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Journal

Journal of the Law Society of Scotland

Volume 66 Number 7 – July 2021

Long goodbye

Ian Forrester QC, former judge on the General Court of the EU, speaks on life among differing legal traditions, and ongoing legal issues from Brexit

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Law Society of Scotland

Publishers
The Law Society of Scotland
Atria One, 144 Morrison Street,
Edinburgh EH3 8EX
t: 0131 226 7411 f: 0131 225 2934
e: lawscot@lawscot.org.uk

President: Ken Dalling
Vice President: Murray Etherington
Chief Executive: Lorna Jack

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Editorial
Connect Publications (Scotland) Ltd

Editor: Peter Nicholson: 07785 460743
e: peter@connectcommunications.co.uk

Advertising: Elliot Whitehead: +44 7795 977708
e: journalsales@connectcommunications.co.uk

Review editor: David J Dickson

Online legal news:
e: news@connectcommunications.co.uk

Other Connect Publications contacts,
telephone 0141 561 0300

Head of design: James Cargill (0141 561 3030)
james@connectcommunications.co.uk

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Editor

Email > peter@connectcommunications.co.uk
Read > www.lawscot.org.uk/news-and-events/blogs-opinions/
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Change at the top

It's amazing how often some big legal news breaks just when I've gone on holiday. Last month it was the pending retirement of the Society's chief executive Lorna Jack.

It would be difficult to overstate the extent of the changes that have taken place at the Society during her tenure, which dates back to January 2009.

I looked back for interest at my first interview with Lorna Jack (Journal, February 2009), soon after she arrived as the first non-solicitor to head the Society. One phrase I recorded was "improving our governance arrangements constantly – an organisation should do that naturally", and I wrote of my impression that she "looks set to accelerate the progress of the Society as a more dynamic, outward looking body". That has been borne out constantly over the 12½ years since.

Progress was in hand before she arrived, but fresh impetus there certainly has been, driven by the five year strategic plans carrying a vision of a world class professional body, with annual business plans to take these forward containing specific goals tracked at every Council meeting. The transformation has included the Society moving from the confines of Drumsheugh Gardens to the bright environs of Atria One, and establishing itself as a leader in equality and diversity.

Of course there have been trials along the way. The schism in the profession over alternative business structures was deep, and wounding, yet no one can judge the outcome: it is ironic that the Government that started the whole process has to date found itself unable to finish it, though the Society has done everything it could to prepare. The debate about the Society's own future status is far from over. And COVID-19 tested its leadership (and just about everyone else) to the limit, but has been another challenge met.

Another positive has been the Society's steady building of its public image where it matters. The quality of its parliamentary briefings – sometimes provided under the tightest of timetables – has come to be accepted almost without question by MSPs, and perhaps also MPs; and careful judgment as to when to build bridges with Government and when to take a stand, gave it a strong hand for example in the vital legal aid negotiations at the turn of the year – with Lorna herself involved at the climax.

In pretty much everything it does, the Society works as a team. That should not change just because of a change in the person at the top. But that person has a key role in setting the direction, and the ethos, of the organisation; and for its positive, dynamic vibe of today, the Society has much to thank Lorna Jack for.

Contributors

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

Carly Forrest is a partner in insurance and risk at Brodies LLP

Amanda Jane Ward and **Jennifer O'Neill** are members of the Society's Health & Medical Law Committee

Elaine E Sutherland is Professor Emerita at the University of Stirling

Ann (Lady) Paton (co-author) is chair of the Scottish Law Commission

Sarah Eynon is Infralink programme lead at the Scottish Futures Trust

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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In practice

ONLINE INSIGHT

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

Cladding and external wall systems – an update

Brian Smith looks at what the Scottish Government is doing in relation to high rise blocks with potential cladding issues, and the current state of play from a practical point of view with the EWS1 form

Virtual proofs: anticipation and reality

Alan Robertson was enthusiastic at the prospect of his first virtual proof, but it threw up a number of practical issues which he believes need addressed if they are to remain a feature of litigation

Judges and commercial common sense

Richard McMeekin believes that Scottish judges are less wary than their English cousins about relying on commercial common sense as a means of interpreting commercial contracts – at the expense of certainty

Right to work checks: what must employers do?

Maria Gravelle provides a guide for employers on carrying out right to work checks after 1 July 2021, in light of the Home Office guidance that applies after the deadline for applying to the EU Settlement Scheme

OPINION

Brian Dempsey

If the UNCRC Bill as passed becomes law, it could have the unintended consequences of infantilising young adults, and perhaps a higher minimum age of marriage, which would be a retrograde step

As readers will know, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, passed unanimously by the Parliament on 16 March, is being challenged by the UK Government in the Supreme Court. If the bill survives this test of legislative competency, it will make it unlawful for Scottish ministers, courts, tribunals and other public authorities to act in a way which is incompatible with the UNCRC.

So what's not to like? Well, the definition of a child in the UNCRC is a person below the age of 18, unless the age of majority is attained earlier (article 1). In Scotland the age of majority is 18 (s 1, Age of Majority (Scotland) Act 1969), and so if brought into force the bill will create a situation in which young adults of 16 or 17 will be transformed into children.

This is regrettable, as it is in conflict with a range of laws giving greater respect to the rights and autonomy of young adults. Although only indirectly prompted by the UNCRC, the recent announcement by the UK Government that it intends to raise the minimum age for marriage in England & Wales from 16 to 18 shows one possible unintended consequence of incorporation.

Generally, a person under the age of 16 years has no legal capacity in Scots law, while a person of 16 years and older has full capacity (s 1, Age of Legal Capacity (Scotland) Act 1991). While there is some limited protection for young adults of 16 or 17 to have substantially prejudicial transactions set aside if challenged before they reach the age of 21 (s 3), the exceptions in the Act are more concerned with when a person under 16 will in fact have capacity (s 2).

In family law, parental responsibilities and rights imposed by the Children (Scotland) Act 1995 end when the child reaches 16, if not before, with the one exception of providing guidance, but not direction, until age 18. Indeed the 1995 Act states that the parental responsibility to act as the child's legal representative exists *only* "where the child is incapable of so acting or consenting on [their] own behalf" (s 15(5)(b)), so where a child under 16 in fact has capacity under the 1991 Act the parent's ability to act disappears.

The minimum age for marriage in Scotland is 16 (s 1, Marriage (Scotland) Act 1977). In order to protect young persons, the age of consent to sexual activity is also set at 16 (Sexual Offences (Scotland) Act 2009). (Yet, to our shame, the age at which we hold children criminally responsible was raised to just 12 by the Age of Criminal Responsibility (Scotland) Act 2019.)

Young adults of 16 and 17 have been empowered to vote in Scottish elections (Scottish Elections (Reduction of Voting Age) Act 2015).

All of this shows that the age of 16 is, generally, the appropriate age at which the law should recognise that older children become young adults.

If the UNCRC is incorporated into Scots law, one of the first tests of its impact could be in relation to the minimum age for marriage.

Recently, under pressure from campaigners against forced marriage, the UK Government announced that it will legislate to raise the minimum age for marriage in England & Wales from 16 to 18. At present, it is a requirement that 16 and 17 year olds get the permission of their parents if they are to marry, except that it does not matter if they marry without that permission (aspects of English marriage law stand in need of rationalisation).

Whether raising the minimum age of marriage for all persons in England & Wales is the best response to the scourge of forced marriage is a matter for that jurisdiction. The UK Government's Forced Marriage Unit states that of the 1,355 reports of actual or suspected forced marriage in 2019, about 18% of those targeted were under 16, so clearly were not protected by the minimum age, and 68% were 18 or over, so would not be protected by raising the age. Perhaps strengthening the effectiveness of forced marriage legislation would be a better way to go?

So how would the UNCRC impact on the settled Scots law of marriage? As noted above, the definition of a child in Scotland under the UNCRC is a person under the age of 18. Although the UNCRC does not directly address forced marriage, the UN's position is that marriage under the age of 18 is "child marriage" and is always a species of forced marriage to be condemned and eradicated. Some commentators support the imposition of that position in Scotland (Rebecca McQuillan, "It's time for Scotland to end child marriage", *The Herald*, 18 June 2021), but the infantilising of young adults in Scotland would be a retrograde step.

Brian Dempsey is a lecturer in law at the University of Dundee

VIEWPOINTS

The editor's pick of some recent Twitter posts

"Dear Sirs..."
We strive to make positive changes at Thorntons so we have recently changed our salutations to wave goodbye to #DearSirs and pave the way to becoming more inclusive and gender neutral. ***@Thorntons_Law***

Northern Ireland Protocol
An interesting, well-argued, commentary on the Northern Ireland Protocol by former #Taoiseach & former EU Ambassador to the USA, John Bruton, who is always worth listening to on EU issues. @EUintheUS @EUAmbUS [bit.ly/3xsWdd7] ***@DanMulhall (Ireland's Ambassador to the USA)***

Face masks
Before folk get upset about there being differing laws on mask wearing between Scotland and England remember: Scotland banned indoor smoking in March 2006 (16 months before England) and the world kept on turning. It's not an affront to democracy. It's a public health measure. ***@drmarcaitken***

Defence agents
[Thread] Rising numbers of agents testing positive/self isolating in Edinburgh. Entire firms effectively incapacitated. Sole practitioners marooned at home. There is real worry out there about how commitments can be met if and when the dreaded ping arrives..... ***@DarrylLovie***

Universal credit
The cut to universal credit in September will be devastating, with single people seeing their monthly income fall again from £410 to £318 and many low income people being thrown out the benefit system altogether. Just as furlough comes to an end. ***@Advice_Scotland***

Privilege
Tell you what though. Nothing makes you more aware of your own privilege than spending a day in court. Those who make our laws should be obligated to spend a week observing trials/ sentencings in/close to their constituencies. (Yes I know @BarristerSecret has said this already.) ***@HannahAlOthman (Sunday Times journalist)***

Rule of law
Don't attack rule of law, says top judge: Chief Justice's comments seen as rejoinder to Lord Chancellor [bit.ly/3dRXhpi] New post, free to read. ***@JoshuaRozenberg***

UK Supreme Court
Today we launch our free, interactive virtual tours for schools in jurisdictions that use the Judicial Committee of the Privy Council (JCPC) as their final court of appeal. Tours provide information about the building, the JCPC's history, cases and more. ***@UKSupremeCourt***

BAILII information resource
BAILII: The first 20 years www.bailii.org/bailii/timeline/ #bailii #law #selflitigants ***@BAILII***

England team
Congratulations to @GarethSouthgate & @England who have shown true leadership to the country in areas of discrimination, inequality & humanity while still doing the day job! #ShowRacismtheRedCard #ProuderTogether #AbuseisUnacceptable #CivilSociety #MuchStillToDo ***@amanda_millar***

BOOK REVIEWS

Public Law (4th edition)

PAUL REID
PUBLISHER: W GREEN
ISBN: 978-0414060524; PRICE: £40

The fourth edition of this core text on Scottish public law provides comprehensive, up-to-date and accessible coverage of the key areas. The book is equally of value to those newly entering the law, this field of law, or practitioners who come into contact with public law.

One has to step back and consider the areas which may become of ever increasing focus in the course of the next few years, including judicial review, the Human Rights Act, and the decisions of the Supreme Court following the 2016 referendum.

The book opens with a legal analysis of the 2014 and 2016 referendums which, the author notes, "have seen the constitutional arrangements of the United Kingdom tested to the extreme". Thereafter over 15 chapters he shines a penetrating light on the subject, ranging across the foundations such as elections, rule of law, parliaments, governments, the courts, tribunals and the judiciary to the more complex areas of human rights, the continuing relationship between the UK and EU, and judicial review. The chapter on EU law and in particular retained EU law is an exposition of clarity.

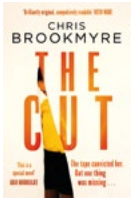
The author offers no personal view on any of these issues. However their importance is undeniable and this text provides insight with immense clarity.

David J Dickson, solicitor advocate and review editor
For a fuller review see bit.ly/3xvo5mM

Legacies of the International Criminal Tribunal for the Former Yugoslavia

EDITED BY CARSTEN STAHN AND OTHERS
PUBLISHER: OXFORD UNIVERSITY PRESS
ISBN: 978-0198862956; PRICE £95

Read the review by David Josse QC at bit.ly/3xvo5mM



The Cut

CHRIS BROOKMYRE
(LITTLE, BROWN: £18.99; E-BOOK £9.99)

"Written with Brookmyre's inimitable style, this book is thoroughly enjoyable and one to savour over a couple of sun soaked summer afternoons."

This month's leisure selection is at bit.ly/3xvo5mM

BLOG OF THE MONTH

www.landcommission.gov.scot

Hamish Trench, chief executive of the Scottish Land Commission, authors the first blog in a series titled "Land &", looking at the connection between land ownership and economic recovery and growth.

Promoting a diverse pattern including community ownership, and shared governance models, he concludes: "There is no shortage of ways that land reform can help deliver... Land reform is a continual process, and one that can help Scotland take some big steps in its ambitions over the next five years."

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

"Humans may also be needed"

"Sources cite that 85% of job concepts predicted for 2030 do not currently exist." Just one of the eyecatching sentences in a new report published by the Law Society of England & Wales.

Images of the Future Worlds Facing the Legal Profession 2020-2030 is the first stage of LSEW's *Future Worlds 2050* project, set up to promote "raw, frank and honest discussions" around future client needs and the business models to meet them.

It doesn't end with the present decade but boldly peers into the 2050 crystal ball. Some may draw (relative) comfort from the "conservative route", of high street rather than "high-end" decline, but emerging alternative and multidisciplinary models. More attention has been drawn to the "disruptive scenario": "Only the high value, complex or newest areas of law will need human input. Humans may also be needed in relationship management with larger clients".

Oh, and those who survive may find their prized flexible working curtailed. "Lawyers remaining within the profession must work alongside technology – and are required to take performance-enhancing medication in order to optimize their own productivity and effectiveness."

PROFILE

Colin Cameron

Colin Cameron, the Society's newest honorary life member, was a pivotal figure in achieving Malawian independence and has continued to support the country's people. This is his story

❶ How did he become involved with Malawi?

Colin Cameron qualified as solicitor in 1957, married Alison Spittal, and left Scotland for a position with a firm in Malawi (then Nyasaland). Voyaging via South Africa, the couple quickly became disillusioned by their experiences of apartheid, which they found effectively practised also in Malawi.

Colin began active support of the Nyasaland African Congress and working with its leaders, including Dr Hastings Banda who became its President, and in the mass movement for independence.

❷ What was his role in Malawian independence?

In 1960, Colin was invited by Dr Banda to stand in elections. He was appointed Minister of Works and Transport in Dr Banda's first cabinet. He also took part in the Marlborough House Conference, London, when the future independence of Malawi and its constitution were negotiated. He set up new transport companies prior to independence and represented Malawi in other African states.

❸ How did relations with Dr Banda break down?

Shortly after independence in July 1964, Dr Banda, without discussion, introduced a fundamental change to the constitution to allow detention without trial. Colin resigned from the cabinet on this issue. Law and order broke down and only by good luck did Colin escape. He and his family were deported under armed guard, leaving all their possessions.

❹ What happened after his return to Scotland?

Colin resumed legal practice, setting up his own firm in Irvine in 1970. He served on the Society's Council from 1976-1982. When democracy returned to Malawi in 1994, the new President offered Colin the position of Honorary Consul in Scotland, which he held until 2009. He was closely involved in the Scotland-Malawi Co-operation Agreement signed in 2005. In 2017, the Malawi Government presented him with a Malawi Medal of Recognition for his involvement over the decades.

Read a fuller biography at bit.ly/3xvo5mM

WORLD WIDE WEIRD

① Bedrock of justice

bit.ly/3qZZKOM

The Californian owner of a Flintstones-themed house, charged with public nuisance, has won the right to keep large sculptures and landscaping relating to the cartoon characters in her back yard.

② Cereal offender?

bit.ly/3xpbh2h

Marcy Shaffer, a prison guard, has been fired and arrested on a charge with smuggling drugs hidden in Rice Krispies treats into a women's jail in South Carolina.

③ Getting the bird

bit.ly/3qWttJJ

Two men have appeared in court after a 7ft tall Big Bird costume was stolen from a Sesame Street circus in Adelaide – and returned with a note apologising for being a "big birden".

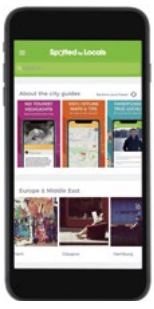
TECH OF THE MONTH

Spotted By Locals

iOS, Android, free

If you're planning a break, home or away, and want to see your destination through the eyes of the people who live there, you should download Spotted By Locals. It's a travel app that recommends places to visit within 81 cities including Glasgow and Edinburgh, based on curations from people who live in and around the area.

www.spottedbylocals.com/app



PRESIDENT

Ken Dalling

COVID has made many aspects of our lives harder than before, but it is still worth checking the things within our control to make sure we are not being held back unnecessarily in our lives

When my younger daughter was about six years of age, and not very long after she had learned to ride a bike, we decided to have a family cycle along the Forth & Clyde Canal from Dullatur to the Falkirk Wheel. Four bikes were loaded on to the back of the car, then unloaded and we set off on the towpath. It would be a bit of an adventure, but hopefully not too much for Fiona or her older sister Claire. No hills always helps when you are on a bike.

After about 10 minutes, Fiona was tired. This didn't bode well. She was encouraged and she persevered. We stopped, as I recall, another couple of times in the following 20 minutes or so. We told her that we were all on the same journey, that the exercise was good for her – we probably promised chocolate. Eventually, and to my shame after too long, we all stopped for a proper rest. Only then did I notice that the cable to the back brake on Fiona's bike had been caught when I took the bike off the bike rack. Fiona had been cycling for half an hour with her brakes on. I feel guilty about that to this day.

In so many ways COVID has put the brakes on so many aspects of our life. There have been lots of things we simply have not been able to do but, perhaps even worse, the things we have done have been made much more difficult.

Education hurdle

The Society's Donald Dewar Debating Tournament was held on an entirely virtual footing this year, and it was my pleasure to speak to the school students and announce Peebles High as the tournament winners. As well as impacting on their studies, the pandemic with its consequential uncertainty around education, careers and general day-to-day living will have affected the wellbeing, confidence and general happiness of students. I hope that their participation in the debates was of benefit to them and also a balance to some of the rubbish with which they've had to live.

It was also a great pleasure for me to "speak" at the graduation ceremony for the Law School of the University of Strathclyde. As well as being an alumnus of that institution, I am the third successive President to have been so. I have seen at first hand how much more difficult remote university study has been in the year of COVID; Fiona, now 25, has just completed her Diploma in Legal Practice and is set to start her traineeship. So much is learned from the shared experience of university life, whether that be in the common room, in the library or, yes, even in the pub! Those students who have been required to do without that, but have still succeeded in their studies, should be very proud of themselves.

The Rising Star award was presented at the In-house Lawyers' Conference. We recognised that the value of supervision, mentoring and learning by osmosis as we work alongside more experienced colleagues was not to be underestimated. Current circumstances made those layers of in-practice development very difficult and it was to the credit to Angus Niven of BoxMedia, the award winner, and to Anna Ziarkowska of Aberdeenshire Council, as runner up, that they had achieved so much so early in their careers.

Check your brakes

So too with those of us who have been at this for a while. Over the past year we have been required to endure extraordinary circumstances. We have all had to adapt, in a very short timeframe, to significant business interruption, to working from home and to communicating online. We have had to work longer and harder than ever to mitigate the effects of the pandemic. New and seemingly everchanging work practices have not made it easy, but we have persevered and will continue to do so.

But there are things about which we can do something. For my own part I still try, metaphorically, to check the brakes both in my office and in my work for the Society, to ensure that I am not held back unnecessarily. I would urge you to do the same.

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

People on the move

ANDERSON STRATHERN, Edinburgh, Glasgow, Haddington and Lerwick, has appointed three directors: **Gillian Harkness-McKinlay** (Public Sector & Charities), who joins from BURNESS PAULL; **Chris Devlin** (Planning & Environment), who joins from SHEPHERD & WEDDERBURN; and **James McMillan**, head of Corporate Crime, Regulatory & Investigations), who joins from AL TAMIMI & COMPANY, Dubai.

BALFOUR+MANSON, Edinburgh and Aberdeen, has appointed **Katie Albiston**, who joins from TAGGART MEIL MATHERS as a solicitor in its family law team in Aberdeen. **Alastair Milne**, an accredited specialist in family law and in the regulation of professional conduct law, retired as a partner on 25 June 2021 after almost 35 years in the legal profession.

The firm's Aberdeen office has moved to new premises at 6 Albyn Terrace, Aberdeen AB10 1YP.

BANNERMAN BURKE LAW, Scottish Borders, announces that as of 1 June 2021 the partnership comprises **Rory Bannerman**, promoted to senior senior partner and **Heidi Kandyba-Callis**, promoted to senior junior partner, both in charge of everything.

BBM SOLICITORS, Edinburgh and Wick, has promoted **Ewan Hazelton** to senior solicitor in its Commercial Litigation & Insolvency team in Edinburgh. **Thomas Holligan** becomes a solicitor in the same team following completion of his traineeship, and **Vajiha Ali** has joined as a senior solicitor dealing with employment matters.

BLACKADDERS, Dundee and elsewhere, has appointed to its Commercial Property team **Andy Yule**, who joins from GILLESPIE MACANDREW, as a director in the Edinburgh office, and in Glasgow, **Richard Duffy**, who joins as a senior solicitor from McEWAN FRASER, and recently qualified solicitor **Natalia Bell**.

BURGES SALMON, Edinburgh and UK wide, has appointed **Sophie Black,** previously senior legal counsel at Edinburgh Airport, as a senior associate in the Projects team; and in the Banking & Finance team, **Samir Younes** (previously with DENTONS) as an associate, and recently qualified solicitor **Natalie Bennett**.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has appointed **Allana Sweeney**, an accredited specialist in insolvency law, as a director in its Restructuring and Insolvency team. She joins from SHEPHERD & WEDDERBURN.

CMS, Edinburgh, Glasgow, Aberdeen and globally, has appointed **Michael Urquhart** as of counsel to its Banking & Finance team in Edinburgh. He joins from DLA PIPER.

JAMES & GEORGE COLLIE, Aberdeen (incorporating KINNEAR & FALCONER, Stonehaven) has announced the promotion of **Steven Allan** to partner.

