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Journal

Journal of the Law Society of Scotland

Volume 67 Number 9 – September 2022

Power pinch point

For those already struggling with fuel debt, and the cost of living generally, what can be done?

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Conveyancing, Transparency, and the New Registers

Are you RCI-fluent?

Suddenly, both transparency registers are upon us: the Register of Persons Holding a Controlled Interest in Land (RCI) since 1 April and the Register of Overseas Entities (ROE) since 1 August. Neither is straightforward. Already the RCI has thrown up difficult issues, while the ROE presents its own registration challenges for non-UK bodies corporate owning or leasing land in Scotland. Both are policed by criminal sanctions. The ROE also affects day-to-day conveyancing. From 5 September the Keeper must usually refuse to register dispositions, leases, and assignations of leases granted in favour of overseas entities unless the entity is registered in the ROE. And from 1 February the Keeper must refuse to register deeds granted by unregistered overseas entities. New questions have been added to the application form for registration, and a new clause or clauses will be needed in missives.

Are you on familar terms with the ROE?

Alan Barr, Brodies LLP and Honorary Fellow, Edinburgh Law School, University of Edinburgh and **Kenneth Reid**, Professor Emeritus of Scots Law, University of Edinburgh. Joined for the Q&A by **George Gretton,** Lord President Reid Professor of Law Emeritus, University of Edinburgh.

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Laura Macgregor, Chair of Scots Law, University of Edinburgh and **Lorna Richardson,** Senior Lecturer in Commercial Law, University of Edinburgh.

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Editor

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Tribute to HM The Queen

As this month's Journal was on the point of completion, news came through of the death of HM Queen Elizabeth II. This column, and the President's, have been rewritten in tribute.

For a high percentage of our readers, including many now into retirement, until that moment the Queen had been on the throne throughout their lives, offering a selfless dedication to the service of our country that hardly sits with the notion of "ruler" or "sovereign".

Small wonder, then, that so many, supporters or otherwise of the institution of monarchy, held her in a level of high personal esteem, respect, affection, even love, reflected in the myriad tributes and personal memories already shared. As has been evident at successive jubilee celebrations, the continuity of her reign has had an extraordinary unifying effect on her country and her people.

What is notable also is the speed with which world leaders put aside other tasks in order to offer sincere and obviously very personal tributes to someone who, in President Macron's words, "stood with the giants of the twentieth century on the path of history".

For me, President Biden's reference to "the incomparable power of her example" particularly hit the mark. Those who lead by example can have influence beyond any legal or physical power, and it is difficult to think of a stronger example of such leadership than Her Majesty's conduct throughout her 70 year reign.

The United Kingdom, already going through a period of considerable turbulence, will now find itself seeking to hold on to the sense of unity, stability and continuity that the Queen personified during those decades. It is to be hoped that those who now lead our nation will be sensitive to the particular need to emulate her qualities if they wish to steer us through these times and towards a better future.

Peter Nicholson, Editor

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

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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Taxi and private hire cars: licensing issues: Page 24

In practice

ONLINE INSIGHT

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

Lessons on life and liberty from America
Gavin Walsh argues that the controversial decision in *Dobbs v Jackson* was correct when regard is had to the constitutional jurisprudence of the USA, and achieves a proper rebalancing of interests between the state as protector of the unborn child, and the mother.

Charities: the investment dilemma
An English decision has helped clarify charity trustees' powers and duties where investments would conflict with the charity's purposes. It reflects guidance published by OSCR, and Valerie Armstrong-Surgenor and Jemma Alexander compare the sources.

Bribery: a ground of claim?
An Outer House decision has clarified the status of bribery as a cause of action in Scotland, and the evidence allowed and standard of proof to be applied in proving it, as Richard McMeeken discusses.

"Are they still together?": Settling the relevant date
The issue of the relevant date has come under scrutiny in some recent decisions. Alexis Harper considers these cases, against the background of the previous case law on this topic.

Menopause: the mark of discrimination?
The Commons Women & Equalities Committee has made various proposals to support menopausal women in the workplace; but is the Government likely to act? Marianne McJannett considers the report.

OPINION

Gordon Dangerfield

A recent Inner House decision, and a speech to similar effect by the then Attorney General, show why the single sex services allowed by the Equality Act are necessarily defined by biological sex, and the Scottish Government should take heed

The law on female single sex services is set out in the Equality Act 2010, which allows services to be exclusively single sex if this is a "proportionate means of achieving a legitimate aim".

Surprisingly, perhaps, there has been great controversy and uncertainty over what "sex" means in this context. In particular there has been a widely held view that trans-identified males are to be treated as female. This view is held by the Scottish Government, which insists that female single sex services are "trans inclusive" as a condition of granting funding to such services.

A recent Inner House decision has now resolved this uncertainty in Scotland, and a very recent speech by the (then) Attorney General in England has confirmed that the UK Government believes it to be resolved for the whole of the UK.

In *For Women Scotland v Lord Advocate and Scottish Ministers* [2022] CSIH 4, Lady Dorrian, giving the opinion of the court, said: "The protected characteristics listed in the 2010 Act include 'sex'... [A] reference to a person who has a protected characteristic of sex is a reference either to a man or to a woman. For this purpose a man is a male of any age; and a woman is a female of any age... Provisions in favour of women, in this context, by definition exclude those who are biologically male" (para 36).

For the purposes of the 2010 Act, then, "sex" means biological sex. If a provision is made in favour of the female sex, it is made in favour of those who are biologically female, and it excludes those who are biologically male.

The court then considered the question of whether the quite separate protected characteristic of "gender reassignment" in the Act had any bearing at all on the meaning of "sex". Lady Dorrian made clear that none of the authorities put before the court constituted "authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present". These cases, she continued, "do not vouch the proposition that sex and gender reassignment are to be conflated or combined" (para 38).

Thus, if a biological male is undergoing what we call "male to female" gender reassignment, that process will give them the protected characteristic of "gender reassignment" under the Act. It will, however, have no effect at all on their sex for any of the purposes of the Act. Their sex, for any of these purposes, will remain male.

This authoritative statement on the application of the UK-wide Equality Act in Scotland is wholly in line with the approach set out very recently by Attorney General Suella Braverman QC. Speaking specifically of schools, but in terms which apply equally to services, she said: "The exceptions in [the Act] create a mechanism whose sole purpose is to ensure that even though there is a general prohibition of sex discrimination, [services] are legally permitted to take a single sex approach... Parliament could not have plausibly intended for these specific exceptions to be subject to collateral challenge by way of complaints of indirect discrimination by other protected groups such as those with reassigned gender. This would be to risk the Equality Act giving with one hand, and promptly taking away with the other."

It is precisely on this basis that, as the Attorney General pointed out, the exceptions in the Act which allow for single sex services "permit direct discrimination on grounds of sex: they permit 'women only' and 'men only' services, provided that the rule is a proportionate means of achieving a legitimate aim".

It follows, then, that "it is not possible to admit a biological male to a single-sex service for women without destroying its intrinsic nature as such: once there are [biological males] using it, however they define themselves personally, it becomes mixed sex".

In other words, single sex services are an all-or-nothing package. It's either proportionate and legitimate to have a female single sex service or it isn't.

The moment you say that it's not proportionate or legitimate to exclude even one solitary biological male from your single sex service, then at that exact moment your service ceases to be a single sex service, and you lose your whole justification for excluding any male from that service. When you admit a biological male to what was a female single sex service, you are admitting in terms that you no longer have legal justification for your single sex service. You are now a mixed sex service.

That is what having a female single sex service is. The clue is in the name.

The Scottish Government, among others, would do well now to pay heed to that simple message.

Gordon Dangerfield is a Scottish solicitor advocate.

VIEWPOINTS

Sex and gender

In his letter (Journal, August 2022, 6) Brian Dempsey perpetrates two logical fallacies which are unfortunate in a lecturer in law at the University of Dundee.

First, he states that "there are persons who do not fit the simplistic 'female or male' categorisation", and clearly implies that the existence of such persons problematises the "simplistic" categorisation. This is logically false. The statistically tiny incidence of people born with one leg does precisely nothing to undermine logically the fact of human beings as a bipedal species. Equally, the statistically tiny incidence of intersex conditions does precisely nothing to undermine logically the immutable sex categories of male and female in humans.

Secondly, he states that the "either/or" male and female sex categories are "based on medieval canon law", and that this is "the same law that allowed for girls to be married at the age of 12". The implication is of course that canon law must be wrong about one because it is about the other (or else why mention it?). The logical fallacy is again obvious. Vegetarianism isn't wrong because Hitler was a vegetarian. Male and female categories aren't wrong because medieval canon law used them.

If there are the slightest credible scientific grounds for asserting that there is a third (or more) human sex (spoiler: there isn't), then by all means let's hear them. Otherwise, let's – as lawyers and lecturers – stick to logic and the facts.

Gordon Dangerfield, solicitor advocate, Glasgow

Ban PI cold calls

Almost half the population has had a cold call or text about making a personal injury claim in the past year, and MPs now have a chance to put a stop to it.

The Data Protection and Digital Information Bill is currently before Parliament and we are calling on MPs to include an amendment to ban cold calling outright.

Cold calls for personal injury are tasteless and intrusive. Most of the people who are contacted in this way are left feeling disgusted, annoyed, and anxious, according to a YouGov survey commissioned by APIL. The survey also found that 88% of adults in the UK support a total ban on cold calls and texts from companies who tout for injury claims.

Current rules on cold calling have not prevented the exploitation of vulnerable people. Now is the time for MPs to act. It is what people want.

John McQuater, President of APIL (Association of Personal Injury Lawyers), Nottingham

*The proposed second reading debate on 5 September was cancelled after it was announced that ministers wanted to consider the bill further. – **Editor***

Registers of Scotland arrear

A letter responding to last month's Q&A between the Law Society of Scotland and Registers of Scotland on the arrear of applications to the Land Register is published on p 34 of this issue as the property law article. – ***Editor***

BOOK REVIEWS

Deportation: A Practical Guide

GARY McINDOE AND GEMMA TRACEY
PUBLISHER: LAW BRIEF PUBLISHING
ISBN: 978-1913715168; £49.99

Law Brief Publishing was founded with the aim of publishing practical guides for the profession, often on very specific topics. This book seeks primarily to assist practitioners who act for foreign national prisoners in deportation cases.

There are useful chapters on the key legal concepts in deportation and the provisions that apply to EEA nationals before and after Brexit. Three appendices – providing a checklist on taking instructions, a list of documents to obtain and a template skeleton argument for deportation appeals – will also assist.

There are, however, two shortcomings. The first is that the book is uneven. Twenty two pages are devoted to the provisions applying to EEA nationals, but only six to the provisions on who is exempt from deportation, and the majority of that to the Windrush scheme rather than the British Nationality Act 1981. And though it is directed at practitioners, beyond the template skeleton argument at appendix C, there is very little on conducting an appeal before the First-tier Tribunal.

The second is the price. For their length, none of the publisher's titles are cheap. The investment can be justified for slightly longer books in the series, or for those that will survive changes in the law (e.g. Richard Padley's *A Practical Guide to the Use of Expert Evidence in Criminal Cases*). But £49.99 for this work of 96 pages, in a field of law which changes constantly, is difficult to justify.

Paul Harvey, advocate

Hex

JENNI FAGAN (BIRLINN: £10; E-BOOK £7.99)

"This... tells the last hours of Geillis Duncan, convicted of witchcraft... The device of the hex is put to superb effect, highlighting the modern day violence inflicted on women... Outstanding."

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

BLOG OF THE MONTH

landcommission.gov.scot

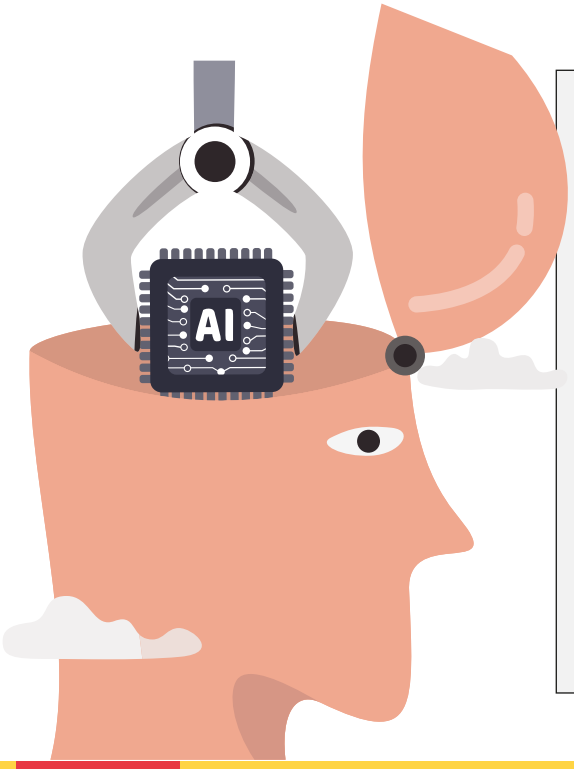
Tenant Farming Commissioner Bob McIntosh has produced much guidance in his role, and in this new blog he promotes mediation as a means of resolving disputes between landlords and tenants.

Research into various alternatives led the Scottish Land Commission to fund a pilot mediation service, involving disputes on a range of issues. All were settled, after "tough talking and some uncompromising bargaining", and the process "allowed attitudes to change", with both timescales and costs a fraction of what going to litigation would have involved.

To find this blog, go to bit.ly/3Rn1Jy3

Into the (brain) cells

Readers may have noticed a recent report that lawyers of the future could have electronic chips implanted in their brains, increasing efficiency and enabling charging by "units of attention". The temptation proved too much for our erstwhile columnist Stephen Gold, who penned these words (previously published at lightpoetrymagazine.com/):



Pate of Chips

When matters judicial arise,
It may come as a nasty surprise
To discover one's brain
Is a source of disdain,
And is far from its optimum size.

For a lawyer who isn't bionic
Will be cruelly dismissed as moronic.
We shall live in an age
Where one cannot be sage
If one's noggin is not electronic.

With this chip, I shall reason with ease,
And concoct irresistible pleas.
Though it won't stop my clients
Exuding defiance
When computing the size of my fees!

WORLD WIDE WEIRD

① Clockwise remake

A newly elected Kenyan governor has won praise for strict office rules after turning away top officials from a meeting for arriving after the scheduled time.

bbc.in/3QwFUux

② Stuffed

A teenage car thief who climbed inside a giant teddy bear to hide from police in his Rochdale home was rumbled when officers noticed that the cuddly toy was breathing.

bit.ly/3RmXXPy

③ Monkey business

Officers rushed to a zoo in California after receiving a 911 call – only to discover that the caller was a monkey that had picked up the zoo's mobile phone from a cart.

bit.ly/3RGuqW9

PROFILE

David Gordon

David Gordon is convener of the Society's Regulatory Committee, responsible for oversight of all the Society's regulatory functions and operating independently of Council. It is 50-50 non-solicitor/solicitor and chaired by a non-solicitor

❶ Tell us about your career?

I am an actuary and worked for a pensions consultancy for 30 years, advising on funding and benefit design. Early in my career, I prepared expert witness reports for damages for personal injury and for pensions on divorce. In 2020, I moved to my professional body, the Institute & Faculty of Actuaries, to establish and lead the Actuarial Monitoring Scheme, which carries out thematic reviews on the work of actuaries..

❷ What drew you to join the Regulatory Committee?

Throughout my career, I have worked with numerous solicitors across many disciplines, so I think I have a lot of relevant experience of the legal profession and can make a significant contribution to the work of the committee as a non-solicitor member. There are many parallels between working in a profession such as actuarial services and the work of a solicitor. The legal and actuarial professions also have many similarities in their governance.

❸ Have you been surprised by anything you have learned through the committees?

Before becoming involved, I wasn't aware of the amazing range and depth of work that is carried out by staff and volunteers to represent the Society. As convener, I see how this incredibly impressive work affects so many aspects of Scottish life.

❹ What are the priorities for the committee in the next 12 months?

The committee will focus on two key areas: working with the Government and other stakeholders to ensure the appropriate and proportionate regulation of the legal profession in Scotland; and maintaining a wholly distinct voice within the Society on regulatory matters.

Go to bit.ly/3qppzGd for the full interview

TECH OF THE MONTH

FIFA+

Google Play and Apple Store: free

With the World Cup in Qatar just around the corner, here's the perfect app to get you in the mood. You can rewatch classic matches, find out more about your favourite players and get all the latest football news.

PRESIDENT

Murray Etherington

The Law Society of Scotland joins the nation in mourning the death of HM Queen Elizabeth II

"The end of an era", is a phrase that often trips off the tongue of TV pundits when a longstanding footballer or manager moves onto pastures new, or at a retirement celebration for a longstanding colleague: it is meant with kindness and respect, but rarely does it actually mean what it says.

This month, however, we are truly seeing not only the end of an era but the birth of a new one. It is a rare event and the first such change in many of our lifetimes. I had the sad duty of writing to His Majesty The King offering the Law Society of Scotland's deepest and sincere condolences to him and the rest of the Royal Family following the death of Her Majesty Queen Elizabeth II.

There are many facts being reported about the longevity of the Queen's life and reign – she was witness to huge change in the UK and globally during her lifetime, from her active service during World War 2, shifting borders across Europe, a new Commonwealth of nations now consisting of 56 countries and over 2 billion people, financial boom and bust, and the dawn of a new digital age.

She gave assent to over 3,200 Acts of primary UK legislation and over 310 Acts of the Scottish Parliament – quite an astounding number. However it was her commitment to public service and duty that most resonates for me, and which is reflected in so many of the tributes to her from around the globe. Throughout her remarkable reign, the Queen put her country and the Commonwealth first.

She was no stranger to Scotland, or indeed to the Law Society of Scotland. In a letter of welcome to the 2015 Commonwealth Law Conference in Glasgow, the Queen demonstrated her absolute belief in the just administration of the law. The Commonwealth under her stewardship has championed the rule of law through sharing knowledge, skills and expertise to ensure the best possible standards throughout this unique family of nations.

As the reign of His Majesty King Charles III begins, we all wonder what the future will bring. The mantle he has taken up is daunting. Undoubtedly there will be change ahead for the monarchy and the country as a whole. As I write this column, I ponder what will these changes mean for my family, myself and our profession.

As much as we grieve the loss of The Queen, we wish King Charles well for a long and prosperous reign. He himself has been part of the fabric of the country for over 70 years and, for many decades, has advocated for causes close to his heart. We will all, I am sure, look keenly to see how he takes on his new constitutional duties as Sovereign, particularly at a time of such uncertainty at home and abroad.

For now we mourn the passing of our longest reigning monarch, and our thoughts and prayers are with her family.

Murray Etherington is President of the Law Society of Scotland – President@lawscot.org.uk

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ADDLESHAW GODDARD, Edinburgh, Glasgow, Aberdeen and elsewhere, has made three senior hires to its Corporate & Commercial team in Aberdeen. **Jennifer Cham**, previously with LEDINGHAM CHALMERS, joins as a managing associate, while **Gemma Hills**, previously with BRODIES, and **Emma Sinclair**, who joins from an in-house position at oilfield service company WEATHERFORD, have both been appointed legal directors.

ANDERSON STRATHERN, Edinburgh, Glasgow, Haddington and Lerwick, has announced the promotion to partner of **Gary Burton** (head of the catastrophic personal injury unit) and **Robbie Wilson** (head of the medical negligence unit), both in the firm's Healthcare, Public & Regulatory team; and the promotion to director of **Elizabeth MacGregor** (Commercial Property/Rural Land & Business), **Tom Docherty** and **Gillian Murray** (both in Dispute Resolution), **Robin Turnbull** (Employment, Immigration & Pensions), **Karen Craig** (Rural Land & Business), and **Fiona Savage** (Commercial Property).

BALFOUR + MANSON, Edinburgh and Aberdeen has promoted **Will Wallace**, in the Residential Property department in its Edinburgh office, to associate.

BLACKADDERS LLP, Dundee and elsewhere, has appointed **Philip Buchan** WS, a director at the firm since 2020, as its new head of Rural Land & Business.

BRODIES LLP, Edinburgh, Glasgow, Aberdeen, London and Brussels, has opened its new Inverness office at Clava House, Cradlehall Business Park, Inverness IV2 5GH (t: 01463 214390; f: 01463 211487). The former office at Dingwall has relocated there.

Kavita Chetty, formerly head of legal and strategy at the SCOTTISH HUMAN RIGHTS COMMISSION, has joined the SCOTTISH GOVERNMENT as deputy director for human rights and mainstreaming, on a three year fixed term.


Friends Legal (l-r): Angela Craig, Tony O'Malley and Alan Borrowman

CONNOR MALCOLM, Edinburgh intimate that **David Devlin** retired as a partner of the firm with effect from 31 August 2022 but will remain with the firm as consultant. It is also intimated that with effect from 1 September 2022, **Scott Brown** has been assumed as a partner.

FRIENDS LEGAL, Glasgow and Edinburgh, has acquired the firm of GARDEN STIRLING BURNET, Dunbar, Haddington, North Berwick and Tranent. The Garden Stirling Burnet name will be retained, while becoming part of the Friends Legal network. Directors **Alan Borrowman**, **Angela Craig** and **Ian Philp** will remain with the firm in new consultancy roles.

GILSON GRAY, Glasgow, Edinburgh, Dundee, Aberdeen and North Berwick, has appointed **John Kydd**, a litigator and accredited mediator, as a partner in Dundee. He joins from THORNTONS where he was a partner.

HARPER MACLEOD, Glasgow, Edinburgh, Inverness, Elgin, Thurso and Lerwick, has appointed **Bill Stark** (left) as a debt and asset recovery consultant. He joins from MORTON FRASER.

LEGAL SERVICES AGENCY LAW CENTRE, Glasgow announces the retirement of its principal solicitor **Paul Brown**, who has developed and built up LSA and its work since its inception more than 30 years ago.

LEVY & McRAE, Glasgow and Edinburgh, has expanded its Property team with the appointment of **Jon Findlay**, who joins as a legal director from JOHN JACKSON & DICK; **Paul Kenneth**, who joins as a partner from WOMBLE BOND DICKINSON; and **Elaine McKinnon**, an experienced paralegal who joins from FREDERICK & CO.

LINDSAYS, Edinburgh, Glasgow and Dundee, has appointed **Jordan Hay** as a senior solicitor in the firm's Private Client team in Edinburgh, and solicitors **Gemma-Grace Johnstone** and **Maddie Miller,** to the Commercial Property teams in Dundee and Edinburgh respectively. Lindsays has also appointed four former trainees to permanent qualified positions with the firm: **Ronan Duff** (Personal Injury, Glasgow), **Stephanie Goudie** (Commercial Property, Glasgow),


Lindsays (l-r): Curtis Preston, Deborah O'Donnell, Stephanie Goudie, Ronan Duff

Deborah O'Donnell (Private Client, Dundee), and **Curtis Preston** (Corporate, Edinburgh).

