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Society news>
Turn to pages 29-35 for PC fees; caution for guardians; OU and Scots law; Stair Encyclopaedia at 21; complaints processes. Website: www.lawscot.org.uk.
There has been much news affecting the profession in the past month, adding to the feeling that it is difficult to guess what may be round the corner.

Hang in there

Taking the medicine
Another month of difficult economic news culminates as I write this in the government’s announcement of the temporary (12 month) raising of the stamp duty threshold, coupled with the loan assistance for first time buyers in England.

At least we now have some action, after much criticism from market professionals of hints followed by denials which only added to the general uncertainty. Whether and to what extent it will help turn the market round, only time will tell.

Within the two days prior to the announcement, two leading legal firms in the Scottish property market had between them confirmed over 60 redundancies, and there have been many others less publicised, as well as intending trainees and NQs finding themselves left without the position they thought they had secured. Our lead feature this month attempts to assess the state of the legal jobs market through the eyes of recruitment firms active in the area, and while it is true to say that the position is extremely difficult in the property sector, the overall position is far from being as gloomy, especially if those looking for work are able to be flexible about what they apply for and where.

As one recruiter comments, people are for example still having accidents, splitting from their partners, or simply dying, so there is plenty or work to be done. Hang in there.

Speaking the same language
The Special General Meeting of the Society called by the Glasgow Bar Association was a rather curious affair. Clearly the two bodies have not seen eye to eye in relation to summary criminal legal aid, nor has everything suddenly become sweetness and light, but there was a positive feeling about the outcome – three agreed resolutions – as demonstrating that there is indeed a common purpose, and perhaps now a better understanding by each organisation of the other’s position.

Last month we wondered whether the tactic of calling the meeting would add to the weight of opinion in the public domain. If it results in a greater unity of purpose, there is every chance that it will.

Moving target
The decision of the Scottish Legal Complaints Commission, whose opening is now imminent, to accept complaints relating to matters instructed on or after 1 October, makes for a simpler and cleaner break from the current system in one way, but has caused its own anomalies in others. Those who have retired, or found themselves out of work, since the cut-off point for raising the first annual levy are not happy at having to pay something which will not relate to work they have carried out; and there is also the question of the size of the levy when the Commission will have little to do in its first months (and is phasing in its staff accordingly).

Those continuing in practice at least have the assurance that any surplus from one financial year will be carried over into the next. That the goalposts shifted compared with what the Society had been led to expect will be of small comfort to the others liable, but it does highlight the importance of basic transitional provisions being set out well in advance and not left to administrative decision at such a late stage.

Stop press
Just as we were going to press, the Society’s Council decided on a budget for the coming practice year which would mean no rise in the practising certificate fee (the Guarantee Fund and Master Policy will not unfortunately be able to follow suit). Those who were expecting an actual cut because of the SLCC should by now know why that will not happen (see Journal, August, 38), and having observed some of the Council’s discussions we can say that it has taken some difficult choices to get to where we are. For this much, give thanks.
An eventful month demonstrates the Council and Society making every effort to improve services for members and the environment within which they work.

Both staff and Council are working to implement changes in the Society’s management and governance which will ensure it is fit for purpose in the years ahead – from education and training to professional support – at the lowest cost possible in challenging economic times. The cost of the practising certificate was therefore uppermost in our minds during the process of preparing next year’s budget.

As a result, and despite sustained pressure on our resources and increased workload, Council decided to hold the cost of the PC at last year’s levels. In ordinary circumstances, we would be recommending at least a rate of inflation rise. This is a cut in real terms and means that we cannot do all of the things we would otherwise want to do, but this decision will go some way to minimising next year’s costs for members.

**Commission costs**

The annual levy for the Scottish Legal Complaints Commission is a significant burden for the legal profession. I would like to thank all those who responded so promptly to the invoices, when many questioned the Commission’s significant costs, others opposed its establishment in the first place and the Society would rather not collect this fee from members. I hope a constructive relationship can be built when the new body opens its doors for business in a matter of days.

Several people have questioned why PC levels cannot be reduced as the Commission comes into force. The answer is that from October onwards, the Society will continue to handle all conduct complaints (including the new category of unsatisfactory conduct) and all service cases dating from before 1 October. Consequently, our complaints handling obligations will remain substantially unaffected by the Commission, for at least another year. The Commission may therefore have overestimated its own workload and we will press for a significant reduction in the annual levy in 2009 if there is any surplus this year.

**CRO for you**

Changes to the Client Relations Office will ensure that solicitors receive the best possible service from the Society in the new regulatory landscape. A new Regulation Liaison Team has been set up under Mary McGowan to offer advice and assistance to solicitors about every stage of the complaints process. More details appear on p 34 of this edition. I am sure members will find this a valuable service.

Reorganisation of CRO’s functions is one of many areas in which the Society is developing focused and cost-effective services for members. At the end of last month, Council members approved revised sets of standards for service and conduct, to be consulted on and then put to this month’s Special General Meeting. The new standards will clarify what those using legal services can expect from their solicitor – for the benefit of both the public and the legal profession.

**Visions of the future**

The proposals in the corporate governance discussion paper considered by Council last month will also refocus the ways we work to meet the needs of solicitors effectively and efficiently. All the Society’s functions have been examined and radical reforms to the Council, committees and departments are recommended. With the backing of Council members, we will now move ahead with some realignment of functions in the short term, followed by more extensive reconfiguration in the longer term. The profession will be kept informed and consulted. They will also be asked to vote on any fundamental changes, such as revisions to the constitution.

A passionate interest in the future of the legal profession and system was certainly evident at the SGM called last month to discuss changes to summary criminal legal aid. It was heartening that those present gave overwhelming backing to the Society’s representatives in the group reviewing those reforms. All those involved are well aware of the difficulties facing practitioners, particularly in the current economic climate. Equally, the cuts to summary legal aid and levels of bureaucracy – both the subject of motions at the SGM – are matters that should concern us all.

**The home report challenge**

It is disappointing that the Scottish Government was not prepared to back our suggestion to delay home reports because of the downturn in the property market. In response to its decision to press ahead with the introduction on 1 December, the Society is continuing to give extensive guidance to assist members with compliance. The Society has also decided to produce our own online home report pack: for more information see p 70. Any profit made on the packs will be reinvested for the benefit of members. It is an innovative response to a challenging development and further evidence of a flexible, businesslike determination to meet the needs of the profession.

I also urge members to keep in touch on this issue so the Society can continue to press the government for action on the economy.
I read with interest the article entitled “Beyond chip and PIN” by Laura Reid and Michael Bromby (Journal, July, 50).

I am heartened to see evidence that the appetite for electronic business within the Society’s membership is growing, thanks, perhaps, in no small part to the introduction of ARTL. However, I would like to take the opportunity to clarify a couple of points about ARTL raised in the article and assure the users of ARTL that the system’s security and integrity is of paramount importance to the Keeper.

At Registers of Scotland we are confident that the digital signatures created through ARTL meet the standards for advanced electronic signature as set out in the Electronic Communications Act 2000. The use of a strong, secure PIN, such as is enforced by the ARTL system, provides the necessary level of authentication to give the required element of non-repudiation. By non-repudiation I refer, in this context, to the concept of ensuring that a party who has digitally signed an ARTL digital deed cannot repudiate or refute the validity of the signature.

In this day and age no business computer user should be in the habit of leaving their PC unattended while logged on. As the article correctly points out, this is a major security risk where the private key associated with the digital certificate is stored in the computer’s software. In the ARTL signing solution the private key is stored on a smartcard. The smartcards are configured to require the user to authenticate themselves, by way of the correct entry of the PIN, whenever a signing operation is performed. The public and private keys are actually generated on the smartcard, which, apart from storage space, has enough computational capacity to perform the signing function as well, so even when signing a deed within ARTL the private key never actually leaves the secure device.

The issue of liability is nearly as hot a topic within the PKI community as it is within the legal profession. To reduce any potential exposure of the Keeper’s indemnity, prospective users of the ARTL PKI must have their identity verified in line with UK Government standards similar to those for money laundering before they are issued with a digital certificate. The uses for which ARTL digital certificates are authorised are restricted for the same reason. To assure ourselves and our users that the PKI element of ARTL is effective and applies recognised best practice, we have recently achieved accreditation for both tScheme (www.tscheme.org), which is an independent, industry led scheme set up to approve providers of trust services, and the technical standard ISO27001 (en.wikipedia.org/wiki/ISO_27001). The tScheme and ISO27001 assessments covered not only the quality of the technical solution provided by ARTL but also the policies and procedures put in place to manage it, the administrators and the users within it.

Three or four years ago, when ARTL was being designed, Registers of Scotland explored the possible use of a biometric element (fingerprint, iris scan, etc) to control access to the private key. Unfortunately, the technology at the time did not appear to be mature enough. It has of course improved since then. Registers of Scotland is monitoring current developments in the field. We anticipate that from time to time in the future ARTL (including its PKI) may be upgraded to keep it in line with the latest industry best practice.

Kevin Ramsay, ARTL Technical Manager, Registers of Scotland

Cost control

It’s good to see government helping to keep down inflation. From Friday 1 August, the cost of confirmation rose from £129 to £190, an increase of 47%. How is that justifiable?

Donald I S Skinner-Reid, VMH LLP, Edinburgh
The Special General Meeting requisitioned by the GBA was called to air the views of the profession, and the resulting agreement was the most positive aspect of it

Sending a unified message

The Glasgow Bar Association has been closely following the reform of summary criminal procedure and criminal legal assistance for about a year now; the livelihood of many of our members is solely dependent upon it. It is no secret that we did not agree with the approach adopted by the Law Society of Scotland in April 2008, when the proposals for a new summary criminal legal aid payment regime were finalised. The Society “cautiously welcomed” the proposals and simply wished them kept under review. Our members were very much against the proposals and voted unanimously in favour of taking a stance against them at that time. We knew that the proposals would mean cuts in fees already frozen for nine or 16 years.

GBA members recognised that there might be benefit in being a part of the review group, but also had misgivings. We resolved to consult fully with our members. The debate at the meeting, as with many before in relation to the reforms, was educated, articulate and thoughtful. The types of issue raised were the fact that involvement in the review implied acceptance of the Government’s 6% cut in the summary criminal legal aid budget; the dismal history of the supposed review process in relation to civil legal aid; the legitimacy of the review group’s constitution and mandate; the lack of assurances given in relation to the review process; and the lack of parameters or remit for the review. In relation to the last point, I had sought clarification from the Cabinet Secretary, on two occasions. His reply declined to give any assurances or even commit a clarification from the Cabinet Secretary, however, it is difficult to see what has changed since our vote was taken earlier in the summer.

In my view the most positive aspect to come from the meeting was a near unanimous agreement that the profession must work together, towards the common good. It is thus to be hoped that the Society will seek to ensure that it is truly representative of its members and work to promote the aims of the majority.

Members and non-members alike were concerned about the impact of summary criminal legal aid reform

The GBA's intention in requisitioning the SGM was to canvass the views of the profession, at a single forum, in relation to these important areas. Against that background, the GBA was surprised to hear from more than one Law Society of Scotland office bearer during debate at the SGM that they had thought the meeting was likely to be a “waste of time”. Despite the anti-GBA rant by one review group member, and the incredible admission from the Vice President that he had considered “rigging” the vote, the GBA thought the meeting served a most useful purpose. To air the views of the profession was exactly why the meeting was requisitioned. The three motions, which were passed unopposed, will send a unified message from the profession that the cut in the summary criminal legal aid budget is unacceptable and will provide a mandate to the members of the review group to press for change, which will be to the benefit of us all. The motion condemning increased bureaucracy will allow the Society’s representatives to attack the changes made in the application procedures and in other areas by the Scottish Legal Aid Board.

The motion expressing support for the members of the review group (rather than for the review process itself) was a Society motion. The GBA understands that the review group has asked the Cabinet Secretary to commit the remit of the review to writing and to provide written assurances, in terms that he has thus far failed to provide to the GBA. In the event that such a written remit or assurances are forthcoming, the GBA would immediately revert to all members seeking clarification as to whether they wished to have a representative on the review group. With nothing definite from the Cabinet Secretary, however, it is difficult to see what has changed since our vote was taken earlier in the summer.

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Feature Legal job market

Amid all the reports of business slowdown and redundancies in the legal profession, what is the true state of the legal jobs market? The Journal surveyed the main legal recruitment consultancies to find out – and checked out where those currently not in work stand as regards keeping their practising rights.

Facing the squeeze

Redundancy is not a word much associated with Scottish solicitors in the past, but times are not as they were. With the wheels having fallen off the housing market in the wake of the credit crunch, reports of legal firms being forced to lay off staff, fee-earning and non-fee-earning alike, are commonplace.

“The latter half of 2008 is obviously a very difficult time for many Scottish law firms”, says Eddie Docherty, head of legal recruitment at Hammond Resources. “The downturn in the property sector is having a drastic effect, especially on the small and medium-sized firms who were used to having a steady income stream from the conveyancing side of their businesses. Bigger firms too are seeing a slowdown as the construction industry is suffering and there is a lack of liquidity in the market: for this reason many firms have slowed their recruitment activities.”

Nor are the specialist residential property firms immune; quite the reverse. Member firms of the Edinburgh and Lothians Property Group, and leading property firms in Tayside and the north east, announced redundancies or short time working as this feature was in preparation.

At the same time we have heard occasional reports from small offices of broader based general practices that they have “never been busier”. So what is the real employment picture in the Scottish solicitor profession at present? Are there jobs, and if so where? The Journal asked its regular recruitment advertisers for their assessment of the situation.

Outlook: poor, with bright spots

Those who responded were more or less agreed that there is currently little joy in the property sector. “Prospects are pretty grim as the majority of the solicitors being made redundant, particularly within domestic conveyancing, have only ever worked in this area”, comments Sharri Plimbley of Search Legal.

“There are very few opportunities for property lawyers in Scotland at present”, Liz Frost at Hudson adds.

“There are occasional vacancies within the public sector. If there is a chance to retrain within their present firm this is definitely a good option.”

For paralegals the prospects are even worse, particularly in the central belt. Plimbley’s colleague Jill Cowan reports that the number actively seeking work in property greatly outweighs the available vacancies, and advises candidates to seek temp or...
attend and vote at General Meetings. This way you can keep in touch and still be a member of the Society.

(2) Simply be retained on the roll at a cost of about £65, for which all you get is an annual request for the retention fee.

As long as you stay on the roll you can apply for a practising certificate at any time, and the Society is assuming that a certain number who currently hold a practising certificate but do not at present need one, will not renew in the autumn when it falls due. The crucial date for liability for next year's levy will be a date in December 2008, to be confirmed. All those who have a practising certificate on that date will have to pay the levy in 2009. (Solicitors intending to retire from practice should note that their practising certificate requires to be surrendered prior to the relevant date; it is not enough simply to retire from their firm.)

If more than 12 months elapse since the last practising certificate was held, s 15 of the Solicitors (Scotland) Act 1980 gives the Council discretion to refuse (hardly ever exercised) or impose a restriction from practising as a principal or being a nominated solicitor on a legal aid certificate (almost always done). That restriction is normally for a year.

Waiting for that traineeship
For those who find themselves currently unable to complete their professional training, Liz Campbell, Director of Education and Training at the Society, has this advice:

There is no time limit on the validity of an LLB degree. However, we do check that everyone coming into the profession has the up-to-date professional requirements in undergraduate subjects. If there has been a particularly long gap between degree and Diploma, there may have been changes in the professional subjects. Anybody in that position is advised to check with the Diploma provider they intend to apply to and the Education and Training Department.

The Admission as Solicitor Regulations set a time limit for commencement of a training contract of two years from 1 January in the year following the year in which the Diploma was completed (in other words a period of about two and a half years). However, it is possible to apply for a waiver of that regulation (reg 8). A first application for a waiver is considered administratively under delegated powers. In a waiver application, we would expect to see the reason for a training contract not having been commenced, evidence of seeking a traineeship if appropriate (for example, if somebody has been completing a masters degree or PhD, they would not have been looking for a traineeship), evidence of relevant work in the period since finishing the Diploma and evidence of their efforts to keep their knowledge of law up to date. A waiver, if granted, will usually be for one year. Any further waiver application(s) will be referred to the Admissions Committee which would be looking for the same type of evidence. The committee may impose conditions in granting a waiver.
retraining opportunities. However there are still some openings in private client/executries, and contract/commercial.

But some claim that the picture is not uniform across the country, such as Stuart Coull of G2 Legal. "Edinburgh has seen the knock-on effect of its large financial services client base and its close links to London. The Glasgow property market has been particularly badly hit. However Aberdeen has only recently been affected in any way and it is really only residential and commercial property that has seen redundancies."

Liz Frost agrees that the north east is bucking the trend to some extent: "Aberdeen is still fairly buoyant due to the oil and gas industry. The central belt is definitely seeing a dramatic reduction in the number of opportunities in both private practice and in-house."

Sharri Plimbley, while reporting that Search's four offices "are all experiencing the same slowdown in the same areas, i.e. residential and commercial conveyancing, construction and corporate", adds that they haven't seen a lot of redundancies on the commercial property side, and where there have been, solicitors seem to have been able to diversify into construction roles, for example.

**What's on offer?**

So what practice areas are still seeing activity in the current climate?

"There is still a demand for construction, projects and environmental and planning lawyers", says Frost. Most others point first to court work. "Litigation is emerging as the growth area for legal recruitment", claims G2's Victoria Watson. "Both civil and commercial litigation (reparation, personal injury, construction and property), as well as employment law, corporate, corporate tax, oil and gas and PFI projects are still strong recruitment areas. Family and crime are fairly recession-proof, and debt recovery has had a new lease of life."

Plimbley's view is "civil litigation: personal injury, debt recovery, family, employment, insolvency etc; and in-house has been very buoyant this year and remains so."

Eddie Docherty, while again pointing to Aberdeen as an area where the market is holding up quite well through the oil and gas sector ("Corporate departments there are still busy, albeit not as frenetic as they were earlier in the year"), adds: "Across Scotland there is still a shortage of good employment lawyers, and debt recovery and insolvency specialists are more and more in demand."

Stuart Coull however sounds a note of caution over moving to another type of work. "Changing the area of law practised is always very tricky. Residential property lawyers often get sidelined into private client, and commercial property lawyers into property finance, construction or projects. However the nature of the market generally means that non-contentious work as a whole has been hit, and waiting for the market to bounce back might be the only option for most people."

**The rural picture**

If lawyers are willing to move to where the work is, what about the more rural firms, the traditional poor relations of the recruitment market despite their best efforts to talk up the quality of life outside our cities? Or have...
For those solicitors, and firms, facing up to the unfamiliar prospect of redundancy, these are the principal points to bear in mind:

**Employee’s rights**
(for those with at least two years’ continuous service)
- To a statutory redundancy payment calculated on basis of age and length of service (subject to upper limit of £330 on a week’s pay)
- To be offered suitable alternative employment (if available)
- To a trial period in the alternative employment without losing the right to a redundancy payment

**Employer’s duties**
- To reasonable time off on full pay for job hunting or to arrange training
- Not to be unfairly selected for redundancy.

**Selection criteria to those in the selection pool**
- To consult individuals and follow the statutory discipline and dismissal procedure
- Where 20 or more redundancies are proposed – consult collectively with trade union or employee reps
- To consult with a view to avoiding, minimising or mitigating the effects of redundancy dismissals

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**Tougher for the NQs**

If it’s a buyers’ market, how does that reflect in the type of candidates being sought? The majority of our recruiters claim that the lawyers most in demand at present are those with some years’ experience, and preferably a client following. “Senior lawyers with a real following rather than a ‘black book’ of contacts will always be sought after”, says C2’s Watson. Liz Frost of Hudson reports that “Many of the private practice firms across the central belt currently have a recruitment freeze in place for all staff, unless a candidate has outstanding experience or has a specialist discipline which is hard to source, such as pensions/tax… the majority of vacancies across Scotland (although few) are at four years’ pqe+.”

While Frost believes that most 2008 qualifiers have secured positions, there have been those whose expectations of having a job to go to have been rudely shattered by their prospective employers having second thoughts – a situation reflected in that of a number of intending trainees. Other recruiters acknowledge that this will prove to be a tough year to qualify in.

“The jobs market for newly-qualified solicitors is as bad as it has been for many years”, Hammond’s Docherty comments. “Many NQs are being informed that the job they had been due to start has been scrapped as a result of the downturn. If you are a newly-qualified solicitor looking to work in property then this really is a tough time.”

Victoria Watson notes: “In times like these we see a polarisation in the market – firms tend to side with expensive, senior and cast iron, or lower level, cheaper and low risk. This creates a vacuum quite often in the NQ-five year market and NQs this September are going to find it incredibly tough.”

Sharrl Plimbley of Search sees less of an imbalance: “The picture hasn’t really changed in that respect. We still have senior roles for solicitors in the areas of private client, family, employment and in-house, but we have also been busy at NQ level although there will be a higher number of 2008 qualifiers who struggle to secure their first assistant’s post this year.”

Looking at the overall picture she agrees that there is currently a surplus of candidates: “Up until six months ago if you hadn’t...”
worked within commercial property but had an interest within this area you were being given a chance, whereas now firms will wait to get their absolute ideal.”

But it isn’t the case, as some appear to think, that you have to keep up your practising certificate or come off the roll altogether – see the panel (pp 10-11) with the information from the Law Society of Scotland about breaks in employment within the profession.

Ex-pats return?
What about opportunities for those prepared to look down south? As is well known, the property market in England & Wales has if anything suffered an even sharper reverse than in Scotland, and Sharii Plimbley relates the feedback from her English colleagues as indicating that “the number of Scots relocating to the south has dramatically declined, and it is more the reverse, people wanting to come back up to Scotland.”

Eddie Docherty on the other hand believes there are still openings: “London is a huge market, and while the effects of the downturn are being felt there too, there are always jobs for good lawyers, especially in the banking, corporate and IP/IT areas.”

G2’s Watson dares to hope that England & Wales may already have seen the worst. “Outside Scotland things have levelled out. In England (where we have six offices) I think we have seen the bottom and firms have emerged from the frankly ridiculous state they were in six months ago where some firms panicked and put recruitment on hold…. I think lawyers have realised that outside of property and some finance disciplines it really is business as usual – people are still having accidents, getting divorced, committing crime and dying. No doubt that will filter northwards over time. Dublin (where we also have an office) has still got a strong market for corporate, PFI projects, construction litigation and tax.”

Liz Frost however warns that “if the economic slowdown continues, the number of 2009 qualifiers [in Scotland] being retained within their present firm or securing new jobs will be very limited.”

To the four corners
Asked about prospects even further afield, our recruiters report an overall downturn in activity but a few continuing hotspots. Frost notes: “The most common locations for Scottish lawyers to relocate in the past few years have been Australia, Asia, Dubai and London. Due to the fact that the economic slowdown is a worldwide issue, there has been a decline in the number of opportunities overseas (with the exception of Dubai and Eastern Europe).”

Even property lawyers, she reports, are still in demand in Asia and the Middle East.

And Eddie Docherty says Hammond is currently “assisting international law firms who are very active in Dubai, Abu Dhabi and in Eastern Europe and they are finding it very difficult to recruit lawyers with strong experience in corporate, banking, commercial property or IP/IT. If you are a good lawyer with experience of working for a big firm then there are fabulous opportunities out there”.

