Civil solicitor advocate QCs: why so few?
P.16

Roberton: the lessons of recent events
P.18

Family businesses: a special need for advice
P.24

Journal

Journal of the Law Society of Scotland

Volume 65 Number 7 – July 2020

Safe to come back?

As our workplaces open up again, what is expected of employers to safeguard health?

Now available as part of our Westlaw UK offering:

ISBN: 9780414059450
December 2017
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Bankruptcy SULI

Donna W McKenzie Skene

Publishing under the auspices of the Scottish Universities Law Institute.

This new text publishing in the SULI series takes the place of the classic work of McBryde on Bankruptcy. Recent years have seen a raft of new and amending legislation in relation to Bankruptcy, for example The Home Owner & Debtor Protection, changes to Trust Deeds and the introduction of diligence of Land Attachment. This is the core text for practitioners and academics working in this area.

ISBN: 9780414015012
December 2016
£317

Agricultural Tenancies

4th Edition

The Honourable Lord Gill

The Agricultural Holdings Act 2003 resulted in completely new forms of tenancy and amended laws relating to holdings, resulting in a complete overhaul of this major work. There is now increased emphasis on the historical background to tenancies, providing a complete overview of the development of the law and an understanding of its current standing. The text includes up-to-date case law and full appendices of legislation as a second volume, making it the complete source of information.

Following publication this title won the prestigious international award, the Prix d'Honneur of the Comite European de Droit Rural, having been chosen by an international jury from books on agricultural law published in the European Union in 2015–2017.

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Editor

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Jury out?

What to do about jury trials? Of all the issues to have faced the legal profession due to COVID-19, this one is perhaps the most intractable.

The essentials are by now familiar. This month will see the first solemn trials in Scotland since March, but only initial exercises to test social distancing safeguards, each taking up two or three regular courtrooms plus other facilities. Meanwhile Lord Carloway, in a statement which praised the courts, and court users, for progress on other fronts, issued a stark warning that proposals put forward to facilitate more trials amounted only to "tinkering at the margins" of a backlog that could reach 3,000 cases by next March.

While not calling for juryless courts, the Lord President was clear that a "political solution" will be required. But the legal profession, and not just defence lawyers, appears united that the jury system is sacrosanct, if possibly with fewer jurors in less serious cases. "If we were just safeguarding our incomes, we would be pushing for judge-only courts," is the message. "But the principle of keeping the system is more important."

At the same time we cannot overlook that justice delayed may end up being justice denied. For accused, particularly if on remand, human rights issues will come into play sooner or later, and Holyrood cannot legislate those away. Complainers and others affected will also suffer the more if cases are left hanging.

Is the problem essentially COVID-related, or was there already a serious backlog due to longer term underfunding, as some allege? Either way, promises of extra money, if forthcoming, would not in themselves provide a solution. Logistical issues remain.

A proposal currently being promoted is "Nightingale courts", borrowing from the name of the temporary hospitals set up to prevent the NHS being overrun at the height of the pandemic. Back in April the Scottish Government suggested the use of non-court buildings was unworkable due to practical difficulties, though in a paper in late May the Society was still arguing it should be explored further. It is regrettable that we appear to be no nearer a decision on what can be achieved, let alone any action on this front, when some additional provision is almost certain to be needed, whatever else is done.

It may turn out that, as with the schools, something like full capacity can be achieved sooner than was being predicted only recently. But even on the best case scenario for control of the virus, special measures will be needed for an extended period to tackle trials already pending. Unless a workable alternative is agreed, and urgently implemented, constitutional tradition may find itself in opposition to practical human rights.

Contributors

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

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.65 NO.7 – JULY 2020

Perspectives

Regulars

Features

Briefings

Help from the Scottish Solicitors' Benevolent Fund: Page 26

In practice

ONLINE INSIGHT

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

White privilege: what should we do?
The Glass Network founder Drew McCusker believes that white members of the profession need to take action in relation to racism – by celebrating diversity and actively dismantling institutional racism.

Workplace harassment: the third party issue
Sam Middlemiss considers the law on liability for sexual harassment in the workplace by non-employees, in the context of a Government Equalities Office consultation on possible reforms.

Territorial scope, again: *Lawson* revisited
The latest case on the territorial scope of UK employment law offers an opportunity to examine the correct approach to a 2006 House of Lords case on which doubt has since been cast, Kieran Buxton argues.

Copyright, charities and creative commons
Fergus Whyte offers a summary of the things that charities might want to think about in relation to copyright generally and in applying creative commons licences to their intellectual property.

OPINION

Thembe McInnes

As Black Lives Matter raises the profile of BAME issues, in what senses should the colour of a person's skin matter in the Scottish legal profession? Are there things we need to become more comfortable with?

Does it matter that I am Black?

As a society our first instinct is to say no, of course it doesn't. We tell our children that it doesn't matter what colour their skin is, that kindness and love are all that matter. Our universities are melting pots into which students of diverse ethnicity, race, gender and socio-economic background are welcomed in the hope that they emerge with a wealth of knowledge, experience and friendship. Our graduates embarking on their careers are reassured that employee selection is about competency, demonstrable experience, behaviours and cultural fit. Race does not come into it.

We develop our CSR agendas, our personal development programmes, our business development networks, and our people to reflect the culture of our business. Are we merely providing our unconscious bias a warm blanket under which to take cover? Because what do we mean by culture and cultural fit? Do we mean a culture where race doesn't matter, where we don't see colour? If so, does it follow that we also don't see the challenges and limitations faced by people of colour?

As lawyers we are perhaps more cautious in our discussions, as we are aware of how easily a word can be misconstrued. So, we steer away from these sometimes difficult and almost always awkward situations. We strive for equal opportunity: legal education and qualification are certainly levellers, but social class, private education, family connections, access to opportunities and legal work experience still heavily influence the path to the profession. While there has been an increase in the number of BAME lawyers in Scotland and a more general openness to diversity within the profession, we need to see that race does matter, and we all need to get comfortable talking about it.

This reticence to be open is not exclusive to white peers. I know that in my effort not to stand out more than I already do, my accent has been anglicised, my Zimbabwean expressions softened, and my natural Afro has not been seen since 1995! I have let clear injustices go unchecked as I have been afraid of impact on my career. I have had to laugh off the "my tan will never be as good as yours" banter, as calling people out on it would be laughable. But would we chuckle in the same way if a male counterpart compared his chest size to a woman's?

I don't want to be seen as the "angry Black woman" (my kids may argue they often see me as one!), but I need it to be OK to be the angry Black woman. I need it to be OK that you don't know how to pronounce/spell my name. I need it to be OK for prospective law students to go to a school where family heritage and private benefactors are not a thing. I need it to be OK for invitations to networking events to be sent regardless of faith. Presence is surely more important than the contents of the glass in hand.

I need everyone to get comfortable being uncomfortable. As legal professionals, we need to own our lack of understanding and experience. Because it is in this space that we listen, we learn, and we begin to empathise. And when we know better, we do better. Our population is changing; BAME culture is forming an intrinsic thread in the tapestry of being Scottish. So too it should be reflected in the discussions, opportunities and progression of our BAME solicitors. Our profession needs to acknowledge that diversity and inclusion mean nothing unless we act to engage more with our BAME peers.

So, does it matter that I am Black? Yes. It matters because despite the challenges, I am here. I am in that collective of lawyers; no longer is it an exclusive club. The Law Society of Scotland's *Profile of the Profession* in 2018 gave real insight into the issues that BAME solicitors deal with, and as more people of colour share their experiences, we see there is still work to be done. The steps the Society is taking to address the imbalance of representation need to be replicated across the profession, which must persevere in recognising and removing the barriers to entry and progression that BAME solicitors face.

We can then comfortably promote our diversity and inclusion, knowing what they really mean. Our future lawyers will be better placed to recognise and identify role models, to connect with the culture of our organisations, to see themselves and their communities represented in the profession. As we celebrate 100 years of women in law I am optimistic that BAME lawyers too can take hope that in the years to come, the Scottish legal profession will be able to celebrate its diversity and inclusion knowing that it didn't just learn about the Black Lives Matter movement: it acted.

Thembe McInnes, solicitor.
The views expressed are personal.

CORRESPONDENCE

Do we go back?

What a very thought provoking editorial in the May Journal, and well done in getting the magazine out there online.

It made me wonder why would we want to return to the BC (Before COVID-19) era and go back to printing out a magazine, then sending it physically to members. It all seems a bit passé.

I have been working from home for the duration and have found it a very enlightening and positive experience. I have learned a lot from it and will be putting it into practice as a practitioner and, as an employer, I will certainly be discussing homeworking and flexible hours with the staff when we return to work.

I now strongly believe in homeworking, but I also strongly believe that isolation is a terrible thing, so for most people there would have to be flexibility.

I think we have to cope with the current terrible situation, but we have to set out to learn from it. There have to be positives.

Look at what reduced traffic of all sorts has meant for the environment. Do we really have to travel to meetings? Yes, I am sure we do for some, but all? I think not. We have been making extensive use of video calls of various types to deal with clients. It really works and has been generally welcomed especially by elderly and vulnerable clients.

It also made me wonder why Law Society of Scotland inspections could not be done remotely. If my cashier can work from home, then surely a Society inspector, given remote access, could inspect my cashroom and client files.

Could the Society's monthly meetings be done by way of video? If Boris could run the country from isolation using videoconferencing and emails... [They are now – *Ed*]

And just so you don't think I am attacking the Society, well done to them for their online CPD.

I appreciate that there will always be advantages to hard copy in some instances, and to turning up to meetings rather than videoconferencing, but should these not be the exceptions post-COVID?

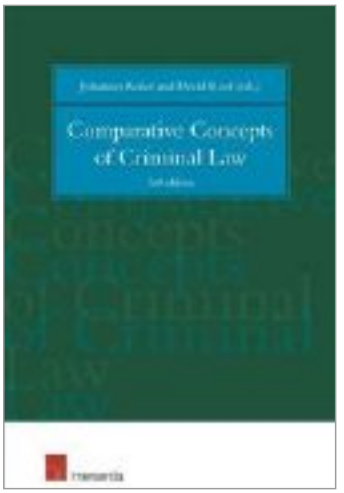
As we start the long process of coming out of the COVID-19 era, I put out a call to look for what we can learn from it and how we move our businesses forward in terms of efficiency and delivery of the profession's essential contribution to our society.

Archibald J Millar, MacRae Stephen & Co, Fraserburgh

BOOK REVIEWS

Comparative Concepts of Criminal Law 3rd edition

KEILER AND ROEF (EDS)
INTERSENTIA
ISBN: 978-1780686851; €89 (E-BOOK €89)



Scots lawyers are natural comparative lawyers. No other bench or bar in the common law world so systematically refers to decisions of other courts in criminal matters.

There is value, however, in going beyond *ad hoc* comparative law surveys. This work seeks to do so, by examining how different jurisdictions understand and apply key concepts of criminal law. It surveys many, but focuses on three fascinating comparisons: England & Wales (exemplifying the casuistic and result-orientated common law tradition), Germany (criticised as concept-driven and excessively formalistic), and the Netherlands (the authors take some native pride in its pragmatism and practicality).

The book occasionally becomes a little too theoretical, but comes into its own in the chapters exploring the fundamental concepts of *actus reus* and *mens rea*, commission and omission, causation, justification and excuses, inchoate offences, and forms of participation. The last two are the most rewarding for the criminal lawyer.

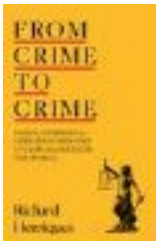
If there is a weakness, it is a failure to recognise that focusing on substantive criminal law gives an incomplete picture. A chapter on sentencing policy and practice in future editions would cure that.

Scots lawyers will be comforted that our time-honoured approach is the right one.

Paul Harvey, advocate
For a fuller review see bit.ly/2VFqyuh

From Crime to Crime

SIR RICHARD HENRIQUES
HODDER & STOUGHTON
ISBN: 978-1529333480; £25 (E-BOOK £12.99)



"Written in a sparse but immensely readable fashion, this book offers a ringside view on some of the most high profile and important cases... before the English courts."

Read David J Dickson's review at bit.ly/2VFqyuh

The Little French Recipe Book

JACKY DURAND
HODDER & STOUGHTON: E-BOOK £12.99 (HARD COPY PENDING)

"This book is an utter delight... laden with vignettes of life in cooking and recipes".

This month's leisure selection is at bit.ly/2VFqyuh
The book review editor is David J Dickson

BLOG OF THE MONTH

gla.ac.uk/schools/law/

The University of Glasgow's School of Law project, 100 Voices for 100 Years, features some remarkable personal accounts from women who have overcome barriers to pursue a legal career, not least Society Council member Naomi Pryde.

"My step of courage is to share my story", she begins, but her grit and determination in the face of adversity show through at every step. Now a successful litigator, is it all rosy? "In a word: no." Bias, conscious or not, still rears its ugly head. But they'll learn.

To find this blog, go to bit.ly/2VCRgn5

Dead bored, live claim

Beware the office bore, they used to say – now employers may need to be alert to "bore-out".

A tribunal in Paris last month found against perfume company Interparfums in a claim by former manager Frédéric Desnard that his job was so dead beat he ended up with depressive bore-out – the opposite of burnout.

Desnard alleged that after being stripped of responsibilities he was given only menial tasks like letting in the plumber at his boss's house, over a four year period he described as a "descent into hell" which ended with his being made redundant after taking sick leave.

He blamed anxiety, depression and even an epileptic fit on his being left with nothing to do.

The company's argument that he had never complained about his situation did not prevent it being at the wrong end of a €40,000 award.

It's said to be a common problem in France, with people being unwilling to take the risk of changing jobs. But this is its first judicial recognition.

PROFILE

Sheila Webster

Head of Dispute Resolution at Davidson Chalmers Stewart, Sheila Webster has been a Society Council member since 2017 and has just been appointed to the board

1 What made you pursue a career as a solicitor?

Even in primary school, I liked to be the narrator in presentations – some would say I still like talking. I always enjoyed debate, so law was a natural choice for university. It was that or medicine and I never could stand the sight of blood.

2 What do you enjoy most about being a Council member?

Meeting Council members from all types of practice, and from across Scotland and further afield has been a highlight – I've learned so much about concerns in different practice areas. I've also learned so much more about the immense work done by the Society team – I'm in awe.

3 What are you most looking forward to as a board member?

Having been on Council for three years, being more involved in operational decisions will be really interesting and challenging – never more so than in the current climate.

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

Future regulation of our profession will continue to be an issue and the Society has much to contribute. COVID-19 has exposed the difficulties for our courts of years of cuts and I hope this is an opportunity to rebalance. I am alarmed about the crisis in recruitment for those in criminal legal aid – the issues can really only be addressed by improvements in the legal aid system. Finally, I'm impressed by the work to ensure our profession is diverse, with equality at the centre of what we do – that will remain a big issue.

Go to bit.ly/2VFqyuh for the full interview

WORLD WIDE WEIRD

① Stuck on you

bit.ly/2Zf7fkk

Egyptian honeymooners, stranded in Turkey as they returned from Mexico in mid-March due to COVID-19, found only one place they could travel to – the Maldives. But even its appeal is fading by now.

② You can't always get...

bbc.in/3dE9niQ

The Rolling Stones have issued a "cease and desist" letter to Donald Trump for playing one of their hits at a rally without permission – but they would not be the first to have had such letters ignored.

③ One who didn't get away

bit.ly/2BiqCsW

A man has been arrested in Harrisburg, Louisiana on a charge of criminal damage after being caught on video swimming in an aquarium at a Bass Pro Shop (outdoor activities suppliers).

TECH OF THE MONTH

Paprika

iOS, Android – $4.99

A colleague recommends Paprika as an app to help you save recipes from anywhere on the web, organise them, make meal plans and create grocery lists.

paprikaapp.com

PRESIDENT

Amanda Millar

For members, the Society is now focusing on practical help with issues arising from COVID-19; with Government and others, we are constantly attempting to engage to help ensure the best decisions in the interests of civil society

So ... it's July, it's the summer holidays and colleagues with kids should be heading off somewhere or dealing with the challenges of having them at home. Those without would be covering for them and waiting for schools to return. But this is 2020, we are in the middle of a global pandemic and for the last three months we have all been juggling work/domestic life without regular schooling or office access, while concerned about colleagues, technology, pastoral support and uncertainty over the future shape of business.

The Society has become increasingly aware of the practical issues affecting many members during this time. A recent series of round table events with members focused on these areas, giving us insights into the challenges as well as allowing Society staff and participants to offer practical help and advice.

This month, and likely beyond, we are meeting with employers and firms to give feedback on the challenges, while offering some solutions where we can. We have also set up lunchtime drop-in (virtual of course!) sessions for parents/carers to share experiences and offer and receive support. The next session is planned for 30 July, with an employers' session on 22 July. For more information or to book a place, contact heathermckendrick@lawscot.org.uk. As the challenges around the pandemic, schooling and childcare develop, we are adapting our support. Our free-to-join mentoring platform (www.lawscot.org.uk/members/career-growth/mentoring/) may also be of interest. Sometimes it's good to be able to confide in someone outside your immediate colleagues.

We are also aware of concerns from our newest members, trainees. Some have been furloughed, with associated concerns about qualification dates and career options. Firms with trainees are also concerned about effective remote supervision etc. There is a blog and FAQs on many of these issues from careers and outreach colleagues on the website: bit.ly/LSSteefurl

In terms of delivery of the sustainable and viable profession I referred to last month, we mustn't forget future generations. The inclusive and varied backgrounds of the Scottish solicitor profession have been highlighted by the recently published #OneProfessionManyJourneys Role Models campaign (see bit.ly/LSSjourneys), designed particularly to help young people see that a career in law could be for them. Due to lockdown this has initially been promoted via social media, with positive feedback. We look forward to engaging in person in schools, although we are open to virtual engagements too. We have become quite experienced at these, having delivered the final of the Donald Dewar Debating Tournament remotely. Congratulations again to Peebles High, this year's winners.

Communication first

Now that we are well into phase 2, and hopefully have reached phase 3 of moving out of lockdown, the Society has produced more guidance for members in relation to opening up. This can be found in the business support section of the website. I have seen first-hand the work of the Society and the adaptable, capable, civic minded Scottish solicitor profession as they pulled together to deliver support to members, clients, Government and stakeholders in these most challenging times. We continue to engage collaboratively and are delighted to see many stakeholders deliver flexible solutions to the urgent challenges – remote summary trials and legislation to allow for remote notarisations being but two of these. This has only been achieved through sharing of knowledge, flexibility, and open-minded collaboration in the interest of the public and civil society.

Collaboration has also continued in work not directly related to the pandemic. Recent weeks have seen us deliver trauma-informed training for practitioners in collaboration with Scottish Government, Scottish Women's Aid and Scottish Women's Rights Centre.

Unfortunately, while the Society continues to engage proactively and regularly with other organisations, the speed of change and pressure to make decisions can sometimes make communications from those organisations a casualty. Society staff and I continue to emphasise the importance of engaging at an early stage and with openness around changes to the processes and procedures on which our legal system is based. However, that is not always happening. Solicitors are a vital part of our justice system and Scottish civic society, and as your representative body we will make that case at every opportunity. If you do become aware of a change in process which is of concern as causing significant issues for your clients, please get in touch either via your regional Council member or directly to myself or other colleagues at the Society.

While I'm on the subject of clear and consistent communication, I'd like to congratulate trainee solicitor Emily Campbell, this year's winner of the Innovation Cup with her idea for a template to agree how and when solicitors communicate with their clients. As the judges recognised, failures in communication are a common cause of complaints and claims against the Master Policy, and Emily's idea to address that by setting clear expectations from the outset is very much to be welcomed.

I look forward to more clear communication and effective collaboration in the interests of us all.

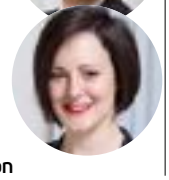
Amanda Millar is President of the Law Society of Scotland – President@lawscot.org.uk Twitter: @amanda_millar

People on the move

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

To advertise here, contact
Elliot Whitehead on 0131 561 0021;
elliot@connectcommunications.co.uk

ADDLESHAW GODDARD, Edinburgh, Glasgow, Aberdeen and internationally, has recruited two new partners to join its Infrastructure, Projects & Energy (IPE) practice: **Suzanne Moir**, former partner and head of Projects at DWF, who will be based in Edinburgh, and **Martin Stewart-Smith**, formerly with BRACEWELL LLP, who will be based in London.



BLACKADDERS LLP, Dundee and elsewhere, has announced the following promotions: to legal director, **John Dargie** (Private Client team, Aberdeen) and **Hazel Anderson** (Rural Land & Business team, Dundee); to associate, **Lucy Smith** (Residential Property team, Dundee) and **Jacqueline Tainsh** (Private Client team, Glasgow); and to senior solicitor, **Azeem Arshad** (Commercial Property team), Glasgow. IT director **Kevin Moran**, has been promoted to chief information officer. In addition, **Fiona James**, a trainee in the Aberdeen Rural Land & Business team, has qualified as a solicitor and will continue working in Rural Land & Business.

