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Society news>
Turn to pages 36-45 for the GBA’s Special General Meeting; standards; EU update; SLCC levies; Council members; Practice Guidelines. Website: www.lawscot.org.uk.
Surviving the crunch
It is not often one hears of redundancies within legal practices, and it seems to be a new field of advice for the Society’s Professional Practice Department, but sadly the current situation in the housing market in particular has seen it become a reality for some firms.

Amid its usual diversity, this month’s Journal aims to show something of the bigger picture of where the profession finds itself economically at present – and in our lead article in the Professional Practice section, to offer some practical suggestions to help hard-pressed practitioners through the current tough times.

One of its messages echoes the letters page contribution from Christine Lambie, Scottish Paralegal Association President – it’s best to explore every other avenue before making people redundant, because when the upturn comes, as come it will, it will be very much harder to take people on again.

Whatever the outcome, let it at least be said that legal firms kept their heads and avoided any temptation to take panic measures.

Defining moment?
Meantime the Glasgow Bar Association is sufficiently concerned about the outlook for its members involved in criminal defence work, to have requisitioned a Special General Meeting of the Society, to be held on 22 August. Separate from the meeting usually held in September to approve the practising certificate and related fee levels for the coming year, the GBA wants to have on record the profession’s views on matters such as the summary criminal legal aid, the diversion from prosecution aspect of the summary justice reforms, and the very future of criminal legal practice (see news pages for more).

While most of the factors that have given rise to these issues are more within the control of government than the global economy – subject to the effect of the economic situation in restricting funds available for public spending – the outlook for levels of business remains cloudy here also, as our head prosecutors have insisted that the diversion statistics to date show less rather than greater use of the provisions than originally anticipated, whatever the experience of individual firms.

With the Society already fully engaged with the Scottish Government on reviewing the effects of the reforms, we watch with interest to see whether the GBA’s tactic can add to the weight of opinion in the public domain at this time.

Standards advance
Longer term work goes on, and the Society has published the results of its consultation on standards (also in this month’s news). This shows high levels of agreement with the various propositions put regarding standards of service and conduct to be expected of solicitors. It would be fair to say that none of the proposals was very controversial, and one respondent is quoted as commenting “these are really standards that every solicitor in the profession should already be adopting”, so to that extent the exercise appears to show a broad agreement within the profession (as well as outside) as to the level at which standards should be set.

Given however that a principal driver of the exercise was the desire to define standards before the new Complaints Commission stepped in to do it for the profession, I for one was left wondering whether there was enough in the statements to provide a yardstick against which complaints can be judged. Or will we need some form of commentary, or refinement to clarify how they are intended to apply in different types of business? Clearly it is a difficult task to achieve anything detailed, yet of general application, but this is set to be an ongoing exercise even when the current proposals have been finalised.

Whatever decisions are needed to pull through the business downturn, let them be taken with a clear head

To that extent the exercise appears to show a broad agreement... as to the level at which standards should be set
President Richard Henderson

With economic issues dominating the profession’s thoughts at present, the Society is taking steps to provide advice and support to those in need.

Shifting sands

Funding the Commission
With the arrival of summer, many of us take the opportunity of a well-earned break. But at the Society and in firms and legal teams across the country, the hard work continues too. The new Scottish Legal Complaints Commission is almost upon us and the Society is doing all it can to prepare for the changes that will take effect when it opens for business on 1 October.

Invoices for the annual levy were sent out in June – as the Society is obliged to do on behalf of the Commission – and within a month or so, 75% of payments had been received. Reminders have been sent to those still to pay. Elsewhere in this edition of the Journal, Philip Yelland deals in detail with the processes for handling both service and conduct complaints under the new system. However, it is worth underlining the fact that the Society’s complaints handling obligations will remain substantially unaffected by the Commission, at least over the next financial year. In addition to continuing to handle conduct complaints, the Society will have to retain sufficient capacity to handle service complaints for some time to come. Unfortunately, that means that the cost of complaints handling will not reduce this year and so neither can the cost of the practising certificate. We will continue to work with the Scottish Government and the Commission to ensure, so far as possible, a smooth transfer of responsibility for complaints handling. There is still much work to be done.

Special Meeting called
The summary justice reforms are also beginning to take effect, with signs of reductions in court business. Any such reductions in business must be proportionate and measured; we cannot accept policies and practices that threaten rights and liberties, especially of vulnerable groups and individuals. A Special General Meeting has been called by the Glasgow Bar Association and will be held at the Society on 22 August. The SGM provides all practitioners with an opportunity to discuss the summary justice system, legal aid regime, recent reforms and the best way forward. I would encourage members to attend or to send a representative with proxy votes to ensure that we have a good and wide-ranging debate on this important issue.

Tough choices
The Society is well aware that the effect of the summary justice reforms is compounded by the current economic climate. However, the downturn in the economy goes beyond that: it is an issue for us all to consider. The Chancellor of the Exchequer, Alistair Darling, is reviewing the Government’s fiscal rules as pressure on public finances grows. And just as the Chancellor makes plans at the macro-economic level, so legal firms must do likewise at the micro-level. It is a business imperative regardless of the prevailing economic conditions, but especially in a downturn. I am conscious that others are having to take the tough decision to make redundancies. The redundancy process can be difficult for all involved and the law itself is now very complex for employers to navigate, whether solicitors or not. It is a situation that requires good advice, good practice and careful consideration.

Society support
The Society is working on a number of initiatives to support solicitors. A conference to provide information and business advice specifically for high street firms is being planned. Office bearers and staff will continue to meet with local faculties and representatives from a cross section of the profession for feedback and information on what is happening in their firm or area. Also, the Professional Practice Department is giving help and advice to solicitors who may yet be faced with losing their job, and to employers who might be forced to make staff redundant. In addition, the Education and Training Department is offering support to those concerned about traineeships.

While realising that the underlying issues facing the economy are beyond our control, we are determined to do all we can to assist firms and individuals affected by these unwelcome developments. As a profession, we must plan for the future and try to ensure that the legal sector in Scotland is in a condition to respond to new demands as and when they emerge. That approach involves recognising when changes in working practices are necessary and ensuring our training and entry processes continue to promote excellence.

The Scottish legal profession has survived much change and many economic fluctuations. I know that it will continue to do so however challenging the economic circumstances.
Paralegal redundancies

I have been contacted by a considerable number of paralegals who have been made redundant in recent weeks due to the impact of the current credit crisis. They all work in conveyancing and in most cases have had little or no warning of the loss of their employment. Certainly in the majority of cases, no guidelines on redundancy procedures have been followed.

Recruitment agencies have also indicated a considerable rise in the number of paralegals seeking employment, with no new vacancies being advertised by legal firms. Some firms are trying to work with their employees by asking them to work part-time or a four day week, or even in one case, take two months’ unpaid leave until the situation improves. They, at least, are trying to find a solution rather than the knee-jerk reaction of making staff redundant.

I urge all legal firms to try and work with their employees to find a solution which does not result in unemployment. Things will eventually get back to normal and those who have been made redundant may not be willing to return if they have not been treated well.

Send your letters to:

Email: journal@connectcommunications.co.uk
or by post to: The Editor, The Journal, Studio 2001, Mile End, Paisley PA1 1JS
E: 0141 561 0400

Recoverable proceeds: a reply

I am writing to respond to Ken Swinton’s letter (Journal, July 8). I take no issue with any of his comments as far as they apply to civil recovery. My article tried to draw attention to the different approaches adopted towards criminal confiscation in Scotland and in England & Wales, for which I can find no justification in the Act itself. Ken Swinton states: “s 305 provides for confiscation in England & Wales, for which I can find no justification in the Act itself.”

The July 2008 edition of Money Laundering News reports a recent case, R v Panesar [2008] EWCA Crim 1526. The Court of Appeal held that two mortgage repayments totalling £8,600 towards a previous house had been made with tainted funds, with the result that the whole of the equity in Mr Panesar’s current house represented part of the benefit of criminal conduct. The court increased a confiscation order of £30,687 by the value of the equity in the current house (£150,000).

Mr Panesar had used the £60,000 equity in his previous house, plus a £40,000 mortgage, to enable him to purchase his current house for £100,000. Because the purchase had been part funded by that equity, and the use of tainted funds had facilitated the retention of that house, the court linked the two transactions. The Crown Court had held that the proportion of tainted funds used in the acquisition of the current house was relatively insignificant, but the Court of Appeal found this to be irrelevant in the context of criminal confiscation in England & Wales.

Don’t be afraid to look

My former employer once described conveyancing as an art, but the more I see of the legal profession nowadays, the more I wonder if they look on it with the same esteem. In reviewing files where conveyancing faults have come to light, I occasionally find that the root cause is quite simple. Whoever looked at the deeds did not bother to go and look at the property.

I accept that we all have to work under constraints of time, but if no time is available for a site visit, is time then available to deal with a negligence claim? Even sending the client a copy of the title or deed plan and asking them to confirm that it shows everything they think they are buying is not enough: the property has to be looked at with a conveyancer’s eye to make sure that what exists on paper in two dimensions corresponds to what exists on site in three. Only the conveyancer can do this.

As the Duke of Wellington used to say when he was unsure about something, “I got on my horse and went and had a look.” One of the key factors in his victories was his ability to understand the lie of the land and deploy his soldiers to best advantage on it.

Title deeds and the ground to which they relate are inextricably linked even though they exist in different dimensions, and if this very simple fact is lost sight of, problems and claims will continue to arise.

Jewish divorce and the simplified procedure

If divorcing couples are Jewish, decide to use the simplified procedure and consult solicitors beforehand, it would be prudent to advise that they should first obtain the get (Jewish divorce) to avoid procedural difficulties. Two recent SSIs include rules on the simplified procedure in the sheriff court and the Court of Session respectively: SSJ 2007/6 and 7. They follow s 15 of the Family Law (Scotland) Act 2006, which inserted s 3A in the Divorce (Scotland) Act 1976 (application to postpone divorce decree where religious impairment to remarriage exists).

The rules contain three forms for each court. Each form states that no such application can be made if the simplified procedure is used. If the spouses have not yet obtained their get and one wants it before divorce (as invariably recommended), it would be good practice to advise that the simplified procedure is inappropriate and if an application is subsequently made for postponement, the divorce action will be dismissed. To avoid other problems, the get should be obtained before divorce decree.

See the Submissions page at www.journalonline.co.uk for fuller information.

Letters
The Faculty of Advocates’ response to the Office of Fair Trading does its members a disservice by defending a rule not relevant to modern conditions and by resisting the use of ABS

A rank bad rule

We have argued for some years that the Faculty of Advocates needs to embrace modern business practices if it wishes to thrive. The advocate’s business model is a commercial anomaly which is very difficult to justify in business terms. Advocates cannot incorporate; they cannot harness tax and other efficiencies of alternative business models; they cannot sue for their fees; they cannot properly compete with solicitor advocates or barristers; and they are inhibited from developing their services by arcane practice rules with origins in the 18th century.

Commercial clients struggle to understand the purpose of some of our professional rules. It is difficult to explain to them in a cogent way that rules which are relics of the past and unfit for purpose are in their interest. Advocates are bound into a system of practice which is no longer relevant to modern conditions, and in our opinion hampers the evolution of an environment conducive to the development of excellence.

In May the Faculty of Advocates published its paper “Access to Justice – A Scottish Perspective – A Scottish Solution” (Journal, June, 37), in response to the OFT’s request, following the Which? supercomplaint. In that paper Faculty based its resistance to alternative business structures ("ABS") principally on maintaining the “cab rank rule”, arguing that “one of the core values of... an independent referral bar is... the cab rank rule”.

We submit that Faculty’s reliance on this rule is misplaced. There are far better reasons for having a truly independent bar than reliance on a rule which is meaningless.

The “rule” exists on paper only. In reality it is a polite fiction. There are now so many exceptions to this so-called rule that it has no practical effect. Any advocate can decline work if he or she does not wish to do it, for reasons which may or may not have any real content. There is no basis for questioning such a decision. In any event there is no obvious demand for a cab rank rule from the users of legal services. The rule serves no purpose other than to attach a meaningless label to distinguish those practising at the bar from solicitors and solicitor advocates. Yet the Faculty seems to rely on it. There are now so many lawyers with extended rights of audience, that supply comfortably exceeds demand. In short, there is no evidence of unmet need for advocacy services, nor is there any need for a cab rank.

Sir David Clementi recognised the fallacy of the rule, and the Bar Council of England & Wales subsequently abandoned its resistance to ABS on this ground. The Faculty of Advocates should do likewise.

On the wider issue of the adoption of ABS, the Faculty argues that ABS will “undermine access to justice”. We think this is an extravagant contention. Any housepainter or hairdresser in the land can adopt a business format which suits his own trading requirements, and allows him to ply his trade to best fiscal advantage. But not advocates.

The Faculty’s answer to anyone wishing to adopt an ABS is that they should become a solicitor advocate. This high-handed approach misses the point. There are a number of advocates who now actively wish to adopt ABS. Some, for example, want to incorporate as a single member company. This simple step can result in significant cost efficiencies and tax savings, and would have no harmful effect whatsoever on the real key distinguishing feature of an advocate’s practice – his or her rigorous independence. The Bar Standards Board in England has acknowledged that there must be strong reasons to justify preventing individuals taking advantage of ABS if they wish to do so. Why are we so special and different in Scotland?

The Scottish legal world has recently seen a number of advocates joining legal firms, becoming solicitors or solicitor advocates. There is clear evidence that large clients north and south of the border now wish to be able to instruct counsel directly. The whole legal services market is undergoing immense change. We think that if the Faculty does not acknowledge these changes, and lead from the front, it will be doing a real disservice to its members, and will see them left behind and inhibited from competing for work – resulting in a smaller and less effective bar.

The Faculty’s answer to any challenge to existing rules is to review them yet again, and perhaps, one day, reform them. Experience suggests this will be a glacial process – recent reviews have resulted in few changes of consequence. We believe that ABS will ultimately lead to lower costs, innovation and improved service levels. There is nothing to fear from the Scottish legal services market becoming a more competitive place. Current changes are a positive force for good and should be embraced, not resisted. We think it is a great pity that our professional body does not share our enthusiasm for modernisation and reform.

Opinion

Experience suggests this will be a glacial process – recent reviews have resulted in few changes of consequence

John Campbell QC and John Carruthers, advocate are members of Oracle Chambers
Amid reports of redundancies among fee earners as well as support staff, and fears of collapsing business in property and crime, Jennifer Veitch investigates how different types of legal firm are coping with the current economic downturn, and how they see their future.

With an annual turnover of £1.2 billion, the legal profession undoubtedly plays a key role in boosting Scotland’s economy. In recent weeks, however, its continuing success has been called into question, with evidence that the “credit crunch” and the resulting slowdown in the residential property market are biting hard.

Long-established firms have begun laying off staff: the Scottish Paralegal Association reports more than 50 redundancies in June alone, mostly...
she says. “Certainly I am surprised by how many are losing their jobs, and corporate seems to be getting hit as well as conveyancing.”

While the significance of job losses at a relatively small number of firms should not be overstated, there is also some evidence of a wider malaise and a lack of confidence within the profession. A survey by PKF recently found that Scottish firms now have the “gloomiest outlook” since the recession of the early 1990s, and are considering recruitment freezes, redundancies, tighter credit controls and specialisation of services in order to ride out the storm.

New enquiries
With the controversial home reports legislation still scheduled for introduction on 1 December, and alternative business structures also firmly on the cards for the following years, the Law Society of Scotland is also concerned about the future, and is now “actively monitoring” the situation.

“Legal firms, like many other businesses in Scotland, are feeling the effects of the current economic climate”, says Henry Robson, the Society’s deputy chief executive. “While at present relatively few solicitors have informed us of being made redundant, we have had reports of support staff from firms across the country having lost their jobs, which is a real concern.

“The Professional Practice Department is giving help and advice to solicitors who may yet be faced with losing their jobs, or equally to solicitor employers who have never before been in the position of having to make people redundant.”

The Society’s Education and Training Department is also offering support to those concerned about finding traineeships. “We have been contacted by people who have been told they won’t be able to take up their traineeships this year, or whose training contract has been cut short, and by firms who are having to consider making that decision”, says director Liz Campbell. “We would encourage anyone in this position to contact the Education and Training Department for advice.”

Property impact
However, the outlook for firms is not all gloomy, provided that their business is not dependent on the vagaries of the residential property market. Robson adds that the slowdown in Scotland appears to be “less severe” than south of the border.

“Firms are looking ahead, reviewing the services they provide and exploring where they may be able to diversify,” he says. “Some firms are still reporting new appointments and expansion in certain areas.”

But he adds: “There has been a very definite slowdown in the property market, with prices slowing, or falling in some areas of the country, as well as properties taking longer to sell. It has also had an impact on the numbers of mergers and acquisitions taking place, and the commercial property sector.

“The Law Society of Scotland is just one of many organisations to be affected by the uncertainty of the property market and we have decided to delay plans to relocate.”

Approaches to government
Of wider concern is the potential impact that the slowdown may have for access to justice. As The Journal reported in July, the Society has already taken the highly unusual step of writing to the Chancellor, Alistair Darling, to warn of the serious impact that the downturn in the housing market may have for future access to legal services in Scotland.

“Information coming to us points to a significant reduction in business in the housing market such that in some areas there is virtually no activity at all,” wrote Richard Henderson, the Society’s President. “Inevitably this will lead to redundancies and indeed there is already some evidence of this happening throughout the profession.”

Mr Henderson added that the withdrawal of 100% mortgages by lenders had been a particular problem in Scotland, and urged the Chancellor to explore options to help first-time buyers enter the property market. The Society has also met with Kenny MacAskill, Cabinet Secretary for Justice, to make strong representations about the potentially detrimental effects of the plans to introduce home reports legislation in December.

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The Society says it will remain in close contact with solicitors on the ground, and also plans to offer more support to solicitors, including a conference providing information and advice specifically targeted at high street firms.

Litigation – but no legal aid
One high street firm predicts that future viability may depend on how reliant firms are on conveyancing and
Delivering in property
Not all firms are unduly worried about the future of conveyancing, however. Dianne Paterson, a partner with Russel + Aitken in Edinburgh, predicts that firms who adopt new technology and innovative solutions to deliver property services will be able to cope with the challenges.

“The entrance of new providers into the residential property markets, together with regulatory change, has already altered the delivery of property services from its traditional practice into a highly automated process,” she says.

“However, Scottish solicitors, being by custom ‘men of business’, have been more than able to embrace such change, allowing us to compete in this challenging marketplace and continue to deliver a service which is responsive to our clients’ needs.”

“Scottish solicitors have always been well placed to offer the ‘one-stop shop’ solution, delivering estate agency, legal, financial and property services to clients in the most cost-effective and efficient way. This will not change.

“Solicitors are already investing heavily in the latest technology and working practices to build on their current offering, to deliver an even higher level of integrated services to clients, through online and automated systems.”

She adds that the Edinburgh Solicitors Property Centre’s “MoveMachine” already allows firms to interact more efficiently with clients and business partners. “MoveMachine provides a range of services to solicitors, such as home reports, property marketing, and e-conveyancing solutions. This allows solicitors not only to take advantage of the changing property market, but also to compete successfully with the national brands and new providers in the property marketplace.”

Hopes for summary justice
The Society is also concerned about the impact of the recent summary justice reforms on high street firms. Oliver Adair of Adair & Bryden in Larkhall, and convener of the Society’s Legal Aid Solicitors Committee, says criminal lawyers have repeatedly expressed their concerns about the changes.

But he concedes that it is too early to say whether the reforms will actually result in a drop in income, and says he remains “optimistic” about the future, stressing that the current administration appears to be committed to investing in legal aid, subject to its limited resources.

“I am quite an optimistic person and I do get the feeling that the Scottish Government is committed to the legal aid system,” he says. “If we work with them and review the summary justice programme, I believe they will do their bit.”

International appeal
While the UK economy teeters on the brink of recession, those firms with an eye on international markets may
be better placed to weather the economic storm.

Malcolm McPherson, senior partner with HBJ Gateley Wareing, says demand from international clients for Scottish expertise “remains strong”. He adds: “We are seeing significant continuing growth in sectors such as major infrastructure projects and energy, and also major growth outside of the UK in our Chinese offices and in Dubai. Whilst the anticipated uncertainty makes it difficult to predict exactly how any forthcoming recession will impact on a firm’s business, we are confident that this diversity in our business puts us in good stead to resist the worst of the downturn, and indeed to take advantage of any opportunities it creates.”

**Investment opportunity?**

Firms may also be able to use the downturn as a period for reflection on the way ahead. Linda Urquhart, chief executive of Morton Fraser, says that the downturn, while challenging, presents opportunities for firms to strengthen client relationships and focus on future improvements.

“In areas where work is quieter it is essential that we use our time to maintain and develop relationships with our clients, keeping close to them and finding out how we can support them with any particular challenges they’re facing. “There is also the opportunity to spend time on the investment areas which often get pushed down the agenda at busier times. We all have ideas for improving the way we provide our services – this is an ideal opportunity to get those improvements in place.”

Acknowledging that staff face an unsettling time, she comments: “We also need to make sure that we spend time communicating with them on the wider market, the firm’s current position and our thinking for the future. “We will all need to be flexible and be willing to use our skills where they are needed in the short to medium term, but one factor which won’t change for us is that we will continue to look for great people and great teams who can join us to contribute to the success of the firm in the future.”

**Meeting needs**

Alan Campbell, managing partner, Dundas and Wilson, which recently reported a 23% increase in turnover, anticipates his firm’s own growth will slow down. “We are still budgeting to grow, not at the level we have grown — but we didn’t budget to grow at that level anyway,” he says.

But Campbell adds that there will still be business out there, even if it means a change of focus. “Whereas in a boom cycle there are a lot of people wanting to do deals, in a downturn there are people who need to do deals,” he says. “The transactions will not disappear, but will change in nature. “If you have got a good business, then there are opportunities.”

Jennifer Vetech is a freelance journalist with a special interest in the law and legal affairs.

More on business prospects>

Turn to page 46 to read Stephen Vallance’s suggestions for surviving through a business slowdown.
Civil justice: where next?

This conference on “Delivering excellence in Scotland’s civil justice system” is being held in the light of the consultation paper published by Lord Gill’s Civil Justice Review. I would start by paying tribute to the huge amount of work that has clearly gone into the preparation of the paper and to the way in which it has provided so much information and helped to focus so many issues.

In the short time available, I can really do nothing more than touch on a few points which occurred to me when reading the consultation paper and some of the responses to it. Given my own personal experience, I shall concentrate for the most part on the Court of Session. But I certainly do not overlook the fact that the various employment, social security and other tribunals are, in many ways, the front line of the civil justice system for most people in the United Kingdom today, while the sheriff court, of course, handles the bulk of traditional litigation in Scotland. Nor does the fact that I do not address them specifically mean that I am unaware of the very great problems which people encounter as a result of the high cost of litigation and the substantial reduction in the availability of legal aid. These are plainly material factors.

It seems to me that the Review really has to confront two types of issue. First, there are fundamental issues about the nature of the civil justice system, and, secondly, there are more mundane practical questions about the delivery of legal services by the courts and the lawyers who appear in them. Because of time constraints, I shall pay more attention to the practical issues, although the answers to these must be shaped by the more fundamental issues.

A last resort?
The consultation paper itself poses a very basic question when it asks whether the policy should be that courts should be regarded as a resource of last resort. Perhaps wrongly, I have the impression that the authors would like the answer to be in the affirmative. In other words, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Doubtless, the article is subject to interpretation, but fundamentally it envisages that the state must provide an independent and impartial tribunal for the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. It seems to me to be the kind of society which is guaranteed to citizens of the United Kingdom by article 6(1) of the European Convention on Human Rights: “In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Doubtless, the article is subject to interpretation, but fundamentally it envisages that the state must provide an independent and impartial tribunal, established by law, to which we can resort to have our civil disputes determined. Of course, if parties can settle their dispute, so much the better – they know that as well as anyone. But obliging parties to engage in some form of mediation, whether as a precondition to going to court or as a result of compulsion by the court, seems to me to be rather contrary to the spirit of the guarantee in article 6.

Leaving the Convention on one side, the provision of independent tribunals – courts – for the any approach which treats the courts and judges as something to be avoided if a substitute can be found. That does not seem to me to be the kind of society which is guaranteed to citizens of the United Kingdom by article 6(1) of the European Convention on Human Rights: “In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Doubtless, the article is subject to interpretation, but fundamentally it envisages that the state must provide an independent and impartial tribunal, established by law, to which we can resort to have our civil disputes determined. Of course, if parties can settle their dispute, so much the better – they know that as well as anyone. But obliging parties to engage in some form of mediation, whether as a precondition to going to court or as a result of compulsion by the court, seems to me to be rather contrary to the spirit of the guarantee in article 6.

Leaving the Convention on one side, the provision of independent tribunals – courts – for the continued overleaf. >
More on the Civil Justice Review (also www.journalonline.co.uk) >
Journal, February, 18: "Man with a mission": Interview with Lord Gill
Journal, July, 31: "Justice for sale?": Mike Dailly's address to the conference
determination of civil disputes is surely just as vital to society as providing independent tribunals for determining criminal accusations. It is not an optional extra. Naturally, that leaves open what form any independent tribunal should take, and the availability of resources is a relevant factor. But I see no good ground for discouraging the use of the court system which should, one would have thought, be the best vehicle for achieving justice. Achieving justice, not simply getting a result, is what the policy aim must be.

Given the costs of litigation today, the state does not need to discourage people from going to court. Most individuals are already too well aware that courts are expensive places and that, if you are financing the litigation yourself, you should think more than twice before getting involved in them. The need would be greater in the unlikely event of the court system being free or so cheap that people were liable to use it irresponsibly. As matters stand today, if people or companies come to court and the litigation is to be conducted by lawyers and can be financed, the courts should not act like a branch of the nanny state, but should treat litigants as responsible adults or businesses who, with the help of their legal advisers and, in particular, their insurers, can be expected to judge their own best interests. The courts have the power to award expenses as a means of penalising any abuses of the system.

The need for litigation
Moreover, society actually needs litigation. If you regard it as an evil, it is, at the very least, a necessary evil. Unless there continues to be a stream of litigation with decisions of high quality from the courts, individuals and businesses will lack guidance on all kinds of everyday situations. If I buy a piece of equipment and it does not work, but the seller offers to repair it, what are my rights? A difficult point, made somewhat easier, is it to be hoped, by the determination of two Scottish businesses to carry their dispute about a piece of farm equipment worth about £3,000 all the way from Jedburgh Sheriff Court to the House of Lords. The parties deserved not criticism for failing to settle, but the gratitude of anyone who advises consumers, from CABx onwards.

The need for decisions is just as important to public law, which is now the growth area in litigation. The Data Protection Act is an obvious example – along with the United Kingdom and Scottish freedom of information legislation. Only a line of authoritative decisions on such legislation is ever going to put flesh on the very abstract statutory bones and show how the system is actually meant to work in practice. In that way they perform a vital service for members of the public who would never dream of going near the courts, but who might want, for example, to obtain some information from their local authority which that authority was reluctant to give. In the field of public law, it may be that a change to the title and interest to sue requirement, in order to allow representative bodies to raise judicial review proceedings, would bring benefits to members of the public who could not afford to raise proceedings themselves.

