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Journal

Journal of the Law Society of Scotland

Volume 67 Number 6 – June 2022

Evolving world

As it takes form, the metaverse is bringing a whole new set of legal challenges

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The big freeze

What price justice? If its spending review is anything to go by, the Scottish Government appears to have concluded that it is basically unaffordable.

I should not have to repeat here that legal aid, and with it the entire criminal defence sector of the profession, is in crisis. One that has been "a generation in the making", as has regularly, and rightly been said, given the stalling of fee rates since the 90s, and with the recent increases already effectively cancelled out by current inflation. What exactly will ministers do if in a few years' time there are simply not enough defence lawyers to enable the expected number of cases to be dealt with?

Yet for all the pressure, all the arguments, and now also direct action affecting domestic abuse cases, the recent spending review has taken the crude approach to just about every line of the justice budget, among other departments. The table of spending totals for the current and the next four financial years shows a straight freeze across the board – one that the Institute for Fiscal Studies quickly identified as an 8% cut in real terms over that period, commenting that "the axe is set to fall" on a wide range of areas.

In ministers' words, this equals "continuing to support" justice agencies. As the Scottish Solicitors' Bar Association, echoing others, has pointed out, a summary criminal legal aid case with deferred sentence today attracts a fee only pennies different from that paid in 1999 – and one that now covers certain work for which a separate fee was previously payable.

There was a time when solicitors tended to assume – maybe some still do – that if they, or their representative bodies, failed to secure an increase in legal aid rates, the fault lay in their failing to make a strong enough case. But it was always a mistake to treat presenting a case to Government as equivalent to arguing your case in court.

With the latter, there is a reasonable expectation that the stronger argument will win. With the former, political considerations always have the potential to trump an argument, however good on paper. Certainly there is no way the Government can claim at this stage to be unaware of the seriousness of the situation that is looming.

What prospect of progress, then, if any? It would seem to follow that only political considerations will tip the balance in the profession's favour. What these could amount to is the question, and many other interests whose budgets have been frozen will be highlighting the effects (some already are), so I fear the hardship of the defence bar will continue for a while yet. But what ministers cannot prevent with their present course is the continuing buildup of pressure in the system, and as I have said before, something has to give.

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

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In practice

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Parental alienation in Scottish child law

Parental alienation is a term entering into common use in relation to disputes over childcare, but requires to be used with caution in the interests of the child, Sarah Lilley writes.

Unified Patent Court – winners and losers?

The Unified Patent Court will finally begin operating in Europe before long. With the UK no longer involved, John MacKenzie explains the impact for the UK, the court, and for rights holders.

Pride and progress

The Law Society of Scotland and Morton Fraser mark Pride month together by taking stock of the progress made on LGBT+ inclusion in the profession, and what it will take to ensure everyone feels like they belong.

Third party harassment: the financial services angle

Diversity and inclusion issues can arise in relation to the behaviour not only of employees but also third parties, and financial services firms face additional controls in this respect, as Anne Sammon explains.

OPINION

Hannah Slater

Private rented sector reforms in Scotland have brought benefits to tenants, but a study of their impact shows that a broader approach is needed to make rights effective for those on lower incomes

Across Scotland, private rented housing is unaffordable, insecure, and unsafe for too many tenants. Major private renting reforms were introduced in Scotland from 2017 through the Private Housing (Tenancies) (Scotland) Act 2016 to enable tenants to better assert their rights, challenge rent rises, and ask for repairs. This included the introduction of the new private residential tenancy.

The Nationwide Foundation believes that much can be learned from the impacts of these reforms. That's why we are pleased to fund the RentBetter project by Indigo House, which is gathering longitudinal evidence to understand how the changes are impacting tenants and landlords. The first wave of the research found that the changes were beneficial for tenants in general.

The wave two findings, published last month, focus on the experiences of tenants on lower incomes and those in housing need. These findings come at a useful time, as the Scottish Government develops its plans for further legislation affecting tenants.

First, while tenants have been given more rights in legislation, the research found that many renters are still unaware of these rights and often don't know whether they have the new private residential tenancy.

Indigo House recommended that landlords or letting agents should provide tenants with information about the key tenant and landlord rights and responsibilities at the start of each tenancy. This could be delivered quite simply, in the form of both an easy-to-read leaflet and a verbal walkthrough for tenants.

Secondly, independent information and early advice are crucial to help renters better understand and exercise their rights, but worryingly, the study found evidence of reducing provision in face-to-face advice services over the last three years. This decline began even before the pandemic. Boosting advice services for tenants must also be borne in mind by the Scottish Government, as new rights cannot be exercised if renters do not know they have them.

Thirdly, the evidence from the research shows that tenancy reform in isolation is not enough to adequately improve security, property conditions and affordability for lower-income renters. The weak market power of tenants on low incomes means that they still fear to ask for repairs or challenge their landlords, worried about reprisals like rent rises – or worse, eviction – when their access to other housing options is severely limited.

The First-tier Tribunal (Property & Housing Chamber) was set up to take pressure off the courts with housing cases. But just 4% of all applications to the tribunal in 2019-20 were for repairs, despite the private rented sector having the worst conditions of all tenure types in Scotland. This suggests that the fear of reprisals has a very real effect on reporting. In part, this could be dealt with through proactive, targeted enforcement by local authorities – particularly at the lower end of the market – which would mean that poor-quality housing could be identified without renters needing to use redress routes. However, this would generate a significant amount of work for already at-capacity local authority housing teams, and provision of extra resource would be vital in ensuring its success.

In addition to better resourcing of enforcement systems and advice services, further reforms must ensure that redress is more accessible to both tenants and landlords, including by simplifying the tribunal system and speeding up case times by providing more resources and capacity.

The research also found signs of reduced private renting stock in Scotland. In certain parts of the market, more landlords are planning to exit the private renting sector; in particular, those letting to students and people on low incomes or benefits were more likely to be thinking of leaving.

Given that the weak market power of financially vulnerable tenants is already a barrier to these households accessing their rights, it is concerning that their position may be further weakened by landlords leaving this segment of the market. This is something the Scottish Government should consider and take action to address.

While the reforms so far have improved the rights of private renters overall, the RentBetter research demonstrates the limits of what can be achieved by legislative reform for low-income renters, when market factors make new rights difficult to realise in practice. Improving the situation of low-income tenants is complex and will require addressing challenges that sit beyond the confines of private renting policy, such as benefits, wider cost of living, and social home building.

Hannah Slater is programme manager of independent charity, Nationwide Foundation
nationwidefoundation.org.uk

VIEWPOINT

Lawyers at panels

I read with interest Stephen Bermingham's article "Hearings for the child" (Journal, May 2022, 26). I found his observations under the heading "Role of the legal representative" of particular interest.

At the onset, I was pleased to note that Mr Bermingham felt that the "vast majority" of legal representatives who attend at hearings are "excellent" and add "real value". A few further points in the same paragraph were pleasing and encouraging. However, a number of comments thereafter caused me to be both perplexed and at some points, concerned.

First, I do not entirely follow what is meant by "combative approaches", and moreover, why such approaches would seem more appropriate in court. In essence, it is a matter for the solicitor to make a professional judgment about the correct and appropriate approach. Mr Bermingham appears to have assumed (I state this respectfully) that solicitors adopt an aggressive, hostile stance in court. This is simply not correct and again is a matter for the solicitor's professional judgment. The solicitor is also at the helm of his or her client. Perhaps in addition, and importantly, it should be acknowledged that we have an adversarial system and the panel is very much part of it.

Regarding his disapproval of cross-examination, the same observations apply. I also respectfully disagree with Mr Bermingham where he states that if a legal representative has concerns or disagreement about a professional opinion, these should be dealt with outside the children's hearing. I do not follow the logic of this argument. If the solicitor fails to state to the panel that they or their client have concerns or disagreement about a professional report, then in my view they would not be able to carry out client instructions effectively. That in itself could have serious repercussions for the solicitor. I accept that solicitors can and do approach professionals outside of the panel, but that should not preclude them from raising any points arising out of professional reports. Otherwise, it would be difficult to imagine how the panel could properly know what is in dispute and what is not. It is also very difficult to approach any professional just before a hearing that is taking place on a virtual basis, for example.

I entirely take on board the need not to increase stress levels. I agree that is important. However, panel hearings can be very stressful for everyone involved, especially where for example a child is to be removed from a family.

Finally, I was very concerned at the insinuation that solicitors may think panel members are less skilled because they are volunteers and not paid professionals. I do not understand why any solicitor would treat a panel member any differently from any other professional such as a sheriff. It really makes no sense. I have never come across this before, as it is accepted that panel members are unpaid volunteers who come from a variety of backgrounds and Mr Bermingham's observations allude to that.

All of these points are intended to be raised in a respectful manner. I would be very happy to prepare a seminar for Children's Hearings Scotland if that might assist in clearing up matters and also identifying the various duties and responsibilities that are incumbent on solicitors (and they are numerous!).

Alan W Robertson,
senior litigation lawyer, MBS Solicitors

BOOK REVIEWS

A Practical Guide to Periodical Payment Orders

in Personal Injury Cases in Scotland

KIRSTY O'DONNELL
PUBLISHER: LAW BRIEF PUBLISHING
ISBN: 978-1914608155; £39.99

This helpful text provides practical guidance for those advising clients (pursuers and defenders) on the settlement of claims involving significant elements of future losses. O'Donnell analyses the advantages and disadvantages of periodical payment orders ("PPOs") in comparison to lump sum awards.

The main uncertainties for future losses are (i) life expectancy and (ii) investment risk. As explained in this book, PPOs, paid annually until death, can reduce these uncertainties.

O'Donnell takes as her starting point the judicial consideration of the benefits of PPOs in *D's Parent and Guardian v Greater Glasgow Health Board* [2011] CSOH 99. It seems that PPOs have not been widely used in Scotland. This may be set to change following legislation in 2019.

Part 2 sets out practical considerations for agents advising clients on PPOs. The author notes that the practice might develop whereby defenders make both lump sum offers and PPO offers.

One remaining uncertainty is the commencement of the 2019 Act. However, the practitioner with a copy of this text will be well placed to advise on PPOs.

David McNaughtan QC, Compass Chambers.
For a fuller review see bit.ly/3xmSC7o

Tunnel 29

HELENA MERRIMAN
HODDER & STOUGHTON: £8.99

"This book follows the successful podcast of the same name in the *Intrigue* series on BBC Radio 4."

This month's leisure selection is at bit.ly/3xmSC7o
The book review editor is David J Dickson

BLOG OF THE MONTH

scottishsentencingcouncil.org.uk

This short but interesting post by Sheriff Jillian Martin-Brown describes her work in the problem-solving court in Forfar, dealing with summary cases where addiction or other issues can make completion of community sentences challenging.

The sheriff states her aim as combining provision of multi-disciplinary treatment in the community with regular court reviews so that she can monitor offenders' progress. A trauma-informed approach may be appropriate; positive outcomes have been assisted by the reviews the court carries out. She hopes it can continue.

To find this blog, go to bit.ly/3zoLGt8

Big numbers in the noughties

We are familiar with Scots lawyers with a sideline in writing crime fiction.
A solicitor recounting his youthful clubbing days, however, is more of a novelty.

Retired Teenagers: the story of a Glasgow club night tells how Dentons IT/IP lawyer John D McGonagle organised parties at venues like The Arches while completing his diploma and traineeship. His "Pin Up Nights" promoted internationally acclaimed live acts like The National, Florence and the Machine, and MGMT, as well as upcoming Scottish bands like Chvrches, Glasvegas and The Fratellis.

Writing the book was sparked by a conversation between JD and a fellow former trainee, just before lockdown. His ex-colleague expressed her disappointment that JD was still a solicitor (he isn't sure whether that concerned his not finding an alternative career, or the Society continuing to renew his practising certificate). Either way, JD felt it was time to document his "role in launching some of the best new Scottish bands", the highs and lows of DIY nightclub promotion, and life before he learned to love the law.

Claimed as essential reading for fans of indie rock, synth pop and Glasgow nightlife of the noughties, *Retired Teenagers* is available now on Amazon (paperback and e-book).

PROFILE

Rob Marrs

Rob Marrs is head of Education at the Society, secretary to the Education & Training Committee and a member of the LawscotTech advisory board

1 Tell us about your career so far?
Entirely unplanned! Worked in New Zealand, then in recruitment (dismal), then for an NGO for three years (worthy), and then various roles at the Society.

2 What motivated you to join the Society?
I was working for an NGO. I saw a role at the Society, thought it looked interesting, and went for it. It was initially short-term, but I swung a full-time role halfway through and have stayed ever since.

3 What aspects of the LawscotTech advisory board have you found most interesting?
Learning from subject matter experts, be they working in legal, academia, or in tech. I'm very much a muggle on the board and hope that helps sometimes.

4 What impact have technological developments had on the Society?
Like everyone else dealing with remote work and collaboration over the last two years, the impact has been huge. The biggest impact will be how tech affects our members and how we respond.

5 What are the biggest challenges for tech development in the legal sector?
That people jump to tech as the solution to all our ills and overestimate what it can do. The mantras "People, process, tech" and "focus on the problem" may be a little worn, but contain a lot of truth. Why revolutionise a process that doesn't need to exist? If law firms really wanted to make huge leaps, getting everyone really good at the systems they already use (Word, Excel, PowerPoint, PDFs etc) would be a great starting point. Efficiency savings would be vast. Then really home in on process improvement, and design services around clients. And then think about tech.

6 What keeps you busy outside work?
Family. Biting my nails over Liverpool FC, England cricket, or England rugby (delete as appropriate).

WORLD WIDE WEIRD

1 Live issue

Two days after Kenyan presidential candidate Raila Odinga described secondhand clothes as "worn by dead people" – attempting to boost textile production – the hashtag #DeadPeopleClothingChallenge was trending.
bbc.in/3H4eZ62 (8 June)

2 Thought it looked nice

A long-lost painting by 15th-century Italian master Filippino Lippi has sold for £255,000 at auction after it was found hanging above a pensioner's bed in her bungalow in Enfield, North London.
bit.ly/3zm9YUN

3 Lawman with bite

A child actor who played the role of a prankster with a fake shark fin in *Jaws* has become a police chief on the island where the 1975 hit movie was filmed.
bit.ly/3xvK7Z1

TECH OF THE MONTH

ScotRail

Free: Apple Store and Google Play

With all the travel disruption that's going on at the moment, the ScotRail app is a must for your phone. It'll give you live updates and which trains are running, and which ones aren't, which is good to know if you're working late or on a night out.

PRESIDENT

Murray Etherington

Taking up the presidency with a mix of pride and trepidation, I am looking forward to meeting as many members as possible in person, and to working as part of a top team at the Society

I begin my presidential year with a tremendous amount of pride and a fair bit of trepidation. I am proud to be a Scottish solicitor, proud of the profession that I represent and proud of the incredible work that our colleagues at the Society undertake on behalf of all of us as the members. While it is an incredible honour to be the President, there is an understandable nervousness! That has only increased by following two fantastic presidents in Amanda Miller and Ken Dalling.

I've said to some people recently that my main aim as President is not to break anything. Well, that's not quite true. I want to make a difference, I want to challenge what we do and how we do it, and I want to listen to the challenges that you have for the Society too, and that may result in a few breakages. With our new CEO, Diane McGiffen, our new strategy and entering the "new normal" post-COVID world, it feels like a perfect time to challenge the status quo. Now is the time to be bold, to be courageous and to ask why, or indeed, why not?

I have been left a strong, solid foundation with which to work, and I want to be able to build further on that to make improvements and leave the Society in a better position. So I will try not to break anything but, if I do, it's only so I can use the pieces to make something better.

Back to normal?

As we return to normal I hope to visit as many faculties as possible in person over the next 12 months. I am keen to hear from as many of you as possible. While I'm aware that online meetings are more convenient for people, I think we are probably all a bit tired of Zoom/Teams/Webex (delete as appropriate). Therefore I want to extend a personal invitation to each of you to attend a presidential visit in your local faculty area. I want to listen to your concerns, to hear your issues and also your solutions. I am keen to hear not only about the big ticket items such as legal aid and the SLCC, but also more mundane day-to-day matters. At heart I'm a fairly practical person and if I can help to make some change that aids members' day-to-day experience either with the Society or a third party, then I am keen to listen to these issues and find a solution.

I'm also delighted that we will have a place in new five-year strategy at the beginning of my presidency. The Society has consulted widely on the new strategy and I think it provides a bold plan for our future. The strategy is due to be ratified by Council at our June meeting and it will allow us to continue the good work championed by Amanda on equality and diversity, to fight for further financial support for legal aid as advocated for by Ken, while also providing my own emphasis on member wellbeing and challenging our environmental impact.

Top team

I'm also looking forward to working more closely with my Vice President Sheila Webster. Both Sheila and Ken will be a vital part of my presidential year and I hope that both will be very visible to the profession this year. The Society is a big institution, and while I'm delighted to represent it as a figurehead, I know that there are areas in which I am not the best person to be leading the discussions. To that end, I will make sure we use our best people with the right skillsets, perspectives and experiences to make sure we get the best possible outcome. That is why Ken, Ian Moir (criminal legal aid) and Pat Thom (civil legal aid) will continue, alongside me, to lead negotiations on legal aid support with the Government. I feel progress may not be far away so we don't want to change horses mid-stream.

Finally, a huge thank you to Ken, who was a fantastic mentor to me during his presidential year which certainly helped to make my vice-presidential year so enjoyable. He's left me very large shoes to fill on both the national and international stage. This was highlighted this weekend as I attended the Law Society of Ireland's annual dinner alongside Ken and Sheila. It was wonderful to see how warmly Ken was received and he is clearly held in great esteem by presidents, directors general and CEOs of those jurisdictions.

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

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People on the move

Aberdein Considine has merged with Russel+Aitken Edinburgh

ABERDEIN CONSIDINE, Aberdeen and elsewhere, has merged with RUSSEL+AITKEN EDINBURGH LLP. All of Russel+Aitken Edinburgh's staff have transferred to Aberdein Considine and will be based in the firm's Edinburgh offices in Multrees Walk, Elm Row and Lothian Road. Its two equity partners, **Dianne Paterson** and **Alan Jones**, have joined Aberdein Considine as consultants. RUSSEL + AITKEN (FALKIRK + ALLOA) LTD continues as a separate practice.

Jennifer Adams, an accredited professional pension trustee and former consultant at BURNESS PAULL, has become an associate director at INDEPENDENT TRUSTEE SERVICES.

BTO SOLICITORS LLP, Glasgow and Edinburgh, has appointed solicitor advocate **Michael Collins** as a senior associate in its Property & Professional Liability team. He joins from PINSENT MASONS.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has appointed **Barry McHugh** as a partner in its dedicated English Commercial Real Estate team, and **Jamie Gray** (right) as a partner in its Financial Services Regulatory team. Both join from ADDLESHAW GODDARD.

CLYDE & CO, Edinburgh, Glasgow, Aberdeen and globally, has promoted **Kirsty Cassidy**, **Colette Finnieston**, **Natalie Gibb**, **David Hutchison** and **Gary Nicholls** in its Insurance practice, and **Ameeta Panesar** in Real Estate, to legal director in Scotland, as part of its 2022 promotions round.

DAC BEACHCROFT, Glasgow, Edinburgh and internationally, has promoted **Annis MacKay** and **Karen Railton** to partner, and **David Magee** to legal director, all in its Glasgow office, from 1 May 2022, as part of a round of promotions across the firm.

DAVIDSON CHALMERS STEWART, Edinburgh, Glasgow and Galashiels, has promoted renewable energy specialist **Steven McAllister** to partner and head of its Renewable Energy team. Renewable energy lawyer **Alex Irwin**, and environmental law specialist **Chala McKenna**, have been promoted to associate.

DRUMMOND MILLER, Edinburgh, Glasgow, Bathgate, Dalkeith and Musselburgh, has merged with PEACOCK JOHNSTON, Glasgow. The 11-strong Peacock Johnston team have joined the Glasgow office of Drummond Miller. Peacock Johnston partners **Andrew Pollock** and **Susith Dematagoda** become partners at Drummond Miller; **Ken Waddell** and **Laura Ceresa** become consultants.