Jamie McArthur has left his role as company solicitor for ARNOLD CLARK, to take up a new position with DENTONS HELIX.

McKEE CAMPBELL MORRISON, Glasgow has appointed

employment law specialist and mediator **Laura McKenna** (below) to head the firm's newly launched employment law and HR division. She joins from MORTON FRASER.

MBM COMMERCIAL, Edinburgh and London, has announced the following changes to senior leadership roles within the firm: **Tracey Ginn**, partner, becomes head of Corporate; **Tim Edward**, partner, becomes head of Dispute Resolution; and **Gail Downes**, operations and HR director, becomes the firm's first non-lawyer managing director.

MORTON FRASER, Edinburgh, Glasgow and London, has moved its Glasgow office to a new hub at 1 West Regent Street, Glasgow G2 1RW (t: 0141 274 1100; f: 0141 274 1129).

SHEPHERD AND WEDDERBURN LLP, Edinburgh, Glasgow, Aberdeen and London, has appointed **Peter Smith** (left) as a Commercial Property partner with effect from 1 August 2022, heading the firm's Real Estate team in the Aberdeen office. He was formerly a partner with BURNESS PAULL.

Shepherd and Wedderburn has also appointed accredited agricultural law specialists **Petra Grunenberg** (left) as a partner from 5 September 2022, and **Ellen Eunson** (above) as a director from 18 August 2022, in its Rural team. Formerly partners in BLACKADDERS, where Ms Grunenberg led the Rural team, both will be based in Shepherd & Wedderburn's Aberdeen office.

THORNTONS LAW LLP, Dundee and elsewhere, announces that **Andrew Bird**, formerly with SLATER & GORDON, has joined the Private Client team in Cupar as a solicitor.

Legal services company VIALEX, Edinburgh, has announced the appointment of **Steven Dunn** as a legal director heading its Pensions & Immigration Law team. He was previously with ANDERSON STRATHERN where he was head of Pensions and senior associate for immigration law.

Losing our grip on power

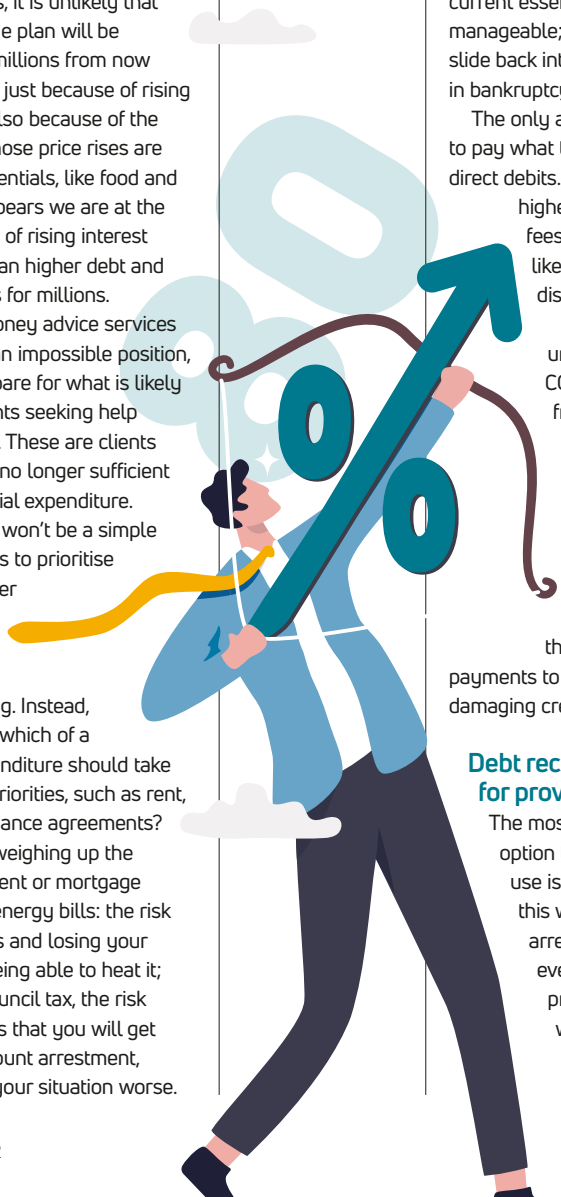
With some domestic consumers struggling financially even without a further energy price rise, Alan McIntosh considers the position of those unable to afford their bills, and their rights in relation to their suppliers

At the time of writing, we are still awaiting the UK Government's response to the recent announcement by Ofgem (The Office of the Gas & Electricity Markets) that the price cap for energy prices will be increased in October to £3,549 for a typical dual fuel customer; and to discover what further intervention will be made.

Regardless of this, it is unlikely that any additional rescue plan will be enough to prevent millions from now falling into debt, not just because of rising energy prices, but also because of the inflationary effect those price rises are having on other essentials, like food and fuel. Also, it now appears we are at the beginning of a cycle of rising interest rates, which will mean higher debt and mortgage payments for millions.

This is placing money advice services across Scotland in an impossible position, as they try and prepare for what is likely to be a wave of clients seeking help with deficit incomes. These are clients whose incomes are no longer sufficient to meet their essential expenditure. In such situations, it won't be a simple case of telling clients to prioritise their energy bills over their credit cards, personal loans, and other unsecured borrowing. Instead, the problem will be which of a client's priority expenditure should take priority over other priorities, such as rent, council tax or car finance agreements?

This will involve weighing up the risks of not paying rent or mortgage against not paying energy bills: the risk of increasing arrears and losing your home against not being able to heat it; and in relation to council tax, the risk if you go into arrears that you will get a wage or bank account arrestment, potentially making your situation worse. For car finance, it will be the risk of losing your car and being left with a potential shortfall debt, and in some cases an inability to get to work and earn a living.



Are deficit payment plans the solution?

In such scenarios, what will be the solutions available to clients? It won't be debt management solutions like the Debt Arrangement Scheme or bankruptcy, as if you can't afford to pay your current essentials, your debt will not be manageable; and if you are just going to slide back into arrears, where is the relief in bankruptcy as a solution?

The only alternative for people will be to pay what they can afford and cancel direct debits. However, this may mean higher prices, added charges and fees, and other consequences like damaged credit ratings and disruptions to energy supplies.

Part of the problem is that, unlike with the response to COVID-19, what is missing from this cost of living crisis is an offer of forbearance from creditors. If people, therefore, go into arrears, there is nothing to suggest that energy providers won't actively seek to recover their debts from them and report missed payments to credit reference agencies, damaging credit ratings.

Debt recovery options for providers

The most likely debt recovery option that energy providers will use is prepayment meters, as this will allow them to recover arrears from people's meters every time they top up. The problem, however, is that where people are not able to top up they will end up disconnecting themselves.

It is not surprising, therefore, that calls are already being made for a moratorium on energy firms using these meters to recover debts.

However, for many consumers it is already too late, as more than half of UK homes now have smart meters installed and these allow energy providers to switch customers on to prepayment mode remotely, with the press of a button. Where people don't have smart meters installed, firms will need to gain access to homes to install them.

Standard licence conditions: some protection

The UK energy market is governed by myriad primary and secondary legislative provisions, including the Gas Acts 1986 and 1995; the Electricity Act 1986; the Competition and Services (Utilities) Act 1992; the Utilities Act 2000; the Energy Acts 2010, 2011 and 2013; and the Consumer Rights Act 2015. Most of this law is reserved to Westminster.

However, gas and electricity suppliers also have licence agreements with Ofgem and some of the standard licence conditions ("SLCs") in these agreements may offer some protection for consumers.

So, for example, SLC 0 requires firms to treat customers fairly, while SLCs 25

"For those UK households that still don't have smart meters, if firms want to switch them or disconnect them, they will need to gain access into the customer's home"

to 30 also contain several provisions that are intended to protect consumers. One useful condition is SLC 26 which requires firms to establish a priority service register for vulnerable customers and to actively try and identify which of their customers are vulnerable. This can include customers who are pensioners, or who are suffering from physical and mental illnesses, and customers who are pregnant or have young children in the household. When such customers are identified, firms are under an obligation not only to treat them fairly but to offer additional support in the form of various priority services. They should also have regard to these vulnerabilities before deciding to install a prepayment meter, which should not be installed where it would be unsafe or unreasonable for someone to operate such a meter (SLC 27.6(a)(iii)).

Firms are also under an obligation to try and enter reasonable repayment plans with customers who are having difficulty paying, and should have regard to their ability to pay (SLC 27.8). They should also treat customers on a case by case basis (SLC 27.8A(a)(i)).

Where customers already have a smart meter installed and a firm wants to switch it to prepayment mode, they must provide customers with seven days' notice and should not exercise the right in relation to any amounts genuinely in dispute (Electricity Act 1989, sched 6, para 2; Gas Act 1986, sched 2B, para 7).

Warrants of entry

However, for those UK households that still don't have smart meters and are still operating old style credit meters, if firms do want to switch them or disconnect them, they will need to gain access into the customer's home.

In relation to this, the first thing to note is that firms do not have a right of entry into anyone's home unless it is an emergency, or they have a warrant from the court. Nor can someone suffer any penalty for refusing entry to a person without a warrant (Rights of Entry (Gas and Electricity Boards) Act 1954, s 1). Where a warrant is granted, however, refusing entry can lead to a £1,000 fine.

An application to gain entry can be made under s 2 of the 1954 Act. However, before the court can grant such a warrant it is required to be satisfied that the right of entry is reasonably required, and any requirements in any relevant enactments have been complied with.

This does suggest that where a debt is reasonably in dispute, or the firm has failed to comply with obligations under Ofgem's standard licence conditions, it may be possible to argue that a warrant should not be granted.

Equally, SLC 28B.1 prevents a firm from applying for a warrant to install a prepayment meter or to use such a warrant, where installing a meter "would be severely traumatic to that domestic customer due to an existing vulnerability which relates to their mental capacity and/or psychological state and would be made significantly worse by the experience".

However, the 1954 Act does not place any obligation on the energy firm to notify its customers that it intends to apply for such a warrant, albeit some firms in their code of conduct state they will notify them. The Act also doesn't place any obligation on the court to notify the customer or give them a right to be present or represented at a hearing. This clearly raises questions whether courts would be in breach of article 6 of the European Convention on Human Rights if such an opportunity was not provided.

Arguments could be made that such notifications would not be reasonable where the reason for wanting entry related to an emergency or where it related to theft and tampering (as notification could defeat the purpose of gaining entry); it is hard to see, however, any justification for not providing notification where the reasons for wanting entry relate to arrears.

Right to complain

Like any rights, unless there is a remedy available to customers, they are meaningless. Customers, therefore, can complain to their energy provider where they are unhappy with their conduct; or where they believe the firm has failed to comply with Ofgem's Standard Licence Conditions. Firms then have eight weeks to resolve the issue or issue a deadlock letter. Customers can then escalate their complaint to the Energy Ombudsman.

Alan McIntosh is managing director, Advice Talks Ltd

Caught in the **spiral?**

Peter Nicholson highlights some of the advice available for those with serious debt issues, and the recurring messages that emerge

As Alan McIntosh writes in the preceding feature, many people in the coming months are likely to find their incomes no longer sufficient to meet even essential expenditure. For them there may be few options other than to seek creditor forbearance. For anyone worried about rising debt levels, however, the first advice is always: seek help as soon as possible.

Step by step approach

Before someone struggling financially presses the panic button, they should check whether their position is in fact irretrievable. "MoneySavingExpert" Martin Lewis's website, to take one approach, offers a four-step guide to deciding the right solution, beginning with an assessment of how serious the situation is.

A "debt crisis" would exist for someone struggling to pay all their basic outgoings, and/or having debts (excluding mortgage) bigger than their annual after-tax income. Someone not yet at that level is more likely to be in a debt spiral, which still needs urgent action but can possibly be tackled through, first, more "pain free" savings (with the help of a proper budget and checking that all available benefits and rebates, instanced on the website, are being claimed), and then the more "painful" savings, meaning those with more impact on lifestyle. These could be giving up subscription TV channels, gym membership or indeed the car. Lewis even offers a "demotivator" tool – a "fun tool" to stop you spending what you can't afford.

Step 4 is for those still struggling after all the above. Then it's time to get help from a debt charity – as opposed to a commercial concern offering debt help or loan consolidation – and in particular, take advice before embarking on one of the formal debt solutions.

Time to prioritise

Debt Camel has been run since 2013 by former debt adviser Sara Williams. Her page dealing with help for those who can't make ends meet, starts with the twin aims of budgeting and knowing which debts are and which are not priority.

"Paying your rent/mortgage, car finance, food, clothes and heating may leave little or nothing for unsecured loans, credit cards or catalogues", she writes. "This may sound alarming, but non-priority creditors know that they are bottom of the list and that priority bills have to be paid in full."

Council tax is another priority, because of the enforcement powers readily available against those in arrears.

For non-priority debts, Williams recommends approaching the creditor to ask for a payment arrangement (once the budget exercise confirms you need it, because it affects your credit record). Financial Conduct Authority rules require creditors to show "forbearance and due consideration" to customers in difficulties, and they may agree not to add interest or charges, and to accept reduced payments. She favours talking to a debt adviser first.

Moneyhelper.org.uk cautions as to the need for fair shares when making arrangements with creditors, because if these break down and a formal debt solution becomes necessary, certain options may not be available if some creditors have been prioritised over others. Again the advice is, talk to a debt adviser first.

This site also has a page that allows the user to enter the types of bills and payments they are most worried about, and then suggests an order of priority, and help that might be available.

Another point worth noting is that people in certain categories of vulnerability (including pensioners, pregnant women and parents of young children) may be protected from some types of enforcement action.

If debt levels really appear unsustainable, the Coronavirus (Recovery and Reform) (Scotland) Act 2022 has kept in force the emergency provision allowing a debtor to apply to the Accountant in Bankruptcy for a six month moratorium on diligence, to give time to consider options for formal debt solutions. A 60-day breathing space is available in England & Wales.

Self help?

What are the prospects for taking matters into one's own hands? One campaign against energy prices calls for people to pledge to stop their direct debits if the October rise goes ahead. Don't Pay UK believe that if 1 million people sign this pledge (and their action will only go ahead if they get that number), energy companies will be in serious enough trouble that it will "bring them to the table".

However they admit this strategy has risks, including being transferred to prepayment arrangements (for those on smart meters), higher bills through coming off direct debit, and harm to credit ratings. And it is difficult to find any external advisers who think that cancelling direct debits is a good idea. Debt Camel, while supporting the campaign's aim of lower bills, warns that the site doesn't fully explain the effects that cancelling a direct debit may have.

As of early September the site was still showing fewer than 150,000 pledges, so without a late rush it would fall well short of its target in any event.

To finish as we began, whatever your financial worries, the top line is – get advice. There are many avenues available, all confidential, and no one should feel alone in their time of need. Debt is now a national problem.

Some other useful links

- www.moneyadvicescotland.org.uk/help-for-people-with-money-worries
- www.citizensadvice.org.uk/scotland/about-us/our-work/advice-partnerships/money-advice-services/
- www.advicescotland.com/ (includes geographical guide to local agencies)
- www.mygov.scot/support-money (links to Scottish Government supported organisations)

Back together again!

Friday 21 October 2022 is a red letter day – the Law Society of Scotland's Annual Conference is back as an in-person event, though you can still join remotely

For the first time in three years, solicitors will be able to meet up at the Law Society of Scotland's Annual Conference, which is returning as an in-person event next month.

Friday 21 October is the day, and the Edinburgh International Conference Centre the venue, for presentations on key themes including the challenges facing the profession, the rule of law and the opportunity for lawyers to be "Disruptors for Good".

Joining remotely is still an option, but coming along on the day offers the most complete experience, and the best networking opportunities.

Lord Advocate Dorothy Bain QC is this year's opening keynote speaker; and following her address, a panel of distinguished guests, chaired by the Society's Michael Clancy, will tackle professional ethics, the rule of law and international conflict. Michael will be joined by Sir Howard Morrison QC, a former judge of the International Criminal Court where he served as President of the Appeals Division, and Frances McMenamin QC from the Faculty of Advocates.

The morning breakout sessions (described below) come next, and attention then turns to trainees, with an expert panel from both in-house and private practice giving their opinions and advice on training. You'll hear from Susannah Donaldson of Pinsent Masons, Iain Miller of Kingsley Napley, Christopher Weir of Scottish Social Services Council and Philip Hall of NatWest.

After lunch, regulation is on the menu with the Society's Executive Director of Regulation, Rachel Wood exploring how to regulate in a constantly changing environment with a former judge of the Utah Supreme Court, Constandinos Himonas.

Paul Mosson, Executive Director of Member Services and Engagement, and Aisling O'Connell, Technology and Innovation Policy Lead at the Legal Services Board, will round out the day's main sessions, discussing the value of cooperation in legal tech between different jurisdictions.

We're looking forward to meeting up in person again

Breakout sessions will give attendees the option to choose in the morning programme between neurodiversity in the law, and leadership in building an inclusive future; and in the afternoon, between in-house lawyers driving critical business needs, and strategic litigation as a tool for strengthening the rule of law.

In the venue there will be plenty of opportunity to network with colleagues, sponsors and exhibitors. Main conference sponsor and Law Society of Scotland strategic partner St James' Place will be on hand to chat about wealth management.

Diane McGiffen, the Society's chief executive, is keenly looking forward to her first Annual Conference. "It's great that we've got the opportunity to bring the profession together at our flagship event. I'm very much looking forward to chatting with members and hearing from our speakers on a wide range of important and topical subjects", she commented.

Free places at the conference are on offer to several membership groups. Unemployed members and Fellows of the Society are eligible to join for free, in-person or online. Legal aid solicitors and law students get free access to join remotely.

For full conference details or to book your place, please visit www.lawscot.org.uk/annualconference

ARBITRATION: an institution?

As the ICCA Congress opens in Edinburgh, Jared Oyston describes the role arbitral institutions can play in managing international arbitrations, and some considerations in choosing the most appropriate body

This year features as an important one for dispute professionals in the UK and further afield, as Edinburgh hosts the largest international arbitration gathering in the world. The International Council for Commercial Arbitration (ICCA), accredited as an NGO by the United Nations, is holding its biennial conference in the capital, a little over 10 years after the installation of a modern regime for governing arbitrations in Scotland in the form of the Arbitration (Scotland) Act 2010 (which bears much similarity to the 1996 Arbitration Act for England & Wales).

Given the global nature of arbitration, the decision about which arbitral institution to opt for can be complex. So what are the roles of arbitral institutions, the benefits and costs of using an institution, and how do parties choose from the many institutions available to them?

What is an arbitral institution?

An arbitral institution is an organisation that manages arbitrations, usually under a standard set of arbitration rules published by the organisation. Although comprehensive figures are not available, it is estimated that more than 75% of international arbitrations are conducted under the supervision of an arbitral institution. Thousands of arbitral institutions exist worldwide, from well-known, long-established institutions such as the International Chamber of Commerce ("ICC") and London Court of International Arbitration ("LCIA"), to smaller bodies specialising in particular sectors or jurisdictions.

An international arbitration managed by an arbitral institution can be contrasted with an ad hoc arbitration, in which the parties essentially agree to manage the arbitration themselves under bespoke rules to be confirmed by an arbitrator once appointed.

Why use an arbitral institution?

There are a number of reasons for using an arbitral institution to manage an international arbitration. Most large institutions have developed a set of arbitral rules which set the broad framework for the arbitrations they manage. This means that, at the time of agreeing to arbitration, parties have visibility and control over the basic rules that will apply to their arbitration.

These rules have been developed and updated regularly over time to respond to trends in the dispute resolution market as well as procedural problems that have arisen previously. A good example of this is recent amendments to the LCIA and ICC rules of arbitration in response to the growth of electronic hearings and document filings during the COVID-19 pandemic. An international arbitration managed under such rules is therefore less likely to encounter unanticipated problems. As well as greater certainty, this has the potential to deliver time and cost savings to the parties, as fewer procedural issues need to be escalated to the tribunal for resolution.

Many arbitral institutions also have recommended arbitration clauses, which parties can include in their contracts if they wish to use that institution to resolve their disputes. These clauses are prepared and regularly updated by

the institutions' lawyers to ensure their clarity and enforceability across jurisdictions, and therefore parties using such a clause can have confidence that their agreement to arbitrate will not be challenged. This is no small advantage, particularly in circumstances where a party's reason for choosing arbitration is a desire to avoid litigating in the courts of a particular jurisdiction.

There can also be "softer" benefits of using an arbitral institution. Parties often feel that using an arbitral institution – particularly a longstanding, well-known one such as the LCIA or ICC – can lend additional weight to any award, whether that is for the purposes of enforcement in a particular jurisdiction or for political or PR purposes.

If there is a downside to using an arbitral institution, it is that the above benefits do not come without costs. In particular, arbitral institutions charge upfront fees to cover the administrative costs of running an arbitration as well as their background costs such as maintaining their arbitration rules and clauses.

However, overall the cost difference between institutional and ad hoc arbitration may be minimal. For any arbitration to run effectively, it will require clear rules and effective administrative support, and the upfront fees charged by an institution may be outweighed further down the line in an ad hoc arbitration by the costs of putting in place bespoke rules and dealing with any unanticipated procedural issues. Therefore, as always with arbitration, this is really a matter of party choice: incur administrative costs upfront on an institutional arbitration, or deal with them as they arise in an ad hoc arbitration.

Which arbitral institution should I choose?

There is no set formula that parties should apply when choosing which arbitral institution to use. It is also important to keep in mind that what will often be more important than the arbitral institution chosen is the parties' choice of the "seat" of the arbitration. The seat is a geographical location, which will determine what procedural law will apply to the arbitration, what courts are responsible for applying that law, and the "nationality" of any award for enforcement purposes. For example, an arbitration naming the seat as London will be subject to the overview of the courts of England & Wales, and may be seen internationally as an English arbitral award.