A longer view
So, taking as the bottom line question “Are there enough jobs to go round?”, the answer appears to be, not if you are in property, in the short term at least, and not without being prepared to migrate if necessary in search of work. As Victoria Watson puts it: “There are enough jobs around unless you are in one of the ‘hit’ areas. If you are in residential or commercial property it just needs confidence to return and I think there will be a surge in roles, given that firms have been so cautious over the past few months.”

Solicitors looking for work will certainly be hoping that Chancellor Alistair Darling’s remarks about the downside risks facing the economy, which hit the headlines shortly before the Journal went to press, will prove unduly pessimistic. But perhaps their employer firms too need to take a longer view. As Liz Frost reminds us, “In the early 1990s the UK suffered a recession which resulted in not enough lawyers being trained or graduates moving into the profession. As a result, when the market improved and until very recently, the legal market became very candidate-tight in many disciplines, such as private client, corporate, projects, construction, pensions, tax and employment. Law firms need to be careful that history does not repeat itself.”

Tailpiece
What can firms do to keep their staff motivated during a downturn? Working in partnership with a charity called Challenges Worldwide (CWW), Hudson-Legal is offering some ideas to help their legal clients continue to invest and develop their people and brand. Hudson helps to source and place Scottish based lawyers for short-term international assignments in NGOs to benefit some of the world’s poorest people. The assignments are legal roles which not only improve their own personal and professional development, but can enhance their existing legal skills which in turn will benefit their employers on their return. To find out more, contact Liz Frost, Hudson-Legal on 0131 555 9913.

For more information on Challenges Worldwide and the central resource created by the Law Society of Scotland for firms hoping to become more involved in corporate social responsibility opportunities, see Journal, March 2008, 28.
The Scottish Legal Complaints Commission will shortly take over the Law Society of Scotland’s role in receiving complaints against solicitors and adjudicating on inadequate professional service. However, complaints about the conduct of solicitors will continue to be dealt with by the Society.

Under the Legal Profession and Legal Aid (Scotland) Act 2007, the Society has been given the power to investigate cases of unsatisfactory professional conduct. This is a new category of complaint which falls short of professional misconduct. By contrast, more serious allegations of professional misconduct will continue to be referred to the Scottish Solicitors’ Discipline Tribunal (SSDT). Whilst the burden of proof in professional misconduct cases applied by the SSDT is the criminal standard of proof in their factual decision making in such cases. Like many other regulators, the GMC follows a three stage process after hearing evidence:

- whether the facts alleged have been found proved;
- whether, on the basis of the facts found proved, the doctor’s fitness to practise is impaired; and
- whether any action should be taken against the doctor’s registration.

Whether or not proved facts amount to impairment of a doctor’s fitness to practise is a matter of judgment and not proof: RHP v GMC & Biswas [2006] EWHC (Admin) 464. It may therefore be that the SSDT will come under pressure to apply the civil standard of proof in professional misconduct cases.

Like many other regulators, the GMC has moved away from applying the criminal standard of proof in fitness to practise (“FTP”) proceedings. Already, the majority have moved or are moving towards applying a “flexible” civil standard of proof instead.

**Medical precedent**

By way of example, the General Medical Council is the independent regulator for doctors in the UK. It recently consulted on the introduction of the civil standard of proof at fitness to practise panel hearings when decisions are being made on disputed facts. Previously, the GMC applied the criminal standard of proof in their factual decision making in such cases.

Independent regulators of professionals in the United Kingdom are increasingly moving away from applying the criminal standard of proof in fitness to practise (“FTP”) proceedings. Already, the majority have moved or are moving towards applying a “flexible” civil standard of proof instead.

**Public interest?**

The move towards the flexible application of the civil standard of proof in fitness to practise proceedings has been justified by some professional regulators on the basis of the protection of patients/clients and the public interest, as well as being fair to professionals. However, public safety has not been accepted as a justification for lowering the standard of proof in criminal cases. For example, in June this year, a bill was introduced to the Scottish Parliament to reform the law on rape and sexual assault. Despite the low conviction rates, there has been no suggestion of changing the standard of proof in such cases to the balance of probabilities.

Similarly, public safety arguments do not justify a change to the standard of proof in FTP panel hearings. It has also been argued that the introduction of the flexible civil standard of proof will enable a lower threshold for findings of impairment to be made, thus enabling regulatory panels to take action more easily on less serious matters. But many regulatory panels already have powers to deal with matters falling short of findings of impairment, by way of issuing the professional in question with a formal warning.

In addition, other mechanisms exist...
for dealing with complaints that fall short of professional misconduct. Under the 2007 Act, for example, the SSDT has the power to remit a complaint back to the Society when it is not satisfied that the solicitor has been guilty of professional misconduct but considers that the solicitor may be guilty of unsatisfactory professional conduct. A range of sanctions are available to the Society should it make a finding of unsatisfactory professional conduct, including censure, fine, compensation or an order for retaining.

**English developments**

In recent years, English courts appeared to have moved away from regarding the civil standard of proof as a rigid criterion by which facts were to be judged. Instead, the standard was to be tailored to the nature of the particular case. As Lord Justice Richards explained in *R (N) v Mental Health Review Tribunal* [2006] QB 468: “the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before the court will find the allegation proved on the balance of probabilities”.

For example, the risk of erasure of a doctor from the register is obviously a very serious consequence. In such cases, the General Medical Council intends to apply the rigour of the criminal standard of proof or a standard close to it when making findings in fact. By contrast, the consequences of sanctions other than erasure, such as issuing a written warning, are much less profound. In such circumstances, the GMC hopes to apply the civil standard of proof more flexibly. The application of the flexible civil standard of proof has not been confined to decisions of professional regulatory panels. In considering an appeal against banning orders preventing attendance at football matches (*Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213), Lord Phillips MR explained that “While technically the civil standard of proof applies, that standard is flexible and must reflect the consequences that will follow if the case for a banning order is made out. This should lead the magistrates to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard.”

Similarly, in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787, Lord Steyn judged a case dealing with applications for antisocial behaviour orders to be civil in nature. However, he took the view that some reference to the heightened civil standard would be necessary given the seriousness of matters involved.

**Recipe for confusion**

This approach has led to some confusion, as Lord Hoffmann recently observed on reviewing the English authorities: “Some confusion has, however, been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil… but nevertheless thought that, because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent

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Continued overleaf >
Inconsistency in decisions by regulatory panels may in turn lead to an increased number of legal challenges

There is no justification in Scotland for that approach, and if it were applied it might well lead to uncertainty in any case where an allegation of serious criminal or immoral conduct was made.”

More recently in Wilson, Pet [2008] CSOH 96, Lord Uist indicated: “In my view there are only two standards of proof recognised by the common law: proof on the balance of probabilities and proof beyond reasonable doubt. There is no intermediate standard of proof, such as some kind of higher balance of probabilities. This was made clear by the judges in Mullan v Anderson”.

**Future prospects**

The increased application of the flexible civil standard of proof by professional regulators in FTP proceedings may therefore lead to uncertainty. Regulatory panels often include a mixture of professional and lay members, together with members who are not legally trained. The flexible civil standard of proof is a much more difficult concept for regulatory panels to understand and apply than the criminal standard of proof.

The practical effect of the application of the flexible civil standard of proof in FTP proceedings may amount to the application of different tests depending on the precise circumstances of any given case. Inconsistency in determinations by regulatory panels may in turn lead to an increased number of legal challenges.

A decision of the General Medical Council to suspend a Scottish general practitioner from the register for a period of three months was recently appealed to the Court of Session: Mullan v GMC [2007] CSIH 17.

Despite dismissing most of the charges, in light of all the evidence and its findings in fact, the FTP panel concluded that the doctor’s conduct fell seriously short of the standards expected of a general medical practitioner. As a result, she was found guilty of serious professional misconduct. On appeal, the doctor argued that the allegations found proved fell short of serious professional misconduct. The penalty was therefore inappropriate and unnecessary.

The Inner House held that the test to be applied in such appeals is to look at the decision of the Regulatory panel in the light of the whole circumstances of the case, always having due respect for the expertise of the panel and giving to its decision such weight as the court thinks appropriate (McMahon v Council of the Law Society of Scotland 2002 SC 475). However, in applying this test, the court also accepted that it was entitled to substitute its own judgment on the facts for that of the panel.

It remains to be seen how the Scottish courts will react to findings in fact made by the GMC or other professional regulators applying the flexible civil standard of proof rather than the criminal standard. In light of the recent House of Lords criticism of this approach, it is perhaps doubtful whether the flexible civil standard of proof will survive.

**Government push**

The Faculty of Advocates and the Bar Council of England and Wales both apply the criminal standard of proof to professional misconduct proceedings. By contrast, in February 2007 the UK Government published a white paper, Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century, directing that the civil standard of proof, rather than the criminal standard, should be the common standard of proof for all nine health regulatory bodies: General Chiropractic Council, General Dental Council, General Medical Council, General Optical Council, General Osteopathic Council, Health Professions Council, Nursing and Midwifery Council, Pharmaceutical Society of Northern Ireland, and the Royal Pharmaceutical Society of Great Britain. The Health and Social Care Bill currently being considered by the UK Parliament includes provisions in relation to the standard of proof in FTP proceedings. In addition, the Royal College of Veterinary Surgeons and the Faculty and Institute of Actuaries apply the flexible civil standard. It may only be a matter of time before there are calls for the SSDT to follow the trend, but this should be resisted.

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**Feature** Professional discipline

Continued from page 17 >

probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.” (Re B (Children) [2008] UKHL 35 at para 5.)

Lord Hoffmann went on to recommend that “the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not… clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard” (para 13).

In light of Lord Hoffmann’s comments, professional regulators should arguably abandon the flexible civil standard and return to the criminal standard of proof in FTP proceedings.

**The Scottish approach**

The flexible civil standard has been specifically rejected in Scotland. In Mullan v Anderson 1993 SLT 835, a widow and her children raised an action of damages in the sheriff court against a man who had been acquitted in the High Court of the murder of her husband. The family’s averments amounted to an allegation that the defendant had murdered the deceased, which was denied. When the defendant’s motion for the action to be remitted to the Court of Session was refused, he appealed, arguing, amongst other things, that the sheriff had erred in law in concluding that the standard of proof required was on the balance of probabilities.

Although the appeal was allowed, their Lordships were of the view that the sheriff was correct in his determination of the appropriate standard of proof. Lord Morison rejected the suggestion that there existed in Scotland some standard intermediate between a balance of probabilities and beyond reasonable doubt:

“My view that any civil case, including this one, must be determined on a balance of probabilities does not ignore the obvious fact that it is more difficult to prove, according to the required standard, an allegation of murder or serious crime, because it is inherently unlikely that a normal person will commit such a crime. Certain English authorities cited... appear to have proceeded on the basis that this difficulty is to be reflected in a variation of the normal standard of proof, but in my view there is no justification in Scotland for that approach, and if it were applied it might well lead to uncertainty in any case where an allegation of serious criminal or immoral conduct was made.”

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Jillian Martin-Brown is an associate in Dundas & Wilson’s Dispute Resolution Group, specialising in professional discipline and regulation.
Registers of Scotland are training more skilled staff to handle the increase in complex applications for first registration.

**RoS: Dealing with our older casework**

At RoS we have an obligation to record applications for registration on the day we receive them, since that safeguards rights. We meet this obligation. We recognise that our customers expect us to register their applications speedily and accurately.

Over the last few years volumes of applications, particularly complex applications for first registration or transfer of part, have increased beyond the level of our capability to deal with them as speedily as we would have wished. To address this, we are increasing the number of our staff with the skills and knowledge to deal with such cases.

But building that expertise takes time. We have developed a strategy to ensure that by 2011 there will be no case with us for more than six months without being registered, where it is legally appropriate and within the Keeper’s power to do so. We are on track to achieve this. But what does this mean for solicitors who have applications for registration already with us?

If your application is for a first registration and was submitted before January 2006 then we will process it by 31 March 2009. If it was submitted after January 2006 then it will be processed at a later date and we will make an announcement on this in our Corporate Plan for 2009-14, due to be published in March 2009.

If your application is for a transfer of part registration you need to know that we are tackling these in the following way. Starting with the oldest applications, we will be completing 25,000 applications this year, 56,000 in 2009-10, and 75,000 in 2010-11. This will mean that by 2011 we will have no transfer of part application older than six months where it is legally appropriate and within the Keeper’s power to complete.

Sheenagh Adams, Managing Director, Registers of Scotland. www.rosgov.uk

**ARTL UPDATE – as at 29 August**

- 8,371 ARTL transactions have taken place.
- 43 solicitors’ firms and 15 lenders are currently using the ARTL system.
- 2 local authorities are currently using the system.
- 19 full sign up meetings scheduled for the next four weeks.

The joint project board of the electronic Register of Sites of Special Scientific Interest (SSSIs) mark the project completion by holding their last meeting in the Holyrood Education Centre. The centre sits in the Arthur’s Seat Volcano SSSI in Edinburgh, which can be seen behind the partners. (Left to right) John Dixon – BT, Chas Green – BT, Stephen Dora – Scottish Government, Stewart Pritchard – SNH, Douglas Tudor – SNH, Alison MacGregor – RoS, Andy Smith – RoS
The CSA is dead; long live the CMEC, is the message of the Child Maintenance and Other Payments Act 2008. John Fotheringham highlights what will change and what will not.
calculation at the instance of the non-resident parent (NRP) cannot proceed without the consent of the PWC. This is of course utterly wrong and any such comment from the Agency or from CMEC should be met with a demand to speak to someone more senior and better trained.

The upshot of this of course is that very few NRPs will be willing to sign any alimentary agreement on the basis of any capital payment to a PWC, even though that may be a very useful way of organising the parties’ division of assets.

The new calculation
When the new cases become live there will be a differential maintenance calculation. Those NRPs who have earnings of £800 per week gross or less will have to pay 12% of that gross income where there is one qualifying child, 16% where there are two and 19% where there are three or more. If the NRP has gross earnings in excess of £800 per week, then he will pay 12%, 16% or 19%, depending on the number of children, on the first £800 of his gross earnings and then 9%, 12% or 15%, depending on the number of children, on the balance above £800 per week.

Note that the calculation will be on gross earnings rather than net, so that the self-employed NRP will have less scope for bending or massaging the income figures against tax in any given year.

The existing earnings cap for CSA purposes of £2,000 per week net will be replaced by a cap of £3,000 per week gross.

Whose benefit?
It remains to be seen how well or badly the new system of child support maintenance will work. The government intends to farm out many of the functions of CMEC to private contractors who, it may be argued, will run the system more efficiently but who will certainly have to try to run it at profit. If they are to be paid in respect of the amount of maintenance which they recover then we will all have to be especially vigilant to make sure that that profit motive does not spill over into an improper administration of the child support system, which should after all work for the benefit of children rather than for the state or for their hired contractors.

One disturbing feature of the CMEC system is that CMEC itself will be a non-departmental body, so that no politician will have parliamentary responsibility for the day-to-day running of the new body. The Secretary of State will be able to say quite simply, “not my department”.

It will be up to the lawyers to test the new system of child support and the officials and private contractors who run it. Our clients have never been more in need of protection from any system designed (or declared to be designed) to protect the interests of children and families.

John Fotheringham is a consultant to Fyfe Ireland LLP, Edinburgh and Glasgow, and an accredited specialist in child and family law.
T he Scottish criminal justice system has not been short of negative headlines over the last year or two. On the sentencing front, we have somehow reached the situation where sections of the press habitually apply the label “soft touch Scotland” even as prisoner numbers repeatedly reach new record levels.

If this is ever to change, it may be that the work of the Risk Management Authority will be seen to have played a significant part. This somewhat anonymous-sounding body has a pivotal role at the serious end of the system, but is coming to be recognised by other professionals as a valuable resource on a much wider front.

While the RMA, set up in 2004 as an independent centre to develop best practice in the management of the most serious sexual and violent offenders in Scotland, will really only be able to prove its worth in this respect over the longer term, the nature of the body and the expertise it is already demonstrating have attracted interest from well beyond Scotland.

Peter Johnston, a former Scottish solicitor who moved into regulation of the accountancy profession and then recently to chair the RMA’s board, believes the authority is still the only one of its type in the world. “It is, I’m told, envied by others and to be honest I’m not surprised. I think it has achieved very significant advances and is leading the way in the field. Risk management was a concept which existed in many other areas and professions but somehow it did not get to the judicial system as quickly as one might have hoped.”

Collaborative approach

To begin with its principal purpose, the RMA was founded on the recommendation of the MacLean Committee (2001) to oversee the committee’s other creation, the order for lifelong restriction (OLR), under which certain serious offenders are made subject to a lifelong management order. As the RMA’s chief executive Professor Roisin Hall puts it, MacLean “saw risk assessment and risk management as the absolute fulcrum for looking at serious offenders”.

Here the authority’s initial role is to accredit the assessors who provide the reports for the court considering an OLR, having agreed the levels of competence that are needed, and laid out the standards and guidelines for how offenders receiving this type of sentence will be managed. If an order is made, the designated lead authority then has to produce a risk management plan for the offender, which the RMA has to approve as fit for purpose.

But its focus is far from confined to these relatively few cases. Hall continues: “Our role is an advisory body, a regulatory body, we produce standards and guidelines and carry out the research that informs those and also train on them. We relate to the Parole Board, we relate to criminal justice social work, prison service and the police and we’ve done training for the sheriffs and the judges in terms of risk assessment and management, so our role is to build awareness and to develop skills in this area.”

Alongside the OLR offenders are the larger number of sexual offenders who present a serious risk of harm and are subject to the Multi-Agency Public Protection Arrangements, or “MAPPA” scheme. Here the RMA works with agencies such as the state hospital, forensic psychologists and psychiatrists and the police to develop good practice in risk management. (In time the scheme will be extended to the violent.) Another significant area of work is helping develop standards and guidelines for the management of restricted patients under the mental health legislation.

When inquiries have been held into why serious repeat offending has gone unchecked in the past, often the conclusion has been that the offender slipped through the net because different agencies each thought another was taking charge. Through MAPPA, however, the concept is emerging of the “lead authority” to take overall charge of a case. The twin thrust of designating a lead authority and the development of collaborative working between agencies is central to the RMA’s approach.

It also exists to ensure constant monitoring and review. “We really crawl over the detail of these risk management plans”, Johnston comments. “They’re not a nod through in any sense.” He adds: “The plan that is approved...”
The Risk Management Authority was set up under the Criminal Justice (Scotland) Act 2003, charged with “ensuring the effective assessment and minimisation of risk” through compiling and keeping under review information, research and development, promoting best practice, publishing standards and guidelines and other means, in addition to overseeing and reviewing risk management plans for offenders made subject to the order for lifelong restriction introduced by the Act.

Directed by a board comprising Peter Johnston as convener and seven other members with legal, prison service, clinical and forensic psychology, and clinical and forensic psychiatry expertise, the RMA is led by Professor Roisin Hall as chief executive and employs 12 other staff at its offices in Paisley. Its accounts for the year ended 31 March 2008 show net operating costs of £1,392,000.

Peter Johnston is a former Scottish solicitor. Following a career in legal practice and in the Crown Office and Procurator Fiscal Service, he was appointed chief executive of the Institute of Chartered Accountants of Scotland (1989) and thereafter of the International Federation of Accountants, the umbrella body of the accountancy profession, based in New York. Having served on the board of the RMA he was appointed convener earlier this year.

Professor Roisin Hall was previously head of psychology for the Scottish Prison Service and has worked in a number of NHS, custodial and academic settings. On coming to Scotland, she joined the Douglas Inch Clinic in 1986 and worked in both the NHS and SPS before taking up her current appointment.

No ivory tower
The research and training area is a big thing for the RMA. Unusually, perhaps, it has express statutory duties to compile information and carry out research, which takes up a third of its budget and two thirds of its staff time.

This may be original research, perhaps for the government; undertaking studies of offenders to see how they respond to certain tools in use; acting as a centre of expertise; or developing training opportunities. “We’ve published a directory of tools which I was very intrigued to see how pleased the judges were to get copies, because I think they felt this gave them some understanding of what is being quoted in the reports they read”, Hall observes.

Johnston indeed admits: “One of the things I can say since I came to the RMA is that for the first time in my life I have begun to understand the value of research, because it’s not ivory tower stuff, even if that’s what one thinks of research, it’s a very useful, in fact indispensable methodology to test the validity of the tools and other processes that are used.

“Anything to do with prediction is difficult; anything to do with the prediction of human behaviour is very difficult; and one has to test the tools and the methodology very carefully to make sure that they actually do work and that they are likely to minimise risk. It’s what we’re about and so research has to be very important.”

Across the board?
Is it, then, the $64,000 question to ask, with so much public debate about sentencing, does the RMA have expertise which can be applied to offending at all levels? Hall is convinced that it does, and indeed the McLeish Commission in its recent report acknowledged the RMA’s input.

“We feel this is incredibly important”, says Hall, “because our central message is, it isn’t enough to make an assessment and say somebody is high risk, it’s all about...."
Interview Risk Management Authority

Continued from page 23

how you manage that person. And therefore you've got to look across the whole spectrum of risk even as it's reducing, and look at the community provision. Now whether prisons will be effective or not is about how you target resources, and in order to do that, the ways you assess and the ways you manage are very important.” Welcoming the Commission’s conclusion that management in the community is every bit as important as management in custody, she adds: “In fact it’s probably more important because that’s where it really matters. So the whole focus on what are we trying to do with offender management, we’re trying to make communities safer, I think this is where we link up with the Prisons Commission.”

From her own experience of prison work, she recalls her concern that the sophisticated behavioural change programmes being developed in the custodial setting were not being translated for the outside world on the prisoner’s release: “Teaching somebody to be assertive in Cornton Vale is not the same as standing up for yourself in Pollok or wherever.”

Report card
Its apparent success behind the scenes notwithstanding, the RMA is currently under Scottish Government review. Johnston accepts this as part of the general drive by ministers to maximise the effectiveness of public and regulatory bodies, but believes that the authority should have nothing to fear. “If it can be demonstrated that there is a more effective delivery mechanism, then so be it. I hope and think that will not be the case but I’m not going to prejudge it. We want to take part in it and for it to come to the right conclusion.”

Pointing to the advantage in Scotland as compared with other jurisdictions of having the RMA as a central repository of different competences, he adds: “From the fact that there is a body into which all of this good stuff can be fed and which can then deliver very effectively, if the review were to say we’ve thought of a more effective way, the only possible alternative to my mind is something very similar to what we have now.”

But at this early stage in its life, and operating as it does in conjunction with so many other institutions, how can we measure the RMA’s success? “I think we’ve got three overarching goals”, Hall responds. “Obviously public safety, making Scotland safer, is terribly important, but that’s not just about reducing the number of cases, it’s also about people feeling safer, and I think that trying to explain to people about what goes on in risk management is an enormous part of making people feel safer in their communities. But the third thing is the whole area of prevention, and that’s where helping people to do things right, training them, making sure there are the resources and the skills and the competences to do this work in Scotland is very important… “The very welcome reception we’re getting for this training, the fact that our accredited assessors’ reports are according to the judges very helpful in deciding whether to make an order for lifelong restriction, is again for me an indication that we are providing a useful service. We know that we’ve taken it from the best available research, but whether we’ve phrased it in the best way is about communication as well.”

Johnston agrees, adding: “The hope I have in this area derives from the fact that for the first time perhaps, we have a method of testing the efficacy of the assessment process and the management process.” He acknowledges that things can still go wrong, but argues that through the RMA the system is now best placed to learn from experience. “You’re dealing with some of the most difficult areas in the world, and yes, things will go wrong. But I hope not nearly as many as would go wrong if we didn’t have this very good process.”