DWF, Glasgow, Edinburgh and globally, has appointed **Katherine Doran**, who joins from HFW, and **Emma Peveril**, who joins from DLA PIPER, as directors in its Construction & Infrastructure and Real Estate teams respectively. **Ursula Currie** has joined the firm as a senior associate in the Dispute Resolution team, and in the Insurance team **Eileen Sherry**, **Kirsteen Picken**, **Kris Kane** and **Lucy McMeekin**, have also joined as senior associates. **Ashleigh Farrell** and **Ferga McKay** have both been promoted to directors in Real Estate in Glasgow; **Calum Raine** to senior associate in Real Estate; and **Sarah Cunningham** to associate in Dispute Resolution.

GILLESPIE MACANDREW, Edinburgh, Glasgow and Perth, has appointed **Sandy Telfer**, an accredited specialist in planning law, as a partner. He joins from DLA PIPER.

HARPER MACLEOD, Glasgow, Edinburgh, Inverness, Elgin and Lerwick, has promoted five partners, along with 20 lawyers across the firm, effective from 1 April 2022. The new partners are **Leigh Beirne**, who leads the Private Client practice in Shetland, **Tom Gray** (Rural team, Glasgow), **Jenni Gear** (Family Law, Lerwick), **Ricardo Matteo** (Banking, Glasgow), and **Laura McLean** (Family Law, Elgin and Inverness).
Eight promoted to senior associate are **Lynsey Brown** (Family), **Sascha Cochran** (Risk & Compliance), **Cinzia Duncan** (Private Client), **Ann Gallagher** (Rural), **Calum Gee** and **Alastair Johnston** (Dispute Resolution), **Lewis Hendry** (Energy), and **Rory Paterson** (Commercial Property).
Promoted to associate are **Angus Brown**, **Adam de Ste Croix** and **Jennifer Grosvenor** (Dispute Resolution), **Jocelyn Gilda** and **Matthew Smith** (Private Client), and **Lyndsay McMahon** (Debt & Asset Recovery).
Promoted to senior solicitor are **Natalie Bruce** (Family), **Eilidh Crawford** (Debt & Asset Recovery), **Hannah Grace** (Corporate), **Leanne Maitland** (Private Client), **Clare McGeough** (Dispute Resolution) and **Rebecca Scott** (Banking).

HOLMES MACKILLOP, Glasgow, Giffnock, Johnstone and Milngavie, has appointed private client solicitor **Ross Brown** as a director. He joins from BTO SOLICITORS where he was a partner.

LINDSAYS LLP, Edinburgh, Dundee and Glasgow, announces the appointment of **Helen Kidd**, an accredited specialist in charities law, as partner in the Charities & Third Sector team, based in the head office in Edinburgh, with effect

Drummond Miller and Peacock Johnston have merged

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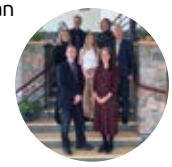
journalsales@connectcommunications.co.uk

from 30 May 2022. She was previously a senior associate with BRODIES.

McDOUGALL McQUEEN, Edinburgh, Dalkeith, Gorebridge, Pencuik and Tranent, has opened a new Midlothian property hub at 25-27 High Street, Dalkeith EH22 1LD (t: 0131 240 3818).

McKEE CAMPBELL MORRISON, Glasgow has welcomed **Michael Flett** to the firm's Corporate team as an associate director. He joins from ADDLESHAW GODDARD.

MACPHEE & PARTNERS, Fort William, Oban and Tiree, is pleased to announce the promotion of **Billie Smith** to partner. She specialises in family law and private client.



MACPHEE & PARTNERS, Fort William, Oban and Tiree, has merged with MACARTHUR STEWART, Fort William with effect from 1 June 2022. Staff of MacArthur Stewart will transfer to MacPhee & Partners. MacArthur Stewart partner **David Dewar** retired with effect from 31 May 2022; his partner **Craig Murray** becomes a partner in the merged firm.

MACROBERTS, Glasgow and Edinburgh, has promoted **Nicole Cook** (right) and **Mark Quinn** to partner in its Real Estate practice.

PETERKINS, Aberdeen, Inverurie, Huntly and Keith, intimate the retiral of **Hartley Wilson Lumsden** from the partnership with effect from 30 April 2022.

RAEBURN CHRISTIE CLARK & WALLACE, Aberdeen, Ellon, Banchory, Inverurie and Stonehaven, has promoted three members of its Residential Property team to partner: **Anne Littlejohn** and **Gavin Cooper**, based at 399 Union Street, Aberdeen, and **Scott Rennie**, based in the Stonehaven branch.

RUSSEL + AITKEN (FALKIRK + ALLOA) LTD, Falkirk and Alloa, are pleased to announce the promotion of senior solicitors **Philip Bonnar** (Civil Court) and **Marc Convery** (Residential Conveyancing) to directors.

SHOOSMITHS, Edinburgh, Glasgow and UK-wide, has appointed three further partners across its Scottish Real Estate teams: **Ian McCann**, previously with CMS, has joined the Edinburgh office as a Construction partner; in Glasgow, **Lyndsey O'Connor** has joined as a Real Estate partner from Dentons and **Lauren Miller** has been promoted to Real Estate partner with effect from 1 May 2022.

THOMPSONS SOLICITORS SCOTLAND, Edinburgh, Glasgow, Dundee, Galashiels and Peebles, has opened a new office at 43 Buccleuch Street, Dumfries DG1 2AU (t: 0141 280 7447), led by partner **Hannah Bennett**.

THORNTONS, Dundee and elsewhere, has promoted three new partners: **Nicola McCafferty** in Dundee and **Aimee Gibbons** in Glasgow, both in the Commercial Real Estate team, and **Hannah Fraser** in Edinburgh, in Residential Property.

WARNERS LLP, Edinburgh, announce that they are sad to say goodbye to **Scott Craig**, who is retiring after 33 years at the firm, and **Scott Brown**, who is leaving after 27 years, but delighted to announce the appointment of their new partner from 9 May 2022, **Sean McMillan**, who joins from ABERDEIN CONSIDINE.

Warren Wander: accredited technologist

LawWare's Managing Director on his business and what the recognition means

How would you describe your current role at LawWare?
As founder of LawWare Ltd, I am proud to have grown the business from a seedling back in 1998 to the fine organisation it is today. Nowadays, my role is to prune the leaves, and make sure there's plenty of sunshine and nourishment.

That means setting the direction, recruiting the best talent, managing the team, keeping in touch with clients, and generally rolling up my sleeves and helping out. I love being very hands on. I see our team as one big family, and our clients are an extension of that. If they're happy, then I am too.

It has been my pleasure to have grown LawWare to support almost 500 UK law firms, and I'm honoured that we're the custodian of their technical lifeblood. We value this and I never take it for granted.

Where do you hope to take the company in the next few years?
LawWare is a strong brand, and a financially secure, debt free business that is committed to re-investing in its future. We're innovating and creating great solutions that we're delivering to the profession through our recently launched V5 product.

I am an avid technologist and passionate about how tech can help find ways for law firms to enhance productivity, profitability, and enrich people's lives.

Over the next few years, we will continue to take advantage of the newest breakthroughs, reaffirming our position as leaders in legal and one of the foremost suppliers of software to law firms in Scotland, and the rest of the UK.

What motivated you to seek accreditation?
To me, accreditation means being a part of a specialist community in Scotland, working together to influence how law firms can maximise the potential of technological change, now and into the future. I feel I can help and have a lot to give, and the award supports that ambition.

What does it mean to you?
LawWare software was born out of the "High Street Starter Kit Project" back in 1995, a collaboration between the three major regional UK Law Societies to encourage the development of modern software that met the high standards they defined. Having served the profession for so many years, it's humbling to have now earned the right to become personally accredited with this prestigious recognition.

The metaverse – a new world for rights

As a concept the metaverse may be still evolving, but it is set to present a whole new world of challenges for lawyers. Richard Danks explores where it is going, with particular reference to IP rights

The word "metaverse" was shortlisted by *Collins Dictionary* for its Word of the Year in 2021. If you are not yet familiar with the word, its shortlisting is surely a sign that you soon will be. If you are familiar with the word, but are not quite sure what it means, you are not alone. The word has existed for a couple of decades, but entered the public lexicon last year when the CEO of Facebook (now aptly known as Meta) predicted the metaverse as the next frontier in technological advancement. In the months since then, there has been widespread discussion of the concept.

In reality, the metaverse is currently not much more than an idea, albeit one which is quickly evolving. For this reason, the concept of the metaverse does not lend itself well to a lawyer's inclination to define with precision exactly what is meant by it. However, broadly speaking, the metaverse is describing the shift of various parts of a person's life from the physical reality to an immersive virtual reality. It is envisioned as a digital space where we can interact with virtual objects and people in real time. It is the internet, but with an enhanced immersive dimension.

There is not yet a single unitary metaverse experience. The gaming industry has been at the forefront of developing metaverse-like environments, with games like Fortnite and Roblox placing users in extensive virtual worlds where they can interact with other users. Rapid advances are underway in other industries, with the potential to change drastically the way we shop, socialise, work, consume content and live our lives.

As with other recent technological advancements, the increasing prevalence of the metaverse will raise legal issues across a wide range of specialisms. At the forefront of these issues is likely to be intellectual property. What follows is a brief overview of the opportunities and risks for businesses and consumers in the metaverse relating to intellectual property. It is by no means exhaustive, not least because the development of the metaverse in the coming years is likely to present countless challenges not yet contemplated.

Brands in the virtual world

Virtual realities present opportunities for businesses to extend their reach into new industries and consumer bases. Brands, particularly in the fashion, sports and entertainment industries, are increasingly seeking to establish a presence in the metaverse by taking advantage of new virtual advertising opportunities and by collaborating with platforms to offer digital branded items or services to consumers. Though outside the scope of this article, it is worth highlighting the growth of the NFT (non-fungible token) market over the past two years, which demonstrates an insatiable appetite from consumers for digital branded assets.

Content: ever more channels?

The consumption of online content has become a staple part of our lives, whether by streaming music and television shows, scrolling social media feeds or subscribing to our favourite YouTube channel. Life in the metaverse is likely to amplify opportunities for creators to exploit their content by presenting new channels for consumption by consumers, but it also raises questions for licensees around the scope of rights they may have been granted in content licences which predate considerations around the metaverse. Given the uncertainty about how the metaverse may develop in the future, we may in the coming years observe a tension between proprietors seeking narrow licensing provisions to ensure they can exploit each new emerging use case, and licensees seeking sufficiently broad licences to adapt to emerging use cases.

It is common, for example, for licences to be granted on a territorial basis, so prior to any metaverse-related exploitation of content, territorial definitions included in licences will need to be considered to ensure use in the metaverse is permitted. It is entirely possible that practice will develop whereby metaverse use is carved out to be licensed separately, in a similar manner to the emergence of new monetisation opportunities in the past, such as entertainment licensing for air travel.

Another example is where a licensee has been granted exclusivity in relation to a particular use case for the licensed content. We may see licensors

increasingly seek to argue that metaverse use falls outside the scope of the exclusivity, since it was not envisioned at the time the licence was granted.

Businesses will need to consider carefully whether they have appropriate rights to exploit content in the way they intend to in the metaverse. The introduction of new methods to exploit content has in the past led to disputes between the parties and it is likely that use in the metaverse will be no different, while also bringing novel legal questions and challenges as yet unforeseen in the content licensing arena.

Your metaverse persona

The creation of a virtual world necessitates creation of virtual people to inhabit it. Individuals using virtual reality technology tend currently to be represented by cartoonish avatars which bear little resemblance to the people they are embodying. However, this is expected to change as "deepfake" technology becomes more advanced and more widely available. Deepfakes enable sophisticated re-enactment of an individual's face, face swapping between two individuals and even re-creation of an individual's voice.

While this presents opportunities to make the metaverse experience even more immersive, as we come into contact with virtual avatars of our friends, family and colleagues, it is not difficult to imagine the prospect of deepfakes being deployed for more nefarious purposes, such as taking on a person's virtual identity to give the impression that the person made comments or took action (such as criminal activity) which they in fact had nothing to do with. This has clear implications for the reputations of individuals, and particularly those in the public eye, but also more broadly.

It will be important that the law offers sufficient routes to tackle the improper use of deepfakes. In the US, the "right of publicity" will likely offer recourse for individuals in certain circumstances to prevent unauthorised use of a person's name, likeness and voice, but no equivalent right exists under Scottish or English law. Instead, tackling improper use of deepfakes will likely involve action under a patchwork of laws, depending on the circumstances in question, some of which go beyond the scope of this article.

For example, where a deepfake is produced using existing footage of an individual, the owner of the copyright in the footage may be able to bring an action for copyright infringement, although the owner may not always be the individual featured, which complicates matters. In some circumstances, defamation may be an appropriate route for recourse and where a deepfake is used in relation to endorsement of a product, an action for passing off may be available.

Fraudulent use of deepfake technology is an issue largely untested as yet by the courts, but if, as is predicted, its use grows in tandem with the metaverse, it seems almost inevitable that disputes will follow.

Tip of the iceberg

While the metaverse in its final form may not yet be in existence, or even understood, what is clear at this stage is that a new metaverse-shaped landscape is on the horizon and shows no sign of slowing. If the issues set out in this article represent the tip of the iceberg in terms of intellectual property considerations for businesses and consumers entering the metaverse, it is to be expected that new and as yet unforeseen challenges will surface from the currently submerged depths of that iceberg, as the metaverse becomes more and more fully realised in the years to come.

Richard Danks, legal counsel in the Outsourcing, Technology & Intellectual Property legal team at Natwest Group

Advance choices: time to fill a gap

Adrian Ward introduces an important report on advance directives, and on medical decision-making in intensive care situations, published by a cross-committee working group of the Society

Hiding in plain sight are two major areas of deficiency in Scots law. The pandemic didn't create them, but it has brought them into sharper focus. One might hesitate to acknowledge that the law of England & Wales ("England") reaches, at least to a limited extent, places that Scots law doesn't reach at all, but we can no longer avoid the comparison when UK-wide information and advice has been based on English law, and has neither addressed the difference, nor even acknowledged that Scots law is significantly different.

People have been advised to make advance directives. English law has some statutory provision for them; Scots law none, except in the very limited case of advance statements under mental health legislation. Medical professionals in Scotland lack significant legal protections available in England & Wales.

The Law Society of Scotland, and specifically its Public Policy Committee, identified the need for these deficiencies to be addressed. It established a cross-committee working group with a remit to consider and address current deficiencies in Scots law in relation to (a) advance choices (in the original remit "advance directives"), and (b) medical decision-making in intensive care situations. Without proposing draft legislation, the report nevertheless offers clear proposals for the content of appropriate legislative provision, and related matters. You can read the report at the Society's policy work web pages.

Advance choices

Existing Scots law is unclear about how to ensure maximum effectiveness of decisions that people might wish to make in advance of incapacity. Such decisions can cover a wide range of matters, such as what to do with the house and contents, where they would (and would not) wish to be placed in a care home, what to do with a pet they can no longer look after, and so on – as well as medical matters, but going far beyond medical matters.

The significant characteristic of "advance choices", as the report calls them, is that people make their own decision in advance. They do not entrust decisions to someone else such as an attorney (and they may want to cover the situation where there is no one whom they would wish to appoint as attorney; or to grant a power of attorney and an advance choice in substantially identical terms, to cover the eventuality where a chosen attorney is no longer able to act). They are thus at the top of any hierarchy of compliance with the human rights principles of autonomy and self-determination, above decisions entrusted to others, for example under powers of attorney, and further above all non-voluntary measures, such as guardianship.

Council of Europe Recommendation (2009)11, "on principles concerning continuing powers of attorney and advance directives for incapacity", principle 2.3, defines advance choices as covering either "instructions given" or "wishes made", or both. Provision in Scots law for both types is necessary to comply with modern human rights requirements.

Sometimes circumstances can change between when an advance choice is issued, and the later date when it becomes operational. The report offers precise criteria for addressing such situations. Crucially, the advance choice might be disapplied in particular circumstances, but not treated as revoked as it would then no longer be available. The report lists the other questions which the working group formulated, drawn largely but not entirely from the provisions of that recommendation, and work following upon that recommendation, and provides the answers offered to those questions.

Medical decision-making

Many medical practitioners in Scotland do not understand that they do not have the legal protections available to colleagues in England & Wales (Mental Capacity Act 2005, s 5) if they act properly in the circumstances, but "get it wrong". They are unaware that they and others acting under the medical provisions of part 5 of the Adults with Incapacity (Scotland) Act 2000 are excluded from the exemptions from liability for all others acting under that Act: s 82.

The report offers for the first time a legal framework. It draws on the principle of *negotiorum gestio*, traditionally seen as regulating a situation in which the gestor steps in to act on behalf of an adult who is capable but absent and cannot be contacted for instructions. It applies that principle to situations where the adult is not physically absent, but in consequence of medical emergency is "absent" in the sense of being unable to hear, consider and respond to explanations and offers of treatment.

The working group

The working group comprised members drawn from various committees of the Society and an external expert, and included legal and medical practitioners, academic lawyers, and an English barrister. The report has already attracted international attention, with preliminary suggestions for a Europe-wide project to prepare European model laws on advance directives (advance choices), which would help promote the concept more widely, and provide uniformity that would be helpful in cross-border situations.

Adrian D Ward MBE, LLB, co-convener of the working group; as consultant to Council of Europe, author of *Enabling citizens to plan for incapacity* (2018)

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Wills and their ways

Peter Nicholson draws together some key issues from the wideranging presentations at the Wills, Trusts and Executries Conference, held over two mornings in May

Wills, trusts and executries is probably not the first area you would think of as subject to rapid legal change. But the effects of social change, IT (bringing new forms of assets), and tax and regulatory changes at home and abroad mean that practitioners still face an evolving landscape, as was well illustrated by the Society's recent CPD seminar dedicated to the subject. This feature attempts to present a selection of the many points of interest that were brought out.

Legal rights: a bone of contention

Sometimes, of course, it is the hallowed rules that prove contentious. Lindsays' Sandy Lamb took us through some of the issues arising from legal rights, such as identifying the relevant assets and calculating their value (think cryptocurrencies, or incorporeal moveable rights such as a debt owed, or rights in a trust). Then there is the heritable-moveable border: a farmer's interest in a farming partnership which owns the farm land is moveable even if most of the value lies in the land; a secured loan owed to the deceased goes in the inventory as moveable but counts as heritable for legal rights purposes.

Which costs can be deducted in calculating the pot; where the IHT burden falls; changing valuations as assets are disposed of – all have to be considered. Even the question whether a solicitor acting in the executry is under a duty to advise a family member of their legal rights has caused difficulty, resulting in guidance from the Society covering the different circumstances that may arise.

Audience discussion also revealed tricky problems regarding the status of the proceeds from a house sold prior to death; and what to do when a family member cannot be contacted in relation to claiming or discharging their legal rights.

Assets in the metaverse

The increasing prevalence of digital assets, and practical issues that arise from these, was the subject of a stimulating breakout presentation from Louise Levene of Finders International (who along with software providers Advanced were the conference sponsors). Difficulties can arise even as to knowing when such assets exist, as some people can be very secretive and there may be nothing on paper – Levene recommended doing a "legacy stocktake" with a client to compile a list of what they hold, and where possible getting them to put access details in a sealed letter of wishes. (Warning: using a password that has been passed on may be a breach of terms and conditions of use.)

She would not advise starting a search for assets without some leads to follow, because of the costs. And even where a foreign bank account is known about, if the sums involved are small the formalities involved – for example, European countries often require notaries – may make it not worth the effort. With US assets, be prepared for a long drawn-out process, especially if above the $60,000 threshold for a certificate being required from the Internal Revenue Service.

Assets may be of sentimental rather than money value – social media accounts and music archives being the prime examples. It can be a source of great distress to families if these cannot be obtained, yet with, say, music the account holder likely only held a licence to use the music, and their account will be deleted on their death. Some platforms are now appointing legacy contact people who can allow limited access to enable a representative to retrieve documents and photos, but Levene warned that there is a long way to go here.

"How would compliance with the conditions be monitored, and what would happen to the legacy in the event of a breach?"