COULTERS, Edinburgh, has appointed **Wilson Browne** as legal director in its conveyancing arm. He joins from DRUMMOND MILLER. **Mike Fitzgerald**, previously a partner at ADDLESHAW GODDARD, was recently appointed executive chairman.

DIGBY BROWN LLP, Glasgow, Edinburgh and elsewhere, intimate that with effect from 31 March 2020 **Sue Grant** retired from the partnership.

Caroline Pigott, an IP solicitor and chartered trade mark attorney, has joined HGF LTD, patent and trade mark attorneys, Edinburgh, from ANCIENT HUME LTD.

RAEBURN CHRISTIE CLARK & WALLACE LLP, Aberdeen, Ellon, Stonehaven, Inverurie and Banchory, has promoted **Allan MacKenzie** to associate in the Commercial Property department.

STRONACHS, Aberdeen and Inverness, has promoted **Kirsten Anderson** of the Private Client team, **David Marshall** in Agriculture & Rural, and **Michelle Sharp** in Family Law, all to senior associate. In addition, **Karen Leslie** will take on the new title of debt recovery manager.

WYLLIE & HENDERSON, Perth has promoted **Grant Peter McLennan**, solicitor to associate with effect from 18 June 2020.

Denovo during lockdown

Our team have responded superbly to the challenge of working under lockdown – and to meeting clients' needs that have arisen

Batten down the hatches?

It's safe to say that the past few months have been tough on all of us. Here at Denovo we were worried about everything you would expect from a business perspective – our team's safety and ongoing wellbeing, our clients' ability to get the best out of our product while working in new environments, the thought of new business drying up, and the potential, gruelling re-forecasting process. These were all factors weighing heavily on the minds of the people leading our business.

At the start we basically had two options – batten down the hatches and weather the storm, or use the time unceremoniously gifted to us to make our product, service and overall offering even better! We chose the latter.

Getting to work... quickly

Perhaps unsurprisingly, given the product and services we offer, lockdown has been busy at Denovo HQ (or home as we now call it). Law firms up and down the country had to adapt, and quickly. That was our cue to step up and do the right thing – support, free online training tools, deferred payment plans for new clients and anything else firms needed to keep them operating, were put in place swiftly.

Internally, we were lucky. Although we've always been pro-remote working, our team have primarily been based in our Glasgow office at Spiers Wharf. However, when the Government gave the order to lockdown, that's exactly what we did. The move to full time remote working was as seamless as it could be. All the tools we needed were at our disposal. Anything we didn't have was sourced. Communication channels for this type of working, although already in place, weren't as familiar to some, so guidelines were shared and anyone who needed additional support got it. The business even helped people pay for bikes to keep them active. For a business of our size, you couldn't ask for much more.

Time to accelerate

Beyond ensuring our team and clients were all OK, we wanted to do more. This was our time to accelerate our plans to develop new features and integrate new platforms into our software to meet our customers' needs. So that's what we've been doing.

DocuSign

We recognised that the logistics of signing in ink were fast becoming more and more impractical. With over 44% of the UK working from home, many of whom may remain that way when things get back to "normal", and the limitations on access to printers, scanners and post, we have fast-tracked our plans to integrate DocuSign into our software. Firms can now complete contracts, approvals and agreements in minutes rather than days.

Smart events

Smart events have been designed with workflow-style automations in mind. Without the constraints of a path-style workflow, we can bundle up a variety of automations into selectable options within CaseLoad, giving the automation you would typically find in a workflow but shrinkwrapped to be deployed as and when you see fit and not when a workflow dictates. We can bundle up a whole variety of actions/processes into smart events for you and tailor them to your needs.

Bundledocs

We were told we needed to find the best way for lawyers to access documents quickly and easily on the move. We found it. Now you can take documents from anywhere – your folder, the boot of your car or our case management system, and Bundledocs will organise them into a neat, numbered, indexed and sectioned booklet in minutes. Instantly ready to save, share or print. No matter how big or small, you can change in seconds. It can store all your court documents in one place, allowing you to finally get rid of that paper case file and replace it with a tablet, wherever you go. It's so simple to use, saves you time and is massively efficient.

Superstars

In times like this, adversity always shows you who the true "stars of the show" are and who is maybe just there to collect a pay cheque. The way the Denovo team have responded to one of the most challenging times we will face in our lifetime proves what we already thought – they are all superstars! This period will be an invaluable lesson for the future and will shape how we operate our business in the short, medium and long term.

I am lucky and can't wait to see what our team does next.

If you want to learn more about some of the incredible work our team have been doing recently and how to begin a partnership with us, visit www.denovobi.com, email info@denovobi.com or call us on 0141 331 5290.

2019 VS 2020

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Just back to work?

As workplaces begin to open up again after COVID-19, all employers, including legal practices, are facing some key questions and challenges. Alison Weatherhead looks at some of the issues as we enter the "new normal"

Where we are

On 11 May 2020, the UK Government published its COVID-19 Secure Guidance, setting out its measures for a safe return to work. Guidance from the Scottish Government followed on 29 May, and we now have tailored versions for use across eight of Scotland's key industries.

The basic tenet featuring in all of this guidance is that (at least for now) two metres of social distancing should be maintained wherever possible. As well as this, employers must carry out a risk assessment and, in doing so, consult with their workers, and any relevant trade union, on the measures proposed. Whilst it is not a requirement to publish the risk assessment, unless there is a good reason not to (for example, the presence of commercially sensitive information), the UK Government expects employers to do so for reasons of transparency.

As clients continue to grapple with what this guidance means for them, below are some of the trickier questions they and practitioners should have in mind moving forward.

Do employers need to provide PPE?

If an employer's risk assessment indicates that PPE is necessary, they will need to provide this to staff and ensure that it fits properly. The guidance states, however, that it is unlikely you will need to implement the wearing of PPE, face coverings or face masks, unless PPE was mandatory in your workplace prior to the pandemic.

As such, for most employers, it is unlikely that PPE will be a necessary consideration. If, however, you find that your employees feel more comfortable wearing face coverings or masks, you should not necessarily discourage them from doing so, and you may even find it helpful to implement this as a temporary, reassuring measure.

What should employers do if an employee calls in sick with COVID-19 symptoms?

In the first instance, employers should speak to the employee, and ascertain who, and what areas, they had contact with in the workplace over the preceding days. They should then speak to those members of staff, and analyse the workspaces, as well as any CCTV they may have in place. Public Health Scotland's guidance does not suggest closing the workplace, but employers should carry out rigorous cleaning.

Employers should err on the side of caution and treat situations where an employee describes COVID-19-like symptoms, but has not necessarily tested positive, in the same way as a positive test result. You should tell the individual to stay home and to self-isolate for seven days. Ultimately, in both cases, the employee's return to the workplace should be based on the time that has passed since the onset of their symptoms, the extent to which there has been a reduction in those symptoms, and of course whether they have recovered from the illness generally.

What should employers reveal if an employee is diagnosed with COVID-19?

Employers are not obliged to inform the rest of their staff that a colleague has been diagnosed with the virus, but it would be good practice to do so. The Information Commissioner's Office (ICO) states that you should inform your workforce of any positive cases and, as an employer, you have a duty to ensure the health and safety of your employees.

"It is clear that we may never see an absolute return to what was there before, particularly where office working is concerned"

Since personal health information is special category data under GDPR, employers must take care to preserve the individual's privacy as much as possible and not name them directly. In reality, employees will likely be able to identify the individual, and so employers should remind their staff that they must not speak to the media and, in particular, should not name anyone who may have the virus, or discuss the events publicly, for example on social media.

What about informing the local health authority?

The ICO has confirmed that data protection law will not prohibit employers from sharing this information with authorities for public health purposes, or with the police where necessary and appropriate. In terms of whether they *should* disclose in this way, the ICO has made clear that employers must also consider the risks to the wider public where they choose *not* to share this information.

Are employers allowed to make temperature checks?

A number of employers are reported to have implemented temperature checks in the workplace. If a temperature reading is taken, but is not recorded against an individual employee or visitor, for example for compiling a report that includes the data as anonymous, then this may not constitute personal data, in which case the GDPR will not apply.

Note however that the GDPR sets high standards for data to be anonymous. In many cases, it will not be necessary to retain temperature readings once satisfied that the individual does not have a high temperature, and the information can therefore be destroyed immediately, or not recorded at all.

If a temperature reading is taken, and then recorded against an individual employee's file, or used to allow or deny access to a building, this will constitute personal data and the GDPR will apply.

As this is health data, you may only process this information on certain specific grounds under both GDPR and the Data Protection Act 2018.

There are only two relevant grounds on which you could rely in this situation. The first is that processing is necessary for the performance of rights and obligations in connection with employment. Given that neither the Government nor the World Health Organisation recommends taking employees' temperatures, it will be difficult (but not impossible, depending on the circumstances) to argue this processing is necessary.

That leaves consent, and there are well-documented difficulties with consent in the context of the employer/employee relationship, due to the imbalance of power. Employers adopting temperature checks should be aware that they may find it difficult to show employees freely consented, if they will not be admitted to the workplace if they refuse. For these reasons, temperature checks will generally only be appropriate in higher risk settings such as healthcare.

In deciding whether to initiate a programme of temperature checking (or, for that matter, other COVID-19-related data processing activities, especially those that entail processing of sensitive personal data such as health, race or ethnic origin), employers need to follow the general compliance requirements of the GDPR. This means carrying out a documented data protection impact assessment to ensure that the collection and processing of temperature data complies with the core GDPR requirements. These include:

- being transparent about how you will provide employees with information about the data processing;
- having a clearly defined business purpose for the processing, and ensuring that the data will not be used for incompatible business purposes;
- ensuring the data is adequate, relevant and the minimum necessary to achieve the purpose (which could be problematic if the benefit of taking temperatures is unclear);
- accountability (including documented policies and processes); and
- enabling individuals to exercise their rights.

In the context of testing employees for COVID-19, the ICO recommends considering the specific circumstances of your workplace: what type of work do you do, what type of premises do you have and is working from home possible? You should also be clear about what you are trying to achieve and consider whether personal information is necessary for that purpose.

"If an employee does not want to come into work because of genuine fears, employers should take these concerns seriously"

Can an employer monitor how its employees move around the workplace?

The ICO has confirmed that monitoring (for example, using thermal cameras or other types of surveillance) is acceptable, as long as it is necessary in the circumstances, proportionate, and in line with employee expectations. On 18 March, the Surveillance Camera Commissioner (SCC) and ICO updated the data protection impact assessment for surveillance cameras and issued new guidance for use in this context. Employees must always be informed before any such monitoring takes place, and its use must be proportionate, necessary and justified by a legal basis.

Recognising employee concerns

What if an employer brings in the necessary measures indicated by their risk assessment, and implements the correct processes, but some of their employees still refuse to come to work? The reality is that this will

happen in some cases and employers need to be prepared.

If an employee does not want to come into work because of genuine fears relating to COVID-19, employers should take these concerns seriously. ACAS guidance states that, where possible, you should allow the employee to work remotely or take time off work as holiday or unpaid leave. You should also remind employees of any support systems you have in place, such as an employee assistance programme. In particular, employers should consider mental health, and whether the employee might be suffering from anxiety or stress resulting from the pandemic. In some cases, this will exacerbate an existing condition, which may qualify as a disability under the Equality Act 2010. Where that may be the case, you must be mindful of the duty to make reasonable adjustments.

On a basic level, as a first port of call, employers should have an open conversation with the employee to seek to understand, and listen to, their individual concerns. If they fall into the category of someone who is vulnerable or extremely vulnerable, or indeed if they live with someone who does, this will also require special consideration. In these cases, you should pay particular attention to the risks involved, and consider adapting duties to facilitate homeworking. If you have made use of the job retention scheme and furloughed employees in these categories prior to 10 June, you should consider keeping them on furlough leave for the time being.

If an employee unreasonably refuses to attend work, however, and cannot work from home, you may consider disciplinary action. You should ensure you deal with similar cases consistently, as with any disciplinary matter, whilst also taking into account the particular individual's circumstances and reasons for refusing to attend.

What special protections do employees have in this context?

Under ss 44(1)(d) and 100(1)(d) of the Employment Rights Act 1996, employees have the right not to be dismissed or subjected to any detriment on the ground that "in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work".

What were, prior to the pandemic, seldom-used provisions will no doubt be the subject of much employment litigation over the coming months and indeed years. With both subjective (reasonable belief) and objective (circumstances of danger) elements, it will be interesting to see how the tribunals interpret these provisions in light of the pandemic, particularly where the employer is following both public health and governmental guidance in encouraging and facilitating a return to work.

Employers will wish to do all they can to avoid escalations of this kind, particularly as these provisions are but one of a number of potential avenues of protection available to employees in this context. Employers can do this by engaging with their employees throughout the process, listening to them and making them feel listened to, and considering alternative arrangements where possible.

The new normal

Notwithstanding the efforts being made to facilitate the return to work, it is clear that we may never see an absolute return to what was there before, particularly where office working is concerned. Flexible working, and working from home in particular, has been propelled into the spotlight in a way that might otherwise never have happened. Certainly, in Scotland, "working from home where possible" is set to remain the default position for the foreseeable future.

What was arguably once seen as a "treat" became a lived reality for millions overnight. In perhaps the biggest social experiment of all time, employers have seen flexibility boost productivity, with some of the world's largest companies announcing that their employees need never return to the office. Technology has come into its own, allowing meetings, webinars and even coffee catch-ups to take place straight from the nation's livingrooms, and there are already reports that almost half of workers want to continue with flexible working after COVID-19 restrictions are lifted. The question of when schools go back on a full time basis will also have a huge knock-on effect on the nation's working patterns, in the office working sphere as well as beyond.

While employers can implement various interim changes to help navigate a safe and happy return to work, ultimately they will need to look at what permanent changes they must make to bring in the new normal many employees will be expecting.

Alison Weatherhead, partner, Dentons UK & Middle East LLP

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The silk road: a modern journey

Few civil solicitor advocates have as yet taken silk. Why is that? Tony Jones QC recounts his own journey to becoming senior counsel, and assesses how the changing litigation scene may affect others on the path

Just over two decades ago I wrote an article (Journal, April 2000, 22) that I intended to afford some guidance to those considering qualifying as a solicitor advocate, as I had just been introduced as one myself. It is fair to say that things have changed a little over the last 20 years, and I thought it might be time to offer aspiring solicitor advocates the benefit of my experience gained during my journey to taking silk, as well as looking ahead to the changes we might expect to be coming our way.

It surprises some that the criteria for being awarded the rank and dignity of senior counsel are the same for solicitor advocates and advocates. One is assessed on one's ability to present highly complex and challenging cases in the supreme courts of Scotland. The full guidance on the criteria can be found on www.scotland-judiciary.org.uk .

In 2000 the Scottish Government published a research paper which recorded that in 1996 there were 87 solicitor advocates. Today the Law Society of Scotland's website indicates that there are now 201 civil and 152 criminal solicitor advocates. There remain approximately 460 practising members of the Faculty of Advocates, of whom approximately one fifth are Queen's Counsel. One might conclude that there has been significant progress in expanding consumer choice as to who they instruct to conduct advocacy. Yet only six solicitors have taken silk as civil solicitor advocates. Why is that?

Out of court

One of the reasons probably lies in practical difficulties surrounding the practice of civil advocacy as a solicitor. Historically, it has been difficult for solicitors carrying their solicitor work to find the time to appear in proofs and procedure rolls. This is one of the reasons that Brodies LLP founded an in-house set of dedicated solicitor advocates called Advocacy by Brodies. We want to retain talent by facilitating those who want to develop a career focused on advocacy to do that at the firm.

Another reason why there are fewer civil silks on the solicitor side of the profession may be the reduced opportunities to appear in court. It is fair to say that when I started conducting advocacy in the 1990s there was significantly more appearance work than there is now. Indeed, in the early 1990s almost every aspect of a court action required to take place before judge. An example was "tabling", whereby any ordinary cause sheriff court action called before a sheriff to "table", a pointless hearing at which nothing happened other than that the defended case was noted as having "tabled". Successive changes in procedure have seen less and less day-to-day oral civil advocacy happening. The packed courts and the lengthy motion rolls of old in the Outer House had been a source of experience for many members of the junior bar as well as a valuable source of income. Today, many litigators find it difficult to get time on their feet in a civil court at all.

Getting the breaks

Having gained significant experience in the sheriff courts, qualified as a solicitor advocate and run my first Court of Session proof, I was fortunate to move to a large insurance firm where my path to seeking silk became clear. Also, the introduction of personal injury procedure in the Court of Session led to an upswing in interlocutory appearance work while everyone began to get used to how the rules should work. At the same time, I was able to expand my commercial practice as well as acting in many professional negligence and construction disputes.

It is fair to say that the impact of Faculty's prohibition on "mixed doubles" had an unexpectedly positive impact on my route to taking silk. The rule prohibited members of Faculty from appearing with solicitor advocates. The term "mixed doubles" came about because the then Dean introduced the rule during the Wimbledon fortnight. The fact that it was not possible for clients to instruct a senior with whom I could appear resulted in many clients choosing to continue instructing me alone. This meant that I was privileged to conduct some interesting and complicated cases, usually against junior and senior counsel, myself. Had clients been afforded the opportunity to instruct "mixed doubles", I am not sure that I would have been favoured with the opportunity of conducting so many cases on my own. However, I was very pleased when the rule was revoked and I had the opportunity to work with a number of silks.

If the solicitor branch of the profession wishes to retain its advocacy talent, then it must offer sufficient opportunities to conduct advocacy. Which is why, at Brodies, we aim to afford those of our solicitors who want to qualify as solicitor advocates the opportunity to be trained and appropriately experienced to do so. That means good quality

"The future of Scottish dispute resolution must lie in adopting more flexible ways of working and maximising the benefits of technology"

training and time on their feet. Similarly, our dedicated set of solicitor advocates is there to provide a choice to our clients, as well as a secure platform from which solicitor advocates can build and conduct their advocacy careers.

Dispute resolution today

In the last few decades, we have seen new tribunals, adjudication, arbitration and mediations, and this has led to a significant decline in the amount of traditional civil litigation being conducted in Scotland as well as a rise in solicitors specialising in particular types of dispute resolution. I see the future of advocacy being the same – solicitor advocates will become more specialist, and to do that they will need to be in larger firms with specialist or niche practices.

It is also fair to say that COVID-19 has changed and will continue to change dispute resolution. However, we should look at that as an opportunity because as lawyers we have a rare opportunity to determine the direction of travel.

The pandemic has lent much force to Professor Susskind's assertion in his most recent book, *Online Courts and the Future of Justice*, that the courts should be a service and not a place. As the author observes, many people cannot afford to use our excellent but complex courts.

If we embrace the opportunities for change, we ought to be able to afford greater access to justice and reduce the costs associated with resolving disputes.

Clients' changing demands

But what does the future hold for those with higher rights of audience? We too ought to embrace the opportunities. Advocacy by Brodies aims to be able to operate with clients and colleagues in a more flexible and integrated way, using information technology.

It seems to me that the future of Scottish dispute resolution must lie in adopting more flexible ways of working and maximising the benefits of technology, thereby reducing costs and affording consumers greater access to justice.

The focus for our profession ought to be how we can use the new skills and techniques we have learned during this pandemic to better deliver the resolutions that our clients want. In that endeavour we must not be dogmatic in defending the historic way, or ways, in which our profession has chosen to try and resolve disputes. Anyone who has teenagers will know that they socialise and communicate differently. Often, they prefer meeting online to going out to meet friends. The lawyers of the future will see nothing strange in resolving disputes online; indeed they will probably look on tales of "motion rolls" in the way we did about our grandparents speaking about gas lighting and their first crystal radio set.

If clients, particularly in civil disputes, want and need online dispute resolution, whether such resolution involves oral online hearings or not, that is something that our system requires to deliver. The fact that we have considerable numbers of our profession, including me, who have devoted their careers to resolving disputes in a particular way is not a reason to refrain from delivering that. Those of us who grew up under these old systems may fear change but, in the midst of COVID-19 and the challenges that we all face as a result, I find myself remembering the words of Clint Eastwood as the drill instructor in *Heartbreak Ridge* – "improvise, adapt and overcome". I suggest that, as ever, Scots lawyers will, and we shall!

Tony Jones QC is a partner and civil solicitor advocate with Brodies LLP

New angles on the review

Recent reports and events bring fresh perspectives on Esther Roberton's proposal for a new professional regulator but, in Tom Marshall's view, fail to add weight to her case for reform

Esther Roberton's review of regulation of the legal profession, *Fit for the Future*, has already generated many column inches in the Journal, but I hope I can be permitted a few more.

Since the replies from Stephen Gibb, Philip Rodney and Donald Reid (March 2020, 12) to Lorne Crerar's article (January 2020, 12), there have been three significant developments, leaving aside the COVID-19 outbreak. The Competition & Markets Authority delivered its latest verdict, *Legal Services in Scotland*, in March; the Scottish Legal Complaints Commission issued its budget for 2020-21 in April; and in June, Professor Mayson's final report on *Reforming Legal Services* (in England & Wales) was published.