Hall continues: “I think you have to judge success in terms of what you see happening with people from different agencies talking to each other, passing information to each other in a way that both find intelligible and this type of thing.” To which Johnston cites the senior social worker in Glasgow who told him the RMA’s materials had given his staff a new confidence in dealing with the people they managed, “actually and potentially violent people… This fellow was some distance from the OLR yet he was saying the work you’re doing is giving my staff and me a new confidence and a new ability to do our job”.

Government objectives
So as it feeds in various ways through the criminal justice system, does the RMA have a broad enough remit? Both Johnston and Hall seem content with what they have: “We don’t need to grow an empire”, Johnston responds. “The work if it’s good enough, and I think it is, will tend to speak for itself, and I always think that efficient units working together are better than juggernauts.”

“I don’t think there’s anything wrong with our remit”, Hall adds, “but I think people’s perception of it needs to grow a little and we need to develop it because quite often people do think the RMA is just the OLR, and it’s not. If you’re going to talk about risk management, public safety, you’ve got to look at these concepts right across the spectrum of risk from wild adolescents to serious offenders, and that means improving best practice with people who are dealing with them, you’re taking it all the way through.”

Johnston concludes: “If the work we do enables another agency, the appropriate agency to take steps then I think we could actually be a very valuable part of what the Scottish Government wants to do and that is to reduce recidivism. There are all kinds of potential without our necessarily having a larger remit or more staff or anything else. We’re effective and lean and we can do the job…” “I think the difference for tomorrow may well be that there is a harnessing of facilities and abilities and different approaches by bringing agencies together. This has not always happened in the past. It’s not going to happen overnight; it will never be perfect; we’re talking about minimisation here. But it’s a damn sight better than it used to be.”

“Things will go wrong. But I hope not nearly as many as would go wrong if we didn’t have this very good process”
On the move

ALLCOURT, Livingston, are pleased to intimate that on 1 August 2008, Desmond James Maguire was assumed as a partner of the firm.

ANDERSONS SOLICITORS LLP, Glasgow and Edinburgh, are delighted to announce that one of Glasgow’s oldest law firms, HEADRICK INGLIS GLEN, merged with ANDERSONS as of 7 April. HEADRICK INGLIS GLEN’s solid reputation in traditional private client matters fits well with ANDERSONS’ current head of Private Client, Tom Quail, who recently qualified as a solicitor advocate in addition to his accreditation as a specialist in family law from the LAW SOCIETY OF SCOTLAND. Fiona Dalton, a solicitor in the Private Client department, has also been made an associate. A number of internal promotions include Anne Logan, a solicitor advocate and associate with the firm for the last four years, assumed as an associate with the firm for 1 July 2008. Isla Matier is now also an associate and Catherine Chung, Graham Laughton and Mary-Jo McKenna are now senior solicitors. This move follows the additions of last year, when solicitors Jenna Katz, Erica Jones, Kirsty Denham and associate Cameron Urquhart joined the practice and Lindsay Williamson, a well-known insurance industry figure, joined the firm in a consulting capacity within the firm’s Litigation department. Joanna Brynes also joined the firm as a licensing specialist with the firm’s Commercial department.

JAMES & GEORGE COLLIE, Aberdeen, intimates that Innes Richard Miller has been assumed as a partner with effect from 1 July 2008. DUNCAN & WALLACE SSC and WARD & CO, both Edinburgh, are delighted to announce their amalgamation with effect from 6 June 2008. The new firm will continue to practise at 131 Newhaven Road, EH6 4NP, under the name of DUNCAN & WALLACE. This follows the retirement of Nigel Duncan from the firm of DUNCAN & WALLACE and from the practice of law on the same date. Nigel is now enjoying retirement in the south of France!

FINLAY MACRAE, Dundee, are pleased to announce the assumption of their associate, Billy Warden as a partner in the firm.

With effect from 31 July 2008 Jamie Gilmour has retired as a partner of the firm of CURRIE GILMOUR & CO, Edinburgh. The firm’s practice will be continued by Neil Campbell from 41-43 Warrender Park Road, Edinburgh EH9 1EL.

The partners of McCONVILLE O’NEILL, Glasgow, are delighted to announce that David H Pirrett, formerly of HUGHES DOWDALL, Kirkintilloch has joined them as a consultant with immediate effect. Contact details are: McCONVILLE O’NEILL, 5th Floor, Standard Buildings, 94 Hope Street, Glasgow G2 6PH (tel: 0141 204 7910; fax: 0141 221 1040; email: davidpirrett@mcconnvilleoneill.co.uk; web: www.mcconnvilleoneill.co.uk).

MAXWELL MACLAURIN, Glasgow and Edinburgh, intimate that with effect from 17 July 2008 Phyllis M Stephen ceased to be a partner as a result of a demerger of the firm of STEPHENS, which amalgamated on 1 April 2007.

MURRAY DONALD DRIMMOND COOK LLP, St Andrews, Anstruther, Cupar and Leuchars are pleased to announce that Suzanne Frances Arrowsmith became an associate of the firm with effect from 1 September 2008.

ROWSON AND ASSOCIATES LIMITED, Aberdeen, are pleased to intimate that with effect from 11 August 2008 their office has moved to 96 Holburn Street, Aberdeen AB10 6BY. Their new telephone number is 01224 581771 and their new fax number is 01224 591588. Their Legal Post number remains unchanged.

TAYLOR & HENDERSON, North Ayrshire, are pleased to announce that with effect from 20 August 2008 Barbara Black has been appointed an associate, based in our Irvine office. Barbara deals with both civil and criminal court work and has a special interest in family law. Alison Murphy was also appointed as an associate in May of this year. Alison is based in our Kilwinving office and specialises in conveyancing and private client work.
In the months before the smoking ban came into force in 2006 we saw adverts about the change in law on the side of buses, in flyers and leaflets, on bus shelters, in the press and on the news. There was much discussion and consternation, but it was quite clear what was to happen on the appointed day, 26 March 2006.

The Licensing (Scotland) Act 2005 and its impact on licensed premises in Scotland (and that of the 20 or so SSIs that require to be read along with the Act), have not been quite so well advertised. It is predicted that the difficulties and costs associated with the 2005 Act will cause a 20-25% decline in licensed premises in Scotland.

Some may recall the dawn of the 1976 Act. No fuss was made; no special applications were required. When an applicant required to renew their existing licence, they applied for renewal and were sent a licence with “Licensing (Scotland) Act 1976” written at the top. It was that simple; but life was different then.

Scotland’s problem relationship with alcohol, and the links between its misuse and health issues, crime and antisocial behaviour, remain the subject of much concern. It was recognised that the 1976 Act provided no assistance to those trying to combat these problems. As a result, Sheriff Principal Gordon Nicholson was tasked with undertaking a review of “all aspects of liquor licensing law and practice in Scotland, with particular reference to the implications for health and public order; to recommend changes in the public interest; and to report accordingly”. The Nicholson Report was followed up by a further report by Peter Daniels, chief executive of East Renfrewshire Council, who was charged with examining the regulation of off-licences and making recommendations as to (1) better engagement and consultation at community level on the grant of licences; and (2) management and enforcement mechanisms which will help to prevent off-licences being a focus for antisocial behaviour.

The 2005 Act has emerged from the Nicholson and Daniels Reports, and it is important to remember this background as we are assailed by more and more requests from licensing boards for information and changes.

Countdown time
The Act comes into force at 5am on 1 September 2009, “T” day. As at this date, every licensee who wishes to be able to trade in the sale of alcohol going forward must have a premises licence, an appointed premises manager (who holds a personal licence), and must ensure that all staff who are involved in the sale of alcohol are appropriately trained. Licences granted under the 1976 Act, together with regular extensions of permitted hours and children’s certificates, continue automatically without the requirement for renewal until “T” day, when they terminate.

Currently we are seven months into the 18 month period of “transition”. Two “last lodging dates” have passed, 7 March and 6 June; two are to come, 3 October 2008 and 16 January 2009. Much has been learnt along the way in terms of wording of applications, access by children, outside areas, even down to the colouring of layout plans.

Most applicants are seeking to convert their existing 1976 Act licence in terms of the Special Procedure Regulations (SSI 2007/454). These applications benefit from the rather limited “grandfather rights” which (1) allow the applicant to continue trading under their 1976 Act licence; (2) avoid the premises being caught in an “overprovision” assessment; and (3) avoid the applicant having to provide certificates of suitability in relation to the premises from building control, environmental health and planning.

An applicant’s relevant “last lodging date” is dictated by the month of renewal of the existing 1976 Act licence. Having been instructed by clients who were not aware of the exact date of last lodging and asked for assistance.

Applications have been objected to by the support departments because baby changing facilities were not yet installed.

With the transition to the new licensing law well underway, practitioners are constantly finding new difficulties being thrown up in the way of their clients’ applications, says Caroline Brown.
with an application the day before the relevant date, I have been faced with having to advise that if that date was missed, the clients would have to obtain certificates of suitability, only to be told that the property in question had asbestos and lead pipes – no certificate of suitability would be granted without a very expensive upgrading project.

A hearing to “consider” the application should be held within six months of the date of receipt of the application by the board. Applications lodged on or around 7 March should have been “considered” in the early part of this month. Most boards are treating this six month time period as being the time within which the application is to be processed, reported on and decided. In practice, applicants are finding that some boards are allowing matters to be “adjourned” even though this takes the application outwith the six month limit and involves the applicant in further cost and uncertainty. There is no sanction on a board in terms of the regulations if they do so.

**Issues with the premises**

As with all new systems there are snags. Trying to revolutionise a regime which has been in existence for over 30 years and which affects upwards of 17,000 licence holders was never going to be easy, but what we have seen has been fairly remarkable. Slight has been lost of the fact that the 2005 Act does not come into force until 1 September 2009.

Objections have been accepted by boards even though they were late, frivolous or related to matters regulated under other enactments. More particularly, applications have been objected to by the support departments because baby changing facilities were not yet installed, signage for a ladies’ toilet was upside down, light bulbs had blown, fire doors required to open in the other direction, bin bags blocked access routes, or the licensed area had not been delineated in red. Luckily after the first round of board meetings, common sense prevailed and many of this type of “objections” turned into representations only and could be dealt with in early course by the applicant.

Objections from building control teams across Scotland in relation to inadequate sanitary provision or fire requirements are however a different story. These are true objections to applications and have been accepted by boards, even though s 27(7) of the 2005 Act specifically provides that licensing boards may not “impose a condition on the premises licence which relates to a matter (such as planning, building control or food hygiene) which is regulated under another enactment”.

In addition, the Scottish Government confirmed in its Guidance to Licensing Boards that it did not intend this Act to be used as a tool to force the upgrading of licensed premises to current building standards. Many board policy statements also echo these sentiments, but they have been forgotten and applicants are faced with having to agree to drastically reduced capacity figures for the premises to correspond with sanitary provision, or carry out the works.

What can be done? A small restaurant is told to install two new toilets but this is physically impossible. A listed building is told to install a banister immediately adjacent to a stained glass window, again a physical

*Continued overleaf*
impossibility. Luckily for the clients involved in these two examples, compromises are likely to be reached, but what if the support department is adamant that these works are required and the board refuses to grant the premises licence until an undertaking to do the works is reached?

Less appeal?

Thoughts turn to appeal. Appeal against a refusal of a premises licence differs from the procedure for appeal under the 1976 Act, which was by way of summary application to a sheriff or petition for judicial review in the Court of Session. Section 131 of the 2005 Act, the Licensing (Procedure) Scotland Regulations 2007 (SSI 2007/453) and the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc) Rules 1999 (as amended), create what on first reading is a maze of legislation.

In terms of the new rules, appeal is now by way of stated case to the sheriff principal if it concerns a premises licence and to a sheriff in relation to a personal licence. As always, it is imperative to note the timings dictated by the new legislation. A note of appeal must be lodged with the relevant sheriff clerk not later than 14 days from the “relevant date”, which is either the date of the board’s decision or, where a statement of reasons has been required, the date of issue of the statement.

In the note of appeal the grounds of appeal are stated; they remain as they were under the 1976 Act. It is then for the licensing board to state the case in response to the grounds of appeal, and thereafter there is the usual period of adjustment. Where there is no statutory right of appeal under the 2005 Act, an applicant can still present a petition for judicial review in the Court of Session.

Issues of personal bar and the competence of appeal are raised in the situation where a premises licence has been granted by the board but is subject to an unacceptable condition. Personal bar may be argued against an applicant if they have “accepted” the condition at the board hearing to avoid the application being refused. In addition, the terms of s 23(7) of the 2005 Act, which states that the board must grant the application as modified “if the applicant accepts the proposed modification”, will no doubt be raised by the board.

The issues of competence arise in relation to s 131 of and sched 5 to the Act, under which appeal can only be made against refusal of the premises licence. It remains to be seen whether a court would allow an appeal in a case where the premises licence has been granted and the applicant seeks to rely on Wolfinson v Glasgow District Licensing Board 1981 SLT 17 and other decisions relevant to the 1976 Act.

More practical problems

The difference in interpretation of capacity figures between the applicant and building control has created difficulties, and premises licences are being granted with much reduced capacity figures being applied to the premises. Applicants were asked to state how many customers can be in the premises in order for the boards to gather this information and use it in an assessment of overprovision. Building control have however used their own method of capacity calculation based on the cubic area in question, which results in a much reduced figure. The end position is that on-sales licensed premises will have to use some sort of checking system to ensure compliance with the capacity figures stated in their premises licence. How can this happen? Boards will argue no doubt that the imposition of these figures is “necessary or expedient” in terms of the board and the applicant fulfilling the licensing objectives (s 27(6) of the Act).

Other practical issues of concern to applicants (and their agents) have been boards seeking to reduce off-sales hours, even though these have already been reduced from those previously enjoyed under the 1976 Act and can be from 10am to 10pm. Some Boards consider that off-sales should only be from 11am from Monday to Saturday and from 12:30pm on a Sunday. Early opening on-sales premises also cannot be assured that their existing hours will be preserved under the new regime. It seems that boards are reluctant to grant hours which involve selling alcohol for more than 14 hours in one 24 hour period, even though a premises may have enjoyed being able to serve shift workers from 6am and office workers up until 1am for years without issue.

Access by children and young people is also being heavily regulated and restricted, with some premises losing the ability to allow children and young people to be in the premises. Finally, the issue of what is “one area” for alcohol display in off-sales premises has also tested patience, with applicants being told that this is one shelved area (which leads to having to give the number of shelves in the area).

This cannot be correct and arguments have been made at boards across Scotland that “one area” can be a number of aisles or shelved areas as long as they are all together.

To sum up, transition is a testing time for all involved. “Expect the unexpected” has been the mantra adopted by most specialist agents in this field. Licensing implications should be considered at the very beginning of a new project or instruction and it is very much a case of “cautem emptor”.

Caroline K P Brown is an associate with Lindsays and is a member of their Hospitality and Leisure Group, specialising in licensing and licensing litigation.

Property transfers – the licensing traps

Commercial property practitioners will also be aware of the difficulties that the new regime creates for drafting. Historically, planning permission granted for a premises licence was, with the type of licence applied for and granted, be it a hotel, public house, restaurant licence etc. No longer will we have these “types” of licences and this change impacts on obtaining planning consent for new projects.

The timing of “transition” is creating chaos in terms of the buying and selling of commercial properties. For the buyer, has the outgoing seller submitted their grandfather application in time before the relevant last lodging date? If they have not, will this create difficulties for the buyer in terms of obtaining a new premises licence, as certificates of suitability are required and the grant of the application could take over six months? If the seller has submitted a “grandfather” application, does the draft operating plan allow the buyer to operate as they would like? Has the seller agreed to do any works, agreed to any capacity figures or other condition which would create issues for the new buyer? Additionally, who is responsible for the costs of submitting these applications? Should this be the landlord or the tenant? Who is ultimately concerned about ensuring that the premises licence works for both parties? Equally importantly, who pays for any works required?

The answers to these questions will of course all depend on the facts and circumstances and the terms of the lease in place, but does that lease take account of the 2005 Act and can these costs be passed on? It is important to note when examining these questions that existing rent review provisions within leases are also unlikely to take account of the Act. Even the usually fairly simple temporary and permanent transfer of existing licences to new parties could take months to be decided under the Act if the chief constable raises any issues. The 2005 Act could have a real impact on the commercial viability of licensed premises, given the potential for existing conditions to be attached and the length of time for decisions by the licensing board to be made.
Council agrees PC fee freeze

The Law Society of Scotland has agreed a budget that means that the practising certificate fee to be proposed at this month’s Special General Meeting will be the same cost as last year. The decision, taken after discussions at two Council meetings, recognises the difficult economic conditions facing legal firms across the country.

Richard Henderson, the Society’s President, said: “The Society continues to work hard to provide members with the best service at the lowest possible cost.

“Given the current economic situation we wanted to do all we could to ensure any increases in the practising certificate and retention fee could be kept to a minimum.

“We have looked over and again at next year’s budget and, despite considerable pressure on resources, have managed to bring forward a budget which will mean no increase in the proposed PC fee for next year. Of course, that amounts to a reduction in real terms.”

Mr Henderson explained that despite the need to provide an increased complaints handling facility over the coming year and meet other obligations, the budget had been cut in other areas to allow the real terms cut.

However, he said the quality of service provided by the Society would not be affected. He added that the Society would continue with plans to reform its own governance and management as part of a programme of modernisation.

He added: “We are determined to meet the needs of the profession and will therefore continue to provide cost-effective services across the whole range of the Society’s work.”

The Special General Meeting will be held at 2pm on Friday 26 September in the Roxburghe Hotel, Edinburgh.

Consumer credit licence changes

New licensing requirements under the Consumer Credit Act 2006 came into force on 1 October, expanding the scope of some categories of ancillary credit business for which consumer credit licences are required.

The changes affect debt purchasing, collection and administration; and credit information services. A leaflet “Do you need a credit licence?” is on the OFT website at www.oft.gov.uk/shared_oft/business_leaflets/credit_licences/oft147.pdf.

A wii word for charity

Following the Society’s adoption of the Prince’s Trust as its charity for this year, a staff project team has come up with a list of fundraising events – kicking off with “Wiimbledon”, a Wii tennis tournament, with virtual events for boxing, golf and baseball to follow.

Wimbledon will, alas, be all over by the time you read this, but any reader who fancies joining in other events will be welcome.

See also Hearsay, p 74.

SSDT members

The Lord President has appointed two new solicitor members to the Scottish Solicitors’ Discipline Tribunal, Joseph Hughes, of Messrs J C Hughes, 1028 Tollcross Road, Glasgow, and Graeme McKinstry, The McKinstry Co, 39 Sandgate, Ayr. Both have been appointed for five years from 6 September 2008.

“Politics” show sparks interest

A large and lively audience greeted the Law Society of Scotland’s first foray into the Festival of Politics, which runs during the Edinburgh Festival.

Committee room 3 at the Scottish Parliament was full as Vice President Ian Smart and Director of Law Reform Michael Clancy took the platform (to the strains of The Proclaimers’ “I’m Gonna Be (500 Miles)” – work that one out), to introduce the topic “Law unto Itself”.

Michael Clancy delivered his celebrated “1,200 years of Scots law in 10 minutes” talk and the meeting was open to the floor. Though some suggested topics were trailerd for the audience – Do we have too much law or too little? Is it for the public good or political expediency? Principled framework or reactive patchwork? Too many or too few devolved areas? – and the comms team wouldn’t let us away without waving our blue and orange voting cards (who chose the colours, Ian wondered) on these, the gallant pair found themselves fielding questions on just about everything else instead. One even asked what the title of the meeting meant (“What you make of it”, was the reply).

If we learned anything it was that the audience had concerns about the legislative process and political horse trading, resources to implement and enforce the law, and the need for better use of IT by the courts. Oh, and our two speakers had different views about the desirability of codification.

But Ian Smart did stand up for the democratic process and the rule of law when asked if civil disobedience was ever justified.

Coming up with the answers: Ian Smart
RFPG’s online trainee service

The Royal Faculty of Procurators in Glasgow is to provide a new service for trainees, and firms looking for trainees.

The free online service will enable law graduates and students who are looking for traineeships to advertise their services. To submit a CV, either for posting on the Royal Faculty’s Jobs Direct website or to be held offline and supplied only to potential employers, an email with CV attached should be sent to jmckenzie@rfpg.org.

The flip side of the service is also free – firms can advertise for trainees by filling in a simple form. The information submitted will then be posted on the Jobs Direct website until the firm wants to withdraw the advert.

The Royal Faculty aims in this way to go back to one of its original remits of finding placements for trainees within law firms. The portal for both these services is at www.rfpg.org/jobs.html.

Open University to teach Scots law

The Open University (OU) is to launch a new course, “An introduction to the law in contemporary Scotland”, developed with the support of the Law Society of Scotland.

Starting in November 2008, the course is the first of its kind. The OU hopes it will give people a better understanding of Scotland’s legal processes.

The six-month course is aimed at the general public, both in and outside Scotland – anyone who is looking to improve their understanding of how laws are made and how the legal system works in Scotland.

It begins by exploring Scotland’s legal history, the legal powers of the Scottish Parliament and its interaction with Westminster; and Scotland’s court structure and procedures. It moves on to look at key aspects of Scots law in more detail, such as children and the law, employment law, and human rights legislation. The final section of the course uses topical examples, including the legislation designed to support the Glasgow Commonwealth Games in 2014, to explore how law is made and applied in contemporary Scotland.

The OU designed the course in response to market research, which revealed a gap in the market for a qualifying law programme, accessible to everyone and needing no legal expertise.

Professor Gary Slapper, director of the Open University’s Centre for Law, said: “Everyone should know about the law as it is such an important part of citizenship. This course explains the law in a way that is fascinating and relevant to life in Scotland.”

Liz Campbell, Director of Education and Training at the Society, said: “We welcome this development by the Open University. More people with an understanding of law is better for everyone in an independent legal system.

“We think it will be especially helpful for support staff at law firms who do not have a legal education, but are interested in knowing more about the law in Scotland, from its historical roots in Europe to how legislation is formed following a decade of devolution.”

Further information about the course is available from www.openuniversity.co.uk/w150. The deadline for registration is 10 October.

Obituaries

Dr ENID ANN MARSHALL (retired solicitor), Stirling
AGE: 76
ADMITTED: 1960

DOROTHY ISOBEL GRASSIE (retired solicitor), Aberdeen
On 15 July 2008 Dorothy Isobel Grassie, formerly partner and latterly consultant of the firm Ledingham Chalmers, Aberdeen
AGE: 86
ADMITTED: 1952

MARGARET ALISON HUME, Johnstone
On 26 July 2008, Margaret Alison Hume, employee of the firm McCusker McElroy & Company, Johnstone
AGE: 44
ADMITTED: 2004

TERESA ETHEL MARKHAM, Falkirk
On 28 July 2008, Teresa Ethel Markham, employee of the firm Blackadder & McMonagle, Falkirk
AGE: 56
ADMITTED: 1984

RODERICK GEORGE ALEXANDER, Edinburgh
On 16 August 2008, Roderick George Alexander, partner of the firm Morton Fraser, Edinburgh
AGE: 47
ADMITTED: 1985

Court has new Auditor

Kenneth Cumming, a partner and the head of litigation at Shepherd & Wedderburn, Edinburgh, has been appointed as Auditor of the Court of Session, succeeding Neil Crichton who retires in September.