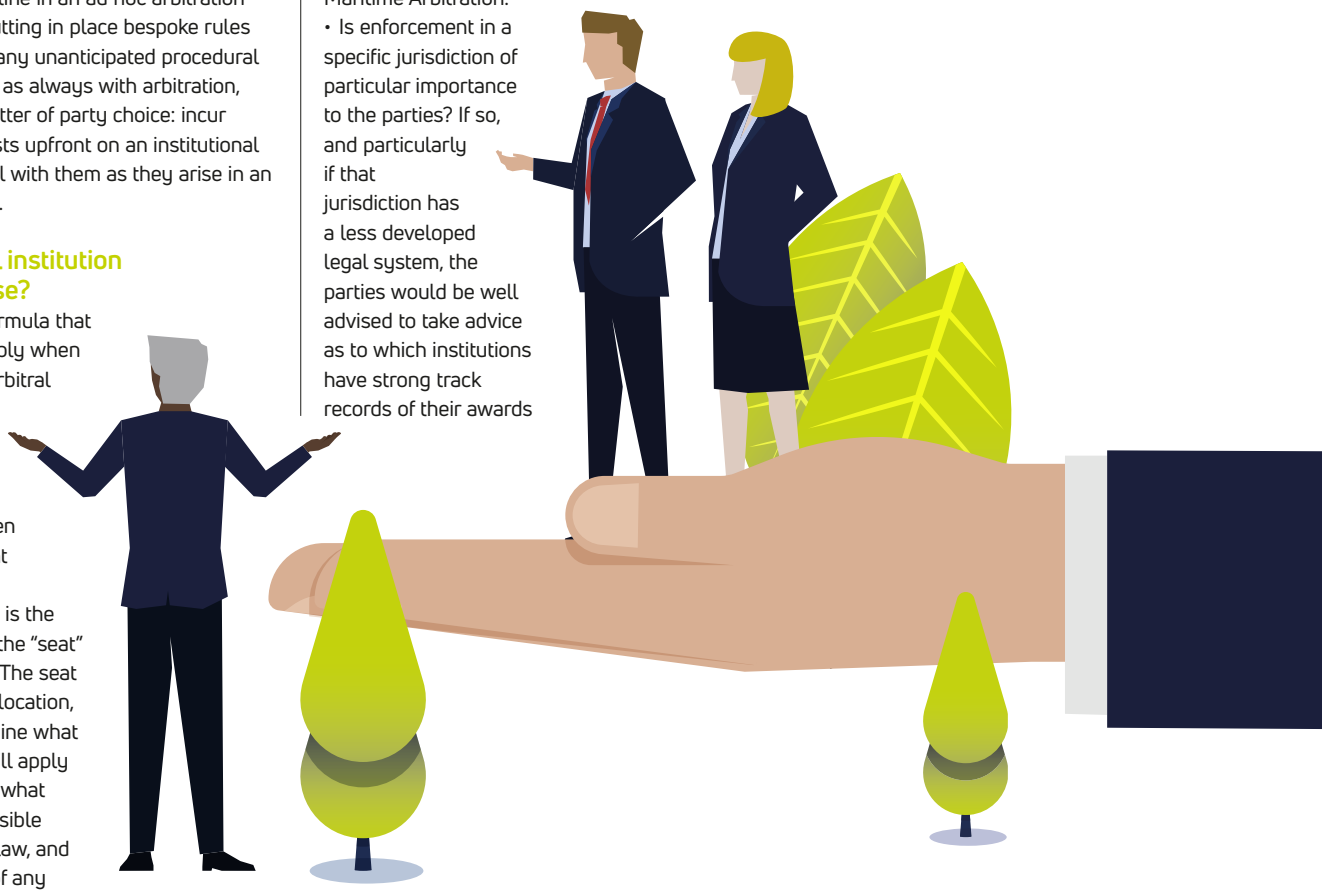
Once the parties have chosen their seat of arbitration, they should consider which arbitral bodies would be well placed to administer an arbitration with that seat: which institutions have a proven track record of producing robust arbitral awards in that jurisdiction? In some cases this will lead to a straightforward choice: for example, a choice of London as the seat of an arbitration might well lead the parties to select the LCIA as their arbitral body. That said, the choice of seat is independent of the choice of arbitral institution: for instance, it is perfectly legitimate for parties to name London as their seat of arbitration but to choose the Paris-headquartered ICC as their arbitral institution if they have particular reasons for doing so (for example if they have used the ICC before and are familiar with and confident in its workings).

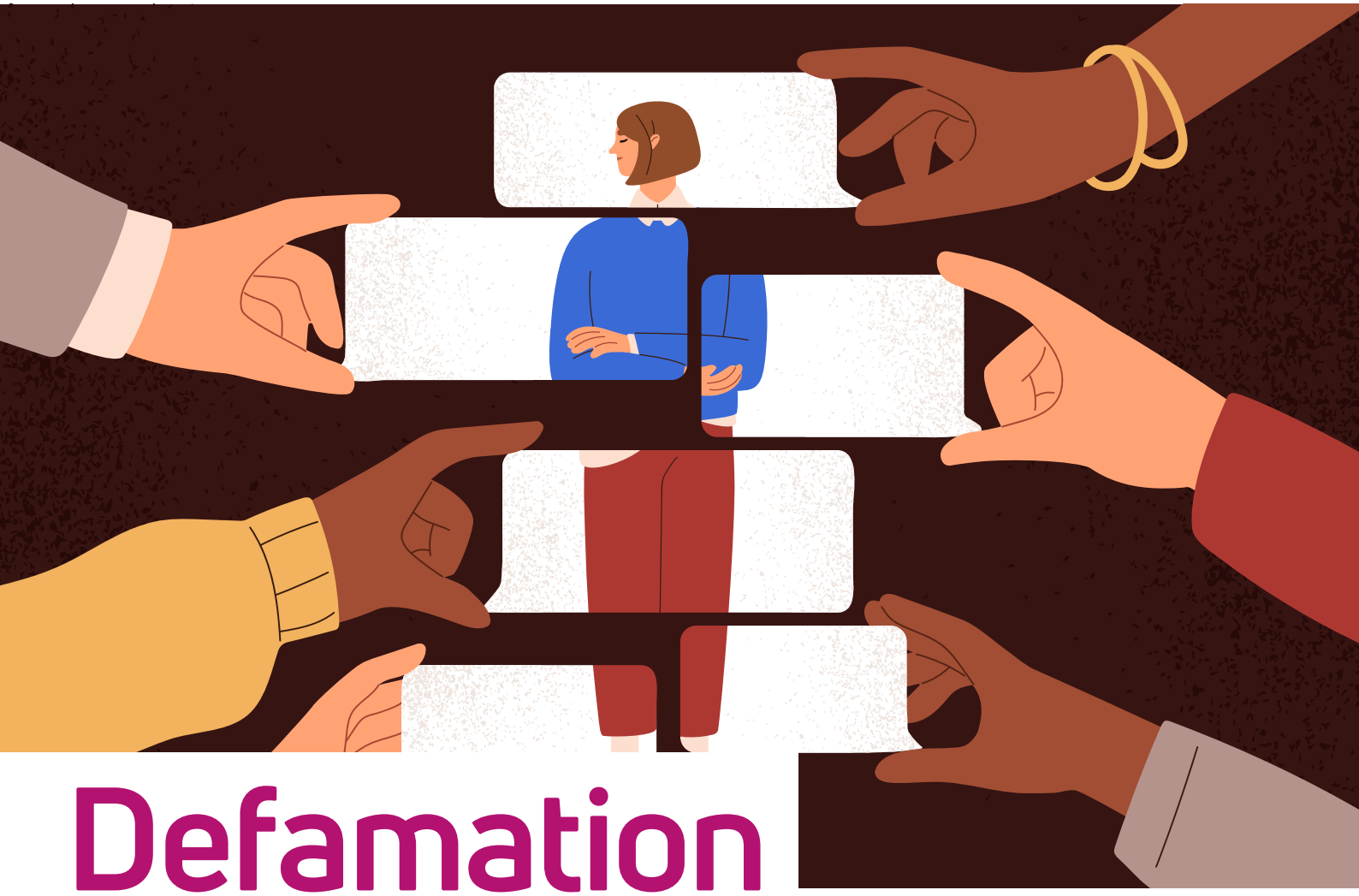
In some cases, however, more case-specific factors will apply. For example:

- Is the dispute likely to involve a particular technical specialism? If so, there are a plethora of specialist arbitral bodies to choose from, with prominent examples being the Court of Arbitration for Sport and the Paris Chamber of Maritime Arbitration.
- Is enforcement in a specific jurisdiction of particular importance to the parties? If so, and particularly if that jurisdiction has a less developed legal system, the parties would be well advised to take advice as to which institutions have strong track records of their awards being enforced in that country's courts.
- Cost can also be a factor. Although all arbitral institutions charge fees, some (particularly well-known, well-established institutions) may be higher than others. Similarly, different institutions calculate fees in different ways: some charge according to the value of the dispute, whereas others base their charges on the time their staff actually spend on the arbitration. In some cases, factors such as these can make a real difference to the cost of an arbitration.

The number and variety of arbitral institutions worldwide means that there will always be an arbitral institution – large or small – which is a suitable choice for parties to a potential dispute. Lawyers who are experienced in handling international arbitrations can advise at an early stage as to which arbitral body would be best placed to manage a dispute and ensure the certainty, flexibility and efficiency which are the hallmarks of international arbitration.

Jared Oyston is a partner with Brodies LLP





Defamation in the modern age

Fergus Whyte describes the major changes introduced by the Defamation and Malicious Publication (Scotland) Act 2021, newly entered into force

Major changes occurred in Scotland's law of defamation with the coming into force of many of the provisions of the Defamation and Malicious Publication (Scotland) Act 2021 on 8 August 2022.

The changes made by the Act are extensive. A full discussion of its impact and the previous law would require considerably more space than the present piece, but there are a number of major changes that legal practitioners may wish to bear in mind.

Changes to the actors in defamation

One significant change that the Act makes is to exclude certain public authorities from bringing defamation proceedings against people (s 2). This seems to be a statutory reflection of a longstanding policy of the law in England & Wales (*Derbyshire County Council v Times Newspapers* [1993] AC 534 (HL)). It appears never to have been definitively clarified whether this principle applied in Scotland, though it seemed likely that Scots courts would follow that approach.

The definition of public authorities in s 2 covers a core set of central government institutions, local authorities, and courts and tribunals. It does, however, also contain a more general definition relating to those exercising functions of a public nature (s 2(2)(d)), and it remains to be tested where the limits of this will lie. Universities, for instance, present an interesting example of a body whose status may be mixed or uncertain. Questions relating to individual officers (under s 2(5)) and elected representatives of public bodies would seem to fall outside the definition, allowing them to bring defamation actions, but this may provide grounds for further debate as well.

Changes to the concept of publication

The concept of publication and when an act of publication leads to liability has also been significantly altered by the Act. In the first instance, defamation now requires that a third party becomes aware of the statement, whereas this was not previously the case in Scots law (s 1(2)).

The Act also limits the ability to bring proceedings against those regarded as "secondary" publishers, by defining who is generally responsible for offending publications (s 3(1) and (2)). It also clarifies that certain acts, including hyperlinking, will not generally attract liability for defamation (s 3(3) and (4)). There is also some future-proofing in the Act by allowing for regulations to extend the types of acts that will be considered "secondary" forms of publication (s 3(6) and (7)).

Setting thresholds for defamation claims

One of the most significant changes in the Act, and perhaps the most contested, is the creation

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"The truth defence also clarifies the degree to which the statement or statements complained of are required to be true"

of a "serious harm to reputation" requirement. Section 1(2) requires that any defamatory statement cause, or be likely to cause, serious harm to reputation in order to be actionable. A similar requirement was inserted into English law and has been the subject of discussion up to and including at UK Supreme Court level (*Lachaux v Independent Print Ltd* [2019] UKSC 27). It will be interesting to see how the Scots courts interpret this requirement and how this serves as a practical or procedural point of initial dispute in defamation proceedings in Scotland. Section 1 also clarifies that, for trading entities, serious harm is equated with serious financial harm rather than any more intangible harm to reputation of the business.

Section 19 of the Act sets up a significant barrier to what has sometimes been called "libel tourism", by imposing particular requirements in proceedings brought in the Scottish courts against persons domiciled outside the UK. This section requires a court to be satisfied that Scotland is "clearly the most appropriate place to bring proceedings in respect of the statement" (s 19(2)). How this works will have to be tested in practice, particularly as the section also preserves the doctrine of *forum non conveniens* (s 19(4)).

Section 32 also reduces the limitation period for defamation (and malicious publication) actions from three years to one year, amending s 18A of the Prescription and Limitation (Scotland) Act 1973. It also inserts new language to govern re-publication or subsequent, substantially similar publications of a statement and when they will or will not become actionable (s 32(3), inserting a new s 18A(1A) into the 1973 Act).

The nature of defamatory statements

Section 1 also codifies previous case law definitions of "defamatory" statements as generally being those that "[tend] to lower the person's reputation in the estimation of ordinary persons" (s 1(4)). This is likely to be no great change in the law, but does provide a clear definition of what is in issue in defamation actions.

Changes to defences

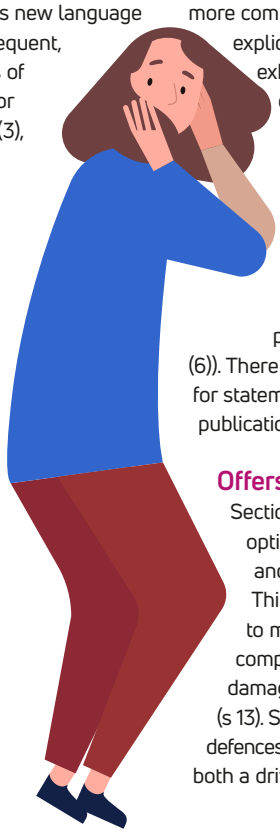
The historical defences to a defamation action have undergone some reorganisation, and are now to be known as the defences of truth (s 5) and honest opinion (s 7). The truth defence also clarifies the degree to which the statement or statements complained of are required to be true, in order to address cases where there is some marginal variance between the truth and the exact nature and effect of the statements (s 5(2)).

The defence of statements in the public interest arose out of the House of Lords case of *Reynolds v Times Newspapers* [2001] 2 AC 127, and has been referred to by the Inner House on a few occasions (see, for instance *Curran v Scottish Daily Record* [2011] CSIH 86; 2012 SLT 359). Section 6 of the Act follows English statute law (s 4 of the Defamation Act 2013) in creating a new, statutory defence called publication on a matter of public interest. Clarifying the existence of such a defence and setting the criteria for its exercise is helpful, though the defence itself is likely to be highly fact dependent (as acknowledged in s 6(2)), and some benefit may still be found in referring to the prior law.

Changes to privileges

The Act also makes some changes to the defences of absolute and qualified privilege. First, the contemporaneous reporting of court proceedings is definitively placed within the category of absolute privilege (by s 9 of the Act).

The changes to qualified privilege are slightly more complex. It is worth noting that the Act explicitly does not seek to codify an exhaustive list of occasions on which qualified privilege will apply, and there is still scope for innovation within the common law in this area (s 11(7)(b)). It does, however, provide an entire schedule of situations in which qualified privilege will apply as well as the conditions under which these types of qualified privilege may be exercised (s 11(2) to (6)). There is also an explicit qualified privilege for statements in scientific and academic publications (s 10).



Offers of amends

Sections 13 to 17 of the Act provide new options in respect of the resolution of and remedies for defamation actions. This is principally by allowing defenders to make offers of amends to pursuers comprising corrections, apologies and damages or other steps as necessary (s 13). Such offers must be made before defences are lodged (s 13(2)(a)), creating both a drive to resolve cases but also likely additional urgency in the initial stages of a defamation action.

The Act then defines the conditions for acceptance and enforcement of offers to make amends, including enforcement by a court (s 14). It is worth noting that there are particular provisions dealing with offers of amends which are only partially agreed (e.g. the parties disagree as to damages or expenses – s 14(4)-(7)), and where offers are qualified (i.e. restricted to certain meanings – s 14(9)). The Act also dictates the consequences where both unqualified and qualified offers are rejected (ss 16 and 17). It will be interesting to see how these sections are relied on in practice and the effect which offers, even qualified ones, have on awards of damages and/or expenses.

Procedure

The Act also makes some procedural tweaks, such as removing any presumption that defamation actions are to be tried by jury (s 20).

There is also power for the court to make an order for the publication of a summary of its judgment where it finds for the pursuer in a defamation matter (s 28). The parties have the first go at agreeing this (under s 28(2)), but if not, the court will have to determine what is to be published and how (s 28(3)). There are also powers applying to open statements settling cases, and the removal of defamatory statements (ss 29 and 30).

Law of malicious publication

Lastly, as the name of the Act suggests, it also reforms the law relating to harmful statements other than those which are defamatory. It does this by abolishing the law of verbal injury and substantially defining the elements of the action for malicious publication (ss 21-27). This is a helpful reform of a messy area of the law. Whether this new clarity leads to a greater use of this delict remains to be seen.

Conclusion

The Act, though fairly short (with 40 sections and one schedule), represents a very substantial reform of numerous, important parts of the law of defamation and malicious publication. There is certainly more that could be said about its various provisions. The coming years will no doubt involve questions as to the application of its provisions, and likely litigation clarifying how it is to work in practice.

Fergus Whyte is an advocate at Arnot Manderson Stable with a background and interest in commercial, intellectual property, media and information technology disputes

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A pledge against the consumer? A reply

Professor Andrew Steven, lead commissioner on the Scottish Law Commission report which led to the Moveable Transactions (Scotland) Bill, responds to questions raised over the level of consumer protection offered

IN his article "A pledge against the consumer?" (Journal, August 2022, 18), Alan McIntosh argues that unless amended, "the Moveable Transactions (Scotland) Bill could easily become a charter that leads to an expansion of sub-prime lending and logbook loans in Scotland, targeted at the most vulnerable". He observes that this "may have not been the intention of the Scottish Law Commission".

It certainly was not. Consumer protection issues are covered throughout the Commission's *Report on Moveable Transactions* (Scot Law Com No 249, 2017). An example is the recommended prohibition on consumers assigning future salary, which I assume Mr McIntosh supports. The preceding discussion paper (Scot Law Com DP No 151, 2011) has several questions on consumers. It is of course legitimate to question whether the policy conclusions reached are correct. The broad concern expressed, however, is that consumer issues were not given sufficient consideration. This article attempts to address that concern.

The consultation process

Mr McIntosh writes: "The narrative that has surrounded [the bill], primarily focusing on the impact for businesses... blindsided many consumer rights organisations, who did not participate in its drafting". It is true that the major focus of the bill is business finance. Nevertheless, the proposals for consumers were included in four preceding consultations: (a) the abovementioned discussion paper consultation in 2011; (b) a draft bill consultation in 2017; (c) a Scottish Parliament Economy, Energy & Fair Work Committee consultation in 2020; and (d) a targeted Scottish Government consultation in 2020-21. As Mr McIntosh acknowledges, Citizens Advice Scotland ("CAS") responded to (c) expressing concerns. The Scottish Government engaged with CAS in (d). At an earlier stage, the Commission met with the since-abolished Consumer Focus Scotland, who were content with the proposed consumer protections.

The Commission is currently undertaking a project on heritable securities. This is of huge relevance to consumers. I urge all interested parties to engage with the Commission on that project now, rather than only on the resultant bill being introduced to the Parliament.

Security and debt

The Moveable Transactions (Scotland) Bill is primarily a property law measure. It will reform the law of assignation and the law of security over moveable property. A new type of non-possessory security called a statutory pledge will be introduced.

The bill does not deal directly with debt. Therefore interest rates and regulation of lenders are outwith its scope. Statutory pledges will be subject to the general provisions of the Consumer Credit Act 1974, legislation which is a reserved matter under the Scotland Act 1998.

Mr McIntosh's concerns about sub-prime lenders and logbook loans in respect of vehicles surely relate to the possibility of very high interest rates. But these are for the Financial Conduct Authority to regulate. It already has a price cap power on high cost, short term credit loans. Moreover, its new consumer duty, which introduces higher standards of consumer protection, comes into force next year.

In contrast, the evidence given to the Commission by the Asset Based Finance Association (now part of UK Finance) was that the availability of the statutory pledge would facilitate lower interest rates, which will benefit consumers as well as businesses. Excluding consumers entirely from the statutory pledge because of a risk of predatory lenders would be like prohibiting cup finals and pop concerts because of ticket touts.

Closing a gap

In current property law, non-possessory secured *acquisition* finance is available through hire-purchase, but a consumer wanting to grant security over a moveable item which that individual *already owns* has to pawn it. This means relinquishing possession. That of course is impractical in the case of many assets. But take the case of a valuable painting. That can be pawned, but it must come off the owner's wall. The pawnbroker has to incur costs storing it which are ultimately passed on to the consumer. The ability to have a non-possessory security over such an item is therefore attractive. The FCA's regulatory powers will still apply.

Our law accepts that consumers, subject to legislative protections, can grant a security over their house without having to give up possession of it. Therefore, it is surely not contrary to public policy for the same to be possible for high value moveable assets such as vehicles, as it is internationally.

Monetary threshold for consumer property

The Commission recognised that it would be unacceptable for ordinary household goods to be subject to a statutory pledge. Consumers should not have such items seized by a creditor. These are excluded from diligence under the Debt Arrangement and Attachment (Scotland) Act 2002. But having considered the nuanced and complex list of exempt goods in that Act, the Commission favoured a simpler

approach of a monetary threshold to be set by statutory instrument. Items worth less than that figure would be excluded. In its report, the Commission suggested £1,000, drawing on a figure used in the 2002 Act.

Mr McIntosh argues that this is not "sensible" when compared with excluding property exempt from attachment. He says that it "could mean essential items like settees could become the subject of securities". But this would be contrary to the Commission's policy set out above. There are two mechanisms to ensure the implementation of that policy. First, the £1,000 figure could be increased during the bill's parliamentary passage or subsequently by statutory instrument. Secondly, the bill also contains a provision allowing ministers by statutory instrument to exclude types of asset being the object of a statutory pledge granted by a consumer.

As Mr McIntosh mentions, vehicles worth less than £3,000 are exempt from diligence. The figure was increased from £1,000 by the Bankruptcy (Scotland) Amendment Regulations 2010 (SSI 2010/367), but the 2002 Act itself was not amended. This underlines that the diligence provisions are complex.

Hire-purchase compared

Concern is also expressed that not all the special rules for hire-purchase in the 1974 Act are applied to statutory pledges granted by consumers. In one major respect, however, the statutory pledge provisions are more protective.
A court order will always be required for enforcement. For hire-purchase this is only necessary where one third of the debt has been repaid.

The "one half" rule in hire-purchase, whereby a consumer who has paid half the debt can terminate the agreement and have no further liability (1974 Act, ss 99 and 100), is missing from the bill, having been duly considered by the Commission: *Report on Moveable Transactions*, paras 27.25-27.26. The rule works easily in hire-purchase, where the property remains owned by the *creditor* until the final payment is made and the hirer triggers the option to purchase. Meanwhile, the debt is paid off in instalments. (The debt is the purchase price of the asset and interest.) The consumer is entitled to return the property to the creditor/owner and the transaction ends. Sometimes, the creditor suffers a loss due to the different rates of repayment of the debt compared to depreciation in value of the asset; at other times (for example, the current buoyant market for secondhand cars), the creditor makes a profit.

In contrast, with statutory pledges the property is owned by the *debtor*, like a house subject to a standard security. The debt may be unconnected to the acquisition of the asset. Where, for example, the asset has become worth much less than the outstanding debt it would be unfair on the creditor to have to accept the asset rather than full repayment. Furthermore, there would have to be a mechanism for the creditor to obtain an unchallengeable title to the property, which would be highly problematic to achieve where the debtor was insolvent. The Commission recognised nevertheless that if lenders were actively to use statutory pledges to defeat the "one half" rule for hire-purchase, the position would need to be reviewed. It is more likely, however, that statutory pledges will secure loan transactions where, as at present, consumers are protected by FCA rules, not by any statutory right to repay only part of the loan.