As I have stressed on more than one occasion, looked at from the standpoint of the healthy development of our civil law, the problem in Scotland is not that we have too many cases, but that we have too few. Especially in an era of devolution, where more statutes may be unique to Scotland, it would in my view be bad public policy positively to discourage resort to the very courts whose decisions could provide the necessary guidance on their interpretation and application. If the Scottish courts are not to provide that guidance, where in the world is it to come from?

First instance
A related issue is the need to have a civil justice system which encourages the emergence of lawyers with the specialist knowledge which clients need and demand. The aim must surely be to encourage the development of a system which, inter alia, promotes the growth of expertise among practitioners in all kinds of fields. How this aim is best achieved is, in my view, an important question to be considered when formulating any future strategy.

Like other ancient countries, we have a court system which has not been planned, but has grown up over time. That explains, for example, why the jurisdictions of the Court of Session and the sheriff courts overlap to such a degree. But that very overlap requires us to confront very basic questions about why we have a Court of Session and the sheriff courts. What is the difference?

In the end, the only respectable explanation must be the simple one that more is to be demanded of the Court of Session than the Court of Session judges. Where the jurisdictions of the two courts overlap, the Court of Session judges are expected to produce a superior output. This may indeed mean that they have to work longer hours. But, fundamentally, it means that, overall, the Court of Session judges will produce better decisions because they are, overall, of a higher quality. So the system for the selection of Court of Session judges should be aimed at ensuring, so far as possible, that the very best people are appointed. By that, I mean the most able, intellectually and legally, the most skilful members of the profession – whether men or women, black or white, straight or gay, sheriffs or practitioners, it does not matter, and no preferences should be given to
members of any group. What should these judges do? There have always been siren voices – sometimes within the court itself – suggesting that the Court of Session should be an appeal court only. I would reject any such suggestion. There is, of course, room for discussion about the level of claims which should be brought in the Court of Session. Nevertheless, I am quite sure that there should continue to be a first instance court to which people can take their case in the expectation that it will be dealt with, straightaway, by a judge who is one of the best legal minds in the system. That is, unquestionably, the position in England with the commercial court, the companies court, the administrative court dealing with judicial review, etc. Precisely the same must apply in Scotland. Otherwise the Scottish court system will not be able to offer the standard of service which businesses expect from courts all over the world. Those with a choice will, quite rightly, take their business elsewhere. Surely, no one would want that. The real question is whether there should be further specialisation along the lines already established for commercial cases. Consideration could also be given to the feasibility of Outer House judges conducting proofs in Glasgow or elsewhere, if that would improve the service the court can provide.

Any suggestion that the Court of Session should do purely appellate work has the most far-reaching implications for the whole of the court system. Such a change would tend, I believe, to discourage, rather than encourage, the growth of expertise. Moreover, it is surely fanciful to assume that advocates or solicitor advocates could then be appointed to the Court of Session straight from the bar. So, in effect, any proposal for a purely appellate Court of Session is a proposal for a unified court system in which all new appointments would have to be made to the lower courts throughout Scotland. That is a possible system, but I very much doubt whether it would attract the best practitioners to the bench.

The burden of administration
But assume that a case is taken to court. It is vital that the dispute is determined efficiently and with due despatch. Although it is not a topic for discussion today, I confess that I have always been very sceptical of the changes made recently in England under which the judges undertake so much of the responsibility for running the courts. The Judiciary and Courts (Scotland) Bill before the Scottish Parliament proposes to introduce a somewhat similar system, with responsibility for running the courts removed from the Scottish Ministers and vested in the Lord President. The proposal has the support of the judges. It is for the Parliament to determine whether it is a good idea, in a democracy, to remove the primary responsibility for running such an important public service from elected ministers, responsible to the legislature, and pass it to unelected judges.

But leaving that fundamental political point on one side, it may be asked whether the resulting system is likely to be more efficient and so provide a better service to the public. The Lord President already has a very substantial administrative load, the Lord Justice Clerk a lesser load. Under the new system it seems likely that other judges would also have administrative responsibilities. Some judges are better administrators than others, but the simple fact is that most judges have no real training or experience in administration. Speaking personally, as Lord President, I should have been cautious, to say the least, about taking

Continued overleaf >
on additional administrative responsibilities in case they ate into the time available for my judicial work. In England it is not uncommon to find senior appeal judges spending at least two days out of their working week on administration. I doubt very much whether that is desirable. It would certainly be undesirable if ability in administration, as opposed to legal skills, ever came to be a significant factor in judicial appointments.

Putting extra administrative burdens on judges might, I fear, divert them from their key function of judging – which is, I suspect, what members of the public think they are paid to do. Even today, one of the complaints which the Review mentions is delay in producing judgments.

On that subject I think that there would be much to be said for a system under which cases were automatically put out for a hearing, after a set period – say, two months – if the judgment had not appeared in the meantime. The judge would then have to explain the reasons for the delay. I would have the same system for the appellate courts. It would not, in itself, be an answer to the problem of delays in producing judgments, but it would help to discourage unnecessary delays.

**Efficiency in appeals**
The consultation paper raises the possibility of introducing a system of leave to appeal to the Inner House. A system under which the Court of Appeal grants leave exists in England. I think that a similar system for appeals to the Inner House might well help, by eliminating appeals with no real prospect of success, and helping to deal with the problem of party litigants.

I am also in favour of proposals for improved timetabling in the Inner House. What is needed is to make sure both that the time allotted is no more than is reasonably necessary and that the case finishes within the time allowed. Part of the key lies in having clear and concise written cases set out in an easily readable format. I freely confess that I am a somewhat reluctant convert to the use of written cases. Although I remain very much in favour of oral hearings and oral advocacy, experience with written cases in the House of Lords has convinced me that they can significantly reduce the time a hearing takes, e.g. because counsel can simply rely on the written case for certain parts of their argument and so concentrate on the more important, or more difficult and controversial, aspects. If the system works in the House of Lords, I can see no reason why it should not work in the Court of Session, even if it involved a certain evolution in the way that cases are handled.

With written cases, it is easier for the court to lay down a strict timetable for the hearing, which has to be observed. In other words, if a case is down for two days, it gets two days and no more. It demands discipline from both counsel and judges. In particular, counsel have to divide up the available time by agreement so that it is shared fairly. In practice in the House of Lords, this causes no difficulty.

If such a system is to work, however, it is necessary that all the time allotted should actually be available for hearing the case. That means giving further thought to how incidental business, such as single bills in the Inner House, is handled. Could some be dealt with on paper? Do they all require to be heard by three judges? Those that do could be scheduled, say, at 4 o’clock so as not to interfere with the day’s business.

**If people or companies come to court and the litigation is to be conducted by lawyers and can be financed, the courts should not act like a branch of the nanny state**

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**Room for improvement**
Finally, it occurs to me when I read Court of Session judgments that many judges spend an enormous amount of time simply recounting the submissions of the parties. This practice seems to be a recent development: the reports do not show Outer or Inner House judges doing this in the past. The practice seems more pronounced in Scottish cases than in cases from other jurisdictions which come before the House of Lords. It does not appear to serve any very useful purpose. What matters is not for the judge to tell the parties what counsel argued, but to tell them what the judge has decided in the light of the argument. So, in practice, everyone – including the parties and counsel in the case – passes over the paragraphs giving the argument without reading them and goes to the point where the actual decision begins. It therefore seems to me that there might well be scope for the judges to reduce the burden of work on themselves, and produce judgments more quickly, by summarising the arguments very much more shortly and concentrating on the point on which they have decided the case.

No system of civil justice is perfect. The Review provides a welcome opportunity for improving ours. What I have put forward are simply a few suggestions based on my own experience. I am conscious that they have a narrow focus, while the issues for the Review are far wider. Like everyone else involved in civil litigation, I look forward to seeing the recommendations which Lord Gill and his colleagues produce for improving the Scottish civil justice system.
New procedures are in place for deeds intended to create new real burdens, to assist solicitors in ensuring compliance with the requirement for dual registration.

Section 4 of the Title Conditions Act sets a general rule that an application for a deed that purports to create new real burdens should be registered against both the benefited property and the burdened property (a process commonly described as dual registration). As with any rule, there are exceptions, one of which applies to deeds that create burdens solely in reliance on s 53 of the Title Conditions Act which need only be registered against the burdened property.

Following an internal review of the operation of dual registration it has become evident that we continue to receive applications that have not been presented for dual registration against all of the affected properties described in the constitutive deed. In addition, some deeds that seek to constitute new real burdens fail to satisfy the technical requirements imposed by s 4 of the Title Conditions Act, requiring amendment if they are to create real burdens.

Following discussions between the Joint Consultative Committee of the Law Society of Scotland and the Keeper it was agreed that Registers of Scotland would introduce new registration procedures to assist conveyancers by giving them the opportunity to address these issues early in the registration process rather than later when often it becomes difficult to do so. A Registers Update has been issued to solicitors explaining the change.

These procedures took effect from Monday 28 July 2008. From that date Registers of Scotland will carry out a preliminary examination of an application for registration of a deed that purports to contain new real burdens to identify those applications in which the appropriate application forms and fees for dual registration are not provided.

In the event that a deed that contains new real burdens is presented for registration without an application for dual registration it will be returned to the presenting agent to allow them to re-present it with the appropriate forms and fees. There are two exceptions to this policy. First of all, where the deed is a disposition granted by a local authority or housing association. In such cases the burdens are likely to fall under s 53 of the Title Conditions Act. The second exception is where either the additional information field of the application form or a covering letter gives a valid reason for not presenting the application for dual registration.

In the event that the preliminary examination reveals that a deed that is presented for dual registration fails to constitute real burdens due to a technical defect in the wording of the deed, the application will be returned to the presenting agent to allow them to make the necessary adjustments. This will not apply where the deed has other effects and the Keeper is asked to register it as it stands. Each case will be assessed on its merits. The new procedures are set out in detail in Registers Update 23.

James Ness, the Deputy Director of Professional Practice at the Law Society comments: “I welcome the proposals which reflect the continuing development of the strong working relationship between RoS and the Law Society of Scotland, and I anticipate they will be of considerable benefit to the profession as well as reducing risks to the public.”

ARTL UPDATE – as at 31 July

- 7,504 ARTL transactions have taken place.
- 27 solicitors’ firms and 15 lenders are currently using the ARTL system.
- 15 more have signup visits already scheduled for August.

For up-to-date information and a full list of participating firms and companies go to: www.ros.gov.uk/artl
Come to our relaunch party, the young lawyers chorused. Recognising the call of duty to show face for the Journal (and not being averse to a modest celebration), I set course through the pouring rain of an early June evening for a convivial basement bar in Glasgow’s Merchant City. Visions of rubbing shoulders with the cream of today’s rising stars were slightly jolted when, as one of the first to arrive, I was followed in by ex-Law Society of Scotland President David Preston, and retiring (in one sense at least) BBC Scotland solicitor Alistair Bonnington. Yes, they have a generous definition of young lawyer these days – must be age discrimination law at work.

As the party began to swing, its purpose became clearer. The SYLA wanted to make it a reunion-cum-thank you to those who had helped it on its way in the past, as well as raise its profile among those who might do so in the next few years. And indeed the turnout suggested that both boxes were satisfactorily ticked.

David Preston, a member of the first committee, reminisced on the early days, including the meeting to approve the first constitution. (“And somebody did get up and say, Mr Chairman, there should be a comma in clause 2, subparagraph (3)(b)...”) Fortunately the fledgling Association found itself more significant things to do, and the number of past office bearers who have gone on to achieve prominence in the profession testifies to the place it has secured for itself.

**Ambitious strategy**

“There is no other organisation that can speak for young lawyers”, current President Maryam Labaki pointed out when we met for a chat a couple of weeks later. “All the committees have achieved a lot, for example with the campaign over trainee salaries”.

She admits that the Association’s fortunes have fluctuated over the years. Committee membership demands a time commitment from people who are mostly junior lawyers at the mercy of demanding bosses and targets. Since becoming President she has made a point of keeping meetings short!

You have the impression however that Labaki is one who is liable to make things happen. The relaunch was clearly part of a strategy. “Our ambition is to increase our contact with our members and potential members, including via a newsletter. We’ve doubled our membership this year to between 500 and 600. We’ve raised our profile through trying to go out to meet people. We said ‘Go west’ and have done more in Glasgow. And we hope to hold an event in Aberdeen in September, a social evening/meet the committee thing for people to get to know us. We’ve kind of gone back to our basics, thinking about what different types of lawyers do and trying to be more approachable. And I decided that we shouldn’t have a membership fee – at least while I’m President!”

**Triple focus**

From the outset SYLA has had three main objects. Education features quite heavily, through CPD-qualifying courses which may cover subjects such as choosing a career in-house, or becoming dual qualified, as well as practice areas. “We try to run these cost effectively; we often have high profile speakers who give freely of their time. We couldn’t do this without their support. We aim to make the events as cheap as possible, to encourage firms to send their trainees and NQs. And we often manage to get sponsorship, which keeps the costs down.”

That side of things also includes keeping members informed on the big issues of the day, perhaps organising debates as a means of gathering views to submit to the Society. During the alternative business structures consultation they held an event in Edinburgh with a video link to Glasgow – “we didn’t get a huge number coming but it was important to do it, and we had people from Crown Office and RBS to give their points of view about how forms of ABS operate already”.

 Representation has a further aspect – if a member, or indeed a non-member, wants to be represented...
worries are.” They feel they are in a precarious position. Similarly with the education and training reforms – who knows what the result will be? We can’t advise them, but we can suggest who they should speak to. It will be? We can’t advise them, but we can suggest who they should speak to and also how to put in representations of their own. And it gives us the opportunity to respond to consultations.

“The way the market is, people are worried generally. We represent them and we must know what their worries are.”

The Association was even given the opportunity to respond to consultations. “Whatever area they practise in, issues common to many members: traineeship places. And there may be problems with criminal legal aid – we get emails from trainees and NQs asking whether they should jump ship? They feel they are worried generally. We represent them and we must know what their worries are.”

The Association was even granted a meeting with Justice Secretary Kenny MacAskill on the legal aid proposals. “We delivered our submission and were able to ask him for his thoughts”, says Labaki, herself one of the rare breed of young lawyers still practising in criminal defence work.

But back to where we came in. The most popular events, now as ever, are the social, which range, in season, from barbecues to Burns Suppers to balls – and recently a five-a-side football tournament, even if that one failed to cross the gender divide.

“There’s always a great turnout for social events”, Labaki adds. “People are working increasingly long hours, so we tend not to run these during the week. There are very tight constraints on young lawyers starting out, and people are trying to prove themselves. That’s why it’s important to have nice things to go to.”

Still independent

One thing to be kept in balance is its relationship with the Law Society of Scotland. The Society has paid increasing attention to the junior end of the profession in recent years, through two co-opted members of Council, the appointment of Collette Paterson as New Lawyers’ Co-ordinator, and, currently, a trial period under which the Society helps SYLA with administrative support (“which saves us sitting up at night stuffing envelopes”) – in addition to joint projects such as a student diary carrying much advice on embarking on a career in the law.

Labaki insists that these developments can only be taken so far. “We don’t want to compromise ourselves or the Society”, she states. “We couldn’t do what we do and not be independent.” So her Association will continue to act as a ginger group in relation to the professional body while at the same time receiving assistance from it – on the basis that both are working for the best interests of the profession.

And for Labaki and her committee, all the unpaid hours may bring benefits in the long run. "I've met some fantastic people; people have been very kind. You get exposed to different aspects of the law, you develop a network and develop your presentation skills in different environments. It's important for your career – it's becoming the norm."

Oh, and is the name going to change? “SYLA is open to everyone from student up to 10 years qualified, of whatever age. But its events are open to all ages and stages, and members and non-members alike.” Perhaps inclusive enough that everyone who wants to count themselves as young, is able to do so.

Former Law Society of Scotland President David Preston has kept an interest in the SYLA because of his involvement in its earliest days around 1974. “I was at the inaugural meeting which agreed the constitution and set up the first actual SYLA committee”, he recalls.

“From the recollection of Angus Stewart, who was secretary, that included myself, Gerry Malone, Roderick Macdonald, Philip Brodie, Kathleen Hay, Stephen Gold, Nick Scullion and me.”

“It seems to me that the Association has always had a fairly cyclical existence, depending on the attitude and support that can be given by the employing firms of the young lawyers. But I feel it’s important that law firms should be prepared to invest some time in allowing their younger members to develop the Association, because it’s important to have their voice as part of the profession.”

Preston was impressed when a guest at the Canadian Bar Association conference, at the status given to the young lawyers’ section there. “The CBA has a fairly conglomerate type of conference with judiciary, academics, in-house counsel, attorneys, all the different sections coming together for one large conference, and that includes the young lawyers’ section. It has its own AGM at the conference, and the closing lunch of the whole conference is hosted by the young lawyers and that’s the point at which the President’s jewel is handed over, it has that level of importance. I think that SYLA could aspire to something similar as long as they are given the facility to do that.”

He adds that it was a “very positive move forward” when two young lawyers (who are not SYLA representatives as such) were co-opted to Council. SYLA had always had representatives, particularly on the Education and Training Committee, “but their attendance, their commitment, varied depending on the support they had from their employers, and it was only if their employers allowed them a couple of hours a month to go to committee that we saw them. Often we didn’t."

“If the principle of co-opting two young lawyers to Council is there, then in fact young lawyers have a better chance of representation because young lawyers are as eligible to stand as Council members as the other members of the profession, so they’ve got two bites at the cherry; but there’s less chance in the sense that young lawyers have to be released by their employers for sufficient time to give a meaningful contribution as members of Council.

"It’s great to see the relaunch and I hope that it will take off, when it takes 30 years to get to here!”

Though the difficulty of travelling from Oban meant that he did not remain on the committee for long, Preston thinks that then as now, it was the social events that proved the most popular. “Probably! Maybe that’s where I developed my fondness for a good party.”
Shining some more light...

*Savings, investments and pensions*

Perhaps the most practically useful change here involves what might be seen as a rather esoteric area – dividends from foreign companies. But takeovers of well-known British companies have left many shareholders with small holdings in foreign companies. Individuals owning less than 10% of non-UK companies will now be entitled to a non-repayable tax credit of one ninth of the dividend – as with UK holdings. The original restriction to total non-resident dividends of less than £5,000 has been removed; and the 10% shareholding restriction will be removed from 2009-10 for many companies, as long as the source country levies a comparable tax to UK corporation tax on company profits. Also in the field of international matters, Finance Act 2008 provides the basis for UK-based investment managers to be appointed by non-residents to carry out specified transactions without exposing the non-resident to UK taxation.

The Finance Act provides the basis, and new regulations will supply the detail, under which investors will be taxed on offshore funds. This can remain favourable, but there will also be provision for funds to report income to investors rather than make distributions. The investor will be taxed on that income, rather than receive CGT treatment. There will also be arrangements for authorised investment funds who themselves go on to invest in such offshore funds.

In relation to ISAs, the increase in...
While there was some retreat from the original proposals on residence and domicile, much of the original package announced will be implemented.

This was another tax change which attracted huge interest beyond the specialist. While there was some retreat from the original proposals, much of the original package announced will be implemented. As regards residence, there will be a change to the longstanding practice in relation to days of arrival and departure. Now, any day in which an individual is present in the UK at midnight will be counted as a day of presence in the UK. Days of transit will not count (even if midnight comes), as long as the individual does not engage in activities inconsistent with merely being in transit. So reading rubbish at the airport will be just fine; straying over into business activities may not be. This sounds like one of the better excuses!

The major changes are to the remittance basis of taxation. From 2008-09, if an individual who is not domiciled or not ordinarily resident in the UK has nevertheless been resident in more than seven out of the last 10 years, he will not be permitted to utilise the remittance basis of taxation unless he pays an additional tax charge of £30,000 for that year. Otherwise, such a person will be charged to tax on total worldwide income and gains. There is a de minimis exception where unremitted foreign income and gains for the year do not exceed £2,000. If the £30,000 charge is paid, its payment directly to HMRC from abroad will not be regarded as an additional remittance and thus will not be liable to tax under the normal remittance basis – a concession which seems both logical and surprising at the same time! The “attack” on those using the remittance basis continues, with new rules whereby those using it will not be entitled to income tax personal reliefs or the CGT annual exemption, unless their unremitted foreign income and gains are less than £2,000. This seems somewhat unfair on some comparisons, for instance in relation to some non-residents with UK-sourced income. On a more positive note of fairness, it will be possible for those not being taxed on the remittance basis to claim relief for foreign capital losses. There is also legislation to close what are described as loopholes in the remittance basis, but which might more accurately be described as inherent in its operation – for example the use of different years for receipt and remittance; the use of entities different from the individual under consideration; and the remittance of assets other than cash.

The subscription limit to £7,200, of which one half can be cash (covered by previous legislation), came into effect from 6 April 2008. There are a number of relaxations on the reports required to be made by ISA providers and the information they are required to retain.

At the other end of the investor risk scale, subject to state aid approval, the investment limit for Enterprise Investment Scheme companies is increased from £400,000 to £500,000.

Rather strangely, given their very pure trading status, shipbuilding and coal and steel production are to become excluded activities for all the tax incentive regimes – EIS, VCTs and the Corporate Venturing Scheme. The same restriction is to apply to another part of the alphabet soup of investment schemes, the Enterprise Management Incentive share scheme – which is to be further restricted to qualifying companies with fewer than 250 employees. However, the limit on the market value of options under such schemes is increased from £100,000 to £120,000.

Regulations will be introduced to allow property authorised investment funds. These are open-ended funds, as an alternative to the already available closed real estate investment trusts. As with REITS, the point of taxation will move from the fund to investors in the fund.

The new unified pensions regime is bedding down. A number of fairly technical amendments will be introduced, in areas including the rules on contributions to non-registered schemes based outside the UK; the taxation of authorised payments to members; and the commutation of very small (generally less than £2,000) funds in schemes. The lifetime and annual allowances rise as planned, to £235,000 and £1,650,000 respectively; and various simplifications are made in relation to the calculation of the lifetime allowance.

Trusts and settlements

Most of the changes to trusts and settlements (or in some cases the lack of change) are incidental to other important developments – for example, the restrictions on entrepreneur’s relief for CGT, and the inability of trading trustees to claim the annual investment allowance. Some trust changes derive directly from these new developments – the abolition of most of the rules on settlor-interested settlements derives directly from the restructing of that tax.

However, the income tax rules on settlor-interested settlements continue in full force and effect. The possibility of double taxation where income is distributed to beneficiaries other than the settlor has been eliminated; and the tax which is paid for the year do not exceed £2,000. If the £30,000 charge is paid, its payment directly to HMRC from abroad will not be regarded as an additional remittance and thus will not be liable to tax under the normal remittance basis – a concession which seems both logical and surprising at the same time! The “attack” on those using the remittance basis continues, with new rules whereby those using it will not be entitled to income tax personal reliefs or the CGT annual exemption, unless their unremitted foreign income and gains are less than £2,000. This seems somewhat unfair on some comparisons, for instance in relation to some non-residents with UK-sourced income. On a more positive note of fairness, it will be possible for those not being taxed on the remittance basis to claim relief for foreign capital losses. There is also legislation to close what are described as loopholes in the remittance basis, but which might more accurately be described as inherent in its operation – for example the use of different years for receipt and remittance; the use of entities different from the individual under consideration; and the remittance of assets other than cash.
by the trustees under these rules is treated as paid on behalf of these beneficiaries. A new rule is introduced whereby such tax is to be treated as among the highest parts of the beneficiary’s income, so that the beneficiary does not have his income from sources other than the trust pushed into the higher rate band.

Given the ridiculous quantities of new legislation and other changes, it is something of a relief to report that new rules on alleged income shifting, which were to be introduced following HMRC’s defeat in the Arctic Systems case ([Jones v Garnett [2007] UKHL 35]), are to be deferred. It is less comforting that this is merely a delay; and that further consultation is intended to lead to new legislation in Finance Act 2009. If past experience is any guide, it is still likely to affect all of the guilty, the well-informed tax planner and the completely innocent bystander who does not know that perfectly sensible arrangements can be completely re-characterised for tax purposes.

**Business taxes**

**Capital allowances**

The main focus again this year is on the capital allowances regime, continuing the programme of reform started in last year’s Budget. Indeed, the bulk of the legislation to implement that programme is in this year’s Finance Act; and there have been some extensions of the programme since the first announcements.

The most important new development is the introduction of the new annual investment allowance for expenditure on plant and machinery. This is no longer restricted to small and medium sized enterprises, as originally proposed. It replaces first year allowances in most cases, although some specialised regimes continue. It will provide relief for the first £50,000 of expenditure each year by a business. It will apply to individuals, partnerships of individuals and most companies – but not to trustees or to partnerships which have other than individual partners. Any excess above £50,000 of expenditure will be dealt with under the normal (and now revised) capital allowance regime.

The restrictions for companies will generally be based on a restriction to a single annual allowance for (a) groups of companies; and (b) where companies are related, which means under the control of the same individuals. It is notable that the very wide ranging rules on connected persons and associated companies do not apply for the purposes of this new allowance.

There are significant changes to the basic regime – the main rate of writing-down allowance is reduced from 25% to 20%, although that on long-life assets is increased from 6% to 10%.

There is also to be a more general “special rate pool”, to which expenditure on particular assets will be allocated. This will be significant in the property industry, as it will include a very wide range of plant and machinery fixtures described as integral features – the current list includes electrical and lighting systems; cold water, heating and cooling systems; lifts, escalators and moving walkways; and the mysterious and slightly scary “active façades”, whatever they may be. It also includes thermal insulation (which would not normally qualify at all for allowances, but in fact previously benefited from a special 25% rate of capital allowance). As well as removing the right to the main writing-down allowance rate, it is made clear that expenditure on integral features will not qualify for a full revenue deduction from profits where this...
requirement to notify transactions with SDLT 60 has been withdrawn; and, were probably administrative. Form (not conversions), on their first sale. Worth £1 million or more.

Extended to cover residential properties and the disclosure regime is being rules on alternative property finance; counter SDLT avoidance utilising the purchaser. There is also legislation to departure of the purchaser company (not normally an occasion of charge, unlike the company leaves the group (not normally a matter of practical necessity to explain to Registers of Scotland why a transaction with apparently significant consideration does not attract SDLT, doing the job formerly done by the SDLT 60).

In relation to VAT, the most significant change is in relation to the option to tax (election to waive exemption, although that expression is no longer to be used). This involves the complete substitution of sched 10 to the Value Added Tax Act 1994 with effect from 1 June 2008, by means of the Value Added Tax (Buildings and Land) Order 2008 (SI 2008/1156). There is also a new version of the VAT Notice 742A, some of which has the force of law. Space does not permit the changes made by this important piece of legislation to be dealt with in full here, but the following changes are highlighted in the new VAT notice:

- New rules providing that an option to tax affects land and buildings on the same site, with transitional rules, and ability to exclude new buildings from the scope of an option to tax;
- A new certificate for buildings to be converted to dwellings etc and new ability for intermediaries to disapply the option to tax;
- A new certificate for land sold to housing associations;
- New rules for ceasing to be a relevant associate of an option;
- An extension to the “cooling off” period for revoking an option to tax (now six months);
- The introduction of automatic revocation of the option to tax where no interest has been held for six years;
- The introduction of rules governing the revocation of an option to tax after 20 years;
- A revised definition of “occupation” for the anti-avoidance test, including new exclusion for automatic teller machines;
- The introduction of a new way to opt to tax (a real estate election, which covers all relevant land owned or acquired after the real estate election). Most of these provide opportunities rather than threats, but the procedural and form-filling requirements have changed and the new rules will require to be followed when dealing with any property to which the option to tax is relevant.

