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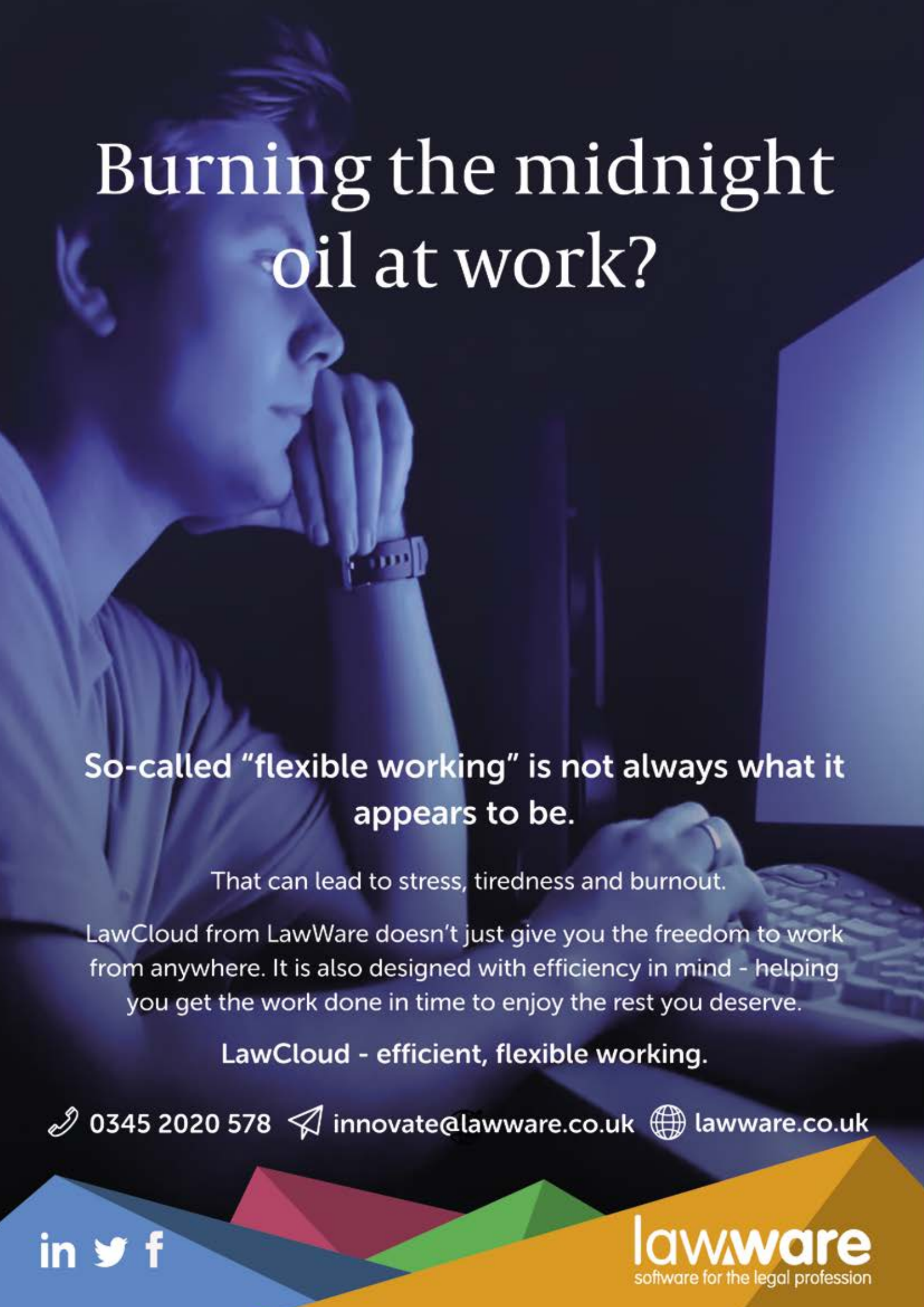
Journal

Journal of the Law Society of Scotland

Volume 66 Number 9 – September 2021

Conveyancers are go

Time for the profession to form a "Task Force" to seize the initiative in shaping the future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Editor

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Stay on screen

Remote court hearings, or in-person? The subject of continuing debate over the past year, the issue is brought to a head by the Scottish Civil Justice Council's draft rules covering modes of hearing once the emergency measures expire.

As we report on p 38, the default position is for online save in relatively limited situations. But despite some quite complex proofs having been successfully conducted online, many believe it remains a second best solution: a Society survey revealed a large majority who found examining witnesses (in chief or cross) more difficult, and felt their clients' interests were disadvantaged, in remote hearings; and a strong joint statement by the UK and Irish bars called for the restoration of in-person for any hearing potentially dispositive of all or part of a case.

It may not come as a great surprise that those most practised in traditional hearings are keen for them to continue wherever possible, but it should be recognised that some cogent points have been made. Technology difficulties affecting evidence, the ability to read the court, taking on-the-spot instructions from clients, newer lawyers learning court skills, for example, along with wellbeing issues and loss of collegiality, deserve to be fully considered. While the consultation paper appears to recognise the strength of feeling, it has less to say about the arguments.

The conference on the subject held in May recognised the value of working in partnership with agencies across the justice system, and what had by then been achieved by collaborative working during the pandemic. But there appears to be a desire now to push much further with change than many either feel comfortable with or are as yet willing to accept.

True, the default position can be reversed on application, to be granted (per the draft rules) "only if" the court is of opinion that it would not prejudice fairness or otherwise be contrary to the interests of justice. At first sight, it is hard to see how an in-person hearing would fail that test, unless a party has difficulty physically attending, but one suspects such hearings are not intended to be there for the asking.

There is some danger of the debate taking place without proper recognition of the pressures created by the huge backlog of criminal work that built up during lockdown. If this is driving the proposals, it would be better to be open about it and let the debate embrace that aspect. If it is not, there is surely a risk of unnecessarily sacrificing the goodwill of the profession in the supposed interests of efficiency, and it has to questioned whether justice would benefit. J

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.66 NO.9 – SEPTEMBER 2021

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In practice

ONLINE INSIGHT

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

So what makes a good judge?
Douglas Cusine believes there are various qualities required of a judge which will be difficult to assess during the appointments process – a process which is also prejudiced if behind-the-scenes influence is deployed.

More than just a game
Legal education through games? Other fields are now turning to games, and trainee solicitor Anzal Baig believes similar moves in the legal sphere could benefit both lawyers and non-lawyers.

He said, she said
On a conflict of evidence in clinical negligence actions, where a pursuer's recollection differs to entries in the medical records, how do the courts decide which to accept? Carolyn Jackson reviews some recent cases.

Data breaches: the grounds of claim
Where a hacking attack exposes customer data, on what basis might an individual customer sue the data holder? Fergus Whyte considers a case dealing with grounds of action in data protection and their relationship to confidentiality and privacy.

Victim support – in road traffic?
If supporting victims is a priority in criminal justice, why is police information withheld from road traffic casualties, impeding their civil claim and potentially their recovery? Roz Boynton asks.

OPINION

Rupa Mooker

Even firms committed to equality, diversity and inclusion may not be adopting the best practical steps to achieve that – they should give thought to how best to achieve visibility of role models

I was recently on the panel of an event called "Less talk, more action: what are we doing to improve ethnic diversity in the legal profession?" It was uplifting to hear from others in the Scottish profession who are as passionate as me in wanting our workplaces to be diverse at all levels to reflect our society.

Genuine commitment and progress to equality, diversity and inclusion ("ED&I") is undoubtedly being made. However, the general perception among people from minority ethnic ("ME") backgrounds appears to be that although organisations say ED&I is important to them, they are less good at actually showing it. For those that have made good efforts to date and are keen to improve their ethnic diversity further, what practical actions might bring about a real difference?

At a Law Society of Scotland ("LSS") round table a few years ago, one attendee said: "Organisations talk about the importance of diversity, but when you walk into a recruitment fair, the people behind the desks are generally white." The impact of seeing someone who looks like you should not be underestimated. I once posted on LinkedIn that I would be attending university law fairs (pre-COVID) on my firm's behalf. My inbox quickly filled with messages from contacts and friends from ME backgrounds saying things like "my son/daughter/niece/neighbour is coming – would it be ok for them to chat to you as they'll feel more comfortable?" It wasn't something I had given much thought to, but when I walked in it was really quite noticeable – I was one of just two people visibly from a ME background, representing a law firm.

It is so important to review what the candidate experience looks like. Many people from underrepresented backgrounds already feel intimidated by the legal profession. Those feelings are then amplified by visuals at events or social media content that hasn't been thought through. There may be no intention to discriminate, but a failure to evaluate carefully how such things are approached undoubtedly results in fewer applicants from diverse communities.

Again, thinking back to my own university experience 20-plus years ago, as someone who had no connections within the industry (or in any professional services), I don't recall much support on how to actually get into the legal profession. Thankfully, things have since moved on. Universities and colleges now offer information and support on summer placements, when to apply for traineeships, and opportunities to get involved in relevant extra-curricular activities.

However, much more work is required at the grassroots. School children and students need access to mentors and role models from backgrounds similar to themselves. Unfortunately there still aren't very many!

Our educational establishments, the LSS and future employers could work more closely on this. For example, the LSS already runs two mentoring schemes. This is a great opportunity for organisations to ask internally whether anyone wants to be a mentor for a student. If the answer is yes, it shouldn't take much work to match the right mentors to the right mentees being identified by the LSS and universities. It's a simple but effective and practical way for organisations to make a difference in the ED&I space.

We could also collaborate on events in our workplaces and literally open our doors to students. Talk to them on a 1:1 basis, connect them with others in the profession, provide constructive feedback where unsuccessful in an interview – all actions I know make a difference.

Should the legal profession have ethnicity workforce targets to ensure better representation across our businesses? While a positive initial step, I think targets must be handled sensitively.

If, for example, targets are set that X% of trainees must be from certain backgrounds, it gets them in the door. For those who have genuinely committed to ED&I, it's brilliant – they have future solicitors to work with. However, I believe targets can only really work when put in place alongside other commitments and initiatives. It's not about just getting numbers in – it's about retaining and developing people.

Significant progress has been made to improve the representation and experience of our ME colleagues. Overt discrimination is (mainly) on the way out due to the significant moral and legal consequences attached to it. However, unconscious bias still manifests itself in many ways such as those outlined above, and is more difficult to eradicate.

There is considerable focus on ensuring our leaders are fully invested in ED&I matters. But sometimes that will just not happen. I recently heard someone say "Go where the energy is." I agree. Find those people and work with them on practical ways to remove the barriers that are sometimes unknowingly created – the rest will fall into place.

Rupa Mooker is Director of People & Development with MacRoberts LLP

VIEWPOINT

SLCC rules need updating

Consultation on revisions

The SLCC recently published a consultation on proposed changes to its rules. Our current rules were last updated in 2016, and we are required to keep them under review, so we felt an update was timely.

We specifically wanted to ensure that they reflect a digital focus in our operations and engagement with the profession. Our 2020-24 strategy committed us to moving to a digital first approach, and the experience of the last 18 months has only underlined the importance of this. The changes proposed therefore take account of the changing external landscape and norms, including technology, communication methods and administrative tools.

We also took the opportunity to respond to specific issues which have arisen in the last five years, where we identified that a change in the rules would be desirable to update or to clarify our processes and procedures, or to help us improve our efficiency.

The changes include:

- Removing unnecessary barriers to digital processes, including clarifying that, where appropriate, communications can be sent by electronic means, and that mediations, oral hearings and determination committees can take place using digital options.
- Allowing the SLCC to identify the nature of the information it requires from parties, and the form in which it would be most usefully provided, in order to assist a transition to use of digital formats, which will reduce delay and cost.
- Updating the section on confidentiality to ensure that the rules comply with current confidentiality and data processing requirements.
- Simplifying the requirements to make a complaint to remove unnecessary administrative barriers, to clarify when a complaint is deemed to have been registered by the SLCC, and the information required by the SLCC in order to register a complaint.
- Updating the section on time limits in recognition of the time elapsed since the last changes to time limits came into force, bringing all complaints in line with the three-year time limit. In practice, this only has implications for a small number of service complaints where the service was first instructed pre-April 2017. We have also clarified the circumstances in which the SLCC may accept a complaint that has not been made within the specified time limits.
- Clarifying the process for premature complaints, where the firm has not yet had an opportunity to try to resolve the issue, and the circumstances in which the SLCC may proceed to take action.
- Highlighting our focus on resolution, and the steps we may take to facilitate it.
- Make language gender neutral throughout.

Together, we believe these changes will ensure the SLCC is able to discharge its statutory duties as efficiently and effectively as possible. We look forward to hearing others' views on these proposals over the next few months.

Full details on the proposed updates, and how to respond to the consultation, can be viewed on the SLCC website. The consultation closes on 1 December 2021.

Vicky Crichton, Director of Public Policy, Scottish Legal Complaints Commission

BOOK REVIEWS

McGowan on Alcohol Licensing in Scotland

STEPHEN J McGOWAN
PUBLISHER: EDINBURGH UNIVERSITY PRESS
ISBN: 978-1474473910; PRICE: £140 (PAPERBACK)

This book is as comprehensive as it is readable. Think about a knotty point of licensing law and you will find it analysed here. When does a licence cease to exist? What is the correlation between a club's constitution and its premises licence? Is there a duty to trade?

The writing style is very much the author's own, and the book is peppered with tales from the trenches, many of which resonate with old stagers. There is a great deal of humour. Nor is he slow to criticise our lawmakers.

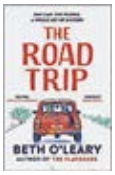
Anyone who is instructed to draft an operating plan should carefully study chapter 8, which highlights so many potential pitfalls. On the other hand, anyone looking for help in drafting an appeal will fail to find much. I think this is the only criticism I could level at a phenomenal piece of work. It probably reflects the ultra-specialist nature of the law these days.

Who is the book for? Well, as the preface says, "licensing practitioners of all sorts... as well as the good people of the licensed trade". It continues: "I have tried to make the style fluid, the language accessible and with a dash of personality wherever possible whilst relaying anecdotes from 'the front'."

I had the pleasure of reading the entire original manuscript. The author and his editors are to be congratulated not just for the effort in producing the original, but for converting what was a rough diamond into a polished gem.

Tom Johnston. For a fuller review see bit.ly/3trApDB

The Road Trip



BETH O'LEARY
(QUERCUS: £14.99; E-BOOK £8.99)

"After [some] ups and downs... there's a hilarious finale to round it off".

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

The book review editor is David J Dickson

BLOG OF THE MONTH

stephenmayson.com

"Is the BigLaw business model sustainable?" asks Stephen Mayson, a leading advocate for the reform of legal services provision. As you might expect, his short answer is basically no, but this blog should be studied for the particular model he has in mind.

What does creating value for clients involve? Or resourcing the firm? Allocating returns? Financing the business? Depending on your answers, your firm might be caught by his conclusion: "Too many firms are currently operating with a blindfold on."

To find this blog, go to bit.ly/3h8Lcov

See, it works

Just testing the system? You'd better be sure of that.

Several planning applications to Swale Borough Council in Kent were rejected by a junior council worker who thought they were testing a dummy website – and the council has been advised that the refusal letters are legally binding until overturned, probably via judicial review.

Vital improvements to an animal sanctuary were refused because "Your proposal is whack", with a second reason reading "No mate, proper whack".

Other refusals contained reasons such as "Don't even bother re-applying lol" and "not even joking lmao".

Applicants to demolish a pub were more fortunate, with a permission reading "why am I doing this am I the chosen one".

Council leaders indignantly pointed the finger at Mid Kent shared services, which handles the applications. An investigation is said to be underway.

Everyone else is now lmao.

PROFILE

Tatora Mukushi

Tatora Mukushi is a solicitor with the Scottish Government and convener of the Law Society of Scotland's Racial Inclusion Group

❶ What made you pursue a legal career?

Stephen Bantu Biko, South African anti-apartheid activist, organiser and law student, was murdered in 1977 by security services. Since I was a boy, every aspect of his life and death intrigued me, especially as there are so many contemporary echoes of his philosophy, experience and harsh reality. Seeing the law, as he did, as a device of meaningful empowerment, is what engages me here and keeps me going.

❷ Can you tell us about your career path to date?

I initially trained in criminal defence and then in conveyancing in small firms in London. I practised for about seven years in criminal defence until I moved to Glasgow. I cross-qualified and practised in asylum and immigration and then in a mental health and incapacity project. I joined the Scottish Human Rights Commission in 2019. After paternity leave I moved to Shelter Scotland's Migrant Destitution Project. I recently joined the Scottish Government Legal Department.

❸ Have your perceptions of the Society changed since you joined the Racial Inclusion Group?

I think so. My prior engagement with the Society was based entirely around transferring my qualification to Scotland and all of the bureaucratic anxiety that entails. My work on the Racial Inclusion Group has been far more personal and engaging. I appreciate the Society as a modern dynamic organisation. The Racial Inclusion Group's research will help to inform its work to build a more inclusive culture for the profession.

❹ What's your top tip for new lawyers?

Always be interested in things outside your immediate role's mandate. Live and work outside your comfort zone, whether through hobbies, education, pro bono work. Diversity of thought and experience is an asset that cannot be overvalued.

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

WORLD WIDE WEIRD

① Write and wrong

A pensioner who tried to rob a bank in Eastbourne fled empty-handed after cashiers couldn't read the handwriting on the note that listed the would-be thief's demands.
bit.ly/38PKzEt

② Seeds of failure

A job seeker in Plymouth failed a drugs test at interview, allegedly after eating bread from Tesco containing poppy seeds. The seeds can absorb small quantities of opium during harvesting.
bit.ly/3ySzWLF

③ Home alone

Police in Texas have appealed for help to identify the owner of a mobile home that was found abandoned on a trailer in the middle of a highway.
bit.ly/3DYVjyD

TECH OF THE MONTH

slowly.app/en/

Free. Apple Store and Google Play

If you ever had (or wished you had) a pen pal at school, Slowly lets you recreate the experience by smartphone. It's a social app that's intended for a slower messaging experience.

Users set up a simple profile with an avatar, location and list of interests; Slowly then matches you with users with similar interests. The app adds a time delay element to your messages, encouraging longer-form writing at a gentler pace.

Ken Dalling

Keeping active in retirement is great – but being able to provide for retirement is one of the issues facing the legal aid sector which needs to be addressed through proper investment by Government

Before opening my office in November 1992, I attended a meeting with my accountants to uplift the ledger books and ring binders that I would need to complete ("on a daily basis if you want to avoid trouble"), to keep on top of firm finances and comply with the accounts rules. Just thinking about the practice and discipline of double entry bookkeeping still makes my head hurt.

As the office became busier, my mother was volunteered to take over the cashroom. At age 92 she is still supervising the books that are now handled by the same accountants from whom I collected the ledgers almost 30 years ago. My father, a retired teacher, also works with me. As a filing clerk/messenger, before lockdown, he would come into the office to take pressure off the secretaries every afternoon and then he would archive the dead files at home. He would bring my mum up on a Thursday to catch up with the finances. COVID put an end to the weekday office attendances. Even now that COVID restrictions have eased, as much as a measure to keep them safe as anything, they only come in on Saturdays when there's no one else in the office. It has been emotionally priceless to have family support with my business, and I am sure that I haven't told my parents that enough.

The advice to a police officer for the day after their retirement has always been to "put on your shoes and not your slippers or you'll be dead in a year". I have no doubt that the mental and physical engagement that my parents have given to my business has kept them alive. But now my parents are feeling their age and they want to retire.

Growing imbalance

Retiring (again) when in your 90s is great, but I really hope that most of us are able to step away from a full time working life long before that age is reached. The private practice business model has always been the most efficient when it comes to delivering legal aid services – at least from a Government cost perspective – but just how easy it is to make proper pension provision from legal aid profits is another matter. As the Crown receives increased funding for its deputes, the attractiveness of the defence bar is further diminished and with that the chances of legacy planning for partners in the criminal court practice area.

It is a good thing that the Government is looking ahead to see that the civil and criminal justice systems are in the best shape possible to get through the backlog of cases and process new business. The Law Society of Scotland is eager to contribute to the thinking on RRT. But before we consider "T"ransforming, there is the issue of "R"ecovering and "R"enewing. There are to be more courts so, therefore, more fiscals and more sheriffs, but what about solicitors? Criminal court pleaders are a finite and diminishing resource – as well as an undervalued one. Until there is further, and long overdue, investment in legal aid that redresses the current imbalance between privately funded and legally aided work, and now also the imbalance between the Crown and the defence, there will inevitably be a problem with supply and demand. It is in the interests of all, not just the legal aid solicitor, that those who would have the justice process operate at its best recognise the need for such investment.

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

People on the move

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NQs welcomed at Blackadders

ABERDEIN CONSIDINE, Aberdeen and elsewhere, has appointed **Emma Roman** as a senior solicitor in the Family Law team, based in Edinburgh. She joins from BEVERIDGE & KELLAS.

ADDLESHAW GODDARD, Edinburgh, Glasgow, Aberdeen and internationally, has appointed **Ian Le Pelley** as a partner in its Transport team in Scotland, based in Edinburgh. He was formerly group deputy general counsel for DP WORLD in Dubai.
Addleshaw Goddard has promoted **Kirsten Thomson** to managing associate in the Commercial Litigation team, based in Edinburgh.

BALFOUR+MANSON, Edinburgh and Aberdeen, has appointed its three former second-year trainees to new roles as qualified solicitors: **Taylor Henry** (Private Client), **Klaudia Wasilewska** (Medical Negligence & Personal Injury), and **Emily Deans** (Family Law).

BLACKADDERS, Dundee and elsewhere, has appointed its six former second-year trainees to new roles as qualified solicitors: **Bethany Buchanan** and **Paul Nash** (both Corporate & Commercial, Dundee), **Emma Grunenberg**, **Fiona Knox** and **Blythe Petrie** (all Private Client, Aberdeen or Dundee), and **Faye Lipton** (Family Law, Dundee and Glasgow).

Jonathan Bremner QC, barrister, a tax lawyer who practises from One Essex Court, has joined AXIOM ADVOCATES after calling to the Scottish bar earlier this year.

BURNETT & REID, Aberdeen, has relocated to new headquarters at 9 Queen's Road, Aberdeen AB15 4YL. The firm has also opened an office at Banchory Business Centre, Burn O'Bennie Road, Banchory AB31 5ZU.

Claire Campbell has been appointed senior legal counsel at TVSQUARED. She joins from CAPITA TECHNOLOGY SOLUTIONS.


ESSON & ABERDEIN, Aberdeen, has appointed **Joseph Bowie** as chief operating officer. He joins from ABERDEIN CONSIDINE, where he built up the firm's Lender Services division.


Taylor Henry, Emily Deans and Klaudia Wasilewska of Balfour+Manson

GILLESPIE MACANDREW, Edinburgh, Glasgow and Perth, has appointed chartered tax adviser **Lisa Macpherson-Fletcher** as tax director. She joins from accountancy firm SAFFERY CHAMPNESS.

JONES WHYTE, Glasgow, has appointed **Charles Brown** as partner and head of Family Law. He was previously a partner with HARPER MACLEOD.

LEVY & McRAE, Glasgow, has appointed clinical negligence specialist **Elizabeth Rose** as a senior associate. She joins from DRUMMOND MILLER.

