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Journal

Journal of the Law Society of Scotland

Volume 65 Number 9 – September 2020

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Chapter 26: Judicial Variation and Discharge of Title Conditions
Chapter 27: Public Access Rights
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Chapter 29: Social Control of Land Use
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Chapter 31: Community Rights to Buy

REUTERS/Russell Cheyne

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Editor

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Hold the line

There are times when I feel the legal profession is increasingly at the mercy of governments and public authorities that appear to have little appreciation of the role of lawyers in defending individuals' rights and challenging abuses of power.

And if that is the case, they equally have little concern for the rights of the less fortunate members of society who may have a particular need of professional help in standing up for those rights.

Two things in particular have sprung to prominence in recent weeks.

First we had the disgraceful Home Office video with its slighting reference to "activist lawyers" preventing the removal of people seeking to establish a right to be allowed to remain in the UK. It was, tardily, removed from the social media channels to which it had been posted; the Home Office's permanent secretary accepted that it should not have been expressed in those terms; yet the Home Secretary herself has since repeated the phrase.

That from a Government whose ministers indiscriminately refer to "illegal" migrants when there is no illegality about genuine refugees attempting to reach this country, and which has failed so far to pay the promised compensation to the great majority of those wronged by the Windrush scandal. Oh, and which also seems intent on restricting the scope of judicial review, even while it seeks to limit other forms of scrutiny over the exercise of its powers.

The second issue is the savage cuts to funding of advice centres proposed by Glasgow City Council. Two law centres, including Castlemilk, the oldest in Scotland, stood to lose their support completely; others including Govan faced cuts in the region of 33%. Five CAB offices faced closure. No doubt, as the council said, it received many more applications for support than it could meet, but that did not explain its priorities in proposing a 60% cut in financial and debt advice, at a time when need can only increase as the full impact of the recession starts to bite.

As we sign off, a temporary reprieve appears imminent, but these are services that need more secure funding. It must be of great concern that long-established agencies that help thousands in less advantaged areas can be left at the mercy of grant allocations in this way.

I fear that we are in a period that calls for constant vigilance, and we must not be slow to act when necessary and call foul. Prompt and coordinated protest produced results in both of these instances. There is likely to be an ongoing need to stand up for those who most need our help.

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.65 NO.9 – SEPTEMBER 2020

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ONLINE INSIGHT

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Proof of the pudding
Some court hearings converted fairly readily to remote appearances, but how would a personal injury proof fare? Simon Dempsey relates his experience conducting the first such case before the ASSPIC.

Criminal injuries compensation: the changing scene
Hannah Goldsmith considers the impact on the Criminal Injuries Compensation Scheme of the removal of the "same roof" rule, and the pending changes in Scotland to the need to disclose previous convictions.

Looking after remote workers: an employer's duties
Chris Phillips discusses how the changing world of work is likely to impact on the way employers need to carry out their duties to safeguard their employees' physical and mental health and safety.

Tradecraft: keeping the client happy
In the last in his series on "tradecraft" practical advice, Ashley Swanson highlights some further scenarios he has known arise in property and other private client work.

Child maintenance: the balance of care
A note from John Fotheringham on two tribunal decisions on what constitutes "day to day care" for the purposes of the Child Support Maintenance Calculation Regulations.

OPINION

Laura Hutchison Sharon Cowan

The provisions designed to protect the right to dignity and privacy of complainers in sexual offences trials are not achieving their aim, and proper evaluation is needed of the reasons why

As we face faster and deeper change in our society, equality and human rights laws and standards are more important than ever. As Britain's equality regulator, the Equality & Human Rights Commission (EHRC) is working to create a more equal and rights-respecting society. The EHRC current strategic plan prioritises work to expose and challenge barriers to justice for women and girls who have survived gender-based violence.

In trials involving sexual crimes, complainers are protected in law from evidence about their sexual history, bad character and private information (such as medical history) being used, when it is not sufficiently connected to the facts of the case. The law (found in ss 274 and 275 of the Criminal Procedure (Scotland) Act 1995) has been held to be compatible with the European Convention on Human Rights, as it properly balances the rights of the accused and the complainer.

However, despite recent efforts by government and criminal justice agencies to increase public confidence in reporting sexual crimes, conviction rates remain low. In particular, the most recent statistics show that conviction rates for rape and attempted rape cases are 40% lower than for all other crimes.

Organisations representing survivors of gender-based violence have raised concerns about the inappropriate and irrelevant use of sexual history and bad character evidence in sexual offences trials, and the impact this can have on survivors, as well as the potential impact on reporting and conviction rates.

To understand more about these issues, the EHRC commissioned Professor Cowan (co-author of this article) to review the publicly available literature and cases on the use of this kind of evidence.

The review found evidence of a potential "justice gap" in relation to the protection of the dignity and privacy of the complainer, and identified serious concerns about how effective the legal protections are in practice.

There has been no in-depth review of practice in this area since research, published in 2007, found that only 7% of applications to use sexual history or character evidence were challenged by the Crown. Figures released in 2016 by the Cabinet Secretary for Justice showed that over a three month period only 10% of applications were opposed.

In several recent appeal court cases, the High Court highlighted serious concerns about the use of sexual history and bad character evidence and the treatment of complainers during rape and sexual offence trials. These included concerns about prosecutors failing to properly contest applications to introduce this kind of evidence before trials, and the failure of prosecutors and judges to challenge inadmissible references to sexual history and bad character during trials.

Because sexual offences are estimated to make up 75% of High Court cases, these recent appeals represent only a small fraction of trials in this area. But it is important to acknowledge that these concerns about the way sexual history is dealt with during trials would not have come to light had there not been reported appeal court decisions. Overall, it is fair to say that there is a lack of publicly available information about how the law is being applied in practice, and that we need more research to understand fully how widespread the problems identified by the High Court really are.

Given these findings, the EHRC is calling for:

- an independent evaluation of how the Crown Office & Procurator Fiscal Service (COPFS) responds to defence applications to use complainers' sexual history and private information, and how it communicates with complainers about such applications. We have also asked that this evaluation looks at how COPFS complies with its equality duties when considering applications to introduce this kind of evidence;

- more systematic collection of information about the number and content of applications for the use of sexual history and other private information (such as medical and phone records);
- a programme of research into what is happening in court;
- consideration of the benefits of introducing state-funded independent legal representation in hearings about whether to allow sexual history and other private information; and
- clearer rules about the recovery and disclosure of sensitive private information.

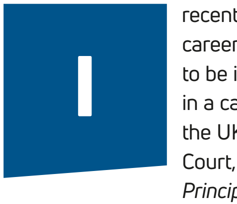
This level of transparency and scrutiny will help to ensure there is a clear and fair process for both the complainer and the accused in the prosecution of sexual crimes, and increase public confidence in the criminal justice system.

The EHRC has published a series of research reports based on Professor Cowan's review on its website (equalityhumanrights.com) and the full review is available on request.

Laura Hutchison, compliance principal, EHRC Scotland
Sharon Cowan, Professor of Feminist and Queer Legal Studies, University of Edinburgh School of Law

CORRESPONDENCE

UKSC legal aid: an open letter



I recently had the career satisfaction to be instructed in a case before the UK Supreme Court, *ABC v Principal Reporter* [2020] UKSC 26 (18 June 2020).

The case involved the rights of relevant persons to attend at children's panel proceedings. Eight QCs were instructed in two appeals along with 10 junior counsel. My firm acted for one of the parents of the children in one case. As there was no conflict of interests, we jointly instructed our junior with the agent for the other parent.

The case was heard over two days. It involved a great deal of work for all the advocates concerned, *and the solicitors instructed*.

I had expected that an uplift in solicitors' fees could be applied for from the Scottish Legal Aid Board. It was therefore extremely disappointing, to say the least, to find that this is not possible.

So far as counsel are concerned, the Legal Aid (Scotland (Fees) Regulations 1989, reg 10(2) states: "Counsel's fees for any work in relation to proceedings in the Supreme Court… shall be 90% of the amount of fees which would be allowed for that work on a taxation of expenses between solicitor and client, third party paying, if the work done were not legal aid."

Supreme Court Practice Direction 13 indicates the level of remuneration which counsel would expect to receive in a non-legal aid case, and in terms of reg 10(2) SLAB would look to make payment of 90% of those rates depending on the specific factors of the case. In this case, I understand, fees were sought by seniors in the region of £35,000 each and for juniors around £19,000 each, from SLAB.

Our own account was restricted to just over £3,000.

By reg 5(3) of the 1989 Regulations, "A solicitor's fees in relation to proceedings in the Supreme Court on appeal from the Court of Session… shall be calculated in accordance with Schedule 3". Schedule 3 is the legal aid table of detailed fees.

It would appear therefore that for solicitors there is no provision for an application to the UK Supreme Court for additional fees, which seems to me to be most unfair. In my view there should be some provision for an uplift in fees from the lowly solicitors involved in this type of cases on legal aid rates. There is such a provision in relation to the Court of Session and the Sheriff Appeal Court.

I am writing by way of an open letter to both SLAB and the Legal Aid Committee at the Law Society of Scotland. I would hope that this matter can taken forward for the profession as a whole, so that at the very least regulations can be put in place to allow solicitors to charge on the same basis as counsel, or alternatively for an uplift to be made direct from the court.

Yvonne McKenna, McKennas Law Practice, Glenrothes

Patricia Thom, co-convener of the Law Society of Scotland's Legal Aid Committee, responds: "Yvonne McKenna highlights shortcomings that exist in the current system in recognising the complexity and sheer amount of work that is involved for solicitors in preparing such cases.

"We have worked successfully with SLAB to address some issues to help ensure timely payments for practitioners during the COVID-19 period. However there are still short and long-term issues that need to be addressed so that we have a justice system that is accessible to anyone who needs it – and that means ensuring that solicitors can afford to take on legal aid cases now and in the future."

BOOK REVIEWS

Haldane
The Forgotten Statesman Who Shaped Modern Britain

JOHN CAMPBELL

PUBLISHER: HURST PUBLISHERS

ISBN: 978-1787383111; PRICE: £30 (E-BOOK £15.07)

We may know Viscount Haldane (1856-1928) for his judgments as Lord Chancellor, but he achieved much more.

Entering politics while a hugely successful barrister, he reformed the pre-1914 Army, was instrumental in establishing the Royal Flying Corps, MI5, MI6, the London School of Economics, Imperial College and a series of universities, championed women in the civil service, heavily influenced Canadian constitutional law and created what became the Medical Research Council. The list goes on. His sumptuous dinners in London and at his beloved Perthshire home included a roll call of the influential.

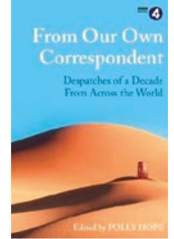
John Campbell's meticulously researched book contains two complementary parts. The first covers Haldane's background, personality, philosophy and economic and political views; the second his main activities, in office and no less busily after being unjustly forced out in 1915, and how he embodied his guiding philosophical tenets, always returning to first principles.

This book is immensely readable and enjoyable. Its historical expositions give context without losing pace. It has much to teach politicians and lawyers on simplifying complexity, collaboration, diplomacy, pragmatic idealism and patience. Was Haldane the 20th century's greatest British lawyer?

Charles Clark, partner consultant, Linklaters LLP.

For a fuller review see bit.ly/2Z3DrzH

From Our Own Correspondent



EDITED BY POLLY HOPE

WEIDENFIELD AND NICOLSON: £18.99; E-BOOK £9.99

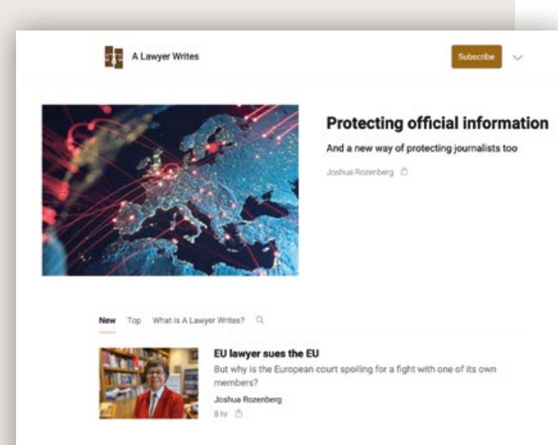
"This book is a rich and absorbing tapestry of writing of the greatest quality written by those who tell us the story behind the headlines."

This month's leisure selection is at bit.ly/2Z3DrzH

The book review editor is David J Dickson

BLOG OF THE MONTH

rozenberg.substack.com



Veteran commentator Joshua Rozenberg has begun a blog about developments in the law. He hopes people will subscribe for a small monthly fee, bringing alerts for all his published output.

Meantime one of his first posts covers the UK Government's review of judicial review. Subtitled "Constitutional crisis or a waste of time?", it paints the legal and political background, profiling reviewer Lord Faulks while noting that none of his panel, including Dundee's Professor Alan Page, "strikes me as a pushover".

To find this blog, go to bit.ly/3547YRI

Unnatural restraints

French COVID-19 lockdown rules have not met with conspicuous success at a popular naturist resort – one with a reputation for attracting swingers.

Business at the southern village of Cap d'Agde is well down this year, but that hasn't encouraged observance of social distancing rules – face masks and keeping 2m apart don't really fit in there.

One couple commented, "Sure we all have been taking risks but the lockdown was so tough and long it was important for our wellbeing to let go."

After two employees at a local hotel tested positive for the virus, a mobile testing operation found 30% positive results from 800 naturists tested.

And when the local prefect shut down many of the clubs and bars following the outbreak, people moved to parading themselves round the beach instead.

One problem at least that the Scottish Government isn't recorded as having to contend with.

PROFILE

Stuart Munro

Stuart Munro is head of Criminal Litigation and Inquiries at Livingstone Brown, and member of the Society's Criminal Law and Technology Law Committees

1 Why did you choose to become a solicitor?

It wasn't really planned. My guidance teacher told me – in a five minute meeting – it was either medicine or law. Glasgow and Edinburgh rejected me as I was still 16, but I was accepted by Strathclyde. Then a friend's dad, a sergeant in the courts branch, said he could get me a summer job at a criminal defence firm. That placement has lasted 29 years and counting.

2 What led you to become involved with the Society?

I've always had an interest in technology, and that led me to the Technology Committee. It tried its best to advocate for sensible change in the justice system, like email communication and lodging

pdf documents, but it took a pandemic for much of that to become routine.

3 What have been some of the key challenges through the outbreak?

It was very soon apparent that complete shutdown of the courts wasn't sustainable. We quickly initiated various working parties, securing participation from SCTS, COPFS and the bar, using Microsoft Teams. A strong sense of cooperation and goodwill developed, and I think that helped speed up reopening. A highlight was acting as the Society representative on the Lord Justice Clerk's working group on resuming solemn trials, which developed the innovative remote jury model.

4 What's your top tip for new lawyers?

I'll suggest two. First, work hard at becoming part of the team. Muck in. Try to support your colleagues. Make yourself invaluable because of your efforts. Secondly, think about what you can offer that's different.

Go to bit.ly/2Z3DrzH for the full interview

WORLD WIDE WEIRD

1 Poor summer

Police encountered a penguin wandering around a Nottinghamshire village in the early hours, and "quickly moved to question him on what he was doing walking in the middle of the road". bit.ly/2ZfRRQX

2 Normal politics

Vermin Supreme, a performance artist who wears a boot on his head and promises every American a free pony, is running for the US Senate in Massachusetts. bit.ly/3hTk7NO

3 A bridge too far

A French woman faces up to three years in prison after she made a video of herself naked on a sacred bridge in India – to promote her bead necklace jewellery business. bbc.in/3hQGwKU

TECH OF THE MONTH

Google Pixel Buds

£179

As well as acting as earphones, this clever creation automatically adjusts the volume as you move between quiet and noisy situations (this requires Android 6.0 or higher, though the buds pair with any Bluetooth 4.0+ device). www.store.google.com/gb/product/pixel_buds

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PRESIDENT

Amanda Millar

The need to meet virtually is enabling me to get round all our constituencies – very valuable in helping us respond to proposals, such as from SCTS, or when professional standards need to be defended from Government attack

So ... I am a year older, 25 years out of university, but apparently now only an activist. I thought being a lawyer, representing clients within the bounds of the law, giving advice without fear or favour was simply the joy and responsibility that came with being a member of this profession that is a fundamental pillar of civil society.

But apparently not. Applying the law, representing clients within it (often some of the most vulnerable and voiceless people in society), bringing challenge and testing the evidence had at least one Government department calling those taking such actions "activist lawyers". So I am an activist, and I stand with all my professional colleagues who are not "complacent about our human rights and the need to preserve the pillars of our profession that contribute to the democratic and civil rights that we hold dear: The independence of the rule of law, our responsibility as solicitors to provide advice without fear or favour, the right to be tried by a jury of your peers for the most serious offences" (last month's article). We will and must maintain our professional standards in the interest of our hard-earned reputations and in the greater interest of society.

SCTS issued a plan entitled *COVID-19: Respond, Recover and Renew* in mid-August. Both the Lord President and the CEO of SCTS have confirmed that this should form part of a consultation with the profession, and nothing within it has been decided. I am also aware that SCTS's view of how the courts are operating from a national viewpoint is not mirrored in local experiences. From members' social media activity alone, it is clear there are strong views on these and I encourage all with direct current experiences and anyone with a constructive view on the plan to share them with us via comms@lawscot.org.uk. I will be writing about local issues we are told of directly to the relevant sheriffs principal, keeping the Lord President informed as requested. I am equally happy to copy in relevant faculty leaders and receive local faculty communication if that is thought helpful. My aim is for collective, effective and collaborative communication. You can read more on the Society's website (Law Society news section, 20 August 2020).

IT means engagement

I have been travelling the country via the magic of technology, meeting members and Faculty leaders to discuss the challenges of working in a slow release from lockdown environment. I will meet more of you over the coming month and hope to meet every constituency before the end of October – if not a unique feat, then certainly something not done by a President in my Council lifetime. It has given me a wonderful opportunity to get on-the-ground engagement across the country early in my year as President, and so hopefully will aid my ability to add greater value to the profession and the public we serve. I look forward to seeing many more of you in the coming weeks – if not at a constituency visit, perhaps at our Law and Technology Conference or the New Partner Practice Management Course: see the CPD section of the website.

Notwithstanding all the current challenges, in order to maintain a viable, sustainable profession that reflects the society it serves we must continue to look to the future. Last month I told you about our (entirely online for the first time) summer school programme. This month our award-winning public legal education programme Street Law, which had to be paused in March due to the COVID-19 outbreak, was reawakened by the determined and talented Careers & Outreach team, who have trained 40 street lawyers from across Scotland's universities virtually in recent weeks.

Street Law has a great impact on the school pupils we work with, but is also a real opportunity for law students to learn some teaching methods and give back to Scottish education. The Street Law year will commence next month with law students teaching pupils virtually. Massive thanks to all the volunteers who helped us deliver the training and to our sponsors, Pinsent Masons.

Before signing off, I want to congratulate the Society's chief executive Lorna Jack who has been appointed to one of the Department for International Trade's new trade advisory groups to represent the Scottish legal sector. I know Lorna will do a tremendous job in representing the profession.

Stay safe. Take care of yourselves (check the Lawscot Wellbeing page), your colleagues, loved ones and of course keep doing what you do for your clients. Value yourselves, your work and your professionalism.

Until next month, if I don't see you before.

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

People on the move

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

Burness Paull (clockwise from top left): Hazel Moffat, David Davidson, Dawn Reoch, Ashley Mawby

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has appointed four new partners: **Hazel Moffat**, previously at DLA PIPER, will lead a new Public Law & Regulatory division; **David Davidson** (corporate and private equity), who arrives from CMS; **Dawn Reoch** (banking and finance), who also moves from CMS; and **Ashley Mawby** (professional liability disputes), who joins from BTO.

DALLAS McMILLAN, solicitors, Glasgow have appointed **Rosslyn Milligan** as a senior associate in the firm's Private Client team. Rosslyn joins the firm from THE McKINSTRY COMPANY in Ayr. Dallas McMillan have also employed three first year trainees, **Kirsty Adams**, **Erin Doherty** and **Liam McKay**. The firm further intimate that **Terence Docherty** left the partnership on 28 August 2020.

DAVIDSON CHALMERS STEWART LLP, Edinburgh and Glasgow, has appointed as an associate **Steven McAllister**, who joins from RENEWABLE ENERGY SYSTEMS, and as a senior solicitor **Chala McKenna**, who joins from SEPA. Both will be based in the firm's Glasgow office.

DUNDEE NORTH LAW CENTRE announces the retirement of **Peter Kinghorn**, principal solicitor, who helped found the centre in 1994. His successor as principal solicitor is **Joyce Horsman**, who joins from FIFE LAW CENTRE.

GIBSON KERR, Edinburgh, is pleased to announce the appointment of **Beverley Cottrell** as its head of Property. Beverley was previously with MOV8.

GILSON GRAY, Glasgow, Edinburgh, Dundee and North Berwick, has appointed property and private client lawyer **Lindsay Darroch** as partner and head of the firm's Dundee office. He joins from ABERDEIN CONSIDINE, where he was a partner.

© Derek Gerrard

HARPER MACLEOD, Glasgow and elsewhere has appointed **Charles Brown** as a partner in the Family Law team, based in Glasgow. He was previously head of Family Law at MILLER SAMUEL HILL BROWN.