Sole traders

Mr McIntosh argues for certain protections in the bill to be applied to sole traders as well as private individuals. Again this was a policy issue considered by the Commission. Having a monetary threshold for sole traders would prevent a statutory pledge being available over lower value equipment which collectively might be worth thousands of pounds and could secure a loan. The requirement for a court order to enforce against business assets would increase costs for which the sole trader would ultimately be liable. The bill treats sole traders as consumers in relation to their property which is not used wholly or mainly for business purposes.

Assignation

The bill if passed will create a Register of Assignations. Registration will be an alternative to notifying the debtor, which is necessary under the current law to complete an assignation.
Mr McIntosh worries that consumers may be adversely affected by not being notified that a debt due by them has been assigned. This is to overlook the debtor protections in the bill. The net effect of these is that normally, unless there is notification, the debtor can pay the assignor and have no liability to the assignee. (The main reasons for registration are to protect the assignee in the event of the assignor's insolvency and to allow the assignation of future claims, as is possible in other countries.)

Moving forward

Mr McIntosh's concerns deserve proper consideration, particularly with the current cost of living crisis. My purpose here has been to show that the Commission duly appreciated the consumer dimension and weighed its policy choices carefully. The overall aim of the bill is to improve access to finance. In including consumers within its remit, but with specific protections, it follows the position with regard to reform of secured transactions laws internationally. It will be for Parliament to determine the exact content of the reform, taking account of the FCA regime, which is primarily responsible for consumer protection.

Andrew Steven is Professor of Property Law at the University of Edinburgh, and was lead Scottish Law Commissioner on the *Report on Moveable Transactions*

Stephen McGowan surveys some current issues around taxi and private hire car licences, one of which, he fears, is set to cause significant resource problems for licensing authorities

I imagine many dedicated readers of the Journal may, like me, have gone out for a nice meal or a drink with friends, and been struck by the lack of taxi or private hire car provision. The night-time economy is, in a general sense, imperilled, and the lack of transport in the later hours is a significant barrier to a properly prosperous night-time sector. Many drivers fell out of the trade during the pandemic and have gone on to other careers. It is a period of tumult for the hardworking taxi and private hire drivers of Scotland; and in turn, for those who seek to use their services.

A significant change in the trade generally is the move away from traditional telephone bookings and the ever-increasing reliance on apps. Those who have used taxi or private hire booking apps will see the benefit in the details provided: the name of the driver, the car make, model and registration number, as well as in some cases live updates on location. A recent English case revolving around the use of a booking app makes for interesting reading about an age old imponderable – what is the difference between a taxi and a private hire car? These are two separate licences issued under the Civic Government (Scotland) Act 1982.

Waiting to serve

In fact, there are actually five types of licences which relate to this trade: a taxi operator licence (the vehicle), a taxi driver licence (the driver), a private hire car operator (the vehicle), a private hire car driver (the driver), and a booking office licence. Joe Public might simply refer to a "taxi" as a catch-all term – but don't let an actual taxi driver catch you calling a private hire car a taxi!

Section 23 of the 1982 Act defines a "taxi" as "a hire car which is engaged, by arrangements made in a public place between the person to be conveyed in it (or a person acting on his behalf) and its driver for a journey beginning there and then". The key difference is that a taxi can, to use the English phrase, "ply for hire". In other words, it can pick up a fare from the street without being booked in advance. A private hire car cannot do this: it must be pre-booked and cannot accept a random fare.

This brings us to *R (United Trade Action Group Ltd) v Transport for London* [2022] EWCA Civ 1026 (22 July 2022). In this case the issue revolved around whether a parked private hire car, or a car driving around waiting to be assigned a job via an app was acting, illegally, as a taxi. The Court of Appeal was firm in its view that such behaviour did not cross the line into acting as a taxi, following earlier decisions (*Reading Borough Council v Ali* [2019] 1 WLR 2635, and *Cogley v Sherwood* [1959] 2 QB 311) which required there to be both "solicitation" and "exhibition".

While an English case, this chimes with the equivalent position in Scotland and is helpful to appreciating the nuance between the two types of licence in the app-using world we all live in. A private hire driver in their car waiting to be allocated a booked fare via the app, who is not soliciting fares in the street or exhibiting the car as available "there and then" – to use the Scottish language – has not crossed the red line.

Virtual hearings and party applicants

The Coronavirus (Recovery and Reform) (Scotland) Act 2022 has now made permanent the facility for licensing boards and committees to offer hybrid or fully virtual hearings, a staple of the lockdown experience for licensing lawyers across the country. It is safe to say that the majority of taxi/private hire licence holders "appear" as party applicants, without representation. There are numerous cases I am aware of where I or my colleagues across the licensing bar have witnessed cases where applicants have "appeared" holding their smartphones while standing in their kitchen, walking around the streets, or even in one infamous case involving a private hire driver, with his phone in a dock inside his car – as he was driving.

While the virtual offer allowed business to be done during lockdown, concerns remain about livelihood-altering decisions being made where it may be that the seriousness of the hearing is not fully understood in the virtual environment. As these options are here to stay, it makes it very important that authorities underline the formality or importance of matters in their citations and calling letters.

Tax burden for authorities

There are changes on the horizon in Scotland which

"Joe Public might simply refer to a 'taxi' as a catch-all term – but don't let an actual taxi driver catch you calling a private hire car a taxi!"

will affect both taxi and private hire car drivers equally. They relate to the addition of tax checks as part of the licence process. The UK Government has been exploring the use of the licensing system to introduce "tax conditionality" measures for some time – this was first proposed back in 2016. On 20 July 2022 it was announced that the 1982 Act will be changed, from 1 April 2023, to introduce a tax check requirement for applicants for these licences. The new law will require applicants to undergo a bespoke check to confirm they are tax registered. Licensing authorities will have to establish that the tax check has been completed before they process an application.

There are a number of issues around this which I and other commentators have raised with the UK and Scottish Governments, and HMRC. A key concern for local authorities is the impact on resource, and the knock-on effect on the delivery of their licensing function generally. There are thousands of these applications, and this extra step will create delays – not just for the applicant in hand, but applicants for all the myriad other licences for which the local authority licensing staff are responsible.

We shall have to see just what these new checks will mean for processing times and delays; but there remains for me a wider, more fundamental concern about the legislative precedent being set – and that surrounds the principle of improper use, for which there is longstanding jurisprudence in Scotland. In short, I suggest that a licensing regime should not be used to "get at" some mischief but should be focused solely on the purpose for which the regime was created. Is it the job of the licensing authority to be a guardian for tax propriety? Where art thou, HMRC?

Proper purpose

The list of cases which support the idea that licensing decisions should be based on the proper purpose of the licensing regime is a long one: *Stewart v Perth & Kinross Council* [2004] UKHL 16; *Spook Erection Ltd v City of Edinburgh Council* 1995 SLT 107; *Gerry Cottle's Circus Ltd v Edinburgh District Council* 1990 SLT 235; *Bantop Ltd v City of Glasgow District Licensing Board* 1990 SLT 366; *Brightcrew Ltd v City of Glasgow Licensing Board* [2011] CSIH 46; *Bapu Properties Ltd v City of Glasgow Licensing Board* (22 February 2012, unreported); and goes back to *Dunsmore v Lindsay* (1903) 11 SLT 545, indicating the vintage of the proposition in Scots law. The point was perhaps most recently ventilated in the context of the 1982 Act in *McCluskey v North Lanarkshire Council* [2016] SC HAM 3, the now famous "burger van" case.

In *McCluskey* the council sought to ban burger vans from being located near schools on the grounds of the nutritional value of the food being offered, which it was said was of detriment to the children. The council was, in short, using the licensing system to address perceived issues around child obesity, and therefore the question was one of vires.

Sheriff Smith makes a number of points which draw out the relevance of vires and proper purpose (at para 65): "That obesity among the general population and children especially is considered problematic is not in dispute. That elected representatives wish to confront this problem and take steps to promote healthier lifestyles is to be commended. Neither of these is the issue in this case. The issue is whether the defender, as a licensing authority, has the power to impose this particular condition upon the licences of street traders. In my judgment it does not." And further (at para 96): "Imposing a condition because one has to be seen to be doing something is an ulterior purpose and not a licensing purpose."

I consider that, had a licensing authority sought to impose a tax check via a licence condition or local policy, a licence holder would have had good grounds for challenge. In the present case, as this is an amendment by Parliament to the primary legislation, the question is not one of the vires of licensing authority decision making. Nevertheless, as a licensing lawyer it jars with me to have the licensing system used to address a non-licensing mischief, no matter the desirability.

While it may be argued by some that ensuring taxi drivers are properly registered for tax purposes speaks to their "fitness", I consider that to be too remote – too alien to the purpose for which the licensing regime exists, especially when other, existing laws are in place for which the purpose is a direct one.

Properly applied, licensing systems should be focused on the purpose of the licence, and not a panacea.

Stephen McGowan is head of Licensing (Scotland) at TLT LLP

Families across frontiers

International travel, and post-Brexit residence restrictions, are bringing more situations where family law and immigration issues combine. Amanda Masson and Ashley Fleming highlight two cases, and some of the key rules

The post-Brexit, post-pandemic era heralds new challenges for family law specialists.

Borders have opened up again, but free movement of people between EU member states is no longer a concept on which we can rely. Clients are beginning to look further afield than our European neighbours for solutions to the challenges they and their families face, too.

We have been struck by the spike in instructions involving an international element in recent weeks. More and more often we find ourselves collaborating to find practical legal solutions.

This article will explore the immigration dimension of family and child law scenarios, highlighting the benefit of seeking guidance from an immigration specialist in family law scenarios involving international families.

We begin by considering two real life scenarios which coincidentally both involve family creation rather than separation. The first example draws on the facts of a reported case; the second on the bare bones of an ongoing case with the details changed to protect client anonymity.

X, Y and Z

The case of *Re X, Y and Z (Children: Parental Orders: Time Limit)* [2022] EWHC 198 (Fam) contains elements of immigration law, EU law, fertility law and the law of jurisdiction, though it is essentially a child law case about the time limit for lodging an application for a parental order following a surrogacy arrangement.

A married same sex couple, TT and RR, decided to start a family using TT's sperm and donor eggs. The couple lived in Denmark. TT was a British citizen; RR a Danish citizen. The respondents, Mr and Mrs HH and Mr and Mrs JJ, were US citizens. Mrs HH and Mrs JJ acted as surrogates. TT and RR had deliberately opted to work with a surrogate in the US due to the perceived certainty around parentage in terms of surrogacy law there.

When twins X and Y were born, the couple obtained a declaratory judgment from the court in Oregon to the effect that they were considered their legal parents, enabling them to return to Denmark with the children to live as a family there. X and Y had Danish passports and Danish citizenship as well as US citizenship.

TT was present when Z was born in California some two years later. RR and the twins joined the new arrival in California before returning to Denmark as a family when Z had been issued with her US passport. TT and RR were recognised as her legal parents under a pre-birth order obtained in terms of the law of California.

In 2019 the couple tried to register their daughter as a Danish citizen, to be told by the authorities that they were not recognised as her legal parents under Danish law. Z could not obtain Danish citizenship because of that absence of the status of legal parents; further, the authorities rescinded X and Y's Danish citizenship.

The children were threatened with deportation. TT had British citizenship, and on the basis of that the three children were able to be registered as British citizens with acquired permanent residence in Denmark on 16 December 2020, a mere two weeks before the UK left the EU. The births were re-registered in Denmark. TT was registered as the "father" and the surrogates registered as each of the children's "mothers".

Luckily the family had relocated to the UK in 2021, therefore TT had resumed his domicile of origin thus establishing a basis for jurisdiction for the application for parental orders in respect of each of the children, albeit outside the statutory time limit.

Thankfully this tale has a happy ending. The court drew upon various legal principles to reach the right decision to secure the welfare of the children.

Satisfaction of immigration requirements is essential to the establishment of legal parentage.

The adoption of P

A young Scottish man (AB), having travelled to Cambodia to do voluntary work, chances upon a young child who has recently lost his mother. He secures legal guardianship of the boy in Cambodia. This makes him legally liable to support the child financially. The relationship goes further than that. The child sees our protagonist as his father in every sense.

Following his return to Scotland, AB establishes a successful business operating between Scotland, Cambodia and the UAE. His family is truly international, with the child spending time between each of the countries in which his father lives and works. In order to be able to move freely with his son and to secure schooling, AB decides to pursue adoption. He wishes to be recognised as the child's legal parent, primarily to consolidate a relationship already enjoyed in practical terms but also to facilitate the child's education and residence with his father. Without having legal parentage the child cannot travel freely between the countries in which he would live, learn and holiday.

Pursuit of the adoption required consideration of the law around jurisdiction and legal status, partly to be able to comply with immigration requirements of numerous countries which in turn would enable AB to fulfil his parental responsibilities and those financial obligations created by the earlier award of guardianship.

Parentage becomes in part a vehicle for satisfaction of immigration requirements.

These scenarios are essentially about surrogacy and adoption, but both highlight beautifully the complex issues which can arise for international families.

British citizenship

British citizens and certain Commonwealth citizens have the right of abode in the UK. This means that they are allowed to live or work in the UK without any immigration restrictions. In other words, they will not need a visa to come to the UK and there is no time limit on how long they can spend in the UK. Those individuals who do not have the right of abode are subject to immigration control (unless otherwise exempt), and will generally require permission to enter the UK.

What are the key concepts?

British citizenship

Birth in the UK does not make a child automatically British; citizenship depends on the nationality and/or immigration status of the parents at the time of birth.

For those based overseas and considering starting a family, one consideration may be where any child is born. It is an important consideration, as the decision can have an impact on the child's, and potentially any future grandchild's, rights and entitlements to British citizenship.

British citizenship is normally passed down one generation to children born outside the UK, provided the British parents are not themselves citizens by descent. This would mean a child might automatically become a citizen if born outside the UK to a British parent, but could not automatically pass on their citizenship to their children born overseas. That said, in certain circumstances the child may be eligible to apply to register as British depending on their personal circumstances.

Immigration control

For those individuals who are not British citizens and do not have the right of abode in the UK, they will usually have to consider the visa routes available to them when relocating to the UK. The visa options will largely depend on an individual's personal circumstances, for example whether they are coming to the UK to join family or for work.

When relocating it is necessary to consider the position of all family members hoping to relocate as part of the family unit, including any children. Where both parents have already relocated, or are relocating to the United Kingdom (or where one parent is relocating and the other is deceased), the immigration rules generally permit them to bring their children provided the visa requirements are met. These usually include the child or children being under the age of 18 at the date of the visa application and that they will be adequately maintained and accommodated on arrival.

However, where one of the parents is going to be based in the UK and there is a surviving parent who will remain abroad, the position is more complicated. This will often require the incoming parent showing that they have sole responsibility for the child's upbringing or that there are serious and compelling circumstances which would make the child's exclusion from the UK undesirable and that suitable arrangements have been made for their care. Such cases will be fact specific and depend on the circumstances and evidence that can be put forward in support of an application.

Conclusion

One article cannot do justice to the myriad and complex considerations to be taken into account in assisting international clients. Both the scenarios discussed above highlight the wonderfully creative options which are potentially available to clients wishing to establish themselves as legal parents. Both scenarios also highlight the difficulties which can arise in terms of movement of parents and children.

We must look to immigration law in order to identify potential barriers, but also to find potential solutions. As the world becomes smaller and more accessible, it is increasingly important for family law specialists to open their minds to other practice areas, seeking specialist input from colleagues practising in other disciplines where appropriate.

Amanda Masson is partner and head of Family Law, and **Ashley Fleming** a senior associate, Immigration, with Harper Macleod LLP

Pointers to the future

In addition to recent cases of interest, this month's civil court roundup notes the appearance of two publications of relevance to the way civil litigation will be conducted in coming years

Civil Court

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

Before reviewing some recent judgments, I want to mention two developments in the civil litigation world of considerable significance to practitioners.

First, on 20 July 2022, the sheriffs principal (all of them) issued Guidance for Court Users: Proceedings in the Sheriff Courts, its purpose being "to achieve a consistency of approach across the sheriff courts wherever possible". By all accounts, sheriff court practices and procedures during the pandemic and its aftermath have varied significantly, and while the guidance acknowledges that existing local guidance must still be considered, this attempt to restore order and a degree of certainty to our civil justice system should be welcomed by confused practitioners – not to mention sheriffs. The main provisions are that parties will be expected to address the court on the mode of hearing for proofs of all kinds, but the default position for proofs and "other substantive hearings" is that they will be conducted in person. On the other hand, "All procedural business and debates will be conducted by electronic means unless otherwise directed by the court."

Secondly, the Scottish Civil Justice Council has published *The New Civil Procedure Rules – Second Report*, a 40 page document outlining a model for ordinary procedure which would apply in both the Court of Session and the sheriff court. The SCJC is going to be drafting a new set of rules and will then be consulting "end users" (that means you, I suppose). Case management and the modernisation of processes are the main features, and the report should be read fully and carefully by anyone interested in how we may be litigating in the years to come.

Preliminary proof

A case that says much about how we litigate now (and gives cause for thought about how we might in future) is *Tollerton v Highland Fuels Ltd* [2022] SC ABE 12 (1 April 2022), a commercial action in Aberdeen Sheriff Court. The pursuers had oil delivered to their domestic tank one day in November 2019; the next day, the tank was found to be leaking. They made a claim under their own insurance policy, and the insurers of the oil suppliers were eventually roped in on the basis that the condition of the tank was such that it should not have been filled. Lawyers, loss adjusters, claims handlers, contractors and specialist subcontractors all became involved, in the way they are nowadays. An action was raised in March 2021, and about eight months later the defenders instructed a forensic engineer. They requested an opportunity for him to inspect the tank, but it had been removed from its location and scrapped. The court heard a preliminary proof on the sole question of whether the pursuers would be entitled to lead evidence of the condition of the oil tank at the date of delivery. Sheriff Mann held that the best evidence of the condition of the tank on the day of delivery was the tank itself, that such evidence had been lost due to the fault of the pursuers (per their insurers), and that the defenders were prejudiced by its absence. Any secondary evidence of its condition would be inadmissible at a proof.

Apart from an interesting analysis of the best evidence rule, the case raises a number of procedural points of interest. First, this being a commercial action, the court was involved in managing the procedure whereby a preliminary proof was thought to be appropriate. It seems that at one of the case management conferences the defenders had intimated that they would be objecting to any secondary evidence of the condition of the tank, and "given the critical importance" of the issue of its condition, the preliminary proof had been assigned.

Secondly, the proposed proof was initially to take place by way of affidavit evidence only. Thirdly, after determining that the affidavit evidence was not really in dispute, the sheriff proposed to the parties that a joint minute of admissions should be lodged, agreeing all the facts, and this was duly done. Fourthly, after considering two sets of written submissions and further oral submissions from the parties the sheriff pronounced an *ex tempore* judgment. He was subsequently asked to issue a written decision, which runs to 18 pages and includes a detailed analysis of the facts and the law on best evidence.

I cannot remember any other case where the sole question of the admissibility of evidence was the subject of a preliminary proof. One would usually expect such a question to emerge during any proof at large and to be debated at that point rather than treated as a distinct and preliminary matter. I am curious as to whether this decision was considered by the parties to be conclusive of the merits of this action as a whole.

Another example of a preliminary proof was

> *"I cannot remember any other case where the sole question of the admissibility of evidence was the subject of a preliminary proof"*

C & L Mair v Mike Dewis Farm Systems [2022] CSOH 47 (1 July 2022). The preliminary issue was prescription, although it was agreed that the preliminary proof was not going to resolve the case conclusively, regardless of how it went. There would have been justification for simply having a proof at large – in fact a proof before answer on the merits had already been assigned. The defenders had installed a slurry tank for the pursuers in 2012. In 2016 there was a ground slippage which significantly damaged the tank. The pursuers alleged the defenders had been negligent in 2012 and this was denied. There were material disputes on causation and other facts, not to mention the legal arguments on prescription. Putting it simply, if the start date for prescription was 2012, the action *might* be time barred. If it was 2016 then it definitely was not.

Again, this was a commercial action and there had obviously been prior discussion among the parties and the court as to the appropriate procedure to follow, notwithstanding that a proof, unrestricted in any way, had already been assigned. It is worth noting the justification for having a preliminary proof on prescription in this case: it was "agreed that the relevancy of the defender's averments about prescription could usefully be discussed at debate. It was common ground that if those averments were held to be irrelevant, the court could dispose of the defender's... plea at this stage, allowing parties... to focus exclusively on the merits of the action at proof, with some saving in time. That advantage was tempered to some extent by the fact that it was also common ground that if the defender's averments were held to be relevant, the issue of whether the pursuer's claim had in fact prescribed would require to be held over until the proof, for inquiry into the pursuer's averments that prescription had not in fact operated" (per ss 11(3) and 6(4) of the 1973 Act).

Pleadings

The Sheriff Appeal Court issued another judgment bearing on the principles and practice of good written pleadings in *Parks of Hamilton (Townhead Garage) v Deas* [2022] SAC (Civ) 18 (13 April 2022). As the court put it rather bluntly, "The present case is a straightforward, simple consumer claim made complicated by the manner of pleading." It is unnecessary to dwell here on the exotic background to the case,

which concerned claims by the purchaser of a Bentley car which was alleged to be unfit to tow a caravan, nor on the detailed averments under consideration. Both parties had instructed experts who had prepared reports which were lodged. The defenders (appellants) sought to have the action dismissed at debate and argued, among other things, that there was a lack of specification in the pursuer's pleadings. The sheriff rejected the criticisms of the pleadings and allowed a proof before answer. The defenders appealed unsuccessfully.

Three main points can be taken from Sheriff Principal Anwar's judgment. First, on the question of fair notice, "The appellant can be taken to readily understand that which it has chosen to investigate, that upon which it has sought the opinion of an expert and that which it has chosen to aver in its answers. Viewed from that perspective, it cannot legitimately be said that the respondent has failed to aver her case with sufficient clarity and precision to allow the appellant to understand the case made against it."

Secondly, a supplementary argument was that, as the expert report for the respondent had not been referred to or incorporated into the pleadings, it could not be referred to at the debate. The appellant relied on the opinions of the court in *Gordon v Davidson* (1864) 2 M 758 and the well known and oft cited – though not often properly understood – case of *Eadie Cairns v Programmed Maintenance Painting* 1987 SLT 777, which feels increasingly like a relic from a bygone age. Distinguishing *Eadie Cairns*, the court said: "In the present case both parties had lodged expert reports, and made reference to these without objection, at the diet of debate... [The sheriff] has examined the terms of the respondent's expert reports to assess the question of whether the appellant's assertion of material prejudice was well founded. She was entitled to do so."

