavily on interpersonal psychology should be peopled with those who believe in the exclusive power of technical mastery."

He quotes a former CEO of Deloitte & Touche, who he describes as "someone who very effectively builds lasting relationships, deep relationships". In the first meeting with a very unhappy client, Maister explains that the most important aspect of the CEO's approach and skill was the ability to listen. Long story short, having earned the trust of the formerly very unhappy client by listening rather than telling, at a pitch for a high value project years later, the client "looked at me and said 'Do *you* think I should do this?'". The client saw the adviser as a partner; trust had been earned.

Now, as a partner in a reputation and relationship consultancy, I talk to clients of lawyers and other professional advisers all the time. They invariably say that the critical variables in deciding to deepen a partnership are the fundamental, emotional factors like interpersonal chemistry and working relationships.

> *"Lawyers are smart, commercial, astute, but they often undervalue making the human connection that transitions them to being a true business partner to their clients"*

## The pandemic effect

Not surprisingly, 18 months of conducting relationships on Teams and Zoom has been an eyeopener. Exposing our home lives has brought a more human element into day-to-day conversations and shown some of us to be more vulnerable than before, whether we like it or not.

Perhaps as a result, we've seen an increase in firms undertaking client review and listening programmes; they are keen to know how they performed during the pandemic and find out what clients want from their lawyers as we return to offices and face-to-face contact.

But why have so many firms waited for something as catastrophic as COVID before prioritising listening to their client views, experiences and future plans?

## Those directory rankings...

We recently saw Legal 500 and Chambers & Partners publish their latest UK rankings.

Over the years, I've seen lawyers berate the value of rankings. However, as any in-house business development team will tell you, when results day comes, partners are beating a path to their desks, demanding action if they haven't received the recognition they believe they deserve.

This is often when I get a call: when a team loses its top ranking, I am asked to find out what's gone wrong and make it right. Invariably, some bad client feedback is to blame for the rankings. And the obvious, often unpopular, answer is, don't leave it to the directories to ask your clients how much they value you. Instead put your clients' needs and expectations at the heart of what you do and establish your own structured, independent client listening programme so that you know how they feel and how you can improve your relationships.

Lawyers are smart, commercial, astute, but they often undervalue making the human connection that transitions them to being a true business partner to their clients. While "client listening" might still sound fluffy to some, the impact of earning the respect, empathy, trust and ultimately the ear of clients on a firm's bottom line can't be overstated.

More than this, embedding a culture of meaningful client listening in your firm, using independent, knowledgeable interviewers to unearth the issues that often don't get spoken about otherwise, grows enduring and enjoyable relationships that will continue to drive mutual growth and satisfaction for client and adviser.

**Linsay Leslie**
is a partner and head of the Directories, Awards & Tenders team with MD Communications

# "It's good to talk"

Following on from last month's theme of "talking", BT coined this headline as a catchphrase for a 1995 advertising campaign, but in this modern world is "talking" all that it used to be?

Some of you probably remember Bob Hoskins with his Cockney accent encouraging us all to communicate more and use our telephones, with that famous strapline: "It's good to talk". A great message at the time, and one that I am sure increased both the social capital of the nation as well as BT's profits. Strange now to think that it was landlines not mobile phones they were promoting, and email was still in its infancy. Today, though, the art of talking seems to be on the decline. Why, and does it matter?

In the same way that the landline has been replaced by the mobile, emails, for many, have now replaced phone calls as their primary form of communication. These are in some ways more efficient, and I understand many of the reasons why practitioners prefer them. Emails can be dealt with at a time that suits, can be kept short and to the point (avoiding some of those long rambling calls), and on occasion can avoid, or delay, some of the more challenging or difficult discussions. In essence, they provide a barrier between the busy practitioner trying to meet the needs of many clients and the client looking for immediate updates or more detailed explanations. Similar issues, I suspect, exist when it comes to dealing with practitioners in other firms.