LANARKSHIRE COMMUNITY LAW CENTRE has appointed immigration solicitor **Filip Angelov** to join its EU Citizens Support Project.

LAW AT WORK, Glasgow and elsewhere, has promoted **Heather Maclean** to senior associate and head of its knowledge development function; and **Paman Singh** to principal litigation solicitor.

LEGAL SERVICES AGENCY, Glasgow, announces the retirement of **Ronald Franks**, partner and head of Mental Health Legal Representation Projects.

LINDSAYS, Edinburgh, Dundee and Glasgow, is delighted to announce the appointment of **Caroline Fraser** as partner with effect from 1 September 2020. Caroline will join the firm's Private Client department and be based in the firm's Dundee office at Seabraes House, Greenmarket.

MACNABS, Perth, Blairgowrie, Pitlochry and Auchterarder, has announced the promotion to partner of **Alan Roughead**, head of Private Client, and **Stewart Baillie**, director of Property.

MACROBERTS, Glasgow, Edinburgh and Dundee, has announced the following promotions: to senior associate, **Susan Murray** and **Michael Vaughan**; to associate, **Rebecca Cox** and **Melissa Hall**; to senior solicitor, **Suzanna Brown**, **Rebecca Henderson**, **Amanda Hodge**, **Meghan Jenkins**, **Alisha Malik**, **Rhea McKenzie** and **Hannah Ward**; and to senior marketing executive, **Jennifer Gibson**. The firm has also appointed **Emma Aitken**, **Charlotte Fleming**, **Rachel Gillan**, **Martin Kotsev**, **Fergus Lawrie**, **Chris Murphy**, **Laura Roddy** and **Conor Whittaker** as solicitors on the completion of their traineeships.

McSHERRY HALLIDAY LLP, Irvine, Troon and Kilmarnock, are delighted to announce the promotion of **Louisa E Doole** to associate with effect from 1 September 2020.

MITCHELLS ROBERTON LTD, Glasgow, are pleased to announce the appointment as directors (partners) of their associates **Allyson Gilchrist**, **Laura Schiavone** and **Heather Warnock** (all Private Client), and **Joyce Moss** (Commercial Property), with effect from 1 September 2020.

MOIR & SWEENEY LITIGATION announces the opening of a new branch office at 879 Govan Road, Glasgow G51 3DL (t: 0141 429 2724).

Wing Commander **Allan R M Steele WS RAF** (retd) has opened ARMS LEGAL SERVICES WS, a boutique legal practice dedicated to serving the needs of members of the Armed Forces, based at 22 Forres Avenue, Giffnock, Glasgow G46 6LQ (t: 07954 188167; e: allanrmsteele@armslegalservices.co.uk).

CHARLES WOOD & SON, Kirkcaldy has appointed **Fraser Tait**, who joins from BTO, Edinburgh, as a private client solicitor, and **Dionne Brady** as a solicitor in its Civil Court department on completion of her traineeship with the firm.

WATT LAW SOLICITORS has opened an office at 3 Leven Way, Town Centre, Cumbernauld G67 1DY (t: 01236 787030).

Mitchells Roberton (l to r): Heather Warnock, Joyce Moss, Laura Schiavone and Allyson Gilchrist

Denovo joins forces with Amiqus

Integration will save time, reduce risk and speed up client onboarding

Scotland's only whole practice management software provider has teamed up with Amiqus ID as part of the global fight against money laundering, identity fraud and terrorism financing. The new integration will save law firms up and down the country time and money by turning hours of paperwork into minutes of secure online compliance checks.

Amiqus has grown to be recognised as a trusted and secure online point of access for legal support. Their aim is to always improve in line with regulatory changes, making it simpler for legal professionals to comply with the latest data privacy standards, while improving processes for your clients and staff.

Amiqus CEO, Callum Murray, said about the recent partnership: "We've built a world class AML compliance product as a first step towards supporting legal firms into new ways of working. The Denovo integration means legal firms can spend less time doing their compliance admin and more time doing what they do best: providing a great service to their clients."

80% of law firms find AML and KYC challenging – how can you make it easier?

Legal firms everywhere need to review their practices to ensure they remain compliant with increasingly stringent regulations. Ideally, systems and processes should be put in place that enable you to verify the identity of clients, and ensure they understand the true nature and purpose of the business relationships they engage in. Make it easier to meet regulatory requirements for AML by bringing your client and staff compliance checks and onboarding into one secure online account.

Conducting these due diligence checks enables you to take a risk-based approach and avoids exposing your firm to any potentially damaging circumstances.

How can Denovo and Amiqus help?

HM Treasury and the National Crime Agency in the latest National Risk Assessment clearly define the legal sector as being at high risk of money laundering. Therefore, the regulators and the Law Society of Scotland are clamping down on areas of weakness and setting out a plan to increase the frequency and intensity of AML and KYC inspections.

We're at a point now where meeting these standards is the only way to maintain the ideals of regulatory best practice within the legal profession.

Steven Hill, Denovo's Operations Director, added: "There is an obvious synergy between both organisations who are working towards a vision of removing all unnecessary manual tasks in the daily working life of legal practitioners.

"Moving from your current compliance process to a new, online system can be a daunting task. Along with Amiqus's award-winning team we have built support networks to help you with this – whether that's making sure it's simple for staff to move away from paper-based processes, quickly answering day-to-day technical or regulatory questions, or ensuring costs are transparent.

"Working collaboratively with our case management software, Amiqus seamlessly integrates workflows, digital risk assessments, internal decision-making audits and client data with CaseLoad. All the data is stored in one place, so there's no need for duplication. You'll save yourself time and can be assured that you're being consistent and secure."

Amiqus ID makes it easy for you to meet the standards set with checks such as:

- Identity checks
- Credit reports
- Photo ID verification
- Basic disclosures
- Companies lookup
- Remote client onboarding
- Watch list (PEPs, sanctions and adverse media)

Mark McBride, Director at Wallace Quinn Solicitors & Estate Agents in Glasgow, was an early adopter of Amiqus ID. He had this to say about the importance of the integration with his Denovo practice management software: "Using a solution that is respected and approved by the Law Society helps to give confidence that our business and reputation is adequately protected from financial crime risk. The integration has helped us a lot. Being able to run the ID checks via the files and then saving them in automatically when approved has been a really good addition."

To find out more about the integration between Amiqus and Denovo and how it can streamline your working processes and protect your firm, visit www.denovobi.com, call 0141 331 5290 or email info@denovobi.com

“The ability to run ID checks via the files and save them in our Case Management system automatically when approved has been a really good addition.”

— Mark McBride, Director, Wallace Quinn Solicitors & Estate Agents

Amiqus seamlessly integrates workflows, digital risk assessments, internal decision-making audits and client data with CaseLoad. All the data is stored in one place, so there’s no need for duplication. You’ll save yourself time and can be assured that you’re being consistent and secure.

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Soft skills for a harder world

COVID-19 and its impact on office work should be seen as one of the periodic key moments in human evolution, Stephen Vallance believes – but how do we still need to adapt to deal with the issues that have been thrown up?

It's a challenge to write a piece like this without repeating a multitude of platitudes about the current situation. Every once in a while, something happens that changes the world in a way that wasn't imagined and cannot be reversed. Recent examples include 9/11 and its effects on air travel, in particular security. Most of us now have probably forgotten the more relaxed travel of the past, before queues for scanners and baggage searches. Likewise, the Y2K bug pushed us from our Unix-based office computers to desktop PCs, and from there on to the cloud.

The list in many ways reflects human evolution: challenges, change and then adaptation to a new norm. COVID-19 has been another of those moments.

What is interesting is that none of them in themselves brought about changes in technology. They accelerated a change in mindset which encouraged people to adopt technologies already in existence. Security systems and PCs existed long before 9/11 and the millennium, in the same way that remote working has been growing since the 1980s when IBM let its first five employees work from home, and growing rapidly since the early 2000s. COVID-19 has, though, catapulted homeworking forward by at least a decade, and many are now attempting to catch up.

Few would argue that remote working is not here to stay and, in this piece, I'm going to cover four key areas that it impacts. Most will be things you are already aware of; however, I'd like to look a little further at some of the issues we as a profession are still dealing with.

Life online: our digital selves

A good friend of mine laughed when I told him about all the benefits of Zoom and Teams. He has been using such tools for 10 years or more, in growing his software business internationally. In that time he has developed a deep understanding of how to make an impact with clients he may never meet.

Most legal firms over recent months will have developed a basic understanding of good virtual meeting etiquette. A few will even have invested in essential items to enhance the experience (good lighting, cameras, and broadband for a start). Are we yet, however, comfortable with all the facilities these services offer? Have we invested in the "pro" version, and perhaps more importantly, in training all our staff in best practice? In the same way that our receptionist so often gives the first impression of our business, what first impression do we now give when meeting online? It takes only seconds to make a first impression, but it can take a long time to overcome wrong ones. What do new clients think when they first meet you or your firm online? Have you asked them? For those looking to make a real impact, perhaps have a look at www.mmhmm.app.

As for our websites and social media presence, no one reading this will need to be persuaded of the power of the internet when it comes to clients choosing their preferred legal partner. Under lockdown we have all become conditioned to purchasing whatever we need, whenever we need it, online. Even when we have a preferred supplier, most will now at least price-check the competition before committing. But how many firms have a clear system and methodology for attracting new clients and, more importantly, for engaging with clients after they contact us, with follow-ups to ensure that we maximise the opportunity from each new enquiry?

From the many firms I speak to there is a clear conflict for fee earners between already high workloads and time to follow up on enquiries. That follow-up and engagement, though, are a process, and like most processes can be structured and ideally delegated or automated as in many other industries. In this digital age, any lack of follow-up is like leaving a large hole in your fishing net.

Remote working: problem or solution?

Things are seldom black or white, and remote working, I suspect, is potentially both. Most firms appear to have found few issues with staff working from home, often discovering that productivity has increased as a consequence. Several are already looking at downsizing their real world footprint, anticipating a reduced requirement for office space. Amongst additional benefits has been, for some, an almost instant evolution to a paperless office, the quest for many firms over the years. As one practitioner told me he has learned, one office-based person is able to scan all correspondence and forward it to those working remotely.

In conversations about staff working remotely the responses are mixed. Many who craved the flexibility now appear keen to return to a more defined work day. While some have grasped it fully, I suspect many firms will develop a blended approach. Likewise we have yet to see the full extent of issues around furlough and the tensions that will arise, as those returning and those who worked through lockdown come to terms with their respective lots.

Under furlough the staff working remotely will generally have been among the most experienced, familiar with the office systems and trusted to use them appropriately, so the practical issues appear to have been few. This will not always be the case and, particularly as new staff are introduced, it will be important to consider how they are integrated into an office's culture and systems. Previously they would been around more experienced staff, listening to their style and tone and able to ask questions. Often our paralegals have been the first port of call, being easier to get hold of, and less embarrassing to ask than admitting any knowledge gaps to partners.

All the above can be addressed, with some thought. Many firms already have a WhatsApp group for teams to ask

"Don't forget to diarise reminders to check in with colleagues regularly"

questions. Inviting new members of staff to client Zoom meetings might also help. As the coffee break catchups no longer exist, don't forget to diarise reminders to check in with colleagues regularly, particularly when there is a proof or large transaction pending. For new members of staff, file reviews remain key. A practitioner reminded me recently that second year trainees are less of a worry, as by then you have a good grasp of their abilities. Qualified solicitors new to the firm can be more of a challenge, as you can't assume their levels of ability.

Remember also that emails and other written communications for teaching/ review purposes are, compared with real time conversations, slow and clumsy and prone to misunderstanding. Scheduling real time meetings for these purposes wherever possible remains essential.

Both practitioners and staff can, at times, find the technology challenging. While I very much prefer the commute to my home office, nothing compares with the speed and ease of use of my office computer with its access to printers, scanners etc. Likewise, Zoom and Teams meetings save a lot of travel time, but somehow leave me feeling more drained than a "normal" meeting would. Moving forward, and with a little investment, all of these should become easier as firms adopt better IT systems, perhaps encompassing a more blended solution, with days in and out of the office.

On the subject of blended working (which I believe will be the route most firms take), give some thought as to how that might work for you. Hotdesking does not come without its issues: people are territorial and can become very attached to "their" desk. Most high street offices are not set up to accommodate staff moving freely between desks, and it would seem an opportunity lost if blended working simply meant different desks lying empty depending on the day of the week. Are firms, though, prepared to deal with all the issues around clear desk policies to facilitate real hotdesking?

The caring profession

One of the great unspoken tragedies of lockdown has been the sharp rise in issues around mental health. As a profession we are not immune, and many I have spoken to over recent weeks have indicated that working with limited human interaction has left them

feeling, at best, low at times. Further, for many firms experiencing high levels of demand for services but with staff still furloughed, much of the strain is being borne by principals and senior colleagues, which exacerbates the problem.

While we are indeed a caring profession, that care tends to focus outwards towards clients, whose needs are often placed before our own. No single answer exists, but there are perhaps a few things for each of us to consider:

- Work can by its nature become all-consuming. We all need time out, and we need it most when we believe we don't have any time to take it. Whether it's going for a walk, doing the garden or just chatting to a loved one about anything except work, take time every day just for you.
- Following from that, I was once given this wise advice: "At a certain stage in your career the last thing you need is additional income: what you need is to build in longevity." Learn to say no, whether to clients or colleagues, when the only way to get something done is by you taking on yet another matter.
- Remember that remote working brings with it access to a huge range of resources. Whether it's a referral and support network like HM Connect, or an outsourced cashroom, compliance or even sales and marketing, is there a solution out there that can help?
- Build a support network. Sometimes these might be networking groups, university colleagues or, for myself, a breakfast club of legal business owners that meets once a month. All can be ideal places to discuss general business issues and, as importantly, to hear that others have similar issues and challenges.
- Remember LawCare (www.lawcare.org.uk/information-and-support), and don't be afraid to contact them.

Business owners and managers also need to be more aware than ever of the need to really listen to staff. A simple "How are you?" is no longer enough. Lack of person-to-person contact can mask a lot of personal issues with colleagues, and we need to remove any barriers around staff being able, openly and without fear, to discuss any fears, concerns or issues, particularly when working remotely. Firms are different, so no one size fits all, but a mixture of team and one-to-one meetings online is a minimum and, if blended working allows, regular face-to-face meetings where possible.

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

The trust equation (T = C+R+I/S)

I have, for many years, been fascinated by the impact we as solicitors have on our clients. They return to us again and again, sometimes with years in between and with little or no communication from us in the interim. The internet has been eroding that, as I touched on above, but generally only in relation to new purchasers of legal services or those whose expectations were not fully met the last time. When remote meetings become the norm rather than the exception, will there be an erosion of the solicitor/client relationship?

During lockdown many of us will have been transacting work for clients already known to us, and Zoom meetings are ideal in many ways for keeping in touch and progressing work. The relationship is already there and simply needs to be maintained. New clients may be more of a challenge, as the more subtle human interactions just aren't there and it can be much harder to create a relationship and, more importantly, build trust by videoconference.

There are steps to building relationships and trust. Most of us do it automatically, but there is a formula for it which is worth considering for a moment. Generally trust is built by credibility, reliability and intimacy. Credibility is our reputation and expertise; it's why we look to become accredited or seek awards or (with clients' consent) publicise cases we have been involved with. Reliability is our ability to get the job done, and it's why client testimonials and sites like Trust Pilot are so important. I know that I seldom purchase without checking the reviews. Intimacy is the personal touch, the ability to give an appropriate amount of information about yourself as a person. People buy people, I was always told, and being able to share a little about who you are helps.

Lastly, if you do all of these well, demonstrate where and when you can that your only interest is in the client. Don't be afraid to give a little knowledge or to share useful information, even when you think there is little chance of securing the client. You will have built up real trust, and that still goes a very long way when clients look to make the final decision about who to instruct.

In conclusion

In case you hadn't already realised, what we are experiencing is just a part of the cycle of business. These changes have been going on for ever and will continue to do so. Like every change, it brings threats and opportunities and there will be winners and losers. Our profession so far has proven itself, I believe, to be robust and more than up to the challenge. The question now is how each of us embraces the opportunities ahead and surmounts the challenges that they bring.

A specialism of many angles

Accredited legal technologist? Isn't that for backroom IT staff? Much more than that, as Peter Nicholson discovered on speaking to the diverse group now awarded the Society's recently recognised specialism

What exactly is a legal technologist? Probably the picture that most readily comes to mind is the IT expert in a big firm, working to streamline systems and probably also on cutting-edge support for major clients.

That is possible. But the profiles of the first six to have gained the Law Society of Scotland's specialist accreditation in the role present a much more diverse picture, showing it to be a string that a good few solicitors, and others, could add to their bow.

To date, as well as two who might match the initial idea – one a solicitor and one not – we have a solicitor in a specialist team who integrates team IT with that of clients; the head of IT in a support services company; the head of a practice whose vision is competitive advantage through IT-led customer service; and the founder of a niche practice who speaks the language of his tech-focused client base.

Not just backroom staff

A notable feature, common to some degree to all six, is the extent to which their work not only enhances their businesses' own IT, but directly assists clients as well.

Such is the experience of Sam Moore, innovation manager at Burness Paull and the first to achieve the accreditation. His input can range, he explains, from an informal discussion of a specific process, to more direct input such as assisting during a vendor demonstration, or temporarily joining a project team: "We've found that many clients value the input of an experienced legal technologist if they don't have one on-staff, and being accredited by the Law Society of Scotland adds an extra level of assurance around that expertise."

Steve Dalgleish at Shepherd & Wedderburn, a non-lawyer who began in digital marketing before moving across to IT, which he now heads, paints a similar picture. The firm's Smarter Working team, which he co-manages, covers both internal and external angles, with bespoke solutions for clients supporting legal process for volume transactions: "We've done quite a lot of work with some large clients, to dig down into common transaction types and figure out what the touchpoints are, how they could be made easier, and improve the flow of data between us and the client, and their clients."

Jill Sinclair, DWF partner and head of Counter-fraud in Scotland, takes such engagement further. Her team has won a series of awards based on innovative technology-based solutions to combatting fraudulent behaviour, and her accreditation was based on her developing case management systems to improve efficiency, on process mapping and alignment with service level agreements, and on assisting insurer clients to develop pre-litigation strategies using both DWF's and clients' own technology solutions to allow claims to be routed more efficiently.

(Below)
Jill Sinclair;
Steve Dalgleish

For Rob Aberdein, CEO at Aberdeins, his very mission in investing in technology is to attract business. Indeed he sees himself as a potential disruptor in the way that Elon Musk is shaking up the car industry, and his firm's progress in IT as a constant quest to stay one jump ahead of the competition.

"It's to make it a journey that customers buy into," he affirms. "If they look at 10 law firms I want mine to be the one they choose because they think they will have a better customer experience. It will be easier, simpler, more commercial. I think all consumers nowadays are looking for ways for companies to deliver a better customer experience, and that is our DNA, that's the spirit of what we are trying to build."

Alan Stuart, who left the partnership at Morisons seven years ago to start his own specialist technology practice, uses his expertise to take a "deep dive" into his clients' technology, in order to advise on how it interfaces with the law, with GDPR, with cybersecurity, and in order to draft terms of use. He is also a business matchmaker. With a 400-strong customer base of technical specialists, "we give a lot of technology advice because we have so many technology customers that we introduce them to one another".

Completing the roll call, Andre Boyle, Head of IT at Millar & Bryce, is the only accredited specialist to date not to work for a legal practice. For him,

the focus is on building what the business needs in order to support customers. "What I find though is that we can't move forward the way we need to without really listening to and getting feedback from our customers, so it quite often involves sitting with them, understanding the processes and challenges they have and trying to make their life easier."

Some are born to it…

Do these portraits show that to become an accredited legal technologist, you have to have been more or less weaned on IT? Not necessarily. Certainly Stuart used to "build and mess about with" computers with his scientist father; Aberdein "was one of these kids who had a ZX Spectrum when I was about eight years old… my house is a bit like Starship *Enterprise*"; and Moore's first passion was computer science. Sinclair however just happened to find herself working with, and appreciating the potential of, case management systems at an early stage in her career.

Aberdein offers the observation that since COVID-19: "I've seen people who would typically not be adopters of technology, become evangelical about WhatsApp and other applications that have enabled them to continue a normal existence while in lockdown, so we've almost had a turbocharging of a certain generation who were averse to consuming legal services in a progressive technology-led way, to saying I'd actually prefer to do that."

It would be wrong, then, to divide the profession permanently into those who are naturally at home with IT and those who more or less need spoon fed to take it up. As Dalgleish puts it: "We're finding a lot less resistance to engaging with technology now than we did even six months ago. Some people will struggle, but I think it's very much the minority now. People are realising that technology is here to stay and if we don't do it, others will; that it has potential to make their life better, to allow them to do the proper legal work where the value is added, and to make it more interesting for them. It takes away a lot of the more routine tasks."

Moore takes up the theme, pointing to further potential for automation of "those more routine areas of practice, such as information gathering at the start of a transaction, where lawyers perhaps don't need to be so hands-on. Streamlining the information gathering element of most transactions would be an easy way to start using technology".

Burness Paull, he adds, has found that automated systems have the potential to save upwards of 50% on repetitive tasks. "The trick is picking the right tool for the best use cases, and recognising that sometimes a simple solution is preferable to a sophisticated one."