McCUSKER, McELROY & GALLANAGH, Paisley, has appointed **Lyndsey Barber** as a criminal defence solicitor. She joins from MOIR & SWEENEY LITIGATION.

MACROBERTS, Glasgow, Edinburgh and Dundee, has announced 19 promotions. **Maggie Kinnes** (Construction) becomes a legal director, along with **Sarah Pengelly** (Construction) and **Kenny Scott** (Employment). Advancing to senior associate are **Rebecca Barrass** (Construction), **Jennifer Burns** (Real Estate), **Graham Horn** (Commercial Litigation), **Richard MacDonald** (Pensions), **Bonar Mercer** (Corporate Finance), **Susan O'Farrell** (IP, Technology & Commercial) and **Rebecca Yassin** (Corporate Finance).
Amie Brown and **Graeme Harrison** (both Real Estate), **Rebecca Henderson** (IP, Technology & Commercial), **Pauline McLachlan** (Real Estate) and **Hannah Ward** (Corporate Finance) move up to associate level, while **Ryan McLaughlin** (Corporate Finance), **Zoe Rocks** (Real Estate), **Gemma Scrimgeour** (Real Estate) and **Agne Zasinaite** (IP, Technology & Commercial) become senior solicitors.
Seven former trainees begin new roles as qualified solicitors: **Christie Carswell**, **Calum Lavery**, **Douglas Leslie**, **Michael Gallagher**, **Sarah Milne**, **Nicola Kelly** and **Nikita Sandhu**.

MOV8 REAL ESTATE, Edinburgh, Glasgow and elsewhere, announces that **Hajira Nisa** has joined its Conveyancing department as a solicitor.

MURRAY BEITH MURRAY, Edinburgh, has promoted **Laura Brown** to director of tax and **David Windram** to tax manager, and appointed **Charles Adams** as senior tax assistant.

David Nicolson, advocate, has joined COMPASS CHAMBERS from ARNOT MANDERSON ADVOCATES.

PINSENT MASONS, Edinburgh, Glasgow, Aberdeen and globally, has appointed **Bruce McLeod** as a partner in the Energy team based in its Aberdeen office.
He joins from BURNESS PAULL where he was a partner.

LISA RAE & CO, Edinburgh, announces that **Dondé Thiam** has joined the Child & Family team as a solicitor.

Dominic Scullion, advocate, has joined COMPASS CHAMBERS from AMPERSAND ADVOCATES.

WALKER LAIRD, Paisley and Renfrew, has appointed reparation lawyer **Barry Berlow-Jackson** as an associate. He joins from DIGBY BROWN.

A bright future at Edinburgh Dog and Cat Home

Many people know the Home from the bright green hoarding at Seafield, or recognise us from the sound of dogs barking as they drive past Leith and along Edinburgh's coast road. Maybe they've taken a long stroll down the Portobello prom and ended up at our colourful dog and cat mural, or spotted wagging tails and wet noses through the fence of our paddock runs.

The Home has been on this site since the 1950s, but few will know the true extent of the work that goes on both inside and outside the gates to help animals from across the East of Scotland.

A typical day might involve reuniting an owner with their lost pet, providing veterinary treatment to animals who have suffered neglect, or meeting with an MSP to discuss animal welfare legislation to help protect Scotland's dogs and cats and promote responsible ownership. Every day we provide the unconditional love and attention that stray and unwanted pets need, to go on to new, loving, forever homes.

Empowering our community

More recently, the Home has set its sights on a new mission – to support our local community and particularly those pet owners that may be struggling to make ends meet. Above all else we hope to keep animals where they are loved, and this means helping people to feed their pets.

Paws Pantry was launched in 2019, our dedicated pet foodbank that supplies food, leads, collars, jackets and bedding, free of charge. We have recently started bringing the foodbank out to schools and partner foodbanks to bring the stock to where it is needed most. We're proud that now many dogs and cats that may otherwise have had to be surrendered, are still in loving homes and enriching the lives of their owners at their most difficult of times.

One in three animals

We hope to continue this work for many years to come. Unfortunately we know that there will always be a need for services like Edinburgh Dog and Cat Home, a place where those animals that may have never experienced a loving home, coming from the darkest of circumstances, can be given a second chance. Providing this safety net for Scotland's unwanted animals comes at a price, and one that we are overwhelmingly grateful to our local community to help us pay. The Home costs nearly £2 million a year to run, and in the absence of any regular government funding, we are left nearly completely dependent on donations and fundraising initiatives to keep going.

One of the most powerful ways that our community has supported us is by leaving gifts to us in their wills. An astounding one in three animals that reside with us each year have had their care funded by legacies. We simply couldn't keep going without this lifeline, and there really are no words to describe what it means to us when we discover that someone has made that decision to include us in their will.

We are now looking at ways that we can give more to those who are planning for end of life, and we are making plans for a more structured guardian programme to give owners the peace of mind that their pets will be in safe hands when they pass away. In doing so we hope to honour the memories of those that have gone and ensure that their most beloved asset, their pet, goes on to find another home where they can continue to be loved.

1 in 3

of our animals are helped thanks to gifts in Wills.

To find out more please call Gillian on **0131 669 5331** or email **fundraising@edch.org.uk**

Edinburgh Dog and Cat Home
26 Seafield Road East, Edinburgh, EH15 1EH
edch.org.uk

Action stations

The case for a Conveyancing Task Force

The pandemic brought sudden changes in conveyancing practice – but what else is on the way, and should practitioners not take the initiative in shaping their own future? Stewart Brymer argues for a new forum to do just that

Over the past 20 years we have witnessed a quite extraordinary amount of change in our property law and the practice of conveyancing. Whilst the essence of a conveyancing transaction is largely the same, the component parts have changed dramatically: the introduction of the home report, the Combined (now Scottish) Standard Clauses, and enhanced conveyancing case management systems, to name but a few. Add to that the effect on everyday practice of the COVID-19 pandemic, and one has the proverbial perfect storm.

A lot has been said and written over the years as to what the future of residential property conveyancing might be for solicitors in Scotland – often by referring loosely, and usually erroneously, to what is referred to as e-conveyancing. The purpose of this article is to assess where matters currently stand, and how conveyancers might best influence their own destiny and chart a course forward.

It may be argued that there is no need to change, and that conveyancing practice will continue to evolve with solicitors involved as they always have been. That is certainly an option, but it is suggested that market forces in the UK and beyond point towards a more proactive approach being required. This comment is made against the backdrop of over 40 years in the legal profession and a similar time involved in teaching conveyancing and property law at the University of Dundee.

When I commenced my apprenticeship in 1979, deeds were typed with typewriters on engrossment paper, stitched with red ribbon and folded appropriately to satisfy Registers of Scotland – I am that old. Then came the word processor and everything that followed. Throughout this period, however, solicitors have deservedly enjoyed a prominent position in residential property transactions and have usually been the source of quality advice for buyers and sellers alike. Others are moving into the space, however, and that prominence is under threat. While it is easy to "see no ships" during busy periods such as we have seen in the past 12 months, the ships are there nonetheless – and they are closer than we might think.

Setting the pace?

The pandemic made changes to working practices essential if business was to continue. In the space of a very short period of time, Registers of Scotland adopted new practices to facilitate non-physical submission of deeds for registration. Solicitors quickly became accustomed to these changes, and practice evolved. In an article published at Journal, February 2020, 33, a contemporary of mine from university, Chris Stuart, considered the role which legal tech was then playing in transactions and asked whether the current position was really of benefit to solicitors. He suggested a digital solution at a point in time when he, like us all, did not know what was literally about to come round the corner. That solution was a Scottish conveyancing system based at Registers of Scotland ("RoS") which would lead to us having a unified, national conveyancing system, which he described as a Scottish Conveyancing Hub working for the benefit of everyone – or all "stakeholders", if we must use that term. In his article, he also suggested other innovations which might benefit the legal profession and others involved in broader legal processes.

In the same edition of the Journal (p 35), the Keeper of

"Since March 2020, RoS has introduced considerable changes which have benefited all involved in the conveyancing process"

the Registers responded warmly to the suggestions made in the article and gave hope that the pace of Registers' Digital Transformation Programme was increasing. That was, of course, before lockdown had the impact which it has had on everyday working practices. Even then, however, the Keeper sounded a cautionary note when she said that RoS was pausing its project looking at digital standard securities because research with certain firms had informed RoS that it would not be viable to have a client sign a power of attorney authorising a solicitor to sign a deed on their behalf using their Law Society of Scotland QES or a re-issued RoS smartcard.

Was that conclusion really justified? Indeed, who were these firms, and were they aware that the ARTL system functioned entirely on that basis and that powers of attorney were held at RoS as evidence of the authority given? What is in any way difficult about a client granting a transaction-specific/limited purpose authorisation to their solicitor to sign on their behalf? One can only conclude that a broader investigation of this matter might have led to a different conclusion.

Since March 2020, RoS has introduced considerable changes which have benefited all involved in the conveyancing process. The Keeper hosted a "Future of Conveyancing" conference earlier this year in an attempt to form a consensus base on which further changes could be built. RoS has also continued to liaise with the Society and other stakeholder groups, as it has always done.

It is suggested however that the past 18 months have demonstrated that change often happens when we least expect it. As a result, the change process requires to be harnessed and influenced, or else it can run away with itself and conceivably end up in a completely different place than might otherwise have been anticipated. It might also take too long to deliver change when so many changes are already taking place at pace. That, I suggest, is potentially where we might end up with conveyancing if we adopt no more than a watching brief as to developments in title insurance, lender-led (or more accurately lender-influenced) conveyancing, the use of IT "bots" in examination of title, money transfer, and other innovative projects including the use of blockchain.

Why a Forum?

Solicitors remain central to most conveyancing transactions, and can continue to be so if they harness and adopt appropriate technological developments. The fact of the matter, however, is that the so-called "monopoly" which solicitors enjoy in conveyancing relates only to the drawing of the deed of transfer. Even that can come under attack, as is evidenced by what happened in Denmark a number of years ago. Once the solicitors' monopoly in conveyancing was done away with in Denmark, many feared the worst. The opposite happened, however: Danish property lawyers found a new forum (www.danskeboligadvokater.dk/english/) through which to get their voice heard, and their role in the process has flourished.

Such a change, made in the face of potential adversity, required leadership and vision, and it is suggested that that is precisely what is needed in Scotland. There is a proposal being mooted for the creation of a Scottish Conveyancers' Forum.

This is not just a response to technological change. There are other potential benefits of a Conveyancers' Forum: for example, agreed protocols on issues of conveyancing practice; enhanced risk management; better representation of the sector to third parties; and, as is the case in Denmark, the Forum becoming the face of the consumer champion with enhanced standards all round in accordance with a Residential Property Charter.

Discussions have already taken place, led by Ross MacKay, a former convener of the Property Law Committee and a driving force behind the Scottish Standard Clauses, about the formation of such a body. It is anticipated that the Forum would operate in a manner similar to that in which the Conveyancing Association (conveyancingassociation.org.uk/) operates in England & Wales. Why could that not happen? Do we not share a common purpose? Preliminary discussions have led to the conclusion that there would be considerable merit in closer collaboration with property lawyers in England & Wales at this time of rapid change.

Breaking the mould

The initial reaction of many when faced with such questions is to say that conveyancing firms need to modernise and invest more in technology. While it is true that there are still a few firms that continue to post paper documents, the majority have made smart investments to optimise their case management and communication systems. More is required, however. No matter how good a firm's customer relationship management system (CRM) is, or how smart their automations are, it is the factors beyond the control of an individual firm that stand in the way of true end-to-end e-conveyancing. It is for this reason that innovation and leadership must come from elsewhere, before firms can finally deliver true e-conveyancing.

We are a small country with a history of innovation and, most importantly, we are already embarked on a digital journey. The goal must surely be to complete that journey and, in so doing, deliver real benefits to the economy, to citizens and those involved in the home moving process.

"The initial reaction of many when faced with such questions is to say that conveyancing firms need to modernise and invest more in technology"

RoS already holds all title information with which conveyancers must interact. As suggested by Chris Stuart and others, therefore, the best solution is to create a central point of convergence that is used by all parties, with clearly defined data standards. Each firm's CRM would then "push and pull" data into an exchange using the agreed data standards, thus enabling seamless and real time data flows for all parties involved in a title transfer. RoS is best placed to lead from the front. To do so, however, requires more than listening to stakeholders. Of course, public consultations are important (indeed, essential to help build consensus), but a transformation strategy requires focused leadership drawn from a broader base. Conveyancing is about more than registration of title.

Conveyancing is a broad church, with everything from sole practitioners to large specialist firms and dedicated conveyancing units operating under panel management systems. All have something to contribute to what the future of conveyancing might be. Young solicitors should also have a voice as they are, as a general rule, much more open to doing business digitally. To that end, I believe that now is the time for a Conveyancing Task Force to be formed, chaired independently of RoS in order to bring about real and effective lasting change within a specified period of time.

That is the way in which the Scottish Government worked when the home report was introduced, and again when the concept of ScotLIS was first floated by Unifi Scotland (unifiscotland.com). The result of both, but most notably ScotLIS, was something which broke the mould as to how information on land and property in Scotland can be accessed by all. Much is still to come from ScotLIS, but an excellent start has been made and it is surely one of the building blocks on which a new digital way of working will be built.

Aim high

It is suggested that the Task Force should also look at other jurisdictions where radical and effective change has been made to conveyancing law and practice. In my opinion, the best example is Australia and the leadership shown by PEXA (pexa.com.au) while working in partnership with local and state governments, the various state land registries, and lenders and conveyancing practitioners. To introduce a similar system in the UK is not as easy as some might suggest, as the UK is not a Torrens-based system. As in Australia, however, it will be necessary for there to be legislation which will underpin and give validity to a central exchange and e-conveyancing generally.

In Australia, the Government worked with industry to establish the Australian Registrars' National Electronic Conveyancing Council (ARNECC). This led to the development of the Electronic Conveyancing National Law, which governs the e-conveyancing process for all those involved in title exchanges. Compliance with regulation and operating standards would also need to be determined. These and other matters should be considered by the Task Force in consultation with all relevant regulatory and other bodies – most notably the Law Society of Scotland, the Scottish Legal Complaints Commission and RoS, working together for the benefit of all. Once a framework has been established, private companies are then free to develop bespoke solutions for title transfers.

We are rightly proud of the fact that we in Scotland operate from principle rather than precedent. If we adopt that approach when looking to change our law and practice, we can start to make real change happen now and, in so doing, ensure that solicitors continue to help shape the practice of conveyancing for the benefit of all. Either that or we wait to see how others shape the home moving process and accept whatever crumbs are left on the table.

We should be aiming high, and doing so in a co-ordinated manner. Enormous sums are being invested elsewhere in legal tech. As a developed but, importantly, small enough country to be an ideal testing ground, it is suggested that we should put our best foot forward to secure the benefits such investment can bring to both the economy and the maintenance of our prized legal system. The result could be transformational.

Anyone interested in joining the discussion about creating a Scottish Conveyancers' Forum should contact either Ross MacKay (ross.mackay@coulters.io) or myself (stewart@brymerlegal.co.uk).

Professor Stewart Brymer WS
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Homeworking burnout

For many in the legal profession, working from home during the pandemic blurred the distinction between home life and work. For some, that can lead to burnout.

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Personal Perspective.
I have to be honest, when the first lockdown came, I took to homeworking like a duck to water. Did I miss the 10 hours per week commuting? No! That gave me time to do other things like the novelty of eating breakfast, preparing proper cooked food, doing the chores so the weekend is free and being financially better off.

Would I go back? Absolutely not. However, that's not the case for others. Let's take a look at just what that means.

What is burnout?
According to the mental health charity, Mind:

> "Burnout isn't technically a diagnosis in itself, but instead it refers to a collection of symptoms. You may feel completely exhausted, have little motivation for your job, feel irritable, or anxious and you may see a dip in your work performance. Some people also experience physical symptoms like headaches or stomach aches, or have trouble sleeping."

The inability to compartmentalise, the social isolation and being joined at the hip to PC and phone can lead to long hours, stress and tiredness.

Several people I know have taken the route 1 approach and dashed straight back to the office at the first opportunity. Others whose firms have adopted homeworking for the foreseeable future are not so lucky. So, what can you do to avoid this?

Live as if you were in the office.

- Stick to normal working hours - unfailingly.
- Take annual leave.
- Make sure your family respect your space when you are working.
- Get enough sleep.
- Use the evenings and weekends to follow enjoyable pursuits.
- If you are struggling, ask your manager or colleagues for help.

It's surprising how many people didn't take these simple measures and suffered as a result.

Practical Measures.
This means getting the right kit. If you can, work at home in a room that is dedicated to just that. Fill it with the kind of things your office used to have: a proper desk and suitable chair come as standard as does a decent internet connection and print and scan facilities if you need them.

Install video communication hardware and software so that you can hold virtual meetings as frequently as you used to when you were in the office. Email and phone are not enough on their own.

Get the most out of your legal software.
Well, you knew I'd say that eventually! But it is still a valid point. The key purposes of practice management software are both to allow you to work from anywhere and to do so more efficiently.

Ask your supplier for help with this or take a few online courses on their academy to see how you can speed up your work.

At the end of the day, they are there to help you get the work done in time to enjoy the rest you deserve.

To find out how legal software can help you work more efficiently, contact us on innovate@lawware.co.uk or 0345 2020 578.

Mike O'Donnell.

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Finding the value in valuations

The role of expert witnesses providing valuations in financial provision disputes has come under scrutiny in recent decisions. Alison Edmondson considers what practical points solicitors can take from the cases

Outer House decisions regarding financial provision on divorce in recent years have largely featured themes of unequal division, whether source of funds arguments in terms of s 10(6) of the Family Law (Scotland) Act 1985 or economic disadvantage arguments in terms of s 9(1)(b). However, in the past few years another theme has emerged: the interaction between the court and the expert witness, valuation experts in particular. It is possible to draw out some very practical implications for agents instructing expert witnesses in the specific context of business valuation for financial provision.

It is useful to begin with a reminder of the guidance given by the Supreme Court in *Kennedy v Cordia (Services)* [2016] UKSC 6; 2016 SC (UKSC) 59, to the effect (at para 57): "It falls in the first instance to counsel and solicitors who propose to adduce the evidence of a skilled witness to assess whether the proposed witness has the necessary expertise and whether his or her evidence is otherwise admissible. It is also their role to make sure that the proposed witness is aware of the duties imposed on an expert witness."

At para 44 of its judgment, the Supreme Court set out four considerations which govern the admissibility of skilled evidence, namely (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

Agents are the first line of assessment of the admissibility of the evidence of the expert witness, and primarily responsible for making sure that experts are aware of their duties. Three recent financial provision decisions from the Court of Session illustrate the range of the court's reaction to expert evidence.

A v A [2020] CSOH 54

A v A, a decision of Lady Wise, neatly illustrates the practical import of these passages. Summary and analysis of the expert valuation issues arising can be found in Fiona Sasan's briefing at Journal, August 2020, 32. The key practical point is that the report of one expert contained no reference to his duties to the court. That was a backdrop against which other errors took on more significance than they might otherwise, and opened the door to a finding that the expert had allowed himself to be influenced by the views of the party instructing him.

Jewellery valuation issues also arose. The parties led evidence from competing experts. One set out her qualifications and professional memberships, and described her methodology which followed the standard laid down by the relevant national association. The other had long experience but no equivalent registration, nor had he applied a nationally recognised standard approach. Crucially, one of the parties had personally requested the valuation, and the court noted that his instructions were casual and there was some confusion about the basis of valuation. These are all factors which influenced the court and are easily avoided by agents when instructing valuations, and perhaps usefully reinforced at pre-proof consultation.

Lady Wise's decision was reclaimed. Lords Malcolm, Woolman and Pentland refused the reclaiming motion, which focused on the treatment of the expert evidence at first instance: [2020] CSIH 66. The Lord Ordinary had awarded the pursuer a substantial capital sum, after resolving complex expert evidence as to the value of the defender's business interests. She rejected the evidence for the defender, adopting a valuation in a report from the pursuer's forensic accountant. She proceeded in one respect on conclusions drawn from her assessment of the defender's father's evidence. The defender submitted that this evidence should have caused the Lord Ordinary to reject the valuation she had relied on.

The Inner House, helpfully, resisted the invitation to interfere with the Lord Ordinary's assessment of evidence and consequent adoption of one of the experts' approaches. The point raised now was said to be relatively insignificant in the overall context of the case and the sums involved. The Lord Ordinary was entitled to accept a considered valuation by an expert forensic accountant. She was not obliged to identify and address a point only now being raised by the defender. Again, practically speaking, identification of all relevant arguments at first instance remains self-evidently crucial.

It was accepted that if the reclaiming motion had succeeded the Inner House would have had to assess whether a capital gains tax liability would have arisen, and the amount and its impact if so. No evidence had been led on the matter at proof. Lord Malcolm's judgment states: "This is illustrative of a more general problem in that, even if the court did see merit in this ground of appeal, it is not in a position to unscramble the Lord Ordinary's figures and identify appropriate alternatives."

The reclaiming motion ultimately failed because it concerned one small aspect of a complex set of competing reports and valuations. The focus was on bigger issues, including which of the differing approaches of the respective experts should be accepted. Simply because a party can identify a point not addressed in a judgment does not warrant the appeal court "upsetting [the Lord Ordinary's] detailed and careful assessment of the value of the matrimonial property".

T v T [2021] CSOH 6

T v T is a classic of the divorce and business valuation genre. The significant issues at proof related to companies in which shares held by the parties were matrimonial property: their valuation was key. A further dispute arose as to the treatment within the valuation exercise of a significant debt due by one company to other companies the shareholdings in which were matrimonial property. The court's view was that the appropriate valuations for all the relevant companies were at the midpoints agreed by the two forensic accountants, and that those figures should be used without taking account of any of the contingent liabilities (for commentary on this aspect see Fiona Sasan, Journal, May 2021, 33).

A further issue arose in relation to companies operated by the parties during the marriage whose value would not otherwise be taken into account because the wife's shareholdings were pre-matrimonial. Her position was the strict approach that as the shares fell outwith the definition of matrimonial property, the husband had no entitlement to share in their value. The husband's position was that the shareholdings should be treated as if they were matrimonial because "they have for many years been part of the same omelette".

Lady Wise considered both positions extreme, unrealistic and unreasonable. Significantly for present purposes, she noted that the evidence was in fairly general terms and it was surprising that no evidence was tendered about the value, if any, of the companies as at the date of the marriage or the commencement of cohabitation. If the husband had led evidence to show that effectively the whole value by the relevant date had been created during the cohabitation and marriage, findings to that effect could have been made. Ultimately, the court did make an adjustment in terms of s 9(1)(b) to reflect the economic advantage to the wife of the wealth created in these companies during the relationship. Presumably the adjustment might have been more favourable to the husband had detailed valuation evidence been led in this respect.

McC v McC [2019] CSOH 100

McC v McC is a decision of Lord Glennie, contrasting with Lady Wise's approach in *T v T* by illustrating that there are instances in which compromise between competing expert opinions cannot be justified intellectually. Contentious issues arose regarding capital gains tax on the disposal of investment shares arising from intellectual property rights. The particular point was whether HMRC would treat the disposal as occurring in the 2012-13 tax year, when the husband had exercised an option requiring his joint venture partner to purchase his shares (attracting a tax rate of 10%), or in the 2015-16 tax year when the parties to the joint venture settled their dispute (attracting a tax rate of 28%).