Good intentions not enough

Alan Eccles of Bannatyne Kirkwood France & Co gave a survey of issues around charitable legacies.

One such concerns charities that reconstitute themselves, particularly by incorporation. Although provision will be made for all assets to transfer to the new entity, a bequest in a will that has not yet taken effect is a mere *spes* and not an asset, and without some provision conferring power on the executors to pass the legacy to another charity with similar purposes, may prove ineffective. Perhaps this will be addressed following the current review of charity law: the English Register of Mergers can avoid such difficulties.

Sometimes, also, conditions attached to a legacy can cause problems. A charity may decline a bequest that comes with strings attached that it considers problematic, or indeed if a particular asset would be awkward for it to manage. Eccles would encourage a client with such intentions to speak to the charity in advance and find out whether what they propose would be acceptable and workable. Further, how would compliance with the conditions be monitored, and what would happen to the legacy in the event of a breach?

He advised caution with the wording of the purpose of bequests. Anything beyond

"charitable" might lead to HMRC asking questions about whether a bequest is truly a charitable one – bearing in mind that the somewhat different English view of what is charitable is applied for this purpose. Other tax matters to consider include whether lifetime or death giving would be more tax efficient; and the potential for a deed of variation to mitigate tax – as he had employed when faced with a legacy to NASA!

The many uses of trusts

A panel session, featuring Gillian Campbell of Shepherd and Wedderburn, Ian Macdonald of Wright, Johnston & Mackenzie, and Carole Tomlinson of Anderson Strathern, focused on the use of trusts in succession planning.

To begin at the end, the wrap-up question was to the effect, is it worth it given the regulatory and compliance requirements? All three were agreed that while clients need to understand the implications, there can be huge advantages. Macdonald in fact recommended that advisers try to persuade clients to include a trust in their will if it could be useful to the family – it is much easier to cancel a trust if you don't need it than to introduce one retrospectively by deed of variation, he observed.

Most of the session looked at three particular types of trusts: liferent trusts, life insurance trusts and trusts for family businesses. In addition to tax planning, liferent trusts can be used to limit the scope for legal rights claims, or allow for changes in family relationships – and to reduce or even eliminate the value of a house for the purpose of local authority care costs calculations. Life insurance trusts don't necessarily reduce IHT liability, except through the premiums paid out, but can provide a lump sum to a beneficiary on a death to help pay the IHT. In the family business context, trusts are one option to consider for allowing some continuing control for the senior generation while helping develop the next into that role; have potential tax advantages; and could be a suitable long term structure for the family.

Advantage England

When is it advantageous to use English in preference to Scots trust law? The question was addressed by Barbara Gardener of St James's Place.

The answer is that some aspects of English law lend themselves better to tax planning, especially IHT, as they enable the gift with reservation provisions to be overcome via the principle in *Ingram v IRC* [1998] UKHL 47. That case ruled that retaining one clearly defined interest in a property while giving away another such interest in the same property is not a gift with reservation. Whereas Scots law insists that trust property must vest in the trustees, with beneficiaries only having a personal right against the trustees, the English recognition of legal and equitable rights enables the settlor to "carve out" the latter and hold them in, say, a discounted gift trust: a section of the life insurance market caters for such arrangements.

Choice of law is open to the settlor under the Recognition of Trusts Act 1987, implementing the 1985 Hague Convention. There are certain statutory differences between Scotland and England to be aware of also, such as around the rules governing perpetuities.

See you out of court

Whatever the nature of a dispute, litigation should be the last resort. That was the clear message from Brodies' Nicola Neal, who spoke on court actions involving executors. Litigation may be needed to preserve the value of the estate, but it must be necessary, reasonable and in the interests of the estate, given the costs involved – probably with only 50-70% recovery even in the event of success. And there is potential personal liability in expenses for executors who the court considers have acted unreasonably.

Neal's recommendation to allow a "really important role" for alternative dispute resolution – if nothing else, it shows a court that the executor has made efforts to settle the dispute – was followed by a breakout session on the use of mediation in executry disputes, presented by Rachael Bicknell, founder of Squaring Circles, who wrote on the subject at Journal, December 2021, 20.

When people complain

Complaints, and in particular their avoidance, was the focus for the SLCC's Susan Williams in another breakout session. Last year executry related complaints overtook family law as the second most frequently complained of practice area, at 19% of the total (behind conveyancing at 26%). The top cause of complaints – probably nothing new here – was failures in (or lack of) communication. Clients feeling they were not enabled to make an informed choice from the advice given also featured regularly.

Frequently also, solicitors have been found to be "off the mark" in assuming what clients want. Before you take instructions, Williams recommended, ask the client what their expectations are for their family, and what they actually want. She strongly advised devising a "tool" that everyone in the office can use to keep them right. Oh, and keep excellent file notes.

There is no getting away from file notes, speakers agreed, especially if they may need to be relied on after the death of a client.

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The importance of will registration and Certainty Will Search

Scottish private client firms and will writers have been urged to join The National Will Register to protect Scots undertaking estate planning and administration, as well as protecting themselves when it comes to writing wills and administering probate

Since launching in 2006, The National Will Register has become an invaluable service to over 5,500 private client solicitors across the United Kingdom with over 9.4 million will records in the system.

The National Will Register exists to ensure no will is left unknown or untraced at the time it is needed and is chosen, endorsed and used by the public, legal profession, law firms, PI insurers, Government agencies, charities, the public and other associated sectors and organisations.

Protecting your clients, protecting your firm

Will registration ensures a will can be located quickly and confidentially at the time it is needed. Its sole purpose is to ensure a will is found, and it requires only the basic details of the testator, the date the will was made, and the law firm who drafted and stored the original will.

For clients, it ensures their last wishes can be located and fulfilled, including any funeral wishes, and the rightful beneficiaries are able to inherit from the estate accordingly. For firms, the ability to locate the correct will or have certainty beyond reasonable doubt that there is no will provides you with the assurance to continue with probate without concerns regarding will disputes, especially at a time where will disputes are exponentially on the rise.

Through will registration and its Certainty Will Search services, one in five located wills were either wills not thought to exist or later wills to the one held by the executor originally. That is up to 20% of your probate business potentially liable for a will dispute.

A Certainty Will Search is a cost-neutral, allowable disbursement, that allows a probate professional to demonstrate that a recommended and accredited process was undertaken to ascertain if a will existed or confirm that the most recent version of the will is being used to distribute the estate.

It searches the over 9.4 million will records on the system, as well as three geographically-targeted areas for unregistered wills stored by member and non-member law firms, and will writer members from the Institute of Professional Will Writers

"Will registration ensures a will can be located quickly and confidentially at the time it is needed. Its sole purpose is to ensure a will is found"

and the Society of Will Writers. It also places a notice on the Missing Will Noticeboard, issued to The National Will Register member solicitors.

Firms are also able to enjoy the protection that will registration gives to your probate business. By registering the wills you store with The National Will Register, you are ensuring that they can be found by beneficiaries and relatives through a Certainty Will Search and be able to win the probate work.

Scots need you – join as a member for free today

Scottish firms are invited to join The National Will Register as a member and claim their first year for free, between now and 31 July.

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Getting it right over reform of moveables

The Scottish Government is to implement the Scottish Law Commission's recommendations for reform of moveable transactions law. Professor Andrew Steven provides an overview of the bill before Parliament

The Moveable Transactions (Scotland) Bill was introduced to the Scottish Parliament on 25 May. The Scottish Government has thereby taken forward the recommendations made by the Scottish Law Commission in its three-volume *Report on Moveable Transactions* (Scot Law Com no 249, 2017). On that report see "Asset Finance: Time for Reform", Journal, January 2018, 22.

As the name suggests, the legislation deals with transactions involving moveable property. The bill is arguably the most significant reform to Scottish law here since the Sale of Goods Act 1893 – the successor Sale of Goods Act 1979 falls outwith scope because of its UK-wide application.

The ability of businesses to use assets to raise finance is hugely important in practice. Secured loans will generally offer cheaper interest rates than unsecured loans because of the reduced risk to the lender. Historically, finance was often raised against land. Nowadays, many businesses do not own premises over which they can grant a standard security.

For startup small and medium size enterprises in the technology sector their intellectual property rights may be their principal assets. In other types of business, ownership may be held of vehicles and equipment. Whisky stored by a distiller in its own warehouses will typically be of huge value. In addition to secured loans, a business may wish to sell its invoices and raise immediate cash that way. The current law in this area, frustratingly, impedes such transactions. Internationally, not least compared with English law, we have fallen away behind. The Scottish Parliament, having passed much important legislation in relation to land, is now rightly turning to overdue reform of the law of moveable property.

Three major inadequacies

There are three headline issues which the bill will address. First, an assignation of a claim (a right to demand the performance of an obligation, typically to pay money) by the creditor to an assignee requires intimation to the debtor. This area is partly governed by the Transmission of Moveable Property (Scotland) Act 1862, which unsurprisingly does not meet modern needs. The rest of assignation law has little changed since the time of Stair. The requirement to intimate is cumbersome and expensive, particularly where a single assignation deals with multiple claims. Moreover, where an intimation is made by post under the 1862 Act there is a requirement to send a copy of the assignation to the debtor.

These rules create a barrier to invoice discounting transactions whereby businesses sell their invoices to a financial institution. The requirement of intimation also prevents the assignation of future claims, for example invoices yet to be issued, because the customer identity is not yet known. Complicated workarounds such as trusts and contracting under English law have to be used.

Secondly, the only universally available security over corporeal moveable property (such as equipment, livestock, vehicles and whisky) is pledge. It requires delivery to the creditor. According to *Hamilton v Western Bank* (1856) 19 D 152 such delivery must be actual, and constructive delivery (such as by intimation to a third party warehouse holding the property) is impermissible. A business can hardly operate if its bank has its vehicles. Moreover, banks do not want to store such assets.

Floating charges are available to companies and certain other corporations, but not to sole traders and partnerships. But in any event, floating charges have a lower ranking than other security rights such as pledges, or standard securities over land, which in terms of corporate insolvency law are fixed securities. Moreover, they rank below certain tax claims, following the reintroduction in 2020 of the statutory preference for these.

Thirdly, the floating charge aside, security over incorporeal property requires transfer into the name of the creditor. Rather like delivery in pledge, this gives the creditor too much. With intellectual property, license-back arrangements are needed. For shares in a company, contractual arrangements are required in respect of dividends and voting rights. The fact that the shares are in the creditor's name causes awkward issues in relation to the Persons with Significant Control legislation (Companies Act 2006, Part 21A and Sched 1A) and the National Security and Investment Act 2021. These problems do not arise under English law where an equitable fixed charge can be used instead.

What will the bill do?

The inadequacies in the current law are addressed by the setting up of two new registers to be run by the Keeper of the Registers of Scotland. First, there is to be a Register of Assignations. Registration there will be an alternative to intimation to the debtor in order to effect the transfer of a claim. For these purposes a claim will include rental payments under a lease even although these relate to

land. Businesses will have a choice as to how to proceed.

The 1862 Act will be replaced with modern rules on intimation. In particular, electronic intimation will be facilitated. Where intimation is made there will be no requirement to send a copy of the assignation but the debtor will have certain rights to information. The Register of Assignations itself will operate electronically. A debtor who does not know, as will often be the case, that an assignation has been granted and registered will be protected under good faith provisions which will discharge the debtor if payment is made to the assignor.

Secondly, there is to be a Register of Statutory Pledges. Here a brand new type of security over moveable property will be registered. The statutory pledge will be able to be granted by any person, not just by companies, although there will be specific consumer protection provisions.

In property law terms, the statutory pledge will be a subordinate real right. The debtor will retain ownership of the asset. In corporate insolvency law terms, the statutory pledge will be a fixed security. It will be available generally over corporeal moveable assets, apart from aircraft and ships where there are existing specialist regimes. A simple electronic registration in the Register of Statutory Pledges will replace the need to deliver the asset.

For incorporeal moveable property, the position will be more limited, as discussed further below, but the fundamental reform will be that using a statutory pledge will remove the need to transfer the asset into the creditor's name.

Good faith acquirers of assets encumbered by a statutory pledge will be protected in some circumstances. The enforcement rules for possessory pledge (except for pawn, where the Consumer Credit Act 1974 regulates the matter) and statutory pledge will be broadly the same, with sale being the usual remedy.

Has the bill changed?

Four and a half years have passed since the Scottish Law Commission published its report together with a draft Moveable Transactions (Scotland) Bill. But for the pandemic, implementation would have been quicker. The Commission's draft bill ran to 124 sections. The bill which has been introduced is 118 sections. With one exception, the changes are generally cosmetic. The draft bill was produced in-house by parliamentary counsel based at the Commission. It has now been refined by the Parliamentary Counsel Office to meet up-to-date drafting practice.

The exception, which is the main substantive change, is the deletion of the provisions on financial collateral and on statutory pledges over financial instruments. The Commission had recommended that the statutory pledge initially should be limited in respect of incorporeal property to (a) financial instruments such as shares in a company, and (b) intellectual property. This was partly because these are the assets as regards which there is most demand for reform, and partly for technical reasons. The draft bill also had provisions to ensure it complied with the complex Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226), which implement an EU directive.

The Scottish Government, in contrast to the Commission, has concluded that both the financial instrument and financial collateral provisions deal with issues reserved to the UK Parliament. Nevertheless, it accepts the importance of reform and intends to seek an order by the UK Government under s 104 of the Scotland Act 1998 to take reform forward.

Timetable

In accordance with the usual Scottish Parliament procedures, the bill has been allocated to a lead committee, in this case the Delegated Powers & Law Reform Committee. It will call for written evidence on the bill's contents. Members of the profession are strongly encouraged to contribute. The committee will subsequently take oral evidence before issuing its stage 1 report. It may be expected that this will happen in the autumn. The documents submitted by the Scottish Government to the Scottish Parliament indicate that the bill is expected to complete the subsequent stages of its consideration in early 2023.

Assuming that the bill is passed, the plan is for the new registers to be commenced by summer 2024. As well as the necessary IT work by Registers of Scotland, there will require to be a number of statutory instruments issued, including register rules, as for the Land Register. This timetable is quite ambitious, although the registers are not technically complex when compared with the Land Register and its mapping aspect. As with other registers, the expectation is that the running and maintenance costs will be funded by registration and search fees. These too will be fixed by statutory instrument. On the new registers becoming operational, Scotland will finally join the modern era in terms of its moveable transactions law.

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

Sexual harassment: managing the workplace risk

Sexual harassment at work is a continuing problem, one likely to need measures beyond having an appropriate policy and training programme to counteract it. Elouisa Crichton suggests what else can make a real difference

Despite the growing recognition and awareness of sexual harassment in the workplace, sadly it continues to be a reality faced by many employees. Preventing sexual harassment is a priority for employers, given the business and legal consequences when sexual harassment does occur in the workplace, and of course the desire to ensure all employees are safe at work.

From a business perspective, failure to prevent and properly deal with incidents of sexual harassment can be hugely detrimental to reputation, business value and employee morale. From a legal perspective, employees are protected from sexual harassment at work by s 26 of the Equality Act 2010. Employers are often vicariously liable for any sexual harassment committed in the course of employment. That can include acts during the working day at the workplace, but also during the commute, work social events and even the homeworking environment.

All reasonable steps?

Where sexual harassment does occur, an employer who can prove they took all reasonable steps to prevent harassment from taking place may avoid legal liability (Equality Act, s 109(4)). This defence is rarely successful due to the high bar set by the employment tribunal.

The tribunal will first consider what steps an employer took and, secondly, whether there were other reasonable steps that it could have taken (*Canniffe v East Riding of Yorkshire Council* [2000] UKEAT 1035_98_1704; [2000] IRLR 555), taking into account (i) the likelihood of steps being effective in preventing discrimination; (ii) cost; and (iii) practicality. The reasonable steps defence will fail if the tribunal finds that the employer could reasonably have taken any additional step to prevent the harassment. The reasonable steps defence will fail if the tribunal finds that the employer could reasonably have taken any additional step to prevent the harassment (*Allay (UK) Ltd v Gehlen* UKEAT/0031/20; [2021] ICR 645). This can even catch steps that might not have been successful in preventing harassment: the real issue is whether the employer could reasonably have done anything more.

Policy – plus

So what can employers do to minimise the risk of harassment occurring in the first place?

There are two basic steps that employers should take (and many already do):

- First, have a policy that explains what harassment is and that it will not be tolerated: one that sets out a framework for addressing complaints and taking disciplinary action up to and including summary dismissal for perpetrators. The more comprehensive a policy is, the better. Remember, however, a policy that is poorly communicated or not adhered to in practice will not be enough.
- Secondly, training is important. Training will help ensure the policy is known and understood in the context of the specific organisation. The quality of training is important too: brief and superficial training is unlikely to have a substantial effect in preventing harassment, nor will it have any longlasting consequences. Regular training is important to avoid it becoming "stale", as was the case in *Allay v Gehlen*.

Workplace environment

While polices and training are likely necessary requirements for creating a safe working environment, they are by no means sufficient to prevent sexual harassment from occurring. We know from experience that many organisations have such policies and training in place, yet sexual harassment still occurs. For businesses that wish to be at the forefront of tackling this problem, some broader actions can significantly help to move the dial on protecting staff from harassment. These include:

- Improving the quality of policies and training. To ensure policies and training are meaningful, they must be complied with in practice, including by communication to new joiners and being publicised throughout employment. Training materials should be tailored to the organisation and attendees, and focused on sexual harassment rather than combining all equality issues together. Training should also be provided regularly, rather than as a one-off or tick-box exercise. Nuanced practical examples and training on unconscious bias and micro-aggressions can help everyone to see how embedded low-level sexual harassment often is in our culture, and really encourage people to reflect on the required standard of behaviour.

  For those involved in taking disciplinary decisions, training on how individuals may react when they are subject to harassment is key: for example, a person not promptly removing themselves from the situation does not mean they did not feel harassed.
- Recognising environmental factors that create a higher risk of harassment occurring. Take time to consider where risks arise in your organisation. Many risk factors are common: high-stress environments, late nights/long hours, working between just two colleagues (especially where there is a power imbalance), or any events involving alcohol or close contact. The last is particularly important, as in practice

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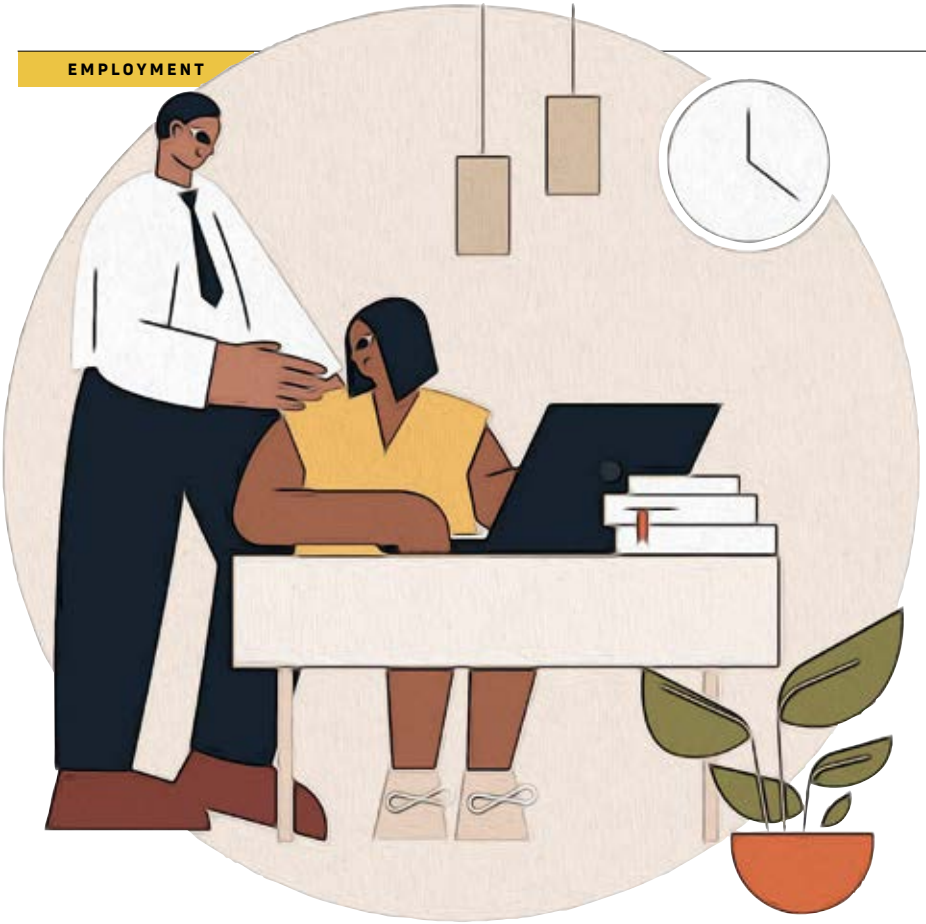

acts of sexual harassment often happen at workplace social events and after hours. Once identified, consider what extra measures could be put in place to reduce the risk of harassment. For example, if an employer recognises that incidents involving sexual harassment occur within their workplace from customers or other employees, the employer should take specific and targeted steps to address the issue, an issue raised in the race harassment case of *Tesfagiorgis v Aspinalls Club Ltd* [2021] UKET 2202256/2020.