DAVIDSON CHALMERS STEWART, Edinburgh and Glasgow, has announced the promotion to director of **Lisa Kitson** in the Corporate team, **Lizzy Enayati** (Commercial Property), and **Steven McAllister** (Renewable Energy). **Craig Jackson**, previously with McCLURE SOLICITORS, joins as director to head a new Private Client service, and **Keith Rawlinson** joins as an associate in Commercial Property. **Ellis Walls** (Commercial Property) and **Andrew McDonald** (Dispute Resolution) are promoted to associate; and **Alex Irwin** to senior solicitor.

DICKSON MINTO, Edinburgh and London, announce the promotion of two new partners, **Craig Roberts** in Commercial Property, and **Nicola Mitchell**, head of Employment. **Alex Smith** has joined the firm as finance director.

DIGBY BROWN, Edinburgh and elsewhere, has promoted **Trish McFadden** (Clinical Negligence, Edinburgh) and **Matt Leckie** (Insurance Litigation, Glasgow) to partner, and **Kim Catterall** and **Theresa Mutapi** (both Network department, Edinburgh), and **Sarah Ennis** (Professional Support, Glasgow) to associate.

GILSON GRAY, Edinburgh, Glasgow, Dundee and North Berwick, has promoted **Gregor Duthie** to legal director in Real Estate; **Iain Grant** to senior associate in Commercial Litigation; **Joe Davies** to senior associate in Private Client; **Fraser Cameron** to associate in Litigation; and **Charlotte White** and **Scott Runciman** to senior solicitor in Corporate and Private Client respectively. **Karen Henderson** has been promoted to finance director.

LEDINGHAM CHALMERS, Aberdeen, Inverurie, Inverness, Stirling and Edinburgh, announces that private client lawyer **JP (James Peter) Campbell** will join the firm in Inverness later this year from WRIGHT, JOHNSTON & MACKENZIE.

LINDSAYS LLP, Edinburgh, Dundee and Glasgow, announce the promotion to partner of **Douglas Roberts** (Corporate & Technology, based in Edinburgh) with effect from 1 July 2021.

Lindsays has also welcomed **Alexandria McNeill** as a solicitor in Residential Conveyancing in Edinburgh, joining from WARNERS.

Angus N G Macdonald announces that he retired from BAILLIE GIFFORD on 30 June 2021 after a 31 year career starting with MILLER HENDRY WS (HENDRY & FENTON), then DUNFERMLINE BUILDING SOCIETY before joining Baillie Gifford as their first dedicated in-house lawyer. He served as Group Head of Legal for 20 years, and in 2015 moved to Hong Kong to set up and lead their offices in Asia.

MACFARLANE YOUNG, Paisley has appointed recently qualified solicitor **Cati Johnstone** to its Conveyancing team (residential and commercial).

MALOCO & ASSOCIATES, Dunfermline intimate the appointment of **Stacey Parker** as a director from 14 June 2021. She joins from LYNN HERBERT, Leven.

MILLER SAMUEL HILL BROWN, Glasgow has announced the promotion of **Eilidh McGuire** in Licensing, and **Laura MacSporran** in Employment Law, to senior associate.

Sam Moore, solicitor, has joined legal tech implementation platform REYNEN COURT, from BURNESS PAULL, where he was the firm's innovation manager.

MORTON FRASER, Edinburgh, Glasgow and London, has announced 17 promotions with effect from 1 July 2021: to partner, **Matthew Barclay** (Agricultural & Rural team); to legal director: **Gail Watt** (Agricultural & Rural), **Fiona Hogg** (Real Estate) and **Jennifer Thomson** (Litigation); to associate: **Nikki Hunter** and **Lesley Holloway** (both Private Client); **Alyson Cowan** and **Jamie Reid** (both Real Estate & Infrastructure); and **Cameron Greig**, **Derek Couper**, **Laura McKenna**, **Jennifer Andrew** and **Ailie Crawford** (all Litigation); and to senior solicitor: **Ellen Robinson** (Real Estate & Infrastructure), **Fiona Meek** (Litigation), and **Laura Purves** and **Finlay Leggat** (both Corporate & Banking).

MOV8 REAL ESTATE, Edinburgh, Glasgow and elsewhere, has promoted **Stephen Dickson** from solicitor to associate in its Private Client department. **Omar Mohammed** has joined its Conveyancing department as a solicitor from RALPH HENDRIE LEGAL.

RAEBURN CHRISTIE CLARK & WALLACE LLP, Aberdeen, Banchory, Ellon, Inverurie and Stonehaven, has announced the promotion to associate of **Craig Veitch** (Aberdeen) and **Gillian Smith** (Banchory), in Commercial Property and Private Client respectively.

SCULLION LAW, Hamilton and Glasgow, announce these recent appointments: as solicitors in Wills & Future Planning, **Hope Raleigh**, from BARNETTS SOLICITORS, and **Laura Kerr**, from THOMPSONS; as a solicitor in Residential Conveyancing, **Paul Fletcher-Herd**, from ABERDEIN CONSIDINE; and as a senior associate in Family Law, accredited mediator **Nicola Buchanan**, from BLM.

SHEPHERD & WEDDERBURN, Edinburgh, Glasgow, Aberdeen and London, has appointed **Euan Murray** as a partner in its Construction & Infrastructure team. Dual qualified in Scotland and England & Wales, he has rejoined the firm after working for a year with SP ENERGY NETWORKS.

STRONACHS LLP, Aberdeen and Inverness, has announced the promotion to partner of **David Marshall** of the Agriculture & Rural team; to senior associate, **Adele Anderson** (Commercial Property) and **Karen Oliver** (Private Client); to associate, **Annika Neukirch** (Employment); and to senior solicitor, **Patrick Norris** (Energy) and **Jonathan Wemyss** (Dispute Resolution).

THORNTONS, Dundee and elsewhere, has announced a total of 25 promotions: to partner, **Stuart Mackie** and **Stephanie Pratt** (Wills, Trusts & Succession), **Robin Beattie** (Dispute Resolution & Claims), and **Steven Drake** (Residential Property); to legal director, **Angela Wipat** and **Elaine Sym** (Family Law), **Anne Miller** and **Michael Kemp** (Dispute Resolution & Claims), **Amy Jones** and **Kirsty Stewart** (Business Law), **Debbie Dewar** (Land & Rural Business) and **Graeme Dickson** (Wills, Trusts & Succession); to associate, **Megan Maclean** and **Rachel Anderson** (Wills, Trusts & Succession), and **Neil McWilliam**, **Stephanie Gallacher** and Victoria McLaren (all Business Law); and to senior solicitor, **Daniel McGinn**, **Jamie Lyons**, **Kirsty Waughman** and **Sarah Cooper** (Dispute Resolution & Claims), **Katie Hobkirk** and **Katy Williams** (Business Law), and **Rebecca Ellwood** and **Zoe Irving** (Land & Rural Business).

Thorntons

Thorntons has appointed **Victoria Wright** as a senior solicitor, and **Roisin Donnelly**, as a solicitor, in its Edinburgh Intellectual Property team. Both join from the University of Glasgow In-House Contracts team.

WRIGHT, JOHNSTON & MACKENZIE, Glasgow, Edinburgh, Inverness, Dunblane and Dunfermline, has promoted **Sarajane Drake** (Commercial Property, Glasgow), and **Kirstin MacDonald** (Corporate, Inverness), to associate; and K**athleen Docherty** (Private Client, Glasgow), and **Lauren Farquhar** (Private Client, Inverness), to senior solicitor.

Wright, Johnston & Mackenzie

Unfinished business

Ian Forrester QC, the Scot whose Brussels-based practice led to his appointment to the EU General Court, is well versed in the legal issues behind the current UK-EU tensions. The Journal asked him about life on the court, and the shape of events since he left

Words > Peter Nicholson

So-called "sausage wars". The future of Northern Ireland. An uncertain outlook for financial services, the performing arts and many others. With Brexit "done", what are the prospects for UK-EU relations? And, in particular, the body of law that falls to be applied relating to future trade?

Someone with more of a finger on the legal pulse than most is Ian Forrester QC, until January 2020 the British judge on the General Court of the European Union. Yet another Scot who has made his name on the international stage, Forrester, who turned 75 last year, is not ready yet for a quiet retirement.

Raised and educated in Glasgow, Forrester first broadened his horizons with a masters at Tulane University, New Orleans, writing a thesis on trade secrets, followed by a spell with Davis Polk & Wardwell in New York. After devilling back in Scotland to David Edward – himself a future judge at the EU Court of Justice – he was admitted as advocate before choosing to practise in Brussels as the UK was preparing to join the

then European Economic Community. Setting up his own practice with a friend in 1980, he became involved in celebrated cases such as *Bosman* (freedom of professional footballers) and *Microsoft* (abuse of dominant position), until the call from the Foreign Office that he was to be nominated for the General Court.

Contrasting traditions

With a caseload dealing with contested decisions of EU institutions on subjects from IP rights to asset freezing to state aid, as well as staff issues such as pension rights and harassment, Forrester found it a "happy and fascinating job" which exposed him to the widely differing approaches of the many legal traditions represented on the court – not least the British practice of judges testing counsel's arguments during hearings.

"The tradition in civil law countries, notably France, is that oral debate may give the wrong impression that the judge has already made up their mind, and if the judge puts a lot of questions to counsel, that means the goose is cooked," he explains. One fairly typical exchange – to Forrester – was described afterwards as of "quite spectacular intensity" by an East European colleague, who added: "It's part of your tradition, but if I did that in my Supreme Court from the bench I would be the object of judicial discipline."

He learned also that whereas British judges, though careful about overruling a government decision or policy, will have no qualms about doing so in an appropriate case, others may be much more cautious. Perpetual uncertainties included what weight to give to precedent, in a court that has no rule of *stare decisis* yet

is extremely respectful of what it has done before; how to ensure consistency of chamber decisions, when there are maybe 2,000 cases coming through each year; deference to the public authority's fact finding; and simply knowing the background facts. "Judges from five countries have to reach a single unanimous judgment – that is a really interesting challenge. It was a huge privilege to have spent five years in that atmosphere."

Foreseeable problems

Forrester's tenure may have come to an end with Brexit, but contentious legal issues certainly have not. Does anything about the current state of play surprise him? His reply might best be written: "I. Told. You. So." He continues: "In the speeches which we were encouraged by the court to make, we all said that Brexit is not going to be achievable without very careful consideration, and ought not to be done until a number of questions have been settled. And if the negotiations don't address these questions there is going to be perpetual squabbling, difficulty and loss of economic opportunity as well as lots of frayed tempers. Those sad consequences have materialised."

Although some may have expected Brexit to be a one-off occasion, "I and a lot of other people said it's going to be a long drawn-out process punctuated by crises as particular unresolved problem areas come up, and that's how it's turning out."

Some of the controversies "may sound trivial as an object of dispute, but it goes back to the confusion between regulation and sovereignty. Sovereignty involves the capacity to take a decision as a sovereign state; regulation can be, and commonly is, engaged in jointly, communally, and the EU has for 50 years been based on that notion of pooling sovereignty. Now the UK is invoking the capacity to regulate and the dignity of having sovereignty as excluding the possibility of parallel regulation" – even though while a member it worked with the other 27 to draft rules that suited everyone.

"There is nothing inconsistent, I would say, with achieving the political goal of Brexit, and deciding that the rules currently in force are valid and attractive and useful, and should stay unaltered. But by making a merit out of divergence the UK is guaranteeing for some years to come a succession of Brexit arguments."

"The court and all the officials I have met regard British citizens as the victims of Brexit and kind of sympathise. I see my children, all of our descendants as being even bigger victims"

The judges' role

Problems are likely to come before the courts, and UK judges have for some time been calling for guidance. How, for example, should they treat a future CJEU decision on a text which is still reflected in UK law? "The Lord Chief Justice repeatedly said that that question should be addressed and the judges be given a steer, but they weren't. Discrepancies will occur and more and more questions are going to arise in future – to what extent are UK judges to be on their own making decisions about how European law adopted into Scots/English/UK law should evolve – in parallel with or different to European law? Those obvious questions still lack a clear answer. It is difficult to say how EU law will be applied in the UK.

"In five years' time I would guess that there will have evolved a set of answers, probably judge made as opposed to legislatively prescribed, but it won't be quick I don't think."

As for the new provision that certain courts need not be bound by EU precedent, Forrester does not regard it as realistic to expect judges to apply it without clear legislative indication relating to particular rules. "It's inviting judges to 'show courage' in departing from European standards. I don't see the political merit in that and I see the possibility of considerable and continuous confusion."

Further outlook

Has Brexit changed the way the EU is run? "That's an enormous question," Forrester replies.

On the one hand the controversies surrounding certain democratically elected governments in Eastern Europe whose policies conflict with democratic values, present big challenges today: for example, the court has to decide how to handle references from two judges whose appointment has been held unlawful in terms of democracy and judicial independence.

"That's part of my answer. Another part is that the immense difficulties Brexit has created for the UK mean that the 27 can see how many problems can arise, and I guess to that extent the pains of Brexit must constitute a significant cooling effect on the ardour of those who would wish to achieve a departure by their member state from the EU."

Forrester himself remains active on the scene. Though precluded from appearing before the court for three years, "I'm free to advise on EU law and I'm therefore resurrecting as a member of the bar and looking forward to doing some arbitrations, advising on EU law questions and maybe being in some other capacities useful in the context of Brexit and its consequences for Scots law and the law of the UK."

How are Britain and the British regarded where he lives and works? "The court and all the officials I have met regard British citizens as the victims of Brexit and kind of sympathise. I see my children, all of our descendants as being even bigger victims because their future opportunities have been sacrificed in order to deliver the political aspiration of separating us from the EU in a manner which makes a merit of difference. But I hear commentators, journalists, diplomats, talking about the UK's difficult relationship with the EU, in particular associated with the Northern Ireland Protocol. There is a sense that the UK signed and committed itself to something the terms of which were pretty clear, and which are now being denied, rejected, wriggled around, and that causes damage to the level of trust, confidence and so on."

Despite that atmosphere, Forrester believes the EU would allow the UK back in if there was ever a change of heart. "I don't see why they would not be willing to. It would make things a great deal easier. The negotiations would be toothy, and prolonged, but I would have thought it not impossible that in my lifetime there will be a return, a swinging of the pendulum."

Franco-British perspectives

One of Forrester's continuing enthusiasms is the Franco-British Lawyers Society, of which he is President. "That's something every Scottish lawyer should join."

With chapters based in Belfast, Edinburgh, London and Paris, regular meetings "on all manner of subjects" have since COVID been replaced by webinars (comparing the approach to the pandemic has been a recent theme). A major colloquium is held every two years on naval cooperation in the Channel, as well as frequent sessions on succession, choice of law, animals (held in the French Senate!), refugees, pollution, practical Brexit problems, comparative constitutional issues and more. Guidance is offered for young lawyers on looking for a job, there is a student focus, "and we also have the re-enactment of famous trials – Oscar Wilde's was rerun in the Supreme Court building, we plan to do Oscar Slater, and there's one brewing in Paris for a famous miscarriage of justice there. It's a really unique organisation, and fun".

"Good speakers are ready to make 11.15 to 12 on Tuesday mornings whereas they would not be able to give a whole day to a conference. So I think there are going to be interesting changes in how legal conferences are organised and legal societies operate in future."

QOCS: *in force, but questions remain*

QOCS, or qualified one-way costs shifting, is intended to provide a level of protection for personal injury pursuers against liability in expenses, but the exceptions to the general rule seem likely themselves to give rise to disputes

In our online article in the March Journal, we discussed big changes for Scotland's claims landscape, with the likely impact of qualified one-way costs shifting (QOCS) on personal injury practice. As anticipated, the court rules on QOCS have now been published, and took effect on 30 June 2021. The new rules apply to actions commenced after that date – and look set to raise both questions of interpretation and points of argument for pursuers and defenders alike.

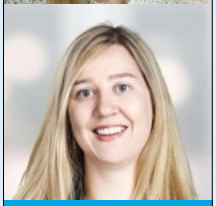
Qualified one-way costs shifting

Section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 formed the basis for QOCS in Scotland, providing that where a person brings an action for personal injuries or death *and* has conducted the proceedings in an "appropriate manner", the court *must not* make an award of expenses against that person, in respect of any expenses relating to the claim itself, or any appeal. This is a radical departure from the current practice which is, in the vast majority of cases, for expenses to be awarded to the successful party.

Exceptions to QOCS

The 2018 Act provides for three exceptions whereby a pursuer may not be considered to have conducted proceedings in an "appropriate manner", and therefore may not benefit from the protection of QOCS. Under the Act, the pursuer will only be liable for the defender's expenses in Scotland, where the pursuer:

1. made "a fraudulent representation or otherwise acts fraudulently" in connection with the claim or proceedings;
2. behaved in a manner which is "manifestly unreasonable" in connection with the claim or proceedings; or
3. conducted the proceedings in a manner considered by the court to be "an abuse of process".



Carly Forrest is a partner, and **Alison McAteer** an associate, in insurance and risk at Brodies LLP

The standard of proof for all three exceptions is the balance of probabilities.

Section 8(6) also provides that further exceptions may be specified by an Act of Sederunt. The Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Qualified One-Way Costs Shifting) 2021, laid before the Scottish Parliament on 1 June 2021, now provides for additional scenarios where QOCS will not apply, and a pursuer may be found liable for the defender's expenses. These are:

- where the pursuer fails to obtain an award of damages greater than the sum offered by way of minute of tender;
- where there has been "unreasonable delay" by the pursuer in accepting a minute of tender;
- where the pursuer seeks to abandon the action, by way of decree of dismissal or decree of absolvitor in favour of the defender; or
- in sheriff court cases, where the defender is granted summary decree of absolvitor or dismissal against the pursuer.

Implications of new QOCS rules

The new provisions aim to add restrictions to the operation of QOCS. In the exceptions under the 2018 Act, any basis for arguing that QOCS should not apply rested solely on the behaviour of the pursuer. In contrast, the new rules, in allowing expenses to be recovered in cases where a minute of tender is not accepted (or, where there is a delay in acceptance), provide defenders with the ability to try and protect their costs and negotiate settlement.

Arguably, the rules add weight to minutes of tender. Ordinarily, both parties are susceptible to some risk on expenses throughout the course of a case, but when the new QOCS rules are applied, a minute of tender means the pursuer goes from the primary position

of having no liability for expenses, to being potentially liable for the defender's expenses from the date of tender.

There are some aspects of the rules that require further clarification, and which will undoubtedly form the basis of arguments in court regarding expenses. At first glance, there is an apparent inconsistency between the rules and the 2018 Act: under s 8 of the Act, a pursuer who takes their case to court, and does not succeed on the merits of their claim from a liability perspective, would be entitled to the protection of QOCS provided they have behaved reasonably. In contrast, a pursuer who is successful on the merits, but does not receive an award greater than a minute of tender, would not benefit from the protection of QOCS under the new rules. Other issues to be explored include, for example, what constitutes an "unreasonable delay" in accepting a tender. While the rules therefore provide some clarification on when defenders may apply to the court for QOCS to be disapplied, questions remain about how they will operate in practice.

Restrictions on expenses awarded against the pursuer

The new rules also address how expenses will be calculated, if a defender successfully argues that the pursuer should not benefit from QOCS protection in relation to a minute of tender.

The court has discretion to determine whether QOCS should be disapplied in any case, but if an award of expenses is allowed against the pursuer, there are a number of aspects taken into account:

1. First, the pursuer's liability in expenses cannot exceed the amount of expenses the defender has incurred after the date of the tender.

2. Secondly, the pursuer's liability in expenses is capped at 75% of the damages awarded to the pursuer.

If there is more than one defender, the cap of 75% applies to the *total* of all the defenders' expenses as an aggregate sum, not to each defender's expenses individually.

The rules specifically state that the figure of 75% will be calculated *without* offsetting any expenses due to the pursuer by the defender, before the date of the tender.

One question arising is how the 75% cap will apply to a minute of tender that is made gross of CRU. It is also not clear yet how an additional charge under the Taxation of Judicial Expenses Rules 2019 will be considered in this context. These questions require clarification and we can expect to see arguments being made on these points before the courts.

3. Thirdly, the rules specifically require the court to order that the pursuer's liability in expenses does not exceed that 75% cap. This will apply even if the Auditor of Court assesses a greater sum being due, or if there has been any modification of an award of expenses.

This point is expressly made in the new rules, but at this stage it is unclear what this will add to the 75% cap rule set out above. Clarification by the courts is required to establish how this will operate in practical terms.

4. Finally, where there is more than one defender, the court will apportion the award of expenses recoverable between them, failing agreement between the defenders.

For now, it is unclear whether the defenders would be expected to have agreed a specific apportionment between them (e.g. 50/50), or simply to confirm to the court that they would be content to agree matters between them at a later date.

However, a word of caution to the defenders in such cases: if parties are left to discuss matters between themselves and no agreement can be reached, there will be no opportunity to return to court for a further hearing to decide the matter. The question of expenses in this scenario must be dealt with as part of the final disposal of the case – and after the final interlocutor, there is no going back.

What happens now?

QOCS will have a significant impact on personal injury cases in Scotland going forward. For pursuers and defenders alike, consideration should be given to the new exceptions provided for in the rules, particularly surrounding minutes of tender.

It is inevitable, given the potential questions of interpretation and the court's discretion when applying the provisions of the 2018 Act and the new rules, that we will see expenses arguments on the application (and disapplication) of the QOCS provisions in the coming months and years. QOCS is happening, but this is by no means the end of the story.

"There are some aspects of the rules that... will undoubtedly form the basis of arguments"

The body or the part?

Where does Scotland's body donation programme stand in relation to the new "opt-out" legislation governing organ donation? The authors see a risk that people's wishes will not be respected

In March 2021, the Human Tissue (Deemed Authority) (Scotland) Act 2019 introduced a system of deemed authorisation for the "removal and use of any part of the... body" for the purposes of organ transplantation, thus creating an "opt-out" organ donor system: s 7(2), inserting s 6D in the Human Tissue (Scotland) Act 2006.

However, under the Anatomy Act 1984, as amended by the 2006 Act, individuals over 12 years of age can request to bequeath their body to universities "for the purposes of teaching or studying, or training in or researching into, the gross structure of the human body": s 1(1). This creates a potential conflict between deemed authorisation for organ donation and explicit request for body donation, particularly whereby the deceased's request for body donation is outlined in their will, which is read some weeks after death.

