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JANUARY
Contingency Planning
Company Law

FEBRUARY
2  ILG Seminar – Competition Law*
11  ILG Seminar – Consumer Credit Act*
18  CPD For New Lawyers – Learning to Manage Stress, Edinburgh
25  ILG Seminar – Legal Update*
Consumer Credit Road Show
Mediation Conference
Insolvency Road Show
Licensing Conference

MARCH
04  ILG Seminar – Planning Law*
11  ILG Seminar – Consumer Credit Act*
16  ILG Seminar – Update on Professional Privilege Case Law*
17  CPD For New Lawyers – Instructing Advocates, Glasgow
18  ILG Seminar – Public Law*
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25  ILG Seminar – Vulnerable Witnesses Act: An Update*
Trusts & Executories for Paralegals
The Law is IT Conference
SOLAR Annual Conference
Client Care Road Show
Criminal Rights of Audience

APRIL
20  ILG Seminar – Is Public Procurement More Challenging?*
21  CPD For New Lawyers – Instructing Advocates, Edinburgh
27  ILG Seminar – Regulations*
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High Street Conference
Client Care Road Show

MAY
04  ILG Seminar – Scottish Public Services: An Update*
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Risk Management Road Show

JUNE
02  CPD For New Lawyers – Instructing Advocates, Inverness
            Anti-Money Laundering Road Show
Planning for Retirement
11 & 12 New Partners Practice Management Course
Damages
Immigration and Asylum Conference
Personal Injury Conference

SEPTEMBER
Management Skills One Stop Shop Road Show
Conveyancing Road Show
Time Mastery for Lawyers – Frank Sanitate
Employment Law Conference
Private Client Conference
Legal Advice for the older client

OCTOBER
Buying and Selling Rural Property
Legal Aid Conference
Legal advice for the older client
Criminal Justice Bill Seminar
Agricultural Conference
Civil and Criminal Court Conference
Arbitration Bill Seminar

NOVEMBER
Fraud Conference
New Partners Practice Management Course
Advocacy Skills
Civil Litigation Drafting Skills
Sole Practitioner Conference

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Details of venues, speakers, programmes and CPD hours are available on our website www.lawscot.org.uk/update. Update’s aim is to continue to produce good quality, affordable training for our members, and to help develop a comprehensive portfolio of events to support our members’ needs. If there are any events you would like us to run in 2010/11, or any comments you have about the Update events programme, please let us know. Also if you are interested in speaking at any of our events we would be more than happy to hear from you.
As the profession debates fundamental issues concerning its future, solicitors should make sure they understand what is and is not being proposed in the reforms.
Regulating the conventional firm

Alistair Morris’s letter (“Facing up to ABS”, December, 10) makes familiar reading. Unfortunately it only makes sense viewed from fairly specific perspectives. For example:

1. Commercialism is good. You will be a better solicitor as a result. Presumably, however, you won’t be doing legal aid work, because it makes very little commercial sense, but hey, who cares? If people can’t pay, how can they possibly matter? Some bottom-feeder who presumably isn’t a very good solicitor will end up doing it.

2. Being regulated as much as possible is also good – both for our clients (or is that term anachronistic and paternalistic?) and for us. Having neglected my studies of medieval monastic theory lately, I can’t quite recall the justification for self-flagellation, but being subject to the jurisdiction of the courts, the Law Society of Scotland, the Scottish Legal Aid Board (criminal and civil), the Scottish Legal Complaints Commission, and the Scottish Solicitors Discipline Tribunal (please fill in the rest of the bodies who regulate you depending on your practice area), I feel that there are quite enough manifestations of righteous authority looking over the shoulder of one humble sole practitioner. Never in the field of human endeavour has so little been of interest to so many for so much cost. And, given that I’m usually on a fixed rate for the legal aid work, I can’t pass any of the cost of that little lot onto whatever I’d call the provider who, presumably, isn’t a very good solicitor will end up doing it.

3. The best one of all: conventional practices should be subject to the same rules, regulations, safeguards and procedures as ABSs. Presumably that’s my fault as well: if I’m too stupid to see the obvious advantages of floating on the stock market, or getting a job at Tesco, then I’ve only myself to blame if I get all the grief and none of the goods. However, given that most of the proposed regulatory framework concentrates on trying to separate ownership of the business from ownership of the files, I’m really puzzled as to how I’m supposed to set up Chinese walls to make sure I don’t have control over what I’m doing with the files and try to influence myself to do something I ought not to be doing. Otherwise I might have to blow the whistle on myself. And serve me right too.

Of course, if I was inclined to be a large commercial organisation which happened to have a law degree and the title of solicitor like a franchised trade mark rather than the qualification which entitles me to do what I do, I’d probably want everyone else hobbled by the same regulations as myself. There’s nothing like sharing the misery – if it was misery, that is. I keep forgetting that regulatory burdens are good. Sorry about that.

I must look out my copy of Animal Farm again. How does it go: “Four legs good, two legs better”?

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A bumpy playing field?

I was interested to read your November editorial, in particular the second part of your “Double puzzle” raising the question of a “split level playing field” between differently constituted firms.

I share your concerns and I think it would be in everyone’s interests to have greater clarity as to the competitive environment that the Government envisages under the legal Services Bill. In that context, I have two further questions to add to your own.

First, how will the proposed ban on “traditionally constituted” firms opting for LLSP status apply to English law firms operating in Scotland? As you note, a “firm of solicitors” is not eligible to be a licensed provider, but how does this apply, e.g. to an LLP established and regulated in England & Wales, which decides to open a Scottish office to serve Scottish clients and employs Scottish solicitors for that purpose?

Secondly, and more broadly, is it appropriate, in what one might describe as the “multi-polar” regulatory world which the bill introduces, for the Law Society of Scotland to retain a legal monopoly in regulating traditionally constituted firms? Would it not be preferable for such firms to have the same freedom of choice of regulator as their alternatively constituted competitors and for the Society to win their loyalty by offering a superior regulatory service?

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Defence rights in the EU

I refer to the feature on EU criminal law, “Case for the defence” (Journal, November, 21). In an otherwise excellent article, Michael Torrance, in my opinion, has missed the point with regard to the “letter of rights”. The author refers to the information sheet currently attached to complaints and petitions. This page is primarily concerned with the availability of legal aid and the right of access to a duty solicitor. In no way can this be compared to the proposed “letter of rights”. The letter is a document framed in simple language that the police should hand to suspects and accused persons at the point they are brought to a police station. I am aware that in certain police stations a notice summarising some basic rights is affixed to the rear of the door of the cell. More often than not, if this document is in place, it will have been defaced.

In the “letter of rights”, the EU wish member states to address such issues as the rights to contact a lawyer, to have a consultation with a lawyer prior to interview, to silence during an interview, to have a lawyer present at that interview, and the maximum duration of detention. Extensive research throughout Europe has been carried out by Tara Sprokens and her colleagues at the University of Maastricht, funded by the European Commission. The resulting report was published on 8 September 2009. It is simply entitled EU Procedural Rights in Criminal Proceedings. It is clear that Scotland does not have a “letter of rights” in the sense defined there. It would also appear that the majority of jurisdictions do offer suspects a notice informing them of their basic rights at the point of detention. Of all the jurisdictions in Europe that the research has investigated, the country that ticks all the boxes in terms of providing suspects with a comprehensive list of rights in simple language and in no fewer than 44 different languages is... England.

We have much to learn.

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Happy New Year.

For me, the clock is ticking.

On 17 December, the Society’s Council confirmed Jamie Millar as the President of the Society for 2010-11 and elected Cammie Ritchie as the incoming Vice President. Thus passed my lingering hope that a latter day Dustin Hoffman might burst into the Council room to object, at the last minute, to any change, on the grounds that I was so irreplaceable that I must be allowed an unprecedented second term. There’s gratitude for you.

More seriously, the selection of new officers sets out the shape of the future. As always, the transition of the current Vice President to the position of President-elect was largely a formality, but the new Vice President’s post was strongly contested. The reassuring thing however was that all of the Vice Presidential candidates produced personal statements with a remarkable degree of consensus: that the Society must continue its process of modernisation but also remain committed to being both the regulatory and representative arm of the solicitors’ profession in Scotland.

Cammie Ritchie has the distinction of being the first procurator fiscal elected as an officer of the Society. No institution in Scotland has changed so much, and for the better, in the 10 years since devolution than the COPFS. A much greater openness, a willingness to explain decisions and even to apologise for occasional mistakes, far from undermining the respect for an independent prosecution service, have actually enhanced its authority. Cammie now brings the insight from a central role in that process to the ongoing tasks at the Society. I am certain we will all benefit from his experience.

What are the major challenges he and Jamie will face? Well, first, they are likely to have to guide the Society as to how far we wish the permissive provisions of alternative business structures in the Legal Services Bill to be actually utilised by the Society. It should not be overlooked that, in the end, ABS will have to be framed in practice rules and that these rules will need the approval of the membership in General Meeting. The devil is likely to be in the detail. Both the Guarantee Fund and the Master Policy are important client safeguards which also bring benefit to all parts of the profession in private practice. These benefits must be preserved in any new regulatory scheme. I am confident it can be done, but it will take considerable innovative thinking in the drafting.

They are also likely to face the challenges of a new public expenditure environment. It hopefully has not escaped your notice that one of the few areas of public spending, even at this stage, to be identified for cuts in the Pre-Budget Report was the legal aid budget for England & Wales. Anyone with experience of the English legal system can certainly see inefficiencies and archaic practices that hugely contribute to the costs of dispute resolution, although it seems perverse to respond to that, not by reforming the system, but simply by denying access to it to the poor. In Scotland however per capita legal aid expenditure is already much lower than south of the border and, with the assistance of Lord Gill, there is scope for a quite different approach. It certainly must be made clear to the Scottish Government that any temptation to indulge in crude expenditure cuts in the legal aid field will not be acceptable to the Society or indeed to any section of the legal community.

Above all, however, the new officers will face the constant task of continuing to ensure that the Society and its work remains both of relevance and of assistance to an increasingly diverse profession. My own impression, admittedly a not unbiased one, is that this is an area in which we have enjoyed some greater success in recent times. Jamie Millar, both as Vice President and, before that, as treasurer, has been a key contributor to that achievement. I am sure that in Cammie he will have a loyal future ally.

I’m not yesterday’s man quite yet however. Watch out for some final initiatives from me in the spring.

More next month. ✪
Renewal of transitional guardianships

Did transitional guardianships of adults lapse on 5 October 2009 even though renewal applications had by then been lodged but not yet determined? No, but concerns may have been caused by the suggestion that they did in the surprising judgment of Sheriff Baird in G v Guardian, uncritically described at Journal, November, 48. Is the drafting of relevant provisions of sched 4 to the Adults with Incapacity (Scotland) Act 2000 “excusable”, as suggested by the sheriff? That word was not used by the Society’s Mental Health and Disability Subcommittee when the proposed amendments to sched 4 were first introduced, but it did foresee such concerns and urged improvement. The response was that the legislative intent was that the powers of such guardians should continue at least until the renewal application was determined, and that this was achieved by the drafting, which was retained.

The relevant substantive provisions are contained in the amended sched 4, not the amended s 60, and they do achieve the legislature’s intention. They are opaque, but must be applied, not ignored.

All persons who were tutors or curators to adults on 1 April 2002 then became guardians under the curators to adults on 1 April 2002 and will continue, until their authority to act as such then became guardians under the Guardians to Adults (Scotland) Act 2000 “execrable”, as suggested by the Journal, November, 48.

It is gravely disappointing that the Sheriff Court Rules Council has so far refused to rectify defective provisions in the Act, namely s 71 (replacement or removal of guardian, or recall of guardianship, by the court), s 73 (recall by Public Guardian or Mental Welfare Commission), s 75 (resignation of guardian) and an incomprehensible reference to s 79A (probably intended as s 77, dealing with the death of the adult).

Paragraph 6(3A)(a) covers the only situation in which a transitional guardianship terminated on 5 October 2009, namely where the guardian had not applied for renewal by that date. Under para 6(3A)(b), where the guardian applied for renewal and the application is refused, the guardian’s authority continued until the date of such refusal, and then ended. The remaining situation, under para 6(3A)(c), is where an application for renewal is granted. In that situation, the guardian’s powers continue not only until renewal, but thereafter until they end “in accordance with the provisions of this Act”, in other words until the renewal itself expires without being renewed in accordance with s 60, or where the guardian’s authority is terminated under s 71, 73, 75 or 77 – that is to say, broadly the same situation as previously applied under para 6(3B).

Paragraph 6(3A)(c) does not say that if the renewal application is refused, the guardianship should be retrospectively deemed to have terminated on 5 October 2009. It can only be interpreted as applying to the situation following grant of the renewal application (“where the person applies for such a renewal within that period; and the sheriff grants the application”). It would be absurd if under para 6(3A)(b) the guardianship continues until determination of the renewal application where renewal is refused, but were to be retrospectively deemed to have lapsed on 5 October 2009 where renewal is granted.

In the case of transitional guardianships, s 60 provides the mechanism for renewal, but all the circumstances in which the guardian’s authority ceases are provided for in sched 4. Sheriff Baird was quite right, in the same judgment, to criticise the seriously defective rules which apply to “subsequent applications”, including renewals. I stated these and other criticisms in my annotation to s 60 in Adults with Incapacity Legislation. It is gravely disappointing that the Sheriff Court Rules Council has so far refused to rectify defective and outdated rules relating to adults with incapacity.

Middle East visit?

The interesting and lively correspondence you have published on the West Bank shows the need to refer the Palestine issue to the International Court at The Hague. Israel has shown no enthusiasm for this. I do not know why. Also, is there enough support for a party of Scots lawyers to visit both sides? I wonder how one can practise law in such a turbulent region. It would put our own problems in perspective.

N Hugh Mackay, Mowat Hall Dick, Edinburgh

EMLC website

I was delighted to read the positive parts of Iain Nisbet’s review of our website (Journal, November, 51), but did feel he was slightly harsh not to point out that the front page clearly states that the website is “under review”.

In common with many charities, especially in this climate, we have to cut our cloth carefully. Although we would dearly love to spend some of our funds on a full update of the website – especially further to the opening of our office in Edinburgh and our new projects in Highland and Aberdeenshire – changes to the site have to be a work in progress at present.

We would, of course, not discourage any readers or their firms from donating finances or the time of their web designers towards this project. Cheques and offers of help should be sent to our office at 41 St Vincent Place, Glasgow G1 2ER.

Joel Conn, Vice Convener, Ethnic Minorities Law Centre, Glasgow

Adrian D Ward, Turnbull & Ward, Barrhead
End the navel-gazing

Robert Carroll
is a solicitor and managing director of Mov8 Real Estate Ltd, Edinburgh

I run a property-focused business in Edinburgh. Much of our work is estate agency related. I am happy to admit that I was not a fan of home reports prior to their launch. I am also happy to admit that, based on experience, I was wrong.

It is my opinion that the introduction of home reports is the single thing that has helped to break the paralysis that gripped the property market in the second half of 2008.

I am therefore disappointed to have seen the negative comments about home reports coming from our profession in recent weeks.

The criticism seems to be focused on two areas: first, that mortgage lenders are not accepting home reports; secondly, that home reports have caused a drop in the number of people wanting to market their properties and this is having a negative effect on the profession and the consumer.

Since home reports were introduced, for the first time in Scotland buyers can look at a property and see a large, metaphorical price tag attached to it. Buyers hated the previous system where, often bidding against many others, they had to guess what a property might be worth. They love home reports.

One of the first principles of sales is to make your product easy to buy. So how can home reports be a bad thing from a buyer’s point of view?

According to an ESPC survey, in 25% of cases lenders are insisting that the buyer obtains their own survey, often from the lender’s own surveyor. It continues that this usually happens where loan-to-value ratios are high, the home report is more than three months old, or the surveyor is not on the lender’s panel.

However, all of these things happened prior to home reports. When loan-to-value ratios were high, lenders would quite often insist on carrying out their own survey. When a survey was more than three months old, the buyer would usually have to get an updated survey for the lender. And most lenders insisted that the survey was done by their own surveyor or by one on an approved panel. The difference back then was that the buyer had to bear the cost of all of this and, sometimes, would get the survey only to find out something negative about the property and back out, leaving the next potential buyer to have to risk purchasing another survey.

So, home reports are not being accepted in 25% of cases? If that’s true, that means that they are being accepted in the remaining 75%. Surely this is great news for property buyers.

As for home reports having a negative effect on the number of properties coming to market, I recently read a tirade along these lines by the managing partner of one of central Scotland’s largest firms. He claimed that, in the month after home reports were introduced, the number of new properties coming to market fell by 80%.

This startling statistic could perhaps be seen as being a little misleading.

After home reports were introduced in 1 December 2008, unemployment continued to rise, lending criteria continued to tighten, house prices continued to fall, and the media continued to carry mixed messages about house prices. All of these had a hugely negative effect on anyone who was thinking of selling property. And new listings always drop in December.

Otherwise though, have home reports directly lowered the number of properties coming to the market? Certainly, they have. The up-front cost of a home report has decreased speculative “listings” of property. It has reduced “listings” where people had deluded ideas about the value of their property, because the home report has put them right. It has also put paid to the age-old practice of overvaluing potential clients’ properties to ensure that the seller uses that company.

So, what have we as a profession lost because of home reports? Surely solicitor/estate agency firms would not wish to use estate agency as a way of getting new clients on their books, boosting the resale value of their firms and cross-selling other legal services to them, all in the knowledge that the property had no chance of selling? That being the case, the only effect home reports can have had on law firms is to reduce the number of properties that had no chance of selling, or the occasional speculative listing.

Professionals in the solicitor/estate agency area, as I see it, have two options. The first is to navel-gaze and pontificate about the negative effect that home reports have had on the property market in Scotland, by which we really mean on our law firms. The second is to accept the new reality, embrace the benefit to the customer, and do all we can to ensure that the properties we “list” actually sell.

My firm will be adopting the second of these options. I rather suspect that, behind all the whingeing, most others will too.
As the Legal Services (Scotland) Bill is scrutinised before the Parliament, questions have been raised once again about the thrust of the ABS reforms – and the role of the Law Society of Scotland under the proposed new regime. Peter Nicholson explores the main arguments.

Who speaks for lawyers?

This May it will be two years since the Society’s annual general meeting voted 801-132, on a poll, to adopt the policy favouring non-lawyer participation in the ownership of law firms. And we are now a year on from the Scottish Government white paper proposing to legislate in line with that policy (Journal, February 2009, 10), which appears to have come and gone without attracting a great deal of comment from the profession.

Now we have the Legal Services (Scotland) Bill, currently the subject of evidence to the Justice Committee at stage 1 – and the whole debate seems to have been stirred up once again. Is there a need to allow alternative business structures (ABS) at all? Are they compatible with professional independence? Are the prospects for the profession better, or worse, if they are legalised?

And what does it mean for the position of the Law Society of Scotland (LSS) as regulator? Can it retain its representational role at all, if its governing Council, currently made up entirely of solicitors apart from four non-voting lay members, in future has a 20% non-solicitor element to strengthen the public interest voice? And what about the possibility of ministerial influence in the appointment of those members?

All these questions have been raised in recent weeks, both before the Parliament and outside. This article seeks to highlight the reasoning behind the questions, together with current LSS thinking on its future role and on the standing of the profession.

The case against

“While the bill may offer some competitive advantage for a small number of legal firms it offers nothing but an uncertainty for the vast majority of legal practices operating in high street practice.” So concluded the Scottish Law Agents Society’s written submission to the Justice Committee.

In a wide ranging memorandum the SLAS argues, among other things, for regulation of claims management companies and will writers, along with providers of confirmation services (only the last are currently covered by the bill, though ministers are now consulting on a similar scheme for will writers: see p32 below). It also expresses concern at direct ministerial involvement in the processes required by the bill, suggesting that UN and Council of
Europe declarations on the independence of the profession point to the need for “an intermediary body” such as the Legal Services Board in England & Wales. On this point at least it finds common ground with Which? and Consumer Focus Scotland, although the Government’s position, like that of the LSS and Faculty of Advocates, is that such a structure would be unduly costly and bureaucratic for a small jurisdiction like Scotland.

However the SLAS then challenges the very rationale for the introduction of ABS. A survey of its members produced a figure of over 85% opposed to external ownership, which if introduced (it claims) would make it more likely rather than less that Scottish firms will re-register in England or be taken over by English practices. The submission goes on to restate the argument that new non-lawyer providers will cherry-pick profitable work, leading to high street legal firms withdrawing from less profitable areas, thus impacting on access to justice.

Before the Justice Committee the SLAS delegates admitted they had not opposed the LSS policy paper, but said they did not have their members’ views available then. The LSS disputes the analysis presented. “The exact opposite is the case”, says President Ian Smart. “If we have a restricted market and others are allowed to play in that market, as is the current legal position, then people will look to how to achieve that liberalisation outside the structures of the Society. There is no doubt about that at all.”

As is well known, some firms, not only at the big corporate end of the scale, have been pressing for the ability to give senior non-lawyer employees a stake in the firm alongside their solicitor partners. While the SLAS suggests that “with a bit of ingenuity” it is possible to achieve an equivalent position for such people as things stand, the LSS believes it is better to have such arrangements set out in the open and properly regulated. “The perception has been that the Society was a bit behind the times, shall we say in

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**European conundrum**

One closely argued issue concerning ABS is the position of externally owned legal firms under European law. A 2004 European Commission report on competition in the profession is sometimes said to have been the catalyst for reform; it highlighted the striking range of rules governing the legal profession at national level, from the light-touch Scandinavian countries to the very restrictive rules particularly in southern Europe. Nevertheless there is a considerable body of opinion, not only that the Commission would recognise grounds of public policy relating to independence and ethical standards as justifying the overriding of competition law in relation to the legal profession, but also that rights to free movement and to the protection of legal professional privilege would not apply in the case of lawyers employed by non-lawyer firms. Thus the firms with international ambitions who have been among those pressing for the ability to attract external investment, might find themselves handicapped in pursuing these ambitions as a result of such investment.