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At para 35 Lord Glennie describes himself as effectively being put in a position of having to decide what was the liability as at the relevant date on the balance of probabilities. The court relied heavily on an expert report provided by a tax barrister practising from London. The judgment says specifically that "there is no room at this stage for making a finding somewhere in the middle, to reflect the uncertainties inherent in any prediction". The court concluded that on the balance of probabilities, if the disposal had been disclosed at the relevant date it would have been dealt with as a gain within the 2015-16 tax year and taxed at 28%.

However, the potential unfairness to the wife was mitigated by adjustments because the court was satisfied that this depletion of matrimonial assets by the husband amounted to a special circumstance within s 10(1) and (6)(c) of the Act, justifying a departure from equal sharing notwithstanding the strictures of s 11(7) that the court must not take account of the conduct of either party to the marriage, given the exception where the conduct has adversely affected the financial resources relevant to a claim for financial provision. Even though the husband's expert evidence was relied on by the court at the valuation stage, the wife's position was protected because the court was persuaded by legal argument applicable at a later stage in the decision process.

Evidence by video link

Lastly, again on a practical note, agents' duties to instruct the expert must be considered particularly carefully in light of the increased (and apparently ongoing) use of videoconferencing in evidential hearings. In *AF v AF* [2019] SC GLA 22 the expert giving evidence by video link had a tendency to look up and to the right before answering, and whispering could be heard in the room before he corrected his answers. On being asked by the court to confirm whether others were present and to move the camera to allow the court to see the room in which he was giving evidence, the door to the room was seen to be clearly ajar.

Agents may need to set aside our discomfort about the risk of patronising instructed experts and provide them not only with very clear instructions but also a reminder of their duties (per *Kennedy v Cordia*). It may now be appropriate to offer guidance about the court's expectations of solitude during evidence, and clarity about which papers should be available in the room or on screen during evidence. Hopefully that will be sufficient to protect our clients, ourselves, our experts and the court from the much more uncomfortable consequences of the camera panning out to reveal a door left ajar...

Farming: fertile ground for mediation

The value of mediation is becoming recognised in agricultural disputes, and not only those relating to tenancies. Rachael Bicknell explains its particular attractions in this sector

It has been said that Scotland was born fighting. Battles over landownership can be traced back to at least Roman times, and the bloodline of our nation is stained with centuries of clan warfare, struggles for territory with the English, and the brutal evictions of the Highland Clearances.

To this day, while the feuds are conducted in a more civilised forum, conflicts over or relating to land and property ownership are often acrimonious and costly. Probably the most notorious litigation in recent times is the bitter 20-year boundary dispute between Perthshire pensioners. It was reported they had spent £500,000 in legal fees in a seven year court battle over a strip of land less than a metre wide, before the sheriff encouraged them to drop their case, saying that it was difficult to identify the benefit in continuing when judged against the effort and expense involved.

The costs of litigation as compared to mediation have been the subject of much discussion over the last year, particularly in the context of the convenience and cost-effectiveness of remote or online mediation. While an important consideration, costs are not the only reason for parties in dispute to consider mediation over litigation, particularly when it comes to agricultural disputes.

Art of the possible

One of the main benefits is that the parties retain control of the outcome. Mediation allows them, with the help of the mediator and their solicitors, to come up with an agreement that can work for everyone, and actually solve the problem – something that is often not within the gift of a court.

Significantly, this is recognised by the Scottish Land Commission and the Tenant Farming Commissioner, who recently set up a panel of approved mediators for the benefit of agricultural landlords and tenants. Following a two-year pilot scheme, the TFC reported that those who took part in mediation in the tenant farming sector said the outcomes achieved would not have been possible in a court process.

Added to this is the constant stream of changes to agricultural legislation over the past 20 years, for example relating to assignation and succession, landlord's improvements, diversification, right to buy, rent reviews and relinquishment, meaning that, now more than ever, there are more routes to conflict. For some disputes, little case law exists to inform how a dispute might be decided by a court, making "litigation risk" difficult to assess and outcomes difficult to predict.

Rachael Bicknell is a mediator on the Scottish Land Commission mediation panel and founder of Squaring Circles. Squaring Circles is offering any firm or in-house team regulated by the Law Society of Scotland free CPD on mediation. Please email info@squaringcircles.uk for more information.

Why agriculture?

Of course, agricultural disputes do not only arise in the context of landlord and tenant. In the past few months alone, I have been involved in the mediation of access disputes, a partnership dispute, a professional negligence claim and a board and workplace dispute, all involving farming businesses. Disputes relating to succession planning within farming families are common, as are trust, wills and executry disputes involving farming businesses or assets. Outwith the family context, commercial disputes regularly encountered by farmers include compensation for land acquired under compulsory purchase, leases for telecommunication masts, disputes relating to access, boundary and building defects and disputes with suppliers or machinery providers.

What makes agricultural disputes particularly well suited to mediation? First, farming disputes often involve conflict within a family and can therefore be highly emotional for those involved, particularly where the dispute involves legacy conflict passed down through generations. Mediation gets to the heart of the conflict and is far more suited to resolving the "people problem", which can be just as important as, or more important than, the substantive legal issues when it comes to finding a solution or settlement.

Secondly, farming disputes often arise in the context of an ongoing relationship. Litigation is well known for tearing apart business and family relationships. Mediation, on the other hand, often results in outcomes which preserve or restore those relationships, in part because it is a flexible process which can be adopted early in the life cycle of a conflict, before significant (sunk) costs are incurred, and positions become entrenched or escalate into formal intractable disputes.

Thirdly, commercial disputes in any context are hugely time consuming and expensive. Preparing animals for sale or slaughter, milking cows, attending auction marts, ploughing fields and sowing, spraying and harvesting crops need to be done when they need done. Everything else needs to come after that, and a farmer's work is never really finished. Pursuing or defending a claim for court is a huge inconvenience and can add considerable stress to farming life. Further, even the most profitable of farming businesses may struggle to meet the costs of pursuing or defending a claim in court, especially since the onset of the COVID pandemic, with many farms needing to diversify to stay afloat. Mediation costs a fraction of litigation and is widely considered the most cost-effective way of resolving even the most difficult and contentious disputes.

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Income tax: really becoming simpler?

Are HMRC's proposals to simplify taxation of trading profits more likely to increase complexity?

Most legal firms operate as a partnership or LLP, which, for tax purposes, means each of the partners are self-employed.

There has been little variation to the way self employed individuals assess and pay their tax since the introduction of self-assessment in the 1990s, but HMRC are now proposing a number of changes which are timetabled for implementation across the next few years, some of which will have an impact on the amount of tax due.

Firstly, the introduction of Making Tax Digital (MTD) means that those with annual trading profits and/or property profits in excess of £10,000 will have to maintain digital records and submit quarterly updates to HMRC from April 2023. A "final declaration", to report other sources of income and calculate total tax liabilities, will replace the tax return, although tax payment dates will remain the same. Currently, the self-employed report their profits according to the accounting year end which falls in the tax year. For example, if accounts are drawn up to 31 October each year, then an individual's tax return for the 2021/22 tax year will report the profits earned in the year to 31 October 2021.

The second change involves HMRC "simplifying" this system from 2023/24 to report profits earned in the tax year, rather than the accounting year. Using the same example, this means that the 2021/22 tax year would include 7/12ths of the profit to 31 October 2021 and 5/12ths of the profit to 31 October 2022. HMRC are of the view that this will enable taxpayers to understand more readily what they need to report under MTD.

It is true that the current system of aligning accounting profits to tax years can be complicated, particularly in the first three years of trading and on cessation. Taxpayers find it difficult to understand "overlap relief" where they have an accounting year end that isn't the tax year end, and the current system is not always to the taxpayer's benefit, particularly where there are movements in tax rates between when overlap profits are accrued and relieved.

Transition phase

HMRC propose there will be a transition year in 2022/23 whereby taxpayers will align their profits with the tax year end and relieve any overlap profits. Our example means that in 2022/23 the taxpayer will be taxed on the profits to 31 October 2022 plus the five months to 31 March 2023 less any overlap profits accrued when the business began. For some, this will create "excess profits", pushing taxpayers into higher rates of tax, restricting personal allowances and reducing capacity to contribute to pension or claim child benefit. HMRC propose allowing excess profits to be spread over five years to ease the tax and cash flow pressures of the change.

Another issue is the timing of accounts preparation. In our example, the accounts to 31 October 2022 would need to be finalised by 31 January 2023 to report profits accurately for the 2022/23 tax year. In the event that accounts are not final, HMRC will allow estimates to be submitted that can later be amended either by updating the return or by adjusting the position in the following tax year.

Still time to speak up

At present, the above proposals are at consultation stage. Already, a number of professional bodies have called for a delay in implementation when the move to MTD will be challenge enough. We expect partnerships both large and small may struggle to deal with the additional administrative burden, and for those recovering from the impact of COVID-19, finding extra cash to pay accelerated tax liabilities will be testing: we would encourage them to speak to their accountants or business advisors for advice.

Jill Walker is a Private Client Tax Director at Anderson Anderson & Brown

Law lessons learned

Recent features have debated the future for teaching law, partly with reference to experience during COVID-19. But what do students think? Matthew Bruce offers a view on what has worked with remote learning, and what has been lacking

"A man's mind, stretched by new ideas, may never return to its original dimensions." (Oliver Wendell Holmes Jr)

For as long as there has been formal education, students have been studying law. There are times when it feels like nothing has changed, alas, albeit lectures are no longer delivered in Latin and there is greater diversity in the student body. That is until a pandemic swept the globe and, since March 2020, fundamentally changed the way in which students in Scotland study law. Following on from Dr Michael Randall's article at Journal, May 2021, 18, I want to look at how the pandemic has impacted how legal education is delivered in Scotland.

In early 2020, my peers and I joked that a new and other-worldly virus might halt our studies and save us from taking the dreaded company law exam. However, come 23 March, Boris Johnson and Nicola Sturgeon confirmed that coronavirus would require a strict lockdown and a legal prohibition on non-essential activities. Still, we thought, this would only last a few weeks and we would be back to the routine of studies by the end of the Easter break.

It is now September 2021 and COVID-19 is still the dominant factor in our lives. It has impacted everything we do and has fundamentally changed how higher education has been delivered. Without any choice, students and academics had to adapt to keep working, and most of the adaptations have become the new normal.

For better or worse, the pandemic has provided ample opportunity for reflection. It would be wrong to think that the study of law is an exception from this. Has the pandemic been the catalyst for change we have needed? Or, has it shown that the traditional method of delivery is best? This article is not a criticism or a response to how I study law; rather it explores how the course is delivered and what, if anything, ought to change as we emerge from this arduous period of our lives.

Well, what has worked?

First and foremost, it must be recognised that Scots law students were still able to continue their studies despite successive lockdowns. One only has to look at Scottish dental schools, where each year group must now take an additional year of study to catch up, to see what could have been. Law, then, is clearly an adaptable course.

The most evident change was an overnight one from lectures being in-person to almost all being made available as pre-recorded online videos. No longer were students acting as note-taking automatons: we could now work to our own pace in a time that best suited each student's personal circumstances. When talking to my peers, there is an overwhelming consensus that this method of delivery has enabled them to spend more quality time with their lectures and as a result have a greater understanding.

Courses, panel discussions and networking events also made a move online. Pre-pandemic, there was simply not enough time in the working week – nor enough money to pay for travel – for a majority of students to attend as many of these events as they would have liked. The Law Society of Scotland's Law Fair in October 2020 was a resounding success by being available via Zoom all day for students to drop in and out to fit their schedules. The past year has given students the opportunity to attend more events than is usually possible. It would be a real loss to potentially limit student engagement by removing an accessible mode of attendance – although, as I will come on to, there is still a need for in-person engagement.

Assessments, too, have had to adapt. With exam halls closed there has been a greater emphasis on coursework and practical assessments. This meant students no longer had to regurgitate information, as is typical in a traditional exam. Now arguments have had to be developed and a better understanding demonstrated. There is much debate on whether timed examinations are the best way to assess students. COVID-19 has shown that effective assessment can be carried out by using a whole host of more "modern" methods.

The question on how students are assessed is by no means a post-pandemic discussion. Abertay University lecturer in law, Jade Kouletakis, has an interesting pre-pandemic article directly in point, in volume 5, issue 3 of *The Online Journal of Quality in Higher Education,* titled "Good practice and the UK LLB degree or: how I learned to stop worrying and love the 21st century."

What have we missed?

Dr Randall presented pressing concerns about students that have been exacerbated by the pandemic. A move to blended learning may

well be better, but only where each student has equal access to this mode of learning. The digital divide has never been more evident. Society would be doing a disservice to students if this divide is not bridged.

With law libraries closed, the pandemic highlighted issues on access to materials. There was no real problem with sources such as cases and legislation, which are almost always accessed online. What was more challenging was finding textbooks and journals, which are not as easily accessible online compared to primary legal sources. The past 18 months have shown that legal literature must be more accessible and affordable for students and institutions alike.

There is also the difficulty that not every household, for a number of reasons, may be an ideal environment for learning. A legal education in Scotland should be an equaliser. We all follow the same syllabus and meet the same accrediting standards. We cannot create a situation where some do better due to individual circumstances, nor can we limit who can study law post-pandemic. The profession has made positive steps forward in recent years in widening access to a Scots law degree, particularly with initiatives such as the Lawscot Foundation. This progress should only continue: any step backwards would be detrimental to the profession as a whole.

" First and foremost, it must be recognised that Scots law students were still able to continue their studies despite successive lockdowns"

Universities are not just about learning; they are incredibly social places. The change in delivery meant that for a while studying law became very isolated. Moreover, this meant that mental health and student wellbeing were tested to the extreme. It is very difficult to replicate the university experience anywhere other than lecture theatres and student unions.

If there is to be a change in delivery, we need to be careful not to turn the legal profession into a digital sector. Many students are attracted to law because they want to work for and with people. It is at university where networking begins. We are lucky in Scotland to have a close-knit legal profession. Whatever approach is adopted going forward, it needs to keep law people focused and closely bonded. If lost, this could be the most difficult thing to bring back.

Going forward

We do not want to look back on a missed opportunity to potentially update legal education by assessing the pros and cons of the past 18 months. Speaking to students and academics alike as a student representative, I have realised that we are all discussing the future of the profession and possible changes. This is by no means the beginning of a manifesto for change; it should be viewed as the basis for a debate on the future of legal education in Scotland.

Blended learning appears to be the favoured approach going forward. If adopted, it should realise all of the benefits developed during the COVID era. This should mean that students are able to reach a better understanding of the course content, be assessed in a way that challenges this understanding and move away from a process of copying and pasting. Blended learning, however, should not mean a complete move away from in-person delivery. Instead, it should focus on creating quality in-person experiences that allow for networking, the pooling of ideas and debates. Ultimately it will not be worth the change if it does not affect all students equally and allow for fair access into the profession.

The pandemic has shown us that we work within an incredibly adaptable sector and that we should not necessarily oppose or be frightened of change. As you read this article, students will be preparing to begin the new academic year in law schools across Scotland. It will be interesting to see whether the new academic wonts developed over the past 18 months become the norm, and whether the ongoing discussion on how we study law evolves into something greater. This is still very much a dynamic situation and – at the time of writing – COVID is still rearing its ugly head. I believe we should continue to adapt and build on the lessons learned.

It remains to say that we should all recognise an incredible achievement by students and academics for triumphing over the pandemic.

I would be interested to hear the views of practitioners, academics and fellow students on this area. Do get in touch on 1805328@abertay.ac.uk

Matthew Bruce is a final year LLB (Hons) student at Abertay University

denovo

What the best High Street law firms do...

Part 4 – Are you an agent of change?

Every great business has an agent of change driving it forward – is that you?

I'm a firm believer that in business you are only one smart decision away from completely changing your working life. I also believe you can learn from those who have driven their business forward.

Emma King, Director at Clarity Simplicity, did exactly that. She's taken on the mantle of spearheading a change in her firm. She recognised that change was required to allow her business to grow, move forward and prosper. We asked Emma about the change process.

What business issues were you facing that made you want new case management software?

As a business we were accustomed to using a CMS. However, I recognised that the system we were using was not delivering the efficiency we desired. We were content to plod along, like many firms do. However, as the challenges increased – such as connectivity becoming an issue and a lack of modernisation of processes – they started to lead to us losing business. We felt the system did not provide us with necessary tools to transform our working environment. Nowadays we are so technologically dependent we felt change was needed to maximise our growth opportunity. We're a busy firm, so having a reliable case management system in place is paramount to our success.

How important was it for your business to find solutions to these issues?

It became business critical. The frustrating thing was, I understand and recognise that faults happen with even the best of systems. We felt we could almost live with the connection issues, but we wanted the system to do more for us. We wanted the system to provide us with more automation, with better ways to manage our client onboarding process and the ability to report on our business performance, to name a few. There wasn't the same level of desire as on our side to get things rectified. The system issues shining a light on the existing CMS, allowed us to focus on areas which we could introduce far greater efficiencies and accountability.

How did you go about selecting a new CMS? How did you find that process/experience?

Quite simply we went to market – we sought recommendations from other practitioners as well as researching the marketplace. What we then did was reach out to our shortlist of providers, arrange meetings with each and explain our requirements both now and what we anticipate and want to grow to in the future.

Why did Denovo become your preferred partners?

We were impressed by the fact that Denovo listened to what we wanted and were very responsive to that. With some other providers it felt very much like we would be getting an "off the shelf" product and we were to fit in to that. In contrast, with Denovo, we felt we were able to outline what we wanted the system to do. We were impressed by the response and how simple it was to customise the system. It allowed us to create a bespoke package which would let us work the way we want to. We felt that Denovo could become not simply our case management supplier but work in partnership with us to help us achieve our goals and aims.

At this stage are your business aims being realised?

Absolutely. We have, within a short space of time, managed to introduce a working, refined case management platform which is allowing us to bring together different systems and processes which previously worked disparately and across a range of mediums, meaning that cohesive oversight was difficult to achieve. Now we have everything we need in one place. However, the aims are never static. We are a firm who wish to continually grow and develop, and through our experience with Denovo so far, I'm confident that as we grow, develop, and refine, our case management system will do so with us.

If you could give one piece of advice to another law firm about changing their case management software, what would it be?

Invest your time. The introduction, or change, of a case management system is a significant fiscal investment. For me this project would have been a massive failure if we had simply achieved a system which worked the way our previous one did. To make sure that wasn't the case we as a firm, and I personally, have invested significant time both in terms of the preparation for the changeover but probably and more relevantly since the changeover has taken place. The goals and objectives are to make sure that the system works as well as it possibly can to meet our business needs. Denovo's system is fantastic, but to guarantee success, that requires input from us.

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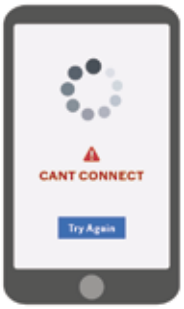

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Parole: *the Board as court*

Recent developments in law and procedure relating to the Parole Board for Scotland have seen it evolve into a fully fledged parole court. John Watt sets out what practitioners should now be aware of

The concept of parole was first introduced by Scottish geographer and navy captain Alexander Maconochie. Appointed superintendent of the British penal colonies in Norfolk Island, Australia in 1840, his scheme was based on a system of rewards for good behaviour that could ultimately lead to freedom.

Parole has developed significantly since that time, into a system which is entirely based on an assessment of risk, with public protection at its centre. The Parole Board for Scotland celebrated its 50th birthday in 2019. It is now accepted that the Board is an independent, judicial body, and a court for the purposes of articles 5(4) and 6(1) of the European Convention on Human Rights. This status comes with responsibility, and the Board has taken great steps to embrace fairness and transparency in its operation. It now confidently asserts its role as Scotland's parole court, and recognises the importance of public understanding and confidence in its operation.

"Worboys"

The case of *R (on the application of DSD and others) v Parole Board for England & Wales* [2018] EWHC 694 (Admin), concerning the offender John Worboys, has emphasised the importance of the public protection function in the Board's decision-making. The Board has an inquisitorial role, and where information is lacking but potentially significant, it has a responsibility to obtain and consider this information.

Parole hearings will not consider cases where there is not enough information to make a fair decision, and practitioners may have noticed the significant increase in oral hearings under Part III of the Parole Board (Scotland) Rules 2001, and tribunals under Part IV of the Rules, where witnesses have been cited to give evidence. This is simply a consequence of the Board implementing its obligations to obtain and consider information.

Guidance

The Board has recently published its internal guidance to members, which can be accessed on the Board's website. This guidance is kept under review, and is developed to take account of such things as victim attendance at tribunals and how rule 6 of the 2001 Rules (non-disclosure of evidence to the prisoner) can be best applied to ensure fairness. Its publication is intended to be a resource for the legal profession and the public, promoting understanding of how the Board will conduct proceedings and reach decisions.

Witnesses

The Board is also looking at how best to require and secure the attendance of witnesses and the production from third parties of documents relevant to risk. An example of this might be information in relation to outstanding or unproved charges, or an ongoing criminal investigation. In light of *Worboys*, it is clear that the Board must get this information, and it is engaging in ongoing discussions with other agencies to ensure that it does so in a way which allows it to act in accordance with the need to give priority to public protection.

Amendments to the rules

Registered victims

As practitioners may be aware, the Parole Board (Scotland) Amendment Rules 2021 (SSI 2021/4) came into force for all cases referred to the Board by Scottish ministers on or after 1 March 2021.

The amendments enhance the rights of registered victims. Rule 2(2) of the 2021 rules defines a "registered victim" as "a person who has intimated under section 16(1) of the Criminal Justice (Scotland) Act 2003 that they wish to receive information about the release of an offender". Essentially, a registered victim is a victim who has opted in to either part 1 or part 2 of the Victim Notification Scheme which is administered by Scottish Prison Service.

The amendments also add a new para (e) to the existing rule 8 (matters to be taken into account by the Board), which reads: "(e) the effect on the safety or security of any other person, including in particular any victim or any family member of a victim, were he or she to be released on licence, remain on licence, or be re-released on licence as the case may be".

Paragraph (e) relates to all victims, not just those registered under the Victim Notification Scheme. In practice, the Board has always taken this into account, and its inclusion in the rules simply makes this a legal requirement.

Rule 9 of the 2001 Rules, which deals with the confidentiality of the proceedings, is amended to allow publication of decision summaries produced in terms of rule 28A.

Rule 28A introduces a requirement for the Board to publish a summary of all release decision minutes. Before doing so, the Board must send a copy of the summary to any registered victim unless the victim has intimated that they do not want to see the summary. It should be noted that the requirement to publish and to send a copy of the summary to the victim before publication relates only to decisions to release. The Board has a discretion to publish where it has declined to direct release, and the requirement to send a copy to the victim still applies in such cases. The rule also requires that the summary is anonymised to remove information which could identify any person concerned in the proceedings.

Attendance of victims at tribunals

Importantly, the rules are also amended to expressly permit the attendance of victims at a Tribunal. Rule 26A permits a victim registered under the Victim Notification Scheme (parts 1 or 2) to attend a hearing with the authority of the Board. The

presumption is that the attendance will be by live link, and rule 26A also permits the victim to be accompanied by a supporter or supporters.

In fact, the Board permitted the attendance of victims at tribunals under the previous incarnation of the rules. The Board's experience is that it requires careful planning and risk assessment, and is resource intensive. However, there is no doubt that the new rule will be welcomed by some victims.