The most important changes to SDLT were probably administrative. Form SDLT 60 has been withdrawn; and, broadly, there is no longer a requirement to notify transactions with a chargeable consideration of £40,000 or less. The rules on notification of transactions involving leases remain complicated but have also been relaxed – the £40,000 threshold will apply to payments other than rent; leases for more than seven years will only be notifiable where the annual rent is £1,000 or more; and leases for less than seven years will only be notifiable where the chargeable consideration exceeds the zero rate threshold.

In some circumstances, it will remain a matter of practical necessity to explain to Registers of Scotland why a transaction with apparently significant consideration does not attract SDLT, doing the job formerly done by the SDLT 60. In relation to VAT, the most significant change is in relation to the option to tax (election to waive exemption, although that expression is no longer to be used). This involves the complete substitution of sched 10 to the Value Added Tax Act 1994 with effect from 1 June 2008, by means of the Value Added Tax (Buildings and Land) Order 2008 (SI 2008/1156). There is also a new version of the VAT Notice 742A, some of which has the force of law. Space does not permit the changes made by this important piece of legislation to be dealt with in full here, but the following changes are highlighted in the new VAT notice:

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Land taxation: nuts and bolts

The legislation which removes the income tax potential benefit in kind charge on those who own holiday homes abroad through companies is contained in Finance Act 2008. Many of the capital allowance changes dealt with elsewhere have significant effects on land taxation. Again there were no changes to the main stamp duty land tax rates or thresholds, but there were quite significant SDLT changes.

There is an element of relaxation of SDLT for some transfers of interests within property investment partnerships. In the other direction, group relief clawback rules are tightened, so as to impose a charge when the vendor company leaves the group (not normally an occasion of charge, unlike the departure of the purchaser company) and there is a later change of control of the purchaser. There is also legislation to counter SDLT avoidance utilising the rules on alternative property finance; and the disclosure regime is being extended to cover residential properties worth £1 million or more.

The SDLT relief introduced for zero carbon homes is extended to new flats (not conversions), on their first sale.

Most important changes to SDLT were probably administrative. Form SDLT 60 has been withdrawn; and, broadly, there is no longer a requirement to notify transactions with a chargeable consideration of £40,000 or less. The rules on notification of transactions involving leases remain complicated but have also been relaxed – the £40,000 threshold will apply to payments other than rent; leases for more than seven years will only be notifiable where the annual rent is £1,000 or more; and leases for less than seven years will only be notifiable where the chargeable consideration exceeds the zero rate threshold.

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There is confirmation of increases previously announced in the tax credits available for research and development by large companies (to 130% of qualifying expenditure) and small and medium-sized enterprises (to 175% of qualifying expenditure, although there is a restriction to 7.5 million euro per research and development project for SMEs, which will lead to definitional problems). As these very high figures (which can involve payments from HMRC in appropriate circumstances) demonstrate, this can be a highly significant and profitable relief, providing a real tax incentive for this activity. There are also more minor changes to the specialised scheme for vaccine research relief.

Anti-avoidance

Anti-avoidance rules are introduced in relation to the crystallisation of balancing allowances on the sale of trades to enterprises which do not intend to carry on that trade; and very complex anti-avoidance legislation is extended in an area which occupies considerable government attention, the leasing of plant and machinery. These include measures designed to treat payments of “premiums” as income; and to prevent the creation of artificial losses by businesses who act as intermediate lessors, who lease plant and machinery from businesses and then let the same plant and machinery to other businesses.

Continued overleaf >
There is further anti-avoidance to prevent individuals benefiting from loss relief against other income when not actively engaged in a trade. These extend the restrictions that already exist where such losses are generated via partnerships.

The anti-avoidance theme continues in complex rules to prevent disguised interest being received tax free; and in relation to attempts to avoid the controlled foreign company rules by the use of partnerships and trusts (although the latter is an example of legislation to put beyond doubt the ineffectiveness of a scheme which HMRC do not believe works in any event).

Associated companies
A minor but useful change is made to the rules on associated companies. These often depend on common control of companies; and the rights held by business partners are taken to be held by the persons under consideration when looking at how many companies are within those persons’ control (Income and Corporation Taxes Act 1988, s 839).

Under the new rules, there will only be such attribution of control where there have been tax planning arrangements so as to secure a tax advantage under the rules for small companies. Thus it will no longer be necessary when considering how many companies are controlled by a particular individual to include those under the control of business partners of which the individual may have no knowledge (and no right to obtain that knowledge). This may be of particular value in large professional partnerships.

Value added tax
In relation to VAT, the registration threshold rises from £64,000 to £67,000; and the deregistration threshold from £64,000 to £65,000.

A new transitional relief is introduced following House of Lords judgments on the original introduction of the three year cap on input tax claims from 1997. Until 31 March 2009 only, businesses may submit claims for output tax overpaid before 4 December 2006 (not specifically covered by the judgments in question but affected by the principle); and input tax incurred prior to 1 May 1997. HMRC have had trouble in fully enforcing the three year cap on VAT claims pretty much since its introduction. This new short transition period will close another line of attack. An important VAT concession on the supply of temporary staff by employment businesses is to be withdrawn from 1 April 2009. This will lead to VAT being payable on the wages element of payments to such agencies.

Employment
The changes in pure employment tax were relatively minor this year. The tax on company cars is reduced for cars with lower CO2 emissions. The rules on reimbursement for fuel purchased for business use in company vans is to be brought into line with those on company car fuel, so that reimbursement is not to be treated as taxable.

A possible confusion has arisen in the tax law re-write in relation to employment-related securities (shares or options from employment share schemes). This will be corrected to make clear the full amount which is liable to tax. Also in relation to employment-related securities, changes will be made to bring the position of employees who are not ordinarily resident, or not domiciled, in the UK, into line with those who are so resident, ordinarily resident and domiciled. But the changes will also take account of the remittance basis where this applies to employees, and provide for apportionments of amounts that would otherwise be chargeable.

Environmental taxes
The join between environmental taxes as economic instruments to direct environmentally desirable behaviour, and as a means of filling growing gaps in the tax take, becomes much harder to distinguish. But the rhetoric of environmental taxes as being for purposes other than raising revenue continues. Landfill tax continues its planned rise to very high levels, while aggregates levy and climate change levy have more modest rises. Some of the landfill tax incentives are being reduced or removed, such as the exemption for cleaning contaminated land. The maximum rate of possible offset of landfill tax liabilities for contributions made to registered environmental bodies is being reduced.

The use of reduced rates of fuel duty for pleasure flying and pleasure boating will be removed. Air passenger duty is to be replaced in November 2009, with a new tax which will be based on plane flights rather than individual passenger numbers.

Alan Barr, Brodies LLP and University of Edinburgh
Keen to establish Scotland as an international centre for arbitration, the Scottish Government is consulting on a draft legislative code. Gordon Reid QC explains how it is intended to work.

The commendable aim of the Arbitration (Scotland) Bill is to modernise, consolidate and codify the law and practice of arbitration in Scotland, and to improve the standards of arbitral decision making. This is part of the Scottish Government’s broader strategy to support domestic arbitration in and attract international arbitration to Scotland.

A feature of this strategy is the policy decision to remove the distinction between domestic, cross border and international arbitrations seated in Scotland. This is achieved by the repeal of the UNCITRAL Model Law provisions for international arbitrations in the Law Reform (Miscellaneous Provisions) Scotland Act 1990. Another element is the development of a self-financing dispute resolution centre in partnership with interests representing arbitrators and those appearing in arbitrations.

The consultation paper identifies a number of problems with the law and practice of arbitration in Scotland, namely:
- the many and varied sources of law and practice;
- uncertainty as to what the law is;
- the scope of an arbiter’s powers;
- the variety of arbitral codes; and
- the overall expense of arbitration.

These problems are addressed by providing, in effect, a default code, which parties can contract out of (in part). The bill sets out a number of fundamental principles (fairness, impartiality etc.), which will cause no surprise and have no significant effect on the way arbitrations are managed and conducted in Scotland.

I propose to consider some of the main proposals which affect the way arbitration is set up, conducted and reviewed, with particular reference to how the new provisions will assist to promote the speedy, efficient and satisfactory resolution of disputes.

Continued overleaf >
between parties who choose arbitration rather than litigation or some other form of alternative dispute resolution.

**In the beginning**

A most important innovation is the amendment to the Prescription and Limitation (Scotland) Act 1973 in relation to the commencement of arbitrations and the interruption of prescription. Goodbye preliminary notice and hello notice of intention to submit. The giving of such a notice of intention interrupts prescription. At this stage, the arbitrator (now called arbitrator and referred to in the bill as the “tribunal”) will not have been appointed. No guidance is given as to the content of the notice of intention. The practical advice is to give a fairly full but flexible narrative of the nature of the dispute.

The provisions for default rules (where a contractual arbitration clause is fairly basic) will assist in getting through a number of critical pinch points, namely commencement and appointment, without too great a risk of judicial intervention and delay. The parties may agree on the constitution of the tribunal, but if they do not, default provision is made for appointment by an arbitral appointments referee, likely to be one of the usual nominating bodies. Subordinate legislation will ensure appointing bodies maintain a list of appropriate arbitrators, by requiring them to have in place training, regular assessment, and disciplinary procedures. The Faculty of Advocates is likely to be eligible to become an arbitral appointments referee.

**Before the tribunal**

Once the arbitral tribunal is appointed, the first practical step will be to decide on the form of procedure. The success of the arbitration process depends to a large extent on co-operation. The tribunal must act positively but be flexible enough to accommodate the reasonable wishes of the parties. It may appoint a clerk. It may meet anywhere, even outwith Scotland. If the parties’ advisers co-operate with each other, the

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**Refurbishing arbitration for the construction industry**

Construction lawyer Tricia Morrison offers a solicitor’s view

In the late 1990s alternative dispute resolution (ADR) was in fashion and no legal seminar was complete without a mention thereof. With the Scottish Government’s consultation on the Arbitration (Scotland) Bill we see a revival of the traditional ADR tool of arbitration.

Arbitration was historically the favoured dispute resolution forum of the construction industry, largely because it allowed industry experts to decide disputes. The quantity surveyors who completed the standard form construction contracts tended to select arbitration rather than litigation.

The coming into force of the Housing Grants, Construction and Regeneration Act 1996 resulted in a shift away from arbitration towards adjudication, both as provided for by the Act and by the various construction industry standard form contracts. Arbitration was perceived to be lengthy, costly and overly reliant on written submissions, whilst adjudication seemed to offer a 28 day quick fix. In recent times however, anecdotal evidence is that the popularity of adjudication is on the wane. Adjudications are almost always longer than the minimum 28 day period and are rarely cheap. The adjudicator’s fees must be paid at a professional’s hourly rate. Whilst expenses including the adjudicator’s fee may not require to be borne by a winning party, their own legal fees will not be recovered unless there is some contractual provision allowing this.

The right of parties to a construction contract to adjudicate in respect of a dispute at any time, in terms of the Act, will remain. It should be hoped that the process proposed by the bill will complement the available adjudication procedure, as may be demonstrated by the following scenario (which is entirely fictional but not uncommon): Contractor A has been on site for 12 months and is days away from completion of the construction work. The final account detailing every screw, nut and bolt is with the employer for consideration. The employer has already said that it doesn’t accept that contractor A has counted each screw properly, and also thinks that the 25 different types of bolts haven’t been properly priced. It thinks that contractor A has already been overpaid by £10,000. The employer also wants to deduct £50,000, which it says it is entitled to because contractor A has finished 6 months late. It thinks contractor A owes it £51,000. Contractor A says the employer caused the delay, and in addition to £3,000 for the construction works it is entitled to payment of £1,350 as a result of the employer causing the six month delay. Both contractor A, the employer and the construction site are based in Edinburgh.

Contractor A is fed up talking and wants to pursue payment. If we assume that there is a choice of post-bill arbitration, adjudication and court, what is best?

The dispute is not sizeable and there is potential for the irrecoverable costs of an adjudication to outstrip the value of the contractor’s final recovery, if not the claim itself. This puts contractor A off adjudication. Also the delay aspect of the dispute is fairly complicated and it seems unlikely that 28 days will be enough to get a good decision.

Court action remains an option. The court could award the successful party their judicial expenses, thus reducing the irrecoverable legal costs. The courts with jurisdiction are the Court of Session and Edinburgh Sheriff Court. The low level of the sums in dispute make the Court of Session unsuitable. The lack of commercial procedure at the sheriff court may cause difficulty – the
dispute will be lengthy, technically complicated and need good case management, something the sheriff court ordinary procedure cannot always accommodate.

In the pre-bill days the arbiter’s powers in relation to expenses were uncertain. However, the bill provides that the arbiter has the power to make awards of expenses. The arbiter can, like the court, reduce the successful parties’ irrecoverable expenses. The arbiter is also a QoS of old, so knows the principles which are important in bolt counting disputes. Further, the arbiter has been earning his crust as an adjudicator over the last decade and knows exactly how quickly parties can provide information if they want to. He is keen to flex his case management muscles and may just use his powers in respect of expenses to prevent the delaying tactics that almost killed pre-bill domestic arbitration.

With many of the uncertainties of domestic arbitration cleared up by the bill, arbitration may be attractive to both parties, even in absence of an existing contractual provision for arbitration.

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*Tricia Morrison is a partner and Head of Construction (Scotland) at HBJ Gateley Wareing*
How does the bill assist at this point? Unfortunately, it has little impact. It gives the tribunal a very wide procedural discretion, which an arbiter already had at common law.

The bill refers to a written statement of the parties’ claim or defence. Claim includes counterclaim. This is a key stage in any arbitration. It might have been preferable to provide that a statement of claim should contain a conclusion identifying the orders sought, and a brief statement, in numbered paragraphs, of the material facts on which the claimant relies. Similar provision could be made for the statement of defence and any counterclaim.

In many cases, it may be worthwhile attempting to state the issues which have to be determined, so as to focus parties’ minds on the law and the facts which have to be proved or refuted. At this important stage, it is critical that the arbitration does not become tangled in the long grass of extended periods of adjustment of pleadings mirroring traditional court procedure. The mandatory duty on the tribunal to do its best to conduct the arbitration as quickly as is reasonably practicable points the tribunal in the right direction, but does not go far enough to make a significant difference to the way arbitrations are currently conducted.

Powers as to awards

The bill gives the arbitral tribunal power to award damages, interest (including compound and backdated), expenses including payments on account, and security for expenses (no criteria being specified), with provision for capping a party’s liability in advance. Interim and partial awards may be made, and protective measures such as the recovery and inspection of property may be granted. Power to rectify and reduce documents is also given. These are all to be welcomed. A range of unworthy arguments previously deployed by employers against deserving contractors will be eliminated. It is to be hoped that the consultation process will lead to a tightening up of the current drafting on some of these topics.

Another bill currently in circulation, the Interest (Scotland) Bill, also makes comprehensive provision for simple interest to be awarded by an arbiter (the traditional term used in that bill). These two bills should perhaps be examined by the parliamentary draftsmen together to ensure consistency and avoid unnecessary duplication.

Finally, the tribunal may refuse to make an award until its fees and outlays have been paid in full. This is appealable to the sheriff court or the Outer House (see below).

Simplifying appeals

The stated case procedure is repealed. In its place come restricted rights of appeal. These include appeals to the Outer House on rulings and decisions on jurisdiction. An application may also be made to the Outer House to remove a member of the tribunal on grounds of impartiality or qualification, or to dismiss the whole tribunal on somewhat broader grounds. The final award (having first been issued in draft) may be corrected where there are clerical or typographical errors, or ambiguities. The final award may be appealed to the Outer House on specified grounds of serious irregularity (mainly procedural in nature), or error of law. In relation to a legal error appeal, a form of leave to appeal is required. The decision in the Outer House on all these matters is final. There is no appeal against an interim award.

All these provisions provide practical clarification and simple procedural mechanisms for appealing. The court’s decision on an appeal against the tribunal’s refusal to make an award until paid, may, in turn (with leave), be appealed.

Bold action needed

The only way arbitration will become popular again and overtake mediation and adjudication is if arbitrators take full control of the arbitration process, and engage in some serious, intense case management. Most commercial clients complain about the length of judicial and quasi-judicial proceedings.

Adjudication has generally been a success because of the statutory time constraints. Major adjudications require a significant effort from all concerned over a relatively short period. This, at least, achieves a result with which both parties are often prepared to live. There has been some disquiet about the quality of decision writing and procedural management on the part of some adjudicators.

To make arbitration blossom again in Scotland, a compulsory framework which has all the advantages of adjudication, mediation and arbitration but none of their disadvantages is required. A good start would be arbitration enduring for somewhat longer than 28 days but generally no more than say six or nine months, with positive case management, focusing on succinct pleadings, the use of expert meetings and round-table discussions (particularly as the tribunal is given power to engage its own expert) to narrow the issues, leaving only the live factual and legal issues which matter to the clients and have sufficient commercial value for them to make the whole exercise commercially worthwhile. A compulsory procedural framework incorporating these aims is surely not beyond the ingenuity of the Scottish parliamentary draftsmen. The Scottish Government should act boldly and rethink the implementation of its worthy general policy of rationalising and consolidating arbitration law and practice in Scotland.

J Gordon Reid QC is a member of Axiom Advocates, which specialises in commercial and public law cases including commercial arbitrations.
The Law Society of Scotland’s policy paper on alternative business structures (ABS) was approved at its AGM on 22 May, after some spirited debate and a couple of unsuccessful amending motions. It would appear that most of the big firms in Scotland see ABS as offering a significant strategic opportunity, presumably from the advantages that external funding would provide. This article looks at the position as it is emerging in England & Wales with regard to ABS, and their forerunner legal disciplinary practices (LDPs), following the passage of the Legal Services Act 2007.

LDPs – the structure
The Act has created the Legal Services Board (LSB) as an over-regulator, designed to operate through existing regulators such as the Law Society (of England & Wales) and its regulatory offshoot, the Solicitors Regulation Authority (SRA). The LSB has now had its chair and board appointed, but will take until autumn 2009 to become fully established. The first set of changes will not, however, have to wait until then.

The reason is that two sets of reforms which collectively are known as LDPs are being achieved not through the complex machinery under the Legal Services Act for England & Wales is slowly being assembled, as Simon Young reports

Piece by piece

As the legal profession in Scotland awaits the Scottish Government’s next move on regulation, the complex machinery under the Legal Services Act for England & Wales is slowly being assembled, as Simon Young reports

LDPs – mixing lawyers together
The first part of LDPs, which will not subsequently change, is with regard to the mixing of different types of lawyer within one business. The neutral word “business” is here used carefully, because any LDP (as will later be the case for ABSs) can be a partnership, a limited liability partnership, or a limited company. So, solicitors will be able to join in equity with such as barristers, legal executives, licensed conveyancers, and patent or trade mark attorneys.

Views differ as to how far-reaching this will be. For instance, some senior members of the Bar are still taking the view that allowing their profession to practise in any way other than as sole practitioners is anathema to the independence of the Bar, whereas others in their ranks are thought to be eyeing up solicitors’ firms as prospective targets. Likewise, solicitors who wish to strengthen their litigation and advocacy will be considering extending invitations to their barrister colleagues – perhaps even a whole set at a time. Firms with departments run by legal executives will be free formally to offer them the partnerships they may long have had in all but name. And, in these troubled times in the conveyancing world, there may be opportunities for much closer links between solicitors and licensed conveyancers, perhaps to obtain the benefits of the more generous regulatory regime of the latter.

LDPs – non-lawyer “managers”
The other aspect of the LDP regime will however be only a temporary exercise. When Part 5 of the Act comes into force, it will supersede those parts of the LDP structure which relate to those other than lawyers. For that reason alone, it may prove not particularly popular. Say, for instance, a firm takes a non-lawyer chief executive into partnership under the LDP rules, and then finds that the ABS rules that it would need to comply with, in order to perpetuate that, are much stricter than before. It will then be faced with the choice of complying with the stricter regime, or getting rid of the chief executive. Firms may prefer to bide their time, and see how the ABS regime looks.

This part of the LDP regime was intended to facilitate the taking in by firms of their senior management. Any suitable person may be eligible – there is no restriction to those who are members of other formally recognised professions. The regime allows persons to become “managers”, in the sense defined in the Act, namely

- a partner in a partnership;

- a director of a limited company;

- a manager of a limited liability partnership;

- a director of a public company;

- an officer of a partnership;

- an officer of a public company;

- an officer of a limited liability partnership;

- an officer of a limited company.
There is no requirement that a "manager" should actually manage at all. In theory, there will be nothing to prevent a suitable person, who is not a lawyer, becoming a 25% sleeping partner in a law firm.

There are some fears that the SRA, in achieving this, has taken to itself certain extra and potentially intrusive powers, which were not strictly speaking necessary for this exercise. The representative side of the Law Society, and the SRA, are working together to see how this can all be achieved without too much disturbance to those who are not themselves opting for change.
The poor in our midst

The notion of lawyers or their dependants needing charitable support is not one that readily strikes a chord with the public. But Dunfermline solicitor Craig Bennet knows better than most about the hard times that fate can deliver to solicitors’ families.

Bennet, convener of the Scottish Solicitors’ Benevolent Fund for the past four years, is keen to raise the profile of the Fund at a time when, as he reported to this year’s Law Society of Scotland AGM, income has taken a dip such as to potentially call into question the Fund’s ability to maintain its current level of support to beneficiaries.

Varied circumstances
Typically these beneficiaries are the elderly widows, whether still in their own homes or in care, of now-deceased solicitors, whose assets include little if anything in the way of pension provision. For instance one, aged nearly 90, is in a retirement home supported only by the remaining proceeds of sale of her house. Another, younger but suffering from a heart condition, remains in her own home but has entered an equity release arrangement to secure enough to live on. A third lives on income support in a local authority house.

But fate can take an unkind turn for anyone. A solicitor in their 30s or 40s with a disabling medical condition, or even a combination of problems that prevent them working, can turn to the Fund, which has more recently found itself providing assistance in cases of this nature.

Craig Bennet believes that with stress and stress-related illness becoming more prevalent among younger solicitors, the profile of the average beneficiary could be changing. “I think applicants will come out of the woodwork and they’ll be younger ones, whether affected by stress or by drink or what not, I think that will come through.”

He also suspects that the Fund still is not as well known as it might be, and that “a lot of people still don’t know the Fund exists – we’ve got to help people we don’t know about yet but who do need to be aware of the existence of the Fund”.

Making ends meet
The Benevolent Fund’s objects are simple enough: “to help in case of necessity solicitors, their widows and other dependants”. (One applicant is the son of a deceased solicitor who receives money to help him through his schooling.) In its present form it dates only from 1990, when separate funds in the care of the Scottish Law Agents Society (running from 1933) and the Law Society of Scotland (established with the Society in 1949) were merged. A Benevolent Fund Committee, made up of members of the two Societies, makes the major decisions affecting the Fund, and appoints the trustees who decide on grant applications and prepare the financial statements as required by charity law.

Grants are made twice a year. Currently at £600 a time, the grants certainly are not riches, but to many of the beneficiaries they genuinely help them make ends meet.

With such long-term cases for assistance, the Fund has a particular need of a reasonably predictable income. However its recent financial statements show the annual level of donations (which come both from individuals and from local faculties of solicitors) fluctuating from around £9,000 in 2005, to over £12,000 in 2006, to under £4,200 in 2007 – a drop that well outweighed the rise in investment income from £9,270 to £10,442, and the money raised by the annual golf outing.

On the agenda
External factors can have a significant influence, reflecting Bennet’s view that the profile of the Fund needs to be maintained at a higher level. The rise in 2006 followed a mailing with the papers for the Law Society of Scotland’s AGM that year. This prompted substantial donations including £1,400 from a sole traders’ association in the west of Scotland which happened to be winding up at the time.

“There’s always somebody who has a particular amount of money at a particular time that they can give away, and that’s the sort of thing that we’re looking to catch on to”, Bennet adds, welcoming the fact that the Society has now agreed to send out a similar slip with the practising certificate renewal
forms. He casts a somewhat envious eye at the police and health service, where small but mandatory deductions come off individual salaries each month to boost their equivalent finds, while accepting that this would be impractical for solicitors given the differing ways in which individuals are paid.

He does however put in a plea for local faculties and societies to add an item to their AGM agendas to cover the Benevolent Fund. The most regular donors – Highland, Perth & Kinross, Dunfermline, Dumbarton and Dundee – generally do this, and Bennet is keen for others to follow suit. “Once you get on to the AGM agenda faculties are very helpful, but it’s getting the Fund known and my big push for this year will be to get the Fund better known in local faculties who may like to contribute if they have a surplus from CPD activities or whatever. We want to get more people to know about it and then to have it on their agenda, that’s the important thing.”

Individuals too can play their part, and the trustees are always grateful to those who donate for example speaker’s fees, or even the odd £5 or £10 they decide they can spare – as well as the solicitor who gave £1,000 last Christmas.

If you can’t take a break

Ironically an important recent addition to the Fund’s income is the one it has most difficulty spending, because of the conditions attached. In 2006 the Tod Foundation offered to provide an endowment of £10,000 a year to defray the cost of short holidays (normally three or four days), to be taken in Scotland, for solicitors suffering from stress and in need of rest and recuperation. Similar schemes have been set up for doctors, ministers and artists, and the flexible terms offered extend to paying for locum cover for solicitors currently practising. Despite the perceived prevalence of stress in the profession, however, and the award being open to dependants, and the dependants of former solicitors, takeup to date has been low, at only four holidays so far.

“The money’s just pouring in and we can’t do anything with it”, Bennet comments. Fund trustees have identified two particular difficulties. Many of the existing beneficiaries are too infirm to take advantage of the offer; and solicitors currently in practice may be reluctant to disclose health or financial circumstances. Again, local faculties may have a role in communicating privately with possible beneficiaries to make them aware of the facility and encourage them to apply.

Threat of cuts

Funds from the endowment, of course, are not available for the ordinary support of applicants to the Benevolent Fund – which explains why the trustees will have to consider restricting the already modest grant, barring an increase in the level of ordinary donations. “We went up from grants of £500 a time to £600 three or four years ago, but we may have to go back again”, Bennet warns. “Last time it was agreed that three of the beneficiaries, whether because they had more cash or because their health wasn’t as bad as others, would be told that if the Fund income doesn’t increase, their grant next time would be reduced maybe by half.”

That would be a matter of great regret to the trustees. As Craig Bennet comments, “I think apart from the state, many of these people do not have any other form of income. Some of them apply to the Indigent Gentlewomen’s Society and things like that, but many of them don’t have that, and some of the letters we receive are heartwarming and sincerely thankful. Without that £600 twice a year, they’re toiling.”