Emails are, however, not without their challenges. They are a direct line to your desk, are instant, and as such, clients' expectations about the speed and frequency of replies are high. No amount of automated responses will satisfy a client or colleague who is looking for an update or some important information, and the immediacy of the medium of email means that it is extremely hard to manage and indeed exceed expectations.

## Why phone?

Written communications are a huge part of risk management, and an essential part of every transaction. I do wonder, though, whether the perceived benefits of moving more important conversations to email are always worth the benefits lost by not just picking up the phone. Here are at least a few reasons why:

- While there is some debate on the actual percentage, it is clear that only a limited portion of what we are trying to communicate is conveyed by the written (or spoken) word. A larger part is gleaned from things such as tone, body language and other signals.
- Our client's understanding of language is seldom perfect, and certainly not identical to our own. Even words used in common parlance can be interpreted differently, leading at times to upset and misunderstanding. The old adage remains true: you know what you have written, not what the client has read. A conversation allows you to check that what you are communicating is being both heard and understood.
- There is both a time saving and a risk benefit in the ability of a telephone conversation to deal with both of the above. How often have you exchanged numerous emails with either a client or a colleague to clarify a point that could have been resolved instantly by a call?
- I have, at times, avoided a call, not wanting to have to deal with a challenging or difficult conversation. It never works. The issue does not go away and the avoidance or delay only adds fuel to the flames. Having that discussion and letting the other person know that the issue has your attention is always the first step to the best resolution.
- What other information is being lost that we would have picked up on when speaking? Perhaps something relevant to the transaction in hand or an opportunity for an additional piece of work? There is no doubt that clients will be more forthcoming with additional information when speaking.

*"The adage remains true: you know what you have written, not what the client has read. A conversation allows you to check what you are communicating is being both heard and understood"*

## Catch that call

I appreciate that telephone calls have their own challenges. We have all played telephone tag, with "call me back" messages being bounced backwards and forwards for days on end. That is a problem that can be addressed by scheduling calls with clients, as I'm sure many of you do. I've found Calendly particularly useful for this (calendly.com/), one simple link to be sent to a client or colleague allowing them to book a time in your diary to speak.

At the core of what we do, we are a people business and people are social creatures. Those conversations are what help create the relationships with clients and can be the most enjoyable part of the day. If the last 18 months has taught us anything, it is the importance of maintaining human interactions. Perhaps then the next time you are in doubt, just pick up the phone. It might be better to talk.

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

# The R word

Talent is a ticket to the game, but it's resilience that determines who wins, Stephen Gold believes

In the teeth of the battle against COVID-19, we were transfixed by the "R" number, the rate at which infection was spreading. Above 1, it was accelerating; below and we had cause for hope. Now, as we lurch uncertainly towards something like the pre-pandemic world, R is once again centre stage, but this time it's a word: Resilience.

In the last few weeks, we have seen motorists queuing round the block at forecourts, crops lying unpicked and rotting in the fields, animals culled because they cannot be taken to market, and HGVs lying idle for want of drivers. Just-in-time supply chains, once touted as modern marvels of efficiency, have shown how vulnerable they, and hence we, are to disruption. These threats to the UK's national resilience play out in countless ways for businesses, as they do for individuals.

Recently, I sat on the judging panel for *The Herald* Law Awards of Scotland. Many different kinds of firm entered, all with inspiring stories. All of them, rightly, emphasised the resilience which enabled them to thrive through the pandemic. It is worth asking, what does it take to be resilient? These firms had many different answers, but common to all is that they began with a resilient mindset. Resilient people are honest about the problems facing them, confident they can be overcome, positive about the prospect of change, and alert to the opportunities change may bring. While they may hold to "traditional values" in the best sense, they do not cling for old times' sake to an artisanal way of doing things. On the contrary, they welcome new technology, harnessing it to enhance the quality of their work, freeing themselves from the mundanities of their job and giving themselves the prospect of greater prosperity and a more enjoyable life.