The Auditor of the Court of Session is a statutory appointment made by Scottish Ministers after open competition.
The Public Guardian has been acutely aware of the length of time that many guardians have to wait before cautionary cover is confirmed (delaying them having full powers to act), and of the complexity of the application process and the cost of the annual premiums to the adult’s estate. In her article “The Cost of Guardianship” (Journal, March 2008, 26) the Public Guardian advised that she was negotiating the provision of an alternative cautionary service with HSBC Insurance Brokers Ltd.

This service, administered by HSBC Insurance Brokers and underwritten by Norwich Union Insurance Ltd, is available from 25 August 2008. It provides a simplified application process for all cases and particularly in estates below £500,000 where, by virtue of the court appointment process and the ongoing supervision of the Public Guardian, there will be an automatic presumption of suitability and the requirement merely to confirm minimal information. A more detailed application form will be necessary in larger estates but this, and the process, have also been simplified to allow a much speedier review.

Consequently HSBC Insurance Brokers will be able to issue confirmation of caution to the majority of guardians, by post, and to the Public Guardian, electronically, within two working days of HSBC’s receipt of a request. The Public Guardian has committed to issuing the certificate of appointment the following working day.

In addition the Public Guardian has been able to secure a fixed and reasonably priced premium scale, commencing at just £30 for estates of £5,000.

Guardians who are currently covered with an alternative provider may choose to switch to HSBC Insurance Brokers. If this is being considered the Public Guardian advises that this is dealt with at year end, as no return of premium will be offered if a guardian cancels their current premium part way through a year.

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A bond of caution remains a matter between the individual guardian and the cautioner. Guardians are completely free to apply to whichever cautionary provider they choose. The Public Guardian is not paying for this service, nor receiving any payment.

In conclusion, it is hoped that this simpler, speedier and cheaper service will be of value in adult guardianship cases.

Sandra McDonald, Public Guardian

If you wish any more information about this new service please feel free to contact Clive Lissaman, Senior Manager, Legal and Protection Services, HSBC Insurance Brokers Ltd (t: 0845 5859 473; e: clive.lissaman@hsbc.com), or alternatively, the Office of the Public Guardian (t: 01324 678300; e: opg@scotcourts.gov.uk).

Lord Macfadyen remembered

The memorial service for the Rt Hon Lord Macfadyen will be held at 4.30 pm on Monday 13 October, at Stockbridge Parish Church, Saxe-Coburg Street, Edinburgh.
Alexander Edward (Sandy) McIlwain, CBE, MA, LLB, WS

Sandy McIlwain died suddenly on 18 July after a three year battle with myeloma. From the diagnosis till he died, he dealt with his illness with the gritty determination, fortitude and faith with which he had lived his life.

Born in Aberdeen, he was educated at Aberdeen Grammar School and thereafter at Aberdeen University where he graduated MA, LLB. His potential for leadership was first demonstrated when he became President of the Students’ Representative Council. It was the first of many positions of high office he held throughout his professional life. While at university, he helped with the student show and edited the student magazine Gaudie. He left on graduation and undertook his National Service with the Royal Corps of Signals, rising to the rank of lieutenant.

In 1961 he married Moira and moved to Hamilton, where he was to practise law for the rest of his professional career, later becoming the senior partner of Teague Leonard & Muirhead, now known as Leonards. He also served for many years as burgh prosecutor and thereafter as district prosecutor.

Over the years he was elected Dean of the Hamilton Faculty of Solicitors, and was appointed an honorary sheriff for South Strathclyde, Dumfries & Galloway.

Despite being a busy solicitor, he felt the need to put something back into his chosen profession. In 1974 he was elected the member of the Council of the Law Society of Scotland for the Burgh of Hamilton. He was quickly recognised as a person who knew about legal aid, its problems and its need for proper funding. It was not surprising that he quickly became a member of the Legal Aid Committee and its associated Fees Committee. He very quickly became the convener of both committees. He served on a complaints committee. He set and maintained high standards of professional competence for himself, which he used as a benchmark for others. Yet he was a solicitor’s solicitor, fully understanding the problems practitioners might experience. Many solicitors who turned to Sandy over the years were grateful for the advice and help he willingly gave, for which he was greatly respected.

His colleagues on the Society’s Council recognised he was a leader and a good man to have at the helm in difficult times. The Council elected him President of the Society in 1983. This was a time of change and turmoil for the profession with the recommendations of the Royal Commission being implemented by the government. A paper was published by the Scottish Office entitled Conveyancing by Banks and Building Societies. Sandy accepted he was no conveyancer. He often said he had never done a piece of conveyancing for money. Yet he quickly grasped and understood the problems which faced the profession if the proposals were to be implemented. Almost singlehandedly he wrote the Society’s response, which persuaded the Scottish Office not to proceed at that time.

Despite the professional problems during his presidency, he and his wife Moira were the most charming hosts at the many social functions which go with the office.

When he retired from active practice with his firm, he became chairman of the Scottish Legal Aid Board, a member of the Central Advisory Committee for Scotland on Justices of the Peace, and chairman of the Lanarkshire Scout Council. He was appointed a temporary sheriff and quickly became the President of their Association. He also became a member of the Cameron Committee on shrieval training. He was a doyen of the Criminal Injuries Compensation Board, becoming a chairman and dealing with the most difficult and complicated cases. Indeed it was while sitting on a panel that he first became ill. He was also a dedicated elder of Glasgow Cathedral.

Despite what might be thought to be an overwhelming workload, he was the most cheerful and happy family man, enjoying nothing better than being with his devoted wife Moira and his three daughters and five grandchildren. They held parties in their home which were enjoyed by their wide circle of friends and were legendary for hilarity, fun, laughter and song.

Throughout his last three years he underwent extensive treatment in ward 24 of the Southern General Hospital in Glasgow, where he received wonderful care. When at home he was most willingly and lovingly nursed by Moira. As you would expect, he faced his illness with his usual cheerful determination and fortitude.

As a solicitor, a man of principle, as a leader in many fields, as a husband, father and friend, he will be sorely missed.

He is survived by his wife Moira, daughters Karen, Shona and Wendy, and his five grandchildren of whom he was very proud. His mother, who is 104 years old, also survives him.

KENNETH PRITCHARD
Stair Memorial marks its 21st

This year sees the 21st anniversary of The Laws of Scotland: Stair Memorial Encyclopaedia, first published between 1987 and 1996 in 25 volumes with 137 titles. The titles were written by about 300 contributors, nearly all members of the legal profession, who gave of their time and expertise for nothing, or at most a very small token honorarium.

The Encyclopaedia represented an important stage in the rebirth of Scottish legal literature. In 1981, the centenary of the first edition of Stair’s Institutions, the Law Society of Scotland resolved to sponsor a new legal encyclopaedia. The first General Editor was Sir Thomas Broun Smith, the main guide and inspiration of the project, who was followed on his death in 1988 by Professor Robert Black, formerly one of the deputy editors along with Mr Hamish Henderson and Professor Joe Thomson. Joe Thomson was the first General Editor of the Reissue, which commenced publication in 1999, and he was followed in 2000 by a small team of LexisNexis editors noting relevant developments. The current Reissue programme was then launched in 1999. To date it covers some 50 titles.

With the Reissue, the format changed from volumes covering several titles to publication of individual titles in binders. This enables titles on areas of the law subject to rapid change, such as Criminal Procedure, to be reissued more than once. It also allows greater flexibility of length of titles, such that those on very significant areas of the law can be given extended treatment, for example Child and Family Law.

On this 21st anniversary it is still the objective of LexisNexis and of the Society to maintain the Encyclopaedia as the corner stone of every Scots law library, a task which can be achieved only with the ongoing commitment of our contributors who still give generously of their knowledge and time and to whom we owe our heartfelt thanks.

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Will Aid’s November campaign

Will Aid, the UK-wide campaign to encourage people to make wills through participating solicitors who waive their fees in return for a donation to charity, runs again this November. The last campaign resulted in over 7,000 new wills and almost £700,000 raised. This year the money raised will be shared between ActionAid, British Red Cross, Christian Aid, Help the Aged, NSPCC, Save the Children UK, Sight Savers International, SCIAF and Trocaire.

Solicitors interested in taking part can do so through the Will Aid website www.willaid.org.uk or by contacting the hotline 0300 0300 013.

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Brian Dempsey’s monthly survey of consultations that might be of interest to practitioners

... the point is to change it

Reshuffling the hearings system

Ah, the much promoted and admired, but never ever copied, children’s hearings system. Following reorganisation in 1996 into 32 local areas, the government thinks there would be benefits in imposing more centralisation and standardisation, all in the interests of “Scotland’s vulnerable children and their families”, you understand. The idea is to bring together the Scottish Children’s Reporter Administration, 32 children’s panels and various other bits and pieces under one national body – but might anything be lost when they do this? The paper is called Strengthening for the Future, just in case you thought the government might be busy “strengthening for the past”. See the consultation paper at www.scotland.gov.uk/Resource/Doc/234074/0064080.pdf.

Licensing knife dealers

The Scottish Government wants to end the “booze and blade” culture, asserting that “people should not pick up a knife along with their wallet and mobile phone when they head out for the evening”. As well as having the police stop and search 14,000 people in just one month last year (failing to find a weapon in about 97% of searches), there is an impending licensing system for businesses which sell non-domestic knives ranging from kirpans and skean-dhus over three inches to machetes and swords. The government would like views on the details of the licensing scheme which is intended to come into existence in September 2009. See the consultation paper at www.scotland.gov.uk/Publications/2008/07/Knives.

Nothing to hide?

Ever sent an email you wish you hadn’t? Well, the nightmare of hitting the “reply to all” button when you meant to share an amusing but cutting remark only with an individual may be as nothing once Directive 2006/24/EC is transposed. This will require providers of telephone and internet services to retain information on each call, email or website visit an individual makes for scrutiny by “public authorities”, though it is only the “who” and “when” information and not the content of the communication that is supposed to be retained. Of course, if you’re nothing to hide… See the paper at www.homeoffice.gov.uk/documents/cons-2008-transposition.

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Eve Moran, Managing Editor: Laws of Scotland Reissues

Respond by 24 October with a respondent information form to chilletteam@scotland.gsi.gov.uk.

Respond by 22 October to KnifeCrimeConsultation@scotland.gsi.gov.uk.

Respond by 31 October to commdata@homeoffice.gsi.gov.uk.
As the Scottish Legal Complaints Commission goes live, Craig Watson explains how the Society’s continuing investigatory processes are changing in line with it.

"Gateway" opens its doors

The system for handling complaints against solicitors has undergone a number of significant changes in recent years, though it is now only a matter of days until the most dramatic shift yet is upon us. The need to provide information and advice to solicitors and clients will never be greater when the Scottish Legal Complaints Commission opens its doors for business on 1 October.

Yet, while the Commission has a statutory duty to advise the public about the complaints process, there is no obligation to provide a corresponding service for solicitors. With that in mind, it is worth giving an overview of how the new system will work.

The Commission will act as a gateway for all complaints against lawyers, and by mediating, resolving or determining complaints about service and sifting out those that are frivolous, vexatious or without merit. Conduct matters will be passed on to the professional organisations, though the Commission will oversee the way conduct complaints are handled as well as taking over the Scottish Legal Services Ombudsman’s current overseeing powers.

**Society’s continuing role**

However, the Commission will only consider complaints about service where the business was instructed after 1 October. The Society, therefore, will continue to deal with service complaints relating to business instructed before 1 October. A one-year time limit for making complaints will apply when the Commission is fully operational.

In addition to considering those service complaints, the Society will continue to handle professional misconduct matters, with prosecutions still going before the independent Scottish Solicitors’ Discipline Tribunal. However, a new category of complaint has also been created – unsatisfactory professional conduct – which is the responsibility of the Society to investigate and decide. Unsatisfactory professional conduct falls short of professional misconduct, but carries its own sanctions – a mandatory censure and potentially a fine of up to £2,000, compensation to the aggrieved complainant of up to £5,000 or an order to undergo training, or a combination of these.

**In-house system**

Mary McGowan, the current Deputy Director of the Client Relations Office, explains some of the changes. "As the Society will continue to deal with service complaints where the business was instructed before 1 October, reporters will still have a role to play in handling those cases. We are incredibly grateful to the reporters for everything they’ve contributed, but felt it was time to bring in a different system in line with modern complaints-handling regimes. As a result, in-house complaints investigators will investigate and report on conduct complaints for business instructed after 1 October, making recommendations to the Professional Conduct Committee.

"Making findings of unsatisfactory professional conduct will be a particular challenge for the Society as we have no precedents or case law, so we will have to start from scratch and build up our jurisprudence. We will look at the particular circumstances of the case when judging unsatisfactory conduct. The decisions taken by the Professional Conduct Committee and on any appeals to the SSDT will help to mould the process.”

Not only has a streamlined system of professional complaints investigators been put in place to replace volunteer reporters, but a new team has also been created specifically to liaise with the Commission, offering information and advice to solicitors and the public. This team is being financed from the restructuring of the former Client Relations Office.

Mary McGowan will lead the unit as the Head of Regulation Liaison. She says: "The new regulation liaison team will provide a particularly valuable service for solicitors in the new regulatory landscape. It will give information and advice to the profession at every stage of the complaints process and about how the Commission works. We know it might be confusing when there are suddenly two organisations to deal with, but we are there to help. In fact, we will be able to do everything short of representing the solicitor – we cannot do that because of the possibility of a conduct complaint arising out of the service complaint.”

In liaising with the Commission, the new team will be responsible for dealing with any correspondence and issues that arise, for instance how to go about investigating a hybrid complaint with elements of both service and conduct.

**Up to speed**

Mary McGowan adds: "Solicitors and clients will have to get used to the new process – all complaints going initially to the Commission, the transfer of the Ombudsman’s powers to the new body, appeals heard before the Court of Session, and so on. But whatever the issue, we will do everything possible to help out. The Commission staff are gradually getting up to speed and we are working constructively with them. There has been some uncertainty during recent months and years but we know what we must do and are ready for the challenges that lie ahead.”

Craig Watson is a freelance writer specialising in legal affairs.
Entrance certificates issued during July/August 2008

Notifications

Applications for admission July/August 2008

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Since I wrote the first part of this article little has changed for the better, and it appears that a long cold winter lies ahead for many. It does not all have to be gloom and doom though, and for most of us the future still remains within our own control.

We have looked already at some of the more protective measures that a firm can take to maintain profits, by cutting costs and improving marketing to existing clients. Let’s now look at some of the more proactive ways of increasing profitability.

Clients are the lifeblood of a firm and the volume of new clients is often seen as the most obvious sign of success. With diminishing demand for certain services, how can we maintain these client numbers?

Planning a campaign
There are no simple answers, but there are a number of options that should be considered. Advertising is an obvious one. This can be a blunt and often expensive tool, but as advertising revenues are dropping, so are costs, making it more appealing to undertake a campaign. Advertising without clear goals and targets closely monitored, however, is likely to be as successful as a blind archer at the Olympics. Advertising should be paid for by results!

Adverts have to have a clear message and a clear proposal. It is not effective therefore to place an advert stating “We do conveyancing”. This is more a statement than a meaningful advert.

People generally buy two things, “people” and “results”. How you phrase these two proposals in an advert is an art in itself, but it’s likely that an advert linking you to a particular geographical area (e.g. Glasgow) or client type (e.g. nurses), and with a specific result, e.g. fixed fees, personal service or even “keys on time or your money back”, will bring the best results. It is important that people make a connection with you or your firm (i.e. you have a connection with a geographical area or a sector of the population) and have some reason to expect that you may be able to secure something that they want.

Advertising campaigns, as with all business processes, should start with the end in mind. Set yourself a budget and a timescale. Monitor closely any increase in business as a result of the advert and ultimately whether there is an actual benefit to the bottom line. Remember that what you actually keep is about half of the gross fees generated and from that you have to deduct the cost of advertising. Depending how well you know your business, you might be able to extrapolate further how much each new client is actually worth to your firm. If for example you make a £250 profit from each new client and 33% of them will use you at least three more times during their lifetime, the actual profit is £500. If a £1,000 advert brings you three new clients, you have made a £500 profit after the cost of advertising. This is not an exact science but it at least allows

**Pulling through: top 10 tips**

1. Look to implement small changes in a number of different areas of your business.
2. Understand the true value of a client. What is a client worth to the business in terms of net fees?
3. Cost cutting can add real value to the bottom line – provided you don’t affect service or quality.
4. Advertising in a recession can bear fruit, but has to be targeted and monitored.
5. There are many ways even in a recession to acquire new clients – you just have to concentrate on their needs.
6. Maximise the value to the business of every client by widening the range of services offered.
7. Never forget to ask for referrals. How else will a client know you want them?
8. Resist the temptation to reduce fees. Try to focus on the results that the client needs.
9. Try to build a business with many income streams. It will be more robust and will have a much greater value.
10. Remember, it’s better to be at home with the family than doing work you aren’t getting paid for!
you a framework to monitor the success of a set of adverts. Without it you are just shooting arrows into the dark and hoping you hit something!

**Vary the approach**

If advertising proves successful repeat it, but also consider either adding or changing markets. One advert will not hit every market sector, and adverts with other "proposals" may bring in different client types and numbers. So, if you have successfully marketed to nurses, could you next aim a similar set of adverts at doctors? If you have targeted the result as "we'll get you the house", could you now offer "the best value fees in town"? Each will attract a different type of client and again the effectiveness of the advert can be monitored and the campaign expanded or dropped depending on the results.

This approach can be further enhanced. If you have decided to target a certain market, it may be possible to produce articles relevant to the issues of that market in publications applicable to them. So, if you had targeted opticians for example, perhaps the journals that opticians are required to read would let you write some features relevant to them. If you are simply targeting your local area, local papers are often happy to consider articles particularly from those advertising with them. Ultimately what you are attempting to foster is a sense of connection with your firm. You can also use these articles to highlight areas of law that are of interest and in which you would like to encourage more client enquiries.

**Best prospects**

We touched on seminars previously to retain existing clients. They can also be very effective in winning new ones, used either independently or in conjunction with advertising. Used with advertising you will generally find a much higher strike rate. Those who attend are amongst the best possible prospects as new clients, but for people to take the time and effort there must
Professional practice Beating the recession

Continued from page 37

be again, a result on offer. While I would personally strongly recommend that seminars or adverts on ”Cheap Fees” are unwise, there are other more positive results that can be reinforced at this time. Each firm will identify its own areas, but some suggestions could be “How to bag a house bargain in the current market”, “Trust deeds and insolvency – How they might work for you”, or “Inheritance tax, the optional tax”.

To digress for one moment, clients are not interested in how well you will carry out, for example, a conveyance: competence is assumed. You are a solicitor and to the public at large the presumption is that we all do the same thing and they will be compensated if we get it wrong. What they are however looking for is someone who can benefit them in some way. Once they have found them, fees are generally not an issue.

**Remember me to your friends**

Our own client banks remain a rich and fertile source of new referrals. Who better than those who already know us to recommend us to their families and friends? But do your clients know that you would welcome, or indeed need their help? Unless you let them know, how will they know?

**Broadening your appeal**

We look lastly at increasing the number, or improving the quality, of services that we offer. As solicitors we can offer all the services that a legal practice is entitled to offer, within the limits imposed by the Society and by our indemnity insurance. Most firms offer but a fraction, preferring to rely on the repetition of a limited number of services that they are comfortable with. For many this has been not only acceptable but highly profitable. Specialisation has allowed many firms to deal with much higher volumes while retaining healthy profit margins.

This is unlikely to be the case for many general practices today, so that either diversification or further specialisation has to be considered. For example a general conveyancer may spend 80% of their time on conveyancing matters but would consider executry work, wills and commercial work - although the thought of a court appearance might terrify them! In the current market I believe they would be faced with three choices.

First, they may look to expand their business in areas in which they are already comfortable. In our example, that might be trying to increase wills and executry work and commercial instructions. The challenge will be that this is a spinoff from general conveyancing, so will be reducing in line with the current market. Active marketing of these services would be required in the ways that we have already touched on. There is no doubt however that with the reduced volume of work being experienced by many, there is both the time and the opportunity to target existing clients on services such as powers of attorney, wills and IHT. These if marketed correctly will not only bring substantial additional income but will improve
client retention significantly. Secondly, they may do nothing regarding the range of services but seek to become more expert in some or all existing areas. If you cannot change the number of hours you bill for, the best option may be to increase the rate that you can charge per hour. This may involve further study or qualification followed by some form of advertising of these new skills, but once achieved there will be realistic prospects of higher fees for the work undertaken, plus the likelihood of more referrals from a variety of sources in these areas. This path may however require a longer term view to be taken.

Lastly, they may look to develop as many additional services as their firm is able to support. A diving board is a very poor business model, being a large board supported by a single pole. A table with four legs is much more stable. Likewise a business with many potential income streams is the most robust. The benefit of this approach then is not only short term improvements but a far more balanced and stable business model for future years. Some of the additional services will be obvious and we have touched on these already. Others may need additional expertise either by training existing staff or by acquiring new staff.

We have as a profession almost limitless opportunities to develop services for our clients, not only in our traditional roles but in many areas that are developing. There is no doubt that many firms continue to do very well in times such as these: firms with expertise in insolvency and debt issues, but also firms with a focus on associated areas such as matrimonial (which tends to increase during times of financial issues), litigation and developing areas such as intellectual property. Ultimately each practice will require to look to its future and decide which services it feels best able to and has a desire to provide.

Some thought should be given to building work streams that are recurring. Too many of our traditional services are occasional purchases. While, seen over our whole client base, conveyancing does provide a regular flow of business, many of our clients will utilise our services irregularly. Recurring work types with annual meetings/checkups or consultations will guarantee future stability and will add huge value to the worth of the business.

**Don’t go this way**

It is worth considering a few things not to do in the current market. Cutting fees is a course for many firms struggling to maintain client flow. This however is an extremely dangerous path unless you are very sure of your facts and figures. While you may wish to consider reducing profit margins, it may be better to spend the time developing other work types than carrying out work for no profit or, worse still, a loss. For the avoidance of any doubt, a small loss made in a transaction, when multiplied by a higher volume of transactions never becomes a profit, it just becomes a bigger loss!

While reducing costs has been identified as essential, it remains equally essential to protect and nurture the core of the business. Unnecessary expense may be wasteful, but equally so will be kneejerk reactions and shortsighted costcutting. Better to retrain or redeploy existing staff in areas where demand for services remains strong.

Likewise, reducing the standards or quality of the service offered is a threat to the long term future of the business. If business is quieter, it is very easy for standards to slip. Times like these are the ideal opportunity to concentrate on providing an excellence of service in every way. Systems can be introduced and tested to ensure real quality of service and value to clients, which would be impossible to implement during busier times. Once in place, these systems will continue to deliver rewards for many years to come.

Little that I have mentioned is original or unique. It is useful however to be reminded of it from time to time. Implementing even small changes in each of the areas that we have touched on, when looked at cumulatively can make significant improvements to the success of a business. Be heartened though: for those who survive the year or two ahead the times after will be profitable, and those firms who have weathered the storm will be well placed to reap the rewards.

Stephen Vallance is a former partner in Vallance Kliner & Associates, Glasgow. He is happy to undertake consultancy work. For any queries arising from this article or any issues surrounding practice management, profitability or marketing, contact him at svall45193@aol.com.
On the road again

The 2008 Risk Management Roadshow series took place during April, May and June. As in previous years, these events concentrated on group discussion of case studies based on the current claims experience and emerging risk issues in order to illustrate risk issues and practical risk management points.