Donations, and applications, to the Scottish Solicitors Benevolent Fund can be sent to the Secretary, Michael Sheridan, 166 Buchanan Street, Glasgow G1 2LW.
BIGGART BAILLIE LLP, Glasgow and Edinburgh, are pleased to announce the promotion of their associate Martin Gallaher (above) to partner in the Infrastructure, Environment and Transport department with effect from 1 July 2008.

David Brookens of BROOKENS & CO, Glasgow, is pleased to announce that on 27 June 2008 he retired from full time practice and his office at 87 Carlton Place, Glasgow closed on that date. With effect from 7 July 2008 Mr Brookens commenced part time practice as DAVID BROOKENS, Solicitor Advocate, PO Box 8062, Isle of Arran, KA27 8WT. The telephone/fax number there is 0844 561 6174; email: mail@davidbrookens.com; web: www.davidbrookens.com. Mobile telephone contact numbers are unchanged and are 07000 333 363 and 07768 898 830.

CAESAR & HOWIE, Bathgate and elsewhere, regret to announce that Robert William Shaw has with effect from 27 June 2008 retired fully from his consultancy with the firm and from the practice of law. The partners and staff wish him a long and happy retirement.

FLEMING & REID, Solicitor Advocates, Glasgow, are pleased to announce that James John Mulgrew was assumed as a partner of the firm on 1 July 2008.

PHILLIP A LAFFERTY, Criminal Defence Solicitors, 30 Alexander Street, Clydebank, are delighted to announce that with effect from 1 April 2008 Judith-Anne Reid has been assumed as a partner of the firm, which is now practising as LAFFERTY REID, Criminal Defence Solicitors. All contact details remain unchanged.

D M MACKINNON, Oban are delighted to announce the assumption of their assistant, Alayson Wilson, as an associate with effect from 26 July 2008.

Alan McKnight wishes to intimate that he left the employment of EAST AYRSHIRE COUNCIL on 25 July 2008 following his decision to retire from the practice of law to pursue other interests.

MILLER HENDRY, Dundee, Perth, Crieff, Comrie and Auchterarder, are pleased to intimate that their associate Alison L Fitzgerald has been assumed as a partner of the firm with effect from 1 July 2008. Alison is a member of the firm’s Dundee Court department. With effect from 27 June 2008, Kenneth Harry Wood has retired as a partner of the firm.

NEILL CLERK & MURRAY, Greenock and Gourock, are pleased to announce the appointment of Gail Docherty as an associate with effect from 11 August 2008.

PATTISON & SIM, Paisley and Glasgow, intimate that with effect from 31 August 2008 George Jamieson has retired as consultant with the firm. The partners, David J Howat and Bridget M McLaren, and consultant Alan MacDonald, wish Mr Jamieson well in the future.

SEMPLE FRASER LLP, a multi-national practice, Glasgow and Edinburgh, wish to announce the promotion of five senior fee-earners. Dual qualified lawyers Douglas Gourlay, Jonathan Kirkwood and Kirsteen Milne are promoted to Director level and Nigel Eccles and Kathryn Black merit promotion to Associate.

SKENE EDWARDS LLP, Edinburgh are pleased to intimate that at 1 September 2008 their practice will merge with MORTON FRASER LLP, Edinburgh, Glasgow and London. As from that date R Iain F Macdonald, G David Rankine and Robin J S Morton will become partners of, and Thomas C Foggo and Alistair J R Ferguson will become consultants to, MORTON FRASER LLP.

STODARTS, Hamilton, wish to intimate the retirement of their senior partner, W Grant Wood, with effect from 31 August 2008 after 32 years of service with the firm. Mr Wood will continue to be associated with the firm as a consultant.

STRONACHS LLP, Aberdeen and Inverness, are pleased to announce that Ingrid McKay and Ferga McKay have been appointed associates with effect from 1 June 2008. Joanna Hardie and Hayley Fulton have also joined STRONACHS as assistants, Joanna specialising in family law and Hayley specialising in health and safety and environmental law.

STURROCK & ARMSTRONG, Edinburgh, are pleased to announce that with effect from 26 May 2008, they merged with P CLARK THOMSON & SON, Edinburgh. The new firm is known as STURROCK, ARMSTRONG & THOMSON and continues to practise from the offices at 16 Young Street, Edinburgh EH2 4JH and 7a Dundas Street, Edinburgh EH3 6QG. The telephone and fax numbers of both offices, as well as their respective DX and LP box numbers, remain unchanged.

WEST ANDERSON & CO, Glasgow, intimate that their consultant and former senior partner Michael C Hodge retired from practice as at 30 June 2008. After 54 years in the profession, 49 of them with their firm, they wish him a well deserved rest.

Upgrade your entry to a boxed advert. Contact Clare Stebbing on 0131 561 0024 or email clare@connectcommunications.co.uk.
A Special General Meeting of the Society will be held on Friday 22 August, on a requisition from the Glasgow Bar Association. The meeting will be held at the Society’s offices, 26 Drumsheugh Gardens, Edinburgh at 3pm.

The objects of the meeting, as set out in the requisition, are:

- ascertaining the views of the profession on the new summary criminal legal aid regime;
- ascertaining the aims of the profession in respect of the ongoing review process;
- ascertaining the views of the profession on the new summary criminal legal aid, and advice and assistance forms;
- ascertaining the views of the profession in respect of diversion from prosecution;
- ascertaining the views of the profession with regard to the lack of new entrants to the criminal branch of the profession and the drop in the numbers of those registered to provide criminal legal assistance;
- discussing the future of criminal legal aid.

In response to this requisition, the Society will seek to move the following motion at this meeting:

“The Special General Meeting of 22 August 2008 supports the Law Society of Scotland representatives on the Summary Criminal Legal Assistance Monitoring and Evaluation Group in their negotiations with the Scottish Government and the Scottish Legal Aid Board”.

All members are invited to attend and participate.

The Scottish Government has commissioned an independent review into the legislation which governs the operation of fatal accident inquiries. The review, led by Lord Cullen of Whitekirk KT, began its work on 9 June 2008 and has the remit:

“To review the operation of the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976, which governs the system of judicial investigation of sudden or unexplained deaths in Scotland, so as to ensure that Scotland has an effective and practical system of public inquiry into deaths which is fit for the 21st century.”

The review will examine the operation of judicial inquiries into sudden, suspicious or unexplained deaths. Lord Cullen will be inviting responses to his consultation later in 2008. In the meantime, you can get further information on the website www.scotland.gov.uk/FAIreview, or by contacting Andrew Mackenzie, Secretary to the Review of Fatal Accident Inquiry Legislation, 50 Frederick Street, Edinburgh EH2 1NG

Andrew.Mackenzie@FAIreview.org; t: 0131 225 5972; f: 0131 226 4338.
Booking opens for CALM training courses

Details of the next CALM training course for solicitors who wish to train as family law mediators have been announced.

The first module, which is open to all solicitors who are interested in mediation, collaborative law and soft skills negotiation, will run on Monday 15 and Tuesday 16 September 2008. The cost of this module alone will be £300. Modules 2 and 3 are aimed at those solicitors who wish to seek accreditation as family law mediators through the Law Society of Scotland. Module 2 will be held on Wednesday 5 and Thursday 6 November 2008, and module 3 on Tuesday 13 and Wednesday 14 January 2009.

The trainers will be Lisa Parkinson, Anne Hall Dick and Ewan Malcolm. The course will be run at 18 York Place, Edinburgh. The cost for all three modules will be £1,100, to be paid at the rate of £220 per month from September 2008 through to January 2009. There is some pre-course reading, assessment throughout the course and an assignment to be handed in.

FROM THE BRUSSELS OFFICE

Direct settlement procedure for cartels

A settlement procedure for cartels has been introduced by the European Commission to allow it to deal more speedily with cartel cases under investigation. Cartelists can opt to recognise their involvement and liability at an early stage of the process and consequently be granted a 10% reduction in fine. Parties will be entitled to review the evidence gathered by the Commission during its investigations and allowed to voice their opinions on the case against them, concluding ultimately whether or not to settle. Parties will thereafter be invited to introduce a settlement submission, acknowledging each of the elements of the case against them. The Commission has emphasised that this is not a process of plea bargaining, but it is still hoped that it will reduce the burden of current procedural formalities and reduce the number of appeals against Commission decisions. It should be noted that where settled cases also involve leniency applicants, the reduction of the imposed fine will be cumulative.

Cross border healthcare rights

The European Commission has published a proposal for a directive on cross border healthcare which clarifies the rights of patients seeking healthcare in another member state. Several rulings from the European Court of Justice and the decision by the European Parliament to exclude healthcare from the Services Directive led to calls for a specific initiative on this area. The proposal provides that patients may seek healthcare in any EU country and will be reimbursed for the cost as long as the treatment would be covered under their national system. There is no requirement for prior authorisation, except in certain cases of hospital or specialised care. The overall aims of the proposal are to establish a framework for the provision of safe, high quality and efficient cross border healthcare, and to promote co-operation between member states through various particular measures.

Boosting the “knowledge economy”

On 16 July, the European Commission outlined various initiatives in the field of intellectual property. This includes a legislative proposal to extend copyright protection for performers and producers from 50 to 95 years. A green paper on copyright in the knowledge economy was also published. This seeks views until the end of November about the accessibility of research, educational and other material, in particular on the internet. It reviews the exceptions that exist in Directive 2001/29 on copyright and related rights in the information society and how they are applied by member states. It also asks whether there is a need for guidance on contractual arrangements implementing certain exceptions, or a need to make certain exceptions mandatory. Lastly, a new industrial property rights strategy was published.

Public procurement goes green

On the same day the Commission published a communication on green public procurement (GPP), part of a larger package of measures entitled the Sustainable Production and Consumption and Sustainable Industrial Policy Action Plan. The communication proposed that by 2010, half of all public procurement procedures should be green. The Commission seeks to develop a set of common criteria, which public authorities would be able to use to ensure the goods and services they buy are the least damaging to the environment. This would also bring greater coherence to the practices being developed in different member states. The expert group agreeing the criteria is to draw on existing standards, such as eco-labels, and a consultation on them will take place. The criteria will concentrate on 10 sectors of procurement, such as construction, office equipment and transport, and should eventually be incorporated into the national action plans and guidance on GPP.

Strong backing for standards project

The further development of standards of service and conduct for solicitors has received overwhelming backing in a consultation carried out by the Law Society of Scotland.

The consultation, which aimed to clarify what those using legal services can expect from their solicitor, outlined draft standards covering different areas of a solicitor's service and conduct. In total, 227 individuals responded to the questionnaire. Of those, 75% worked within the legal services market – mostly as solicitors – and 25% were members of the public.

Overall, 94% of respondents agreed that the standards were "very important" or "important". A solicitor's competence and acting in the best interests of the client were ranked the most important "important". A solicitor's service and conduct.

"We are very encouraged by the level and positive nature of the responses we received to the consultation and would like to thank all those who took part."

Following revision in light of the consultation feedback, the standards will be submitted for approval at the Society’s Special General Meeting in September. Once formally accepted as solicitor rules, the aim is to have the new standards published and distributed towards the end of the year.
Reactions from solicitors to the first levy issued on behalf of the Scottish Legal Complaints Commission indicate that some remain unaware of when and how the Society’s responsibilities are changing. Director of Regulation Philip Yelland attempts to explain

The Society’s future role in complaints handling

The opening of the Scottish Legal Complaints Commission on 1 October represents a new era for the Law Society of Scotland in terms of handling complaints. However, it is clear from some letters received from practitioners after we issued the annual levy invoices, that there is confusion over the Society’s future role. This article will clarify that role and its effect on the Society’s operation.

When the Legal Profession and Legal Aid (Scotland) Act 2007 was passing through the Scottish Parliament, it was agreed that the Commission would be the gateway for all complaints against solicitors, handling service complaints itself and passing conduct complaints to the Society. Initial discussions indicated that the Society would continue to receive and handle service complaints up to 1 October 2008 and the Commission would handle all new service complaints after that date. That, however, is not now the case. Under the Commission’s rules, the new organisation will only handle service complaints where the business was instructed before that date, and therefore our workload will be maintained at the current level for at least the next year.

The Society recently announced that, as of 1 October, it will reduce the time limit for making a complaint from the current two year period to one year. This is in line with the Commission’s planned rules and will limit the run-on time for the Society. The transitional provisions that bring the Legal Profession and Legal Aid (Scotland) Act into force are also likely to include a provision ensuring the Society will handle no new service complaints after the Commission has been open for two years, irrespective of the date of the instruction.

Practising certificate costs

A number of practitioners responding to the levy invoice clearly expected that the opening of the Commission would result in an immediate reduction in the Society’s work and costs, and therefore a lowering of the practising certificate subscription. As the Society will have as much work over the coming year (in addition to liaison with and monitoring of the Commission), the cost of the Client Relations Office will remain at its current level and there can be no reduction in the practising certificate on that basis.

The Commission is an independent body and its budget has been approved by the Scottish Parliament. It is worth noting that the Society’s complaints handling system has been subsidised for many years by the goodwill of solicitors and non-solicitors who prepare reports and sit on committees. The Commission will not replicate that process and its costs will be higher. In fact, it will cost more for the Commission to deal with service complaints alone than it does for the Society currently to handle all complaints.

New conduct provisions

From 1 October, the Society will be able to make a finding of unsatisfactory conduct against a solicitor, as well as continuing to refer allegations of professional misconduct to the Scottish Solicitors’ Discipline Tribunal. This will require continuation of some committees to deal with conduct complaints. As the Journal has already reported, there will be an explanation in next month’s edition of the process for handling conduct complaints where business is instructed after 1 October. For ease of understanding by both practitioners and the public, the Society and the Commission will have similar processes for handling different types of complaints.

Due and payable now

A number of practitioners have asked why the levy is to be paid in advance
of the Commission opening. That was always going to be the case. Whilst the Scottish Government has indicated that it will meet the start-up costs, the 2007 Act always made it clear that the Commission would consult on its budget, and the levy categories, between January and March and then have its budget approved by Parliament in April. As reported to members in the Journal, the e-bulletin and on our website, that is exactly what the Commission did earlier this year. The Commission is entitled to request the professional organisations to pay the total sum due in advance of the Commission opening. The Commission’s first budget is for a nine-month period to 30 June next year. If the money collected from the profession exceeds the actual running costs of the Commission, any surplus will be carried forward into the budget for future years.

It is important that the profession is aware how the Commission will gather and carry forward its costs. As the Society will continue to have a statutory duty to handle conduct matters and, for a significant period of time, service complaints, the expectation of some practitioners that the arrival of the Commission and the payment of the levy will bring about a reduction in the practising certificate fee is simply not the case.

At present, the Society is considering its budget for 2008-09. The process for the budget and the setting of the subscription is a rigorous one. Proposals for the subscription for the practice year starting on 1 November will be put to Council members in August, following which they will go forward to the Special General Meeting in September for consideration and approval by the membership. Following the August Council meeting, all members will be advised of the proposed subscription rates.

No shortfall permitted

Finally, it is important to remember that the Society has a statutory duty to pay all sums due to the Commission by the solicitor branch of the legal profession, whether or not we have successfully collected that money from members. Any shortfall will ultimately be met by the remainder of the profession. The Society, which has the power to recover the annual levy from someone holding a practising certificate, through a court action and/or by raising a complaint, will consider its options in the event of a shortfall.

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**Raised court fees in force**

New tables of court fees for the Court of Session and sheriff court came into force on 1 August 2008, raising fees in those courts by an average of 49% and 31%, respectively, in furtherance of government policy to shift more of the cost of funding the courts from the general taxpayer to court users.

The relevant orders, SSI 2008/236 for the Court of Session and SSI 2008/239 for the sheriff court, also contain new tables of fees to apply from 1 April 2009 and 1 April 2010 respectively, when fees will be further increased in line with inflation.

Scottish Court Service has issued a reminder of the right to claim exemption from fees in certain circumstances where:

- (a) the person or his or her partner is in receipt of income support;
- (b) the person is in receipt of an income-based jobseeker’s allowance;
- (c) the person is in receipt of civil legal aid in respect of the matter in connection with which the fee is payable;
- (d) the fee is payable in connection with a simplified divorce or dissolution of a civil partnership application and the person is in receipt of advice and assistance from a solicitor in respect of that application;
- (e) the person’s solicitor is undertaking work in relation to the matter in connection with which the fee is payable on the basis of regulations under s 36 of the Legal Aid (Scotland) Act 1986 providing for legal aid in a matter of special urgency;
- (f) the person or his or her partner is in receipt of guarantee credit under the State Pension Credit Act 2002; or
- (g) the person or his or her partner is in receipt of working tax credit, provided that:
  - (i) child tax credit is being paid to the party, or otherwise following a claim for child tax credit made jointly by the members of a couple which includes the party; or
  - (ii) there is a disability element or severe disability element (or both) to the tax credit received by the party, and that the gross annual income taken into account for the calculation of the working tax credit is £16,017 or less.

**Public Guardian fees also up**

The fees payable to the Public Guardian also increased on 1 August 2008. The fee to register a power of attorney with the Public Guardian is now £65. The new fee structure is outlined in SSI 2008/238 and introduces three separate fee schedules which will be implemented over the next two years. The Table of Fees can be viewed in the news page of the website www.publicguardian-scotland.gov.uk.

For further information contact the Office of the Public Guardian – opg@scotcourts.gov.uk or t: 01324 678300.

**Professional ethics conference**

The Scottish Forum for Professional Ethics invites all professional bodies in Scotland, and their members, to its inaugural conference on the morning of Monday 8 September in the Playfair Library Hall, University of Edinburgh.

Addressing the issue “What is the role of professional bodies in 21st century Scotland?”, speakers will be Professor Sir Kenneth Calman, Chancellor of the University of Glasgow, and Professor Gordon Kirk, former Vice-Principal of the University of Edinburgh.

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**Public Law Group reviews FOI**

The Scottish Public Law Group’s autumn seminar, “Scotland’s FOI Regime”, will be held on Thursday 18 September 2008 from 5.30-7pm, in Conference Room 1, Scottish Government, Victoria Quay, Edinburgh EH6 6QO.

Chaired by Ros McNees, solicitor, BBC Scotland, with panellists from the Scottish Government, the Campaign for Freedom of Information and the Scottish and UK Information Commissioners’ Offices, the event will review the experiences and practice of how FoI is operating in Scotland and beyond. Tea and coffee will be served from 5pm, and drinks afterwards until 7.30pm.

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**IP judges nominated**

With effect from 21 July 2008, the intellectual property judges nominated by the Lord President are the hon Lord Emslie, the hon Lady Smith, the hon Lord Hodge and the hon Lord Malcolm.

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**News in brief**

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Your Law Society of Scotland Council Members

Sheriff Court District of Aberdeen
Jane MacEachran
Aberdeen City Council, Legal and Democratic Services

Graham Matthews
Peterkirk, Inverurie

Sheriff Court District of Airdrie
Ian Smart
Ian S Smart & Co

Sheriff Court Districts of Arbroath & Forfar
Hamish Watt
The Watts Legal Practice, Montrose

Sheriff Court District of Ayr
Ian Gardiner
The McKinstry Company

Sheriff Court Districts of Campbeltown, Dunoon, Oban, Fort William & Rothesay
Sandy Murray
MacArthur Stewart & Co, Oban

Sheriff Court District of Cupar
Alistair Morris
Pagan Osborne

Sheriff Court District of Dumbarton
David Newton
The PRG Partnership, Clydebank

Sheriff Court Districts of Dumfries, Stranraer & Kirkcudbright
Peter Matthews
A B & A Matthews, Newton Stewart

Sheriff Court District of Dunfermline
Eileen Sumpter
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Murray Beth Murray

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Ross MacKay
HBJ Gateley Wareing

Christine McLintock
McGilgors

Scott Miller
Allan McDougall & Co

Sheriff Court Districts of Elgin & Nairn
Ian Cruickshank
The Cruickshank Law Practice, Elgin

Catherine Hackney
Eddowes Walsden, Derby

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Andrew Mellor
Somerville & Russell, Musselburgh

Sheriff Court Districts of Hamilton & Lanark
Oliver Adair
Adair & Bryden, Larkhall

Sheriff Court Districts of Inverness, Dingwall, Tain & Wick
Robert McDonald
Stronachs, Inverness

Sheriff Court Districts of Kirkwall, Lerwick, Portree, Lochmaddy & Stornoway
Sheekha Saha
Comhairle nan Eilean Siar, Stornoway

Sheriff Court District of Kilmarnock
Andrew Glencross
Ruth Anderson & Co

Sheriff Court Districts of Linlithgow
Ian Bryce
Central Criminal Lawyers, Livingston

Sheriff Court District of Paisley
Stuart Naismith
Stirling & Mair Ltd, Johnstone

Sheriff Court District of Perth
Farah Adams
A & R Robertson & Black, Blairgowrie

Sheriff Court Districts of Stirling, Falkirk & Alloa
Ian Angus
Ian H Angus & Co, Stirling
Brian Dempsey’s monthly survey of consultations that might be of interest to practitioners

**Arbitration**

Is Scotland losing out on arbitration work because our law is not clear, and if so, what is to be done? While other jurisdictions have a codified system, Scotland has a mish-mash of the Arbitration (Scotland) Act 1894, the Arbitration Acts of 1950 and 1975 and the UNCITRAL Model Law for international but not domestic arbitration. See [www.scotland.gov.uk/Resource/Doc/229975/0062280.pdf](http://www.scotland.gov.uk/Resource/Doc/229975/0062280.pdf).

*Respond by 19 September to alison.dewar@scotland.gsi.gov.uk.*

**Rational sexual offences law?**

The Scottish Parliament’s Justice Committee seeks views on the general principles of the Scottish Government’s Sexual Offences (Scotland) Bill. The bill seeks to sweep away the common law offences such as rape, sodomy, lewd and libidinous practices, and clandestine injury to women. The new statutory rape would include penetration of the anus and mouth as well as the vagina in the *actus reus*. Common law concepts of “overcoming the will”, or “without consent”, will be replaced by a concept of free agreement to sexual acts. Offences against children and vulnerable adults will be rationalised. The bill is based on, though slightly different to, the Scottish Law Commission report on the subject last year. One contentious issue so far is the rejection of the SLC’s proposal that children who engage in consenting sexual activity together should not be criminalised. See the document at [www.scottish.parliament.uk/s3/committees/justice/inquiries/SexualOffences/call.htm](http://www.scottish.parliament.uk/s3/committees/justice/inquiries/SexualOffences/call.htm).

*Respond by 12 September to justice.committee@scottish.parliament.uk.*

**Alcohol**

Inappropriate consumption of alcohol seems to affect every aspect of life, including crime, poverty, antisocial behaviour, health – and of course professionals are far from immune. The Scottish Government invites you to have your say on how they can “enable people to make positive choices about their alcohol use and to challenge the acceptability of drunkenness”. See [www.scotland.gov.uk/Resource/Doc/227785/0061677.pdf](http://www.scotland.gov.uk/Resource/Doc/227785/0061677.pdf).

*Respond by 9 September to Alcohol.Consultation@scotland.gsi.gov.uk.*

**Co-operative savings**

The UK Government is looking for views on its Proposals for a Legislative Reform Order for Credit Unions and Industrial & Provident Societies in Great Britain. These co-operative bodies have about 30 million members and assets of over £400 billion. See the document at [www.hm-treasury.gov.uk/media/0/D/consult_lro230708.pdf](http://www.hm-treasury.gov.uk/media/0/D/consult_lro230708.pdf).

*Respond by 15 October using the response form to Sammy Amissah, Mutuals Policy Branch, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ.*
Lord Johnston, who died suddenly on 16 June, was paid a handsome tribute in the Court of Session by the Lord President on 1 July.

Recording the court’s shock and sadness at losing a second member of the Inner House so soon after the death of Lord Macfadyen, Lord Hamilton related that Alan Johnston, the son of the popular judge Lord Dunpark, was educated at Edinburgh Academy and Loretto School, and in law at Jesus College Cambridge and Edinburgh University, before being called to the bar in 1967. “Even by then”, he observed, “he was a character who could readily be described as larger than life.”

Apart from his busy practice first as a junior and from 1980 as a silk, the Lord President identified the most striking features of Lord Johnston’s years at the bar as his contributions to the Faculty, first as treasurer from 1977 to 1989, and from 1989 until December 1993 as Dean. His astuteness in financial matters was of great benefit to the Faculty and he identified several properties in the vicinity of Parliament House suitable for development as Faculty premises, without which it was difficult to imagine how the Faculty could have expanded and prospered as it had.

“But it was as Dean of Faculty that he truly came into his own. His energy and enthusiasm were boundless. Having succeeded a line of perhaps more cerebral holders of that office, he carried the Faculty forward with such gusto and flair as had rarely been seen before. He guided it carefully in the troubled waters which followed the extension to certain solicitors of rights of audience in the Supreme Courts. He was always conscious of the fact that, if the Faculty was to survive, it was necessary to demonstrate that its members showed true excellence in the performance of their professional duties. To that end he was instrumental in setting in place the now familiar arrangements for the training and education of prospective and current advocates.”

He also set about improving the Faculty’s relations with the public.

Lord Hamilton commented that when Lord Johnston was installed as a senator in January 1994, “Seldom had the court welcomed to its ranks someone so large in person and at the same time so large in personality. As a trial judge, he handled juries with consummate skill – not least by taking care not to bore and distract them with lengthy charges, but rather by keeping his directions succinct and to the point.” He mastered the complex world of employment law as Scottish judge in the EAT from 1997-2005. “In the writing of civil judgments he never aspired to be a Jane Austen; but the administration of justice is not secured by Ciceronian cadences but by the giving of prompt and effective rulings. In that Alan excelled.”

After he joined the Second Division in 2005, “It was perhaps in appellate criminal business that he most excelled as a judge. He made valuable contributions to many important judgments in conviction appeals, but it was as chairman of the sentencing appeal court that his best work was done.” Explaining the heavy burden of preparatory reading imposed on such chairmen, Lord Hamilton continued: “Alan applied himself with great diligence to that task. He always had a complete grasp of all the business in hand. The result was that in court it was dispatched with great expedition. Practitioners in that field held him in very high regard. The prospect of dealing in his absence with this branch of the business is daunting in the extreme.”

The Lord President went on to pay tribute to Lord Johnston’s out-of-court contributions to the court’s work, in which he regularly passed on information gained from the many friends he had made in other jurisdictions. “He was a mine of information as to what was or might be happening elsewhere – often drawing to our attention matters of which we should be aware.” During his service on the Judicial Advisory Group, tasked with liaising with administrators over the redevelopment of Parliament House, “Many a problem was identified and resolved by his insightful and direct approach.” He was chairman of the working party set up to consider the practical aspects of the jurisdiction to deal with contempt of court. “His absence from that group’s further deliberations is a particular loss.”

The Lord President added: “Alan was a man with many, many friends and interests. The overcrowding of the Canongate Kirk last Monday is witness to that. He was not a bookish lawyer. He recognised and gave effect to the important principle that those who have to judge others and their affairs should not be cloistered individuals but have real experience and understanding of the community which they serve.” He instanced Lord Johnston’s service on many charitable and other trusts; as a governor, and chairman of the governors, of Loretto School; as a founding trustee of the Jean Clarke Foundation for Legal Education; and on the governing body of Heriot-Watt University, which in 2001 awarded him the degree of Doctor of the University.