Resilient businesses plan. They develop strategies which are thought through and clear about some fundamental questions. What is to be achieved? What are the crucial tasks? How will success be measured? What cash and other resources will be needed? What constraints are there, and how can they be overcome?

But they do more than plan; they execute. Law firms are often afflicted by SPOTS: Strategic Plans On The Shelf, but the best of them are as meticulous about execution as they are to the original conception.

## As always, people matter most

Businesses may be likened to machines, but the people who work in them cannot. Every resilient business takes good care of its people. To be effective and settled, employees need a network of harmonious relationships, and a feeling that whatever their job title, they are respected, and heard. Businesses which invest in employee wellbeing are not only more resilient at times of crisis, they consistently achieve superior results.

Underpinning all of this is that resilient businesses think deeply about their values and purpose.

David Maister, the doyen of law firm management experts, proposed these values, and I don't think they have ever been improved upon:

1. We will make all decisions based on putting the clients' interest first, the firm's second and individuals' last. We do not accept people who act in a self-interested way, to the detriment of clients or the firm.
2. We will attain levels of client satisfaction that result in client referral becoming the major source of new business.
3. We will have no room for those who put their personal interests above the interests of their team.
4. We will design a reward system to reflect an assessment of overall contribution to the success of the firm, not just short-term individual performances.
5. We will select, evaluate and remunerate those in managerial roles based primarily on the success of their group, rather than on individual performance.
6. We acknowledge that individual billings may not be the most important measure of an individual's contribution to the business.
7. We will require, not just encourage, everyone to learn and develop new skills. The firm accepts its responsibility to help each individual achieve this.
8. We acknowledge the individual and collective obligation to support through difficult business and personal challenges all colleagues who subscribe to this constitution and conduct themselves accordingly.
9. We will individually and collectively, operate with a "stewardship" mentality towards our junior people, accepting the obligation to coach, mentor and develop those who report to us.
10. We will work actively to deliver the whole firm. We accept a fundamental obligation to create opportunity for colleagues in every practice area, and are willing to be judged on our efforts.
11. Collectively and individually, we will invest a significant amount of time and resource each year on things that will pay off in the future.

In the last two years, COVID-19 has tested our personal resilience to destruction. As we head into another winter, we can at least have confidence that "R" will not stand for "Repeat".

***Stephen Gold was the founder and senior partner of Golds, a multi-award-winning law firm which grew from a sole practice to become a UK leader in its sectors. He is now a consultant, non-exec and trusted adviser to leading firms nationwide.***
***e: stephen@stephengold.co.uk; t: 0044 7968 484232; w: www.stephengold.co.uk; twitter: @thewordofgold***

# Debt solutions and the impact on executries

Anne Hastie and Eileen Maclean report on work taking place in relation to protected trust deeds and sequestration, and make a request to all those acting as executors

Debt, and the Scottish statutory solutions that exist to deal with individual overindebtedness, has the perpetual attention of the Scottish Government and the wider Scottish Parliament.

In 2018 the Scottish Parliament's Economy, Energy & Fair Work Committee refused to approve legislation replacing the common financial statement with the standard financial statement as the statutory common financial tool (CFT) in Scottish legislation. In response, in December 2018 Jamie Hepburn MSP, the Minister for Business, Fair Work and Skills, established the Scottish Statutory Debt Solutions Discussion Forum.

The Forum enables stakeholders, including insolvency practitioners (IPs), creditors and the advice sector, supported by officers from the Accountant in Bankruptcy (AiB), to discuss current issues around Scotland's statutory solutions for personal insolvency and debt management.

## PTD consultation

Following its consideration of the CFT and because of concerns arising therefrom, the committee turned its attention to protected trust deeds (PTDs) at the end of November 2019, conducting a short, PTD-focused inquiry in January 2020.