Finally, the appellants criticised the terms of one of the pleas in law (the term "clutching at straws" springs to mind). The court said: "As a general rule, a plea in law should be a distinct legal proposition applicable to the facts averred. A plea in law requires to be read together with the facts averred. In the present case, while the plea in law could be better expressed, it cannot legitimately be said that it fails to give fair notice of the respondent's case in law."

Appeals

A further reminder of the difficulties of appealing against findings in fact can be found in *Hastings v Finsbury Orthopaedics* [2022] UKSC 19 (29 June 2022) – the metal hip replacement case. The Supreme Court provides a clear and succinct confirmation of what the Lord President had said earlier in the case: "In order to reverse a determination of fact, the appellate court must be satisfied that the Lord Ordinary erred in law, made a finding without any basis in the evidence or demonstrably misunderstood, or failed to consider, relevant evidence. Otherwise, it can only interfere with the findings of fact if it concluded that the Lord Ordinary was plainly wrong, in the sense of his decision not being capable of being reasonably explained or justified. None of these requirements is satisfied in the present case and, accordingly, it is not open to this court to interfere with the Lord Ordinary's findings."

That is a formidable hurdle to overcome. It has been said often enough recently, and it remains to be seen whether future appeals (at all levels) properly take this into account.

Uplift in fees

There are few things more likely to stir up the interest of court practitioners than a decision on expenses, but I suspect that any decision on an uplift of fees might just do it. In *McFarlane v McGregor* [2022] SC GLW 18 (10 June 2022), Sheriff Cubie had to consider an opposed motion for an uplift of 100% in fees, with the opponent suggesting little or no uplift would be appropriate. This was an action of count reckoning and payment, described by the opponent as "run of the mill", although I think most practitioners might find those terms mutually exclusive.

The legislation which permits the court to allow a percentage increase in the standard fees "to cover the responsibility undertaken by the solicitor in the conduct of the cause" is the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (SI 1993/3080). There are seven separate factors which can be taken into account, and the pursuers argued that five of them applied. The motion was opposed in relation to each factor. After reviewing all the circumstances in detail the sheriff allowed a 70% uplift, without ascribing any particular value to any specific factor or factors. The decision is, of course, a discretionary one, and it is trite to say that such motions depend entirely on the facts and circumstances of each individual case. One point to note was the sheriff's view that, where counsel had been involved for the duration of the action, no uplift should be considered in respect of the "legal skill" factor.

Group proceedings

I should briefly mention the tea pickers case, *Campbell v James Finlay (Kenya)* [2022] CSIH 29 (27 May 2022), which is the most prominent of the new actions of this type. The Lord Ordinary had granted permission for such proceedings to be raised – an essential requirement in the legislation – and the defenders challenged that decision on the basis that the claims of the employees were not "the same as, or similar or related to, each other" as provided in the Act. The Inner House had no difficulty in finding that he had been correct to grant permission. It is not difficult to foresee further procedural and substantive challenges to these claims in the future.

Ex tempore judgment

Earlier articles have raised the issue of *ex tempore* judgments, and *M v M* [2022] SAC (Civ) 19 (30 June 2022) should hopefully provide clear and authoritative guidance to the bench and the bar on the limitations in their use. As the court explained, the rule (OCR, rule 12.3) about *ex tempore* judgments was designed to ease the burden on sheriffs and to provide parties with a swift determination by not requiring a written note following a proof in every case. *Ex tempore* decisions pronounced in relation to simple disputes need only address the central contentious issues. If a note is requested under rule 12.3(3), however, it must take the form of an adequately explained decision, complete with findings in fact, findings in law and the reasons for the decision.

This was a contentious family action. The sheriff heard evidence from eight witnesses including the parties and an expert witness. In addition, several affidavits were lodged by both parties. The proof lasted five days. It is fairly obvious that this could not be characterised as a simple dispute. Although the sheriff's approach was motivated by a desire to give the parties a quick decision, he failed to understand what was required of him according to the rules. The Sheriff Appeal Court judgment contains a helpful explanation of how the rules should be applied in circumstances where such a judgment is appropriate – and where a subsequent request for a written note is made. There is also a very useful section on the adequacy of judicial reasoning which cites the leading authorities on that topic, and the case is well worth reading, copying and keeping for future use.

Briefings

Intellectual property

ALISON BRYCE,
PARTNER, DENTONS
UK & MIDDLE EAST LLP

In June 2022, the UK Government announced the outcome of its consultation on intellectual property and artificial intelligence. In a bid to make the UK an "AI superpower", the Government will be introducing new provisions in copyright law to allow data mining and analysis of datasets for commercial use. These new changes will impact on many Scottish businesses, in particular those that rely on the use of, or access to, large datasets, for example comparison websites and research companies.

Background

Under current UK copyright legislation, a company must first obtain permission if it wishes to access and commercially exploit mined data from a third party. Often this will be given in the form of a data mining licence, with a payment being made to the third party for access and use of its data. Under existing rules, if a person accesses or exploits such data for commercial purposes without consent, this will most likely constitute copyright infringement. Currently, the only exception to the text and data mining rules is in relation to non-commercial purposes, such that a person can freely use and access mined data as long as this is for non-commercial purposes.

What will be changing?

The outcome of the Government's consultation will see the introduction of a new exception to allow text and data mining for commercial purposes. Text and data mining means using computational techniques to analyse large amounts of information to identify patterns, trends and other useful information. It is widely used in research, pharma, marketing and business analysis. It is anticipated that the rationale for this change is to encourage innovation and AI development in the UK.

The new provisions will undoubtedly favour businesses that use and access mined datasets, with limits being placed on the owners of mined data. For example, where a third party has lawful access to the data, rights holders will no longer be able to restrict the right to run computational analysis on a dataset and will not be able to contract or opt out of the exception. The consultation did, however, stress the need to maintain certain safeguards for rights holders, including their ability to restrict access to their data, or indeed charge a fee for access.

How will this affect businesses?

The Government has said that introducing an exception that also extends to commercial data mining will bring benefits to a wide range of stakeholders, including researchers, AI developers and small businesses.

Companies that rely on being able to access and use mined data commercially will benefit from not having to obtain permission from multiple rights holders and pay an additional licence fee – it is hoped we will start to see the benefits in a range of sectors from public health to the creative arts.

However, the biggest benefit will most likely be felt by those in the realm of AI. The new provisions will encourage companies to use mined data in ways that were previously limited. It is hoped this will encourage the development of AI and will directly benefit AI companies providing data mining and related services in Scotland and, indeed, the rest of the UK. We expect to see the legislative proposals in 2023, which should provide greater clarity in how this exception can be utilised.

Agriculture

ADÈLE NICOL, PARTNER,
ANDERSON STRATHERN LLP

In July the Scottish Government issued a consultation, *Land Reform in a Net Zero Nation*, on further reform of Scotland's land ownership and use. It closes on 25 September.

The core aims of land reform policy are set out in the Government's Land Rights and Responsibilities Statement ("LRRS"):

- to increase diversity of land ownership;
- to bring about changes in land use;
- to create more opportunities for communities to engage in decision making about the land around them, including the benefits it brings.

The consultation is in 15 parts, of which part 9 is the most relevant to the agricultural tenanted sector.

Part 2 outlines a forthcoming bill that will deal with the impact of Scotland's concentration of land ownership, based on a Scottish Land Commission discussion paper which included recommendations for changes in legislation such as:

- the requirement for significant land holdings to engage in, and publish, a management plan;
- a land rights and responsibilities review process, to take effect where there is evidence of adverse impacts; and
- a new public interest test that would determine whether significant land transfers or acquisitions are in the public interest.

The proposals are aimed at tackling perceived issues associated with large scale ownership and concentration of land ownership. The Government intends that these proposals would apply to large scale landholdings (part 4 sets out relevant criteria), and not to smaller landholdings and family farms.

Part 5 suggests ways to strengthen the LRRS; part 6 asks whether land management plans and strategy documents, which some landowners already proactively publish, should be made compulsory. Part 8 proposes the withdrawal of public funding for not adhering to LRRS requirements.

The Government proposes to take forward the Commission's recommendation for a public interest test, which would assess, at the point of transfer of a large scale holding, the risk of a party holding excessive power which acts against the public interest. Part 7 considers this issue and what types of landholding would be in scope for such a test.

Land use tenancy

Part 9 emphasises the Government's commitment to addressing climate change and biodiversity. It proposes a new form of flexible tenancy, the land use tenancy, which would help tenants to deliver multiple eligible land use activities within one tenancy. These could include woodland management, agri-forestry, nature maintenance and restoration, peatland restoration, and agriculture. This would allow tenant farmers to undertake a combination of agricultural and non-agricultural activities which support climate change mitigation and help to restore and preserve nature.

The current system of agricultural and small landholding tenancies is perceived to lack flexibility for a combination of agricultural and non-agricultural activity. This is an issue the Tenant Farming Commissioner has already identified in relation to carbon capture.

A land use tenancy would set out the terms and conditions of the tenancy for a tenant and their landlord, including:

- the key elements that both would agree to at the start of the tenancy;
- how benefits would be shared;
- the range of activities throughout the tenancy; and
- the process for bringing the tenancy to an end.

"This would help tenants to deliver multiple eligible land use activities within one tenancy. These could include woodland management, agri-forestry, nature maintenance and restoration, peatland restoration, and agriculture."

The consultation proposes that tenant farmers and small landholders would be able to convert their tenancy into a land use tenancy, to allow diverse land management activities to deliver climate and environmental objectives without leaving the landholding.

It is suggested this framework would provide a transparent system, encourage better use of land and aid retention of people in rural areas.

From a landlord's point of view it is also suggested that the land use tenancy would provide a transparent framework for creating a hybrid of agricultural and non-agricultural land use. Landlords may have concerns at the prospect of existing contracts being rewritten.

Carbon capture

The Tenant Farming Commissioner has already identified concerns about inflexibility in relation to carbon capture schemes, and has issued an *Interim Guide to Securing Tradeable Carbon Credits*. It warns that anyone considering entering a carbon credit scheme needs to consider the implications relating to change of ownership of land over the course of a project.

It says: "Entering a scheme generally involves a long-term commitment, and disengagement part way through may prove difficult or expensive, so careful appraisal of all the implications is a necessity."

The guide also highlights that a tenant or landlord wishing to acquire carbon credits from woodland creation or peatland restoration will face constraints not experienced by an owner-occupier.

Landlords need to consider who has the right to carbon which is normally comprised in the soil. Carbon capture does not easily fall within the definition of "agriculture", and it is difficult to see how a tenant can take advantage of the carbon rights; or is carbon a mineral which is generally reserved to a landlord under an agricultural tenancy? Conservation activities fall within the rules of good husbandry, but that would not give the tenant a right to the carbon. The existing framework would seem to prevent both tenant and landlord taking advantage of carbon trading. The carbon is not part of what is leased, and harvesting it is not an agricultural activity, but unless it has been explicitly reserved, which is unlikely, the landlord would have no rights either. If there were a resumption clause, the extent of the rights required to be resumed may well be a fraud on the lease. It may be that both parties voluntarily agree something that looks similar to a land use tenancy.

The remaining parts of the consultation cover reform of smallholdings; transparency – who owns, controls and benefits from Scotland's land; and other land related reforms (fiscal and taxation, community benefits and natural capital).

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Debt solutions

The Scottish Government seeks views on its proposals for action to ensure both formal debt recovery (diligence) and statutory debt solutions are fit for purpose. See consult.gov.scot/accountant-in-bankruptcy/debt-solutions-and-diligence/
Respond by 7 October.

Equality evidence

The Scottish Government seeks comments to inform its next Equality Evidence Strategy. See consult.gov.scot/housing-and-social-justice/equality-evidence-strategy-2023-25/
Respond by 7 October.

Parole Board Rules

The Scottish Government is consulting on proposals to modernise and simplify the Parole Board (Scotland) Rules 2001. Topics include a new procedure for non-disclosure information and appointment of a special advocate. See consult.gov.scot/justice/parole-board-changes/
Respond by 12 October.

School uniforms

Although imposition of school uniform rules lies largely with school heads, the Scottish Government committed itself to introduce statutory guidance to address equality issues and reduce the cost of uniforms. Views are sought on scope and principles. See consult.gov.scot/learning-directorate/school-uniforms-statutory-guidance-scotland/
Respond by 14 October.

Restraint in schools

The Government seeks views on implementing draft guidance based on recommendations of the working group that addressed concerns about the violation of children's human rights by physical restraint and seclusion in schools. See consult.gov.scot/learning-directorate/physical-intervention-in-schools/
Respond by 25 October.

Online computer misuse

The Home Office is seeking information on how to tackle unauthorised access to online accounts and personal data offences under the Computer Misuse Act 1990. See gov.uk/government/consultations/unauthorised-access-to-online-accounts-and-personal-data
Respond by 27 October.

Domestic abuse register

Conservative MSP Pam Gosal seeks views on her proposed bill concerning domestic abuse, which would require convicted offenders to go on a register, and provide for rehabilitation measures in relation to offences, collation and reporting of data, and domestic abuse education in schools. See parliament.scot/bills-and-laws/proposals-for-bills/proposed-domestic-abuse-register-scotland-bill
Respond by 20 November.

Hybrid/distance working

The UK Office of Tax Simplification seeks evidence of trends in relation to hybrid and distance working, including across borders, and whether tax and social security rules are flexible enough to cope. See gov.uk/government/consultations/review-of-hybrid-and-distance-working-call-for-evidence
Respond by 25 November.

Corporate

EMMA ARCARI, ASSOCIATE, WRIGHT, JOHNSTON & MACKENZIE LLP

Recently there have been several developments in relation to data protection. On 18 July, the Government introduced the Data Protection and Digital Information Bill, together with a policy paper on artificial intelligence, and the next day, the Information Commissioner's Office put forth its strategic three year plan ("ICO25") at its annual conference. On 21 July the US and UK released a joint statement announcing their intention to bring into force the Data Access Agreement.

Data Access Agreement

Taking the last development first, the agreement (signed in 2019) aims to further co-operation between the UK and US, by

allowing investigators in both nations to gain better access to vital electronic data, and law enforcement agencies to access evidence needed to "bring offenders to justice". Although the statement declares the agreement will not "compromise or erode... human rights and freedoms", it will allow the US to access personal data and it is uncertain how this will affect the UK's EU adequacy status. The agreement will come into force on 3 October 2022.

ICO25

ICO25 is open for consultation until 22 September and will be finalised in the autumn. One of the main initiatives proposed involves reducing compliance costs for businesses by publishing previous advice and additional compliance templates. However, given that the new bill will overhaul the ICO and its operations, how ICO25 progresses after the consultation should be carefully considered.

Data Protection Bill

The bill is long and complex, and aims to allow more innovation and reduce compliance burdens (but see below). Focusing on the many changes to existing data protection and privacy legislation, some of the notable changes currently proposed include:

- **Personal data** – A more subjective approach would determine whether information is personal data or anonymous. This could have the effect of certain data being regulated in the EU but not the UK, and could affect the UK's EU adequacy decision.
- **Cookies and tracking proposals** – Again, contrary to the European route, the bill proposes to relax consent requirements regarding cookies, particularly for information collected for statistical purposes or in order to improve a website or service. Web users are also to be given the choice of opting in or out of cookie tracking while in a browser.
- **Data protection impact assessments** ("DPIAs") and records of processing activities ("ROPAs") – DPIAs are proposed to be scrapped and replaced with the need to carry out an assessment of high risk processing (in what way this will differ from DPIAs is yet to materialise). Similarly ROPAs are to be replaced with a "record of processing personal data".
- **DPOs** – The obligation to have a data protection officer in some circumstances is to be removed. Instead, public bodies and high risk processing entities are to appoint a "senior responsible individual", to be a member of, as opposed to reporting to, senior management. Without further guidance, this could mean external/outsourced DPOs will face issues.
- **The ICO itself** – Significant changes are proposed here, with the abolition of the office of Information Commissioner, a new governance structure and the transfer of functions to a new statutory body, the Information Commission, with new powers (such as to compel individuals' attendance at criminal/civil interviews). In short, the Government is proposing much more involvement with the new body (it has been described elsewhere as political control), which is along the lines of other regulators but again potentially at odds with the EU, should it consider there to be no UK independent regulator of personal data.
- **Automated decision making** – The right of individuals to challenge automated decision making is proposed to be reframed and restricted to significant decisions, as opposed to decisions that produce legal or similarly significant effects. This will form part of the next discussion in relation to AI systems and proposed regulations on these.
- **DSARs** – At the moment data subject access requests are to be treated as "purpose blind", a right available no matter the purpose behind the request and in the majority of cases at no cost to the individual. The bill proposes a broader range of circumstances in which organisations can refuse to respond, or charge a fee where DSARs are regarded as "vexatious or excessive" (such as requests not made in good faith, intended to cause distress, or an "abuse of process").
- **International transfers of personal data** – Several significant changes are proposed, including a new "data protection test", met if the standard of protection for processing is "not materially lower" than that of the UK GDPR and parts of the Data Protection Act 2018. However the requirement to consider whether the country has an "independent authority" (an EU requirement) would be removed; there would be a new requirement to consider "the constitution, traditions and culture of a country", on which no guidance is available as yet.
- **Privacy and Electronic Communications Regulations 2003** – The level of enforcement fines is to be on the GDPR scale (£17.5 million or 4% of global turnover, whichever is higher), among other changes.
- **Legitimate interests** – The existing balancing test for some activities would be dropped.
- **Access to customer/business data** – Regulations can be proposed to make data holders disclose customer and business data to customers or third parties (as well as in relation to the processing/retention of such data).

The bill is at an early stage and we recommend paying close attention to its progress. If it passes, although there will be some wins for organisations (such as in relation to DSARs), they come at a cost of lowered standards for individuals, a potential dual regulatory approach for entities which operate internationally, greatly increased fines for marketing breaches and overall a general increase in complexity. Given some organisations are still reeling from GDPR, we remain hopeful that the UK will not lose its EU adequacy decision in relation to data, but taking into consideration the aims of the bill together with the US/UK Data Access Agreement, does this seem likely?

Sport

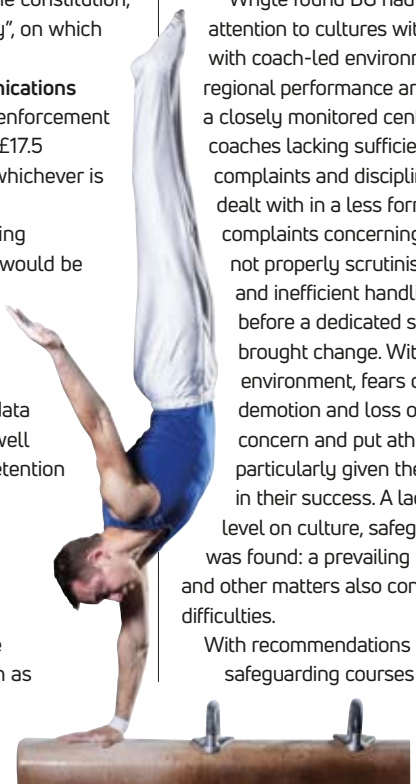
BRUCE CALDOW, PARTNER, HARPER MACLEOD LLP

In recent years, there have been enquiries in various sports and growing calls for independent reports, investigations and assessments of issues. In some instances, an independent and extensive review is essential.

The Whyte review of gymnastics in England is one such example. Multiple allegations of emotional and physical abuse prompted an examination of whether British Gymnastics ("BG") failed to prevent behaviours and preferred the pursuit of performance success; where welfare and wellbeing sat in BG's culture (including clubs and coaches); whether safeguarding complaints had been dealt with appropriately; and whether persons had felt unable to raise complaints. Physical abuse complaints focused on chastisement, overtraining (with consequences), and withholding of food, water and access to the toilet. Emotional abuse ranged from shouting to excessive weight management.

Whyte found BG had paid insufficient attention to cultures within the sport, with coach-led environments, including in regional performance areas (rather than a closely monitored centralised one), and coaches lacking sufficient CPD. Safeguarding complaints and disciplinary issues were often dealt with in a less formal manner. Low-level complaints concerning poor practice were not properly scrutinised; inconsistency and inefficient handling were prevalent, before a dedicated safeguarding manager brought change. Within the performance environment, fears of deselection, demotion and loss of funding caused concern and put athletes off complaining, particularly given the coach's essential role in their success. A lack of focus at board level on culture, safeguarding and welfare was found: a prevailing focus on commercial and other matters also contributed to cultural difficulties.

With recommendations including improved safeguarding courses and training,



welfare provision for athletes, and education and standards being improved and reinforced, the Whyte review directed cultural change. Through recommendations for improved case management and independent panels overseeing complaint assessment, coupled with higher level board responsibility, Whyte called for improved governance arrangements, with independent, suitably experienced board members, a communication pathway with athletes, and more effective oversight from the board (by taking responsibility for implementation of the correct processes).

Lessons for other bodies

The Whyte report prompts the need for sports and sports practitioners to consider reaffirming knowledge and understanding of the seriousness of physical and mental abuse. The lasting impact of poor coaching behaviours on athletes should not be underestimated, and should be factored into the response of the sports body, shaping the institutional response and culture in addressing complaints. Low level complaints must be given formal attention for welfare within the sport to be prioritised and not overlooked in the pursuit of performance goals. Experience highlights that it can be difficult for complaints to be forthcoming (given the coaching relationship), but also a reluctance to become involved in a process where live evidence may be required and be challenged. Sports bodies can manage their proceedings to support welfare, manage risk and avoid quasi-judicial proceedings, with appropriate care, focused not only on the interests of the complainer, but carefully considering how to respect the interests of the person accused of perpetrating abuse.

Formal proceedings are not required where poor practice or conduct is admitted and guidance, training and sanctions are agreed. An agreed disposal, to the sports bodies' liking, will help reduce administrative resource and allow focus on improvements for the benefit of the athlete and sport alike. If cases are contested, care needs to be exercised if oral evidence is to be given; traditional cross-examination is often not permitted by sports procedural rules, but if an inquisitorial approach is followed by the expert panel examining the allegations, the evidence can be well tested. That may include questions posed, for the accused, through the chair.

While such an approach can be unpopular with defence agents, in private proceedings of this nature there is no inherent unfairness or unlawfulness in it. Stopping proceedings becoming aggressive and offputting to participants is essential, while allowing accused respondents to assert their position is important. Formal proceedings can be particularly daunting for persons who may have suffered or witnessed abuse, and while the rights of the accused must be balanced, the accused should be best judged by the expert panel interrogating the evidence and assessing it against the rules and their expert knowledge of the sport, safeguarding issues and the law.