The arguments are made particularly by the Scottish Law Agents Society and by Law Society Council member Walter Semple (who dissent from the Council’s current policy on ABS), in their submissions to the Justice Committee. For previous exchanges published in the Journal see McLean, “OFT-related FAQs” (December 2007, 14), and correspondence at January 2008, 8 and February 2008, 8.

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**Whose Society?**

Given the background to the bill, it is not too surprising that the LSS finds relatively little to criticise compared with other submissions to the Justice Committee. Any argument is about how to achieve ABS, not whether it should happen at all. That said, the LSS believes that four sections in particular need to be amended to preserve the independence of the profession, mainly concerning ministers’ powers in relation to approved regulators.

It appears content, however, with s 92, which deals with changes to Council membership, a subject on which others question the LSS’s independence from Government.

Section 92 introduces for the first time the power to appoint non-solicitors as full members of Council. (The four current non-solicitor members have speaking but no voting rights.) The appointments, to be made by Council, will be of persons who appear “(a) to be qualified to represent the interests of the public in relation to the provision of legal services in Scotland, or (b) having regard to the Society’s objectives, to be suitable in other respects”.

Ministers however would be able to specify by regulation, after consultation, additional criteria for “appointability” as non-solicitor members and the number or proportion of members to whom these should apply, as well as the overall (minimum) number or proportion (the LSS currently proposes 20%).

To the LSS, the changes are a necessary part of making its governing structure acceptable to Government to achieve approval as a regulator under the bill: for it to be seen to act in the public interest, the public should be sufficiently represented. In addition, it hopes to attract talented and experienced people who can enhance the effectiveness of its operations. Ian Smart cites the example of former President Ruthven Gemmell, who sits on the council of ICAS. He also believes it goes with the territory. “Being a regulator carries certain privileges as well. These privileges are to the advantage of the profession. You can’t expect in this day and age simply to carry on in splendid isolation from the views of the public. It’s not how any organisation of any sort operates.”

Such views do not placate John McGovern, President of the Glasgow Bar Association, who asserts that s 92 “removes the Society’s control of its own Council and defers it to the Scottish Ministers”. He puts forward three reasons why the LSS is no longer independent of Government: the 2008 Standards of Conduct Rules, replacing the 2002 Code of Conduct, no longer refer to solicitors, as part of a free and independent profession, having a “moral obligation” towards the public faced with the power of the state, nor can they have such an obligation if the public and the state are to sit on Council; s 92 effectively cedes a right to ministers to appoint such members of Council as they consider “necessary” – since the Government can determine the criteria and the numbers, the fact of appointment being by Council “is much less significant in that context”; and the effect of the constitutional changes will be that “almost half of the democratic mandate of the profession is removed”.

He adds: “Generally speaking, much of the profession suspects that the Society over the last three or four

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A survey of SLAS members produced a figure of over 85% opposed to external ownership

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years has been following an agenda which satisfies the Government and the very big commercial firms to whom a Scottish base is not particularly relevant."

The WS Society also sees increased Government control arriving via s 92, and indeed s 93, concerning the new regulation committee with 50% non-solicitor membership, though the thrust of its submission to the Parliament is that it is "fundamentally untenable" for a body indirectly controlled by Government to retain its representative function for solicitors – of which more below.

"Astonishing", Chief Executive Lorna Jack responds to the claim that the LSS has lost its independence. "When you have a Council and a forum that's largely made up of Scottish solicitors, that doesn't look like a Government-run body to me. I'm personally not accountable to ministers or Government or parliamentarians at all; I'm accountable to a group of Scottish solicitors." And non-lawyers? " Lay membership of the quality and calibre that we might choose will just add to the Scottish solicitors' brand. And I think if you look at other professional bodies, they have that too. We're absolutely nothing like being controlled, run [by Government]… That doesn't mean we have to be in a fight with them all the time – that has a tendency not to achieve very much other than making you very unpopular, achieving nothing for those you are trying to represent."

What if the LSS fails to get the amendments it wants to safeguard its independence? "But we will." Ian Smart has no doubt. "This is a classic example of where we could have gone into a trench, some kind of trial of strength with the Government, or we could try and work with them to persuade them of the merits of our arguments. We've chosen the latter path and we are confident that we will get the amendments."

Troublesome twins

Independence is an issue on which it is at least possible to study the legislation and form an opinion on whether proper lines have been drawn. A more difficult topic is the tension, as old as the LSS itself, inherent in its twin roles of representation and regulation. The question whether it leads to an irreconcilable conflict of interest has been much debated over the years, perhaps more so when the LSS also had to handle complaints of inadequate professional service by solicitors. Do the changes made by the bill alter the equation again?

The WS Society thinks so, stating in terms to the Justice Committee that the bill "compounds the problem" of conflict. Chief Executive Robert Pirrie explains to the Journal:

"We have not said that the Society should not under any circumstances continue its dual representation/regulation role. Indeed, in our oral evidence we referred to the delicate balance of regulation and representation under the Solicitors (Scotland) Act 1980 as having worked reasonably well, all things considered. What we have said is that the provisions in the bill – increasing the variety and complexity of what has to be regulated and represented, and increasing the Government's powers in relation to the Society – would push things past the point where the Society could both regulate and represent.

"It is always a tension, if not a contradiction, for a representative membership body when membership is compulsory. This has been demonstrated over the past year by some of the reaction to the Society's support for the bill, and the AGM approval involving less than 10% of the over 10,000 eligible votes. When membership is compulsory there can be a disengagement that can easily turn to disillusion. What we are saying is that the bill would exacerbate that inherent problem to the point where an alternative should be considered."

Pirrie's proposed alternative is that the Society's role is "limited to the regulatory function and that solicitors are allowed to determine independently by whom and how they are represented". This could involve voluntary bodies such as the WS Society forming a joint council for representation purposes, similar to that which existed before the formation of the LSS.

Accepting that no arrangement is going to be perfect, Pirrie envisages that democratic processes would resolve disagreements between bodies represented on any such council and that individual solicitors unhappy with the policy of one association could join another. "Solicitors would only be paying for representation with which they identified and which supported their individual and business requirements."

"As I have said, it is all a question of achieving the right balance when it comes to regulation and representation. But one test any arrangement has to pass is the complete independence of solicitors from the state. That is fundamental."

One stop shop

Part of the issue for Pirrie is the increased potential range of regulatory remit for the Society, taking in law firms, law firms with external ownership, MDPs and other ABS, as well as the individual solicitors in these businesses. "The sheer diversity of interest makes common representation impossible (or unrepresentative for some)."

Would we end up with something like the SRA in England, some of whose proposals have not been popular with solicitors there?

"Our concern would be that, if the regulatory body is proposing something with which solicitors disagree, it is not clear how solicitors' views are going to be independently
formulated and advocated if the representative body is also the regulatory body. This becomes a major problem if, as under the bill, solicitors have lost control of the regulatory decision-making. "The point is, he adds, that for solicitors the regulatory body would have ceased to be truly "their" body. "At the very least there would be a major problem with perception and, in these matters, perception is as important as outcome."

John McGovern too believes that the time has come for a regulatory-representative split, and recently called for a referendum of the LSS membership on the question whether it should continue to represent solicitors. It isn’t that he necessarily supports the situation that now exists in England – as he sees it, it is the LSS itself that has agreed to regulation being removed from solicitors. But he does believe that the Law Society in England & Wales now comes across as an effective campaigning body.

In fact the Law Society of Scotland insists that it has turned its back on attempting to regulate all forms of entity that might emerge under the new scheme. It made it clear to the Scottish Government that it still sees itself as the solicitors’ professional body and the regulator of "what are still essentially legal businesses, employing Scottish solicitors as the main deliverers of the service", as Ian Smart puts it. "We are the one stop shop: you can come and speak to us about what the views of the profession are, how the profession should be regulated, how the profession should move forward and you’re talking to one authoritative body."

What if we don’t get other would-be regulators coming forward? That’s for the Government to worry about, Lorna Jack responds. "We want to support our members in whatever way they think about ABS, but what other people think about it is their concern... We just want to make sure the legislation is fit for us."

"Essence of a profession"
To Jack, the twin functions have to stay together if the profession is to remain a profession. "The FSA would be a good example of a body that regulates but doesn’t represent, and there’s no way that you would describe financial services providers as a profession the same way that you would describe surveyors, architects, accountants. If you look at these professional bodies it’s because they take responsibility for the client or the society or the group that they’re delivering to, as well as for professional standards."

The English model is not one she is in a hurry to copy. "The more we watch the English experiment unfolding, the more interesting it becomes for me as to why we would want to go down the same path. "Cost is the first thing she cites, with a 20% practising certificate fee hike to pay for the new structure. And there is a tussle going on over which body is responsible for education and training, "so I’m interested to see who owns the badge of English solicitor".

To which Ian Smart adds that there was a “failure of regulation” in England some years ago that helped start the movement for reform, whereas "The one thing that people say consistently about the Law Society of Scotland, if there is any controversy it’s on the representation side. Our regulation has maintained throughout all sections of the profession." As for the changes on Council, Smart claims: "There’s a fundamental misunderstanding about who these people are. If there was a situation where the Government had the right to put people onto Council, that would be a serious matter for concern. What’s been reached is a compromise whereby there have to be non-solicitor members of Council, but the Council albeit through a Nolan [public appointments] process chooses these people." Commenting that the current lay members have made a "hugely valuable contribution", he adds: "The irony is, some of the people who are moaning most about lay members were also the people who took us on over the Society’s finances, and the person they looked to as the honest broker in all that was Stewart Hamilton, the convener of the audit committee and a lay member of Council!"

One thing that would force a rethink, Smart concedes, would be if you had 50% non-solicitor membership, as the consumer bodies continue to press for – though he dismisses the likelihood. "In the wholly absurd situation where that came about, patently we would have to reconsider... the Society would not in reality be the professional body of the legal profession, and clearly on any view the representation would have to go elsewhere."

The Society has set out its stall recently as marketer of the excellence of the Scottish legal profession, providing quality assurance of the solicitor’s badge, but Smart sees no conflict with an expanded regulatory role. "Partly what we’re doing is marketing the regulation. Partly what we’re actually saying is not only do you have an excellent standard of service from the Scottish legal profession, in the very few occasions where something goes wrong, you also have a very efficient standard of regulation of that.”

Time to move on?
The Society certainly believes that, whether or not a challenge to its position materialises, the majority of the profession are behind it – and cites the membership survey reported last month (p24) in support. Lorna Jack suggests that the challenge to all solicitors is going to come from outside, and that is where people have to focus rather than on internal wrangles. "There’s a big thing going on in the world and we can’t protect ourselves up in this wee part of the UK and say that’s not going to have any impact on us.

“We’ve got to be as a professional body thinking about how do we make it easy for the members to be in the winning camp rather than the camp that’s getting stuff taken from us, and some of that’s about freeing up structures, allowing people to deliver differently, and to think through imaginative new solutions in areas where you’re under pressure, because it’s just going to be tougher and tougher as things go faster and faster and you can’t hang around too long thinking about them. That’s our biggest challenge, to stop people obsessing about ourselves.”

The Society has set out its stall recently as marketer of the excellence of the Scottish legal profession
Reasons to be hopeful

The Society’s third High Street Conference presented a picture of a more stable business outlook, particularly in the property market, as Peter Nicholson reports.

S harpening up on your accounts and how to use them, and some practical exercises in thinking differently about problems, were among the sessions offered to solicitors at the Society’s third High Street Conference at the end of November.

Held again on a Saturday morning in Stirling, so as to attract the maximum participation from small firms around the country, there seemed to be a measure of agreement among delegates that business prospects had stabilised since the first such event a year earlier, even if 2009 had been tough.

That was certainly the outlook for the property market, according to Kennedy Foster of the Council of Mortgage Lenders, who gave the first main presentation. On CML forecasts, inflation will remain low, but the impact of unemployment and the cuts in public spending are as yet unknown.

On the mortgage market, supply and demand are in better balance, but conditions are still tight on the money markets, though the Government and Bank of England initiatives have had some positive impact.

But there is now much less competition – specialist lenders have disappeared through being unable to access money, and 85-90% of lending is now in the hands of six or seven major players. And with around 900,000 borrowers across the UK in negative equity at present, which inhibits their ability to borrow more, or remortgage, the recovery in housing and mortgages is likely to remain slow.

To put it in perspective, the CML forecasts 850,000 housing transactions across the UK in 2010, up from 810,000 last year, with gross lending up from £141 to £150 billion. But the market reached a peak of £342 billion in 2007, from only £177 billion 10 years earlier, so perhaps we are seeing a return to more normal conditions.

As for repossessions, Foster predicted that low interest rates and “creditor forbearance” would keep the numbers down. On the Scottish Government’s current bill, he had some concerns over the proposed pre-action requirements and also on the ability of the court system to cope; while the consultation on unauthorised tenants was “one of the poorest papers I have seen”.

Acknowledging concerns over lender panel arrangements particularly as affecting small firms, he pointed out that lenders are responding to the current level of mortgage fraud, much of it the work of professional fraudsters. One lender was investigating 500 solicitors’ firms, mostly in England & Wales; there had been collusive arrangements; and cases had been found where no title had been registered for the borrower or security for the lender. Panel arrangements were an individual matter for each lender, but dialogue with the Society continued.

In the property pipeline

Also on the lenders’ panel front, John Scott of the Society’s Professional Practice Department told the meeting that negotiations with Abbey were continuing on whether they would accept an open panel. The talks had stalled while Abbey discussed mortgage fraud with the SRA in England & Wales.

In a general roundup of property matters, Scott repeated earlier warnings from the Society about the various types of mortgage fraud currently prevalent – ID fraud (to obtain a loan), “back-to-back” arrangements to achieve a higher loan, and rebate schemes. He also alerted solicitors to possible changes regarding letters of obligation, which still cause “a large number of very expensive Master Policy claims”.

The 21 day period could come down to 14 in the next year, and longer term, though probably not until parliamentary time is found for a Registration Bill, a system of advance notices will come in under which Registers can be told of a transaction in advance and will not allow registration of any document for a certain period pending settlement.

From 1 April 2010, payment of fees to the Registers will have to be by direct debit. (Errors on cheques are one of the main reasons for rejection of applications.) And if your firm has an above average rejection rate, it can expect a letter from Registers sometime soon, spelling this out.

Registers also plan to cut from 60 days to 30 the period for responding to a requisition – solicitors will have to ask for an extension if they cannot reply within the new limit.

Get it figured out

Solicitors should work with their accountants in order to get the best information from their figures, according to CA Gordon Christie. Many accounts are “rubbish”, he said, because they don’t really help you understand which parts of your business are making money and which are losing it. You should know the basic cost of providing each type of work you offer, and how much of each type you need to make it pay.

That gives you the information to help you focus on what is profitable, or take corrective action if something is not – to scale up or give it up.

And you need that information promptly. You should have figures showing the contribution from each area every two weeks, or monthly at worst.

He urged his audience also to consider zero-based budgeting: instead of taking last year’s outgoings as your basis, look at each item and ask why you are spending that money at all? If you are still entertaining clients, for example, are you actually getting work as a result, or just indulging yourself?
Registers of Scotland’s information services provide the fullest picture of the Scottish property market, and can be tailored to suit your needs

The full picture

RoS is the only organisation that holds the full picture on what’s happening in the property market, as we register every sale and property transfer in Scotland including cash sales. The processes for providing statistics from house price registration data are designed to meet the standards of the Scottish Government statisticians. Here we explain more about the free house price information and services that are available.

Quarterly property statistics
This statistical release tracks the movement of property sales for every local authority area across Scotland. The release contains information on average house price, median price and volume of sales figures for detached, semi-detached, terraced and flatted properties. You can view the latest statistical release on our website at: ros.gov.uk/public/news/indepth_house_prices.html.

The next set of figures for the quarter October-December will be published in early February, so look out for these on the RoS website.

Trends
Graphs showing trends in residential property prices and sales volumes from 2003-2009 are available at: ros.gov.uk/professional/eservices/land_property_data/lpd_stats.html.

Weekly house price information
The latest property prices and sales volumes are broadcast on local radio stations across the country every Thursday during the popular breakfast show and drive-time slots.

These broadcasts provide data on average price, volume and percentage change for the latest four week and 52 week periods for all 32 local authority areas in Scotland. They also provide information about the free house price search facility on our website.

The weekly property statistics can also be found on our website and are updated every Monday at ros.gov.uk.

This local radio campaign is supplemented by similar information in The Sunday Times, again promoting headline figures and the fact that RoS provides the best house prices information.

From mid-January, we will also be providing data on average house prices for a new home column in the Daily Record and also running feature articles from house histories to coastal towns throughout the year in the Daily Record.

Monthly house price statistics
Monthly figures showing the average house price, number of sales and value of sales by local authority area are also available at: ros.gov.uk/professional/eservices/land_property_data/lpd_stats.html.

Bespoke and standard reports
Our Business Development team can provide bespoke house price statistical reports for specific geographical areas in Scotland or price ranges, and for specific time periods.

We can also provide a number of standard data extracts and analytical reports, for example:

- postcode district/sector reports;
- price range;
- local authority area;
- sales for consideration – residential sales between £20,000 and £1,000,000; and
- land values – base data for all property transactions.

- Our fees for these services are on a cost recovery basis. To find out more, please tel: 0131 528 3814, email: business.development@ros.gov.uk or visit: ros.gov.uk/productsandservices/lpd.html

ARTL UPDATE – as at 16 Dec 2009

- 21,914 ARTL transactions have taken place.
- Live on ARTL
- 330 solicitors’ firms.
- 18 lenders.
- 11 local authorities.
- 2 full sign-up meetings scheduled over the next four weeks.
- For up-to-date information and a full list of participating practices and companies go to: ros.gov.uk/artl

Direct debit – prepaid registration fees
From 1 April 2010, Registers of Scotland will be moving to direct debit payments for our prepaid registration fees. This is in line with our commitment to providing a more efficient service to our customers and is a practice that is being adopted widely across the commercial sector. Already 60% of our fee payments for registration services are received by direct debit, with these customers avoiding delays when we have to return cheques that are incorrect.

We recently wrote to all account holders explaining this change. There is a section on our website outlining the procedures for setting up a direct debit arrangement with RoS. We will also be sending out an application pack in January to those firms who are not yet using this payment method.

- If you have any questions, please visit the Direct Debit pages on our website: ros.gov.uk/fees/payment.html
Additional provision for legal representation at children’s hearings should enable the hearings to fulfil better the purpose for which they were created, says Kenneth Norrie

Hearing and speaking

Important changes are in the offing for the children’s hearing system. Very soon the Scottish Government will be presenting to the Scottish Parliament a Children’s Hearings (Scotland) Bill which will restructure the way the system operates, though without, one hopes, departing significantly from the foundational principles upon which the system is based.

Doubtless these changes will be discussed fully in these pages and elsewhere in months and years to come. But there have already been significant changes. Legal representation for children has been available since the coming into force of the Children’s Hearings (Legal Representation) Rules 2002, and more recently legal representation of relevant persons has been available since 4 June 2009, when the Children’s Hearings (Legal Representation) Amendment Rules 2009 (SSI 2009/211) came into force.

The 2002 Rules were enacted as a result of the Inner House’s decision in S v Miller 2001 SLT 531, that it was contrary to the child’s right to a fair hearing, protected by article 6 of the European Convention on Human Rights, not to have funded legal representation in (very basically) two situations: where sending the child to secure accommodation is under active consideration, and where the child would not, without legal representation, be able effectively to participate at the hearing. The 2009 amendments to these rules were designed to pre-empt another Inner House decision, that of K v Authority Reporter 2009 SLT 1019, and they permit funded legal representation of relevant persons where this is necessary to ensure that the person being represented has the chance to participate effectively at the hearing.

The court in K v Authority Reporter accepted that the failure to provide state-funded legal representation of relevant persons amounted to an “in-built systemic flaw in the legal aid scheme as it applied to the children’s hearing system” (para 60). The 2002 Rules, now amended, establish what has always been described as an “interim scheme”, but that scheme will continue to apply unless and until it is replaced by new rules to be contained in the 2010 Bill.

Effective participation

The key concept in the current scheme is that of “effective participation”. The rules do not provide that legal representation of children and parents is available at all hearings.
Instead they are designed to address the issue that was before the Court of Session in both the cases mentioned above: when does article 6 of the European Convention require a party to civil proceedings to be provided with state-funded legal representation? The answer given in both cases was that this was required when the party would not otherwise be able to participate effectively in the proceedings.

“Effective participation” is the ability to contribute to the decision-making process in a way that communicates the main point of view of the participant to the hearing members. This has to be read in light of what is expected by way of participation. It is not expected that a one-year-old child will participate, and so hearings do not routinely appoint legal representatives to children of that age. The decision always needs to be made in the context of the nature of the participation that is required, and the stage in the process.

For example, at a grounds hearing, a relevant person who cannot understand, cannot give agreement, and the matter must be sent to the sheriff for proof. There is no effective participation needed there, and the fact that a legal representative would understand the grounds is neither here nor there: the matter goes to the sheriff if the relevant person cannot understand the grounds, even if that person’s legal representative does. So in that type of case there is no need to appoint a legal representative (at least at that stage).

Similarly if the hearing is a simple and straightforward one in which there is no change proposed and limited scope for discussion, “effective participation” can be interpreted at a much lower level than in a complex hearing with much contention.

It would be wrong for hearings to adopt a policy of automatically making an appointment if a specified set of circumstances presents itself, for example in all cases in which the relevant person comes to the hearing under the influence of drugs or drink. Hearings must at the very least assume that the relevant person has capacity to participate effectively, and must make an individualised judgment that this is just not possible in the case before them. It may well be that (except perhaps in the most extreme cases) the panel members will have to attempt to conduct a hearing and give the relevant person the chance to participate before concluding that, in fact, the person is incapable of effective participation. If a person attends the hearing the worse for wear through drink or drugs and is clearly unable effectively to participate, the proper approach will be to continue the hearing to allow the person to sober up, rather than to appoint a legal representative.

Further guidance
In K v Authority Reporter the Inner House was asked to give some guidance as to when it would be appropriate for hearings to make an appointment of a legal representative. They said this in response:

“In our opinion guidance on this particular issue is to be found in Marangos v Cyprus [2008] ECHR 1604 in para 35 of the judgment of the ECtHR. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent him or herself effectively.”