Sometimes, indeed, it can allow you to carry out tasks that you otherwise couldn't or wouldn't do at all. An AI (artificial intelligence) tool enabled the firm to carry out a mass review of 30,000 near-identical forms to extract one key piece of information from each (or record if it wasn't found). What might have taken 150-160 working hours to do manually, was completed in an afternoon, using AI to identify the data required and extract it into a template, "with a high degree of confidence in the resulting data".

Blending in

As a slight digression, much of the specialists' mission now is to make systems ever easier to use. For Boyle, the goal is "to get to the point where technology simply blends into the background". Whereas in the past it often created extra admin, as people took data from documents supplied and entered it into their own systems, he is now seeking to save time, for both fee earners and backup staff, by "ensuring that every interaction a firm has with our systems through their processes is light touch, so that they can be as efficient as possible".

"We've had a turbocharging of a generation who were averse to consuming legal services in a progressive technology-led way, to saying I'd actually prefer to do that"

(Above)
Sam Moore

(Below)
Rob Aberdein

He explains: "Knowing as I do the deep level of data focus that lawyers have, we are looking at providing data rather than documents. It means that we can enable processes within legal firms to move forward automatically rather than depend on human intervention, enabling members to use their intellect to focus on the work that they do rather than admin.

"One of my longstanding goals in working [for three legal firms before he joined Millar & Bryce] has been to reduce the admin overload that takes people away from doing the really incredible legal work they do. Where we now want to get to is to reduce the effort required to get the search data needed and, in time, not to have to enter it into their systems as well."

Applications welcome

Who should seek the accreditation? For most of our interviewees, it is something that enhances client (or customer) trust and confidence, especially as it carries the cachet of recognition by the Society.

Stuart suggests that anyone involved in technology, whether immersed in how their

own organisation is functioning or in a more client facing role, should consider doing so: "The technologist has to bridge the gap between law and technology in order to be able to best advise the client about their products and about how their technology interfaces with the law. We have to do a deep dive into each of our clients' pieces of technology, have maybe days learning about it at a granular level before we start trying to draft contracts for its use."

Sinclair observes that technology impacts on every sector, has become increasingly important over recent months, and the more people who are aware of what it can offer their practice area, to drive efficiencies and deliver better client service, the better for the profession. "The team of legal technologist accredited specialists have a very diverse background and I would recommend that anyone with an interest in technology solutions and experience in this area should consider applying, even if it is not the main focus of their role."

Dalgleish focuses on those in a support role. "Accreditation gives confidence to the legal teams that the technology side is well understood, and that appropriate thought has gone into ensuring a correct workflow, providing a positive experience for clients and colleagues and delivering commercial benefits to both... There are people in my team who maybe don't have the external profile but they are absolutely capable of being leaders. It could encourage those up and coming team members to get accreditation as a possible route to career development."

Boyle too would like to see more IT people in legal firms become certified, "to help demonstrate to the fee earners that there is a deeper level of understanding of business processes in IT departments, that it's not just support provision. IT departments can provide consulting services as well". In addition: "I'd really like to see suppliers and vendors get on board. I'm obviously pleased as Punch to be the first accredited legal technologist outside a legal firm; I appreciate I came from a legal firm background but I think it's a great first step to get others involved."

Moore identifies certain qualities for the role. First of all, attention to detail remains crucial, to understand what is going on, and recognise potential issues. "This is a timeless requirement for a lawyer, and I don't think that will ever change." The second is strong project management skills, to be able to break down workstreams into smaller deliverables, and plan work accordingly. Third, perhaps more novel, is curiosity. "I think this quality is more important now than it has been in the past, as the modern lawyer needs to be more curious about the way things work": in understanding their client's business, and also what is coming down the technology pipeline which will change both their own business and their client's.

"Being willing to question the status quo and being open to new ideas is fast becoming an essential skill for the modern lawyer who wants to embrace legal technology."

Aberdein puts it pithily: "I now have a bunch of peers and a marketing opportunity, and some sort of validation that everything I've been doing the last 10 years isn't madness basically." J

For more information on the accredited legal technologist specialism, go to bit.ly/LSStechAccred

Mapping the customer journey

An unexpected feature of the interviews was that more than one of our accredited legal technologists prefers to speak of customers rather than clients. It is understandable with Andre Boyle at services company Millar & Bryce, but both Alan Stuart and Rob Aberdein, as leaders of smaller legal practices, think the same way.

"They're called customers because we think that's what they are," says Stuart. "We think of customer relations rather than clients – customer development, customer retention, and so on." His firm has low overheads – everyone has always worked from home – and as many customers pay by retainer as by transaction. "They like that because they don't think the meter is running when they speak to us and they know they can put in their budget what their legal costs are going to be."

Rob Aberdein also thinks in terms of providing "a better customer journey". "It's something I guess from my banking litigation background. Nowadays everybody the bank has lent money to becomes a customer; it just has more positive connotations than 'borrower', and it sounds more progressive. With legal services, I like it because it focuses the minds of the team, it's about thinking customer service, customer journeys. Sometimes lawyers, and I think most of the profession would admit it, are quite bad about forgetting that. We're smart, typically quite academic, we ended up in a profession and make our living with our brains. Sometimes we forget it's ultimately about the customer, in my view, and that's why I think of customers as opposed to clients."

(Below)
Andre Boyle

EOTs: the post-COVID succession solution?

To mark its new series of webinars for business owners and professional advisers on employee ownership trusts, Co-operative Development Scotland highlights the latest evidence of EOTs' growing popularity, and their resilience in difficult times

cotland continues to set the pace for transitions to employee ownership, and this impetus shows no sign of slowing down.

What is the reason for this, and why are we forecasting a significant boost to the number of Scottish-based employee-owned businesses post-COVID-19?

The recent report on employee ownership in the UK, published by the White Rose Centre for Employee Ownership based at the University of York, found that the number of employee-owned businesses has increased by 100 in the past year. Scotland was second only to London in the number of employee ownership transitions: quite remarkable when you consider the difference in the London and Scottish economies.

Scotland: fertile soil

If everyone agrees employee ownership is so good for the economy, why is Scotland forging ahead? Scotland is an SME economy and the employee ownership trust (EOT), the most common vehicle used to transition to an employee ownership model, is arguably a good fit for the small business. Of course, the tax incentive may play a part. If a business owner sells a controlling interest in their business to an EOT, that transaction is exempt from capital gains tax.

In my experience, the tax benefits are not a key driver for business owners considering employee ownership. It's loyalty to the workforce, commitment to maintaining the business in the local area and a reluctance to sever all ties with the business that are more likely to be the prime motivators for a business owner to consider employee ownership as a succession option.

The business owner as seller is able to manage the pace of exit, and the continuity of longstanding relationships for both customers and suppliers can be a convincing consideration.

"Another factor in Scotland's success in growing employee ownership is undoubtedly the enthusiasm among our adviser community"

Another factor in Scotland's success in growing employee ownership is undoubtedly the enthusiasm among our adviser community. The 2012 Nuttall Review identified a lack of awareness amongst advisers at a UK level as being a key challenge to increasing the number of employee-owned companies. However, Graeme Nuttall himself remarked how encouraged he was to see such high levels of interest in Scotland from lawyers, accountants and bankers in building their knowledge of the model. A number of Scottish firms have built significant expertise in employee ownership trusts within their corporate and commercial teams.

The key factor that differentiates Scotland from the rest of the UK, though, is dedicated support for employee ownership from the Scottish Government. Co-operative Development Scotland (CDS), as the specialist unit working on behalf of Scotland's three economic development agencies, delivers expert business support across the country. Our experienced team provides free advice and guidance to business owners looking to explore the model, and signposts to experienced advisers to assist the business transfer process.

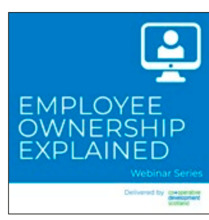
Surviving the storm

In these uncertain times, employee-owned businesses demonstrate a good track record of resilience during recession.

Glen Dott, specialist adviser, Co-operative Development Scotland

A 2012 study carried out by the Cass Business School at City University London found that employee-owned companies experienced a less negative impact from the 2008 recession than their peers of similar size and sector. The study also found that employee-owned companies were more likely to maintain their employment levels and were thus able to bounce back more quickly. This is supported by a recent survey undertaken with a sample of Scotland's employee-owned businesses, which found that 76% of respondents believed the company's employee-owned status was helping them through the COVID-19 crisis. With talk of second waves and the threat of further local lockdowns, as well as a vaccine potentially being years away, the employee ownership model may offer some stability and security that is missing from ownership structures reliant on individuals.

Despite the impact of COVID-19 on the economy, CDS has seen eight transactions this year, and an increasing number of companies have been expressing interest in exploring whether employee ownership might be the right plan for them. The EOT isn't the best solution for every company, but it should certainly be on the table when succession options are being discussed.



To find out more about the EOT transaction, Co-operative Development Scotland is hosting a series of webinars for professional advisers and business owners exploring the employee ownership trust as a succession solution. Find out more here: bit.ly/3h8wh4u

Positive impact

Aspire is a Glasgow based company that provides support to those who need it: homelessness, addiction issues, refugees, care leavers and the elderly and vulnerable. Aspire founder, Peter Millar, was attracted to the employee ownership ethos and looked to employee ownership as a means to exit while maintaining and protecting the company's strong culture and values. Aspire became employee-owned in June 2019, with Peter retiring as managing director in February 2020, although he has remained as chair of the board of directors and as a trustee.

Campbell Clark and Sarah Winter of Blackadders provided legal advice on the transaction. Sarah Winter said: "Aspire is an excellent company that makes a positive impact on society. The move to employee ownership reinforced the company's values and gives employees real ownership. Employee ownership allowed Peter to retire knowing his company was in safe hands."

Developing competent management

Mediascape is Scotland's leading independent audiovisual expert, with customers that range from universities and heritage sites to corporate businesses. The company was founded in 2003 by husband and wife team Angus and Shona Knight. They were planning retirement but were concerned that a sale would result in relocation of the business, with a negative impact on the loyal employee group. They read of a similar business that had adopted the EOT model successfully and invested some time in exploring the option, including meeting with several business owners who had taken the same path. Their EOT transaction completed in January 2018 and the business has since had its best trading year ever.

Bruce Farquhar and Ewan Regan of Anderson Strathern were the legal advisers to Mediascape. Bruce Farquhar is enthusiastic about the EOT as a succession solution. "The EOT can be ideal for the business owner who is looking to realise the value in the business, and ensure the company remains in a stable ownership model. Angus and Shona were not quite ready to retire, and the move to employee ownership enabled them to phase an exit that allowed the development of a competent management team, and the appointment of a new managing director to take over from Angus. These deals are enjoyable to work on: everyone is aligned. You don't get the same adversity sometimes experienced in trade sales."

Weathering the COVID-19 crisis relatively unscathed

Falkirk-based **Palimpsest** is the UK's market leader in the provision of typesetting, digital and pre-press services to the publishing sector, with over 50,000 books produced during its 25 years of operation. The two founders, Craig and Ruth Morrison, had no plans to retire but wanted to lay the ground for an eventual exit. They heard about the employee ownership option after attending an event run by Co-operative Development Scotland, and finalised the move in September 2018. It has worked well for the Palimpsest team, and Craig and Ruth believe that employee ownership was a key factor in helping the company weather the COVID-19 crisis relatively unscathed. Qualified lawyer Ruth says: "We had to immediately change to home working and dynamically update our workflow. The staff coped with this efficiently. The service to customers was seamless."

Douglas Roberts of Lindsays provided legal advice on the deal. "Employee ownership is a flexible model that can be shaped to fit with the aspirations of the sellers, and meet the current and future requirements of the business", he says. "It is remarkable how quickly employees embrace the ownership stake and demonstrate enhanced performance soon after completion. We have worked on a number of these transactions with excellent results, and have a healthy pipeline of companies considering employee ownership as the best way forward."

How Scottish law firms can remain competitive in a pandemic scenario

Looking at your costs and keeping an eye on the latest technological developments and trends can help businesses through these uncertain times

It is estimated that the UK gross domestic product (GDP) has fallen by 20.4% in the second quarter of 2020 (April to June), which is the highest decline on record and 10 times higher than the worst month of the 2008 recession.

How can Scottish firms respond to performance decline in individual practice areas? What should the long-term plans be?

LexisNexis' UK research study, the *Gross Legal Product* (GLP), examines the impact of the pandemic, detailing what we can learn from immediate results and statistical analysis of practice area legal trends.

The study revealed that the Scottish economy and subsequent legal market demand have been more severely impacted by the crisis than the UK overall.

Traditional sources of income in local communities have stalled – Scottish councils have had the highest cost in the UK of managing COVID, particularly the Highlands, Aberdeen and Perth. The devastating effects that the pandemic has had on the global oversupply of oil, lowering oil prices to the lowest they have been in 20 years, could mean job losses of up to 30,000 in the sector, as regions relying on tourism and marine fuel sales are also hit by COVID-19.

Employment data shows that 23.6% of all those employed in Scotland are currently furloughed – 628,000 people in total – higher than the 22.9% in England. When comparing the average share price of Scottish companies versus the FTSE 350, Scottish companies are down 31% in total, compared to 19% overall.

Unemployment rates are also affected, with an increase of 1.3% between February and April in 2020, whereas the UK rate stayed stable. Most prominently, research conducted by Durham University with 250,000 companies in Scotland, across 99 sectors, put 29% of them at "high risk" of collapse due to the impact of COVID-19 on supply chains.

One reason behind this is that the Scottish economy is driven by work in the quaternary and tertiary (79%) sectors – namely knowledge-based firms operating in information technology, media, and research and development, who rely on complex global supply chains.

Consistent with trends revealed by the GLP report, the financial services industry is responding positively to the pandemic, with the Scottish financial services industry only showing a very minor retraction. Much more resilient than the total Scottish economy, it grew by 1.2% in March and only shrank by 1.7% in April, in comparison to -5.8% and -23.8% respectively for the whole economy.

Recommendations for Scottish firms

Keep control of your cash

• You can find what financial support is available for your business (including loans, tax relief, cash grants, job retention scheme) on the **UK government website** or **www.gov.scot** for Scottish Government schemes.

• Are there any unnecessary costs you can strip out or delay? Review your variable costs and seek payment holidays or negotiate discounts. Digital services can be considered to offer better value and flexibility than the traditional alternatives. Stay on top of your receivables and invoices, and proactively negotiate payment plans where possible.

• Forecast your cash flow regularly and be proactive in addressing any upcoming threats to your business. A regular cash flow forecast will help you make quick decisions when needed.

Efficiency and tech adoption – Try the LexisNexis tech adoption quiz

• There will be greater pressure than ever from clients on fees – are your processes as efficient as they need to be? Are there any areas you can automate to free up time for more productive work?

• 80% of firms are improving their technology and working practices. This has been led by a 47% increase in use of videoconferencing platforms in the short-term, but the next phase of adoption is likely to include legal research tools and efficiency solutions.

Diversify or rebalance your practice

• Look at your service lines – how well aligned are they with our expanding practice areas? Are there any faster growing areas you could move into? Is it time to change your approach in struggling areas?

• Make use of tools and research to facilitate your diversification and fill any gaps in your staff's knowledge.

• Can you merge or partner with another firm to give yourselves a broader base for future crises?

Trends and assumptions in this article were taken from the LexisNexis Gross Legal Product (GLP) study, published in July 2020, due to be updated quarterly. Click below to download the full report and receive future legal market coverage.
Download the full report
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Fair sharing in a financial storm

Achieving a fair financial settlement on divorce may be especially problematic in a recession. Richard Wadsworth and Amanda Masson look at the changing value of particular assets, and potential options to help meet parties' needs

As lockdown began, many family lawyers raised concerns around valuation of matrimonial property and settlement of cases. What if anything should they do to discharge their obligations to their client, having regard to the extraordinary circumstances that arose? Consulting an experienced and trusted adviser has become more pertinent than ever. This article will explore how expert financial advisers can work alongside family lawyers to provide practical advice to clients managing separation.

The notion of fairness underpins the Family Law (Scotland) Act 1985 scheme. Financial advice may be useful in relation to valuation of matrimonial property, as well as when exploring the specific nature of proposed settlements or orders.

Investments in the recession

What has been the impact of the pandemic, and the ensuing severe recession, on matrimonial assets? In terms of investment portfolios and pensions (ignoring salary-related pensions, ostensibly unaffected but subject to other issues beyond the scope of this note), the position is mixed. In March, stock markets fell significantly and we saw losses of 30% or so, but since then most markets have partially recovered. The FTSE100 is, over the 12 months to early August, down about 15%, while the S&P500 (a US index including a lot of "tech" shares) is actually up about 10%.

It should be noted that most individuals will hold not just company shares (which these indexes measure) in their portfolios or pensions, but also lower-risk investments like fixed-interest bonds, many of which have enjoyed gains over the last year, making the impact on overall portfolio and pension values much less severe than the headline figures.

You often see headlines along the lines of "billions wiped off share prices" when markets fall, but you don't see "shares slowly and undramatically edge up over a period of weeks" – that's not very sexy! However, markets could fall at any time between the relevant date and the date at which matrimonial property is actually transferred between spouses. Indeed, at the time of writing, commentators are remarking that stock markets don't appear to be reflecting what is expected in the real economy, as the furlough scheme unwinds and company closures and redundancies bite.

The family home

Regarding the housing market, the position is far from clear. Unlike stock markets, there is no mechanism constantly processing thousands of buying and selling transactions to give a clear picture of what the market is doing. Fewer and less frequent sales of different stock make it hard to know what is going on. This can explain why the man or woman on the street likes property, not just because it is a physical asset, but because you don't actually see what might be huge gyrations in price on an ongoing basis. All you see is the price previously paid and the sale price, giving the impression of a steady increase over time.

> *"Since lockdown, the true position has become even less clear. What is clear is that sales volume is down, albeit prices may have held up in the short term due to lack of supply"*

Since lockdown, the true position has become even less clear. What is clear is that sales volume is down, albeit prices may have held up in the short term due to lack of supply. As the issues in the real economy bite, there is likely to be less demand, leading to lower prices, irrespective of rock-bottom interest rates and exemptions from LBTT.

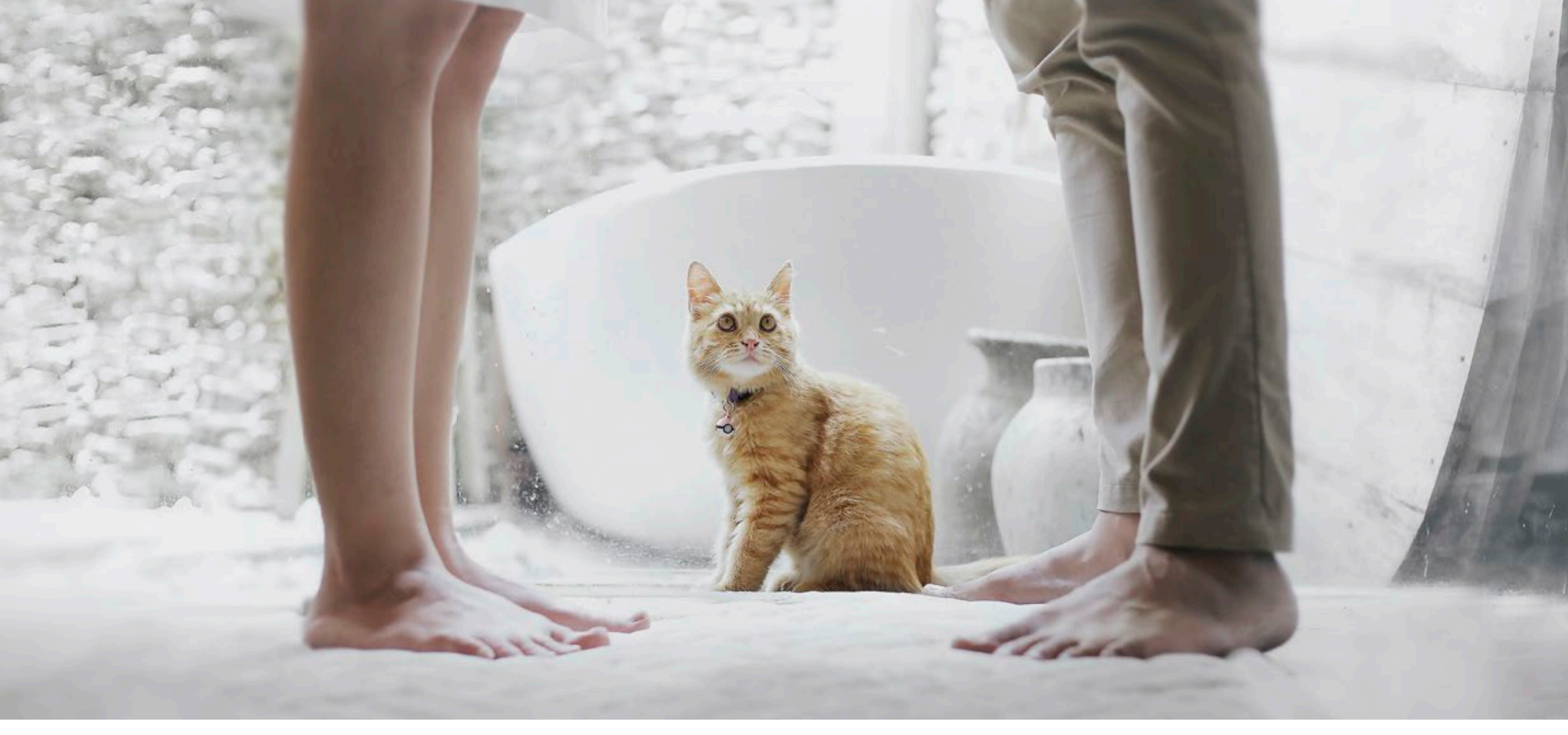
That said, a recent *Which?* article provides the following predictions from property experts:

- Knight Frank predicts a 3% drop this year and a rise of 5% in 2021.
- Savills says prices could drop by 5-10% this year before rising by 4-5% next year.
- Lloyds Banking Group (which includes Bank of Scotland and Halifax) says prices could fall by up to 5% before recovering by 2% in 2021.
- Zoopla says a release of pent-up demand could see prices rise by 2-3% in this quarter, before dipping later in the year.
- A Reuters poll of property experts claims prices will drop 5% this year, before rising by 1.5% in 2021 and 3.5% in 2022.