Some of the case studies from the Risk Management Roadshow appear here with a note of some of the risk management points to be considered. There is no definitive “correct answer” to the questions posed, and no authoritatively “correct response” to the issues raised by the case studies. As was evident from the group discussions, quite different approaches can be equally valid.

The file
The following scenarios and allegations have featured in claims made against solicitors.

In each case, the content of the client file is not as helpful to the insurers/panel solicitor in defending the claim as it might be. How could the defence of these allegations have been assisted by something that the insurers/panel solicitor might have expected to find on the file?

Case study (a)
Klondikes Solicitors acted for Mr Floyd in the purchase of the tenant’s interest in the lease of a public house. As part of the transaction, Klondikes arranged the transfer of the liquor licence and existing extended hours licence. Some seven months after settlement of the transaction, Mr Floyd contacted the firm in a state of panic. He had just had a visit from the police, who advised him he was trading without a licence, his licence having expired three weeks earlier. He claims he was unaware of the expiry date of his licence, and would in any case have expected that Klondikes, as his solicitors, would have dealt with the renewal process. Klondikes do not handle routine licence renewals and cannot understand how Mr Floyd could have expected that they would deal with the matter.

Risk management points
Klondikes should have on file a copy of the terms of engagement issued to Mr Floyd. One would expect these to contain provisions excluding the licence renewal from the scope of the engagement and informing Mr Floyd that the firm would not issue reminders about the expiry/renewal of the licence. Many delegates described a practice of sending the licence to the client with a “sign-off” letter on completion of the original instruction and in that letter advising what action the client has to take and by when. The letter typically refers back to the terms of engagement and confirms that the firm will not be diarising the critical date(s).

Case study (b)
Law firm, Reinharts, have always avoided giving tax advice to business clients. They are therefore taken aback when they receive a letter from Dreyfus Enterprises alleging that, relying on advice allegedly given by the firm in a conversation in the run-up to 5 April, Mr Dreyfus has now missed the opportunity to take advantage of a tax concession.

Risk management points
Who is the client – the company or Mr Dreyfus? The terms of engagement will confirm the identity of the client and, in this case, exclude tax advice from the scope of the engagement. It can be easy to get drawn into discussion about tax matters and an appropriate file note/letter/email confirming the conversation would provide evidence that no tax advice had been given.

Case study (c)
When Esther Hazy sold her house nine months ago, the deal was: two-thirds of the price to be paid over at settlement with the remaining third to be paid three months after settlement. Of course this wasn’t quite as good as getting the full amount straight away, but it seemed to Esther to be the best deal on offer at the time – better certainly than accepting a more straightforward offer at a figure well below what Esther reckoned her house was worth. By the time she’d paid off the mortgage, the arrears and all the legal expenses, that would have left her with little or no equity towards the more modest house she was trading down to. After three months, there was no sign of...
the balance of the price. After another couple of months, proceedings had been started to call up the security granted by the purchaser in terms of the missives. Only then did it emerge that there would be nothing left for Esther after settlement of what was owing to the first ranking security holder. She blames her solicitors for the situation she finds herself in.

**Risk management points**

When allegations of poor advice or failure to advise are made, sometimes there is nothing on file to support the solicitor’s recollection of the points discussed and the advice given e.g. during a telephone conversation or a meeting. In the case study, corroborating the firm’s recollection would be easier if there is a letter on file fully advising Esther Hazy of the risks involved in settling without receiving the price in full; identifying the risks in not obtaining a first ranking security over the property; and making a comparison of potential outcomes/worst case scenarios.

**Mortgage fraud**

The incidence of mortgage fraud continues to be of concern to insurers where loans have been obtained by false or exaggerated applications, often by fictitious borrowers. In a number of cases, following default, claims are made against solicitors, along with other professionals, who have unwittingly (or perhaps intentionally) become involved in facilitating the fraud. This subject will be addressed more fully in a future issue of the Journal.

The following case study was one of the scenarios discussed at the roadshow.

**Case study (d)**

When Mr and Mrs Goode first began receiving demands from a bank for arrears of mortgage payments, they assumed there had been a careless clerical mistake by the bank. For one thing, they had no connection whatsoever with this particular bank and, for another thing, there was no mortgage over the house. A rollercoaster 18 months later and they were eventually successful in having a security over their house reduced after establishing that a mortgage had been obtained fraudulently and that their signatures on the standard security had been forged by an employee of the company they had appointed to handle the letting of their house while they were abroad on voluntary service overseas. The Goodes’ unencumbered title to their house had been reinstated but not without substantial cost, distress and inconvenience. For its part, the bank had lost a six figure sum and expected to recover those losses.

**Risk management points**

In some of these situations, the solicitors concerned appear never to have met with their clients face to face. Query whether that complies with anti-money laundering regulations (including enhanced due diligence) and/or the Society’s guidance? Leaving aside compliance with the letter of the anti-money laundering regulations, what additional steps could have been taken?
Professional practice  Risk management

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taken to verify the identity of those instructing the solicitors?

Time bar
Time bar claims are a persistent feature of the claims experience. At the roadshows delegates were asked to consider a scenario involving a firm with a record of recurring claims arising out of missed time limits. To address the situation, the firm introduced the following risk controls:
- Central diary – all time bar dates (without exception) require to be entered in the central diary as well as on the file
- Countdown warnings – without exception, countdown warnings six months, three months and one month prior to the time bar date require to be entered in the central diary
- Case reviews – assistants responsible for cases approaching time bar are required to discuss/agree with the head of department an action plan for cases at six months, three months and one month prior to time bar
- Client communication – at the six months, three months and one month stages, a letter requires to be issued to the client alerting them to the approaching time bar and reminding them if we are awaiting information or instructions from them

How would you rate the effectiveness of the above set of risk controls? Are there any additional controls you would recommend?

Subsequent to their introduction of these risk controls, the firm had to undertake three further time bar claims. The risk controls would not necessarily have prevented these claims because the underlying causes of the claims were not related to a failure to comply with the controls.

Case study (e)
One of the firm’s clients had a claim for injuries sustained as a result of an accident on board a ferry. While the assistant concerned had very meticulously followed all the firm’s procedures for duarising and following up on critical dates, he hadn’t appreciated that the applicable time limit in the circumstances of the accident was two years rather than three years.

Risk management points
Claims are still arising from a failure to appreciate that a two year limitation applies to personal injuries claims arising from air/sea accidents. Firms should have appropriate training/checklists in place to raise awareness, and prompt consideration, of this kind of “legal trap”. Wherever there is doubt as regards the applicability of a time limit of less than three years, the rule should be – if in doubt, the shortest possible time limit applies. Some firms operate on the basis that an “assumed two year triennium” applies.

Case study (f)
An established client of the firm had encouraged a friend of hers, Mr Twelfty, to consult the firm regarding a possible claim arising out of an accident some time ago which had resulted in Mr Twelfty having to change his job and give up skiing. By the time Mr Twelfty consulted the firm, his claim was going to be time barred in less than three weeks. Although Mr Twelfty was pretty vague about the circumstances of the accident and had mislaid an envelope of papers regarding the accident and his treatment, it seemed to the assistant who met Mr Twelfty that there could well be some basis for a claim and that the claim could be reasonably substantial. Mr Twelfty had undertaken to find the envelope of papers but by the time he got the papers to the assistant, the triennium had expired.

Claims are still arising from a failure to appreciate that a two year limitation applies to PI claims arising from air/sea accidents

Risk management points
Client/transaction vetting procedures should address whether or not and in what circumstances work will be taken on. Many delegates indicated that they would tend to decline instructions in a personal injury claim close to an impending critical date and send a letter of non-engagement in appropriate terms. If the work is taken on, enhanced risk controls might be appropriate, e.g. terms of engagement/ correspondence setting out clearly the client’s responsibility for providing full, accurate and complete information/documentation before court proceedings can be raised and spelling out the consequences of missing the critical date. If the client fails to produce information/evidence/documentation timely, consideration should be given to terminating the engagement, in which event a letter of disengagement should be sent.

Case study (g)
An assistant in the firm’s branch office has allowed a personal injuries claim to become time barred. This was the only such claim he had – most of his cases are family law matters. He joined the firm a few months ago and he maintains that he knew nothing about the central diary or the system for case reviews.

Risk management points
Firms should have appropriate induction procedures to ensure that all joiners are given appropriate training in the firm’s risk management procedures. This case demonstrates the value of auditing files to establish whether risk controls which fee earners are supposed to know about (or are misunderstanding) and ought to be complying with are actually being complied with. Otherwise, there is a risk of inconsistency or lapses.

Russell Lang and Marsh

Russell Lang is a former solicitor in private practice who works in the FinPro (Financial and Professional Risks) National Practice at Marsh, the world’s leading risk and insurance services firm. To contact Russell, email: russell.x.lang@marsh.com.

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.

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Information technology

In this special IT supplement the Journal looks at the next big issues facing legal practices, and previews this year’s Nothing but the Net conference.

Don’t miss in this section

Nothing but the Net: Preview 45

IT: The next big projects 47
e-legal@nothing.but.the.net

The Annual Law Society Technology Conference

Tuesday 7th October 2008
Radisson SAS Hotel, Glasgow

O2
dacoll
the people who make IT work

www.dacoll.co.uk 0870 609 1402 sales@dacoll.co.uk
The afternoon programme offers another keynote address by DS Alastair Wilson, who will be looking at the developments in cyber crime. Throughout the day there is also a packed schedule of workshops ranging from technically focused sessions on digital forensics and unified communications, to discussion forums challenging legal issues of data protection, intellectual property rights in a digital age and developing your firm’s corporate social responsibility.

Ron Macfarlane, national sales manager for conference sponsors Dacoll said: “Having attended the exhibition in previous years, Dacoll decided to sponsor the 2008 event as e-security is a huge subject. Security is not only about the high profile cases but includes how your data is stored every day and what disaster recovery, business continuity and reliable backup solutions are in place. These are the decisions that help keep you secure. Nothing but the Net is the only event that delivers for the key decision makers in the legal profession in Scotland in a single day.”

E-legal @ Nothing but the Net is taking place on Tuesday 7 October at the Radisson SAS Hotel in Glasgow.

Richard MacLennan, the Society’s IT manager, explains the choice of theme: “E-crime is a global phenomenon which no individual or organisation can afford to ignore. This year’s conference will look into the latest threats and how we all should be tackling the latest information security challenges.”

NBTN goes undercover
Ira Winkler, President of the Internet Security Advisors Group, is flying in specially from the USA to be keynote speaker at the conference. Considered one of the world’s most influential security professionals, he has been named a “Modern Day James Bond” by the media. A former undercover security analyst with the National Security Agency, he now works with governments and major corporations to help them uncover potential security breaches. His unique approach to security issues has included performing espionage simulations, where he physically and technically “broke into” some of the largest companies in the world to investigate crimes against them. Winkler continues to perform these espionage simulations, as well as assisting organisations in developing cost effective security programs.

Jenny Paterson, Head of Update at the Society says: "We are thrilled to have Ira join us for this year’s IT conference. His reputation as consultant, author and IT guru precedes him and we are looking forward to him revealing his security secrets and sharing with us how we can protect ourselves, and our companies, from e-crime and fraud."
The problems and challenges facing the IT directors of Scotland’s major legal practices seem to get more complex and demanding with each passing year. While they solve some problems, advances in IT tend to sharpen existing dilemmas and push firms in the direction of change, almost whether they will or no.

Running a large legal practice is much like running any other competitive business, and IT definitely conveys competitive advantage. However, those heading up the IT departments in Scotland’s law firms tend to know and talk with each other, so there are few secrets. The key project for many practices right now – and it is a phase that several of the larger firms have either completed or virtually completed – is to reduce the large number of applications servers by replacing them with virtual server technology.

Virtualisation – a “must do”

A “virtual” server is a large server running software that carves up the big machine into a number of separate “virtual” servers, each of which can run entirely independently of any of the others.

This might sound deadly dull stuff to a non-IT person, but it is a fundamental issue to all organisations, not just legal practices. Since the early 1990s it has become standard practice for every application to have its own server. Inevitably the number of servers in larger organisations spiralled onwards and upwards, creating both a very significant management problem and, at the same time, a gnawing sense of waste – waste because it is commonplace to find that all the servers in a large organisation are running, on average, at less than 20% capacity, often considerably less!

Apart from the fact that waste is expensive, there are the power implications as well. With global warming grabbing the attention more than ever, every organisation has to be mindful of its carbon footprint, and running one large server instead of 10 not so large servers saves money, power and management time, as well as allowing the IT department to contribute to the “greening” of the firm.

Crawford Hawley-Groat, IT director at Maclay Murray & Spens, reckons that completing the move to virtualisation, something he calls his department’s “must do” project, will both increase the firm’s “agility”, the speed with which it can respond to changes in the business, and increase its business continuity planning and disaster recovery options.

Mining knowledge

Another “must do” project, one that is already in hand but likely to take a good deal of time to complete, is to enable enterprise-wide searching of every scrap of data, from emails to documents and the firm’s time recording system. Mining the knowledge within a practice is one of the biggest long term challenges for any law firm, he says.

“In a small firm with a handful of partners, everyone knows who has done what and where the expertise lies on any issue. With a big firm, replicating that completeness of shared knowledge is extremely difficult. So much is invisible unless you can somehow get it out of fee-earners’ heads and into a knowledge base that is available to all.

“There are so many different areas we could be moving in, from a new projects perspective. It is all about understanding what technology it is appropriate for us to be working with right now, then concentrating on those projects and doing them properly,” he adds.

Failing over gracefully

Richard Harvey, IT director at Harper Macleod, says that his firm too regards virtualising all its business-critical systems as the biggest technology change the practice is going through.

“When we started looking at virtualisation, we ran a discovery process on the workloads on all our servers and we found that they were running way lower than 20%.”

The practice uses VMWare, a middleware application which creates the virtual servers. It has the added benefit of allowing what IT experts call “a graceful failover”. If one of the virtual servers goes down, its workload moves seamlessly to another virtual server. Workloads too, can be moved around, so if one server is being thrashed by running a month-end report, the work can be moved to an idle server with no impact on the users.

Remote but secure

Many larger commercial organisations
Professional practice IT Supplement

Continued from page 47

With today’s appropriate multi-function combination scanner, printer and copier devices, the technology exists now to capture every item. But Harvey points out that this kind of exercise needs careful management. “Any change on this scale within an organisation is critical. It would have to be managed carefully and not forced on people,” he says.

For Raymond O’Hare, Microsoft Scotland regional manager, insofar as they are thinking about how to do away with paper files, the law firms are starting to broach what he sees as the biggest environmental change on the way, namely the onwards and upwards march of mobile technology that combines voice and data.

“In terms of increased productivity for the legal profession this is going to be huge,” he says. O’Hare adds that while exact figures are hard to prove, studies carried out in the US suggest that the average fee earner in a legal practice could save up to four hours a week.

There are still real challenges for software and technology providers, he acknowledges. They have to come up with still more intuitive, easy to use systems. One area that interests him is gesture recognition allied to voice recognition. “This kind of thing takes up huge amounts of processing power, but we have that kind of power coming through with new multi-core processor technology.”

Information capture

Part of the future for legal practices is about automatically capturing fee and billing information from fee earners’ everyday activities, including telephone conversations and emails. That project too, is under consideration as a number of practices, but it is not yet at the forefront of the queue.

Richard Elson, chief information officer at Dundas & Wilson, says that there are probably many areas in most practices where the firm involved is not in a position to leverage the best of current technology. Knowledge management, he suggests, is an obvious example. “We have a knowledge management portal, but clearly, the degree to which it is exploited within the practice depends heavily on the quality and quantity of resource we are able to apply to it. It is a good starting point, but to try to use it to the fullest extent would depend on how information is captured, marked up and presented.”

He points out that it is a long and difficult process getting good clean data in that kind of system. “Technology will enable the exploitation of knowledge more efficiently, but we are still talking about knowledge in people’s heads, and that is always difficult to get into a system,” he says.

Managing relationships

However, the practice is putting a great deal of work into CRM (customer relationship management) and this project is being led from the managing partner down. “This is a big current project for us,” he comments.

Jason Nash, product marketing manager for Microsoft Dynamics CRM, says that the company is having a number of conversations with law firms, largely because these firms are already familiar with Microsoft Office, Outlook and Diary, and want to extend this into better relationship management. “They want a system that staff will not have to relearn. Firms like Dundas & Wilson are looking to deliver a different level of customer engagement. There are products on the market that are very legal centric, but they lack the ease and familiarity of the Microsoft family,” he comments.

Again, the idea is to capture all telephone calls, emails, meetings and time spend on a client matter inside the CRM system. Much of this can be automated if the practice chooses, and it can flow through into the time recording system. “Today, legal firms are very much about compliance management and tracking time and materials, but the standard for interactive systems is being set by internet based web systems like Amazon and Facebook. These are the benchmarks that all organisations will need to aspire to, including legal practices,” Nash says.

Anthony Harrington is a freelance business journalist.

“In terms of increased productivity for the legal profession, mobile technology that combines voice and data is going to be huge”
Professional briefing

Civil court

Sheriff Lindsay Foulis’ latest survey of civil court decisions includes a number testing the competency of actings under different procedural rules

Testing competency

Since the last article Trunature Ltd v Scotnet (1974) Ltd (July article) has been reported at 2008 SLT 653, Cultural and Educational Association v Glasgow Council (May) at 2008 SLT 670 and CSC Braehead Leisure v Laing O’Rourke (July) at 2008 SLT 697.

Changing rule 22 notes

In a recent decision from Sheriff Principal Young, Wright v Turriff Contractors Ltd, Banff Sheriff Court, 12 August 2008, an issue regarding rule 22 notes was aired. At the original options hearing a note had been lodged by the third party *inter alia* against the relevancy and specification of the defenders’ pleadings as directed against the third party. In the note the third party gave notice of two points to be taken at debate.

The defenders lodged a minute of amendment which necessitated the discharge of the debate assigned. During the amendment procedure the third parties lodged a fresh rule 22 note which reiterated the previous points but added a fresh point, also on relevancy and specification. No new preliminary plea had been added to the third parties’ pleadings. At the conclusion of the amendment procedure, the new point in the second rule 22 note was the only one that the third parties insisted on. The sheriff however refused a debate and allowed a proof before answer, apparently on the basis that it was unclear whether the preliminary plea would, as opposed to could, lead to dismissal.

On appeal Sheriff Principal Young considered this was too stringent a test and assigned a debate. It appears that considerable submissions were aired before him as to whether it was appropriate to assign a debate in respect of a point that only appeared in a supplementary rule 22 note lodged after the options hearing, on the basis that having regard to OCR, rule 22.1(4) the only stage at which such further points could be raised was at the debate or proof before answer and only on cause being shown. The sheriff principal had little difficulty in rejecting this submission. The purpose of the note was to give prior notice of the points to be argued at any subsequent diet and thus allow the court to determine whether a debate or PBA should be assigned, and further allow the parties and the court to prepare for that diet. The supplementary note

* Continued overleaf >

![instructusnow.com](image)
fulfilled that purpose. The sheriff principal further granted a partial sist of the cause in respect of the issues between defenders and third party, allowing the action to proceed to proof quoad pursuer and defenders, in light of the time which had elapsed since the accident in question. Further, if the defenders were absolved no further procedure would be necessary between them and the third party.

As an aside, he noted with regret that before the court at first instance, submissions involving counsel for three parties had taken place in the ordinary court. Of necessity time would be at a premium and if parties had prior notice that a hearing was likely to be lengthy, it might be preferable if attempts were made, after consultation with the sheriff clerk, to assign a special hearing. It may be worthwhile for practitioners to bear this in mind, although I have doubts as to how far a court diary could oblige!

**Sist pending other proceedings**

In Morton v Bank of Scotland, Edinburgh Sheriff Court, 26 August 2008, Sheriff Morrison was moved to sist the action, which related to bank charges, pending the outcome of the proceedings involving the Office of Fair Trading before the courts in England. There have already been two decisions regarding such applications from Sheriff Fyle in Inverness, to which I have previously referred.

In the present case, Sheriff Morrison granted the motion. He considered that there was a considerable overlap between this litigation and the one in England. Further the law in both jurisdictions on the relevant points was such that there was a very real prospect of the courts in England and Scotland coming to the same conclusion. There were many actions raised in both jurisdictions and uncertainty would remain until such times as the issues were authoritatively decided. If courts in different jurisdictions came to different decisions prior to that stage, the resultant uncertainty would be unhelpful for business. Sheriff Morrison did not consider the administrative burden of the many actions of any consequence. Resources have to be available for litigants.

**Counterclaim for assigned claim**

In Barr Roads and Contracting v Lusk Construction Ltd, Kilmarnock Sheriff Court, 7 August 2008, an action for payment, the defenders counterclaimed for recovery of sums said to be due by the pursuers to a company which had assigned its claim to the defenders. The issue at debate was whether the counterclaim was competent. Was the counterclaim necessary for determination of the question of controversy between the parties in terms of OCR, rule 19.1(1)(b)(ii)? Sheriff Ireland decided that the provision was an enabling one to allow issues in dispute between the same parties to be decided in the one action, thus in theory saving time and expense. A question of controversy between the parties could cover issues wider than those raised in the principal action. Sheriff Ireland considered that a court still had discretion to refuse to allow a counterclaim to be received. This would be exercised with regard to issues of expediency. The provisions of OCR, rule 19.4 gave the court wide powers to regulate procedure vis-à-vis the principal action and counterclaim. In the present case the counterclaim was admitted to probation.

**Amendment of the instance**

In Royal Insurance (UK) Ltd v Amec Construction (Scotland) Ltd [2008] CSOH 107; 2008 GWD 27-423, Lord Emslie was moved to allow amendment of the instance by the
Questions at debate
In Jackson v Hughes Dowdall [2008] CSH 41; 2008 GWD 26-404, an appeal was taken against the procedure adopted by a sheriff following a debate in an action conducted under the rules of court for commercial causes in the sheriff court. At the debate the defender had sought dismissal of the action. After avizandum, the sheriff issued a note determining that certain averments were irrelevant and should be deleted, although no leave to amend in that manner had been sought. The sheriff thus refused probation of these averments but allowed a proof before answer.

The Inner House determined that the issue at debate was the relevance of the pursuer’s averments and nothing suggested that the sheriff had been required to do otherwise than adjudicate upon the submissions made in support of the pleas debated. If the pursuer had sought to amend, the terms of such an amendment would have been for the pursuer to determine. By, in effect, amending the pursuer’s averments ex proprio motu, the sheriff prevented the defenders debating the issue of the amendment. Whilst a sheriff was involved in the case management of a litigation, this did not allow him to depart from the role of impartial arbiter and as a result problems can occur. In the course of delivering the opinion of the division, Lord Reed also made observations that the callings of a case being conducted by conference calls might not sit easily with the general principle that the conduct of a case should be in public. Further, the use of emails to deal with other than administrative matters seems also to have concerned their Lordships. Matters such as legal submission, which normally should be aired in public, had been transmitted by email.