“In our opinion, that broad approach falls to be applied to the particular facts and circumstances of the case in which an individual’s Convention rights under article 6(1) are engaged, including the personal characteristics and capabilities of the individual concerned. Those facts and circumstances will include, but are not limited to, the importance and potentially long term consequences of decisions taken at children’s hearings, the stress that may be experienced by parties involved in proceedings relating to family life, the complexity of the factual and legal issues involved, the ability of the individual to understand those issues and the contents of any documents or statements made at the hearing, their views in an effective manner.”

It is ability to challenge any document or statement made at the hearing that is crucial to effective participation. Too often in the past statements which should have been challenged have been accepted by the hearing simply because no one was able to challenge them.

Role of the legal representative
The regulations do not specify the role that the legal representative is to play. It is to be remembered that there are other participants, who may well be able to assist in the child’s or relevant person’s participation. The legal representative is different: he or she will act on behalf of his or her client and is not to be seen as playing the same role as the safeguarder, or other representative of the child. In other words, the legal representative will take instructions from the client, and act upon them: the legal representative has no role in assessing the welfare of the child (or at least no more of a role than they would have in a normal residence or contact dispute before the sheriff).

The interim scheme is likely to be with us for some years to come. It is not expected that legal representatives will appear at hearings as a matter of course, but it is generally beneficial to everyone when they do appear. Lawyers are trained to act as procedural watchdogs, and to articulate the points of view of those whom they represent. So long as children’s hearings continue to operate discursively in the search for a solution that best meets the child’s needs, it will remain of crucial importance that each participant’s point of view is expressed effectively and taken into account. Not only will this consist with article 6 of the European Convention, but it will consist with the very philosophy by which the children’s hearing system has always operated.

It is also to be noted that a new rule 3B was added into the 2002 Rules by the 2009 amendments, and it provides that “A person’s ability to effectively participate in a children’s hearing may be affected, in particular, by (a) a number of factors, including (a) the complexity of the case, including the points of law in issue; (b) the nature of the issues involved; (c) the ability of the individual… to consider and challenge any document or information before the hearing; (d) the ability of the individual… to present their views in an effective manner”.

It is ability to challenge any document or statement made at the hearing that is crucial to effective participation. Too often in the past statements which should have been challenged have been accepted by the hearing simply because no one was able to challenge them.

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Kenneth McK Norrie is a Professor of Law in the University of Strathclyde.
The Adults with Incapacity (Scotland) Act 2000 came into force on 1 April 2002. It sets out in s 1 the general principles applying to guardianship and also, in s 57 for first applications and s 60 for renewals, the procedures which must be complied with when presenting applications for guardianship under the Act. In addition, on 3 July 2006 the Sheriff Principal of Glasgow and Strathkelvin issued a practice note making further provision in connection with such applications.

If an application complies with those provisions, the sheriff must fix a hearing, order answers to be lodged within a specified period if considered appropriate, and appoint service and intimation (Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules 1999 (SI 1999/929 as amended by SSI 2001/142), rule 3.16.2). For first applications, service has to be on, inter alia, the adult, the adult’s nearest relative, the primary carer, and the Public Guardian (rule 3.16.4(1)).

Where such an application is granted, the order subsists for three years, or for such other period, including an indefinite period, as the court may determine (s 58(4)).

The provisions in practice
Experience has shown that many applicants and/or relatives attend the hearings fixed, and that the presence of the applicant’s solicitor is invaluable, in that the practitioner directly involved is available to answer any questions which may arise, and respond to any change in circumstances or new information. The court benefits greatly from the assistance of practitioners in this regard and, as a result, the vast majority of applications can be determined with only one appearance being necessary.

Renewals and the 2007 Act
Applications for renewal of orders granted under the Act were originally required to comply with all of the same general procedures, but with the passing of the Adult Support and Protection (Scotland) Act 2007, some aspects of these were relaxed, with the intention of simplifying the renewal process.

In a recent case, reported as G’s Guardian, Applicant 2009 SLT (Sh Ct) 153, at paras 10-17, Sheriff John Baird expressed certain views about the rule on intimation and service in the case of applications for renewal, as apparently affected by the amending provisions in 2008 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (Adult Support and Protection (Scotland) Act 2007) 2008 (SSI 2008/111).

It is not unknown for adults, particularly those who were subject to proceedings under the pre-2000 law, and whose curators (who became guardians by operation of sched 4 to the 2000 Act) have been in office for many years, to recover at least partial capacity and to be able to express views about the future administration of their estates. I have myself presided over such a case, but if intimation of the intention to renew guardianship is not made to the adult in such cases, as seems to be implied by para 3(2)(b) of the Act of Sederunt of 2008, then the adult and the adult’s relatives may not know about it.
The latest problem

In this article, I draw attention to another problem which has arisen as the unintended result of one of the relaxations introduced by the 2007 Act, namely, the provision inserted into the 2000 Act as s 60(4A), which provides that a sheriff may determine an application for renewal of guardianship without hearing the parties.

It should be noted that that provision does not specify that such an application can be determined without fixing a hearing, merely that it can be determined without hearing the parties. The court must still comply with rule 3.16.2 and fix a hearing, order answers if thought appropriate and order intimations of caution, duration and service, and whatever the correct view is about the extent to which there must be intimation in cases of applications for renewal, there still has to be some intimation, time allowed for answers or objections to be lodged, and a known date upon which the application will then be determined, albeit without the need for parties to attend. Of course, if answers or objections are lodged, then the solicitor for the applicant, at least, will require to attend and be heard.

Who has to apply for renewal?

Those who held office as curators and tutors under the old law did not require to ask the court to renew their appointments, which did not have a time limit, and were not required to do so when the 2000 Act came into force and made them guardians, but they became obliged to do so as a result of s 60(1)(a) of the 2007 Act. Guardians appointed after an application under the 2000 Act, but whose appointment is time limited, also require to apply for renewal, assuming the conditions justifying guardianship still apply.

In both situations, it is now routine for solicitors to request the court to determine the application without the need to hear the parties, and the interlocutors of this court now state that the application will be heard on a specified date, but that in the absence of notice of opposition or answers, the case will be determined on that date without the need for parties to be heard.

The unintended consequence

However, that provision, which is designed to reduce cost and simplify the renewal process, has in many cases produced the opposite result, since it means that the court is deprived of the assistance of the applicant’s solicitor at a hearing at which a number of issues may require to be resolved. Ironically, in some cases the hearing has had to be continued for an attendance by the solicitor, or even for re-service, where both might have been avoided if the solicitor had attended in the first place.

Processing of the most recent batch of renewals at this court has highlighted a number of areas where the court has been hindered from the immediate determination of such applications, either by deficiencies which could have been remedied if there had been a solicitor at the hearing, or by the need to react to information received since the application was lodged.

In what follows, I set out the most common situations where difficulties have arisen which could not be resolved without recourse to the applicant’s solicitor. These are:

- Notwithstanding para (f) of the practice note of 3 July 2006, which requires applications for financial guardianship to contain such information, many applications for renewal of financial guardianships contain no details about the existing level of the estate or caution. Caution will be in place already where the applicant was appointed under the old law. Although the court now has the power to dispense with the need to find caution, it cannot decide on the level of caution, or whether to dispense with the need to find it, unless it has this information.
- Often, important observations are made to the court by the Public Guardian upon receipt of intimation, but if parties or their solicitors are not present, there is no one at the hearing who can address these. One observation commonly made relates to the situation where the adult may own and still reside in heritable property but is, or may soon become, unable to sustain living in the community, and the guardian requires the power to be authorised to sell the heritable property. In such a situation the consent of the Public Guardian is required to the sale (sched 2, para 6(1) to the 2000 Act). Often the necessary words are omitted from the powers craved, and para 6(1) is simply overlooked.
- Often, applications are silent on the question of expenses, and ambiguous on the length of the order sought, e.g. “indefinitely or for such period as to the court seems appropriate”. Where a solicitor is present, it is the practice in this court always to deal with the issues of caution, duration and expenses, but where none is present, this may not be possible.

- Service may not have been effected, and in some cases this has not been checked by the solicitors. There may be return of citations, or no form 22 (certifying service on the adult), and the case may have to be continued for re-service. Often, when conducting a hearing where the applicant’s solicitor is present, such difficulties can be resolved, as the solicitor is able to produce other evidence of service, either by documentary production or by making telephone calls.
- Often there is no information as to whether the adult owns heritable property, or even if there is, the powers sought do not adequately describe that, which will cause further expense to be incurred if there is to be a subsequent sale. Such detail was not required in orders granted pre-2000, but is required for orders granted under the Act.
- If any of these sorts of issues are raised when there is a solicitor present, and it becomes obvious that additional or amended powers are required, such issues can be easily dealt with, but not if there is no representation.
- Solicitors are respectfully reminded that the medical report which must accompany a renewal application where the adult is suffering from mental disorder must come from a practitioner who is approved under s 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (s 60(3A)(a) and (b) of the 2000 Act, as read with s 57(3)(a) and (68)).

Action by practitioners

There will be other areas where the court is placed in difficulty in processing renewals in the absence of the solicitor for the applicant, and it is no doubt perverse that a provision designed to reduce cost may have precisely the opposite effect, but I would respectfully ask practitioners to recognise the burden of administration which is required by the sheriff clerk’s staff, and that where the expense of the application is being borne by the adult’s estate, it is appropriate to try to keep that to a minimum.

I would ask practitioners to ensure, therefore, that all relevant information is presented to the court in the application, and that they respond in writing to any observation which may have been made by the Public Guardian or any other party, failing which the court may be forced to revert to a position where solicitors are routinely required to attend renewal hearings.

John A Baird is a sheriff of Glasgow and Strathkelvin
In a critique of violence risk assessment of offenders using actuarial risk assessment tools, clinical psychologist David Cooke explains the limitations of such tools in predicting the future behaviour of individuals, despite their current prevalence in the criminal courts.

More prejudicial than probative?

The past decade has witnessed the irresistible rise of violence risk assessment. Calls for risk assessment reports are more frequent than ever before: from minor cases of domestic breaches of the peace, through all indictable cases of sexual offending, to the ultimate in risk assessments – in terms of time, cost and detail – those prepared in relation to orders of lifelong restriction (Criminal Procedure (Scotland) Act 1995, s 210B).

The increasing pervasiveness of violence risk assessments begs the questions, are they credible; how much weight should the decision-maker place on such assessments; indeed, what challenges should defence agents pose? In this brief paper I want to focus specifically on the use of actuarial risk scales, including the Risk Matrix 2000, Stable and Acute 2007, the LSI-R and the Static-99 – names with which courts are becoming increasingly familiar.

The use of these actuarial procedures is perhaps surprising, given that both Government reports and professional best practice guidelines support the use of different approaches, based on structured professional judgment not on actuarial methods.1–4 However, surprise may be lessened when it is considered that they are quick to use and require relatively little training. They are attractive to organisations under pressure to respond to the burgeoning demand for risk assessments.

The actuarial paradigm is apparently straightforward. A group of offenders, usually prisoners, is assessed, often in terms of characteristics that are easy to measure (age, marital status, history of offending, type of victims etc); they are followed up and new criminal convictions identified from criminal records. Statistical methods are applied to link the assessed characteristics to the observed probability of reconviction. This information about group relationships is used to make a prognostication about a new individual: guidance is given to decision-makers about his likelihood of reoffending.

The use of actuarial tests is now so pervasive that their validity appears to have been accepted; they are not subject to sufficient challenge. A further concern is that poor practice based on actuarial scales will devalue the currency of properly conducted assessments of violence risk using the structured professional judgment approach, as recommended by both the Cosgrove and MacLean reports5,6. As will be seen, it is my opinion that the application of actuarial tests to make decisions in the individual case is more prejudicial than probative.

A disquieting case

My disquiet about actuarial approaches was confirmed by a referral from Glasgow Sheriff Court. A social worker opined that the individual accused of sexual offence was “high risk”; a psychologist opined he was “low risk”. I suspect the sheriff was bemused: he contacted me. The social worker had applied the RM2000 correctly and in line with the manual; he implied that “high risk” equated to a likelihood of sexual reoffending of 26% over five years and 36% over 15 years, figures that would raise concern. How valid were these figures?

There are two stages in calculating the level of risk using RM2000. First, three risk factors are considered: the individual’s age at commencement of risk, his number of court appearances for sexual offences, and the number of appearances for other types of offences. The accused scored zero on the latter two items, but he obtained a positive score merely because he was aged between 18 and 24. On that basis he was assessed as “medium risk” for sexual reoffending.

On the second step “aggravating factors” are considered. These include convictions for a contact offence against a male, convictions for a sex offence against a stranger, any convictions for a non-contact sex offence, and finally, whether the accused is single or has ever lived with an adult partner for at least two years. Two of these aggravating factors applied; in terms of RM2000 this is sufficient to increase the risk factor by one category, i.e. “medium risk” becomes “high risk”.

First, the court heard, and accepted, that while the accused had not met the victim before, she had pursued him by text and phone messages for four or five weeks prior to the offence; nonetheless, she was deemed a stranger victim. She consented to sexual intercourse and as she was only 12 years and 11 months at the time, he committed an offence.

Secondly, the accused, a 19-year-old student, had not married or cohabited for two years or more, i.e. he was deemed to have difficulty forming intimate relationships. This seems tenuous: it is not usual for 19-year-old students to have cohabited for two years or more; indeed, the contrary is the case.

This evaluation appeared to me to confirm Menken’s observation “There is a simple solution to every human problem – neat, plausible and wrong.” The conclusion that this accused posed a “high risk” was based on three pieces of information. In my experience people are more complex than that – as are the risks that they pose.
Actuarial approaches: a false analogy

Actuarial methods are compelling because they appear to be scientific, they are based on data, they are based on statistical analyses, and their product is a number. Unfortunately, this appearance of science is very misleading. There are at least three lines of argument challenging the utility of these devices for making prognostications about an accused individual: logical, statistical and empirical.

The (il)logic of actuarial approaches

From the logical perspective the reasoning inherent in the actuarial approach commits the fallacy of division. This fallacy rests on drawing a conclusion about an individual member of a group based on the collective properties of that group. For example, it is obviously fallacious to argue that if, in general, intelligent people earn more than less intelligent people, then Jules, with an IQ of 120, will earn more than Jim with an IQ of 100. Equally, it is fallacious to argue that since people who score highly on an actuarial risk scale generally reoffend more than people who do not score highly, Bill in the “high risk” group will reoffend more often – or more quickly – than Brian in the “low risk” group.

A common defence of the actuarial approach is founded upon a related fallacy: “If it is alright for life insurance companies, it should be alright for psychology.” Indeed, a sheriff made such a remark during one of my lectures on risk assessment. The analogue is false. The actuary makes a profit by predicting the proportion of insured lives that will end in a particular time period; they have no interest in predicting the deaths of particular individuals. By way of contrast, the decision maker in court is only interested in the accused in front of them, not the properties of any statistical group from which they may be derived. This has been long recognised; Sherlock Holmes knew it.

The illusion of certainty

Numerical statements, e.g. there is a 36% likelihood that this individual will reoffend sexually in the next 15 years, are powerful. Numbers stick in the mind. It is difficult for the decision maker to disregard them and alter their evaluation based even on detailed, credible and contradictory information. This is the anchoring bias – a well-established cognitive bias that influences all human judgment. Judges in court are not immune. This problem is compounded by the tendency to predict rather than forecast, to provide a single value of the likelihood that someone will offend, without any indication of the confidence that should be placed on that single value, such as the range of possible values which that likelihood may take. Is the range narrow or wide? Deterministic predictions create the illusion of certainty in the judge’s mind and may lead to sub-optimal action: a lenient sentence when more control is required, or equally, a disproportionate sentence when such is not required.

It is possible to use statistical methods to quantify the degree of (un)certainty that is associated with any estimate, and this includes predictions. Unfortunately, the manuals for actuarial scales generally do not provide the information necessary to determine uncertainty.

The problem of making predictions for individuals using statistical models is now recognised in other disciplines: it is not merely a function of the complexity of assessing their psychological characteristics. (See Rose, p 48 in relation to medical risks.) As Stephen Hawking wryly observed, “Thirty years ago I was diagnosed with motor neurone disease, and given two and a half years to live. I have always wondered how they could be so precise about the half.” (It would be interesting to know whether those making decisions concerning the release of Mr al-Megrahi appreciated this uncertainty.)

This view that we cannot predict for individuals has been regarded as controversial in the field of violence risk. A thought experiment using a non-psychological example may clarify the point. If I tell you the height of the next man to enter the court, how accurately can you predict his weight? The precision of the measurement of height and weight should be
substantially greater than for the measurement of risk factors for violence or violent reoffending and the correlation between the two is stronger. The prediction is also immediate and not degraded by the passage of time, as is the case with some actuarial scales. This should make prediction easier. We have shown elsewhere that for Scottish men whose height is 1.7m the best estimate is 78 kg; however, the prediction interval (the range within which 95% of men will lie) is between 61 and 95 kg.11 Thus predicting the weight of the next individual into the court based of knowledge of his height is a hit or miss activity. Therefore, how can high precision be expected in predictions about complex and changing risk potential over many years to come?

If we return to the disquieting case, the accused was said to be in the “high risk” group, with an estimated 26% probability of reconviction within five years. While the 95% confidence interval, which is concerned with the average for a group, can be conservatively estimated to be between 19% and 34% (Hart et al10 has a description of a method), to assess the confidence about the probability of reconviction for an individual not in the development sample requires the prediction interval. For this case, the prediction interval was conservatively estimated as lying between 2% and 88%.11 None of the manuals for the actuarial scales provide this information; indeed, many actuarialists do not appear to appreciate the relevance of this consideration.12

In other areas of life it has been long recognised that forecasts should entail an estimate of the degree of certitude that the forecaster holds about their prognostication.14,15 From a scientific and professional perspective it is more honest to communicate the degree of (un)certainty with which the expert holds their opinion. This assists the decision maker to make rational decisions about the management of any risk. Relevant information about uncertainty is not made available for any of the actuarial scales in common use.

Actuarial risk assessments as screening tools
Within Scotland and beyond, actuarial instruments are becoming institutionalised. Under multi-agency public protection arrangements (MAPPA), police officers and social workers, for example, are being trained in the use of RM2000. A growing scepticism amongst certain practitioners may have led to a shift in position: “we only use the actuarial as a screen”. This sounds amiable, tolerant, and evenhanded; unfortunately there is no compelling empirical evidence to support such a use. Perhaps alarmingly, despite the clear limitations of actuarial approaches, the Risk Management Authority (RMA) argues for the use of RM2000 as a “screening tool for the Scottish population of sexual offenders to identify those who require further (and state-of-the-art) risk assessment. “The RMA continues to work with the Scottish Government in supporting and developing an integrated multidisciplinary approach to risk assessment in which the RM2000 plays a useful role as a screening instrument” (RMA, 2007; www.mascotland.gov.uk/ViewFile.aspx?id=363).

There are two problems with this position. First, in practice this rarely happens: the social worker and police officer do not have the time – nor probably the training – to provide the systematic risk assessment required if the offender is caught in the screen. The decision maker in court is provided with the results of the actuarial scale without any consideration of certitude or risk formulation. Secondly, and perhaps more critically, what is the scientific credibility of this position? Has it been demonstrated that these instruments are effective screens? The contrary is the case. Screens are used in medicine in asymptomatic individuals to identify the risk of future disease. It is not generally appreciated that to be effective as a screen, risk factors (or sets of risk factors) must be very strongly associated with the disorder being screened for.16 The best calculation that can be achieved for RM2000 gives a result several orders of magnitude below that which is required for an efficient screen.

To evaluate the effectiveness of a screening tool, it is necessary to compare the relationships between the distributions of the risk factors, e.g. RM2000 scores, for those who reoffend and those who do not. To the best of my knowledge this has not been done. Regrettably a request for access to the data derived from publicly funded research, in order to carry out these and other relevant analyses, has been declined. It is perhaps noteworthy that of the four offenders in Grubin’s 2008 study17 who received life sentences for their new convictions, one was in the “low risk” category; three were “medium risk”; none were “high” or “very high” risk. At the very least, to be effective, a screen should identify all, or nearly all, cases, i.e. it should have a low false negative rate. In particular, it should identify serious cases such as those who receive life sentences.

Challenges to decisions
Actuarial scales have been the subject of consideration in a number of appeal cases. It is perhaps surprising – and somewhat concerning – that the scientific basis of the conclusions based on actuarial scales including the RM2000, Static-99 and LSI-R has not been subject to scrutiny and challenge. The results of these tests are accepted at face value. From a public policy perspective it should be noted that the application of these instruments can, and does, lead to errors in both directions: individuals who are assessed by more comprehensive procedures to be “low risk” may be deemed “high

References

risk”, or vice versa. The public is poorly served by such errors.

A number of Scottish appeal cases illustrate both the influence of, and lack of critical appreciation directed at, these procedures. In HMA v Carrie [2008] HCJAC 67 a ground of appeal was that “The learned trial judge erred in failing to obtain a full risk assessment.” In their decision (at [11]) their Lordships concluded: “The Risk Matrix 2000 Assessment Tool is regularly and widely used for the purposes of assessing the risk presented by an offender to the public…. In our view [the trial judge] was entitled to proceed upon the basis of the outcome of the risk assessment carried out using Risk Matrix 2000.” Would their Lordships come to this view if they appreciated the lack of certitude associated with opinions based on the RM2000?

In Robertson v HMA, 17 February 2004, it was accepted by their Lordships that use of RM2000 provided a valid opinion that the convicted person was high risk. The application of another actuarial instrument, Static-99, was part of the evidence used to argue controversially that an individual convicted, amongst other things, of raping a baby girl, was “low risk”: HMA v JT, 24 September 2004. It was used in another case to argue for “high risk”: Jordan v HMA [2008] HCJAC 24.

One exception that I am aware of is the case of Lord Watson: the appeal court accepted that a report I prepared “casts doubt on the validity of the risk assessment”. There were a number of difficulties in the use of an actuarial instrument (LSI-R) in addition to those alluded to above. For example, the procedure was developed on Canadian prisoners with an average age of 26.89, in a sample of general offenders with no reference to fireraising. Lord Watson was not Canadian; he had not been to prison before; he was convicted of fireraising: he was aged 56 when the assessment was carried out (statistically it was very unlikely that there would have been anyone of his age in the development sample).