The final point to note about property prices is that there will be huge variations, depending on the region, whether it's in a city or the country, and countless other factors. So, seeing a loss from property is entirely possible; it's just extremely hard to know what that might be.

In *Wallis v Wallis,* 1993 SLT 1348 (HL) the matrimonial home had risen significantly in value between the relevant date and the date of divorce. The transferee therefore stood to receive a windfall. The court held that the increase in value was not *per se* a special circumstance justifying unequal division of the matrimonial property. This led to unfairness. The solution came in the Family Law (Scotland) Act 2006, which amended s 10 of the 1985 Act to introduce the concept of the "appropriate valuation date". Where the court orders transfer of property, it shall be valued as at the date agreed by the parties, failing which the date of the order, unless in the latter case the court considers that because of exceptional circumstances a different date should apply.

It is a provision worth remembering when considering what should happen to the family home as part of a settlement. Valuations provided prior to March of this year may bear little resemblance to sale prices in a recession.



Financial modelling for clients

Could it be argued that a recession-based slump in the value of, say, a share portfolio should be taken into account in looking at settlement structures? The underlying principle of fairness may provide a hook.

As agents our obligation to the client to make sure the settlement is not only fair, but in their interests, can include making sure, as far as reasonably possible, that they have at least considered what their financial future may hold post-divorce.

One of the sources of stress around separation is finance. Not knowing the potential position ("Am I going to be OK financially?") can cause individuals to make less than rational decisions on agreeing a settlement, and this could be exaggerated in a recession as they react to headlines. Modelling their future situation can help significantly increase their general understanding of what might otherwise be a (scary) unknown, specifically the impact of reduced values on settlement options.

This modelling need not be an all-singing, all-dancing cashflow using dedicated software (although that might be the ideal from the adviser's perspective). Indeed, an advanced cashflow model might be too much for the client, and add to rather than lessen the stress factor. A better option could be a "back of the fag packet" calculation, or basic spreadsheet. It is the principles that the client may not have got their head round, rather than precise calculations.

At its most basic the modelling might follow these steps:

1. Consider what the value of the capital settlement might be.
2. Consider how that settlement might break down between cash, pension share and other assets.
3. Deduct any capital that will likely need to be spent – the purchase of a new property, the gift to children of cash to fund university fees, for example.
4. Convert the remaining capital amount into an income for life.

The model can then be used to trial different scenarios such as:

• spending less on a property and seeking a larger pension share;
• deferring selling a property and renting in the short term;
• continuing working for longer than initially intended, allowing more time to build retirement funds, and reducing the time over which these are required;
• using a mortgage to free up capital.

The modelling can also be stress-tested to allow for a reduced capital settlement, and to assume lower investment/pension values or lower proceeds from the sale of the family home.

Examining options: a case study

As a simple example, take the following asset situation for separating couple Bob and Sue:

• jointly-held family home worth £400k;
• Bob's pension worth £200k; Sue's £500k;
• Bob's investment portfolio worth £200k; Sue's £100k;
• no cash.

Assuming a 50-50 split, Bob and Sue are each entitled to £700k. If they keep their own pensions and investments, Bob is entitled to another £300k and Sue another £100k. The simple solution is to sell the home and split the proceeds £300k-£100k, which might suit both parties.

However, this would mean that Sue would have £200k to buy a new property (£100k property proceeds and £100k in investments), which she might feel is too little. Bob would have £300k, but might feel that is too much, and his focus should be on building his more meagre pension funds. An alternative might be that Sue receives a larger proportion of the sale proceeds, say £200k, and instead shares £100k of her pension funds with Bob. Sue gets sufficient cash/investments to buy her property (up from £200k to £300k), as does Bob, but he also boosts his retirement fund (from £200k to £300k).

Going one step further, Bob's focus is on retirement. What would his situation be if he immediately retired at age 60? If we assume Bob has spent his cash and investments on a property, he has a pension pot of £300k. If Bob leaves that fund invested and draws an income directly from it (rather than buying an annuity), and we make certain other assumptions about returns and Bob's life expectancy, his £300k might give him a little over £17,000 per annum. This, with his state pension beginning at age 67, might be sufficient for Bob to live on.

But what if his pension value fell by 15% during separation? In that case he would have a pot of £255k, which, on the same assumptions, would give him less than £15,000 per annum. In this scenario, Bob might feel income would be too tight, in which case he has some options to consider. These could include:

• continuing to work for a few more years;
• spending less on a property, perhaps seeking more of a pension share instead;
• borrowing some of the property price.

Already we are seeing a rise in enquiries from clients concerned that their income has dropped due to the pandemic, or that their estranged spouse may be looking for more financial support for a longer period. The "silver separator" phenomenon is real, such clients tending to be concerned about provision for adult children, retirement planning and inheritance tax planning. The number and nature of the issues raised by the pandemic in relation to valuation and distribution of assets highlights just how important appropriate expert input is in terms of adding value to the client experience.

Richard Wadsworth, Director Glasgow, Carbon Financial Partners Ltd
Amanda Masson, Partner, Head of Family Law, Harper Macleod LLP

Ogden 8: shifting the balance

Updated for the first time in several years, the eighth edition of the Ogden Tables sees some substantial reworking – with effects that generally favour defenders, as Steve Love QC and Grant Markie explain

The Ogden Tables, love them, loathe them or fear them, have been updated for the first time in nearly a decade. The eighth edition took effect from 17 July 2020.

One of the laudable (if unachievable) aims of the Ogden working group was to simplify the use of the Ogden Tables in the calculation of future losses in damages actions.

The effect of the updating of the underlying statistical data and the methodology used in its application appears to favour defenders; that is to say, that the multipliers for future losses are generally lower.

Tables reworked

There are now 36, rather than 28 tables. They include additional tables for loss of earnings to age 68, reflecting the state retirement age. There has been a reworking of Tables A-D in relation to educational attainment, a revised definition of "disability", and further guidance provided in relation to the quantification of fatal claims.

The introduction of tables calculating multipliers to retirement ages of 68 and 80 will be a welcome addition to those who have had to interpolate the Ogden 7 tables to calculate accurately the state retirement age of 68, which was not previously provided for. So too will be the separate publication of the Additional Tables in Microsoft Excel format to allow for the calculation of multipliers at discount rates of -0.75%, -0.25% and 0% from any age at date of proof to any future age (up to 125).

The eighth edition does not address the current COVID-19 pandemic, perhaps for obvious reasons. The effect that the crisis will have on future mortality is as yet unknown, and perhaps will not become clear for years.

Mortality data

The reliance on the Office for National Statistics (ONS) downward estimate of the rate of improvement in life expectancy has generally translated into a reduction in life multipliers across the board. However, the most significantly affected group are older female pursuers who, in some cases, see as much as a 9% reduction in predicted life expectancy. Younger pursuers may see a reduction of between 1 and 2%.

Revised definition of "disability"

The eighth edition has responded to the increased prevalence of the working population being classified as "disabled" (an increase from 12 to 19%).

Ogden 7 adopted the definition provided in the Equality Act 2010, which was that, in terms of s 6 of the Act, a person is disabled if that person has: (i) a physical or mental impairment; and (ii) the impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.

Ogden 8 reverts to using a definition based on the Disability Discrimination Act 1995, which applied at the time of the research underpinning the Table A-D reduction factors. To fall within that definition, the impairment must be work-affecting, either by limiting the kind or the amount of work that a pursuer is able to perform. The definition reads: "A person is classified as being disabled if **all three** of the following conditions in relation to ill health or disability are met:

(i) The person has an illness or a disability which has or is expected to last for over a year or is a progressive illness; and

(ii) The DDA 1995 definition is satisfied in that the impact of the disability has a substantial adverse effect on the person's ability to carry out normal day-to-day activities; and

(iii) The effects of impairment limit either the kind **or** the amount of paid work he/she can do."

Anyone not satisfying all branches of this three-part test is to be considered "Not disabled".

The terms "substantial" and "normal" will likely require judicial interpretation. The guidance notes to the eighth edition provide that "normal" day-to-day activities are those which are carried out by most people on a daily basis and which include those carried out at work.

Education attainment categories

The previous categories of D, DE-A and O have been done away with. In their place, levels 1, 2 and 3 have been introduced. As the explanatory notes indicate, level 3 is the highest level educational qualification level and is used as a proxy for human capital/ skill level. The notes specify that those in professional occupations such as law, accountancy and nursing who do not have a degree nonetheless meet the criteria and fall to be treated as if they did.

Disappointingly, despite later retirement ages, the tables only provide for reduction factors up to age 54 and simply propose that, for claimants over that age, reduction factors will be "particularly dependent on individual circumstances" and tend to increase towards 1 at retirement age for those who are employed and towards 0 for those who are not. It seems this will result in a lack of precision and consistency of approach in calculations.

Examples

The application of Ogden 8 to some commonly encountered scenarios has the following results:

Example 1

A female (aged 30 at date of proof) suffered an injury to her right arm. Her earnings pre-injury were £20,000 net; post-injury she is unable to return to work; she has a retirement age of 65; she falls into level 2 in terms of her educational attainment; she is considered disabled; she has no residual earning capacity; she requires future care at a cost of £50,000 a year. Her future loss is as follows:

Ogden 8

Multiplicand	Multiplier	Discount	Value
Earnings Pre-accident earnings: £20,000	Table 10: 39.31	Table C level 2: 0.84	£660,408
Care Annual cost: £50,000	Table 2 at -0.75% 74.05		£3,702,500

Ogden 7

Multiplicand	Multiplier	Discount	Value
Earnings Pre-accident earnings: £20,000	Table 10: 39.27	Table C employed GE-A: 0.85	£667,590
Care Annual cost: £50,000	Table 2 at -0.75% 76.95		£3,847,500

The Ogden 8 increase in the earnings multiplier (0.04) and increase in discount (0.01) results in a reduction in the award of damages for future loss of earnings of £7,182 or 1.1%. The decrease in the life multiplier (2.9) reduces the claim for future care by £145,000 or 3.77%.

Example 2

The pursuer is a 30-year-old male at the date of proof, with the other factors in example 1 above remaining the same.

Multiplicand	Multiplier	Discount	Value
Earnings Pre-accident earnings: £20,000	Table 9 38.87	Table A level 2 0.90	£699,660
Care Annual cost: £50,000	Table 1 69.82		£3,491,000

Ogden 7

Multiplicand	Multiplier	Discount	Value
Earnings Pre-accident earnings: £20,000	Table 9 38.71	Table A employed GE-A 0.91	£704,522
Care Annual cost: £50,000	Table 1 71.43		£3,571,500

The Ogden 8 increase in the earnings multiplier (0.16) and decrease in discount (0.01) results in a reduction in the award of damages for future loss of earnings of £7,182 or just over 1%. The decrease in the life multiplier (1.61) reduces the claim for future care by £80,500 or 2.3%.

Example 3

A female (aged 60 at proof) requires equipment at a cost of £50,000 a year for life. Her future loss is as follows:

	Ogden 7	Ogden 8	Difference
Multiplier	32.68	30.53	
Multiplicand	£50,000	£50,000	
Valuation	£1,634,000	£1,526,500	-£107,500

Application of Ogden 8 results in a 6.58% reduction when compared to the same calculation using Ogden 7.

The position in relation to a 60 year old male pursuer with the same lifetime loss is:

	Ogden 7	Ogden 8	Difference
Multiplier	29.19	27.67	
Multiplicand	£50,000	£50,000	
Valuation	£1,459,500	£1,383,500	-£76,000

In this case, the reduction is 5.21%. This is a not insignificant downward trend which, when applied to the upper reaches of lifetime losses, will result in significant reductions in awards of damages.

Comment

It can be seen that lifetime losses are the awards most affected by the application of the new mortality data. The examples demonstrate that the awards for future care using Ogden 8 are materially lower than those achieved when using Ogden 7. The overall reduction in the level of awards may be significant.

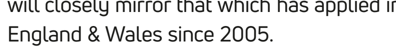
Pension loss and fatal claims

Section C of the explanatory notes deals with pension loss, and new guidance is provided to reflect the auto-enrolment requirement in effect since 6 April 2019. The explanatory notes offer the helpful suggestion that where pension losses are complex (when are they otherwise?), assistance from an actuary or forensic accountant should be sought.

Section D provides revised guidance in relation to the calculation of fatal claims in England, Wales and Northern Ireland in light of the Supreme Court's decision in *Knauer v Ministry of Justice* [2016] UKSC 9.

Periodical payment orders (PPOs)

In Scotland, the courts still have no power to implement PPOs. That power will exist whenever the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 eventually comes into force. It is unclear when that will happen, but it is reasonable to anticipate that, when it does, the Scottish regime



will closely mirror that which has applied in England & Wales since 2005.

The explanatory notes incorporate a new section E that provides guidance on the application of the discount factors in Tables A-D to the indexation of periodical payments for loss of earnings. It is proposed that, if loss of earnings claims are to be paid in the form of periodical payments, the issues of indexation, employment risks and residual earning capacity require to be considered and accounted for. The correct approach requires the identification of an inflation linked indexation figure for the pre-accident employment and a separate inflation linked index for the post-accident employment.

The effects may be limited in catastrophic injury cases where there is unlikely to be any residual earning capacity.

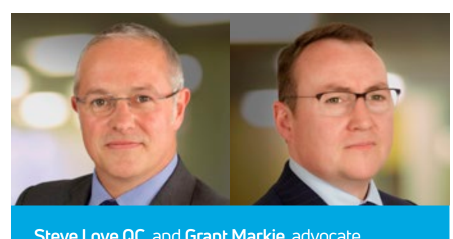
Summary

The eighth edition provides overdue revision on Ogden 7, demonstrates a clear effort by the working party to make matters more user friendly for practitioners and offers welcome clarity on some calculation methodology.

Application of Ogden 8 will generally result in lower awards for certain categories of pursuer. The reduction in many instances is small but, for older female claimants with significant annual losses, the impact may be significant. The effects will be most evident in catastrophic injury cases but, in reality, the effect of the changes in multipliers can only be assessed on a case-by-case basis.

The redefining of "disabled" will tighten up the class of pursuer who will benefit from the application of the increased discount factor when it is appropriate to do so. The introduction of new, wider categories of educational attainment is to be welcomed, providing greater accuracy in the assessment of discount factors. It remains to be seen whether the "rules" set out in the explanatory notes will be approved and adopted by the courts or whether departures will be made, particularly with claims for future loss of earnings, as were made under Ogden 7.

To reflect these changes, practitioners may be well advised to consider reviewing current pursuers' offers, tenders and advice given to insurers on their reserves. Compensators will welcome the arrival of Ogden 8, given disquiet following the outcome of the 2019 review of the discount rate in Scotland.



Steve Love QC, and **Grant Markie,** advocate, Compass Chambers

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Briefings

Lessons from a video proof

Precautions in relation to witnesses giving evidence at a proof conducted remotely have been noted by the judge in the first such hearing, a case which leads this month's civil court roundup

Civil Court

LINDSAY FOULIS, SHERIFF AT PERTH

Jurisdiction; remote proof

In *Peter J Stirling v Brinkman (Horticultural Service) UK* [2020] CSOH 79 (13 August 2020), Lord Clark determined that the need for an agreement conferring jurisdiction to be in writing or evidenced in writing for the purposes of para 6 of sched 8 to the Civil Jurisdiction and Judgments Act 1982 was not met by a party's terms and conditions, including one relating to jurisdiction, being sent and not being demurred from.

At the beginning of the opinion it is also interesting to note Lord Clark's observations as to the conduct of a proof by way of videoconference. Witnesses required to confirm compliance with directions given by the court, including being alone in the room, having no access to means of communication and not having perused the productions sent to them. Clearly there are a number of issues involved in evidence being taken remotely. The rules of both the Court of Session and sheriff court are silent on such matters, and it may be that practice notes will be required to provide something akin to a checklist.

Issues in this case also arose regarding the best evidence rule applying to a version of a production lodged in electronic form. Lord Clark observed that a document of materiality in a proof did not require to be lodged in its original electronic version on the likes of a memory stick. Further, in a commercial action it was expected that such a challenge would be highlighted at procedural hearings. His Lordship further observed that where a crucial piece of evidence was not admitted and fell to be proved, it would be expected that this would be covered in a witness statement as opposed to being stated for the first time in oral testimony.

Representation

The requirement for a person providing professional representation in any legal proceedings either to hold a practising certificate or to fall within the definition of commercial attorney was reiterated in the decision of Sheriff McCormick in *FF v AFMS Ltd* [2020] SC GLA 31 (9 July 2020). As a consequence a petition for liquidation was dismissed as incompetent, notwithstanding that the person acting for the creditor was on the roll of non-practising solicitors.

Group proceedings

Sections 20-22 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 permit group proceedings to be raised in Scotland. The rules for such proceedings are now introduced by the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Group Proceedings) 2020, which came into force on 31 July 2020. They form chapter 26A of the Court of Session Rules. The Lord Ordinary lays down the procedure to be adopted in such a litigation, subject to the specific provisions in the chapter.

Provision is made for applications to be a representative party to bring such proceedings and their determination, applications for permission to bring such proceedings and their determination, and opt-in procedure. Thereafter the chapter deals with the commencement of group proceedings, the form of the summons and defences, preliminary hearings, case management hearings, debates, pre-proof hearings, the lodging of productions for proof, and settlement. There is specific power provided to a Lord Ordinary to pronounce any order to secure the fair and efficient determination of proceedings. There are provisions dealing with the effect of interlocutors pronounced in such proceedings, and the consequences of failure to comply with the provisions of the rules or any order made by the Lord Ordinary.

Averments and debate

The Lord Justice Clerk, Lady Dorrian makes some pointed observations as to the need for averments to support any submission made at a diet of debate, in the decision of the Second Division in *Advocate General for Scotland v Adiukwu* [2020] CSIH 47 (14 August 2020). This might seem pretty fundamental, but...! Her Ladyship observed that to proceed on the basis of oral submissions made "on the hoof" with little or no support being found in the averments was not an appropriate way of conducting a debate. To survive a debate and proceed to proof, the pleadings had to provide some basis for the leading of evidence at that later hearing.

Why rules of procedure are important

Normally decisions involving judicial review are not covered in this article. However the observations made by the Lord President in *Prior v Scottish Ministers* [2020] CSIH 36 (30 June 2020) are worth noting. The issue was that the averments of fact and legal argument in the petitions for judicial review were quite different to the oral arguments advanced. Lord Carloway observed that rules of procedure were an important element of any judicial system. Expedition and finality were not concepts in conflict with those of fairness and justice. They were all integral parts of the system. Accordingly if there was to be any significant change in a petitioner's case, this should be undertaken by amendment which gave notice to the opponent and was subject to control by the court, as opposed to being undertaken simply by oral submission. In short, the rules ensured fairness and promoted the just determination of a dispute. Such observations are perhaps worth noting when so many hearings are taking place at present by remote means, where there can be a temptation to overlook the formal nature of the hearing as it is not being conducted in court.

Consequences of a debate

The question as to whether a point discussed at a debate can be revisited at a subsequent proof before answer was aired before Sheriff Kinloch in *West Lothian Council v Clark's Exrs* [2020] SC LIV 30 (3 June 2020). It was submitted that everything fell to be considered of new in light of the evidence now led. The short answer depended on whether the evidence led raised anything new which could enable legal points aired at the debate to be reconsidered.

Proof

There has been a move over recent years for evidence to be presented in affidavit or statement form, and this is becoming even more prevalent in the present climate. I suspect it will stay with us after COVID-19 has left the building! Accordingly it is worthwhile simply pointing out an issue which was aired before Lord Clark in *Somerville v McGuire* [2020] CSOH 70 (10 July 2020). In short, there still has to be record for what is contained in any affidavit or written statement. This should not come as any great surprise, but clearly it is sometimes overlooked. It is not a new matter. Readers can view the observations made by Sheriff Kelbie

in *Patterson v Patterson* 1994 SCLR 166 at 168A-C.