- Diversity is key. A lack of diversity, including at leadership levels, can increase the risk of harassment. Certain groups are at greater risk, in particular women and where there is intersection of protected characteristics. By embedding diversity into all layers of an organisation, practices which reduce harassment are more likely to flourish.
- Instilling personal responsibility for making policies a success and changing the culture. Everyone has a role to play in maintaining a safe culture. This comes in two key forms. First, ensure everyone understands that it is not acceptable to be a bystander. As noted in connection with training above, the aim should be to positively empower people to be architects of change. Secondly, leaders must be consistently proactive in visibly championing the policies and standards expected.
- Being mindful of language/semantics. Employers should avoid emotive or partisan language such as "victim", "complainer" or "accused" in their policies, training and processes, as it can influence views and it risks creating a feeling that an outcome has been predetermined. Individuals may not like to associate with a word such as "victim", for example. It is best to use non-emotive language, initials, anonymised references ("Employee A"), or more neutral descriptions such as "person who has raised a concern", where appropriate.
- Effective and safe reporting mechanisms. All employees should be familiar with how to report concerns and, for those involved in responding, how to do so quickly, effectively and sensitively. Until employees feel safe and supported in reporting harassment, an organisation may have an inaccurate view of whether a problem exists, its extent and how to address it. Appropriate levels of confidentiality and psychological support should be built into any safe reporting system and sexual harassment policy. Employers must also recognise the need to ensure that any process implemented does not unnecessarily cause any more damage or reopen trauma: incidents of sexual harassment and subsequently the handling of any complaint process can be traumatic and employers must handle such processes carefully and provide sufficient holistic support.

"Failure to prevent and properly deal with sexual harassment can be hugely detrimental to reputation, business value and employee morale"

"All employees should be familiar with how to report concerns and, for those involved in responding, how to do so quickly, effectively and sensitively"

- Wellbeing support for all involved. Employers have health and safety obligations to all employees involved in sexual harassment, and that includes obligations to those who are witnesses and to the subject of the complaint.
- Be prepared for concurrent police involvement. In more serious cases, a workplace sexual harassment case can amount to a criminal allegation of sexual assault or even rape. It can sometimes help for employers to engage with police proactively on a no-names basis at an early stage to gain an understanding of how processes may link together. Each case is different but often an employer will choose not to await the outcome of a criminal trial before progressing matters internally. Where a person is under criminal investigation, they may be legally advised not to say anything to their employer as it could jeopardise their defence. Employers should not draw any adverse inference from an employee's decision to remain silent about events under investigation in these circumstances, but they should make it clear that they may need to make important decisions based on the information they have, so that individuals can reflect on what details they feel able to share. It is common to receive police requests for information sharing.
- Publicly committing to improvement. Committing publicly to reducing harassment is key. In order to make this meaningful, organisations may wish to include targets and progress updates as a standing board agenda item, and ensure that any actions agreed are followed through. Managers and those in senior positions should visibly condemn sexual harassment and commit to and clearly communicate a zero-tolerance approach to sexual harassment.

Research based

These missing ingredients can really make a difference. They have been researched extensively, as described in the recent report *Enough is Enough* by Engender – Scotland's feminist policy and advocacy organisation – on ways to tackle workplace sexual harassment in Scotland.

The ideal outcome is to create a workplace free from harassment. It may be that by making such comprehensive cultural changes an employer is better placed to run a successful statutory defence if any incidents do occur.

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An expensive business

An Outer House decision has clarified what may be covered by an award of expenses occasioned by preparation for and conduct of a proof, and the role of the auditor in taxing an account, as Jenny Smith discusses

An interesting decision has come out recently in relation to the issue of expenses. The opinion of Lord Menzies in *McCallion v McCallion* [2022] CSOH 36 follows on from the court's interlocutor after a proof in August and September 2019. The pursuer was found liable to the defender in respect of 50% of the expenses of and occasioned by the preparation and conduct of the proof.

An account of expenses prepared for the defender was subject to taxation by the Auditor of the Court of Session. The auditor refused to allow anything in respect of several items in the defender's account. The defender lodged a note of objections to the auditor's report. The auditor lodged a minute in response.

The auditor's position was that his role was not limited to considering matters raised by paying parties. He was also of the opinion that preparation for proof can only truly commence after parties have finalised their pleadings, ingathered and lodged all their evidence and attended to all incidental procedural matters required in advance of a proof. The auditor held that some of the entries did not constitute work undertaken in the preparation for or conduct of the proof. He said this was because there would then be no distinction to be made between an award of expenses for the preparation and conduct of a proof and an award of the expenses of process, on the basis that all of the required work in conducting a court action could be said to have been undertaken "in preparation" for the definitive hearing in that court action.

Jenny Smith is a partner with Harper Macleod LLP

Decision on the objections

The first ground of objection by the defender to the auditor's report related to "paid court dues for proof". The auditor did not allow this. In his minute he noted that his role is not limited to considering and determining matters raised by parties (with which Lord Menzies agreed). However, Lord Menzies held that the auditor failed to justify his decision in not allowing this item, the judge reasoning that paying the court dues for a proof is a necessary precondition of proceeding with the proof. He noted that the auditor's minute did not provide a reason or justification for the decision not to allow this item.

The next ground related to a charge for instructing counsel for a pre-proof case management hearing, attending that hearing, paying counsel's fees for attendance and paying court dues. This hearing was assigned by the court at the same time as it assigned a four day proof. The auditor did not uphold this item. Lord Menzies noted that the auditor did not deal with this ground of objection individually, but simply made a general observation that the highlighted work was not work undertaken in preparation for or conduct of the proof and that otherwise there would be no distinction between this award and an award of the expenses of process. Lord Menzies held that this was a misunderstanding of the position and a misinterpretation of the court's award. Likewise, he held that the auditor's decision to abate an entry for instructing counsel for and attending at a pre-proof hearing was an error of law based on his misunderstanding of the court's award.

Another ground related to charges for a pre-proof consultation with counsel. This took place eight days before the first day of proof. The auditor in his minute failed to address this point specifically. Lord Menzies held that this is a normal (possibly essential) step in preparation for a forthcoming proof and falls within the award of expenses.

Just as an aside, it is vital to obtain sanction from the sheriff court for the involvement of counsel in that court as soon as possible after the decision is made to instruct counsel. Failure to do so will

make it very hard to get an award of expenses which covers their fees.

The next ground related to the affidavit of a supporting witness for the defender. The court had appointed parties to lodge affidavits of witnesses which would stand as their evidence in chief. If the defender had not lodged this witness's affidavit, the witness's evidence would not have been available to the court. Lord Menzies disagreed with the auditor's decision not to include it and felt that it clearly fell within the category of an expense as referred to in the interlocutor. Likewise, Lord Menzies also upheld entries in relation to the defender perusing affidavits of the pursuer and his witnesses and for preparing an affidavit for the defender and perusal of an affidavit by a witness for the pursuer.

Lord Menzies did not, however, uphold the defender's ground of objection in relation to charges for an incidental hearing which took place after the proof. This hearing was assigned by the Lord Ordinary on the last day of proof, on 17 September 2019. His opinion was issued on 23 October and the hearing in question took place on 29 November. At that hearing, various detailed orders were made, including the award of expenses. Lord Menzies did not accept the defender's submission that this hearing was a continuation of the diet of proof and should properly be characterised as forming part of that diet.

What to seek?

The decision is helpful when considering seeking expenses generally, the interpretation of an award of expenses, and the role of the auditor (including whether or not it is worthwhile lodging a note of objections to the auditor's report). Having a good law accountant is also important.

In the first place, it is important to take care when framing a request for expenses. For example, it is not enough just to seek a blanket award of expenses of the proof. Rather, the wording should make clear that what is sought is the expenses of and occasioned by the preparation for and conduct of the proof. Consideration should be given as to whether it is appropriate to seek an award of the expenses of process. That is much wider (since not tethered to a specific hearing such as the proof), and in turn harder to obtain. An award of expenses of and occasioned by the preparation and conduct of the proof is different from, and more restrictive than, an award of the expenses of process.

The auditor's role

In terms of the role of the auditor, Lord Menzies makes clear that it is necessary for the auditor to consider each item in an account of expenses and determine whether that item falls within the specified category (per the terms of the award of expenses), and if so, to go on to determine whether the charges are reasonable. The auditor must be able to justify that decision. Lord Menzies held that the auditor in this case did not carry out that exercise properly.

He referred to the earlier case of *Stuart v Reid* [2015] CSOH 175. This case was an action for damages following a fatal road traffic accident. The court repelled the deceased's family's note of objections to the auditor's taxation of accounts where the auditor had sufficiently set out the reasons for his decisions. Lord Woolman observed that in taxing a party and party account, the auditor's task is to determine whether the proposed fee is fair and reasonable. He noted that there is a substantial body of case law which has developed in relation to challenges to the auditor's decision. He helpfully summarised salient points from those cases:

- The auditor acts essentially as a valuer.
- He is expected to apply his knowledge and experience in carrying out his task of assessing a fair and reasonable fee.
- The court will be slow to disturb his decision if he has properly exercised his discretion.
- It will not substitute its own views for those of the auditor.
- It will not attempt to tax an account itself.
- The court will, however, intervene if the auditor did not have sufficient materials on which to proceed, or his decision is unreasonable.

Wider category

While it is likely that many or most of the expenses after a proof has been allowed will fall to be categorised as expenses of and occasioned by the preparation for and conduct of the proof, it does not necessarily follow that all such items will fall into that category. For example, late changes to the pleadings by way of minute of amendment may not.

Lord Menzies in *McCallion* noted that preparation of written pleadings, and any discussions or challenges to the relevancy or specification or particular legal challenges, will not normally fall within the category of "expenses of and occasioned by the preparation and conduct of the proof". So, the drafting of the summons or defences, adjustments to the pleadings, minutes of amendment or answers thereto, specifications for the recovery of documents and preparations for and attendance at the debate will not normally be recoverable in terms of the interlocutor in this case (but would normally be recoverable under the wider award of expenses of process).

The judge reiterated the dicta in *Stuart v Reid*, that the court should be slow to disturb the auditor's decision if the auditor has properly exercised his discretion, that the court will not substitute its own views for that of the auditor and will not attempt to tax an account itself. The court will however intervene if the auditor did not have sufficient materials to proceed or if his decision is unreasonable. Lord Menzies intervened because he reached the decision that the auditor's decision was unreasonable and flowed from a misunderstanding of the court's award.

Lord Menzies remitted the matter back to the auditor to tax the elements of the account which he had not included within the award of expenses and which Lord Menzies decided should be included.

Hunted within the law?

Evidence handed over by paedophile hunters has been held to have been fairly obtained, barring particular reasons to exclude it: one of the significant cases canvassed in this month's criminal court roundup

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

End of an era

It was the end of an era at the Sheriff Appeal Court with the retiral of the first President of the court, Sheriff Principal Mhairi Stephen QC who signed off in typically robust style in *Humphreys v Procurator Fiscal, Aberdeen* [2022] SAC (Crim) 5 (19 April 2022).

The case was a serious road traffic matter where a motorist travelling north on the A90 was alarmed at the driving of an articulated lorry which swerved about the carriageway for around 20 miles. She followed the vehicle until it stopped at an industrial estate. Concerns that the driver might have been ill were quickly dispelled when he was seen to be drunk, and police were called.

He subsequently pled guilty to drink/driving with 98 micrograms in his breath compared to the 22 micrograms limit, and dangerous driving. He had a previous conviction for drink/driving, was on bail and had been drinking at the wheel. After obtaining reports the sheriff imposed a sentence of six months' imprisonment (two months representing the bail aggravation), discounted from nine months for a plea at the outset, disqualification for three years and seven months and an order to resit the full test.

The minute failed to record the sheriff's reasons why no disposal other than a short custodial sentence was appropriate in terms of s 204(3A) and (3B) of the Criminal Procedure (Scotland) Act 1995, and it was said the sheriff had not made these sufficiently clear. The appellant had previously served a term of imprisonment. While the court accepted the minute was incomplete, "there would be significant public concern if serious road traffic offenders and others including those convicted of domestic offending could escape punishment by way of a custodial sentence for entirely technical reasons".

Sheriff clerks were warned to minute reasons given when the court imposes a sentence of 12 months or less (or indeed a first prison sentence), and the appeal was refused.

The case does bring into focus the poor relation summary criminal procedure is compared to all manner of civil casework including the oxymoronic simple procedure, and extradition matters where the judge signs each interlocutor. While most colleagues would not like to sign each procedural summary criminal interlocutor, mistakes are thrown up from time to time by the issuing of unsupervised minutes by the sheriff clerk.

Given the importance of the presumption against short sentences legislation, the wish to reduce summary jail sentences and the prospect of appeals against sentence or indeed conviction, should there not be a rule that judges sign the final interlocutor to ensure the minutes are in proper form and provide an accurate audit trail?

In a similar vein

The Sheriff Appeal Court, comprising the retiring Sheriff Principal D L Murray and Sheriff N McFadyen (who shows no signs of stopping), heard an appeal against sentence, *Hutchison v Procurator Fiscal, Dundee* [2022] SAC (Crim) 3 (9 March 2022).

The appellant pled guilty at an intermediate diet to struggling with and trying to assault a nurse at Ninewells Hospital on 20 April 2020, contrary to s 5(1) of the Emergency Workers (Scotland) Act 2005, and threatening or abusive behaviour including the uttering of sectarian remarks (the nurse had an Irish accent), contrary to s 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010.

He had a long record for public order offences, police assault and racial or religious aggravations. He had little memory of the offences because of his intoxication, and his mental health had been affected by solvent abuse when he was 16. It was not suggested to the court that anything other than a custodial sentence would be appropriate. The sheriff selected a starting point of 10 months' imprisonment, reduced to eight months in view of the early plea for the s 5(1), and four months consecutive reduced to three for the s 38(1), including one month for the religious aggravation, making an aggregate sentence of 11 months.

This sentence was appealed as it represented a headline sentence of 14 months' imprisonment, which was incompetent as it exceeded the sheriff's powers at summary level (cf at solemn level where the sheriff has power to remit to the High Court and can select a higher starting point: *McGhee v HM Advocate* [2006] HCJAC 87; 2006 SCCR 712). The sheriff had given different discounts for the two offences.

The sentence was quashed; in respect of the first charge eight months' imprisonment reduced to six months was imposed. On the second charge the three months was allowed to remain, making a total of nine months' imprisonment.

I do not understand why the sentences were consecutive since the matters arose out of the same *species facti*.

Paedophile hunters

Many of the solemn prosecutions which take place in Scotland sadly involve the sexual abuse of children by adults. Children are likely to be even more reticent about complaining to the authorities due to the position of power and trust which the perpetrator often holds or the guilt they harbour when asked to perform demeaning acts online, which are used for blackmail purposes to continue the abuse.

As a result police sometimes have used decoys to flush out adults posing as children in chat rooms, who are looking for opportunities to groom young people for online abuse or to arrange a meeting in person.

The cases of *Quinn and Sutherland v HM Advocate* [2019] HCJAC 61 (20 September 2019 but only published on 28 March 2022) are important as they deal with the activities of paedophile hunter groups who set up online profiles of children, in which adults inclined to engage in sexual communication with children may become enmeshed. Such groups will then attempt to arrange a meeting with the individual, which, if it takes place, will be streamed live on social media and the recordings then handed over to the police.

Challenges to the prosecutions were taken separately that the actings of the paedophile hunter groups were an "affront to justice", the prosecutions amounted to oppression, and the accused's article 8 ECHR rights had been infringed. The groups, it was alleged, had acted without

required authorisation to operate covert human intelligence sources (CHIS) under the Regulation of Investigatory Powers (Scotland) Act 2000 ("RIPSA") and accordingly the evidence was inadmissible.

Hitherto there was little Scottish authority in this area apart from *Procurator Fiscal, Dundee v PHP* [2019] SC DUN 39, although I recall throwing out a case about the same time where the hunters failed to meet up with the individual, went offline and lured him to Princes Street in Edinburgh where they subjected him to an apparent breach of s 38(1) of the 2010 Criminal Justice Act and broadcast his name and address to all their followers with consequent danger to the man and his family.

In fairness to the groups, they resorted to their own devices in the face of what they saw as police inaction or police being overwhelmed with cases; they wished to offer an "oven ready" vehicle for prosecution, warning off others who seek to prey on young, vulnerable and immature persons who may resort to chat rooms with their peers when trying to work out their own sexuality or feeling lonely.

The Appeal Court reiterated that evidence obtained by entrapment was evidence unfairly obtained: where an accused committed an offence he would not otherwise have committed due to pressure from or a trick perpetrated by the police, it would be excluded because such conduct would be regarded as grossly unfair (*Jones v HM Advocate* 2010 JC 255, paras [76] and [83]). The court noted that security firms, shops, gamekeepers and neighbourhood watch schemes were all free to carry out their own investigations into criminal behaviour and report the results to the police or the Crown. Journalists too often run a story and publish the results of an investigation before submitting the results to the authorities, where the accused may belatedly come under the protection of the court prior to a trial (cf the "fake sheik" cases and the recent revelations about hip hop DJ Tim Westwood). None of these investigating individuals come under the ambit of RIPSA. The article 8 claims were dismissed as the paedophile hunter group's decoys or other members were private individuals and if they strayed into criminality might be arrested and prosecuted; they would have no immunity from prosecution for breach of the peace or assault, or from a civil suit.

Where evidence from a private individual is secured by torture or gross misconduct it would be excluded, but such exclusion would only occur in rare circumstances: see *R v L (T)* [2018] 1 WLR 2060, Lord Burnett CJ at paras 31 and 32, which was quoted with approval.

Paedophile hunter groups are free to carry out their activities if their aim is to report individuals seeking to groom or meet young people. Usually at an early stage the decoy discloses they are under age so as to avoid entrapment, and a full audit trail of communications should be retained for disclosure to the authorities. If this action results in the group meeting an individual, no criminal acts or incitement to commit crime against the individual should take place and the matter should be reported forthwith to the authorities for such actions they deem appropriate to take.

Bail update

I have been back in court a bit recently, sitting as an old timer, and can report that although bail reforms are in the air, the Crown continues to oppose bail frequently but appeals on very few occasions. Remand numbers remain high; many accused who are convicted after a lengthy remand do not receive a custodial sentence; and many backdated sentences imposed are much lower and more proportionate than the time spent on remand.

The expected rush of bail reviews for those seeking release on a tag has not emerged yet on my horizon, but the process to impose an electronically monitored bail curfew and/or stay away order is very clunky.

If agents think bail will be opposed in a custody case and an electronically monitored bail order may be a clincher, get your orders in with the social work department early on as they seem not to be organised to turn them around same day. Particular difficulties arise where the accused is designed as being of no fixed abode. Any address subsequently proffered must be properly checked out to ensure it is a viable residence and not simply a postal address.

Appeal Court v Jury

We are constantly reminded that no case to answer submissions are all about sufficiency and not in any way about quality. Some blame must attach to the way in which the topic is treated in *Renton & Brown's Criminal Procedure*.