Family actions
An issue of jurisdiction arose in MB v CR, Dunfermline Sheriff Court, 18 August 2008. On 3 October 2007 a final interlocutor had been pronounced in respect of a child, making various orders in terms of s 11 of the Children (Scotland) Act 1995. The child then moved to Bristol, attending school there and having medical care arranged there. The pursuer had consented to the order in anticipation of this move. A minute to vary the interlocutor of 3 October 2007 was lodged by the pursuer in Dunfermline Sheriff Court on 10 June 2008, some eight months after the child had moved to Bristol. An action had also been raised in Bristol relating to the child by the defender. Sheriff Dunbar was referred to Council Regulation (EC) 2201/2003 and s 17A of the Family Law Act 1986. He noted, however, that a 15 of that Act had not been amended in any way: the conduct of the liable party had to be “irresponsible”. I don’t think that is a bad yardstick.

Adults with incapacity
There have been two decisions of some practical interest issued in the last couple of months. In the Application by JOP, Glasgow Sheriff Court, 14 August 2008 Sheriff Baird noted the difficulties regarding the finding of caution for lay persons appointed guardians. There is now a system in place covering estates up to a value of £500,000 which carries a presumption that a person appointed guardian by a court is a suitable person. The premiums have been substantially reduced for small estates [see p 31: Ed].

In two applications in Edinburgh Sheriff Court by Francis Galashan and John Lynn, 7 July 2008 Sheriff Mackie observed that whilst there was no general rule, normally the expenses incurred in making an application would be taxed on an agent/client, client paying basis. However, the decision was one for a sheriff to determine and the interlocutor should specify the basis of taxation.

The usual caveat applies.
A Wise decision

A recent Scottish case illustrates the potential value of interim interdict in intellectual property cases

The recent Inner House decision in *Thomson Wise Property Care Ltd v White Thomson* [2008] CSIH 44 is a useful reminder of the value of taking swift action to obtain an interim interdict in passing off, and for that matter other types of IP cases, and of the difficulties facing a party who wishes to appeal against an interim interdict once granted.

The background

The case has a complex background, borne out of a family dispute where the surname of the three brothers involved was White. The brothers initially worked for their father’s company, White Thomson Preservation (Northern) Ltd, which specialised in the investigation and treatment of dry rot, rising damp, woodworm and similar problems. In 2002 the brothers left their father’s company to set up their own business, White Preservation Ltd, which operated in the same area, and the two businesses competed with each other until late 2003. The father commenced proceedings for winding up his company in around May 2004.

White Preservation continued to be operated by the three brothers until, following a dispute, Ewan White sold his share of the company in 2004. The two remaining brothers (Gavin and Grant) continued the business following the split and it went from strength to strength. In early 2006 they sold the company and goodwill in the brand to Wise Property Care (“Wise”), who maintained the previous company name and operated it as a trading division.

Then, in late 2007 and early 2008, more than three years after he left White Preservation Ltd, Ewan White set up two companies, White Thomson Preservation Ltd and White Thomson Preservation (Northern) Ltd, in direct competition to White Preservation in the property preservation market.

First instance hearings

Wise, as the pursuer, successfully obtained an interim interdict *ex parte* at a hearing in the Outer House on the basis that the names White Thomson Preservation Ltd/White Thomson Preservation (Northern) Ltd were confusingly similar to the name of their trading division White Preservation and that the use of those names was passing off. The defenders then applied for recall of that order.

The Lord Ordinary, Lord Matthews, held that the three prerequisites for passing off (goodwill to protect, likelihood of confusion, which as a result was reasonably foreseeable to cause damage) were satisfied. He placed great weight on transcript evidence of a telephone call made by a private investigator to the third defender, Ewan White, in which White attempted to foster the confusion by saying that the pursuer’s business address was a “maildrop” of his company. Lord Matthews also indicated in his opinion that the likelihood of confusion was reasonably foreseeable in the objective sense because the two parties had similar names, similar addresses, provided similar services and traded in a similar geographical area. There was therefore a *prima facie* case. Further, the balance of convenience favoured the pursuer because it was an established business whereas the defenders were only recently incorporated. The defenders appealed to the Inner House.

The Inner House decision

The three judges, Ladies Paton, Smith and Dorrian, unanimously rejected the appeal and agreed that the Lord Ordinary was entitled to refuse to recall the interim interdict. They found no fault with the Lord Ordinary’s approach to addressing either the *prima facie* case or balance of convenience. Of course the hurdles to overcome to appeal successfully against an interim interdict are particularly high. Essentially a party must either show that the first instance judge has made an error in law, or demonstrate that no reasonable judge would have reached the decision based on the evidence and arguments before him. The latter is an exercise of discretion not to be lightly interfered with and it is not enough that the appellate court would have decided matters differently. This case illustrates just how difficult it can be to challenge successfully a first instance decision on interim interdict.

Of course the hurdles to appeal successfully against an interim interdict are particularly high... This case illustrates just how difficult it can be

Discussion

The facts here were interesting, with the third defender arguing he was merely picking up and running with the goodwill of the old White Thomson Preservation (Northern) Ltd company owned by his father, which he was effectively saying had been lying dormant in the years since his father’s company was dissolved. The suggestion was that this gave him a defence to passing off. However passing off is of course assessed on an objective basis and this argument was rejected by the Lord Ordinary.

Interim interdict applications are inevitably conducted over a short timeframe, but their impact can be very dramatic and they should always be considered as an option at the start of any IP action as a method of achieving a quick and effective result.

Mark Cruickshank, Maclay Murray and Spens. The author acted for the pursuer and respondent
A new body, the Company Names Tribunal, is about to take up its function of adjudicating on opportunistic company name registrations

Name calling

On 1 October 2008, the Company Names Adjudicator Rules 2008 (SI 2008/1738) will come into force, giving effect to ss 69-74 of the Companies Act 2006. Proceedings will be administered by the Company Names Tribunal and cases will be decided by company names adjudicators (who are also trade mark inter partes hearing officers), based at the United Kingdom Intellectual Property Office, in Newport (formerly the Patent Office).

A specific remit
Company names adjudicators will deal only with disputes about opportunistic company name registrations; that is, solely with applications (complaints) made under s 69(1)(a) and (b) of the 2006 Act. This section provides for complaints by businesses or persons who have a goodwill or reputation associated with a name, where that name (or a similar name likely to suggest a connection with the complainant) has been opportunistically registered as a company name by someone else with a view to obtaining money from the complainant, or to prevent the complainant from registering the name.

Company names adjudicators cannot deal with cases where someone feels that another company name registration is too similar to, or "too like", their own company name but there is no suspected opportunism behind the registration. This sort of dispute or complaint is dealt with by Companies House. Alternatively, if the company name is used as a trading name it may be actionable under the law of passing off. However, an application which is made to the company names adjudicator because the applicant is aggrieved that someone has a company name which is too similar, will not succeed simply on the basis that the holder is trading under the name and causing confusion.

Defences
Section 69(4) of the Act lists the following defences:
(a) that the name was registered before the start of the activities on which the applicant relies to show it has goodwill/reputation;
(b) that the company is operating under the name or is planning to do so and has incurred substantial startup costs, or was operating under the name but is now dormant;
(c) that the name was registered in the ordinary course of a company formation business and the company name is available for sale to the applicant on the standard terms of that business (an "off the shelf company");
(d) that the name was adopted in good faith;
(e) that the interests of the applicant are not adversely affected to any significant extent.

It is very important to note that an application to the Company Names Tribunal will only succeed if the registration holder cannot show any of the above; or, even if the registration holder can show that it satisfies the criteria listed in (a), (b) and/or (c), that the applicant can prove that the registration holder’s main purpose in registering the company name was to obtain money (or some other consideration) from the applicant or to prevent the applicant from registering the name.

Outcomes
An application to the Company Names Tribunal must fall within the bounds of s 69. Applications outside its remit will not be refunded. Applicants do not have to have a registered company name, but must demonstrate goodwill/reputation in the name at the time that it was adopted by the registration holder.

Further information is available on the Company Names Tribunal website www.ipo.gov.uk/cna.

Judi Pike, Company Names Tribunal at the UK Intellectual Property Office
Two cases help to clarify the 2003 Act provisions on diversification by the tenant

Among the provisions of the Agricultural Holdings (Scotland) Act 2003 most requiring interpretation by the Scottish Land Court are those contained in Part 3, permitting the tenant to diversify into non-agricultural activities. The grounds on which a landlord may object to proposed diversification by the tenant (s 40(9)) are particularly vague and will, I’m sure, be the subject of litigation, in due course.

We do, however, now have guidance on two points on this topic.

Reconciling resumption
Cawdor Trustees v Mackay RN SLC/183/04. The lease contained power to resume any part or parts of the farm at any time, plus an explicit power to resume any dwellinghouse not occupied by a farm worker for over three months. The landlord sought to resume a cottage. The tenant was not the original occupier but had taken on a new use of the property. It was argued that the landlord could not resumne the cottage as the tenant was not the original occupier. The court held that, because subletting was not itself a use of land, the proposed subletting could not be said to be “ancillary to the use of the land for non-agricultural purposes”. Part 3 of the Act did not, therefore, apply.

The court went on to consider how a contractual right of resumption could be reconciled with the statutory right to diversify – in particular where the tenant had either conceived or implemented the non-agricultural use and the landlord tried to take advantage of a resumption clause to put the land to that use himself. As there is no express provision covering the situation, the court reached no conclusion but thought that resumption in such circumstances could be controlled by testing the materiality of the resumption and its impact both on the agricultural use contemplated by the lease and the diversified use now permitted by statute.

No duty to co-operate
Grant v Trustees of the Glengarry Estate Trust SLC/92/08. Much more recently (7 July 2008), the court issued a decision of great importance to both landlords and tenants. The tenant served notice of diversification in the form of a proposed micro-hydro scheme. The landlords initially objected under s 40(9) but later withdrew. They did not seek to exercise their powers (under s 40(10)) to impose conditions on the proposed use. The tenant requested the landlords to sign a wayleave agreement with Scottish Power for cables to connect the hydro scheme to the grid. The tenant could have installed the cables without the wayleave, but at much greater cost and with future liability for maintenance. The landlords did not agree to grant the wayleave. The tenant applied to the court for an order requiring the landlords to do so. He argued that the fact that the landlords had neither objected nor imposed conditions was tantamount to them granting the tenant the right to diversify and that, accordingly,

- the landlords’ refusal to co-operate with the tenant was a derogation from their own grant; and
- there was an implied obligation on the landlords to grant the tenant whatever additional rights he required in order to implement his scheme.

The court emphatically rejected the tenant’s arguments and held that it could not look beyond the statutory provisions (which neither contained nor implied any requirement for landlords to co-operate with tenants). It drew no inference, such as that suggested by the tenant, from the landlords’ decision not to object or to impose conditions.

Workable rule?
The implications for landlords are obvious. From the point of view of tenants, the court’s decision may mean that some diversification schemes cannot go ahead or be carried out economically, without the landlord’s co-operation. The court recognised this, although it did not consider it made the legislation unworkable. It took the view that to compel co-operation by a landlord in matters affecting his own property rights was a step too far. Accordingly, tenants will, in future, have either to establish that their proposed schemes, and everything required to make them workable, are under their control, or to obtain the landlord’s co-operation, by agreement, and possibly at a price. In addition the tenant may require the consent of third parties, such as the owner of a private road or a lender, which are unlikely to be within the landlord’s control, irrespective of the landlord’s own position.

I will provide updates on diversification as and when the litigation which I anticipated at the beginning of this article unfolds.

fyi
To compel co-operation by a landlord in matters affecting his own property rights was a step too far.

Alasdair G Fox WS, Anderson Strathern LLP
The Scots and English courts still take different approaches to the availability of judicial review for decisions of sporting bodies.

**Tackling the sporting bodies**

The recent High Court case involving Dwain Chambers and the British Olympics Association (BOA) serves as a reminder of the substantial part the law has to play in the administration of sport and sporting events.

Comments by an eminent English silk involved in the case also highlight an important distinction between the Scots and English systems for review of the decisions of sporting bodies. David Pannick QC (The Times, 31 July 2008) recorded the “first principle of sports law” thus: “governing bodies are not public bodies whose decisions are subject to judicial review”.

The Scottish courts have long denied that the availability of the supervisory jurisdiction of the Court of Session rests on any distinction between public bodies and private: West v Secretary of State for Scotland 1992 SC 385. Under that jurisdiction, the courts may regulate the process by which decisions are taken by any person or body entrusted with a jurisdiction, power or authority; in order to ensure that the person or body does not exceed or abuse their jurisdiction, power or authority, or fail to do what is required.

**Sporting bodies in Scotland**

In Scotland it has long been clear that decisions of sports bodies may be subject to judicial review. For recent examples, see Crocket v Tantallon Golf Club 2005 SLT 663. The authorities highlight the need for a tripartite relationship between (1) the person or body delegating the jurisdiction, power or authority; (2) the person or body to whom it was delegated; and (3) the person in respect of whom the power was to be exercised. Having said that, Lord Reed in Crocket referred to the concept of the tripartite relationship only as a paradigm. It was not “to be applied inflexibly, as if it were a Procrustean bed which every situation must be forced to fit”.

In Wiles v Bothwell Castle Golf Club 2005 SLT 785, Lord Glennie, relying on the decision of Lord Reed in Crocket, but not necessarily agreeing with all of Lord Reed’s analysis, held that “It is now clearly established that proceedings in court by a member to vindicate his rights are, in Scotland, properly to be taken by way of judicial review”. As to the willingness, or otherwise, of the courts to intervene, Lord Glennie said: “Whatever may have been the position in the past, I consider that it is wrong today to draw a clear line between, for example, on the one hand, trade associations and, on the other, social or sporting clubs; and say that in the former case the courts will be ready to intervene on procedural matters whereas in the latter they will not.”

It appears clear, therefore, that whilst the tripartite test in West remains useful, it is not determinative, and the courts will look at the nature and the circumstances of the decision.

However, the absence of a tripartite relationship altogether will preclude judicial review. In Fraser v Professional Golf Association 1999 SCLR 1032, Mr Fraser sought judicial review of a decision of the PGA that he failed an element of its admission examination, meaning that he was refused entry. He sought to review the decision of the examiner, upon whom, he said, a decision making jurisdiction had been conferred, creating the necessary tripartite relationship. Lord Eassie agreed with the PGA’s submissions that, by delegating a decision to an employee or agent, they had not created a tripartite relationship, and distinguished that delegation from the establishment of examiners as a body possessing an identity outwith the association comprising the PGA.

**Nature of the argument**

In the end, one wonders whether the fact that the decisions of sporting bodies may be judicially reviewed in Scotland would have been a distinction without a difference for Dwain Chambers. Although the full written decision of the High Court is not available at time of writing, it appears that Chambers’ argument was with the byelaw of the BOA itself (which he said was in restraint of trade), rather than its application by a body to whom “the power to decide” had been delegated. If those were the facts, the Scottish courts may not have entertained an application for judicial review.

It will be interesting to see whether the supervisory jurisdiction will have a part to play in the Commonwealth Games in Glasgow in 2014. Whilst that event will have the usual network of decision makers and appellate bodies to deal with issues arising, there is the authority that it is not possible to contract out of the supervisory jurisdiction, since to do so would be contrary to public policy: St Johnstone FC v SFA, 1965 SLT 171. Or should lawyers concentrate on involvement as sporting participants and spectators?

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Michael Nicholson, Harper Macleod LLP

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Keeping it legal

Any employer taking on an immigrant worker needs to know the new procedures to be complied with in order to avoid the risk of a civil penalty for employing someone illegally.

In previous Journal issues (March, 44; July, 60) I examined the new points-based system and tiers 1 and 2. We now turn to the new offences relating to the employment of illegal immigrants or immigrants lawfully in the UK but without permission to work. I also address the checks required of employers and identify the documents immigrant employees should provide.

On 29 February 2008 ss 15-25 of the Immigration, Asylum and Nationality Act 2006 came into force. Under s 15 an employer who employs someone over the age of 16 who is subject to immigration control will be liable to pay a civil penalty of up to £10,000 per illegal worker. The Secretary of State is empowered to issue a penalty notice which will be served by the UK Border Agency (UKBA). The new provisions apply only where employment commences on or after 29 February. There is a sliding scale of penalties. Which scale is applied will depend on:

- how many times an employer has been found employing illegal migrants;
- whether the employer is cooperating with the UKBA;
- whether the employer has reported any suspected illegal migrant;
- the nature of the employer’s checks.

Under the new law, employers will be able to establish an excuse and may not have to pay the civil penalty, even if it transpires that the employee was working illegally. To establish the excuse employers will have to check and copy one, or a specified combination, of:

1. A passport showing that the holder, or a person named in the passport as the child of the holder, is a British citizen or a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom.
2. A passport or national identity card showing that the holder, or a person named in the passport as the child of the holder, is a national of the European Economic Area or Switzerland.
3. A residence permit, registration certificate or document certifying or indicating permanent residence issued by the Home Office or the UK Border Agency to a national of a European Economic Area or Switzerland.
4. A permanent residence card issued by the Home Office or UK Border Agency to the family member of a national of a European Economic Area country or Switzerland.
5. A biometric immigration document issued by the UK Border Agency to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom, or has no time limit on their stay in the United Kingdom.
6. A passport or other travel document endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the United Kingdom, has the right of abode in the United Kingdom, or has no time limit on their stay in the United Kingdom.
7. An immigration status document issued by the Home Office or the UK Border Agency to the holder with an endorsement indicating that the person named in it is allowed to stay indefinitely in the United Kingdom, or has no time limit on their stay in the United Kingdom, when produced in combination with an official document giving the person’s permanent national insurance number and their name issued by a government agency or a previous employer.
8. A full birth certificate issued in the United Kingdom which includes the name(s) of at least one of the holder’s parents, when produced in combination with an official document giving the person’s permanent national insurance number and their name issued by a government agency or a previous employer.
9. A full adoption certificate issued in the United Kingdom which includes the name(s) of at least one of the holder’s adoptive parents, when produced in combination with an official document giving the person’s permanent national insurance number and their name issued by a government agency or a previous employer.
10. A birth certificate issued in the Channel Islands, the Isle of Man or Ireland, when produced in combination with an official document giving the person’s permanent national insurance number and their name issued by a government agency or a previous employer.
11. An adoption certificate issued in the Channel Islands, the Isle of Man or Ireland, when produced in combination with an official document giving the person’s permanent national insurance number and their name issued by a government agency or a previous employer.
12. A certificate of registration or naturalisation as a British citizen, when produced in combination with an official document giving the person’s permanent national insurance number and their name issued by a government agency or a previous employer.
13. A letter issued by the Home Office or the UK Border Agency to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom, or has no time limit on their stay in the United Kingdom, when produced in combination with an official document giving the person’s permanent national insurance number and their name issued by a government agency or a previous employer.
be established for the duration of the individual’s employment.

Where the leave to enter or remain in the UK granted to an individual is time-limited, the documents or documents provided will be specified in List B. If an individual provides a document or documents from List B employers should carry out specified document checks before employment begins and carry out follow-up checks at least once every 12 months. These repeated checks are required to retain the excuse. If employers do not carry out the follow-up checks, they may be subject to a civil penalty if the employee is found to be working illegally. To establish the excuse and avoid being liable for payment of a civil penalty for employing a person illegally it is recommended that employers conduct checks as follows:

**Step 1**
A prospective employee must provide:
- one of the original documents alone, or two of the original documents in the specified combinations given in List A; or
- one of the original documents alone, or two of the original documents in the specified combinations given in List B.

**Step 2**
To establish and retain an excuse, if List B statutory documents have been presented, employers are required to check the validity of the document and establish that the identity of a prospective, or existing employee, is the same as the person named in the documents presented. Employers should do the following:
- check that any photographs contained in the documentation are consistent with the appearance of the employee; and
- check that the dates of birth listed are consistent across documents and that they are satisfied these correspond with the appearance of the prospective or current employee; and
- check that the expiry dates of any limited leave to enter or remain in the UK have not passed; and
- check any stamps and visas to see if the prospective or current employee is able to do the type of work in question.

**Steps to safety**
If an individual is not subject to immigration control, or has no restrictions on their stay in the UK, they should be able to produce a document or a specified combination of documents, from List A (opposite). The checks must be made before they are employed and the excuse will then

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**List B: Documents which provide an excuse for up to 12 months**

1. A passport or travel document endorsed to show that the holder is allowed to stay in the United Kingdom and is allowed to do the type of work in question, provided that it does not require the issue of a work permit.
2. A biometric immigration document issued by the UK Border Agency to the holder which indicates the person named in it can stay in the United Kingdom and is allowed to do the work in question.
3. A work permit or other approval to take employment issued by the Home Office or the UK Border Agency, when produced in combination with either a passport or another travel document endorsed to show the holder is allowed to stay in the United Kingdom and is allowed to do the work in question, or a letter issued by the Home Office or the UK Border Agency to the holder or the employer or prospective employer confirming the same.
4. A certificate of application issued by the Home Office or the UK Border Agency to or for a family member of a national of a European Economic Area country or Switzerland stating that the holder is permitted to take employment, which is less than six months old, when produced in combination with evidence of verification by the UK Border Agency employer checking service.
5. A residence card or document issued by the Home Office or the UK Border Agency to a family member of a national of a European Economic Area country or Switzerland.
6. An application registration card issued by the Home Office or the UK Border Agency stating that the holder is permitted to take employment, when produced in combination with evidence of verification by the UK Border Agency employer checking service.
7. An immigration status document issued by the Home Office or the UK Border Agency to the holder with an endorsement indicating that the person named in it can stay in the United Kingdom, and is allowed to do the type of work in question, provided that it does not require the issue of a work permit.
8. A letter issued by the Home Office or the UK Border Agency to the holder or the employer or prospective employer which indicates that the person named in it can stay in the United Kingdom and is allowed to do the work in question, when produced in combination with an official document giving the person’s permanent national insurance number and their name issued by a government agency or a previous employer.
Continued from page 59

Employers need to make a copy of the relevant page or pages of the document, in a format which cannot be subsequently altered, for example a photocopy or scan. In the case of a passport or other travel document, the following parts must be photocopied or scanned:

- the front cover and any page containing the holder’s personal details, in particular any page that provides details of nationality, photograph, date of birth, signature, date of expiry or biometric details; and
- any page containing UK Government endorsements, noting the date of expiry and any relevant UK immigration endorsement which allows the prospective or current employee to do the type of work offered.

Other documents should be copied in their entirety. The copies of the documents should be kept securely for at least two years after employment has ceased. When a follow-up documents check is undertaken (at least every 12 months), the specified steps given above should be repeated.

Employers who acquire staff as a result of a Transfer of Undertakings (Protection of Employment) Regulations (TUPE) transfer are provided with a grace period of 28 days to undertake the appropriate document checks following the date of transfer.

**Losing the defence**

Employers presented with a false travel document or visa will only be required to pay a civil penalty if the falsity is reasonably apparent. The test is whether an individual who is untrained in the identification of false documents, examining it carefully, but briefly and without the use of technological aids, could reasonably be expected to realise that the document in question is not genuine. Equally, where a prospective employee presents a document and it is reasonably apparent that the person presenting the document is not the person referred to in that document, the employer may also be subject to legal action, even if the document itself is genuine. If the falsity is not reasonably apparent, or a valid document is presented by the named person, the employer can expect not to be subject to the penalty.

If an employer knows that a person who is working for them is not permitted to do the job in question, they will lose their right to the excuse and could face prosecution under s 21 of the 2006 Act. On conviction following indictment the maximum penalty is two years’ imprisonment and/or an unlimited fine. On summary conviction, the maximum penalty is 12 months’ imprisonment in England & Wales or Scotland (six months in Northern Ireland), or a fine up to the statutory maximum or both. This allows UKBA to tackle the minority of employers who deliberately employ illegal workers and use false or forged documents to obtain a false excuse.