Breach of interdict

The issue in *Transocean Drilling UK v Greenpeace* [2020] CSOH 66 (3 July 2020) was whether an organisation could be found in breach of interdict when the actions complained of were carried out by unnamed individuals. The organisation had a duty to take all reasonable steps to ensure the relevant servants or agents were made aware of the requirement to comply with the terms of the order, and further not to overlook, forget, or misunderstand that requirement. If such steps are not taken, acts or omissions of individuals might be attributed to the organisation. In this instance the organisation's knowledge and active and essential support meant that the final decision of an individual to act in breach of the order did not result in the organisation escaping responsibility for these actions. The comprehensive support and resources of the organisation which enabled the individual to so act rendered the organisation responsible. These criteria applied with equal force in the present instance, albeit the actions complained of were conducted by volunteers as opposed to employees or agents. The division between executive and operational decision-making made no difference.

Expenses

In *Keatings v Advocate General for Scotland* [2020] CSOH 75 (30 July 2020) Lady Poole refused to make a protective expenses order at common law. The criteria for making such an order were identified as: the issues were of general public importance; public interest required that these issues be resolved; the party had no private interest in the outcome; having regard to the financial resources of the parties, making the order was fair and reasonable; and the proceedings were likely to be discontinued by the applicant if the order was not made.

The requirements of no private interest and the discontinuance of proceedings were not essential preconditions. Legal advisers being prepared to act pro bono was a factor in favour of the order being made; however the order could still be made when advisers were being remunerated. The overriding purpose was to enable the applicant's position to be presented by a reasonably competent advocate without the applicant being exposed to serious financial risk which would deter a case of general public importance being advanced at all. The level of representation permitted would be described as modest, and instruction of representation should be undertaken accordingly.

At common law the court had discretion as to the form of such an order. It was framed by reference to the circumstances of the case, depending what was appropriate and fair. A condition for the grant of the order was a real prospect of success. It had also been argued that there should be an exemption from court fees. In the present case, determination of this issue was unnecessary due to the pursuer's personal circumstances.

On a perhaps more commonly occurring subject is the decision of Sheriff McGowan in *Akmal v Aviva Insurance Ltd* [2020] SC EDIN 33 (28 July 2020). The defenders had made an extrajudicial offer to settle before proceedings were instituted, and on proceedings being raised, tendered the same sum. After sundry procedure the pursuer amended, increasing the sum sued for by adding two new heads of damage. The defenders tendered of new a greater sum and this was accepted. The tender was worded in the usual manner offering expenses to the date of the tender. The defenders sought to modify liability to the date of the first tender. Sheriff McGowan followed the decision of the First Division in *McKenzie v HD Fraser & Sons* 1990 SC 311, which to summarise, determines that a tender worded in the usual manner provides the court with the full power to award, not to award, increase, modify, or restrict expenses. The wording did not preclude the court exercising its discretion on issues regarding expenses.

Sheriff McGowan considered that the two new heads of claim, which necessitated the amendment increasing the sum sued for, should have been introduced much earlier as the pursuer should have been readily aware of them. The defenders, having investigated whether these claims were justified, tendered of new. In those circumstances, Sheriff McGowan restricted the award of expenses to the pursuer and found him liable to the defenders for the balance of the expenses of process. This reflected the inefficient handling of the claim, which led to very serious consequences and in all probability prolonged proceedings and increased the expenses.

Interim orders – commercial actions

In the unsuccessful appeal by the defenders against the refusal to recall an interim interdict in *Highlands & Islands Enterprise v CS Wind UK* [2020] CSIH 48 (18 August 2020), Lord Malcolm, delivering the opinion of the First Division, observed that only in a clear case would an appellate court interfere with a decision on an interim order. Leave to appeal should only be sought and granted, bearing in mind that commercial procedure is designed for speedy resolution of disputes, when the likely delay was outweighed by compensating benefits which furthered a just and effective disposal.

Update

Since the last article *A & E Investments v Levy & McRae Solicitors* (March article) has been reported at 2020 SCLR 574.

Corporate

EMMA ARCARI, ASSOCIATE, WRIGHT, JOHNSTON & MACKENZIE LLP

Various forms of grant assistance have been made available to businesses from government throughout the pandemic to help with enforced closures. Some are more generous than others.

Who gets what?

In March the Chancellor announced an additional cash grant of £25,000 to all businesses in the retail, hospitality and leisure (RHL) sector in England, provided they had a rateable value of less than £51,000. He further advised that £3.5 billion in additional funding would be given to the devolved administrations to support businesses in Scotland, Wales and Northern Ireland. A week later it was confirmed that grants in England would be paid per property rather than per business.

The amount of funding to be provided was to be calculated for Scotland through the application of the Barnett formula. In Scotland, the amount available to be claimed by a RHL business was unclear until early June. By that time it had evolved to:

(1) a one-off £25,000 grant where the business had traded from a single property with a rateable value between £18,001 and £51,000;

(2) a one-off £10,000 grant where the business had traded from a single property with a rateable value not exceeding £18,000;

(3) potential cumulative grants for businesses trading from multiple properties, of £25,000 or £10,000 (depending on rateable value) for the first property with 75% of the full grant (£18,750 or £7,500 as applicable) for each eligible property thereafter.

Challenge to reduced grants

In *Sharp v Scottish Ministers* [2020] CSOH 74 (23 July 2020), the petitioner applied for judicial review after receiving a reduced grant.

Of the petitioner's properties, five had a rateable value between £18,001 and £51,000; a sixth had a rateable value below £18,000. Under the RHL scheme the petitioner received one grant of £25,000, four of £18,750 and one

of £7,500. In the application for judicial review, the petitioner argued that the 25% reduction to the grants paid for the second and subsequent properties of his business was unlawful: he had a legitimate expectation that a full 100% grant would be paid in respect of each of his properties, and the decision to restrict the amount paid was irrational.

Further, although detrimental reliance was not essential, it was a relevant consideration and he had relied on the promise of a full grant per property in his dealings with suppliers, and in taking important decisions about the future funding of his shops. It was illogical to place businesses in Scotland at a disadvantage compared to equivalent English businesses while maintaining the scheme was being "mirrored".

No legitimate expectation

Lord Fairley refused the petition for judicial review, stating that the petitioner did not have a legitimate expectation.

The judgment reviews the origins and development of the RHL grant in Scotland and holds that the Chancellor's initial statement was "ambiguous on the issue of whether the proposed grant support being described by him was intended to be per business or per property". In assessing whether or not a case had been made in relation to legitimate expectation, Lord Fairley noted the relevant questions were:

1. Did the respondents create a legitimate expectation in the terms contended for by the petitioner by making a promise which was clear, unambiguous and devoid of any relevant qualification?
2. If so, did they frustrate that expectation?
3. If so, was that frustration so unfair that to take a new and different course amounted to an abuse of power?

He examined the statements made by cabinet secretaries to "mirror" the measures announced by the Chancellor, and the way the grant scheme developed in Scotland. He noted particularly that: "the use by the Chancellor of the qualifying words 'up to' clearly signified that whilst individual grants would be capped at £25,000, they would not necessarily be paid at that maximum level. The words 'up to' were relevant words of qualification". Given that the petitioner could not point to a clear, unambiguous and unconditional promise, the (most crucial) part of the argument based on the principle of legitimate expectation failed.

Nevertheless Lord Fairley considered the issue of abuse of power, expressing the view that the respondents' argument, that the policy for the allocation of Barnett consequentials was within the "macro-political field" where a change of policy would not readily be seen as an abuse of power, was persuasive. In relation to rationality as a standalone ground of review, simply because there was a difference between England and Scotland in their approaches to the grants did not mean either approach was wrong. The courts should be slow to interfere with political policy decisions in relation to the detailed allocation of Barnett consequentials, unless *Wednesbury* irrationality was alleged.

Closure of scheme

The closing date for the RHL grant in Scotland was 10 July. The judgment notes that had the petitioner's properties been based in England, he would have received a full 100% grant for all six properties. Could businesses have foreseen that the corporate structure and location of their business would prove to be pivotal in the assessment of the amount of grants available? Though disappointing for single structure entities with branches in differing locations, the judgment notes the benefits available to businesses that choose to operate in this manner and cost savings available. When helping clients structure their businesses, practitioners will be aware of the differing forms of trading vehicles available and whether or not to incorporate (and if so in what form), the risks of failing to ringfence assets, the benefits of limited liability and the pros and cons of separate legal personality. In this case the chosen business structure proved pivotal for the allocation of grants in Scotland.

Intellectual Property

ALISON BRYCE, PARTNER, DENTONS UK & MIDDLE EAST LLP

Under Armour has celebrated a rare victory in China's highest court in a trade mark infringement judgment issued in July. Companies have traditionally found it notoriously difficult to enforce their intellectual property rights in China, but Under Armour's success could spell a new trend.

Under Armour argued its case before the People's Higher Court of Fujian Province, with the appeal being heard before the Supreme People's Court. It alleged that Fujian Tingfeilong Sporting Goods Co, Ltd infringed its intellectual property rights by using a logo that was substantially similar.

Under Armour is a US based company, founded in 1996, which sells sports clothes and shoes. It has been hailed by Forbes as one of the fastest growing companies in the apparel industry, making $5.2 billion in 2018. Fujian Tingfeilong launched its own sporting brand named "Uncle Martian" in 2016.

The Under Arnour brand has a number of trade marks registered in China and it also has a Chinese language equivalent of its brand name. In deciding the case, a number of factors were considered. First, the logo was used substantially by the Uncle Martian brand. It featured on brand press conferences, investment promotion advertisements, the business premises of Uncle Martian, brochures, shoes, wristbands and T-shirts. Secondly, Tingfeilong used "Under Armour (China) Co, Ltd" on its business cards even though it had no relationship whatsoever with the company. Under Armour alleged that this amounted to unfair competition.

Under Armour won its case on both trade mark infringement and unfair competition. This has been a longrunning dispute between the two companies, with Under Armour first filing its case before the Fujian Province court in 2016. The Court of First Instance issued an injunction to stop the Uncle Martian brand from using the logo. Tingfeilong was also ordered to destroy the infringing products, pay damages totalling $300,000 and publish a public apology. The Supreme People's Court, on appeal, stated that "Tingfeilong's appeal request cannot be established and should be rejected; the first instance judgment has clearly established the facts and the applicable law is correct and should be maintained."

A better climate?

The case marks an interesting turn in the tide for companies wanting to enforce their intellectual property rights in China. In the European Commission's biennial *Report on the protection and enforcement of intellectual property rights in third countries*, published in

January this year, China was ranked as Europe's "priority 1" worst offender. Indeed, China and its territory Hong Kong account for more than 80% of the seized counterfeit goods within the EU. This reflects a large-scale problem that has been ongoing for years. A recent US report estimated that IP theft damaged the US economy by between $180 billion and $540 billion a year. Additionally, the European Commission's report stated that sales, jobs and government tax intake are all affected by IP theft.

It appears that China has taken notice of its trading partners' complaints. It has recently published a national plan to combat intellectual property infringement. The plan, titled *Key points of the National Work to Crack Down on Intellectual Property Infringement and the Production and Sale of Counterfeit and Inferior Commodities in 2020*, was published on 5 June. It contains a list of 35 points that the Chinese Government will consider in its attempt to combat IP theft, the most relevant of which are to "strengthen protection of intellectual property rights of foreign-invested enterprises", and "intensify multi-bilateral exchanges and cooperation". China is already seen to be working hard on this plan, as the following month it sentenced four people to prison for producing and selling counterfeit Dyson hairdryers.

China's trading partners shall be cautiously optimistic as the country attempts to crack down on IP infringement. Both the EU and the US have previously criticised China on how it enforces and regulates intellectual property rights. Indeed, it has been a longstanding concern that non-Chinese companies seeking to enforce their rights can face a very long and hard battle with little prospect of success. It is interesting that the month before US-based company Under Armour's success, the Chinese Government published its national plan, with one of the focuses being to improve foreign exchanges and cooperation. All eyes are now on China to see if the tide is turning on the enforcement and regulation of intellectual property rights within the state.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Redress for abuse survivors

The Parliament's Education & Skills Committee seeks views on the Government's Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. The committee asks whether the bill will achieve the goal of treating survivors of abuse with dignity and respect and whether it will create an effective redress scheme. See www.parliament.scot/parliamentarybusiness/CurrentCommittees/115852.aspx

Respond by 2 October via the above web page.

Food traffic lights

The Scottish, Welsh and UK Governments and the Northern Ireland Executive seek views on ensuring that the "traffic light" front-of-pack nutrition labels scheme indicating nutritional content continues to help people choose what food and drink to buy.

See www.gov.uk/government/consultations/front-of-pack-nutrition-labelling-in-the-uk-building-on-success

Respond by 21 October via the above web page.

Homelessness "local connection"

Scottish ministers, as required under s 33B of the Housing (Scotland) Act 1987, are consulting on the content of a statement on how their power to modify local connection referrals between local authorities in Scotland is to be exercised and on their proposal to suspend such referrals in order to remove barriers to accessing support. See consult.gov.scot/housing-and-social-justice/modifying-local-connection-referrals/

Respond by 23 October via the above web page.

Risk in consumer contracts

The default legal rules on transfer of ownership in consumer contracts where the consumer pays in advance of delivery are under review by the (English) Law Commission. These rules matter if, for example, the retailer ceases trading before delivery. At the moment the proposals affect England & Wales only, but with consumer protection largely reserved to Westminster these deliberations may come to inform the law in Scotland. See www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/

Respond by 31 October via the above web page.

Planning consultations

The Government seeks views on proposed changes to the requirements for pre-application consultation with local communities in national and major developments. These requirements were introduced in 2009 under the Planning etc (Scotland) Act 2006. The intention is to improve community engagement in planning matters and build public trust. See consult.gov.scot/planning-architecture/pre-application-consultation-requirements/

Respond by 6 November via the above web page.

Regulating electricians

Conservative MSP Jamie Halcro Johnston seeks views on his proposed Electricians (Scotland) Bill which would "provide for the protection of title and registration" of such tradespersons. Currently there is no protection of the title "electrician", so that anyone can present themselves as such without having demonstrated any skills or qualifications. See www.parliament.scot/parliamentarybusiness/Bills/115752.aspx

Respond by 10 November via the above web page.

...and finally

As noted last month, the Government seeks views on the commencement regulations for the Prescription (Scotland) Act 2018 (see consult.gov.scot/private-law-unit/prescription-commencement-regulations/ and **respond by 14 October**), and on whether the Lands Tribunal might be incorporated into the Land Court (see consult.gov.scot/justice/land-court-and-the-lands-tribunal/ and **respond by 19 October**).

Agriculture

ADÈLE NICOL, PARTNER,
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Crofting tenure still?

This quarter's article does not specifically deal with agricultural matters as, other than the extension until 12 December 2020 of the period in which an amnesty agreement can be agreed, there has not been much, in legal terms, to report in the agricultural sector. I will therefore comment on *Highlands & Islands Airports v Committee for the combined common grazings of Melbost and Branahuie* [2020] CSIH 8 (28 February 2020), an interesting case highlighting the complexities of crofting law and in particular the question of when does croft land or common grazings cease to lose its status as such.

The owners and operators of Stornoway Airport applied to the Land Court seeking to clarify that land owned by them was no longer subject to crofting tenure. The application was opposed by the grazing shareholders. The disputed area was part of land of which possession had been taken in 1940 by the Secretary of State for Air for the war effort. Title was taken by a later backdated disposition from the trust, which disposition made no reference to the exercise of compulsory powers but followed on minutes of agreement between the Air Ministry, the trust and the crofters in the four townships concerned. In 2001 the airport was conveyed by the Secretary of State's successor to the applicants.

Before the Land Court the applicants argued there was a necessary inference that the 1940 acquisition had been made under compulsory powers, which would have removed the common grazings from crofting tenure. The Land Court determined, on the material presented to it, that the airport remained subject to crofting tenure. It stated a special case for the Inner House.

The Land Court provided five reasons for its conclusion, which centred on the absence of documentary support for compulsory acquisition, the terms of the disposition and the terminology in the crofters' minutes of agreement. The Inner House however came to the view that the use of language referring to compulsory acquisition and the adoption of rules in a 1919 Act relating to compensation on compulsory acquisition would only be explicable if what was happening was an exercise in the assessment of compensation following compulsory acquisition of the land under statute. In addition the crofters' minutes specifically stated there was an assessment of diminished values consequent on compulsory acquisition of part of the crofts by the Air Ministry, supporting the view that this was what had happened.

In the absence of any material counterbalancing factors, the appropriate inference to draw was, as a matter of probability, that what had occurred was a compulsory acquisition under statute and therefore the land ceased to maintain crofting tenure.

Land can only be removed from crofting tenure by a resumption by the landlord on an application to the Land Court, or a decrofting order on the application of the landlord or an owner/occupier crofter to the Crofting Commission, or the exercise of compulsory powers. Anyone acquiring land in the crofting counties needs to keep this in mind if it is possible that land might, at some time in the past, have been subject to crofting tenure, since without being formally removed from crofting tenure by these mechanisms, the land will remain as such in perpetuity.

The use of croft land for other purposes can be a very live issue. The writer has personally come across croft land on which local authority housing had been built; croft land incorporated into someone's garden; and croft land forming the car park of a convenience store, all of which, unlike the case here, could not found on any compulsory powers, resulting in the parties who were using the croft land having to take steps to resume and pay compensation.

New Land Commission protocols

The Scottish Land Commission, as part of its Land Rights and Responsibilities Protocols in its Good Practice Programme, has issued two new protocols titled "Diversification of Ownership and Tenure", and "Negotiating the Transfer of Land to Communities". These set out practical expectations for achieving a more diverse pattern of land ownership, management and use, focusing on how landowners create opportunities for local businesses, residents or community organisations through purchases, leases and other collaborative working arrangements. The protocols are supported by a route map which provides a visual guide for landowners to create more opportunities for communities to get involved with ownership of land. They contain two case studies, namely Buccleuch Langholm Moor sale, and Doune Ponds, involving Moray Estates and Doune Community Woodland Group.

While these protocols are not strictly related to agricultural law, they are one of a series issued by the Commission to assist bringing the Scottish Government's Land Rights and Responsibilities statement into practice. I will not attempt to cover their content in detail here, but anyone acting for a rural landowner should be aware of those protocols and how they may impact or indeed afford new opportunities for such clients.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

William Renfrew (s 42ZA appeal)

An appeal was made under s 42ZA of the Solicitors (Scotland) Act 1980 by Khizer Khan, Giffnock, Glasgow against the determination by the Council of the Law Society of Scotland in respect of a decision not to uphold a complaint of unsatisfactory professional conduct made by the appellant against William Renfrew, solicitor, W Renfrew & Co Ltd, solicitors, Glasgow (the second respondent).

The appeal was defended by the first respondents. The second respondent did not enter the appeal process and later the Tribunal learned that he had died. The first respondents' position was that the appeal could not longer proceed. The appellant's submission was that the appeal should continue. Parties made submissions to the Tribunal at a procedural hearing on 8 July 2020. The Tribunal carefully considered the parties' submissions and had regard to its powers when dealing with an appeal under ss 42ZA and 53ZB of the Solicitors (Scotland) Act 1980.

Although the appeal would proceed by way of a review of the Professional Conduct Committee's decision making, at its heart this was a disciplinary case involving an individual solicitor. The solicitor had to have the opportunity to defend himself against the complaint in disciplinary proceedings. The first respondents should be able to call him as a witness if required. It would not be fair to proceed with the appeal without these safeguards in place. Although the Tribunal had the power to award compensation, this power was ancillary to the disciplinary decision. There were no Tribunal rules or legislative provisions which would allow executors to be sisted to the case to allow an order for compensation to be made against them in the place of the second respondent. Therefore, on the first respondents' motion, the Tribunal dismissed the appeal.

Planning obligations: seeking better practice

To inform the Scottish Government's review of the effectiveness of planning obligations, the Law Society of Scotland undertook a consultation which has led to it formulating a series of proposals for Government

Planning

ALASTAIR McKIE
PARTNER, ANDERSON STRATHERN LLP

Planning obligations, often known as "section 75 agreements" in reference to s 75 of the Town and Country Planning (Scotland) Act 1997, are an important part of the planning system. These obligations are entered into to mitigate the impacts of proposed developments. They are increasingly being used by planning authorities to support infrastructure provision required as a direct consequence of development. This includes financial contributions or in-kind provision of affordable housing, schools, and transport infrastructure.

While the existing Planning Circular (Circular 3/2012, *Planning Obligations and Good Neighbour Agreements*) provides advice on the scope of planning obligations and the need for compliance with five policy tests, it does not provide detailed guidance on many of the practical aspects of planning obligations which often are the subject of detailed negotiations between the parties after a "minded to grant" decision has been made.

The Scottish Government is currently reviewing the effectiveness of planning obligations (www.transformingplanning.scot/planning-reform/work-packages/), and the findings of its review will inform future policy development on infrastructure planning and delivery in Scotland.

Project work

There are a range of examples of good practice, and also variations in practice, in relation to planning obligations. The Law Society of Scotland's Planning Law Committee considers that there may be merit in further detailed guidance to help enhance consistency and to assist in reducing delays in the process of negotiating planning obligations.

The committee therefore undertook a consultation in late 2019/early 2020, followed by a series of virtual discussion events to explore a number of practical issues. A range of topics was covered, including model and style agreements, heads of terms and processing agreements, parties to the agreement, connection to the site area, liability of parties and the enforceability of planning obligations, recording or registration, and unused contributions.

The purpose of the consultation and discussion events was to identify an evidence base to support good practice. The consultation attracted 31 responses from solicitors in private practice, solicitors and non-solicitor staff of planning authorities and organisations.