The SLCC as regulator

The SLCC budget, laid before the Scottish Parliament exactly as per its draft of January 2020, took absolutely no notice, bar lip service, of COVID-19 and the economic crisis facing the legal profession along with every other sector. If ever there could be a shining example of what the Roberton reforms would mean, this was it. The regulator decides what the cost of regulation will be, and the regulated just have to keep writing the cheques. If they don't like it, tough.

Actually, I doubt very much that Esther Roberton would agree with that proposition. Her proposals were based on the Better Regulation principles, which, let's remind ourselves, are that regulation should be proportionate, consistent, accountable, transparent, and targeted only where needed.

For one thing, the SLCC is effectively not accountable, in the true sense of being responsible. I note that on 5 August 2014, Scottish Government representatives told the Scottish Parliament Justice Committee that the SLCC "is funded not by the Scottish Government but by a levy on the profession, giving a certain amount of accountability to the profession". Well, not really, when the profession has no control over the amount of the levy. The SLCC isn't accountable to the Scottish Government or Parliament either. Budgets, accounts and reports may have to be laid before Parliament, but no approval is required or disapproval possible. Audit is carried out by Deloittes on behalf of Audit Scotland, but this does not involve any qualitative assessment of its operations.

When the financial memorandum was prepared for the 2006 bill that became the Legal Profession and Legal Aid (Scotland) Act 2007, it was estimated that the annual cost of the SLCC would be £2.4 million. The proposed budget for 2020-21 may be no more than that in real terms, but this was estimated to be sufficient to handle 4,000 complaints a year. That number has never been approached.

In addition, 50% of the funding was to come from the complaints levy on a "polluter pays" principle, or at least that those against whom complaints were being made were paying for the dispute resolution service the SLCC would provide. In its 2018-19 accounts we can see that of the total income of £3.5 million, a mere £116,000 came from the complaints levy. The cost of the SLCC is therefore almost entirely borne by the profession as a whole.

"The only people who can adequately define what skills are required of a profession are professionals themselves"

If there are issues with accountability, there are also questions of proportionality. A relevant comparison can be made between the SLCC system and the complaints system which preceded it. The old system is neatly summarised in the SPICe briefing (06/33) to the Scottish Parliament on the 2006 bill. Complaints against solicitors were handled by Law Society of Scotland committees made up of equal numbers of solicitors and lay persons. As with the present system for service complaints, clients and solicitors were encouraged to come to agreement to resolve issues. If this was not possible the committees could uphold or reject complaints and impose a range of remedies, very similar to the present SLCC remedies, when a complaint was upheld. Conduct complaints, then as now, were handled by the Society and prosecuted before the Scottish Solicitors' Discipline Tribunal in appropriate cases.

It can reasonably be asked whether the construction of the SLCC edifice, including the rigid and convoluted processes contained in the 2007 Act, was a proportionate response to any concerns which may have existed about the independence of the Society's complaints structure. There was no evidence of systemic failure of that structure because of its administration by the profession. On the other hand, the evidence to Esther Roberton's inquiry on the functioning of the SLCC complaints structure showed considerable dissatisfaction from many quarters.

Simply making a regulatory organisation independent of the profession it has to regulate is obviously not a panacea for any actual problems which may be seen,

or thought to exist, when the organisation was created.

Essence of professional regulation

Turning, therefore, to the case for an independent regulator, it is appropriate to consider whether the proposal itself satisfies the Better Regulation principles. Is independence a factor which overrides or should override those principles? In other words, is it more important that a regulator should be independent of those it regulates than that it is genuinely accountable? Are any questions whether or not proposed changes are proportionate, or targeted to meet any problems seen to exist, subordinate to the principle of independence?

The legal profession, as with others such as the medical, dental, veterinary, accountancy and architect, has developed over centuries as skills and specialist knowledge increased and with the organisation of education to support it. Of importance to all professions was the formation of professional bodies, membership of which became, if not a prerequisite to practice, a qualification and indication of competence. This served several purposes. First, the professional bodies laid down the levels of skill and knowledge which any aspiring member had to achieve. Secondly, any client would know that a member had satisfied the profession of his/her skills and knowledge. Thirdly, the professional bodies had no interest in lowering standards, as to do so would allow competition from persons with lesser skills than the existing membership. Professional bodies also have no interest in permitting people to remain members if they do not uphold and maintain the standards and conduct expected of them. As Donald Reid pointed out, these concepts long predated the creation of the Law Society of Scotland.

What about the interests of the public in general, or of the individual client? It is in the public interest that there exists a body of expertise available to provide services necessary for the functioning of society. That interest extends to seeing that standards of competence, skill and conduct are maintained. This includes the need for professionals to develop in response to advances or changes in their fields of expertise and, so far as conduct is concerned, to changes in society's expectations of behaviour. It is also in the public's and clients' interests that there are recognisable professions with identifiable members who have the competence and skill to provide whichever service is required. However, there is an interest to have external involvement to provide a wider perspective on the organisation of the profession.

One thing is clear: the only people who can adequately define what competencies and skills are required of a professional are professionals themselves. An electrical engineer cannot define what a doctor needs to know, nor can an architect prescribe what a lawyer should be able to do. On the other hand, professions cannot be insular. Beyond the pure issues of skill and knowledge, professions must be able to adapt and learn. They must also be open and transparent. This is where lay input is vital. A system of regulation which includes both professionals and lay people ought to be the answer.

Of course, for the solicitor profession that is precisely what exists at the present time. The current system, with the Regulatory Committee of the Law Society of Scotland having a 50/50 lay/solicitor membership, a lay chair and the statutory responsibility to carry out the Society's regulatory functions, satisfies the Better Regulation principles. The Legal Services (Scotland) Act 2010, which provided for this system, was passed specifically with these principles in view. The creation of an entirely new and independent regulator was not considered proportionate. Lay representation on the Regulatory Committee and on the Society's Council provided transparency and targeted reform to the pre-existing structure. The present structure therefore provides accountability both to the public and to the profession. In addition, it has been the consistent policy of the Scottish Government to avoid creating new public bodies wherever possible.

Consumer interests

One would be forgiven for thinking that Esther Roberton's recommendation that, nonetheless, the Scottish Government should go ahead and create a new independent regulator for the legal professions, resulted from some obvious failure or defect of the system set up so recently and with the same principles behind it. However, no examples are cited demonstrating, for example, that ill-qualified people are being admitted to the profession, or that there is a systematic lack of skill being exercised in any facet of practice, or a decline in the standards of conduct. On the contrary, Roberton went out of her way to state that her recommendation "should not be taken to imply any criticism of the existing bodies currently involved in regulation". All that could be said was that "professional bodies providing both regulatory and representative functions can lead to the perception that the two roles are in conflict. It is this perception that risks compromising public trust".

Nothing has occurred which gives any cause for loss of public trust. No conflict has occurred between the Regulatory Committee and the Society's Council. On the other hand, public trust in the complaints structure under the SLCC has been compromised even though it is independent of the profession.

Perhaps the most persuasive factor for Roberton was the position of the Competition & Markets Authority, based on conclusions it reached from its 2016 examination of the legal services market in England & Wales (where regulation was already independent of the professions), that regulators should be independent from the markets they regulate. There are a number of points to be made on this, which are equally relevant to the CMA's most recent intervention, its report into legal services in Scotland in March 2020.

To begin with, the role of the CMA is "to promote competition for the benefit of consumers" (Enterprise and Regulatory Reform Act 2013, s 25(3)). "Consumer" is defined as a person "who does not receive or seek to receive… goods or services in the course of a business carried on by him". Accordingly, the interests of business clients, the public sector, the wider public interest or the interests of the profession itself are at best secondary considerations. The ambit of the CMA's 2020 report is, not surprisingly, entirely concerned with legal services provided to consumers.

The work of solicitors in practice extends far beyond such provision. Is it appropriate to impose a new regulatory framework simply to satisfy the interests of consumers? An independent framework may in any event still fail to meet those interests, as the CMA's 2016 report for England & Wales argues. The discussion of the CMA's position in the Roberton report, and what is said in its 2020 report, both suggest a preference on its part for a domination of the market by a far smaller number of providers able to cut prices by using economies of scale. At the same time, confusingly, the 2020 report also criticises different providers for different levels of pricing for similar services – which actually suggests price competition already exists in a wider market place.

The Scottish Parliament has just passed the Consumer Scotland Act 2020. There has been a void in Scottish public life since the UK Government abolished Consumer Focus (formerly the Scottish Consumer Council) in 2014. If there is a need for a greater reflection of consumer interests in the regulation of the legal profession, one possibility might be to provide for representation of the new Consumer Scotland on the Society's Regulatory Committee. This would seem a far more proportionate step.

The changing Scottish market

In his Journal article Lorne Crerar argued forcefully in favour of the Roberton proposals. He cited increasing choice of English law in transactions, the invasion of

the Scottish legal market place by English-headquartered firms, and the continuing restrictions on business models available to Scottish solicitors. He also agreed with Roberton's conclusion that all legal services providers in Scotland should be regulated by a single regulator. With respect, these do not appear to be convincing reasons for the Roberton proposals.

The erosion of Scots law has been a concern for decades, if not centuries. I'm sure Professors Matheson and Wilkinson and others discussed this in the Scots law lectures I attended at Dundee University in the mid-1970s. It is arguable that Scots law has influenced English law to just as much an extent, and will continue to as long as two Scottish Justices remain in the Supreme Court. Lord Reid in the post-war period and, more recently, Lords Hope, Rodger, Reed and Hodge have been outstanding, not forgetting Lord Mackay of Clashfern's spell as Lord Chancellor.

Just because their regulatory system ensures that a country's courts and lawyers are regarded as upright and competent does not necessarily make the laws of that country an obvious or automatic choice for business to adopt. Ownership and headquartering of clients is much more likely to play a part in the selection of governing law or the prorogation of a court in any contract. English law has benefitted from London's history as the centre for business and finance since the days of the Empire. Scotland has suffered from the demutualisation of its financial sector, de-industrialisation, and the sale abroad of much of its remaining industry, none of which has to do with the regulation of the legal profession.

I would also argue that the increasing presence of English or international law firms in the Scottish market has little or nothing to do with the regulatory structure. In the 1990s in particular, a significant number of Scottish law firms took the plunge and opened offices in London, with varying degrees of success, but it was not one-way traffic. North Sea oil had encouraged a number of firms to venture north of the border. Robin Thompson & Partners, the trade union law firm, came in 1979. Some of the other firms listed by Crerar have been around the Scottish market since well before the Clementi reforms.

Ultimately what has led to the more recent expansion of English and other law firms into Scotland was their size and scale in comparison with even the largest Scottish firms. The "invaders" have been able to make offers to equity partners of Scottish firms which those partners were happy to accept, or felt unable to refuse. Client pressure in some instances will have tipped the scales. Whatever business model Scottish firms had been operating under would have made no significant difference. The owners of those businesses, solicitors or otherwise, would have been under exactly the same pressures.

"There is no case for a brand new regulator. The current system satisfies the Better Regulation principles"

As to the restriction on business models, the Legal Services (Scotland) Act 2010 has now been on the statute book for 10 years. It is not the Law Society of Scotland's fault that the Scottish Government has failed to bring its own legislation into effect. The Roberton review came about, not because of any fundamental problem in principle with the present regulatory structure, or with the ABS structure which the 2010 Act set out, but because the Society asked the Scottish Government to deal with other features of the Solicitors (Scotland) Act 1980 which were out of date, and because the complaints system under the 2007 Act was too prescriptive and cumbersome. It seems highly improbable that ABS will arrive in the Scottish legal market place more quickly if we must await the design, incorporation and formation of an entirely new regulator.

Beyond Clementi

Finally, there is the question of who the providers of legal services might be, and who should regulate them. On the face of it, having a single regulator independent of any providers looks good, but what would this actually mean in practice? Leaving aside the Faculty of Advocates and the SLCC, there is to all intents and purposes a single regulator in Scotland at the present time – the Law Society of Scotland. What in effect is not regulated is any legal work not reserved under s 32 of the 1980 Act. "Lawyer" is also not a regulated term. This was graphically illustrated just before the Roberton review when a prominent Glasgow solicitor, having been struck off the roll, promptly reopened for business as a "lawyer". Even a risk-based approach to regulation might spot that this may not be in the public interest.

Roberton accepted that the use of "lawyer" by an unregulated person was liable to be confusing to consumers, but was unwilling to recommend the expansion of the reserved areas of work, or, at least initially, the supervision of claims management companies by her regulator. Section 3 of the 2010 Act sets out a broader definition of legal services, but in the absence of the ABS structures coming into effect, does not proscribe the carrying out of those services by unregulated persons.

The answer, according to Professor Mayson's review, is to focus on the regulation of legal services and not of lawyers. He recommends sweeping away all the regulatory structures created in England & Wales after the Clementi reforms and the creation of a single body to regulate all legal services in the public interest. "[We know that] risks, vulnerabilities, threats and insidious impacts arising from technology and alternative or unregulated providers are already 'out there' in the legal services sector," he states at para 4.3.5. "Allowing them to increase and spread, unchecked, will in the end improve neither access to legal services nor public confidence in the provision and regulation [of] those services."

This statement could be applied as much to Scotland as to England & Wales, but his answer would mean the creation of a far bigger drawing board than anything envisaged by the Roberton review or by the Scottish Government in setting it up.

The carrying out of legal services by unregulated persons appears to me a far greater hazard to the public or consumer interest than any potential (as opposed to actual) conflict of interest in the Society as between its functions as regulator and representative of the solicitor profession. Scots law is at far greater risk of erosion the more legal services are provided by less qualified, and lightly regulated persons. The standing of the solicitor profession in Scotland is also more likely to diminish the more its members are relegated to the back seat in the ownership and management of legal service providers.

Accordingly, the Scottish Government should reject Roberton's principal recommendation. There is no case for a brand new regulator. The current system of regulation of the solicitor profession has independence built in and satisfies the Better Regulation principles. The examples of the SLCC and the English regulatory system inspire no confidence that a new regulator could appropriately balance the interests of justice, the public interest, business, consumers and the profession and be genuinely accountable.

Tom Marshall is a member of the Council of the Law Society of Scotland, representing solicitor advocates

Arbitration: a family lawyer's tale

Ruth Croman describes her first experience of arbitration to resolve a family law dispute, and how it overcame difficulties facing a sheriff court action

Family lawyers have, along with many other court users, found themselves unable to progress cases substantively for their clients over the COVID-19 lockdown period, with sheriff courts and the Court of Session Outer House broadly closed to all but emergency business. Proofs are still not taking place and, at time of writing, no guidance is available as to when these might be assigned again.

Even once the courts reopen more widely, physical distancing requirements will inevitably have an impact on the number of cases that can be dealt with at any time and, despite the best endeavours of SCTS, our already stretched system will have to deal with additional pressures, as well as trying to clear the bottleneck of cases that have built up.

We all have cases where it becomes clear that negotiation is going nowhere and a third party decision (usually from a court) will be required to break the deadlock. In our present situation, that leaves a very large question mark as to how to progress a case for a client where the opportunity to have a sheriff or judge hear evidence and make a decision is not likely to arise any time soon.

So what does this mean for those involved in such disputes? Unless designated high priority by the court, it seems likely that cases will be dealt with in chronological order, with the oldest cases first. Where lives are on hold pending such determinations, delays can seem intolerable.

Testing arbitration's potential

But there is an alternative in the form of arbitration. Although it has been slow to take off, arbitration has been available in family law cases for almost 10 years now, both for cases involving children and those where finance is in dispute.

I was fortunate to act in one last year.

We were trundling along in a sheriff court divorce case where financial provision was the main issue and my client had relocated to New Zealand. The other agent and I were discussing the logistical difficulties that might be involved in her giving evidence, including of course the substantial time difference, and he mooted the prospect of arbitration. After some research and discussion with the client about that process and likely timescales, we agreed to sist the sheriff court action and refer the issues of what orders should be made for financial provision to arbitration.

We identified and agreed on an arbitrator (a QC with very considerable family law experience). We discussed the process, agreed the questions we wished to refer and the broad detail of the process. Both parties then signed a formal agreement to arbitrate. This was a case where issues of credibility and reliability were not going to be determinative and, given the logistical challenges of my client's location, we agreed that the process would be by affidavit only, without oral evidence.

The arbitrator set out a timetable for submission of documents and affidavits and assigned a hearing, undertaken by conference call, to discuss further procedure. On the basis of decisions made during that hearing, we exchanged affidavits and each side prepared a brief further affidavit addressing points raised by the other. Both sides then lodged a note of authorities, and their submissions, in much the same way as often now happens at court. The arbitrator issued her written decision four weeks later, in line with the agreed timetable.

After the decision was issued, we had a further conference call to consider the issue of expenses, and the timescale for implementation of the decision. Once payment had been made, we recalled the sist in the sheriff court action and decree of divorce was subsequently granted, using the affidavits that had been prepared in the context of the arbitration, to save further expense for the client.

Effective forum

In an arbitration there is a cost for our clients in paying the arbitrator, but there is similarly a cost in litigating through the courts – meeting warrant or signet dues, a fee for fixing a proof in the sheriff court and for court time in the Court of Session; and of course shorthand writer fees in the sheriff court. I suggest that the cost of arbitration fees is comparable to litigating in the sheriff court, and lower than in the Outer House.

In our case the process was concluded much more quickly than it would have been in court. The parties were assured of absolute confidentiality, and because the arbitrator was a respected family lawyer, both appeared to be readily willing to accept her decision.

For all these reasons the use of arbitration in this case proved to be highly effective. It represents a clearly viable alternative to litigation, particularly in these troubled times.

Further information about arbitration in family law cases can be found at www.flagsarb.com, and more generally in commercial disputes at www.scottisharbitrationcentre.org

Ruth Croman is a partner with Macnabs, Perth

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Could you help family businesses?

Family business clients are a growing market, but need carefully tailored, multi-disciplinary solutions. Ken McCracken poses some testing questions for would-be advisers

Families have been in business since the beginning of history, but only recently have family businesses been recognised as a distinct type of client. The good news for advisers is that these clients are increasingly seeking creative advice. The interesting challenge is how to take advantage of this opportunity.

In other good news for advisers, there is plenty of new knowledge out there. For example, the Family Firm Institute (FFI: www.ffi.org/education/) provides certificated learning programmes, as does the Society of Trust & Estate Practitioners (STEP), through their Advanced Certificates in Advising the Family Business and Family Business Governance.

Family business owners and leaders are avid consumers of this new knowledge. The Family Business Network (www.fbn-i.org/) has member associations in 65 countries and a membership of some 4,000 business families encompassing 16,000 individuals. Since each business family knows many others, this knowledge spreads quickly through peer learning, popular among families who want to emulate those who have achieved multigenerational success. For them, the world offers more hope than is expressed in mean-spirited clichés, which claim that every family business is doomed to fail over three generations.

Crucial overlap

The new approach to family businesses accepts that, above all else, every family in business has to cope with various challenges caused by the overlap between family and business life. This is the reality that makes family businesses different from other types.

For example, employing a family member will often stir up discussions about talent, fairness, reward and nepotism, and possibly cause arguments between relatives competing for the same job. Would you like to help this client?

This could easily be approached as an opportunity to draft an employment contract, combined with some tax advice; job done and move on, hopefully to the next family business who would like to purchase the same outcome. Undoubtedly, family businesses will always need specialist advice because the world is a complex place, but the challenge they are now offering advisers is, can you go beyond this conventional approach?

Business families would like to hear from you if you can create a policy on employing family members that governs these sensitive decisions in a way that balances the interests of the family and their business.

They would also like to know if you can advise on an incentive scheme for non-family management that is aligned to achieving all the returns on investment that the family value. These usually include non-financial returns, like preserving a legacy of attachment to a particular type of business activity or a geographical location. If this opportunity sounds interesting, a good place to start would be to review the piles of literature on the importance that family businesses attribute to socio-emotional wealth, another characteristic that makes them unlike any other type of business.

Changing specialism, some families want to use an ownership trust but want to ensure that it will be a vehicle for entrepreneurial wealth creation rather than wealth preservation. They also want beneficiaries to be actively involved in governing their business rather than becoming passive and disenfranchised owners. What help can you offer?

Anyone who would like to be the trusted adviser to a family business would have a desire to help with this decision making, and would never take the commercial risk of waiting on the sidelines until the family need to choose one of the many specialists who could implement their decisions.

Dealing with the "soft" stuff?

Advisers should, of course, expect to be asked to demonstrate their experience. It is easy for

most advisers to say that they already act for family businesses, for the simple reason that it is difficult to avoid these clients. According to the Institute for Family Business there are 4.8 million family businesses in the UK, of which more than 18,000 are medium and large businesses. They generate over a quarter of UK GDP and employ 13.4 million people, approximately 50% of private sector employment.

However, nowadays family business clients will expect more from advisers than a track record of other clients and a particular specialism. Is this where soft skills become important?