This case raised a general point: even if the actuarial approach were considered to be appropriate, it is axiomatic that any individual being assessed should be similar to those with whom they are being compared. In statistical language they should be drawn from the same population. Such inappropriate comparisons are common. In recent cases I have seen RM2000 being used with first offenders even though the procedure was developed using data from prisoners (data from the Cosgrove report suggests that fewer than 50% of those convicted of a sexual offence receive custodial sentences); first offenders are likely to be different from recidivists. I have seen the actuarial scales used to assess internet offenders, even though the internet was of limited availability when the development studies were carried out.

Actuarial assessments and expert testimony

Should evidence based on actuarial scales be the basis for expert testimony? Lord Wheatley has recently provided a clear and detailed restatement of the role, responsibility and privileges of the expert witness (Wilson and Murray v HMA [2009] HCJAC 58). In brief, the evidence must contribute to the proper resolution of the dispute and provide relevant information from an area of knowledge or experience that a judge or jury would not generally have access to. Critically, Lord Wheatley noted, “the witness must demonstrate a sufficiently authoritative understanding of the theory and practice of the subject” (at [58]).

As argued above, the scientific basis for actuarial scales, as applied to individuals, may be more illusory than real. In the United States, in relation to scientific evidence, the theories and procedures on which the expert testimony is based should be accepted within the appropriate scientific community (e.g. Frye v United States, 1923), and procedures should be testable, have been subjected to peer review, and error rates should be established (Daubert v Merrell Dow Pharmaceuticals, 1993). If criteria such as these were to be applied it is difficult to see how actuarial procedures would be deemed to be admissible given that the uncertainty of individual predictions is large, unknown, or indeed perhaps unknowable.

Given the complexity of the issues discussed above, are the usual witnesses required to provide evidence on risk – criminal justice social workers – in a position, by dint of their training or experience, to provide “a sufficiently authoritative understanding of the theory and practice of the subject”? I suspect not.

In conclusion, I would urge decision makers and others to be cautious in the weight they place on opinions derived from actuarial risk assessments. From a scientific rather than a legal perspective it appears to me that the application of these tests is more prejudicial than probative. As Neil Bohr remarked, “Prediction is difficult, particularly about the future.” I would be interested in the answers to two questions. Are defence agents who do not challenge assessments based on these tests failing their clients? Are organisations that require their employees to use these flawed procedures at corporate risk?

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A slightly fuller version of this paper can be found at www.journalonline.co.uk/extras

It is axiomatic that any individual being assessed should be similar to those with whom they are being compared

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Scotland is ready to show the world how to do e-registration. That was the confident message promoted by Registers of Scotland at the official launch of the ARTL system last month.

The profession has known for a few years now that it has been coming, and live transactions have been taking place with increasing frequency since the first successful registration in July 2007, and the first actual property transfer in April 2008. But 15 December 2009 at Our Dynamic Earth, Edinburgh, was when it was announced to the wider world that the first country to introduce a form of state protection for property owners, as Cabinet Secretary John Swinney told a capacity audience, was continuing its tradition of innovation with this ground-breaking development. Only New Zealand, it is said, has anything even approaching what has been developed for Scotland.

Step back for a moment and remind yourself what is involved. No more having to make sure the SDLT certificate comes through before the 21 day period for registration covered by the seller's letter of obligation expires: SDLT is calculated as part of the transaction and paid automatically by direct debit three days after completion. No more worrying about undisclosed additional standard securities: the state of the title can be confirmed up to the day before and the registration in favour of the purchaser completed within 24 hours. No more bounced applications because of simple errors in the deed or the cheque: the system validates the information submitted as you go through the transaction and, as with SDLT, calculates and takes payment of the registration dues automatically.

All that plus a reduction in work for the submitting firm (much of the information is on the system already), registration dues down by about a third, and savings in paper and postage, not to mention that crucial carbon footprint.

The benefits, Mr Swinney emphasised, are not confined to solicitors or their clients. An efficient land registration system is one of the World Bank's key measures of a successful economy.

ARTL is now a term familiar to Scottish solicitors – so familiar, in fact, that we may fail to realise its significance as a world-leading system. Registers of Scotland's official launch for ARTL, and the upgraded Registers Direct, reminded us just what has been achieved, as Peter Nicholson reports.

One giant leap

Although over 20,000 transactions have now been completed using ARTL, all but a few of these have involved securities only, with no property transfer, and therefore only a single solicitor acting. With over 300 firms now signed up to ARTL, and RoS having planned their training to bring on clusters of firms together, you might expect that even though both sets of agents to a transaction need to be ARTL-enabled for the clients to benefit from the system, there would by now be a stronger flow of automated dealings with whole. Andy Smith, RoS’s Deputy Keeper, Service Delivery, indeed confirmed to me that the system can cope with any number of live sales.

Brian Inkster of Inksters, Glasgow, says however that he often comes across a reluctance on the other side to commit to ARTL, even if the firm is
True end-to-end electronic caseworking is the goal, covering all applications including first registrations and sasine entries

country that is good to do business in, he pointed out, and with up to £50 billion worth of transactions going through the registers in a good year, the new system was an essential part of ensuring that Scotland was well placed to take advantage of economic opportunities. The Scottish Government had put out a challenge to the public sector to identify how to participate in e-business, and the involvement of the SDLT office made an effective partnership providing a good service to the private and commercial sectors.

Joining the Cabinet Secretary on the platform were John Scott of the Society’s Professional Practice team, who said the Society had been proud to have been involved since the birth of the project a decade ago, and was now working with RoS on the future for missives and letters of obligation; Nick John of HMRC’s stamp taxes section, who highlighted the benefits of “joined-up government” through the SDLT interface, which produced a “seamless, streamlined system”; and Brendan Dick of BT, the project’s IT partners, who admitted that it had not been an easy task: processes, attitudes and culture had all had to change, but the achievement was a clear cause for celebration and he looked forward to collaboration from all users in order to drive the system forward.

Impressive though the achievements to date are, there is much more to come, according to Andy Smith, one of the Deputy Keepers, who rounded off the morning with a look at the future. True end-to-end electronic caseworking is the goal, covering all applications including first registrations and sasine entries. Accurate, up-to-date mapping will be critical and a new co-operation agreement with Ordnance Survey was reached this year.

Accelerating the coverage of the Land Register is another ambition. Currently about 55% of individual titles in Scotland, relating to 20% of the land mass, appear on the register, increasing at 2-3% a year, and there may be a move to encourage voluntary registrations in the counties furthest ahead in the process.

Smith also offered a vision of a “one-stop shop for all areas of property ownership”, combining data held by assessors, or relevant to school catchment areas, or showing the location of doctors and dentists, or photographic images…

In truth, ARTL is only the beginning of the new age.

Further enquiries, and how to apply; t: 0845 607 0160; e: eservices@ros.gov.uk; w: ros.gov.uk/artl.

Direct effect

The Dynamic Earth event also celebrated the new, improved Registers Direct service, now upgraded to provide greater stability and some enhanced functions. Available to regular users with an account, or casual enquirers through the Customer Service team (the charge is now only £2, and levied only if matches are found), it can bring to your desktop the information on ownership of any parcel of land in Scotland, as well as a search of the Register of Inhibitions and the Books of Council and Session.

We were shown a customer off the street wanting to find the ownership of a plot on Skye, knowing only the locality and a particular building that it was near. Pulling up the OS map resulted in the subjects being quickly identified, together with their present owners, and the whole title history including entries in the sasine register back to 1905, which confirmed the enquirer’s belief that an older property once stood on the site.

Searchers are freed of the need to maintain an office next to Meadowbank House and to search within opening hours there; local authorities have ready access to ownership information for purposes of serving statutory notices; solicitors in debt recovery work value the same data; those acting for lenders have ready access to property descriptions for drafting securities; the lenders themselves no longer have to store bulky title deeds; anyone can order a low cost copy title plan. These were only some of the benefits identified for users of the service.

Further information, t: 0845 607 0160; e: eservices@ros.gov.uk; w: ros.gov.uk/artl.

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Stair was fond of penalties. In his 1681 contract for the printing of the *Institutions* he insisted that the printer keep copies of the treatise under lock and key until all copies were printed under "the pain" of £100 Scots for each copy found out of the printer’s custody. The printer was bound to deliver 12 leather copies, half of them gilded, to the author "under the pain of £40 Scots money as the liquidate price thereof by consent”. As if this was not enough, both parties had to perform the contract "under the pain of 1000 merks of Scots money, by and attour [in addition to] performance of the premises".

Whether such clauses would have survived scrutiny of the courts we shall never know. Stair wrote that it was part of the *nobile officium* of the Court of Session to modify penalties in contracts where they were exorbitant, even if they were referred to as liquidate expenses and agreed to by the parties, and to substitute the real expense and damage of the parties. Whilst the jurisdiction may now have changed, the underlying prohibition of the recovery of exorbitant sums remains.

Liquidate and ascertained damages (or "LADs" for shorthand) are merely sums payable by the defaulting party in the event of its breach of contract. If they are LADs, they are enforceable and the sum stipulated for recoverable. By contrast if they are penalties, the sum is not recoverable and the innocent party is left to prove its true loss. Such provisions were common in bonds, charterparties and indentures for apprentices. They even appeared in agricultural tenancies where a penalty was payable for "miscropping", i.e. sowing a crop out of rotation. Nowadays such clauses are often inserted in process engineering or power station contracts, where the achievement of a certain output is often subject to LADs, but they appear most commonly in construction projects.

**Distinguishing features**
Commercially such clauses are extremely important because they almost always provide that the employer may retain or set off the LADs against sums otherwise due to the contractor. It is evident that this gives the contractor every incentive to attack the LAD provision as a penalty. What are the rules distinguishing a liquidate sum from a penalty?

They derive from two House of Lords authorities, *Clydebank Engineering* [1905] AC 6 and *Dunlop Pneumatic Tyre Co* [1915] AC 79, one a Scottish case and the other an English case but applying Scottish legal principles. Both were decided at the beginning of the 20th century. In summary:

- The use of the word "penalty" or "liquidate damages" in a contract is not conclusive.
- The essence of a penalty is the payment of money *in terrorem* the offending party. The essence of a liquidate sum is that it is a genuine
The fact that it is difficult or impossible to make a precise pre-estimate of loss does not prevent a sum being a genuine pre-estimate

Unique status

In many ways liquidated damages clauses are unique. Subject to statute, parties are by and large free to agree to anything they wish, but in this one respect the courts assume a jurisdiction to strike down such clauses, even if they have been freely agreed. Since this power only arises in cases where a sum is payable on breach, it is not too difficult to avoid the scrutiny of the courts by careful draftsmanship. Thus a contract stipulating payment of £500 per day by a contractor if he fails to complete by 1 January might be attacked as a penalty and therefore unenforceable. By contrast, a contract which reduced payments to the contractor in the event of completion after 1 January probably would not be susceptible to attack. Such drafting techniques were adopted by the banks, and thus the courts were unable to consider whether the fees and other sums payable by their customers on unauthorised overdrafts were penal. In other words these “penal” sums were not payable on breach but as a term of the contract between bank and customer, and were therefore not subject to examination by the courts, at least under this jurisdiction.

right to be reasonable, nor does the test turn on the genuineness or honesty of the party making the estimate. Similarly even if the sum might in certain circumstances be greater than the likely loss, the specified sum will be recoverable unless it can be said to be extravagant by comparison to the range of losses that it could reasonably have been anticipated it would cover at the date of the contract.

Applying a cap?

Whilst these tests may assist in striking down extravagant LADs, what if the sum stipulated is less than the likely loss or, as in two reported cases, the LADs are specified as “nil”? Such a provision could mean that the parties had agreed that in the event of delay the losses were not to be dealt with by way of LADs at all, leaving the innocent party to prove its loss. Alternatively it could simply mean that no damages were to be payable in the event of delayed completion. In the Scottish case Lord Prosser did not have to decide the point but thought there was an ambiguity to be investigated (Stanley Miller 1988 SLT 514). In the English case, decided at about the same time, the Court of Appeal held that it meant the parties had agreed that no damages for delay were to be payable (Temloc v Errill Properties (1987) 39 BLR 30).

Where the LADs are held to be penal, does the stipulated sum act as an upper limit of recovery? A contractor would clearly think twice about running the penalty argument if it were to find that the employer could recover more than the stipulated sum. In English law there is a line of authority derived from charterparty cases which suggests that the claimant may have a choice either to sue for LADs or to ignore the clause and claim general damages without limitation. In Dingwall v Burnett 1912 SC 1097 the defender let the St George Hotel, Dunbar to the pursuer on terms that the pursuer was to take over the furniture and fittings and stock of liquors. Further detailed terms included provisions in the event that the licence could not be transferred to the pursuer. The agreement also provided for the payment of £50 if either party failed to perform the obligations set out. The pursuer refused to perform its part of the bargain and the defender claimed damages of over £300. The Inner House held that the clause in question was penal since it specified a single sum payable upon a breach by either party, the consequences of which could have been either no or substantial loss. The suggestion that the defender was limited to recovering £50 was described as a “somewhat startling proposition”. However startling this suggestion may have been in 1912, it is thought that the case can probably be distinguished on its facts and that nowadays a clause struck down on the basis of being penal would act as the upper limit of recovery.

In practice LADs in construction contracts are inserted by employers on a “take it or leave it” basis, with little or no information provided as to how the sum in question has been calculated. The contractor therefore usually cannot know whether the sum is a genuine pre-estimate of loss and its bargaining power on this aspect is often limited. At most it can price the risk, but more usually a contractor will assume that it can complete in time or obtain the requisite extension of time or, possibly, attack the LADs. Very few contractors, if any, would agree with the suggestion that a liquidated sum is to be welcomed on the basis that it provides certainty. Most, if not all, contractors when faced with a claim for LADs would wish to force the employer to prove its loss.

It is of course important to identify the scope of the LAD clause. Does it cover the breach in question or is the employer free to recover unliquidated damages? Thus a LAD clause which provides for payment on failure to complete by a specified date will encompass all claims for breach which result in delay, whether the delay is caused by lack of resources or remedying defective work. By comparison an employer under a contract which required all coal from an opencast mine to be extracted was not limited to the specified LADs for failure to complete by the due date, or by a further clause which specified LADs for a failure to produce minimum quantities of gigajoules, and could accordingly claim such damages as it could prove (Scottish Coal Co v Kier Construction [2005] CSOH 74).

Stair would undoubtedly have recognised the situations described above as familiar territory, and judging by his publishing contract would probably have been as reluctant as the courts have been to strike down such clauses.

→ Stephen Furst QC is a barrister at Keating Chambers and joint editor of Keating on Construction Contracts
Half a century of strife

If anyone ever makes *Glasgow Bar Association: The Movie* – and of course nobody ever will – then the soundtrack will be big band music. Live from the Berkeley Ballroom in the 1950s. Bobby Jones Band in full flow. The dance floor a vision of swinging, swooning, post-war euphoria; nylons, slick hair, wide lapels and ex-army ‘taches. A man called Harry Flowers holding the clarinet up at shoulder height, playing and paying his way through his apprenticeship as a lawyer.

The backdrop will be Lyons tea-rooms, or the basement coffee room in the Trades House where a Glengarry biscuit, a coffee and a cigarette can be had for 6d from waitresses who surreptitiously run customers’ lines to the bookies. Some of the action will take place in the old sheriff court in Ingram Street, a decrepit, overcrowded building commonly described as a “Victorian toilet”, where boys are still being pulled from court to be birched over the birching stool by burly coppers, who carry out the sentence almost instantly to stave off an appeal.

It is a place where there are no rooms to see clients, no money to pay lawyers and the poor are effectively defended by the poor. Where for financial reasons very few plead not guilty and where the hustle and bustle, the rhythm, of everyday life pauses once momentarily, and memorably, as a man hurls himself to his death from the balcony moments after seeing his lawyer.

All this in a city bursting with life and with crime. In a country that still thinks it appropriate to fund the defence of an accused by the 14th century poor’s roll. Each lawyer given one two-week stint per year, covering hundreds of cases including murder, and all to be paid for by a stipend of £30. Where counsel receive two and half guineas a day and a free lunch. Where the whole thing is so criminally, hopelessly and unfairly underfunded that counsel once came striding into the court bar with his wig and waistcoat and fob watch a-swinging, looking for instructions on an imminent trial and left with an envelope on which the words “it’s a murder” had been laconically written.

If anyone ever makes *Glasgow Bar Association: The Movie* – and why would anyone? – the opening scenes will show an elderly man in a long coat and a brimmed hat, squeezing himself into Aileen’s Room, the GBA office in Glasgow Sheriff Court. His name is Sheriff Jim Murphy and he will be the narrator, talking of events 50 years ago. He will take his hat off, set down his bag and adjust his hearing aid as almost next door in the common room young lawyers sit and talk of, amongst other things, the latest clash between the GBA and the Law Society.

And while business in the busiest criminal courts in Europe, all marble walls and cool clear spaces, gets underway, ghosts will begin to stir amongst the piles of legal aid forms. The most powerful of those being that of the clarinet-playing legal apprentice Harry Flowers, in the mid-1950s a bowler-hatted qualified solicitor arriving at court on his Zundapp Bella motor scooter. Near the end of the decade, returning from holiday – was it America? – sick of the unfairness of the Scottish legal situation, saying: “We have to start our own organisation”.

There will be talk of that first historic advert in the *Glasgow Herald*. Carried on Monday, 19 October 1959, as *Ben-Hur* was about to open in the cinemas and, appropriately perhaps, the first photos were being beamed back from the dark side of the moon. “Proposed Glasgow Bar Association”, it stated. “A meeting of solicitors to be held within the North British Hotel”.

Bar Association? Even the name with its modern, American overtones was an irritation to the powers-that-be. If there is to be a voice-over to this movie then Jim Murphy will recall that Tom Gunn was appointed the first ever
Perhaps the sole female criminal lawyer in Scotland, Winnie Ewing. There will be Keith Bovey and many others including Jim Murphy, who will become the first GBA lawyer to make it to the bench. And the aim will be to improve the lot of the lowest of the legal low, the criminal solicitors and their clients, to fight to end the poor’s role and bring in legal aid for criminal cases, to improve facilities and to have Glasgow solicitors included in appointments to the shrieval bench.

If anybody ever makes Glasgow Bar Association: The Movie – and anything is possible these days – then the five years that follow will be all crash bang wallop action. Huddled meetings in Glasgow flats, carefully-composed but stinging letters to the editor, members of the GBA pitching up at Law Society AGMs and firing in last minute motions. There will be raised voices, cold reactions, moments when the piano stops playing and tumbleweed rolls across the floor. There will be a strike. The first ever by Scottish solicitors. Mentioned in Parliament. There will be endless and thorough briefing of MPs and then there will be a result. Legal aid for criminal cases. In 1964. Not as we know it today, but a start.

If there is to be a dramatic moment in this movie then it will take place in the House of Commons during the second reading of the Criminal Justice (Scotland) Bill. Every single Scottish MP has been armed with a detailed report from the GBA. The organisation is mentioned repeatedly. That bill contains clause 47, ushering in criminal legal aid. And MP William Hannan (Glasgow Maryhill) will thunder in response to a member of the Government:

“I invite him to come to Glasgow on any day and go unannounced to see what goes on in the courts. The corridors and hallways are thronged with people. This is no exaggeration. Police witnesses who ought to be out on duty are there wasting the whole day because cases timed for ten o’clock in the morning do not come on that day at all. Witnesses are there and they lose employment, with the consequent trouble of completing forms in order to make claims. Solicitors reporting at ten o’clock in the morning for their cases find that there are as many as 27 diets down for the same time. Is this the administration of justice? Is this carrying out the law?... A solicitor does not know a few days or even hours before a case who will be the fiscal who is to handle it. The building itself is outdated and outmoded. It is dim, dingy and dark. The basement is in use and children are shepherded there to wait.

“As things are, more than 90 per cent of people, no matter how strongly they may feel about their innocence, find their solicitor suggesting... ‘you know what it is. You had better plead guilty, hadn’t you?’"

If anyone ever makes Glasgow Bar Association: The Movie, it would have to be a movie because only a fool would ever try and make GBA: The Documentary. No minutes were made of that first meeting, or of the second. The association’s records were taken home by somebody, sometime. Harry Flowers is of course dead, as is John S Boyle. Dowdall’s biography Get Me Dowdall makes no mention of the formation of the Glasgow Bar Association and the fights that were to follow. Winnie Ewing’s biography concentrates mainly on the glittering career that saw her become one of the most famous Scots in Europe.

Once upon a time the story was told in thousands of brown envelopes containing millions of newspaper cuttings in The Herald Library. But they are in storage now. Virtually lost. All that’s left of the early years is buried in the microfiche collection of the Mitchell Library, entombed in an archaic system, virtually impenetrable, hand-cranked and weakly indexed. Computerised records start in 1989, but stripped of their context, and recorded in grim, sparse type, are dry and dull. They don’t bring to life former GBA president Ross Harper’s significant contribution to making Scottish legal aid into a system that was envied worldwide. They don’t have details of the day the BBC devoted six hours of live programming to a teach-in by the GBA at Glasgow University, attended by stars and featuring, to nationwide gasps, a bank robber on the run in England. Yet they do minute the fights that followed. They contain in letters and small stories the constant struggle of the GBA and its presidents as a bulwark, a thorn in the side of the establishment even, a constant voice, usually in the wilderness, sometimes alone, often unpopular. A tradition that continues to this very day. To the sound, one would hope, of Harry Flowers’ Big Band’s clarinet.

Ron Mackenna is a solicitor with Cradly & Co. Glasgow, and a member of the Glasgow Bar Association

President of the new GBA. Why? “He didn’t look like a hot-head.” If there is to be a nemesis in this movie it is the Government, which has approved civil legal aid but not criminal. It is the newly formed Law Society of Scotland. Establishment, old school, elders of the Kirk and seemingly blind to the complaints of a handful of lawyers who defend criminals in appalling surroundings and with no money. And, to a certain extent, it is the Royal Faculty of Procurators, then the most powerful legal body in Glasgow but accused of “rolling over” the criminal solicitors’ needs.