Proposals

Following the committee's analysis of the consultation responses and events, it is clear that there is a strong evidence base for a number of proposals to be made in relation to the circular. The Society considers that if taken forward, these would improve the efficiency and transparency of the process of completing and registering planning obligations and therefore help to facilitate earlier release of planning permissions.

The committee's findings have been reported to Scottish Government and will contribute to the review of planning obligations.

Its proposals include:

- **Model agreements and in-house styles:** planning authorities should be encouraged to consult on and publish a model planning obligation, recognising the need for this to be reviewed regularly and updated as appropriate. The need for flexibility must be recognised, while having regard to the model and reflecting the desired objective of efficiency. The committee suggests standard clauses be developed on a range of matters (e.g. excluding liability for former owners, ultimate owners and statutory undertakers; registration of planning obligations), the use of which would be optional, but encouraged.
- **Continuing liability for former owners (s 75C):** the circular should be updated to reflect that, while the approach to this matter requires to be based on risk to the planning authority, it will generally be appropriate to exclude liability for former owners other than in relation to antecedent breaches.
- **Enforceability:** the circular should be updated to reflect that it will generally be appropriate to exclude liability for *bona fide* purchasers of individual residential properties (with the exception of specific provisions relating to affordable housing) and any statutory undertaker who proposes to place infrastructure on a development site. The circular should reflect that it is unreasonable for a planning obligation to provide that an appropriate remedy for a material breach of the obligation is for the planning authority to be entitled to revoke the permission without compensation (other than as referred to below).
- **Recording or registration of a planning obligation:** the circular should be updated to reflect that where rejected by the Keeper, the obligation may need to be amended or a new obligation entered into. Where the landowner is unwilling to amend or enter a new obligation, or has become insolvent (thus unable to do so), it is considered reasonable for the planning authority in these limited circumstances to reserve the right to revoke the planning permission without compensation.
- **Unused contributions:** planning obligations should provide for unused financial contributions to be returned to the payer if not used within a particular period of time. The circular should provide guidance on the appropriate period, recognising that this will depend on the circumstances and that it will be appropriate to consider the period relative to local development plan review cycles and local planning policy.

"The need for flexibility must be recognised, while having regard to the model and reflecting the objective of efficiency"

The full paper, including proposals and analysis of the consultation responses and discussion events, is available at www.lawscot.org.uk/research-and-policy/lawsocietyconsultations/

Alastair McKie is a legal associate of the Royal Town Planning Institute, a Law Society of Scotland accredited specialist in planning law and convener of the Society's Planning Law Committee

Rough justice, smoother delivery

The advantages of adjudication for a party seeking payment under a construction contract have been strengthened by new services to deal with "low value" disputes, and an Inner House decision illustrating a pragmatic approach to enforcement

Construction

NICK McANDREW, ADVOCATE, AMPERSAND ADVOCATES

In 1973, the English Court of Appeal described the cash flow of a construction company as the "very life blood of the enterprise". Some 50 years later, concerns over cash flow are exacerbated by COVID-19, never mind the impending impact of Brexit. Luckily, there is a way of ensuring that cash can flow quickly.

The adjudication provisions within the Housing Grants, Construction and Regeneration Act 1996 (the "Construction Act") significantly enhanced the rights of payees. Those provisions were introduced in response to the final report of Sir Michael Latham, *Constructing the Team*. Sir Michael highlighted the access to justice issue presented when contractors faced lengthy delays recovering payment through the courts. His recommendation that adjudication became "the normal method of dispute resolution in construction" has since been taken up by the industry.

How does adjudication work?

In summary, the Construction Act provides that:

- Any party to a "construction contract" (defined in s 104, with exclusions in ss 105 and 106) *must* have the right to refer a dispute to adjudication at any time (the pursuer is the "referring party" and the defender the "respondent").
- The dispute must be determined by the adjudicator within 28 days, unless an extension to the timescale is agreed.
- The adjudicator's decision is "interim binding" on the parties. This means that the decision must be complied with, unless the dispute is determined afresh through the courts or arbitration.

Importantly, if the construction contract does not contain these provisions (for example, if the contract is not in writing), a set of default statutory rules under the "Scheme for Construction Contracts" will take effect.

The key advantages of adjudication are: (i) the reduced cost and increased speed of recovering payment (when compared to court or arbitration); and (ii) the ability to select an adjudicator with qualifications relevant to the dispute. Whilst adjudication is often said to deliver "rough justice", that concern is balanced against its advantages and the fact that the decision is interim binding only. As put by the Supreme Court, "The motto which has come to summarise the recommended approach is 'pay now, argue later'."

The problems

In more recent years, the advantages of reduced cost and increased speed have been eroded:

- **Cost.** The types of disputes have become more complex, and the procedure more sophisticated as a result. In addition, adjudicators are wary of their decisions being undermined by challenges raised at the outset, based on jurisdiction, for example the absence of a "dispute" or the referring party's failure to appoint the adjudicator in line with the contractual procedure, and/or natural justice – in general, some sort of procedural unfairness. Perhaps a symptom of both of these factors, there is a tendency for some adjudicators to allow multiple rounds of submissions rather than exercise strict control over the timetable. This substantially increases the parties' legal costs (which, importantly, neither can recover from the other side).
- **Speed.** The successful referring party may not be cashing its cheque immediately. The respondent can refuse to comply with the decision, based on a challenge raised at the outset, or a shortcoming in the written decision. This has led to a practice of respondents scrabbling around for grounds to resist enforcement, and therefore delay while an enforcement action is determined through the courts.

If a payee can no longer afford to adjudicate (let alone litigate or arbitrate), the access to justice issue highlighted by Sir Michael again rears its head. Two recent developments are welcome in addressing that issue. The first is the release of new services for determining "low value" claims, and the second is the Inner House's recent support for a pragmatic approach to the enforcement of adjudicators' decisions.

Cost: low value dispute services

The Technology & Construction Solicitors' Association (TeCSA) established its Low Value Dispute Adjudication Service permanently in January this year. More recently, the Construction Industry Council launched its Low Value Dispute Model Adjudication Procedure (the LVD MAP), which is now available from a range of adjudicator nominating bodies. Some key features of the schemes are considered:

- **Adoption of procedure.** The TeCSA service can be used under existing contracts simply by asking TeCSA to appoint an adjudicator (unless the contract names an adjudicator or restricts the adjudicator nominating bodies that may be approached). By comparison, the LVD MAP constitutes a new set of procedural rules that must be incorporated into new contracts or otherwise used with consent.
- **Value threshold.** Under TeCSA's service, a low value dispute is anything up to £100,000. This compares to the £50,000 threshold under the LVD MAP. Both are sensible, given the Adjudication Society's 2019 statistics that: (i) 38% of disputes had a value from £0 to £50,000; and (ii) 19% had a value between £50,000 and £100,000.
- **Fee cap.** Adjudicators' fees are capped according to a sliding scale based on the value of the claim (beginning at £2,000 and rising to £5,000 (TeSCA) and £6,000 (LVD MAP)). These caps will undoubtedly deliver a saving, in light of the Adjudication Society's finding that the average adjudicator's fee was £9,000. There is, however, a trade-off for reduced cost: the dispute

must be relatively straightforward to determine.
• **Complexity.** Under the TeSCA service, the claim must be for a specific sum of money (e.g. a claim for liquidated damages, or the so-called "smash and grab" adjudication based on sums previously certified). Disputes under the LVD MAP are not limited to claims for specific sums of money; however a list of factors is given to determine whether the dispute is suitable or not. These are more restrictive, being dependent both on the substance of the claim and the volume of material to consider.

One of the drawbacks with the LVD MAP is the prospect that the adjudicator could resign if, midway through, a dispute became too complex or document-heavy. This could lead to attempts by the respondent to frustrate the process. Separately, neither service can be used for low value but nonetheless complex claims. The solution in such cases is for adjudicators to be more proactive in regulating the procedure and timetable in an adjudication. In doing so, adjudicators will be walking a tightrope in view of potential jurisdictional and natural justice challenges, although most should be able to strike the correct balance. Further, adjudicators may take some reassurance from the recent Inner House judgment in *Dickie & Moore v McLeish's Trs* [2020] CSIH 38.

Speed: approach to enforcement of decisions

While a firm line has always been taken on enforcement, in recent years the Scottish courts have refused to enforce the decisions of adjudicators who failed to address a material line of defence or provide adequate reasons in relation to some aspect of the dispute. The problem was that, in such cases, the decision became a house of cards. It was generally viewed as a total nullity and could not simply be enforced to the extent it was valid.

In *Dickie & Moore* the Inner House considered this problem. The case concerned an adjudicator's decision on a contractor's claim for payment of its final account. There were three types of subclaim. There was no dispute that the adjudicator had jurisdiction to deal with claims 2 and 3, but the Lord Ordinary held that he had no jurisdiction to deal with claim 1. The question became whether the court could ignore the decision on claim 1 and safely enforce the decision on claims 2 and 3 (in other words, apply severance of the good from the bad).

The Inner House clarified that severance is allowed, so long as the valid parts of the decision are not "significantly tainted by the adjudicator's reasoning in relation to the invalid parts". In effect, removal of one card should not always lead to a total collapse.

This principle can be more easily applied to "final account" claims, which usually consist of different types of subclaim, although it is not restricted in scope. A "practical and flexible" approach will be applied to determine whether, in any case, there are elements to the dispute that are clearly separate and untainted. Where the test is met, it will no longer make economic sense for a respondent to resist enforcement of a decision when the adjudicator's failure affects a lower value element.

This decision was grounded in the policy aims of adjudication, the Inner House noting: "the provisions of the scheme should be interpreted in such a way that they achieve its fundamental purpose, which is to enable contractors and subcontractors to obtain payment of sums to which they have been found entitled without undue delay". Looking beyond the issue of severance, this emphasis on the underlying principles will serve as a warning to respondents considering other types of challenge to enforcement.

Advising clients

In light of the advantages of adjudication, solicitors should consider how they might advise their clients:
• **Litigators.** The Law Society of Scotland expects solicitors to "have a sufficient understanding of commonly available alternative dispute resolution options to allow proper consideration and communication of options to a client in considering the client's interests and objectives" (guidance to rule B1.9). While a lengthy sheriff court or Court of Session action would achieve finality, would a quicker adjudication better suit the client's objectives?
• **Drafters.** Drafters should consider incorporating the LVD MAP into new construction contracts. Where the activities would not be caught by the Construction Act, a bespoke adjudication procedure could be considered (for example in the case of construction of a residence, which is excluded from the Act, by using the scheme available under the JCT Building Contract for a Homeowner/Occupier).

The increased access to adjudication, through the developments discussed above, may now tip the balance when deciding between dispute resolution options.

Full circle: the way ahead

The O Shaped Lawyer® is a new programme that promotes professional success by putting people, whether colleagues or customers, at the heart of legal services. Neil Campbell, of the programme working group, explains the concept

Are you an O shaped lawyer? This is not a comment on anyone's diet and exercise habits since the COVID-19 lockdown, but a challenge based on a programme that takes a fresh look at the skills and competencies needed to be a successful lawyer from the eyes of the customer.

Its starting position is that the technical, analytical skills which are the longstanding hallmark of a lawyer need to be supplemented by additional skills and competencies. Developed last year by a group of UK lawyers, the purpose of the O Shaped Lawyer Programme is simple – to make the legal profession better: better for those who work in it, for those who use it, and for those who are entering it. This is a bold ambition, so what is this programme?

At its heart, the O shaped lawyer is about mastering more human-centric behaviours and attributes under three pillars:

- first, competencies to build successful long-term professional relationships, whether between lawyer and customer, between in-house and law firm, or between colleagues;
- secondly, competencies which will enable a lawyer to adapt to the changing legal landscape and to help them develop and thrive in their legal career;
- thirdly, competencies to support customers, to understand priorities and goals and to identify opportunities to find the best legal solutions and create value for the client.

These are not new requirements, but those leading on the O Shaped Lawyer Programme believe the time is ripe for change. Why?

The legal services market is in a state of change. External factors such as new legal service providers entering the market, the potential for technology to disrupt the traditional role of the lawyer, the increasing expectations of clients demanding "more for less", and more innovative solutions, will impact the traditional legal services model. Internal factors within the profession are also driving change. The challenges to become more diverse and inclusive, and to respond to the concerns raised around mental health and the wellbeing of members, are two examples. Lawyers who develop and adopt a broader set of skills and behaviours will be best placed not only to meet these challenges but to make the most of opportunities that changes will bring.

Figure 1: the 12 attributes of an O shaped lawyer

O shaped is three by four, over five

The O Shaped Lawyer Programme started life as a group of likeminded individuals who wanted to make a positive difference to the profession. Their goal was to create a model which did not just advocate for a broader skillset for lawyers, but which spoke with the customer voice and was practical in its application. To do so, the group started by interviewing 18 GCs of FTSE 350 entities to understand the attributes and skills that lawyers must acquire to become valued partners with their customers. This research highlighted 12 attributes of an O shaped lawyer which fall under the three pillars mentioned above (building relationships, being adaptable and creating value): see figure 1 above.

These attributes sit within a framework of five "O shaped" behaviours which drive not just the actions of the programme, but which the group likewise views as the mindset which successful O shaped lawyers will need to adopt: see figure 2.

So, what do these attributes mean in practice? Focusing on "empathy" (also known as EQ) as an illustrative example, it is clear that high levels of EQ are becoming increasingly recognised as a necessary component of leadership which differentiates the great from the good. Yet all too often it is IQ, assessed through exam results and technical knowledge, which is given far greater weight in determining recruitment and career progression. EQ is rarely discussed, and more rarely still, actively developed. Yet the research of the O Shaped Lawyer Programme has shown that though EQ may be termed a "soft skill", it is a hard requirement to drive value for customers.

Consider the following examples of behaviour which demonstrate high levels of EQ, and the impact each might have on building long term and successful relationships with colleagues and clients:

- putting yourself in other people's shoes to support informed decision-making;
- not seeking to blame others;
- acknowledging the contributions of others and celebrating their successes;
- giving praise when deserved without being overly concerned about taking credit;
- developing self-awareness (i.e. reading your own emotions and knowing your strengths and limitations);
- developing self-management/self-regulation (i.e. being able to control your emotions in a healthy and constructive way);
- demonstrating and promoting social awareness;
- promoting relationship management through a focus on social skills.

Viewing just one element of the 12 attributes in this way, the impact of their exercise on a relationship between lawyer and customer becomes apparent. The attributes may even seem obvious, yet they are rarely actively developed, whether for those in the profession or for those completing legal education to enter the profession in the future. In combination, they have the potential to create lawyers capable of developing powerful and value-driven relationships.

Bringing O shaped lawyers to life

Identifying behaviours and attributes is helpful, but on its own it isn't going to change the dial. A core feature of the O Shaped Lawyer Programme is its focus on bringing the 12 attributes to life, within the framework of the five O shaped behaviours. To achieve true practical application, the programme focuses on two separate but interlinked workstreams:

The education stage

A core objective of the O Shaped Lawyer

Programme is to see legal education modernised to better reflect the skills and competencies needed to be a successful lawyer. While technical knowledge and its practical application remain core, the programme's aim is to embed the O shaped attributes into training for the profession. In England, the University of Law (U-Law) will shortly pilot a one-day course for trainees and junior lawyers on the "building relationships" pillar, with later courses on the other two pillars also planned. Several universities and law schools have also expressed an interest in either developing specific modules or embedding the attributes throughout their programmes. While it is early days, it is encouraging to see legal educators and legal practitioners coming together to discuss the skillsets needed to be a lawyer.

The O Shaped Lawyer Programme will continue to collaborate with universities and law schools to ensure that legal education, which is so rarely viewed afresh, places a much greater emphasis on the building of more rounded lawyers, utilising the framework that the programme has put in place.

The practice stage

Strengthening the relationship between lawyers and their customers (including between private practice and in-house lawyers, and both types of lawyers and their end customer) is a core objective of the O Shaped Lawyer Programme. It is within the practice stream that true practical application of O shaped attributes and behaviours can be tested and refined.

To foster practical application, and to test the impact of new O shaped initiatives properly, the programme has developed a pilot scheme for in-house legal teams and law firms to explore new ways of working together in a safe environment based on the three customer-centric pillars of building relationships, being adaptable, and creating value. The purpose is to use O shaped behaviours and attributes in a real life, real time working environment for them to improve the relationship with each other, and look together at how the service to the end customer can be improved. These pilots offer a safe environment which encourages open and honest discussions. Already, pilot groups are reporting tremendous progress, with one senior in-house lawyer commenting: "Since starting the pilot I have had some of the most open discussions I have ever had with the external lawyers that support our business."

To date, six pilots are operating, with more in the pipeline. The outcomes are intended to be shared across not just the wider customer and law firm relationship, nor only in the relevant law firm, but with the wider legal community. In this way, the findings will also inform the education stream.

Be part of the discussion

The O Shaped Lawyer Programme has existed for less than a year, yet in that short space of time its vision of a legal profession which puts people first, its aim to make the legal profession better for everyone involved in it, and its engagement with legal educators and legal practitioners alike to help make this happen, have found a receptive audience. The programme recognises that there will be profound changes to the provision of legal services in the years to come; and that lawyers will need to adapt to meet changes as well as continue to meet client expectations. There is a spotlight shining on the profession's ability to respond to the gap in diversity and inclusion, and on how wellbeing and welfare are dealt with. Good work is already taking place to understand and respond to this diverse range of challenges. The O Shaped Lawyer Programme hopes to play its part: putting people first, and shifting the dial so that a lawyer's technical expertise is complemented by a broader palate of behaviours and attributes which are not only recognised and valued, but are also embedded into a lawyer's development throughout their legal career.

The programme's vision is for lawyers to master attributes which will put them in the best position to meet the challenges and opportunities facing the legal profession, which help a lawyer to develop and thrive in their legal career, which create more rounded lawyers who can deliver better value to their customers, and, just maybe, which help to make the profession better for everyone involved.

Neil Campbell, managing legal counsel, Royal Bank of Scotland, and member of the O Shaped Lawyer working group
e: Neil.J.Campbell@rbs.co.uk

If the O Shaped Lawyer Programme resonates with you, or to find out more, join our O Shaped LinkedIn group (search for: "The O Shaped Lawyer Group") and visit our website (www.oshapedlawyer.com), both of which contain lots more information. If you are interested in getting involved, please join the mailing list or contact me.

The Five O's Framework

BE OPTIMISTIC

We will adopt an optimistic mindset so that lawyers are viewed as business partners, not business blockers.

HAVE AN OPEN MIND

We will adopt a growth mindset through which we will always be open to new ideas and reduce defensive attitudes to a thing of the past.

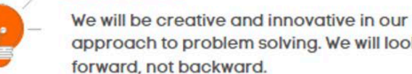
MAKE AND TAKE OPPORTUNITIES

We will encourage lawyers to make and take opportunities outside of the traditional lens of risk avoidance.

TAKE OWNERSHIP

We will focus on taking accountibility for business driven outcomes beyond pure technical legal advice.

BE ORIGINAL



We will be creative and innovative in our approach to problem solving. We will look forward, not backward.

Figure 2: the five "O shaped" behaviours

Jack joins trade advisory group

Lorna Jack, chief executive of the Law Society of Scotland, has been appointed to represent Scotland's legal sector on an expert group on professional advisory services.

The group is one of 11 trade advisory groups set up by International Trade Secretary Liz Truss to help inform the UK's position in trade negotiations post-Brexit.

Court plans must involve profession, Society insists

Consulting with the legal profession is key to delivering post-pandemic courts which are effective and fair for all, the Law Society of Scotland has insisted.

Following recent concerns over virtual custody courts, and a Scottish Courts & Tribunals Service modelling paper which raised the prospect of Saturday court sittings among measures to eliminate the backlog of trials, the Society's President, Vice President and chief executive met with the Lord President, Lord Justice Clerk and SCTS chief executive to emphasise the need for consistent consultation, in what was described as a "frank and robust" exchange.

Afterwards, President Amanda Millar commented: "I appreciate the Lord President and his colleagues giving the time to meet with us to discuss the concerns of our members. We are all aware of the significant challenges facing the court service. We are committed to continuing to engage positively in creating innovative solutions which support an effective and fair court system for all.

"It is important to recognise that it is through the goodwill and professional commitment of our members that the courts have been able to operate as they have in recent months. It is reasonable to ask that stakeholders repay that support by ensuring that the needs and views of Scottish solicitors are taken into account in planning for the future."

Welcoming a commitment from SCTS to further discussions, she added: "The suggestion of introducing weekend courts is a particularly significant one, which would have a negative impact on an already under pressure group of professionals. Our Criminal Law Committee believe that no case has been made to justify this proposal, but we look forward to engaging in discussions about alternative ideas to address the court backlog."