**Section 21(3)** empowers immigration officers to arrest, enter and search in relation to this offence. For the purposes of s 21(1), a body (whether corporate or not) shall be treated as knowing a fact about an employee if a person who has knowledge of transfer.

**Documents that do not provide you with an excuse**

The following documents will not provide a statutory excuse under s 15 of the 2006 Act:

- Home Office standard acknowledgment letter SAL1 or SAL2 or Immigration Service letter IS96W which states that an asylum seeker can work in the UK. If you are presented with these documents then you should advise the applicant to call the UK Border Agency on 0845 010 6677 for information about an employee if a person who

- a driving licence issued by the Driver and Vehicle Licensing Agency;
- a bill issued by a financial institution or a utility company;
- a passport describing the holder as a British Dependent Territories Citizen which states that the holder has a connection with Gibraltar;
- a short (abbreviated) birth certificate

issued in the UK which does not have details of at least one of the holder’s parents;

- a licence provided by the Security Industry Authority;
- a document check by the Criminal Records Bureau;
- a card or certificate issued by the Inland Revenue under the Construction Industry Scheme.

**Objection and appeal**

Under s 16 of the Act an employer may object to the payment of a penalty to the Secretary of State on the basis that he is not liable, has acquired a statutory excuse or the penalty is too high. With the grounds for objection the employer will be required to supply any additional evidence in support. The Secretary of State must respond to the objection within 28 days, and can cancel, reduce or increase the penalty or decide not to take any action against the employer. If the employer is still not satisfied they may appeal to the county court or sheriff court against the penalty.

There is no requirement to object first: a dissatisfied employer can appeal directly to the court (s 17).

Note that nationals of the European Union are permitted to work in the UK without any Home Office approval (different rules apply to A8 and A2 EEA nationals).

General advice on the prevention of illegal working can be obtained from the UK Border Agency’s employers’ helpline 0845 000 6677, and further information via www.bia.homeoffice.gov.uk.

Damir Duheric is a senior solicitor with Morton Fraser Solicitors, specialising in immigration law.

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e: damir.duheric@morton-fraser.com
This month’s cases deal with failure to reply to correspondence and misleading a client; and failure to pay counsel or record deeds, combined with accounts offences.

Scottish Solicitors
Discipline Tribunal

Ajaz Mohammed Hussain
A complaint was made by the Council of the Law Society of Scotland against Ajaz Mohammed Hussain, solicitor, 12 Albany Terrace, Dundee (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of his repeated failure to respond to correspondence from the Society, his failure to obtempere statutory notices and his misleading his client as to the status of his application.
The Tribunal censured the respondent and directed in terms of s 53(5) of the Solicitors (Scotland) Act 1980 that any practising certificate held or issued to the respondent shall be subject to a condition that the respondent’s practising certificate, this restriction to run concurrent with his existing restriction.

John Gerard O’Donnell
Two complaints were made by the Council of the Law Society of Scotland against John Gerard O’Donnell, solicitor, 15 Clarkston Road, Glasgow (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of his repeated failure to record heritable deeds between 14 July 2000 and 22 March 2007 to settle counsel’s fees, his delay and/or failure to record heritable deeds with the Registers of Scotland on behalf of his clients, his breach of rules 6, 8 and 24 of the Solicitors (Scotland) Accounts etc Rules 2001 and his unreasonable delay in responding to the reasonable enquiries of the Society. The Tribunal censured the respondent, fined him £500 and directed in terms of s 53(5) of the Solicitors (Scotland) Act 1980 that the respondent’s practising certificate be subject to a condition that the books and records of the respondent’s practice be inspected by the Council of the Society no later than 30 June 2008 and thereafter at nine-monthly intervals on two further occasions, the last of which to take place no later than 31 December 2009, all such inspections to be at the expense of the respondent.
The Tribunal noted that there were numerous instances of long delays in recording deeds. The respondent had also not been maintaining proper records and operated without having proper systems in place to ensure compliance with the Accounts Rules and Money Laundering Regulations. This is damaging to the reputation of the legal profession. Solicitors have a professional responsibility to recognise that they should not continue working if they are unable to operate satisfactorily due to illness. The Tribunal however accepted that all the issues in both complaints arose during the period when the respondent was suffering from depression. The Tribunal also noted that the respondent had previously worked without incident in the profession for 30 years. The Tribunal was impressed that matters had been resolved and that the respondent was willing to have further inspections. The Tribunal considered that in order to ensure protection of the public, the respondent’s records should be inspected by the Society on a regular basis over the next two years. This would ensure that if there were any further difficulties they would be picked up immediately. The Tribunal imposed an additional fine of £500 in respect of the delay in paying counsel’s fees.
The web review looks at two very different organisations which have launched or relaunched in recent months

New kids on the block

Scottish Young Lawyers Association

www.syla.co.uk

The Scottish Young Lawyers Association’s relaunch was covered in last month’s Journal and I don’t think that their website has been reviewed (or not for some time, at any rate), so now seems like an apposite moment to do so.

The SYLA website has a crisp, modern and attractive look to it. It has obviously been professionally designed (or much kudos to the amateur who did it), and benefits from this immensely. It obeys many of the basic rules of web design, e.g. it is immediately apparent from the first sight what the organisation is and what it does: “representing, educating and entertaining young lawyers in Scotland today”.

From the latest news section (which also features on the home page) it is apparent both that the site is frequently updated, and that the Association is a busy and active one.

Highlights from the rest of the site include the “Events” page, which is a cross between a CPD calendar and a facebook style social diary (complete with photos of previous events). The “Issues” page provides updates on the SYLA’s work on various issues of interest to young lawyers: from the obligatory trainees’ salaries and professional competence certificate to thorny questions vexing the profession as a whole, such as the Scottish Legal Complaints Commission, legal aid reform etc. Finally, a “Careers” page offers some interesting information and relevant links to the solicitor in the early stages of their career.

In conclusion, and without wishing to sound like a recruiting sergeant for the SYLA, this really is a must for the bookmarks of any young lawyer.

CL@N Child Law

www.clanchildlaw.org

Launched in April 2008, CL@N is a new law centre in all but name. CL@N is an acronym (if you overlook the “@” symbol) for Community Legal Advice Networks, and the organisation’s aims state: “every person should be able to get the legal help that they require at the time that they need it and in a way that is suitable to them”.

Thus, CL@N Child Law is only “phase 1” of what seems to be a very ambitious project indeed. Backed by Sheriff Gail Patrick among others, the website relates to their initial focus, i.e. child law in Edinburgh and the Lothians.

The site itself is not nearly as inspiring as the project. It comes in predominantly grey, with occasional blue highlights, and even the atmospheric photo at the head of the page is of grey skies (being based in Edinburgh, you can’t fault them for accuracy!), albeit tinged with orange.

Technically, the site is a little basic and it scores very few points for accessibility despite CL@N offering advice on disability discrimination. This no doubt stems from the small scale and limited budget of what is still a young charity, but it certainly doesn’t make for a good first impression.

It is a fairly small site and very easy to navigate, with no page being more than one click away. Much of the information is provided by way of downloading PDF documents which, on a site of this size, is unnecessary for the most part and simply places a barrier between the user and the information they are trying to reach.

The main features of the website beyond the introductory parts are the News and Training pages. The news has not been updated since the launch, but the training section has been – bringing details of a very full and useful training programme to be run through the autumn. On finding a suitable training course online, I imagine many would be disappointed to note that the only way to book a place is to send a cheque by good old-fashioned snail mail. I realise that online booking may be beyond a small charity, but an email link or web response form would add functionality to these pages.

Special mention must be made of the “R U under 18?” section, in which young people have been offered the opportunity to design a new logo for CL@N – the winning entries are displayed in full colour here.

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.
The Promised Land
Property Law Reform

It is almost 10 years since Donald Dewar presented the first legislative programme of the first Scottish Executive to the new Scottish Parliament, with land law reform as the vanguard of social and democratic change for a new, vibrant Scotland in the 21st century. Beginning with the Abolition of Feudal Tenure etc (Scotland) Act 2000, a series of Acts, based on the work of the Scottish Law Commission, has substantially overhauled and modernised property law, making it more modern and coherent.

Although this process is not yet complete, with the ongoing land registration project a large piece still to be fitted into the new jigsaw, the time is right to take a step back and analyse the progress made, and question whether the reforms have achieved their aim. Professor Robert Rennie of Glasgow University has assembled a team of 11 leading writers and practitioners to reflect on the various reforms in this very welcome volume of essays. It is handsomely produced in hardback form, and although relatively small in appearance, it is weighty in content.

It was inevitable that the promised land of property reform would not be one entirely of milk and honey, and that problems would persist or be created anew. However, as Lord Gill emphasises in his foreword, the legislation has achieved more radical and valuable reforms within a few years than had been achieved in the previous century. The reforms have been intended to make property law in practice more efficient and coherent, and the great value of these essays is that all the authors subject the reforms to critical academic analysis but do so in the context of how the law operates in practice, which is what Scottish solicitors involved in this field want to know. It is true that some topics covered in the book are more relevant than others. For instance, the average conveyancer will be more concerned with interest to enforce real burdens than servitude rights in servitudes. However, all the essays are very relevant to the practice of property law, and the large majority of the book covers matters which are significant for day-to-day practice.

The essays cover all the major areas of reform including servitudes, access rights, tenements, the Lands Tribunal, and the new financial provisions on termination of cohabitation under the Family Law (Scotland) Act 2006. Professor George Gretton provides a welcome overview of the current land registration project, and there is a very useful essay on automated registration of title to land by Stewart Brymer and John Davis in which the authors rightly encourage the profession to embrace ARTL now.

Perhaps the most useful chapters, however, are the three on various aspects of real burdens by Professor Rennie, Scott Wortley and Professor Kenneth Reid. Although the reforms under the 2000 Act and the Title Conditions (Scotland) Act 2003 made significant improvements, practical problems continue, especially in relation to burdens created previously. Professor Rennie discusses interest to enforce real burdens, Scott Wortley looks in depth at personal bar (one of the welcome improvements to the regime for real burdens, but not without pitfalls), and Professor Reid examines the very real problems posed by ss 52 and 53 of the Title Conditions Act regarding common schemes and related properties in third party enforcement rights. This is a particularly thorny area and cannot be ignored with impunity.

It is one of the challenges for a modern day solicitor that the ever increasing pressures of day-to-day practice make it difficult to keep pace with every detail of changes in the law, even within an area of specialisation. Property and conveyancing lawyers are no exception. Completing transactions correctly to clients’ satisfaction and taking care that nothing will come back to haunt you is the order of the day. Time to contemplate the intricacies of property law is not available. Professor Reid in his contribution rather cuttingly refers to a low level of knowledge of the law amongst conveyancers. The number of professional negligence cases on conveyancing would seem to bear this out. As the economic climate starts to slow down significantly, it is an ideal time for solicitors specialising in property law and conveyancing to purchase and carefully read the 250 pages of this book. It will be rewarding reading.

David A Brand, Senior Lecturer and Director of the Diploma in Legal Practice, University of Dundee
In-house Road traffic prosecutions

The new road traffic offences focusing on fatal consequences of driving have caused much debate as to how they should be assessed in terms of criminality and seriousness. Cameron Ritchie explains the approach that the Crown Office and Procurator Fiscal Service will take to prosecution.

Charging the death offences

Sections 20 and 21 of the Road Safety Act 2006 introduce two new offences of causing death by driving into the Road Traffic Act 1988:
- causing death by careless, or inconsiderate, driving (s 2B); and
- causing death by driving: unlicensed, disqualified, or uninsured drivers (s 3ZB).

Both the offences will have effect in relation to any fatal road traffic incident occurring on or after Monday 18 August 2008. The introduction of these two new offences will have a significant effect on the way that the Crown approaches the investigation of road traffic deaths, and the policy in regard to the prosecution of drivers involved in fatal accidents.

The s 2B offence
Section 20 of the 2006 Act introduces the new s 2B into the 1988 Act, which creates the offence of causing death by careless or inconsiderate driving. The section states:

“A person who causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, is guilty of an offence.”

This offence can be prosecuted either summarily or on indictment. The maximum penalty on indictment is five years’ imprisonment, and on summary complaint 12 months.

Disqualification from driving and endorsement of the offender’s driving licence are mandatory. The offence carries between three and 11 penalty points in circumstances where the court finds special reasons for not imposing disqualification.

Section 3ZB: three possibilities
Section 21 of the 2006 Act introduces the new s 3ZB into the 1988 Act, which creates three new offences of causing death by driving whilst either unlicensed, disqualified or uninsured. This section states:

“...”

This offence can be prosecuted either summarily or on indictment. The maximum penalty on indictment is two years’ imprisonment, and on summary complaint 12 months. The same requirements apply in relation to disqualification and endorsement as for s 2B.

The investigation stage
This means that the offences which involve causing death by driving are:
- murder and culpable homicide;
- s 1 (causing death by dangerous driving) and s 3A (causing death by careless driving when under the influence of drink or drugs) of the 1988 Act;
- s 2B of the 1988 Act (causing death by careless, or inconsiderate, driving); and
- s 3ZB of the 1988 Act (causing death by driving: unlicensed, disqualified and uninsured drivers).

All deaths in which there is a possibility of such an offence will be investigated by the procurator fiscal and reported to senior Crown counsel for consideration of prosecution. Unless the only driver of a vehicle involved in an incident is deceased, the presumption will be that, when the death is reported to the procurator fiscal, there will be at least a possibility of prosecution for one of these offences.

Accordingly, the procurator fiscal’s investigation will be aimed at determining whether prosecution is appropriate, and thereafter to proving to the required standard the relevant criminal charge. There will be post mortem examination of all deceased with a view to establishing corroborated proof of the cause of death. It will be usual, before a death is reported to Crown counsel, to have a meeting with the nearest relatives of all deceased, to explain the procedure to be followed and the factors that Crown counsel will take into account in coming to a decision.

Unless a driver is kept in custody (which is a probability in the case of a disqualified driver), the driver will not be charged until Crown counsel’s instructions to proceed with a prosecution have been received. Where a driver is kept in custody, the case is likely to be on petition to High Court or sheriff and jury indictment on the custody timescale.

Before indictment proceedings are commenced, an offending driver will always appear on petition to allow full disclosure and preparation for trial to take place.

Proceedings under s 2B
Careless, or inconsiderate, driving covers a very wide range...
of driving behaviour and different levels of culpability on the part of offenders. COPFS prosecution policy takes this into account as well as having regard to all relevant surrounding circumstances. However there will be a presumption that all offences under s 2B of the 1988 Act will be prosecuted on indictment before a sheriff and jury. Summary proceedings may be taken in certain circumstances. In deciding whether summary proceedings are appropriate, senior Crown counsel will take into account the culpability of the offender and whether there are significant aggravating or mitigating factors.

The aggravating factors to take into account include:
- other offences were committed at the same time, such as driving other than in accordance with the terms of a valid licence; driving while disqualified; driving without insurance; driving while a learner without supervision; driving a stolen vehicle;
- the accused has previous convictions for motoring offences, particularly offences that involve bad driving;
- more than one person was killed as a result of the offender’s actions;
- serious injury was caused to one or more persons in addition to the death(s);
- the accused behaved in an irresponsible manner, such as failing to stop or falsely claiming that someone else was responsible for the collision.

The mitigating factors to take into account include:
- the accused was seriously injured in the collision;
- one or more of the victims was a close friend or relative;
- the actions of the victim(s) or a third party contributed to the commission of the offence;
- the offender gave direct, positive, assistance at the scene to victim(s).

Section 3ZB: policy and prosecution

Parliament, when considering this offence, decided that, in this context, causing a death by driving in these circumstances required no fault on the part of the offending driver. The view taken was that the offender’s vehicle should not have been on the road while being driven by the offender and the simple act of driving it on the road in these circumstances would be sufficient “cause” to constitute the offence. The Sentencing Guidelines Council in England & Wales has recommended that “culpability arises from the actions of the victim or a third party contributed to the death(s); the accused showed irresponsible behaviour, such as failing to stop or falsely claiming that someone else was driving. The mitigating factors to take into account include:
- the decision to drive was brought about by a proven and genuine emergency falling short of a defence;
- the offender genuinely believed that he or she was insured or licensed to drive;
- the offender was seriously injured as a result of the collision;
- the victim was a close friend or relative;
- the accused has previous convictions for analogous offences or offences of bad driving;
- more than one person was killed as a result of the offence;
- there was serious injury to one or more persons in addition to the death(s);
- the accused showed irresponsible behaviour, such as failing to stop or falsely claiming that someone else was driving.

The mitigating factors to take into account include:
- the actions of the victim or a third party contributed to the offence;
- the offender gave direct, positive, assistance at the scene to the victim(s);
- the offender has an exemplary driving record.

There is no doubt that the introduction of these offences by the UK Parliament heralds a much tougher approach to dealing with fatal road traffic accidents, and many incidents which are currently dealt with by summary complaint against an offending driver are likely to be the subject of indictment procedure in the future. The profession needs to be aware of the potential impact not only on clients who are drivers involved in such accidents, but for clients who are the nearest relatives of the deceased.

- Cameron Ritchie is Area Procurator Fiscal for Fife
Members of the profession are alerted to the fact that the Council of Mortgage Lenders (CML) have introduced a significant change to the CML Lenders’ Handbook for Scotland, effective from 1 September 2008.

CML advises that the change is to help restore confidence in the new-build market. The difficulties in capturing discounts and incentives offered on new-build properties have led to price distortions and exposed lenders and the public to fraud and the risk of loss. This is now impacting on builders and prospective purchasers due to the harder line lenders are taking to avoid hidden risks, and the whole market is suffering.

Additional duty
From 1 September 2008, therefore, lenders will enhance their instructions in part 2 of the Lenders’ Handbook. These changes will require solicitors to confirm that they have received a new “disclosure of incentives” form from the builder/developer of any new-build, converted or renovated property, before submitting their certificate of title. CML hopes that the form and associated changes to the CML Lenders’ Handbook for Scotland will achieve a greater transparency in a way that is as simple as possible. A copy of the disclosure of incentives form and a frequently asked questions document can be found at www.cml.org.uk/handbook/frontpage.aspx.

The Law Society of Scotland fully supports the principle of combating mortgage fraud. However, the members of the Society’s Conveyancing Committee have grave concerns about the practicalities and potential difficulties for solicitors which the new procedures will cause. In our view, the new process fails to take adequate account of the way the Scottish market operates. We have voiced our concerns to CML, and we are disappointed that our concerns have not been taken on board. We will continue to engage with CML to seek to secure a workable solution that addresses all concerns.

Approval before missives
However, since CML has now indicated that it will be proceeding with its proposed changes to the handbook despite our concerns, we offer the following advice to the profession:

When you send a completed certificate of title after 1 September in
Incentives require to be reported to the lender. However, as a general rule, all incentives must be involved in the process. CML feels that the solicitor has a duty of care to the lender to prepare proper and effective security documentation, but we do not believe that a solicitor has a duty to verify the value of the security subjects. So in all new-build cases where the purchaser will be seeking mortgage funding, our advice is that a copy of the form should be sent to the solicitor as soon as received and the lender’s specific approval thereof sought before missives are concluded. Failure to seek approval prior to concluding missives on an each-and-every-case basis where a loan is involved could leave the solicitor exposed to a claim in the event that the loan instructions, when issued, do not take into account the terms of the form as delivered to the solicitor.

Delay factor
We appreciate that not all purchasers of new-build properties will have firm offers of finance in place when they reserve a new-build property. However, if the solicitor is to ensure that the lender’s approval of the form as issued has been obtained prior to conclusion of missives, then prospective purchasers will have to arrange their finance in advance of concluding missives.

Inevitably, the new disclosure requirements will result in significant delays in the process of purchasing a new-build property while the CML disclosure of incentives form is approved by the lender. Solicitors and their clients are reminded that these new procedures are being put in place by CML to restore lenders’ confidence in this particular sector of the market. CML has indicated the support of Homes for Scotland for its initiative, so perhaps it can be anticipated that builders will extend their usual reservation periods to allow prospective purchasers sufficient opportunity to have their loan arrangements approved in the light of the particular disclosures in each particular case?

Under review
We believe that the aims of CML could have been addressed in a simpler, more efficient and transparent way by insisting that the disclosure information be, and remain, entirely a valuation matter, addressed by the lender’s surveyor. However, CML feels that the solicitor must be involved in the process. CML has indicated that it will review how the new procedures are operating in practice in the first half of 2009. If therefore any member experiences any difficulty with the new arrangements, we would ask that they provide details (anonymised, if necessary) to James Ness, Deputy Director of Professional Practice at the Society.

Until we have seen how the new arrangements work in practice, however, we will continue to recommend that missives for new-build properties should not be concluded unless and until the lender of choice has confirmed its approval of the CML disclosure of incentives form in each particular case. Solicitors are reminded:

(i) it is not their function to usurp the role of the lender in making the lending decision;
(ii) that there is no general duty on a solicitor acting for a lender to verify the value of the security, but
(iii) all information supplied by the builder’s solicitor to the lender’s solicitor upon which the lending decision might be based should be passed on receipt to the lender;
(iv) very few lenders actually permit non-disclosure of incentives below 5% of the purchase price. Those who do operate this exception only allow it in the first purchase of a new-build property. It does not generally apply with secondhand property and therefore, as a general rule, all incentives require to be reported to the lender.

Clearly, only actual disclosure to (followed by approval by) the lender of the information contained within the CML disclosure of incentives form will fully protect the solicitor from subsequent claims.

Paul Carnan is a member of the Conveyancing Committee
A rule introduced to prevent owners of land getting round the prohibition of new feuduries is having a number of adverse effects on the funding and provision of housing in Scotland which were neither anticipated nor intended, according to Len Freedman and Robert Rennie.

An idea whose time has gone

At a time of financial stringency and “credit crunch”, coupled with increasing demands by government for greater efficiency, flexibility and innovation, the last thing the Scottish housing market needs is additional restrictions on the funding and products available to it – especially when they are unintended, unnecessary and place both providers and consumers at a disadvantage to their counterparts in the UK and elsewhere.

In this article we examine the impact of the 20 year rule on Scottish housing providers, consider the reasons for the rule and suggest steps to resolve the problems which it causes whilst enabling any benefits to be retained.

What is the 20 year rule?
Put briefly, the 20 year rule provides that:
- leases of private dwellinghouses are limited to 20 years (the “leases rule”). This includes any right of occupancy granted for payment which is capable of extending for more than 20 years;
- a standard security (i.e. mortgage) over a private dwellinghouse may be redeemed on repayment of all money advanced under the security together with interest and expenses after 20 years (the “securities rule”).

The disadvantages of the 20 year rule manifest themselves in a number of areas relevant to the provision of affordable housing in Scotland.

Facilities for housing providers
Housing providers such as registered social landlords (RSLs) generally take out loan facilities for a period of 30 years, or sometimes longer, secured over their housing stock. These facilities will normally contain options to limit interest risk, by either fixing interest rates or entering into other interest-hedging arrangements, all in accordance with proper Treasury management policy.

Due to the nature of the interest hedging process, if the arrangement is terminated prematurely at a time of falling interest rates the lender is likely to suffer certain costs (“breakage costs”) as a result of their own funding arrangements which they will require to pass on to the customer.