A blend of experience is often invaluable in assessing whether there is a risk of harm and what response the sport should take. Punishment may not be the obvious or best approach, but is often necessary; changing behaviours, correcting practice and some possible reconciliation may often be keenly explored. Any person facing proceedings is of course entitled to a fair procedure, which observes the principles of natural justice and the rules of the sport in question. That typically equates to the right to present evidence and submissions; to have knowledge of and to be allowed the opportunity to comment on the evidence and submissions made to the decision-maker; and to a reasonable opportunity to present their case.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Michael Thompson

A complaint was made by the Council of the Law Society of Scotland against Michael Thompson of Thompson Family Law, Glasgow. The Tribunal found the respondent not guilty of professional misconduct and remitted the complaint to the Council of the Law Society of Scotland in terms of s 53ZA of the Solicitors (Scotland) Act 1980.

There were two allegations of misconduct. The first was that the respondent had unduly delayed in providing a file to another solicitor. The file was requested on an urgent basis on 26, 27 and 30 April and 1 May 2018. The Respondent did not respond or provide any of the file until 1 May 2018. The second allegation was that the respondent had failed or unduly delayed in providing the client's new solicitor with portions of the file which were not included within the material sent on 1 May 2018 and were not received despite further requests from the new solicitor on 14 and 30 May and 31 July 2018.

There were shortcomings in the way the mandate was handled. The respondent admitted these. He did not attach the whole file to his email of 1 May 2018. The disc which was later provided was also incomplete and appeared to have "bounced" between the two firms without the respondent being aware of the problem. When considering the whole circumstances and the respondent's degree of culpability, the Tribunal did not consider that the conduct constituted a serious and reprehensible departure from the standards of competent and reputable solicitors; however, it considered that the respondent might be guilty of unsatisfactory professional conduct, which is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional service. He could have done more to oversee that the implementation of the mandate was successful and to apply his mind to the reasons why his firm was receiving repeated emails from the new solicitors. Accordingly, the Tribunal found the respondent not guilty of professional misconduct and remitted the case to the Society under s 53ZA.
The secondary complainer's claim for compensation would be dealt with by the Professional Conduct Subcommittee when the case was remitted.

David Ewan McNeish

A complaint was made by the Council of the Law Society of Scotland against David Ewan McNeish, formerly of Optima Legal (now Alston Law) and now of DWF LLP, Edinburgh. The Tribunal found the respondent guilty of professional misconduct, *singly* in respect that (a) in the period between 7 January 2015 and 3 February 2015 he failed to act in the best interests of Dr A by liaising directly with her, and (b) in the same period he failed to ensure that he had the authority of Dr A for his actings in the conveyancing transaction; and *in cumulo* that (c) in the same period he failed to communicate effectively with Dr A while she was a client of the firm.

The Tribunal censured the respondent and directed him to pay £1,250 by way of compensation to the secondary complainer.

The respondent communicated only with Dr A's then husband Mr A, and ultimately took title in Mr A's sole name to a property they were buying, as Dr A, who did not have a right of permanent residence in the UK, was not accepted as a mortgage borrower. The Tribunal was satisfied that the respondent's conduct amounted to a serious and reprehensible departure from the standards of competent and reputable solicitors. The respondent had failed to recognise that the individuals concerned were separate clients with separate interests. Instructions can be taken through one of two clients. However, a solicitor must ensure that they have the authority of all clients to take instructions in that way and that this continues throughout the transaction, particularly when there are material changes to the nature of that transaction.

Registration: over a decade?

A response to the Society and Registers of Scotland Q&A on the Land Register arrear, published last month

Property

J KEITH ROBERTSON,
RETIRED SOLICITOR, KINGUSSIE

What are we to make of the Q&A session (Journal, August 2022, 34) with Chris Kerr, Registration and Policy Director at Registers of Scotland ("RoS")? He maintains that RoS is "on track", referring to published key performance indicators. These show that, in the April-June quarter, RoS cleared 5,390 cases against the target of 2,000 to 5,500 pre-2022 arrear cases. As such cases totalled over 109,000 in July 2022, even achieving 5,500 cases per quarter would mean this arrear not being cleared until 2027.

Drilling down into the actual clearance figures, however, discloses the truly concerning situation shown in the table below. It appears that more recent cases are being cleared far more quickly than older ones. (I should clarify that, while the headline 109,000 figure includes ancillary applications such as standard securities, the table figures are based on dispositions only, as provided by RoS to the Economy & Fair Work Committee ("EFWC") of the Scottish Parliament and available on the correspondence section of the committee's website.)

Apart from 2017, these figures are based on limited data and may vary drastically over a longer period. The 2017 figure, however, includes data provided in March 2021 and therefore gives a picture of progress over the past 15 months in reducing the oldest part of the backlog. It makes sad reading. On a forward projection, it will take over a decade for some 2017-2019 applications to be completed by RoS. Quite how anyone can believe that taking so long to register a disposition is in any way acceptable, is beyond me. It also seems to completely contradict the Keeper's evidence in March to the EFWC in which she predicted that "it is going to take us at least three years to get rid of the whole backlog – probably a little bit longer – but during that period the age of the backlog and the number of cases in it will keep shrinking".

Having an application stuck in the backlog is also not a "risk free" situation, as the Keeper appeared to suggest, when she emphasised that the legal effect of registration backdates to the date when the application was received, that homeowners are not restricted from dealing with their property while the application is outstanding, and that applicants can request an expedited application where necessary.

I was recently contacted by a fellow solicitor who had an application stuck in the backlog, involving a right of access which required dual registration. The servient tenement was sold and the new owner refused access as dual registration was not complete. It seems reasonable to suppose that, as many of the arrear applications are transfers of part, more of these will involve dual registration servitudes. "Risk-free"? I think not. Urgent completion of all registrations, including those in the arrear is therefore essential.

Chris Kerr suggests that rejections are a rare occurrence. According to RoS's own figures, the number of "over three months" rejections averaged 90 in June and July, compared with some 1,100 disposition applications completed from the arrear. An FOI request has revealed 502 such rejections over the six months from January to June 2022, of which 181 related to the years 2017-2020. That does not seem to me to warrant description as "a rare occurrence". I can well understand why a solicitor described the situation as "a risk management nightmare".

Expedition is not really a solution either. Having to complete a lengthy application form and produce evidence of meeting the criteria is simply placing another unpaid burden on already overworked solicitors. In addition, the grounds for expedition are quite restrictive, length of delay not being one of them. In 2020-21, 728 requests for expedition were granted out of 1,359 applications, a 54% success rate. Given Chris Kerr's encouragement to contact RoS, perhaps he can tell us the current acceptance/rejection rate?

Finally, there are RoS's priorities. The latest five year plan (2022-27) sets out six strategic objectives of which number one is "deliver the benefits of a completed land register". The target for the arrear is stated to be to "continue to complete registration of older cases as quickly as possible". No date is given, but RoS confidently predicts that functional completion of the register will be achieved by the end of 2024. Its own figures give a target of 2.5 million addresses registered, with some 328,000 still outstanding in July 2022. At the current rate of about 4,600 per month, functional completion will not be achieved until 2028. One need only look on the ScotLIS Land Register map at how many gaps exist between registered properties to realise that even that date is unlikely to be achieved. Completion, functional or otherwise, of the Land Register by 2024 is clearly impossible and should be abandoned now to make clearance of the arrear RoS's prime objective, with all resources and targets dedicated to that end.

Chris Kerr states his willingness to return to these columns, so perhaps he would care to comment on these figures, all of which are, after all, from RoS's own statistics?

Total dispositions in arrear lodged in:	**2017**	**2018**	**2019**	**2020**	**2021**
FR and TP applications outstanding at 08/03/2021	3,744	**Not available**	**Not available**	**Not available**	**Not available**
Dispositions outstanding at 01/05/2022	3,130	11,778	14,451	15,869	23,007
Dispositions outstanding at 01/06/2022	3,081	11,661	14,281	15,580	22,520
Reduction over period	663	117	170	289	487
Monthly average reduction rate	**44**	**117**	**170**	**289**	**487**
No of months to eliminate backlog	70	100	84	54	46
No of years to eliminate backlog	5.8	8.3	7.0	4.5	3.8
i.e. backlog eliminated by	**2028**	**2030**	**2029**	**2026**	**2025**

The top team: three more years

As they begin their second three-year term, In-house Lawyers' Committee co-conveners Sheekha Saha and Vlad Valiente tell of what has been achieved in their first term and what they hope will come next

In-house

SHEEKHA SAHA AND VLAD VALIENTE, CO-CONVENERS, IN-HOUSE LAWYERS' COMMITTEE

In 2019, in a first for the In-house Lawyers' Committee (ILC), not one but two conveners were appointed. Now entering their second term, we caught up with Sheekha Saha, an in-house solicitor with Comhairle nan Eilean Siar in Stornoway, and Vlad Valiente, head of Governance & Assurance at Dumfries & Galloway Council, to ask them about the past three years, and their plans for the ILC now they have been reappointed.

You must have enjoyed working with each other, given that you are back for another three years. How have you found working together? Did it live up to expectations?

SS: Oh my, the stories I could tell! Before we threw our hats in the ring together, Vlad and I knew each other pretty well, from SOLAR (the Society of Local Authority Lawyers & Administrators), the ILC and just being part of the in-house community. The past three years have given us a lot of challenges both work-wise and in our personal lives and I'm just incredibly grateful for the strong partnership we have: one based on mutual respect, trust, honesty, patience, care for each other *and* about what we're doing; and last but not least, being able to share the tears as well as the laughs. Lots of laughs!

VV: We have known each other for a very long time and always got along brilliantly, which has undoubtedly helped in this co-convenership marriage. Our friendship has grown in the last three years as we worked closely together through the COVID period. We are very much aligned in our thinking and drive to represent the in-house community and do our very best as ILC co-conveners. This translates into a fantastic working relationship which allows us to manage our role effectively. The role is a complex and demanding one, so it has definitely helped to have two of us sharing the responsibilities and tasks. So, yes, it has definitely lived up to our expectations and I'm pretty certain it will continue to do so for the next three years.

You were first appointed in 2019. The world has changed a lot since then. How has the work of the ILC changed?

SS: Jings, 2019 seems such a long time ago. Like all things, the ILC has had to respond to the changing demands on it and the fast-moving changes around it. I think the biggest shift has been the almost universal adoption of online ways of working. That has meant greater agility, and flexibility in being able to get together – we can easily grab a quick half hour meeting, virtually face-to-face, whereas before we'd have been scheduling around in-person and travel. We've always been able to speak on the phone of course, but it is nice to *see* people. I think the work itself continues to be about supporting and promoting the membership – across education and training, celebrating in-house successes, increasing opportunities to connect and learn from each other, and supporting the next generation.

VV: The impact on all of us has been significant, and particularly the way we do our business. We were impacted in terms of our normal business and delivery of our workplan. Getting out and about the way we would have in the past, meeting the in-house community and other stakeholders at events and progressing our workplan was very difficult. In saying that, we have done a lot in the last three years and in some ways there has been more accessibility to our ILC meetings through the hybrid approach, saving time and effort for those not in the central belt and helping reduce our carbon footprint. In addition it has highlighted the need to provide a mechanism for the in-house community to communicate and interact, which is one of our main workstreams – an

online networking platform for the in-house community. We have adapted and improved as we learned from the COVID experiences.

The composition of the ILC has changed since you became co-conveners. What has this meant for its work?

SS: I think the ILC goes from strength to strength. I'm glad to see plenty of us on the committee, but more than the numbers I'm really pleased to see the representative spread across sectors: no one on committee is wearing their day-job hat as such, but it's really important that we have a wide breadth of practice experience as that directly impacts the breadth of our understanding of our membership.

VV: As mentioned earlier, we have a workplan with a number of tasks and projects we aim to deliver as a committee. Having more enthusiastic and driven "in-housers" to deliver these is always welcomed. We are all in the ILC to do the best we can for the in-house lawyers family, which is a broad church. It's important that we try as best we can to have representatives with different perspectives and levels of experience. We have a fantastic team with a brilliant mix of experience and perspectives, and very much look forward to continue working with them for the next three years. A brief mention to those members who have recently retired or moved on – their input throughout the years has been invaluable and we thank them so much for their contributions.

What were the biggest achievements of your first term?

SS: I'm immensely proud of the last three years. Despite the pandemic, we have seen continued energy across the sector; indeed in-house is growing. Keeping the lights on in the face of such a challenge is not to be underestimated – as a committee of volunteers, all with demanding day jobs, that we were able to keep up the level of service is a huge testament to the committee, the support from the Society and indeed the membership for continued engagement.

In terms of specifics there are lots: we've developed our CPD opportunities including our Best Practice Course and the Annual Conference, both of which are very popular and now work really well in the online environment as well as in person; and we are hopefully in the final stages of "The Platform" project, a few years in the development, which will provide an online, secure space for in-housers to gather, share practice challenges and ideas etc (watch this space!).

We've also started the champions initiative, in its early days and designed to increase membership connection for the purposes of shaping the ILC's work to better meet members' needs; and there are our trainee round tables which give in-house trainees (often the only trainee in an organisation) a space to connect with each other and the ILC, raise issues and celebrate good practice. I could go on!

VV: First and foremost, we have with the help of the Law Society CPD team delivered two very successful online In-house Annual Conferences: a lot of brilliant teamwork resulted in their success. Secondly we have continued to progress the workplan, which includes (amongst others):

- The online platform Sheekha mentioned.
- We continue to contribute to ongoing Law Society CPD events and the Journal, ensuring that the in-house lawyer's voice is represented and heard.
- We continue to improve our social media presence through LinkedIn and Twitter.
- We continue to grow the number of ILC champions, to be one of our main links between the ILC and the in-house community.

"We're passionate about meeting members' needs, so we'll be asking and listening to what members want and how they want it."

One thing the in-house community certainly has noticed is the shift towards remote working and more virtual communication, for example with the Annual Conference. Will we see more of this in future?

SS: I think the in-house community has shown a tremendous resilience and flexibility with the new ways of working. I think we're in a curious and fascinating phase of personal and business development now: the post-crisis phase of the pandemic, and emerging into a space where we can redefine how we work, no longer because of essential need, but now out of personal choice, optimal practice and that's a really interesting space to be in. It's not without its challenges, but exciting.

I hear lots of people craving a return to in-person events and engagement, but still very committed to the flexibility and time-efficiency of the online options. I'm really proud of the way the ILC adapted key things like the conference, to keep meeting members' needs throughout the pandemic. Will we do more of it in the future? We're passionate about meeting members' needs, so we'll be asking and listening to what members want and how they want it.

VV: Yes, absolutely. As mentioned previously we have learned and adapted from the COVID related impacts on how we do our business. Wider accessibility to our conference and other CPD events has always been an objective; virtual communication helps us to deliver that.

What have you learned about yourselves and your colleagues in your first term, that will help you in your second term, and in your professional lives?

SS: The experience has really confirmed a lot of positives: that we really *can* do; that we are a strong team who look out for each other and want to do more; that we are ambitious to do more. The ILC members are a seriously committed group, who get stuck in, are solutions focused, realistic and optimistic, and between them bring a huge range of experience and understanding of in-house practice and issues. It's a great place to be, looking ahead at the next three years.

VV: We can't ignore the COVID years, and therefore the main learning curve is probably that we can be much more resilient and adaptable than we gave ourselves credit for. That probably comes as second nature to in-house lawyers, but we need to celebrate that we successfully got through that period together as an ILC team and continued to deliver on behalf of those we represent. These successes, and resilience and adaptability skillsets, will make us stronger going forward as an ILC team but also personally in our professional and family lives.

What will be your top priorities for the ILC's next three years?

SS: Member services. The Society, and the ILC, need to continue to listen to the membership, the challenges of practice and support. I'd love to see even greater engagement and ownership by the membership for the Society's priorities – this is a statutory but also a members' organisation and we're always mindful of that.

VV: As referred to previously, the delivery of the networking platform is a key priority. We hope this brings real benefits to the in-house community, allowing us to share best practice and connect with other in-house lawyers for sounding board or guidance. As an ILC it will give us a platform for direct communication with the community and vice versa.

The Annual Conference will also continue to be a priority, with ongoing improvements based on our experience and feedback that we have received.

How do you plan to expand the reach of the ILC and to engage with more in-house lawyers?

SS: I'm really passionate about this. The online platform will provide secure space for in-housers of different sectors and practice areas to connect and share practice, ideas and so on. This is a fantastic opportunity to harness the enormous strength of the in-house sector and support that vital cross-collaboration that we all benefit from. We're also extremely keen to get back on the road and actually meet colleagues, sit down, hear first hand what their needs and challenges are and appreciate how these differ sector to sector, as well as locality to locality. The champions and round table initiatives will be part of that outreach too.

VV: We will continue to deliver the Annual Conference, continue to feed into the Society's CPD calendar and the Journal, and continue to improve our social media presence. In addition we will continue to recruit more in-house champions; and did we mention the online networking platform?

What does the future look like for in-house lawyers?

SS: Despite all of the personal and business challenges of the last two and a half years, the in-house community has expanded in volume and breadth. The benefits and rewards of in-house practice – for practitioners and their client organisations alike – are being recognised more and more. It's an exciting and desirable way to work: being able to provide a really tailored service, that is deeply understanding of the client organisation's needs, stressors and ambitions, all with the fundamental security of the quality and independence of the profession, which is so important. There are significant challenges ahead for all of us, personally and business-wise, navigating the legal and business landscape post-pandemic, post-Brexit, with the possibility of Indyref2 on the horizon and huge financial pressures across all sectors. That all said, and for all of the positives shared above, I'm undeterred, in fact bolstered by the resilience and growth of the sector; I'm only excited to get stuck in and continue to develop the support the ILC can give the in-house community. The future looks vivid and exciting. Bring it on!

VV: The future is bright, the future is in-house. As a community, we have many traits and attributes which will stand us in good stead moving forward. We are by nature problem solvers, collaborators, influencers within our respective businesses. As long as we continue to apply and improve on these traits, we will be successful and this will undoubtedly lead to the continued growth of in-house lawyer teams and the community as a whole. The ILC will continue to support the community in this journey, celebrating successes and promoting what in-house lawyers do. J

Caption: Vlad Valiente and Sheekha Saha now regularly catch up online

Questions put by John Morrison, In-house Lawyers' Committee

In practice

Calendar idea wins Innovation Cup

An easy-to-use key dates calendar designed to mitigate risks for solicitors has won the 2022 Innovation Cup.

Mary-Jay Morton, a senior associate at Laurie & Co in Ballater, was awarded the £1,500 cash prize provided by Master Policy insurers RSA, along with the trophy, for her calendar. It comprises a simple memory aid for transactions to mitigate risk and ensure that key dates are not overlooked, by providing a checklist which is useful for both the individual completing the transaction and anyone who takes up the work in their absence.

Designed for residential conveyancing, it can also be adapted for other areas of law and would be useful for litigation, matrimonial, personal injury and debt recovery. The calendar will now be developed by Lockton's Risk Management team for distribution to the profession.

Now in its fifth year, there were 11 entries for the 2022 Innovation Cup competition. Shortlisted alongside the winning entry was a residential conveyancing idea from Paul Brown at W & JS Gordon, and one on cryptocurrency and blockchain technology risk management from Stuart McDonald at Wright, Johnston & Mackenzie.

Mary-Jay Morton is pictured receiving her prize from the Society's chief executive Diane McGiffen, alongside Kenneth Law, risk management solicitor at Lockton.

Legal Services Regulation Bill promised

A bill to reform the regulation of legal services in Scotland is among the measures planned to be introduced to Holyrood under the Scottish Government's Programme for Government 2022-23.

The bill is one of 18 announced with the First Minister's statement to the Parliament on 6 September. No detail was given of how the Government intends to resolve the sharp differences of opinion over whether the professional bodies should continue to be responsible for regulation, but the Law Society of Scotland said it was "pleased" that reform was being prioritised, the current regime from the 1980s being "simply unfit for Scotland's legal sector and the modern international market in which it now competes".

However the Society expressed "deep concern" at plans to abolish the not proven verdict, which it believes will risk an increase in miscarriages of justice; and it was also "surprised and disappointed" by the omission of a Legal Aid Bill from the legislative programme.

Other bills scheduled for introduction in the coming months include Bankruptcy and Diligence; Charities (Regulation); Circular Economy; Education Reform; Housing (two bills); Police Complaints and Misconduct Handling; and Trusts and Succession.

Rugby players still wanted

The Law Society of Scotland's rugby club is still looking for players for its fixture against the Italian Law Society XV on Saturday 19 November, to re-establish the team ahead of the return of the Law World Cup in Paris in 2023 (see Journal, July 2022, 36). Current and former players of any ability are welcome to contact club captain Alistair Wood (alistair.wood@pinsentmasons.com) or vice captain Matthew Henson (matthew.henson@burnesspaull.com).

CERTIFICATION COURSES

The following have been certified by the Law Society of Scotland in Trauma-Informed Law:
ZAYNAB AL-NASSER, Turcan Connell; AIME ALLAN, Martin, Johnston & Socha Ltd; JENNIFER BARR, Dailly, Walker and Co; LINDSAY BRUCE, Lefevres (Scotland) Ltd; NATALIE BRUCE, Harper Macleod; DANIEL CANNING, Jones Whyte; LAURA COUSINS, Scullion Law Ltd; DAVID COUTTS, Burness Paull; STEPHEN CULLEN, Miles & Stockbridge PC; AMY GANNON, Digby Brown; SELENA GRAHAM, Educational Institute of Scotland; KAREN JACK; LAURA JOHNSTON, Criminal Injuries Compensation Authority; CAITLIN KINLOCH, Scottish Social Services Council; EMMA LETHAM, Wright, Johnston & Mackenzie; LISA MARSHALL-KILCOYNE, John Kilcoyne & Co; DOUGLAS McCONNELL, Hilland McNulty Ltd; SARAH McKEEVE, Katani & Co Ltd; MARGARET McNULTY, Hilland McNulty Ltd; GAYLE MIDDLETON, David Kinloch & Co; CATHERINE MULLEN, Aberdeenshire Council; IAIN NISBET, Cairn Legal Ltd; ROSEMARY SCOTT, Thorntons Law; SEONAID STEVENSON, Glasgow Caledonian University; SHARON SUTHERLAND, Mediate BC Society; SARAH WALKER, legal member, Parole Board Scotland; ALAN WATT, Watt Law; VICTORIA YIU, Criminal Injuries Compensation Authority.

Lorna Jack, Honorary Consul

Lorna Jack, former chief executive of the Law Society of Scotland, has been appointed Honorary Consul in Scotland for the Kingdom of the Netherlands. The role includes helping make connections, particularly business, between the Netherlands and Scotland, and providing help if needed to Dutch citizens.

PUBLIC POLICY HIGHLIGHTS

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

Circular Economy Bill

The Environmental Law Committee responded to the Scottish Government's consultation on proposals for a Circular Economy Bill, reiterating views expressed in its 2019 response.

While the committee welcomes proposals aimed at developing Scotland's circular economy, these proposals do not go far enough to address the core concepts of reducing demand for raw materials and designing products to last.