In May 2020, the committee published its recommendations and the Scottish Government responded in October 2020. A three-stage approach to review, improve and/or change was agreed, starting with introductory round table discussions, which will lead ultimately to a full review of the purpose and functionality of Scottish debt solutions.

Stage 2 saw the establishment of three working groups, tasked with the specific remit of considering PTDs, bankruptcy and diligence. The Society and the Insolvency Practitioners Association (IPA) are represented on group 2, considering certain of the committee's areas of concern regarding PTDs. The discussions are wide ranging, reflecting divergent points of view.

## PTD Protocol

In direct response to the committee's report on PTDs, the AiB, working with the IPA as the foremost regulator of IPs providing PTDs, developed and introduced a new PTD Protocol, introducing operational changes to immediately address some of the committee's recommendations.

Intended to promote good practice, improve transparency and enable trustees to manage debtor and creditor expectations in a PTD, trustees signing up to the Protocol agree that wherever practicable:

- an interim dividend should be paid to creditors 12 months after commencement, and quarterly thereafter;
- should a trustee decide to withhold the debtor's discharge from the PTD, the trustee must first obtain the AiB's agreement; and
- IPs may only accept trust deed referrals from FCA-approved lead generator firms.

To date, eight firms have signed up, but with a reach of more than 80% in terms of the volume of providers.

## Death of a debtor subject to a PTD

The committee took evidence on one specific case in which the debtor had died leaving behind a number of ramifications of an extant PTD for their beneficiaries. Group 2 was asked to consider whether PTD arrangements strike the appropriate balance between creditors and family members when a debtor's death occurs during a PTD.

If a debtor dies during their bankruptcy or PTD, there is no change in the statutory requirement for the trustee to deal with assets of the estate. The trustee is still required to deal with creditor claims ahead of recognising any rights and entitlements of beneficiaries, per s 129 of the Bankruptcy (Scotland) Act 2016. The principle that creditors get paid ahead of beneficiaries or partners is well established – the law recognises that debt is a responsibility and that wherever possible, creditors should be repaid ahead of any individual benefitting in a personal capacity, as a beneficiary. The group agreed that the repayment of debt to creditors ahead of beneficiaries from a deceased's estate is well established in different areas of the law and unanimously agreed that no changes are required to this principle.

## What should executors do?

Group 2 recommended that the Scottish Government publication *What to do after a death in Scotland* be amended to explain the process where a debtor dies while subject to a PTD or bankruptcy. Ideally that wording should make it clear that an executor should check the Register of Insolvencies and the Debt Arrangement Scheme (DAS) register, for details of both the deceased and the beneficiaries, to establish whether any party is subject to insolvency or a debt payment programme before any money is paid out from the estate, to ensure that funds are not released to any party without reference to the trustee. The group has also recommended incorporating this process into legislation to ensure that such a check by executors is mandatory. It would be considered good practice therefore in any executry that this process should be adopted on a voluntary basis from now on.

**Anne Hastie** is a non-solicitor member of the Administrative Justice Committee and represents the Law Society of Scotland. **Eileen Maclean** represents the Insolvency Practitioners Association.

APPRECIATION

# Vincent Connor

17 April 1964-5 October 2021

Vincent Connor was a lawyer and beyond. He undoubtedly developed an outstanding reputation in the field of construction law both in Scotland and Hong Kong; however his contribution to society and life went far beyond the practice of law.

Although his mother passed away when Vincent was only nine, his father Stan (a Gliding Regiment veteran in Palestine, and ultimately a Strathclyde Police chief superintendent), his sister Pauline and brothers Arthur and Tony forged him into the dapper, multi-talented gentleman and lawyer that he became.