Notifications

ENTRANCE CERTIFICATES ISSUED DURING JULY/AUGUST 2020

ADAM, Nathan Cameron Lee
AL-MIDANI, Samia Naomi
AULD, Rebecca
BARCLAY, Gemma
BATHGATE, Colin John
BENSON, David Trayner
BROOKS, Rachael
BUCHANAN, Scott Kenneth
CAMERON, Alec
COOPER, Rachel Margaret
DENLI, Ezgi
DEVLIN, Katie McLean Elizabeth
DEVOY, Lewis
DOHERTY, James
DONAGHY, Lynne Catherine
DONALDSON, Antonia Clare
DONALDSON, Simon David
EDWARDS, Leeanna Frances Toni
FULTON, Ben Robert
GILL, Najeeb Javed
GRANDISON, Suzanne
HEPBURN, Holly Anne
KINNINMONT, Jade Ann
KIRKMAN, Laura Annetta
McALONAN, Danielle Josephine
McCOURT, Rachel
McINTOSH, Charise Roberta
MACINTYRE, Connor Angus Macpherson
McKEOWN, Lisa Elaine
MANSON, Andrew Duncan
MEHIGAN, Liam Peter
MILKOVA, Rory Milcheva
MILLER, Rachael Elizabeth
MUNDIE, Erin Margaret
MURRAY, Rebecca Catherine
O'DONNELL, Anna May
PARTON, Rory William England
PEDDIE, Alex Anne
PURDIE, Ross William Robert
RUSSELL, Abby Jayne
SHANNON, Nicholas Gregory
SHEARER, Emma-Jane
SMALL, Euan Matthew
SMITH, Andrew Scott
SPEED, Martha Rose
STEVEN, Olivia
STEVENSON, Scott Fraser
THOMSON, Hannah Margaret
WHITE, Nadia Bridia
YULE, Kathryn Elizabeth

APPLICATIONS FOR ADMISSION JULY/AUGUST 2020

AHMED, Sabihah
AIRTH, Sophie Elizabeth
AITKEN, Emma Roberta Marjory
ARCHIBALD, Scott Michael
CHRISTI, Anoop
COCKBURN, Ruth Lindsay
CUNNINGHAM, Jennifer Mary
DURIE, Katrina Margaret
EDGAR, Deborah
FLAHERTY, Lisa
FOSTER, Christy
FRASER, Andrea May
FYFFE, Andrew Robert Urquhart
GRAY, Joshua Andrew
INNES, Sarah Charlotte
JAKUCZUN, Sylwia
JASIN, Anton
JONES, Cameron Gordon
KAPAON, Jan Maria
KENNEDY, Jade
LEITH, Michael
LENNIE, Alasdair Hugh
LIM, Won
McCRACKEN, Lucy Charlotte
McDERMID, Alistair Coates
MACPHERSON, Jack McCrae
MENZIES, Samantha Ruth
MURRAY, Richard David
NAPIER, Flora Elizabeth
NEEDLE, Lucy Louise
ORLANDO, Nadia
PATERSON-HUNTER, Kirsty April Margaret
PEHLIVANOV, Kiril Georgiev
PETTERSON, Emma
PIA, Giuseppe
PIRIE, Caitlin Mairi
SCOTT, Rebecca Julie
SCULTHORPE, Erin Cameron
SEDMAN JAENSSON, Caroline Birgitta
STEWART, Agnieszka
STEWART, Gulam Karima
THOMSON, Andrew Alexander
TINNEY, Stephanie Margaret
WELSH, Lauren
WHITTAKER, Conor Craig
YOUNG, Kirsten

OBITUARIES

DORIS MARGARET MACKAY (retired solicitor), Edinburgh
On 16 June 2018, Doris Margaret Mackay, formerly employed with the Secretary of State for Scotland, Edinburgh and latterly with Scottish Homes, Edinburgh.
AGE: 87
ADMITTED: 1959

CARYL MARGARET ANNABELLA GODWIN (retired solicitor), Glasgow
On 25 December 2019, Caryl Margaret Annabella Godwin, formerly of Dumfries & Galloway Council, Dumfries.
AGE: 73
ADMITTED: 1978

THERESA GWENHWYFER GAVAN HUNT, Aberdeen
On 24 July 2020, Theresa Gwenhwyfer Gavan Hunt, partner of the firm Burness Paull LLP, Aberdeen.
AGE: 40
ADMITTED: 2004

JAMES HAMILTON RUST WS, Edinburgh
On 10 August 2020, James Hamilton Rust WS, partner of the firm Morton Fraser, Edinburgh.
AGE: 62
ADMITTED: 1982

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

UK internal market

In July, Business Secretary Alok Sharma published a white paper on plans to legislate for a UK internal market to ensure that cross-border business can continue unimpeded within the UK once powers previously exercised at EU level are returned to the UK. The white paper states that devolved administrations will be given "unprecedented regulatory freedom within new UK frameworks". However, the Scottish Government is not in favour and argues that common frameworks would be sufficient to manage divergence within the UK.

Having consulted other committees, the Constitutional Law Committee submitted detailed comments, including these recommendations:

- Government should engage in pre-legislative consultation on the clauses concerning the market access commitment, and on those containing exclusions from the scope of the internal market;
- Government should engage at an early stage with professional bodies affected by the proposed review of the objectives for regulating professions and recognising international qualifications;
- in order to ensure proper scrutiny, internal market issues of significant impact should feature in primary legislation;
- Government should ensure it complies with the Memorandum of Understanding and Concordat on International Relations.

EU law continuity

The Environmental Law and Constitutional Law Committees gave oral evidence at stage 1 on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. Alison McNab, secretary of the former committee, raised points including:

- provisions in part 2 are welcome in filling the environmental "governance gap" following EU withdrawal, but could be strengthened, particularly in relation to Environmental Standards Scotland;
- strong collaboration between the UK Government and devolved administrations is important given the trans-boundary effects of environmental impacts;
- clarity and certainty as to the role, effect and interpretation of the environmental principles are important and it is expected that guidance will help achieve this.

Michael Clancy, secretary of the Constitutional Law Committee, raised points including:

- with the bill giving power to Scottish ministers to introduce EU law into Scotland in the post-transition period, law that will have been made without the involvement of Scotland or the wider UK, it would need to be scrutinised closely in the Scottish Parliament;
- in some cases, primary legislation might be the most appropriate route and the bill should provide for this;
- at the very least, any implementing regulations should be subject to super-affirmative procedure;
- specific provision is needed for Scottish ministers to issue any information or justification about the EU law they choose not to adopt.

Children (Scotland) Bill

Several significant amendments were proposed to the bill at stage 3 which the Society did not support, including proposed changes in relation to child welfare reporters, professional misconduct for referrals to child contact services or ADR, the expression of views by the child, and effective participation. The Society provided a further briefing in advance of the stage 3 debate on 25 August and was pleased that an amendment to preclude solicitors being appointed as child welfare reporters was not passed.

Sentencing young people

The Criminal Law Committee responded to the Scottish Sentencing Council Consultation on sentencing young people. The committee was of the view that subject to certain comments in the response, the introduction of the proposed guideline was to be welcomed to provide clarity on a complex subject. It will be important to inform the public about how sentencing decisions have been reached, and to promote transparency and consistency of sentencing.

The response gives detailed consideration to the various issues raised by the proposal that the guidelines should apply to all those under the age of 25 at the time of sentencing.

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

SARs: where do **they end up?**

Solicitors sometimes wonder what happens to suspicious activity reports they make. The Society's Fraser Sinclair asked the National Crime Agency to explain

Suspicious activity reports (SARs) must be made where a solicitor carrying out regulated work knows or suspects or has reasonable grounds for suspicion of money laundering. They remain a crucial mechanism for engagement between law enforcement and Scottish solicitors; however, sometimes members of the Scottish legal community query what actually happens to their SARs and just how much use they really are.

Law Society of Scotland AML risk manager, Fraser Sinclair, put some questions to National Crime Agency (NCA) head of reporter engagement, Tony Fitzpatrick.

FS: Reporters are often unsure of what actually happens to SAR submissions. Can you give us a bit of a rundown from that first moment a SAR is opened by the NCA?

TF: The SAR Enquiry and Action team screen every SAR – more than 72,000 annually. They use keywords or glossary codes to identify SARs regarding vulnerable persons, human trafficking, modern slavery and child sexual exploitation for fast tracking.

Core responsibility of the Defence Against Money Laundering (DAML) team is to grant or refuse requests for a "consent". They consider thousands of consent requests in a time critical environment, assessing legal implications as well as the welfare and impact on the reporter and the subject. Typically, the team refuses consent where an investigation is underway with a view to restraining assets, therefore refusals can actually *help* return stolen money to victims and deny criminals the benefit from their crimes.

Relevant SARs are analysed and disseminated by the Terrorist Finance team (TFT), using automated searches for keywords/ phrases. Those searches derive from regularly updated counter-terrorist intelligence. Importantly, this work can identify positive hits where the reporter is making a money laundering report while not realising the significance it will have to a terrorist financing investigation.

The International team interrogate SARs data to identify reports linked to a foreign territory or for foreign criminal assets in the UK. They share intelligence with other countries and handle thousands of inbound and outbound enquiries from across the globe.

FS: And some SARs actually end up back with local law enforcement?

TF: SARs which have been triaged as "sensitive" are not available to general law enforcement but are allocated to specialist teams; "integrity SARs" and those relating to politically exposed persons (PEPs) are forwarded to anti-corruption or professional standards teams; and terrorist financing indicators are forwarded to the National Terrorist Financial Intelligence Unit (NTFIU) and the relevant counter-terrorist units.

The SARs database is called Elmer. All non-sensitive SARs (about 99% of total SARs) are made available to local law enforcement seven calendar days from receipt, on tools called Moneyweb, Arena and Discover. These tools allow local enforcement to try to match their intelligence with data contained in SARs, i.e. names, postcodes, bank accounts etc.

SARs are made available to a wide range of law enforcement – not just the police. They can be shared with specialists in HMRC, local councils, NHS, Trading Standards etc.

FS: How long will a SAR be kept for use in the matching process and in other investigations?

TF: SARS are kept on the Elmer database for six years. This information can be accessed by law enforcement as long as the person accessing the database has the correct accreditation to access Elmer.

FS: What do you see as being the key benefits of SARs submitted by legal professionals in particular?

TF: Solicitors are vital due to the diverse areas they specialise in, and often solicitors are privy to information that banks are not. For example, a solicitor SAR might alert us where the client is due inheritance but is the subject of a confiscation order, or they may be dealing with complex international contacts and have submitted SARs which have the hallmarks of trade-based money laundering.

FS: Can you give us any examples of a legal professional's submission being used?

TF: One solicitor received a request from a foreign lawyer to act on behalf of their client in relation to drafting contracts for the purchase of goods from a UK company. Before drafting the contracts, the UK solicitor received the full payment from the foreign lawyer, who then requested that the funds be paid directly to the foreign supplier of the UK company in order to cut out the middleman.

Using the UK-based solicitor adds unnecessary steps to a trade transaction and adds a further layer to the funds. This layering of high values of funds has the hallmarks of high-end, trade-based money laundering. This SAR generated an NCA alert and investigation.

In another example, a solicitor was in possession of funds which represented a charge on a property in favour of their client as part of a divorce settlement. The reporter was aware that the subject had recently served a prison sentence for drug trafficking and that there was a confiscation order in force in relation to him. The DAML request was refused and local enforcement obtained an uplift order.

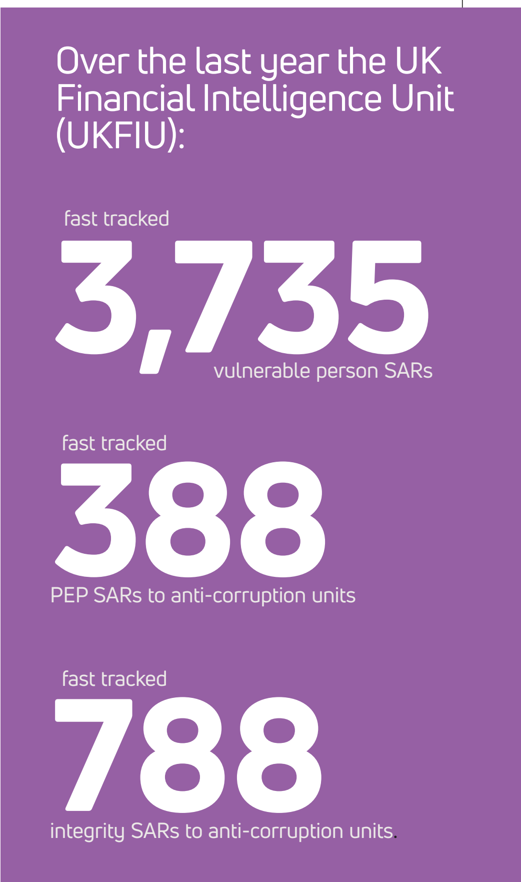
FS: So the impact of SARs is obviously potentially far-reaching, but reporters won't always know what has happened with them?

TF: We are aiming to improve a number of current feedback systems, and the introduction of better feedback loops in the SARs IT transition is something solicitors can look forward to.

Feedback can be limited for a number of reasons. Accidental leakage of information could jeopardise investigations, or years may elapse between a SAR being submitted and it playing a role in an investigation. We deal with thousands of SARs every month and most reporters will realise that 100% feedback is not feasible.

FS: Is it possible to put a figure on how many enforcement actions have been undertaken

involving SARs? How is success measured?
TF: SARs contribute in a number of ways and some successes are hard to measure, but a number of successes were outlined in the most recent SARs annual report. For example, over that year £131,667,477 was denied to criminals as a result of DAML SARs.



FS: Solicitors historically file proportionately few SARs. What is your view on low SAR numbers and "quality over quantity"?
TF: The UKFIU makes no comment on the relative volume of reports from different sectors. It is for the sectors and their supervisors to assess if the volume of SARs submitted is proportionate to the risks their sectors face.

It is important that Scottish solicitors understand their obligations and the relevant legislation around SARs.

To that end, we recommend taking a moment to visit the dedicated SARs page in our AML site: bit.ly/LSSAMLsars, where you can find some more information as well as our new "Getting it right first time" webinar collaboration with the NCA. You can also visit the dedicated NCA SARs page: bit.ly/NCAsars

ASK ASH

Back, and it's weird

How do I cope with the strange new office atmosphere?

Dear Ash,

I have recently returned to work in the office a couple of days a week. However, I am finding that the office environment is far from ideal as there are fewer people present due to social distancing measures and this is impacting on the overall atmosphere. No one seems to want to spend much time speaking at coffee or lunchtime and there is limited banter. I appreciate that it may take some time for more "normal" conditions to resume, but it is still quite depressing and certain colleagues seem on edge.

Ash replies:

You clearly, like other colleagues, are still trying to find your bearings after a prolonged absence from the office, and your feelings of uneasiness are quite natural and understandable. For anyone returning to the office there will be a certain period of adjustment required, and it is important that you allow yourself some time to get comfortable with your new surroundings.

You will certainly not be alone in your feelings about the new environment; and although everything may aesthetically look the same, it will be far from the atmosphere that you were familiar with before COVID-19 hit. The impact of COVID, especially in terms of our working environment, is likely to be longer term; things that we perhaps previously took for granted like simply going to lunch with colleagues or having banter at the coffee machine are unlikely to readily be the "norm".

However, slowly but surely, we will resume some form of normal routines. Take everything in stages: perhaps as a first step, suggest going for lunch with a colleague at a pub or restaurant with outdoor seating. This could allow you to feel more at ease outwith the office environment and make you feel more comfortable when you return to the office. Don't be offended if others are not so eager to socialise initially, as everyone will want to move at their own pace. Find what level of pace you are comfortable with and try not to stress; you managed to cope with lockdown and you will find the strength now to transition to the next phase of this phenomenon.

Send your queries to Ash

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

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

The billable hour: **some fairy tales**

Offering a perspective from Down Under, legal consultant John Chisholm challenges the belief still held by some lawyers that the billable hour is accurate, transparent and ethical

Some time ago, a law firm partner told me that while a small minority may have abused it, overall hourly billing is good because it is "accurate, transparent and ethical".

This is not the first time I have heard, or read, similar comments as justification for maintaining the billable hour model, and indeed when I was a practising lawyer and managing partner I used similar terms myself.

There are several purported justifications for the billable hour, such as:
- it is easy to implement and understand;
- it records effort;
- all professionals sell time;
- it is the norm as most of our competitors charge by time too;
- it is acceptable to most clients, and some demand it;
- our practice management system is built around time;
- our firm's measurement and rewards structure is built around time;
- it transfers all risk to our clients.

However I, like many, challenge the notions that charging by time is "accurate, transparent and ethical".

"The billable hour is accurate"

Accurate = to be correct, exact, without any mistakes

Of course, to charge by time you must keep a record of your time. And if your contractual engagement with your client is to charge by the hour (broken down into six, 10 or 15 minute units or whatever iteration the management consultants, most of whom do not charge by time themselves, dream up), your time recording must be, at the very least, *reasonably* accurate.

Ever since time based billing was introduced, firms of all sizes have been drilling into their fee earners (an awful expression, only exceeded by the derogatory "non-fee earners") the importance of accurately recording billable time. Manual recording has moved to automated, as practice management vendors extol the virtues of their systems which "capture time".

Alas! Even with all the help from technology, you will still not get your time recording accurate. Why? Simply because time recording still requires *human input* to start/stop automated recording. It is physically and psychologically impossible for human beings, no matter how good their intentions, their intelligence or their software, to accurately record time spent on anything. Law is not practised in some kind of vacuum. We are constantly interrupted by emails, texts, colleagues, phone calls, family, not to mention that our minds often wander, so unavoidably, accurate time recording gets "overlooked".

At best, we record the time we think we spent, or we think we should have spent, on something. At worst, we forget completely, sometimes for days or weeks, until the managing partner sends an "all firm" email on the second last day of the month reminding all that chargeables are down and fee earners must lodge their timesheets – then we guesstimate it, or simply make it up.

"The billable hour is transparent"

Transparent = easy to perceive or detect, open to public scrutiny

I confess to never being sure why this statement has any ring of truth to it. It seems to be one of those sayings that rolls easily off the

tongue and if you say it often enough people will believe it.

I suspect the "transparency" part stems more from some notion that "you only pay for the time spent" rather than any real openness. Of course there are times when a client knows or observes when their lawyer is physically doing something, such as attending the same meeting, appearing in court, speaking to them on the phone. However, as we know, and many lawyers are only too quick to tell me, the real value of a good lawyer is their "intellectual and social competencies" (often called "thinking"). Until technology invents a chip that is inserted in our brain and somehow linked to a client matter number to track when we are actually thinking about the matter and that matter only, genuine transparency has a long, long way to go.

"The billable hour is ethical"

Ethical = morally good or correct, in accordance with the rules or standards for right conduct or practice

Here is where it gets really interesting. The ethical justification for the billable hour seems to be intrinsically tied to the rules or standards in the legal profession (originally set by the profession itself). It has been an accepted practice for so long to bill retrospectively for our services, either by an agreed hourly rate or some sort of scale of fees, that the profession has convinced itself that this practice must be ethical.

Both these retrospective bases meant that, essentially, clients and lawyer had no way of knowing what the fees were in advance because the task, activity based solely on time, had not yet been undertaken.

Regrettably, as in any industry or profession, there are a minority who choose to take advantage of these accepted retrospective billing practices. Time based billing tempts otherwise ethical professionals to do unethical things, and the legal profession well knows that behaviours such as block billing/rounding up, hoarding and multi-billing exist much more than we are prepared to admit.

Even though retrospective billing is arguably pretty much the perfect crime, the profession (and in many jurisdictions, the appropriate regulators) introduced codes of conduct or rules to try to ensure clients were protected as best they could be, with anyone aggrieved by the fees charged purportedly able to have those fees assessed, or "taxed" (a quaint legal term) to see that they were in essence fair and reasonable.

One of the inherent problems even with an independent third party assessment is that it too is an after-the-event determination, and often of little comfort to the client if they were not expecting the quantum of such fees in the first place.

Clients fear "bill shock" almost as much as lawyers fear their clients' reaction to "sticker shock" – the shock of discovering the price of their services. For so long as the legal profession enjoyed a monopoly on provision of legal services, and so long as clients were prepared to accept these billing models, such practices were deemed ethical. (Note that billing models are not *pricing models*, as billing takes place *after* the work is done whereas pricing takes place *before* – and an hourly rate is never a price.)

But as we know, law world has changed. Lawyers no longer retained the same monopoly, the profession became more deregulated in many jurisdictions, and more and more clients wanted and insisted on greater certainty and predictability in their fees. Perceptions and acceptance of what constitutes ethical and unethical conduct change with the times, particularly as knowledge increases and community and business norms evolve. The medical profession is a prime example; ditto builders, architects, and engineers. And so it is and should be with the legal profession.

For years there have been any number of articles, posts, surveys and research studies undertaken by many participants, including members of the judiciary, bringing into question the ethics of the billable hour and what perverse behaviours it encourages and entrenches into firm cultures.

Shaky ground?

In 2017 Ivy B Grey, writing in the ABA Journal under the title "Not competent in basic tech? You could be overbilling your clients – and be on shaky ethical ground", stated: "There are no business, practical, or ethical excuses to avoid learning about, understanding, and adopting technology. Yet, at the same time, we must recognize that there are perverse incentives that encourage lawyers to refuse to learn technology – the main one is the billable hour. Increased financial rewards for increased hours encourage lawyers to bill as much as possible for every matter.

"It's an incentive structure where lawyers are working in opposition to their clients' interests.

"The seemingly innocuous decision to skip technology training can lead to overbilling. And if you are deliberately avoiding technology because it means that you can bill more, then you are definitely overbilling. Do not confuse this with a clever billing scheme. This is not 'just business' – this behaviour is an ethical breach."

The same logic can and should be applied to time based billing.

The late Dr Michael Hammer (see hammerandco.com) once said: "a professional is someone who is responsible for achieving a result rather than performing a task".