The creation of an additional body to assume responsibility for development of the circular economy would generate unnecessary costs. The committee acknowledged the role of the individual householder in relation to recycling of waste, and supported a more consistent approach across local authorities. Public education, engagement activities and incentives might be more effective than statutory enforcement and penalties in this nuanced and complex space.

Environmental Standards Scotland

The same committee responded to a consultation from Environmental Standards Scotland ("ESS") on its draft strategic plan. ESS was established by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 to monitor, investigate and secure improvements to compliance with, and the effectiveness of, environmental law in Scotland.

Potential challenges for ESS around prioritisation of work were highlighted, the response noting that access to relevant data and scientific information will be key to making data-driven decisions. Clear communications and engagement about ESS's role will be crucial to managing stakeholder and public expectations.

The proposed approach to resolving matters informally with public authorities where possible was supported; a clear commitment to publicise matters dealt with in this way would enable the public to help monitor compliance by reporting further issues.

Victims in the justice system

The Criminal Law Committee led the Society's response to the consultation *Improving Victims' Experiences of the Justice System*, launched in May. Part of a wider Scottish Government review, the consultation seeks views on proposed safeguards for victims of crime during their involvement in the justice system.

It has been informed by the work of the Victims Taskforce and the recommendations from Lady Dorrian's 2021 report, *Improving the Management of Sexual Offence Cases*.

Proposals include:

- a Victims' Commissioner for Scotland;
- anonymity for complainers in sexual offence cases;
- independent legal representation for such complainers;
- special measures to assist vulnerable parties in civil cases;
- specialist sexual offence courts;
- single judge trials in sexual offence cases.

Responses from this consultation are intended to form the basis of priority legislative reform.

Abortion: safe access zones

The Society responded to Gillian Mackay MSP's consultation on a proposal for a bill to introduce safe access zones around healthcare settings providing abortion services. The response highlighted that any attempt to introduce and enforce safe access zones is likely to engage a range of fundamental human rights, and any legislation must seek to balance these competing rights in line with established domestic and international human rights principles. The key consideration from a legal perspective would be whether banning protests within safe access zones was a proportionate interference with the fundamental rights of protesters.

Disability Commissioner

The Mental Health & Disability Committee responded to Jeremy Balfour MSP's consultation on a proposal for a bill to establish a Disability Commissioner for Scotland. The response noted that the consultation was largely focused on the Equality Act, which is a reserved matter, and suggested that any Scottish proposals should focus on the UN Convention on the Rights of Persons with Disabilities ("CRPD"), with its broader concept of disability, particularly in view of the intention to incorporate CRPD into Scots law. It also highlighted Scotland's already crowded landscape of commissioners and organisations with functions relevant to the proposed bill, particularly in light of the commitment to creating a Learning Disabilities, Autism and Neurodiversity Commissioner.

See the website for more about the Policy Team's work with its network of volunteers to influence the law and policy.

ACCREDITED SPECIALISTS

Construction law

KIRSTY SANTANDREU, Balfour Beatty Regional Civil Engineering (accredited 1 August 2022).
Re-accredited: SARAH LOUISE ALEXANDER, Dentons UK & Middle East LLP (accredited 7 July 2017).

Child law

Re-accredited: LESLEY DOWDALLS, Mackintosh & Wylie LLP (accredited 22 August 2012); KAREN SANDRA WYLIE, Gibson Kerr (accredited 11 August 2017).

Family mediation

Re-accredited: CHERYL PRENTICE BROWN, McWhinney Richards (accredited 27 June 2013); SIMON JAMES CARNEGIE LIDDIARD, Stewart & Watson (accredited 6 August 2013); ANGELA O'HARA BARRETT, Russell+Aitken Denny LLP (accredited 9 May 2019); GARRY JOHN STURROCK, Brodies LLP (accredited 8 July 2019)

Medical negligence law

Re-accredited: PATRICIA MARY McFADDEN, Digby Brown LLP (accredited 27 June 2017).

Over 600 solicitors are accredited as specialists across 33 diverse legal areas. If you are interested in developing your career as an accredited specialist, see www.lawscot.org.uk/specialisms to find out more. To contact the Specialist Accreditation team email specialistaccreditation@lawscot.org.uk

ACCREDITED PARALEGALS

Residential conveyancing

MELISSA ALLAN, McSherry Halliday LLP.

Civil litigation – reparation law

CRAIG LAFFERTY, Carpenters Scotland Ltd.

OBITUARIES

John Stuart Lisgo, Edinburgh

On 25 October 2021, John Stuart Lisgo, formerly of Pagan Osborne Ltd, Cupar.
AGE: 51
ADMITTED: 1995

John Gormley, Prestwick

On 15 May 2022, John Gormley, formerly of Scottish Power, Glasgow.
AGE: 69
ADMITTED: 1975

Christina Laing Lister Anderson, Edinburgh

On 12 June 2022, Christina Laing Lister Anderson, retired solicitor.
AGE: 74
ADMITTED: 1977

Patricia Maureen Reid

On 25 June 2022, Patricia Maureen Reid, retired solicitor, formerly of Flowers & Co, Glasgow.
AGE: 82
ADMITTED: 1962

Ruben Valaydon Murdanaigum, Lochgilphead

On 18 August 2022, Ruben Valaydon Murdanaigum, sole partner of Rubens, Lochgilphead.
AGE: 71
ADMITTED: 1980

In practice

Dare you enter the Dragons Glen?

Scotland's national children's charity, Children 1st, is inviting legal firms to join its entrepreneurial fundraising challenge Dragons Glen this autumn.

Teams of up to 10 employees develop a product and business plan, pitch it to business leader "Dragons" and then use £500 seed funding to put it into practice, aiming to raise at least £5,000. The Dragons will then mentor the teams for the duration of the five-month challenge.

Dragons Glen offers a great reason for your teams to come together and build relationships, but can be conducted completely remotely. Participants have taken part from around the globe. Feedback from previous participants focuses on the transferable skills they've developed, as well as the sense of reward from using those skills to "give something back" in a different way to the day job. This year will see the introduction of additional learning and networking events.

Over the last 10 years, the challenge has raised more than £500,000 for Children 1st; the largest amount raised by an individual team was an amazing £31,000. Products have ranged from cookbooks and calendars, to socks, t-shirts, umbrellas, and accessories for dogs. Every penny raised helps to protect children and families across Scotland from trauma and abuse or support them in recovery.

This year's challenge starts in October, so there's still time to join. Email partnerships@children1st.org.uk to register interest, or visit www.children1st.org.uk/dragonsglen to learn more.

Claire MacPherson, Children 1st

Notifications

ENTRANCE CERTIFICATES ISSUED 29 JULY-6 SEPT 2022

ACHAMPON, Samantha Jemma
ADAMSKA-PATERSON, Katarzyna Anna
AIZPURU, Kristy Kate
AKRAM, Haarisa Sarwar
AMOS, Andrew George
ANDERSON, Jennifer Irene
ANDERSON, Thomas Scott
ANDROUTSOS, Sokratis Panagiotis
ARMSTRONG, Kathryn Wallace
ASHTON, Kristofer
ATIQ, Salma
ATTARZADEH YAZDI, Arina
BASILE, Giorgio
BAXTER, Carol
BEGUM, Forida
BENTON, Jack Stephen Cranston
BILON, Harkirit Singh
BINGHAM, Samuel David John
BOROWICZ, Marta
BOYLE, Matthew Alan
BOYS, Katarina Anna
BRANNIGAN, Neil Baxter
BROWN, Lynne Carol
BROWN, Rachel Amy
BROWN, Rebecca Evelyn
BRUCE, Kathleen Anna
BRYSON, Hannah Clare
CALDWELL, Chloe Frances
CALDWELL, Rebecca Irene
CAMERON, Ruairidh Fraser
CARMICHAEL, Ellie Jane
CARR, Lauren Ann
CHRISTIE, Ewan Alastair
CODONA, Carla
COLEMAN, Stuart Edward Peter
COOPER, Sophie Henderson
CORR, Nathan James
COWIE, Daniel Alexander
CRAIB, Sam
CRILLEY, Lauren Jayne
CUTHBERTSON, Jack Alexander
DAY, Jacqueline Sarah Maureen
DEANE, Isobel Alison
DEAYTON, Hannah
DEMBELE, Macoula
DICK, Rachel Pleszkan
DICKSON, Katie
DYSON, Michael Fionnbharr McHugh
ELLIS, Rebecca Jennifer
ESDAILE, Hannah Morley
EVELYN, Skye Oliver
EWING, Connor William
FENTON, Courtney Elizabeth
FERGUSON, Thomas Alexander
FERRIE, Robert Lee
FINLAYSON, Ellen Mary
FLETT, Tia Inez
FOCKLER, Alanna Mary Victoria
FORDE, Nicola Catherine
FRANCHI, Monica
FULTON, Laura Margaret
GALBRAITH, Daisy Lesmoir Sheila
GESHEVA, Simona Ivanova
GIBSON, Hope Rebekah Maclean
GLASS, Joel
GOW, Ellen Grace
GRAHAM, Daniel Peter
GRAHAM, Ewan Findlay
GRANT, Natasha Sophie
GRAY, Joanna Margaret
GULLEN, Cian
HAMILTON, Rona Margaret
HANNAH, Christi Quinn
HASTINGS, Annemarie Elizabeth
HERD, Chloe
JACONELLI, Anna Lauren
JAWORSKA, Weronika
JOHNSTON, Andrew Grant
JOHNSTON, Hannah
JOHNSTONE, Lucy
JOHNSTONE, Neil Frank Raine
KELLY, Nicole Stephanie
KEOHANE, Ross Alexander Angus
KHAN, Elisa Bukhtaver
KIRKLAND, Josh
KNIGHT-TOWNSLEY, Beth
LAIRD, Georgia Beveridge
LECKIE, Dawn Margaret
LESLIE, Callum
LESLIE, Rosalind Alexandra
LINTON, Isabella Kit Gordon
LLEWELLYN, Ethan James
LOGAN, Catriona Sara
McALLISTER, Emma Susan
McARTHUR, Kirsty Marion Lena
McCANN, Craig Thomas
MACCOLL, Katherine Louisa
McCUSKER, Eve
McGOWAN, Ciaran
McGUIRE, Mark John
McINALLY, Rory Mark
McINTOSH, Kate
MACINTOSH, Keir Jon William
MACIVER, Kirsty Fiona
MACKENZIE, Roman David Daren
McKILLOP, Evan
McLEAN, Alexander Thom
McLEAN, Carrie Elizabeth
McLENNAN, Struan Ross Domhnull
MACLEOD, Finlay Grant
MACLEOD, Luciana Maria Ross
McNALLY, Jeraldine Cyrena
McQUILLAN, Rebecca Susan
McSHERRY, Morgan Margaret Malloy
MARTIN, Liam
MARTIN, Lucy Jane
MILLAR, Rebecca Anne
MISACAS, Maria
MITCHELL, Joanne
MITCHELL, Sophie Elizabeth
MITCHELL-WHYTE, Archie Alexander
MOORE, Duncan Arthur
MORRICE, Karina
MORRISON, Katie Macpherson
MORTON, Rebecca Cathleen Iona
MUIR, Christopher Iain
MURRAY, Ailsa
MURRAY, Anne Clare
NEELY, Lauren Hannah
NEVILLE, Laura May
NICOL, Emma Louise
O'BYRNE, Lyndsey
O'CONNELL, Emer Winifred
O'NEILL, Jack Charles
PATERSON, Aiden James
PATON, Hannah Claire
PEDDIE, Ross Mitchell
PERRIE, Erin Mary Alison
PERRY, Alice May
PRESTON, Caitlin Ann
QADIR, Iqra
QUIGLEY, Jennifer
QUINN, Lewis Anthony
RAE, Olivia Helen
RAMSAY, Fraser John
RASKIN, Judith Tilly
RASUL, Sarah
REID, Alix Jane
REID, Argyll Kate
REID, Steven Campbell
REID-McCONNELL, Katrina
RENNEBOOG, Hannah
RICHMOND, Louise Elizabeth
RILEY, Kelvin McEwan
ROACH, Duncan John
ROBERTSON, Callum Glen
ROSS, Kate Elizabeth Jan
ROSS, Stephanie
ROULSTON PLANT, Meredith
ROWAN, John James
SCOTT, Annabel
SCOTT, Jordan
SHEERIN, Taylor Rose
SHIELDS, Joseph Francis McCrory
SIMS, Kirsten Louise
SINCLAIR, Rona Gillian
SLOAN, Samantha Elizabeth
SMART, Gregory Francis
SMITH, Craig Laurence
SMITH, Flora Bella
SMITH, Megan Elizabeth
SMITH, Natalie Colette
SMYTH, Jacob Paul
STEVENSON, Olivia Skye
STOBIE, Charmaine Elizabeth
STOICA, Diana Elena
STRAIN, Dana
THOMSON, Isla Rose
THOMSON, Joanna Claire
TURNBULL, Elise Audrey
TYLER, Meghan Jane
VAZQUEZ SCORTTI, Irene
VERNEL, Aidan
WARNER, Fergus Richard
WARREN, Patrick James
WATSON, Amy Alexandra
WAYTH, Jenna Rose
WEBSTER, Zoe
WESTHEAD, James Simon
WHEELER, Christopher David
WILSON-McKAY, Ewan
WITHERS, Eilidh Jean
WROBLEWSKA, Joanna Natalia
WYMAN, Sam Michael
YOUNG, Aidan

APPLICATIONS FOR ADMISSION 29 JULY-6 SEP 2022

AHMAD, Attika
AHMED, Faiza Zreen
ALCORN, Paul Donald
ALLARDICE, William Robb Anderson
ALLISON, Ruaridh John
AL-MIDANI, Samia Naomi
ASHRAF, Hamza
BARCLAY, Gemma
BENNETT, Ainslie Marie
BENNETT, Angela
BIRRELL-MURRAY, Doreen Karen Janice
BLYTH, Ross MacKenzie
BRACELAND, Elisa Maria
BREMNER, Laura May
BRUCE, Emma
BRYCE, Ronald Colin Gavin
CAMERON, Jack Alexander Millar
CAUNT, Rebekah Elizabeth
CLARK, Amy Louisa Campbell
COWIE, Stephanie Catherine
CURLEY, Michael Thomas
DALLING, Fiona
DANDO, James Alexander
DARROCH, Rhea Jane
DEVOY, Lewis
DI CARLO, Sara
DONAGHY, Lynne Catherine
DUHERIC, Hana Vera
FAGAN, Catherine Jane
FAIRLEY, Sarah Valerie
FAZELI, Amal
FERGUSON, Rachel Nicole
FIDELO, Luisa Astoria
FLYNN, Lauralyne Kathleen Moyra Hannah
FRASER, Euan Kennedy
FULTON, Craig John William
GILCHRIST, Eve Elizabeth
GILL, Najeeb Javed
GRANT, Jamie
GRAY, Harriet Hazel
GREEN, Clare Louise
GREEN, Megan O'Dowd
GREIG, Adam James Vernal
GUTHRIE, Christy Nicole
HUNTER, Craig Peter
HUNTER, Joanne Elizabeth
INGLIS, Christopher Fairley
JACK, Megan Louise
JOHNSTON, Beth Carrie Grace
JOHNSTON, Elliot Iain
JOHNSTONE, Chloe Cessford
KHAN, Shahroze Shabbir
KING, Deborah Louise
KROLL, Sarah Hornung
LITTLE, Karen Jane
McCARRON, Stephanie Jane
McCONNELL, Kathleen
McFARLANE, Caitlin Maria
McINTOSH, Charise Roberta
MACKENZIE, Ross Alexander
McKEOWN, Lisa Elaine
MACLEOD, Kathleen Christina
MACLEOD, Katie Mary Margaret
MANSON, Emma Mackenzie
MARTIN, Leeanna Francis Toni
MATHER, Catriona Anne
MATHIESON, Iain Thomas
MILLER, Gemma Jane
MORRISON, Rachel Macgregor
MUNRO, Alexandra Mairi
MURPHY, Euan Jack
MURRAY, Danielle Louise
NEILSON, Rebecca Kate
O'DONNELL, Anna May
O'HARE, Caitlin
PANOL, Suzanne Helen Barbara
PEARSON, Sarah Margaret Ann
PEDDIE, Alexandra Anne
REID, Rebecca Allyson
RENTON, Fiona Louise McCallum
RUSSELL, Hannah Margo
SALEEM, Haris
SCULLY, Moreen
SHEARER, Emma Jane
SIMON-ROBERT, Kimberley
SMITH, Lucy Elizabeth
STEWART, Claire
STORIE, Danielle
SWAN, Finlay Kenneth
TAIT, James Fyfe
TARBET, Emily Jane
TAYLOR, Frances Ellen Wilton
WALKER, David Daniel
WALKER, Jonathan William
WOODHOUSE, Katharina Jane
YOUNG-SMITH, Colomban William Jamus Olivier Burgess

IN ASSOCIATION WITH

Clio

Thinking of starting your own law firm?

Clio has published a "How to" guide for those looking for practical help

The past three years have dramatically shifted how solicitors think about the practice of law – including the potential to start one's own law firm.

Starting your own law firm can come with a host of benefits: greater work-life balance, the ability to choose cases that are meaningful to you, and the ability to build a firm that prizes exceptional service on your own terms. With the shift to remote and hybrid working, it's more affordable to start a law firm than ever before. Many new law firms are forgoing paying for expensive office space in favour of starting from shared offices, more affordable locations, or even from the owners' kitchen tables.

If you're considering starting your own law firm, it can be hard to know where to start. While many solicitors are well versed in the law, owning and managing a firm can present new challenges and require completely different skillsets to those you've learned in your career and education so far.

That's where a brand-new guide from Clio comes in. Developed for UK and Irish lawyers (including Scottish lawyers), this just-released guide gives extensive insight and information on how to set up and run your own law firm.

In Clio's "How to Start a Law Firm," you'll discover what's needed to set a brand-new law firm up for success. From creating a business plan to acquiring insurance, as well as networking, marketing, and hiring, this guide will help you to determine your goals and design a roadmap to see them through.

It provides practical information on the basics you need to know – right down to the essential equipment you need, and even how to set up your office – as well as information on the approach needed to register and name a firm.

The guide also includes some essential tips when it comes to starting off on the right foot financially, including:

- How to create a law firm budget
- How to avoid excessive debt when you're just starting out
- What you can do to make revenue as predictable as possible

Whether you're already in the process of setting up your own firm, or are simply starting to consider taking the plunge, this guide will provide you with the resources you need to take the next steps of your journey.

The guide is available to download for free at clio.com/uk/start-scotland

Hey CPD!

CPD for lawyers delivered from outside the law? Shaping Your Success, devised by the Law Society of Scotland and Hey Legal, is a free resource for progressive lawyers who get to shape what they watch

CPD for Scottish lawyers involving Netflix, Google, and Minecraft? Welcome to the Shaping Your Success CPD channel, from the Law Society of Scotland and Hey Legal.

There are plenty of incredible CPD courses catered *for* those in the legal profession, delivered *by* those in the legal profession, but with so much learning, dynamic thinking, and inspiration to be found from other sectors and industries, we wondered "What insights could lawyers gain from leading figures from outside the legal world?" And thus, the Shaping Your Success mission statement was born. Delivering short form, dynamic content to you every month, the channel brings together innovators, disruptors, technologists, entrepreneurs and more, all of whom offer their expertise, advice, and thoughts on the legal industry and, importantly, how you can shape your careers and practices in new and innovative ways.

As a busy professional in an ever-evolving field, it's easy to get wrapped up in the day-to-day aspects of your work, and it can be difficult finding the time to dedicate to personal and professional learning. Which is why each episode of SYS is broken down into easily consumable, bite-sized chunks, providing the perfect lunchtime entertainment or soundtrack to your commute.

Starring cast

Since launching in January, we have sat down for an exclusive interview with leading entrepreneur Chris van der Kuyl, whose company 4J Studios is responsible for the award-winning console edition of video game phenomenon Minecraft, in which he urged lawyers to be entrepreneurial enablers. We welcomed Jo Berry, an inspirational peace campaigner who champions restorative justice, and heard about how she befriended the man who killed her father, a Conservative MP who died in the Brighton bombing. And we met Hollywood producer Fritzi Horstman, director of the Compassion Prison Project, to discuss how we can create a more trauma-informed justice system. We also met Kenneth R Feinberg, the New York lawyer portrayed by Michael Keaton in the film *Worth* (available to stream on Netflix), to speak about his work as Special Master of the September 11 Victim Compensation Fund and the weight of responsibility he felt and continues to feel to this day.

From top: Hollywood producer Fritzi Horstman; New York lawyer Kenneth R Feinberg and his portrayal by Michael Keaton; and a montage of Shaping Your Success guests

And it's free!

And the best part? This new, innovative CPD channel is completely *free*. By watching the channel, you can claim one hour of free, verifiable CPD every month. And by signing up, not only do you get to join a fast-growing community of progressive lawyers, but you also get the opportunity to shape the channel as it grows. We continually ask our members who they want to hear from, whether it's ex-professional rugby players or toy store marketing executives, ensuring that at its core, Shaping Your Success delivers content for you, created by you.

So, what does the future hold? As well as bringing you exciting new speakers every month, we will be launching several new online

courses to explore further some of the topics discussed during the SYS series. The first two courses, "Legal Tech for all Lawyers" and "Winning Business Online for Lawyers", have just launched and are designed to help those in the legal profession gain foundation knowledge on some of the essential skills that are key to running a business today. Hosted by Hey Legal founder Ally Thomson, a senior tutor at Glasgow University Law School with more than 20 years' experience of working in private practice, these courses have been especially curated between the Law Society of Scotland and Hey Legal to provide fast-track learning for busy lawyers.

So why not sign up for Shaping Your Success today, or better yet, get in touch with one of the team today to let us know which of your idols you want us to reach out to... you never know, they might say yes!

Thank you to our channel sponsors, Denovo.

In practice

RISK MANAGEMENT

Avoid the curve balls

Litigators are always likely to have to face some curve balls, but there are good risk management habits that can be practised to minimise some of the common hazards

The role of a civil litigator can sometimes seem a thankless one. In most cases, instruction of a civil litigator is the ultimate distressed purchase. Even after an apparently successful outcome, clients can leave the process feeling drained (both emotionally and financially).

Litigation is filled with inherent risk and uncertainty. Even with the most meticulous planning, you will likely have to deal with some curve balls. From a risk management perspective, the wisest litigator will inform their client of the very real risks and uncertainties involved in any litigation and take steps to minimise those risks which might evolve into claims and complaints.

Here, we set out some points for civil litigators to bear in mind at various stages of a case.

Case investigation

A client will normally provide their narration of the facts and, hopefully, supporting evidence.

It is good risk management to ask your client to provide you with everything that is relevant to the dispute. Has the client checked all phone messages, emails and correspondence? If the client takes handwritten notes, ask to see those. Where your client is a business or organisation, have the emails of key personnel been checked for relevant information? Has a search of email servers been carried out?