Review of Board decisions

Practitioners who regularly carry out parole work will know that for many years the Board has operated an informal process whereby a prisoner may apply to the Board for reconsideration of a Board decision on procedural grounds. Review on the merits was reserved for judicial review.

Where, for example, information has come to the Board in good time but is not placed before a panel, or the Board has declined to order an oral hearing in breach of its own guidelines, the Board may, at its own hand, convene a fresh hearing to consider the case as of new.

This was not an appeal, as the Board only has power to make decisions at first instance. It was simply a mechanism to cure administrative irregularities or a failure to comply with the Board's procedure.

IN ASSOCIATION WITH

REMEMBER A CHARITY IN YOUR WILL WEEK

Remember A Charity calls on legal profession to talk gifts in wills

This September, the legal profession joins forces with 200 charities to celebrate Remember A Charity Week. Together, they will raise awareness of the option of giving to charity from your will, after taking care of family and friends. Throughout the month, people will be encouraged to consider how they might change the world for future generations by leaving a gift in their will.

The Remember A Charity consortium is now calling on solicitors and will-writers across the country to join its network of over 1,300 legal professionals, taking part in this year's campaign and sharing information with clients about gifts in wills.

Legacy giving is gaining appeal with the British public, with the consortium reporting that 40% of the over 45s say they would be happy to leave a gift in their Will and 100 people now writing a gift to charity in their Will daily . These donations raise over £3 billion for good causes annually, funding vital charitable services.

2021 marks the 12th year of Remember A Charity Week, a collaborative initiative to highlight the importance of legacy giving.

To find out more or join the existing network of 1,300 campaign supporters, see: https://www.rememberacharity.org.uk/solicitor

Following the case of *Dickins v Parole Board for England & Wales* [2021] EWHC 1166 (Admin), the Board can no longer carry out internal reviews: the court concluded that the Board is functus after the decision is made and steps are taken to intimate it. At that point, the only remedy is judicial review.

The Board is working with Scottish ministers to find an administrative solution. It is anticipated that there will be a review of the 2001 Rules, and amended rules may include a formal review process.

Authority to present evidence

It is perhaps not as widely appreciated as it might be that prisoners need to apply to the Board for permission to cite witnesses and/or produce documents. This applies both to oral hearings under Part III of the 2001 Rules and tribunal hearings under Part IV.

Applications for such authority should be made by way of a motion using the approved form, giving reasons and relevant authorities. Applications which lack reasons are likely to fail.

Applications for postponement or other orders

The Board not infrequently receives applications to postpone hearings for various reasons. The most frequent is to await the outcome of outstanding criminal proceedings.

The Board will consider such applications in light of circumstances prevailing at the time, its duty to proceed expeditiously, and authorities which permit it to make decisions on the basis of the existence of outstanding charges which have not been disposed of.

Any application for a postponement or other order should be made by way of a motion using the approved form, giving reasons and relevant authorities. Applications which lack reasons are likely to fail. The Board is unlikely to find merit in applications to adjourn due to a solicitor's unavailability, or for the prisoner to conclude ongoing work in prison. In the case of the former, the solicitor should make other arrangements for representation, and the latter case can be addressed in submissions in relation to an appropriate review period.

Form for applications to the Board

In order to achieve some consistency in form and content, the Board has produced an approved style form which should be used in all applications.

The Board expects that use of the form will achieve consistency and direct the mind of the drafter to the relevant rule(s). Practitioners may expect to attract adverse comment from the Board if the application is not submitted using the form, which can be found on the Board's website.

Form for submissions to the Board

The nature and content of submissions by practitioners are not always made by reference to rule 8 and the matters which the Board must take into account. The Board, whether sitting as a tribunal or as a casework meeting panel, is required in every case to take into account the matters set out in rule 8 of the 2001 Rules. There is no suggestion that solicitors' submissions must be made on each and every matter referred to in rule 8. Where submissions, written or oral, are to be made, it will be extremely helpful to members of tribunals and casework meetings if they are grouped together to follow the paragraphs of rule 8. Such groupings will make for a logical structure and better allow members to identify and note how the submissions relate to the matters which must be taken into account.

In order to achieve some consistency and to allow drafters to formulate submissions, both oral and written, around the matters which the Board must take into account, the Board has produced a standard template which it expects will be used for written submissions but will also inform oral submissions. This can also be found on the Board's website.

The Board expects that submissions will address the templated matters as relevant to a specific case.

Failure to provide any written submissions in advance may attract adverse comment from the Board or, in some cases, necessitate adjournments, which might delay an individual's release.

Rule 6

The 2001 Rules provide that the prisoner should receive a copy of the dossier and documents which are before the tribunal or panel. Rule 6 provides an exception to this general rule, where Scottish ministers or the Board are satisfied that disclosure to the prisoner would be damaging on one or more of the grounds set out in rule 6(1)(i)-(v).

The Board has previously taken the view that where Scottish ministers have provided information in terms of rule 6, the Board could not look behind that. However, the Board's status as a court, and recent developments, have altered that view, and the Board now considers that it has the power to disclose some or all of the information to the prisoner or other parties, subject to careful consideration of whether this is appropriate. In practice this will be among the most anxious decisions that the Board will make, and it must attach weight to public protection, and fairness to all parties, including the prisoner, the information provider, and the subject of the information. The Board has developed and consulted on guidance for Board members on how to approach such issues, available with the other guidance on the Board's website.

The Board's status as a court

It is now accepted that the Board sits as a court for the purposes of articles 5(4) and 6(1) of the European Convention on Human Rights. On that basis, the Board is entitled to be treated as a court by practitioners who appear before it, and have a professional responsibility to it. Practitioners are asked to bear this in mind; the Board expects solicitors to attend timeously, and be properly prepared. Unnecessary delays or postponements are discourteous, costly, and can result in offenders spending extra time in prison.

The vast majority of solicitors understand this, but there are some who may not comply with their professional responsibilities. In such cases the Board will seek an explanation from the solicitor. It is to be hoped that it never becomes necessary to refer matters to the SLCC.

The future of parole

The Board has moved a long way from the system envisaged by Alexander Maconochie. It is now a forward thinking and dynamic parole court, well equipped to balance the rights of the individual with the importance of protecting the public. It is committed to a fair, efficient and transparent system of parole, which has the confidence of those using the system and the general public.

This has been demonstrated by the Board's response to the COVID-19 pandemic. The Board quickly moved to conducting tribunals by teleconference and, where necessary, by video link. It has conducted over 1,000 hearings in this way since the first lockdown in March 2020. In doing so, the Board has avoided any backlog in cases, and has reviewed prisoners' detention in accordance with statutory timescales.

The Board will continue to adopt a dynamic and innovative approach to working, with fairness and public protection at heart, in order to carry out its crucial role within the Scottish justice system.

John Watt
is chair of the Parole Board for Scotland

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Head of Product Development at Cashroom, Paul O'Day, said: "This is an exciting development and one we've been working hard to achieve for several months. Law firms can now benefit from the ultimate in legal accounting efficiency with a solution that links seamlessly between their PMS and our Cashroom portal. Cashroom continues to support out client's choice of system and our technology will provide the most secure, efficient and compliant service for all law firms, enabling out expert service.

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There are many benefits to your firm in using Cashroom. The Cashroom portal dashboards offer simple visibility into a legal business and its client information, reducing double-data entries and preventing human error. Client matters are quickly accessible, and the system's data flow to payment forms frees up staff to focus on more profitable tasks and improves the overall client experience.

Paul continued: "Automation between Cashroom and your PMS has the power to revolutionise how finance drives your legal business forward. In the current climate of day-to-day disruption and change, it can mean the difference between success and collapse.

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Legacy of COVID

Under new authorship, the civil court briefing reflects on the longer term impact of COVID-19 before turning to matters including expert witnesses, *domini litis*, and a number of issues raised in party litigant cases

Civil Court

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

I should start with a brief personal tribute to Sheriff Lindsay Foulis, whose bi-monthly articles on civil procedure began over 20 years ago and have had the distinction of never saying anything daft and often something extremely sensible and helpful. His updates have always been a valuable source of information and insight to the profession, expressed in plain language and heartily recommended by me to all court lawyers. It is a hard act to follow, but I hope to emulate his skills in identifying interesting and important decisions in recent cases and their implications for court procedure and practice. I wish him a long and happy retirement, finally freed from his civil procedure nerdiness.

Long COVID in the courts

What legacy will COVID leave for our civil justice system? We have already seen changes in administration, with Civil Online being a major feature. There have been *ad hoc* changes in procedure and practice in individual sheriffdoms. Many of the judgments in the last few months amply demonstrate that things are being done differently without any need for rule changes or any significant undermining of the pillars of justice.

Most non-evidential hearings are now conducted remotely. The Commercial Court has continued to lead the way in encouraging and applying innovative approaches to litigating. Webex proofs or hybrid proofs are commonplace, with an increased emphasis on establishing before proof what is truly contentious, what can be achieved by agreement or joint minute, and what evidence can be led by affidavit. Non-evidential hearings (motions, debates, procedural hearings, appeals) conducted in the traditional way may well be on the way out, and detailed written submissions with shorter oral arguments presented remotely on the way in.

The interests of public health have accelerated many changes that would probably have come about in the fullness of time. On the other hand, many litigators have legitimate concerns that the interests of justice are not well served by remote hearings, especially evidential hearings, and my limited experience of observing them gives me reservations about their suitability in many cases. As we tentatively move back to normality, it will be interesting to keep an eye on such things, and what could be called the "long COVID effect" on litigation procedure and practice.

I particularly liked the image conjured up by Lord Braid in *Smith v Scottish Ministers* [2021] CSOH 83 (13 August 2021) of the danger of the "COVID cart [being] allowed to drive the fairness horse". Albeit that this case related to deficiencies in procedure relating to a prisoner's progression to parole, the broad principle is that whatever procedure might be forced on us by the pandemic, it must still be fair and seen to be fair. Indeed, there is an argument that the courts must bend over backwards to ensure that nobody is disadvantaged by any temporary measures introduced due to the current restrictions. That should include evaluating as soon as possible the benefits and drawbacks of new practices and permanently adopting – or not – the provisions introduced over the last 18 months.

Future proofed?

An outstanding example of COVID-led procedural innovations can be seen in a divorce action, *Scott v Scott* [2021] SC ABE 40 (1 June 2021), in which the proof began before the pandemic and was interrupted by almost a year by it. There were 10 days of evidence, the last five of which were conducted via Webex. The sheriff participated from his home; most of the participants, including a shorthand writer, were scattered throughout Scotland; and the defender took part from Norway. A substantial number of documentary productions had to be shared on screen. A large amount of evidence was agreed by joint minute.

There were a number of witnesses, including two experts. One expert gave *part of* his evidence in chief by way of affidavit, and was criticised in cross-examination for using that as his "script", a criticism which the sheriff considered unfounded, observing that the prior lodging of the affidavit gave the opponent much more time to prepare for cross-examination than might have been the case otherwise. Could you have imagined 10 years ago (even five?) that proofs would be conducted in this way in the sheriff court? Can you see many of these features being with us from now on? If so, court lawyers will have to rethink their tactics, strategy and advocacy skills to keep up.

Simple procedure

In *Blair v Baird* [2021] SAC (Civ) 13 (8 March 2021), Sheriff Principal Murray identified a lacuna in the Simple Procedure Rules, which do not specify how an unless order should be intimated to a party. He noted that he would draw this to the attention of the Scottish Civil Justice Council to consider an amendment, observing that since such an order, and compliance with it, was an important aspect of the sheriff's case management powers, it was desirable that a direction be given that it should be formally served in terms of rules 18 and 19. Meantime it would be prudent to ensure that this is done wherever such an order is made.

Dominus litis

It is always good to get in a bit of Latin, especially when it is combined with issues about expenses. In *Reactec Ltd v Curotec Team Ltd* [2021] CSOH 72 (16 July 2021) the successful pursuer in an interdict to prevent infringement of their patent rights was faced with a defender company which went into voluntary liquidation after judgment had been issued. The pursuer enrolled a motion for two other parties (a limited company which was a majority shareholder in the defender, and an individual who was an officer of both) to be found liable for expenses on the basis that they were "*domini litis*". The motion was argued in relation to the related company, with the pursuers reserving their position regarding the individual.

Following Lord Reed in *Travelers Insurance Co v XYZ* [2019] UKSC 48, Lord Clark said that to meet the test of *dominus litis* the person must have the "true interest", being the whole interest in the case for all practical purposes, with complete control of the litigation. In this case there was no doubt that the nominal defender did have an interest in the outcome of the case whilst it was being contested, and even though the suggested *dominus litis* would have been affected by the outcome, that did not give it the *whole* interest that was required.

We can all sympathise with the successful pursuer looking for someone to foot the bill after it had won the case, but obviously it is a hard test to satisfy. The pursuer's argument was not helped by its motion being directed against two different parties. How could two different entities both have the whole interest and complete control required by the test?

"We can all sympathise with the successful pursuer looking for someone to foot the bill after it had won the case"

Expert evidence

In *Cameron v Swan* [2021] CSIH 30 (10 June 2021) – which started with the ominous words "This ought to have been a relatively straightforward road traffic accident case" – there was expert evidence from a psychologist directed towards demonstrating what the driver might or might not have seen before he ran over the pursuer. The Inner House was critical of the reliance on opinion evidence on matters which were solely for the judge to decide, and commented on the legitimate scope of opinion evidence generally. As experts seem to be used more frequently nowadays, it is well worth reading what Lord Carloway had to say about their place in a litigation.

Delay in judgment

Another aspect of that judgment which I suspect will be of considerable interest is the comment on the delay in issuing the judgment at first instance until nine months after the proof. The court said that a delay of this nature did not provide the reader with confidence that the testimony or the demeanour of the witnesses would have been fresh in the judge's mind or that, even with the benefit of his notes, he could recollect the evidence accurately.

Remit to the Court of Session

In *Henderson v Mapfre Middlesea Insurance* [2021] SAC (Civ) 18 (25 May 2021), the pursuers appealed to the Sheriff Appeal Court following the sheriff's decision in ASSPIC not to remit their cases to the Court of Session in terms of s 92 of the Courts Reform (Scotland) Act 2014. They were all passengers on a tour bus in Malta when they (and others) were injured; one of the other passengers had already raised Court of Session proceedings which were due to go to proof relatively soon. While recognising that the cases satisfied the test of "importance or difficulty" in s 92, the sheriff exercised his discretion against remitting and the Sheriff Appeal Court found no fault in this. Indeed, had it required to consider the matter it would have decided the same way. I suggest that there would have to be some very special circumstances to warrant the remit of an action from ASSPIC, the specialist personal injury court, to the Court of Session.

Party litigants: decree by default

In *Amil v Lafferty* [2021] CSIH 41 (30 July 2021), the Inner House refused an appeal by party litigants against whom the Lord Ordinary had granted decree by default as a result of their failure to attend a peremptory diet (a proof). There was a long and convoluted procedural history, and medical certificates had been produced by the parties which had not been found compelling. Reference was made to *Smith v Scottish Ministers* 2010 SLT 1100 as the leading authority on the point.

Interestingly, there is a decision on a similar point by Sheriff Cubie in the Sheriff Appeal Court in *McCallion v Apache North Sea* [2018] SAC (Civ) 1, which includes some guidance on what a medical report or certificate which purports to explain a failure to attend court should contain. Equally interesting is that I located this case via Lindsay Foulis' article at Journal, March 2018, 28. The fact that the Inner House also considered, for good measure, whether there was any sustainable defence on the merits (it did not think so) indicated that this was more than just a technical procedural defect.

Vexatious litigants

In *Lord Advocate v Politakis* [2021] CSIH 34 (1 July 2021), the Inner House considered a petition under s 100 of the 2014 Act to make a vexatious litigation order. Pointing out that the order did not prevent the respondent from raising proceedings but meant that he required the permission of an Outer House judge to do so, the court enumerated a number of factors which had a bearing on the interests of justice, including: the *prima facie* right of all citizens to invoke the jurisdiction of the civil courts; the availability of other powers to deal with abuses of process; the overall conduct of the litigant; the need to protect persons whom he might sue; and the finite resources of the court itself.

Pleadings

In *Dunn v Greater Glasgow Health Board* [2021] CSOH 68 (13 July 2021), the party litigant pursuer came up against the (some might say) inconvenient requirement that you must set out the essentials of your case in writing before you can have a proof. The pursuer was seeking damages of £900,000 following an unsuccessful hip arthroscopy. There was a "discussion on the procedure roll" – helpfully translated by the Lord Ordinary to "a debate" – regarding the relevancy and specification of the pursuer's pleadings. Party litigants are inevitably at a disadvantage once they enter this particular battleground. The pursuer and defenders had lodged written notes of argument in advance, and the debate was conducted by Webex with the pursuer in Campbeltown having a poor internet connection just to compound his difficulties. Like many similar claimants, he did not have and could not afford expert evidence on fault or causation and his pleadings reflected that absence. His pain was worse following the surgery, but he could not say why or how. The action was dismissed. It calls to mind the detailed discussion about pleadings in medical negligence cases in *JD v Lothian Health Board* [2017] CSIH 27, well worth a read for anyone interested in pleadings generally. Is anyone still interested in pleadings?

Procedural motions

One benefit of party litigants is that, every so often, they challenge the conventional way of doing things and cause the courts to go back to first principles. I recall the disheartening experience of reading a transcript and being utterly convinced that it was wrong as I could not possibly have asked so many stupid questions. I cannot recall ever being able to do much about it though, either in the days before digital recording or after.

In *McGowan v Ayrshire & Arran Health Board* [2021] SAC (Civ) 19 (4 March 2021), the unsuccessful party litigant in a medical negligence case appealed to the SAC and made a motion for access to the digital recording of the defenders' expert's evidence as he intended to submit that the written transcript of that evidence was incorrect, incomplete, or misleading. Sheriff Principal Anwar noted that this was an unusual motion – but there was no suggestion that it was incompetent – and that there was no authority on the point. She considered that there had to be a cogent, reasonable and objectively demonstrable basis for an assertion that a transcript of proceedings is incorrect. The fact that the appellant argued that the transcript did not accord with his recollection was not sufficient grounds for granting the motion.

Cheers

At the risk of offending the more sensitive among us – but I don't practise any more so why should I care? – I was struck by the startling admission in the case of *William Grant & Sons Irish Brands v Lidl Stiftung & Co* [2021] CSOH 55 (varied, [2021] CSIH 38) in which the well-known supermarket chain was interdicted from selling Hampstead gin, which was said to look remarkably like Hendrick's gin but was much cheaper. There are pictures of the bottles incorporated in the judgment for those not familiar with the beverages.

The Lord Ordinary observed that a bottle of Hendrick's gin and a bottle of the new Hampstead gin were lodged as productions, and "I had these before me for consideration".

Maybe someone could check the digital recording to see if "me for" was in the original sentence?

Briefings

Corporate

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WRIGHT, JOHNSTON
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In *Pakistan International Airline Corporation v Times Travel* (UK) [2021] UKSC 40 (18 August 2021) the Supreme Court determined that the "lawful act economic duress" doctrine can void a contract. However, while not prescribing the only circumstances in which it arises, the court's approach is seen as a narrowing of the doctrine given the restrictive grounds on which it held it could be used, while rejecting several alternative approaches.

Background

Times Travel ("TT") sold airline tickets to and from Pakistan, on Pakistan International ("PIAC") flights. TT raised claims for unpaid commission, but under pressure from PIAC did not pursue these. Subsequently PIAC greatly reduced TT's ticket allocation and gave a month's notice to terminate the arrangement (as it was allowed to do). Around that time, a director of TT was shown a draft of a new agreement which waived TT's existing claims for commission, but was not allowed to take a copy to seek legal advice. Given the termination would have put TT out of business, TT entered into the new agreement a week later.

TT eventually claimed for the unpaid commission, winning the first round in the High Court by challenging the validity of the new contract on the grounds of economic duress. The Court of Appeal allowed PIAC's appeal, as PIAC genuinely believed the commission was not due and had not acted in bad faith. TT appealed to the Supreme Court, which dismissed its appeal, considering the doctrine of economic duress for the first time.

Economic duress

The leading judgment was provided by Lord Hodge, with a minority judgment by Lord Burrows. The panel agreed on several factors in relation to the existence of economic duress:

1. The threat/pressure by the defendant must have been illegitimate.
2. Said illegitimate threat/pressure must cause the claimant to enter the contract.
3. The claimant must have had no reasonable alternative to giving in to the threat/pressure.

Lord Hodge considered the two circumstances where the English courts recognised lawful act duress, reviewing previous case law where attempts to uphold or enforce a contract were described as "unconscionable" due to that party's behaviour, and the influence of equity on the development of the common law doctrine. These circumstances were, first, where a defendant uses knowledge of criminal activity to threaten the claimant, and secondly where the defendant uses reprehensible means to manoeuvre the claimant into a position of vulnerability to force it to waive a claim.

The majority considered that PIAC's behaviour did not add up to being unconscionable, therefore did not amount to duress, and the appeal was dismissed. It was stated that lawful act duress should not be contingent on whether the defendant honestly believed it had a defence to the claim: to do otherwise would increase an undesirable uncertainty in commercial transactions.

Although Lord Burrows agreed the appeal should be dismissed, he disagreed on the meaning of illegitimate threats in relation to economic duress. Lord Burrows (like the Court of Appeal) considered that the focus should be on the defendant's behaviour and the justification for the demand. Lord Burrows considered that a demand would be unjustified (and the accompanying threat illegitimate) if (a) the threatening party deliberately created or increased the threatened party's vulnerability to the demand, and (b) the "bad faith demand" requirement is met (in that the threatening party does not have or honestly believe it has a defence to the claim being waived).

Commentary

So how sharp, does sharp business need to be to constitute economic duress? As Lord Hodge states: "the scope for lawful economic act duress is extremely limited in the sphere of commercial transactions". Only in rare circumstances will economic duress be possible in English law. The deemed existence but then curtailment of the doctrine, and rejection of any sanction of grounds for extension, was of particular disappointment to one of the interveners in the case, the All-Party Parliamentary Group on Fair Business Banking (APPG). APPG sought to explain the familiar case of SME business customers who are frequently pressurised to enter into new terms/sign away claims for continued banking services, and had hoped for a restatement of the doctrine based on good faith. Neither England nor Scotland recognises an implied duty of good faith. Lord Hodge explained that without such a doctrine, or one in relation to unequal bargaining, the behaviour of PIAC was a "hard-nosed exercise of monopoly power", but not on its own illegitimate pressure.

What does this mean for Scots lawyers? In Scots law duress would only amount to the contract being voidable as opposed to void, and claimants would need to be careful not to accidentally ratify and "cure" the potential contractual defect (removing a right to rescission). The judgment is only applicable south of the border, and based on English concepts which do not neatly fit into Scots law, like equity (not recognised in Scotland though we do of course have equitable remedies). However confirmation of the doctrine's existence (albeit on a restrictive basis) in English law is of great interest and could help pave the way for a Scots attempt.

Employment

CLAIRE NISBET,
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The Scottish Government recently published its updated COVID-19 Strategic Framework (Updated Framework), which considers the impact of a move to beyond level 0 on a number of key stakeholders, including Scottish employers in all sectors.