Possession of the body

Currently five Scottish universities run body donation programmes: the universities of Aberdeen, Dundee, Edinburgh, Glasgow, and St Andrews (see Scottish Government, Body Donation in Scotland: Guidance). According to the Anatomy Act 1984, s 4(1A), a bequeathal request must be in writing and signed by the individual in the presence of a witness (or, in the case of those aged 12 to 16, by two witnesses in accordance with s 4(1C)). According to Scots law there can be possessory rights over a body (J Brown, "Corpus vile or corpus personae? The status of the human body, its parts and its derivatives in Scots Law", PhD thesis, University of Strathclyde 2020, T15649), therefore following death "the person lawfully in possession of the body" (s 4(2)) can authorise the request, with such a right of possession established in accordance with the circumstances of death.

For example, in the event of a suspicious or ambiguous death, the procurator fiscal may take temporary possession of the body (s 4(6); Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016) or, if the body poses risk of infection, a hospital may adopt such rights of possession: Health & Safety Executive HSG283. (Note that according to the University of Glasgow's guidelines dated March 2021, bodies which are deemed to be COVID-19 positive will not be accepted into the body donation programme.) Alternatively, if the deceased had a will, then according to Scots law, the executor nominate is therein appointed to take right of possession over the body to fulfil the deceased's request.

The Scottish Government guidance cautions that there is "no way to ensure that your body is donated to medical science", and advises individuals to disclose their wishes to their "next of kin/executor" so that they can "take necessary steps" to ensure the request be enacted. However, according to the 2019 Act, healthcare practitioners are now deemed to have authorisation to extract organs for donation upon death, which raises a possibility that the deceased's request may not be fulfilled.

Amanda Jane Ward and **Jennifer O'Neill** are members of the Law Society of Scotland's Health & Medical Law Committee

Concurrent regimes

The implementation of the 2019 Act has been relatively smooth, with the Act enjoying majority public and political support. One objective of the Act was to introduce more flexibility in the timing of the authorisation process, as well as clarity about authorisation for pre-death procedures, including pre-death tests to ascertain usage viability. Arguably, more thought should have been given not only to tests ascertaining whether the person's organs/tissue are suitable for donation, but also how full body donation to medical science would work in practice.

As mentioned, the Scottish Government advises individuals to disclose their wishes to their next of kin/executor in order that their request can be carried out. However, each year approximately 40% of family members override consent previously given, thus the provisions of the Act – alongside discussions with the next of kin, if any – do not give enough protection in law to ensure that people's final wishes are respected. The Government, instead, emphasises the value of both schemes: its guidance encourages those wishing to bequeath their body to medical science to remain on the organ register, so that at the time of death a decision can be taken on their behalf in accordance with the given circumstances.

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Get your law firm lean for the summer

What if... you could achieve a leaner, fitter law firm just with the right software?

The Scottish legal sector has been rocked to its core recently – financially, operationally, socially, and physically. The one thing that stands out to me is how resilient law firms have been. Very quickly focus turned to strategy and value creation, addressing sustainability in the midst of unprecedented challenges. Many took the time to pause, briefly, to ask... What if...?

What if there was a way to score your business fat to reveal a carved operational physique that others will be envious of?

Let's get lean!

Lean case management principles can be applied to every area of how you handle your workload, from the secretary's desk to the partners' meeting. It is a management philosophy that advocates analysing all your processes to eliminate or reduce anything you do that doesn't add value to your business, and ultimately, your clients.

Process efficiency and cost reduction are the most direct benefits of a lean business model. But the benefits extend far beyond the obvious. Here are some of the top advantages of operating as a lean business:

- More efficient processes, including greater throughput and increased productivity.
- Reduced operating costs through a decrease in lead times and admin tasks.
- Increased team productivity and morale, through spending less time firefighting and more time focusing on quality and value.
- Better workload visibility at the team level as well as for senior staff.
- Delivery of customer value through increased speed/quality of work and communication, leading to an improved client experience.

What if you could add all these benefits into your firm? Would you?

Adopting robust practice management software to become "business lean" allows everyone at your law firm to manage their workload all in one place, with access to up-to-date legal information, and the ability to share knowledge and documents, and communicate effectively with colleagues and clients.

Sound too good to be true? It's honestly not.

It's time to get to work!

After months of uncertainty around restrictions, court closures, remote working and everything else that's impacted the health of your legal business, it's starting to feel like now is the time to start moving forward.

What if, as things slow down for the summer, you actually accelerate your focus and invest in a robust legal case management software platform to improve your practice performance?

What if you recognised that in today's ever evolving and competitive legal marketplace, law firms who refuse to do so can quickly be outpaced and left behind?

As we enter the height of summer, businesses normally take a bit of a break. Why not substitute some of those hours trying to get "beach body" ready and use the time to focus on getting your business lean? ***What if*** you took that focus and applied it to speed, discipline, and flexible adaptation in your business? New approaches to operating practices and tech adoption will be crucial in the months ahead, so why not get ahead of the curve – now?

Can software help get your firm in shape?

What if there was legal software which exists in one integrated system, is simple to use, with a familiar user interface, is customisable to the way you work, is fully compliant and allows you and your team to work from anywhere. Would that be a great place to start getting the firm into shape?

In getting lean, the most difficult part is making the decision to get started!

Whether you're a sole practitioner starting your own firm or running a large practice with a team of hundreds, you need to know what tools exist to get your business in the best shape it's ever been in. CaseLoad exists.

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"Avoid lawsuits beyond all things"

Two provisions in the Children (Scotland) Act 2020 promote the use of alternative dispute resolution. Elaine E Sutherland highlights a fundamental problem with one of them, and raises some questions about the pilot project it mandates

The 17th century French satirist Jean de La Bruyère advised, "Avoid lawsuits beyond all things; they pervert your conscience, impair your health, and dissipate your property." Doubtless, he would have had something equally pithy to say about ss 23 and 24 of the Children (Scotland) Act 2020, which seek to promote the use of alternative dispute resolution (ADR) in family disputes over the arrangements for the care of children – that is, where an order under s 11(1) of the Children (Scotland) Act 1995 is being considered.

Section 23 is in the nature of a "carrot", since it requires the Scottish ministers to make funding available to meet the cost of ADR in certain s 11 disputes, either by setting up an independent scheme for that purpose or by arranging for provision from the legal aid fund. ADR is not defined, but ADR techniques only qualify for funding if they ensure that account is taken of the relevant child's views to at least the same extent as would be required of a court in reaching a decision (s 23(5)). Access to funding may be subject to eligibility criteria, which must be no more onerous than those for civil legal aid (s 23(3) and (4)). The financial eligibility criteria for legal aid are hardly generous, but this provision is to be welcomed in so far as it will permit some people to choose ADR when cost might have presented a barrier.

Section 24 is rather less benign, and has a distinct air of the "stick" about it. It obliges ministers to set up a time-limited pilot scheme under which the parties to a s 11(1) dispute will be *required* to attend a mandatory alternative dispute resolution meeting where the options available to resolve the dispute will be explained to them. Given the popularity of acronyms, the meetings are likely to be known as "MADRMs".

Where there is "a proven or alleged history of abuse between some or all of the parties", they are exempt from attending such a meeting (s 24(2)(b)). That an allegation of abuse is enough may raise some eyebrows but, bearing in mind that much domestic abuse goes unreported, it would be unduly onerous to require a victim to produce details of a police report or evidence of a conviction in order to avoid participating in a MADRM. Of greater concern is the fact that some abuse victims, particularly those who have experienced coercive control, do not self-identify as victims.

There is a second possible route to exemption from the MADRM requirement, since the Act provides that if the scheme allows, the court may, on cause shown, determine that it would not be appropriate to require the parties to attend such a meeting (s 24(1)(b)). Effectively, ministers have been empowered to decide, by regulation, whether to afford the court this latitude. Happily, the preliminary plans for the pilot project suggest they will, and the plans also make provision for the parties attending separate information sessions, and for virtual sessions.

Having heard about the ADR options, the parties will be free to litigate if that is their preference. That makes s 24 seem fairly benign: after all, what is the harm in simply hearing about what is available? There

is the ethical point that people in the areas of Scotland selected for the pilot project will be forced to participate in what is, essentially, an experiment. Of far greater concern, however, is the fact that, as far as those required to attend a MADRM are concerned, the court "may *only* make an order" under s 11(1) where they do so (2020 Act, s 24(1), emphasis added). In short, if they do not participate in the experiment (and are not exempted), the court will not be able to deal with their – and their child's – problem. We shall return to the full implications of that presently.

Towards implementation

It is not unknown for provisions like ss 23 and 24 to languish unimplemented for years. For example, the Children's Hearings (Scotland) Act 2011, s 122, making provision for a children's advocacy service, was not brought into force until late in 2020. To ensure they do not suffer that fate, each section contains a requirement designed to raise its profile and give ministers an incentive to move things along. Until they have carried out their obligations under each provision, ministers must report to the Scottish Parliament, every six months, providing an explanation for the delay and indicating when they expect to fulfil their duties (ss 23(7) and (8), and 24(4) and (5)). Once they have taken the necessary steps, ministers must report to the Parliament on the details of implementation and how the pilot project will be evaluated (ss 23(6) and 24(3)).

"Once they have taken the necessary steps, ministers must report to the Scottish Parliament on the detail of the implementation"

Ministers' first report to the Parliament (23 March 2021) indicated that delays in carrying out their duties had been due to the need to prioritise dealing with COVID-19, and more time would be required in order to implement each scheme. One benefit of that report is that it sets out preliminary plans for how the pilot scheme under s 24 might operate, and indicates that ministers are consulting various stakeholders. Thus, there is still an opportunity for readers to have an input.

Readers may have noted a resemblance between s 24 and the provision in England & Wales for mandatory family mediation information and assessment meetings ("MIAMs"): Children and Families Act 2014, s 10(1). It is fair to say these have not been a resounding success: A Moore and S Brookes, "MIAMs: a worthy idea, failing in delivery" 2018 *Private Client Business* 32. The two are, however, very different, with MIAMS applying to all "family proceedings" (as defined in the Family Courts Act 2003, s 75) and emphasising mediation. MADRMs are confined to s 11 cases and are supposed to explore all the options for dispute resolution. Also, legal aid is no longer available for most family proceedings in England & Wales.

Litigation and ADR

It is not the purpose of this comment to explore the respective merits of litigation and ADR, since each has a place in appropriate cases. Nonetheless, it is familiar territory that litigation of disputes over children has been criticised as being too slow, too costly (to the public purse or to the parties), for taking up too much court time and for exacerbating acrimony between the parents, reducing the prospect of them co-operating in the future. ADR is often presented as the antidote to these problems.

Equally familiar are the criticisms of mediation in disputes over children: that it fails to protect domestic abuse victims adequately, and that the voice of the child whose future is at stake may go unheard. Similar criticisms are sometimes levelled at arbitration and the collaborative law approach. Other shortcomings are sometimes laid against either litigation or ADR, but that is the essence.

While the various ADR techniques share the common feature of "not being litigation", they are very different in nature and what will work well for one family may be wholly unsuitable for another, hence the increasingly popular use of the term "*appropriate* dispute resolution". All the forms of ADR currently available in Scotland are mentioned in the provisional plans for MADRMs: see the ministers' first report at annex A.

Moving away from voluntarism

Hitherto, and subject to two discrete exceptions, participation in ADR in Scotland has been voluntary. The first exception is found in the power of the court to refer a dispute over parental responsibilities and rights to an accredited mediator (RCS, rule 49.23; OCR, rules 33.22 and 33.22A), which is exercised somewhat unevenly across the country. The second exception is more nuanced and applies only to cases where a party is applying for legal aid in respect of a dispute over children. The Scottish Legal Aid Board, in its guidance for cases involving disputes over children, requires the applicant to provide details of the efforts made to settle the dispute and, save in cases where domestic abuse is alleged, whether mediation has been considered or attempted and, if not, why not.

"There is a further problem with s 24, since it could prevent the court from making an order that would otherwise be in the child's best interests"

The climate of voluntarism in the use of ADR began to change, culminating in 2018 in the publication of a Justice Committee report, *I won't see you in court: alternative dispute resolution in Scotland*, containing a section entitled, "Is it time for compulsory alternative dispute resolution?" In the event, it was not prepared to go that far – yet. Instead, it recommended that, "save in domestic abuse cases, mandatory dispute resolution information meetings should be piloted". (It also recommended a range of other strategies designed to improve awareness and takeup of ADR, while ensuring that victims of domestic abuse, and children, are not put at risk.) The following year, Margaret Mitchell, then an MSP, lodged a proposal for a Mediation (Scotland) Bill, which would have compelled the parties to attend an information session to discuss using mediation.

Meanwhile, the Scottish Government was working on its *Family Justice Modernisation Strategy*, in which (at para 7.8) it expressed support for ADR, but made no mention of compelling attendance at meetings to discuss the options. While the Children (Scotland) Bill, as introduced, made no mention of ADR, it was amended at the final stage, resulting in ss 23 and 24 of the 2020 Act.

Fundamental flaw in s 24

The fundamental problem with s 24 is that, where the parties are required to participate in the pilot scheme (i.e. they are not exempt) and one or both of them fails to attend a MADRM, it will simply not be competent for the court to make a s 11 order (2020 Act, s 24(1)). Tying the court's hands in this way is in direct conflict with the court's other duties when considering such an order.

To elaborate, a s 11 order is sought most often when parents disagree over some aspect of their child's care – usually residence or contact – and have been unable to resolve their differences. Where the court concludes that making an order would be better for the child than not doing so, it is normally required to determine the matter on the basis that the child's welfare is the paramount consideration, taking account of any views expressed by the child concerned (1995 Act, s 11(7); soon to be ss 11ZA and 11ZB). The court will not be able to fulfil these obligations where the pilot scheme applies to the parties and one or more of them has not participated in it. The issue in dispute will be left unresolved. In their enthusiasm for ADR, it seems that MSPs were prepared to cast aside the basic principles of Scots child law, punishing the child who is left in the middle of the dispute for the perceived sins of the parent(s).

There is a further problem with s 24, since it could prevent the court from making an order that would otherwise be in the child's best interests, raising the issue of failure to comply with the obligations set out in the United Nations Convention on the Rights of the Child, something that will be all the more significant when the current dispute over the bill to implement the Convention is resolved by the Supreme Court and, as expected, it becomes law.

Evaluating the pilot project

The point of the s 24 pilot scheme is, of course, to inform the decision about whether MADRMs should be introduced in s 11 cases across the whole of Scotland, save for those in the exempt categories. That is reflected in the requirement that not only the scheme itself, but also details of how it will be evaluated are to be laid before the Scottish Parliament (s 24(3)). At the time of writing, details of the pilot scheme have yet to be finalised, but the preliminary plans envisage it operating in a small number of urban and rural locations and lasting for one year.

The preliminary plans are based on an unimplemented proposal for a pilot project put forward by Relationships Scotland and CALM some years ago: ministers' first report, para 23. That may explain why the pilot is premised on mediators being at the helm, something that raises questions about the methodology of the

pilot scheme itself and any evaluation of it.

This comment will confine itself to three such questions by way of illustration:

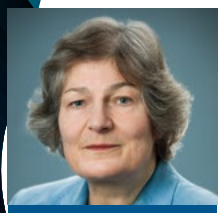
- Do mediators necessarily know enough about the ADR options other than mediation to explain their advantages and disadvantages fully?
- Assuming the mediators involved in the pilot do understand all the ADR techniques well enough, will there be a temptation to give prominence to the option to which they may have devoted a considerable portion of their working lives?
- Since those who participated in running the pilot will be central to evaluating it, what is the risk of conscious or unconscious bias in evaluating the success of something to which they are committed?

Happily, there is still time for the proposed pilot scheme to be revised and to ensure that it is subjected to rigorous appraisal before, as is entirely possible, MADRMs become the norm across the whole country.

Elaine E Sutherland
is a professor at the University of Bergen; a visiting professor at Edinburgh Napier University; Professor Emerita at the University of Stirling; Distinguished Professor of Law Emerita at Lewis & Clark Law School, Portland, Oregon; and a member of the Child & Family Law Committee of the Law Society of Scotland. The views expressed here are her own and should not be regarded as reflecting those of any of these bodies.

Murder in mind

Is the Scots common law of homicide suited to 21st century society? The Scottish Law Commission is taking a thorough look at the law with a view to possible reform, and welcomes views on its recent discussion paper



Lady Paton (above), **Graham McGlashan** and **Nicholas Burgess**, Scottish Law Commission

Murder is one of the gravest crimes in any society. The ways in which different legal systems define and deal with this "most heinous of all crimes" provide fascinating avenues of research, which throw up similarities, parallels, and also major differences.

Scotland has its own unique law of murder, using "wickedness" as a key concept in relation to the accused's requisite state of mind. No other jurisdiction uses that express word. Moreover, unlike for example the USA, New Zealand, Australia, Germany, France, Italy and other countries, Scots homicide law is not contained in a penal code. It contrasts also with the homicide law of England & Wales, which is mainly statutory. The Scots common law has evolved over centuries, shaped by institutional writers such as Hume, Alison and Macdonald, and by decisions of judges in individual cases. Only occasional statutory interventions appear, such as s 51B of the Criminal Procedure (Scotland) Act 1995, which defines the partial defence of diminished responsibility.

Is this homicide law fit for purpose in 21st century Scottish society? Early in the millennium, four developments raised this question.

Impetus for reform

First, major reviews of the law of homicide were undertaken in England & Wales (*Murder, Manslaughter and Infanticide*, Law Com No 304 (2006)), and Ireland (*Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008)). Secondly, a drive for codification of the criminal

law was led by a group of respected academics: E Clive, P Ferguson, C Gane and A McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (published under the auspices of the Scottish Law Commission, 2003). Thirdly, observations by the Criminal Appeal Court in *Petto v HM Advocate* 2011 SCCR 519, a fatal fireraising case, suggested that Scots homicide law was archaic and confusing, and required review. Fourthly, there was growing appreciation of the destructive effects of years of domestic abuse, resulting in questions being raised about the adequacy of accepted homicide defences where a person is accused of murdering an abusive partner.

In *Petto*, the court described Scots homicide law as having "a definitional structure in which the mental element in homicide is defined with the use of terms such as wicked, evil, felonious, depraved and so on, which may impede rather than conduce to analytical accuracy". It continued by observing: "we remain burdened by legal principles that were shaped largely in the days of the death penalty, that are inconsistent and confused and are not yet wholly free of doctrines of constructive malice... a comprehensive re-examination of the mental element in homicide is long overdue".

As a result the Scottish Law Commission is now undertaking a research project on the mental element in homicide. A *Discussion Paper on the Mental Element in Homicide* (Discussion Paper no 172) was published on 27 May 2021. The paper examines the current law; makes comparisons with other legal systems; identifies perceived problems; and suggests potential ways forward. Questions are asked throughout the paper, and are summarised in chapter 14.

Taking a fresh look

Some important issues are raised:

- Should the existing bipartite structure of murder with the lesser crime of culpable homicide be further divided into prescriptive grades or categories of homicide, resulting in a grid or ladder reflecting the level of gravity of each offence, with for example "first and second degree murder, culpable homicide (further subdivided), negligent homicide and assault causing death"?
- Has the Scots common law definition of murder suffered an unwelcome restriction as a result of *HM Advocate v Purcell* 2007 SCCR 520, a case which reflected the public's reluctance to label a car driver as a "murderer" or a "killer"?
- Should some crimes automatically be defined as "murder" as a matter of social policy, based not on the mental state of the killer (*mens rea*) but solely on the circumstances of the killing (*actus reus*), an example of which might be the killing of a police officer or emergency worker acting in the course of duty? This the case in, for example, New Zealand and Germany.
- Should the exceptional plea of self-defence to prevent rape be abolished, or should it be extended to all members of society in view of the wider definition of "rape" contained in the Sexual Offences (Scotland) Act 2009?
- Is it acceptable in 21st century society to retain the partial defence of provocation reducing what would otherwise be murder to culpable homicide where the killer discovers an intimate partner's sexual infidelity – a plea which some suggest has its roots in 18th century concepts of male honour and possession?
- Are the traditional defences of self-defence, provocation, and diminished responsibility adequate in circumstances where a person is accused of murdering their abusive partner?

The discussion paper is divided into chapters 1 to 5, which discuss the substantive Scots homicide law, and chapters 6 to 12 which discuss defences. Chapter 13 gives a brief overview, and chapter 14 lists the questions asked of consultees.

> *"Scotland has its own unique law of murder, using 'wickedness' as a key concept"*

Issues canvassed include the structure and language of Scots homicide law; the definition and development of the crimes of murder and culpable homicide; defences, including self-defence, necessity and coercion, provocation, and diminished responsibility; and the possible need for a special "domestic abuse" defence.

The brief overview in chapter 13 focuses on the important question, "Would Scots law relating to the mental element in homicide be improved by placing it (or parts of it) on a statutory footing?" A short executive summary of the paper is also accessible on the Commission's website.

Possible models

Reference is made throughout the discussion paper to the Draft Criminal Code for Scotland, referred to above. The Draft Code offers a model for placing the common law of homicide on a statutory footing. Relevant provisions and commentary include sections on intention, recklessness, knowledge, culpably induced state of mind, murder, and culpable homicide, providing a useful sounding-board for ideas for reform.

Other models for reform include legislation enacted in other jurisdictions. The Commission has published a standalone paper outlining its research into homicide laws internationally.

Comparative research has particularly informed the Commission's consideration of a potential new partial defence for those who kill following prolonged domestic abuse, for whom the current defences of self-defence, provocation and diminished responsibility appear, to some commentators, to be inadequate.

Notably, in Victoria, Australia the offence of "defensive homicide" was introduced in 2005, intended to offer a "halfway" homicide category for those who kill in response to abuse. However, this offence was abolished in 2014, with Attorney General Robert Clark commenting that the law had been "hijacked by violent men who've been able to get away with murder". Similar legislation in other Australian states including Queensland and South Australia, and in New Zealand, has also faced difficulties – both in being enacted and also in practice – underscoring the need for any modernisation in this important and sensitive area of Scots law to be evidence-based and well informed in order to prevent abuses and other undesirable consequences.

A homicide statute?

Further assistance in considering possible reform in Scots homicide law has been provided by Professor Claire McDiarmid, head of the Law School, University of Strathclyde, who worked with the Commission for four months in autumn 2018. Her standalone paper on culpable homicide, "Between Accidental Killing and Murder: Culpable homicide", can be found on the Commission's website. Any reader's understanding of Scots homicide law will be enriched by comparing and contrasting the discussion paper and the standalone paper, as there are some differences in approach and emphasis.