"Soft skills" describes an indistinct cluster of personal characteristics and experiences that enable advisers to interact more effectively with clients and cope with the relationship side of things. They are contrasted with the "hard skills": the adviser's hard-won knowledge and expertise. But in the following example, what really deserves to be described as the hard and the soft stuff?

A family fear that the absence of a workable succession plan for ownership and leadership of their business will lead to loss of money, status and reputation. They also fear that starting to discuss a plan will stir up conflict, and make people feel vulnerable, anxious, and frustrated, partly through the effect the business is having on family relationships and the way some family issues are played out in the business.

This family business needs a lot of help. It is mindboggling, however, to think that dealing with fear, loss, conflict, vulnerability, anxiety and frustration could ever be described as soft stuff. Many family businesses would suggest that for them the soft stuff is the hard stuff. They would like help from advisers who can demonstrate an understanding of these needs and who can place them, rather than the adviser's specialism, at the centre of the offer.

Not for the generalist

The question still is, would you like to help family businesses?

The idea of being the trusted adviser to all members of a family and their business sometimes generates nostalgic memories of the general practitioner. This species of adviser, however, has become largely extinct and it is unlikely that such retrospectives will support the challenge of serving today's family businesses.

However, nor can all the challenges in a family business be reduced to a series of problems to which separate specialists provide discrete technical answers. While family business affairs are too complex to be served by a single adviser, specialists will be of limited value if they work only in their specialist silos.

Serving the family business client is inevitably a multi-disciplinary activity. Of course, many specialists already work in a team of sorts. They share information and intermingle advice, but still mostly this is transaction based and each specialist contributes to the team by focusing on their respective area.

Team approach

Imagine, however, if it was like this:

- The advisory team have a clear, shared understanding of the family's overall vision for their business. This includes the financial return they want and the non-financial returns that they value.
- The team shares information to reduce costs to the client if they had to repeat the same things many times over.
- The team can provide concise, consolidated reporting on the business and the family's private affairs, if requested.
- Fee structures never clash, and the team agree to share some revenues depending on overall performance rather each adviser billing in isolation.
- It is clear how team members are appointed, appraised, and if necessary, removed.
- Team leadership is shared, and transfers depending on the matters being dealt with at any time.
- No one tries to become the gatekeeper because the team knows that ultimately the family business client needs all of them to work together.

Is this type of multi-disciplinary team desirable? The client-centric way to frame this question is, what type of team does a family business need? If the answer is the type just described, the question becomes, are advisers able to do what is necessary to deliver for these clients?

The size of the family business market emphasises the scale of opportunity for firms who want to commit to this sector. This means investing in training in the new knowledge and in developing effective ways to collaborate internally, and across different organisations. It entails focusing on the needs of a family and their business and anticipating the challenges as ownership and leadership pass across generations. And it is about grappling with the reality created by family and business relationships always interacting.

The question remains, would you like to help?

Ken McCracken, formerly a solicitor, is a family business consultant and teacher, and a Fellow (and from later this year, board member) of the Family Firm Institute. He is also the author of the STEP courses mentioned in this article.
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Case study: could you help?

Tom Wilson is managing director and owner of a second-generation family business started by his late father. Tom's brother never entered the business and his father's decision to leave all the shares to Tom resulted in a rift between the brothers.

Tom and Mary have three children. The youngest, David, joined the business straight from school, while his siblings Eleanor and John pursued careers elsewhere, and have their own families.

Tom would like to retire, but feels financially vulnerable because over the years he has reinvested a lot in the business. Tom and Mary are also concerned about their children.

A friend suggested that "obviously" all the shares should go to David because he works in the business. However, Tom remembers how this approach caused a split with his brother and does not want the same thing to happen. Tom and Mary would prefer to divide the shares equally among their children. In any case, maybe Eleanor and John will one day join the business, an outcome that Tom and Mary subtly promote at family get-togethers.

Tom's doctor recently recommended that Tom should take things a bit easier. Tom decided not to share this advice with Mary because it would worry her. Unknown to Tom, however, John recently told Mary that it seems likely that he and his wife will divorce.

An incomplete list of the challenges facing the Wilson family would include:

- How can Tom and Mary harvest money from the business to fund the next phase of their lives and look after their health?
- What does retirement mean to Tom, and does the rest of the family agree with his opinion? Does he want to walk away from the business or retain some involvement?
- How will David feel? Does he want to assume control, or would he like dad to remain involved?
- In future what will the owners do, especially if Eleanor and John inherit shares but resist the hints to come and join the business?
- What effect will John's news have on future planning?
- Do David, Eleanor and John want to be in business together, at all?

The Wilson family would like to hear from you if you are able to help them as a family, as individuals and as a business.

Support in time of need

Anticipating additional demand from within the profession due to COVID-19, Andrew Stevenson reminds readers of the two trusts comprising the Scottish Solicitors' Benevolent Fund

Q. What does the Fund do?
A. Broadly speaking, it makes grants of money to solicitors in Scotland or the dependants of such solicitors.

Q. Are there restrictions on how it can do that?
A. Yes. The money in the Fund can be paid out only in accordance with the purposes of one of the two separate trusts under which it is held.

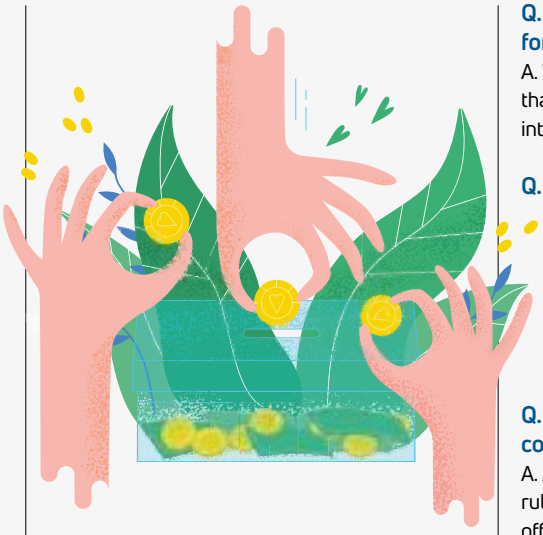
Q. What are these trusts?
A. First, there is the general Scottish Solicitors' Benevolent Fund. It was established in 1961 by a deed of declaration of trust. The trust purposes are very broad indeed: its funds shall be held "for any purpose which the Trustees may consider to be for the benefit of such of the Beneficiaries as may... be in necessitous circumstances". The beneficiaries are solicitors in Scotland or their dependants.

Q. How does someone apply?
A. The application has to be supported by a solicitor, and we ask for the names and addresses of a couple of referees; they don't have to be solicitors. We have a form which has to be completed and sent to us. All the information is treated confidentially. The form asks about the applicant's personal and financial circumstances. Most of the people who apply at the moment are in poor health, but that isn't a prerequisite for making an application. All that matters is that there are "necessitous circumstances". We fully expect the economic damage caused by COVID-19 to create those for many practitioners and their families.

Q. Does an applicant have to say what he or she wants?
A. No. We simply decide whether the applicant should be given a grant of money. If we think that he or she should be given a grant we then decide how much to pay, and we pay it.

Q. Does the applicant have to account for how the grant has been used?
A. No.

Q. What is the second trust that you mentioned?
A. It is named the Tod Endowment Trust.



It distributes money for the purpose of providing holidays in Scotland. Grants are made to provide rest, a change of air and recuperation in Scotland.

Q. Are applications made directly to the Tod Endowment Trust?
A. No. The trust gives sums of money to the Scottish Solicitors' Benevolent Fund so that we can administer it and distribute it in accordance with the purposes of the Tod Endowment Trust, i.e. "to defray the cost of obtaining rest or recuperation in Scotland".

Q. Who is entitled to apply?
A. Those who have been in practice as solicitors in Scotland for at least two years before application, together with their spouses, partners and dependants.

Q. How do they apply?
A. Again, we have a form which has to be completed and sent to us, and all information is treated confidentially. The form does not ask about the applicant's personal or financial circumstances.

Q. Does an applicant have to say what he or she wants?
A. Yes. We ask the applicant to say how much is sought and the purpose and reason for the application. We look for vouching, e.g. a quotation from a hotel or other evidence of travel costs.

Q. Does the applicant have to account for how the grant has been used?
A. We would expect to see evidence that the money has been spent for its intended purposes.

Q. Does the application need to be supported by a solicitor?
A. No.

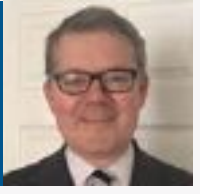
Q. Do you ask for the names and addresses of referees?
A. No.

Q. What is the effect of the coronavirus lockdown?
A. As we know, the 2020 Regulations create rules about travel and they create criminal offences for breaches of those rules. Non-essential travel is prohibited and the trustees cannot facilitate a breach of the regulations in any way whatsoever. However, the situation is continually evolving: every application will be judged on its own merits rather than under any blanket policy, and the lockdown won't last forever.

Q. Who are the trustees of the Scottish Solicitors' Benevolent Fund?
A. The present trustees are the President and Vice President of both the Scottish Law Agents Society and the Law Society of Scotland, together with several other senior officers.

Q. Where can applicants get application forms or further information?
A. Forms are available from scottishlawagentssociety@gmail.com or by writing to The Secretary, Scottish Law Agents Society, 14 The Firs, Millholm Road, Cathcart G44 3YB. Specific enquiries should be directed there too. Both the trusts that I've mentioned are registered with OSCR, and general information can be found on its website.

Andrew Stevenson is secretary to the committee of the trustees of the Scottish Solicitors' Benevolent Fund



Management matters

Review of case management decisions in the Court of Session and a new ordinary cause rule providing for proof management hearings are among the matters surveyed in this month's roundup from the civil courts.

Civil Court

LINDSAY FOULIS, SHERIFF AT PERTH

Review of case management decisions

In *SA v PA* [2020] CSIH 24 (10 March 2020) the issue before the Inner House was the decision to allow a proof before answer rather than appoint the case to debate. Delivering the opinion of the court, Lord Malcolm observed that RCS, chapter 42A provided the judge at first instance with wide powers to manage an action to achieve efficient determination. Decisions in that regard were to be treated with considerable respect and deference. Arguable grounds for adopting a different course would not justify overturning the decision. A case management decision could only be interfered with if it was clearly erroneous in that it was not a decision open to a reasonable first instance judge.

The court further observed that reserving questions of law until after evidence had been led was often either preferable or justifiable. This was particularly the case where the sustaining of a preliminary plea would not dispense with the need for evidence.

Amendment after limitation period

The decision of the First Division in *Cowan v Lanarkshire Housing Association* [2020] CSIH 26; 2020 SLT 663 visits this area once again. In many respects the procedural history renders the ultimate decision case specific. That said, however, there are some points worth remembering. The Lord President refers to *Sellars v IMI Yorkshire Imperial* 1986 SC 235. I always viewed this decision as one to remember. In essence it said that provided an action was raised within the limitation period, the averments could be altered beyond all recognition provided this was before the record closed. It was only if such a change was proposed by way of amendment that the court had the right to regulate any such change.

By reference to this decision, the Inner House considered it could re-examine the Lord Ordinary's reasoning in refusing the pursuer's application, notwithstanding it was by amendment. The action had commenced under the chapter 43 procedure. Following a direction from Lord President Gill in 2013, this and other similar actions were to proceed as ordinary actions. The action had a somewhat chequered procedural history and, in March 2019, the Lord Ordinary ordered the pursuer to lodge a minute of amendment, no doubt to push matters forward procedurally, the action having been raised in 2012. However, while Lord Gill's direction was considered a sufficient basis for that order, there had been no actual provision for adjustment and no closing of the record – hence the significance of *Sellars*. Further, having regard to the requirements of chapter 43 and what was required for an ordinary action in relation to averments, an expansion of what had been initially pled was undoubtedly required. In any event, the case as initially pled was fundamentally the same as the one proposed in the amendment.

Skilled witnesses

A word of warning from the decision of Lord Tyre in *McCulloch v Forth Valley Health Boards* [2020] CSOH 40 (7 May 2020). A skilled witness was instructed and duly prepared a report. The report, when provided, correctly listed all the documents with which the witness had been provided and which had been considered in the preparation of the report. These documents included certain statements from witnesses. Once the report was in the hands of the solicitors, the witness was requested to prepare another copy of the report, excluding reference to a number of the witness statements. This exercise eventually came to light.

The first observation made by Lord Tyre was that when the report was provided to the other party's representatives, it represented an inaccurate statement of the information relied on. Although not specifically commented on in this respect, it strikes me that a logical consequence of this could be a penalty in expenses. Of greater significance was the observation that the exercise undertaken was one which should not have been instructed or followed, even though some of the statements might well have been subject to legal privilege. As a consequence, the impartiality of the skilled witness was potentially impugned. This clearly could have had fatal consequences.

Update

Since the last issue, *Heriot-Watt University v Schlamp* (May article) has been reported at 2020 SLT (Sh Ct) 103 and 2020 SCLR 415, and *LRK v AG* (November 2019) at 2020 SCLR 325.

Designation of parties

Although the decision of the Inner House in *MH v Mental Health Tribunal of Scotland* 2019 SC 432; 2020 SCLR 240 deals with *inter alia* the anonymisation of parties' names, it is worthwhile to repeat the observation of the Lord President relating to the designation of parties care of solicitors. Such a step has to be justified by averment. This is not new but is sometimes overlooked.

Interim orders – defamation actions

In *British Gas Trading v McPherson* [2020] CSOH 61 (13 May 2020), Lady Poole reaffirmed that in actions of defamation the test for the grant of interim interdict was more testing than in other actions in which such a remedy was sought. The combination of article 10 of the European Convention on Human Rights and s 12 of the Human Rights Act 1998 resulted in the court requiring to be satisfied that the pursuer was likely to succeed in the remedy of perpetual interdict. The balance of convenience had also to favour the grant of interim interdict.

The order required to leave a defender in no doubt as to its extent, and could be no wider than necessary to protect the legitimate interests of the pursuer. Where the material complained of was journalistic or literary, particular regard had to be had to the right to freedom of expression and the extent to which the material was or was about to become available to the public, and whether it was in the public interest that publication occurred. A similar test applied to interim orders *ad factum praestandum*, as set out by her Ladyship in the follow-up opinion [2020] CSOH 62 (29 May 2020).

Objections to evidence

Nothing new as such – simply a reminder. In sustaining two objections to questions in *McMahon v Grant Thornton LLP* [2020] CSOH 50 (26 May 2020), Lord Doherty noted that an ordinary witness must confine themselves to matters of fact. Any inference or conclusions to be drawn from that evidence were matters for the court. A similar observation was made regarding asking an ordinary witness to express an opinion.

Expenses

In sheriff court litigation, in terms of OCR, rule 32.1A an account of expenses should be lodged within four months after final judgment or any time thereafter with the sheriff's permission. The pursuer in *Scott v Prestwick Aircraft Maintenance* [2020] SC EDIN 24 (30 March 2020) failed to lodge an account within four months. A motion was accordingly enrolled to allow the account to be lodged late. In considering the opposed motion, Sheriff Braid noted that rule 32.1A did not impose an absolute requirement

that the account be lodged within four months, or refer to failure to lodge an account within the period as non-compliance. The issue accordingly was not one of relief for non-compliance. It was simply whether the account should be allowed after the four month period, which was considered a reasonable period within which to prepare and lodge an account to allow the opponent to have notice of the extent of liability.

The court accordingly had to determine whether it was appropriate in all the circumstances for the account to be lodged. Although no cause was required, there needed to be some factual basis to allow the court to exercise its discretion. Factors such as relative prejudice, the length of delay and the reason, and steps taken to rectify the error, once discovered, were all relevant. The litigant found liable in expenses was entitled to know the extent of that liability within a reasonable period. In the present instance, Sheriff Braid took account of the extent of the liability, which was not insignificant, and the delay of less than two weeks; and of the duration of the litigation itself, over which the defenders had been unaware as to their liability in damages. The delay was not wilful and it had not occurred in the face of reminders from the party liable. It arose as a result of human error promptly rectified once noticed, albeit there had been no attempt to draw the opponent's attention to the matter of lateness. He granted the motion.

In terms of rule 32.1A, conditions can be imposed to such a grant. Sheriff Braid considered that modification of the expenses was not competent, as this would have the effect of altering a prior interlocutor. Instead he ordered that the pursuer pay the expense of the motion and the expenses of any taxation.

Act of Sederunt

The Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (Miscellaneous) 2020 (SSI 2020/166) came into force on 2 June 2020. It introduces a proof management hearing into ordinary actions in the sheriff court. Such a hearing may be assigned *ex proprio motu* if a proof diet has been discharged, adjourned or continued to a later date. At this hearing the sheriff is tasked to ascertain whether the action can proceed to proof or the continued proof, and in particular, when the parties expect to be able to proceed to proof, witness availability, whether witnesses require to attend or whether the evidence can be taken remotely, and if so, how that might be achieved. The extent of use of affidavits is also to be investigated.

Any proof can be discharged. A diet of proof can be assigned. The management hearing can be continued. Clearly this power envisages, *inter alia*, that evidence presented orally in court may well become the exception rather than the norm. The sheriff has an all encompassing power to make such order as secures the expeditious progress of the cause. In personal injury actions under chapter 36 the sheriff *ex proprio motu* can discharge a diet or sist the action.

Postscript – looking to the future

On 19 June 2020 Lord President Carloway issued a statement on the future of the courts. In a wide ranging statement it is worth noting the following comment: "Virtual courts and online services should, and now will, be viewed as core components of the justice system, rather than short term, stopgap alternatives to appearances in the courtroom." Later in the statement his Lordship observed: "More written submissions and online processing of civil business will become a reality." Practitioners will no doubt be familiar with the content of practice notes and guidance which have been issued regarding civil business since March. Without wishing to adopt the "I told you so" approach, I have always considered it likely that what was set out in these would constitute a template for the future conduct of civil business. These comments make it clear that this would indeed appear to be the case.

Licensing

TOM JOHNSTON, ORMIDALE LICENSING SERVICES

I genuinely can't remember how long ago I started writing the licensing column for the Journal. I moved firms in 2001, and it was certainly before that. The other day I realised with a start that over six years have passed since I retired from practice. My justification in continuing was my involvement with Fife Licensed Trade Association, latterly as secretary, which maintained a direct link with the trade, many of them past clients. As I have relinquished that as well, the time has come to divert the keyboard to the many other projects which I have.

I thank the Editor for the opportunity for a brief chance to reminisce. My first appearance at a licensing board came the year after the 1976 Act came into force. As an apprentice I was sent to the Edinburgh board, with about 400 people crammed into a room designed for half that number. It was also the first time I had ever had to use a microphone, part of a decrepit sound system which meant your own words came back to you a second or so later. The word *terrifying* doesn't begin to do justice to the experience.

Back in the day

The licensed trade then bore no resemblance to that of 2005. You knew exactly what a pub was and what you would get. They closed in the afternoons. With a very few exceptions, food was a pie or, in exotic places, a bridie. Despite extensive research I never did find the byelaw which decreed that these had to be three days old before they could be sold, two of those having been spent in a lukewarm cabinet. There had always been genuine hotels, but so many of the establishments holding hotel licences were there simply to enjoy that prized asset – Sunday opening.

Pubs themselves were allowed for the first time to apply for extended hours. This more than anything emphasised the patchwork quilt nature of licensing in Scotland. Some boards embraced this enthusiastically. Those patrons who were accustomed to leave premises only when the bell for last orders had sounded were discomfited to realise that this might be seven hours hence. And afternoon opening? In some areas this would only be permitted if you could

persuade board members of a tourism benefit. As a solicitor with a significant client base in Lochgelly and Cowdenbeath this was a challenge.

The numbers of new licensed premises soared. In the 1950s and 60s, the licensed trade was a lucrative one and not unduly arduous. As a publican your premises could open for a maximum of 51 hours per week, and your clientele was relatively easy to please. Greater affluence and foreign travel changed public expectations. The fear of losing out to the competition led licensees to seek ever longer hours.

In many ways of course, competition is not unhealthy. Standards rose, and food became an important part of any licensed offering. Children's certificates were a game changer, fulfilling at last Christopher Clayson's aim of demystifying licensed premises and making them more child friendly. It is unfortunate that some licensing boards used the 2005 Act to set this back in some areas.

Art of persuasion

The era of the lawyer as general practitioner was coming to a close. The notion that if you did the occasional stint at the sheriff court you would be a good licensing lawyer persisted for a while, but the more canny board practitioners realised early on that it's much more akin to public speaking. Quoting case law or the like was generally seen as an acknowledgment of a weak case, and instructing counsel meant you knew you had no chance and were looking for someone else to blame.

The majority of my columns have probably been on the subject of reform. The need for it; its genesis and inception; its flaws. Sad to say, one thing has been a constant, namely woeful failure on behalf of Governments, both in London and Edinburgh, adequately to listen to, and provide consistency for, one of the most important sectors in our economy.