In the summary section the issue is given little attention (para 21-27) and the case of *Williamson v Wither* 1981 SCCR 214 holds sway, the test being whether the evidence was sufficient and did not depend on whether it was thought by the judge to be acceptable. However, in the solemn section at para 18-75.1 the learned author refers to "one case which considered the basis on which a judge should deal with [a no case to answer] submission," going on to quote at length from *R v Galbraith* [1981] 1 WLR 1039 at 1042 where the English Court of Appeal said the test involves considering "tenuous evidence or an inherent weakness". While that is a more satisfactory basis, sadly it does not represent the law of Scotland, although paradoxically it may have to be factored in should judge-only solemn trials take place as is currently being mooted.

In the summary context the judge can readily repel a no case to answer submission on a mathematical sufficiency basis without thought to credibility or reliability, but then can suggest, if so minded, to the defence agent about to call the accused that the evidence cannot get any better and instantly acquit on a qualitative basis, thus avoiding a miscarriage of justice.

Not so in the solemn arena, as can be seen in *HM Advocate v BL* [2022] HCJAC 15 (23 March 2022). In a two charge case involving lewd, indecent and libidinous practices and behaviour towards a brother and sister, the incidents allegedly occurred between 1979 and 1981. The female complainer could not recall being touched on the private parts, and the case involving her brother was much more serious.

The trial judge sustained a submission of "no case to answer", being of the view that the case fell "into the rare category in which it was the responsibility of the judge" to decide that *Moorov* could not apply and the issue should not be left for the jury to determine.

The Appeal Court upheld the Crown appeal, stating: "it is not for the judge to conduct an intensive analysis of the respective accounts at the stage of a submission of no case to answer". The court remitted the case to the judge to reconvene the jury immediately and proceed further.

On 25 March 2022 the jury unanimously found the charges not proven.

Corporate

EMMA ARCARI,
ASSOCIATE,
WRIGHT, JOHNSTON & MACKENZIE LLP

The Economic Crime (Transparency and Enforcement) Act 2022 creates new implications for overseas entities that own UK property. It implements some of the longstanding proposals for reform in this area, originally discussed in 2016, that have been spurred on following Russia's invasion of Ukraine. The aim behind the Act is to combat illegal activities such as money laundering by increasing transparency about the beneficial owners of land. Although not fully in force at the time of writing (further supporting regulation is required), the UK Government has indicated it wishes to do this quickly.

Corporate practitioners will already be familiar with the requirement on all UK companies to maintain a register of People with Significant Control ("PSCs"), which is lodged at Companies House. The Act seeks to identify any "beneficial owner" of overseas entities who own UK property, by comparable conditions to those used to identify PSCs, and creates a register of overseas entities.

Who comes under the Act?

The Act applies to "overseas entities" and their "beneficial owners" who hold, in Scotland, a "qualifying registrable deed", or in England, Wales or Northern Ireland a "qualifying estate". This can be broken down as follows:

- An overseas entity is any legal entity that is governed by the law of a country or territory outside the UK. A legal entity is any legal person under the law by which it is governed.
- A beneficial owner is a person who, in relation to the overseas entity:
  - owns directly/indirectly more than 25% of the shares or voting rights;
  - can appoint or remove a majority of the board of directors; or
  - has the right to exercise or actually exercises significant influence or control.
- In Scotland a qualifying registrable deed is a registrable deed under the Land Registration etc (Scotland) Act 2012 (i.e. a disposition, standard security, lease or assignation of a lease, including subleases bought on or after 8 December 2014). In England, Wales and Northern Ireland a qualifying estate means a freehold estate in land or a leasehold estate granted for more than seven years (bought on or after 1 January 1999).

What needs to happen?

Overseas entity owners of relevant UK land need to register at Companies House (once the register opens) and provide information about the beneficial owners. Overseas entities should start to prepare this information now, as specific information is required for the application (such as which of the conditions relating to beneficial ownership is met, does the entity meet that condition by virtue of being a trustee etc). If the overseas entity does not have this information, it is required to take reasonable steps to identify the beneficial owners and must send an "information notice" to any person it knows or reasonably believes is a beneficial owner (or knows their identity). Information notices require compliance within one month; failing to comply (or recklessly providing false statements) is a criminal offence.

Companies House then will issue an overseas entity ID, which is needed by the entity to register as the owner, together with details about the registration and the duty to keep the register updated. Existing overseas entities will be given six months from parts 1 and 2 of the Act coming into force to either register or dispose of their land (the transitional period). After this, there is an ongoing duty to update the register every 12 months.

Failure to comply

Should relevant overseas entities fail to register, provide information or comply with the updating duty in accordance with the Act, the entity and its officers will have committed a criminal offence punishable by fines (including a daily default fine of up to £2,500 for continued contravention) or prison. Another consequence is that an overseas entity purchasing UK property will not be registered as the owner with the relevant land registry until the entity is on the Register of Overseas Entities, and those entities which already own UK property will not be able to complete sales as the buyer will be unable to register the transfer. Restrictions will be placed on the titles of the relevant UK properties for failure to comply with the Act, which will affect transactions involving the property (including the creation of charges).

Other points to note

The Secretary of State may exempt someone from a registration requirement in the interests of national security or to prevent or detect serious crime. Certain beneficial owners will also benefit from exemptions where the interest is held through an entity already subject to its own disclosure requirements (such as a company which is registered on the PSC register). Practitioners may be aware that in Scotland there already exists a transparency regime via the Register of Persons Holding a Controlled Interest in Land ("RCI"). The RCI excludes owners/tenants of registered leases in Scotland who are reporting in certain other UK transparency regimes – however overseas entities are still included, given the rapid implementation of the Act. This means there is a risk of double reporting in relation to overseas entities who own/tenant land in Scotland. Hopefully further legislation will remove overseas entities from the ambit of the RCI before the Act is fully in force.

In any event practitioners should review corporate structures and identify UK land which is held by an overseas entity, together with information relating to the beneficial owners. As noted, the further regulations required to establish the overseas entities register are expected sooner rather than later. J

Intellectual Property

ALISON BRYCE, PARTNER, DENTONS UK & MIDDLE EAST LLP

The introduction of the Online Safety Bill to the UK Parliament marks a milestone in increasing online safety in an industry that was previously dubbed "underregulated". The bill proposes to place a whole host of new obligations on user-to-user service providers and search engines to detect, monitor, remove, and in some cases report harmful and illegal content, with a particular emphasis on reducing child sexual exploitation and abuse ("CSEA") and terrorism content. This article considers the steps companies will be required to take to comply with their new obligations, and the repercussions they will likely face if they fail to do so.

New obligations

User-to-user service providers and search engines with "links" to the UK will be under a new legislative duty to implement proportionate systems and processes to reduce the amount of illegal content on their website. This includes obligations to:

- proactively detect illegal content;
- prevent individuals from encountering the content;
- minimise the length of time the content is visible to users; and
- quickly take down such content as soon as the company becomes aware of it (whether the content is reported to the company by a moderator, user or otherwise).

The bill suggests companies adopt certain measures to comply with their new obligations, including revising their regulatory compliance and risk management arrangements, the design of their algorithms, their moderation capabilities, and functionalities to allow users to control the content they encounter, as well as strengthening and clarifying their website terms of use and internal staff policies and practices.

However, the new obligations do not end there. In addition to the above, companies will also be required to:

- implement new measures to address anonymous trolls online;
- ensure 18+ age verification checks for sites that host pornography;
- tackle fraudulent advertising on social media and search engines;
- address how they will deal with "legal but harmful" content and make this clear in their terms and conditions (note, it is anticipated that Parliament will release secondary legislation on this in due course);
- report all CSEA content to the National Crime Agency; and
- put in place additional protections if there is a likelihood that their website will be accessed by children.

What about non-compliance?

Ofcom will be appointed as the new independent regulator, responsible for monitoring compliance and taking action when companies fail to fulfil their duties.

Ofcom's initial approach will be one of collaboration. It will work with companies to help explain what the new rules mean in practice and the steps that can be taken to stay

compliant. It will also issue codes of practice to help guide companies in the right direction. However, Ofcom will also have a wide range of enforcement powers at its disposal, depending on the seriousness and persistence of the breach in question.

In the worst cases, Ofcom will be able to impose fines up to the higher of £18 million or 10% of global annual turnover, and apply to the court for business disruption measures (which will include the ability to block non-compliant services).

Finally, the bill also introduces criminal liability on senior managers of companies who fail to ensure their company is compliant, or who deliberately destroy or withhold information from Ofcom, with offenders facing up to two years in prison or a fine.

Final thoughts

Companies providing user-to-user and search services will need to grapple with their new duties and be ready to demonstrate compliance. Although the bill has not yet been passed, it is never too early for companies to start thinking about the changes they can make now to make their services as safe as possible for users. Companies will also be required to give thought to how they will balance their new obligations with protecting users' existing rights, including freedom of speech.

Agriculture

ADÈLE NICOL,
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The Land Court has recently had to consider a plea for sympathy from a woman who was the author of her own misfortune.

In *Scott v Hunter* SLC/173/21 (3 March 2022) Mrs Hunter was formally the tenant of Castleside Farm, Selkirk. On 24 February 2020, her agents gave notice under s 21 of the Agricultural Holdings (Scotland) Act 1991 of her intention to quit the farm as at 28 November 2021. Her tenancy accordingly came to an end at that date. The date came and went but Hunter remained in occupation of the farm.

On 14 December 2021 agents for the landlord, Mrs Scott, applied to the Land Court for an order (1) finding and declaring that the lease had been terminated as at 28 November 2021 by virtue of the tenant's notice of intention to quit; (2) for the removal of Hunter from the farm; and (3) for the expense of the application. The application was duly intimated to Hunter, who was given 21 days within which to lodge any answers. No answers were received by the court and on 21 February 2022 Scott's agents emailed the court to move that an order be granted in terms of the crave.

An order was about to be signed and issued when on 25 February 2022 the court received an email from Hunter stating that she intended to be fully gone from Castleside no matter what by 28 May. She explained the reasons for not removing as difficulties in finding alternative locations for sheep which were about to go into lambing and for herself. A comment was also made about an alleged propensity on the part of the landlord who would rather see houses sit empty than let them.

The court took it that Hunter recognised there was no defence to the application but was asking the court to hold off granting the order for removal until such time as the sheep could be moved with their lambs at foot, at latest 28 May 2022. It gave Scott's agents the opportunity to respond; they confirmed that Scott wished the court to proceed to grant the order for possession without further ado. Hunter had had over two years to plan and organise her removal from the farm. Scott was also understandably reluctant to rely on Hunter's word again, and allowing the sheep to remain on the farm would be prejudicial to the landlord's interest as she was herself gearing up to start lambing. Further, the proposed backstop removal date of 28 May was after the single farm payment reference date by which time Scott would require vacant possession in her own right. There was no suggestion of a defence to the application.

The court considered the matter very carefully, and clearly took cognisance of the dilemma for Hunter and her concerns about animal welfare, but weighing all the facts up, particularly bearing in mind that Hunter had served notice of intention to quit, refused the deferment she sought. This was not the first time the parties had seen each other in court, and the court commented that the present situation might colloquially be put as "the writing has been on the wall for the respondent for a number of years".

The court observed that it could not either comprehend or overlook that the termination date was fixed at the tenant's own hand for 28 November 2021, but with that date fast approaching she chose to put her remaining ewes to the ram with "no plan B" as to where they would spend the winter and lamb if the landlord enforced the removal to which the tenant herself had agreed. She had had a number of options including selling the remaining sheep before the termination date.

Extract of the order was however superseded until 18 March 2022 in respect of the farmland and 1 April 2022 in respect of the farmhouse and farm buildings, the purpose being to emphasise to the tenant that it was incumbent on her with lambing imminent to make relocation of the sheep her immediate priority, therefore avoiding the potential animal welfare issues to which she had drawn attention in her email.

It strikes me as a decision which is fair, sympathetic and reasonable to both parties taking account of the rather peculiar circumstances here.

Succession

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How does one value a claim for legal rights? That was (or, perhaps, ought to have been) the question for the court in *Harley v Harley's Executrix* [2022] SC PER 14.

In most cases the answer is relatively straightforward: if the assets in question are not realised by the executor (when a different value might apply), the applicable value is based on the value of the moveable estate at the date of the deceased's death. What, though, if the value of the moveable estate is wrong or the legal rights claimant disagrees with it?

James Millar Harley died on 12 April 2019 leaving a will and codicil appointing his wife, the defender, as one of his executors. Among his assets was a shareholding in Alexander Harley Seeds Ltd. The shares in the company were not listed. The defender's agents obtained a valuation of £1,984,930.88 from the company's finance director. That value was returned in the application for confirmation. The pursuer's agents intimated a legal rights

claim; in response the defender's agents sent a calculation of the legal rights based on the finance director's valuation. At that point the value of the pursuer's claim was £227,542.24, prior to deduction of legal fees.

At some point (it is not clear from the judgment why), the defender obtained a separate valuation from an independent firm of accountants. That valuation took into account (as the finance director appears not to have done) that Harley was a minority shareholder, and applied a discount of 75%. An effect was to reduce the value of the legal rights claim (as calculated by the defender) to £61,049.93.

Arguments

Somewhat surprisingly, counsel for the pursuer did not address the correct way in which unlisted shares ought to be valued. Instead, he argued that the defender was bound by her inclusion of the higher value in the application for confirmation. He placed much emphasis on the defender not having obtained an eik to the confirmation to reflect the revised value. It is hard to tell what the pursuer's position would have been had the defender done so.

The pursuer also argued that the initial exchange of correspondence between the parties' agents amounted to a contract between the parties for payment of the legal rights claim as originally valued.

For the defender it was argued that the valuation of legal rights should be based on the lower valuation of the shareholding. Since the pursuer had not in his pleadings questioned the method of valuation or called on the defender to provide justification for it, the defender had little to answer beyond rejecting the pursuer's assertion that the claimed contract had been formed.

Decision, analysis and practice points

The sheriff rejected each of the pursuer's arguments and did not find herself able to grant decree even for a reduced claim. As she said at para 116 of her judgment, "The pursuer brought the action on a certain basis and has been unsuccessful."

The pursuer's argument that the defender was bound by the valuation in the inventory ignored the fact that that value is at best an opening statement in negotiations with HMRC. Even had the defender revised the valuation by applying for an eik, as the sheriff also made clear, that would not, of itself, have changed the position. Nor would the timing of the application for an eik have been of any significance from the pursuer's perspective.

What was in dispute between the parties was the value of the shares. Differences of opinion on the value of items of estate are not uncommon in executry administration, although happily few of them result in court action. They can occur where a person has an over-inflated idea of the value of, say, an antique or where, as in this case, an asset is more difficult to value.

While the value that should be ascribed to unlisted shares and business interests is their market value, determining that can be complex. Even obtaining a valuation can prove troublesome. Despite that, in many, perhaps most, estates it will not much matter what value has been ascribed to unlisted shares, particularly where business property relief for inheritance tax can be successfully claimed and there is no dispute among beneficiaries about the valuation.

Where there is such dispute it would be open to a beneficiary or legal rights claimant, if they can obtain all the necessary information, to instruct their own valuation and attempt to negotiate with the executor to reach agreement, failing which, as the sheriff pointed out in *Harley*, they might raise an action of accounting, or count, reckoning and payment. It is not clear why the pursuer in *Harley* did not do so.

Finally, although it would not have helped this pursuer, where the value returned in the inventory is wrong and this is of significant moment, and the executor declines to obtain an eik, it is open to the beneficiary to apply for confirmation *ad omissa vel male appretiata*, discussed in the recent case of *Mackay v Mackay's Executor* [2018] SC TAI 22.

Sport

BRUCE CALDOW, PARTNER, AND CLAIRE FOWLER, TRAINEE SOLICITOR, HARPER MACLEOD LLP

Sports organise their activities through a series of rules and regulations, bringing an orderly structure to how members and participants interact and engage. A growing trend across sports is to adopt licensing regimes, whether it be for agents (intermediaries), coaches, or clubs. The requirement to obtain and maintain a licence provides an active regime in which standards can be raised, monitored, maintained and enforced.

FIFA has published its first ever *Guide to Club Licensing in Women's Football*. This guide bolsters FIFA's commitment under goal 8 of its 2020-23 vision to accelerate the growth of women's football, which FIFA acclaims as one of its top priorities.

What is club licensing?

Club licensing in football is a development and control tool that associations can use to raise standards in the key strategic areas of football club operation such as sporting, infrastructure, administration, legal and finance. It is a set of criteria that clubs must meet to receive a licence and be permitted to participate in specific competitions. Chief women's football officer at FIFA, Sarai Bareman, said that "strong and sustainable leagues where players are in a competitive professional environment" was a key area for future development of women's football. This guide complements earlier FIFA guidance to the 211 member associations.

The guide

The guide is intended to be a "comprehensive, yet practical" tool to support member associations with implementing club licensing for women's football on solid, customised foundations to enhance long-term growth and stability, and improve pathways for women and girls. It can be used either to improve an existing system, or to create and introduce a new system. It sets out key steps that a member association or competition organiser should consider, divided into two sections: (1) a 10-step guide for setting up a system; and (2) an eight-step guide for implementing a system.

Part 1: set up the system

For setting up a system, the 10-step guide covers everything from the preliminary steps of establishing a budget and "understanding the reality" of the clubs, to hiring individuals and approving regulations. Each step includes comprehensive guidance as to what a member association is required to do, including an actionable "task list" as well as helpful examples and explanations at each stage.

Part 2: implement the system

The eight-step guide is intended to be used on a per-season basis to ensure the system is properly implemented by member associations. Again, the steps are comprehensive, from implementation budgets all the way to organising and holding development workshops with stakeholders. It covers the roles of each of the individuals who should have been appointed at setup and what their continuing obligations should be in order for the system to work to its full effect. The guide culminates with a "big picture timeline" accompanied by detailed setup and implementation timelines and checklists.

The step-by-step guidance and handy checklists aim to leave member associations in no doubt as to how to properly implement club licensing in women's football. With most sports operating on the basis of majority rule, adopting new rules, regulations and licensing regimes with the majority vote at an AGM or SGM, or sometimes where permitted by standing powers, typically the keenest question to be answered for a new licensing regime, is what lead time would be appropriate? The regime should not be introduced so swiftly that it cannot be met by members. A reasonable timeframe for a regime to be introduced and become mandatory is required.

Developments in Scotland

Raising overall standards and performance pathways is the goal of club licensing, and within the men's game in Scotland there is no doubt that club licensing has successfully improved the game. The arrival of specific guidance for women's football and FIFA's focus on developing the women's game are timely for further significant developments for the game in Scotland, with a majority of the Scottish Women's Premier League clubs voting for elite women's football to become the responsibility of the Scottish Professional Football League from season 2022-23.

Discussing the changes, Scottish FA chief executive Ian Maxwell said that to take elite women's clubs and competitions to the next level, there was a need to "optimise the game's governance and structures". Women's football has grown exponentially in recent years, with UEFA on course to double the number of women and girls participating across Europe by 2024, while significantly increasing sponsorship revenue, television viewing figures and club competition prize money at the elite end. Under the SPFL, clubs will be invited to become members of a new two-tier league competition, as the SPFL seeks to improve the product on offer, increase commercial revenues, and provide better governance and support for participant clubs, which clubs in turn will, it is hoped, further promote the game across Scotland.

Property lawyers unite!

Support is needed from individual firms for the idea of a Scottish Conveyancers Forum dedicated to representing the sector

Property

ROSS MACKAY, PARTNER, COULTERS; CHAIR, SCOTTISH CONVEYANCERS FORUM STEERING COMMITTEE

As you may recall, I chaired a Law Society of Scotland working party some years ago somewhat grandly titled "The Future of Conveyancing". Amongst the discussions, there was a clear view that something had to be done to enhance and develop the overall brand of being a Scottish property lawyer focused on the residential sale/purchase sector.

For various reasons, it was not possible to take that suggestion forward at that time nor later, but I do now believe that we have a rapidly shrinking window in which likeminded firms can come together to set up and instigate a body which would represent us to our clients, the rest of the profession, and to the world in general as a clear and distinct sector of legal work.