Ultimately the key question is whether the Scots law relating to the mental element in homicide would be improved by placing it (or parts of it) on a statutory footing in order to reflect the views and values of 21st century Scottish society.

In preparing the discussion paper, the Commission heard from legal practitioners, academics, judges, and victim support organisations. Their comments and advice were greatly appreciated, and made a major contribution to the paper. At this stage of the project, the Commission would welcome responses to the questions posed in the paper, during the consultation period which ends on 27 August 2021. Responses will greatly assist in the Commission's formulation of policy, proposals and recommendations for reform, and may be submitted using a form on the Commission's website, accessible at the current consultations page. The responses will therefore play a major role in shaping the future of the law of homicide in Scotland.

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Mike O'Donnell.

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Infralink: a helping hand for telecoms

Following last month's article on the Electronic Communications Code and the *Duncan* case, Sarah Eynon sets out how the Scottish Futures Trust's Infralink project can assist with telecoms lease negotiations

One thing that has helped us all adjust to the challenges and changes over the past 18 months or so and continue living our lives with some form of normality, has been digital connectivity. It has allowed us to work and educate remotely, "track and trace", assist the vulnerable by having their shopping delivered, and ensure we are still in regular contact with colleagues, family and friends.

As we recognise and build on the strengths of using digital connectivity in our lives, we need to remember that all this can only be delivered if we have the necessary mobile digital infrastructure in place.

In doing so, mobile network operators (MNOs) need to agree leases with asset owners to place masts on land and buildings. The UK Government introduced the Electronic Communications Code in 2017 to support deployment of mobile infrastructure and remove commercial barriers to better connectivity. As a result of the Code, the consideration payable in respect of the lease is now to be determined on a "no scheme" or "no network" basis similar to compulsory purchase, and explicit statements have been made in the Code about the MNO tenant's rights to share the site with other MNOs and add additional equipment to the site.

Landlord-tenant gulf

The challenge to this admirable ambition is however twofold. Digital telecommunications is still considered a specialist area. Consequently, many landlords are not comfortable when negotiating to have telecommunications equipment on their property. In addition, the Code is not clear on certain aspects, in particular what should happen when a lease comes to the end of its term and is due for renewal: should it be based on pre-Code or post-Code terms?

The *Duncan* case (*EE Ltd and Hutchison 3G UK Ltd v Duncan* [2021] CSIH 27, discussed by Daniel Bain and Colin Archibald at Journal, June 2021, 22) has now assisted with the latter of these issues by deciding that, in general, a lease renewal should be based on Code terms. This should move forward what had become a deadlocked sector and means that parties now have clear direction that the Code applies to new sites and to existing sites where the lease has ended. But the challenges don't end there.

As we all know, negotiations and agreeing a lease are not necessarily straightforward steps. In the mobile sector it is the tenant that usually provides the standard lease, including terms often weighted in their favour, requiring negotiations to rebalance the document or even resulting in some cases in refusal by the landlords to negotiate. A lack of knowledge and experience in this sector and the ambiguities in the Code have added to the situation, resulting in a "them and us" culture between the parties and a resulting lack of trust. While the direct result has seen costly tribunal cases, the ultimate losers are communities and businesses that rely on good and continually improving connectivity to live and work.

A helping hand

Providing a helping hand to potential landlords and MNOs is Infralink. Funded by the Scottish Government and led by the Scottish Futures Trust, Infralink is providing an alternative way to achieve agreement for 4G and 5G macro sites. By taking best practice from across the United Kingdom to create standardised tools, the parties have an informed and balanced starting point for negotiations.

Infralink has created standardised leases and payment guidance to apply to land and buildings across the rural and urban areas of Scotland. By adapting what is seen to be best practice in the mobile sector, negotiations will be more efficient for both parties, attracting greater investment into Scotland and improving national connectivity levels. For example, by using standardised leases and payment guidance similar to Infralink, one combined authority in the West Midlands that the Infralink team

Sarah Eynon is an associate director in the Digital Infrastructure team at the Scottish Futures Trust and is the Infralink programme lead.

The Strathconan mast, left, and Ettrick Valley mast, above

engaged with in the development of the tools has seen lease negotiations reduce by six months.

Standardised commercial tools

For 4G and 5G macro sites, Infralink has published a set of standard lease documents and payment guidance to aid negotiations. The standardised leases remove the need to negotiate stock terms, thereby allowing the parties to focus on the nuances of the site. Using the already mediated Greater London Authority templates ("GLA templates") as the base document, the Infralink team working with legal firm DWF amended them to be appropriate for Scottish, less urban settings, engaging with MNOs such as Cornerstone and MBNL, and public sector stakeholders to get feedback.

Catherine Haslam, partner and head of the Telecoms team at DWF, commented: "The GLA templates seemed like the natural choice for the basis of the Infralink templates. The GLA templates had already been heavily negotiated, and moderated by the British Standards Institution, with input from representatives from across the telecoms sector, and endorsed by a number of the main players in the sector, including the RICS. We believe that by using templates which the sector are already familiar with, the parties will feel more comfortable implementing their use and it will significantly cut down the negotiation time for new Code agreements and aid the speedy rollout of new, much needed sites."

The payment guidance sets out a recommended methodology and prices for a variety of sites, using existing land values and building on the principles of Code case law. The payment guidance recognises the impact of digital infrastructure as a tenant and sets out suggested figures that can be used as a credible starting point for discussions. In support of potential public sector landlords, consideration has been given in the development process to such areas as subsidy control and "best consideration", so as to remove the burden and reduce the risk of legal challenge.

User feedback

Standardisation is not a new concept, but doing it at scale in this sector is. Forestry & Land Scotland has been leading the way in this area, moving away from a reactionary case-by case approach to telecoms negotiations, to a more effective and efficient, no surprises standardised approach.

James Higgins, land agency programme manager at Forestry & Land Scotland, tells how other organisations can benefit from what it has learned: "Infralink is a helping hand and should be seen as this. Adopting a standardised way of dealing with digital infrastructure site requests is new to lots of public sector organisations, so Infralink can provide support to help them through."

Infralink published the first version of the standard documents and payment guidance in March 2021 on the Infralink website (infralink.scottishfuturestrust.org.uk/), and the response has been positive.

Belinda Fawcett, general counsel and director of Property & Estates at Cornerstone, which deploys infrastructure across the UK on behalf of Vodafone and O2, said: "We need faster mobile deployment, and working with the Scottish Futures Trust on the Infralink programme will help us to simplify and streamline our network rollout process. We are making positive progress through the Infralink initiative to help improve digital connectivity for communities and businesses across Scotland."

Further development

More is still to come. Infralink is developing a Connectivity Marketplace to be an online map-based tool for MNOs and local authorities to monitor connectivity levels, plan mobile deployments in a collaborative way and identify public sector assets that could help improve mobile connectivity and capacity. It will be a shop window for those public sector bodies interested in discussing connectivity in their area, with them being able to set out the terms up front and drive the discussions based on data. Expected to launch in summer 2022, the Infralink team is again using existing resources and datasets to minimise the burden on stakeholders and deliver the engagement tool at scale.

While the *Duncan* case has helped remove one hurdle for those who support better connectivity, the need to improve how parties engage and negotiate remains. Infralink is a no-charge national initiative that can be a credible starting point for landlords and tenants, leading not only to more efficient negotiations, but better estate management and a more positive relationship between the parties.

Find out more about Infralink at infralink.scottishfuturestrust.org.uk/.

Final judgment

In his farewell civil court roundup for the Journal, Sheriff Foulis ranges over matters from *forum non conveniens* to historic child abuse claims, and bows out with some observations on the importance of a good knowledge of procedure

Civil Court

LINDSAY FOULIS, SHERIFF AT PERTH

Forum non conveniens

In *HCC International Insurance Co v Scottish Ministers* [2021] CSOH 53 (21 May 2021), Lord Tyre observed that the essence of the plea of *forum non conveniens* was that although the court seized of the litigation had jurisdiction to hear the dispute, another competent court could try the issue and that court was more appropriate in the interests of all the parties and the ends of justice. The present dispute involved the interpretation of an agreement governed by Scots law, and in those circumstances it was appropriate that the issue be determined by a Scottish court. A related but distinct litigation in England regarding a deed governed by English law was not decisive against that. While, on finding in the pursuers' favour, it would not be appropriate to grant decree prior to conclusion of the English proceedings, it was perfectly appropriate to reach a decision and then sist proceedings pending the determination in England.

Appeals

In *Peebles Media Group v Reilly* [2021] CSIH 23 (12 March 2021), the Lord President observed that in appeals where what was being reviewed was the application of the law to the facts, the appellate court could reverse the decision made at first instance more easily. The appellate court might be more objective in its approach and less influenced by the first instance judge's perception and perhaps sympathy for a witness.

Family actions

In *BB v JT* [2021] SC DUM 30 (14 February 2020) Sheriff Mohan addressed the issue of whether in post-decree variation procedure initiated by minute in terms of OCR, rule 33.44 it was competent to counterclaim in answers to the minute. The minuter argued that rather than include a crave in the answers, the competent procedure was to lodge a separate minute. Sheriff Mohan referred to s 11(1) of the Children (Scotland) Act 1995, in which in relevant circumstances a court had power to make an order in relation to parental responsibilities and/or rights whether or not the proceedings were independent of any other action. Further, in terms of s 11(2) a court could make such an order as it thought fit. "Relevant circumstances" included an application for a s 11 order (s 11(3)), and by s 11(3)(b) the court could make an order although no application was made. Given the complete flexibility provided, Sheriff Mohan concluded that a counterclaim was competent.

I encountered a similar situation in a recent proof. In that instance both counsel conceded the issue of competency but submitted that I still had the power to make an order in light of the provisions of s 11. The same destination is reached; the route may be different!

In *M v M* [2021] SC EDIN 31 (16 April 2021) Sheriff Stirling made certain observations regarding affidavits. First, once again it has to be stressed that where evidence is provided by way of affidavit, there still requires to be record for the content of the affidavit. This is sometimes forgotten. If there is no record for certain sections in the affidavit, it may adversely affect the deponent's credibility and reliability. Sheriff Stirling also emphasised the need for compliance in actions of divorce with s 8(3) of the Civil Evidence (Scotland) Act 1988, which requires evidence to be provided from someone other than a party to the marriage.

The question of intimation to children was considered by the Sheriff Appeal Court in *I v H* [2021] SAC (Civ) 16 (11 May 2021). A minute to vary had been lodged in terms of OCR, rule 33.65 seeking variation of a prior decree and a residence order in favour of the respondent, and two interdicts against the appellant. Decree had been granted in terms of the minute without opposition, but the proceedings had never been intimated to the child, who was aged 11 years. Intimation had been dispensed with "due to her tender years". Sheriff Tait, delivering the opinion of the Appeal Court, observed first that in terms of rule 33.44A(2), whether it was inappropriate to send an F9 to a child related to that procedure as opposed to taking the views of the child. There was nothing to indicate that the child was not of an age and maturity to form and express a view, that it was not practicable to consult her or there were weighty considerations adverse to providing her with the opportunity to express a view. A child of 11 was not of tender years and could be presumed to be able to express a view. While a child of that age might not fully understand the import of the proceedings, this did not inhibit their participation in the decision making process.

I would be tempted to suggest, if it is proposed to dispense with intimation on a child of school age, that the necessary averments should be made in the writ so that they can be considered at the warrant stage. Although the Appeal Court does not go this far, I might suggest that when account is taken of the reference in the relevant rule to "for example, where the child is under five years of age", there is a strong hint that the default position is that an F9 should be sent to children of school age.

As a consequence, in granting the orders the sheriff had not complied with the duty imposed on the court in terms of s 11(7)(b) of the Children (Scotland) Act 1995. The court observed that there might be circumstances in which taking the views of a child might be better achieved by a procedure other than an F9. This might be because of the child's maturity, welfare concerns, or anxiety. In that event a child welfare reporter could be appointed. The parties might provide input on how best to engage the child.

On that point it is important to note that intimation is not to be made until it is clear whether the proceedings are undefended or contested. I refer to rules 33.19-33.19C and 33.44A(6). The Appeal Court observed that it was important to record in an interlocutor what is happening to the F9 – has it been approved; is consideration of intimation of the F9 being continued?

Another personal observation, without even being offered a penny: I suggest that practitioners in drafting the F9 remember that it is being addressed to a child. Avoid asking more than one question. Avoid "reside" and "contact"; use "stay with". Keep it simple. Address the immediate issue which the court will have to determine, for instance weekly not holiday contact. As Bluebottle said (for those who recall *The Goons*), "Just a thought!"

In *Scott v Scott* [2021] SC ABE 40 (1 June 2021) the issue which Sheriff Mann required to consider was whether it was competent to make an ancillary order in terms of s 14(2)(k) of the Family Law (Scotland) Act 1985 without a plea in law. Sheriff Mann considered that it was, as it was often the case that parties were unable to predict the need for ancillary orders to give effect to the s 9 principles and could not frame precise craves or pleas in law.

Time bar: historic child abuse

In *B v Sailors' Society; C v Sailors' Society* [2021] CSOH 62 (20 April 2021) Lady Carmichael considered the operation of s 17D of the Prescription and Limitation (Scotland) Act 1973. A preliminary proof had been allowed to assess whether a fair trial was possible and whether the defenders would be substantially prejudiced in the event of the action proceeding. If the court was not satisfied that a fair trial was impossible, in terms of s 17D, the action would proceed. This

Update

Since the last article *Widdowson's Executrix v Liberty Insurance* (March article) has been reported at 2021 SLT 539, and *Gardiner v Abellio Scotrail Ltd* (also March) at 2021 SLT (Sh Ct) 113.

did not mean that the subsequent proof would necessarily be fair. Further submissions as to fairness could be entertained at the proof. The issue of fairness required continued assessment. If the court assessed at the preliminary proof that a subsequent hearing could not be fair, that was an end of the matter. There was no issue of balancing the interests of the parties. If on the other hand the defender established the suffering of substantial prejudice, in terms of s 17D(3) the action could proceed further after considering the pursuer's interest.

The preliminary proof was an attempt to predict the fairness of future procedure. The lapse of time was not conclusive, nor the different standard of proof between criminal and civil proceedings. The availability of corroboration might be a relevant factor, as was the potential unavailability of the alleged wrongdoer. The defender had the burden of showing subsequent procedure would be unfair. Matters such as the quality of evidence from witnesses, missing records and witnesses, the difficulty in establishing what went beyond acceptable corporal punishment, the causal effect of any wrongdoing, changes in the law/insurance cover, and alternative remedies, were all factors to consider.

Count reckoning and payment

There can be instances in which agents lose sight of the appropriate procedure in less common types of action. Actions of multiplepoinding spring to mind. Another is an action of count reckoning and payment. In *Herberstein v TDR Capital General Partnership* [2021] CSOH 64 (18 June 2021) Lord Ericht observed that title to sue in such actions was restricted to persons who had a financial interest in the accuracy and honesty of the defender's intromissions. The action was a two stage process. The first stage was to establish whether the defender had an obligation to account. The writ should not contain averments anticipating objections to an account. If this obligation was accepted or established, the defender was then ordered to produce an accounting of intromissions. If this accounting was not accepted, the pursuer lodged a note of objections to the accounting and the defender answered these objections. Thereafter the court determined the precise amount due. The purpose of the action was not the provision of documents but rather payment of sums due.

Expenses

The Lord President made a comment in passing concerning expenses in *Keatings v Advocate General and Lord Advocate* [2021] CSIH 25; 2021 SLT 729. Lord Carloway expressed concern as to the potential level of expenses in an action in which there was no substantial dispute of fact and was resolved by debate, and the implications this might have for access to justice.

In *McKinlay v Aviva Insurance* [2021] SC FAL 26 (19 April 2021), Sheriff Livingston determined that in actions under simple procedure a distinction could be drawn between a defence on the merits and one simply on quantum. In the former, once a defence was stated and thereafter not insisted on, the cap for expenses flew off. In the latter, the defender was simply insisting that what was sought was not due, albeit something was due. In that instance, a compromise settlement could not be said to constitute a defence not being insisted on and therefore the cap remained. If the cap did fly off in those circumstances, the court still had a discretion to modify expenses.

In *Philip v Scottish Ministers* [2021] CSOH 52 (19 May 2021) Lord Braid determined issues regarding certification of skilled witnesses and uplift in expenses. In relation to the former, whether it was reasonable and proportionate to employ a skilled witness was not determined by reference to whether their evidence was relied on or whether their remit was exceeded. The issue was objectively determined having regard to the circumstances at the time of instruction. In considering whether an uplift should be granted, and the issues of complexity, number, difficulty or novelty of the questions raised, Lord Braid considered that it was reasonable to view counsel and instructing solicitor acting as a team. Further, it was not an answer to a claim under this head to state that senior counsel was instructed. This also applied under the "skill and labour" head. The fact that there were a number of petitioners was also relevant under the latter head. The effects of the pandemic and any other circumstances under which the solicitor had to work which created difficulties were relevant under the "place and circumstances" head. Lord Braid also considered that he was in a better position to determine the level of percentage uplift than the Auditor of Court, having presided over the proceedings from their commencement.

It is also worth recording that the Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules, Sheriff Court Rules Amendment) (Qualified One Way Costs Shifting) 2021 comes into force on 30 June 2021 and applies to proceedings commenced on or after that date. The provisions also apply to summary cause proceedings. The Act of Sederunt sets out the circumstances and the procedure for an application to be made by a party other than the pursuer for an award of expenses. It further brings to an end the rules regarding payment of expenses as a condition for the granting of decree of dismissal when a pursuer abandons.

Simple procedure

In *Cabot Financial UK v Finnegan* [2021] SC DUN 34 (28 April 2021) Sheriff Martin-Brown considered issues regarding service under simple procedure, and in particular evidence of delivery. No reference was made as to what constituted such evidence. A delivery receipt such as via Royal Mail's Track and Trace service, if available, should be lodged in process. However Sheriff Martin-Brown referred to the rebuttable presumption that a letter posted is received. Therefore proof of posting raised a presumption that the document had been addressed and delivered. Accordingly, completion of the necessary execution of service with proof of recorded delivery posting raised the presumption of delivery without the need for a delivery receipt. Sheriff Kinloch in *Cabot Financial UK v Donnelly* [2021] SC LIV 39 (7 June 2021) came to a similar conclusion.

Final thoughts

By the time this article is published, I shall have retired as a resident sheriff in Perth. I first would thank Peter Nicholson, the current editor of the Journal, for his considerable abilities in that role over the years. Peter and I go back to the 1970s. My interest in procedure can be attributed to my procedure lecturer at Edinburgh University in 1975, a certain junior counsel, Brian Gill! In around 1996 I was first invited by the then editor of the Journal, Joan Aitken, in cahoots with a contemporary of mine from university, Fiona Raitt, to contribute a couple of articles detailing decisions to date on the 1993 rules and the changes to these rules arising from implementation of the Children (Scotland) Act 1995. I have since contributed articles for longer than I care to remember.

I often feel that people tend to roll their eyes when my interest in procedure and its importance becomes evident. However, I make no apology for closing with these observations. If practitioners have a good knowledge of procedure, it is immediately apparent to the bench. The person knows what they are doing. They have a clear view as to what should happen and how the litigation should proceed. They have an ability to control matters. A good knowledge of procedure may not make a huge difference if your case is strong, but it undoubtedly can make a weak case stronger, whether acting for pursuer or defender. Adopting the correct procedure can result in awards of expenses being made against a party whose representative is not as knowledgeable. That is important to clients, and to that end the observations from the Lord President in the *Keatings* case are prescient.

I close by stating that I am delighted to pass the baton to Professor Charles

Briefings

Hennessey. Our paths have crossed on a number of occasions, including being members of the Sheriff Court Rules Council in the late 1990s. I can confidently state that the standard of article will improve. However, in the meantime it has been a pleasure providing these updates over the years and I only hope on some occasions some of the content has been useful.

Sheriff Foulis is currently the Journal's longest serving regular contributor, and I cannot let him leave without a heartfelt word of thanks for his loyal and diligent service over the years. We know that the court briefings are among the best read sections of the Journal and that is due to a significant extent to Lindsay's input. We offer our best wishes for a long and happy retirement. – Editor

Licensing

AUDREY JUNNER, PARTNER, MILLER SAMUEL HILL BROWN

At a recent licensing board hearing, during the consideration of a personal licence application where the applicant had declared a conviction, a board member remarked that she was mindful of the growing trend towards a "cancel culture" in the UK and emphasised that it had no place within the licensing arena. In supporting the grant of the application, despite the applicant's conviction for driving while under the influence of drugs, she said that everyone deserved a chance to make amends.

The concept of "cancelling" a person as a result of past behaviour has become a polarising topic of debate in recent years. This particular example indicates a strong sense of disapproval of this culture from some licensing board members, but how does that sit within a licensing system which uses these exact past mistakes – i.e. convictions – as the very basis for determining suitability?

Care over convictions

When instructed to apply for a personal licence, premises licence or a licence transfer, agents must ascertain at the outset whether the applicant or a connected person has been convicted of an offence. If it transpires that there are convictions to consider, the next stage is to determine (a) whether they are relevant offences with reference to the Licensing (Relevant Offences) (Scotland) Regulations 2007; and (b) whether they have to be declared or are spent and thus fall to be disregarded by virtue of s 129(4) of the Licensing (Scotland) Act 2005. The second part of this exercise is completed by referring to the Rehabilitation of Offenders Act 1974. Changes introduced last year mean that this should be performed with caution.

On 20 November 2020, part 2 of the Management of Offenders (Scotland) Act 2019 was brought into force. These provisions substantially reduced the periods after which convictions can be considered spent, reducing the requirement for disclosure and bringing the timeframes into line with England. Providing comment at the time regarding the policy intention, the then Justice Secretary Humza Yousaf stated: "These important reforms balance the requirement for safeguards to understand a person's recent offending behaviour with the need to allow people to move on with their lives – to seek gainful employment, support their families and contribute positively to their communities."

The headline changes were reductions in disclosure periods for non-custodial sentences from five years to 12 months for community payback orders and fines, and the removal of the requirement to disclose admonishments or absolute discharges. The length of the disclosure period for custodial sentences was also reduced, dependent on the length of the sentence.

However, an SSI carves out an exception for 2005 Act applications. In terms of the Management of Offenders (Scotland) Act 2019 (Commencement No 4 and Saving Provision) Regulations 2019 (SSI 2020/245), the provisions of the 2019 Act have no effect in respect of any application, notice, proceeding or appeal under the 2005 Act until the coming into force of s 52 of the Air Weapons and Licensing (Scotland) Act 2015.