Oldlaw's business model (I define Oldlaw as a model that leverages people x time x hourly rate) reduces everything any lawyer does to a series of tasks, and I ask how much longer can the legal profession get away with claiming it is ethical to ask clients to pay for an activity or a task when many lawyers, let alone their clients, claim they do not even know what the task will be or how long it will take to perform?

I have said for years that every lawyer and law firm could agree their price(s) upfront with their clients – they simply *choose* not to.

If none of the above convinces you about the ethical challenges of the billable hour, perhaps have a go at applying the Golden Rule: *If hourly billing were so ethical, would we want it to be universal?*

Waiting till change is forced?

I have never hidden my distaste and my prejudices regarding the billable hour and the "we sell time" culture that has permeated most professional firms, but especially law firms, over the last few decades and the deleterious effects this has had, and continues to have, on the reputation and values of the legal profession and those that work within it. It is hard to believe that there are some out there still claiming its virtues, but they have their own vested interests in ensuring this model survives long after its "use by" date.

The tide has turned, I am pleased to say, but there is still a long way to go before we eradicate the billable hour, and its partner in crime the timesheet, from the legal profession. While an ever increasing minority have seen the light to a better way of practising their craft for the benefit of not just themselves but their clients, the majority of lawyers, instead of being proactive and changing their business and pricing model for the better, wait until market forces impose change on them.

In the meantime, however you care to justify the continuance of time based billing, if you use terms like "accurate, transparent and ethical" you must accept that increasingly your customers, and indeed your team members, see these justifications as self serving rhetoric that simply does not stand up to any objective and reasonable examination.

We were taught at an early stage that ignorance of the law is no excuse. Feigning ignorance of better business and pricing models is no longer an excuse for the legal profession either.

John Chisholm, B Juris, LLB, is a former managing partner and chief executive of two law firms in Australia, and co-founder of The Innovim Group, an international pricing consultancy
w: innovim.com.au

AML: making the most of your audit

Ian Wattie proposes some criteria for carrying out an anti-money laundering audit – which, properly conducted, should enhance a firm's good governance

Effective implementation of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on Payer) Regulations 2017 (the "AML Regulations") requires certain internal controls to be put in place in any regulated organisation, including law firms. One of those controls is a requirement in some cases for an audit function. This article examines the audit function and offers some guidance as to its use.

Regulation 21 states that, where appropriate with regard to the size and nature of its business, a firm must establish an independent audit function with the responsibility "to examine and evaluate the adequacy and effectiveness of the policies, controls and procedures adopted by [it] to comply with the requirements of [the AML Regulations]".

The audit function may be an external or internal resource; but where it is internal, it must be independent of the team responsible for ensuring compliance with the regulations. The auditor must have the necessary authority to access all relevant materials (policies, client files, internal procedural notes etc), to make recommendations and to monitor compliance.

For some firms, bringing in an external resource to provide challenge to the internal compliance function may be more efficient than the artificiality and cost of creating a second independent internal team.

It would be prudent to record (in a board minute or the like) the deliberations, and associated reasoning, together with all material factors that justify the firm's response to the requirement for an audit function, including decisions as to how that function is resourced, its duties, and accountability within the firm's management structure.

Twin objects

Broadly speaking, in the context of the AML Regulations the audit function can be seen as having two objectives:

- first, to review the infrastructure a firm has put in place – i.e., the policies, controls and procedures ("PCPs") in response to the regulations (let's call this the "macro audit");
- secondly, to assess how well those PCPs are being implemented in practice (the "micro audit").

Put crudely, it is one thing to have a shiny set of written policy and procedural documents, but they are of little value if they are not being properly adhered to. A firm needs to be able to demonstrate good implementation and compliance.

By now, most firms should have completed – or at least have in hand – a first macro audit of their PCPs, and they should be in the course of implementing any remedial action identified in that audit. The macro audit should be updated periodically, the particular timeframe being dependent on the size and nature of the business.

Any update audit should look at whether the recommendations of previous audits have been implemented; whether any new requirements of the regulatory authority (the Law Society of Scotland or, in England & Wales, the SRA) have been put into effect; whether changes in legislation or best practice (e.g. as a result of any reported cases) have been taken into account; and also whether the firm's PCPs have been updated to take account of any changes in technology, the firm's business model or practice areas, which should in any event be reflected in an updated AML risk assessment.

For the micro audit, best practice would require a regular review – perhaps on a monthly basis – of a selection of client matter files, to assess whether and how the firm's PCPs are being implemented. Some larger firms will have an in-house audit function that can fulfil this role. While smaller firms may not be able to sustain that level of permanent resource, they should still consider having micro audits carried out regularly, either by an experienced and senior practitioner in their firm who commands internal respect, or by an external consultant. Micro audits should look at a client file in its entirety, or alternatively adopt a thematic approach with a particular focus on any area that the firm may see as of heightened risk (e.g. source of wealth, proper completion of risk assessments etc).

Positive potential

Overall there are two key points to have in mind. One, it is important that the firm has given proper thought as to the scope of the audit function that is appropriate for the size and nature of its business, taking into account its obligations under the AML Regulations and the degree of exposure it has identified in its AML risk assessment. Separately, there needs to be in place a clear process – e.g. by an upgrade of systems, change of procedures or internal controls, or enhanced training (or maybe a combination of these) – which ensures that the issues identified in any audit are properly and promptly addressed.

The AML audit function should not be regarded as a burden or a tick box exercise. Properly resourced and culturally embedded in the firm with strong support at senior management level, it's a vital tool to help ensure that potential legal, financial, ethical and reputational traps are avoided.

Ian Wattie, former managing partner of Burness Paull, is a consultant with a focus on AML compliance. This article reproduces a blog by the author

COP26: working in support

A "call to arms" to the profession to become involved, as the Society sets up a group on climate change ahead of the now delayed global summit in Scotland

The United Nations Climate Change Conference (COP26), delayed by COVID-19, is now being held in Glasgow from 1-12 November 2021, in partnership between the United Kingdom and Italy.

The holding of COP26 is significant. It has been described, scientifically and politically, as a critical moment to focus attention on the climate change agenda, especially as countries' concentration on the pandemic has inevitably consumed full attention to the detriment of tackling climate change.

COP26 will monitor progress towards the delivery of the commitments made at the Paris Agreement in 2015. These commitments include strengthening the global response to the climate change threat by keeping the global temperature rise below 2°C above pre-industrial levels, with efforts to limit the temperature increase even further to 1.5°C (unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement). COP26 unites action by strengthening countries' ability globally to handle the impact of climate change.

What is the Society doing?

Inspired by the Scottish location for COP26, in August 2020 the Society set up a working group to consider COP26 and climate change. COP26 provides us with opportunities to consider our own responsibilities to climate change and look at how we are affected as individuals both personally and professionally, as a legal profession in representing clients and in policy matters, and the Society as a professional body.

> *"COVID-19 has seen a seismic shift in our individual behaviours and social attitudes. The importance of planning for global catastrophes has now been clearly established"*

Legal representation on the working group demonstrates the universal nature and importance of climate change, with cross-cutting policy interests spanning planning, property, tax, energy, environment, competition, finance and criminal. The Society's committee interests fit well into the UK's key COP26 priorities of: Adaptation & Resilience; Nature; Energy Transition; Clean Road Transport; and Finance.

Some legal interests in climate change issues are obvious. Solicitors advise clients on the implications arising from the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019. That Act sets important net zero emissions targets for the reduction of greenhouse gas emissions, providing for advice, plans and reports relating to those targets. Significantly, it outlines Scotland's delivery commitment on the Paris Agreement, coming back to the objectives of the COP26 agenda.

Some policy interests may be less clear cut. Public safety and security implications arise, given the size of COP26 and the number of attendees expected. Police Scotland anticipates that many more officers need to be recruited, with consequences for the throughput of normal criminal investigation/court business. Given that the venue at the Scottish Events Campus in Glasgow is to be handed over to the United Nations for the conference's duration, crimes taking place will fall to be investigated by Police Scotland but prosecuted under international law. With climate change as a highly charged and emotive issue, control of fringe events and protests outside the venue could cause significant disruption to businesses.

Poverty and financial issues arise where funding is being provided to help poorer countries cut their greenhouse gas emissions. The UK has committed to provide £11.6 billion from 2021-25 to help poor countries cut carbon and cope with the impacts of climate breakdown.

What is the working group planning?

The working group is currently developing its work programme. Its principal aim is to raise awareness of and interest in COP26 by building on the profession's knowledge and understanding of climate change issues. We will publicise relevant events of interest such as the Global Climate Change Week (globalclimatechangeweek.com/), which takes place from 19-25 October 2020, where academic communities are encouraged to engage with each other and with policy makers on climate change action and solutions.

What can you as a member of the profession do?

COVID-19 has seen a seismic shift in our individual behaviours and social attitudes. The importance of planning for global catastrophes has now been clearly established, with the consequences of delay apparent to all. Not all COVID-19 inspired changes have necessarily been negative, with for example the reduction in air travel and an increase in cycling both widely seen as benefits. With much greater working from our home environments too, attendance at virtual events and meetings to engage in discussions can be easier.

To plan how to deliver on our role in combatting climate change, we welcome hearing from members with views, suggestions and activities to promote discussions on how we as the Scottish legal profession with a focus on COP26 may best become involved in contributing to the climate change debate. Contact Alison McNab or Gillian Mawdsley for more details, or email us at policy@lawscot.org.uk

Gillian Mawdsley, Policy team, Law Society of Scotland

Corporate and commercial risks: communication

In part one of a two-part series covering scenarios which can crop up for solicitors dealing with corporate and commercial advice, Matthew Thomson looks at aspects of communication

Communication risks

A failure to communicate, or inadequate communication, lies at the heart of many complaints and claims against solicitors. Even when a claim appears to have a well defined primary causative factor, it is often the case that the underlying risk issue is rooted in communication failure. For a more detailed explanation of communication risks, see our risk management article at Journal, April 2019, 44.

In all corporate and commercial transactions, the solicitor is dealing with an individual. They may be the client or simply the representative of the (corporate) client. It is worthwhile bearing in mind that a key part of managing communication risks is to understand the audience (i.e. the recipients of the advice). Although this should not be surprising, there are many clients who, while sophisticated businesspeople, are not experts in corporate law. This lack of knowledge may not be apparent from initial discussions and it is a mistake to overestimate the level of knowledge that even an apparently experienced purchaser of legal services may have.

It may not be necessary to establish some type of formal checklist system, but it is important to make sure that key elements of communication are present in every transaction. This could mean a thought process along the following lines:

- Have we explained the key provisions of the draft document, particularly drawing the client's attention to unusual conditions or transaction specific conditions?
- Have we explained any negative outcomes that could result from the execution of the document?
- Has the client given some level of feedback to us indicating that they appear to understand the key terms of the document and the outcomes which will be delivered by the document?
- Has the client seen and reviewed a final draft of the document prior to signature?

Case study

A client maintained that they had never been properly advised on the desirability of adding certain events of default in relation to a vendor loan arrangement. The solicitor maintained that discussions had been undertaken between the parties to the transaction directly and, for a variety of commercial reasons, the advice from the client (who was an experienced businessperson) had been to take a "light touch" approach to the loan arrangement. The solicitor recalled that a discussion had been undertaken with the client about default events additional to non-payment which would trigger early repayment of the loan, but that the instructions had been not to add these. There was no supporting file note or email regarding the position.

Although the lack of recording of the instructions was problematic, the solicitor appeared to have regarded the client as having a much better understanding of the risks in the transaction than the client actually possessed. An email acknowledging the instructions and explaining the potential downsides would have assisted the solicitor's position. Whilst that approach could be categorised as "back covering", it is really simply a further strand of the communication process.

Perhaps through pressure of time or the need to finalise commercial aspects of the deal, there can be situations where verbal advice is lost in the noise of the transaction. Setting out some reminders in writing can often be a helpful trigger to clients to consider the position further.

Client management

It is obviously critical in any corporate/commercial transaction to understand what the client wants in terms of outcomes. This is such a basic point that it can be overlooked.

Case study

Where the engagement letter failed to explain adequately to the clients the limits of the tax advice being given by the solicitors in connection with the transaction, the firm in question was left exposed to a claim in relation to matters which the client had understood were within the firm's scope of work and had therefore not been referred for review to the accountants which the client had engaged to advise on other tax matters.

This can often be exacerbated by confusion as to the client. In corporate matters particularly, there is the possibility of inadvertently acting for the same client in different capacities (shareholder, director, employee, trustee), all of which may have different interests in a particular matter. Failing to understand what the desired outcome is for that client in their particular capacity can lead to risk exposure.

Case study

Solicitors were instructed by company directors to document a buyback of shares. That buyback would have allowed one of the directors/shareholders to exit the business. Initially, the terms of exit had been agreed and documentation was duly drafted. It then became apparent that the exiting shareholder wished to renegotiate the terms of the deal. This was, in part, due to a difference of opinion as to the value contributed over the years by the exiting director. Eventually, this resulted in the company solicitors indicating the terms of a new deal based on a revised position resulting from alleged breaches of director's duties by the exiting director. That director then made an allegation of conflict of interest. Although not directly leading to a claim, it serves as a useful reminder that such issues still arise.

"Inadequate communication is at the heart of many complaints. Even when a claim appears to have a well defined causative factor, the underlying risk issue is rooted in communication failure"

File management

All practice areas generate large amounts of paperwork (whether actual physical paperwork or the electronic variety). Corporate transactions are no different and can generate significant amounts of paperwork in a fairly short space of time. It can be difficult to

manage a process with multiple strands without having a disciplined approach to file management. There are a variety of ways to accomplish this, either through document management systems or utilising strict version control outside of such systems. All practices will have their own preferences and requirements. It is, however, essential to understand that from a risk management perspective, managing the file is key to reducing risk exposures.

This can be challenging in a corporate transaction where much negotiation can be at the last minute and there is a temptation to let administrative matters such as file notes slide. In most corporate transactions there are last-minute negotiations and changes to agreed terms, some changes only being agreed during the course of the completion meeting. By their very nature, some of these amendments may be needed "on the hoof". Recording the reasons for these and the advice given to the client may be essential in defending any subsequent claim. Obviously, some consideration has to be given to the practicalities, but a post-completion wash-up meeting where these points are recorded before memories become clouded can be beneficial.

Case study

A disposal by way of share sale had been undertaken. The solicitor acting for the sellers, in the absence of the assistant who normally dealt with this, had managed the process of disclosure against the warranties which the buyer had sought in the share purchase agreement. A significant amount of documentation had been produced by the sellers in a piecemeal fashion. All of this had been delivered electronically. The sellers' solicitor had been unable to keep abreast of the information being produced and had overlooked a number of disclosure items.

Whilst there are a variety of electronic systems which can be utilised in a disclosure exercise, the fundamentals of the process remain the same, namely that there must be a review process in a structured manner. Even where there are no sophisticated electronic systems, there has to be a methodology to ensure that all documentation is reviewed, classified as to relevance and actioned accordingly.

Conflict of interest

Conflicts of interest can, of course, arise in corporate and commercial matters. In relation to the drawing up of shareholder agreements, for example, unless the shareholder rights and obligations are equal, the same firm should not act for all of the shareholders. In other words, if shareholders are to be treated differently in a shareholders' agreement, they should be separately represented. The firm might be able to take instructions from one of the shareholders on the terms of a draft agreement, but should make it clear to the others that they should take separate independent advice on the agreement before signing it.

As touched on earlier, conflict issues may also arise in relation to shareholders, directors and the company, particularly in small private companies, where it may be difficult to differentiate between the interests of the three parties. Solicitors should be clear, from the outset, who they are acting for, be it the company or the individual shareholders or directors.

It is worth noting that where the prime cause of the claim is, or is attributable to, the fact that the insured acted in breach of the conflict of interest rules (B2.1.2 and B.2.1.5), the self-insured amount will be double the standard amount.

Case study

A corporate client acquired the share capital of a separate client company. Following the acquisition, the former shareholders of the acquired company raised a claim against the practice, alleging that the firm was in a conflict of interest. The claim was successful. It is a clear conflict to act on both sides of an acquisition of share capital. Where one client of a firm wishes to acquire the share capital of another client, the same firm should not act for both – even in formalising the terms of an agreement reached by the parties themselves. The firm can act for one of the parties, but the other party should be told in writing to take separate legal advice before signing any documents issued by the solicitors.

In a share acquisition, it is also worth considering whether the firm has previously acted for the target company, or for one of its directors, as in these circumstances the firm may possess confidential information which is relevant to the acquisition.

Matthew Thomson is a client executive in the Master Policy team at Lockton. In part two, next month, he will look other types of risk for solicitors dealing with corporate and commercial work, such as drafting errors and acting outwith core competencies.

FROM THE ARCHIVES

50 years ago

From the report of the proceedings of the Society's 1970 AGM, September 1970: "Mr B. M. Hughes (Glasgow) said that this matter was one which had exercised himself and the members of the Glasgow Bar Association for a great number of years... At the moment it appeared that the Lord Advocate had the total and final say in all appointments to the Bench... Of the seventy-five judicial appointments in Scotland at the present time some seventy were occupied by members of the Faculty of Advocates... This... was a matter on which the Law Society should many years ago have taken a firm stand and they must do so now."

25 years ago

From "An American Arrives", September 1995: "The lawyers I meet are earnest, pleasant, focused and polite. I have no experience of a formally divided Bar – or, should that be a *formerly* divided one? – and I am intrigued by the arrangements, somewhat surprised by the apparent ease with which they work with one another. There seems a common core of respect and cooperation. This is refreshing. I do not yet know if this is an expression of the national character, professional skill, or simply a lack of the Malthusian stress to which I am accustomed."

Keeping the dream alive

Morale and success are two sides of the same coin, Stephen Gold writes

"Good times and bum times, I've seen them all, and my dear, I'm still here." So begins Stephen Sondheim's hymn to survival, immortalised by Elaine Stritch in his wonderful musical *Follies*. It's a line that speaks to this moment. We are battered and bruised by all that COVID-19 has thrown at us, its effect intensified by our shock that it descended so fast from a clear blue sky. But we are still here.

Hope and fear compete for our hearts. The animal spirits of capitalism are reviving. Stock markets have bounced back. A vaccine may not be far away. A tsunami of cash has surged from the vaults of Government and central banks. Still, nobody expects anything but tough times ahead, as furlough schemes end, unemployment rises, and businesses make fundamental decisions about who they will need and how they will operate in the future.

"We have nothing to fear, but fear itself," said President Franklin D Roosevelt. He knew instinctively what the Nobel Laureate Daniel Kahneman proved decades later, that humans are hardwired to value the avoidance of loss more highly than the prospect of gain. Right now, in the battle between fear and hope, fear is playing a strong hand. Polling by YouGov in August shows that 92% of us expect unemployment to rise, and 62% fear being laid off. In more than the obvious ways, this has consequences for the way law firm leaders frame their task.

Bruce MacEwen recently put it well: "Critical is recognising that whereas 'leadership' six months ago was defined as and viewed through the lenses of strategy, business, culture, and people, now it's as much or more about morale, which means truly listening and connecting with people, and admitting your own vulnerabilities."

Morale philosophy

Raising morale is easy and obvious to say; harder to do. We can't all be Churchill. But in the workplace, we are motivated far more by actions and interactions than stirring speeches. In firms where morale is high, leaders behave in clearly observable ways.

They make a point of recognising their colleagues and demonstrating that their efforts are valued. This is not really about money. Pay is important, but warmly expressed recognition of effort and achievement matters more. A handwritten note saying "thank you" can be immensely powerful. They celebrate small wins as well as the big, and make sure they are always encouraging. Nothing is more demoralising than: "That was a good job, well done, but you still need £10k to make target this month." They seek the views not just of direct reports, but of colleagues at every level. A good question is, "What would you do in this business if you had my job?" When they are given good ideas, they act on them and make sure they give credit at the time, not months later in a performance review.

They show their team trust and respect by sharing information with them, especially financial information about how the firm is performing. Sometimes I have an uphill struggle persuading clients of the value of transparency. Being defensive or secretive is a big mistake. As Sam Walton, the founder of Wal-Mart, said, "The more they know, the more they'll understand. The more they understand, the more they'll care. Once they care, there's no stopping them."

Good leaders know the importance of clarity, especially in hazardous times. Nothing breeds fear more than uncertainty, but at the same time, people will deal well with extraordinary levels of difficulty if they are fully informed, see that their leaders are being straight with them and have bought into a well articulated strategy to overcome it. One never wants to be like the army officer of whom it was once said at appraisal: "His men would follow him anywhere, if only out of a sense of morbid curiosity."

It's lonely at the top

Finally, as MacEwen says, good leaders are unafraid to admit that sometimes they feel vulnerable. Too often, vulnerability is dismissed as something shameful and weak. But it is a natural state, the hallmark of a thinking, sentient person. Morale remains high, even in great adversity, when leadership is authentic. People can smell it when their leaders are feigning strength and spinning them a line to keep them happy.

Leaders have an obligation to themselves, as well as the business, to care for their own morale. Going it alone is folly. Wise leaders cultivate a personal board from inside and outside the business, with whom they can be completely honest, share their doubts and who will give them fearless, objective counsel.

Few phrases lift the spirit of leaders and the led more than "We are all in this together, and together we will overcome." There will never be a better time to prove it. J

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