One point on which the working party agreed immediately was that there is no inherent right for solicitors in carrying out conveyancing work. Although, since 1980, the preparation of dispositions is a reserved area under the Solicitors (Scotland) Act of that year, it is stating the obvious that the world has been completely transformed since then.

In 1980, the largest firms were probably in the mid-teens in terms of partner numbers and nearly all considered the provision of residential conveyancing as an inherent part of their service range. That is no longer the case, and while residential property work is perhaps of much greater benefit to the classic high street firm than others, it is clearly a sector which for some years now has been strongly challenged to be an efficient and economic venture. This is not the place to debate the whys and wherefores of that change, but simply to recognise the current climate in which we operate (and have done so for some time now).

Danish model

So what to do? I strongly believe that we require to move to something much more akin to the Danish model which colleagues and I looked at several years ago. There they have a clear, distinct Property Lawyers Association which represents them to the community at large and indeed is recognised as being the consumer voice in relation to home ownership issues. That body invests in the national marketing of the association brand, but how our own model is developed in that and other respects is a matter for ourselves of course.

It could be argued that all this is the responsibility of the Law Society of Scotland, but I know as a former convener of the Property Law Committee that the ability of the Society not just to defend specific sectors but to enhance and develop them as to special brands is restricted for a variety of administrative and financial reasons. In brief, if anything is to happen here, it is up to individual firms to try and take matters forward on a collective and hopefully collegiate basis.

Embryonic Forum

It is suggested that what is needed is a gathering of likeminded firms willing to come together to develop a new Scottish Conveyancers Forum, building on (but not replacing) the success and efforts of the current similar bodies in Edinburgh and Glasgow to achieve those aims. It would be hoped that in a short time its branding and marketing can be developed for the benefit of all its members (whoever they may be), along with agreed protocols aimed at making the sale/purchase process more streamlined for the benefit of not just the profession but of course our clients.

I would strongly argue that while we are all in our own way competitors and we all have our own marketing budgets, etc, there is a glaring omission in not having an overarching body which can represent our specific sector.

To that end therefore, a small steering committee has met online and agreed to develop this concept by initially adopting a working version of a proposed constitution to create such a Scottish Conveyancers Forum. What we as a group now require is support from you, and to that end we invite you to contact myself initially to express your interest and possible thoughts as to how the Forum can be taken forward. Once we hear from you we can then circulate further information and work up action points for discussion and circulation.

If nothing else, the committee will be taking over and shortly issuing a new, fifth edition of the Scottish Standard Clauses under its banner – so watch out for that.

I hope you agree with this proposal and will be delighted to hear from you (preferably by email to ross.mackay@coulters.io) in the near future.

Data privacy: recent enforcement highlights

Recent enforcement action by the UK Information Commissioner's Office contains some clear pointers to what it considers necessary for data processing operations to comply with the law

Data Protection

ROSS NICOL, PARTNER, DENTONS UK & MIDDLE EAST LLP

Over the last few months there have been some interesting fines and enforcement notices from the UK Information Commissioner's Office ("ICO"), which provide some helpful insights into potential administrative fines for breaches of data privacy laws. These come at a time when the European Data Protection Board ("EDPB") is seeking to ensure continuity of approach across Europe, which could well prove influential for the approach taken by the ICO moving forwards.

Scottish Government and NHS National Services Scotland

This first noteworthy enforcement is close to home and involves the Scottish Government. The ICO has issued a reprimand to the Scottish Government and NHS National Services Scotland relating to their failure to provide clear information about how personal data (including special category health data) is being used by the NHS Scotland COVID status app. The ICO has a corrective power under article 58(2)(b) of the UK GDPR (the General Data Protection Regulation, as adopted into UK law following Brexit), to issue a reprimand to a controller or a processor when their processing operations have infringed provisions of the UK GDPR.

The ICO reviewed the NHS Scotland app and identified concerns about non-compliance with obligations under the UK GDPR to provide fair processing information. Following further investigation a reprimand was issued due to the following infringements:

- Processing personal data, including special category data, in a manner which was unfair, in breach of article 5(1)(a) (the lawfulness, fairness and transparency principle). This was due to a misleading statement in the app that explicit user consent was relied on as the lawful basis for processing, despite ICO guidance that performance of a public task was the appropriate basis to use.
- Failing to provide clear information about the processing of personal data, in breach of article 12 (the requirement to provide transparent information). The ICO found the app's information was not straightforward or concise enough.

There was also a requirement from the ICO for the app's privacy notice to be redrafted "in order to present the information required by article 13 in a concise, transparent, intelligible and easily accessible form, using clear and plain language, as is required by article 12 of the UK GDPR".

This enforcement serves as a useful reminder: (a) to ensure that privacy notices are clearly drafted and provide appropriate transparency; and (b) that careful consideration should be given to the legal basis for processing and account must be taken of any ICO guidance which would impact this consideration.

Clearview AI

The ICO has fined Clearview AI Inc over £7.5 million for breach of the UK GDPR. Clearview has collected more than 20 billion images of people's faces and data from publicly available information on the internet and social media platforms to create an online database, including data from the UK. Access to this database was made available to third parties and the ICO found that people were not informed that their images were being collected or used for facial recognition by Clearview's customers, including the police.

Clearview provides a service that allows customers, including the police, to upload an image of a person to the company's app, which is then checked for a match against all the images in the database. The app then provides a list of images that have similar characteristics with the photo provided by the customer, with a link to the websites from where those images came from.

The ICO found that Clearview breached UK GDPR, in particular by:

- failing to use the information of people in the UK in a way that is fair and transparent, given that individuals are not made aware or would not reasonably expect their personal data to be used in this way;
- failing to have a lawful reason for collecting people's information; and
- failing to meet the higher data protection standards required for biometric data (classed as "special category data" under UK GDPR).

The ICO has also issued an enforcement notice, ordering the company to stop obtaining and using the personal data of UK residents that is publicly available on the internet, and to delete the data of UK residents from its systems.

This enforcement underscores the importance of ensuring data privacy compliance when handling special category data and in particular facial recognition data.

Marketing calls

ICO has fined five businesses a total of £405,000 for making unsolicited direct marketing calls in breach of the UK Privacy and Electronic Communications Regulations, which apply to marketing communications.

This followed an investigation which revealed these organisations had been making calls to sell insurance products or services for white goods and other large household appliances, such as televisions, washing machines and fridges. The recipients of the calls were registered with the Telephone Preference Service (TPS) and the ICO found that businesses responsible had been deliberately targeting older people by buying marketing data lists from third parties, specifically asking for personal information about people aged 60 plus, with landline numbers.

The Information Commissioner has been clear that the distress and anxiety caused by unlawful predatory marketing calls made to some of the most vulnerable people in the UK is unacceptable

and warned that organisations responsible for such calls can expect tough action from the ICO.

Fines and enforcement notices were issued against the companies for making unlawful marketing calls to people registered with the TPS. Whilst the fines were not at the headline grabbing level of Clearview, in three of the matters the fines were £100,000 or greater, and the notices provide a clear reminder that such marketing activities will not go unchecked and it is important to check whether the marketing target is registered with the TPS.

Tuckers Solicitors LLP

The final enforcement involves a law firm and is a reminder to all firms of the importance of maintaining appropriate data security measures. The ICO imposed a fine of £98,000 on Tuckers for violations of articles 5(1)(f) (the integrity and confidentiality principle) and 32 (the security requirements for processing) of the GDPR. Following a ransomware attack on its archive servers on 24 August 2020, Tuckers submitted a personal data breach notification to the ICO the following day, in which Tuckers outlined that nearly one million individual files were encrypted; of these, 60 court bundles were exfiltrated by the attacker and published on an underground market site. These bundles included a comprehensive set of sensitive personal data, including medical files, witness statements, names, addresses of witnesses and victims, and the alleged crimes of the individuals.

The ICO found that Tuckers failed to put in place appropriate technical and organisational measures to ensure a level of security appropriate to the risk associated with the processing of data for the purpose of their business, resulting in a violation of the principle of integrity and confidentiality under article 5(1)(f) of the GDPR, as well as article 32.

When assessing the adequacy of Tuckers' technical and organisational measures the ICO highlighted:

- a lack of multi-factor authentication – Tuckers allowed access to its networks using only a single username and password;
- inadequate patch management – which means that the system had known critical vulnerabilities, which were not appropriately addressed; and
- a failure to ensure ongoing confidentiality, integrity, and availability of personal data processed.

In light of these findings, the ICO stated that Tuckers had therefore violated the GDPR. In addition, the ICO found that Tuckers failed to ensure appropriate security by encryption of personal data, where it stored archive bundles in unencrypted and plain text format, resulting in a failure to protect against unauthorised and unlawful processing of its personal data.

As a result, given the seriousness of the breaches, the ICO considered it appropriate to issue a penalty of £98,000. Again, while this may not reflect some of the major penalties that have been seen in recent years this is a very clear reminder to all law firms of the importance of taking appropriate steps to ensure the security of personal data handled by the firm.

EDPB guidelines

There remains uncertainty around the magnitude of potential penalty notices under UK GDPR. In Europe the EDPB has issued guidelines for consultation, to assist in providing greater certainty. The guidelines are a step towards harmonising and providing transparency for the methodology used by data protection authorities across Europe to calculate administrative fines imposed for breaches of the EU GDPR. They introduce a five-step calculation methodology which includes an approach for dealing with multiple infringements, a starting point for calculations and guidance towards achieving consistency in taking aggravating or mitigating factors into account. However the supervisory authorities will also be required to ensure that the penalty meets the EU GDPR requirements of effectiveness, dissuasiveness and proportionality (which is also a current requirement under the UK GDPR). The proposed guidelines are under consultation until late June 2022. It remains to be seen what the final guidelines will be and whether these are followed in the UK, but they should provide further helpful insight and clarity.

From Windrush to Waltham Forest

This month's in-house interviewee is a keynote speaker at the forthcoming In-house Annual Conference – a magistrates' court prosecutor from London with a mission to improve inclusivity and diversity in the legal profession and beyond

In house

PAULINE CAMPBELL,
SENIOR LITIGATION LAWYER,
LONDON BOROUGH OF WALTHAM FOREST

You qualified as a lawyer at 41. Can you tell us a bit about your route into the profession – perhaps not a traditional path?

I decided to take the law degree at 33, via the traditional route but due to financial commitment worked a 25-hour week as a housing benefits complaints officer and chose the closest university to my place of work. That was the North London University, now known as the Metropolitan, where I drove back and forth from work for three years. Then I took nine months off to complete the LPC course at Store Street in London. After that I returned to work as a housing benefits officer for two years while searching for that all-elusive training contract, which I finally found in Kent as a legal adviser in the magistrates' court. So for 18 months (as I got six months off due to work experience) I travelled from Tottenham in London to Maidstone, Sevenoaks, Sittingbourne and sometimes Chatham to run the courts. It was a difficult time; although I made a lot of friends, the day I qualified was the day I returned to London.

You were told at 15 that you weren't A-level material. What impact did that have on you?

The impact was loss of confidence and belief in myself, which was already waning as I experienced serious bullying for a number of years in school. To be told you are not good enough takes something away from you, and affects every aspect of your life after that. My dad told me not to believe it, but I never saw anyone that looked like me, and never had a black teacher, so it hurt a lot.

As well as your current role as senior litigation lawyer at London Borough of Waltham Forest, you're also a supervisor at the Windrush Justice Clinic. How did that come about and what does it involve?

I was a supervisor for the Windrush Justice Clinic ("WJC") until May 2021, when I moved on to being the sole legal adviser to the Windrush Reach Project ("WRP") based in Waltham Forest. I was recommended for the WJC by my previous director of law, Gifty Edila, an amazing woman who really gave me confidence as a senior lawyer, while working in Hackney.

WJC required working with third year law students and conducting interviews with victims of the Windrush scandal who wished to claim compensation. The interviews were difficult and an amazing learning experience for third year students, although at times interviews could be quite traumatic as one of the requirements (which I have always disputed) is that the victim explain the impact this has had on them, which I simply cannot understand. It required a lot of experience and understanding, which I hope was useful for the students.

WRP was run by the Waltham Forest, Antigua & Barbados, and Dominica Twinning Association, funded by the Home Office. I provided free legal advice on preparing detailed referrals to organisations representing those wishing to make compensation claims. It was more involved in that I worked with the Association in preparing the forms, considering the GDPR and making a number of presentations on the work we were doing to various organisations, as well as providing updates for newsletters. I obtained this position as I attended a meeting held by the Home Office where the Association had just received funding and they needed a legal adviser on board.

What do you see as the main value in doing pro bono work?

All my work for Windrush is pro bono. For me it's an honour to have the opportunity to give underrepresented members of our society a voice and help them navigate their way through the complexities of the compensation scheme. Also dealing with a system that has failed those it was set up for does leave people scared and feeling alone, and seeing someone like me helps them to take that step into making applications, which I am glad I am a part of, as it's important work.

Dealing with a system that has failed those it was set up for does leave people scared and alone, and seeing someone like me helps them take that step into making applications, which I am glad I am part of

On top of all this, you're a published author. Your book *Rice & Peas and Fish & Chips* is part memoir, part social and historical commentary. What led you to write the book and what reaction have you had?

The book explores race and racism, culture and identity. I wanted to introduce my generation to the white population in a way that was not confrontational, but open and informational from a personal perspective. The response has been phenomenal. People have reached out to me from all over the country, telling me how much they have enjoyed it, and I have had a number of radio interviews. All I can pray is that I can work towards making the book a great success, but it's still early days and I have a long way to go.

You're delivering a keynote speech at the In-house Annual Conference in June, on "Inclusivity: Boldly going where no one has gone before". What can we expect from your session?

Creating awareness, getting my colleagues to understand that although we may be different in appearance, we all strive for the same thing, through telling listeners what they need to hear rather than what they want to hear, not from a place of confrontation but from a place of understanding – which takes us through the last 50 years of the first generation born to West Indian parents.

Why is improving inclusivity and diversity in the legal profession so important?

Because the law is the only thing, we have to protect us against injustice, and therefore it's crucial that we believe it is there for all of us. But with that in mind, and with the Human Rights Act under threat, and judicial review undergoing change and the Nationality & Borders Bill being pushed through, these are scary times.

What was your main driver for working in the public sector?

It was really the only road I could take. I was 41 years old when I qualified and I knew the public sector inside out, so it was a foregone conclusion that I would achieve a lot more and could progress within an organisation I was familiar with. I had to hit the ground running, which was great as I secured a senior position within four years of qualifying.

You call yourself a "prosecutor with a heart". What do you mean by that?

As prosecutors we are known as enforcers, but at the other end of our cases are human beings. We have to find it within ourselves to work with people rather than against them. Of course, this is not always possible and if you break the law there are consequences, but it's not what you do but how you do it that makes the difference in practising law. I regularly go toe to toe with client departments, as of course we do not always agree, but you have to be true to yourself and I believe we all have a mutual respect for each other in our respective roles.

How have attitudes and working practices in the legal profession changed in the law since you started out?

Unfortunately, attitudes within law are still limited, as the number of black judges is still just at 1%. There is also a lot of pushback against taking positive steps to address this from some within the legal profession, who see this as a way in through the back door – which could not be further from the truth.

What advice would you give young people who want to go into law?

Get some work experience in other areas as well as law, as there are so many different routes available now: the law is changing and we as a profession have to change with it. Communication skills are so important, and understanding the world is a diverse place is equally important. A good starting point is what we are doing now: talking, learning about each other, will make us all better lawyers.

Finally, what do you love about your role and what do you love doing when the working day is done?

With everything I am doing, sleep is a mere inconvenience. The day is never done for me. I sum up my life like someone working towards a gold medal – there is no room for complacency or self-doubt. Maybe if *Rice & Peas and Fish & Chips* makes enough sales I can focus on writing for a living, which is my ultimate dream. But in all this, the most rewarding aspect of everything I do is the chance to give people a voice and a chance to be heard.

Sign up for conference!

The In-house Annual Conference 2022 takes place on the mornings of 28 and 29 June. For full details and to register, see the Society's CPD web pages.

Innovation Cup seeks the best risk ideas

The annual search for the best idea in risk management within the Scottish legal profession is underway with the launch of the 2022 Innovation Cup.

Scottish solicitors, paralegals, trainees, cashroom staff and student associate members are invited to submit their ideas for risk management products, tools or strategies. The winning idea will be developed by Lockton and rewarded with a £1,500 cash prize, provided by Master Policy lead insurers RSA.

Previous winners have included an examination of title checklist, a client communications questionnaire, a notice to quit calculator for commercial leases, and a risk management tracker tool.

The competition is run by the Society, in association with insurers RSA and brokers Lockton. For details of how to enter, go to www.lawscot.org.uk/innovationcup2022. The closing date is 22 July 2022.

SYLA elects new committee

Laila Kennedy, a trainee solicitor at Ledingham Chalmers, is the President of the Scottish Young Lawyers' Association for 2022-23, following the association's AGM. Patricia Taylor (DWF) was elected vice president, Amina Amin (Kennedys) as treasurer, and Brianella Scott (Sheku Bayoh Public Inquiry) as secretary.

Non-executive committee members are Kerri Montgomery (DC Thomson), Amanjit Uppal (student at Glasgow Caledonian University), Millie Shand (Balfour + Manson), Katrina Hall (DWF), Giorgio Ventisei (Aberdein Considine), Heather Gibson (BTO) and Sophie Campbell (DWF).

Pay rise for trainees recommended

Recommended salaries for trainee salaries have been raised from 1 June 2022. First year trainees should receive £20,500, up from £19,500, while the second year trainee rate rises from £22,500 to £23,750. The rates had remained frozen for the past two years, in response to the economic impact of COVID-19.

The recommended rate remains discretionary, with employers able to set their own rates of pay provided they do not pay less than the living wage set by the Living Wage Foundation.

New office bearers take over

Murray Etherington and Sheila Webster have taken up office as President and Vice President of the Law Society of Scotland for 2022-23.

A Dundee-based private client partner with Thorntons Law, Etherington has promised to "fly the flag for chamber practice", while identifying the ongoing fight to save legal aid and the Society's critical regulation role as two priorities during his presidency.

He paid tribute to his immediate predecessor Ken Dalling, who he said would continue to be a "strong public voice" on legal aid, "given how knowledgeable and passionate he is on this important topic".

He added: "The Law Society does an excellent job regulating solicitors so the public can have confidence and our profession continues to prosper. I'll be repeating that message loudly and often as the Scottish Government continues to consider the future of legal regulation.

Society accredited as Investors in Diversity

The Law Society of Scotland has been awarded Investors in Diversity accreditation, underlining its record of leading workplace best practice for the Scottish legal profession.

The National Centre for Diversity awarded the accreditation following a year-long process, including an assessment of the Society's commitment to equality, diversity and inclusion. Among other points it confirmed a colleague-friendly working environment that accommodates personal circumstances – with flexible and hybrid working arrangements valued.

Chief executive Diane McGiffen commented: "This accreditation shows our commitment to our people, and to playing a leading role on equality and diversity for the Scottish legal profession. The Law Society sincerely believes in the standards underpinning this award of fairness, respect, equality, diversity, inclusion and engagement. These are values that benefit employers as much as they benefit the people who work for us and society more widely."

The award will be reviewed at the end of next year. The Society also continues to hold an Investors in People Silver accreditation, a Gold Healthy Working Lives award and is a Living Wage Employer.

PUBLIC POLICY HIGHLIGHTS

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

Scottish Mental Health Law Review

The Society responded to the Scottish Mental Health Law Review's consultation, which sought views on proposals for changes to mental health and incapacity legislation. The response highlighted the need for comprehensive reform, designed to meet all needs for support for the exercise of legal capacity and effective enjoyment of all rights "on the same basis as others", in terms of the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD").

It welcomed recommendations for a wideranging scheme of support for the exercise of legal capacity, human rights enablement as a new approach to assessment, and for the principle of an autonomous decision-making test, but called for the abolition of "mental disorder" or similar gateway terminology based on diagnostic criteria, in order to achieve compliance with UNCRPD and a human rights approach. It also called for reforms to protect the rights of carers and children and young people, and highlighted the crucial importance of ensuring accountability within relevant areas of law and practice.