Spent, but still relevant

Section 52 has yet to be commenced. This places applicants in the peculiar position of having to resort to the provisions of the 1974 Act before it was amended by the 2019 Act in order to determine the rehabilitation periods for the relevant offences. This will undoubtedly cause confusion.

When s 52 comes into force, the 2019 Act provisions will at that point apply. This change will however be almost academic, as the effect of s 52 is to open the door for spent convictions to be brought to and considered by boards as part of their decision-making. Where spent convictions are disclosed, case law suggests that the information should be presented to the board in two stages, with them first being advised of the general nature of the conviction and the penalty imposed, before taking a view on whether it is admitted for consideration: see *O'Doherty v Renfrewshire Council* 1997 SCLR 821 and *R v Hastings Magistrates, ex p McSpirit* (1994) 162 JP 44.

Thus, as matters stand, the reduced timescales introduced in November last year do not apply in the context of 2005 Act applications. A conviction, even one from many years ago, could still lead to someone being "cancelled" for licensing purposes, while the potential for "cancellation" will become even greater when the gates are opened to the consideration of spent convictions.

Insolvency

ANDREW FOYLE, SOLICITOR ADVOCATE, AND PARTNER AT SHOOSMITHS IN SCOTLAND

The Corporate Insolvency and Governance Act 2020 ("CIGA") introduced temporary measures to restrict winding up petitions against businesses facing hardship by reason of the coronavirus pandemic. These included UK-wide limitations to the use of statutory demands, and restricting the court's ability to grant petitions where coronavirus has had a "financial effect" on the company.

The latter restrictions (CIGA, sched 10, part 2) apply to petitions lodged or demands served during the "relevant period". That period has been extended, most recently at the time of writing to expire on 30 September 2021.

"Financial effect" is defined broadly. Where the provision is engaged, the court may wind the company up only if it is satisfied that the company's apparent insolvency would have arisen irrespective of the effects of coronavirus.

There is limited case law on the provisions. However, the recent English judgment in *PGH Investments v Ewing* [2021] EWHC 533 (Ch) sheds some light on the test to be applied.

Company's guarantee

The case centred on a dispute between two shareholders of PGH who entered into an agreement whereby one (Neate) agreed to buy out the shareholding of the other (Ewing) and redeem certain loans to group companies. Under the agreement, the price was to be £825,000. PGH guaranteed Neate's obligations under the contract.

Neate was unable to make payment of the price by the required date. Consequently, Ewing called on PGH under its guarantee and a petition to wind up PGH was raised. PGH raised an application for dismissal of the petition.

The judgment primarily revolved around interpretation of the contract and whether there was a genuine dispute as to liability. The court found that there was such a valid dispute and dismissed the petition.

The question of "financial effect"

However, the court also considered the question of whether the pandemic had resulted in a "financial effect" on PGH and whether the petition should be dismissed on those grounds. Although the judge's comments on that element are obiter, they

are a useful summation of the position.

First, the court took the view that the evidential burden falls on the debtor to establish a *prima facie* case that coronavirus has had a "financial effect". The judgment refers to para 5 of sched 10 of CIGA in this regard, but not para 2. "Financial effect" means a worsening of the company's financial position in consequence of, or for reasons relating to, coronavirus. If that is demonstrated, the burden then falls on the petitioner to show that if that effect is ignored, the company would still be unable to pay its debts as they fall due.

Before the court was a witness statement from Neate. He made three assertions:

1. The pandemic had a dramatic effect on liquidity investment worldwide, making it difficult to find investors and resulting in a loss of anticipated investment to the business.

2. Potential investors in PGH were worldwide. Constraints imposed by the pandemic restricted travel and made business development problematic.

3. Day-to-day operations of the company had been severely impacted by the pandemic.

More broadly, Neate referenced the difficulties in trading during the pandemic, the need for the group to reach forbearance arrangements with creditors until after the pandemic and the negotiations he conducted with Ewing, regarding extending the time for the purchase of shares.

The petitioner argued that these assertions did not meet the test. They were unsupported by evidence, pointed to only indirect rather than direct consequences and were largely irrelevant given that the company was a holding company that did not trade.

The court considered that indirect effects of the pandemic would suffice in order to bring the company within the terms of the provision. However, it agreed that none of these assertions had been evidenced. This could be contrasted with *Re A Company* [2020] EWHC 1551 (Ch), where evidence was produced. The discharge of the burden on the company required some basic evidence. The court therefore concluded that it could not hold that coronavirus had had a financial effect on the company.

In summary

From a legal standpoint, the above is helpful when seeking to interpret some of the coronavirus restrictions around winding up petitions. Certainly, this case suggests that:

- the initial burden of proof may lie with the debtor, not the creditor, contrary to the apparent terms of para 2;
- the "financial effects" do not require to be direct, but may be indirect; and
- while the threshold is low, some evidence is required in order to overcome the burden of proof.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Civil Nuclear Constabulary

The UK Government seeks views on its proposal to extend the remit of the Civil Nuclear Constabulary, the armed police force charged with protecting civil nuclear sites and materials, so they can be deployed more widely. See www.gov.uk/government/consultations/civil-nuclear-constabulary-service-expansion-and-diversification

Respond by 5 August via the above web page.

LGBT "conversion therapy"

Following a commitment from the UK Government to act to eliminate "conversion therapy" for LGBT+ people in England & Wales, the Parliament's Equalities, Human Rights & Civil Justice Committee wishes to hear views on a public petition calling on the Scottish Government to take action. See yourviews.parliament.scot/ehrc/petition-end-conversion-therapy-views/

Respond by 13 August via the above web page.

Short term lets

The Scottish Government seeks views on its revised draft Licensing Order and Business and Regulatory Impact Assessment (BRIA) in respect of short-term lets. See consult.gov.scot/housing-and-social-justice/short-term-lets-draft-licensing-order-and-bria/

Respond by 13 August via the above web page.

Use and misuse of fireworks

The Scottish Government seeks views on possible changes to how fireworks are sold and used, and also on the use of pyrotechnic devices. See consult.gov.scot/justice/use-and-sale-of-fireworks-in-scotland/

Respond by 15 August via the above web page.

Warm Home Discount

The UK Government seeks views on proposals to extend, expand and reform the Warm Home Discount scheme in England & Wales, and also on some aspects of the scheme in Scotland. See www.gov.uk/government/consultations/warm-home-discount-better-targeted-support-from-2022

Respond by 22 August via the above web page.

Having New Year's Day off?

The Scottish Government asks, should workers in large shops be entitled to New Year's Day off by way of a law prohibiting trading on that day by large stores? See consult.gov.scot/economic-development/new-year-s-day-trading-for-large-retailers/

Respond by 24 August via the above web page.

Blocking companies on national security grounds

This initial consultation asks for views on the scope of a proposed new power to allow the UK Government to block a company's market listings, if a listing presents a risk to national security. See www.gov.uk/government/consultations/consultation-on-a-power-to-block-listings-on-national-security-grounds

Respond by 27 August via the above web page.

... and finally

As noted last month, the Scottish Law Commission has published a wide-ranging discussion paper exploring the mental element in murder and culpable homicide (DP No 172) (see the feature on p 22 and www.scotlawcom.gov.uk/publications/archive/discussion-papers-and-consultative-memoranda/, and **respond by 27 August**).

Tax

CHRISTINE YUILL, PARTNER, PINSENT MASONS

The recent G7 meeting came to a broad consensus on two main proposals which, it is hoped, will bring global tax rules up to date and force multinational companies to pay their fair share. The first, "Pillar One", would award countries the right to tax multinationals which operate in their jurisdictions, even if they have no permanent establishment there. The second, "Pillar Two", is a global minimum corporate tax rate of 15%.

Pillar One

Pillar One – which is understood to be a global replacement for the national digital services taxes levied by many European countries – is targeted at the "largest and most profitable multinational enterprises", with a profit margin of at least 10%. Profits which are above the 10% threshold will be taxed at a 20% rate and the taxation rights will be shared out among "market countries".

Details as to how this will be implemented are few. There is no global standard definition of "profit", and the G7's communiqué does not propose one, so the difficult task of finding a consensus on the matter remains ahead. While we know that "market countries" will share taxation rights, it is not clear how those countries will be identified or how the taxation rights will be allocated among them.

The model proposed to the OECD by the US targeted 100 of the largest and most profitable global companies, but there is no guarantee that these will be the only companies targeted. The communiqué does not contain a specific number or specific size criteria, so it is possible that more companies will be affected by this reform than previously anticipated.

Pillar Two

Pillar Two aims to tackle the practice of establishing subsidiaries in tax havens, by imposing a global minimum corporate tax rate of 15%. This is not to say that every country would be obliged to set their rate of corporate tax at 15% or above: they would still have the freedom to set a lower nominal tax rate. However, each signatory country where a multinational is headquartered would be obliged to "top up" the tax paid in respect of any foreign subsidiaries in low-tax jurisdictions to at least that minimum rate, preventing the multinational from saving any money by establishing subsidiaries there.

Again, more detail is needed to assess this proposal properly. It will be necessary to develop a consensus on the meaning of "profit" and the appropriate way to calculate the effective tax rate. It would be a mistake to take the nominal tax rates at face value, as they can be deceptive – generous capital allowances can drastically lower the amount of tax actually payable – so it will be necessary to determine which tax adjustments should be taken into account.

What happens now?

These proposals are not final: the G7 package still has to get through the G20, the OECD countries and the national legislatures, and dissent is already stirring. Some critics maintain that the proposals do not go far enough: a 15% tax rate is, after all, not far from the low rates already charged by tax havens like Ireland and Switzerland, and as Pillar One is intended to replace the national digital services taxes which are already in place, it remains to be seen whether any extra tax will actually be raised. There is also the matter of Pillar One's 10% profit threshold, which should theoretically rule out several low-margin multinationals which were at the centre of the original policy proposals, including tech giants like Amazon and Twitter.

Other critics believe that the proposals are too drastic. Low-tax jurisdictions like Ireland and Hungary have expressed concern over Pillar Two, and legislators across the world – including, crucially, in the US – are reluctant to cede any sovereignty over their tax laws. Some countries have already begun to lobby for carve-outs: Poland and Hungary for business done domestically and the UK for the financial services sector.

Notably, there is one group which appears to have no criticisms: the tech giants. Spokespeople for Amazon, Google and Facebook have all issued statements which range from accepting to approving, and their share prices have remained high, indicating that investors are not concerned.

Ultimately, there is still much to be decided. The task of appeasing critics across the world falls on the G20, who meet in Venice in July to establish the key details of the proposed reforms. It is hoped that, when they do, we will be one step closer to establishing an equitable tax system which is fit for purpose in our increasingly digital world.

Immigration

DARREN COX,
SOLICITOR, LATTA & CO

It is not uncommon for a foreign national offender ("FNO") to raise their rehabilitative efforts, including efforts to guide others away from crime, as one reason why they should not be deported. The rhetoric of the Home Secretary and the UK Government would suggest to many that such individuals are beyond redemption, but how do the courts view an offender's rehabilitation in the context of their attempts to resist deportation?

FNOs who seek to resist their deportation are required to meet one of the exceptions contained in s 117C of the Nationality, Immigration and Asylum Act 2002, dependent on the length of their sentence. While the tests which apply are beyond the scope of this article, it is worth noting that those sentenced to four years' imprisonment or more have to meet a tougher test than those sentenced to between 12 months and four years. For example, the latter category can resist deportation if they can show they have a genuine and subsisting relationship with a British citizen partner or child and it would be unduly harsh to deport them, while those in the former must demonstrate "very compelling circumstances" over and above this.

Proportionality

Despite the UK Government's codification of these various tests in statute, the UK Supreme Court in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 confirmed that the assessment remained one of proportionality in terms of article 8 ECHR, albeit with due regard being given to the strength of the public interest in deporting FNOs. There is no exhaustive list of factors relevant to this assessment. However, the Supreme Court did give some guidance in *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42 at para 55 on factors which might be relevant to the "very compelling circumstances" test. This is the context within which rehabilitation will often be advanced as a relevant factor.

The relevance of a FNO's rehabilitative efforts has been the subject of judicial consideration on a number of occasions, in particular by the Court of Appeal. Of particular issue has been the strength to be attributed to a FNO's rehabilitation and the extent to which that is capable of outweighing the strong public interest in deportation. The approach of the courts and tribunals has, in the past, been inconsistent on this question. For example, the Court of Appeal has upheld the tribunal's judgment that deportation would be unlawful in a case where the evidence for deportation was particularly strong (*Garzon v Secretary of State for the Home Department* [2018] EWCA Civ 1225); while the Upper Tribunal in *RA (s 117C: "unduly harsh"; offence: seriousness) Iraq* [2019] UKUT 123 (IAC) held that rehabilitation was unlikely to bear any material weight in a FNO's favour.

Most recently, two decisions dealing with this issue came from the Court of Appeal in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176 and *Jallow v Secretary of State for the Home Department* [2021] EWCA Civ 788. In *HA (Iraq)*, the court considered the lengthy line of case law before concluding at para 139: "rehabilitation is in principle a relevant consideration. However it makes it equally clear it will not generally be a factor carrying great weight – 'it may be that in a few cases it will amount to an important factor'".

The court's basis for such a conclusion rested on the opinion of the Upper Tribunal that rehabilitation will ordinarily do no more than show that the FNO has returned to the place where society expects them to be. Nonetheless, para 135 of the judgment appeared to suggest, at least implicitly, that greater weight may be attached to an FNO's rehabilitation where they can show "exceptional positive contributions to society since release".

Open to interpretation

What constitutes an exceptional positive contribution to society? One might have assumed that someone who had sought to discourage others from criminal activity would meet this standard. The Court of Appeal said differently in *Jallow*, where the appellant's rehabilitative efforts were of this type and included giving speeches to organisations. Despite accepting that this was relevant to the proportionality assessment, the court doubted that a FNO's positive contribution to society would be of much significance in light of past case law. The court accepted that additional weight could be attributed where an individual's positive contribution could be shown to be "very significant", but unfortunately gave no guidance on circumstances where this may be the case.

To what extent a FNO will be able to succeed on grounds of their rehabilitation remains to be seen. What is undoubtedly clear, however, is that only a case with very strong facts would be likely to have any chance of doing so. The meaning of "very significant" will therefore remain open to wide interpretation until such cases come to the fore and are considered by the courts and tribunals.

Coronavirus Acts

PETER NICHOLSON, EDITOR

The Scottish Parliament has passed the Coronavirus (Extension and Expiry) (Scotland) Bill under the emergency procedure, keeping in force some of the emergency provisions passed in 2020 at least until 31 March 2022 (with the possibility of extension to 30 September 2022).

A summary follows of the provisions that might be of interest in relation to what is being continued or expired (from 30 September 2021).

Legal aid

Ministers recognise that it would not be appropriate at this stage to remove the enhanced interim fee arrangements, and are continuing the provisions enabling reduction of the level of scrutiny required, removal of conditions for counsel to be able to apply – and enhanced recovery powers in the event of overpayment.

Meetings in public

Among amendments successfully pressed on the Government during the bill's passage, the public can no longer be excluded from meetings of local authorities and licensing boards on COVID-related grounds.

Children's hearings

Special measures regarding children's hearings and social work will expire, but transitional arrangements will enable orders granted under the 2020 Act to continue to operate.

Planning permission

Planning permissions, listed building consents and conservation area consents that were due to expire while coronavirus restrictions were in place will be further extended.

Land registration

Digital registration in the Land Register and Register of Sasines, along with the Register of Judgments and Register of Inhibitions, will continue. The policy memorandum states that if it did not, Registers of Scotland and the conveyancing profession "would have to significantly amend their operating procedures which would incur additional costs and likely be viewed as a backwards step by stakeholders".

Tenancies

Notice periods landlords require to give their tenants will remain at six months, except for criminal or antisocial behaviour, and all eviction grounds for private tenancies will continue to be discretionary rather than mandatory.

Pre-action requirements, such as reasonable efforts to work with tenants to manage rent arrears, will continue for private landlords considering eviction for rent arrears accrued during the COVID-19 period.

The provision allowing students in halls of residence etc to end their lease early with seven days' notice for a COVID reason is being expired; but a separate provision allowing 28 days' notice will continue.

Landlords of student accommodation whose properties are empty due to COVID will continue to be exempt from council tax while their properties are unoccupied.

Irritancies in leases

The bill originally proposed to expire the provision allowing commercial tenants 14 weeks' rather than 14 days' notice of intended termination for non-payment of rent, but ministers accepted business representations that it should continue.

Diligence and bankruptcy

Debtors will no longer be able to apply for a moratorium on diligence more than once in a 12 month period. However, where granted, a moratorium will continue to run for six months rather than six weeks, as ministers anticipate increased demand for debt advice and solutions. They consider this will balance the interests of debtors and creditors.

Some provisions not already made permanent by the Bankruptcy (Miscellaneous Provisions) (Scotland) Regulations 2021 are continued. These cover electronic service; the £10,000 debt threshold before a creditor can apply for bankruptcy; and virtual meetings of creditors.

Civil courts

Provisions enabling business to be conducted remotely are regarded as necessary to enable the justice system to continue without serious adverse effect, and are extended. However the Government is aware of the concerns over the use of remote hearings in delivering justice and has commissioned three short research projects into their effectiveness.

Criminal justice

Extended time limits in criminal proceedings are continued, including the 40 days (summary) and 140 days (solemn) within which a remanded accused must be brought to trial, without an individual extension. Despite the significant growth in the number of remand prisoners, ministers state that "the need for flexibility in time limits clearly remains and is likely to do so for a considerable time".

Some extended time limits for adjournment of summary proceedings are also continued, including adjournment at first calling.

Provisions enabling prisoner custody officers to carry out escort functions within police stations to enable remote court appearances will remain – and are likely to for the foreseeable future.

Also to be kept in force are:

- the temporary increases in the levels of fiscal fine available to prosecutors;
- the court's power to extend an undertaking to appear, where it appears that a failure to appear is attributable to a COVID reason;
- Scotland-wide jurisdiction for sheriffs dealing with first appearances from police custody;
- provisions preventing disadvantage if an individual is unable to pay a confiscation order on time for COVID reasons;
- the extended time of 12 months for completing community payback orders remains, as does ministers' power to make regulations varying or revoking requirements imposed in such orders – but not in relation to drug treatment and testing orders (it is not thought necessary to continue other provisions relating to community orders);
- provisions enabling greater flexibility in Parole Board hearings; and
- ministers' powers to provide for the early release of certain prisoners in order to protect the security and good order of the prison.

It was also proposed to extend the COVID-related addition to the circumstances in which hearsay evidence may be led in criminal trials, but MSPs defeated the Government to remove this.

Documents

The provision removing any requirement for lawyers or notaries public to be physically present to witness the signing of a document, or the taking of an oath or affirmation, is continued.

Documents normally required to be displayed on the walls of court can continue to be published online.

PSG at 20: still going strong

In the 20 years since its formation, the Property Standardisation Group has transformed the way Scottish commercial property lawyers work, and today still has a healthy list of projects in hand to keep up with the changing law

Property

PROPERTY STANDARDISATION GROUP

Property lawyers are particularly partial to a good style. The practice of law is demanding enough at the best of times, so when a standard form of document is available to us, we embrace it with alacrity (even if, in the case of some statutory styles, the drafting may be less than satisfactory).

And yet, over the years, the negotiation of regularly used transactional documents had become increasingly fraught, with hours spent on revisal and counter-revisal; each firm had its own preferred style of document, meaning time had to be spent on becoming familiar with that particular version; and the whole process started all over again in the next transaction.

The Property Standardisation Group was formed in 2001 to help address this issue. Its mission was to produce balanced, standardised forms of many of the routinely used commercial property documents which would:

- save time and allow transactions to be completed more quickly;
- let lawyers focus on deal-specific issues to meet their clients' needs;
- facilitate delegation with confidence to more junior lawyers (who benefit from greater exposure to more complex transactional work); and
- manage and reduce risk.

A unique collaboration

The PSG was created by Dundas & Wilson (now CMS), Maclay Murray & Spens (now Dentons), McGrigors (now Pinsent Masons), and Shepherd and Wedderburn. These firms shared a vision: to work together to produce documents that would set out a standard position for what really should be non-contentious points.

What started as a collaborative drafting exercise soon expanded into streamlining, and innovating on style and process too. With the (then new) Scottish Parliament producing an unprecedented amount of legislative change, the PSG rose to the challenge, translating fundamental changes in law into new styles and guidance. This included drafting to cater, over time, for:

- the abolition of feudal tenure and the introduction of the Title Conditions (Scotland) Act 2003;
- the introduction of stamp duty land tax, and its successor, land and buildings transaction tax;
- significant land reform legislation, including the introduction of four community rights to buy land in Scotland;
- the major reform of land registration in Scotland under the Land Registration etc (Scotland) Act 2012; and
- the move to digital registration of documents.

The PSG spent many hours analysing and interpreting the new laws, translating them into workable drafting solutions, while also engaging with the Scottish Government, Registers of Scotland and other stakeholders to ensure the documents accurately reflected the policy purposes and administrative effects of the legislation.

Innovative thinking

Over the past 20 years, the PSG has published more than 95 documents with corresponding guidance notes, ranging from one page letters to lengthy leases and offers to sell. Many of these documents cater for routine everyday transactions: lease management documents when a lease is assigned or sublet, or landlord's consent is sought; undertakings given to facilitate completion of transactions; dispositions to transfer property; and deeds creating title conditions. The PSG's standardised versions of these documents have enabled property lawyers to draft and agree the final format in minutes rather than hours.

The PSG has not been shy about challenging transactional norms. In 2003, the introduction of stamp duty land tax, as different from its predecessor stamp duty as it is possible to be, prompted the PSG to rethink the procedural as well as the drafting aspects of the new tax, and lay out simple steps for parties to follow and incorporate into their documents.

Property law experienced seismic changes with feudal abolition and the reform of the law relating to title conditions. The PSG produced a comprehensive suite of documents that took the guesswork out of this new legislation and simplified the drafting process. The introduction of a collection of residential documents in 2015 took this simplified format to a new level.

Tackling the time-consuming and contentious process of adjusting commercial property missives led to the PSG producing two offers to sell. In a break with traditional practice, this allowed the initial contract document to be drafted by the seller, who is familiar with the property. Practitioners found using an offer to sell resulted in the contract being concluded more swiftly and easily.