Vincent was an academic star from primary school in Kirkintilloch through to Glasgow University, where in 1987 he graduated with First Class Honours. He went on to train as a solicitor with Glasgow firm Hughes Dowdall, and in 1990, not long after qualifying as a Scottish solicitor, pivoted from general civil and criminal law and joined the leading construction law practice of McGrigor Donald in Glasgow. His blend of military-like organisational skill, desire for the theatre of advocacy, and superb relationship handling, ensured that by 1995 he was already a partner.

In 1996 he made partner again, this time by marrying Gillian. They were able to celebrate their Silver Wedding anniversary just weeks before his passing.

As a young boy in the early 70s his ambition was to be a spy. MI5 of course, no doubt influenced by early Bond, and it's fair to surmise that Connor, Vincent Connor, would have excelled in the military or MI5 just as he excelled as a lawyer. Being a lawyer afforded the opportunity to wield his talents as an ambassador, diplomat, and advocate. Courage, opportunity, and a challenge always seemed to define him.

In 1998, despite being at the very top of his game and having a lot to lose by leaving McGrigor Donald, Vincent teamed up with a close friend (your author) to establish a Scottish law firm for the international London law firm of Masons (now Pinsent Masons).

Vincent seized the opportunity. There were only four lawyers at the start, but with his guidance, work ethic, advocacy skills, organisational capability, and relationship nous, it grew rapidly.

Although he made a huge success of the firm's Scottish business, Vincent responded to another call of duty. In 2007 Vincent and Gillian left Scotland for Hong Kong, where he set about becoming a Hong Kong Scot, a Global Scot, and a leader of the Pinsent Masons Hong Kong office.

Apart from developing a stellar reputation as a construction and engineering lawyer in Hong Kong, resolving issues on some of the largest infrastructure projects in the region, Vincent somehow found the time to develop a wider societal contribution. He took on a number of external roles including chair of the International Infrastructure Forum of the British Chamber of Commerce, and honorary legal adviser to the Institution of Civil Engineers in Hong Kong. He sat on the advisory board of the Law Faculty at the Chinese University of Hong Kong. Outside of Hong Kong he was a Fellow of the Institution of Civil Engineers.

A proud Scot, Vincent's contribution to Scotland as a Hong Kong Scot was incredible. He did a huge amount of work in promoting Scotland internationally, and particularly in Hong Kong. This was recognised in 2018 when he was inducted by the First Minister, Nicola Sturgeon, into the GlobalScot Hall of Fame having been appointed as a GlobalScot as early as 2007.

Vincent was also a trustee of the Saltire Foundation, which supports high-flying Scottish graduates in securing international work experience opportunities, and chaired a council of Scottish business people in Hong Kong. He never forgot his first class legal education, and was an ambassador for Glasgow University and its alumni network in Hong Kong. On top of all that, he was a St Andrew's Society committee member, often reciting and singing at Burns Suppers and other events.

Away from the office and his societal contributions, Vincent's focus was on Gillian, and his enjoyment for life and fun was legendary. He was a drummer and vocalist in a gifted amateur rock band, The Basic Lawyers. He enjoyed travelling, hiking, learning Spanish, socialising, singing, and drumming.

Vincent's star qualities held with him to the end. He took his courage to his illness and never seemed to let fear find a path. A Hong Kong Scottish man who made purposeful contributions in all walks of his life, he will be missed by his wife Gillian, his siblings Pauline, Arthur and Tony and their families, his friends, work, and society.

As he was fond of saying: "Make it so!"

*Alastair Morrison*

# ASK ASH

## WFH: one rule for some?

I resent some colleagues still being allowed to work from home

### Dear Ash,

Although our firm has now largely requested staff to return to working in the office full time, there are some colleagues who have been reluctant to do so, and have instead insisted on continuing to work from home. I do not have an issue with this if there are appropriate medical reasons for it; but I do resent having to work a full week at the office while some staff still continue to work from home the majority of the time. I just think there should be one rule for everyone, especially as it is causing tension and frustrations in the office when certain colleagues seem to be unavailable after logging off by 3pm. I am not sure how to make my feelings on this clear without seeming to have sour grapes.