It is precisely because he at least seems one of them, that Tom Gunn with his ex-First World War officer’s bearing, his double-breasted pin-striped suit, his ‘tache and his Brylcreem is chosen, while the man behind it all, Harry Flowers, a socialist, seems one of them, that Tom Gunn was appointed the first ever President of the new GBA. Why? “He didn’t look like a hot-head.”

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January 2010

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Millar and Ritchie
the team for 2010-11

Jamie Millar, the current Vice President of the Law Society of Scotland, will be President in 2010-11, and Cameron Ritchie his Vice President.

The result of the election for next year’s office bearers was announced at December’s Council meeting. Jamie Millar is a corporate partner with Brodies LLP, based at its Glasgow office. He joined the Council in 2004 after serving on Society committees for several years. He has since been a member of the Insurance and Guarantee Fund Committees and was treasurer of the Society for three years, before becoming Vice President in 2009.

Cameron Ritchie is a solicitor advocate and Area Procurator Fiscal for Fife. He will be the first procurator fiscal to hold the office. He has been a Council member for five years and has served on the Professional Practice, Professional Conduct and Nominations Committees.

Ian Smart, the current President, said: “I am delighted with the election results. Both Jamie and Cammie are very able and experienced Council members and, with their very different legal backgrounds, will bring their knowledge and expertise to how the Society moves forward.”

“The profession is now broadly made up of three areas – the larger commercial firms, in-house and high street firms, with around a third of the profession working in each. That mirrors the practice experience of Jamie, with his large firm, commercial and property law background, Cammie as a senior procurator fiscal, and myself, as a high street solicitor.”

Jamie Millar said: “This is a challenging and exciting time for the Society and the solicitors’ profession. I am looking forward to becoming president in May, continuing the work Ian and I have taken forward this year, and to working with Cameron Ritchie in his new role.”

The Family Law Association celebrated its 20th anniversary in November with a conference in St Andrews. At the conference a new training initiative was launched by CALM and SCFLG (collaborative family law).

The Family Dispute Resolution Portfolio will allow family lawyers to acquire skills in knowledge of negotiation and conflict theory, interpersonal skills, child development, children’s reaction to separation, and family dynamics. A series for skills training is being organised through 2010. Although attendance of each part can build towards the entry qualification for collaborative or mediation training, each can be taken on its own with no commitment to pursuing either form of training. The objective is to allow practitioners by developing these skills to enhance their enjoyment of the practice of family law.

The first training is a full day on 18 March, an introduction to negotiation covering theory and practical skills, with the object of representing clients effectively at round table discussions. A half day on “Adult Dynamics and Reaction to Loss” follows on 29 April. Anyone who wishes to undertake the basic collaborative training will need to attend both of these prior to the two day training specifically in collaborative practice, which will be held on Tuesday 15 and Wednesday 16 June.

A booking form can be obtained from Samantha McGinlay by telephone on 0141 420 2430 or by email on glasgow@mhdlaw.co.uk.

New training plan for family law

The Family Law Association celebrated its 20th anniversary in November with a conference in St Andrews. At the conference a new training initiative was launched by CALM and SCFLG (collaborative family law).

The Family Dispute Resolution Portfolio will allow family lawyers to

STUC in challenge to court costs

The Scottish Trades Union Congress has launched an Access to Justice campaign by lodging a petition at the Scottish Parliament calling on the Government to abandon plans to make those who use the courts pay 100% of the running costs. It also calls for revocation of the orders which already impose fees designed to recover 70% of those costs.

Solicitor advocate accreditation

The Solicitor Advocate Accreditation Committee of the Law Society of Scotland will shortly be inviting applications from solicitor advocates who wish to be recommended as suitable for remuneration as “senior” in criminal legal aid cases. Each solicitor advocate will be contacted individually and, in addition, application forms will be available to download from the Law Society of Scotland’s website.
Stepping up for family businesses

The Law Society of Scotland has joined forces with the Scottish Family Business Association (SFBA) to look at the legal services being offered by solicitors to family-run businesses.

According to SFBA, 69% of businesses in Scotland describe themselves as family businesses. The Society aims to identify whether the advice its members provide is hitting the mark with family business clients or whether there is a gap between what the profession thinks is comprehensive advice and what the clients are looking for.

The Society is asking its members to complete the Family Business Survey. This has been mirrored by a similar survey sent to all family-run businesses known to the SFBA. They have been asked to identify firms from which they obtain their legal advice.

Martin Stepek, CEO of the SFBA said that, as the dominant sector in Scotland, family businesses present a huge market opportunity for the legal sector. “Family businesses are of key importance to the economy in Scotland and beyond… with 45% of the UK’s GDP produced by family enterprises, and 50% of the private sector workforce in Scotland employed by family businesses.”

Laura Malcolm, a solicitor with the Society’s Professional Support Team, said: “We’re delighted to be working with the SFBA and see collaboration with the business community in Scotland as a key part of promoting the profession.

“We hope this project – in addition to the feedback from solicitors who compete the online survey – allows our members to consider more closely the particular needs of family business, and that solicitors will take the opportunity to build links with this large and vital sector of the economy.”

One-to-one coaching offer

Do you have a tricky decision you are grappling with? Are you finding all the changes that are happening difficult to cope with? Do you feel you are not quite reaching your full potential but can’t put your finger on why? Are you struggling to keep a healthy balance between personal and professional life? If any of these scenarios sound familiar, maybe you would benefit from coaching.

What is coaching? Coaching is a simple yet effective form of personal development where client and coach work together in a completely confidential environment to allow an individual to explore a specific or general issue which is concerning them. It works equally well with business and personal issues and can be used with teams or individuals. Underpinning a coaching relationship is the belief that any individual, whether on their own or working as part of a team, can achieve their goals and vision, creating the life they really want. It is about success in everything you do. Coaching is not the same as consulting or counselling.

As part of its work to support the profession, the Society is offering 20 individuals the opportunity to experience a free one-to-one coaching session with an experienced and skilled coach, Alison Denton. Each session will last about 1½ hours and there will be an opportunity to arrange further sessions if required (there will be a cost for this).

There will be four dates available for face-to-face coaching, one day each in Glasgow, Edinburgh, Aberdeen and Dundee during February and March 2010, comprising four individual sessions per location. There will also be one day of sessions available over the telephone to ensure that wherever you are based, you have the chance to take advantage of this opportunity.

The sessions will be allocated on a first come, first served basis. The closing date for applications in 10 February 2010.

Website adds practice area data

The Society is currently updating its data in relation to the areas of work carried out by solicitors and legal firms and will be approaching members in early 2010 for help with the relevant information.

This data will be used in the Find a Solicitor function on the Society’s website, which is the section of the site most visited by other solicitors and by the public. The new feature will be a great opportunity for members to promote the activities of their firms and it is important that the Society has accurate information about the categories of work undertaken. Please help with this request when received.

Governance project update

The Society’s review of its constitution and standing orders is now underway with the aim of updating and simplifying the current versions. A consultation will be held early this year in advance of a revised constitution being put to the 2010 AGM.

The recent consultation on the composition of Council generated only seven responses, with a mixture of views varying from support of the proposals to concern over the proposed size, non-lawyer and sectoral elements. The Council is aware of these issues, having previously considered them at length, but believes that the proposed composition is the best way forward.

Elsewhere the review of committees continues under the Regulation, Representation and Registrar Group Conveners. Applicants for non-lawyer members of the Regulatory Committee have been interviewed, and the first meeting is proposed for mid-January 2010.

More details of the governance structure can be found on the “About Us” section of the Society’s website www.lawscot.org.uk.

There is currently a link to the survey from the Society’s home page.
**Should will writers be regulated?**

The Law Society of Scotland has welcomed a new consultation by the Scottish Government on proposals to regulate will writers who charge a client fee. The Society had raised concerns about unregulated will writers as part of its written and oral evidence submission to the Parliament’s Justice Committee on the Legal Services (Scotland) Bill.

In a brief consultation paper, ministers ask whether writing should be left unregulated as at present, or whether a scheme similar to that proposed for confirmation agents in part 3 of the Legal Services (Scotland) Bill should be introduced. The paper adds that if some other framework is preferred, its introduction may be delayed.

Lorna Jack, the Society’s Chief Executive, said: “I’m very pleased that the concerns we have raised are being taken on board and that there is to be a consultation on the regulation of non-lawyer will writers. “Members of the public who go to a solicitor to write a will for them do so in the knowledge that they are dealing with trained and qualified professionals and that there are consumer protections in place. Non-lawyer will writers are not required to have any formal training, professional indemnity insurance and there is no requirement for them to belong to a professional body which could take disciplinary action for inadequate service or negligence. “It’s critical that if the legal services market is to be opened up further, will writers who charge a client fee should be regulated to enhance public protections and that those who provide legal services operate on a level playing field.”

For the link to the consultation see p37. The closing date for responses is Friday, 19 February 2010.

**Honours for Hope, Bowen**

Sheriff Principal Edward Bowen QC of Lothian and Borders has been made a Commander of the Order of the British Empire (CBE) in the New Year’s Honours.

The sheriff principal, who is currently also leading an inquiry into sheriff and jury trials in Scotland, has been cited for services to the administration of justice in Scotland. He was appointed Sheriff Principal of Glasgow and Strathkelvin in 1997 before taking up his current post in 2005. He also sits as a temporary judge of the Court of Session.

Earlier last month it was also announced that the Queen has appointed Lord Hope of Craighead, now Deputy President of the UK Supreme Court, a Knight of the Order of the Thistle. The Order is the highest honour in Scotland.

**Court Service Board membership announced**

The membership of the Scottish Court Service Board, the new statutory body which will take over the administration of the Scottish courts, has been announced by the Lord President.

Chaired by the Lord President and with a majority of judicial members, but including others with a range of experience inside and outside the justice system, the Board, which will be independent of Scottish ministers, begins meeting this month to prepare for taking up its full responsibilities from 1 April.

The Lord President, Lord Justice Clerk and chief executive of the Scottish Court Service are automatically members of the Board. The other 10 members are appointed by the Lord President on the recommendation of an interview panel. Nine of those appointments have now been announced.

Judicial members are the Rt Hon Lord Reed, Sheriff Principal R Alastair Dunlop QC, Sheriff Derek Pyle, Sheriff Iona McDonald and Mrs Johan Findlay JP. Mr Robert Milligan QC is the advocate member, and from outside the justice system come Mrs Deborah Crosbie, whose career has been in financial services and who is now UK chief information officer for the group that includes the Clydesdale Bank; Mr Anthony McGrath, managing director of a public house chain; and Mrs Elizabeth Carmichael CBE, former head of the Community Justice Services Division and currently a board member of the Scottish Social Services Council and deputy chair of SACRO.

A solicitor member of the Board remains to be appointed. This appointment will be announced shortly.

**SLPG “Public Inquiries” seminar**

The Scottish Public Law Group’s winter seminar, “Public Inquiries”, will be held on Thursday 28 January at 26 Drumsheugh Gardens, Edinburgh.

The event will be chaired by Lord Cullen of Whitekirk, who will also address the outcome of the Fatal Accident Inquiries Review. Other speakers will include Richard Keen QC, and Ann Nelson, solicitor to the Fingerprint Inquiry.

The event begins at 5.30pm. Tea and coffee will be served from 5pm, and there will be a drinks reception afterwards.

For further information or to register to attend, please visit http://slpg.co.uk/ or contact karen.brough@ shepwedd.co.uk.
A survey by the Scottish Legal Aid Board has found that most legal aid clients are pleased with the service and advice they received from their solicitor under the civil legal assistance scheme and with the working of the scheme.

The findings, based on phone interviews with 765 applicants for civil legal assistance, show that:

- overall the majority of applicants (87%) were either very or fairly satisfied with the service provided by their solicitor;
- applicants were most satisfied that solicitors treated them with respect and courtesy (93% very or fairly satisfied) and explained things clearly in a way that could be understood (91% satisfied);
- solicitors dealt with things without delay (84% very or fairly satisfied) and kept them informed of progress (83% very or fairly satisfied);
- 91% were satisfied with the ease of use of the system;
- solicitors dealt with things without delay (84% very or fairly satisfied) and kept them informed of progress (83% very or fairly satisfied);
- only 5% said they had difficulty finding a legal aid solicitor.

Lindsay Montgomery, SLAB chief executive, commented: “The results are encouraging and a strong indication that we are enabling access to justice. Given that applicants for civil legal assistance are often involved in difficult and challenging situations, the survey is a very positive reflection on civil legal aid solicitors, who provide this important service.”

He added that the Board would use the detailed findings to identify specific areas for the Board or solicitors to improve further on the system.

The survey findings are available on the Board’s website at www.slab.org.uk/about_us/research/Stakeholderengagement.htm.
From the Brussels office

Commission names and shames
On 9 December the European Commission published a scoreboard presenting an overview of the implementation into national law of Directive 2005/36 on the recognition of professional qualifications. The deadline for implementation was 20 October 2007 and to date five member states are yet to transpose the provisions fully: Austria, Belgium, France, Greece and Luxembourg. The Court of Justice has already found these member states to be in breach of their obligations by their failure to implement the directive on time. The Commission has also published a “user’s guide” to the directive in a question-and-answer format.

Ruling on free movement of legal trainees
On 10 December the Court of Justice handed down its judgment in Krzysztof Pesla v Justizministerium Mecklenburg-Vorpommern (C-345/08). The case raises questions about the free movement of a European citizen seeking to carry out his legal traineeship in a member state other than that in which he obtained his degree.

Mr Pesla, a Polish national, had taken proceedings against the German Ministry of Justice challenging its finding that his qualifications could not be deemed equivalent to those necessarily undertaken by German students prior to commencing a traineeship. The court held that, whereas Community law does require that the experience and qualifications of a candidate with a diploma in law from another member state should be fully taken into account, it does not require that the level of knowledge of national law required be lowered for such a candidate.

EU-wide patent comes closer
The creation of a coherent EU-wide system of patents moved one step closer to fruition on 4 December. Ministers meeting in the Competitiveness Council agreed on a proposed regulation that would establish a single patent valid throughout the EU. They also adopted conclusions on the creation of a European patents court system that would have exclusive jurisdiction over litigation concerning both the validity and infringements of such patents. Language and the need for translation has been the perpetual stumbling block for this proposal. Ministers avoided the matter by concluding that a separate regulation would set down the translation arrangements. While the details will require further negotiation between governments, other considerations will affect the timescale of adoption. The Court of Justice has been asked to give its opinion on the legality of establishing the new court system and consequential amendments will have to be made to the European Patent Convention before the EU patent becomes operational.

Consumer rights and dynamic travel packages
At the meeting of the Competitiveness Council on 3 and 4 December, ministers reached broad agreement on the proposal for a Consumer Rights Directive. Following a public debate, the majority of delegations were in agreement that financial services and immovable property should be excluded from the scope of the directive and many supported the Commission’s choice to pursue maximum harmonisation in this area. At a conference held in Brussels on 8 December, Andreas Schwab MEP, rapporteur in the European Parliament for the proposal, stressed that the directive should not be rushed and that he did not expect a first reading in Parliament until November 2010 at the earliest. On 26 November the Commission launched a consultation seeking stakeholder views on how the related Package Travel Directive should be revised to take account of changes to the market since it was introduced in 1990. The consultation highlights the growth of the internet and low-cost airlines and will close on 7 February 2010. The Commission intends to bring forward proposals to amend the directive in autumn 2010. A study on the Package Travel Directive was published on the same day.

European private company stalls
The Competitiveness Council failed to reach agreement on the proposed Regulation on the Statute for a European private company (SPE). A Swedish Presidency compromise text was published on 27 November. It had been hoped this would resolve the outstanding issues as to the seat of an SPE and the question of employee participation in its management. As regards employee participation, the Presidency proposed clarifying that the rules are not applicable to companies established under national law. In relation to an SPE’s seat, a transition period of two years for an SPE to move its registered office and principal place of administration to the same member state was suggested. It has been reported that the strongest objections raised in Council were from Austria, which wants SPEs to have to register in the member state where they have their central administration, whilst Spain and the Netherlands argue for a longer transition period. Negotiations on the proposal will continue. Similar to the European company in concept, the SPE would allow a business to operate under a single legal form throughout the EU.

There is a better way to alleviate stress at your computer.

LawCare’s Wellbeing Portal is a free and confidential online tool designed to help you assess the stresses in your professional/personal life and develop a plan for dealing with them. There are also additional resources you can download and use, it is personal and available 24 x 7, for as long as you want. Now, doesn’t that feel better?

www.lawcare.org.uk
**Law reform update**

**Legal Services (Scotland) Bill**
The Society gave oral evidence on the Legal Services (Scotland) Bill on 15 December 2009. Following the evidence session, President Ian Smart noted: “The Society broadly supports the bill although we have recommended that some changes be made to ensure that the independence of the profession remains, that there is a level playing field for those providing legal services and for those who will regulate them, that consumers are protected, and that access to legal services across Scotland is a priority.”

**Home Owner and Debtor Protection Bill**
In November, the Society gave oral evidence before the Local Government and Communities Committee. The Society is pleased to see that the committee has accepted its view that there has not been a full and proper consultation on Part 2 of the bill. The Society wrote to MSPs prior to the stage 1 debate on the bill urging them to ask for further consultation on Part 2. The Society has also commented on some provisions within Part 1, including provisions relating to representation in repossession proceedings.

**EU proposed regulation on succession**
In November the Society’s Trust and Succession Law Subcommittee responded to a Ministry of Justice Consultation on the European Commission’s proposed regulation on succession matters. The committee took the view that the UK should not opt in at this time but should continue taking part in discussions and perhaps opt in at a later date. The committee highlighted concerns about the proposals, including on the issue of clawback. The Society is pleased to note that the UK Government has taken up this view. In a ministerial statement the Secretary of State for Justice and Lord Chancellor, Jack Straw said: “The Government have concluded that the potential benefits of this proposal are outweighed by the risks and have therefore decided that the best course of action is not to opt in to the proposal and the UK will therefore not be bound by the outcome.”

**Alcohol Etc (Scotland) Bill**
The Alcohol Etc (Scotland) Bill was introduced 25 November 2009. The bill aims to reduce the impact of alcohol overconsumption through minimum pricing, restrictions on alcohol promotions, and other measures. The Society’s Licensing Law Subcommittee plans to review and comment on the bill in due course.

**Constitutional law papers**
Two new white papers on constitutional law have been published. *Your Scotland: Your Voice* was published by the Scottish Government and seeks to explore options for constitutional reform in Scotland. *Scotland’s Future in the United Kingdom* sets out the UK Government’s response to the Calman Commission. Both papers will be considered by the Society’s Constitutional Law Committee in January.

**Notifications**

**Entrance certificates**
Issued during November/December 2009

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**Applications for admission**
November/December 2009

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**SOLAS Diploma Awards 2009**

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LINDSAYS, Edinburgh, Glasgow and North Berwick, are pleased to announce that with effect from 1 December 2009 Paul Roper joined the firm’s office at TURNBULL, SIMSON & STURROCK, WS, Jedburgh as a Director. Paul can be contacted on 01835 862391 and by email at paulroper@lindsays.co.uk. In addition Andrew Linehan has joined the Jedburgh office on 18 January 2010 as a senior associate. Andrew can be contacted on 01835 862391 and by email at andrewlinehan@lindsays.co.uk. At the same time David Soeder, formerly a partner with the firm, has resigned with effect from 17 November 2009.

IAIN SMITH & PARTNERS WS, Galashiels and Duns, intimate that Paul Roper retired as a partner of the firm with effect from 30 November 2009.

Intimations for the people section should be sent to:
Denise Robertson, Registrar’s Dept., The Law Society of Scotland, 26 Drumsheweg Gardens, Edinburgh EH3 7YR
Email: deniserobertson@lawscot.org.uk

On the move

Protection from domestic abuse
Rhoda Grant, Scottish Labour list MSP for the Highlands, seeks views on a proposed bill to improve the safety of “women, children and others” experiencing domestic abuse. At the moment a non-harassment order can be applied for on the basis of a course of abusive conduct, which of course requires at least two incidents: the member’s proposal would see that requirement removed so that a single incident might suffice. Views are also sought on whether to make civil legal aid available regardless of the alleged victim’s financial resources. Further it is proposed that a breach of an order which is not itself a criminal act be made a criminal act. See www.scottish.parliament.uk/s3/bills/MembersBills/documents/RhodaGrantConsultationfinalversion.pdf.

Paralegals
The Law Society of Scotland is consulting on the creation of a registered status for paralegals. See the documents at www.lawscot.org.uk/paralegals.

Will writers
The Scottish Government is conducting a quick consultation on possible regulation of non-lawyers who write wills and testaments, which might be included in the current Legal Services (Scotland) Bill. Currently, the exemption in section 32(3) of the Solicitors (Scotland) Act 1980 provides that wills or testamentary writings are not “writs”, and therefore non-legally qualified persons can provide such a service over which there is no regulatory oversight. One option is to introduce regulation along the lines of that for authorised confirmation agents. See www.scotland.gov.uk/Resource/Doc/297438/0092535.pdf.

School bullying
The Scottish Government is seeking views on the “strengths and gaps” in the regime intended to tackle bullying of children and young persons. See www.scotland.gov.uk/Publications/2009/11/13154751/0.

And briefly...
As noted last month, the UK Government is seeking views on the implications of a “default retirement age” (send comments to draevidence@bis.gov.uk by 1 February), and also on a range of changes to asylum and immigration (comments to AsylumSupportReform@homeoffice.gsi.gov.uk by 4 February).
Three years ago Cameron Macaulay was probably no different to hundreds of other traditional high street law firms. The 10-year-old practice operated from two offices, providing a wide range of non-specialist services. Profit margins were too low, overheads too high and the danger of taking on too much to sustain the business model all too real.

Today the firm is reborn. Quality and client service are restored as the cornerstones. The constant rush and heavy workload have been replaced with the luxury of time to be more reflective and selective about cases. The work-life balance is restored, and the new civil court practice, relaunched in June 2009, is now inherently profitable.

The transformation has been brought about by the realisation that outsourcing just about everything to do with the running of the firm, from secretaries, to reception, to serviced offices and above all IT, is the modern way to run a practice.