The document the PSG was most often asked to produce was a standardised commercial lease. Originally it considered this a project too far, given the difficulties in balancing the needs

of a well-advised tenant and an institutional investor. The introduction of the Model Commercial Lease, a client-led collaboration in England, provided the PSG with the ideal opportunity to produce a comprehensive set of commercial leases, adapting the MCLs to equivalents fit for purpose in the Scottish market. Written in plain English, with a well balanced approach to the respective parties' interests, the MCL ethos is a good fit with the PSG philosophy, and as the leases gather more traction in the Scottish market, having a uniform style of lease applicable throughout the UK helps clients and their surveyors with lease management, and provides time savings in cross-border transactions.

Core members and supporters

The core drafting group has deliberately been kept small, avoiding the problems that can arise from drafting by committee. Two of the original founding members, Ann Stewart of Shepherd and Wedderburn, and Rachel Oliphant of Pinsent Masons, currently work with Paul Haniford of Dentons (who succeeded Iain Macniven on his retirement in 2015) and Kirsten Partridge of CMS Cameron McKenna Nabarro Olswang (successor to Douglas Hunter, who retired in 2020).

Together they continue the voluntary work of the PSG, whose output is freely available for all to use via the website www.psglegal.co.uk, with their IT colleagues helping with the technology. Careful monitoring and updating now takes up a considerable amount of the PSG's time, alongside new projects.

Robust peer review is an important part of the process when producing new precedents, and the PSG has an active group of consultee members who provide input on new documents: Addleshaw Goddard, Anderson Strathern, Burness Paull, Church of Scotland Legal Department, DLA, DWF, Ennova Law, Gillespie Macandrew, Harper Macleod, Ledingham Chalmers, Morton Fraser, Property Litigation Association, Shoosmiths, Thorntons, TLT, Urquharts, and Wright Johnston & Mackenzie. Over the years the PSG has received support and encouragement from academics, legal and property industry organisations, and most importantly, the Scottish legal profession.

The future

It is no exaggeration to say that the PSG has transformed, for the better, the way in which commercial property lawyers in Scotland work. It is a unique collaboration that has been of immeasurable benefit to property lawyers and their clients, and it shows no sign of tiring, with a healthy list of current projects, and changes in the pipeline such as the Register of Controlled Interests in Land and greater regulation on energy performance of buildings. There is always more work to be done.

Birthday greetings

David Bartos, Scottish Law Commission:
"The PSG has revolutionised transactions with property and very much for the better. Not only did it free practitioners from often out-of-date or inappropriate firm or even partner-based styles, but the readily accessible styles have been kept up to date and allowed parties to at least begin 'singing off the same hymn sheet' in their dealings."

Kevin Robertson, chair, Scottish Property Federation:
"Underpinning the commercial property industry is a legal profession that has benefited enormously from the work of the Property Standardisation Group. In a dynamic legislative environment, having robust and reliable documents benefits all parties, as evidenced by the stellar work of the PSG on subjects such as commercial leases and the transition to LBTT.

"Congratulations and thank you to all those who have been involved in the past 20 years, and all the very best for the next 20."

George Gretton, Emeritus Lord President Reid Professor of Law, University of Edinburgh:
"Styles should not only be good in themselves, but should ideally emanate from organisations that command respect in the relevant community of users. The PSG ticks all boxes: high quality styles, styles that evolve in response to the changing law/practice matrix, and the highest level of respect in the conveyancing community. The Scottish legal system is fortunate, most fortunate, in having the PSG."

Jennifer Henderson, Keeper of the Registers of Scotland:
"On the 20th anniversary of the formation of the PSG I would like to extend my thanks, on behalf of everyone at Registers of Scotland, for the contributions the PSG has made over the years.

"The PSG styles of deeds creating title conditions undeniably resolved a lot of issues for us by setting everything out in a very logical, foolproof way and drastically reduced processing time and rejections.

"We used the PSG discharge in our Digital Discharge System, which gave new users confidence to adopt it. The PSG protocols for digital submission have helped solicitors understand how best to deal with practical aspects of conveyancing using our new Digital Submission System."

Kenneth Reid, Emeritus Professor of Scots Law:
"Ever since its formation back in 2001 by four energetic and public-spirited members of the profession, the Property Standardisation Group has produced an ever-growing suite of styles for conveyancing. As well as facilitating valuable savings in negotiation time, these widely respected styles have shown what it is to draft thoughtfully and with precision.

"The PSG itself has thrived in a way which not even the most optimistic of its founders could have expected. I salute its 20th birthday. All of those involved in conveyancing in Scotland are hugely in its debt."

John Sinclair, convener of the Law Society of Scotland Property Law Committee:
"The creation of the Property Standardisation Group has been enormously beneficial and transformed the way we work as property practitioners. By introducing standardisation and working with changing legislation over the past 20 years – and there certainly has been no shortage of new legislation – the PSG has helped to streamline the conveyancing process, encourage collaboration and save thousands of hours over the years for solicitors across the country. It has been a fantastic initiative and the hard work and commitment of those involved in the group, all done on a voluntary basis, have made the PSG a huge asset not only to us as practitioners, but for our clients who benefit from the knowledge and information which it makes freely available to the profession.

"Many congratulations to everyone in the PSG for reaching your 20th anniversary, and huge thanks for all the work you have done."

Andrew Steven, Professor of Property Law, University of Edinburgh:
"Over the years, I have watched with increasing admiration and interest the contribution of the PSG. When I was a Scottish Law Commissioner we had regard to its work in our property law projects. I direct my undergraduate students to the PSG website, and when teaching conveyancing to Diploma students we look at how to draft dispositions using both traditional and PSG styles. A prized objective of academic research nowadays is real-life impact. In this regard we can learn lessons from the PSG. On its 20th birthday I congratulate warmly all involved and send my best wishes for the next 20 years."

Dealing at the cutting edge

This month's in-house interview shines a spotlight on the varied work of a university contracts lawyer

In-house

PAUL CONNOLLY,
CONTRACTS COORDINATOR,
UNIVERSITY OF ABERDEEN

Can you tell us about the purpose of your role and how it serves the interests of the university?

My role is within the contract team in the Research & Innovation Directorate ("R&I"). Research is vitally important for universities. Education is the other key element of the core university objective.

The principal mandate of this team is to support research and education contracts. In practice, I also provide legal and contract support to various academic-related and business functions of the university.

The agreements I deal with are all sorts of non-disclosure agreements and memoranda of understanding to Scottish, UK, EU and international collaborative research agreements, licence agreements, clinical trials, international educational franchising, and recently even contracts concerning a COVID-19 testing centre.

What does your day-to-day work involve?

The only constant is the review and drafting of agreements. My focus shifts depending on priorities.

I work in small teams, responsible for everything from small projects to projects of strategic importance. I work with business development officers, which is mainly around research grants; Internationalisation & Partnerships, regarding transnational education, international franchising joint institutes, UK partnerships, Go Abroad, and international agents; and the Commercialisation team, for whom intellectual property and data protection are significant areas of law.

Recently, many contracts have involved working with our external lawyers, both domestically and abroad, and with external commercial and tax advisers.

I am seconded for part of the week to provide legal advice and contracts, supporting the Procurement team and Finance, which is an excellent opportunity to participate in significant university activities, including developments in the university's teaching and research facilities, such as MRI technology and, more recently, estates projects for teaching and staff offices.

I act as the R&I information champion as part of a cross-organisational group led by the data protection officer and Information Governance, part of the Directorate of Digital & Information Services.

The university has identified five interdisciplinary challenges. What are these, and how do the university's strategic aims affect your work?

You're on point with that question. The challenges are part of the university's Aberdeen 2040 strategy, based on the 1495 foundational purpose of the University of Aberdeen, which is to be "open to all and dedicated to the pursuit of truth in the service of others".

It directly impacts the organisation's day-to-day work, crucially the attention of academic colleagues, and accordingly the contracts and legal advice. The challenges reflect the university's twin goals, regional and global impact, and can be met by the university's expertise in education and research.

The five interdisciplinary challenges are:

- **Energy transition**, where we are working on energy technology research contracts with the Centre for Energy Transition, National Decommissioning Centre in Newburgh, and the Net Zero Technology Centre, and with industry partners on green energy projects;
- **Social inclusion and cultural diversity**, which may relate to widening access articulation agreements with Scottish FE colleges and contracts supporting internationalisation in research, transnational education, student exchange and study abroad contracts;
- **Environment and biodiversity**, which could relate to collaborative EU or Official Development Assistance ("ODA") agreements for multi-partner research projects about UN sustainable development goals, such as around climate action, life below water, and life on land;
- **Data and artificial intelligence**, which may refer, for example, to contracts establishing a joint institute with a data and AI focus with a major Chinese university and research contracts that develop into academic spin-outs for AI technology; and,
- **Health, nutrition and wellbeing**, which could relate to complex clinical trials contracts for the School of Medicine, Medical Sciences & Nutrition, collaboration with NHS Grampian or nutrition and research contracts for the Rowett Institute.

When you qualified as a solicitor, did you know in which area you wished to practise?

Not really. On qualification, I had vague ideas about working in-house.

I was fortunate to secure a commercial traineeship at a sizable Scottish firm, and remain hugely grateful for the opportunity to learn from leading professionals in multiple areas of the law that have all featured in my career since to a greater or lesser extent while working in-house.

At school and university, I had the romantic idea of being a lawyer working in practice and applying logic and analysis to complex legal problems. The dynamic and competitive reality was a completely different experience.

You completed an MBA at Strathclyde Business School last year – congratulations! How have this and your past employment helped you with your work at the university?

Thank you. I was thrilled to complete my MBA. It feels like a real accomplishment. I would recommend it to lawyers who want to develop their commercial skills, which I remember was an area of development for me as a trainee.

In the past, I have worked in public

procurement, commercial contracts and major projects. Before that, I had stints working in governance and information law, committee reporting, statutory compliance, policy development, civil court, housing law, liquor and civic licensing, equality law and some child law.

Building towards and becoming a trusted lawyer means you are placed in situations and positions of greater responsibility where you represent your organisation externally, interacting with other professionals. The MBA helped me develop confidence in these interactions. It increases your understanding of the different professional disciplines and business areas that as a lawyer you work closely with, such as the C-suite, finance, HR, operations management and IT. I now feel more comfortable providing business-focused advice.

Regarding the direct impact on my work at the university, I was fortunate to interview several fantastic colleagues as part of my MBA project (thesis). The subject was university spin-outs (USOs). It extended my knowledge and understanding in that area, which has been helpful as I am aligned to support Research & Innovation's Commercialisation team (aka the Technology Transfer Office). I am grateful for the guidance and support I received from colleagues.

Which skills and knowledge are essential when dealing with contracts on behalf of the university?

General commercial contracts experience, awareness of legislation that covers the public sector, e.g. Equality Act 2010, freedom of information, IP, data protection (UK GDPR), export controls, awareness of tax laws and insurance (Bribery Act 2010 and Criminal Finances Act 2017), public procurement. Understanding the higher education operating and funding environment is helpful, including incorporating the university, relevant higher education statutes, and the Scottish Code of Good Higher Education Governance.

What are the critical challenges for you and your contracts colleagues this year?

Brexit preparedness has been on our minds recently, and the ODA research funding cuts from UK Research & Innovation. Providing support across the organisation to a five-year plan will be a feature as we develop our campuses and estate. I will be supporting internationalisation as we further grow our global presence. And the changes around the Erasmus programme with the Turing scheme; supporting policy and governance developments internally; and providing support to our local plans in technology transfer, life sciences, energy transition and regional educational impact.

What have you done that has been innovative or resulted in process improvements?

I took part in the university's initiative to secure electronic signatures using one of the leading software solutions. This was partly in response to COVID-19 and full-time working from home. I am part of the project implementation team, and the user group, and help colleagues to learn how to use the software.

Concerning policies, I've advocated for protecting our marks and brand in key international markets, and introducing an institutional export controls policy. I was involved in our response to the data protection impact of Brexit and worked with internal colleagues and external advisers on the treatment of tax, such as foreign exchange rules and the effect of the Criminal Finances Act 2017. I feed back on contracts and changing insurance requirements for our activities.

In terms of innovation, I work with the Commercialisation team – the bridge between the university and companies.

They support university spin-offs focused on research, startups, and collaboration with industry programs such as knowledge transfer partnerships. There's some exciting stuff with life sciences and medical and engineering technologies.

What do you enjoy the most about working in the higher education sector?

Education and research are critically important to society, as we witnessed during the COVID-19 crisis.

You work with highly educated individuals and support the academic team, which often works on fascinating research in various disciplines. The opportunities are fantastic if you're interested in culture and continuous learning and an international and culturally diverse work environment. There are conferences, festivals and events on different academic topics. The staff can use the tremendous Aberdeen Sports Village.

Professional development is encouraged, and I recently completed the ILM 3 Leadership & Management course. I've been attending a lunchtime French conversation group when possible, and take part in the Research Contracts Directors Group contracts subgroup.

What is your most unusual or fun work experience?

I attended an Erasmus staff exchange visit at the university research office in Aarhus, Denmark. It was informative and enjoyable. I was repeatedly questioned quizzically about Brexit by my continental counterparts, but remained diplomatic throughout.

You have been working at home during COVID-19. Is this the future, or will you return to the office when the Government eases the restrictions?

Working from home provided a welcome break from routine and commuting. Undoubtedly, it will be an enduring part of our professional life. However, I am now ready to go back to the office for at least a portion of the working week.

Our university HR department has developed a new working from home policy, which will help clarify the parameters. One of the considerations in preparing the policy was ensuring continued academic freedom regarding academics' customary ability to work remotely *ad hoc*, which is essential to support teaching and research activity.

Another consideration was how to address the temptation to work longer hours when working from home. Many lawyers may be familiar with this!

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

Society seeks the next Lorna Jack

The search is on for the next chief executive of the Law Society of Scotland after Lorna Jack announced her intention to stand down at the end of the year.

Jack, who has been in post since the start of 2009, has led the Society through a significant programme of modernisation, setting the goal of leading legal excellence for the solicitor profession.

She said: "It has been an immense privilege to lead the team at the Society over these years. The Society has a fantastic team of colleagues, and it has been an honour to work alongside them, our members, volunteers and office bearers during my time here.

"While there are still many and varied exciting challenges ahead, I feel the time is right to pass the baton to a successor."

Paying tribute, President Ken Dalling said: "We have been extremely fortunate to have Lorna as our chief executive for the last 13 years. She has been a fantastic support to me and to each of my predecessors as President during that time, as well as an inspiring leader to the staff team. We wish her all the very best in the future."

OBITUARIES

COLIN DOUGLAS RICHARDSON WHITTLE, WS (retired solicitor), Forres
On 23 May 2021, Colin Douglas Richardson Whittle, formerly partner of and latterly consultant to the firm R & R Urquhart LLP, Forres.
AGE: 73
ADMITTED: 1978

KRISTIAN EDWARD JAMES ROSE, Aberdeen
On 2 June 2021, Kristian Edward James Rose, formerly an employee of Thermo Fisher Scientific, Paisley.
AGE: 30
ADMITTED: 2019

MICHAEL NEILL CLIFTON GASCOIGNE, WS (retired solicitor), Dunfermline
On 11 June 2021, Michael Neill Clifton Gascoigne, formerly partner of and latterly consultant to the firm Gillespie MacAndrew LLP, Edinburgh.
AGE: 72
ADMITTED: 1972

Angus is In-house Rising Star

Angus Niven, general counsel at media and production company MediaBox, has been named Law Society of Scotland In-house Rising Star of 2021. The award was announced at the online In-house Annual Conference on 16 June.

Just four years qualified, Niven plays a key role in ensuring the business operates legally and efficiently in different jurisdictions, while his entrepreneurial spirit has seen him turn problems into opportunities and play a key role in strategic development.

Anna Ziarkowska, of the legal team at Aberdeenshire Council, was named runner-up for her innovative proposals which have streamlined legal processes, as well as her voluntary work with the migrant community, which has led to her becoming a certified immigration adviser.

Lafferty elected RFPG Dean

Former Law Society of Scotland President Austin Lafferty has been elected Dean of the Royal Faculty of Procurators in Glasgow.

Stephen Vallance of HM Connect (Harper Macleod) was chosen as Vice Dean, and Ahsan Mustafa and Paul Neilly were welcomed as new council members.

Outgoing Dean Donald Reid was appointed an honorary member, with the Faculty praising the tenacity of his leadership during the COVID-19 pandemic. He said: "This is an honour I would never have dreamt would be mine in the earlier stages of my career."

Seven join SLCC board

Seven new board members for the Scottish Legal Complaints Commission have been appointed, three lawyer and four lay.

Joining from 1 April 2021 are Professor June Andrews FRCN, Niki Maclean, director at the Scottish Public Services Ombudsman, and Frank Gill, solicitor.

Those joining on 1 January 2022 are Gerard Sinclair, retiring chief executive and principal solicitor of the Scottish Criminal Cases Review Commission, Richard McMeeken, solicitor, Susan Walsh, a former college principal, and John Stevenson, also of the Scottish Public Services Ombudsman's Leadership team.

All will serve five-year terms.

Charge coming for full smartcard

The Society's smartcard service is changing from 1 November 2021. Smartcards with digital signatures will no longer be issued to all members as a matter of course, and instead will only be issued on request. ID-only cards are available for all members who require a Law Society photo identification, but do not need a digital signature service. A fee of £110 plus VAT per annum will be introduced for the smartcard with digital signature. The ID-only card will be free of charge.

The Society said the changes followed a review of how many members were using their smartcards and for what purpose, with the charge intended to help cover the cost of the service. See the website for more details.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key work in June is highlighted below. For more information see the Society's research and policy web pages.

Coronavirus Bill

The Coronavirus (Extension and Expiry) (Scotland) Bill, introduced to the Scottish Parliament on 18 June, extends or expires aspects of the Coronavirus (Scotland) Act 2020 and the Coronavirus (No 2) (Scotland) Act 2020: see the Scottish Parliament Information Centre extended blogpost for full details. On 22 June, the Parliament agreed that the bill be treated as an Emergency Bill, with stages 1-3 running on consecutive days from 22 to 24 June.

This timetable required considerable effort from the Policy team to get a briefing to MSPs ahead of the debate, not least as the bill reflects the work of a number of policy committees on the use of emergency measures through the pandemic, particularly around bankruptcy, mental health, children's hearings, criminal time limits and equality issues, and placing respect for human rights at the centre of the continuing response.

Patient Safety Commissioner

The Health & Medical Law Committee responded to the Scottish Government's consultation on a Patient Safety Commissioner role for Scotland. This sought views on what the Patient Safety Commissioner role should look like; who it should report to; and how the role should interact with existing legislation and policies, and with the various organisations involved in health and care services in Scotland.

In its response the Society noted that there must be a clear public interest justification for introducing a further role alongside existing and well established oversight. It called for clarification on the relationship between the Patient Safety Commissioner and the Crown Office & Procurator Fiscal Service. The role should also be independent, properly resourced, and established with clearly defined statutory powers supported by effective sanctions.

Local Place Plans Regulations

The Planning Law Committee responded to the Scottish Government's consultation on Local Place Plans (LPPs) Regulations, with input from the Equalities Law and Mental Health & Disability Committees.

The response noted that LPPs will need to be robust in order to perform a meaningful role in the planning system. It highlighted the need for clear guidance to support community bodies in the preparation of LPPs, noted the potential for significant barriers to understanding, and identified that some communities will require greater resource, stimulus and support than others in order to prepare an LPP.

It supported a requirement for community bodies to engage and seek views from communities, including from disabled people and minority ethnic groups, when preparing an LPP; and offered views as to minimum requirements for registration of an LPP.

Professional Qualifications Bill

The Professional Qualifications Bill completed its committee stage on 22 June. It revokes the EU-derived system for the recognition of overseas professional qualifications in the UK following the post-Brexit transition period, replacing it with a new framework. It also gives the Government power to make regulations to give effect to any provisions affecting regulated professions that are negotiated in free trade agreements.

This gave rise to strong objection from some quarters during committee stage, with calls for the relevant clause to be removed. However, amendments to this effect were withdrawn on the basis that the minister in charge, Lord Grimstone, promised to give further consideration to the preservation of regulator autonomy prior to report stage.

The Society's main concerns centre around the lack of a statutory obligation on the UK Government to consult on any changes or obligations arising from the provisions – whether with the devolved administrations or the regulators themselves. It drafted a number of amendments for committee stage on this, which were tabled by Lord Foulkes with support from Baroness McIntosh but also raised by Lord Hope of Craighead and others; and an amendment to the effect that the consent of the devolved administrations be obtained to the arrangements made for establishing a UK-wide assistance centre.

Peebles win Dewar Debate – again

For the second year running, and the third year in four, pupils from Peebles High School have won the Donald Dewar Memorial Debating Tournament, organised by the Law Society of Scotland.

Thomas Dunmur and Laura Eggleton won the final, opposing the motion "This House would ban opinion polls being published in the build-up to an election". Thurso High School pupils Kyle Leavesley and Kieran Johns of Thurso High School were runners-up, against the other finalists Fortrose Academy and The Royal High School, Edinburgh.

The winners receive £1,000 for their school from the Society, and share with the runners-up educational books to the value of £500 from tournament sponsors Hodder Gibson. The runners-up also receive £250, donated by the Glasgow Bar Association.

Congratulating the winners, Society President Ken Dalling, said: "I am delighted that we have been able to continue to give schools and pupils the chance to participate in the Dewar Debate by going fully online. The final was an exciting and fitting end to the tournament and I thank all the debaters and coaches for their commitment and enthusiasm in such challenging circumstances."

ACCREDITED SPECIALISTS

Child law
CLAIR CRANSTON, MacNabs LLP (accredited 23 June 2021).

Debt and asset recovery
NATALIE DISSAKE, Harper Macleod LLP (accredited 16 June 2021).

Employment law
SCOTT MILLIGAN, Harper Macleod LLP (accredited 27 May 2021).

Environmental law
CHALA McKENNA, Davidson Chalmers Stewart LLP (accredited 9 June 2021).

Family law
CLAIRE CHRISTIE, SKO Family Law (accredited 9 June 2021).
Re-accredited: FIONA CAMPBELL, Macleod & MacCallum (accredited 15 February 2011); ALISON EDMONDSON, SKO Family Law (accredited 15 March 2011).

Family mediation
Re-accredited: LORNA BUCHAN, Patience & Buchan (accredited 24 May 2007); RACHAEL KELSEY, SKO Family Law (accredited 24 May 2007); VIVIENE RIDDELL, TC Young LLP (accredited 9 June 2015); JACQUELINE POLSON, Jackie Polson (accredited 28 June 2018).