Planning

ALASTAIR McKIE, PARTNER, ANDERSON STRATHERN LLP

This article summarises the legislative and policy steps that the Scottish Government (SG) has undertaken since March to ensure the continued operation of the planning system during the COVID-19 crisis. These steps are welcome and recognise the importance of a well-functioning planning system in assisting economic and social recovery and allowing appropriate development proposals to be consented.

Enforcing conditions

At the start of the outbreak, SG indicated (Chief Planner's letter, 11 March 2020) a relaxation of enforcement regarding the operation of supermarkets, other retailers and distribution centres. Many of these developments are subject to controls (usually planning conditions) restricting the timing of delivery and other vehicles within set hours, usually in order to minimise adverse effects on residential amenity. The letter acknowledges that flexibility is needed in order that retailers can accept deliveries throughout the day and night. Accordingly, SG makes it clear that planning authorities should adopt a positive approach to the industry, to ensure that planning controls are not a "hard barrier to food delivery over the period of the coronavirus".

A further letter dated 18 March 2020 indicated a similar relaxation of enforcement in relation to public houses and restaurants, indicating that planning authorities should not undertake enforcement action which would unnecessarily restrict them from providing takeaway services.

Both measures were intended to be in place for three months, and to be reviewed with the intention to withdraw them once the immediate urgency has subsided.

Coronavirus (Scotland) Act 2020

This Act came into force on 7 April and (1) extended the duration of planning permissions (including permissions in principle) due to expire during the "emergency period" (7 April to 6 October 2020) until 6 April 2021; (2) enables the publication of planning documents online as a substitute for requiring them to be available to view at physical locations; and (3) enables all committee meetings (including planning committees) to take place without the public attending.

In force on 27 May, the Coronavirus (Scotland) (No 2) Act 2020 extended the duration of listed building consents and conservation area consents due to expire in the "emergency period" (27 May to 6 October 2020) until 6 April 2021.

Temporary regulations

The Town and Country Planning (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020 came into force on 24 April, temporarily suspending the requirement for (1) holding a public event for pre-application consultation; (2) a local view body to meet in public; and (3) paper copies of EIA reports to be accessible to view at public places. SG has published guidance for online conduct of public events.

In force on the same date, the Town and Country Planning (General Permitted Development) (Coronavirus) (Scotland) Amendment Order 2020 grants permitted development rights (planning permission) for a local authority or health service body (subject to certain restrictions) to build and operate emergency healthcare facilities. These rights expire on 31 December 2020.

Developments

SG has also published interim guidance on consultation and engagement on development plans and encourages these to be progressed through digital engagement alongside one-to-one opportunities within physical distancing requirements.

The Chief Planner's letter dated 20 May 2020 provides additional and helpful guidance on a number of specific issues regarding the planning system:

Site visits. Although not mandatory, it is sometimes helpful for an officer and/or decision maker to visit a site to better understand the location and setting. The guidance indicates that a site visit may not be necessary due to use of satellite imagery and videoconferencing, but should they be necessary they must be conducted subject to physical distancing.

Planning committees and local review bodies. The guidance supports and encourages online meetings, and indicates that authorities should aim to broadcast meetings either live or in a recorded form as soon as possible thereafter in order that members of the public can observe proceedings.

Section 75 agreements. These need to be registered to enable related planning

permissions to be issued. Registers of Scotland (RoS) has a digital submission portal which is accepting applications to register deeds in the Land Register. If a s 75 agreement must be recorded in the Sasine Register, contact RoS to arrange for an application to be escalated to a senior adviser. RoS is working on a digital solution for the Sasine Register.

Insolvency

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

Insolvency law has moved rapidly over the last three months due to the economic effects of coronavirus. Fundamental changes have been made, with more in the pipeline. What follows is merely an overview of the changes as at 15 June 2020.

Personal insolvency measures

First, the Coronavirus (Scotland) Act 2020, which came into force on 7 April. In addition to introducing measures to protect tenants, the Act affects the moratorium on diligence under the Bankruptcy (Scotland) Act 2016. It provides that the period of moratorium shall be extended from six weeks to six months. It also temporarily removes the prohibition on a debtor applying for more than one moratorium in a 12-month period. The Act will remain in force until at least 30 September 2020, but with the ability for the Parliament to extend its provisions, potentially until 30 September 2021.

The Scottish Parliament subsequently passed the Coronavirus (Scotland) (No 2) Act 2020, which came into force on 27 May. This Act introduced further temporary changes to personal insolvency law. As with the first Coronavirus Act, the provision are subject to expiry on 30 September 2020 unless extended. The maximum extension will be to 30 September 2021.

The main provisions of the No 2 Act affecting insolvency are:

- An increase in the minimum debt level above which a qualified creditor may commence a petition for sequestration, from £3,000 to £10,000.
- Reductions and waivers of certain fees for debtors who seek to have themselves sequestrated under the MAP (minimal asset process) or bankruptcy application procedure.
- Allowing increased use of electronic communications in sequestrations governed by the 2016 Act. The Act also allows for the use of electronic signatures on most forms under the 2016 Act, and for virtual creditors' meetings.
- Extension of the period of time for a trustee to propose a debtor contribution order from six to 12 weeks.
- Finally, the Act also provides for the reopening of the register of inhibitions. One consequence of this is the ability now to register warrants to cite in that register as required.

Corporate insolvency measures

At time of writing, the Corporate Insolvency and Governance Bill is about to go to the committee stage at the House of Lords. Once in force, it will introduce major change to the corporate insolvency landscape. Some of those changes will be temporary, in reaction to the coronavirus pandemic. Others are intended to be permanent, based on proposals which have been under consideration for a number of years.

Temporary measures

Among the most eyecatching of the temporary measures introduced to protect business during the pandemic is the suspension of the wrongful trading rules. As with most of the bill, the effect of this provision will be backdated to 1 March 2020. It achieves its objective by introducing a presumption that a director is not responsible for any worsening of the financial position of the company during the pandemic.

The other retrospective temporary measures introduced by the bill relate to winding up petitions. The bill will prevent a creditor relying on a statutory demand to found a winding up petition if that demand was served between 1 March and 30 June 2020, and the petition was commenced on or after 27 April. The bill also requires the court to refuse any petition for winding up where the court is not satisfied that a company's inability to pay its debts was not caused by the pandemic.

Much has been written on the retrospective nature of these provisions and the potential effect on petitions already decided. The English courts have already begun to rely on the bill to refuse petitions presented (see *Re: A Company (Injunction to Restrain Presentation of Petition)* [2020] EWHC 1406 (Ch)).

To offset some of the effects, the bill proposes to extend the period after which certain transactions such as unfair preferences may be challenged by six months.

Permanent measures

Permanent measures introduced by the bill include:

- A new moratorium for companies preventing enforcement action whilst companies investigate a rescue option.
- An extension of the prohibition on termination of supply contracts, currently applying to utilities contracts, so that insolvent businesses may maintain supplies whilst they continue to trade.
- The introduction of a new restructuring plan procedure, similar to the existing scheme of arrangement procedures, but with different voting and approval procedures.

Each of these measures is deserving of an article of its own. It is a testament to the speed and extent of change that they must be treated as mere footnotes for the purpose of this briefing.

Tax

CHRISTINE YUILL, PARTNER, AND ZITA DEMPSEY, SOLICITOR, PINSENT MASONS LLP

The Coronavirus Job Retention Scheme (commonly known as the furlough scheme) has been a necessary lifeline for businesses during the COVID-19 pandemic since it was first announced by Chancellor Rishi Sunak on

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Children's hearings: COVID

Children's Hearings Scotland and others seek to better understand the experiences of everyone involved in hearings during the COVID-19 lockdown. See www.celcis.org/knowledge-bank/protecting-children/childrens-hearings-research/
Respond as soon as possible via the above web page.

Scottish budget

Holyrood's Finance & Constitution Committee is inquiring into the impact of COVID-19 on the Scottish Government's budget for 2021-22. It welcomes views on all aspects including what the Government's priorities should be and what fiscal adjustments are needed in response to the impact of the virus. See www.parliament.scot/parliamentarybusiness/CurrentCommittees/115303.aspx
Respond by 7 August to finance.constitution@parliament.scot

Lobbying legislation

Holyrood's Public Audit Committee seeks views on the operation of the Lobbying (Scotland) Act 2016 – has it met its aim of introducing "a measured and proportionate register of lobbying activity", or could improvements be made? See www.parliament.scot/parliamentarybusiness/CurrentCommittees/115336.aspx
Respond by 14 August via the above web page.

Police COVID powers

The Independent Advisory Group led by John Scott QC seeks experiences of the use of additional police powers granted in light of COVID-19, including ordering the closure of "non-essential" businesses and restricting freedom of movement and assembly, especially from people with protected characteristics under the Equalities Act 2010 or who may be considered vulnerable or disadvantaged. See covid19iag.citizenspace.com/iag/police-powers-review/
Respond by 1 September via the above web page.

Domestic abuse and employment

The UK Department for Business, Energy & Industrial Strategy is considering how workplace support can be provided to persons experiencing domestic abuse. See questions at www.gov.uk/government/consultations/support-in-the-workplace-for-victims-of-domestic-abuse-call-for-evidence
Respond by 9 September to domesticabuse.employmentreview@beis.gov.uk

Food poverty

Labour MSP Elaine Smith seeks views on her proposed Right to Food (Scotland) Bill. This would enshrine the human right to food recognised by the United Nations into Scots law, and create an independent statutory body "to oversee Scottish food policy to ensure that no one goes hungry". See www.parliament.scot/parliamentarybusiness/Bills/115201.aspx
Respond by 15 September via the above web page.

Children at 16+?

Should the age limit for new (as opposed to continued) referral to the children's hearings be raised from 16 to 18 years, in line with the expectation in the UN Convention on the Rights of the Child? See consult.gov.scot/children-and-families/age-of-referral-to-the-principal-reporter/
Respond by 7 October via the above web page.

20 March this year. Until 1 August, it allows employers to claim 80% of the normal pay and national insurance contributions of employees designated as furloughed, up to a cap of £2,500 per month.

It is estimated that over 8 million individuals are currently furloughed, costing around £14 billion each month. One of the main conditions of the scheme is that employees cannot be asked to undertake "remunerative work" while furloughed, a condition that is not always met by employers receiving the grant. Given the huge cost to the state, it is no surprise that, as administrator of the scheme, HMRC is implementing various methods to deal with fraudulent claims.

Finance Bill 2020

The Finance Bill 2020 was published on 19 March and is currently working its way through Parliament. The bill includes draft legislation published by HMRC confirming that sums received under the furlough scheme are subject to either income tax or corporation tax, as relevant. The draft legislation also gives HMRC the power to investigate and recover payments made under the scheme where the recipient was not entitled to those payments or where the payments were not used by employers to cover employee costs.

If, however, the non-compliance with the furlough scheme was deliberate, the draft legislation gives HMRC the power to impose penalties as appropriate, but only if it was not notified about the non-compliance within 30 days. HMRC has advised that it is not trying to catch people out and will only use this power in the most serious of cases, but employers should use the time before the legislation comes into force to review their furlough scheme claims, ensure that their employees are genuinely furloughed and the grant has been used for the correct purposes.

The draft legislation also gives HMRC the power to make company officers jointly and severally liable for any tax charge imposed where that officer was responsible for making a fraudulent furlough scheme claim. However, to use this power, HMRC must be able to show that there is a serious risk that the company itself will be unable to pay the tax due.

Corporate criminal offence

With so many individuals currently furloughed, some managers may seek to additionally support their employees by making "off book" top-ups to furlough payments. In this situation, HMRC could pursue the employer company for the corporate criminal offence of failing to prevent the facilitation of tax evasion.

If HMRC was to launch such an investigation it would be for the company to demonstrate that it had reasonable prevention measures in place to mitigate this risk. Given that the risk is very new, and COVID-19 specific, it is not expected that many businesses will have such measures in place. However, employers should consider regularly reviewing furlough scheme claims to ensure at least some mitigation of the risk of scheme breaches by their management. If the business does not have reasonable prevention procedures in place and someone lower down the management chain facilitates employees under their control to evade tax due, that is sufficient to establish the offence.

HMRC can also pursue employers under the corporate criminal offence legislation if furloughed employees are continuing to work. HMRC encourages furloughed individuals to report if this is the case, and has made

it clear that it can still pursue the employing company even if it has not convicted the individual taxpayer. HMRC has also explained that if a taxpayer voluntarily comes forward, "it may not be in the interests of justice" to prosecute them for non-compliance with the scheme.

Upcoming scheme changes

As of 1 July, furloughed employees have been able to return to work on either a full or part time basis, with the furlough scheme continuing to cover the hours that the employee is not working. The scheme will then be scaled back each month from 1 August before closing on 31 October.

The scaling back of the grant and its implementation for part time employees will make it more difficult to implement correctly. Although HMRC claims that it will not penalise innocent mistakes, it has already received thousands of reports of "furlough fraud" and is expected to review these. Employers are therefore advised to tread carefully and ensure that any mistaken furlough scheme claims that come to light are notified to HMRC as soon as possible.

Immigration

DARREN COX, TRAINEE SOLICITOR, LATTA & CO

The Home Office's "no recourse to public funds" (NRPF) policy has long been controversial. Part of the wider "hostile environment" measures, in general the NRPF condition is imposed on non-EEA migrants who obtain temporary residence in the UK (and have to apply for sequential grants of leave to remain, normally every two and a half years).

The basis for its imposition originates from s 3(c)(ii) of the Immigration Act 1971, since restated in the Immigration Rules (IR), in particular para 276BE(1) and GEN 1.10 of Appendix FM. It renders the individual ineligible for almost all benefits paid by public funds. The power to impose an NRPF condition is discretionary and should not be used where: (1) an applicant is destitute; (2) an applicant would be rendered destitute without recourse to public funds; (3) particularly compelling reasons relating to the welfare of a child exist on account of a parent's very low income; or (4) other exceptional circumstances apply.

COVID-19 circumstances

Introduced in 2013, the NRPF policy has been the subject of challenge in the past, albeit the Home Office has in effect managed to circumvent any such challenge by reforming the policy to comply with any legal deficiencies (see for example, *R (Khadija BA Fakih) v Secretary of State for the Home Department IJR* [2014] UKUT 513 (IAC)). More recently, following the widespread closure of businesses in response to the UK Government's COVID-19 lockdown, the policy has come under closer scrutiny. In *R (W, a child by his litigation friend J) v Secretary of State for the Home Department* [2020] EWHC 1299 (Admin), the child of a single mother sought urgent suspension of the policy for those unable to work due to COVID-19.

There were six grounds of challenge: (1) the NRPF condition in the child's case breached s 55 of the Borders, Citizenship and Immigration Act 2009, which requires the best interests of the child to be a primary consideration; (2) adoption of the policy failed to have regard to the differential impact on British children of foreign parents, non-white British children and single mothers, contrary to s 149 of the Equality Act 2010; (3) the policy directly or indirectly discriminates against those of non-British national origin or ethnicity; (4) the policy is "collectively overbroad and/or insufficiently precise", and hence contrary to the rule of law; (5) the policy deprives British citizens from entitlements provided to prevent children falling into homelessness and extreme poverty, and is therefore *ultra vires*; and (6) the policy fails to ensure that imposing an NRPF condition will not result in inhuman treatment contrary to article 3 ECHR.

Prior to the hearing, the Home Office conceded that the challenge against the policy raised serious issues that required to be reviewed and determined by the court urgently. It also introduced revised guidance, on 1 April 2020, in light of applications being made to have the NRPF condition lifted during the pandemic.

Facing destitution

As for the court, the focus of the decision was primarily on the article 3 ECHR ground. The judgment confirms the earlier opinion of the House of Lords in *Limbuela* [2006] 1 AC 396 that the threshold for a breach of article 3 is higher than that required for a finding of destitution within s 95(3) of the Immigration and Asylum Act 1999 (s 95 being the provision under which asylum seekers are generally provided with support while a decision on their asylum claim/appeal is pending).

Given that what was under challenge was provision made in the IR (defined as "subordinate legislation" by the Human Rights Act 1998) and the Home Office "Instruction", the court began by setting out the tests applicable to such challenges, namely that the

scheme was "incapable of being operated in a proportionate way in all or nearly all cases". The court held that neither GEN 1.11A of the IR nor the Instruction explicitly set out that caseworkers were under an obligation not to impose, or to lift, an NRPF condition where an applicant was suffering or would imminently suffer article 3 mistreatment (nor was there any mention of the latter in GEN 1.11A). These defects could not be, as the Home Office had submitted, considered "purely technical defects devoid of significance in the real world". Rather the IR and Instruction appeared to confer the decision maker with discretion, rather than an obligation, with the effect of misleading caseworkers and giving real risk of unlawful decisions potentially in breach of article 3. Although at first glance this may appear to be a conflation of destitution and inhuman and degrading treatment, the court also noted (in line with *Limbuela*) that an individual who is destitute or facing destitution with NRPF would meet that threshold (and, in any event, the policy would be unlawful under common law).

While the case related to an applicant with a dependent child, the implications of the judgment are much further reaching for anyone applying for their NRPF condition to be lifted. Where an applicant can show that they are destitute or will imminently become destitute without recourse to public funds, the Home Office is under an *obligation* not to impose, or to lift, the NRPF condition. Given the damage to the economy expected to follow the end of the pandemic, the judgment is a positive step for those who find themselves in such a situation in the future.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Christopher James Forrest

A complaint was made by the Council of the Law Society of Scotland against Christopher James Forrest, formerly solicitor, Falkirk. The Tribunal found the respondent not guilty of professional misconduct. The Tribunal did not consider that the conduct established might meet the test for unsatisfactory professional conduct and therefore declined to remit the complaint to the Council in terms of s 53ZA of the Solicitors (Scotland) Act 1980.

The respondent was the solicitor acting for the seller in a conveyancing transaction. An issue arose with a residents' association regarding the position of a boundary fence. He did not disclose this to the other side. A question arose as to whether that issue ought to have been disclosed as an outstanding "dispute". The Tribunal found that the respondent's conduct did not constitute a serious and reprehensible departure from the standards of competent and reputable solicitors. There was insufficient specification of the issue to categorise it as a "dispute". In any case, the respondent considered that the matter was resolved and was entitled to rely on the client's reassurance in that regard. The client had been advised that the matter would require to be disclosed if not resolved.

Caroline Rose Goodenough

A complaint was made by the Council of the Law Society of Scotland against Caroline Rose Goodenough, now with Keenan Solicitors, Greenock. The Tribunal found the respondent guilty of professional misconduct in respect that she failed to act with integrity, misled others and breached rules B1.2, B1.10 and B1.14 of the Law Society of Scotland Practice Rules 2011. The Tribunal censured the respondent and fined her £3,000.

The respondent misled the secondary complainer and her then client relations manager regarding progress on a guardianship application and whether legal aid had been granted. She failed to act with competence and diligence. The respondent was given many opportunities to check the file or Legal Aid Online, and did not do so, even although she was specifically asked about the grant of legal aid. Failure to do so was reckless. She repeatedly misled others with regard to legal aid and medical reports. The Tribunal accepted that she was suffering workload and stress problems. Her conduct in these circumstances fell short of dishonesty but demonstrated a lack of integrity.

Ross James Porter

A complaint was made by the Council of the Law Society of Scotland against Ross James Porter, solicitor, Perth. The Tribunal found the respondent guilty of professional misconduct in respect that he (a) sent emails to the secondary complainer on 1 and 2 April 2014 in terms which were inappropriate, derogatory and offensive in their nature and which were capable of bringing the profession into disrepute; (b) sent emails to the secondary complainer on 1 and 2 April 2014 which were inappropriate, derogatory and offensive in their nature, which drew the respondent's integrity into question and thereby constituted a breach of rule B1.2 of the Practice Rules 2011; (c) sent emails to the secondary complainer's mother on 2 April 2014 which were inappropriate and offensive in their nature towards the secondary complainer and which were capable of bringing the profession into disrepute; (d) sent emails to the secondary complainer's mother on 2 April 2014 which were inappropriate and offensive in their nature towards the secondary complainer, which drew the respondent's integrity into question and thereby constituted a breach of rule B1.2 of the Practice Rules 2011.

The Tribunal censured the respondent and awarded £750 compensation to the secondary complainer.

It is a fundamental principle that a solicitor requires to be a person of integrity. By sending inappropriate, derogatory and offensive emails to clients, the respondent allowed his integrity to be called into question. The Tribunal noted particularly that the respondent was aware of the secondary complainer's mental health background and this made his comments particularly offensive. These comments were capable of bringing the profession into disrepute. The conduct was a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore constituted professional misconduct. The Tribunal noted that the professional misconduct took place during a 24 hour period in an otherwise unblemished career. The respondent had cooperated with the fiscal and the Tribunal. He had demonstrated remorse and insight. He had attempted to minimise the impact on the secondary complainer by offering to meet and apologise. On the scale of solicitor's wrongdoing, the Tribunal considered the misconduct to be at the lower end. Accordingly, it censured the respondent.

Morag Wilson Yellowlees

A complaint was made by the Council of the Law Society of Scotland against Morag Wilson Yellowlees, Lindsays, Edinburgh. The Tribunal found the respondent guilty of professional misconduct in respect of her breaches of rules 3 and 5(2) of the Solicitors (Scotland) Practice Rules 1986 and rules 3 and 6 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008. The Tribunal censured the respondent and fined her £5,000.