A number of priorities were suggested, including a regime to govern deprivations of liberty and the establishment of a unified tribunal to facilitate a "one door" approach under mental health, adults with incapacity and adult support and protection legislation. Find out more online.

Advance choices and medical decision-making

A Society working group of legal experts, medical practitioners and academics authored a report, with annexed preparatory papers by members of the group, on advance choices, and medical decision-making in intensive care situations.

Advance choices, also known as advance directives, are instructions given, or wishes made, by capable adults concerning issues that may arise in the event of their incapacity. The paper identifies and addresses all the matters which, it suggests, would require to be covered in legislation to meet current deficiencies in Scots law.

Medical decision-making in intensive care situations includes decisions about refusing or withdrawing life-sustaining treatment, a matter that may be covered by advance choices. The paper calls for urgent reform to provide the clarity and certainty at present lacking in Scots law, offering a basic formulation of the doctor-patient relationship, and resulting obligations, responsibilities and potential liabilities in any situation where medical decision-making cannot proceed in accordance with the informed consent of the patient. Find out more online, and on p 14 of this issue.

Proposed Fly-tipping (Scotland) Bill

The Society's Environmental Law and Criminal Law committees responded to a consultation from Murdo Fraser MSP on a proposed Fly-tipping (Scotland) Bill.

The response highlighted the need for a multi-faceted approach to fly-tipping, including consideration of matters such as societal attitudes towards litter and fly-tipping, the challenges of disposing of waste particularly on a smaller scale from domestic use and business, and challenges with enforcement, including resourcing. Improved data collection, co-ordination and reporting would assist in understanding the nature and extent of the problem, and targeting actions and resources appropriately.

Regarding proposed duties on those generating waste, including householders, it was noted that careful consideration would be needed to ensure no unintended consequences. Certain duties of care in relation to waste already exist in the Environmental Protection Act 1990.

Concerns were highlighted regarding a proposal to review the requirement for corroboration in relation to fly-tipping, the response suggesting that the challenges around reporting and prosecution should be investigated before systemic change is considered.

Birthday honour for O'Donnell

Annemarie O'Donnell, chief executive of Glasgow City Council, has been awarded an OBE (Officer of the Order of the British Empire) in the Queen's Birthday Honours List, for services to local government.

Joining the city's legal team as a solicitor in 1991, she became chief solicitor on the formation of the City Council in 1996, and was promoted to further managerial posts before becoming chief executive in December 2014. She also chaired the COP26 Programme Board.

ACCREDITED SPECIALISTS

Agricultural law
ELLEN CATHERINE EUNSON, Blackadders LLP (accredited 24 May 2022).

Child law
VICTORIA ANNABEL HELEN VARTY, Drummond Miller LLP (accredited 6 May 2022).

Construction law
Re-accredited: MADELEINE CLARE YOUNG, CMS Cameron McKenna Nabarro Olswang LLP (accredited 31 May 2017).

Discrimination law
ANDREW ROBERT GIBSON, Morton Fraser LLP (accredited 19 May 2022).

Family law
Re-accredited: CATHERINE MARGARET KARLIN, Horchheim Ltd (accredited 8 May 2002).

Family mediation
ROSEMARY ANNE SCOTT, Thorntons Law LLP (accredited 23 May 2022).

Freedom of information and data protection law
Re-accredited: ALLISON ELIZABETH BLACK, Renfrewshire Council (accredited 15 May 2017).

Insolvency law
Re-accredited: GILLIAN ANNE CARTY, Shepherd and Wedderburn LLP (accredited 24 May 2001).

Intellectual property law
KIRSTY STEWART, Thorntons Law LLP (accredited 27 May 2022).

Medical negligence
Re-accredited: RUTH SARAH ANNE KELLIHER, Digby Brown LLP (accredited 24 May 2017).

Public procurement law
JAMES STEPHEN DUNNE, Brodies LLP (accredited 29 April 2022).

Over 600 solicitors are accredited as specialists across 33 diverse legal areas. Find out more about accreditation at www.lawscot.org.uk/specialisms. To contact the team email specialistaccreditation@lawscot.org.uk

ACCREDITED PARALEGALS

Civil litigation – reparation law
KRISTY KENNEDY, Digby Brown.

Company secretarial
ASHLEIGH COULTER, Whyte & Mackay Ltd; LAURA GAIRDNER, Burness Paull LLP.

Residential conveyancing
SHARON HEDDLE, Lows Orkney Ltd; KATRYNA LONGMUIR, Watersrule Ltd; NICOLA SMITH, Paris Steele.

Wills and executries
CHARMAINE LOVE, McKean Gardner Ltd.

Next PC fee set at £585

Solicitors will pay £585 for their practising certificate fee in 2022-23, the Law Society of Scotland's AGM has confirmed.

The online meeting on 26 May supported Council's proposal to set the fee at a rate £10 higher than pre-pandemic – 8% lower in real terms, the Society said – as the special discounts applied as part of the support package during COVID-19 come to an end.

Outgoing President Ken Dalling said: "We temporarily cut the PC fee by 20% in 2020-21 to support solicitors when they needed it most, at a point when we had no way of knowing what the full impact of the pandemic would be. Our members' approval of the increased PC fee demonstrates recognition that, as we start to move on from the pandemic, we must ensure the Law Society's finances are secure."

He added that careful budget management meant the Society had been able to limit the fee increase.

In his AGM address the President recognised the efforts of members in another year that continued to be dominated by COVID. "Solicitors once again went above and beyond, working longer and harder to provide essential advice and expertise to those most in need and to ensure that civic life, private life, politics, government and the courts continued to function", he said.

"And it is a tribute to your commitment that public satisfaction remained impressively high, with the number of those satisfied with the service they received from their solicitor increasing slightly to 93%, according to our own survey at the end of last year. That is a huge vote of confidence in the profession and something I think we can – and should – all be proud of."

What had been key to coming through the pandemic was the active role that solicitors, and indeed the Society, had played in finding solutions to problems. Using cinemas as remote jury centres had emanated from discussions at the Society; and his own sheriff principal, in evaluating the virtual custody pilot, had made a particular point of commending those solicitors who had facilitated its operation despite resourcing issues.

"There is no getting away from it, it is *people* who make the difference", Dalling continued.

As for the Society, it had had a busy year working on regulation reform and complaint handling – and protecting legal aid and access to justice had remained key priorities throughout, with a £20 million support package secured from the Scottish Government.

"However, the current crisis in legal aid cannot be overstated. It has been a generation in the making and the Society will continue to press the Government to invest properly in legal aid to ensure the most vulnerable in our society receive the advice and services they need, and solicitors are fairly paid for the work they do."

Chief executive Diane McGiffen said she had spent much of the time since joining the Society listening – within the Society and across the legal sector; to stakeholders in the wider justice sector; to those in other jurisdictions, and to the wider business community. Throughout, she had been "tremendously struck by the support from within and the pride when looking from afar for our Scottish legal profession".

Looking ahead, what she was most excited about was the development of the Society's next five year strategy, which will launch in October.

The Society had been working tirelessly with colleagues, members and Council; and their insights and expertise had helped it "navigate some of the biggest issues we have ever faced, both as an organisation and as a civil society".

"So it is with pride, a sense of optimism and a promise of unwavering dedication that I take the Law Society of Scotland forward."

Treasurer Graham Watson reported an after-tax profit of £583,000 for the 2020-21 practising year, from income of £10.6 million, boosted by an unrealised gain of £618,000 on the value of the Society's investment portfolio. Expenditure, excluding pension scheme adjustments, had been cut by 5.3% to £10.5 million. Overall performance against the budgeted operating loss of £1,500,000 for the year was positive.

Review of AML policies, controls and procedures

Adopting a risk-based approach to anti-money laundering (AML) supervision allows the Society to focus attention on the highest AML risks for the profession, where its efforts will have the most impact, and ensure disruption is minimised where the risk is low.

The Society is therefore keen to undertake further oversight regarding the standard of AML policies, controls and procedures (PCPs) across the legal sector, and will shortly launch a sample-based thematic review of PCPs across a number of firms.

AML risk managers, Jenni Rodgers and Dale Trahms are leading the review, which will allow the Society to gauge and further its understanding of compliance with the Money Laundering Regulations and Legal Sector Affinity guidance, with a view to identifying areas for improvement.

Following the review, high level findings will be published, on an anonymous basis, alongside new practical guidance to support solicitors.

Firms selected to take part will be contacted during June. Their cooperation and participation will help minimise the AML risks to themselves, their business and their clients, while also benefitting the profession as a whole.

Society hosts inaugural lunch for Fellows

The Society was proud to host a lunch celebrating its retired solicitor community. Ken Dalling, then President of the Society, and Diane McGiffen, chief executive, were delighted to be joined by 16 Fellows (retired solicitors with at least 25 years' practice experience) on 5 May for a meal at The George Hotel, Edinburgh.

The Fellow membership category was launched in autumn 2019, with a view to creating an alumni network of solicitors who are keen to stay involved in the legal profession. Although the Fellows have previously come together in online forums, this event represented the first opportunity for meeting in-person.

More information on the Fellow membership category, including a list of current Fellows, can be found on the Society's website.

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Mark Zuckerberg, Facebook

Graeme McKinstry

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Time is of the essence...

On behalf of Lockton, Andrew McConnell and Victoria Rae consider recent changes to the time bar regime that were made by the Prescription (Scotland) Act 2018

1 June 2022 was Global Running Day but, despite the apt title of this article, we are not talking about running times. Instead, we mean the more exciting (depending on who you are talking to) topic of prescription, as 1 June 2022 was also the day that the Prescription (Scotland) Act 2018 came into force.

The Act makes major changes to the way some prescriptive periods will be calculated, so solicitors acting in this area should familiarise themselves with the new rules and assess whether they will affect any current litigation.

Overview of the prior law

In Scots law prescription is governed by the Prescription and Limitation (Scotland) Act 1973. By s 6 an obligation to make reparation is extinguished where it has subsisted for a continuous period of five years after the appropriate date without (a) any claim having been made in relation to the obligation, and (b) the subsistence of the obligation having been relevantly acknowledged. The contentious issue is nearly always the appropriate date.

What is the appropriate date?

Until now, s 11(1) of the 1973 Act has provided that an obligation to pay damages arising from a breach of contract or duty "shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred".

When the loss, injury or damage occurred is the critical question. It centres on s 11(3), which states: "In relation to a case where on the date referred to in subsection (1) above... the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."

In *David T Morrison & Co v ICL Plastics* [2014] UKSC 48, Morrison raised an action against ICL for damage caused to its premises by an explosion at ICL's factory. The explosion occurred on 11 May 2004. It was not until later – following expert input – that it became apparent that the damage was caused by ICL's negligence. Court proceedings were issued in August 2009.

ICL submitted the case had prescribed. In response, Morrison argued that s 11(3) postponed the running of prescription until it became aware that the damage was so caused. The Supreme Court rejected this argument and held that awareness of loss is all that is needed to start the prescriptive period, i.e. there is no requirement for the party suffering that loss to be aware of its cause (in this case, the negligence of ICL).

Following *Morrison*, *Gordon's Trustees v Campbell Riddell Breeze Paterson* [2017] UKSC 75 set out further confirmation on the effect of s 11(3):

1. it does not postpone the start of the prescriptive period until such time as a pursuer is actually or constructively aware that he has suffered detriment in the sense that "something has gone awry" or "made him poorer or disadvantaged";

2. "loss, injury or damage" means "physical damage or financial loss as an objective fact"; and

3. knowledge of the incurring of expenditure could amount to awareness of loss for the purpose of s 11(3) if the expenditure ultimately turned out to be wasted.

The most recent notable case looking at s 11(3) is *WPH Developments Ltd v Young & Gault LLP* [2021] CSIH 39, in which our firm acted on behalf of the successful defenders/appellants ("Y&G").

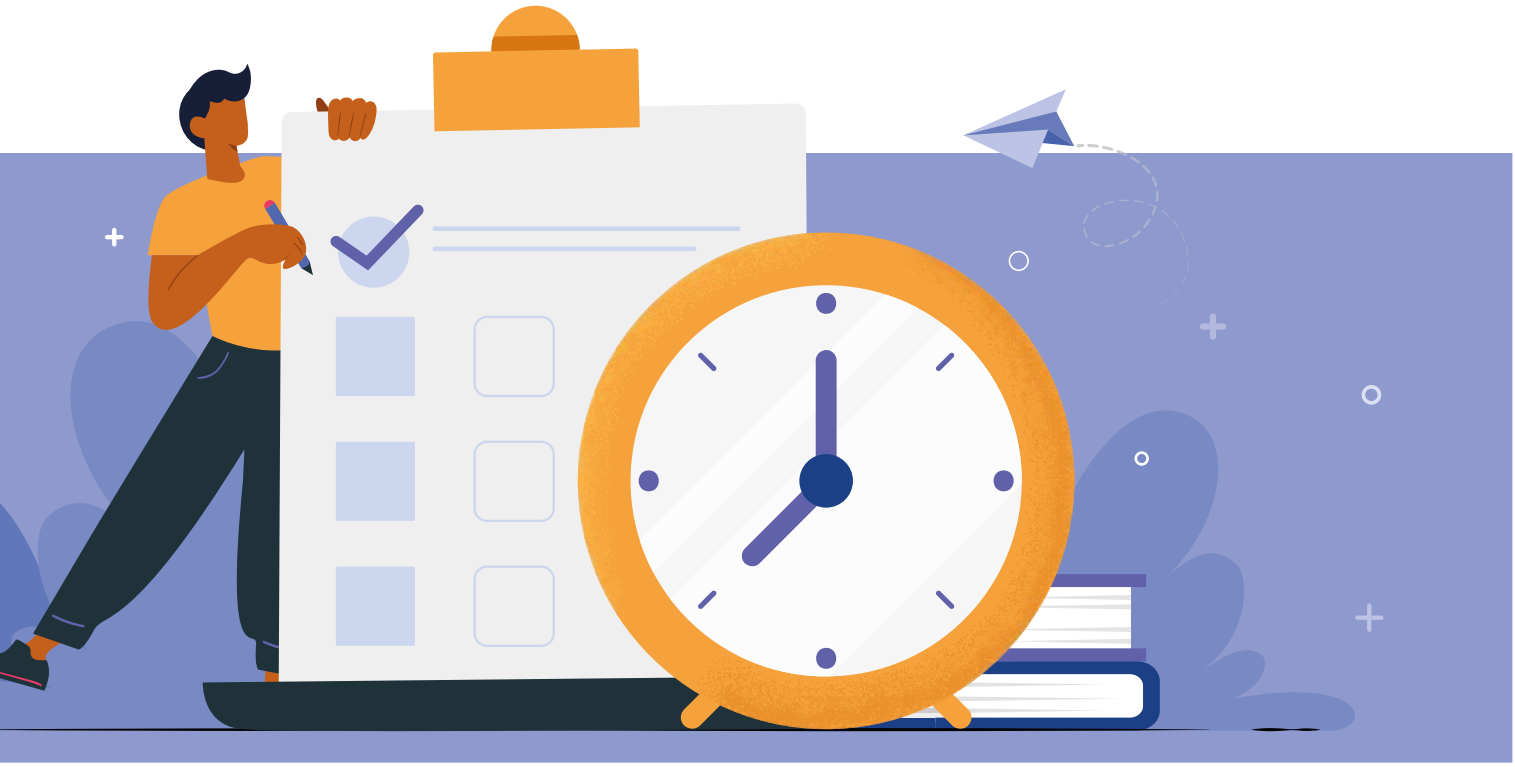
In October 2012, WPH, who were residential property developers, instructed Y&G to provide architectural services in respect of a development site, including the plotting of the precise location of its boundaries. In 2013, Y&G provided WPH with construction drawings which allegedly identified the boundaries incorrectly. WPH, having developed the plot on the basis of the drawings, brought an action for damages against Y&G on 21 November 2018. Y&G argued that WPH's claim had prescribed by virtue of s 6 of the 1973 Act.

At debate at Glasgow Sheriff Court, Y&G argued that the loss allegedly suffered occurred more than five years before the raising of the proceedings, when WPH began to develop the plot and thus incurred wasted expenditure. Sheriff Reid held that WPH's claim had not prescribed, as WPH could not have been aware of the occurrence of that loss until around 20 February 2014 when the neighbouring landowner brought the boundary issues to their attention.

On appeal, Y&G successfully argued that Sheriff Reid had erred in understanding the approach to s 11(3). Had he applied s 11(3) in the manner described by the Supreme Court in *Gordon's Trustees*, he would have been bound to hold that WPH's arguments were irrelevant and the claim had prescribed. The appeal was allowed and Y&G were granted absolvitor, bringing the case back into line with *Gordon's Trustees*.

The 2018 Act

The Prescription (Scotland) Act 2018 received Royal Assent on 18 December 2018. It makes certain amendments to the 1973 Act. For the



purposes of this article, we will be focusing on the following changes which came into force on 1 June 2022:

- the new s 11(3A) – the knowledge test;
- the new s 13 – standstill agreements.

All of the other provisions of the Act will come into force from 28 February 2025.

The 2018 Act will make a number of changes to the rules of negative prescription, addressing certain issues which have caused or may cause difficulty in practice. It is clear that there has been a significant shift in the law following the Supreme Court judgments discussed above and the 2018 Act seeks to remedy this, but it remains to be seen to what extent this will be achieved. It appears a rebalancing is to be introduced together with a number of other steps.

Section 11(3A): the knowledge test

The amended s 11(3) of the 1973 Act reads: "In relation to a case where on the date referred to in subsection (1) above… the creditor was not aware, and could not with reasonable diligence have been aware, of each of the facts mentioned in subsection (3A), the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."

It is followed by two new subsections:

"(3A) The facts referred to in subsection (3) are –

(a) that loss, injury or damage has occurred,

(b) that the loss, injury or damage was caused by a person's act or omission, and

(c) the identity of that person.

"(3B) It does not matter for the purposes of subsections (3) and (3A) whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law."

The most obvious change from the 1973 Act is that individuals must now be able to identify the person that caused the loss. This is a significant shift from the previous test and will undoubtedly lead to a later date for the start of the five-year period.

It will be interesting to see how the new test plays out in litigation in years to come. When we apply the new knowledge test to the case of *ICL Plastics*, it is likely that the case would not have been held to have prescribed. However, if we apply the same test to *WPH Developments*, then, in our view, the claim would still have prescribed given that the pursuer (the developer) was fully aware that the defender (architect) had plotted the boundaries.

The date of 1 June 2022 is very important. In general terms, if a claim prescribes on or before 31 May 2022 due to the previous knowledge test under s 11(3), the change makes no difference. The right to pursue a claim is lost. However, if a claim was due to time-bar on or after 1 June 2022, it will benefit from the new provision under the 2018 Act. This is a significant point for solicitors to note, given that in relation to those particular cases the five-year period will be extended, and solicitors would be well advised to check whether any of their current cases might be affected.

Section 13: standstill agreements

Unlike our peers south of the border, standstill agreements have not been allowed in Scotland, due to s 13 of the 1973 Act. That has all changed, given that from 1 June 2022, standstill agreements will be enforceable under the 2018 Act. These agreements, however, can only be entered into:

(a) after the prescriptive period has commenced and before it expires;

(b) for a maximum of one year;

(c) once for the same obligation.

The introduction of standstill agreements will be welcomed by many, as they allow parties to negotiate an end to their dispute without the need for litigation. Defenders, however, will need to take careful consideration and appropriate legal advice before entering into any standstill agreement, given the effect it will have on any potential prescription defence.

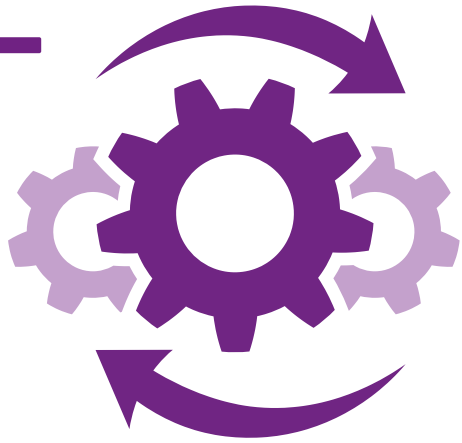
Further thoughts

It remains to be seen how the 2018 Act will play out in practice and we will need to keep a close eye on litigation that follows. It will be interesting to see how the court approaches the new knowledge test, as we are sure defenders will seek to challenge steps taken by pursuers before confirming they have full knowledge of the facts referred to in s 11(3A) of the amended 1973 Act. The case law for many years has certainly benefited defenders advancing a prescription defence, but the 2018 Act is rebalancing the odds with prescription in favour of pursuers. It is clear that each part of the knowledge test is likely to be the subject of litigation for many years to come.