For many, since March 2020, working from home has been the "new normal" and indeed, where possible, has been mandated by the Scottish Government as part of the public health measures to curb the spread of COVID-19. However, as both the easing of restrictions and vaccination rollout continues, employers have been cautiously awaiting further guidance on whether working from home will continue to be encouraged on moving to level 0 and beyond.

From the Updated Framework, it is clear that the Scottish Government will continue to support homeworking where possible and that it will continue to play a vital role in minimising the spread of COVID-19. Potentially changing the landscape of how us lawyers, not to mention our clients, will work in the future, in the Updated Framework the Government has said it will give employers "strong encouragement" to support working from home some of the time. However, it has also recognised that employers and businesses will be best placed to shape how hybrid working will work for them, and has encouraged employers to engage in early consultation with employees and unions to ensure their working practices meet the needs of their staff.

While the Scottish Government's guidance will be welcomed by some employers, it won't be welcomed by all. It also raises further questions. Many employers will now be asking themselves to what extent the "strong encouragement" stated by the Government should affect their working arrangements moving forward. Employment law is reserved to the UK. This means the Scottish Government can give its recommendation to businesses, but beyond that it is very restricted in both

the financial and legal changes it can make to support homeworking. It is therefore unlikely that any compulsory changes will come into effect in this regard with the country beyond level 0.

Wellbeing

Employee wellbeing is something that should appear on every employer's priority list, and this has been further catapulted into the spotlight since the pandemic. Whilst the Scottish Government has made it clear that it will continue to encourage working from home primarily for public health reasons, the Updated Framework also touches on the benefits that homeworking can have on employee wellbeing more generally. In light of this, employers should have a strong handle on employee welfare and a good understanding of how this has been impacted by remote working, whether positively or negatively. As we cautiously take steps back to the pre-pandemic world, employers should gauge the appetite and preferences of their employees as to returning to the workplace, to ensure that welfare needs are taken into account when planning for the future. This, of course, needs to be balanced with business needs and feasibility.

On the flipside, where employers are intending to roll out remote or hybrid working models, it is important that mechanisms are in place to ensure that employee wellbeing remains a focus for those who are working from home. The approach used for promoting employee welfare in the office may not be appropriate for those employees who are working from home, and employers may find themselves having to get creative to make sure everyone is covered and employee engagement remains high.

Return to office policy and plans

Planning a return to work policy, however that may look, will raise a lot of questions and potential uncertainty for employers and employees alike. Employers should consider how the Scottish Government's measures, such as Track and Trace or other health and safety requirements, will impact on, and be incorporated into, their return to work plan. As offices begin to fill up again, employers should be prepared for members of the workforce having to self-isolate if someone in the building has contracted the virus. These eventualities will need to be carefully thought through in advance, and employers should have a contingency plan in place should a large number of their workforce be forced to self-isolate or revert to homeworking full time.

Where a return to the office is being proposed, whether on a full-time or part-time basis, employers should plan well in advance and communicate their plans to employees at the earliest opportunity, ensuring regular updates are provided. This will avoid any surprises and allow questions or concerns which employees may raise to be addressed and arrangements put in place where required.

Although there is no doubt that the upcoming months, and indeed years, will be challenging for employers, the circumstances also present a unique opportunity to reconsider and reinvent how and from where their workforce operates.

Intellectual Property

ALISON BRYCE,
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The Court of Appeal has delivered its latest instalment in the longrunning trade mark dispute, *Sky Ltd v SkyKick UK Ltd*, allowing Sky's appeal and overturning the High Court's ruling that its trade marks were partially invalid due to bad faith. It also dismissed an appeal on the issue of passing off.

By way of background, this dispute centred on SkyKick Inc, a Seattle based startup company, and Sky plc, the media and telecoms giant. This has been a protracted battle and has been hard fought by SkyKick, which has generally been lauded for its arguments and focus on a number of key trade mark issues. Despite various setbacks, SkyKick was considered successful when last year, the High Court found that Sky's filings were made in bad faith and that Sky had no intention of using its trade marks for some of the goods and services specified in its trade mark applications. Accordingly, such trade marks were found to be invalid for those goods and services on the ground that they were made in bad faith. Sky appealed against this ruling.

The Court of Appeal has now concluded that in fact Sky never did act in bad faith: [2021] EWCA Civ 1121 (26 July 2021). The court undertook a comprehensive review of UK and EU law on bad faith and found in Sky's favour. Sir Christopher Floyd, giving the judgment of the court, concluded:

1. On the High Court's "no prospect of use" ruling, he disagreed that there was bad faith where a trade mark applicant had no prospect of using the mark in relation to each subdivision of a goods and service specification. Indeed, the Court of Appeal concluded that a finding that an applicant had no intention to use a mark for a specific category at all might support a finding of bad faith, but a finding that it did not intend to use the mark across the breadth of the category would not.
2. It was not evidence of bad faith when an applicant could not demonstrate a commercial strategy for using the marks in relation to each category of goods and services falling within the general description. Indeed, it was recognised that the strategy of broad filing to cover future goods within a category was a common approach. Sir Christopher found that there was nothing wrong with filing for a broad category of goods and services where there is an intention for use in at least one item within the category. The example given was where an applicant only sold one item of "software" but would be justified in applying to cover computer software as a whole.

The Court of Appeal found that the High Court had failed to undertake a fresh assessment of bad faith in relation to each of the categories of goods and services in question, and had wrongly concluded that Sky had applied for its trade marks as a "legal weapon". This broad approach was inconsistent with the findings that the marks were only partially invalid. It further found that Sky's approach of filing widely for computer software could not be considered bad faith, as Sky had extensively used its mark for software and could be expected to do so in the future; the lack of commercial strategy was not evidence of bad faith as Sky had a substantial software business and so a wide filing could be reasonably expected.

In addition, the court of first instance had made a procedural error in not requiring SkyKick to specify what restricted versions of Sky's goods and services were appropriate so that Sky could defend itself on those specific points.

While the ruling will provide reassurance to owners of UK trade mark registrations that cover broad specifications, the latest decision has been hailed as a disappointment by UK trade mark practitioners generally. The case was seen as a real opportunity for the courts to address the ever increasing problems of the cluttering of registers due to the use of broad terms such as "computer software", and of the length

of specifications. Sir Christopher indicated that it would impose an "increasingly impossible burden" on applicants if they had to specify finely the goods and services being applied for rather than use broad terms. This approach, though, can cause real problems for businesses who are trying to seek clearance of new brands prior to launching them to the market.

SkyKick has stated it will seek permission to appeal to the UK Supreme Court for a final say on these issues, so the battle continues!

Agriculture

ADÈLE NICOL, PARTNER, ANDERSON STRATHERN LLP

Below I discuss two recent crofting cases of interest, both from the Land Court.

Macleod v MacLean

In *Macleod v MacLean* (SLC/65/19), the applicant challenged the first registration of a croft in Stornoway. The crofts concerned (21A and 21B Sheshader) were created in 1946 by written agreement dividing croft "21 Sheshader" into two separate holdings. The applicant became tenant of croft 21A by virtue of his father-in-law renouncing tenancy in his favour; the respondent was assigned the tenancy of croft 21B by his mother.

The crofts are bisected by a single track public road. The disputed area related to the south eastern boundary, which the applicant argued should be a straight line from road to sea, not the registered position which included a kink in the fenceline which had been in place since the 1940s, providing the respondent with an additional triangular section of land. Although not raised as an issue until 2017, the applicant contended that he had always considered the disputed area to be part of his croft. The court made clear that such a delay in raising this complaint would not necessarily be detrimental to the applicant if the evidence supported his position, noting that "neither prescription- nor personal bar-based arguments [hold] any sway in this crofting context" (para 22).

Evidence by both parties was considered together with documentation from the court archives. The court seemed to deem the historic estate plan of the croft as most persuasive, together with archive evidence indicating that the estate plans had been used in the past to assist in determining croft boundaries. It also noted that the respondent's case lacked "any convincing explanation as to why... the line of the boundary should, approaching the public road, have deviated from the straight in the manner the respondent claims it did. When a croft is being fenced, the general rule is the fewer changes of direction, the better" (para 31).

The court therefore found for the applicant, stating that on balance of probabilities, the boundary continued in the straight line from the sea to the road. It directed that the boundaries be modified by removing the disputed area from the registered croft 21B Sheshader. This case acts as a stark reminder that first registration of a croft may unearth longstanding disputes between neighbours and, unlike the Land Register, beating a neighbour to the Crofting Register does not necessarily dictate which party has the upper hand.

Macdonald v Kennedy

Macdonald v Kennedy (SLC/75/20) examined the process followed by the Crofting Commission in terminating a croft tenancy. The applicant landlord had long intended to retire to the croft, and leased it to a friend on the understanding that the friend would vacate when the landlord retired. Unfortunately the tenant died in May 2016. The Commission wrote to the landlord in December 2018 advising that it planned to "terminate the tenancy and declare the croft vacant". The landlord failed to make representations in response, and as a result the Commission sent written notice of the termination and vacancy of the croft with immediate effect, per s 11(8) of the Crofters (Scotland) Act 1993.

In response, the landlord's solicitor wrote to the Commission suggesting that the croft was not to be relet but instead split into two holdings, and sold thereafter. This was not a competent suggestion as, under s 9 of the Act, only a crofter (not a landlord) may apply to divide a croft. The landlord's preference to sell rather than relet led to no representation being made in response to the Commission's notice, and ultimately the mandatory provisions in s 23(5A)-(5C) were triggered and the Commission publicly invited applications for the tenancy. The landlord's solicitor also made no suggestions as to rent, and the Commission ultimately advised that the rent had been fixed at £18 per annum and a new tenant found (the respondent).

The landlord applied to the court under s 23(6) of the Act for variation of the terms and conditions of let fixed by the Commission, on the basis that the fixed conditions would cause "unreasonable prejudice to the applicant in terms of preventing him retiring to live on the croft and cultivate it", and that he would ultimately be deprived of use of the croft if the tenant exercised a right to buy. The respondent argued that it would be incompetent by s 5(1) of the Act for a landlord to let out a croft on any conditions other than those set out in the statute and fixed by the Commission. In addition, the variation sought would be inconsistent with the key principles of crofting legislation which seek to provide security of tenure to crofters.

The court found for the respondent, acknowledging (para 24) that the landlord "did not appear to take advantage" of his opportunities to respond to the Commission throughout the reletting process. It agreed that the Commission was bound by the conditions of let set out in the Act and, in any case, the modifications sought would have been "contrary to the whole of the crofting legislation" (para 27), and would likely have gone beyond what was intended by Parliament (para 29). Despite the purpose of s 23(6) being to protect the landlord, in reality it seems the landlord will rarely prevail in crofting disputes.

Sport

BRUCE CALDOW, PARTNER, AND ALEX MERTON, TRAINEE SOLICITOR, HARPER MACLEOD LLP

Manchester City FC v Football Association Premier League [2021] EWHC 628 (Comm) (17 March 2021) has offered insight into (i) drafting rules in sports regulation; and (ii) appropriate structures for arbitration, including the question of bias in appointments.

The heart of the dispute is financial fair play and the Premier League ("FAPL") inquiry that commenced following a series of leaks in continental Europe. Manchester City ("MCFC") petitioned the High Court arguing that arbitration was not possible, when FAPL commenced arbitration following MCFC's failure to comply with a request for information and documents.

Scope of arbitration

The first argument hinged on the interpretation of the rules governing the FAPL. Clubs competing in the FAPL are shareholders for that season. The relationship is governed by the articles of association and its rules. Rule X.2.1 stated: "[the league and clubs agree] to submit *all disputes* which arise between them... whether arising out of these Rules or otherwise, to final and binding arbitration" (emphasis added).

One would assume that, to most, the words "all disputes" would mean precisely that. MCFC referred to another rule, stating that one category of disputes is: "X.3.1. disputes arising from decisions of Commissions or Appeal Boards made pursuant to Rules W.1 to W.83 (Disciplinary) of these Rules ('Disciplinary Disputes')".

Rule W has its own mechanisms by which FAPL can investigate and mete out justice. MCFC contended that the issue at hand should not have been addressed by rule X, and

that there was an implicit limitation placed on it by rule W. Mrs Justice Moulder held: "In my view the club is in substance seeking to imply a term into the rules which is not there", and that the breadth of rule X.2.1 permitted arbitration to proceed. She rejected the club's application for an order under s 67 of the Arbitration Act 1996 (that the arbitral tribunal was wrong to conclude that it had jurisdiction to determine the case).

Appearance of bias

The club's alternative position was to say that the arbitrator appointment process breached the principles of impartiality and independence and had the appearance of bias. When assessing the presence of bias, it is necessary to ask "the question of whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility" of bias (per *Porter v Magill*). Appearance of bias etc was asserted as the individuals were drawn from a pool who were available to FAPL for this purpose for three years.

Moulder J offered a helpful checklist that could help shape arbitration in sports by listing what she described as the main factors in the present context, including remuneration; process of appointment; control of reappointments; reputation and experience of individuals; and tactical challenge to achieve delay. Key questions included: do the arbitrators derive their livelihood from acting as arbitrators? Does each party have a say in who is appointed? Do the arbitrators have more than a mere interest in obtaining further appointments? Do the arbitrators have little by way of reputation or experience in these matters? In layman's terms, is someone kicking up a fuss about bias just to stall for time?

With three QCs appointed, one by FAPL, one by the club and each appointing the chair (a familiar model in sports arbitrations), Moulder J held: "I do not accept on the facts of this case and for the reasons discussed above, that a fair minded and informed observer would conclude that as a result of the methods of appointment and reappointment to the panel, the arbitrators in this case were 'beholden' to [FAPL]... and would thus conclude that there was a real possibility of bias." Allegations of bias, especially on the part of officers of the court, are difficult to make out, particularly when those asserting bias in the construct of the process are shareholders and approve that process each year.

Commentary

While the Arbitration Act 1996 applies to England & Wales, arbitration within sport and in Scottish sport is increasing, a current example being that involving the SPFL and Rangers FC regarding the title sponsorship of the SPFL. The judgment offers helpful guidance not only to those drafting rules creating arbitration (including mandatory arbitration), those who may be faced with a challenge to their jurisdiction and to the question of the appointment of arbiters.

The principles discussed and conclusions reached may also prove of assistance when reviewing other panels put together by sports, for matters such as disciplinary procedures, conduct in sport, anti-doping, and safeguarding, where experienced individuals are appointed and often have to determine complex and sensitive matters for the good of the sport in question.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Competition and consumers

The UK Department for Business, Energy & Industrial Strategy seeks views on proposed reforms to competition and consumer policy (still reserved matters), intended to support "strong free markets, vigorous competition and high consumer standards that drive growth and productivity". See www.gov.uk/government/consultations/reforming-competition-and-consumer-policy

Respond by 1 October.

More from BEIS

The department is separately consulting on possible reform of the Better Regulation Framework to "unlock cutting-edge technologies" and "unleash innovation", and on a new pro-competition regime for digital markets, also with the 1 October deadline.

Fire safety

The Scottish Government seeks views on its review of building standards relating to the fire safety of cladding. See consult.gov.scot/building-standards/building-regulations-fire-ews-review/

Respond by 8 October.

Domestic energy efficiency

How can energy performance certificates (EPCs) be improved to better assist property owners, buyers and tenants compare information on the energy performance of a property? See consult.gov.scot/energy-and-climate-change-directorate/reforming-domestic-energy-performance-certificates/ Separately, views are sought on developing the small-scale Energy Efficiency Equity Loan Pilot to support decarbonisation of buildings. See consult.gov.scot/energy-and-climate-change-directorate/home-energy-efficiency-equity-loan-pilot/

Respond by 8 October for both.

Health and disability support

The UK Department for Work & Pensions invites comments on its green paper on ways to "better meet the needs of disabled people and people with health conditions..., enabling people to live independently and move into work where possible". See getinvolved.dwp.gov.uk/05-policy-group/health-and-disability-green-paper/

Respond by 11 October.

Clean energy

The Scottish Government seeks to develop its Sectoral Marine Plan for offshore wind energy with a view to supporting smaller innovation projects and projects promoting the electrification of oil and gas infrastructure. See consult.gov.scot/marine-scotland/smp-innovation-and-targeted-oil-and-gas/

Respond by 20 October.

Island settlement

The Scottish Government proposes to introduce "island bonds" of up to £50,000 to encourage young people and families to stay in or to move to islands threatened by depopulation. See consult.gov.scot/agriculture-and-rural-economy/development-of-the-islands-bond/

Respond by 25 October.

Framework for tax

The Scottish Government seeks views on its overarching approach to devolved tax policy to support the ongoing economic recovery from COVID-19. See consult.gov.scot/financial-strategy/tax-policy-and-the-budget-a-framework-for-tax/

Respond by 26 October.

ADS: the hidden traps

It is a misconception that the land and buildings transaction tax additional dwelling supplement does not apply to a main residence, and there are several situations where purchasers can be caught out by anomalous rules

Property

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Is LBTT additional dwelling supplement ("ADS") payable on a main residence?

In short: yes, and more often than you'd think.

Ostensibly, ADS is a tax designed to increase the costs of second home and buy-to-let purchases. In practice it does not function like that. It is full of odd consequences, lopsided rules and ineffectual provisions. It is a common misconception that ADS does not apply to a main residence.

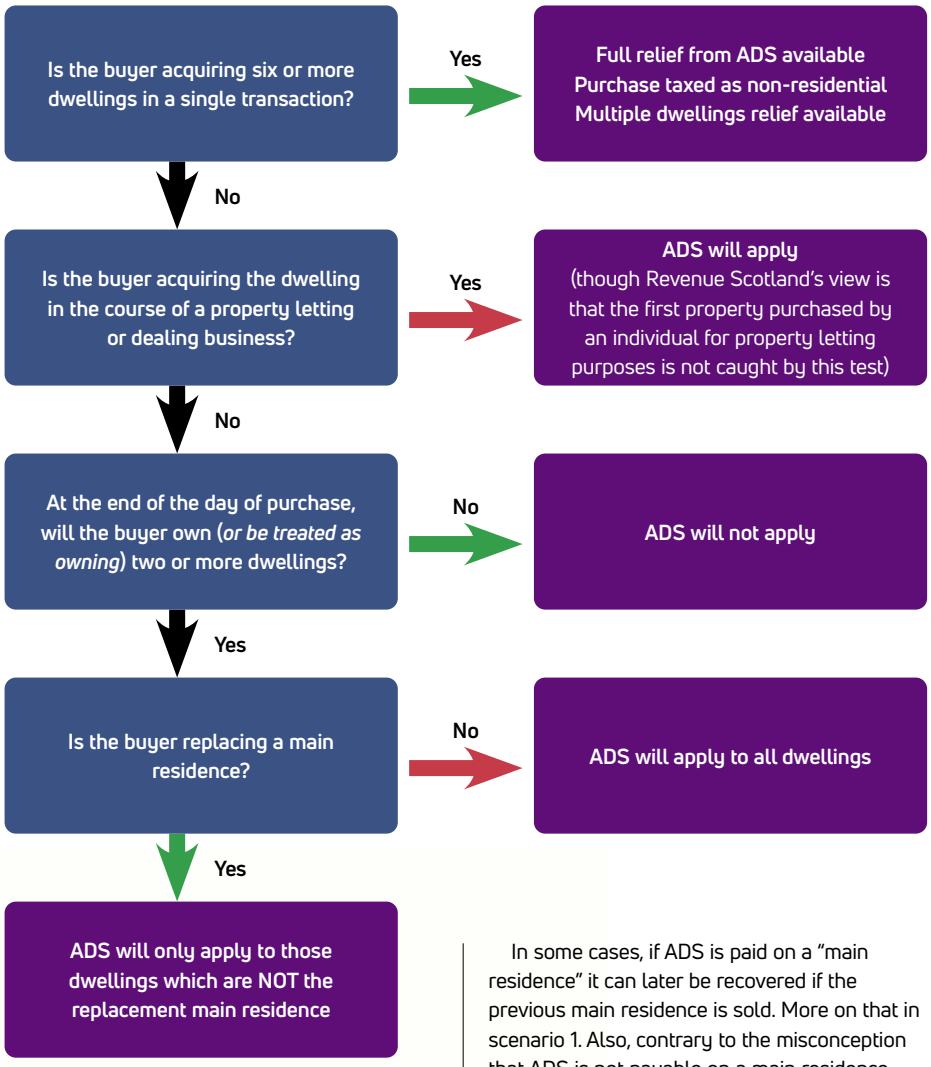
All the examples below are drawn from experience – some of which, I'm sure, will be familiar to readers.

The key points to take away are:

- The common view that ADS is purely a "second homes tax" is wrong.
- The interaction between ADS and the rest of LBTT can be complex and counter-intuitive. Many situations that should not be caught by ADS, are.
- Small differences in fact patterns, which instinctively ought not be important, can have significant ADS implications.

ADS basics

When an individual buys a dwelling in Scotland, the central test for ADS can be broken down as follows:



In some cases, if ADS is paid on a "main residence" it can later be recovered if the previous main residence is sold. More on that in scenario 1. Also, contrary to the misconception that ADS is not payable on a main residence, note that the concept of "main residence" only appears once in the test process for ADS – "Is the buyer replacing a main residence?" (i.e. are they disposing of a former home).

Scenario 1 – buying property after a marital split

In 2010, Edgar and Lenore bought their marital home in joint ownership. They separated in 2017. Edgar moved out of the marital home but kept his half share.

Edgar rents until June 2021, when he decides to purchase a new home. He is advised that he needs to pay ADS on the purchase price. His lingering interest in the old family home catches him under the "two or more dwellings" test, covered in the flowchart.

To recover the ADS, he agrees to sell his half share in the family home back to Lenore in July 2021. Having disposed of his previous main residence, he applies to Revenue Scotland for a

refund and his application is rejected.

Unfortunately for Edgar, Revenue Scotland applied the law as it stands. To qualify for repayment, Edgar needs to have both disposed of his old home within 18 months of buying the new one, and lived there as his main residence in the 18 months before buying his new property. He has fallen foul of the second criterion, so the ADS charge sticks.

The issue here is that ADS does not differentiate between Edgar's interest in his marital home – from which he derives no economic benefit (like rents) or residency – and a buy-to-let or second home. But intuitively it is different.

Scenario 2 – purchasing properties with different partners

Following the breakup of her marriage, Lavinia moves in with her partner, Wilbur. Lavinia owns a half share in her previous marital home; Wilbur owns nothing. They rent for a few months and buy a flat together, a year after Lavinia moved out of the marital home.

Lavinia and Wilbur pay ADS on their purchase. Two months later, Lavinia and her ex-husband sell the marital home and split the proceeds.

Can Wilbur and Lavinia reclaim the ADS they paid? No – for they have not lived their lives according to the bizarrely prurient strictures of the ADS legislation. They can only reclaim if they had lived together "as though married to one another" in Lavinia's previous marital home. They (understandably) did not, so they cannot.

Note that if Lavinia had bought the flat in her sole name, her reclaim would have been fine. If there were no secured debt, she could even transfer a share to Wilbur the next day.

A version of this problem also arises for couples who each own property and decide to live apart until they are married.

Scenario 3 – the ADS loophole for owning two properties

Greg and Elmer both own properties separately (acquired while single). In 2018 they move in together at Greg's flat, keeping Elmer's as a rental property. In 2020 they move homes and fund the purchase by selling Elmer's home. After they move, they will let Greg's flat.

Again, ADS is payable on the new purchase. The "two plus dwellings" test is met (the new house plus Greg's flat) and they are not replacing a main residence.