He loved the outdoors and the sports of the countryman, and was a keen golfer. He was also a man of great personal humour with a ready facility to tell tales against himself. “His laughter was infectious. Although at times verging on the bluff, he was never pompous. While strongly independent of mind, he was extremely modest”, able to recognise and acknowledge any mistake he might have made in judging others.

“He leaves a widow, Anthea, three sons and a grandson. To them, to his other close relatives and to his very many friends the court expresses its sincere condolences. He will be sorely missed.”
Know the law

The law relating to the duties and responsibilities of a company director, and the inherent risks of that office, is complex. A solicitor asked to act as a director of any company (not just a client) should only accept office if he or she is fully aware of the relevant law. A director also has to keep abreast of changes in company law which are constantly occurring.

Conflict of interest

A director is obliged by statute to disclose to the board any arrangement or transaction between the company and the director or any firm of which he is a member (ss 182 to 187 of the Companies Act 2006). This applies, in particular, to the provision of legal services to the company. The articles of the company may impose additional conditions beyond those required by statute. A solicitor acting as a director of a client company must be aware if there is an inherent conflict of interest between the solicitor and his or her firm with respect to fees for legal services and related matters. The solicitor should ensure that any decision on these matters is taken by the directors other than himself or herself.

As a director, a solicitor’s primary duty is to the company in which he holds that office. This may give rise to particular difficulties, (1) if the company is a wholly owned subsidiary and there is conflict between the interests of the subsidiary and the parent company; and (2) where a solicitor director has confidential information about another client which is relevant to the interests of the company. Point (2) is a particular instance of the circumstances considered by the House of Lords in Hilton v Barker Booth [2005] 1 All ER 657, in which a solicitor was found liable in damages to a client from whom information was withheld on the grounds of a duty of confidentiality to another client.

Privileged communications

Another issue which needs careful thought is the matter of legal privileged communications.

Guideline – Acting as a Director of a Client Company 2008

The following Guideline has been approved by both the Professional Practice Committee and the Company Law Committee.

From time to time the Society is asked to provide guidance to solicitors who have been asked to act as a director of a company which is also a client of the firm (and also where a company of which the solicitor is a director becomes a client of the firm). This is a complex subject and it is impossible to provide more than an indication of the main points which a solicitor in this position should bear in mind. Many firms have their own policies on this, and this note is not intended to displace them in any respect. The Society would appreciate any comments with a view to improving the guidelines given in this note in a future edition.

There is no prohibition on a solicitor acting as a director of a client company, but there are a number of issues of which a solicitor should be aware if asked to act in this capacity. A directorship should not be accepted or retained if any of these give rise to difficulty.

A director is obliged to disclose to the board any arrangement or transaction between the company and the director or his firm.

Continued overleaf >
professional privilege, particularly in relation to EU competition issues. The European Court of Justice has recently reaffirmed (in Akzo Nobel Chemicals Ltd v Commission) that in an EU context legal privilege only applies to the extent that the lawyer is independent – i.e. not bound to his client by a relationship of employment. The Commission accepted in its submission that it is possible for documents written by in-house lawyers in preparation for legal proceedings to be subject to privilege but not other documents, and the court appears to have accepted that argument. While this decision obviously applies to executive directors, it is possible that the court could extend it to non-executive directors, particularly if there is an issue of breach of competition law before the court.

**Risk areas**

As noted above, it is impossible in a note such as this to give a full account of the risks and responsibilities borne by a company director. The following may be taken as indications of the main areas:

1. Legislation contains numerous criminal offences which arise if a director is responsible for the company’s failure to observe the provisions of the legislation, as well as his or her own failure to do so.
2. A director may be subject to a claim by a member (or a liquidator etc) that an act or omission in which he or she participated amounts to a breach of duty, and this may expose the director to liability to compensate the company.
3. It is important for a director, whatever the terms of his or her appointment, to participate fully in the management of the company and, in particular, to ensure that he or she receives and understands regular management accounts where the company is actively trading.
4. If the company goes into insolvent liquidation, the liquidator may consider imposing personal liability on a director in respect of his or her failure to take adequate steps to protect the interests of creditors.
5. If the company goes into insolvent liquidation, administration or receivership, all current directors and those who held office in the recent past will automatically be the subject of a report to the Secretary of State on whether proceedings to disqualify them from holding the office of director (and certain other offices) should be taken, on the grounds that the conduct of the director makes him or her unfit to hold that position. This constitutes a particular risk for those solicitors whose firms have become limited liability partnerships. Disqualification as a company director also disqualifies the individual from being a member of an LLP (and vice versa).
6. The duties, responsibilities and risks of a company director also extend to “shadow directors”, i.e. persons on whose instructions the board of a company is accustomed to act. The definition contains an exception, however, for professional advice. This exception may be lost if the person in question is actually a director, and in those circumstances, his or her firm may be deemed to be a “shadow director” of the company and exposed to the same risks as outlined above.
7. It would be imprudent for a solicitor to act as a nominee director for another person.

This guidance note is prepared according to the Society’s understanding of the law in April 2008.

### Guideline on Document Control and File Tracking 2008

The Society’s Professional Practice Committee has considered both the requirements and likely consequences of a formal recommendation in relation to document control and file tracking made by the Scottish Legal Services Ombudsman in terms of s 34B of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Members of the committee met with the Scottish Legal Services Ombudsman to discuss the issues further and the following guidance accommodates some of the Scottish Legal Services Ombudsman’s precise views on the matter of lost files, that she had identified as a persistent problem in the context of complaints by members of the public to the Society.

**The Guideline**

When a solicitor takes control of files from another solicitor for any reason and in any situation (including but not limited to receipt of files either in implement of a mandate or where files are taken over from a ceased practice), the solicitor receiving the files should keep a record of all the files received. This should include where the files are stored, such as within the office, electronically, off-site, or with a named storage provider. The solicitor who receives a mandate should comply with para 11 of the Society’s Guideline on Mandates 1998 (see below).

**Mandates**

The Scottish Legal Services Ombudsman observed in an opinion that if a firm is unable to produce a file because it has been mandated, the solicitor should retain a separate record of the date on which the mandate was implemented. To accommodate this observation an addition has been made to the Guideline on Mandates 1998. This addition has been included as numbered para 11, under the heading “Receiving Mandates”:

> **Separate record of the date on which a mandate is implemented**

11. Following the delivery of a file and any other documents in implement of a mandate, the original solicitor should retain the mandate and a separate record of the date on which the mandate was implemented, to include a general description of what was delivered in implement of the mandate. *(introduced July 2008)*

**Ownership and destruction of files**

The Scottish Legal Services Ombudsman observed in an opinion that if a firm is unable to produce a file because it has been destroyed, the solicitor should retain a separate record of the date on which the file was destroyed. To accommodate this observation an addition has been made to the Guideline on the Ownership and Destruction of Files 2001.

This addition has been included as the first bullet point under the heading ”IMPORTANT NOTES” at the end of the Guideline:

> “When files, papers and/or documents are destroyed, a separate record should be retained of the date of destruction to include a general description of what was destroyed. *(introduced July 2008)*”

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**In Hilton v Barker Booth, a solicitor was found liable in damages to a client from whom information was withheld on the grounds of a duty of confidentiality to another client**

In Hilton v Barker Booth, a solicitor from whom information was found liable in damages to a client by a relationship of employment. The Commission accepted in its submission that it is possible for documents written by in-house lawyers in preparation for legal proceedings to be subject to privilege but not other documents, and the court appears to have accepted that argument. While this decision obviously applies to executive directors, it is possible that the court could extend it to non-executive directors, particularly if there is an issue of breach of competition law before the court.

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Notifications

Entrance certificates issued during June/July 2008

HARKNESS, Andrew Michael, LLB(HONS), DipLP
HASSARD, Niall John Norman, LLB(HONS), DipLP
HASTINGS, Mark Francis, LLB(HONS), DipLP
HUNTER, Joanna Wilson, LLB(HONS), DipLP
HUTCHISON, Lynsey Clare, LLB(HONS), DipLP
JAMIESON, Laura Catherine, LLB(HONS), DipLP
JESS, Ashley Elizabeth, LLB(HONS), DipLP
JOHNSON, Shereen, LLB(HONS), DipLP
JOHNSTON, Nicola Munro, BA(HONS), LLB, DipLP
KIMBLE, Jennifer Joyce, LLB(HONS), DipLP
LANG, Kerrie, MA(HONS), LLB, DipLP
LATT, Steven Farrell, LLB, DipLP
LEE, Eavalyn, LLB(HONS), DipLP
LESIE, Paula Suzanne, LLB(HONS), DipLP
LEIFORD, Gavin, LLB(HONS), DipLP
MCCARTNEY, William Adam Scott, LLB(HONS), DipLP
McCLELLAND, Paul Stewart, LLB(HONS), DipLP
McCONNELL, Laura Elizabeth, LLB(HONS), DipLP
McDOUGALL, Iain David, LLB(HONS), DipLP
McFADYEN, Antony Michael, BA, LLB, DipLP
McGlynn, Andrew Gerard, BSc, LLB, DipLP
McINTOSH, Ralph Leslie, LLB(HONS), DipLP
MACKAY, Iain Finlay Magnus, LLB(HONS), DipLP
MACKENZIE, Robert Stephen, BSc(HONS), LLB, DipLP
MECKOWN, Mark Philip, MA(HONS), LLB, DipLP
MCKEOWN, Adam James, LLB(HONS), DipLP
MCKNIGHT, Isla-Dawn, LLB(HONS), DipLP
McNAUGHT, Gillian, LLB(HONS), DipLP
MANSON, Stacey Morland, LLB(HONS), DipLP
MIDDLETON, Andrew Robert, MA, LLB, DipLP
MILNE, Nicola, LLB(HONS), DipLP
MITCHELL, Geraldine Anne Seton, BA(HONS), LLB, DipLP
MONTGOMERY, Alison Maria, LLB(HONS), DipLP
MORRISON, Charlotte Margaret, LLB(HONS), DipLP
MOIR, Jennifer Christine, LLB(HONS), DipLP
MURDOCH, Ross Matthew, LLB(HONS), DipLP
MURRAY, Karen Ann, BA, LLB, DipLP
NAVEED, Afshaneh, BA, LLB, DipLP
ORMISTON, Andrew, BA, LLB, DipLP
PACHOLEK, Katherine Mary, LLB(HONS), DipLP
PATTERSON, Gerard, LLB, DipLP
PATTERSON, Neil, MA, LLB, DipLP
PEARSON, John Joseph, LLB(HONS), DipLP
PRINGLE, Kenneth Bryce, LLB, DipLP
PYKE, Sarah, LLB, DipLP
REID, Laura Christine, LLB(HONS), DipLP
RICHARDS, Dara Ann, LLB(HONS), MA, DipLP
RING-MACLEOD, Charlotte Claire, LLB(HONS), DipLP
ROSS, Suzanne Anderson, LLB(HONS), DipLP
SINCLAIR, Callum Stuart, LLB(HONS), DipLP
SINCLAIR-CHIN, Marina Rae Sau San, LLB(HONS), DipLP
SOLDANI, Florinda, LLB(HONS), DipLP
STRATHDEE, Grant David, LLB(HONS), DipLP
STRUTHERS, Alison Eleanor Catriona, LLB(HONS), DipLP
SYMON, Fraser William John, LLB, DipLP
THOMSON, Lauren Hazel, LLB(HONS), DipLP
UNGI, Lynn Johnston, LLB(HONS), DipLP
WADDELL, Laura, LLB, DipLP
WALLACE, Lynzi Johnson, LLB(HONS), DipLP

Applications for admission
June/July 2008

BANSAL, Nina, BSc(HONS), LLB, DipLP
BARR, Jennifer Margaret Elizabeth, LLB(HONS), DipLP
BOND, Kate Denise, LLB(HONS), DipLP
CAMPBELL, Keith Fraser, LLB(HONS), DipLP
CLEARY, Louise Kathleen, LLB(HONS), DipLP
DONALDSON, Michael, LLB(HONS), DipLP
DORAN, Aaron Charles, LLB(HONS), DipLP
DOUGLAS, Isabelle Alexandra, LLB(HONS), DipLP
DAVEY, Nicola Clair, LLB(HONS), DipLP
KWOK, Wai-Kee, LLB(HONS), DipLP
LOGUE, Anne Cathrin, LLB(HONS), DipLP
MCINTOSH, Sarah Louise, LLB, DipLP
MACREATH, Emily Gill Coppeurthwaite, LLB(HONS), DipLP
McSHERY, Catherine Ronan, LLB(HONS), DipLP
McVICAR, Alexis Boydlan, LLB(HONS), DipLP
MEARS, Naomi Elizabeth, LLB, DipLP
MCGINNIE, Susanna, LLB(HONS), DipLP
McWILLIAM, Pamela Lesley, LLB(HONS), DipLP
ROBERTSON, Laura Jane, LLB(HONS), DipLP
SIMPSON, Louise, LLB(HONS), DipLP
SMITH, Jennifer Louise, LLB(HONS), DipLP
SOUTHWARD, Fiona, LLB(HONS), DipLP
SOUTHER, Linsey Jane, BA(HONS), LLB, DipLP
SMILEY, Alexander Hugh, BA(HONS), LLB, DipLP
SWEENY, Paul Gerard, LLB(HONS), DipLP
WATSON, Laura Rachel, LLB, DipLP
WOOD, Craig Robert, LLB(HONS), DipLP

As word goes round of legal firms facing declining business and looking at staff cuts and other measures, Stephen Vallance offers some advice on how to pull through a recession and be ready to profit from the next upturn.

Facing the lean years

There are many disadvantages to getting older. Less hair, poorer eyesight, more of a paunch. . . . There are however a few benefits, not least of which is the feeling, in the face of major crisis, of “seen it all before”. With the world seemingly on the edge of economic, political and social meltdown, some can remember the days of negative equity, the cold war and IMF fiascos. We realise that what we are now going through is just part of a cycle. As in the past, this is an opportunity to remember that no bull (or bear) market goes on forever and that however hard you throw something in the air, gravity always brings it back to earth, probably with an unexpected bang!

So, here we are again, faced in many fields of the law with falling income streams and increasing costs, both leading to ever-reducing bottom lines for many practices. The causes lie generally outwith our control: the international credit crunch, the end of the house price bubble, oil prices and inflation. In the short term I suspect that things will only get worse. With transaction levels falling we are faced with an oversupply of conveyancers and/or estate agents, and market forces will tend to drive down prices as firms attempt to retain business by reducing fees.

This article will attempt to look at some of the issues facing those in private practice in light of the decline in the conveyancing market in particular, and to offer a few suggestions as to how to adapt to current market conditions and prepare for better times in the future. There is no simple answer, and no two firms will have identical issues. It is hoped however that a few of the suggestions and insights offered here may be of assistance.

Multiple effect

A number of solutions can be implemented which individually may assist firms in maintaining profitability, and if used in combination will underpin longer term success. There can be resistance to large scale change; indeed there may be no need for it. Small changes are often easier, and may be more appropriate. Small changes in just one area may not be sufficient to turn a firm’s fortunes in a recession, but made in a number of areas they can radically improve performance.

I remember listening to a motivational speaker who asked “If you could increase your fees by 100%, your client numbers by 100% and the services per client by 100%, how much would your business grow?” Not being very good at arithmetic, I assumed 300%. The more numerate amongst you will have worked out that the answer is in fact 800%. The effect of changes can be exponential and therefore the best approach any firm can take at times like these is to look to make multiple beneficial changes.

Even small changes taken cumulatively can have massive effects. In simple terms, even if you improve the three areas we mentioned by 10%, the cumulative effect is a 32% improvement; 20% produces a cumulative 73%. Surely none of us run businesses so well that we can’t find that level of improvements!

Bottom line gains

Let’s look then at a number of areas where adjustments can be made. Some are easier than others, some may not be applicable to every firm, but for those affected by the current economic decline, all are areas that should already be under review. Most importantly though, improvements brought into practice now will reap huge benefits when markets improve.

Many businesses confuse the value of a pound earned and a pound saved. Faced with falling revenues, their first reaction is to try to increase
them without understanding the value of each pound earned. If, for example, your firm has a net profit margin of 50% (extremely competitive in terms of the cost of time survey), each £1 earned would equate to 50p earned by the partners. Even if in these difficult times you are able to increase fee income by £100,000, the actual improvement to the bottom line is unlikely therefore to be any more than £50,000, and probably less. Increasing fee income also means the firm having to work harder, an increased possibility of claims, and possibly other unforeseen expenses (you outgrow your offices/computers/staff numbers etc).

On the other hand, if you can reduce your costs by £50,000, generally this all immediately impacts on the bottom line. In addition, savings are usually without risk, obtaining them requires effort but a lot less than transacting fee-generating work, and once implemented they generally show in future profit and loss accounts for little or no additional effort.

I may be preaching to the converted, and we will look at ways to expand your business in a recession, but it would be a foolish practice that would not first examine how costs can be cut. All it takes is a little time to look at your monthly outgoings and consider what can be improved or changed.

People matter
Let’s look at a few practical suggestions. Staff are usually the biggest single outlay. How can we either reduce staff costs, or preferably, obtain better value from the staff that we have?

Streamlining your staff requirements may be through natural wastage (not replacing those retiring or leaving), or the more drastic measure of redundancies. Consider reducing staff hours, flexitime or job sharing. All may reduce costs without necessarily losing important staff members. Redundancies I believe have to be a last resort. These are the same people who worked so hard to maintain our profits over the “glory” years. Not only are there costs involved; it may also strike at the heart of the ethos of a firm and weaken the bonds with the remaining staff. Likewise when times improve you may well be faced with large agency bills to replace those you let go a short while ago.

There are a number of options to consider. Can you make your existing staff more productive without increasing the cost base? The simple answer is yes: most people work not simply for the money but for a sense of self worth. There is nothing more damaging to staff morale than a quiet office with insufficient work.

Wherever possible, find ways to re-train staff or train them to carry out duties over and above those they currently undertake. Could your senior paralegal undertake more complicated transactions? Could your office junior also be your junior typist? Indeed during difficult times couldn’t all your staff be involved in marketing the firm?

In my experience, seldom will they seek additional pay and any pay increases can be linked to productivity or perhaps to improvements in the fortunes of the business itself. Are you prepared to offer your staff a real share of future more profitable years in return for a reduction in salaries today?

It is important to remember that this is only a part of a cycle and that business will boom again. Could this be the time to invest in the workflow and case management systems that you have been considering? Often we simply do not have the time to adopt these systems: perhaps they could be implemented now, for the benefit not only of clients but the staff and partners. Good IT systems may allow the practice to deal with far higher workloads in the future without increasing staff costs. There may also be shorter term benefits and cost savings. If redundancies are your only option, then perhaps better to ensure you do have in place robust systems that will allow the firm to cope not only with currently reduced business levels but, more importantly, future increased levels, with a smaller staff base.

Bane or boon?
Next in terms of cost will usually be phone lines. Many services have been made for a fixed monthly fee. These have many advantages, including internet based services where unlimited calls can be made for a fixed monthly fee. These may be the time to invest in the workflow and case management systems that you have been considering. Often we simply do not have the time to adopt these systems, for the benefit not only of clients but the staff and partners. Good IT systems may allow the practice to deal with far higher workloads in the future without increasing staff costs. There may also be shorter term benefits and cost savings. If redundancies are your only option, then perhaps better to ensure you do have in place robust systems that will allow the firm to cope not only with currently reduced business levels but, more importantly, future increased levels, with a smaller staff base.

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Bane or boon?
Next in terms of cost will usually be posts or telephones. Huge savings can be made to both with a little thought. Are you still posting all your letters? Would some of your clients not prefer to receive correspondence by email? There is a benefit to them in terms of time, and potentially a massive saving to the practice in terms of postage. The same applies to other agents, with whom email is already far more common. As well as becoming faster, communications are more easily automated and greater marketing opportunities may arise.

Personally emails became the bane of my professional life. Clients’ expectations that answers should be instant created challenges. Expectations however can be managed and I suspect that the next generation of solicitors are already far more adept in this environment. Clients often simply need to know that you received their email. A simple auto response along the lines “I have received your email and hope to revert to you before the end of the week” may be sufficient to keep 75% of enquirers happy. (One point to note: whatever time limit you state, you must contact them one day earlier, not one day later!)

If you can persuade 50% of your clients to transact this way, the savings in postage alone, never mind stationery, would be huge.

Telephone contracts can be renegotiated. There are numerous options, including internet based services where unlimited calls can be made for a fixed monthly fee. These have many advantages, including the fact that paralegals can telephone from their PC without tying up phone lines. Many services have automated answering messages, thus there may be no need to update or expand existing office systems.

In this world of mobile phones, has
in a few areas we could mostly run our businesses on pre-year 2K hardware and software. A review of future IT requirements may bear fruit. Do you need to use Microsoft products with their licensing costs? Open Office is free and works equally well. Most of our staff require nothing except the most basic PC.

But do look at your costs individually and creatively. Saving money is not always the answer and the last thing I am suggesting is to purchase poorer or shoddier goods. However it does make sense to look again at all aspects of the business. Remember also that each £ saved may equate to at least £2 earned, and the saving if managed well will recur every year.

Old client, new trick?
There comes a time where cost cutting is no longer effective, or indeed satisfying. Let’s look at the next area where improvements can be made. We already have a set (although perhaps reduced) number of clients passing through our doors. How can we maximise the profit to the firm from each client while continuing to act in the client’s best interests?

I think the first step is education, education of the client. Over my years in practice I was always amazed when clients returned to me regularly for conveyancing, but went elsewhere for other services. When questioned the response was, universally, “I didn’t know you did that”. Now, while there may be an excuse (and I’m desperately seeking one) when things are busy not to spend some time with clients exploring other services, there can be no such excuse at the moment.

Education can take many forms. It can be as simple as a few minutes of chat with a client. My own position was always that clients should “call me about anything”. If I didn’t deal with an area I would refer them to someone I knew to be expert in that field. That can of course then be tied in with reciprocal or fee sharing arrangements with other firms. Most importantly though you are reinforcing with clients that you are their first point of contact on all legal matters.

Certainly those 10 or 15 additional minutes that you spend with a client are never wasted. I’m sure we all check whether each client has a will, that it is up to date with all IHT issues considered, and whether they or any of their close family have considered the implications of the care in the community provisions and the need to prepare powers of attorney. Just a few minutes spent with every client on these areas can make it possible to almost double the fee income from the client.

Education can also be undertaken by regular mailshots. One mailshot covering all your services is likely simply to confuse, we all offer so many potential services. It is however better than nothing. Ideally though a series of mailshots (perhaps emailed?) will allow clients to consider small digestible pieces of information. This will also have the benefit of regular contact with the client, further strengthening their bonds with your firm and giving you the best opportunity of securing actual work from each stage. They can be adapted to mirror anything relevant to current events (currently, debt management, trust deeds, insolvency; but perhaps powers of attorney or maybe even, one day, buying a first home!).

One other effective education tool is seminars aimed at specific clients or client types. As a profession we are generally regarded as a “grudge” purchase. Clients seek us because they need advice and they often resist doing so because they believe it will cost them money. We ourselves seldom approach clients offering advice aimed at saving them money. Seminars allow the ideal environment to do this. The opportunities will reflect your firm and your clients, but generally will feature services which are not your principal services. These could include insolvency work, powers of attorney and wills, estate planning or any other area relevant to your clients. Most importantly though, you are identifying and inviting your existing clients to attend, at your expense, to learn about an area which you as their professional adviser have identified will save them time or money, or will protect them. Applied well, this type of education will not only result in a very high takeup of the services offered but will create much stronger bonds between your firm and its clients.

Think flexibly
Banks today are desperate for deposits and there is no doubt that a solicitor’s client account is seen as very desirable. Are you satisfied that you are receiving the best possible terms from your bank? Whether it is better client account interest, lower banking charges or better borrowing rates I suspect that almost any existing package can be improved on in the current marketplace. It might even simply be an opportunity to remind your own bank that you are no longer receiving a satisfactory number of referrals or instructions!

Your offices may be crucial to your business due to location or size. It may be possible however to operate from outwith the city where rents and rates are cheaper (even perhaps with one room in the city centre for meetings or for a postal address).

The opportunities to save money are almost endless. Can you cut the cost of your stationery? One solicitor I know actually renegotiated the purchase of the paper itself. Could you join with other firms to buy common items in bulk? Indeed, with a bit of judicious redesigning, could you renegotiate bulk letterhead purchases between you as well?

As solicitors many of our IT requirements are very simple. Except your firm recently looked at the tariffs on the various phones used by your staff to ensure you are obtaining the best possible value? Again a little judicious shopping around may reap huge rewards where a firm has several mobile phone contracts.

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The second part of this article will look further at expanding services, increasing client numbers and increasing fees per client.
The interactive nature of web 2.0 technology presents business opportunities, while posing new risks for those with inadequate precautions regarding internet use by employees. Matthew Godfrey-Faussett and Alison Rankine explain

You may not know it, but you’re living in a web 2.0 world. The interactive and collaborative nature of many new-generation websites means more information than ever is shared at the click of a mouse and can be available for potentially millions to view in an instant.

Websites are not closed pools of information – they act as gateways by connecting via links to almost endless information, blurring the distinction between the personal and the professional. This can prove embarrassing if information is accessed in an unexpected context, as some recent cases have highlighted.

John Darwin, the missing canoist declared dead over five years ago, and his wife Anne, were each sentenced last month to over six years in prison. Their deception was uncovered when a journalist found a recent photo of the pair alive and well in Panama, which had been posted on a website.

Another high profile figure recently at the sharp end of web 2.0 technology was Eliot Spitzer, former Attorney General and Governor of New York, who fell spectacularly from grace following the revelation of his alleged involvement with a prostitution circle (see panel). The flames were fanned when it was discovered that the call girl at the centre of the scandal had a MySpace page, allowing journalists to pore over details of her personal life and budding musical career, which she had posted on the site.

What is web 2.0?

The way that people are using the internet is changing. Previously users may have accessed a web page simply to read a newspaper. Now if they feel strongly enough about a headline, individuals can take the opportunity to share their views via a blog attached to the newspaper homepage. The name “web 2.0” has been used to describe the recent trend towards participation, collaboration and sharing of information between web users.

There are a number of key web 2.0 tools, including blogs (online journals, where users can post comments), wikis (websites with content which can be created or edited by users, such as Wikipedia), social networking sites (online networks for communicating and interacting, such as MySpace and Facebook), file-sharing sites (such as YouTube and Flickr), and even virtual worlds (computer simulated environments, such as Second Life), amongst others.

Some may say this is all just hot air, another fad with no practical business implications. But could these be the same cynics who claimed that email would never catch on, or that the internet was just for “geeks”?

From personal to professional

Web 2.0 has a tendency towards informality, and can erode the boundaries between private life and work life. Most of us will have come across web 2.0 technology in our personal lives at some point, whether as a contributor (sharing photos with friends on Bebo), or simply as a viewer (reading book reviews posted by readers on Amazon). For employees generally, and perhaps particularly for lawyers, however, it is important to remember that failing to make use of the optional privacy settings on a social networking site could mean that clients as well as friends can access your holiday snaps and those pictures of the office Christmas party.