On a cloud

Software as a Service (SaaS) means that small and medium sized practices now have as much computing power as the corporate legal firms. Any apartheid between rich and poor, or the large/small firm divide, has been removed. SaaS, or cloud computing, has allowed even the sole practitioner to benefit from remote servers of equal power to the monsters in the big firms, without the handicap of maintaining them.

In terms of systems, the playing field has been levelled. IT capital expenditure is zero and the quality and features of the software now available are far in excess of what would have been affordable by the previous high street setup, especially for case management. The cost of doing business has reduced by around 80%, but the quality of service is much improved.

Today the practice is run from plush serviced offices in the centre of Glasgow, which is convenient to clients, and from home. Client and case files are accessible online from either location and indeed from anywhere at any time. Business continuity, disaster recovery, backups and storage are now subject to service level agreements and guarantees which are the responsibility of a third party. SaaS is not the future: it is here now and it works.

Choosing a partner

Along the journey there have been some important lessons learned about choosing a SaaS supplier and letting go of the old mindset. Here are some tips.

Outsourcing is the goal, but it is vital to look for quality and value in the marketplace, whether that be the serviced office in a central location to replace high street premises, or the technology to support the business. In my experience it is important to carry out one’s own research into providers of legal software delivered as a service, rather than rely on others to do it for you. Search engines are an obvious route to discovery, especially as the suppliers will, by necessity, have a strong web presence.

Experience also taught me to look for independent commentary about the legal IT industry, as provided by services such as Legal Technology Insider. Supplier consolidation over the last few years has resulted in considerable product consolidation and fewer options.

Take care to find out that the software you choose and train in, is destined for continuous development and support, and that you will not be forced to migrate to another product because support has been withdrawn once the dust has settled from the mergers and acquisitions.

Don’t be afraid to think big, as the cost-effectiveness of the SaaS model means that rich functionality is far more affordable than when running IT in-house. Full blown case management may have been out of reach before; now you can take advantage of all the bells and whistles. Features like time recording are essential, but look too for automated time recording of incoming and outgoing emails against the individual matter, which is an area often overlooked and time consuming to manage.

Perhaps one of the most difficult things to let go of, mentally speaking, is “server hugging”. There seems to be an emotional attachment and a false sense of security in having your own servers in-house. But think of the high cost of maintaining and upgrading those systems, managing new software releases and being responsible for backups. In-house servers can be less secure than backing up online. And you can get...
A solicitor faces a dilemma over whether to organise a leaving collection for a colleague with whom she does not get on

Dear Ash,

One of my colleagues is moving to another firm. I normally organise a leaving do as well as arranging a collection for colleagues who are leaving or going on maternity leave in our department, and this normally includes everyone signing a card and going for a drink at the local bar. However, I have never been on friendly terms with the person leaving and the feeling seems mutual. We just never hit it off and in the past she was critical about my work and made personal remarks about my character. We have worked together for a couple of years but I do not want to seem hypocritical by contributing to her present or signing a card when I am not sad at her departure. Should I stick to my principles or just organise the leaving do?

Ash replies:

The workplace should be kept professional at all times, where possible. This includes sometimes having to stem your emotions, which I can appreciate can be difficult, especially when in a similar domestic setting you may not exert the same amount of control.

As your colleague is leaving, it may be best to try to view this as an opportunity to bury the hatchet or at the very least not to depart on bad terms. I would suggest that you organise the collection and card as per normal and even try to attend the leaving do for at least one drink. You would not be showing yourself up as a hypocrite by taking such action but would merely be demonstrating that you are able to act in a professional manner by being able to detach from your emotions in a difficult work situation. By taking such action you may also shame the person in question into perhaps taking similar steps to show there were no hard feelings.

Of course aside from reasons of professionalism, such gestures will also be perceived as acts of kindness, which may help to extend the season of goodwill!

*“Ash” is a solicitor who is willing to answer work-related queries from solicitors and trainees, which can be put to her via the editor: peter@connectcommunications.co.uk, or mail to Studio 2001, Mile End, Paisley PA1 1JS. Confidence will be respected and any advice published will be anonymised.

Please note that letters to Ash are not received at the Law Society of Scotland. The Society offers a support service for trainees through its Education and Training Department. For one-to-one advice contact Education and Training Manager Katie Meanley on 0131 476 8105/8200, or KatieMeanley@lawsoc.org.uk.

— Malcolm Cameron is founding partner of Cameron Macaulay, solicitors, Glasgow
Data security incidents have featured all too regularly in the news in recent times. This has been due to a multitude of cases in which organisations in both the public and private sectors have lost significant amounts of personal information. Prompted by diminishing public trust and confidence in the proper handling of our personal information, the UK Government is finally minded to take action. Recent weeks have, in particular, seen a number of important developments which will result in new and improved enforcement powers for breaches of UK data protection laws.

**Prison sentences for misuse**

The Ministry of Justice began by publishing on 15 October 2009 a consultation paper (CP22/09) on the proposed introduction of custodial sentences for the misuse of personal data. Section 77 of the Criminal Justice and Immigration Act 2008 (CJIA) gives the Home Secretary power to increase the penalties presently available for offences committed under s 55 of the Data Protection Act 1998 (DPA), but until now the power has not been used.

The UK Government has proposed that those convicted of the knowing or reckless misuse of personal data be liable to imprisonment for a maximum two years on indictment and 12 months on summary conviction. This would be in addition to the current sanctions of an unlimited fine on indictment and a fine not exceeding the statutory maximum (£5,000) on summary conviction.

As provided for by s 78 of CJIA, a new defence would also be introduced for offences under s 55 of DPA. This would mean that if a person obtained, disclosed or procured personal data for what is known as “the special purposes” (i.e. journalistic, artistic or literary purposes) with a view to publication of journalistic, literary or artistic material, and that person acted in the reasonable belief that the obtaining, disclosing or procuring of such information was in the public interest, then no offence under s 55 will have been committed.

There have been longstanding concerns that the current provisions of the DPA do not serve as a sufficient deterrent to those who breach s 55, whether they be journalists, private investigators, tracing agents, or police officers and staff who misuse the police national computer. This lack of “bite” was commented on recently by the courts when Matthew Single, a former member of the BNP, was convicted of posting the party’s membership list on the internet without its permission.

The district judge remarked that “it came as a surprise to me, as it will to many members of the party, that to do something as foolish and as criminally dangerous as you did will only incur a financial penalty”. Even then Mr Single was fined a paltry £200, as the judge took into account the fact that he was dependent on state benefits.

The Information Commissioner, Christopher Graham, has himself described the existing penalties under the DPA as “pathetic”. In his response to the MoJ consultation he argued strongly that custodial sentences at the proposed level are necessary to provide an “effective deterrent against the illegal trade in personal data”. The recent announcement that rogue employees at T-Mobile had sold on
thousands of customer account details to brokers for use by T-Mobile’s competitors is a timely reminder that such unlawful trade is thriving.

The consultation ended on 7 January, with a response set to be published by the end of the month. It is clear, however, that the UK Government is now persuaded of the need to act, and public sentiment is likely to be strongly in favour of the proposals. It is envisaged that the proposed new penalties would take effect in April 2010.

Civil fines for serious breaches

On 9 November the Ministry of Justice issued a second consultation paper (CP48/09) entitled “Civil Monetary Penalties: Setting the maximum penalty”. By way of background, s 144 of CJIA amended the DPA by giving the Information Commissioner the power to impose civil monetary penalties for serious breaches of the DPA. Although the CJIA received Royal Assent on 8 May 2008, s 144 has not yet entered into force.

Once implemented, s 144 will amend the DPA by introducing new ss 55A-55E, to give the Information Commissioner the power to impose a civil monetary penalty on data controllers where:

(a) there has been a serious breach of one or more of the eight data protection principles,

(b) the breach was of a kind likely to cause substantial damage or substantial distress, and

(c) either (i) the breach was deliberate; or (ii) the data controller knew or ought to have known that there was a risk that the breach would occur, and that such a breach was of a kind likely to cause substantial damage or substantial distress, but failed to take reasonable steps to prevent the breach.

Before a penalty can be imposed the Information Commissioner will have to issue the organisation concerned with a notice of intent. This notice must tell the organisation of its right to make representations to the Commissioner before a final decision is made. There will also be a right of appeal to the Information Tribunal (shortly to be replaced in terms of the Tribunals, Courts and Enforcement Act 2007) once a penalty notice has been served.

As the Ministry of Justice has already informally consulted with certain stakeholders, this second consultation invited comment on one issue only, the proposed maximum penalty. The question was simple: Do you consider that a penalty of up to £500,000 provides the ICO with a proportionate sanction for serious contravention of the data protection principles?

In arriving at its proposal, the MoJ decided against suggesting a system based on a percentage of an organisation’s turnover, as used by other regulators. It did so on the basis that this would impose a greater administrative burden. The MoJ does, however, consider that the maximum penalty should be no higher than 10% of the highest annual turnover of a small company.

The proposed maximum fine is to be contrasted with the powers available to other regulators such as the Financial Services Authority when dealing with regulated firms. To put this into context, in July 2009 three HSBC firms, HSBC Life (UK) Ltd, HSBC Actuaries and Consultants Ltd and HSBC Insurance Brokers Ltd, were in aggregate fined over £3 million by the FSA for data security failures.

It appears then that the Information Commissioner can only dream of having such powers. Nevertheless, the proposal represents a significant change in current practice and should ensure that data protection compliance features prominently in discussions at executive level.

This consultation ended on 21 December and a response was expected to be published by 11 January. It is envisaged that the new penalties will take effect possibly at the same time that custodial sentences for the misuse of personal data take effect.

Draft ICO guidance

The consultation also follows swiftly on from draft guidance issued by the Information Commissioner’s Office on 4 November on monetary penalties. The guidance, which the Commissioner will be required to issue by s 55C of DPA, explains how he intends to interpret his powers to impose monetary penalties. In particular, it explains what he regards as a “serious” breach of the data protection principles. Perhaps unsurprisingly, it gives the now all too familiar example of an organisation failing to take adequate security measures resulting in the loss of a CD containing personal data.

The guidance also addresses the “reasonable steps” that organisations are expected to take to prevent a breach in the first place (such as having suitable policies and procedures and adhering to the Commissioner’s codes of practice and guidance), and how he will interpret terms such as “substantial”, “damage”, “distress”, “reckless”, and “deliberate”.

It goes on to address issues such as when the Information Commissioner would consider it right to issue a monetary penalty notice, how the level of the penalty will be determined, what a notice of intent to issue a penalty will contain, the scope for challenging a notice of intent, the monetary penalty notice, and the right of appeal.

The Coroner's and Justice Act 2009

And if all that was not enough to be going on with, the Coroners and Justice Act 2009 received Royal Assent on 12 November. The Act amends the DPA in a number of ways by giving the Information Commissioner enhanced powers. He now has the right to serve Government departments and other designated public authorities and persons with an “assessment notice” so that he can establish whether they have complied or are complying with the data protection principles. This new power is contained in ss 41A-41C of DPA as amended. The Commissioner’s powers in relation to warrants for entry and inspection, as contained in sched 9 to DPA, have also been extended. The Commissioner is also now required to issue a code of practice on data sharing, as provided for and regulated by ss 52A-52E of DPA as amended.

Going forward

Taken together, these changes make up the most significant reform of the current UK data protection regime since it was implemented in 2000. They serve as an important wake-up to organisations by reminding them of the need to take data protection seriously or face the consequences.

David Gourlay is a partner with McClure Naismith LLP

The Information Commissioner, Christopher Graham, has himself described the existing penalties under the DPA as “pathetic”
Professional practice Risk management

Effective risk management can deliver a number of business wins. Complete the Marsh risk management crossword for starters, and you could win a magnum of champagne!

Magnum opus

The start of a new year is a great time to review your systems and procedures. 2009 was a particularly challenging year for many firms, and reducing the risk of claims is one sure-fire way of preventing additional unwelcome costs for the business. To refresh your memory as to some of the big risk issues we identified over the course of the last year, we challenge you to complete the crossword below. The questions all relate to risk management articles in the Journal over the course of 2009.

If you are up for the challenge and submit the completed crossword (address for entries at the end of the crossword), there is a prize of a magnum of champagne on offer to the first correct entry out of the hat on Friday 19 February.

Make effective risk management one of your resolutions for 2010, and hopefully it will prove to be a profitable, claims-free year for you.

ACROSS
6 These were identified by the Insurance Committee in August, and are something worth aiming for. (4,10,7)
8 Advice to clients and clients’ instructions received should be noted this way (December). (2, 7)
10 Introducing this can pose some challenges (February). (5,5)
11 Prior to serving a break notice “carry out a [ ] to ensure that you will be serving on the landlord’s current registered office” (September). (7,6)
12 Want to take a holiday in September? It’s an option, if you deal with this properly. (5,6)
14 Take a tip from us – this could be a useful feature of your IT systems if your office suffers a flood or fire (November). (6,6)
17 Valentine’s Day might be one for that month’s diary, for example. (8,4)
19 It might be a good plan to develop and follow one of these if you’ve suffered a claim and want to avoid a repeat experience (March). (6,4)
21 December’s watch-word. (13)
22 In May we wondered whether the recession had caused one. In November, in another form, one was part of the rationale for ensuring that effective business continuity arrangements were in place. (8)
23 This august person may help protect you from claims, in their professional capacity. (2)
24 A Roman Catholic order of nuns, or one of the possible causes of the claim described in March. (11)
26 What was the suggested risk management tool to address September’s risk management target? (9)
27 This crime has seen a significant rise – up 38% since 2007 (June). (4,5)

DOWN
1 In the month of showers, what was key point of the response to firms looking to reduce their PII cover as a result of the recession? (6,4)
2 A loftier trouper May have made this error. (7,2,6)
3 If a partner retired in April, what issue might they raise with the Master Policy Brokers, (6,6)

Terms and conditions
The winner will be chosen at random from the correct entries submitted by 19 February 2010.
Only one entry per person.
There is no alternative to the prize offered and it is not transferable.
We reserve the right to add to or change any of our competition terms and conditions at any time without prior notice.
The competition is not open to employees of Marsh Ltd or Connect Communications or their immediate families.

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42 / theJournal January 2010 www.journalonline.co.uk
Marsh? A thief might escape the crime scene this way! (3,3)
4 This is something from the past that is worth studying. In recession it's back on the road. (10,11)
5 These could often be avoided by following a handbook (July). (6,6)
7 Completing one of these is one of the first steps recommended when developing a meaningful business continuity plan (November). (4,10)
9 During the summer this was a “constant foe”. (5)
13 One of November’s practical tips: “use [ ] backup servers which reduce the risk of losing data in case of damage or loss of in-office equipment”. (3,4)
15 In September, a panel targeted the problem of [5 down] and reported these requirements. (3,8)
16 A stoned minor was confused when reviewing common claims in March. (12)
18 It’s not just a question of your own workload. This is something you may need to check your client for (August). (8)
20 What a file audit seeks to monitor (February). (10)
24 Entitled to a reduced risk of a claim, electronically? (October) (4)
25 Last spring you may have found you failed to satisfy your trust & executry clients’ expectations. Identify the cause of the problem quickly. (5)

Calum MacLean and Marsh

Calum MacLean 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 Calum, email: calum.maclean@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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Two in one

A copyright action where separate conclusions against two defenders are held competent; an action by a judicial factor following an unsuccessful claim as an individual; and summary cause issues, are among the cases considered by Sheriff Lindsay Foulis in this month’s roundup.

Separate defenders, separate conclusions
In Toner v Kean Construction (Scotland) Ltd [2009] CSOH 105; 2009 SLT 1038 the pursuers sued two defenders for damages for breach of copyright. It was averred that the second defenders had copied parts of drawings the pursuers had prepared for the first defenders. Damages were sought against both. It was submitted that the action was incompetent. Lord Bannatyne determined that in this instance, as the cases against both defenders were inextricably linked both factually and legally, based on the same wrong, and the same remedy was sought, the action was competent. There was a common interest in the position of both defenders and thus it was in the interests of justice that they be sued in the same action. Lord Bannatyne further considered that there was no need to make reference to the legislation upon which the action was based in circumstances in which it was patently obvious that the action was based on the terms of the statute.
the pursuer had been appointed further argued that the mere fact that the action was prior proceedings that the decree was passed to a solicitor could not be orders not being obtempered. Indeed, the averments had had that result. The defender had further accepted that certain averments were untrue. To delay the court process when there was no defence in fact and law to the application constituted an abuse of process. The defender knew what he was doing, had no regret for what he had done, and had achieved his ends as a result.

It is further worthy of note that Sheriff Cubie was moved to find the defender in contempt for his conduct of the hearing. He had been disrespectful of the other parties, their representatives and the sheriff. Sheriff Cubie refrained from finding the defender in contempt in that regard. He had apologised for much of his behaviour, he was unrepresented, and he was reacting to the progress of the action. This was, I have no doubt, an extreme example, but is worthy of note.

Summary causes
In Glasgow Housing Association v Duffy 2009 GWD 40-691 decree was granted in absence at a pre-proof hearing in an action for recovery of heritage. The defender lodged a minute for recall on the basis that the hearing had been a continuation of the first calling and it had not been competent to grant decree by default in terms of summary cause rule 22.1(1). Sheriff Drummond decided that as the pre-proof hearing was neither a diet of proof nor the hearing of an incidental application, it had to be a continuation of the first calling. In those circumstances, the minute was competent.

In West of Scotland Housing Association v Daly 2009 GWD 40-679 Sheriff Principal Taylor determined that the lodging of a minute for recall of decree was sufficient to constitute an application for recall of a decree. Accordingly, when the first minute for recall was refused through want of insistence as a result of the defender failing to attend the hearing, a second minute for recall could not be competently entertained.

Don't miss these essential briefings

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Update

Since the last article S v Argyll and Clyde Acute Hospitals NHS Trust (May article) has been reported at 2009 SLT 1016, and Napoli v Stone (November) at 2009 SLT (Sh Ct) 125.

Jurisdiction
In HSBC Bank plc [2009] CSOH 147; 2009 GWD 37-629 a winding up order was sought against a company incorporated in Gibraltar. Lord Hodge decided that he had jurisdiction to wind up the respondents. Their business was to develop property in Scotland, their principal place of business was here, their principal asset was here, and the petitioners were likely to benefit from the order if the development could be completed and thus a better price obtained.

Res judicata
In Clark's Judicial Factor v Maclehose [2009] CSOH 153 (19 November 2009), the defendants sought to argue that the action was res judicata. A previous action had been raised by the pursuer in an individual capacity. This action had been dismissed at debate. She now pursued an action in the capacity of judicial factor. It was further argued that the mere fact that the pursuer had been appointed judicial factor did not per se give her the right to pursue the claim. Morag Wise QC, sitting as a temporary judge, concluded that as a judicial factor, the pursuer had title and interest to pursue any claims arising from the estate. The fact that her predecessor in office had not pursued the same claims did not restrict her power. Turning to the issue of res judicata, the pursuer now pursued the action in a different capacity to that in which the prior action.

Decrees
This really is an aside from an action of reduction, Campbell v Glasgow Housing Association Ltd [2009] CSOH 154 (20 November 2009), in which the pursuer sought to reduce a decree for recovery of heritage. One point was that the terms of the extract decree referred to the decree “in absence”. Lord Bannatyne rejected a submission that he could not look behind the terms of the extract. In the circumstances of the granting of the decree, Lord Bannatyne considered the words “in absence” only reflected that at the time decree was granted Mr Campbell had not been physically present. It further was clear from the history of the prior proceedings that the decree pronounced was one in foro.

Expenses
In Smith v Highland Council [2009] CSOH 149; 2009 GWD 37-624 an action had been settled extrajudicially with the pursuer being awarded expenses as taxed. The auditor taxed off charges in respect of work carried out by a compensation service and a note of objections was taken. The objection was repelled. There was no basis for including charges for work carried out prior to the instruction of a solicitor and not instructed by a solicitor. Pre-litigation information passed to a compensation service and a deductible charge in respect of work carried out prior to the instruction of the solicitor. Pre-litigation information passed to a compensation service and a deductible charge in respect of work carried out prior to the instruction of the solicitor was competent. In those circumstances, the minute was competent.

Contempt of court
One of the bases for Sheriff Cubie finding the defender in contempt in EB v FR, Stirling Sheriff Court, 30 September 2009, was that the defender had caused and permitted pleadings, which were untrue and which he knew to be untrue, to be lodged in court. Sheriff Cubie observed that whilst pleading which was untrue and unsupported was inherent in the adversarial system, the defender had used his pleadings to give an untrue and self serving account of events, intending that his child would be blamed for court
Enough to turn you to drink

Seasoned observers of the last couple of years of licensing regulation will be saddened, but not surprised, to learn that the draftsmen of the Alcohol Etc (Scotland) Bill have maintained their quality standards.

In last month’s issue, James McLean gave a fascinating insight into the likely arguments on both sides of the debate surrounding minimum pricing. Ironically, at around the time his article was being prepared, it seemed to be agreed that this part of the bill would not reach the statute book; however, anything can happen in Holyrood.

Carry-out carry-on

The bill also contains measures intended to strike at discounting in off-sale premises. This will be done in two ways. First, where drinks are physically packaged together – typically cans or bottles of beer or cider – it will be illegal to sell the pack for less than the multiple of the single unit price. Secondly, para 8(2)(b) of sched 3 to the 2005 Act will apply to off-sales for the first time. This will prevent the supply of one bottle free or at a reduced price on the purchase of one or more. The Nicholson Report saw nothing wrong with normal retail offers applying to alcohol; however, the seven bottles of champagne for the price of six will be deemed to be irresponsible as quadruples for the price of doubles. BOGOF no more.

The location of advertising material (defined in the bill as “drinks promotion”) in off-sales premises is to be severely restricted. Assuming you have no separate tasting room, such promotion may take place only in the display area or areas specified in the operating plan. As “drinks promotion” means any activity, tannoy announcements will no doubt be illegal (unless, presumably, loudspeakers in the other parts of the store are disabled). It is also provided that “a drinks promotion may not take place in the vicinity of the premises”. No doubt this is aimed at preventing external signage, A-boards, etc being erected by the licence holder. Unfortunately it does not qualify this injunction in any way.