That seems uncontroversial. But on slightly different facts they wouldn't have had to pay ADS. If they had sold Greg's flat and retained Elmer's then ADS wouldn't apply, as they'd be replacing a main residence. Likewise, if they lived in Elmer's flat for a year and then moved into Greg's, Elmer's flat would have been a main residence in the 18 months before the purchase and the exemption would apply.

The issue in scenarios 2 and 3 is that ADS is too prescriptive when dealing with the complex and messy world of relationships. It only recognises a few very restricted methods for doing things. Fall outside of those and ADS applies. Again, this feels intuitively (and morally) wrong.

Scenario 4 – the complexities of buying a granny flat

Fran and Dan rent a home comprising a main house and a small "granny flat", occupied by Fran's mother. They agree to buy it from their landlord for £400,000. This is split £370,000 to the main house and £30,000 to the granny flat.

As first-time buyers, Fran and Dan are astonished to learn that they are liable to pay ADS. After all, they will own two dwellings: the main house and the granny flat. Unlike SDLT, LBTT contains no granny flat exemption and so the ADS applies to the full price of £400,000.

The basic LBTT charge is £29,350 (£13,350 of LBTT plus £16,000 of ADS). Fran and Dan can claim multiple dwellings relief, reducing the total to £18,200. That is still £4,850 more than they would need to pay in the absence of ADS.

Compare this with Sue and Sam. They are buying an identical property (house with granny flat, same price apportionment, a different mother). The difference is that they are not first-time buyers: they have a home to sell.

Here, ADS does not apply. They are only liable for the basic LBTT of £13,350. If they claim multiple dwellings relief, the LBTT is arguably reduced to £3,337. Sue and Sam end up paying almost £15,000 less than first-time buyers Fran and Dan.

Why? Because of how the £40,000 threshold for ADS applies. Fran and Dan are not replacing a main residence, so all dwellings in their purchase are considered. If the total price is more than £40,000, ADS is triggered. Sue and Sam, however, can exclude the £370,000 attributable to the replacement main residence. As the granny flat only has £30,000 attributed to it, ADS isn't triggered.

The issues here are:

- ADS effectively prioritises existing property owners over first-time buyers and long-term renters;
- ADS penalises those buying more complex dwellings (such as those with granny flats).

Scenario 5 – partnerships and low value interests

Ron's parents are farmers. They operate their farms via a partnership, which owns the underlying land, including several cottages occupied by farm workers. Ron is assumed into the partnership with a 5% share, with the intention that he will gradually take over from his parents.

Later on, Ron buys his first and (at that point) only house – and Revenue Scotland assess that ADS is due on the price. But why? Under the LBTT partnership rules, he is treated as owning the underlying partnership property, including the workers' cottages. Those dwellings are counted under the "two plus dwellings" rule, so Ron must pay ADS. He has no prior main residence to dispose of, so the ADS cannot be recovered.

This applies regardless of how small Ron's interest in the partnership is. (If Ron held a 0.1% interest in a limited partnership which invested in commercial woodlands, and the partnership property included a cottage worth over £40,000, the analysis would be the same.)

The issue here is that LBTT contains two complex sets of provisions (partnerships and ADS), which do not interact with each other sensibly. It also shows that even a low value interest in another property – which provides no significant economic or other benefit – can cause serious ADS issues.

Reform of ADS

These examples illustrate two main points:

- ADS is more complex and counter-intuitive than might be anticipated and than it ought to be; and
- it's not really about main residences.

In some areas of tax – the inner plumbing of cross-border investment funds for example – this is probably fine. But it isn't okay in the context of housing. Very few people regularly set up cross-border funds; many will buy at least one home. If a bit of the tax system impacts most people, then it should be structured in such a way that it can be quickly understood, and accounts for the way in which lives are led in modern society.

Fortunately, the Scottish Government has committed to a consultation on revising ADS. Looking ahead to that consultation, I'd suggest the following changes, as a minimum:

- First-time buyers and long-term renters should have parity with those replacing a main residence.
- There is a case for excluding trade-related properties, such as tied accommodation.
- ADS should be less prescriptive when it comes to personal relationships. A better alternative might be a wide set of replacement and reclaim provisions, backed by a targeted anti-avoidance rule (a standard approach in most other taxes).
- There should be some form of protection or exclusion for low value interests (e.g. small stakes in an inherited dwelling).

More generally, all of this is an object lesson in the need for a better system for passing and scrutinising Scottish tax and making changes to it, such as an annual Finance Bill. When the ADS consultation begins, I'd encourage all practitioners to make submissions around issues they've encountered, either to the Scottish Government, or via the Law Society of Scotland.

On harm, stakeholders and risk management

If risk management assessments focus on harm rather than predicting risk probability, decisions can be aligned with wider considerations, and the in-house lawyer becomes central to discussions

In-house

IAN JONES, SOLICITOR AND FORMER GENERAL COUNSEL

One day Amazon will fail. Jeff Bezos, their CEO, says so. There is no caveat. The statement is absolute. Amazon WILL fail.

If Amazon will fail, what does that say about your organisation? We assume that our organisation will carry on despite the world outside. We tell ourselves: "Crises happen to others, and our organisation is different. Isn't it?"

Many people see risk management as a process: identify the risks, work out the probability and potential impact, and put in place controls and mitigations. Yet all our efforts in carefully calibrating our plans overlook two immutable points: (1) we cannot predict the future; and (2) human behaviour dictates risk decision-making more than carefully laid plans do.

Risky thinking: an analogy

The divorce rate is rising in the UK (about one third of marriages end in divorce). Yet, the average (pre-pandemic) cost of a wedding is also rising and stands at around £27,000. Young couples complain they do not have the money to put a deposit down on a home. Yet £27,000 represents a 10% deposit on the average house in the UK (around £260,000). A rationalist would forego the wedding and use the money to buy the house, as statistically one in three marriages fail. After all, you can sell the house and divide the proceeds. Yet people continue to have big weddings because they treasure the experience. They are in love.

The pandemic is the latest in a long list of seismic events that have caught organisations off guard. I spent much of my career in property finance, and in my working lifetime I have seen the US savings and loans crisis, the 1987 stock market crash, the 1989 junk bond market crash, the Asian markets crash (1997-98), the dotcom bubble (1999-2000), and the 2008 collapse (which compared to the 1929 crash, I read, was a cakewalk). A national pandemic has been the no 1 risk of consequence in the UK National Risk Register since it was first published in 2008, yet most businesses were unprepared.

Behavioural scientists observe that when a major risk event happens, human behaviour overrides rational thinking. Myopia, amnesia, optimism, herd mentality and short term thinking take hold. Cognitive biases further affect our interpretation of situations. So, we either abandon our carefully thought-through plans, muddle through, or religiously follow them only to find they do not work. Some people cannot see a crisis developing because their planning constrains their judgment. If the event does not conform to their plan, they do not recognise what is happening until it is too late.

A fresh approach

Unless you are a psychopath, you will not act to harm either others or yourself deliberately. Most of us act to reduce any harm through our actions. We start assessing personal risk by understanding the harms that affect our needs. Our engaged couple are not contemplating a divorce; they are anticipating happiness. The harm of divorce thus has little or no weight despite statistics to the contrary.

Organisations can adopt a similar approach. People interact (voluntarily or involuntarily) with our organisations. Our organisations can harm those stakeholders, and if they do there will be consequences. The stakeholders could die, suffer injury, or their property and businesses be damaged. Communities could suffer from pollution or loss of amenity. As a consequence of those harms, our organisations can suffer fines, restrictions on business, revocation of any licence to operate, damage to reputation and loss of trust – all forms of harm.

By thinking about these harms, our organisations' focus shifts away from identifying risk and calculating probability – the "classic" risk management approach (as certain as the horseracing form book). Instead, we think about who we can harm, how that harm occurs, and the resources we must have to avoid/manage the harms we cause. It encourages us to think beyond the cost-benefit analysis of risk decision-making and consider the wider impact of our organisations' decisions, including the ethical and governance impact.

What is harm?

"Harm" is greater than affecting someone's legitimate interests. In our complex world, there are always competing interests. To cause harm in risk management terms, the organisation damages the "essential outcome" of the stakeholder. An "essential outcome" is the outcome that stakeholder expects when interacting with our organisation. If we do not deliver their essential outcome, they suffer harm.

For example, the essential outcome of an electricity company's customer is the continuous supply of electricity to keep their home or business functioning. If the supply ceases, for whatever reason, the electricity company "harms" its customer. The focus moves from the cause of the outage to its effect on the customer. It concentrates on the resources it will need to restore service as soon as possible and how it properly compensates the customer. There may be many causes, but the harm is the same.

Who are the stakeholders?

By identifying the stakeholders and their expectations and needs, you can assess the harms you can cause. For example, most organisations have the following stakeholders:

- customers/consumers/clients/service users;
- employees;
- shareholders;
- suppliers;
- alliance partners;
- lenders;

- key advisers;
- Government;
- regulators;
- trades associations;
- the media;
- interest groups;
- future stakeholders.

Treat these stakeholders badly and they will repay you in kind – lawsuits, fines, bad press, etc.

A social licence to operate

The greatest harm to an organisation is the loss of its social licence to operate. Unlike a formal licence issued by a regulator, this licence is subject to a constantly shifting, complex, informal, ill defined, unpublished, social "regulatory" regime. It is a licence based on trust. Loss of trust in your organisation will cause it to be revoked. This informal licence underpins the organisation's ESG values as measured by the stakeholders. In the world of social media platforms, your organisation can have this licence when you go to sleep, but the stakeholders may revoke it before you wake up.

By focusing on harm and its resilience rather than trying to predict risk probability, the organisation aligns commercial and legal risk decisions with ESG considerations and wider ethical questions. Today, risk management is not just about protection of the tangible assets of your organisation. In this century, protecting intangible assets such as reputation, relationships and trust is just as valuable, particularly given that such assets can be ephemeral.

By understanding the role of "harm" in risk, the in-house lawyer becomes central to discussions as laws and regulations reflect our stakeholders' expectations. Understanding legislative developments gives us insight into changing expectations and needs. A lawyer can thus move from a reactive to a proactive position.

Risk assessment and using evidence to consider probability still have value. We should not deny ourselves the value of information we have. But it is the focus on harm that is paramount. After all, as Jeff Bezos also predicts, "If we start to focus on ourselves instead of focusing on our customers, that will be the beginning of the end."

Ian Jones writes about risk, ethics and compliance, and teaches risk management for the Law Society of Scotland accreditation in risk management and governance. He is the author of Butterworths' In-House Lawyers' Handbook.

ASK ASH

Colleague's chat is my privacy

How do I stop her from revealing my personal matters?

Dear Ash,

I have an issue with an indiscreet colleague, who has a tendency to talk about my private life in group settings. This is making me very uncomfortable. For example, in a recent Zoom call she began to ask me about my partner's health while we were waiting for others to join the call but a number of the team had already joined. My partner has been unwell but I didn't really want to talk about this in front of others. Another time, during a group call she randomly mentioned my recent hospital appointment, and although it was nothing serious I still did not expect to have to talk about it in front of others. I don't like confrontation and don't want to embarrass my colleague, but this is grating on me.

Ash replies:

It seems your colleague has an inability to filter her thoughts in group settings! To give her the benefit of the doubt, she may just be genuinely unaware that she is causing an issue and may just be showing concern.

However, I suggest that you try to nip this in the bud now by arranging a friendly one-to-one catchup. As you are fearful of confrontation, just try to explain that you are a private person and that you don't like too many people knowing your personal business. Also just subtly confirm that group Zoom calls don't allow for appropriate privacy and that you would be happy to catch up with her separately instead.

If the subtle approach doesn't work, you may just have to refrain from confiding in her about your personal life going forward, as the less she knows, the less likely she will have cause to raise the subject inappropriately in future.

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).

Courts planning most civil hearings to stay online

Draft rules for when court hearings should take place remotely or in person, for the longer term following the end of the COVID-19 emergency provisions, have been issued for consultation by the Scottish Civil Justice Council ("SCJC").

Although many court practitioners have expressed the desire to return to in-person hearings for other than procedural matters, under the proposals remote hearings would become the default position except in most family actions, and ordinary proofs. Legal debates on the procedure roll, and all appeals, would take place remotely unless raising a point of law of general public importance or particular difficulty. Remote hearings would apply to all procedural hearings, judicial review proceedings, and commercial actions including proofs.

With the emergency legislation now kept in force until 31 March 2022, the SCJC is prioritising work on the rules that will apply after that date. It takes the view that there is a need to consider how beneficial elements of the current system of remote hearings can be incorporated within existing court rules. The draft rules now being consulted on would apply to hearings in the Court of Session and in ordinary cause actions in the sheriff court.

In addition to setting out the default position for different types of civil hearings, the draft rules provide for the circumstances in which the default position can be overridden by the court (either on application of parties or of the court's own accord); and the process for making an application for attendance at a hearing in a manner other than the default position. Such applications would be granted "only if [the court] is of the opinion that... it would not (a) prejudice the fairness of the proceedings; or (b) otherwise be contrary to the interests of justice".

The SCJC said that responses to the consultation would inform it on "how best it can provide rules frameworks which facilitate and support new ways of working in the courts post-COVID and how longer term system benefits can be realised".

The consultation documents are available at bit.ly/3zTYTrz . The consultation closes on 18 October 2021.

Five new solicitor advocates introduced

Five civil solicitor advocates were introduced to the Court of Session on 8 September, Lord Turnbull presiding. Pictured with, from left, course convener Craig Connal QC are: Kristopher Kane, Kennedys Scotland; Eilidh Barnes, Scottish Legal Aid Board; Ken Dalling, the President; Nicola Hogg, West Lothian Council; Susannah Mountain, Brodies LLP; and Steve Matthew, Scottish Water.

Land Court and Lands Tribunal to merge

The Scottish Land Court and the Lands Tribunal for Scotland are to merge into a single body dealing with land and property issues.

Following a public consultation last year, Scottish ministers have concluded that a unified and expanded Land Court would offer substantial benefits to court users, providing a more streamlined service, with personnel from each body being deployed flexibly and making the process simpler, clearer and easier for those who need it.

Legislation will be brought forward during the current Parliament.

SLCC consults on proposed rules revisions

The Scottish Legal Complaints Commission has opened a consultation on proposed changes to its rules.

The revisions to the current (2016) rules broadly update them to allow for digital and paperless processes, and video hearings where cases go to an oral hearing. They also streamline and clarify certain processes, and introduce gender neutral language.

For further information see letter, p 6.

The consultation documents can be found at bit.ly/3A1TTLL. The deadline for responses is 1 December 2021.

ACCREDITED PARALEGALS

Criminal litigation
CAROL NELSON,
Bruce McCormack Ltd.

Residential conveyancing
TERRI WATSON, Andrew K Price;
NEIL SWAIN, Moray Legal Ltd.

Wills and executries
CAITLIN BARBOUR,
W & AS Bruce.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. August is quite a quiet month, with both UK and Scottish Parliaments in recess, so this month we are taking a look at what's coming up as both Parliaments reopen for a new session. For more information see the Society's research and policy web pages.

Westminster

The UK Parliament reopened on 6 September. There are a number of measures ongoing that were introduced before summer recess, on which the Society has already provided briefings with the exception of the Judicial Review and Courts Bill and the Subsidy Control Bill, which were only just introduced and have not yet been given detailed consideration, though substantial comments were provided on the preceding white papers. These bills are:

- Dissolution and Calling of Parliament Bill
- Environment Bill
- Judicial Review and Courts Bill
- Nationality and Borders Bill
- National Security and Investment Bill
- Police, Crime, Sentencing and Courts Bill
- Professional Qualifications Bill
- Subsidy Control Bill

Proposed bills included in the Queen's Speech earlier this year but yet to be introduced include:

Product Security and Telecommunications Infrastructure: to ensure that smart consumer products, including smartphones and televisions, are more secure against cyberattacks, protecting individual privacy and security.

Procurement: to reform the UK's public procurement regime, replacing the current regime which was largely transposed from EU procurement directives.

Counter-State Threats: to provide the security services and law enforcement agencies with the tools they need to tackle the evolving threat from hostile activity by states and actors.

Telecommunications (Security): to give the UK Government new powers to boost the security standards of telecoms networks, ensuring their long-term security and resilience.

Electoral Integrity: to deliver manifesto pledges to tackle electoral fraud, prevent foreign interference and make it easier for British expats to participate in elections. The UK Government will engage with the Scottish and Welsh Governments on the scope for applying certain provisions to devolved elections.

Holyrood

The 2021-22 session began on 31 August with debates on the agreement that was reached between the SNP and the Scottish Greens, which resulted in junior ministerial posts for party leaders Patrick Harvie and Lorna Slater; and the post-election Government's first 100 days. The Programme for Government was published on 7 September, and as well as the measures introduced following the election and prior to summer recess (a bill to update pandemic-related provisions, a bill to double the carers' allowance supplement and make future increases possible by regulation, and a bill to reimburse people who have paid for transvaginal mesh removal), the Government intends to introduce a further 12 bills during the parliamentary year.

Legislation will be brought forward to reform how remand is used and how release mechanisms work for certain prisoners, in a Bail and Release from Custody Bill; a Fireworks and Pyrotechnics Bill will ensure fireworks are used safely and appropriately while also addressing the misuse of pyrotechnics; and the Miners' Strike Pardon Bill will provide a pardon to miners convicted of certain offences relating to the miners' strike of 1984-85. There will also be a Fox Control Bill, Gender Recognition Reform Bill and Good Food Nation Bill.

The Society was very pleased to see inclusion of the Moveable Transactions Bill, which will implement the recommendations of the Scottish Law Commission, and also that the Government intends to consider a longer-term programme of implementing SLC reports, including trusts, judicial factors, contract law, title conditions, cohabitation, and damages for personal injury.

The new programme also includes plans to launch a public consultation on Scotland's three verdict system, for a new funding programme for victims, and for a new Victims Commissioner.

However, the Society was disappointed to note that the Government does not intend to bring forward a bill on legal aid reform in this session. The independent legal aid review, which reported over three years ago now, recommended an overhaul of the system, and the impact of COVID on the sector has accelerated the decline of firms offering legal aid, but the indication in the new programme is that any substantive reform must wait until autumn 2022 at the earliest.

National Care Service

The Society is considering the Scottish Government's consultation on A National Care Service for Scotland. This wide-ranging consultation focuses on exploring the proposals for significant cultural and systemic change to the delivery of social care in Scotland that will need to be supported by primary legislation, and its conclusions will be used to shape and develop new legislation due to be introduced in the Scottish Parliament in summer 2022.

The consultation proposals will have a significant impact on the public sector in Scotland. Members may want to respond, or provide views to policy@lawscot.org.uk.

The consultation closes on 2 November 2021.

Innovation Cup launches for fourth year

The search for the latest "light bulb" idea in risk management has begun with the launch of this year's Innovation Cup.

Run by the Society in association with Master Policy lead insurers RSA and brokers Lockton, the competition aims to tap into the expertise of the Scottish legal community and inspire new risk management solutions from within the profession. Scottish solicitors, trainees, cashroom staff, paralegals and student associates are invited to submit their ideas for risk management products, tools or strategies. Entries can range from a simple tweak to an existing process to something completely new.

The winner will be awarded a £1,500 cash prize, provided by RSA, and the idea will be developed by Lockton. Previous winners have included a risk management tracker tool, a notice to quit calculator for commercial leases, and last year's winner, a client communications questionnaire.

Murray Etherington, convener of the Society's Insurance Committee, said: "It's been tremendous being part of this competition over the last four years and seeing all the great ideas that have been submitted."

Entrants should complete the entry form at bit.ly/3yyhRRY and return it by email to PaulMosson@lawscot.org.uk by 12 noon on 14 October 2021. Entries will be judged by two members of the Insurance Committee, three representatives from RSA and one from Lockton.

SLCC gets tough over file non-delivery

The Scottish Legal Complaints Commission has been granted a Court of Session order requiring a firm of solicitors to deliver relevant files and documents to support the investigation of a client complaint – the first time it has resorted to litigation against a law firm.

The SLCC said it had raised the action following ongoing concern over the level of non-cooperation from a significant number of solicitor firms in dealing with complaints. It warned that other firms failing to comply with their duties will face similar action.

Although solicitors have a statutory duty to hand over client files relating to complaints, the SLCC regularly complains that a significant number, around 40% over the last few years, have failed to do so.

Chief executive Neil Stevenson pointed out that such failure causes additional delays and worry for clients in hundreds of cases each year, "and calls into serious question the behaviours and ethics of a section of the profession. It also causes entirely unnecessary expense, running into tens of thousands of pounds, which is borne by other law firms who fund the complaints process, and it impacts the reputation of the whole profession".

Litigation was a last resort, as it caused further expense, but the SLCC has decided that all solicitors failing to comply with the statute will be taken to court. Counsel has been instructed in two further cases, as it seeks to build a body of case law and obtain expenses against defaulting firms. "We are also considering naming law firms that fail to comply," Stevenson warned.

He thanked the 60% of firms that do respond timeously and helpfully.