There is now an increasing trend for businesses as well as employees to make use of web 2.0 tools, and law firms are no exception. Firms need to be proactive in dealing with this new technology, and the opportunities and threats presented by it.

Pitfalls for the unwary

A key area where businesses should be aware of web 2.0 tools is the use that may be made of them by staff.

New technologies often present new ways of looking at old problems. One such problem is disclosure of confidential information. In the recent case Hays Specialist Recruitment (Holdings) Ltd v Ions [2008] EWHC 745 (Ch), recruitment firm Hays alleged that ex-employee Mark Ions copied and retained confidential information about Hays’ clients and contacts, which he used after leaving Hays and setting up his own venture. Hays claimed Ions deliberately uploaded business contacts from Hays’ confidential database to his account with business-focused social networking website LinkedIn, so that LinkedIn could invite the contacts by email to join Ions’ network. Ions argued that he acted with Hays’ consent, as it had encouraged him to join LinkedIn for business purposes, and that when the business contacts accepted the invitation to join his network, the information ceased to be confidential as it could be seen by other members of the network.

The High Court held that Hays had reasonable grounds for considering that it might have a claim, and ordered pre-action disclosure of certain documents and details in relation to Ions’ LinkedIn account. The case highlights the risk of networking websites (as well as file sharing sites, blogs and other web 2.0 tools) being used to transfer confidential information outside a business.

Another old chestnut given a new spin by web 2.0 is lost employee productivity. In days gone by, employees may have spent too much
time taking cigarette breaks, or, more recently, surfing the net. Now a common complaint is that time is being wasted by employees updating their Facebook pages during working hours, with surveys showing millions of hours in lost productivity.

As reported in these pages last year (Bruce Caldow, “Monitor – at your own risk”, Journal, May 2007, 20), a widespread practice among employers is use of the internet to background-check employees and potential new recruits, with many businesses “Googling” or checking the Facebook pages of prospective employees as part of the recruitment process. While tempting as a way to gather information, and although such information may be in the public domain, this practice does raise a variety of concerns in relation to privacy and data protection, and should be approached with caution by employers.

Issues may also arise in relation to “user generated content” including, for example, comments and photos posted on blogs and social networking sites. Such content can pose a variety of legal problems, such as infringement of intellectual property rights, defamation, leaking of confidential information, and reputational damage. There may well be cases where vicarious liability arises for employers.

Use of web 2.0 technology by employees outside of the workplace could also affect their professional lives. A comment posted by an employee online which brings their employer into disrepute, for example, may well be in breach of their contract of employment.

Many businesses will find their internet “acceptable use” policies do not adequately cover the uses (and misuses) highlighted above. It is key that such policies are in place, and staff are made aware of what a business considers to be acceptable use of web 2.0 tools, so that when an issue arises appropriate action can more easily be taken.

**New horizons**

As well as the potential pitfalls, web 2.0 presents a wealth of opportunities, particularly in harnessing the technology to improve internal and external communications.

In terms of external relations, the interaction offered by social networking sites such as Facebook has been adapted to the business context by networking sites focused on professional relationships, such as LinkedIn. Marketing is also an area where web 2.0 offers new prospects – London law firm Field Fisher Waterhouse certainly generated column inches when it opened a virtual office in “virtual world”, Second Life.

From an internal point of view, web 2.0 offers a new (and often cost-effective) option for training of employees. Clients in dynamic industries, such as IT and software, may find that traditional staff training courses simply cannot keep up to date with emerging products, and it is more effective to allow new recruits the chance to post queries to peers online. Many law firms already provide internal blogs for staff to comment on everything from new legislation to internal firm developments, or for allowing future trainees to keep in touch with the firm.

Podcasts, blogs and wikis also have a role to play in legal training and information gathering. There are a wealth of dedicated law blogs in the UK, covering a vast array of topics. While it is inadvisable to rely solely on views given in the context of a blog or networking site, they do provide a useful forum for airing of different opinions. An interesting new Scottish resource is CaseCheck, which provides a blogging platform allowing individuals to publish case summaries and comments on case law developments. Such resources are likely to become more widely used as young lawyers, familiar with such tools from university, come up through the ranks of the profession.

**Here to stay**

There are clearly pitfalls to be avoided, and there will undoubtedly be teething problems as people become familiar with the new capabilities and the law catches up with the technology. Web 2.0, however, is here to stay – and will make its presence increasingly felt in the business arena.

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**The interaction offered by social networking sites such as Facebook has been adapted to the business context by networking sites focused on professional relationships**

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**It could happen here**

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**The digital trail that brought down New York Governor Eliot Spitzer, chronicled here by Sharon D Nelson and John W Simek, bears close similarities to what is available to the authorities in the UK**

Eliot Spitzer’s undoing came about through the Patriot Act, a controversial measure giving the FBI new powers to snoop on suspected terrorists, and the Treasury Department authority to demand more information from banks about customers’ financial transactions – supposed to help identify terrorist money launderers. Treasury regulations require banks themselves to look for unusual transactions or patterns of transactions, and submit SARs – suspicious activity reports – to the government.

Banks installed sophisticated software to detect anomalies and began ranking the risk levels of their customers based on complex formulas. One element was whether an account holder was a “politically exposed person”, and the lists included many US politicians and public officials who were potentially vulnerable to corruption.

Treasury lawyers say that the vast majority of SARs filed involve white collar crime and have nothing to do with terrorism.

Spitzer knew enough not to process large cash transactions. Instead, he arranged a series of smaller wire transfers to a bank used by a company fronting for the prostitution ring. Apparently, he did not fully understand that these payments might trigger the filing of a SAR by his own bank, as well as the front company’s bank.

Most SARs don’t go anywhere, because so many are filed, and it was inevitable that someone would recognise Spitzer’s name. Uncertain of whether he might be a blackmail victim, a victim of identity theft or engaging in political corruption, the investigation was opened.

The FBI began wiretapping and the next round of electronic evidence proved utterly damning. The FBI monitored calls between Spitzer and the Emperors Club, working out the monetary details of paying for his now infamous encounter with “Kristen”.

Ultimately, the accumulated evidence showed that Spitzer was mixed up with not one, but two prostitution rings and had been for some time.

Murphy’s law struck when journalists realised that the lady who had an appointment with Spitzer also had a page on MySpace. Kristen (real name Ashley Alexandra Dupre) was a wannabe singer, and everything on her MySpace page became the last of the electronic evidence to add utter misery to Spitzer’s disgrace.

The fall of Eliot Spitzer is a clear indicator that skeletons and personal foibles are far less likely to remain in the closet these days. Once any electronic data bubbles to the surface making any of us “of interest” to law enforcement, very little is likely to remain hidden. Privacy has been eviscerated far beyond the imaginings of even George Orwell. Although the essence of his message is correct: Big Brother is indeed watching.

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In reviewing their own risk profiles and the effectiveness of their risk awareness and risk controls, Alistair Sim of Marsh suggests that all firms might derive benefit from conducting a self-assessment by applying set questions to individuals, teams, practice areas and the practice as a whole.

Questions, questions

A form of self-assessment questionnaire is available from Marsh and may be viewed or downloaded from the Marsh website for Scottish solicitors, www.marsh.co.uk/lawsociety (userID and password have been issued previously and are available from the author by email – alistair.j.sim@marsh.com). This contains a set of 80 self-assessment questions which might be adopted as a basis for an initial appraisal of a firm’s risk controls and developed into a more comprehensive question set for assessing progress from time to time.

On the subject of self-assessment, it may be interesting and useful to consider how you and your firm would answer risk-related questions in the proposal forms and questionnaires of professional indemnity insurers of solicitors under different insurance regimes in other jurisdictions, where the ability to demonstrate the thoroughness and effectiveness of a firm’s risk controls may be an important factor, as is the firm’s claims record, in securing cover on satisfactory terms.

Recruitment

Some proposal forms ask about the firm’s approach to taking up references when recruiting employees and hiring new partners. Questions tend to be along the following lines:

- Do you always obtain satisfactory written references when engaging new partners and employees?
- Do you verify qualifications, previous experience, previous claims and circumstances?

In certain office insurance policies and fidelity guarantee policies, there are “references conditions” requiring that satisfactory references are obtained for personnel whose duties include handling of cash, ordering of goods and stationery, paying invoices etc. Compliance with these references conditions is a condition of cover.

Client vetting

The requirement to comply with anti-money laundering regulations means that all solicitors are required to undertake certain vetting processes in relation to new clients. How effective those processes are in detecting (or deterring) potential money launderers or money laundering activity is an interesting question. However, there is a wider risk management benefit for solicitors in any vetting process which results in knowing the client, the client’s business and the client’s objectives. Is the prospective client one whose expectations are reasonable and capable of being satisfied? Is their timescale achievable? Is the outcome deliverable? Do you really want to take on someone who has already consulted three or four other solicitors on the same matter, or would you prefer to avoid the risk that yours might be the fourth or fifth firm to disappoint the client and to incur a complaint or a claim? Will they pay fees and outlays promptly in accordance with agreed terms of engagement/business?

Insurers ideally want to be able to see tangible evidence of the practice’s approach, and the word “documented” in the question is therefore significant. It is more difficult to ensure consistency of application of an undocumented approach, however sound. How would it be conveniently and consistently imparted to new recruits, across teams, departments and branch offices? How would compliance be audited? How would the approach be demonstrated to insurers (or, if required, to regulators)?
File notes
Lack of attendance notes is often identified by insurers and panel solicitors as a significant handicap in presenting a successful defence on behalf of an insured practice in the event of a claim. In the absence of a file note, it is difficult for a practice to provide supporting evidence for its version of events, where the client has a contrary recollection. With a file note to support the solicitor’s recollection, the prospects of successfully defending the complaint or claim will be improved.

It is therefore unsurprising that included in insurers’ risk management questions, there is often a question requesting information on the firm’s approach to recording conversations with clients and others in relation to client work.

Continued overleaf >
In the article “Note it down – or lose out” (Journal, October 2006, 38), the conclusion is: “Whether file notes are handwritten, or typed, or take the form of copies of emails to the client rehearsing what had just been discussed, they have a vital role to play in your practice’s risk controls.”

Claims and complaints

Do you have procedures in place throughout the firm for registering claims and complaints?

It makes sense for a number of reasons for there to be clarity about who has responsibility for handling claims and complaints, including who has responsibility for notifying insurers to comply with the terms of the firm’s professional indemnity insurance.

Does the practice have a designated individual responsible for the handling of complaints and claims?

If claims or potential claims are addressed promptly and effectively, there is a possibility of minimising the adverse impact of an error or omission. Potentially, by handling these situations skilfully, with insurers’ involvement or input as appropriate, the firm may avoid losing an important client.

The opportunity to learn lessons and minimise the risk of repetition ought to be seized as one of the few positive aspects of a complaint or a claim against the firm. See the article “Learning lessons that lessen risk” (Journal, December 2000, 36). Some insurers, as a condition of renewing cover, will require insured practices to demonstrate that any notified claims have been analysed for causes, contributory factors and preventive action plans.

With effect from 1 November 2007, the Society’s Insurance Committee launched a pilot exercise encouraging practices to analyse claims on their records and devise action plans to prevent recurrence.

Does the practice carry out regular audits/reviews on all active files (including partners’ files)? Provide details

Having established that there are appropriate controls in place, it makes sense to perform checks to establish that the controls are being observed and that they work in practice.

File audit can present practical, logistical and resourcing challenges. There are potentially difficult issues of perception and sensitivities for colleagues around why their files are being reviewed. However, if these challenges are addressed effectively, auditing has benefits in providing management information on a range of risk management issues.

It is one way that a firm is able to demonstrate to itself, to insurers or to regulators, if required, that its partners and staff are actually complying with its risk management policies and procedures. The process may highlight inconsistencies between fee earners, areas of practice, departments, offices etc and may identify the need for training or for refinement of existing controls, all with a view to improving compliance. It should highlight any systems which do not work at a practical level and provide a benchmark against which to assess progress with development of the practice’s overall management of risk.

In considering how best to plan and implement a file audit in your practice, it might be of interest to consider what outcomes you are aiming to achieve. From a risk management perspective, the desired outcome might be to establish whether there are risk controls in place to cover common causes of claims, and where there are controls, whether these are being operated correctly by all fee earners.

Consider how the findings depicted in the table and charts below might be elicited in the most efficient and convenient way. Are these findings potentially worthwhile in assessing the effectiveness of the practice’s risk controls? Could they perhaps be elicited by non-fee earning staff? Could the findings be generated by using case management software?

The questions typically point up the fact that the firm’s systems need to be understood and adhered to consistently by everyone.
The questions typically point up the fact that the firm’s systems need to be understood and adhered to consistently by everyone; that there need to be fail-safes built in to deal with the exceptional case that slips through the net; and that there needs to be monitoring of compliance.

File closure

Does the practice have formal file closure procedures? Are procedures in operation for all practice areas/departments?

In property transactions, for example, claims have arisen because of failure to follow up implementation of outstanding undertakings, deal with funds consigned on joint deposit etc. Arguably this occurs because of failure in the file closing process – a checklist or a file audit might prompt appropriate action.

Transaction-specific risks

There are questions in some insurers’ proposal forms (or separate questionnaires) that are aimed at transaction-specific risks. The presence of questions on these themes indicate either that there has been adverse experience of claims arising out of that particular type of transaction or that insurers have a concern about the risk of an adverse trend, either frequency or severity or both, in claims from that type of transaction.

Consider the set of questions in the article “For the high jump” (Journal, April 2007, 38), prompting firms to consider how options-related risks are being addressed.

Mortgage fraud

In the last three years, what training on identifying mortgage fraud has been given to partners and staff who undertake conveyancing work?

Concerns are being expressed about the exposure of solicitors to claims arising out of mortgage fraud perpetrated by borrowers on lending institutions. The techniques adopted by those involved are apparently little different to those which resulted in a raft of claims in the 1990s. Mortgage fraud risk has been addressed in this year’s Risk Management Roadshow, in recent issues of the Journal, and in guidance, for example “Tips on identifying mortgage fraud” on the Society’s website.

Equity release

The combination of value and complexity, together with the fact that equity release is a form of borrowing most popular with elderly clients, and the possibility of negative equity leaving equity release borrowers exposed, are all factors that have led PII insurers to flag up such schemes with solicitors as a serious risk issue which should be treated with caution and to ask questions about the extent to which firms have been involved in advising clients on these arrangements. See the article “Future perfect?” (Journal, August 2007, 36).

Critical dates

It is not surprising that insurers’ risk management questions tend to include questions concerning the operation of the firm’s systems and procedures for avoiding missed deadlines and critical dates.

Does the practice make regular checks to ensure that the diary system in which all key dates are entered is being adhered to?

How would you go about an audit to elicit the findings depicted below?

How would you rate the firm’s performance based on these audit findings?

Alistair Sim and Marsh

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The information contained in this article provides only a general overview of subjects covered, is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Insureds should consult their insurance and legal advisers regarding specific coverage issues. Marsh Ltd is authorised and regulated by the Financial Services Authority.
It is a truth generally acknowledged, but not always publicly, that the smooth running of a criminal court owes a lot to the attitude of the defence agents who regularly appear in it. This truism came to mind recently when I read in the *Guardian* an article by Ian Loader, Professor of Criminology at the University of Oxford, which stated: “New Labour has passed more crime legislation since 1997 than was enacted in the previous century. It has created more than 3,000 new criminal offences.” For the moment it may be sufficient to remark that it would be nice if the government which appears to be so keen on expanding crime were to show how much they value those involved in the proper process of law.

**Weapons and intent**

That said, if members of the public have read one case this year it is probably *Frame v Kennedy* [2008] HCJAC 25; 2008 GWD 14-257. That is the case about the stripogram performer (pictured left) who dressed as a police officer and in the interests of verisimilitude carried with him two batons and a spray container. The presiding sheriff found that the batons were offensive weapons *per se*, but concluded that in the circumstances there was no evidence to suggest that there was any intention of causing harm with them. On the basis that the respondent had the items as props, he was held to have a reasonable excuse for having them in his possession. Somewhat surprisingly the Crown appealed, contending that any consideration of a person’s intention was irrelevant when he was in possession of weapons offensive *per se*. The appeal court would have nothing of this. This decision will no doubt come as a relief to the Lyceum Theatre in Edinburgh, whose season will start shortly with the performance of *Macbeth*.

Two rather more serious cases which also attracted a lot of public attention are *Fraser v HMA* [2008] HCJAC 26; 2008 GWD 17-298, and *Mitchell v HMA* [2008] HCJAC 28; 2008 GWD 18-315. They are mentioned here mostly for purposes of reference, but the latter case does contain a number of useful observations by the appeal court about the possible effect of pre-trial publicity on the fairness of a prosecution.

**The essence of Moorov**

It may be thought that one of these articles without a reference to *Moorov v HMA* 1930 JC 68 would be like porridge without salt, and in that connection it is fortunate that we have *McKenna v HMA* [2008] HCJAC 33; 2008 GWD 22-359 to consider. The appellant faced a number of charges, the important ones for our purposes being two charges of assault against two male pupils under the age of 14, and a charge of lewd, indecent and libidinous practices towards a third. It was argued on behalf of the appellant that one charge of digital penetration could not corroborate a charge of attempted sodomy, which was said to be of a different character and gravity. The appeal court would not have this, concluding in the first place that there was no reason in law for attempted sodomy to be regarded as a more serious crime than actual digital penetration, and that accordingly the case of *HMA v Brown* 1970 SLT 121, which is authority for the proposition...
that a less serious offence cannot corroborate a more serious one, did not apply. So far as the similarities are concerned, it was held that a criminal pattern of behaviour had been established with the charges relating to the same period, concerning pupils of about the same age, and all involving interference with the lower body. Clearly the appeal court found that the jury was entitled to hold that a pattern of criminal conduct had been established, which is, of course, the critical thing.

Withdrawal from acting
One of the hazards sometimes faced in criminal trials is that of the accused person suddenly becoming unrepresented. In Mason v HMA, 27 May 2008; 2008 GWD 22-360 the appellant’s counsel withdrew following the appellant’s failure to sign a mandate clarifying his instructions. The appellant then requested an adjournment so that he could seek fresh legal representation, but this was refused by the trial judge. The case had already been adjourned twice, the appellant’s co-accused could seek fresh legal representation, but this was refused by the trial judge. The case had already been adjourned twice, the appellant’s co-accused

Evidence of the deceased
A somewhat less familiar situation occurred in the case of Humphrey v HMA [2008] HCJAC 30; 2008 GWD 18-313, which concerned the admissibility of the evidence of someone who had died subsequent to giving a statement. The crime involved was assault and rape, and the evidence admitted was that of a man (R) who had said that he had seen the appellant dragging a woman (X) across the street and lying on top of her, and had heard X moaning during and after the event. There was surrounding evidence to the effect that before this happened X had left a taxi with the appellant, unharmed although drunk, and that later she was found to have been very seriously injured. It was argued on behalf of the appellant that as X could not remember what had happened, R’s evidence was essentially the substance of the Crown case. It was submitted that either the case should have been withdrawn from the jury or the jury instructed to ignore R’s evidence. It was submitted that because R had had poor eyesight his evidence was prima facie unreliable, and thus there was a greater need than usual for him to be cross examined. The appeal court held that no unfairness had been involved in admitting R’s evidence, and pointed out that in so far as he spoke to hearing moaning this had nothing to do with his eyesight.

Statements to the media
Finally, it seems probable that if the general public is familiar with the stripogram policeman case, members of the profession will already have acquainted themselves with what the High Court had to say in Anwaar [2008] HCJAC 36; 2008 GWD 23-368. For those not familiar with the case, this was a hearing on potential contempt of court following a remit by a trial judge to the High Court, in respect of inter alia a statement to the media made by the solicitor for an accused immediately following the jury’s verdict, and also a statement made in a news bulletin. The appeal court held that there had been no contempt of court in respect that the authority of the courts and supremacy of the law had not been challenged or damaged by the statement. However the appeal court did go on to make certain observations about standards of behaviour to be expected of solicitors making public utterances. While these remarks may be obiter, it would appear prudent for any solicitors who feel inclined to make public statements to read, mark, learn and inwardly digest what was said – something which, it has to be said, not all of those commenting on the matter appear to have done.

Library pick: Kidnapped

“...a red-nosed, beery, drunken dog, with a great bottle of whiskey in his pocket, and a long story of wrongs done to him by all sorts of persons, from the Lord President of the Court of Session, who had denied him justice, to the Bailies of Inverkeithing, who had given him more of it than he deserved” – a disgruntled litigant with a walk-on part in chapter 26 of Kidnapped by Robert Louis Stevenson.
Coming on the blind side

The Equality Bill and European Directive proposals have hogged the legislative limelight in recent months. Meanwhile, a “Dispute Resolution: Secondary legislation consultation” may have slipped under your radar. Uninspiring it may sound, but the paper deals with a number of potentially significant measures for employment law practitioners and clients alike, forming part of the package of measures to supplement what will become the Employment Act 2008.

Compromise agreements and HR advisers
The definition of a “relevant independent adviser”, competent to give advice and sign off on compromise agreements, is the first issue covered. Such advice is currently the domain of qualified lawyers and legal executives, along with certified trade union members and advice centre workers. The consultation suggests that it be opened up to qualified members of the Chartered Institute of Personnel and Development. These advisers – most likely acting as HR consultants – would still require to have insurance cover and be independent, i.e. not employed by the same employer. However, there is likely to be resistance to additional competition from those already able to advise.

Employment tribunal procedure
The next topic is the rate and accrual of interest on unpaid employment tribunal awards. The rate has been fixed at 8% for some time. Should this change to a floating rate reflecting the prevailing cost of borrowing? The suggestion is to set it at Bank of England base rate plus 1.5% or 2%.

Currently, only in discrimination and equal pay cases does interest accrue from the day after the employment tribunal’s decision (with an exception where the full amount is paid within 14 days). In all other cases, interest only accrues if the award remains unpaid 42 days after the decision, coinciding with the expiry of the appeal time limit. The consultation asks whether all jurisdictions should be aligned with discrimination and equal pay claims?

Proposals to allow paper-based determination of certain types of claim are then fleshed out. If implemented, claims related to unlawful deductions from wages, breach of contract, redundancy pay, holiday pay, and the minimum wage would be determined by an employment judge without a hearing. Benefits for parties are potential reduction in the time and costs associated with attendance at hearings. Militating against this is the paper’s suggestion that a hearing will “invariably be a quicker route” than the proposed route for paper-based determinations!

Tribunal by videolink is also mooted, with draft revisions to the ET Rules stating that all parties would have to be both heard and seen should evidence be given electronically. This excludes case management discussions, so CMD by phone remains an option.

Many more potential areas of ET procedure are affected, including: augmentation of the overriding objective; express provisions re interim relief hearings; time limits and the State Immunity Act 1978; more clarity re withdrawal of claims; a reduction in the qualification period required for appointment as an employment judge; the addition of holiday pay as a jurisdiction to be heard by a judge sitting alone; and default judgments being made mandatory. Drafts of the claim and response forms to be used in the post-dispute resolution procedure world are also provided for comment.

Discrimination remedies
ETs can currently recommend that the respondent take steps to reduce the impact on the claimant of proven discrimination. However, where for example the claimant has left employment, the power to make recommendations cannot be activated. Consideration is therefore being given to broadening the tribunal’s power to make recommendations, thereby benefiting the wider workforce. Non-compliance would lead to a financial penalty, and previous recommendations could be taken into account in future proceedings. One question posed relates to how employees might be informed about recommendations made to their employer.

TUPE changes
Another question focuses on consequential amendment to the Transfer of Undertakings (Protection of Employment) Regulations 2006, asking whether references to the TUPE provisions should be replaced with references to the ACAS Code of Practice on Disciplinary and Grievance Procedures?

And finally
The good news: the consultation paper reveals that the commencement date for the Employment Act 2008 – sounding the death knell for the dispute resolution procedures – is “expected to be” 6 April 2009.

Bad news: the paper points out that the transitional provisions will require the procedures to continue to apply where the act leading to a grievance took place or began prior to that date; likewise where the employer has contemplated or started disciplinary proceedings. This means cases still heading through the tribunal system in 2010 and (dare I say) beyond.

The paper asks whether consultees agree with the government’s view that the current system could be activated. Consideration is therefore being given to broadening the tribunal’s power to make recommendations, thereby benefiting the wider workforce. Non-compliance would lead to a financial penalty, and previous recommendations could be taken into account in future proceedings. One question posed relates to how employees might be informed about recommendations made to their employer.

Jane Fraser, Head of Employment, Pensions and Benefits, Maclay Murray & Spens LLP
Relocation, relocation

A recent decision explores the matters to consider when one parent wants to relocate abroad along with their child.

“What if my ‘ex’ decides to move abroad and takes my children with them?”

For a number of separated parents, this can be an understandable concern. Such cases are difficult for all the parties involved and there is, unfortunately, no straightforward answer. There can often be equally compelling reasons for and against such a move, although in some cases the parent seeking to move may be doing so simply to restrict contact between the children and the other parent. Courts, when called upon to do so, are naturally reluctant to interfere with a person’s right to decide where he or she resides.

Until recently there has been little Scottish case law setting out the applicable law and outlining the factors to be considered. Anecdotal evidence suggests that, as might be expected, when such cases reach court the factors considered relevant by a sheriff when exercising his or her discretion can differ widely.

However the recent case of AM v IM, Edinburgh Sheriff Court, 28 June 2008, provides further guidance in this area. This appears to be one of the first Scottish cases, in which a written judgment has been issued, to set out the law and to consider the factors to be taken into account when dealing with such emigration type cases.

The case involved the unmarried parents of an 11 year old child, who had separated when the child was just a few months old. The father held parental responsibilities and rights and had exercised regular contact over many years.

The mother wished to take the child to Spain to live with her and her partner, which prompted the father to seek interdict against the mother removing the child from Scotland. She defended, seeking a specific issue order to allow the child’s removal to live in Spain.

Relevant factors
Sheriff Morrison in his judgment confirmed that the test in Scotland, as one would expect, is what is in the best interests of the child. That being the case, there can be no presumption in favour of or against a specific issue order. The sheriff recited s 11(7) of the Children (Scotland) 1995, which stipulates three factors which the court must consider, but these were not the only factors. Having considered the authorities before him, including the English case of Payne [2001] Fam 473, the sheriff opined that the following should be considered when deciding whether to make an order in such a case:

The reasonableness of the proposed move
The motive of the parent wishing to take the child abroad
The importance of the contact with the other or absent parent in the child’s life
The importance of the child’s relationships with siblings and members of the child’s extended family who are left behind
The extent to which contact (if appropriate) is able to be maintained
The extent to which the child may gain from a relationship with family members as a result of the proposed move

It was noted that there was no requirement for the mother and her partner to move to Spain; the couple appeared to be pursuing a "dream".