The respondent accepted instructions in 2010 to act on behalf of three parties in connection with the purchase of a property and its financing. There was a clear conflict between the interests of the parties. The respondent's conduct constituted a serious and reprehensible departure from the standards of competent and reputable solicitors. The conflict of interest between these parties was obvious. The fact that the respondent identified it, yet failed to take appropriate steps, was an aggravating factor, as was the continuing risk of prejudice to one of the parties.

Rights to buy: the new addition

The right to buy land to further sustainable development, enacted in 2016, has finally been brought into force, with supporting regulations. What do practitioners need to know?

Property

MALCOLM COMBE, SENIOR LECTURER IN LAW, UNIVERSITY OF STRATHCLYDE

On 26 April 2020, a suite of legislation relating to Scotland's newest land redistribution measure came into force. The relevant statutory material comprises three related Scottish statutory instruments and their mothership, part 5 of the Land Reform (Scotland) Act 2016. It gives a community the right to force an existing owner to transfer an area of land that is local to that community in narrow circumstances linked to the sustainable development of that land.

The 2016 Act as a whole contains a wide range of provisions that affect Scottish land and its use, such as through the establishment of the Scottish Land Commission, the introduction of a scheme for landowners to engage with a local community when making important land use decisions, and laying the groundwork for the Land Rights and Responsibilities Statement, not to mention copious changes to agricultural tenancies and providing a framework for the disclosure of information about entities that control land in Scotland (see Journal, May 2016, 18). Part 5 of the Act is one of the last pieces of the Act's jigsaw to fall into place.

Rights to buy compared

Like the earlier rights to buy contained in parts 3 and 3A of the Land Reform (Scotland) Act 2003, part 5 of the 2016 Act allows a forced transfer of heritable property to take place, such that title will move from one private actor to another essentially private actor. Forced transfer provisions are not exactly the norm; they can skew the market, and they can engage human rights law (notably article 1 of the First Protocol to the European Convention on Human Rights, which protects the peaceful enjoyment of possessions). They can, however, exist as part of a legal scheme implemented in pursuit of the public interest, normally with suitable compensation to the outgoing owner.

The older forced transfer rights to buy only apply in narrow circumstances. One is of limited geographic application, where a crofting community wishes to buy croft land, associated common grazings and local eligible land; the other is limited by objective parameters relating to the (mis)management of certain land by the current owner, and only then where a local community has tried and failed to acquire the land by voluntary transfer, all in terms of s 97H of the 2003 Act and related regulations (see Stewart, "Community right to buy: the new scope" (Journal, July 2018). The crofting community right to buy was introduced in the first Land Reform Act, whereas the right to buy abandoned, neglected or detrimental land was introduced by the Community Empowerment (Scotland) Act 2015 (see Combe, "Digesting the Community Empowerment Act", Journal, August 2015, 40).

"The two most important exclusions are croft land – already covered by a different community right to buy – and land that is an individual's home"

A forced transfer regime can be contrasted with a (comparatively weaker) right of pre-emption, aka first refusal. That is what is conferred by the now well-established community right to buy, which covers the whole of Scotland in terms of part 2 of the 2003 Act. The pre-emptive right to buy allows community bodies to register an interest in a target area of land with Registers of Scotland, such that the existing owner of targeted land will in no way be obliged to transfer that land, but in the event the owner autonomously decides to sell, the relevant community body will get first dibs on the asset.

It is not possible to explore those existing rights to buy here. Anyone wishing more information can look to the Scottish Government's free online guidance, or deeper analysis can be found in the relevant chapters of Combe, Glass and Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (Edinburgh University Press, 2020). What this note will focus on is noteworthy features of the new right to buy. It should nevertheless be acknowledged that the part 5 scheme shares many features with its predecessor regimes: for example, the need for a community transferee to form a suitable locally accountable juristic body that is geared towards sustainable development and with a suitable connection to the targeted land, the requirement for the buyout to achieve local approval via a ballot, and the need for Scottish ministers to be satisfied that the transfer of land is in the public interest and consistent with the goal of sustainable development in relation to the land. Some of these and other points were outlined in the 2016 Journal article referred to above, and as such the focus here will be on the scheme as implemented.

Some preliminaries

As noted above, there are three SSIs that augment part 5 of the 2016 Act. These are the Land Reform (Scotland) Act 2016 (Commencement No 10) Regulations 2020 (SSI 2020/20), the Right to Buy Land to Further Sustainable Development (Applications, Written Requests, Ballots and Compensation) (Scotland) Regulations 2020 (SSI 2020/21), and the Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 (SSI 2020/114). The first of these is a pure implementation measure. Explanations of the second and third will follow where relevant; suggestions for catchy abbreviations for them will be warmly received.

Before diving into the minutiae of the regime, it is worth flagging the major innovation in part 5 as compared to the other rights to buy: a transfer of land need not be to a community

body directly. In terms of s 54(1), a community body can nominate a "third party purchaser" in its application to exercise the right to buy. This option will allow a community to bring a nominee that shares its ethos into its land reform plans, bringing fresh ideas and, one imagines, fresh investment to the party.

Whether there is a third party nomination or not will determine the benchmarks that a community body must meet before it can apply to ministers to buy land. (More on that application process below, but for now note that applications relating to nominees and community bodies are assessed by ministers in the same way.) If the community body seeks to exercise the right to buy itself, it must be a company limited by guarantee, a Scottish charitable incorporated organisation, or a community benefit society with constitutional provisions that have relevant standards of governance and local accountability. Where the community body is providing the spark but not the vehicle for the acquisition, s 54(5) does not restrict the community body in this way. Any body corporate having a written constitution can do the trick, provided it has local accountability and a statement of its aims and purposes, including the promotion of a benefit for the local community.

What land?

Another point worth clarifying is the land that can be bought. The starting point is that all land is eligible, apart from excluded land (under s 46). The two most important exclusions are croft land – already covered by a different community right to buy – and land that is an individual's home: forced transfer of a home would be difficult to countenance in terms of article 8 of the ECHR. The home exclusion does not apply where the resident is a tenant; a sitting tenant will in many cases not be affected by a change in the landlord's interest, save in terms of where rent is to be paid. Regulation 3 of one of the grandiloquently titled SSIs (SSI 2020/114) operates to deem certain types of occupation and possession as a tenancy.

A community body can also use the right to buy in relation to a tenant's interest in land, where that is relevant, if the landlord's interest is being (or has been) acquired under the right to buy scheme. Again, there are exclusions from the scope of this (including the tenancy of a croft and the tenancy of a dwellinghouse) (s 48). The rest of this note will proceed from the perspective of title to land rather than a tenancy being at issue.

In terms of reg 4 of SSI 2020/114, the curtilage around a home and certain land that serves that home is excluded from acquisition. This includes land used for a resident's recreation, growing food for domestic consumption, or keeping domestic pets. An access route to the dwelling is also excluded, but only where it is owned by the same person as owns the home; this exclusion to the exclusion seems sensible, as a change of ownership of a burdened property would not affect a servitude of way. As such, it seems strange that there are not similar qualifications to the exclusions for drainage or storage of vehicles, which might equally be covered by a servitude. (The author raised this point at the relevant Holyrood committee scrutinising the regulations, but no change was made.)

There are no exclusions relating to non-domestic land use. When the bill passed through Holyrood, there were attempts (put forward by the late Alex Fergusson MSP) to remove land used for businesses like tourism and forestry from the statutory scheme itself. These were unsuccessful. Any such land would have to be considered case by case rather than automatically, although it would seem that any community trying to make a case for a transfer of land that is being used productively would face a difficult task.

That segues to an explanation of the important point that a community or its nominee cannot simply snipe at any asset. A community must apply to buy the land, in terms of s 54 (and the Keeper must maintain a register of any applications, in terms of ss 52 and 53). As with the older rights to buy, that application is made to the Scottish ministers. It is for ministers to act on, and if appropriate consent to the application, if (and only if) everything about it falls into place. SSI 2020/21 makes provision as to the formalities required of a community application (which is to be in a prescribed form), the means by which ministers must publicise competent applications, and paperwork that is to go between a potential buyer and the owner relating to any application (including provisions about when an owner is deemed not to have responded or is taken as not agreeing to any request made).

Over to ministers

A transfer can only be approved where, separately, "sustainable development conditions" and "procedural requirements" are met: s 56(1).

The procedural requirements, set out in s 56(3), are largely matters of fact or steps that track the existing community rights of acquisition, and as such will not be interrogated here. It is worth drawing specific attention to one of these though, namely that an application to buy the land can only be made if a six-month period has elapsed between a written request relating to the land being made directly to the landowner and that request either being rejected or ignored.

Of more substantive import are the sustainable development conditions, which is unsurprising given the focus of part 5 itself. Over and above the public interest and sustainable development requirements that are well known from earlier regimes, there are then two further, beefed-up sustainable development criteria. The first such criterion is met where the transfer of land "is likely to result in significant benefit to the relevant local community", and also that it "is the only practicable, or the most practicable, way of achieving that significant benefit". There is then a separate criterion to be met, namely that not granting consent to the transfer of land is likely to result in harm to that community.

Both those criteria are linked to s 56(12), which requires Scottish ministers to consider the likely effect of granting (or withholding) consent with reference to (a) economic development, (b) regeneration, (c) public health, (d) social wellbeing, and (e) environmental wellbeing. When making a decision about whether an application to buy land meets the sustainable development conditions, s 56(4) provides that ministers *may* take into account the extent to which, in relation to the relevant community, regard has been had to guidance issued under s 44. Such guidance relates to engaging communities in decisions about land, and any landowner who has not engaged sufficiently might be caught out by this. Then, in terms of s 56(13), ministers are also *required* to consider both equal opportunities and human rights beyond the ECHR, including the International Covenant on Economic, Social and Cultural Rights. In short, Scottish ministers will have a lot to think about.

After approval

If those requirements and conditions are met – which would normally involve a compelling application and associated effort from the community and/or a distinct lack of interest from a landowner in terms of responding to the community's initiative – ministers may consent to the transfer. Such consent can be unconditional or subject to conditions (s 57). The statutory scheme is naturally more complex than can be set out here, but in summary it is then for the community or third party purchaser (if relevant) to "secure the expeditious exercise of its right to buy" (s 63), with valuation provided for by s 65, then a compensation scheme (and the possibility of related grants to community bodies for that) is set out in ss 67 and 68.

The compensation sections are supplemented by regs 19 and 20 of SSI 2020/21, which set out a procedure for compensation due to an owner for any losses or expenses incurred through complying with the 2016 Act's steps in general or where the process has been aborted by the prospective transferee, and for any grants from Scottish ministers that might be applied for to cover such compensation. How a community or third party purchaser is to fund the acquisition itself is not provided for in the Act, although presumably a third party purchaser would normally only be involved owing to its ability to inject capital, and existing channels such as the Scottish Land Fund will be available to communities. An appeal can be made to the sheriff about a decision of Scottish ministers (s 69), and valuation appeals can be made to the Lands Tribunal (s 70).

Coming back to the secondary legislation, SSI 2020/114 has been highlighted several times. It also caters for restrictions on dealings regarding affected land when an application is pending, so as to prevent avoidance, and serves to suspend any other rights (such as pre-emptions) that might exist, all in terms of regs 7-11. Meanwhile, in addition to prescribing forms and templates for correspondence and procedures about some compensation and grants, SSI 2020/21 includes detail around the necessary ballot for local approval of a buyout plus related proformas for publishing the ballot result and notifying Scottish ministers of that result.

"Ministers are also required to consider both equal opportunities and human rights beyond the ECHR"

Real prospects?

The new right to buy land to further sustainable development landed when much of the world was quite properly distracted by the response to the COVID-19 pandemic. It seems fair to imagine anyone reading this note at the time of its publication doing so as an intellectual exercise rather than as part of a mature land acquisition scheme or in response to an actual instruction from a client.

Be that as it may, Community Land Scotland has been particularly active in highlighting the strength of the response of its community landowner members to the public health challenges of 2020 (see www.communitylandscotland.org.uk/whats-new/community-coronavirus-responses/). It would be a brave person to predict the future in the current climate, but it is not beyond the realms of possibility that if and when some kind of normality returns, other communities will be spurred into action. Part 5 of the 2016 Act could be part of that, either as an actual means to force a transfer or encouraging a landowner to consider a community's desires rather than face the prospect of a forced transfer. Either way, you will need to know about the new right to buy, which provides yet another tool for Scotland's land reform toolbox.

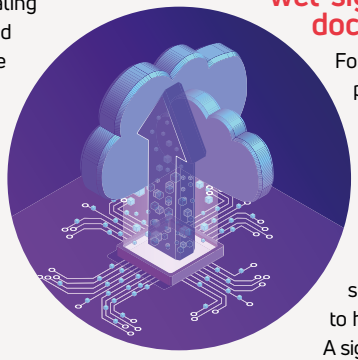
PSG's help for the new normal

The Property Standardisation Group has devised a set of protocols covering delivery of documents and submission for registration in the new digital era

The restrictions imposed by the COVID-19 lockdown have forced solicitors to rethink many of their usual processes and procedures, and with the introduction by Registers of Scotland of the digital submission system for land registration, solicitors need to address how to tackle the practical steps for the new approach to registration.

In the initial bedding-down period for any new process, solicitors can spend an unduly large amount of time in agreeing the practicalities. Factors that may need to be taken into consideration include the ability of individuals to print, scan, post or courier and receive documents.

To address such issues, and provide a clear set of procedures for dealing with delivery of documents and submission for registration, the PSG has formulated a suite of protocols for solicitors to agree and use. These are now available on the PSG website at www.psglegal.co.uk/digital_submission_protocols.php



As with all of our documents, we welcome feedback on these protocols, which are likely to evolve over time, and will adapt to changes in the digital system.

There are advantages to agreeing and following a protocol:

- parties know what is expected of them: no last minute arguments about how completion is to proceed, or what one party is, or is not prepared to accept;
- fewer undertakings: signing up to one of the protocols means each solicitor agrees to comply with set actions and timescales;
- each protocol sets out clear assumptions on which following the protocol is based, including ensuring that documents are validly signed and that solicitors hold and preserve the originals of the documents, in case they are requisitioned by the Keeper.

Possession of the wet-signature hard copy document

Solicitors should bear in mind the requirement for the applicant's solicitor to certify to Registers that the deed is valid.

For many this will mean actually examining the wet-signed hard copy document. Others will be prepared to accept confirmation from the solicitor holding the document that it has been validly signed. Either way, a qualified solicitor needs to check that the wet-signed hard copy document has been validly signed and witnessed.

The protocols cater for both delivery situations, acknowledging that delivery can be achieved by electronic means (as a consequence of s 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015).

Confirmation of signing of wet-signed hard copy documents

For electronic delivery of a pdf of the document, when sending the pdf a partner in the sending solicitor's firm should confirm to the receiving solicitor that it has been checked, is in the possession or control of the sending firm, and that it bears to have been validly signed.

A signed letter on the firm's headed notepaper would be best practice; however, giving this confirmation by email from a partner in the firm is as binding on the sending firm.

Using the protocols

No solicitor should feel pressurised into adopting one particular protocol over another. If all solicitors involved in the transaction cannot agree on the same protocol, they can either agree a hybrid protocol, or make their own specific arrangements. It is strongly recommended that the solicitors agree procedures for how completion and submission for registration are to be handled at an early point in the transaction.

The suite currently consists of six protocols for commercial transactions, with two simpler residential specific styles to follow.

Property market guidance revised

Under revised Scottish Government guidance, from 29 June 2020 all home moves are permitted, provided they can be carried out safely, including students moving home and other moves resulting in two households merging, and custom and self-builders.

Permitted activities now include visiting estate or letting agents, developer sales offices or show homes; property viewing; preparing a residence and moving in; and visiting a property to undertake activities required for its rental or sale.

However, the guidance warns that "this is not a return to normality".

It continues: "Those involved in the process will have to adapt practices and procedures to ensure that the risk of spread of COVID-19 is reduced as far as possible. This will include doing more of the process online, such as virtual viewings and ensuring that you continue to follow advice on physical distancing, hand washing and respiratory hygiene.

"We encourage everyone involved to be as flexible as possible over this period and be prepared to delay moves, for example if someone becomes ill with COVID-19 during the moving process or has to self-isolate. It may also become necessary to pause all home moves for a short period of time to manage the spread of the COVID-19. We will let you know if this has to happen.

"You should also consider whether you need to make provisions in contracts to manage these risks. You should not expect to move into any home where people have COVID-19 or are self-isolating."

Find the guidance, and any updates, under "Housing and accommodation" at www.gov.scot/coronavirus

Client communication plan is cup winner

A client communications plan and template to help strengthen solicitor-client relationships and minimise complaints was the winning entry for this year's Innovation Cup.

It belonged to Emily Campbell, a trainee solicitor with BTO Solicitors, who wins the £1,500 cash prize provided by Master Policy insurers RSA.

Now in its third year, the Innovation Cup is run jointly by the Law Society of Scotland, RSA and brokers Lockton, and judged by a panel comprising two representatives from each. Open to legal professionals and law students, it aims to inspire new risk management solutions from within the profession. Eight entries were received, with four being shortlisted to present to the judging panel.

With more solicitors now working remotely, communication is more important than ever. Campbell's idea involves agreeing with the client a clear and concise communication plan at the outset, to strengthen relationships between solicitors and their clients and avoid the complaints which often result from the breakdown of that relationship.

She said: "Current engagement letters often only mention communication in very general terms, but lack any detail around what the client actually wants. This is a great opportunity to agree those expectations from the get-go and allow for a good and open solicitor-client relationship, minimising the risk for any complaints. I'm really looking forward to seeing my idea developed and made available across the profession."

The plan and template will now be developed by Lockton and RSA into a practical application for members in private practice.

Society research measures COVID impact

The economic impact of the COVID-19 pandemic right across the solicitor profession has been laid bare by research carried out by the Law Society of Scotland.

Based on a telephone survey of a representative sample of 158 firms, the Society estimates that 35% of employed solicitors in private practice – around 1,627 out of 4,650 – have been furloughed, along with 41% of non-solicitor staff (4,720 out of 11,500).

About 90% of firms have experienced reduced turnover, rising to 100% in the case of large firms, with a similar percentage reporting a fall in new business (here, smaller practices were closer to the 100% mark) and more than 80% reduced cash flow. Late or non-payment by clients was somewhat less of a problem, though the average of below 40% was doubled in the case of the largest firms (30 partners or more).

In response:

- nearly 60% of firms overall have introduced a recruitment freeze (but 100% of large firms), and 40% a promotion freeze (more common in small firms);
- fewer than 20% have imposed salary reductions, though this is considerably more likely with larger practices;
- partner drawings have been reduced in 60-80% of firms across the board;
- more than half have imposed hours reductions, though this varies considerably with size of firm.

Firms employing trainees tended to treat them in the same way as other staff, though some were more likely to furlough their trainees.

As for practice sectors, court and chamber work were, unsurprisingly, both significantly affected, but the impact on an employment law practice was much less.

Firms have readily taken up central and local government grants offered as support measures, but only a minority have applied for VAT or other tax deferral or rates relief – many taking the view that it was better to meet these liabilities sooner rather than later.

However the impact of business charges can be seen in the responses to the question on rating the potential impact of the SLCC levy, with almost 70% overall stating that their firm was either "concerned" or "extremely concerned" at this.

The full survey report can be found at bit.ly/LSSCOVIDimpact

PUBLIC POLICY HIGHLIGHTS

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

Disclosure (Scotland) Bill

The Society provided a briefing at stage 3. Overall, it supports the simplification of the disclosure process, as the current regime is complex and can be difficult to navigate. This will bring greater certainty for individuals and organisations engaging with the process, and allowing electronic processes for the disclosure system, subject to appropriate safeguards around sensitive personal information, will make the process quicker and more effective.

The introduction of principles at stage 2 of the bill will also provide a greater degree of certainty around the decision-making involved, though the Society remains concerned that the information provided as a result of this legislation may be more limited than that available previously to it in discharging its functions. However, it looks to engage with Scottish Government and Disclosure Scotland to ensure that the code and guidance available for this process are able to assist in effective safeguarding of the public.

Fisheries Bill

The Society produced a briefing ahead of the report stage in the House of Lords. It noted that fishing opportunities are a particularly important issue for Scotland, and therefore strong collaboration between Defra and the devolved administrations is of considerable importance. It welcomed the recognition by Defra of the importance of engaging with the devolved administrations and legislatures, and the collaborative approach taken by the bill.

It is of crucial importance that Scotland's fishing interests are protected, particularly in recognising that positive changes to the UK fisheries position are likely to impact adversely the European fishing fleet and/or impact on trade negotiations, including tariffs.