Andrew McConnell is a director, and **Victoria Rae** a solicitor, with DWF

TECHNOLOGY

Stalled IT projects – and how to avoid them



Simon Massey's tips on avoiding the pitfalls that often frustrate attempts to introduce legal document automation

Deployed effectively, the fast-growing legal technology toolkits offer a great opportunity for Scottish lawyers to boost efficiency and profitability, address significant resourcing challenges and compete in the wider UK market.

In particular, document automation continues to offer superb opportunities to generate drafting time savings (and improve recovery rates against fixed fees), increase competitiveness, build client value, free up lawyer resource, strengthen business resilience and reduce execution risk.

Yet document automation remains a widely untapped efficiency resource for lawyers. Why is this, and what can we do about it? This article suggests why automation projects often stall, and some top tips on addressing common pitfalls and executing an effective implementation strategy.

Why do projects often stall?

Drafting will always remain at the heart of lawyers' service offerings, so building efficiency into this core process will drive substantial commercial value.

But there are some common pitfalls around introducing automation. These include:

- a lack of combined, experienced legal/technical resource to commit to building lawyer-friendly products;
- an implementation strategy which fails to address key resourcing and automation-specific roadblocks;
- the wrong delivery team structure;
- lack of lawyer awareness, trust and buy-in;
- perfection paralysis and a failure to identify, prioritise and roll out the most valuable automation first;
- failure to quantify the benefits and strengthen management support.

While the rewards are clear, optimal automation takes time, skill and focus: a methodical, planned approach based on prior experience is essential.

Lawyers, however, have multiple fee earning and management priorities, and technical experts face ever-growing demands to support other infrastructure and efficiency projects.

Top tips for implementation strategy

So here are some top tips for kickstarting, accelerating and optimising your implementation strategy:

- ***Identify a core delivery team*** to "own" the rollout and deploy proactive and dedicated project management that targets agreed milestones, fosters cross-business collaboration and is backed by management.
- ***Set an overall strategic direction and identify priority documents*** to be automated within agreed timescales: often it's best to focus first on a few strong use cases within one or two departments.
- ***Never automate for automation's sake***. Always understand how automation can drive the most efficiencies through structural and information coding. Think about whether an end user will really know the answer to an automated question at the time they are generating the document (and have enough commercial context to do so safely).
- ***Find the right resourcing model for your rollout***. It's crucial to understand that automation is not just an IT solution: combined and experienced legal, drafting and automation knowhow, working within a properly managed process, is essential to deliver effective and timely automation. Factor project delivery time into your business planning.
- ***Find and maintain the right balance*** between external and internal resource, and adjust as necessary as your programme progresses. Automation can be time consuming, requiring extensive collaboration and dedicated legal/automation knowhow across the business. Firms/legal departments often lack time and resource internally to drive automation projects and ringfence clear roles, responsibilities and fee earner time – so consider a balance of internal resource and external support to help you:
  - get up and running quickly, perhaps using external expertise to optimise your processes, progress projects faster, minimise fee earner input time, upskill internal resource/knowhow and maximise return; and
  - manage future spikes in demand for automation, both internally and increasingly from clients: even firms with established automation teams are looking for flexible external assistance to manage demand.
- ***For each specific project, use a clearly defined, rigorous and methodical process*** that navigates common obstacles to automation. Projects can involve significant complexity, so it's really important to prepare your content and agree your scope carefully before the actual automation, testing and rollout phases. You will need to bring legal and automation experience together for most of these stages, so try to identify, optimise and implement a clear methodology each time.
- ***Focus on the most valuable automation within documents first***. Projects often get stuck because teams are looking for the perfect automation of a document from the outset; in fact it can be better to identify an initial round of big wins and roll these out to the team. This will enable a quicker investment return and encourage faster adoption within the business.
- ***Build support for automation within practice groups***, so lawyers buy in to each project more quickly, understand the benefits and take full advantage to drive investment return. Develop an effective change management programme and identify automation champions within teams.
- ***Implement procedures for measuring and reporting return on investment***. With proper systems in place, the substantial benefits can become more tangible and quantifiable (failing which, automation projects will lose support).

In summary

Bear in mind that even after netting off the initial implementation and software licence costs, just a modest amount of effective automation is likely to generate attractive returns within short timescales. These would scale even further over time, and when further documents are automated.

Building and executing the right implementation strategy will allow you to reap the substantial rewards offered by document automation – so focus on actual implementation and avoid the common pitfalls.

Simon Massey is founder and CEO of BrightDraft, a document automation consultancy based in Scotland and run for lawyers, by lawyers www.brightdraft.co.uk

Clio®

Why switch to cloud-based legal practice management software?

The pandemic profoundly impacted the way law firms work. Face-to-face client meetings were replaced by video calls, office chats happened on messaging services instead of at the watercooler, and work took place at the kitchen table rather than the boardroom. What's the common thread in all these scenarios? Cloud-based software.

Cloud-based software can be a huge benefit to law firms of all sizes. Yet, some firms are still hesitant about moving away from a managed IT solution or switching from a server to a cloud-based solution.

If you're thinking about switching to a cloud-based solution but uncertain if it's the right choice for your firm, here are some benefits to keep in mind.

Flexibility

Switching to a cloud-based system over a managed service can help law firm staff to work more efficiently and with a greater work-life balance.

Working at a firm that uses on-premise servers often means staff can only work from one physical location. However, with cloud-based practice management software, staff can securely access systems through a secure web browser or a dedicated app, as nothing is stored on local computers or hard drives. That means everyone at your firm can access what they need from any laptop or phone wherever they are: at the office, at home, when commuting, or at court.

Security

Security is paramount for cloud-based legal software providers, meaning systems are constantly being monitored for potential vulnerabilities, while code is reviewed and updated accordingly to ensure that software is always up to date. Advanced security features ensure that suspicious activity is consistently monitored. For example, Clio logs every IP address and relies on multi-factor authentication to help keep its systems safe.

Costs and convenience

The overall cost of on-premise technology adds up – the servers themselves, office floor space, electricity, IT support, and maintenance. Conversely, cloud-based software doesn't require any of the costs associated with having a physical server. Additionally, as on-premise servers are in a physical location, uptime can be inconsistent and at risk of damage by flooding, power outages, and fire: costly if needed to be fixed in an emergency.

Finally, with cloud-based practice management software for law firms, varying levels of support are usually available free or at an additional cost. With Clio, we offer 24/5, award-winning support to all our customers via live phone, in-app chat or email at no additional cost.

For over a decade, Clio has been the global leader in fully cloud-based legal software. To see how Clio's cloud-based solutions can work for your firm, schedule a free demonstration at clio.com/uk/lawscot-cloud

Sniff the air

Stop and smell the roses, and the manure too: Stephen Vallance's advice for those grappling with the cycle of business

One of my favourite films is *Being There*, featuring the late Peter Sellers as Chauncey Gardner, a man with seemingly simplistic views that prove prophetic as the story unfolds. In some ways he reminds me of my father, an old "lion" who no longer roars at the dinner table, but when he speaks, now appears to have greater wisdom in his words. As we parted recently, he reminded me to "smell the roses and the manure too". I've pondered that a lot recently.

It doesn't seem that long since most of my conversations with legal firms revolved around recession, lack of business and financial woes. Perhaps that's one of the drawbacks of my approaching "a certain age". It is though almost 15 years since the banking crisis, and around 10 since the recovery started.

People in all walks of life tend to focus on what is immediately ahead, and conversations within the profession have for some time centred round extremely high work levels and the challenges of attracting and retaining staff. Our issues are generally around the boom which many firms have been encountering, and some of our younger colleagues have little recollection of the most recent of our recurring recessions. But history has taught us that nothing lasts forever, and it needs little commercial astuteness to see that more challenging times may be on the horizon.

Take a step back

A cycling trainer of mine used to say: "It is wise to look ahead on the road, but it's foolish to try and see over the brow of the hill." An understanding of what might lie in the near future, and a plan for once we see what does, seems to me a basic requirement for those of us both running businesses and advising others who do. There are currently real pressures due to volume of work that require to be addressed. Some may have no short term fix, but perhaps we should not act as if this market will continue indefinitely. As with so many purchases over lockdown, what costs and acquisitions might we look back on in a year or two and regret?

Some of us can forget what a blessing such busy times are. They bring the income to fund retirement or invest in our business. Higher income levels evidence that we are again making a healthy return for our efforts and entrepreneurial risks. While many are suffering under pressure of work, perhaps we need a moment to appreciate that this is what many of us wished for in 2009: the manure that goes with the roses, perhaps. Quieter times will no doubt return, bringing their own opportunities and challenges: opportunities to investigate new markets for our services, increase our skills, or simply take life a little easier to prepare for the next upturn. All easy to say, but what then to do?

You might recollect that I have made reference to the philosophy of stoicism before. In simple terms, I see it as an unemotional acceptance of the changing nature of the world: things happen; it's not personal. The above is a case in point. Hopefully, then, we can take a moment to appreciate all that the recent market has brought. It has come not without multiple difficulties, but these difficulties have in themselves been a gift, assisting us and our practices to develop better and faster ways of dealing with our clients and their many challenges. Likewise, quieter times before (I don't like the R word) have assisted us in developing lean and efficient firms, and lockdown, for all its challenges, catapulted the profession 10 years forward in its use of IT. Everything comes with its own measure of the good and the challenging; you can't really have one without the other: no roses without manure.

Before concluding, I would like simply to acknowledge how challenging circumstances remain for so many of our colleagues in the legal aid field. For them, I hope, all that I say is true but in converse: their winter has been summer for others and hopefully better times will be on the horizon.

Changing seasons

So what would Chauncey make of today's world and the challenges in the distance? As one character commented in the film, "I think what our insightful young friend is saying is that we welcome the inevitable seasons of nature, but we're upset by the seasons of our economy." I think that is very much in point where we are now. If things are busy, enjoy them the best we can; when things become quieter, take time and recover. Prune where necessary, but not so much as to damage the plant.

More importantly though for the profession we all operate within, "As long as the roots are not severed, all is well. And all will be well in the garden." To me that is about remaining true to our professional values. Things are changing; they always are, but the values of professionalism and client service that we have provided to our communities have and always will serve us well whatever season we might be in.

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

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AML supervision: a new tipping point?

An all-party group is seeking stronger deterrent action against money laundering wrongdoers. But any change of approach should recognise the needs of those attempting to stay compliant

In case you missed it, the last five years have seen a steady increase in the attention paid by Government and supervisors to so-called "professional enablers" – generally, those services which are not banks but which can play a significant role in money laundering. A recent all-party parliamentary group has published a manifesto with its view and recommendations regarding "professional enablers".

It's possible that that publication marks another tipping point for AML compliance in the legal sector, and we should cross our fingers that any response put in place at national and supervisory level is clever and proportionate, rather than led by a desire to be seen to be doing something.

In its manifesto, the group asserts that not many breaches of the regulations result in fines, and that a credible deterrent means "professional body supervisors... must issue bigger, more public civil fines for wrongdoers".

No issue with this in principle; I don't doubt that there will be firms around the UK which would be apt for a fine. Rather, it is the fertile ground for kneejerk or showy responses that is the problem.

The Law Society of Scotland, quite commendably, notes in its AML risk appetite statement that its work and powers will be used to encourage "positive outcomes and remediation" in less serious cases, focusing on high level principles rather than prescriptive rules. But we live in a world where annual reports from professional body supervisors, HMRC, Treasury etc are no doubt seen as a chance to showcase how much is being done. It's not unthinkable that this downward pressure from Government runs the risk of ending in negative and unhelpful outcomes across the UK. Considering that the money laundering regulations are not always particularly easy to opine on and follow, care would need to be taken about the extremity of (and even necessity for!) any penalties.

By the time I left my role as an AML manager in a professional body supervisor, I had begun to consider whether there were probably two particularly serious ends to the spectrum of AML non-compliance at law firms. At one end, there are firms unaware of or uninterested in their duties to a degree which is clearly beyond the pale; at the other end, firms who are perfectly aware of when they might be hitting a crystallised high-risk factor but systemically go ahead anyway (Googling terms together like "lawyer" and "oligarch" will give you an idea).

These are the firms which it is really in the supervisory and public interest to pursue. I suspect, though, that there is a sizeable squeezed middle ground in this spectrum, made up of many firms doing what they think is right and expending energy, knowledge and resource on complying, only to risk still finding themselves on the end of a fine or censure aimed at building an arbitrary but aesthetically pleasing statistic.

Let's also not forget that there is an argument that the fundamental approach to stopping money laundering (or at least measuring our success at doing so) is flawed from the outset. The interested reader can see Dr Ron Pol's article, "Anti-money laundering: The world's least effective policy experiment?" (DOI: 10.1080/25741292.2020.1725366), though the title alone perhaps gives an idea of the content. In that article, he wonders: "If authorities recover around $3 billion per annum from criminals, whilst imposing compliance costs of $300 billion and penalizing businesses another $8 billion a year, it is reasonable to ask if the real target of anti-money laundering laws is legitimate enterprises rather than criminal enterprises."

The point is that the entire framework which we are all (firms and supervisors alike) trying to work within is actually built rather oddly, and we should therefore take a huge amount of care around how the buck is passed down from global structural ineffectiveness, filtered through the prism of Government pressure, and risks landing on those professionals making good efforts to run a business which is prohibitive to bad actors.

None of this is to argue against the general sentiments of the all-party manifesto, nor the good work and intentions of supervisors. If regulators and professional body supervisors are about to start doing something more or different, this new tipping point represents a chance to set their stall out with a boldness around truly problematic firms, while undertaking to be sensible and pragmatic with everyone else, rather than being dragged along with (or perpetuating) the current.

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

ASK ASH

New boss, old favourites

My new manager just wants to work with her own people

Dear Ash,

I have been somewhat disillusioned by work ever since a new line manager has been appointed. She seems to have brought some loyal colleagues with her and is at times just ignoring the rest of us in the team.

I have tried to highlight the cases I'm working on, but she either seems disinterested or insists that one of her favourites has input. I'm used to working autonomously and don't understand why she seems to be overlooking my input, and the lack of recognition is impacting upon my confidence levels and general wellbeing.

Ash replies:

It is human nature to try to surround yourself with likeminded or supportive people; and it would seem that your new manager has formed an effective cocoon around herself. This has probably worked well for her in the past and she is probably reluctant to allow others to encroach into her confined circle.

However, it is important for you to be able to build trust with her in order to be accepted into her circle. I suggest you arrange a one-to-one meeting to allow you to set out what you are working on and how you would welcome her input too.

It's also important that you have some defined parameters about your role in the team, and your reporting lines for transparency. Take this as a starting point and give yourself a few months to try to build a working relationship with your manager.

Look to re-evaluate the position in about six months' time and see how you feel then; but try to remain positive in the meantime. Remember everything is relatively new for your manager too and she'll need a period of time to settle in properly.

Give it some more time, but try not to take things personally, as it's not just you that seems to be out of the immediate circle for now. Hopefully in time your manager will take down some of the wall she has built around her.

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).

FROM THE ARCHIVES

50 years ago

From "Value-Added Tax", June 1972: "The Value-Added Tax, which will become operative on 1st April 1973, is a general sales tax of a type not previously applied in the United Kingdom. Value-Added Tax... will be assessed on the retail value of a wide range of goods and services, many of which were not previously subject to any form of sales tax... The second distinctive feature of V.A.T. is the method of collection. V.A.T. will be collected, by instalments, from all the persons involved in the production and distribution processes."

25 years ago

From "The Internet and its Future Role in Selling Property", June 1997: "Mostly at the moment the Internet is good for marketing, but I do not doubt that in due course it will come to be one of the major instruments of property sales. SPCs are great but they do not open twenty-four hours a day. It is not easy to access them from Sheffield, and you cannot search a database via an SPC journal. Already in California you can access the Internet via television. For now its use is limited, but I suspect that in future it will dominate."

Classifieds

Simon David Gough (Deceased)
Would any firm holding a Will or having knowledge of a Will for the late Mr Gough, who resided sometime at 20 Burnbank Meadows, Kinross, KY13 8GE; 3 Latch Burn Wynd, Dunning, Perth, PH2 0SP; and Blueton Cottage, Clathy, Crieff, PA7 3PH, please contact PRP Legal Limited, 227 Sauchiehall Street, Glasgow, G2 3EX. Tel: 0141 331 1050 or email ruth@prp-legal.co.uk.

Baker Gostelow Law Ltd, 36 Cadzow Street, Hamilton act for the Executor of the late John Robert Johnston. We have been unable to locate the late Mr Johnston's original Will which was signed on the 26th day of April, 1991. At the time his Will was drawn up his address was 45 Juniper Avenue, Greenhills, East Kilbride. Please contact us on info@bgfamilylaw.co.uk or 01698 307170

Claudia Renate Eder (Otherwise Renee Eder) (Deceased)
Would anyone holding or knowing of a Will for the above, latterly of Kinfauns Castle, Perth, PH2 7JZ, please contact Adam Hoggan, Gillespie Macandrew, Broxden House, Lamberkine Drive, Broxden, Perth, PH1 1RA (01738 231 004 or adam.hoggan@gillespiemacandrew.co.uk)

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The role will involve running a mixed caseload of civil and commercial litigated and non-litigated cases. The ideal candidate will be NQ or up to 4 years' PQE level. You should have experience of dealing with civil and commercial litigated and non-litigated cases. Experience in dealing with property disputes, property damage, contractual disputes and landlord and tenant disputes is essential. (Assignment 13675)

Dispute Resolution & Litigation Solicitor — Edinburgh

This well-established law firm is currently recruiting a Solicitor to join its Litigation Team. This specialist team offer a diverse range of services to a wide range of clients. You will be involved in a range of work including advising on property and commercial disputes, as well as some general civil litigation involving a variety of personal disputes.

The firm is keen to hear from candidates at the NQ – 6 years' PQE level and have property litigation experience, or a keen interest in pursuing their career in this area.
(Assignment 13126)

In-house Litigation Solicitor — Ayrshire

You will be involved in a range of interesting work and some of your duties will include:

- Pro-actively managing defended or complex cases in order to resolve disputes, mitigate costs and protect the reputation of the company
- Reviewing cases and suggesting and implementing strategies to increase revenue
- Ensuring that all internal and external processing volumes & deadlines are managed and achieved, including issuing of claims, document requests, defences and enforcement activity
- Work with other stakeholders within the business

This role would ideally suit an English qualified solicitor with experience in civil litigation and debt recovery, but Scottish qualified candidates at the NQ – 3 years' PQE level would be considered. The organisation is also open to hearing from experienced paralegals. (Assignment 13697)

Personal Injury Solicitor — Glasgow

You will advise on all aspects of personal injury, and in particular employer liability and public liability claims. To be considered for this position you should have at least 5 years' PQE in this area, although candidates with more or less experience and a desire to progress their career in this area would be considered. (Assignment 13729)

Commercial Dispute Resolution Solicitor — Glasgow

This is a large team who advise of a wide range of commercial and civil disputes. You will have a varied caseload and advise on commercial disputes including banking and financial services litigation, shareholder disputes, sports-related disputes, professional negligence, post-transactional warranty claims and intellectual property disputes. To be considered for this position you should have at least 6 years' PQE and in strong experience of dispute resolution. (Assignment 13779)

Senior IFPD Associate — Edinburgh

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For more information or a confidential discussion, please contact Frasia Wright (frasia@frasiawright.com) Cameron Adrain (cameron@frasiawright.com) Teddie Wright (teddie@frasiawright.com) Robert Wright (robert@frasiawright.com) or Stephanie Togneri-Alexander (stephanie@frasiawright.com) on email, or by telephone on 01294 850501.

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