However, as a standard security over Scottish housing stock can be redeemed after 20 years subject to payment of principal, interest and expenses only, actual or potential breakage costs which arise after that period will in all probability not be secured. Accordingly, unlike housing providers elsewhere in the UK (and in most other jurisdictions), a Scottish housing provider will either be prevented from, or at least restricted in, fixing or otherwise hedging interest rates which extend beyond a period of 20 years, notwithstanding that there may be good commercial reasons to do so.

The securities rule also prevents a Scottish housing provider from accessing the bond market, possibly as part of a consortium, for a bond in excess of 20 years – a rather shorter period than is normally offered. Given that the Department of Communities and Local Government is recommending that English RSLs actively consider the bond market as a further option in the current depressed lending market, it would be better if Scottish housing providers had no less ability to access this type of funding than anyone else.

Home purchase and home reversion plans
The home purchase plan (HPP) cannot, in Scotland, last for over 20 years. In almost every other jurisdiction it will last for as long as the parties agree – usually 25 years – and it is unfortunate and no doubt confusing to those who wish such an arrangement that Scotland cannot offer it on the same terms as would be expected and available elsewhere.

Home reversion plans (HRPs) arise where home owners – usually of retirement age – sell all or a proportional interest in the title to their dwellinghouse with a right to occupy it for the remainder of their lives, or at least until they move into long term care. However under the leases rule this would have to be limited to 20 years, which is clearly unsatisfactory.

Shared equity arrangements
Under a shared equity arrangement, the shared equity provider contributes a proportion of the purchase price in return for a proportion of subsequent sale price or valuation, all secured by a standard security ranking subsequent to that of the
primary lender.

Due to the securities rule, however, the shared equity owner can, in Scotland, redeem the standard security after a period of 20 years by unilaterally repaying the original equity contribution plus expenses, leaving the right to capital appreciation unsecured at best and possibly even extinguished.

A similar fate will befall any standard security to secure the obligation to provide a right of first refusal (“pre-emption”) to the shared equity provider outwith the 20 year period.

The net result is that in Scotland, shared equity agreements may only last for a period of 19 years, which again limits flexibility in comparison to other jurisdictions.

Shared ownership arrangements

Shared ownership arrangements involve the sharing owner acquiring a proportional interest in the title to the property, with a right to “staircase” up to full ownership and obtaining a right to occupy the part owned by the housing provider.

Because of the leases rule the occupancy rights cannot be for more than 20 years, whereupon the sharing owner is required to either purchase the entire property, sell his share to the housing provider, or agree a joint sale of the entire property, which is quite different from other jurisdictions where such occupancy rights will last for significantly longer periods. It may also give rise to some unwelcome issues under consumer credit and/or financial services legislation.

Private and public sector tenancies

The rule can also impact on long leases of developments for mixed use where one of those uses is housing, and there have been circumstances where grant providers have wished to fund owners to use property for leases well in excess of 20 years, only to find that they were unable to do so.

There is also an argument that a landlord under a Scottish secure tenancy could terminate the letting after a period of 20 years without cause, which is far from what could ever have been intended and what applies elsewhere, but does seem to be what at least one reading of the legislation provides.

Co-ownership schemes

Finally, although uncommon at present, co-ownership arrangements are being discussed elsewhere as a method of providing solutions for affordable housing, having regard to models developed in the USA, Canada, Norway, Denmark, Sweden and a range of other jurisdictions.

Suffice it to say that this type of arrangement will involve periods of lease and security far in excess of 20 years, so will not be capable of even being considered by the Scottish Government whilst the 20 year rule remains in its current form.

Can the rule be mitigated/avoided?

Predictably a number of schemes/arrangements can be put in place in order to seek to either mitigate or avoid the effects of the 20 year rule. To date, none of these have been tested in court, and although some may prove to be valid, it should be borne in mind that courts are increasingly reluctant to uphold devices whose sole or primary purpose is to avoid or weaken the effect of legislation.

In any event, the sector should be characterised by transparency and straightforwardness, not complex avoidance arrangements.

Why was the rule introduced?

The 20 year rule was enacted in 1974 in the statute which prohibited new feuudities. The rationale was that feudal superiors might seek to circumvent this prohibition by creating new sources of income through ground rents and interest payments on long-term leases/standard securities.

Whilst this is unlikely to be a major issue now, it should be borne in mind that the leasing of housing property is commonly regulated in other jurisdictions, with rights sometimes being given to the tenant to extend the term and even to purchase outright.

What is rarely, if ever, controlled elsewhere, and was never intended to be controlled in Scotland, are the restrictions on long-term interest hedging, bond funding, shared equity and ownership, Islamic funding, home reversion plans and most if not all of the other matters set out in this paper.

A compromise suggestion

It is clear that the 20 year rule creates a number of anomalous restrictions on the Scottish housing market – including affordable housing – which were neither intended nor even considered at the time when the legislation was passed, and which do not apply in other jurisdictions. This is not a desirable outcome, particularly at a time when Scottish housing providers need a maximum of options and products available to them.

Whilst the Scottish Government may not wish to go for a root and branch repeal of the 20 year rule at this stage, they could resolve most if not all of the difficulties and anomalies noted here by amending the legislation to enable exceptions to the rule to be created by secondary legislation and/or by ministerial determination.

An early review would certainly not go amiss.

“Long leases” and redemption rights

The Land Tenure Reform (Scotland) Act 1974, which created the 20 year rule, applied it to every “long lease”, defined in s 8 as “any grant of— (a) a lease, or (b) a liferent or other right of occupancy which is either— (i) subject to a duration, whether definite or indefinite, which could… extend for more than 20 years…”

Section 11 provides, in relation to securities executed after the commencement of the Act, that the debtor, or proprietor if different, shall “be entitled, on giving three months’ notice of his intention to do so, to redeem the security at any time not less than 20 years after the execution thereof”, if at that time the subjects or any part thereof are used as or as part of a private dwellinghouse, and are not so used in contravention of the terms of the security. The amount payable shall not exceed inter alia the unredeemed part of the secured loan plus accrued interest, and “any expense or charge reasonably incurred by the creditor in the exercise of a right to perform any obligation imposed on the debtor; which the debtor has failed to perform, and which was reasonably necessary for the protection of the security”.

Len Freedman and Professor Robert Rennie are partners in Harper Macleod LLP
The Law Society of Scotland has teamed up with home report providers OpenHouse to launch a high quality, fully compliant home report service designed especially for solicitors’ firms. The Society’s web-based home report solution is exclusively available to members through the OpenHouse online channel, and offers a range of benefits such as preferential payment terms and the ability to order additional services in one transaction.

OpenHouse is a joint initiative between Surveyors Panel Management and Millar & Bryce Ltd. Gary Donaldson, business development and marketing manager for Millar & Bryce Ltd said: “We are delighted to provide a solution that supports the Law Society of Scotland members. OpenHouse will enable members to fulfil all their home report obligations using a simple, straightforward web channel.

“Members of the Society will be provided with a range of options to manage the completion of the property questionnaire, access to a network of surveyors across Scotland with the capacity to deliver the single survey requirements, and links to a range of transaction-related products and services.”

Even though home reports won’t be available until 1 December, members will be able to view the portal at www.lawscot-homereport.com to get an understanding of how the system works and be guided through some examples.

James Ness, Deputy Director of Professional Practice at the Society said: “The Society’s views on the Government’s plan to introduce home reports are widely known. We have been involved in the process for a long time and while we have voiced our concerns about the inclusion of the single survey as part of the pack, in addition to the energy report and property questionnaire, we are very much in favour of giving housebuyers and sellers more and better quality information about properties on the market.

“We are working to ensure that our home reports are available by 1 December and the Society has been running a number of popular seminars on the changes ahead to make sure our members are fully up to date. I think the Society’s home report solution will give solicitors assurance that they are fully compliant and can provide their clients the advice and service they need.”

Visit www.lawscot-homereport.com for more information.

The Society’s home report roadshows will be running throughout September and October. See Update opposite, or visit www.lawscot.org.uk for details of dates and venues.

Registers of Scotland

Turnaround times as at 26 August 2008

The Keeper has set new turnaround targets for 2008-2009. These have been endorsed by Scottish Ministers. As in previous years, the targets are set to drive continuous improvement in RoS’s performance. For the first time, the targets set specific timeframes rather than relying on averaging. The targets and performance are as follows:

**Speed of registration**

<table>
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<th>Target: Where it is in the Keeper’s power and is legally appropriate, to complete the recording and registration of:</th>
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<tr>
<td>70% of standard first registration applications within 70 working days.</td>
</tr>
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| 8,530 received since 1 April 2008 |
| 3,158 (37%) despatched within 70 working days |
| 48 (0.5%) despatched in more than 70 working days |
| 5,324 (62%) received since 1 April currently in process |

**Target:** 60% of dealings with whole within 30 working days, with the remainder to be completed within 100 working days.

| 106,907 received since 1 April 2008 |
| 81,015 (76%) despatched within 30 working days |
| 5,664 (5%) despatched within 30 to 100 working days |
| 20,230 (19%) are in process |
| 0 despatched in more than 100 days |

**Target:** 80% of sasine writs within 20 working days, with the remainder to be completed within 40 working days.

**We are on target**
Details of venues, speakers, programmes and CPD hours are available on our website

BOOK ONLINE AND GET A 10% DISCOUNT

www.lawscot.org.uk/update

**EVENTS**

**SEPTEMBER**

17 Personal Effectiveness – Edinburgh (2 hrs management CPD)
18 Home Reports – Inverness (6.5 hrs)
22 Home Reports – Aberdeen (6.5 hrs)
24 Manual Bookkeeping and Accounts Rules for Sole Practitioners – Edinburgh (7.5 hrs mgt)
25 Domestic Conveyancing for Paralegals (4 hrs)
26 PI Update Conference – Glasgow (6 hrs) (To register for this conference please contact www.apil.org.uk/training)
29 Home Reports – Edinburgh (6.5 hrs)

**OCTOBER**

1 Home Reports – Glasgow (6.5 hrs)
1 Legal Advice for the Older Client – Stirling (6 hrs)
3-5 Advanced Supreme Courts Training Course – Criminal – Edinburgh (18 hrs mgt)
7 e-legal@nothing.but.the.net – Glasgow (6 hrs)
14 Drafting a Trust (Advanced Level) – Edinburgh (3 hrs)
22 Negotiation Skills – Edinburgh (2 hrs)
29 Understanding Business Finance – Glasgow (7 hrs mgt)
30 Understanding Business Finance – Edinburgh (7 hrs mgt)

**NOVEMBER**

7-8 Legal Aid Conference – Dunblane (9 hrs)
13 Cross Examination of Child Witnesses – Edinburgh (6 hrs)
19 Networking – Edinburgh (2 hrs mgt)
22 Surviving and Prospering as a Sole Practitioner – Glasgow (7 hrs mgt)
26 Client Care and Avoiding Client Dissatisfaction – Edinburgh (2 hrs)

**UPDATE AND THE SYLA PRESENT:**

**CPD FOR NEW LAWYERS**

This series has been designed specifically for trainee solicitors and solicitors with up to five years’ PQE. Courses are free of charge, and will be held after hours. Courses will include Instructing Advocates, Dual Qualification, Business Development, and Learning to Manage Stress, amongst others. For the full schedule of courses, visit the Update section of the Society’s website.

**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
As soon as I entered the corporate department I feared that I wasn’t going to fit in. It was immediately apparent that only macho men of a certain size would be satisfactory, and I was at least four inches too tall.

I got a sinking feeling – and not just because I was lowering my seat to appear the same size as the associate I would be working for.

The partner was the smallest of the lot. I think the only thing shorter than him in the department was his temper. He attempted to sound posh by pronouncing his "t's" as "d's". "Little" became "Liddle", a "form 288" a "two aid aid", and so on, so that he generally sounded like a South African with the flu.

After three months of ignoring me he finally decided to acknowledge my existence. "Drainee" he called, "come in here". I was quite excited. I had been telling the secretaries a joke and I expected he wanted to hear it properly. It was a chance to get a good relationship going.

I rehearsed the punchline expectantly in my head. "Drainee," he said, "please shut up."

I have never been in such a humourless department. The partner’s minions excused their frequent tantrums on account of their being "stretched". I think the real problem was that they hadn’t been stretched anything like enough. They assumed weird responsibilities such as making sure I wore a tie. Maybe they hoped I would give in and hang myself with it. Or maybe the malevolent midgets hoped I would leave one behind so that they could make suits from the material. I began to feel like Gulliver, lost in a land of fun-sized foes.

On the rare occasions when the partner was in the office he would shuffle about barking orders like a demented Napoleon. "Send out ladders!" But he was mostly out at meetings (though I reckoned he was just stuck outside the office because he couldn’t reach the door handle).

By the time he called me in for my appraisal I was past caring. The furniture looked comically huge. How had he climbed up to the chair? The little man got down to business, gazing angrily up at my knees. "Drainee, I don’t like your addidude. Your morning dimekeeping is bad."

"OK," I admitted, "but you’re not usually in. It’s not that bad."

"Drainee do not answer back, I have been assured it could be much bedder."

"OK, but I stay late in the evenings, so you must know that too."

"How would I know dad?" he barked. "You know fine well I’m not usually in, you just admidded dad yourself!"

Arguing was pointless. I walked out. But not before I helped him down from his chair.

Manus Straw is the pen name of a practising solicitor

"Drainee, I don’t like your addidude. Your morning dimekeeping is bad"
Causing an upset

I suppose I should have realised that Cancun was not going to be my kind of place when Willie the hairdresser (Freddy Mercury impersonator of some renown) told me he had been there and it was “magic”. This quality, it appeared, arose largely from the fact that hotels in this relatively recently constructed holiday city on the Yucatan in eastern Mexico sell “all-inclusive” packages. To Willie’s way of thinking, the fact that unlimited drinks were part of that package made the whole thing quite wonderful. He regaled me with tales of being served non-stop booze from some strange floating poolside bar while in for a dip.

The hotel where we delegates to the 2001 IBA Conference were staying was allegedly seven-star – which makes it much better than Glenawale! It was huge, new, brassy and astonishingly vulgar. Each bedroom had a jacuzzi right in the middle of the floor. I was advised that this was the kind of place where rich Americans are likely to bring third or subsequent wives on honeymoon. So, the jacuzzis were appropriately gigantic, to accommodate the more mature male American body.

The potential was here in this part of Mexico for something similar to Miami beach. The way the spits of land come out from the shore is uncannily like the geography in Miami. But the Mexicans have made a complete mess of it. Supporting the horrible hotels, the city of Cancun is home for more than 1,000,000 citizens. They live in the unsanitary conditions which seem to cause any European dreadful stomach trouble.

The plus point for Cancun is the beach and the climate. It cannot be denied that, out of hurricane season, a reasonable beach holiday could be had here for the first few days before you fall horribly ill. But in truth, the only good reason for going to this part of the world is to see the ruins of the Mayan civilization. There are remarkable Mayan buildings at Chichen Itza and Tulum. In fact, Tulum, a spectacular series of buildings right down beside the Caribbean, regularly features in colour supplement advertisements. It is quite stunning. The problem with Mexico’s disorganised and corrupt society is that it fails to protect these treasures properly. Had I wanted, I could have hacked away at any of these wonderful old structures and brought a piece back home. I have little doubt that some idiots do exactly that. In fact one of the conference sessions concerned the possible introduction of laws to protect the heritage sites in Latin America, something the governments are notoriously poor at achieving. It was interesting to see from the contact we had with the higher echelons of Mexican society how the “governing classes” still comprise the descendants of the Spanish conquistadors who came here to slaughter the Maya and the Incas in the 16th century and then steal their gold. President Vincente Fox, who was then in power, is tall, slim, well over six feet and pretty much white. The Mayan descendants in contrast are broad, swarthy, about five feet tall, have jet black hair and would steal the milk out of your tea. That is something that really got me down.

Out of hurricane season, a reasonable beach holiday could be had here for the first few days before you fall horribly ill
In some rare idle moments I have been compiling a dictionary, or more accurately a thesaurus of terms used by agents, often in unguarded moments, about their clients.

Everyone knows the common “bampot”, or “bam” in its shortened form. Yesterday I heard from a brother that an agent had described a client as a “zoomer” (i.e. one who zooms). He told me that rather than the demon young dangerous driver he expected, a rather bedraggled middle-aged New Ager appeared. The zooming was no doubt chemically assisted, but not by petrocarbons.

Spent a couple of pleasant days at Y Sheriff Court. Took the civil court on the first day. Haven’t really done too many of those and a lot of it was rather tricky. Eventually just agreed with what the agents wanted, but this tactic backfired when it became too obvious. The requests for sists and adjournments got more and more outrageous. This in itself wasn’t too much of a difficulty, but alas some of the requests proved to be, shall we, say less than in accordance with a strict interpretation of the rules. It turns out that the local sheriff was a bit of a stickler and my appearance was a very welcome relief. There was in fact a holiday atmosphere. Had a rather sticky interview later with the sheriff clerk. She asked me what she was expected to tell the sheriff when he came back, now that there would be hardly any cases in his civil courts for the next three months. Made a rather pointed comment that he might welcome the opportunity to be able to get up to date with the piles of unopened SLTs in his chambers.

My last day in Y went much better, apart from a couple of slips in the trials court. Deferred sentence for production of a driving licence or a printout and only realised later that one of the charges had been driving without a licence. Anyway prevented me having to fiddle about with all that penalty point stuff. Said goodbye to the sheriff clerk and opined that he might welcome the opportunity to be able to get up to date with the piles of unopened SLTs in his chambers.

Scott Rettie discovers he takes a different approach in court from one resident sheriff at least

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

The Society’s fundraising efforts for the Prince’s Trust, this year’s adopted charity, have seen new levels of imagination with its Wii-athlon, a series of virtual sporting events for staff (and interested others, we are told), beginning this month with Wii-mbledon – home of the Woo-mbles, you may recall. Fair enough, charges for players, spectators and refreshments (virtual strawberries and cream?) all go to the good cause, and rain of course is virtually guaranteed.

But the bit that caught Hearsay’s eye was that the event comes complete with John McEnroe swearbox. Surely nothing more than the occasional spider would find its way into such a thing within the hallowed portals of Drumsheugh? Are David Cullen, Michael Clancy, Philip Yelland and co, certain cricketing passions notwithstanding, all really closet Superbrats? Or is it just that there are different taboos at HQ? Is one allowed to say Om ****sman, for example, or h*me rep***? Is that the time to call for a good advocate? Oops, there goes a quid.

Missed a bit there

A recent study concluded that Australian judges enjoyed their work. One judge’s wife suggested that the authors of the study should try living with them.

The whoops! corner

Swapping their keyboards (not, repeat not, quill pens) for something a little messier (but better fun than yet more drafting), Jenny Nicholson, Alan Wernham and Eric Galbraith from Dundas & Wilson’s Glasgow office opted for some CSR work doing up a flat under Barnardo’s Scotland 16+ Glasgow service, which sees young people formerly in care given assistance to secure rented accommodation.
Louise Farquhar decides it’s time to plan this winter’s skiing break

**Six of the best...**

**Ski destinations**

With the dark nights drawing in and temperatures dropping it’s time to find your woolly hat, get your ski waxed and book a great winter holiday in the mountains. Whether you’re a thrill-seeker, wobbly intermediate or snowploughing novice there are plenty of resorts offering a huge range of experiences. Enjoy charming alpine villages, glaciers and mountain railways, not to mention a well-earned spin on the dance floor at the end of a fantastic day.

Here are my top six ideas:

**Bella Coola, British Columbia**
Plummeting from a helicopter towards avalanche-prone slopes, then trying to ski down in fluffy powder up to your ears might not be everyone’s idea of a holiday, but for some expert skiers this is simply Shangri-La. Bella Coola, north of Vancouver, is heli-skiing heaven with a phenomenally deep snow pack, sweeping basins and vertical chutes. Bella Coola Heli Sports has guided trips for small groups using reliable A Star B2 helicopters to access the remotest parts of the 1.5 million acres.

[www.bigmountainhelskiiing.com](http://www.bigmountainhelskiiing.com)

**Zermatt, Switzerland**
This chic and long-established destination, where old wooden buildings line the narrow streets and clusters of pine trees nestle below the iconic Matterhorn, is one of the most alluring spots in the Alps. The resort has the highest skiing in Europe, at 3,800 metres, with varied pistes including moguls and motorways. The après-ski is just as good — there is a Michelin starred restaurant in the village and you can even ski down to Cervina in Italy for lunch. Scott Dunn offer outstanding chalets and hotels, superlative service, childcare and lots of luxurious extras.

[www.scottdunn.com](http://www.scottdunn.com)

**Chamonix, France**
If a long weekend is all you can muster then Chamonix is one of the most popular destinations for short trips. Geneva airport is less than an hour from the resort and the town has plenty of hotels offering good rates. The majestic Mont Blanc dominates the area and the skiing is quite simply fantastic, especially for the more experienced skiers. The nightlife is vibrant too. Ski Weekend are specialists in organising Chamonix weekends and can arrange corporate jaunts if you fancy going as a group.

[www.skiweekend.com](http://www.skiweekend.com)

**Nevis Range, Scotland**
Nevis Range is Scotland’s highest ski resort at 1,221 metres – located just north of Fort William and only a couple of peaks away from the magnificent Ben Nevis. The snow conditions can be notoriously hard to predict, but when they get a good dump of snow the skiing is terrific fun. A modern gondola goes to the top station where a good range of runs can be accessed for all abilities, and the Snowgoose mountain restaurant provides great shelter when the wind whips up!

[www.nevisrange.co.uk](http://www.nevisrange.co.uk)

**La Grave, France**
For those in the know, La Grave is reputed to have the scariest and most challenging off-piste skiing in Europe. Diehards have been coming to this “no fall” zone since the 70s – this description suggesting that if you take a tumble here you’re finished... In reality lots of tourists have fun here but a guide is imperative to take you safely through the legendary Trefide couloir and over the shifting glacial crevasses. Guiding company Snowlegend are based in the village.

[www.snowlegend.com](http://www.snowlegend.com)

**Valle Nevado, Chile**
If summer is normally your time for a long holiday then you can still go skiing – on the other side of the world! July in the Chilean Andes is cold and snowy, with a good measure of mountain sun thrown in, and the cheap lift passes and small queues make this a perfect skiing destination. Valle Nevado is only 90 minutes from the cosmopolitan city of Santiago and reaches a breathtakingly (literally) 3,670 metres. A collection of sleek hotels complement the smooth and relaxed skiing and hip atmosphere.

[www.skiweekend.com](http://www.skiweekend.com)

[www.skiweekend.com](http://www.skiweekend.com)

**Valle Nevado, Chile**
For further ideas see:

- [Revelstoke Mountain Resort, Canada](http://www.revelstokemountainresort.com)
- [Saas Fee, Switzerland](http://www.saas-fee.ch)

**From the Journal archives**

50 years ago

*From “Open Letter” from the President, September 1958.* “The Autumn Meeting is the Law Society’s only function of a social character which has been held annually since its inception. There have been occasional dinners, but the concept of an Annual Dinner has not so far been accepted. The Autumn Meeting is informal. Only on one occasion did the Council venture to arrange a Business Meeting in the course of the Gleneagles weekend, and they were promptly taken to task for so lowering the Society’s dignity as to invite it to transact business in a country hotel.”

25 years ago

*From “Symposium Reports”, September 1983.* “On the criminal law symposium at the Society’s Annual Conference: “There was an almost unanimous denunciation of the use of lay magistrates. Reference was made to the views expressed by the Society during the passage of the District Courts Act. It was suggested that these should be not only reiterated but strengthened. This was particularly so because of the greatly increased powers of the district courts.”

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