The Society proposed that following the UK's exit from the EU, regulation of fishing in Scotland should fall within the ambit of the Marine (Scotland) Act 2010 and the Aquaculture and Fisheries (Scotland) Acts 2007 and 2013. Leaving the Common Fisheries Policy opens up the opportunity for fisheries to be looked at in detail alongside matters such as conservation, fossil fuel and renewable energy developments, aquaculture, and navigation. This will help ensure that the system of marine planning envisaged under the Act is comprehensive, rather than having components of use of the sea treated separately.

Other than in relation to a discard charging scheme, the bill does not provide for any appeal or dispute resolution processes, for example in relation to the granting of licences. The Society considers such provision should be made, even on an enabling basis, to bring clarity to the powers of the Secretary of State and devolved administrations in this regard.

Animals and Wildlife Bill

The Society prepared a briefing ahead of stage 3 of the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill. It welcomed the bill's addressing of concerns around the need for an increase in certain penalties. The bill also seeks to increase the range of fixed penalty notices in relation to animal and wildlife crimes and offences. However, increasing sentencing powers will not on their own ensure that the bill is effective in combatting the commission of such offences.

Vicarious liability tends not to form part of criminal law, and if it is to apply here, where an employee commits an offence in the course of their employment, the employer could be held criminally liable, unless a due diligence defence applies. That would create new offences, which was understood not to form part of this bill.

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

SLCC seeks survey help

The Scottish Legal Complaints Commission is appealing to solicitors to complete a brief survey as it updates its guidance to legal practices on dealing with complaints at first instance.

The SLCC's role includes helping to reduce the common causes of complaints, and to help firms in dealing well with any complaints they might receive.

Director of public policy Vicky Crichton said: "We would really appreciate a few minutes of your time giving anonymous input into the nine short questions of the survey we have set up. This will give us a better understanding of how we can help you and serve your needs."

Find the survey at www.surveymonkey.co.uk/r/SLCCHelpSurvey

ACCREDITED SPECIALISTS

Child law
DAWN FINLAYSON, MTM Family Law LLP (accredited 20 April 2020); LINDA FOWLER, West Lothian Council (accredited 13 May 2020).

Discrimination law
SARAH ANNE GILZEAN, Morton Fraser LLP (accredited 3 June 2020). Re-accredited: GRAHAM STUART MITCHELL, Clyde & Co (Scotland) LLP (accredited 9 March 2015); ROBERT KING, Clyde & Co (Scotland) LLP (accredited 8 April 2015).

Employment law
LAURIE GALLACHER ANDERSON, Ellis Whittam Ltd (accredited 20 April 2020); KELLY BROWN, Addleshaw Goddard LLP (accredited 13 May 2020). Re-accredited: ANTHONY MICHAEL McGRADE, McGrade & Co Ltd (accredited 19 April 2010).

Environmental law
Re-accredited: LAURA LOUISE TAINSH, Davidson Chalmers Stewart LLP (accredited 8 April 2015).

Family law
ANNA CLAIRE MAITLES, Morton Fraser LLP (accredited 27 May 2020); FIONA BAIN SHARP, Brodies LLP (accredited 3 June 2020) Re-accredited: SANDRA MARY SUTHERLAND, Thorntons Law LLP (accredited 22 March 2000); JUDITH MAY HIGSON, Scullion Law Ltd (accredited 19 April 2010); KAREN SANDRA WYLIE, Morton Fraser LLP (accredited 8 April 2015).

Family mediation
RICHARD BRYAN SMITH, Brodies LLP (accredited 3 June 2020).

Immigration law
GRACE MARGARET McGILL, G M McGill & Co Ltd (accredited 2 April 2020); JOHN VASSILIOU, G M McGill & Co Ltd (accredited 2 April 2020). Re-accredited: DAMIR DUHERIC, D Duheric & Co Solicitors (accredited 23 April 2010).

Insolvency law
GORDON CRAIG HOLLERIN, Harper Macleod LLP (accredited 27 May 2020).

Intellectual property
JAMIE DOUGLAS SINCLAIR WATT, Harper Macleod LLP (accredited 13 May 2020).

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Jury trial alternatives must be found: Carloway

Alternatives must be found to the current form of jury trial if any reduction is to be made in the backlog of outstanding cases, the Lord President has warned.

In a statement headed "The Future of the Scottish Courts and Tribunals", posted to www.scotland-judiciary.org.uk, Lord Carloway praised the progress made across the court system since the start of the coronavirus lockdown in moving to remote hearings, but warned: "The task in relation to jury trials is a problem of a quite different magnitude."

Whereas some good progress had been made in reducing the backlog in the civil courts – 152 remote hearings took place in the Court of Session between 21 April and 12 June – and summary criminal trials "will return in some volume over time", an immense challenge faced the courts in dealing with the backlog of solemn cases.

The need to use two or three courtrooms for each trial would reduce capacity to 30%, and Lord Carloway predicted that the combined backlog of cases could reach 3,000 by March 2021.

"We need to stop thinking about tinkering at the edges," he continued. "I have no doubt that primary legislation will be required to address some of the technical constraints that apply at present. None of the measures proposed by others have so far come close to offering practical answers to what are real difficulties. They are simply tinkering at the margins of a major problem which, as long as social distancing and self-isolation are in place, requires a political solution."

He would not contemplate any measure which might compromise the basic principle of a fair trial, but the requirements for physical distancing and self-isolation in order to protect public health were "extraordinary inhibitors" on the conduct of court business, with jury trials "particularly badly affected".

He congratulated the courts' Digital Services team for its excellent work in achieving the change to remote business so rapidly, and thanked all those who had been involved in the emergency response, "whether by keeping the courts and tribunals in operation or by building the technological infrastructure that is changing our procedural landscape on a daily basis".

Amanda Millar, President of the Law Society of Scotland, responded: "Of course there is more work to be done, and there will need to be adequate resources and training to continue to deal with the backlog of cases from the early days of lockdown. However, we would reiterate that we don't believe that this is the time to make fundamental changes to the Scottish criminal justice system, such as instituting judge-only trials."

SLAS holds first virtual AGM

John Stirling of Hamilton and David MacLennan of Edinburgh have been elected President and Vice President respectively of the Scottish Law Agents Society.

SLAS's AGM was the first in its 137 year history to be held remotely, using Zoom video conferencing. The principal motion passed, by over 90% of those present, was one calling on the SLAS council to state that it had no confidence in the budget of the Scottish Legal Complaints Commission, or that the SLCC had complied with its statutory obligations in the preparation of that budget.

Andrew Stevenson, secretary of SLAS, said: "Inflation is currently below 1%. Had the SLCC proposed an annual increase of even 1.5% this motion would never have had to have been put before the AGM. As it is, the profession is facing an increase of 3.5% in the general levy. On top of that, coronavirus is a game-changer, threatening the viability of many legal firms. This factor appears completely to have escaped the notice of the Commission. The motion as passed by SLAS is a measured and specific answer to this proposed increase."

Notifications

ENTRANCE CERTIFICATES ISSUED DURING MAY/JUNE 2020

ADAMS, Kirsty
AHMED, Farhan
BEATON, Holly
CAMPBELL, Emily
CARTER, Emma Susan
CHEYNE, Lewis William
CRAIG, Megan Sarah Mary
DOHERTY, Erin
DONALD, Catherine Margaret
DUFF, Anna Jennifer
GADDIE, Hannah Janet Patricia
HAMILTON, Julia Alexandra
HAMILTON, Mirren
HEGARTY, Alice Catherine
INGLIS, Chris Fairley
KASEM, Rouzana
KENNEDY, Laila Margaret
LAWSON, Megan Isabel
LEE ALLEN, Maya Elizabeth
McALLISTER, Megan
McALPINE, Anna
MACDONALD, Sarah Louise
McDOUGALL, Robbie Cameron
McGOWAN, Sarah Emily
McKAY, Liam James Nicholas
MACKENZIE, Ross Alexander (i)
MACKENZIE, Ross Alexander (ii)
McKINLEY, Jenna
McKINNON, Katie Ann
MILL, Stuart
MOON, Philip John
MORRIS, Anastasia
MURPHY, Ali Ian
PEARSON, Kate Jane
PEARSTON, Amy Lauren
PERRIE, Morgan
QADIR, Manahil
RUSSELL, Emily Cleo
SALTON, Catriona Morven
SHIRREFFS, Georgia Gail
SLOAN, April
SMITH, Ruaridh Alexander MacNair
SPOONER, Emily Kate
STEVENSON, Hayley
STEWART, Michael Patrick
TEVEN, Cara
THOMSON, Ashley Jayne
WEBSTER, Kimberley
WRIGHT, Caitlin Elizabeth

ENTRANCE CERTIFICATES ISSUED DURING MAY/JUNE 2020

ARCHIBALD, Jamila Ruby Louise
BROWN, Sophie
BUCHAN, Ashleigh
DUNLOP, Lucy Claire
GREGOR, Simon
IBRAHEEM, Muhammad
JOHNSTONE, Mark Peter
McKNIGHT, Christopher Thomas
MARTIN, Emma Margaret
MILLER, Alison
QUEEN, Konrad
ROBERTSON, Michael Colin
RODRÍGUEZ MOLINA, Sylvia
WHITE, Morven Elizabeth

Listen up

Lawyers prize great advocacy, but in the battle to win clients' hearts, it's listening, not talking, that gets results, says Stephen Gold

This is anecdotal, not scientific, but in conversations with law firms over the last few weeks, from national to niche, corporate to private client, I've heard a remarkably similar message: we're not where we'd like to be, but things could be a lot worse.

That said, Pollyannas are in short supply. Everyone has made tough, necessary decisions on budgets, projects and headcount, anticipating that the recovery may be more pear-shaped than V-shaped. But you can't slash your way to success. Emerging stronger means winning a larger slice of a smaller pie. The skill to sell will not be optional, a thought that terrifies the many reserved, risk-averse perfectionists who inhabit the profession and ironically are often among its best exponents.

They fear the unknown, and this is puzzling. We are all buyers as well as sellers, so we know what being on the receiving end feels like. We recoil instinctively from the hard sell, but know a good experience when we see one: being dealt with courteously by someone who is keen to help, wants to understand us and knows what they're doing. It's easy to forget that in conversations with clients and prospects where our agenda is to win more work, the first task is to not to sell, but establish rapport. Listen to the great US trial lawyer Clarence Darrow, in *How to be a Salesman*, published in the *American Mercury* in 1925:

"The farmer, it appears, must not be approached too abruptly. If you are to get his money you must break the news to him gently. You should first talk about horses, soil, and market conditions. This conversation will show that you are interested in things close to him and likewise give you a chance to study his temperament and to learn his likes and dislikes."

The enemy of rapport is talking at the expense of listening, an easy mistake – so easy that usually we do not realise we are making it. Craving the business, and full of our own message, we can barely resist the temptation to blurt it out. Here is a better way.

Reflective listening

"Reflective listening" is not just an expression, it is a skill, and has been defined thus by the behavioural psychologists Neil Katz and Kevin Murphy:

"Reflective listening is following the thoughts and feelings of another and understanding what the other is saying from his or her perspective. It is a special type of listening that involves paying respectful attention to the content and feeling expressed in another person's communication. It requires responding actively to another while keeping your attention focused completely on the speaker. In reflective listening, you do not offer your perspective, but carefully keep the focus on the other's need or problem. It can help the speaker achieve his or her outcomes, help the speaker clarify his or her thoughts on some matter, decide on a course of action, or explore his or her feelings to some new depth. It is useful for both speaker and listener."

"Conversations can't consist only of you asking questions, or it won't be long before your subjects feel like they have been dropped against their will into a quiz show"

We are concerned here with selling, but as Katz and Murphy point out, reflective listening is useful in a variety of situations: problem solving, assertion, conflict management and negotiation: pretty much the job description of a solicitor.

Here are examples of questions you might ask in a reflective listening conversation:

- "If I understand correctly, your main concern is X. Is that right?"
- "Can I just check this out with you? Your experience has been Y?"
- "So it's fair to say you think Z is the core issue here, correct?"

In response, it's important to avoid being declamatory or dogmatic. At this stage, discovering their views is more important than broadcasting your own. An unsolicited, "In my firm's opinion, this is what businesses like yours must do now," sounds presumptuous and is always a turn-off. But despite what Katz and Murphy say about not offering your perspective, conversations can't consist only of you asking questions, or it won't be long before your subjects feel like they have been dropped against their will into a quiz show. Offering thoughtful, helpful comment which arises naturally in response to what your subject has said will demonstrate your expertise and understanding.

Many professional people recoil at the thought of having sales conversations. It sounds demeaning, and antithetical to their status. But they should feel comfortable with this listen/reflect/respond process, in which they showcase their expertise and demonstrate insight, and which is not a million miles from the advisory conversations they have daily, albeit with a different agenda. In a time of heightened anxiety, clients' desire to be listened to, understood and helped is likewise heightened. Our being paid for lending a hand begins with skilfully lending an ear.

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

Dr You v The Cyber Men

Are the old ways sometimes the best? In light of the continuing grief caused by instances of cyber fraud, Ashley Swanson believes that some things don't need to be "cyber"

I have recently been re-reading the *Ensuring Excellence* risk management booklet issued by the Law Society of Scotland as long ago as May 1998. It was warning of the dangers of direct bank transfers. Twenty two years later, legal firms are still coming to grief in this respect. I think that the profession is sometimes rather slow to change its methods of doing things.

If you are trying to tell someone how to do their job in a more efficient manner, people can be very offended by this if they take it the wrong way. They can gain the impression that you are trivialising their line of work and that what you are saying in effect is, "This is such an obvious thing to do, you must be stupid if you are not already doing it." Personally, I am always willing to learn by the example of other people. To quote the Scottish entertainer Sydney Devine, "I am the biggest thief in the business. I will steal anybody's material."

The Society has engaged the services of a professional IT company to assist with cybersecurity, and I am hesitant about suggesting anything on the subject for fear of being labelled an armchair strategist, but after the eyewatering £900,000 cyber fraud earlier this year, there is nothing to be lost by making one or two simple suggestions.

The modern technology which solicitors have is wonderful, but in some cases it is also optional and if there is another safer method available for doing certain things, we should be using it.

(As a whimsical thought, maybe the Society should actually have engaged the services of Dr Who, bearing in mind the Doctor's 100% success record in encounters with these cyber people.)

High, low or no tech?

My answer to high tech fraud is low tech, or more to the point, no tech at all. There are three elements to this:

1. The Royal Mail.
2. The DX Exchange.
3. Legible handwriting.

All of these exist completely independently of any solicitor's IT system, and if the fraudsters can hack into any of them, they are welcome to try. Incidentally, if I was an internet fraudster I would currently be working full time on how to crack an encrypted email. I would be going onto the "dark web" and offering a substantial reward to anyone who could show me how to do this. These fraudsters have all day long to work these things out, while the rest of us are fully occupied trying to make an honest living.

Bank details – where?

1. Our firm's bank details should be in bold print as paragraph 1 on the very first page of our terms of business, and the terms of business should never be issued by email. Paragraph 1 should begin: "Under no circumstances whatsoever will alternative bank details be issued to you by email." As the terms of business have to be kept on our IT system and could be subject to interference, every time a copy is printed off for issuing to clients the solicitor should check that the bank details are correct.

"The modern technology which solicitors have is wonderful, but in some cases it is also optional and if there is another safer method available for doing certain things, we should be using it"

2. At the very outset of every file the following questions should be asked:

a. Do we need the clients' bank details?
b. Do the clients need our bank details?
c. Do we need the other solicitor's bank details?
d. Does the other solicitor need our bank details?

If the answer to any of these questions is yes, bank details should be issued or requested by Royal Mail or DX and not by any electronic means at all. This should be done right at the start rather than just a day or two prior to any settlement date. Clients in particular should be asked to submit bank details in legible handwriting. Your letter of enquiry should contain a stamped addressed envelope for a reply. Inform the clients that we cannot take bank details by phone or email. You can certainly phone them up to check the details once you receive their letter, but to cover your own position you need something generated by the client to lodge in the file rather than your note of their incoming telephone call. Do not scan the incoming letter into your IT system. Bank details should not be showing anywhere in your IT system.

My employers have conventional paper files, and in this respect there is something to be said for being old fashioned. Paperless offices would need to have some additional security methods in place to avoid having bank details showing in incoming correspondence. My suggestion here is that a photocopy of the relevant letter is given to the cashier to hold in a special folder and the bank details are then blanked out of the letter before it is scanned into the system.

Pen and paper

3. If it is the case that the fraudsters can alter a fax message, then bank details in a faxed redemption statement for a mortgage are suspect to say the least.

Ask a trainee or an intern to trawl through all of the firm's house sale files for the past few years looking for redemption statements from lenders, and prepare a handwritten note to give to the cashier of the various lending institutions and their bank details. None of this information should be put on to the firm's IT system. It should be kept in handwritten form only. Unless you have a dishonest staff member, this handwritten record is incorruptible. If the cashier has to set up a direct transfer to repay Andy Pandy's mortgage, they check the bank details on the faxed redemption statement received from the Bank of Toytown against the details on the handwritten list and if everything matches up the transfer can proceed.

4. Any bank details passing from one part of the office to another should be handwritten or typewritten on a good old fashioned typewriter. Do not send an email or print off a memorandum to the cashier on your computer. Just do not put bank details anywhere near your IT system.

If all mention of bank details is removed from emails, how can the fraudsters ply their trade? Even if they can hack into emails they will be grabbing at fresh air, because the bank details will simply not be there in the first place in any shape or form.

The low cost option

What we should be aiming for is a situation whereby even if our entire IT system is compromised, even if the fraudster was sitting at a desk in our office with full access to the IT system, they could not find bank details anywhere.

These security methods are an "Aberdeen" type system where the cost of implementing them is zero. There would be no consultant's fees to pay or expensive program to purchase to add an extra level of security to your IT system. As the late Margaret Thatcher said, "Not every problem can be solved by throwing money at it."

Solicitors are supposed to be intelligent and clever people. If there are 12,000 solicitors in Scotland, we should be able to make some worthwhile contribution ourselves to tightening up security. If anyone has any positive suggestions in this respect, would they care to share them with the rest of the profession through the pages of the Journal?

Everyone directly involved in the £900,000 cyber fraud will probably remember it for the rest of their lives. In addition to the Society's initiative, the legal profession should be putting their heads together to come up with methods to minimise the risk involved in these matters. The expenditure required here is of time and imagination, not money.

Ladies and gentlemen of the Scottish legal profession, over to you.

Ashley Swanson is a solicitor in private practice in Aberdeen. His views are personal. Other readers are welcome to respond.

DOMESTIC ABUSE

Domestic abuse: a CPD insight

This Scottish Government article introduces the trauma-informed training animation developed with the Society, dealing with coercive control and its impact

For many victims, and their families, home is not a safe place. This is a truth that carries additional significance during the current response to the COVID-19 crisis.

To raise awareness of the impacts of domestic abuse, an eight-minute training animation has been developed for solicitors, which discusses the benefits of a trauma-informed practice when working with those who have experienced domestic abuse. Funded by the Scottish Government, it covers the key provisions of the Domestic Abuse (Scotland) Act 2018 which came into force in April last year.

The Act now makes it easier to prosecute the spectrum of abuse that victims may suffer. It has created a single "course of conduct" offence, criminalising not only physical abuse but other forms of psychological abuse and coercive and controlling behaviour.

Police Scotland data indicate that there are around 60,000 incidents of domestic abuse recorded by the police each year. While the number of incidents reported has been relatively stable since 2011-12, this remains evidence of the unacceptable levels of domestic abuse in Scotland. Additionally, the Scottish Crime and Justice Survey (2016-18) suggests that the police came to know about just under one in five of the incidents of partner abuse experienced by respondents in the year prior to interview.

Government commitment

The approach taken in Scotland is to prevent and eradicate violence against women and girls wherever and however that occurs, including domestic abuse. That is detailed in the Equally Safe Strategy, the joint Scottish Government and COSLA strategy.

Community Safety Minister Ash Denham said: "The Scottish Government is committed to doing everything we can to tackle domestic abuse, and the underlying attitudes and inequalities that very often create the conditions for violence against women and girls to take place.

"This resource is the result of collaborative working from across the legal sector, academia, NHS, and victim support organisations. It will raise awareness of the range of coercive and controlling behaviours that may be experienced by victims of domestic abuse.

"This animation reinforces the Scottish Government's commitment to develop a trauma-informed workforce in Scotland, and highlights the importance of embedding a common understanding of domestic abuse – both the technical aspects of the law, but also the long term impact that domestic abuse can have on victims.

"I hope this animation will encourage solicitors to consider the impacts of trauma on their clients and the potential impact of vicarious trauma for themselves, and to promote good practice when working with survivors."

Promoting understanding

Louise Johnson, legal issues worker at Scottish Women's Aid, explained: "Women experiencing domestic abuse have repeatedly told us how important it is to both their own safety and wellbeing, and crucially, that of their children, to have a practitioner who is clear on the difference between domestic abuse and the family law disputes that they otherwise deal with.

"An appreciation and knowledge of how the power imbalance central to the abuse controls and restricts women's access to justice, and how the abuse impacts directly on children, particularly in relation to issues around child contact and residence, is a valuable addition to, and enhancement of, a legal professional's skillset.