What is a licensee to do if his premises are in the vicinity of an advertising hoarding? What is “vicinity”?

Onus of responsibility

The bill saves its main controversy for its latter sections. Part 2 introduces the mechanism for the so called “social responsibility levy”. This may be imposed by local authorities on premises licence holders under the 2005 Act, or those holding licences which permit street trading, public entertainment or late hours catering. Let us hope that the cynics who see this as a charter for cash-strapped councils to impose a further tax burden on the hospitality and leisure industry are mistaken. It remains to be seen whether there will be any rights of appeal.

On first reading, ss 8 and 9 of the bill would appear to be separate; however, it has been much trumpeted that the bill will allow boards to prevent off-sales in their area to those under 21. Boards will have a duty, in addition to preparing their overprovision policy, to include a “detrimental impact statement” relating to off-sales to persons under 21. There is a requirement to consult. 9 will give boards the widest of powers to vary any premises licence conditions. Such a variation may apply to all licensed premises, to particular licensed premises, to licensed premises within particular parts of its area, or to licensed premises of a particular description. This may be done only where the board is satisfied that the variation is necessary or expedient (my emphasis) for the purposes of any of the licensing objectives. All that the board requires to do is to make the variations, then give notice that it has done so. There is no requirement for consultation. There seems to be no requirement for a hearing, and there is certainly no right of appeal.

This procedure is separate from the existing provisions of the Act. Section 37 permits a board to instigate review proceedings; however, there are detailed procedures to be followed. The licensee has the right to a hearing (as an incidental, can this part of the bill be ECHR compliant without such a right?). There is a requirement on the board to obtain and consider a licensing standards officer’s report, and the licensee has a right of appeal.

Unilateral variation of certain licence conditions may prove fatal to a business. My experience is that boards do not always appreciate the financial implications of some of their decisions. Is my business in danger of being tarred because of my neighbour’s misconduct? And I may not be able to appeal this? What are we coming to?

Let us hope that the cynics who see this as a charter for cash-strapped councils to impose a further tax burden on the hospitality and leisure industry are mistaken.

Tom Johnston, Young & Partners LLP, Dunfermline and Glasgow

Tom Johnston, Young & Partners LLP, Dunfermline and Glasgow
Uncertain security

Difficult practical issues arise for landlords seeking to enforce a hypothec for rent, and vary with the type of insolvency process

Retail insolvencies in the current market have increased the profile of the landlord’s hypothec.

If on the date of insolvency there are rent arrears, the landlord has to establish whether there is any security for his hypothec; and if so, what it is and what value it has. The difficulty is compounded by the theoretical basis of insolvency proceedings. Creditors are expected to lodge claims with the insolvency practitioner (IP), and to value any security they have; the IP then adjudicates on the claim and makes payment of dividends based on those adjudications.

A landlord will be able to lodge a claim in respect of sums owed, and to claim a hypothec by virtue of rent being in arrears, but may not be able to state the nature, extent or value of that security. He may have to rely on the IP to assist him with his claim, and this will be influenced by the nature of the insolvency process and the facts of the case. An IP providing such assistance may have to consider the potential conflict of interest which may arise when he adjudicates on the claims lodged.

Some specific issues may arise from the different insolvency processes.

Receivership

A receiver owes his primary responsibilities to the appointing charge holder. Receivership is the enforcement of security, not a collective process in which the IP’s primary duties are to the general body of creditors. It may not be in the charge holder’s best interest for the landlord to be able to substantiate his claim.

The hypothec (as amended by the 2007 Act) applies only to property of the tenant. This excludes items on lease or hire purchase, or subject to a valid retention of title clause. Apart from the landlord’s difficulties identifying the extent of his security, such a situation will in practice reduce the value of the hypothec despite it ranking ahead of the floating charge (as a fixed security predating that created by the charge crystallising). However, crystallisation subordinates the hypothec to the floating charge in respect of arrears post-insolvency appointment.

Administration

The fixed security nature of the hypothec will give the landlord a prominent ranking in respect of pre-appointment arrears. However it will also extend to post-appointment arrears with the same ranking, because: (a) a floating charge does not crystallise on the appointment of administrators; and (b) the 2007 Act does not limit hypothec to arrears accruing prior to the date of appointment of the IP (s 208).

However, if the IP decides that there is insufficient property to permit a distribution to unsecured creditors (other than under the prescribed part rules: Insolvency Act 1986, s 176A), and files notice to that effect, then the 1986 Act, sched B1, para 115(3) operates to attach the property subject to the floating charge. The ranking of a hypothec will then vary according to whether the landlord’s claim includes post-appointment arrears.

Liquidation

Most liquidations do not involve trading, and rent arrears are likely to accrue. Is the hypothec a right preferable to the liquidator’s rights in terms of the Insolvency (Scotland) Rules 1986, rule 4.66(6) (as amended)? If the hypothec arises in respect of pre-appointment arrears, it is suggested that it is preferable as a right created pre-appointment, but that cannot apply to post-appointment arrears. However, the hypothec is a security and the debts thereby secured must rank ahead of ordinary debts.

Should it be treated like any other fixed security, and if not, where does it rank in a competition with expenses and preferential debts in the rule 4.66 order of priority? Following Leyland DAF, where there is a hypothec claim, the liquidator should not pay fees or expenses from the proceeds of sale of the relevant moveables until the landlord has submitted its claim prior to the final distribution to creditors. Only then would it appear to be safe for the liquidator to take his fees and expenses if there are funds to meet them.

 Might it ever be legitimate for an IP to remove items from the premises (and thus from the ambit of the hypothec), other than by way of sale? This might reduce the recovery to a secured creditor and increase the recovery to unsecured creditors. The answer is not necessarily straightforward. An administrator might reasonably decide that closing some premises, and consolidating stock in units that continue trading, would be in the best interests of the creditors as a whole. Prejudice to a secured creditor might then be justifiable. If the purpose in removing the stock was to defeat the landlord’s claim and enhance the returns to unsecured creditors, the administrator should think twice. A receiver contemplating the same situation might have fewer concerns, given his primary responsibility to the charge holder as potential beneficiary of the sale of the stock removed.

In brief: the right of hypothec

Put shortly, the hypothec is a security over the tenant’s goods on the leased premises, arising automatically whenever arrears of rent exist. When the arrears are paid, the hypothec disappears. Other than by way of hypothec, it is not competent in Scots law to create security over moveable items (except by way of a floating charge), and since it arises by operation of law, it is not registrable as a charge. Landlord’s hypothec was amended by the Bankruptcy and Diligence etc (Scotland) Act 2007, and actions for sequestration for rent were abolished.

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Alistair Burrow, Head of Recovery, Todts Murray LLP

I am indebted to a paper given by Ian Bowie of MacRoberts LLP for the inspiration for this article.
Developers must be aware of the regime for protecting certain animal species found on a site, a subject coming under increasing scrutiny.

This article focuses on the implications for property development should any animal falling within the definition of European protected species ("EPS") be found on a potential development site. This demonstrates an increasing convergence of planning and environmental law.

Whilst the protections given to EPS have been in force for some time, the Scottish Government, planning authorities and indeed those objecting to development are now paying much closer attention to compliance. The implications may be that planning permission is refused, or that a permission issued may not, through the presence of EPS, be lawfully implemented.


Good examples of EPS which may be relevant to urban and rural development are all species of bats, otters and great crested newts.

**Do not disturb**

Regulation 39 gives effect to article 12 of the directive by making it an offence to (a) deliberately capture or kill an EPS; (b) deliberately disturb any such animal; (c) deliberately take or destroy the eggs of an EPS; or (d) damage or destroy a breeding site or resting place of an EPS. Equivalent provisions apply in respect of protected plants.

Damage to or destruction of a breeding site or resting place of such animals is an offence of strict liability. The presence of EPS will normally be investigated under the system of environmental impact assessment ("EIA"), although it is not in every case that a search for EPS will have been scoped into the EIA, nor will EIA apply to all developments. Planning authorities may request a specific survey and mitigation report to accompany a planning application irrespective of whether EIA applies. A planning authority will normally consult Scottish Natural Heritage for advice on the matter.

The failure of a planning application properly to examine the impact on EPS does not absolve the developer or the planning authority from its responsibilities under the directive and regulations.

**High test**

In the event that the presence of EPS is detected, a planning authority must have regard to the impact (temporary and permanent) of the development. The regulations through a licence regime envisage circumstances where it may be appropriate to authorise works of an imperative nature to proceed. The way the regime works is that the protective measures for EPS can be derogated from provided such action is carried out under and in accordance with the terms of a licence.

Applications for licences under reg 44 are made to the Scottish Ministers. The details of each licence require to be reported to the European Commission. In circumstances where development works are likely to result in an infringement of the protections under reg 39, a three-component test for a licence must be met as required by reg 44.

All three tests must be met. The first is that the purpose of the licence is for "Preserving public health or public safety or other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment".

An applicant will require supporting evidence to demonstrate that one or more of these criteria are met. It is considered that "imperative reasons of overriding public interest" may be a very hard test to meet, and will turn on the significance of the development being considered.

The second test is that the Scottish Ministers must not grant the licence unless satisfied that there are no satisfactory alternatives. This test requires the applicant to demonstrate that a full range of alternatives have been examined and evaluated. There seems to be a degree of uncertainty whether this requires the applicant to show that the development could not happen elsewhere. If it does, it will be a difficult matter to demonstrate, as developments (particularly housing) can often be located elsewhere.

The last and third test is that the action authorised will not be detrimental to the maintenance of the population of EPS concerned at a favourable conservation status in their natural range.

Planning authorities must ensure they satisfy themselves that the proposal either will not impact adversely on EPS, or that in their opinion all three tests necessary for the eventual grant of a licence are likely to be satisfied. This is set out in interim guidance to all planning authorities. The reason is that a prospective developer would otherwise be unable to make practical use of a planning permission because no licence would be issued.

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![Altair McKie, Partner and Head of Planning & Environment, Anderson Strathern LLP](http://www.journalonline.co.uk)
This note reflects the author’s experience of assisting with a substantial and complicated executry. The deceased had owned a fairly large estate and had employed two workers whose services remained necessary for its maintenance. Who now employed and paid them, and were there any other obligations?

Death extinguishes contracts, including those of employment. As executors hold a deceased’s estate in trust for its beneficiaries, only they can enter into new contracts of employment. A third party, such as a beneficiary, can pay workers, but it is considered better and more robust practice for executors to be both employers and responsible for remuneration.

**New particulars**

An employee is entitled to a statement of particulars of employment (SPE), in terms of the Employment Rights Act 1996, within two months of taking up a job. This must include details of disciplinary and grievance procedures. The penalty a tribunal can impose for failure to comply with this legislation is in the range of two to four weeks’ pay, at present capped at £330 per week. It is prudent to issue an SPE as quickly as practicable, as the unexpected is more often than not to be expected in complex executries.

SPEs require to include the full names of the executors, a full job description detailing the principal duties, remuneration including method and interval of payment, place of work, starting date, days and hours of work, meal breaks and holidays. Provision for sickness absence and pension arrangements should also be specified. Normal termination procedures apply, but it is possible to draft a contract for a fixed period or indeed to end on the sale of a heritable asset.

If tied accommodation is involved, it is necessary to ensure that only a licence to occupy is issued, to avoid creating an unintended assured tenancy. This can be an anxious time for existing employees and it can help ease the transition for all concerned if any new contract is modelled as closely as possible on the old one.

**Taxing matters**

Compliance with national minimum wage regulations is essential and it is necessary to check each employee’s hours, taking care to establish whether or not any breaks, such as meal breaks, are remunerated. Any cash payments must be subsumed within the employee’s salary to establish if it is then over the threshold for PAYE or NIC. If it transpires that it is, executors would be well advised to establish if this was also the case in any previous year.

Similarly, tied accommodation is eligible for exemption from a charge to tax only if the occupant is in a full time caretaking job and the accommodation is essential to its proper performance. The indications are that the courts apply these tests rigorously.

If accommodation does not qualify for exemption, its cash equivalent must be aggregated with the employee’s other earnings and taxed as a P11D benefit. The same principle applies to any other benefits in kind, which not uncommonly include the subsidy of council tax and utility bills.

Should any underpayment of PAYE and/or NIC emerge, full disclosure is advisable. With the introduction of new investigative and penalty rules, non-compliance, like marriage, is not lightly to be contemplated. HMRC will calculate anything that is still due and the correct ongoing payments. Executors should take the opportunity to register as employers with HMRC, bearing in mind their obligation to pay class 1A NICs.

**Termination**

Employees have a right to one week’s notice of termination of employment for every year’s service. This does not preclude executors electing for a longer period. There has to be a valid and justifiable reason for terminating a worker’s employment, and after one year’s service statutory procedures must be followed.

**Postscript**

A short article of this sort can highlight only some of the issues that may arise in administering the estate of a deceased who had personal employees. More detailed guidance should, where necessary, be obtained from specialist tax and employment advisers who can be contacted via the Law Society of Scotland’s website.
The Cancellation of Contracts made in a Consumer’s Home or Place of Work etc Regulations 2008 came into force on 1 October 2008. In a nutshell, the regulations give a consumer the right to cancel a contract for the supply of goods or services made during a visit to the consumer’s home or place of work by a trader.

A consumer is defined as a natural person not acting in the course of his trade or profession, and trader as someone acting in his commercial or professional capacity. Solicitors are therefore caught and necessarily become tradesmen. It does not matter whether the visit was solicited or unsolicited. The visit could be to the home of an individual other than the consumer concerned. The total value of the contract has to be over £35. A cooling-off period of seven days, within which the contract can be cancelled, has been set.

It is important to note that the regulations do not permit any contracting out. Any inconsistent term, particularly one that imposes any duties or liabilities on the consumer additional to or different from those in the regulations, is void.

They also require the cancellation rights to be clearly and prominently set out in any written contract, or otherwise provided in writing if there is no written contract. Failure to provide this information is an offence that carries a fine not exceeding level 5 on the standard scale. The written notice of the right to cancel must be dated, legible and contain the information prescribed by part 1 of sched 4.

This comprises the identity of the trader (including his trading name, and any contract reference number), a statement of the cancellation rights and how they may be exercised, the rights to be clearly and prominently set out in any written contract, or otherwise provided in writing if there is no written contract. Failure to provide this information is an offence that carries a fine not exceeding level 5 on the standard scale. The written notice of the right to cancel must be dated, legible and contain the information prescribed by part 1 of sched 4.

There will need to be clear documentation to show that there has been compliance, otherwise not only is the contract unenforceable, but criminal sanctions can follow.

To comply with the regulations, solicitors need to ensure they are aware of all that they need to do.

A duty to enforce these regulations functions under the regulations. However, they have clear implications for litigation lawyers, particularly those who see clients at home and conduct work on a conditional fee basis and accept work from accident management companies. The definition of trader includes someone acting in the trader’s name or on his behalf. Indeed, the trader who makes the visit need not be the trader that supplies the goods or services.

There will need to be clear documentation to show that there has been compliance, otherwise not only is the contract unenforceable, but criminal sanctions can follow. While there is a defence of due diligence, it is an unwise solicitor who would rely on it. It must be shown that the commission of the offence was due to the act or default of another or due to reliance on information given by another. Solicitors will need to satisfy themselves that everything is in order.

For limited liability partnerships, corporate liability is imposed where it can be shown that the offence was committed with the consent, connivance or otherwise due to neglect by an officer of the corporate body.

A duty to enforce these regulations has been imposed and considerable powers given for this purpose. The enforcement authority can require the production of a document relating to the business. Furthermore, any documents can be seized or detained if the investigating officer has reasonable grounds to believe that they may be required as evidence. "Document", of course, means information recorded in any form. Legal professional privilege is however retained, as is the right to silence. It is otherwise an offence intentionally to obstruct an officer carrying out his functions under the regulations.

What about a client that wants work to commence straightaway? Regulation 9 provides that is possible in respect of certain contracts, provided the consumer makes the request in writing. The supply of services of any kind is one such contract. In addition to the consumer’s written request, it must also be explained, again in writing, that the consumer may be required to pay for goods and services supplied during that period. Unless this is done, not only must any money paid be refunded but there is no right to charge for any work done but not paid for.

Solicitors need to ensure that any staff who see clients at home are aware of all that they need to do. 

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*But will apply to estate agency: see Journal, August 2009, 55.
This note covers three potential taxation pitfalls facing those who advise separating couples.

Transfers between spouses

It is well known that transfers of assets between husband and wife (or civil partners) are on a “no gain, no loss” basis. In terms of s 58 of the Taxation of Chargeable Gains Act 1992 (TCGA 92), this helpful facility remains open to spouses or civil partners during the tax year in which they separate, allowing the recipient to acquire the asset at the transferor’s base cost. The key point, however, and one which can be missed, is that the court order or contract for transfer of the asset between the parties must predate the conclusion of the tax year of separation. Or, in more complex situations, any suspensive conditions in such a minute of agreement must be purged before the end of the tax year of separation. Self-evidently, this will be an easier task when separation happens on 7 April than when it occurs on 31 March!

Principal private residence relief

A second relief available to separating spouses or civil partners relates to principal private residence relief (PPR) over the former matrimonial home. Most practitioners will be aware that PPR is generally available for a maximum of three years from the date of termination of occupation. Within the marriage or civil partnership, only one property can be treated as the sole or main residence of the parties. When an inter-spouse transfer takes place following separation, the usual 36 month relief is available (assuming the conditions in s 225B of the TCGA 92 are met). However, s 225B also extends PPR beyond the usual 36 months for separating spouses. The former matrimonial home can continue to be treated as the only or main residence of a transferring party until the earlier of (a) the date of transfer, or (b) the date upon which the recipient ceases to use the property as his or her main or only residence.

The circumstances in which s 225B becomes useful are limited by the usual restriction that relief can only be given for one property in any given period. However, it may be of particular use in protracted cases. For instance if a couple have owned a home for decades, it is likely that significant gains will be locked in the property. If the transferor has purchased another home since separation, given recent movements in the property market it is likely that the newer property will have lower gains locked in it at this stage. This may prove to be a useful planning tool, particularly in the current economic climate.

Business interests

Thirdly, heritable properties are not the only asset frequently transferred between separating parties. Interests in family businesses are also frequently so transferred. Most clients are advised of the attraction of transferring such assets within the tax year of separation. Not all such clients are advised that it may be possible to defer the tax charge, even if the agreement or judgment postdates that tax year, by applying for hold-over relief on the gift of business assets.

Not all clients are advised that it may be possible to defer the tax charge, even if the agreement or judgment postdates that tax year, by applying for hold-over relief on the gift of business assets. Two criteria must be satisfied before an application for hold-over relief will be successful. The first is that the underlying assets themselves must qualify. Shares in trading family businesses are often eligible, but be aware that some non-trading assets, such as certain property investments, rarely qualify. The second criterion is that the recipient spouse must not give “actual consideration” for the transfer. Consideration can include the surrender of rights to financial provision, thus potentially reducing the element of gain eligible for hold-over relief. However, HM Revenue & Customs has published a specific concession (s CG67192 of the Capital Gains Tax Manual) that the recipient of such an asset does not give actual consideration where the transfer takes place as part of settlement on divorce/dissolution pursuant to a court order or an agreement formally ratified by the court. (It is believed that registration of an agreement in the Books of Council & Session would suffice.)

In short, the need to give proper consideration to the potential to avoid or defer a tax charge in these three scenarios is certainly something to which family lawyers and tax practitioners alike should be alive. A greater awareness of the taxation of separation might just put the family lawyer or tax adviser in the happy – if presently unusual – position of being the bearer of good news to a financially distressed client.

Alison Edmondson, Family Law Associate, Turcan Connell
Scottish Solicitors Discipline Tribunal

This month’s cases concern an IPS appeal over delay in taking evidence from a witness who then died; and a qualified conveyancer in breach of the conflict rules

Section 42A appeal – Douglas Peters

An appeal under s 42A was made by Douglas Peters, solicitor, Falkirk (hereinafter referred to as “the appellant”). The Tribunal found that the service provided to the lay complainer by the appellant in respect of head of complaint 3 (delay in taking Ms A’s evidence by video as requested on 2 October 2005 despite being advised that her cancer was terminal) did not amount to inadequate professional service; quashed the finding of inadequate professional service in relation to head of complaint 3; varied the determination in respect of payment of compensation and directed that the appellant pay the lay complainer compensation in the sum of £1,300; varied the determination in respect of abatement of fees and determined that the appellant shall abate his fees by 30% and directed the appellant to refund or waive the right to charge fees to that extent.

The Tribunal considered that it was unfortunate that the appellant did not respond to the lay complainer’s letter of 2 October 2005 until prompted by the lay complainer’s phone call on 13 October 2005. However the letter of 2 October 2005 did not give an estimate of life expectancy and the delay was only a period of 11 days. After this the Tribunal did not consider that the appellant delayed in dealing with matters. The Tribunal did not consider that the appellant could be criticised for not giving an estimate of life expectancy in his application to the Scottish Legal Aid Board, as the report from the doctor did not contain this. The appellant quite properly sent the doctor's report with his application. The Tribunal considered that the appellant’s delay between 2 and 13 October 2005 was certainly not good practice, but did not consider that it was sufficiently serious to amount to inadequate professional service.

The Tribunal did not accept the appellant’s submissions in respect of the abatement of fees only being appropriate in respect of the services that were inadequate. In the Tribunal’s view, the Act clearly allows for an abatement of fees in respect of the service provided but the amount of any abatement of fees will reflect how much of the service was inadequate and what effect this had on the overall provision of the service. The Tribunal considered it unfortunate that the Society did not provide more detailed reasoning as to why it chose a figure of 35%. The Tribunal did not consider that it had sufficient information to substitute a different figure. However given that there were seven heads of complaint in respect of which a finding of inadequate professional service was made and that the compensation and the abatement of fees were awarded in respect of all seven, and given that the Tribunal had quashed one of the heads of complaint, the Tribunal considered it reasonable to reduce the compensation and also the abatement of fees by one seventh. The Tribunal made no award of expenses.