Professional negligence
LYNN CARDOW, BTO Solicitors LLP (accredited 16 June 2021).

Trusts law
Re-accredited: MARTIN CAMPBELL, Anderson Strathern LLP (accredited 26 May 2015).

BIRTHDAY HONOURS

Paul Cackette, of the Government Legal Service for Scotland, has been awarded a CBE in the Birthday honours list for services to the Scottish Government as director, Outbreak Control Management.

TECHNOLOGY

Remote hearings – finishing ahead?

Whether remote hearings are desirable for civil proofs is controversial, but this account of a substantial proof in the Commercial Court suggests it was a positive experience

The purpose of this article is to report on a recent proof before answer hearing that was conducted fully remotely, and to set out some tentative thoughts on the future of remote hearings based on that experience.

This is not intended to suggest that what was done should be followed in all hearings. The speaking notes available on the Scottish Courts website for the Civil Justice Conference, held in May, give an excellent commentary on the various views and opinions on some of the issues associated with remote hearings.

The hearing received significant press coverage. It was the claim by the liquidators of RFC 2012 plc against the former administrators of the company that owned and operated Rangers Football Club. Evidence and submissions were heard over 22 days. The court heard from 21 fact witnesses and 10 experts. There were 4,867 documents, including 149 spreadsheets, organised into six joint bundles totalling almost 27,000 pages. These bundles had been partly made up from nearly 47,000 documents that the joint liquidators recovered under the specification of documents procedure. The bundle of witness statements ran to about 800 pages, and the parties had agreed a 50-page joint minute of admissions, in effect a detailed factual chronology. So while the case was not enormous relative to some that the Commercial Court has heard, it was still a fact and document-heavy case.

As well as the usual solicitor and counsel teams, parties agreed to instruct Epiq Global to provide a simultaneous transcription service and a document display function.

Before the hearing, there had been submissions about the challenges, desirability and fairness of dealing with a fully remote hearing. There had also been indications that witnesses were likely to be robustly challenged (which they were). Both parties approached the hearing, we suspect, with a degree of trepidation.

What were our overall impressions?

Our first reflection is that the remote hearing, combined with appropriate technology, was very efficient and effective. There was the occasional technical glitch, but the delays were no more than might be experienced in the "old" world when, for example, a document was not photocopied or was missing.

The document handling function was very slick. Having a single set of paginated documents made for easy navigation, and counsel quickly developed confidence in the document operator, realising that when the wrong document was displayed it was usually their own error. Having a single "bundle", with all the relevant documents immediately accessible, allowed quick and easy access. Despite the six volumes a simple referencing system meant they could be quickly put on screen.

"It's not the same as a live courtroom" is something often said about video evidence. It plainly isn't, but we found the witnesses relatively easy to read. Nervous tics, hesitation betraying a lack of confidence in an answer, a pause showing careful consideration: these could all be seen on the screen. In fact, sometimes too much was shown, if witnesses came too close to the camera. At the end of the hearing neither party submitted that they had been prejudiced by the process, despite reservations at the outset.

Pros and cons of the remote hearing

As already mentioned, the process was very efficient. By way of example, at the end of each day we had a videoconference call with our client team to give a short debrief. Conducted via MS Teams, it could be arranged at very short notice and team members could join from anywhere in the country.

The witnesses were also relatively easy to marshall. Because they were either at home or on call ready to attend our office, we all enjoyed greater flexibility. It was not a significant inconvenience to a witness if counsel took longer than expected with questioning or, as happened, dealt with a witness more quickly than expected. When we started to gain time against our initial timetable we were able to move witnesses about easily, as there was little or no travel involved. To try and ensure a robust internet connection for our witnesses, and our advocacy team, and to minimise distractions, we hosted as many as we could in our offices, within COVID-19 restrictions.

Another practical benefit was that, apart from counsel printing their own notes, there was no paper. That presented occasional challenges when transferring large digital files, but the solicitor team did not use any paper at all. The court created an individual project on its preferred platform, Objective Connect, to host documents larger than 30MB, adding users from both sets of agents. The advantage was that once a document was uploaded, a notice was automatically sent to all users.

In terms of the downsides, the whole process appeared slightly artificial. Although most witnesses gave evidence from an office, several were at home, as was the judge. As discussed at the Civil Justice Conference, there is a concern that the gravitas of the occasion might be lost by conducting hearings in this way. Lord Pentland placed particular importance on the court as a place: "The court as a physical place supports the public's acceptance of the legitimacy and authority of the court, and the law itself."

Thinking purely about efficiency, it seems to make sense to have the main players – judge, advocacy team, solicitors – in the same place. The question of whether the witnesses should be in the same place seems, on a case by case basis, to be a matter of convenience.

While there were very few technical issues in this case, if remote hearings are to be continued in the future we would expect the court to insist that parties, counsel and witnesses are in locations with robust internet connections. The Court of Session Practice Note No 1 of 2020 says: "As with any court hearing conducted by videoconference, each party must ensure its electronic equipment and internet connection to the court – and that of its witnesses – is

of appropriate quality and robustness for the anticipated duration of the proceedings."

Although that is difficult to police on the day, the clerk offered to host test meetings in advance for the witnesses giving evidence from home to check their internet connection and ensure they could operate WebEx. We expect greater judicial intervention to ensure that future cases held remotely can run smoothly. Witnesses in particular should be given guidance as to how they should present themselves to the screen and to make sure that their sound and microphone system is robust. A judge, or counsel, should not be distracted by poor quality sound and a witness should not be unsettled by being asked to repeat answers.

What did we learn?

The most obvious thing is that remote hearings can be done, and can be done well. It takes considerable time and effort to set up, but with the right technology and support it can be a very efficient process.

Solicitors and advocates need guidance and training on how to appear on screen. Simple things like lighting, positioning, camera angles and sound quality will soon become an integral part of advocacy.

Solicitors will also need guidance and training on how to make arrangements for witnesses appearing remotely. In the interests of fairness each witness should be given the same opportunity to present their evidence to the best of their ability. This may mean that witnesses are hosted in solicitors' offices (if they still have offices), but it cannot realistically be envisaged that witnesses will, in the longer term, present their evidence from their own home in an informal setting. Most of our clients' witnesses were happy to attend our office so they did not need to worry about technical glitches.

The English courts seem to be going further. In *Yildiz v Turk* [2021] EWHC 1747 (Ch), the court emphasised the need for parties to consider properly how witnesses should give evidence remotely and, even if they agree between themselves, also to obtain the court's approval. The judge recounted: "I indicated that I did not think that [giving evidence from home, unsupervised] was appropriate and that the witnesses should, at least, be giving evidence from their respective solicitors' offices with the other side having the opportunity, should they so wish, to have an observer present while that evidence was being given."

Document assembly and presentation is key to the smooth running of any hearing. This was of course understood before the pandemic. However, what we learned from our experience was that document presentation technology allows the documents to be shared to all remote participants at the same time very effectively.

A downside frequently cited is that advocacy before a screen is tiring – so-called "Zoom fatigue". We think it fair to say that any engagement with the court process, whether as an advocate, witness or judge, is demanding. Our impression was that the witnesses treated the process with the same seriousness as they would a physical court hearing, but that may not always be the case. As the technology improves, and experience of remote hearings leads to a better understanding of how to conduct them, it may be that they become less tiring. However, the challenge of the process should not lead to the abandonment of the many advantages.

In this case we had a significant number of experts. In addition we had "hot tubbing" of experts, grouped by expertise and led concurrently. This worked surprisingly well, with the expert witnesses being given the opportunity, and even encouragement by the judge, to comment on the answers that the other expert had given. This was in the context of the experts having already lodged significant reports on their subject matter.

Is the future of hearings digital?

As final thoughts, it should be obvious that we consider this was a fairly positive experience. However there are some cases where it is plainly not appropriate to conduct the hearing remotely. In a case involving contempt of court, such as breach of interdict, there is the threat of imprisonment. It does not seem right that such a case could be dealt with by a judge in their study and the accused party in their kitchen. Here the notion of being brought "to court" with the threat of sanction means that these cases need to be dealt with in person. With children, where perhaps less formality is needed, a more informal discussion as to the best interests of the child should also be done in person.

The growing consensus seems to be that procedural hearings can easily be dealt with remotely, with over 90% of respondents to the Law Society of Scotland's survey agreeing that they work particularly well. However, the view from sheriffs is that 76% believe that virtual courts generally have made their job more difficult. For evidential or other substantial hearings we believe it should be determined on a case by case basis. The benefits of scheduling availability, lack of travel, and efficiency all support that. Put neutrally, if there is a convenient gathering point for a significant number of people, that should be used. That points to a court that is set up to allow for both in-person and remote witness evidence.

See also the online article by Alan Robertson in this issue.

John MacKenzie is a partner in Shepherd and Wedderburn's Commercial Disputes team

RISK MANAGEMENT

Client and transaction vetting

Proper vetting of clients and transactions at the outset of an instruction is sometimes overlooked but is always a safeguard against the risk of matters taking an unexpectedly costly turn at a later stage

"Risk comes from not knowing what you're doing"
(Warren Buffett)

In this article we aim to highlight why properly vetting prospective clients and instructions is so important.

What is the point?

The starting point for client and transaction vetting processes is to obtain up-to-date, relevant information about your client and what it is that they are asking you to do. Armed with that information, an informed analysis should be undertaken to determine whether you are able to accept instructions from that client or in relation to that particular instruction. Although the purpose of this article is not to discuss the Law Society of Scotland's rules and regulations that cover client identification and engagement, we do strongly recommend familiarising yourself with them and the regularly updated guidance and information relating to COVID-19 published on the Society's website.

Of course, solicitors have specific responsibilities relating to the prevention of money laundering – primarily under the 2017 Money Laundering Regulations and the Proceeds of Crime Act 2002. One of these responsibilities is to undertake risk assessments and due diligence on clients and transactions. This involves, for example, making checks on the legitimacy of the funds to be used in a transaction. There is anti-money laundering (AML) training available and firms should ensure that they are familiar with the regulations and guidance and have robust controls in place.

But the decision about whether to take on a client or a new piece of work is actually wider than AML considerations.

Without properly understanding (i) what you will require to do; (ii) who is asking you to do it; and (iii) what is the reasoning for doing it, you may find yourself exposed to issues which might otherwise be avoided or mitigated.

The vetting of clients and transactions should be proportionate to the circumstances, but there are certain key considerations to bear in mind.

Client vetting: know your client, know the risks

If asked, most solicitors would not struggle to list factors which would be on their minds when determining whether to take on a new client. Criminal convictions (other than for criminal practitioners), past or current insolvency, a history of failing to pay fees, geographical distance – these would all be points at the forefront of most minds.

And yet, despite those individual factors being readily identifiable, it is still the case that inadequate investigation can lead to something being missed which might influence your decision on whether to accept a client's instructions.

Repeatability

Client vetting processes should be consistent and adhered to, and regular refresher training in them provided to all members of staff. Review your processes on a regular basis – what might have been appropriate a couple of years ago may no longer sit well with your business model or the planned direction of your practice. We all know the obvious red flags we are looking for. The challenge is to ensure that client vetting is carried out, and that whatever else that process achieves, the red flags are not overlooked.

Not seeing the wood for the trees

Prospective clients should be viewed in the round. Vetting processes should be robust enough to flag up those less obvious problems even when minds might be focused on other things. It is easy to become embroiled in the instruction itself, particularly if there is a time bar or closing date approaching, before we have taken a step back and given thought to whether this is something we actually want to, or can, do.

When the facts change, change your mind

Client vetting should be an ongoing process. Circumstances can change between transactions, and an updated assessment of the relevant issues at play is best done at the outset of each new instruction, even with longstanding clients. A client's situation can change at short notice: bankruptcy and loss of capacity are two examples. However, circumstantial changes can be less obvious and easier to miss.

Third parties – the dangers of relying on others

Reliance should not be unduly placed on due diligence carried out by third parties. It is never sufficient to proceed on the basis that due diligence has been conducted by another firm and no checks are required by your firm – you should not take it as read that the other firm has done what it ought to in terms of its due diligence.

A further consideration is the fact that your firm's circumstances will never be identical to those of another firm: what may not present any issues for another firm may in fact pose a significant issue to your firm, which could only be identified through your firm's own vetting processes. Another firm's appetite for risk may be quite different to your own.

Fairness

Vetting processes can scrutinise a client's affairs in a way that they might find intrusive, unnecessary or objectionable. Care must be taken to ensure that the client appreciates why you are asking questions and why, in some cases, you must decline to take on the client. Questions about a client's personal background or their source of funds might feel uncomfortable, but asking them is important for both your and the firm's protection.

Transaction vetting: steering away from trouble

If good client vetting allows you to understand exactly who it is that you are being asked to act for and what, if any, potential issues accompany that client, transaction vetting aims to identify at the outset whether what you are being asked to do is realistic, achievable, and within acceptable risk parameters.

Just as you wouldn't cross the road without looking both ways to check for traffic, so you shouldn't take on an instruction without having first checked for any issues which could arise and which might be avoided. Make sure you have discussed the instruction sufficiently with your client to clarify their objectives and avoid any ambiguities. If there is anything about the instruction which makes you hesitate, consider asking a colleague to give their opinion on it. Again, the potential red flags are often easily recognisable, and the trick is to make sure that they are not overlooked.

To return to the Warren Buffett quote, there can be real risk created where a solicitor does not know the full context of what they are being asked to do. Equally, risk is created when the solicitor agrees to take on instructions which, for whatever reason, they are not capable of achieving.

Context – painting a complete picture

It is important to appreciate the risk that solicitors can become embroiled in others' disputes even where their own client is happy with the service, and good transactional vetting is the most effective tool for mitigating that risk.

Claims and complaints from third parties are perhaps less common and are difficult to anticipate, but they do occur. The basis for such a claim or complaint can often be a factor which might have been identified in the course of transaction vetting, for example the existence of a relationship between the client and the third party giving rise to an allegation of conflict of interest, or allegations of breach of trust or fiduciary duty on the part of the client.

Effective transaction vetting will allow you to understand the context in which your client is instructing you and the intentions of the other parties involved, and not just focus on understanding your client's objectives in isolation.

Avoiding overpromising and underdelivering

Good transaction vetting can identify situations where you are just not able to achieve the result that your prospective client is seeking.

Vetting should always involve considering the nature and complexity of the matter and assessing honestly whether the firm has the appropriate level of professional skills to do that work, bearing in mind the chance that the instructions may grow arms and legs and increase in complexity as things progress.

If this standard cannot be met, think about whether you should assume the risk. You must have regard to your obligations under, for example, practice rule B1.10: "You must only act in those matters where you are competent to do so. You must only accept instructions where the matter can be carried out adequately and completely within a reasonable time. You must exercise the level of skill appropriate to the matter."

Some solicitors worry about turning down work, especially in times of economic uncertainty. Experience shows though that clients may, in fact, react positively if their solicitor is forthright about their limitations and is willing to refer the client on to an appropriate specialist if and when potential instructions fall outside the scope of their usual practice.

Certainly, in the long run, the client will be far happier having to make alternative arrangements and engage someone else than finding themselves in the position of having to consider a claim or complaint. The risk to the firm of taking on an instruction it is not equipped to carry out and which then goes wrong is a claim from the client which far exceeds whatever the potential fees might have been.

In summary

If there is one takeaway from this article, it is that failing to vet clients and their proposed instructions at the outset leaves you unable to understand fully what you are being asked to do and who is asking you to do it. In turn, that creates a risk issue for firms, no matter their size or area of specialism.

The good news is that by putting in place robust vetting procedures and being committed to proactively assessing new work, firms can significantly reduce risk.

This article was authored for Lockton by Anne Kentish, partner and Graeme Milloy, associate of Clyde & Co

DIVERSITY

Diversity – a work in progress

A profession becoming more diverse, while not yet fully reflecting the wider population, is the picture presented by data collected during last year's PC renewals

Diversity data collected as part of the 2020-21 practising certificate (PC) renewal process have been published by the Law Society of Scotland, offering an insight into today's Scottish legal profession.

Diversity questions were included for the first time in the renewal process, in order to give a better understanding of what the profession looks like and help support and advance the Society's equality and diversity work.

Around 80% of members provided the data, providing the most comprehensive picture of the diversity of the profession to date, how it compares to the diversity of the wider Scottish population and the challenges that the profession faces.

Solicitors were asked for information on their ethnicity, disability, religion, sexual orientation, and social background, including the type of school they mainly attended and what their parents' occupation was. The data were automatically pseudonymised to protect members' identities.

Key findings include:

- The Scottish legal profession is becoming more ethnically diverse, although more slowly than the wider population – just over 88% of the profession is white, with at least 3.38% of the profession, but almost 7% of solicitors aged under 30, coming from a Black, Asian and Minority Ethnic (BAME) background. The 2011 census showed around 4% of the general population as non-white, a proportion that is likely to have increased since. At least 18.7% of all BAME solicitors are partners in private practice, compared with 26.2% of all solicitors.
- While the feminisation of the profession continues, with around two thirds of all newly admitted members being female each year, there appears to be an acute issue attracting BAME men into the profession, with just 28% of all BAME solicitors being male.
- At least 3.2% of the profession is LGBTQ+ (more than 10% of respondents chose "prefer not to say" to this question).
- At least 4.8% of the profession has a disability, such as blindness, deafness or a mobility impairment. It is not known whether solicitors have disclosed their disability at work or requested reasonable adjustments.
- More than 46% of Scottish solicitors (and 60% of those under 30) do not subscribe to a religion; 37.5% profess a Christian denomination; 1.3% Islam; 1.6% another religion; and 12.8% preferred not to say.
- Two thirds of the profession (and 72% of those under 30) mainly attended a state school – figures that do not reflect the wider population.
- A solicitor's socio-economic background does not appear to affect their career progression once they are in the profession. For example, those whose parents did routine/manual work are just as likely to be partners. However, it appears to be harder for those from lower socio-economic backgrounds to enter the profession to begin with.

The phrase "at least" in the above points indicates that some respondents preferred not to say, and/or that other information provided indicated that a respondent might fall into one of the diversity categories.

Society President Ken Dalling commented: "We undertook this research to gain a better understanding of the Scottish legal profession and how well it reflects the society that it serves. The information obtained provides a vital and worthwhile insight into the composition of the profession and the challenges that we face. While it is heartening to see that the profession is becoming more diverse, there is still progress to be made.

"With the majority of members completing the diversity information, we have our strongest evidence base yet to help us set effective policies that address the issues identified. We will do all we can to help encourage and support equal opportunities across the profession, and this data gives us a key set of benchmarks to measure our progress towards a truly inclusive profession."

The research follows on from the Society's 2018 *Profile of the Profession* report, the survey for which was completed by around 30% of the membership. The new data will help expand the Society's understanding of the profession and inform its work, such as that being undertaken by the Racial Inclusion Group.

The Society will collect the diversity data every two years, the next time being during the practising certificate renewals in autumn 2022.

Read the full Diversity Data 2020/21 report in the research and policy section of the Society's website.

Society ranked in workplace diversity index

The Society has been named one of the UK's Top 100 Most Inclusive Workplaces for 2021 by the National Centre for Diversity.

It placed 93rd on the Top 100 index, which recognises companies across the private, public and charity sectors that are best at promoting equality, diversity and inclusion, and fairness in the workplace through policies that deliver transformational change.

The Society's ranking follows its work towards gaining the Centre's accreditation as Investors In Diversity.

Because you're worth it?

We need to be much better at knowing our value and fearlessly asserting it, says Stephen Gold

Netflix has just released a marvellous new documentary about Sir Alex Ferguson, *Never Give In*, in which the great man, now mercifully recovered from a cerebral haemorrhage, reflects at length on his life. It captures all the significant moments: growing up in Govan; being shaped by the values of the shipyard where he was apprenticed and later became a shop steward; his scarring experiences as a player at Rangers; domestic and European success at Aberdeen, which led him to Manchester United, where he overcame early struggles to become the most garlanded manager in the game.

One personal triumph was not mentioned. In 2010, when United awarded a mega-money contract to Wayne Rooney, Ferguson made it known that in his very firm view no player should ever be paid more than him. Without hesitation, the owners agreed, and from then on he was guaranteed to be the highest-paid person at the club. At a stroke, his income increased by millions of pounds a year.

Knowing one's worth and not being afraid to assert it is such an important quality. So few lawyers have it. In years of working with firms of every size and shape, I've rarely come across one which does not underestimate its clients' willingness to pay. "How often do you get pushback on fees?" I ask. "Never", or "Hardly ever", is the usual reply. They take it as a sign of client satisfaction, and in a way it is, but it is also a sign that they are short-changing themselves every day.

There are several reasons. First, because dealing with legal matters is our everyday bread and butter, it is easy to forget the importance of what we do. To the seasoned lawyer, for whom as life goes on there is less and less novelty, it's easy to think of work as "just" a divorce, a conveyance, an executry, a case, a business deal. We forget that for the client, while it is happening, it is often the most important thing in life, and that has a profound effect on what they think is a fair price.

We lack confidence. Our starting point is gratitude for being instructed, which is fine, but not when accompanied by the fear that only if we charge modestly will the client stay. Clients are rarely driven away by price alone, and those that flee only in search of something cheaper are usually doing us a favour. If they feel they are getting a great service, have a close rapport with us, and understand in advance how fees are calculated, they will be willing to pay a substantial price. This is how good, profitable work is won and retained, not by being cheap.

Time is the enemy

Perhaps most of all, we are hindered by our continued fixation with time, asking "How long is this going to take?", rather than "What is the value to the client?"

As the noted Australian lawyer and consultant John Chisholm puts it, "There is now irrefutable evidence that professional firms, including law firms, can ditch timesheets and the billable hour and still be viable and profitable. Moreover, the ones that have taken that step and instead price their services and products up front like most businesses the world over, report the following benefits:

- substantially improved cash flow;
- reduction and often complete elimination of cost disputes with clients;
- improved value creation for their clients;
- enhanced relationships of trust with their clients;
- and a genuinely collaborative internal culture."

Shifting the focus from hours to the only thing that really matters, results, allows us to think clearly about the worth of our work, and have transparent, upfront discussions with our clients about what a fair price looks like.