Do your homework
Looking at each factor in turn, the sheriff did not consider it to be in the child’s best interests to move to Spain. Criticism was made of the mother’s preparation for the move. It was noted that there was no requirement for the mother and her partner to move to Spain; the couple appeared to be pursuing a "dream". It was matter of concern that the substantial contact between the child and his father, and indeed paternal and maternal family members with whom he had close relationships, would be materially affected.

Additionally, the child expressed the view that he did not want to move to Spain and this, though not based on weighing all relevant factors, had to be given some weight. The child also had educational needs which had not been properly considered, and these were further compounded by his inability to speak Spanish, which would result in him being kept back a year at school. It is clear that if a parent wishes to relocate abroad, they should do their homework regarding the move, as the plans will be subject to close scrutiny.

AM v IM is worthwhile reading at length, and may cause practitioners to pause and consider their client’s intentions in more detail.

Karen S Wylie, Solicitor, The Morton Fraser Family Law Team
Worse than the disease?

Has the UK quietly outlawed “alternative” medicine through the Consumer Protection from Unfair Trading Regulations?

Alternative medicine is big business. From Acupuncture to Yoga (I couldn’t think of an example for “Z”, but I wouldn’t be surprised if there is one) there are all sorts of remedies, treatments, techniques, practices, devices and indeed entire medical and philosophical systems available in the UK that claim to cure disease, rebalance the body’s energy fields and generally heal the sick.

Proponents of the myriad forms of alternative medicine argue that it is in some way “outside science” or that “science doesn’t understand why it works”. Critical thinking scientists disagree. The best available scientific data show that alternative medicine simply doesn’t work, they say: studies repeatedly show that the effect of some of these alternative medical therapies is indistinguishable from the well documented, but very strange “placebo effect” – the therapeutic and healing effect of an inert medicine or ineffective therapy (the placebo in question).

It is a debate which has raged for decades, and will almost certainly continue to do so.

What’s not allowed now
Enter the Consumer Protection from Unfair Trading Regulations 2008. These came into force on 26 May to modernise and simplify the regulations. It is a debate which has raged for decades, and will almost certainly continue to do so.

The regulations prohibit unfair commercial practices between traders and consumers through five prohibitions:

- a general prohibition on unfair commercial practices (reg 3);
- a prohibition on misleading actions (reg 5);
- a prohibition on misleading omissions (reg 6);
- a prohibition on aggressive commercial practices (reg 7);
- a prohibition on 31 specific commercial practices that are in all circumstances unfair (sched 1).

One of the 31 commercial practices which are in all circumstances considered unfair is “falsely claiming that a product is able to cure illnesses, dysfunction or malformations”. The definition of “product” in the regulations includes services, so it does appear that all forms of medical products and treatments will be covered.

A trader selling a product or service that is based on alternative medicine is likely to claim that it is able to cure illnesses, dysfunction or malformations. If they do so falsely then they commit a strict liability offence, which on a summary conviction is punishable by a fine not exceeding the statutory maximum (£5,000), or on indictment, a fine or up to two years’ imprisonment or both.

Up the creek?
If we accept that mainstream evidence-based medicine is in some way accepted by mainstream science, and alternative medicine bears the “alternative” qualifier simply because it is not supported by mainstream science, where does that leave a trader who seeks to refute any allegation that their claim is false?

Of course it is always open to the trader to show that their alternative therapy actually works, but the weight of scientific evidence is likely to be against them.

Regulations 17 and 18 set out defences to the strict liability offence. If a trader can prove the offence is due to a mistake, reliance on information supplied by another person, the act or default of another person, or an accident or another cause beyond their control, they have a defence provided they can show they took all reasonable precautions and due diligence to avoid committing the offence. In the case of advertisements, if an advertising business does not know that publication of the advert will be an offence, it can avail itself of the “mere conduit” defence.

However, when the best available scientific studies show that an alternative medicine or therapy is no more effective than a placebo, and this has been brought to the trader’s attention, it must be questionable whether they can avail themselves of the defences in regs 17 and 18.

Given the considerable commercial vested interests in the markets for many alternative therapies such as homeopathy, acupuncture and many so-called “herbal remedies”, and the endless debate on the appropriate place (or otherwise) of such alternative practices in medicine, one wonders whether local trading standards bodies, the Office of Fair Trading and the Advertising Standards Authority (in respect of claims made in adverts) will be willing to take enforcement action against all but the lowest level purveyors of snake oil, healing crystals and charm bracelets.

Douglas McLachlan is an associate with Biggart Baillie’s IP & Technology Group

Taking aim at extended warranties
Another commercial practice which is in all circumstances considered unfair is “presenting rights given to consumers in law as a distinctive feature of the trader’s offer”. This has led to speculation that the practice of selling many “extended warranties” to consumers will be unfair.

In an extended warranty, the trader guarantees that the product is free from defects and that he will repair or replace it for a certain period of time (for example, a year). However, the Sale of Goods Act 1979 imposes a duty on retailers that the products they sell must be of “satisfactory quality”. That means the product must work and remain working for a reasonable period of time. Clearly it would not be reasonable if a widescreen TV or a washing machine broke down during the first few years, yet many extended warranties are sold to consumers to guarantee they won’t despite the fact that the consumer is already protected by existing legislation.

It is likely that the sale of extended warranties in these circumstances will now be unfair.
The Scottish Community Foundation has a scheme to breathe new life into dormant charitable trusts

Sleeping bounty

Everyone has heard of great Scottish philanthropists like Andrew Carnegie, William Quarrier, and their modern day equivalents such as Sir Tom Hunter. However, these are only the best known of thousands of men and women who over the years have established charitable trusts to support good causes.

These trust funds are often administered by Scotland’s 32 councils, who inherited their responsibilities as trustees from predecessor authorities. Unfortunately, over the years many of these trusts have become inactive and it is often difficult to distribute funds in line with the wishes of the original benefactors.

Untapped resources
Research conducted by the Scottish Community Foundation shows that in 2006-07, Scottish local authorities distributed almost £2.5m to good causes from charitable trusts. However, in the same year these trusts generated almost £2m of income that was not distributed. Of course, this is not just an issue for public bodies.

Many solicitors in private practice may be experiencing similar difficulties where charitable trusts for which they are trustees have become dormant or inactive.

Charitable trusts may become dormant for a variety of reasons. The original purposes may have ceased to exist or have been fulfilled, or the terms of the trust may simply be no longer relevant, though the trusts still have surplus or residual funds. These “sleeping” assets could be put to good use by providing support to local charities and community organisations.

New opportunity
Thanks to the Charities and Trustee Investment (Scotland) Act 2005, there is now a way of releasing these funds. The Act introduced provisions for charities to make changes to their constitutions, including reorganising their objectives, with the approval of the Office of the Scottish Charity Regulator. This means that the objectives of charitable trusts can be changed to make them more relevant to the current needs of community and voluntary organisations, while respecting the spirit of the original benefactors.

Section 39(1) states that a reorganisation scheme needs to lead to a certain kind of result, before it can be approved by OSCR. If the current purposes are in some way no longer relevant, useful or appropriate, the scheme must ‘enable the resources of the charity to be applied to better effect for charitable purposes consistently with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted’.

The Act offers five possible ways in which the current purposes of a charity may no longer be appropriate: s 42(2)(a) and (b). These are:
- That some or all of the charity’s purposes have been fulfilled as far as possible, or adequately provided for by other means.
- That some or all of its purposes can no longer be given effect to (whether or not in accordance with the directions or spirit of its constitution).
- That some or all of its purposes have ceased to be charitable purposes.
- That some or all of its purposes have ceased in any other way to provide a suitable and effective method of using its property, having regard to the spirit of its constitution.
- That its purposes provide a use for only part of its property.

The Charities Reorganisation Regulations 2007, which give effect to ss 39-43 of the Act, were introduced in May 2007 and OSCR issued guidance last October about the procedures to be adopted for a reorganisation.

The SCF scheme
The Scottish Community Foundation has recently launched an initiative to make it easier for funds held in inactive charitable trusts to be distributed to local community organisations. SCF currently manages 250 individual charitable funds, including £6m in endowments. This allows us to award almost £3.5m a year in grants to community and voluntary groups across Scotland.

Our expertise in grant making is recognised by The Big Lottery Fund, Comic Relief and the Scottish Government, all of whom use SCF’s services to deliver key programmes that target funding at grass-roots community activity in Scotland. SCF wants to build on this expertise, working in partnership with local authorities and others, including solicitors acting as trustees for charitable trusts, to release funds currently sitting in dormant or inactive trusts. Our aim is to use the assets released from reorganising dormant trust funds to establish revived and sustainable community funds across Scotland which will provide much needed additional funding for local community and voluntary organisations.

These new community funds will have objectives relevant to the needs of local communities in the 21st century, while respecting the charitable aims of the original benefactors.

Once established, these community funds would also provide a mechanism that would allow organisations and individuals wishing to support charitable causes to direct their money towards local community and voluntary organisations. In other words, today’s philanthropists can form a partnership with their counterparts from the past to benefit local communities today and for future generations.

Giles Ruck, Chief Executive,
The Scottish Community Foundation

In 2006-07, Scottish local authorities distributed almost £2.5m to good causes from charitable trusts; however these trusts generated almost £2m of income that was not distributed

About the Scottish Community Foundation
For more information about SCF’s work in general or about reorganising dormant charitable trust funds, see www.scottishcf.org or contact giles@scottishcf.org or tel 0131 524 0300
This month’s cases deal with inadequate systems, embezzlement, licensed conveyancer practice, sexual offences and misappropriation of funds.
The Tribunal wished to make clear that it was not good enough for a solicitor to start out in practice without proper systems in place and then sort matters out later

The essential and absolute qualities of a solicitor are honesty, truthfulness and integrity. It is essential for the public to have confidence in the legal profession that solicitors act with integrity. The respondent’s conduct in misappropriating funds and misleading his client had brought the legal profession into disrepute. The Tribunal had regard to all the productions in this case and in particular to the details of the respondent’s medical condition which he was suffering from at the time that these failures occurred. The Tribunal noted that the respondent did not benefit personally from the misappropriation of funds and in fact had lost a significant amount of money due to his conduct. In considering sanction, the Tribunal noted that the respondent’s name had already been removed from the Roll of Solicitors by the Society under an administrative process. The Tribunal considered that imposing a fine on the respondent could be construed as oppressive, therefore the Tribunal determined to impose a censure on the respondent.
What’s in a name?

Domain name disputes have been in the news, and the websites of those who resolve them are very helpful.

Following on from the successful attempt by the C S Lewis estate to reclaim the domain www.narnia.mobi from an Edinburgh couple and their 11 year old son, the web review turns its attention to domain name dispute resolution.

**Internet Corporation for Assigned Names and Numbers**

[www.icann.org/udrp](http://www.icann.org/udrp)

As becomes apparent on a first reading of this site, there are a number of different policies which apply to various types of disputes between registrants and third parties over the registration and use of domain names. For each of them there are approved dispute-resolution service providers for the given policy. Above all of these sits the Uniform Domain-Name Dispute Resolution Policy (UDRP) which, as its name suggests, applies to disputes concerning all generic Top Level Domains (or gTLDs). Generic Top Level Domains are the .com, .net, .info, .mobi etc extensions – those which are not country specific.

For such an important website, it does look a little amateur. There is nothing ragged or confusing about the layout or anything particularly wrong with it, but it just doesn’t have the polish that one expects from the websites of large (and even small) organisations nowadays.

The lion’s share of the site is given over to the policies themselves and rules attaching to the policies. There then follow details of proceedings brought under these various policies, including a statistical summary of such proceedings, and links to the decisions on the websites of the dispute resolution service providers.

Those service providers are the organisations which take the decisions on the disputes which arise on domain names. The website here also provides details on the approval process for becoming such a provider.

**World Intellectual Property Organization**

[www.wipo.int](http://www.wipo.int)

One such dispute resolution service provider (in fact the principal provider) is the World Intellectual Property Organization (WIPO) – a specialised agency of the United Nations. WIPO is “dedicated to developing a balanced and accessible international intellectual property (IP) system”.

The website is very well laid out and is well organised. This is necessary due to the large volume of information covered by the website. Obviously, the organisation deals with many more intellectual property issues than just domain names. However, domain name decisions are one of the titles listed under the “Most Requested” heading – which is a very useful feature.

Again, the website offers resources, cases, decisions, rules, details of fees, brief biographical details of the panellists, and statistical information. The website is obviously updated very quickly as the narnia.mobi decision was available almost immediately – you can read it on [http://tinyurl.com/68syjc](http://tinyurl.com/68syjc).

In addition to gTLD disputes, WIPO also considers ccTLD disputes (country code top level domains), although not for the .uk domains.

**Nominet UK**

[www.nominet.org.uk](http://www.nominet.org.uk)

Nominet is the Internet registry for .uk domain names. Among other features on an excellent website, you will find details of their very own (usually free of charge) dispute resolution service. This involves the possibility of mediation, and a two-stage decision making process (first instance and appeal) conducted by independent experts.

The presentation of the website is little short of immaculate. Unlike some other sites, there is no assumption that the user is familiar with the jargon and acronyms common to the field. This is entirely appropriate as, though it may seem obvious to state, not everyone with a website is some kind of computer geek – and this is one website which grasps that point.

For example, under the main heading “Disputes/Legal”, as well as having a further selection of subheadings, the front page is divided into three main categories: “I am interested in ...”; “tell me about …” and “tools …” – which are also distinguished by a useful yet subtle colour-coding scheme.

Of some interest are the pages drawing attention to the relevant legal issues, together with decisions made by the dispute resolution service, and the (to date) eight court cases which Nominet UK has been directly involved in. Further, Nominet have collected together information about a selection of domain name cases from outwith their own direct control or involvement.

Although it does not aim to do so, it serves as a very useful introduction to the law on domain name disputes in general.


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Are you a Scots law blogger? Or do you know of one? Please let me know and the site(s) may feature in a future web review.
Elaine E Sutherland

PUBLISHER: W GREEN
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PRICE: £150

Elaine Sutherland is a professor of law both in Scotland and in the USA, spending half the year in each, and she has long brought to her writings on Scots child and family law an awareness of the intense debates that so often rage in US academic circles, and courts. This text is a crowning achievement tapping into her unique talents.

Though a second edition (the first was published under another imprint in 1999), this can in many respects validly claim to be a brand new book. At 1,385 pages, it is almost double the size of the first edition, an increase caused largely by the fact that there are whole branches of the subject (civil partnership, gender recognition, human rights) that have either been created or come to full fruition since 1999 and which receive full and enlightening treatment here.

Sutherland taps into these debates in her discussion of that crucial topic, financial provision on divorce. Now, practitioners in Scotland already have at their disposal a variety of existing commentaries on the 1985 Act. But what Professor Sutherland offers is a detailed exposition of the working of the Act in the context of what its aims are, what they could have been, and what they might yet become. She provides new arguments which have been tried elsewhere and which might well prove successful here.

Refreshingly, Professor Sutherland does not hesitate to nail her colours to the mast in relation to many of the major social debates covered in this book. Not for her the dull tendency of so many academic writers to claim a disinterest, or a need to strike a (sometimes spurious) balance between different political approaches. Professor Sutherland does give space to views with which she clearly disagrees, but she is always open in her disagreement, and tells us why.

This is most apparent in the extended sections of the book on same-sex relationships, in many respects the Great Debate in early 21st century family law. But here again she does not limit the discussion to the frankly sleep-inducing “marriage debate”: she widens her scope out to a variety of non-traditional family forms, including “living together apart” and “polyamory”, exploring what, if any, legal consequences might arise from people choosing to live their intimate lives in these ways.

She makes no moral judgments, but plenty intellectual ones.

Not all of her conclusions, or ways of seeing things, would I agree with: I was uncomfortable, for example, with civil partnership being classed throughout as a form of “marriage-lite”, for I do not take the view that civil partnership as designed in the UK is any lighter relationship than the marital relationship. And I fear that the language of “marriage-lite” implies that marriage is the goal to be achieved, or the solution to all our worries. Professor Sutherland certainly does not see marriage in this way, but her language could be misconstrued as giving support to marriage as the only ideal worth aiming for.

This book is a remarkable achievement, one of which the author, and her employers in both Stirling and Portland, Oregon, should be justly proud. The book will be of very high value to Scottish practitioners and to law- and policy-makers. And it will be absolutely indispensable for all teachers of Scottish family law who wish to encourage their students to think about what our rules are, why we have them, where they came from, and what we might do differently.

Kenneth McK Norrie
University of Strathclyde
Sara Scott reports on a survey south of the border which suggests that in-house work in commerce and industry doesn’t always match expectations – but most in-house lawyers expect to stay

Industry standard

77% of surveyed in-house lawyers say their work-life balance has improved

You might think you know what working in-house would be like – but what is the reality? Would it meet your expectations, or are you destined to be disappointed?

In June 2008 the Law Society of England & Wales published a report called Corporate counsel – a profile, containing the findings from a survey of in-house lawyers working in commerce and industry (C&I) in England & Wales. Whilst there may be some differences in Scotland – and it should be said that the C&I Group in England & Wales has criticised the report, claiming it was not consulted – the report nonetheless makes for very interesting reading about the realities of working in-house versus private practice, and how these compare with the expectations which lawyers had when they made the move in-house.

Making the move in-house
Most people move in-house to get a better work-life balance

Meet the Committee

Sara Scott
External Risk, Royal Bank of Scotland Group

Work history
I trained in Dundas & Wilson in Edinburgh and Glasgow and also worked there as an NQ before making the move in-house to RBS, initially working for RBS in Glasgow. I worked in the Group legal department’s Product and Lending team before moving to External Risk earlier this year.

What’s the best thing about your job?
A great variety of very interesting and dynamic work and plenty of responsibility. I am part of a team which lobbies externally both in the UK and in Europe on changes to legislation and regulation which could impact on RBS. It’s very satisfying when we’re able to make a difference. I much prefer working in-house to private practice – it is far less formal, much more hands-on and there is no time recording. The benefits and opportunities can be great too.

Being an in-house lawyer gives you a great picture of what a client really wants from their external lawyer. This is why I think secondments in-house should be encouraged, as they provide a great insight and experience for both the secondee and the employer.

What external bodies/organisations are you involved with?
I am currently on the committee of the In-House Lawyers Group of the Law Society of Scotland. I was previously on the committee of the Scottish Young Lawyers Association (SYLA).

What do you do at weekends?
DIY, as my husband and I bought
Of the surveyed in-house C&I lawyers, 77% cited better work-life balance as one of their reasons for moving in-house from private practice; 38% cited being offered a higher salary as a reason.

Most people do not plan to go back to private practice

Similarly, 77% said that they were not likely to move back to private practice. So it seems that moving in-house is seen as a permanent move.

What is working in-house actually like?
The average salary is higher than in private practice

The average full-time salary for in-house C&I lawyers is £180,000, compared to £70,000 for associates and assistants in the largest private practice firms in England & Wales. However at a more senior level, salaried partners in private practice typically get paid more than their C&I in-house equivalents. Also the statistics suggest that you’re only likely to get better pay if you work in private practice for several years before moving in-house, and work longer hours when you get there.

Most people work longer hours than in private practice

On average, full-time in-house C&I lawyers worked 48 hours per week, compared to the 45 hours average in private practice. However part-time hours were better in-house, and the average working week in-house was considerably shorter than in the largest private practice firms.

If you’re thinking of making the move, it’s essential to... make sure you’re doing it for realistic reasons and at the best time for your career

Does moving in-house deliver on its expectations?
The survey shows that most people move in-house expecting to get a better work-life balance, but in reality end up working longer hours than in private practice. However it seems that for many in-house lawyers the expectation of getting a better salary is achieved in reality, albeit not at the very senior levels.

From my own experience I know there are many benefits to working in-house in C&I. Why else would the majority of in-house lawyers have no desire to move back to the “dark side”? However it’s true that working in-house is not necessarily going to be what you expected. So if you’re thinking of making the move, it’s essential to think it through fully beforehand and make sure you’re doing it for realistic reasons and at the best time for your career. 

● Sara Scott is a qualified solicitor working as an external risk manager in RBS Group, based in Edinburgh

● Note: I would like to thank the Law Society of England & Wales for consenting to the use of the details from their report in this article.

a house last year which is a real doer-upper; learning Italian (we have a holiday house in Abruzzo in Italy); and looking after our brand new kitten who is absolutely adorable!

What are the benefits of being on the Society’s Council or committees?

Being on the ILG committee is great on a personal level for building up business skills. It can be hard work but it’s fun too. It’s also very satisfying when we run successful events or do something which really makes a difference or get positive feedback. The only frustrating thing can be where there is a lack of engagement from in-house lawyers. When I was part of the SYLA I had the chance to do website design and marketing, help run charity balls and conferences, attend conferences run by other young lawyers’ groups in London and Dublin, negotiate sponsorship deals, work together with the Society for the mutual benefit of law students and trainee solicitors, and loads more besides. Because of my role on SYLA I was invited to join the In-house Lawyers Group committee for a three year period and am now particularly focused on trying to make things better for new in-house lawyers. It’s very exciting to be on board the ILG committee, especially amongst such esteemed company!

Who’s your hero and why?
Carrie Bradshaw from Sex and the City. The New York City lifestyle! The lunches! The clothes! The shoes! The laughs! OK, I know it’s not actually real!

If you weren’t a lawyer what would you have been?
Some sort of artist or designer.
Energy efficiency is a concept the property market is going to have to embrace wholeheartedly in the near future. Given the climate change issues we hear about daily, and the spectre of fuel poverty that is becoming a reality in Britain today, landlords and tenants need to look seriously at how they use available resources and how costs can be minimised.

The UK Government’s renewable energy strategy acknowledges that making Britain’s power supply more green will push up energy bills and increase fuel poverty. As a result, viewpoints are starting to shift regarding energy use and efficiency in buildings, and how the traditional legal framework can be altered to reflect this to the advantage of both landlords and tenants. Energy performance certificates are set to focus minds across the domestic and commercial property arena on energy efficiency, and what that means in terms of rental values, property portfolios and investment in green technology. Awareness of energy efficiency will become far more prominent as a result, and another way of realising this is through the medium of “green” leases.

The Real Property Association of Canada (REALpac) has issued a model Green Office Lease, and it is worth considering its implications.

The model lease
The “green” parts are in a schedule to the lease, as an “environmental management plan”. They are stated to be “landlord-centric”, but are easily adapted to suit tenants, and also to operate as a “shared responsibility” model. It is a lease for a single office building, but the green clauses can be adapted for retail and institutional property, as required. The schedule sets out these objectives:

- a comfortable, productive and healthy indoor environment
- reduced energy use and reduced production of greenhouse gases
- reduced use of potable water and use of recycled water
- effective diversion of waste from landfill and incineration, and the recycling of tenant waste
- using cleaning products certified in accordance with suitable environmental standards
- alternate transportation options for people using the building
- avoiding high volatile organic compound (“VOC”) materials, furniture and improvements within the building and individual tenant premises
- electricity use, natural gas consumption and water consumption levels to average no more than X kilowatt hours, cubic metres and litres per square foot of rentable area of the building per year
- a waste diversion rate not less than X% per year
- indoor versus outdoor CO₂ levels of no more than X parts per million measured to relevant standards.

Any carbon offsets arising from the operation of the building belong to the landlord, and there is provision for the deemed amendment of the objectives if more stringent regulatory targets are imposed at any stage.

Implementation of the plan includes the following:

- the landlord is able at any time on reasonable notice to carry out greenhouse gas production monitoring and testing
- avoiding high volatile organic compound (“VOC”) materials, furniture and improvements within the building and individual tenant premises
- electricity use, natural gas consumption and water consumption levels to average no more than X kilowatt hours, cubic metres and litres per square foot of rentable area of the building per year
- a waste diversion rate not less than X% per year
- indoor versus outdoor CO₂ levels of no more than X parts per million measured to relevant standards.

“Green leases” appear to be some way off yet for the UK, but a Canadian model now published shows how they might work, says Kirsty Nicholson.
construction of improvements and alterations in and to the property
- all paints, sealants and adhesives and all cleaning products must comply with a suitable environmental standard, and the landlord may test for VOCs
- furniture, materials, fixtures, supplies and equipment should meet the tenant procurement guidelines supplied by the landlord
- any cleaning contracts must require the contractor to comply with the relevant parts of the plan, especially in relation to specialised green facilities, such as waterless urinals, which have particular cleaning requirements
- the landlord will purge the air in the building while the tenant is moving in, to minimise offgassing of glues and dyes in wallpaper, carpets and furniture, at the tenant’s cost (the evaporation of volatile chemicals in non-metallic materials at normal atmospheric pressure means that building materials can release chemicals into the air for years after the products are initially installed)
- electricity smart meters will be installed at the tenant’s expense
- the tenant shall take reasonable steps to minimise electrical consumption (i.e. reducing lighting where unnecessary and using energy saving equipment)
- the landlord is entitled to use low carbon output energy sources
- the landlord can also install onsite generation capacity and the tenant pays a proportionate amount of the incremental cost of installation
- the tenant can ask for its electricity to come from renewable energy sources, at its own cost and expense
- the landlord’s choice of building rating system will be the benchmark
- the landlord shall operate the common areas and facilities in accordance with the objectives
- water meters will be installed at the tenant’s expense
- the use of treated recycled water where possible, and the collection, treatment and reuse of rainwater and wastewater by the landlord
- the use of water-saving devices
- use of recycled materials in improvements and alterations, and recycled furniture, fixtures and equipment where compliant
- where the tenant demolishes existing improvements or alterations, either the tenant or its contractor to recycle as much of the waste created as possible, to minimise landfill. The landlord is entitled to monitor and measure the amount of waste leaving the site
- use of locally sourced materials where possible for improvements or alterations. The schedule provides for landlord and tenant to cooperate in determining compliance with the objectives and to refine them if required. The parties shall meet at least once a year to discuss progress, and there are mutual covenants relating to using reasonable commercial efforts to achieve the objectives, constructively consulting on any enhancements that may achieve the objectives and to consider undertaking any such enhancements, and on any issues, events or circumstances likely to detract from achieving the objectives.