### Ash replies:

The new way of flexible working has been, for some employees, a real positive, with the ability to achieve a greater work-life balance while still maintaining good productivity. Some employers have recognised the need for flexibility as key to attracting and retaining talented staff.

However, the key issue for employers will be to develop policies in order to manage such flexible working patterns effectively to ensure fairness for all staff, and to avoid the resentment which you clearly are feeling at present.

It is important to appreciate that a person merely being in the office from 9-5 is not necessarily as productive as someone doing more flexible hours at home, and for example logging off to collect children but then logging back on after bathtime.

Everyone is different and able to be more productive at different times of the day, and finally even employers have recognised this.

In one job I recall once being advised by a colleague not to leave the office before 6pm, even if it was just a case of browsing the BBC news channel, as this would help to demonstrate my commitment to the firm by still being physically present! Needless to say I chose to ignore such advice and instead ensured I was productive throughout my working day, and yes, sometimes this included logging in after I got home.

I therefore suggest that you focus on your work-life balance, and look to achieve greater flexibility too, if you think that this will help you to be more productive. Employers will no doubt recognise those who are maintaining productivity levels, whether this is while in the office or at home, therefore your efforts will not be discounted and you need to be patient.

### Send your queries to Ash

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

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

## Notifications

**ENTRANCE CERTIFICATES ISSUED DURING SEPTEMBER/ OCTOBER 2021**

**ADAM,** Sarah Jane
**ALI,** Imran Akram
**ANDERSON,** Harris Edgar
**ANDERSON,** Jamie Peter Alan
**BAILLIE,** Kim
**BARLOW,** Kirsten Barlow Hazel
**BASI,** Liz Anne
**CEFFERTY,** Amy Nicole
**FECKE,** Rhona Marie
**FERGUSON,** Catherine Wilson
**GALLAGHER,** Thomas Michael
**GARCIA-FERRES ORELLANA,** Juan Carlos
**GARDNER,** Lauren
**GEMMELL,** Eliott Robert
**GRIMASON,** Carly Amber
**HARKNESS,** Kirsty Amy
**HAY,** Amy Ann
**HAYWARD,** Victoria Louise
**HERATY,** Callum Gerard
**HOFFMANN,** Will Peter
**JACK,** Melissa Eleanor
**KESLEY,** William Alexander
**MACCONNELL,** Emily Catherine
**McFADYEN,** Emily
**McKEOWN,** John
**McTAGGART,** Annabel Mairi
**MALIK,** Sabaa
**MAYALL,** Iona
**MELLOUL,** Salma
**MELVILLE,** Andrew Peter
**MELVIN,** Martin Joseph
**MOHAMMED,** Jena Karen
**NELSON,** James Richard
**NEWLANDS,** Katie Louise
**O'DONNELL,** Clare Marie
**O'DONNELL,** Lisa Nicole
**PANTELI,** Katie Maritsa
**PARKER,** Lauren Elizabeth
**PATON,** Kathryn Elizabeth
**PHILP,** Kirsten Helen
**PRATT,** Emily Patricia
**REDPATH,** Natasha Leone
**ROSS,** Rebecca Louise
**SHAUKAT,** Sohail Ali
**SHEARER,** Jennifer Ethney
**SMITH,** Chloe Laura Jane
**SMITH,** Jamie Moir
**STODDART DURNING,** Samuel George
**TAYLOR,** Lewis Keith
**WALKER,** Emma
**WALKER,** Michael George
**WALLER,** Freddie Charles Neal
**WATSON,** Caroline
**WIDGER,** Rhiannon Mary
**WILKIE-KANE,** Daniel
**WILSON,** Corrine
**WOOLMAN,** Sarah
**YOUNIS,** Ibrahim