Notifications

ENTRANCE CERTIFICATES ISSUED DURING JULY/ AUGUST 2021

ADAMSON, Declan James David
ADDISON, Hannah Josephine
AIVALIOTIS, Grigorios
ALEXANDER, Jenna Claire
ALLAN, Damon Henry
ALLAN, Holly Marie
ANCEY, Tiffany
ANDERSON, Meegan
ARACENA, Natalie Elena
ATHERTON, Rian Thomas
BELL, Lauren Kathryn
BEVERIDGE, Grant Andrew
BLYTH, Ross MacKenzie
BOWIE, Lauren Ann
BREMNER, Laura May
BROOKS, Charis
BRUCE, George Andrew
BUCHAN, Andrew George
BUZUK, Sarah
BYRNE, Sophie
CALLANDER, Robbie
CALLENDER, James
CAMILLERI-BRENNAN, Elise
CAMPBELL, Anna
CAMPBELL, Hannah
CHISHOLM, Tiffany
COID, Rebecca
CONNELLY, Natasha Ellen
CONNOLLY, Robyn Christiaan
DALKIN, Alice Hester
DAVIDSON, Lucy Victoria
DAVIDSON, Will James Scott
DAVIES, Mark
DEANS, Katie Melville
DEMPSTER, Charlotte Emily
DICKSON, Benjamin David
DOCHERTY, Sinead Marie
DONNELLY, Harry
DUNCAN, Gabriella Lois Marie
DUNCAN, Hannah Louise
DUNN, Alison
DUNN, Anna Mary
DURIE, Jamie Donald Alexander
FAIRBAIRN, Calum John
FAULDS, Lewis David
FERGUSON, Rachel Nicole
FINLAYSON, Mera Shah
FISHER, Kate Yvonne
FLETCHER, Julia Caterina
FORSYTH, Alasdair Kuusik
GALA, Kasia Anna
GALLACHER, Katrina Margaret Alice
GALLACHER, Kirsten
GALLANAGH, Catherine Anita
GILCHRIST, Eve Elizabeth
GRAHAM, Jamie Edward
GRANT, Ellen Nicola
GRIEVESON, Joshua James
GUTHRIE, Rachel Guthrie Katherine
HADDOW, Mark James Robert
HAMMOND, Amy Marie
HARRIS, Calum
HARRIS, Emily Marie Helene
HARRISON, James Stephen
HETHERINGTON, Alison
HEWISON, Rebecca Jennifer
HOYLE, Christopher Gordon
IKRAM, Sarrah
IMRIE, Chloe Louise
JACKSON, Sinead Margaret
JAMES, Abi Mary
JORDAN, Sinead Anne
KANE, Megan
KAPTELLI, Paula
KENDERDINE, Ben Robert
KILDARE, Antonia Felicity
KOTLARZ, Martyna
KULAGA, Emanuele
LAING, Ethan Ian Gordon
LAMEDA, Ana Valentina
LAOUADI, Corey Jon
LIPSCHITZ, Gabby Tamar
LOOSE, Adam
MACARTHUR, Erika Louise
MACAULAY, Jonathan
McAULEY, Kirsty Anne
McBRIDE, Clare Frances
McCARRON, Stephanie Jane
McDONALD, Alex Ruth
MACDONALD, Christina Mary
MACDONALD, Ellie Keira
McFADDEN, Hope Alice
McFARLANE, Lauren Laidlaw
McGOWAN, Jamie Connor Christopher
MACGREGOR, Jamie Albert
McGUIGAN, William Peter
McGUINNESS, Stephanie Louise
MACKAY, Kirstin A
McKAY, Miles Lewis
McKEE, Conor Joseph
McKELVIE, Murray
McKILLOP, Ruairidh
McLEAN, Clem Jack
McLONEY, Megan Kimberley
McMANN, Andrew James
McWILLIAM, Kirsty Anne
MALCOLM, Rhona Kate
MARSHALL, Eleanor Summers
MARTIN, Stella Louise
MATHESON, Gavin James
MELROSE, Laura Jayne
MICHIE, Sarah Danielle
MILLAR, Louise Emma
MINIO-PALUELLO, Kelly Marie
MULHOLLAND, Sarah Isabel
MURCHISON, Murdo Alasdair
NASAR, Ussamah
NEEDLE, Lewis Connor
NICHOLSON, Ewan
NISBET, Brooke Jane
NOCK, Lucy
NOUAR, Lynda Sandra Halima
NUGENT, Zoe Victoria
O'HARA, Mollie Elizabeth
OZBAY, Cisel
PENNIE, Fraser Kenneth
PLEASS, Matthew Patrick James
POLATAJKO, Debbie Catherine
RANKL, Joshua Nicola
REID-KAY, Sophie Maclean
REILLY, Darcy
REILLY, Rebecca Florence
RICHARDSON, Alex
ROBERTSON, Greg Robertson
ROBERTSON, Holly
ROLLINSON, James
ROSS, Eilidh Lorynn
ROSS, Erin
ROSS, Giulia Maria
RUDDY, Erin
RUNCIMAN, Liam Paul
SCARBOROUGH, Kate
SEATON, Rebecca Catherine Anne
SEEDHOUSE, Jamie MacNaughtan
SHAHID, Yasmeen Ashia Rowatt
SHARP, Julie Barbara
SHARPE, William Scott
SMETHURST, Hannah Chloe
SPENCE, Orla
STORIE, Danielle
STRAIN, Ruth Sarah
TEDEN, Lillie Louise
THOMPSON, Ailish Marie
TODD, Gillian
TOOLE, Robbie James
TRAYNOR, Joanna Jessica
WALKER, Aidan Neill Morrison
WALKER, Rachael Robertson
WALLACE, Regan Joseph
WATT, Sean Alexander
WEBSTER, Stacey
WHITE, Connor Michael Cummings
WHITEHEAD, Lewis Jack
WHYTE, Samantha Rachel
WILLIAMSON, Finlay Wrighty
WILSON, Marianne Jenny MacKenzie
WILSON, Morgan Jane
WRIGHT, Tracey Ann
YOUNG, Megan
YOUNG, Nikita Mae
ZAJDA, Jessica Elizabeth

APPLICATIONS FOR ADMISSION AUGUST/SEPTEMBER 2018

AITKEN, Susannah May
ARCHIBALD, Holly
BARNETT, Emma Victoria
BASTEKIN, Sara May
BIGGAR, Walter Duncan
BURNS, Emma
BURTON, Paige Anne
CAMPBELL, Eilidh Morag
CIERANS, Sorcha Elizabeth
CLARK, Hannah Alison
CLETHEROE, Kelly Christina
CONNELL, Lianne
CRAIG, Stuart Andrew
CURRIE, David Owen
DALGARNO, Colin Scott
DAVIES, Ruby Megan
DICKSON, Leslie James
DONALDSON, Rory James
DONOHOE, Laura Charlotte
DUNSMUIR, Hazel
EDMUNDSON, Ione Skye
FARRER, Simone Carolyn Mary
FERGUSSON, Hannah Margaret
FRANCIS, Raymond Innis
GEMMELL, Shelby Alana
GOH, Carmen Kahmun
GRAHAM, Anne
GRAY, Rebecca Chloe Elizabeth
GROVÉ DEMPSTER, Anelda
GUNN, Laura
HALL, Heather Catherine
HAMILTON, Lindsay Alice
HAMILTON, Mirren
HANNAH, Nicole Michelle
HAQ, Abrarr
HARKIN, Aoibheann
HEGARTY, Alice Catherine
HENDERSON, Claire Mary
HO, Vivien
HOLEHOUSE, Elizabeth Rebecca
JAMIESON, Christie Janet
KASEM, Rouzana
KENNEDY, Samantha Lillian Joan
KOCZWARA, Monika Barbara
LAMBIE, Kiera Rae
LEE ALLEN, Maya Elizabeth
LOW, Cara Louise
LYNCH, Jennifer Jane
MACAULAY, John James
McCAMLEY, Flora Margaret
McCLINTON, Laura Ellen Victoria
MACDONALD, Janet Margaret
MACDONALD, Marion Joyce
McFADYEN, Alison Anne
McGREGOR, Grant
McGURK, Hannah
McKEOWN, Jennifer Eilise
McMURRAY, Hannah Alison
MANSON, Andrew John
MELLOR, Kirsty Ann
MILLER, Rachael Elizabeth
MILLS, Sophie Rebecca
MONTGOMERY, Kerri
MULLEN, Jack
NEWELL, Murray Angus McClements
NUTTON, Joshua Wiliam
PARK, Kyung Jae
REES, Jaimie Louise
REVILLE, Lucy Anne
RODDEN, Claira Anne
RUSSELL, Emily Cleo
SALTON, Catriona Morven
SCOTT, Liam John
SHARKEY, David Andrew
SHIELDS, Laura Margaret
SHORT, Michael Kenneth
SIEDLECKI, Igor Gzegorz
SMITH, Katy Jane Lindsay
SPADARO-DUTTURI, Lucia Giuseppa
SPEED, Martha Rose
SUMMERS, Courtney Jade
THOMSON, Ailsa Carmichael
TOWNSEND, Laura Alice
WEIHE, Brynhild Dalsgaard
WEST, Gordon McKenzie
WHYTE, Calum
WRIGHT, Caitlin Elizabeth
YOUNGER, Rose Elizabeth

HYBRID WORKING

Lockdown no more

Newly qualified Melissa Laurie finds being able to go to work in the office at the end of lockdown a liberating experience

Walking home after my first day back in the office post-lockdown, soaking in a rare Scottish balmy evening, I felt like I had lost a limb. I had left my laptop – something which had, for the last 18 months, been no more than five steps away from me at any time – in the office. On arriving home, "phantom ring" set in. I could swear I could hear my phone ring and my email inbox ping without the laptop even being in my flat. It soon subsided and the liberation of a physical separation between office and home swept over me.

Last month I finally qualified as a solicitor. To celebrate and mark the occasion, I decided to return to the office. I knew the rest of my team – the team I have been working with for the last six months – would be there and that I would be meeting them in person for the first time.

The night before going into the office I emptied the contents of my wardrobe to find my old office pass and some work clothes I could still fit into. I was filled with anxiety. While I knew the team had been as welcoming as they could be over email and video call, I had essentially qualified into a team I had never met in person. In fact, more of my traineeship had been spent working from the safety of my kitchen than in the office.

After that first day back in the office, once the initial laptop separation anxiety had worn off, I felt more relaxed than I had in a while. I filled this time catching up on LinkedIn, connecting with contacts and reading some articles which have been sitting in my bookmarks tab for months. Not only did the separation between home and office open my mind and attention to other activities, which may contribute to longer term development, but my adventure into the office also left me feeling rejuvenated. It was uplifting to finally meet the team I had worked with on numerous matters in person and discuss face to face the contracts or clients which had taken up my last six months. It was a real morale boost and reminder of why I chose this firm in the first place.

"It was uplifting to finally meet the team I had worked with on numerous matters in person and discuss face to face the contracts or clients which had taken up my last six months"

What was missing

For someone who considers themselves at times a bit of an introvert, it was easy to think I didn't need the human interaction. I also believed that I worked better from home: able to keep my head down and zone out from any distractions. While I definitely believe productivity and efficiency can be enhanced in a home environment, I also realise now that I was losing out on the benefits of working in a physical team/office.

Although I may not get my to-do list done as quickly in the short term, I believe being back in the office, at least a couple of days a week, is essential for my development and engagement, as well as my personal wellbeing. I am excited to try a hybrid approach to working going forward and I am very fortunate to be with a firm who supports and encourages that flexibility.

I appreciate that the position on working in the office is dependent on Government guidance, and I understand the guidance currently to be work from home where you can. COVID is still rife, and we should remain vigilant to minimise transmission. Nonetheless, I would encourage everyone to take the opportunity to return to the office where they can. However nerve-wracking you may think it will be, I guarantee that you are in for a pleasant surprise – a change is as good as a rest after all!

Melissa Laurie
is a newly qualified solicitor in the TMIC team at CMS Cameron McKenna Nabarro Olswang LLP

The potency of passion

What connects foxes, hedgehogs, love and money? Stephen Gold explains

Does "do what you love" sound self-indulgent, and idealistic? Do you think it's the kind of thing one might say to a child, not responsible advice for adults making their way in a tough world? Would you say that if you love what you do, that's a bonus, but loving our job lags well behind the imperative of doing what we need to do to make a living?

This "realistic" view of work is a great mistake, and in our profession has real consequences. Countless surveys show that the majority of lawyers are unhappy or dissatisfied with their lot. The usual suspects are stress, long hours, and indifferent management. But an equally plausible reason is that in making career choices, "What am I passionate about?" is often either a second-order question, or barely a question at all.

Jim Collins' *Good to Great* is one of the most influential business books ever written. Central to it is the idea that every company which has ever made that leap has had what he calls a "hedgehog concept". It takes its name from the famous essay by Isaiah Berlin about the Greek fable of the fox, "which knows many things", and the hedgehog, "which knows only one big thing". He encapsulates the hedgehog concept in a Venn diagram, where the unifying "one big thing" emerges at the intersection of these three questions: What are you deeply passionate about? What can you be best in the world at? What drives your economic engine, namely, the external commercial and economic factors that create a demand for what you do? Note that passion is given equal weight to the other two. Being the best, and market demand, may result in a measure of success, but without passion, greatness is impossible.

The inventor and industrialist Sir James Dyson is a fine example. In the years spent perfecting his famous bagless vacuum cleaner, he was funded by his wife's salary as an art teacher. Mortgaged to the hilt, he built 5,126 prototypes, before 5,127 hit the jackpot. Today, he has hoovered up a fortune of £16.3 billion, rather more than enough to retire at the age of 74.

But he is not going anywhere. On his Wiltshire estate, he has a "garden shed", a giant aircraft hangar full of pulleys, hoists and machine tools, where he is at his happiest. He is a brilliant man, yet without the passion to keep inventing, and overcome many failures, he would never have achieved so much.

Shifting the spotlight

"I am the master of my fate. I am the captain of my soul." William Henley's *Invictus* speaks to a deep desire in us all. But the normal human state is neither dependence nor independence, but interdependence. We cannot be our best selves without the goodwill and encouragement of others.

Firm leaders have a profound responsibility to help their people be their best selves, to find their personal hedgehog concept for the sake of their own wellbeing, and the prosperity of the business. Yet, "What are you passionate about, and how can we help you pursue it?", is too little asked in staff appraisal, where the focus tends to be on what the individual can do for the firm, not vice versa: What are their billing targets? Can they be increased? How will they bring in new work? Can they be more efficient, or productive? This approach was never right, and if firms want to retain their brightest people it is completely unsustainable, now that the pandemic has caused so many of us to reassess how we want to spend our lives.

Sometimes, no matter how enlightened one's employer, tradeoffs are inevitable as between the needs of the business and personal aspiration. In a recent thoughtful article for *Harvard Business Review*, the authors suggest the right question is: "Can my career be a conduit to passion?" As they explain, "Reframing the question this way frees you up to honestly weigh the pros and cons of pursuing your passion through work. Follow up with questions like: Which industries will allow me to pursue my passion? How do the constraints of these industries align, or conflict with, my other goals – like my desire to have a family, spend time on my hobbies, build wealth, or choose where I want to live? You can also play Devil's advocate and ask: Do I need to pursue my passion through my work? What would it look like to pursue this passion outside of work? Would it be equally fulfilling?"

Wherever your passion lies, be honest about it, especially with yourself, and keep it front and centre, whenever you are faced with important career decisions. We pass this way but once. Don't pass up the opportunity.

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

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Getting interactive at the Law and Technology Conference

Ahead of this year's Law Society of Scotland Law & Technology Conference, taking place online on 30 September, the Journal highlights the three highly topical interactive panel sessions featured in the programme

Technology procurement: how do you get the most out of your spend?

The IT industry is incredibly fast paced, and it can often be confusing when trying to source the right product for you and/or your team, particularly if you have no dedicated IT staff on site. Identifying your main business requirement before you begin to explore the market is key to making sure you don't end up with an unnecessary purchase. As part of the Law and Technology conference, Sarah Blair, Director of IT at Thorntons will lead a panel discussion on how to get the right product for your requirements, detailing the type of questions you should be asking before speaking to vendors and providing tips on how to get the most from your technology spend.

Cybersecurity: incident prevention and response

If your device is connected to the internet, it is at risk of a cyberattack. If that statement comes as a shock, you should attend this session, led by industry experts David Fleming (Mitigo) and Declan Doyle (SBRC). Working remotely has changed the landscape of online security considerably, providing hackers with brand new opportunities to infiltrate your organisation. While you may have secured your systems 18 months ago, it might not be enough to keep you protected from the latest cyber threats. This session will provide important updates on how best to defend yourself from an attack, and the steps to take after an incident to minimise the damage.

The impact of remote learning on traineeships and internships

As most businesses continue with a remote working model for the foreseeable future, it's clear that trainee solicitors and interns have been denied the in-office experience they were originally expecting. The argument could be made that having never worked in a "traditional" office environment beforehand, both will be adept at settling into this new way of working. This, however, doesn't change the fact that many trainees are feeling let down by their experience, regardless of how diligently firms are striving to provide the correct level of training. At this year's conference there will be a panel discussion exploring the impact that remote learning has had, and asking trainees directly what they feel benefitted them, and what they still need from their traineeship.

For details of the conference, including the full programme, visit www.lawscot.org.uk/lawtechconf

RISK MANAGEMENT

Ten red flags for conveyancers

Kenneth Law of Lockton looks at 10 of the slightly less obvious – but nonetheless important – risks to be watched out for in conveyancing transactions

Conveyancing accounts for more than half the value of claims made each year on the Master Policy. Below are 10 suggestions of things to watch out for which go a bit beyond the basics, and in some cases are informed by recently intimated claims.

1. Who exactly is your client?

Hopefully it will be obvious in most cases, but where there are parents gifting a deposit or there is a trust or company involved it is crucial to be clear about who exactly your client is and who can expect to rely on your advice. If your client is a seller but not the registered proprietor, that should ring immediate alarm bells.

It is permissible (and will often make sense) for a solicitor to act for both sides in an inter-family transfer, but it is essential to be open and transparent with the clients about the risk of a conflict arising and to involve an independent solicitor when necessary. Make sure you have encouraged everyone consulting you to consider how they would feel about the transaction if relations soured. Not an immediately pleasant thought, but it might help to focus minds about whether separate representation or a more formal agreement is needed.

2. Have you checked the client has capacity?

It would be easy to see this as an issue relevant only to will drafting, and incapacity is most common in older clients, but it really can occur at any stage in a client's life so solicitors should always have that question in the back of their mind. The signs will not always be obvious, but solicitors are not medical practitioners and are not expected to pick up on every minute sign of incapacity.

Make it a habit to think about capacity the first time you meet a new client, or an existing one you have not spoken to for a while, and include any observations in your attendance note.

3. Do they understand the purchasing process?

It can be easy to assume that a client will know how the Scottish purchasing process works, but that will not always be the case. As well as explaining the general process of making an offer and the back and forth negotiation of missives, make sure the client understands that in a closing date situation they have only one opportunity to make an offer and you will not be in a position to submit another one after that date has passed. Make sure they also understand that, should their offer be accepted, there are only very particular circumstances where the price they have offered could be subsequently reduced (see the Law Society of Scotland's guidance on gazumping/gazundering for these two scenarios).

The client should understand on the one hand that the contract will not be concluded until an unqualified acceptance is issued by either party, and that either party could walk away at any point before then (see more on that below under time limits); but on the other hand that there is always a risk of the client's offer being accepted without qualification, so any formal missive issued should always be in a form the client is fully comfortable with, without relying on being able to negotiate finer details later on.

4. Who is meant to own the property after settlement?

There are plenty of ways for confusion to arise around this. If there is more than one party buying, is the property to be held in equal shares? Is title to be taken in the name of a trust or company? Are some of the funds coming from a relative or third party? Is a relative who is not contributing funds to be included on the title? Is there to be a survivorship destination? You can probably think of another half dozen questions like these yourself.

Make sure to discuss this fully with the client(s) to avoid any disagreement and root out any issues. They may have an idea in their mind of what they want to achieve but have difficulty articulating it without your help, or they may simply not be aware of the options. Be mindful too of LBTT implications, such as where a main residence is being replaced but the purchasers of the new property and sellers of the old property do not match.

5. Have your client account details been provided securely?

Fraud facilitated through email interception is on the rise and unfortunately is here to stay. To guard against it, provide your client account details on paper at the outset of the transaction, and make it clear that under no circumstances will they be changed. If there will be net sale proceeds to return to the client, take their account details at the outset and be clear that those are the details you will use. There is simply no reason for either solicitor or client to need to change account details mid-transaction, and the amounts of money involved are too large to risk it.

Lockton recently released a document of sample wording, available on our Resource Centre at locktonlaw.scot. It can be printed off and issued to clients with your client account details inserted, or used as a style for your own document. The important thing is to make clients aware of the risk of fraud of this type and encourage them to be vigilant.

6. Does your terms of business letter exclude liability for environmental law and/or contaminated land matters?

Environmental law is a complicated and evolving practice area which is subject to a complex statutory regime, imposing strict obligations on those involved with severe fines possible for non-compliance. Unless you have specialist knowledge of these areas, you may find yourself (even inadvertently) acting outwith your own expertise and run the risk of a complaint or claim. The most common types of transaction for this will be rural or commercial property, but residential property (especially new-build) is also at risk.

If it appears any environmental issues might affect the land you are transacting with, specialist advice should be sought

early on. Accredited specialists in any field of accreditation can be found under the advanced search options in the "Find a Solicitor" section of the Society's website.

7. Has your client asked you to delay concluding missives?

This is not an issue in itself, as very often there will need to be a delay while clients obtain funding or agree a sale of their own property; but remember that we have a professional obligation against knowingly misleading professional colleagues, and to act in a spirit of trust and co-operation: rule B1.14 (Standards of Conduct). If a client asks you to keep quiet about the reasons for conclusion being delayed, the Society advises that you withdraw from acting.

Obviously, as in just about every situation lawyers are involved in, communication is key. It may be that it would only take some more discussion with the client to flush out what is going on or whether the issues causing them to want to hold up the transaction can be resolved. It is also important for you to keep in touch with the solicitor on the other side, bearing in mind that they will otherwise be in the dark and will have a client of their own no doubt anxious to be told of progress.

8. Has the seller owned for at least six months?

This is a lender requirement and is covered in clause 28.1 of the Standard Clauses. Your reporting to the lender will also require you to confirm that the seller has owned for the minimum specified period, and this is something lenders take seriously so it is important not to overlook it. If the selling solicitor tries to delete clause 28.1, you should request an explanation immediately and report to the lender and your client.

9. Is the property built of prefab concrete?

Prefab concrete structures, intended as a temporary fix to the post-war housing shortage but still standing today, can be a major issue and potentially unmarketable. Lenders are very unlikely to offer mortgages against these and other types of non-traditional build homes. The home report will not always identify a property as prefab or non-traditional in so many words, but look out for references to this or an appearance of it from the schedule, and raise the matter with the surveyors in early course.

10. Keep an eye on your time limits!

Solicitors in residential property transactions in particular have a professional duty to conclude missives without undue delay; however most if not all of us will have issued a missive containing a time limit we knew would not be enforced. That will not always be the case though, and we have seen instances recently of sellers insisting on time limits which had been set and refusing to re-enter negotiations, resulting in very disappointed buyers. It would certainly be a professional courtesy to advise the other solicitor if your client had told you they wanted a time limit strictly enforced.

Bear in mind too that there might be time limits which apply after conclusion of missives, for e.g. payment of a deposit or delivery of building documentation. In another case from several years ago, a seller was trying to persuade the buyer to withdraw from a set of concluded missives, but the buyer refused. The buyer had been due to pay a deposit within five working days of conclusion, but amongst all the commotion over withdrawing had failed to do so, so the seller simply held the buyer in breach and unilaterally terminated the missives. The lesson: start drafting that settlement checklist as soon as the missives are concluded, if not before!

All 10 of these issues have come up in some way or another in the past year, so are worth keeping an eye on. We also recommend consulting the checklist produced by the Standard Clauses Working Party and available from the Society's website, which provides a helpful guide to other things to watch out for and is cross-referenced to the Standard Clauses. As well as a useful tool during transactions it can act as a simple refresher of issues to keep in mind. Above all, the importance as ever is attention to detail and the trained solicitor's sharp eye.

Kenneth Law
is a solicitor and risk manager in the Master Policy team at Lockton

FROM THE ARCHIVES

50 years ago

From *"Metrication", September 1971:* "The following views are expressed by the Keeper of the Registers with regard to metrication... Where the area and boundaries are expressed in a recorded deed in Scots measurements, it is advisable, but not essential, to bring the description up to date... Where metric measurements are used it is important that there should be uniformity of practice in expressing both linear and area dimensions in land measurement... It is emphasised that it is extremely dangerous to use both imperial and metric measurements together in a deed in view of the uncertainty which would arise from an undetected mistake".

25 years ago

From "Conveyancing Fees – Are We Selling Ourselves Short?", September 1996: "I firmly believe that conveyancing fees have reached a point where they are often below the value of the service to the client, let alone the cost to the solicitor providing the service... There are firms who claim, with every semblance of the truth, that they are making a profit despite charging low fees. This can be achieved by a combination of hard work, efficient processes and a high level of technology. But, even for these firms, profitability cannot be sustained if fees continue to fall indefinitely."

THE ETERNAL OPTIMIST

So, what do you want to be when you grow up?

A question often asked of us when young, but would our answer be the same today?

I have a friend whose standard answer to the question "How's business?" is always the same: "Terrible!" Knowing him as I do, I suspect that business, at least financially, is far from terrible and he is fortunate to enjoy the material rewards that running a business has to offer. However there are few practitioners I speak with whose answer is different to his.