The last thing you want is relevant contradictory evidence (which your client ought to have had in their possession) being lodged by your client's opponent or else discovered only after a specification of documents is served. Not only can that be presentationally very damaging for your client's case, it can also in some circumstances leave your client liable to a finding in expenses.

There are some who might say that a client who has failed to alert their solicitor to the existence of such material at the outset has only themselves to blame, but there are clients who might try to blame their solicitor's failure to advise them to carry out thorough checks. In any event, regardless of whose fault it is, you have an unhappy client on your hands and potentially have opened yourself up to at least some professional embarrassment, and at worst potential conduct issues if there is any suggestion that there has been an improper failure to present a correct position to the court.

Impress on your client the need to identify properly all potentially relevant information, warts and all, to allow you to provide appropriate advice.

Electronic documents

Particularly since the pandemic, the norm tends to be that electronic documents will be used in court proceedings (although it is important to check whether the court also requires hard copies – sometimes the court will ask for these at the last minute).

Significant care needs to be taken in checking electronic documents which we lodge and share with others.

Those following the lawsuit brought by the families of the Sandy Hook victims against Alex Jones (of InfoWars notoriety) might have felt an empathetic stomach lurch when witnessing the debacle which occurred in court, arising out of some unintended document disclosure. In advance of the trial, rather than send to the plaintiffs' attorneys the intended electronic bundle of documents, Jones' lawyers emailed a drop box containing Jones' entire phone records for the previous two years.

This only came to light during Jones' cross-examination, when a phone message was put to him, containing material which he had previously attested did not exist. In addition, the attorney for the plaintiffs informed the court that he had been asked to deliver Jones' phone records to the January 6 Committee.

Although Jones' lawyer maintained a surprisingly good poker face throughout the exchange, one can imagine the level of panic actually felt.

While perhaps an extreme example, this serves as a reminder of the need to take the utmost care in handling electronic documents. One seemingly innocuous attachment can contain hundreds, or thousands, of pages of information, which can be sent out with one click of a mouse. Gone is the opportunity to hastily run down to a mailroom to check and then remove any unintended enclosure.

From a risk management perspective, solicitors should take ownership of checking (and rechecking) attachments which are to be lodged with a court, intimated to opponents or sent to others. This should not be underestimated or considered an administrative task. Do think carefully whether it can routinely be delegated to those who have no real knowledge of the case or the context in which the documents are being provided. In addition, PDFs should be properly named to identify their content easily, and to confirm that they have been approved prior to sending.

Communications with the court

With courts now communicating more or less wholly by email, it is worth making sure that the court's line of communication is with more than just one individual. That individual could miss the email, be off ill or be otherwise unavailable. From a risk management perspective, it is better to include the case handler and some other centralised email address at your firm (for example a court runner, reception, secretary or other email address that is routinely monitored). There is a real risk that a line of communication between the court and one individual solicitor will lead to important communications (and court orders) being missed.

Another point to consider is that court interlocutors should be fully read, and any important dates diarised, as soon as practical

once received. Since the pandemic, and with the move to remote hearings, many courts issue orders which provide deadlines which do not necessarily conform with the default rules. There can be dates specified for affidavit evidence, and written submissions (which pre-pandemic were not required) might be ordered in advance of hearings.

In addition to carefully considering and diarising the precise terms of orders, it is prudent to make yourself familiar with the current practice in the relevant court, by checking the current practice notes available on the Scottish Courts website or making enquiries with the clerk.

Deadlines and time management

Whether a time-barred personal injury claim or a missed appeal date, the failure to meet deadlines accounts for a significant number of claims and complaints against litigators.

Following on from the last point, a key to managing this is to action any court orders on receipt, by diarising key dates and factoring in preparation time in advance – for example dates by which to instruct counsel or experts.

The use of a centralised or shared diary can also help manage the risk of dates being missed because of the absence or inadvertence of any one individual member of staff.

From a pursuer's perspective, diarise well in advance of the earliest possible date for prescription. While the law in this area has been evolving (and we now also have the Prescription (Scotland) Act 2018), you do not want to be left in the position of having to engage in protracted legal argument about statutory interpretation and case law if that can be avoided.

Aim to avoid leaving important tasks (such as serving a writ or lodging an appeal) to the last minute. Murphy's law dictates that this is exactly when issues such as slow IT systems and bounced summonses will present themselves.

Offers, tenders and settlements

Litigation is a costly and uncertain process. Many clients trust their solicitor to provide them with advice on how to bring disputes to a cost effective and, if possible, swift resolution.

Civil litigators should be live to the need to advise clients on their options to manage that – including advising on pursuers' offers, tenders and alternative dispute resolution.

Failure to advise on this aspect can lead to client complaints and claims, even in the face of an apparent win. A successful litigant might still balk at the level of irrecoverable expense incurred and, after the event, ask why they were not advised on the mechanisms which might have resolved their dispute at an earlier and cheaper stage.

Litigators can seek to manage this risk by adopting an ongoing review of resolution options, and by having a record of discussing these options with the client.

While this all may seem like additional burdensome work in what is an already short day, these are habits that are easily formed and can pay dividends in the long run. As the old saying goes: fail to prepare, prepare to fail.

Anne Kentish is a partner, and **Colette Finnieston** a legal director, at Clyde & Co

FROM THE ARCHIVES

50 years ago

From "Two Blind Solicitors", September 1972: "Strangely enough, no blind person has ever qualified and practised as a solicitor in Scotland. There is no legal or constitutional reason for this; the difficulties and problems facing anyone with a serious visual handicap who has contemplated a legal career in Scotland have in the past seemed so severe that they have been persuaded to choose another vocation... It is therefore hoped that the comments and experiences of two blind solicitors practising in England will encourage discussion and stimulate interest."

25 years ago

From "Capital Adequacy", September 1997: "Following a period of consultation and discussion the Guarantee Fund Committee Working Party has recommended the production of guidance notes on the subject of capital adequacy in legal practices. The guidance notes are thought to be a valuable and confidential method of allowing solicitors to measure their own firm's financial standing... The Society is increasingly aware of market pressures and tighter lending policies which combine to cause problems to practices where these questions have never been faced before."

THE ETERNAL OPTIMIST

Optimism in crisis time

As many fear for the future, Stephen Vallance believes we can make it better than the past

It's not easy being the Eternal Optimist, you know: the news is always gloomy and the end of the world is always, well, just round the corner. But one of the few benefits of age is that it gives a degree of perspective, a sense of "I've seen something like this before and we're still here".

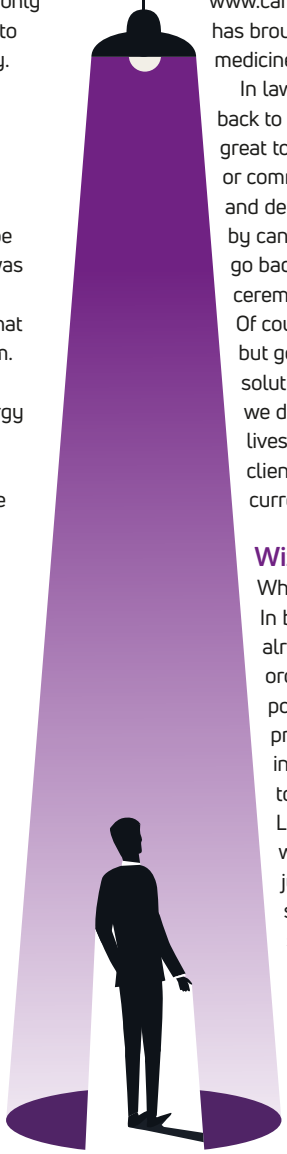
How can we watch the news without becoming disheartened? One theme I like to return to is "Wizards and Prophets". Charles C Mann wrote a book on it and you will find references across the internet. In brief, prophets believe we are all doomed and the only way to save the planet is to return to a simpler time with less technology. Wizards on the other hand believe that technology will overcome any challenges and make tomorrow a better place. For example, an 1894 *Times* article predicted that "in 50 years, every street in London will be buried under 9 feet of manure". It was the invention of the motor car, the source of some of today's issues, that resolved the horse manure problem. Whether it is battery or hydrogen powered transportation, clean energy or carbon capture, the seeds of the technological solutions to resolve current global warming issues have already been planted.

The uncomfortable or the unknown?

Why are people often inclined to the pessimistic prophecy school? My theory is that generally they don't like change. The unknown frightens us or, worse, we are simply too lazy or set in our ways, more comfortable with the way things are, or used to be, than with unexplored territory. But what do the facts tell us, rather than our memories or feelings? If we think rationally, what was the past really like? For me, I remember cheaper fuel, but ice on the inside of my windows in winter as we didn't have central heating; cheaper petrol, but cars that only did 15 miles to the gallon; and worst of all, only three TV channels! The filters through which we see the past are a challenge for the best of us.

Through most of the last century the data are a lot more positive than today's news would have us believe. Conflict between nations has dropped dramatically; we have been living in peaceful times and overall still are. Extreme poverty has reduced and life expectancy increased, as has our access to information. Now we are on the verge of quantum computing, travelling to Mars, curing cancer and even creating the replicator from *Star Trek* (look at www.cana.com). Even a global pandemic has brought some incredible advances in medicine.

In law, would we actually want to go back to the "good old days"? Was it so great to have to wait weeks for reports or communications, or to type out letters and deeds (or even handwrite them by candlelight)? Do we really want to go back to settlements on site with a ceremonial exchange of a piece of turf? Of course, many things could be better, but going backwards is seldom the solution. The question is, what else can we do to make our businesses and our lives better still for ourselves, staff and clients, and to deal with the issues we currently face?



Wizarding tools

What then is an optimist to do? In business, as I suspect you are already doing, keep our house in order. Work to reduce and where possible eliminate any borrowings to protect ourselves from interest rate increases. Work on our credit control to reduce debtors to a minimum. Look at business costs and prune where prudent. Not rocket science, just good old fashioned common sense that we all know but sometimes don't have the time for. On the positive side, can we expand our service offerings in areas that are less affected by recession (private client?), or may even prosper during it (insolvency?). We can work to keep service quality and client engagement high so we remain the first point of contact both during and after any challenging times ahead. We can look at opportunities such as mergers and lateral hires that any market downturn might provide. We can invest in technology and training to simplify our processes and leverage our time and profitability.

"Through most of the last century the data are a lot more positive than today's news would have us believe. Conflict between nations has dropped dramatically; we have been living in peaceful times and overall still are"

Even an eternal optimist, though, requires to temper their outlook with realism. We are undoubtedly in an unsettling period and there are more challenges facing us than for many years: inflation, utility prices, the Ukrainian conflict, and political issues not only here but in the US, Brazil and parts of Europe. As the number of issues increases, the possibility grows of one of these developing into a more serious crisis. Investment in the macro world issues as well as the micro business issues has never been more important. You have to give the wizards the tools to work with.

The future is always a scary place. History has taught us though that it is also filled with excitement, opportunity and advancement. We need to be vigilant, as inaction and, worse, regression has had dark consequences, but the challenges ahead, be they big or small, are hopefully just the boundaries of a new and better place.

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

Tradecraft tips

Some more practice points based on Ashley Swanson's years of experience

Putting the past behind you

At the firm I worked for after qualifying, my room was next to one of the partners' room. He had six four-drawer filing cabinets, whereas I had just one filing cabinet with only three drawers in use. I thought that the partner must be working day and night to sustain such a caseload. However I was looking for a file one day which should have been closed about six years earlier. It was still open and it was in one of the partner's cabinets along with one or two other files well past their "sell by" dates. It looked like he never closed a file and simply added another cabinet as required.

Closing a file is a skill which some solicitors do not seem to have. Such tasks should not be left to unqualified staff. At the next firm I moved to, I spent the first six months retrieving closed files from the basement because the searches had not yet been received or sent out. A secretary had been asked to review the files and weed out those which looked like they were completed, but she was unable to spot files which were still in effect "live".

To my way of thinking, there is no alternative to the solicitor who has dealt with the file from day one reviewing it to see whether or not it can be closed. This might be looked upon by some solicitors as a waste of time, but it is very rarely that any of my closed files have had to be reopened because I had missed something which was still outstanding.

Much obliged?

Many years ago I spotted a title where a half share in an area at the rear of a tenement had been given away by mistake when one of the flats was sold off. The solution was to get the flat owner to re-convey the share, and the selling solicitor included in his letter of obligation an undertaking to obtain such a disposition. Months went by and the corrective disposition had still not appeared. I telephoned the selling solicitor to ask when he was going to produce the deed. He replied that it was my problem as I had been stupid enough to accept his obligation. The disposition was never forthcoming and the solicitor in question has never been forgiven. I was left to sort the situation out myself.

There is no mileage whatever in treating another solicitor in this manner. If you give an obligation it should be a matter of honour to make sure that you obtemper it. It should not be used as a ploy to get you out of a tight corner. If you cannot implement the obligation, you should be liaising with the other solicitor to work out a solution to the problem, not turning your back on them. You might be dealing with the other solicitor again on another matter in six months or six years' time and your previous encounter will not have been forgotten. This sort of behaviour is like spitting into the wind. It is just all going to come right back on to you.

Spin

When he was doing his musical training in St Petersburg before the First World War, the Russian composer Prokofiev entered a piano competition. Instead of playing a recognised piano piece, he played something which he had composed himself. The judges could not tell whether he was playing it brilliantly or making a mess of it. They awarded him the first prize. That's spin.

We were offering for a cottage being sold out of a country estate, and my boss knew that the estate owner gave priority to local people so, as the client was a local man, he included the client's address in the offer, which was not our usual procedure. On reviewing the offers received at the closing date, the estate owner spotted this and instructed her solicitors to accept our offer even though it was not the highest. The value of this coup was enhanced a number of years later when the client's parents managed to get planning permission for an additional house on part of the ground. Just three extra words in the offer allowed all of this to happen and the client was suitably grateful.

On occasion when you are trying to work out how to approach something or add value to it, rather than simply taking the "bog standard" approach, adding a little inflexion or taking an unconventional approach can be enough to tip the balance in favour of your client.

Ashley Swanson is a solicitor in Aberdeen. The views expressed are personal. We invite other solicitors to contribute from their experience.

AML: two key stages

In his quarterly AML column, Fraser Sinclair highlights the importance of the practice wide risk assessment, and AML record keeping, as part of a practice's compliance steps

Clue: A psychological test whereby black ink shapes on a page must be interpreted by the viewer in order to look for a meaning or pattern.

One point if you said Rorschach test, but I will give half a point for "UK Money Regulations" or similar. Challenging as it is sometimes, it has never been more important to make a strong effort to comply with those regulations. The Law Society of Scotland's increased dedicated AML supervision resource, and its provision of a popular new AML CPD course for solicitors, are stark examples of both supervisory intent and "customer demand" in the area, to say nothing of the ever-increasing ethical imperative underpinning the UK AML framework.

I often speak to firms who are interested to hear about the steps they should take and the extent they should go to in customer due diligence. This is right, of course, but there are some *underlying* AML compliance elements that are regularly overlooked while ruminating over practical CDD, and I cover just a couple of them below.

Practice wide risk assessment

The practice wide risk assessment ("PWRA") is a crucial first step. It is essentially a look across the business, as opposed to a specific assessment of any one client or matter. By stepping back and measuring and analysing the business through the lens of AML risk, you build a picture of what your types of AML risk exposure are, what direction they are coming from, and at what level or volume you are exposed. The UK regulations require that you consider certain specific risk areas (clients, geography, services, transactions, delivery channels), and also information provided by the supervisory authority – in our case, the Law Society of Scotland's own sectoral risk assessment, available at its website.

If you are cynical about the importance of the PWRA, and would prefer a stick to a carrot, consider this – the PWRA is likely to be one of the very first things an inspector checks at your firm. Do you want to kick off your inspection as a firm that appears at the outset to be uninterested and lacking knowledge in its risk exposure?

Recommended touchpoints for your PWRA are:

- an analysis of your business data, e.g. volumes of work in different practice areas;
- a review of reg 18 factors for practice risk;

- a review of the UK National Risk Assessment for AML;
- a review of the Law Society of Scotland's own sectoral risk assessment;
- your assessment of what the above all means for you;
- not just downloading the Society's template and writing Yes or No next to each section(!).

Key AML regulation: 18
Key Legal Sector Affinity Group guidance section: 5

AML record keeping

There are two areas of the regulations which relate to what I want to talk about in this section. The first is in reg 28, and it tells us that we must be able to demonstrate that the extent of the measures taken is appropriate in view of the risks of money laundering and terrorist financing.

Secondly, in reg 40 which deals with record keeping more broadly, we must retain sufficient supporting records to enable the transaction to be reconstructed.

Taken together, they clearly lay out the need for you to write and keep very strong notes and records for your clients and matters, including risk assessment and CDD steps taken.

Now, any AML inspector worth their salt will tell you: "If you didn't write it down, it didn't happen." While that rule of thumb can be incredibly annoying in practice, as you start to feel bound to spend your time making notes *ad nauseam* instead of stopping money laundering, it may still help you somewhere down the line.

In my opinion and experience, it is well worth putting template forms in place which induce good notetaking as standard practice. Some firms still operate a sort of file note or blank sheet of paper approach, hoping that roughly the right stuff will be written down. Consider drafting styles which include specific areas for notes on risk assessment, screening, ID, source of funds etc, and where the policy is that each section must be well completed with good detail in order to be compliant with the firm's approach.

Consider also naming conventions and where you store these documents. If an auditor or inspector asks you for the Joe Bloggs file for review, it is very beneficial to both you and them to be able to lay your hands quickly and cleanly on the relevant AML documentation; your inspector won't start the review in a good mood if they have to trawl through 100 emails about grazing access for the sheep before they land on the material relevant for the AML.

Key AML regulations: 28(16), 40(1)
Key LSAG guidance section: 10

Fraser Sinclair is head of AML for MacRoberts LLP and runs the AML consultancy brand AMLify

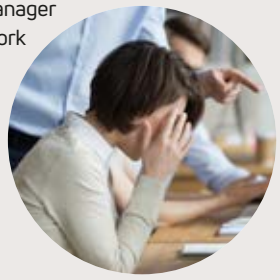
ASK ASH

Worried for a colleague

One of my team is acting strangely but won't discuss how she is

Dear Ash,

I have started to notice one of my colleagues is acting a bit strangely in the office. She seems to be getting upset over the slightest feedback from our line manager and is no longer attending any after-work social events. She seems to be really withdrawn, which is not like her, as she is normally quite talkative and sociable. I have asked if she is okay, but she just changes the subject or walks away and I'm not sure what to do.



Ash replies:

It seems from what you are saying that your colleague is going through a tough time, and it may be a personal problem at home that she is not comfortable sharing at work. However, it may be that she is upset by something at work also.

I do think it's important that you approach her again to explain that you have noticed a change in her demeanour and that you are worried for her. You could also just ask her to talk to someone, even if she is not comfortable sharing her issues with you. Perhaps suggest she speak to her GP in the first instance, or an organisation providing support. You could try to seek more information about support from organisations such as LawCare before speaking to your colleague.

If you have noticed a change in her, it's likely that others in the office will have too. It may therefore be worth speaking to your manager on an informal basis, to relay your concerns, as they may be able to take more proactive steps to help her address her issues, perhaps by suggesting some time out.

On a positive, your colleague is fortunate to have someone like you looking out for her, especially in today's still relatively fragile post-pandemic environment, as some are clearly still struggling with mental health issues but perhaps are reluctant to seek help.

Send your queries to Ash

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

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

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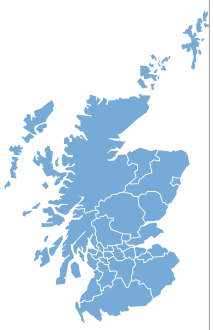

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Mohammed Abdul Aziz Khan (deceased):
Any Solicitor having knowledge of a Will for the late Mohammed Abdul Aziz Khan (date of death 20/10/2020 in India), family home 1 Winton Drive, Glasgow, please contact Low Beaton Richmond LLP, Solicitors, 20 Renfield Street, Glasgow.
The family is aware of a Will prepared by Aberdein Considine in 2009.

James Brown Gordon (Deceased)
Would any firm holding a Will for Mr Gordon, late of Flat 3/4, 35 Tannadice Path, Glasgow, G52 3DY please contact PRP Legal Limited, 227 Sauchiehall Street, Glasgow, G2 3EX.
Tel: 0141 331 1050
or email ruth@prp-legal.co.uk.

Mr Stewart Wilson Argo (Deceased)
Would anyone holding or having knowledge of a Will for the late Mr Stewart Wilson Argo who resided at 88 Church Street, Portsoy, AB45 2QR and formerly of 19 Seafield Street, Portknockie, AB56 4LX and 16 South Castle Steet, Cullen, AB56 4RT, please contact Alexander Arthur, Stewart & Watson, 42/44 East Church Street, Buckie, AB56 1AB. Telephone: 01542 833255 or email: aarthur@stewartwatson.co.uk

Oonagh Patricia Coleman (Deceased)
Would any firm holding a Will for the late Miss Oonagh Patricia Coleman, 38 West Barmoss Avenue, Port Glasgow, PA14 6HH please contact PRP Legal Limited, 227 Sauchiehall Street, Glasgow, G2 3EX. Tel: 0141 331 1050
or email ruth@prp-legal.co.uk.

WILL of William Whyte
Formerly of Lewis Rise, Irvine and prior to this 668 Pollokshaws Road, Glasgow, Moray Gardens. Stamperland, Glasgow, 125 Sillars Meadow, Irvine or 33 Boydfield Avenue, Prestwick. Anyone holding please contact Mains Solicitor Advocates.
Email ABoyd@mainslegal.com

Elizabeth Ann Jollie or Berezowski-Berezford, deceased
Would any Solicitor or other person holding or having knowledge of a Will by the late Elizabeth Ann Jollie or Berezowski-Berezford who died on 12 June 1998, and who resided at The Loans, 18 Cupar Road, Largoward, KY9 1HX, please contact Kathleen McArthur at Wright, Johnston & Mackenzie LLP, Solicitors, St. Vincent Plaza, 319 St. Vincent Street, Glasgow G2 5RZ, telephone 0141 248 3434 or email: kmca@wjm.co.uk.

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Norman Fraser Macsween, late of 17 Alison Lea, East Kilbride, G74 3HN. Would anybody holding or having knowledge of a Will by the above person who died on 11th June, 2021 please contact Mr Matthew Lynch, Mackinlay & Suttie, 48 Cross Arthurlie Street, Barrhead, G78 1QU or by telephone: 0141 881 1450 or by email m.lynch@mackinlay-suttie.co.uk

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If any of these roles are of interest to you, or you would like to discuss in-house opportunities more generally, please do not hesitate to contact us, Frasia Wright (frasia@frasiawright.com) Cameron Adrain (cameron@frasiawright.com) Teddie Wright (teddie@frasiawright.com) or Stephanie Togneri-Alexander (stephanie@frasiawright.com) on email, or by telephone on 01294 850501.

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