"This CPD animation will support professionals towards delivering the best possible legal advice and services to vulnerable women and children who are most in need of protection, and it will raise awareness of the specialist domestic abuse services, such as Scottish Women's Aid, that can provide valuable assistance for both themselves and their client."

Katy Mathieson, Scottish Women's Rights Centre co-ordinator, added: "The training covers the key points of the new domestic abuse legislation, and promotes understanding of the impact trauma can have on victims/survivors of domestic abuse who have been subject to coercive and controlling behaviours. It also provides insight into the range of considerations a solicitor may have when working on civil domestic abuse cases. The animation includes practical steps which solicitors can take when working with people living with domestic abuse, and it demonstrates how trauma informed practice can help to build stronger

"It is important to have a practitioner who is clear on the difference between domestic abuse and the family law disputes that they otherwise deal with"

cases. Working on domestic abuse cases may be challenging, and the animation recognises the possibility of solicitors experiencing vicarious traumatisation, as well as the importance of looking after yourself and your colleagues."

During the animation a short segment raises issues around child contact, noting that a client may have concerns that her children will not be returned after contact. This issue has become of increasing concern over recent months during the response to COVID-19, and victim support services have reported a range of abusive behaviours related to conflict over child contact that are apparently specific to lockdown (research publication: bit.ly/3i6dhUW). This highlights the continued necessity for all professionals supporting these families to have an awareness of the full spectrum of domestic abuse.

CPD opportunity

Amanda Millar, President of the Law Society of Scotland, said: "We have been delighted to be part of this project. Watching the video will provide solicitors with a useful introduction in understanding the impact trauma can have on clients. It is a highly complex area of work, and while a short animation can only touch on some of the most important issues, it provides valuable insight for our members. Any solicitors who are interested in developing their knowledge and skills can engage in further training which has been developed specifically for legal practitioners by our project partners."

Watching the new video, completing the supplementary reading and passing a test allows solicitors to claim one hour of CPD. The animation, readings and test are available on the Society's website at www.lawscot.org.uk/members/cpd-training/trauma-informed-training/ J

Child contact: a creative approach

Relationships Scotland – Family Mediation Highland has introduced innovative measures to help maintain child contact in response to COVID-19

Although the Scottish Government is starting to relax social distancing measures, many businesses and organisations have had to think creatively about how they can continue to deliver their services.

One such organisation is the Highland branch of Relationships Scotland. As a family law solicitor I have, like many of my colleagues across Scotland, been continuing to work closely with clients to help them resolve child contact disputes. These disputes have now, as a result of COVID-19, taken on a level of complexity in ways we have never seen before.

Many clients were using the services of Relationships Scotland – Family Mediation Highland (RS-FMH), before social distancing measures were introduced. All family law solicitors are aware of the important work carried out by their local child contact centres. In March 2020 the RS-FMH office/contact centre had to close, but it has continued working remotely, going above and beyond to initiate a means by which its staff can assist clients/service users, and most importantly children, as best it can in line with Government guidance. Here are some examples of what it has introduced:

• **Direct contact from staff:** Staff compiled a list of service users – those in greatest need of ongoing support – that a family support worker would call on a regular basis simply to "check in".

• **Advice for safe and successful contact:** The service found that some families were able to organise their own arrangements to agree some kind of contact during lockdown. Staff assisted, where requested, by offering advice on how to manage boundaries, and ideas for how to make video calls fun and engaging for young children.

• **Digital post box:** Where direct communication between parents was not possible the service offered the use of its innovative "Digital post box". This has enabled staff to continue to facilitate indirect contact between parents and children in the form of regular updates by video, photo and email. Resident parents send videos and photos of their children together with written or verbal updates. Non-resident parents can, in turn, send videos, photos and messages to the other parent for them to share with the child. Importantly, *all* content is screened by staff before being passed on.

• **Observed video contact:** The most recent addition to this evolving toolbox is the introduction of Zoom contact between child and non-resident parent. FMH hosts the call, and the contact details of both child and parent are kept confidential. Staff remain on the call throughout and intervene in any situation they decide is inappropriate, unsafe or potentially distressing for parent or child.

These additional services have been welcomed by family law solicitors across the Highlands. Service users have, similarly, provided very positive feedback to FMH and it is highly likely that some, if not all, of these services will continue to form part of the offering of FMH moving forward.

Margret MacRae, RS-FMH service manager, said: "I think we can all relate to how hard it has been not being able to see our families during lockdown. Whilst most parents wished for children to maintain a relationship with their other parent, the additional challenges and anxiety resulting from COVID-19 have made this even more difficult for some parents to arrange by themselves. Both resident and non-resident parents have shared how much the contact provided by these new services has meant to them and their children."

On behalf of all of my solicitor colleagues across Highland, and the many clients and children who are benefitting from the efforts of Relationships Scotland – Family Mediation Highland, I want to express gratitude to Margret and all of her team for their incredible work during these challenging times. J

Sarah A Lilley, senior associate at Brodies LLP and accredited child law specialist, with Margret MacRae, RS-FMH service manager

RISK MANAGEMENT

Set off on the right foot

In a follow-up to last month's article on homeworking risks, Anne Kentish and Graeme Milloy share their views on client and transaction vetting and related risk issues that should be considered by law firms, as COVID-19 continues to affect working practices

Client and transaction vetting are activities which have always been a required and necessary part of a solicitor's job when taking on a new client, but never more so than in the current environment.

The COVID-19 crisis has already caused unprecedented upheaval to "business as usual", with fundamental changes almost certainly on the horizon.

As lockdown restrictions are gradually eased and we all start thinking about how to restart business and recover from the financial hit, it is important that the profession thinks about what can be done to minimise risk when seeking to take on new work in what is now a radically altered landscape.

The Law Society of Scotland provides helpful COVID-19 guidance, including advice on how solicitors should approach the process of verifying and vetting new clients. That advice is regularly updated on the website, and the Society's Professional Practice team is working remotely and able to deal with any specific questions. In this article, we focus on key areas to think about when considering taking on a new transaction.

Just don't dabble

Previously reliable streams of work have dried up or seen significant reductions in volume as a result of the lockdown. Clients now face unprecedented challenges, and they will be more reliant than ever on help and advice from the profession. The natural temptation is to seize every opportunity and accept all client instructions that come your way.

However much new business seems attractive, a realistic assessment should always be made before accepting it – are you equipped to accept the instructions in question? Do you have sufficient knowledge of the practice area, and does your firm have sufficient resources to carry out the required work adequately? The last point is particularly relevant, given that fee earners and support staff may not currently be working and may return to work in a reduced capacity.

If things unfortunately go wrong, a solicitor's lack of experience will likely not prove to be an effective answer to a complaint or a claim. The standard for negligence makes no allowance for the fact that a solicitor was working outside their comfort zone. The claims landscape following the 2007 financial crash made clear that an increase in dabbling leads to an upsurge in claims against solicitors.

Instructions in the age of virtual meetings

The fundamentals of dealing with new business have not changed – take careful initial instructions from the client. What has changed, of course, is the ability to carry out this process face-to-face. Current restrictions essentially rule out physical meetings, and even as restrictions are eased it seems likely that there will be a shift away from face-to-face interaction.

Instructions have always been taken over the phone and by email, of course, and remote meetings can now approximate a physical meeting. Sometimes, however, none of these can get to the nub of the issue quite like a physical meeting can.

"It is important that the profession thinks about what can be done to minimise risk when seeking new work in a radically altered landscape"

The best way to head off any risk that instructions are misinterpreted is to communicate. As soon as reasonably practicable, express clearly in writing what you understand to be the client's instructions and have them confirm that you have correctly understood them. Take file notes of your own, detailing what were the instructions provided – you will doubtless be sick of having this particular point repeated to you in these articles, but it really is more important now than ever before to keep notes. And keep file notes safe – they are of no use if they have been lost or destroyed.

Another point to bear in mind is that remote meetings can pose headaches from a data protection standpoint. Virtual platforms, while user friendly, may come with security issues. Ensure that the client is informed of any risks to the security of their data arising from the choice of platform. You might personally prefer to hold a remote meeting to approximate a face-to-face discussion, but security concerns may need to override your preference. Consider this point particularly if the client's instructions may relate to commercially or personally sensitive matters.

Don't forget the humble letter of engagement

Letters of engagement can be powerful tools, especially so for new clients, and yet too often solicitors seem to resist properly scoping their engagement letters to mitigate the risks arising from transactions. If you decide to venture into a new area of practice or are working with a new client, it is doubly important that you are precise about exactly how far you will go and what you will do or not do in relation to the matter.

Many practitioners will issue to a client a letter of engagement covering a particular type of work (lease preparation, debt recovery work), and when future instructions

to carry out the same type of work are received no further engagement letters are issued. That is allowed – practice rule B4 says that you don't need to repeatedly provide the information required under that rule to a regular client who instructs the same type of work, provided they got that information at the time of their first instruction. However, always carefully weigh up the nature of each new instruction: is a proposed transaction really of such similar character to previous ones, or are there any distinguishing factors which should be specifically covered off in a transaction-specific engagement letter?

Consider on exactly what terms you should engage to carry out transactional work where you have identified any transaction-specific risk factors. We have seen claims which might have been avoided if a tailored letter of engagement which properly defined what the solicitor was going to do, and what they would not be doing, had been issued rather than a generic engagement letter. The solicitors failed at the outset to identify that there were specific factors associated with the proposed transaction which increased risk, such as jurisdictional or choice of law issues which might arise, and they failed to take sufficient care to reduce that risk through tailored engagement terms. The result is that there is exposure to potential liability which could potentially have been limited or excluded.

In particular, if you are advising on contractual matters, it is desirable to set out clearly what is the scope of the advice being provided, so that there is a limit to the scope of what is your duty to advise the client. This will help the client properly to understand what your advice will (and will not) cover, which will manage expectations and in turn reduce the likelihood of complaints.

A final point regarding engagement letters is an administrative one. In pre-COVID times, many practitioners might simply have dictated instructions along the lines of "please prepare and issue to the client the standard letter of engagement", and thought no further about it. That could lead to issues where no copy of the principal letter was retained on the file and there was therefore no documentary proof that it was sent.

Engagement letters will now likely be sent out by email. That will generate an email trail showing that every engagement letter was sent, which may actually be an improvement on previous record keeping. But make sure that each email sent is actually properly stored and not left languishing in someone's sent email folder, at risk of being deleted, lost when IT systems are updated, or simply forgotten about if that person leaves the firm or perhaps is furloughed. This point is true regarding all emails sent and received; store them safely!

COVID, contracts and conflict

Firms are now seeing an increased demand for advice on how contracts respond to COVID restrictions and the current business environment. Your firm may well have originally drafted the contracts in question for the client.

The effects of a global pandemic may have been entirely beyond the contemplation of the original drafter, and the operation of provisions such as *force majeure* clauses may now be viewed in an entirely new light. Be aware of the potential for a conflict of interest to arise – such risks need to be identified at the outset to avoid problems further down the road.

Once a fraud, always a fraud

Fraud is still a major issue in the current climate, and the methods by which fraudsters operate often are unchanged.

However, what may have changed are perceptions. Whereas previously an instruction from a new client located hundreds of miles away might have elicited suspicion, it may be less likely to raise an eyebrow where all instructions can now only be received over the phone, remotely or by email.

Many solicitors will see the shift away from physical meetings as a good opportunity to seek out new clients who otherwise have been excluded by geography. Don't forget that if something would have aroused suspicion before the lockdown, it almost certainly is suspicious now.

To illustrate the point, a geographically distant party with no prior connections to your firm, or your existing clients, being nevertheless desperate to instruct you should always ring alarm bells.

The same principle applies regarding the details of proposed transactions, even where the client is already known. Factors which were suspicious before COVID remain suspicious now, and certain questions should always be considered before acting: why is the transaction structured in the way that it is; is your firm being asked to receive and transfer funds which appear tangential to the purposes of the transaction; is there any unexplained or undue sense of urgency in the background?

This article was co-authored for Lockton by Anne Kentish and Graeme Milloy of Clyde & Co

James Haldane Tait

8 January 1931-9 April 2020

James Haldane Tait died peacefully at home on 9 April 2020, from causes unrelated to coronavirus. He was a remarkable man who has left the world immensely enriched by his time upon it, and is remembered with love and affection by all those whose lives he touched, whether in law, in the church, in scouting, in horticulture, in the apparently esoteric world of Egyptology, or in any of the other areas of human endeavour in which he took a keen interest.

Born in Leith on 8 January 1931, Haldane attended school at George Heriot's where his love of language and skill in debating was manifest.

It was during National Service from 1952 to 1954 that he became involved with West Hartlepool Scouts, leading on his return to Edinburgh to his becoming group leader of the 7th Leith Scouts, and eventually receiving the prestigious Award of the Silver Wolf. Even now there are those who have not forgotten when he turned a training ship in Leith Docks into a pirate vessel, with himself as the pirate captain and the boys as his crew, knotting ropes, walking the plank and eating (they were convinced) weevily biscuits!

On graduating BL from Edinburgh University in 1952, he served his apprenticeship with Shepherd & Wedderburn and Gray Millar & Carmichael SSC, before joining the family firm of G W Tait & Sons SSC. On the death of the senior partners, his uncles, he carried on the family business in a new partnership with George Tait and David Johnston until 1985, when he moved to Kilgour McNeill & Sime, and then Robson MacLean. He became a temporary sheriff and served from 1987 to 1991 as Joint Auditor of

Edinburgh Sheriff Court. He was an enthusiastic Council member of the SSC Society from 1967, and its librarian from 1985 to 1990. He was also a Council member of the Law Society of Scotland and convener of the Legal Aid Central Committee, and is remembered as a hardworking editor of the Society's Journal.

In 1991, he left private practice to take on the challenging role of Auditor of the Court of Session, earning the respect of his colleagues for his fairness and courtesy.

In his private life, he was a much-loved husband and father. His marriage to Margaret McLeod in 1968 brought him great happiness and joy, lasting until his death. In Margaret, he found a life partner with whom to develop numerous interests, contribute to the community and serve others. Together they formed a great team, sharing a sharp intellect, a pawky sense of humour and, at root, a deep understanding of human nature. They were made for each other. They had two children, Margaret Anne, and Colin, who sadly died in 2000 after a kidney operation, and three grandchildren.

Following retiral as Auditor in 1998, Haldane was able to devote more time to his private passions, including horticulture and ancient history. After studying archaeology at Edinburgh University came the joys of deciphering hieroglyphs and studying ancient stelae at Glasgow University, memorable visits with Margaret to Egypt and Turin, and lectures at the Egypt Exploration Society in London. His love of Egyptology became an absorbing passion and one which gave him enormous pleasure.

I first met Haldane in 1975, when I was devilling to Alastair McGregor. I remember him coming to Parliament House, immaculate in his blacks and wearing a bowler hat, but the very last thing he was, was stuffy. Rather, he was bright, lively, sharp, entertaining, above all filled with kindness. He always acted with integrity. He was true to his essential nature, and, in that, served as an example to us all.

One of his former colleagues said of him that he was "friendly, amusing, widely respected with a wonderful sense of humour, entertaining, great company and a good friend. He showed kindness and exceptional concern for the wellbeing of others. Working with Haldane you learned so much".

He was also a man of quiet, undemonstrative, but deeply held faith, and an elder of Palmerston Place Church. Perhaps, if you were to sum up all of Haldane's qualities in a single phrase, you could not better what Douglas Irvine, one of his apprentices at G W Tait & Sons and now a minister in the Church of Scotland, has said of him: "J Haldane Tait was a true Christian gentleman."

Haldane achieved much in so many areas of human endeavour, influenced so many people and has left a legacy of lives made better by his touching them, whether it be the young wolf cubs from the tenements of Leith whose eyes he opened to the natural world, or the young lawyers who were inspired to follow his example of integrity and service. In those whom he influenced, you see, now, his enduring legacy.

Iain G Mitchell QC

ASK ASH

Demands on a lockdown working mother

I'm getting worn down trying to juggle all my commitments

Dear Ash,

I am still finding it difficult to adjust to working from home full time as well as home-schooling my children and attending to the housework. Prior to the COVID-19 pandemic I was able to escape to the office and focus purely on my work, and I am finding it difficult to concentrate with the various distractions at home. I have little support as my husband still attends work during the day, so I am the one primarily juggling childcare with work commitments. I normally have my mum to help with childcare, but she is self-isolating due to her health conditions. I'm getting tired and frustrated due to the demands on my time and am consequently unable to concentrate on work properly, which my manager recently commented on too.

Ash replies:

It has been tough adjusting to lockdown conditions; and according to the Institute for Fiscal Studies and UCL Institute of Education, mothers have found it much more challenging to carry out uninterrupted paid work during lockdown compared to fathers. You are therefore not

alone! However, for your own sake you need to take steps to address the issue. First, find out from your employer if there is any flexibility in regard to your working hours: for example, consider starting work earlier when the children may be sleeping or otherwise engaged, or later than normal hours to work around the childcare you need to provide. Most employers are happy to be more accommodating in the current circumstances, especially if it improves productivity and employee engagement in the long term.

Also try to find a pocket of space in your home where you can close the door and focus for at least a couple of hours whilst the kids watch a film or play in the garden. For smaller children I appreciate this is not always possible, but see if your partner can assist with the childcare to allow you to at least have a couple of hours of breathing space.

Another important part of your wellbeing is to get a good night's sleep. I appreciate that the pressures of work can often disturb sleeping patterns, so try to set out a daily to do list for work and for your home, and to tick off at least two or three tasks each day. This will give you a sense of achievement, rather than make you feel dread at what you have still to do.

You also need some time to yourself to relax in order to recharge your batteries for the next day, so after the kids are in bed and the laptop is closed, find time to treat yourself: a few candles, a warm bath, a chat with friends by phone or even just a cuppa in front of the telly – anything that helps, as it is clearly well deserved! Restrictions should hopefully ease and this should help to restore some balance back to our lives. Take care.

Send your queries to Ash

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

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

FROM THE ARCHIVES

50 years ago

From "The Lawyer in 2050", July 1970: "And last but not least: the further application of techniques will reduce to a large extent interpersonal contact. Procedures, during which clients hardly see their lawyer or do not meet him at all, will create the necessity for the lawyer to have an eye to the importance of inter-human relations in a technically perfect but inhuman society. Most probably the greatest problem for the work of the future lawyer will be: to keep on finding time and opportunity for the man-to-man contact which is so essential in his job."

25 years ago

From "The purported ministerial revocation of the Criminal Injuries Compensation Scheme", June 1995: "The House of Lords' decision in *R v Secretary of State for the Home Department*, ex parte *Fire Brigades Union*... [highlights] issues of major constitutional importance and focuses attention on the wider question as to the proper degree of judicial restraint to be exercised where allegations of abuse of power by the executive are encountered... the subservience of the executive to Parliament is reasserted, as is the illegality of invoking prerogative powers to override the clearly expressed will of Parliament."

Classifieds

John Duncker (deceased) – Would any solicitor or other person holding or having knowledge of a Will by the late John Duncker please contact Sarah Lonie at Anderson Strathern LLP, 1 Rutland Court, Edinburgh, EH3 8EY (telephone number 0131 270 7828 or email sarah.lonie@andersonstrathern.co.uk). By way of background, Mr Duncker grew up in Scotland in the 1950s and attended Dollar Academy and Edinburgh University. He worked briefly at his family garage in Kinross thereafter.

Daniel Heaney (deceased) – Would anyone holding or having knowledge of a Will by Daniel Heaney sometime of Glasgow, and latterly of Ashgrove Care Home, 229 Alexandra Parade, Kirn, Dunoon PA23 8HD who died on 3rd April 2020 please contact Alison Barron, Stewart & Bennett, Dunoon on 01369 702 885 or abarron@stewartbennett.com

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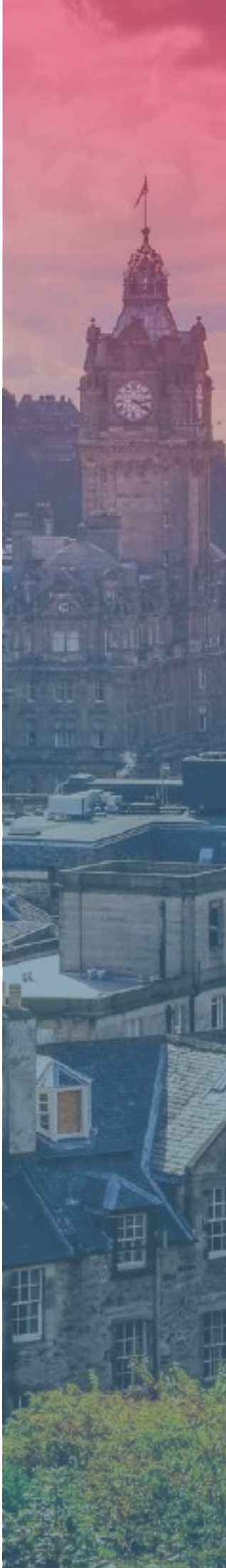

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