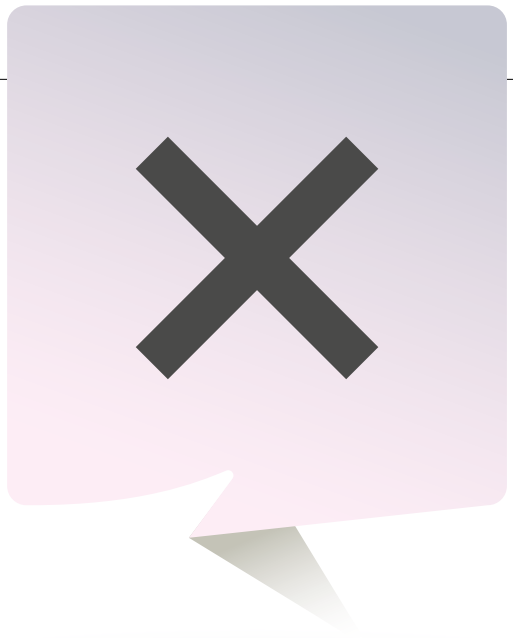
It also allows us to escape the hamster-wheel mentality which is the bane of so many lawyers' lives, where all that matters is the number of six-minute units one can produce (or pretend to) in a month, a quarter, or a year. It is little wonder that so many creative, aspirational professionals declare themselves miserable and burnt-out, toiling in such a regime.

The gateway to knowing one's worth is a clear, logical method of calculating it, and value pricing is such a mechanism. But making the leap can be scary. Hourly pricing is a well-worn comfort blanket, and it is tempting to "always keep a hold of nurse, for fear of finding something worse". There is a big prize for having the courage to come out from behind her skirts.

Sir Alex was the epitome of a results-based professional. He served his club with the devotion of a samurai, but at the same time, understood where his own interests lay and was equally fearless in advancing them.

It's a fine example to follow, wherever we choose to play.

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



Regulated professionals: free to speak?

To what extent can regulated professionals rely on freedom of expression when charged with comments alleged to bring their profession into disrepute?

Freedom of expression is rightly held up as one of the most important civil liberties in our legal system. The right to express one's views, even if some may find those views offensive, is a cornerstone of our democratic system. That said, two recent decisions of the Scottish and English courts have served as a reminder that for regulated professionals, free speech has its limits and it may be appropriate for regulators to investigate and prosecute charges relating to comments which bring their professions into disrepute.

Steele v Deputy Chief Constable of Police Scotland [2021] CSOH 65

The petitioner in this judicial review was General Secretary of the Scottish Police Federation. He sought declarator that a decision made on behalf of the respondent finding that there was a case to answer in relation to allegations of professional misconduct against the petitioner was an unlawful interference with his article 10 right to freedom of expression, and irrational at common law.

The allegations related to a Twitter exchange between the petitioner and the solicitor acting for the family of the late Sheku Bayoh on the day the Lord Advocate confirmed that no prosecutions would take place in respect of Bayoh's death in police custody. The petitioner had made a number of comments to the effect that he supported this decision and suggested that calls to prosecute were based on "innuendo, speculation or smear". In response to criticisms about the extent of Bayoh's injuries, the petitioner had linked to a news article referring to an alleged earlier fight that Bayoh had been involved in, and in a follow-up tweet posted a GIF from the film *Napoleon Dynamite*. The GIF depicted one character lightly tapping another on the cheek before running away.

A number of Twitter users expressed criticism of the petitioner's use of a GIF from a comedy film in this context, and he was subsequently referred for disciplinary proceedings. The petitioner sought judicial review of this referral on the basis that it interfered with his right to freedom of expression and no legitimate justification for such an interference had been shown.

Lord Fairley rejected the petitioner's arguments. He highlighted that the legitimate aim of maintaining public confidence in the police may justify restricting the freedom of expression of police officers. In this specific context, he noted that the respondent's conclusion that there was a case to answer could not be seen as irrational. It was clear that some members of the public had found the comments offensive and it was certainly possible that they could in due course be found to amount to misconduct. The petition was accordingly dismissed.

Professional Standards Authority v General Pharmaceutical Council and Ali [2021] EWHC 1692 (Admin)

This appeal by the PSA concerned comments made by the registrant during a public speech at a rally supporting Palestinian rights. It had been alleged at his fitness to practise hearing that these comments were both offensive and antisemitic. The registrant had admitted that they were offensive but argued that they were not antisemitic. The fitness to practise panel found that they were not antisemitic on the basis of: (i) the registrant's evidence as to his intent with regard to the comments; and (ii) the registrant's previous good character.

The PSA appealed this decision on the basis that the panel had erred in their assessment of the nature of the comments. The appeal was supported by the General Pharmaceutical Council. Johnson J agreed with the PSA's approach. In allowing the appeal, he noted that in assessing as a matter of fact whether comments are antisemitic, a panel must consider what a reasonable, ordinarily informed member of the public would make of them. The subjective intention of the registrant could never answer the question as to whether the comments were antisemitic or not, albeit the intention and any previous good character might inform the issue of current impairment or sanction.

Of note, Johnson J stressed that in dealing with this issue, care had to be taken to consider the wording of the charge. In this case, there was no charge that the comments had been malicious or deliberately antisemitic. If there had been, the registrant's intention would have been relevant to the panel's inquiry.

Think before you speak?

In both cases, emphasis was placed on the interpretations members of the public would or did place on the comments. It is no defence to say during later regulatory proceedings that one simply hadn't meant the comments to be read in that way. Once the registrant's comments were out, he was no longer the master of their interpretation. The lesson carries across to all regulated professions: think carefully about any comments made in a public forum, particularly on controversial topics. If a reasonable member of the public could find them offensive, one may face a long and costly regulatory process.

David Blair
is an advocate with Axiom Advocates

Profile: Alex Prentice

In our latest profile to mark 30 years of the Act providing for solicitor advocates, Alex Prentice QC tells how a defence solicitor who had never contemplated prosecuting, became Principal Crown Counsel

After qualifying as a solicitor, I was offered employment as an assistant in a very high-profile Edinburgh firm which dealt exclusively with criminal work. In those days the quickest way to gain advocacy experience was to appear in the criminal rather than the civil courts, so I jumped at the chance.

As the firm grew, the nature and scope of the work increased significantly and I found myself dealing with some very high profile and important cases from a very early stage.

I frequently instructed counsel in the High Court and admired the way cases were presented. When legislation was brought in to pave the way for solicitors with appropriate experience and qualification to appear in the High Court, I applied.

I was in the second batch of solicitors who, in 1994, acquired rights of audience in the criminal courts. In the course of my work I had been in Parliament House on many occasions along with counsel. I still recall a sense of unease after donning a gown and walking down the corridors of Parliament House, since there were very few of us in those days. I have to say that I met nothing but respect and courtesy from members of Faculty and the judiciary. The work was demanding and, as is often the case in law, events could take an unexpected turn.

In one case, I was instructed to appear for a 16-year-old charged with serious sexual offences alleged to have been committed when he was 13. It occurred to me that there was a significant change between a 13-year-old and a 16-year-old. This was in the relatively early days of challenges being brought under the reasonable time requirement of article 6 of the European Convention on Human Rights. The point was taken and refused at first instance, although it succeeded in the Appeal Court in which I appeared.

To my surprise, I found myself at the receiving end of a Crown Appeal to the judicial committee of the Privy Council which, at that time, sat in Downing Street. The case was taken along with another case, since the Crown sought clarification on the scope of the article 6 requirements.

I considered at the time that a silk should be brought in, but the instructing solicitor was very encouraging and felt that since I had a grasp of the case, I would be best placed to present the appeal. Accordingly, I found myself facing five of the brightest judges in the United Kingdom from a small pedestal in a large room in Downing Street. This was a landmark event which I would never have contemplated on any of the occasions sitting drinking coffee in the common room at Edinburgh Sheriff Court.

In 2003 the then Lord Advocate, now Lord Boyd of Duncansby, invited applications from suitably qualified persons to apply for the post of advocate depute. Several people suggested to me that I should make an application, so I applied to be an *ad hoc* advocate depute and was subsequently appointed as the first solicitor advocate from outwith COPFS.

My first trial called in Glasgow High Court with me facing five counsel across the table, and the enormity of the task sunk in. However, with adequate preparation and planning, I was able to conduct that trial and found it a very rewarding experience.

A full-time post later became available within Crown Office. I applied for it and was appointed as a trial advocate depute. I was later promoted to senior advocate depute, assistant principal advocate depute and later Principal Crown Counsel.

This was another of those unexpected turns in my career, since I had never contemplated prosecuting. The scope and nature of the work within Crown Office is quite extraordinary: you are exposed to cases and issues which you may never see in private practice. I have appeared in the appeal courts and the UK Supreme Court. All my experiences combined to permit me to apply for the rank and dignity of Queen's Counsel, which was given to me in 2007.

The work of the Crown is extremely important, and we face significant challenges particularly in light of the pandemic. There is a terrific collegiate atmosphere within Crown Office, and this is especially so amongst the ranks of Crown counsel. We have a good relationship with the defence bar and I am confident that with us all working together we will be able to meet the challenges ahead and ensure that justice is done for all.

FROM THE ARCHIVES

50 years ago

From "The Role of Advocacy", July 1971 (address by Lord Hailsham to the Society's Annual Conference): "I make no pretence that the providers of professional services in a community are necessarily better than other people. But I think that without us a community would certainly fall apart. I think our interests are too often forgotten in the hurly-burly of modern political strife... I would venture to say that it is high time the professional classes of the world should unite. Whatever we win or lose, the world can ill afford to do without our brains."

25 years ago

From "Cyber Petronius 2", July 1996 ("hoping to tease the practitioner who may yet have thought that the [World Wide Web] was too hard, or useless"): "There are as yet no potent Scottish sources on the WWW but this will have to change soon... at least a few Scots law firms and two universities are ensuring that Scots law exists on the WWW. Many, however, will only take the WWW seriously when the original sources are there... the government could at least offer Scottish statutes... There is no reason either why raw opinions could not go on the Web".

In practice

THE ETERNAL OPTIMIST

"I'm out"

If you don't know your numbers, how can you expect your practice to succeed as a business?

For those who enjoy the TV show *Dragons' Den*, you'll know that the quickest way to lose a dragon's interest is not to know your numbers. It is followed by those dreaded words "I'm out". It always amazes me when budding entrepreneurs either haven't prepared for the inevitable grilling on the financials or simply don't understand the numbers in their business model. I suspect that there are parallels with solicitors generally, and new entrants into the profession in particular.

There are currently many successful practices out there, and additionally we are going through a busy period in many practice areas with profitability for many not currently an issue. Why then are our numbers important? The best analogy I can think of is that ignoring them is a little like driving a car with no instruments. How do you know when you are speeding, the engine is overheating or the tank needs filled? You can make a guess, but occasionally you will get it wrong, and when you do the consequences can range from the inconvenient to the disastrous.

Check your engine

I often ask students on the Diploma, "What do we do in a law firm?" The answer I am seeking is "We make money." Not to be callous or cold, but to underline that no business can exist without making profit. The answer might be better put as "We sell hours." In essence we sell our time and the time of our staff. Often though, when we are busy and making money, we fail to focus on the numbers as "the engine" appears to be running fine.

For some, currently the engine may be beginning to overheat as prolonged levels of high demand are putting strain on practitioners and support staff. If fee earners are operating well outwith their normal levels (and only the numbers will tell you what that is), what measures need to be put in place to protect the engine of the firm? The answer too often is simply to work harder still, but at what cost to the business, as the risk of errors increases, and to the individuals as their health may suffer?

At other times business levels are not satisfactory and profit levels down. How, though, do you drive business forward efficiently if you don't understand the value of a new client to the business? In simple terms the value is the profit we make, simply put being the likely fee less the real cost of providing your service, i.e. the actual number of hours used along with a fair share of the fixed costs. Once you know that number, this will guide you on how much it would be worth investing in marketing to acquire these new clients either externally or from within your own client bank.

Where to harvest?

One final thought: without knowing these numbers, how will you know where the sweet spots are and where the dead wood is? What areas of work should you focus your attention on to reap the low hanging fruits? Likewise, which areas of work just don't make financial sense to keep providing in their current form? Knowing this in turn might allow you to change how you deliver or acquire that work, or simply to decline it. Even if you believe it's a "necessary" loss leader (and I'm unaware of any), you will at least know how much you are losing.

Once you know your numbers and act on them you'll be amazed at how clients, staff and potential business purchasers will greet you with the words, "I'm in!"

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

Notifications

ENTRANCE CERTIFICATES ISSUED DURING MAY/JUNE 2021

ABOUD, Daniah
ADAMS, Leah
ANDERSON, Justine Emma
ANDREWS, Matt
BARRATT, Jack
BARRON, Jack William Geddes
BAXTER, Greig Adam
BEVERIDGE, Rachel Jennifer
BLAIN, Scott Oliver
BONINI, Nikki Lynn
BURKE, Rachael Teresa
BURNS, Hayley
CAIRNS, Matteo Giuseppe
CARLING, Megan Mairi
CLAYTON, Sophie Anne
CLOSE, Martin Patrick
COLQUHOUN, Anna Elizabeth
CONNELLY, Anna Louise
CRAWLEY, Erin Frances
CROCKER, Laura Mary
DALLING, Fiona
DARROCH, Rhea Jane
DE-TORE, Costan Costantino
DEVINE, Conor Robert
DEVINE, Rebecca
DILLON, Sarah Louise
DOBBIE, Lewis
DOHERTY, Natalie Rita
EDWARDS, Gemma Elizabeth
FERGUSON, Adam Joseph
FERGUSON, Helen Louise
FIDELO, Luisa Astoria
FISHER, Debbie Margaret Mary
FOULKES, Alex Christina
FOWLER, Lisa
FRASER, Eva Margaret
GALBRAITH, Linzi Rachel
GALE, Ross Gordon
GEDDES, George Ewan
GEMMELL, Olivia Madeline
GILMARTIN, Simone Georgina
GRAHAM, Lauren
HAGGART, Natasha Grace
HALL, Katrina Adelaide
HARRIS, Morgan
HARVEY, Ian Alistair
HAYHOE, Catherine Janet MacEwen
HENDERSON, Kate Frances
HILL, Mhyrin Caitlin
HUGHES, Gregor Thomas
HUGHES, Jemma Marie
HUNTER, Jo Elizabeth
JACK, Atlanta Tazmin
JACON, Ewa Monika
JARROTT, Gregor Peter William
JOHNSTON, Niamh
KENYON, Scott Ian
KERR, Jennifer Alison
KHOGALI, Ahmed
KILDARE, Jonathan Jeffrey
LAM, Sze Ki
LANG, Rachel
LICHODZIEJEWSKI, Konrad
LIGHT, Luke Evan
LOCKE, Emily
McALLISTER, Caitlin Rae
MACASKILL, Melissa Ann
MACBRAYNE, Sophie
McCORMICK, Kara Charlotte
McEWAN, Iona McKenzie
McGONIGLE, Michael
MACIVER COWAN, Caitlin Anne
McKILLOP, Rebecca
McNAMARA, Annie
McSHERRY, Eilidh
McSKIMMING, Amy
MADDEN, Emily Jane
MILLER, Gemma Jane
MILNE, Matthew John
MOFFAT, Brogan Mary
MOFFAT, Tom Forbes
MUIR, Annie Ross
MURCHISON, Lydia Netta
MURDOCH, Cassie Elliot
MURPHY, Molly Charlotte
NAGLIK, Karolina
NARDINI-TIDY, Sofia Lea
NAYSMITH, Georgie Elizabeth
NEILSON, Rebecca Kate
O'REGAN, Callum
O'TOOLE, Clare Siobhan
PARKINSON, Aaron James
PATERSON, Amanda Bruce
PERRING, Caitlin
PIACENTINI, Katie
POOLE, Jonathan Richard
RANKIN, Rhanna Thandile Kelly
RASUL, Murtaza
REID, Fiona Alison
ROBBINS, Jack Alexander Daniel
ROBERTS, Katie Anne
ROBERTSON, Euan Craig
RONALDSON, Shannon Beatrice Patricia
RUSSELL, Hannah Margo
SEMPLE, Benji Stephen
SERCI, Iolanda Gemma Julia
SHERIDAN, David Myles
SIMMERS, Steven Brian
SINCLAIR, Isla
STEVENSON, Kate Frances Mary
STEWART, Claire
STEWART, Zachary James
STIRTON, Clair Ashleigh
STRACHAN, Kerry Ann
SWEENEY, Andrew
TARBET, Emily Jane
TAYLOR, Jack
THOMS, Yasmin Bibi Kym
THOMSON, Kerry Elizabeth
TURNBULL, Hannah Beth
TURNBULL, Megan Jane
WALKER, Bryony
WALKER, Jonnie William
WATSON, Murray Taylor
WISMACH, Kirsten
WOODHOUSE, Katie Jane

APPLICATIONS FOR ADMISSION MAY/JUNE 2021

AL-SAFFAR, Ainsley Leigh
BAHRU, Iyassu Levi
BROWN, Claire Elizabeth Anne
CAMERON, Heather
CAMPBELL, Emily Louise
CLARK, Deborah Jane
DEENEY, Jemma Ann
DUNCAN, Hannah Louise
DUNCAN, Howat Douglas
FRYER, Kirsty Robyn
GRUBB, Stacey Leigh
GRUNENBERG, Emma Margaretha
GUNN, Roisin Eleanor
HADDEN, Nicola Margaret Dorina
HENDRY, Stefanie Rollan
IRVINE, Kirsty May
KELLY, Beth Anne
LEDGER, Connor Peter Philip
LEES, Kerry
LYON, Kaye Amanda
McCORMICK, Yvette Fiona
McILWHAM, Sarah Frances
McKINLEY, Jenna
McPHEE, Shaun Lee
MIELE, Rachel Jane
MILLER, Christopher David
MONAN, Sarah Frances
MORAN, Sinead
MORTON, Douglas Lawrie McGregor
MURPHY, Gregor Neil
NASH, Paul Francis
NUNES, Jessica
PETRIE, Blythe Helen
REEKIE, Kirsteen Margaret Louise
RZEPKA, Sandra Monika
SAEED, Adil
SAVAGE, Gillian
STEPHEN, Jake Anthony Ross
STEVEN, Lorren Georgia
SWEETLAND, Marion Frances
SWIRA, Monalisa Jestina
WHITE, Liam Calum

ASK ASH

Still feeling the loss

I lost a relative, and I'm not getting support

Dear Ash,

I suffered a close family bereavement a few months back, but as I was working from home, I was kind of pushed back into work earlier than I would have liked. I now seem to be feeling a bit overwhelmed and do not have any motivation to do my job, but I have impending deadlines. I've tried talking to my manager but there seems to be a distinct lack of sympathy; she said that I was not the only one that had lost a family member during the pandemic and felt I needed to get myself together! There are others who seem to be coping quite well in the team and this makes me even more of a failure. I can't afford to lose my job and this fills me with greater anxiety. I'm not sure how I can try to improve the situation.

Ash replies:

First, I am really sorry for your loss. The pandemic has been overwhelming for many of us, but a bereavement is likely to have been even more difficult, especially in light of the lockdown restrictions. Your manager's lack of sympathy is hard to believe in the current circumstances. We are going through one of the most challenging events in our lifetime and everyone inevitably copes in different ways. There is no standard form of grieving and you are not a failure in any sense.

I suggest you try and see if you can speak to another senior manager in your firm, as they may hopefully have a different, more sympathetic perspective on things. I appreciate that financial pressures may be playing on your mind too, but if you don't seek help now then you may end up suffering burnout and have to stop working in any case. Therefore it is better that you try to take some control back now.

I suggest also that you talk to your GP. It may be that your GP could suggest you are signed off work for a couple of weeks initially. Make sure to ask specifically about counselling and support to help with your bereavement. It may also help to contact CRUSE (a bereavement care organisation), as they have a helpful helpline number for people who have suffered loss just like you.

If there is one key positive message to come out of this pandemic, it is the need for us all to look after ourselves. Therefore please take care of yourself and stay safe.

Send your queries to Ash

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

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

Classifieds

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Elizabeth McMillan Palmer
Would anyone holding or knowing of a will for the above, DOB 25/08/1928, late of Darnley Court Nursing Home 787 Nitshill Road Glasgow G53 7RR, please contact the office of Hughes Shaughnessy McFarlane Solicitors, 256 Castlemilk Road, Kings Park, Glasgow, G44 4LB. (Tel. 0141 649 9772), email – ian@hsmsolicitors.co.uk / nathan@hsmsolicitors.co.uk.

Would anyone holding or having knowledge of a Will by a **Claire Miller** of 18A Castleton Court, Castleton Crescent, Newton Mearns, G77 5JX who died on 7th June 2021 please contact Natalia Rogolska at Mitchells Roberton, George House, 36 North Hanover Street, Glasgow, G1 2AD, telephone 0141 5523422 or email nar@mitchells-roberton.co.uk

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- Reviewing and revising leases for Landlord or Tenant
- Dealing with estate management work, such as lease variations, licence for works, rent reviews and renunciations.
- Reviewing and reporting on Purchase and sale contracts.

This is a great opportunity for a solicitor who is attracted to flexible working! It is a part-time role and they would be looking at the successful candidate to work around 3 or 4 days. They are flexible on hours and supports agile working.

For further information in complete confidence please contact Teddie Wright or Frasia Wright via email teddie@frasiawright.com or frasia@frasiawright.com. (Assignment 12203)

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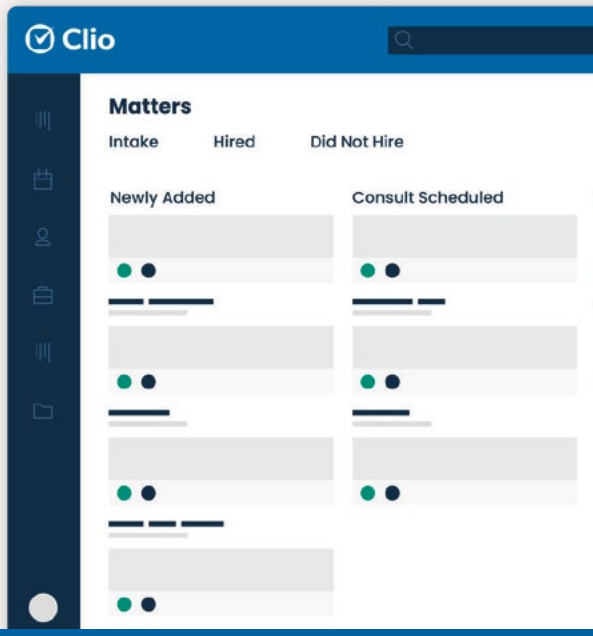

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