It raises the question with me: "Is there something in the human condition that doesn't like to admit that things are going well, or are we all just having a really miserable time at the moment?" Like Goldilocks, is it always "too hot" or "too cold", or do some of us manage to get it "just right"?

I posed that question to a solicitor breakfast networking group recently, and I was intrigued and fascinated by their responses. Initially it was just that it's "the Scottish mentality", but as the conversation expanded a number of additional points arose. Everyone agreed that regulation does suck the joy from most aspects of legal work, although most saw the importance of it in protecting the solicitor brand. Similarly, working within what is, in essence, a profession dealing constantly with conflicts, be they client to client, solicitor to solicitor or indeed solicitor to client, also takes its toll on the mental wellbeing of practitioners.

Running on adrenalin?

Some other themes were that many of us have become adrenalin junkies. While we may not love the fact that our days are stressful, we do begin at some level to crave a degree of stress, having grown accustomed to it in our lives for so long. Think on your own day and how often you squeeze in an extra meeting, settlement or case rather than taking the easier, more relaxing option.

Many of us also defer our gratification to a later date. We take on more and more today in the belief (often mistaken) that at some future point we will be able to spend our time happily taking long walks on sunny beaches. Sadly, many of us have experienced losses that have shown the flaw in that thinking. Finally, amongst the group there was a sense that over time we all get just a little burned out and jaded from doing the same thing for so long and dealing with the pressures and stresses that go with it.

"It raises the question with me: 'Is there something in the human condition that doesn't like to admit that things are going well, or are we all just having a really miserable time at the moment?'"

On a more positive note, everyone still loved the law and its practice, and this did not seem to diminish with age. Likewise, most loved running their own businesses (regulation notwithstanding) and both the challenges and the opportunities that it gave them. There was though a clear message that to continue to thrive, you had to create time for yourself and to build your own internal resources and resilience to allow you to function at your best during the working day, particularly when dealing with client issues. It was interesting to note that most in the group had made some form of change or pivot to their business or life at some point.

The question arose, whether these issues were confined to business owners, and the views again are worth considering. A general sense prevailed that newer entrants to the profession are not as entrepreneurial, or at least less likely to set up in practice or to progress as early to partnership roles than generations before. There are of course many factors at play here, not least of which again is regulation, along with matters such as panel appointments that can be a barrier to entry. It was also felt, though, that newer entrants are perhaps a little wiser and already appreciate the importance of work-life balance, and the longevity of their career may not be as important. These were, of course, opinions only and I'd love to hear from any NQs with their thoughts.

Young in a long life

So what did I take away from it all? A few points on which I hope we can all agree:

- "How are you" is a greeting, not a question. It is always safer to say "fantastic" and to chat through any worries or concerns, if appropriate, later as they arise.
- Take time out for yourself. You cannot look after others unless you first look after you (as the instructions on nearly every airline seat remind us!).
- Remember you will reach a stage in your career where the last thing you will need is additional income: what you will really need then is longevity.
- While repeating the same tasks every day may be efficient, don't forget to develop yourself, your skills and your business. That is what will keep you young in mind and outlook, and help with that longevity issue.
- Borrowing from the lyrics of Stephen Stills, and to answer the question at the beginning: if all else fails, "If you can't be in the job you love, love the one you are in."

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

Commissary: the top 10 failings

Advice from the Society on 10 things to watch out for to cut the return rate of applications for confirmation

The Society's Trust & Succession Law Committee, and others, have been engaging with Scottish Courts & Tribunals Service on commissary matters. With an average return rate of 24-30% of confirmation applications across Edinburgh and Glasgow Sheriff Courts, the committee is taking the opportunity to remind practitioners of points to watch and raise awareness of common reasons for return.

We will continue to work with commissary offices with a view to improving matters for the mutual benefit of the courts, solicitors and – most importantly – clients. The committee would welcome input for this important dialogue – comments may be sent to **policy@lawscot.org.uk**

1. Minor errors are one of the most common reasons for return – check documents carefully before submission, in particular dates of birth and death, place of death, and ensure full addresses including postcodes are provided. You may cross-check relevant details with the death certificate, for example the deceased's occupation.

2. Check that you are using the most up-to-date form C1 – at the time of writing, this is HMRC 06/18. The most recent version can be found on HMRC's website. Applications must be dated within six months of receipt by the sheriff clerk's office.

3. All boxes on form C1 should contain an entry unless instructed otherwise – e.g. if the deceased had no occupation, write "none"; if the NI number is unknown, write "not known". Do not leave blanks, even where there is no apparent positive entry to include.

4. Expediting applications – if you are requesting that an application be expedited, detailed reasons should be given. It is common for requests to be made where a property is to be sold – this is generally not considered to be an appropriate reason for expediting where a property has been marketed after death, but an application would be likely to be expedited if the property was already being marketed before death. Solicitors and clients should generally be discouraged from marketing property before confirmation is available, and at the very least, clients should be warned that there will be delays in any agreed settlement date if confirmation is not available, whoever is responsible for any delay.

5. Requirements of writing petitions – commonly the C1 application for confirmation is submitted at the same time as a petition. These cannot be granted at the same time (as the will needs to be set up before the declaration in the C1 can be given), so the C1 will not be accepted.

6. Declaration – there are a few points to note:

- Unless the applicant could not have been married or in a civil partnership with the deceased due to the familial blood line relationship, a statement that they have not been married or in a civil partnership to the deceased *must* be included. The requirement may seem overly demanding in many common cases, but it is a statutory requirement which will not be waived. See earlier Journal articles containing guidance on appropriate wording: January 2018, 42; April 2019, 43.
- Where a firm/trustee company is appointed as an executor, if the individual signing the declaration is not referred to in the declaration as a director of the company, the minute of meeting granting authority or list of authorised signatures must be attached and referred to in the declaration.
- Any document referred to in the declaration must be docqueted.
- If there are any differences between the deceased's or executors' names or addresses in the application as compared to the will, this should be clarified in the declaration. A common omission is where the deceased was residing in a care home before death.

7. Inventory

- List assets under the headings and in the order set out on p 3, and ensure that a summary for confirmation is included.
- Provide a detailed description of the items of estate. Sort codes and addresses for financial institutions should be included so that the location of the assets can be checked. Vehicle registration numbers should be included.
- Nominal values should be included rather than nil values. Detail how the valuation has been obtained. The higher the value, the more detail is expected.

8. Total estate for confirmation and inheritance tax – the figures in box 9 on p 1, box 6 on p 2, and the value of the inventory on p 3 should match. If a C5 is being submitted, the values in boxes 21-23 on p 5 need to match C5 values, otherwise the correct box at 24 should be selected.

9. The **original will** is required, not a photocopy.

10. Processing of applications – solicitors are encouraged not to contact sheriff clerks' offices to check on progress, as this diverts staff from processing applications, including yours – it is suggested that you wait until after the usual processing time for your local court before making enquiries (for example, Edinburgh: five to six weeks, Glasgow: three weeks). If an application is returned, it will usually go to the back of the queue when resubmitted, otherwise this would add to processing times for applications. If there are multiple errors requiring correction, staff will generally do their best to ensure that all are noted on the application being returned.

Mobility challenges – and the kindness of strangers

Alan Barr is used to writing about the famous inevitables, death and taxes. Here he gives a personal view on a third all too common, if not inevitable, incident of life

I have a very sore leg. A different very sore leg ceased being sore when I had a first hip replacement, in late 2020. I hope to cease having sore legs when I have a second hip replacement and become slightly less Barr and slightly more ceramic and steel. I look forward to setting off airport alarm systems, when that becomes more of a possibility.

So, I am not "out of action" by any means. However, I am pretty certain that I am, in legal terms "disabled" – albeit in a relatively minor, and hopefully, temporary way.

That view follows from this definition: "A person (P) has a disability if – (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities." (Equality Act 2010, s 6(1); and see the online guidance on matters to be taken into account).

For now, I find I am that P. I count my blessings at how little I have generally suffered from illness through my life. And I emphasise that I know that what I am suffering now pales to insignificance when compared to so many others. But I have had the merest hint of what it is like to be more disabled and permanently so; and what I would want to change when I have the good fortune to become less so.

Still capable!

There have been negative, and perhaps more surprisingly positive, aspects to this experience. On the negative side has been the slowness that constant pain has brought, including to some extent in the ability to get things done. I don't think I do things any less well – just a bit more slowly.

Coupled with this is an impression that for some people, physical disability equates to mental incapacity. How can the man with the stick *possibly* tackle hard legal issues? The answer is, I think, quite well actually. I have been spoiled by most meetings taking place recently in an environment where sore legs (or indeed the possible absence of trousers) have not been evident in the box on the screen.

So I have had a small inkling of what I believe quite commonly befalls those who use a wheelchair – encapsulated in that brilliantly titled radio programme, *Does He Take Sugar?* Accompanied throughout by my wife, questions have been directed to her which a sore leg would not have precluded me from answering for myself.

I have fortunately remained able to drive, but various encounters with public transport have shown me the problem of high steps. On the London Underground step-free access is a rare privilege, and involves many, many yards of corridor – not convenient when one is still on hobbling legs and not in a wheelchair.

Kindness counts

A recent concert brought both sides of my picture into sharp focus. Front row seats bought early; an assumption (indeed instruction) to remain seated, only for the star performer to encourage the audience to stand up, come to the front – and thus obviate entirely the benefit of those seats. So off we grumbled, only to be scooped up by a kind bouncer and given special seats behind the stage barrier.

This is emblematic of a positive very clearly seen from my current position – the kindness of strangers. Almost universally, people have looked out for me – springing out of bus seats, ushering me through queues, seizing heavy baggage. Any lingering thought of being patronised or imposing on others is far outweighed by things being made that little bit easier. When I can again, I hope I will always offer assistance.

> *"For now, I find I am that P. I count my blessings at how little I have generally suffered from illness through my life"*

"You're going to be extra nice to disabled people when you get your old life back," I hear you say. "Big of you." Let me be clear: I'm not suggesting that relying on helpful strangers should in any way be an alternative to robust law, properly observed and enforced, to protect and enhance the basic right to independent and equal access to all parts of society.

But this experience has undoubtedly opened my eyes and dispelled some, perhaps lazy, assumptions. The old saying is before you judge a person, walk a mile in their shoes. I cannot actually walk that mile now, but a few months of hirpling in my own shoes has given me new insights into being even slightly disabled. I very much hope to revert from being disabled and old to just being (quite) old. I will resolve to do my very best to avoid clichéd views about those with disabilities. And yes, to be a bit more kind.

Alan Barr
is a partner with Brodies

Law Society of Scotland

Expert Witness Index 2021

Law Society of Scotland

Expert Witness Index 2021

I am very pleased to introduce the 2021 published *Expert Witness Index*. I hope you will find it useful for finding experienced experts that will provide essential technical analysis and opinion evidence in court and reports.

All our listed individuals and companies have demonstrated experience and ability in providing expert witness services through an application process and professional references and have agreed to our code of practice. Many also have specific training in report writing and giving evidence in court.

If you need more in-depth information about any of the experts, you will be able to find their full profile detailing qualifications and experience in our recently newly improved online directory www.lawscot.org.uk/members/expert-witness-directory.

We welcome any suggestions you may have for areas of expertise that you would like to see represented in the directory or indeed recommendations of experts that you have worked with that may benefit from joining it. My contact details are listed below.

Charlotta Cederqvist
Head of Business Development
Law Society of Scotland

If you are an expert witness and would like to find out more about how to be listed in the Law Society of Scotland Expert Witness Directory, please phone **0131 476 8166** or email **CharlottaCederqvist@lawscot.org.uk**

WHO RATES OUR EXPERTS

Reference system underpins entries for all those listed in this index

The directory is comprised of expert witnesses who live and work in Scotland, and expert witnesses who are based in other areas but are willing to travel to Scotland to work. New experts applying to be listed are required to demonstrate experience and ability in providing expert witness services, normally by providing references from two solicitors holding practising certificates who have instructed them within the last three years.

The reference form asks the referee to rate from "very good" to "very poor" several aspects of the expert witness's report: accuracy; understanding and analysis of the expert subject area; presentation; and adherence to timescale. Where the expert has presented evidence in court, referees are asked to rate their understanding of the court's requirements, and the preparation, content and delivery of the expert's evidence.

Referees are asked whether they have received any adverse comment from the judge or others which gives them cause to doubt the expert's expertise and whether the referee would use the expert again or recommend the expert to other solicitors.

Where any of the ratings fall below "good", the references are carefully scrutinised. Other than in very exceptional cases, low ratings lead to the expert's exclusion from the listing of checked experts. It is always the responsibility of the instructing practitioner to ensure any expert witness possesses the knowledge and experience required for each individual case.

Individual expert witnesses and corporate expert firms

All experts listed in a corporate entry must provide satisfactory references for their individual work as expert witnesses. In addition, all firms must supply the name of a main contact person.

Other referees

One reference must be from a solicitor from the same jurisdiction as the expert witness, who has instructed him/her within the last three years. The other reference, also pertaining to instruction as an expert within the last three years, may be given by:

- practising solicitors/lawyers from Scotland, England or Wales
- a lawyer from another jurisdiction
- an advocate in Scotland or barrister in England, Wales, Ireland or Northern Ireland
- a judge, sheriff or holder of other judicial office.

Cases where references have not been required

There are certain cases where our reference requirements have been superfluous because the expert has already passed through a rigorous accreditation process, which has included proven experience and understanding of expert witness work. In these cases, the Law Society of Scotland may accept experts who have worked for or been vetted by other organisations. The Law Society of Scotland will verify the procedures employed by other organisations to ensure that their procedures meet or exceed our requirements and will verify membership/employment where appropriate.

CODE OF PRACTICE IS EXPERT SUPPORT

Law Society of Scotland Code published to assist expert witnesses engaged by solicitors

The Law Society of Scotland has published a Code of Practice to assist expert witnesses engaged by solicitors in effectively meeting their needs, so those solicitors can better serve their clients and the interests of justice.

The Code applies generally, but there may be additional requirements relating to cases in specialised areas of law. Experts must also comply with the code of conduct of any professional body to which they belong.

At the outset, experts should ensure they receive clear instructions, in writing. In addition to basic information such as names, contact details, dates of incidents, etc, these should cover the type of expertise called for, the questions to be addressed, history of the matter and details of any relevant documents. Experts should also be advised if proceedings have been commenced or if they may be required to give evidence.

When medical reports are involved, it must be highlighted whether the consent of the client or patient has been given, and in cases concerning children, that the paramountcy of the child's welfare may override the legal professional privilege attached to the report and that disclosure might be required.

Instructions should only be accepted when the expert is fully qualified to speak on the matter and has the resources to complete the matter within an agreed timeframe.

Experts should provide terms of business for agreement prior to accepting instructions, including rates of payment or the agreed project fee, and travelling expenses, etc.

Solicitors must be notified, and their agreement obtained, if any part of the assignment will be undertaken by anyone other than the individual instructed.

Client confidentiality must be observed.

Guidance is also given as to the content of the report prepared, which should be in plain English with any technical terms explained.

Independence and complaints

Once they have accepted instructions from a solicitor, experts are under a duty to provide an objective and independent opinion relating to the case.

The key to being an expert is maintaining independence. When giving evidence at court, the role is to assist the court. Any and all personal or professional relationships, business dealings and competing interests that might influence the expert's work must be fully advised to the solicitors at the start of each project. Experts should immediately withdraw if a conflict of interest arises.

Site visits or client meetings should first be discussed with the solicitor.

Experts should also provide a procedure for resolving any complaints, and respond quickly and appropriately if any complaint arises.

The Law Society of Scotland reserves the right to exclude any expert who has failed to adhere to the Code of Practice from any future edition of the Directory of Expert Witnesses.

This article provides only an overview of the Code of Practice. For a complete and comprehensive guide, please visit: **www.lawscot.org.uk/members/business-support/expert-witness**

WHEN ALL IS REMOTE

The forced move to meeting via technology poses particular issues for psychologists, but, Gary Macpherson believes, assessments as well as evidential hearings as an expert witness can be conducted satisfactorily

The COVID-19 pandemic and the resulting emergency measures forced changes to the way expert witnesses work for the courts. The response from the Scottish Courts & Tribunals Service ("SCTS") was rapid, and the first Court of Session virtual court convened with an Inner House case on 21 April 2020. The Lord President backed plans for the use of remote juries in High Court cases, and by October 2020 SCTS had developed a digital court infrastructure to allow personal injury, bail and appeal courts to operate largely virtually. SCTS anticipated that in criminal proceedings all custody cases could be conducted with parties participating remotely.

Following the Lord President's comment that Scotland's legal system would not return to the status quo, however, Scottish lawyers voiced their opposition to any entrenchment of remote justice. The Faculty of Advocates opposed the "growing narrative" of remote justice becoming the default position, expressing doubt over virtual hearings for complex matters or in cases with significant issues over credibility and reliability of witnesses.

Assessment via VT

For an expert witness at the time of the pandemic, there was little by way of guidelines on how to conduct remote psychological assessment for court proceedings. Experts who relied on face-to-face assessments for court purposes began to develop new ways of working using remote or virtual assessments. The expert witness advisory committee for the British Psychological Society, on which I sit, reviewed the evidence base for videolink technology (VT) and developed standards and guidelines for conducting psychological assessments of individuals remotely for the courts: British Psychological Society, *Psychological assessment undertaken remotely* (May 2020); *Psychologist expert witnesses undertaking remote psychological assessments for courts in England & Wales, Scotland and Northern Ireland* (July 2020).

Remote assessments were already recognised practice in tele-mental health, with research evidence demonstrating that the assessment of trauma and personality was comparable to face-to-face


Professor Gary Macpherson

assessments; however, experts did not routinely undertake remote assessments for the courts. Practically, assessments relying on simple questions and answers appeared most suitable for VT, a view supported by a reasonable volume of evidence-based examples within clinical psychology. There are many benefits to remote assessments, such as the ease of access for clients, and smartphone or tablet-based evaluations have been shown to be as accurate as an evaluation in person. However, VT could prove problematic for assessments of persons with complex needs or complex mental disorders, where non-verbal behavioural cues and nuances are central for an accurate formulation and diagnosis.

Experts now had to consider potential threats to the validity of assessments, and associated confidence in diagnostic or other conclusions reached via VT, and were obliged to highlight any limitations of VT to the court (G Macpherson, "Expert Evidence", in Corteen and others (eds), *Forensic Psychology, Crime and Policing: Key Issues and Practical Debates* (Bristol University Press, 2021)). Conducting remote assessments also raised questions over confidentiality and safeguarding of clients; however such concerns can be mitigated via discussion with the instructing party and by careful pre-assessment planning that highlights any communication or learning difficulties that may impact on the assessment process.

Evidence via VT

As with remote psychological assessments, VT was the only available medium during the pandemic through which experts could present evidence during court proceedings. The use of VT in hearing oral evidence is not new, and the England & Wales Civil Procedure Rules Practice Direction 35: Experts and Assessors (2010) made provision for oral testimony via VT where instructing agents should "give consideration, where appropriate, to experts giving evidence via a video-link".

Many experts prefer VT testimony to in-court testimony, with over one third of experts in one pre-pandemic survey (*The Times* and Bond Solon Expert Witness Survey, 2017) being of the view that giving evidence via VT was more time efficient, and as effective as being present in court. Remote psychological assessments could be completed in lieu of in-person assessments rather than further delaying court proceedings. (Other experts, though, noted that interactions with counsel and the court were stilted or "sanitised" by VT.)

Practical approach

Face-to-face interviews are generally considered the gold standard when conducting complex psychological assessments for court purposes. However, where face-to-face assessments present practical challenges, or for less complex instructions, VT assessments are not only justifiable but also proven and valid methodology in which the court can have confidence. As an expert, specifying for the instructing agent what may be involved in the assessment and highlighting any limitations on the assessment at an early stage will prove useful. Practitioners will need to continue to use their clinical judgment to apply practical and clinical considerations when completing remote psychological assessments in judicial settings. For hearings, my experience of VT assessments and VT evidence to the court has been positive, and I anticipate that remote assessments and remote court hearings will continue for the foreseeable future and become increasingly recognised as valid and reliable and sanctioned by the courts.

Professor Gary Macpherson is a consultant forensic clinical psychologist at the State Hospital and professor of forensic and legal psychology in the Netherlands

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Meteorology

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Specialisms: weather services, accidents, offence investigation, event reconstruction, road traffic accidents, flooding, insurance

Occupational therapy

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Road traffic/vehicles

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Web: www.aldbar.com
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F:+44(0) 131 225 2934

Classifieds

John Herbert Cuthill
Would anyone holding or having knowledge of a will by John Herbert Cuthill of 24 Eskdale Road, Bearsden, G61 5JX who died on 12th February 2021 please contact Elizabeth Dingwall at DHW legal, 2a Catherine Street, Kirkintilloch, G66 1LJ, telephone 0141 776 7104 or email liz@dhwlegal.co.uk

Classifieds

The Late Keith Stenhouse formally residing at 8 Auchtermuchty Road, Dunshalt, Fife and latterly residing at Rihan Heights, Tower D, apartment 105, Wadi Sbaytah Street, Zayed Sports City, Abu Dhabi, UAE would any agent possessing a Will of the above named who resided as above and died on 23 June 2021 please contact the agent of his sister (and believed Executor)

FT & DC Wallace, Solicitors, Forth House, Forth Street, Leven, Fife, KY8 4PW
07761 753488

The late Esther Swanson
Would anyone holding or having knowledge of a Will by the late Mrs Esther Swanson (DOB: 19.05.1951; DOD: 31.05.2021) latterly of Caroy House (aka 2-3 Caroy), Struan, Isle of Skye, IV56 8FQ (previous address, 29 Cliffburn Gardens, Broughty Ferry, Dundee, DD3 6BB) please contact Joseph Slane of Shepherd and Wedderburn LLP at **joseph.slane@shepwedd.com.**
Any information available as to the location of title deeds relative to the property in Skye would also be greatly appreciated.

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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 (frasia@frasiawright.com) or Cameron (cameron@frasiawright.com)

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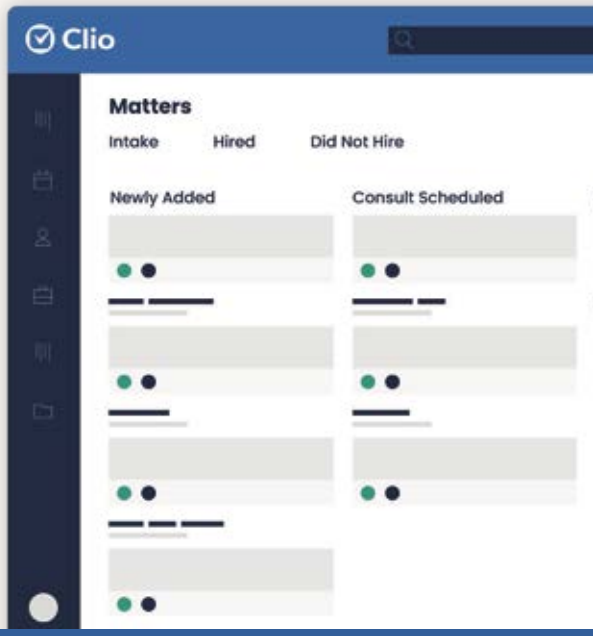

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