Issues for the UK
1. Landlords and tenants in the UK are averse to spending more money than is seen as strictly necessary to obtain the best deal (however defined). This is not a view that sits particularly well with climate change issues and the concept of green leases, where build and fit-out costs are commensurately higher due to the requirement to use certain products and behave in certain ways that are not comfortable for the traditional landlord and tenant.
2. The building stock in the UK has issues that are not so prevalent in Canada, mainly the large quantities of old, and in many cases listed, buildings. The UK has not yet really dealt with the treatment of old stock in terms of the new environmental regulations, and how far they can be made to comply in the first place.
3. There is a high degree of inertia in the property industry, and in some cases an unwillingness to take on board the implications for the market of the behavioural and practical changes being forced on parties as a result of an increasingly well-informed and vocal customer base. Corporate social responsibility (CSR) has become a highly important factor in many leading customers, developers and investors’ businesses, influencing brand, share price and reputation, as well as incorporating the business review requirements of the Companies Act 2006, s 172 – any review must include information about environmental matters (including the impact of the company’s business on the environment) and information about social community issues. The Centre for Research in the Built Environment (CRIBE) has produced a good practice guide, "Incorporating Environmental Best Practice into Commercial Tenant Lease Arrangements", which has useful points for parties to consider when addressing environmental concerns in their contracts.
4. It will be interesting to see how Canadian tenants manage to persuade their cleaning contractors and similar suppliers to comply with the provisions of the green lease, in terms of products used and behaviours on site, and whether the environmental management plan flows down into third party contracts. In the UK it is difficult to see how this would work on a non-mandatory basis, as unless there is a statutory requirement for third parties to comply with the relevant terms of green leases, it would be unlikely to be effective.
5. Constructive consultation on ways to achieve the environmental objectives in the schedule is not something that is familiar to landlords and tenants in the UK, nor has dealing with demolition waste in an environmentally-friendly manner concerned parties here too much in the past. Other unfamiliar concepts such as using treated and recycled water, reducing the levels of CO2 and energy consumption in the property, and having to use environmentally certified products, are likely to cause uneasiness to British landlords and tenants. The Code for Sustainable Homes has at least addressed some of the issues regarding domestic emissions, but in relation to non-domestic stock, there would appear to be no consistent standard.
6. Canada has the “Leadership in Energy and Environmental Design Commercial Interiors” standard, but energy performance certificates and display energy certificates are the only consistent way to review the energy usage in buildings in Britain to date.
7. It is debatable whether the UK has sufficient investment in the type of innovative products and services, and the quality standards, that would make the green lease workable here. This may change with the lifting of barriers to innovation in the renewable energy market, and the incentives envisaged in the renewable energy strategy, and also the new Carbon Trust standard allowing organisations to demonstrate their commitment to and achievement of carbon emissions reductions.

How long?
The REALpac green lease is a further development on the road to a environmentally-aware property market, and the fact that this has been published is evidence that parties are starting to ask for such products. It remains to be seen how soon a model green lease will appear in Britain but, in light of Hermes’ adoption of green lease terms in their portfolio this year, and now the government’s renewable energy strategy, it should not be too long a wait.

Kirsty Nicholson is a partner in Real Estate at HBJ Gateley Wareing

The circumstances surrounding the Trump planning application, its consideration by the planning authority (Aberdeenshire Council) and the subsequent call-in by Scottish Ministers have caused considerable public interest. It is probably no exaggeration to say that this is the most controversial planning application to have been considered in Scotland in the last 30 years, even before one considers the arguments regarding the merits of the application itself.

The article by Peter Macari (Journal, June, 64) challenges the validity of the call-in decision, arguing in effect that because a “decision” had been made by the authority, ministers were not entitled to call the application in. That decision, as Mr Macari acknowledges, was a resolution passed by the committee which in effect had delegated powers to fulfil the role of the planning authority. A decision notice following on from that had not been issued at the time of the call-in.

I beg to differ and with respect to Mr Macari I do think there are other authorities and issues which are relevant to a proper consideration of matters.

The English decisions

As Mr Macari correctly points out, the obligation on the planning authority in terms of the 1992 Order is to communicate its decision on the application in writing with reasons. There is a clear line of case law (not referred to by him) which suggests that what constitutes a decision is not the authority’s resolution but rather the notice of decision. This line of authority is referred to in some detail in Scottish Planning Law and Procedure, one of the textbooks Mr Macari cites. In para 11.46 the learned authors observe:

“Despite doubts by some commentators, case law appears to have established that it is the notice of the authority’s decision rather than the resolution of the authority which constitutes the grant or refusal of permission”.

The paragraph refers to a number of (English) cases which support that proposition. Woolf J (as he then was) in R v West Oxfordshire District Council [1986] JPL founds on a dictum of Lord Denning that “The grant is not made when the County Council resolve to give permission. It is only when the Clerk on their authority issues the permit to the applicant” (Slough Estates v Slough Borough Council [1969] 2 Ch 315).

There appears to be no reason in principle why the position should be different north of the border.

Mr Macari suggests that the decision by Scottish Ministers to call in the application once the planning authority had passed a resolution, but before the consequence of that resolution had been communicated, was unprecedented. I agree with that position, he argues that as a decision had been made, even though not formally communicated, ministers were no longer entitled to give a direction seeking to call in the application. I think that view is simplistic and ignores relevant authority as to what constitutes a “decision” for planning purposes. Before I deal with that, I think it fair to suggest that notwithstanding the high profile and controversy which has surrounded the Trump application, there appears to be absolutely no reason why the applicable processes and procedures should be any different from those which apply to “run of the mill” decisions. I think it would be bad law to apply a set of rules and procedures to the Trump application simply because of its nature.

Good call?

Replying to Peter Macari’s article on the decision to call in the Donald Trump planning application, Murray Shaw argues that the decision is both competent in terms of judicial authority and consistent with the proper operation of the planning system.
and our views are borne out by the report from the Parliament which Mr Macari refers to. While unprecedented, given the case law just referred to I do not think it was unlawful.

It is fair to say that none of the cases cited in the section from *Scottish Planning Law and Procedure* referred to above relate to circumstances in any way similar to the Trump case; rather they are concerned with fairly contentious applications.

**Practical view**

It does seem to me that there is a degree of logic in the position adopted by the courts to date. It is only once a decision has formally been communicated that the applicant is clear about the decision, and more importantly the reason for it, with a view to considering whether they might wish to challenge that decision. Furthermore there may be significant delays between a resolution to grant planning permission and the decision notice being issued.

For example, it is fairly common practice for planning authorities to resolve to grant planning permission subject to certain matters being dealt with, typically a s 75 agreement. There may be significant delays between the date of the resolution and the s 75 agreement being concluded and registered. Over the intervening period circumstances may change. It seems to me appropriate that the authority should have the power to review its decision in light of those changed circumstances. If its resolution was critical. None of the cases referred to above which was probably obiter) made clear that she did not accept an argument for the petitioner that the decision (resolution) of June 2004 was not challengeable by judicial review. While this part of her decision is not particularly detailed, it seems to me that implicit in her comment must have been a view that this decision by the planning committee had some effect and was challengeable even though the formal decision notice was not issued for a considerable time thereafter.

The case concerned an application for judicial review and it might be argued that for that purpose the resolution is critical. None of the cases referred to above which justify the proposition that it is the decision notice rather than the resolution which is critical, were apparently cited to Lady Clark. Her views were approved by Lord Abernethy in the Inner House (2007 SC 366), though the other judges do not deal with the issue. Again however there is no detailed citation of the authorities referred to above.

In my view therefore Mr Macari is mistaken to the extent that he argues that Scottish Ministers were not entitled to call in the application. It does seem to me that there is good and clear judicial authority (which is understandable and in my view correct) that it is the decision notice which is critical rather than the resolution to grant planning permission.

**Open to review**

Even if that is the position, that does not necessarily mean of course that the Scottish Ministers’ decision is beyond challenge. In my view the decision to call in an application is not one which is specifically susceptible to challenge in terms of the 1997 Act. It is however a decision open to judicial review. Any aggrieved party therefore who could show title and interest could have sought to challenge the call-in decision. That challenge could have been because the decision was illegal (though for the reasons outlined above I do not think it was), or was unreasonable (in a judicial review sense).

It is notoriously difficult, I accept, to succeed in any application for judicial review in relation to planning matters. A good example can be seen in a decision of the late Lord Macfadyen, *SHBA Ltd v Scottish Ministers*, 13 December 2001. In effect SHBA sought to challenge a decision by ministers not to have an examination in public into the Glasgow & Clyde Valley Structure Plan 2000. Lord Macfadyen had little difficulty in reaching the conclusion that the decision was not open to challenge, given the significant onus which lay on the petitioner in such applications. That case strikes me as a relevant example of the difficulties, albeit what was challenged was a decision not to act rather than a decision to act.

In conclusion therefore, my own view is that Scottish Ministers were entitled to issue a direction calling in the application at the time they did, and that decision was consistent with judicial views that it is not the resolution of the relevant planning authority which is relevant but rather the notice of that decision. For the reasons outlined above, however, if that view is correct, that does not necessarily mean that the actions taken by Scottish Ministers were beyond challenge.

In his article Mr Macari makes some comments about why ministers may have acted the way they did. In effect the question may be whether they acted reasonably, though as the inquiry has taken place that question for all practical purposes is probably academic. No doubt the views on such an issue may well be coloured by the views one holds in relation to the application itself – an entirely separate issue.

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*Murray Shaw is a partner in Biggart Baillie LLP*

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**Over the intervening period circumstances may change...**

**the authority should have the power to review its decision in light of those changed circumstances**
Home reports – the practice questions

The Society has published for consultation a series of proposed guidelines in relation to the operation of the home reports from 1 December. Iain Considine explains his firm’s reservations to the section dealing with conflict of interest rules, therefore, a clear breach of these rules for the selling solicitor to reveal to the purchasing solicitor that his client has obtained multiple reports before settling on one which provides favourable reading for his client? Indeed, is this also not a breach of client confidentiality rules? The very fact of the selling solicitor advising the purchasing solicitor that the purchasing solicitor could not act, even if no explanation is given, would be prejudicial to the seller’s case.

Another issue is where the selling solicitor does not actually know that there have been multiple reports. This could arise from the client obtaining a variety of reports prior to instructing the solicitor, and only providing him with the most favourable, or the property being taken over from another selling agent during the marketing. In the absence of any register of single surveys, the selling solicitor will have no way of knowing with certainty that only one single survey has been carried out.

What if more than one report was carried out for a perfectly genuine and ethical reason, i.e. the report is commissioned and reveals some necessary repairs? The seller has his repairs carried out and then commissions another report. Does this have to be revealed to the purchasing solicitor, and if that solicitor is within the same firm does he have to refuse to act for the purchaser?

More questions

3. Where a purchaser is to be advised to seek an additional independent report in cases where the firm already acts for the seller, the firm should not represent the purchaser due to the clear conflict of interest between the parties.
The very fact of the selling solicitor advising the purchasing solicitor that the purchasing solicitor could not act, even if no explanation is given, would be prejudicial to the seller’s case.

**Hard choices**

At the seminar, James Ness also confessed his understanding that there is likely to be general trepidation amongst purchasers and solicitors during the initial period of home reports and it is likely that many purchasers will want their own independent report. Solicitors will then be torn between giving what they believe to be “best advice”, i.e. obtaining an independent report, or having to refuse to act for the client.

It is clear that the proposals have not been thought out in a practical and commercial light. They are restrictive to business practice for any firm which is potentially affected under the conflict of interest guidelines.

We do note, however, that these are, at this stage, only guidelines, and not formal practice rules. As such, we feel obliged to point out that our own firm will not be adhering to these guidelines, and we would invite the remainder of the profession to join with us in this regard.

We are intimating this in the form of an open letter in the hope that we will obtain reaction not only from the Society, but also directly from Society members.

**James Ness, Deputy Director of Professional Practice at the Society, comments:**

I would remind members that the proposals were not proposed Guidelines but proposed topics upon which guidance might be formulated. The idea was to get the profession talking and thinking about home reports and the issues that might arise. The topics certainly did that and provoked substantial debate, comment and response at the six roadshows the Society held throughout the country.

Aberdeen Considine raise several issues amongst others which consistently came out of the roadshows, and final guidance will endeavour to reflect these.
Salad days

Abby Solvitor is not turned on by “team building” outdoor exercises that eat up precious weekends

In the words of the mighty Alice Cooper, “School’s out for summer”, and the streets of Scotland are populated by kids hanging around in a Lord of the Flies-type scene of ASBOs waiting to happen. That is maybe a tad harsh and, truth be told, you know you’re getting on a bit when you start reminiscing about the best six weeks of your young life. Oh yes, back then wasn’t it just a sepia-tinted time of endless sunshine, riding on bikes with no concern for the potential brain damage, and loving every minute of the great outdoors?

Now, I am as guilty of such Dylan Thomas-type nostalgia as the next person, but to be honest, no it was not. My actual recollections of summer are chomping Wham bars in front of the television whilst the tent took off down south, was no option but to force us into the outside, probably bored witless with our shrill squabbling, but it was an impossible task and there was no option but to force us into camping. Being detached from the sofa into a windswept camping trip where quivering bottom lips abounded, and sleeping in the car whilst the tent took off down south, was the long and short of my holidays. Not many families seemed to entertain the idea of finding sunshine, and only a couple of Lord Fauntleroys in any class got to head off to Disneyworld. It was a num do and generally resulted in tears before a cold bedtime, longing to be back at the office on the Monday is one for the conquering heroes, and anyone who baulks at the suggestion of joining these brave warriors is branded a bit of a lily-livered dilettante, like the Hanoi Jane hippy protesters to The Nam. Frankly ancient Sparta seems like a Saturday (yes, I do not say this lightly, a Saturday) traipsing through some God-forsaken forest in the Highlands with your colleagues (you know, the people you see every single waking minute, of every single week, of every year ad nauseam) lands in my inbox. It would appear that only a hard slog in the unwelcome terrain will overcome any of our inhibitions and result in us all “getting to know each other as a team” (surely by now an impossible and at the very least highly unappealing thought).

Forgive me if I’ll pass. However, it would appear that only a hard slog in the unwelcome terrain will overcome any of our inhibitions and result in us all “getting to know each other as a team” (surely by now an impossible and at the very least highly unappealing thought).

I can only assume this, as yet another “invitation” to spend a Saturday (yes, I do not say this lightly, a Saturday) traipsing through some God-forsaken forest in the Highlands with your colleagues (you know, the people you see every single waking minute, of every single week, of every year ad nauseam) lands in my inbox. It would appear that only a hard slog in the unwelcome terrain will overcome any of our inhibitions and result in us all “getting to know each other as a team” (surely by now an impossible and at the very least highly unappealing thought).

Abby Solvitor is the pen name of a practising solicitor

It would appear that only a hard slog in the unwelcome terrain will overcome any of our inhibitions and result in us all “getting to know each other as a team”
Looking back, I suppose I guessed it might be time to call it a day when in hospital at the end of 2006. No 2 son, normally a man of few words, appeared at the paternal bedside as a one-man delegation from my offspring and said, “If the doctors think it would help, we want you to give up work.” Over a year and a half later, still experiencing the after-effects of my (if I say so myself) rather spectacular pulmonary embolism, I have decided to retire.

After all, the final form of maturity is accepting that you are not indispensable. Someone else will do the work – perhaps differently, but it will get done. I am strongly of the view that, until you accept that business will go perfectly well without you, you have not truly reached adulthood.

For at least one year, I will practise no law – in fact, I may well never have anything to do with it again – unless perhaps a newspaper or broadcaster feels my views worthy of airing (I know there are many who would miss my take on things). But, that apart, it will be golf, roaring at articles in the Telegraph, bemoaning the ever-increasing price of mince, and generally being an annoyance to those still in work.

Further than this, I have decided to start travelling a bit – after all, I do not get about much. I want to visit countries with extremely funny names – the kind of countries I could not place on the globe. I want to meet people I do not even know exist. Since a ridiculously high percentage of the world’s population now speak good English, it should be perfectly possible to discuss with them the fundamental questions of life.

I have grown to hate the six-month Scottish winter more as I get older. So I will spend the first two months of the coming winter on the Sunshine Coast in Australia – stopping off at “Raffles” in Singapore on the way. I will end it with a month’s golfing in Florida. I am, I hereby intimate, open to offers for the months in between. My raconteur-like lecturing technique, for example, was much admired at various universities. I can talk authoritatively on matters about which I know nothing – like most lawyers, come to think of it. I am confident that I would be rather a good lecturer on luxury cruise liners.

Not one of us knows what the future holds. But even now I can say that if and when my health is restored, I do not want to follow the course taken by so many retired or semi-retired Scottish lawyers by becoming one of our funny little nation’s legion of quango-junkies. These folk cream off fees and expenses for turning up at meetings of the myriad pointless public bodies our politicians have created as sinecures for their suitably obedient and sycophantic friends. This degraded twilight “career” path inevitably leads to adulatory obituaries concerning the “fine public service carried out by Mr/Ms X”. How utterly pathetic. When I go I want there to be sighs of relief and rejoicing that the awkward sod who refused to toe the line is no more. That I would adjudge a fitting tribute to my somewhat offbeat legal life.

I am certainly not willing to spend the Scottish winter attending Edinburgh dinners and receptions full of dreadfully dull quango creatures telling each other how fascinating and indispensable they all are. Does it ever occur to them when venturing out into the cold night after one of these ghastly occasions that they are simply insignificant bores who have many acquaintances but no real friends? No wonder they fear retirement.

So now it is back to arranging golf dates and reading up on foreign places. Of course, it is a bit scary. Will my health recover, as the doctors have predicted? Will I have enough money to get by? But it is exciting too. It is rather like being back in student days, particularly Friday nights – full of expectation and possibilities. So now, metaphorically at least, I drive off with The Traveling Wilburys’ “End of the Line” on the CD player – a fitting anthem for my future.

So will I, like Round the Horne’s Dr Chu N Ginsberg, return? I really do not know. But in these pages I will be reporting back to you all. You will hear from me again.

When I go I want there to be sighs of relief and rejoicing that the awkward sod who refused to toe the line is no more
Sidelines

Home on the bench

Scott Rettie thinks he has made an impression on at least one sheriff principal

Had a meeting with my local Sheriff Principal last week. Part of what he told me was a "listening exercise". Thrown a bit off guard when he started off by asking me whether or not I regarded myself as 'lucky'. I explained to him that if he was referring to the unfortunate incident the previous week when I had knocked a full glass of water from the very narrow bench on to the clerk below, I had apologised profusely to the young lady concerned. I accepted that it wasn’t helpful to the dignity of the court that she had to sit through the rest of the criminal court looking like one of these people you hear of in these reality shows who take part in competitions involving wet clothes. He told me, rather coldly I thought, that he had not yet heard of this incident but that the local Public Service Union rep had recently requested a meeting with him.

I then thought he must have been referring to the day when I had started sitting, I no longer bounced into court throwing myself just started sitting, I no longer needed to struggle for words for a moment) "applauded"! The interview ended in a most cordial and positive manner with him confiding to me that his budget for “temp days” was going to be a little stretched in the coming year but that he should try and get more experience in some of the other sheriffdoms. We shook hands and the great man departed.

Say what you will about these sort of modern management techniques, if handled properly they really give a chap a real insight. 📜

Scott Rettie is the pen name of a solicitor who sits as a part time sheriff

Waxing lyrical: AC partners promote tour

Two partners with Aberdeen Considine & Co, Neil Pitlie and Ritchie Whyte, are to cycle 330 miles in four days round the firm’s 19 offices to raise funds for CLAN (Cancer Link Aberdeen and North). With true lawyerly attention to detail, both have volunteered, we hear, to have their legs waxed in best Tour de France tradition.

Called to judgment

The blessing of Australian law firm Corns Chambers Westgarth by Pope Benedict, attending his Church’s recent World Youth Day in Sydney, which Corns sponsored, has caused consternation among its professional rivals, we hear from local solicitor Paul Brennan – who it seems does not count himself on the side of the angels.

Following this “ultimate accreditation”, firms which have hitherto refrained from promising miracles are rushing to adopt prayer as the latest type of ADR. “It’s more satisfying than mediation, although we’re not sure as a business model that there is much money in it”, said one litigation lawyer.

Rumours circulate, Brennan adds, of Corns setting up a Canonisation Group, contacting clients to gain evidence of miracles performed – perhaps “set piece” events such as the suing of the 5,000, or breathing life into hopeless cases. Partners will be challenged to test their belief that they can walk on water.

And they could start passing the plate round in reception to offset the effects of the credit crunch.

Rallying for charity

Another Scottish firm improving its credentials at the pearly gates is Inksters Solicitors, who are sponsoring a team on the 10,000 mile Mongol Rally from London to Ulaan Baatar. Team Kanbee will tackle the venture, “in a car that the laws of physics say shouldn’t have made it past Peckham Rye”, to raise money for two charities supporting orphaned children and social and economic projects in countries en route and elsewhere. Last year’s rally raised over £200,000.
If you know your working lifestyle isn’t doing you good but can’t sort it yourself, there are those on hand to help. Louise Farquhar introduces her pick

Six of the best...

**Health tips for executives**

Many busy executives are feeling the pinch these days – not just from the credit crunch but from an expanding waistline. Long hours, business travel and fitting in family obligations all leave little time for exercise routines or quiet relaxation. Being overweight and stressed can lead to serious health problems, as well as poor productivity. Counter this with a few simple changes to your daily regime to see massive benefits to the way you look and feel – you might have a lot of fun too!

Here are my top six ideas:

**Be active!**
The occasional round of golf is a good start but won’t keep you fit. Instead choose the stairs rather than the lift, get out for a walk at lunchtime and start an office sports league. To really improve your fitness, try replacing the daily commute with cycling to work. The Bike Station in Edinburgh is a community project that offers several initiatives to employers to promote cycling amongst their workforce, including a handy Dr Bike maintenance service at your office, and training programmes to improve cycling skills and confidence.

- [www.thebikestation.org.uk](http://www.thebikestation.org.uk)

**Take a power nap**
John F Kennedy, Albert Einstein, Winston Churchill, Margaret Thatcher and Leonardo Da Vinci are all reported to have taken power naps during their hectic schedules. A quick “forty winks” in the afternoon can restore vitality to your working day, as the increase in morale and output is well worth the time it takes workers to have a short rest. For a little help the Hypnotic Power Nap is a self-hypnosis CD sold online by the Hypnoshop that uses special music and deeply relaxing voice effects to lull you to sleep in no time.

- [www.hypnoshop.com](http://www.hypnoshop.com)

**Have regular health checks**
Annual health assessments for employees are increasingly being incorporated into the ethos of forward-thinking companies. These physicals are very comprehensive, focusing on the early detection and prevention of health problems as well as offering advice on necessary lifestyle changes. BUPA operates a corporate programme of this kind and has a wide range of health testing available at locations throughout the country. Result: workers who feel looked after, with less long-term sickness.

- [www.bupa.co.uk](http://www.bupa.co.uk)

**Ask for help**
A full diary, unsupportive colleagues, failing to reach financial targets and working anti-social hours are common causes of stress. Busy professionals are also vulnerable to drink and drug addiction. LawCare is an advisory and support service for lawyers and their families which provides a confidential telephone helpline, one-to-one support and seminars on various relevant issues. They have a dedicated Scottish co-ordinator, volunteers with personal experience and an excellent website full of helpful information. Don’t be slow to ask for help if you are facing problems: these concerns are common and can be treated successfully.

- [www.lawcare.org.uk](http://www.lawcare.org.uk)

**Keep a tidy desk**
“A cluttered desk is a cluttered mind”, so the saying goes, not to mention the cup of cold coffee waiting to be spilled over that important file and the health risks associated with mouldy bits of sandwich lurking in the keyboard. To keep tidy have a weekly desk clearout, filing and recycling as you go, don’t eat at your desk, and hang coats and bags somewhere hidden. If you need some professional help, clutter expert Helen Doig can come to your office and sort out storage, filing and generally get you organised.

- [www.yessyess.com](http://www.yessyess.com)

**Go on holiday**
Holidays mean different things to different people, whether it’s lying on a beach sipping a pina colada, or scaling Everest or hacking through the Amazon jungle in order to relax. Whatever your choice, taking a break from work to recharge is essential to health and happiness. And going on holiday means just that – no phone calls, emails, or files sneaked into your suitcase! The internet has some fantastic ideas for vacations including some great last minute bargains.

- [www.lastminute.com](http://www.lastminute.com)

For further ideas see:
- [Healthy food for the office](http://www.beetrootblue.com)
- [Deep Vein Thrombosis Prevention](http://www.dvtsafetyzone.co.uk)

From the Journal archives

**50 years ago**
From *The Solicitors (Scotland) Act 1958*, August 1958: “The powers of the Discipline Committee are materially extended by the provisions of Sections 5 to 8 of the Act. At the present time the Discipline Committee have power to fine a solicitor and to reprimand him but they have no power to suspend him from practice or remove him from the Roll and can only report him to the Court. The new provisions are designed to give the Discipline Committee power to suspend a solicitor from practice or strike him from the Roll.”

**25 years ago**
From *“New fixed penalty system”*, August 1983: “Many traffic offences, including speeding, can now be dealt with out of court by fixed penalty… The motorist is invited to pay the fixed penalty and, if the offence is endorsable, send in his driving licence to be endorsed. The fixed penalty is £20 for an endorsable offence – for example, speeding – and £10 for a non-endorisable offence, for example, failing to wear a seat belt.”
Details of venues, speakers, programmes and CPD hours are available on our website.

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**EVENTS**

### AUGUST

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<td>Private Client Conference (Stirling) (6 hrs)</td>
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### SEPTEMBER

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<td>10</td>
<td>Stress Management and Recognition (Glasgow) (3 hrs mgt)</td>
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<td>11</td>
<td>Home Reports (Dumfries) (6.5 hrs)</td>
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<td>16</td>
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<td>Home Reports (Aberdeen) (6.5 hrs)</td>
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<td>Manual Bookkeeping and Accounts Rules for Sole Practitioners (Edinburgh) (7.5 hrs mgt)</td>
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<tr>
<td>26</td>
<td>PI Update Conference (Glasgow) (6hrs) <em>(To register for this conference please contact <a href="http://www.apil.org.uk/training">www.apil.org.uk/training</a>)</em></td>
</tr>
</tbody>
</table>

### OCTOBER

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Home Reports (Glasgow) (6.5 hrs)</td>
</tr>
<tr>
<td>1</td>
<td>Legal Advice for the Older Client (Stirling) (6 hrs)</td>
</tr>
<tr>
<td>7</td>
<td><a href="mailto:e-legal@nothing.but.the.net">e-legal@nothing.but.the.net</a> (Glasgow) (6 hrs)</td>
</tr>
<tr>
<td>14</td>
<td>Drafting a Trust (Advanced Level) (Edinburgh) (3 hrs)</td>
</tr>
<tr>
<td>22</td>
<td>Negotiation Skills (Edinburgh) (2hrs)</td>
</tr>
<tr>
<td>29</td>
<td>Understanding Business Finance (Glasgow) (7 hrs mgt)</td>
</tr>
<tr>
<td>30</td>
<td>Understanding Business Finance (Edinburgh) (7 hrs mgt)</td>
</tr>
</tbody>
</table>

### Data Protection – Online Learning Module

- Written by Martin O'Neill and Angus MacLeod, Wright, Johnston & Mackenzie LLP, this course is designed to provide you with an understanding of the law relating to data protection in the UK, and will give you an overview of some of the key aspects of the relevant legislation before looking at some specific areas in more detail.
- Modern technology means that the potential for collecting, sharing and processing data is increasing at an exponential rate. Almost every individual and business in the UK is subject to provisions of data protection legislation. All practitioners, whether advising individuals, businesses, or both, should be familiar with it.

**Rating:** *****  
**CPD value:** 2 hours  
**Price:** £77.55

For further details check out the online learning section on our website.

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**ALTERNATIVE CPD**

If time is an issue and you cannot attend live events, we have other options which may suit you better.

- **CPD Online** – our web based distance learning interactive modules.
- **CPD via DVD** – Up to 4 hours general CPD in your own locality or DVDs of Live Events. See our website for more information.

From September a booklet containing full programme details of all our events can be found within the Journal. A pdf version of the booklet can be downloaded from the Society’s website. If you would like this emailed to you on a monthly basis, please contact us at update@lawscot.org.uk.