**APPLICATIONS FOR ADMISSION SEPTEMBER/OCTOBER 2021**

**ABOUD,** Daniah
**AHMED,** Farhan
**BANAG MONGO,** Anäis Gwéanelle Christine
**BONAVENTURA,** Iona Elizabeth
**BROWN,** Siobhan Catherine
**BRUCE,** Rachel
**CAMPBELL,** Euan Colin
**CARTER,** Emma Susan
**CONNELLY,** Kate
**DRUMMOND,** Lucy Olivia
**DUFFY,** Maureen
**DUNCAN,** Molly Grace
**FERGUSON,** Ross Graham
**HARRIS,** Calum
**HIGTON,** Hannah Ruth
**HOOD,** Emily Mary
**JARROTT,** Gregor Peter William
**KEOGAN-NOOSHABADI,** Arian
**KEOGH,** Colette Judith
**KHOGALI,** Ahmed Shihab Eldin Osman
**LEWIS,** Holly
**LYNCH,** Katherine Alison
**LYNCH,** Lauren Helen
**McCOLGAN,** James Patrick
**McCOURT,** Rachel
**McDEVITT,** Clare Louise
**McENTEE,** Seán Michael
**MACFARLANE,** Joseph James
**McKAY,** Liam James Nicholas
**MACMILLAN,** Ceit Louise
**McNULTY,** Emma
**MASON,** Sophie Jane
**MILL,** Stuart
**MILNE,** Sarah Lucy
**PEARSON,** Kate Jane
**PEDRESCHI,** Lara Claudia
**PHILLIPS,** Melissa Anna
**PRENDERGAST,** Karen
**RAWCLIFFE,** Coral Ann
**SANDERS,** Paul James
**SIMPSON,** Ross James Alexander
**SKELTON,** Corinne Louise
**STEVENSON,** Kate Frances Mary
**TAYLOR,** Danielle
**WHITE,** Nadia Bridia
**YULE,** Kathryn Elizabeth

Law Society of Scotland

# Classifieds



**Raghavendra Muralidhar Gosavi (deceased)**
Would anyone holding or knowing of a Will for the above, who resided at 2 Kirk Road, Beith, KA15 1EQ, please contact Carrick Robb Solicitors, 71 Main Street, Kilbirnie, KA25 7AB, telephone: 01505682408, email: mail@carrickrobb.co.uk

Would anyone holding or having knowledge of a Will by **Edmund Buckley** who resided at Flat 2/1 232 Hollybrook St, Glasgow, G42 8SR and who died on 25 August 2021 please contact Laura Nairn at BTO Raeburn Hope Solicitors LLP, 77-81 Sinclair Street, Helensburgh, G84 8TG, on 01436 671 221 or email: lna@bto.co.uk

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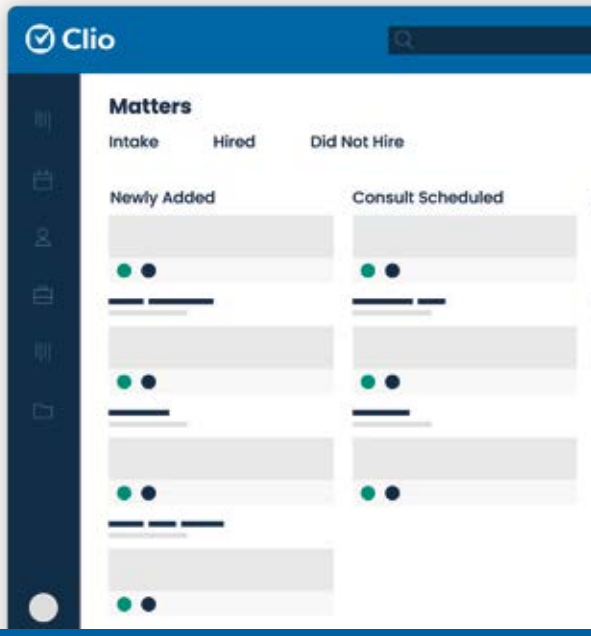


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