Steven Brown

A complaint was made by the Council of the Law Society of Scotland against Steven Brown, independent qualified conveyancer and independent executry practitioner, Scottish Conveyancing Services, 297 Main Street, Wishaw, Lanarkshire (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of his failure to advise his client about a conflict of interest, his acting for his client where there was a conflict of interest between him and his client in two respects, namely a potential claim for damages for professional negligence and in relation to his personal interest in the purchase by him from his client, and his failure to issue a terms of business letter as required by rule 12 of the Independent Qualified Conveyancers (Scotland) Regulations 1997. The Tribunal censured the respondent and fined him in the sum of £1,500.

It was clear that the respondent accepted the rules and that he had acted in breach of the rules. The 1997 Regulations are there to prevent potential risk. The respondent acted in a conflict of interest situation in the two respects mentioned. The Tribunal however accepted that the respondent was trying to put his client back in the position that she would have been in before. The Tribunal also accepted that the respondent was trying to keep his client happy and had the right motive. It was clear to the Tribunal that the complainant had not complained about the deal that she received but only about the delay, and that the complainant was not in any worse position and the deal that she had achieved was not unreasonable. The Tribunal however considered that it was an error of judgment for the respondent to act in the way that he did. The Tribunal also took into account the fact that the respondent had pled guilty to the complaint and co-operated with the Society’s fiscal. In the whole circumstances the Tribunal considered that a censure plus a fine of £1,500 was sufficient penalty.
Another visit to some family law websites might be timely this month

After the festivities

The New Year is traditionally a time for family law solicitors to experience an upsurge in appointments to discuss divorce or separation, as an argument over whether this year’s Christmas no 1 was better or worse than last year’s (or some such) proves the straw that breaks the camel’s back. The effects of the recession may exacerbate this problem, and indeed English legal firm SAS Daniels reported that they were four times busier than normal in December with divorce cases (http://bit.ly/6m8H4pY). Mind you this is the same firm whose employment team recommended sacking people on Christmas Eve (http://bit.ly/4Ef0ab), so it’s entirely possible that they were trying to get cases into court in time to serve papers on the 25th – “Dirty Den” style (http://bit.ly/7Wnx2w).

In any event, family law may well be the flavour of the month this January, so here’s a quick roundup of some relevant sites in that field.

**CALM Scotland**
www.calmscotland.co.uk

When I last reviewed this site exactly four years ago, I hated it. Thankfully, it has improved substantially since then. Goodbye to awkward picture-based “mystery meat” navigation (http://bit.ly/Wtldlk). Hello, professional and simple text links to all the main areas of the site.

There are still one or two accessibility issues which need to be dealt with (a missing “alt” tag on the large image on the front page being the main offender) but, by and large, the site is now very good.

In particular, I thought the “find a mediator” feature worked very well, allowing you to make direct email contact with your mediator of choice. The information provided on the site is very full and detailed. This includes information about the cost of mediation and copy standard documents to download. There is also a nice seven minute video which introduces mediation and includes a dramatised mediation session to give people an idea what’s in store for them.

This is a great idea, but the site insists you download the video to view it. Why not embed it in the site? It’s not even difficult: just pop it on YouTube (www.youtube.com), cut and paste the “embed” link and there you have it. More people will now take the time to watch your lovely video.

**Family Law Association**
www.familylawassociation.org

The website of the Family Law Association subdivides itself into two distinct “centres”. The Advice & Information Centre is aimed at potential customers, while the News Centre is aimed at the profession.

Despite this potentially confusing division, the site remains easy to navigate. The advice and information section includes a page headed “How can we help?”, which in truth is a series of short articles on family law topics, such as divorce, cohabitation and financial problems. These are well written and easy to understand and, although I know next to nothing about any of these topics, seemed to be a good starting point for new or existing clients.

Also of use is a very full A-Z legal jargon dictionary, explaining legal terminology you might come across in a family law action. Again, the explanations were useful and to the point and the navigation tool was nicely done too.

Finally for the discerning consumer who is new to all this, a search function enables them to locate a suitable FLA member and practitioner in their area. It is no doubt very useful to be able to search by area and to specify whether the solicitor in question offers legal aid, is a mediator, a family law accredited specialist or a collaborative lawyer.

If you are already an FLA member, you are presumably already familiar with the section for lawyers on this site. If not, it explains how to join and why you should do so as well.

One small point: the links to the Scottish Government’s website and its useful information and publications are all broken and need fixing.

**Scottish Collaborative Family Lawyers**
www.scottish-collaborativelawyers.com

If you were wondering what a “collaborative lawyer” is, then wonder no more – they have their own website which explains all. As well as defining the term, it goes on to explain the process involved and also provides a helpful list of FAQs, which you can read online or by downloading them as a single PDF (a good idea).

It shares some accessibility problems with the CALM Scotland website, but the loss of information entailed is repeated on every page, compounding the error. The cascading frames beside frames which appear in the section for finding a suitable FLA member and practitioner are all broken and need fixing.

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**Professional briefing**
Web reviews

Who writes this column?
The website review column is written by Iain A Nisbet of Govan Law Centre
E: iain@absolvitor.com
All of these links and hundreds more can be found at www.absolvitor.com

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www.lawscotjobs.co.uk
These are two excellent books, serving different purposes but sharing the theme of the rights guaranteed by the European Convention on Human Rights (and linked by the participation of Professor Colin Warbrick in both). Harris, O’Boyle and Warbrick is the second edition of a comprehensive textbook on ECHR law, first published in 1995. The authors explain, in their preface, that the “spectacular” increase in the workload of the Strasbourg court has made for the delivery of an “overwhelming number of judgments” (dozens every month). From the authors’ point of view, that has made it necessary to expand the team of contributors for this second edition. The list makes impressive reading.

By contrast, Fenwick, Phillipson and Masterman (eds) is the fruit of a collaborative academic project (also with an impressive cast), centred on the University of Durham Human Rights Centre, which set out to examine emerging themes in judicial reasoning under the UK Human Rights Act 1998. Its underlying justification was the proposition that, to have legitimacy, the exercise of the very wide power which Bills of Rights and their analogues confer on judges must be adequately reasoned and transparent to those beyond the legal community, and academic commentary on the judgments is an important element in the process. The value of the book for the practitioner lies in the opportunity to deepen one’s thinking about, and understanding of, Convention law. It deserves and demands to be read slowly, savoured and considered carefully and critically.

The chapter headings in Fenwick et al illustrate the breadth of application of the 1998 Act and hence the range of practitioners affected. They include public law, in the sense of judicial review and criminal procedure. There is private law, with significant attention being given to family law (especially by Ms Harris-Short). Private law, and especially reparation, is the context for consideration by several authors of the developing jurisprudence of the ECtHR, but Fenwick provides a most useful consideration of the Human Rights Act was about. Warbrick explains that he approaches the matter as an international lawyer, so that, for him, “bringing rights home” means providing a better means for resolving disputes about the meaning and application of ECHR within the UK legal system. That perspective is clearly evident in Harris et al. Although the case law of the Strasbourg court has made for the delivery of “spectacular” increases in judgments (dozens every month), the book does not disappoint.

The authors’ approach reflects Warbrick’s observation in Fenwick et al that there are differing conceptions of what the Human Rights Act was about. Warbrick explains that he approaches the matter as an international lawyer, so that, for him, “bringing rights home” means providing a better means for resolving disputes about the meaning and application of ECHR within the UK legal system. That perspective is clearly evident in Harris et al. Although the case law of the Strasbourg court has made for the delivery of “spectacular” increases in judgments (dozens every month), the book does not disappoint.
but not exclusively, in England – Masterman in particular takes notice of Scots cases) are using and applying the Convention rights; but it should only reach that shelf after it has been read thoroughly. Part I examines at large the interpretation of the 1998 Act and Part II considers the Act and substantive law. The contributors do not always agree with each other, and one would look in vain for a “party line”; but all of them are stimulating and useful. There is particular interest in Lord Justice Keene’s treatment of “Principles of deference under the Human Rights Act”, especially as it addresses the prison law case R (Bloggs 61) v Secretary of State for the Home Department [2003] 1 WLR 2724, on which the judge sat. His account contrasts interestingly with the academic analysis of the case provided by Professor Leigh (who goes on to suggest that, in English judicial review, proportionality has supplanted Wednesbury unreasonableness as the litmus test).

Much of the commentary wrestles with the problem of horizontal effect, which Professor Phillipson suggests that courts have “semi-deliberately” avoided resolving. Campbell v MGN Ltd makes an appearance in Phillipson’s chapter, as it does in several others, with the author regretting that the courts did not take account of the academic literature on the right to respect for private life. One wonders, however, how realistic that complaint actually is. Feldman offers a highly theoretical account of statutory interpretation in light of the 1998 Act, particularly illuminating on s 3, and centred round the teleological concept of the desired outcome rather than the more familiar approach which claims to seek to discover the intention of the legislator. Dr Kavanagh’s coverage of similar territory in light of Ghaidan v Mendoza [2004] 2 AC 557 takes an approach which is probably more familiar and accessible, but no less perceptive for that, and which addresses issues of concern especially to the property lawyer.

These are two books about which it is easy to be enthusiastic. Harris et al is more accessible and more immediately useful to the practitioner, but Fenwick et al will be of great value to anyone who thinks that the title “human rights lawyer” is more than a synonym for “one who is paranoid about the state”. Both books are recommended without reservation or hesitation.

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**Actions Against Public Officials**

**Legitimate Expectations, Misstatements and Misconduct**

Richard Moules

PUBLISHER: SWEET & MAXWELL
ISBN: 9781847036353
PRICE: £145

If you were looking for a title for a book with a view to increasing sales, it is unlikely that this one would jump to the forefront of your mind. But Lord Bingham’s introduction gives the key to why this book should be read: “This scholarly and interesting book focuses an intense and revealing light on this area of law, an area which must grow in importance as activity in the public sphere becomes ever more extensive and complex and the public becomes less and less inclined to grin and bear it when mistakes are made.”

What he says is spot on from a number of aspects. This is not an overly easy read, but it is interesting both because of the increasingly critical nature of the subject area and also because of the light it sheds; in a sense this area of law is at the forefront of the future. Keeping government and administration in check is a major task of law as both become more complex and more intrusive into the lives of everyday.

In scope the book is a guide to what is in the title; the unifying theme is the quality of administration by public officials, with particular focus on liability in relation to their advice, statements and representations. I suspect it probably is a first in the field and should be welcomed for that if for no other reason. Its roots are in English law and its narrative does not stray across the border; it is therefore of reduced relevance for Scottish practitioners. That however is not a reason for writing it off, especially given the developing importance of this area across the UK as a whole and the need if not for detailed guidance then at least for signposts sufficient to prompt us all to a better appreciation of the extent to which the landscape has changed and is changing.

In looking at legitimate expectation in domestic law, the book has much to say to a Scottish reader; when it goes on to talk about local government issues, standards committees and the Standards Board for England, perhaps less so. And the differences between the jurisdictions become more intrusive as one gets to chapter 9 and the Administrative Court.

Importantly it looks also in some detail at ADR issues. As the author says, “if regard were only had to redress provided by the courts an incomplete picture of administrative justice would emerge. The civil courts simply could not cope with the many thousands of grievances that citizens pursue against the state each year”. That in a way is also the key to how this book should be seen; administrative justice stands presently at a watershed. The book looks principally at judicial remedies, but in covering ADR and the role of public sector ombudsmen it also helps practitioners decide the most appropriate cause of action against a public body and how to defend a claim. Apart from explaining what legal consequences flow (so far as English law is concerned) from what an authority has said or written, examining liability relating to legitimate expectations, negligent misstatements, restitution or misfeasance in public office, and representations. I suspect it probably is a first in the field and should be welcomed for that if for no other reason. Its roots are in English law and its narrative does not stray across the border; it is therefore of reduced relevance for Scottish practitioners. That however is not a reason for writing it off, especially given the developing importance of this area across the UK as a whole and the need if not for detailed guidance then at least for signposts sufficient to prompt us all to a better appreciation of the extent to which the landscape has changed and is changing.

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Dr Alastair N Brown

Richard M Henderson

www.lawsctojobs.co.uk
Route to freedom

Malcolm Combe sets out the effect of the important Court of Session decision on freedom of information in the Glasgow and Dundee appeals, and some related developments on both sides of the border.

The Freedom of Information (Scotland) Act 2002 is an important piece of legislation, affording members of the public a means to access information held by Scottish public authorities. The Court of Session recently issued an important judgment, *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73 (30 September 2009), which found in favour of two councils (Glasgow and Dundee) who had been subject to information requests from a firm of solicitors under s 8 of the Act.

While this case may have involved two local councils, the concept of a Scottish public authority is not restricted to these entities. The term encompasses disparate bodies such as health boards, the Crofters Commission and indeed the body that passed the Act itself, the Scottish Parliament, to name but a few, so the judgment’s importance should not be understated.

**Assisted searching**
The solicitors acted for a private search firm (its identity was not disclosed at the time of the requests), whose business is to provide information (for a fee) about land and buildings in Scotland. Scottish councils charge a fee for providing, in the form of property enquiry certificates, details of what planning permissions and the like affect a building, but the search firm wished to short circuit any chance to levy a fee and force the councils to provide all relevant data held by the councils. In turn, such data could be included in a wider package of information about specific buildings to be sold to third parties, who would ordinarily buy such a search on the sale of land.

It was reported that the effect of a compulsory disclosure would have a significant impact on the councils’ revenue streams, basically forcing the councils to disclose information to a private sector competitor for nothing. Despite such concerns (and various other representations), the Scottish Information Commissioner (“the Commissioner”) ordered disclosure. The councils successfully appealed the Commissioner’s decisions.

There were several key points the court had to contend with.

1. Was this a request for information in terms of the Act?
The court distinguished “information” from “records” for the purposes of the Act, and looked to comparable overseas legislation from Australia, New Zealand, the USA and Ireland for guidance. “Put shortly, the Act provides a right to information, not documentation.” Here, the solicitors had requested copies of statutory notices, i.e. copies of records containing information, rather than the information itself. Lord Reed diplomatically noted that the request “was, at best, somewhat ineptly expressed”, but in fairness to the solicitors “the requests had been drafted advisedly”, i.e. the solicitors’ client specifically wanted the copies of the notices, “rather than the information which they contained and which might also be obtainable from other records”.

Malcolm Combe

Malcolm Combe sets out the effect of the important Court of Session decision on freedom of information in the Glasgow and Dundee appeals, and some related developments on both sides of the border.
unrecorded information, which is an important reminder that public authorities cannot be forced by the Act to proactively produce information on the back of a request.

2. *Was the information readily available?*
   It was argued that the information contained in property enquiry certificates was reasonably obtainable under s 25 of the Act, and therefore exempt. The Commissioner rejected this on the sole basis that the request specifically asked for copies of extant notices as opposed to property enquiry certificates, but as noted in 1 above, this approach conflated information with documents and therefore fell.

3. *Was a specific copy needed when the request asked for this?*
   As it was an appeal the court refused to be addressed on a new point about the different information contained in a property enquiry certificate as compared to the relevant copy notice, which narrow distinction had, it was conceded, not affected the Commissioner’s decision. The important issue here was an argument based on s 11 (asking the authority to provide information in the manner requested). This also fell, as s 11 is predicated on a valid information request.

   In addition, the court seemed distinctly unimpressed with the argument that a copy of a specified document (or a document in a specified format) was needed when a request appeared to have been made under s 11, but did not express a concluded opinion on the point.

4. *Was there a suitable publication scheme?*
   The court went on to note that the publication scheme adopted by the council, which provided a system for the disputed information to be accessed and had been separately approved by the Commissioner under s 23, was within the s 25 exception as otherwise accessible information. What was requested was already available “in accordance with the authority’s publication scheme” (as required by s 25(3), such scheme involving an (approved) fee). The Commissioner was not at liberty to look at the costs involved when considering the s 25 exemption (there is no discretion built in to the section, which the court noted is “not a model of clarity”). Any cost issues, or indeed other issues, with a publication scheme are to be considered by the Commissioner and a public authority when the scheme is being approved.

5. *The position of the applicant*
   Another issue was whether the information sought by the applicant, being a professional search firm (i.e. not the solicitors who applied on its behalf) was “information which the applicant can reasonably obtain other than by requesting it under s 1(1)”, and as such “exempt information”. This is very much a personalised test, and the standing of the applicant is looked to here. It was noted that other (competitor) private search firms already scoured publicly available registers and minutes of relevant council meetings for the information this particular private search firm sought.

   The court took guidance from a Ministry of Justice publication (Freedom of Information Guidance Series (2008)), and made reference, with approval, to a passage which noted as an example of a potentially relevant factor: “any enhanced skills or resources the applicant may have which would bring otherwise inaccessible information within his reach – for example research, technical or linguistic skills. The resources available to a requestor who is a Member of the Scottish Parliament were taken into account in HM Treasury v ICO [HM Treasury v Information Commissioner (7 November 2007) (EA/2007/0001)]”.

   The characteristics of the particular applicant should have been considered, and “it was a mistake for the Commissioner, as a matter of principle, to close his eyes to those matters”. The court did concede this was very much a peculiar case.

6. *Undisclosed principal?*
   Having discussed all the above, again the court did not need to consider this point but did so nonetheless. Section 8(1)(b) of the Act requires the applicant to be named, but here the purported applications stated they were made on behalf of an unnamed client. Based on the court’s view of the importance of the characteristics of a particular applicant, this was crucial, and the requests were therefore not valid requests. The court did however note that such requests might not all be refused out of hand, but at least a public authority should advise any agent making a request of the requirements of the Act.

*Continued overleaf*
The same advice applies to anyone in a public private partnership, or a project company in a public private sector, such as contractors employed by a public authority or a project company in a public private partnership relationship, when assisting a public sector client faced with an information request. This advice may soon be all the more pertinent to such private entities as, in a move welcomed by the Commissioner, the Scottish Government plans to consult (from the spring of 2010) on whether to widen the scope of the Act so as to directly cover bodies such as “contractors who build and maintain schools, hospitals and roads; private prison operators, leisure, sport and cultural trusts set up by local authorities; Glasgow Housing Association and the Association of Chief Police Officers in Scotland” (see www.scotland.gov.uk/News/Releases/2009/12/08113806). Currently, many contracts have a specific clause dealing with information requests, detailing how a private operator should assist its public sector client. In a perhaps surprising twist, such clauses may also need to operate in the opposite direction.

Contract cases
The Inner House’s decision and the recent ministerial announcement are certainly not the only developments in this rapidly evolving area of law. A decision south of the border has also gone some way to strengthening the public’s right to access information, but interestingly was not based on the (English equivalent) Freedom of Information Act 2000. Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council [2009] EWHC 2382 (Admin); The Times, 15 October 2009 allowed the public to inspect and copy the contract for a waste management PFI, which had previously been partially disclosed following a request under the 2000 Act. The compulsion for such disclosure is found in s 15(1) of the Audit Commission Act 1998, and the contractor’s attempt to block disclosure has been described (perhaps confusionly) by a BBC blogger as a “reverse-FOI” (Martin Rosenbaum, “Veolia and the reverse-FOI” 1 October 2009, at www.bbc.co.uk/blogs/opensecrets/2009/10/). Rosenbaum’s Open Secrets blog also suggests that the Local Authority Accounts (Scotland) Regulations 1985 may apply to analogous situations in Scotland, the relevant provision being reg 5 (Martin Rosenbaum, “Council finances briefly open”, 4 July 2008, at www.bbc.co.uk/blogs/opensecrets/2008/07/council_finances_briefly_open.html).

For completeness, mention should also be made of two key decisions made by the Commissioner in 2009. In Decision 122/2009 (Mr Alex Neil and South Lanarkshire Council), the Commissioner held that the financial model from a schools PPP was properly withheld under s 36(2) of the Act, “on the basis that it was information supplied by a third party and disclosing it would constitute a breach of confidence which could give rise to a court action”. This contrasts with the earlier Decision 104/2009 (Unison Scotland and the Scottish Prison Service), where the Commissioner did order disclosure of the, somewhat dated, financial model for the PFI contract for Kilmainnack Prison. Here, the Commissioner felt the commercial sensitivity exemption under s 33 of the Act was not applicable, as the market had sufficiently moved on since 1997 that the private operator’s commercial interests would not be prejudiced by disclosure.

Proper lessons
It is clear that the Act is a useful tool to access information, but it is not a blunt instrument and the Inner House’s decision makes clear it should not be treated as such. From a public authority’s perspective, an incomplete understanding of the Act could lead to inappropriate disclosure, which could result in embarrassment or, in a worst case scenario, a degree of self-incrimination. As for those seeking information, inappropriately framed requests could lead to frustration or delay in finding out important facts.

Some regard the Inner House’s decision as damaging to the public’s right to information (as reported in the Sunday Herald: “FoI ruling hurts public right to know”, 4 October 2009), but the key lessons to take from the decision are to make appropriate FOI requests framed in an appropriate manner. Despite the negative press response to the decision, further developments are already showing the public’s right to know to be in a fine state of health. The Commissioner may soon be a very busy individual indeed. [i]

Malcolm Combe is a solicitor with Tods Murray LLP

The Scottish Government plans to consult (from the spring of 2010) on whether to widen the scope of the Act.
Steady as she goes is market forecast

A more settled outlook for the property market in 2010 is predicted across central Scotland following the turbulence of the past year, according to industry sources.

A GSPC survey published just before Christmas revealed that following a “rollercoaster ride” in 2009, house prices in Strathclyde had recovered to almost exactly the same level as a year earlier, giving an average figure of £134,400.

While prices in Glasgow were still 1.4% down on average, elsewhere in the region there was a 4.4% gain in the previous 12 months. However landward areas still showed a 16% decline from the 2007 peak, compared with 8% in Glasgow.

The analysis, conducted by Professor Gwilym Pryce of the Urban Studies Department at Glasgow University, also reported that although sales fell sharply in the first quarter, this was more than matched by the fall in the number of properties coming on to the market, thus retaining a level of competition among buyers. Selling times also fell from a peak of 132 days at the start of the year to around 80 days, implying “a significant recovery in confidence that is not reflected in the selling prices data”.

Looking to 2010, GSPC forecasts that prices will hover around their current levels throughout the year, but with a continued improvement in the number of transactions.

Professor Pryce suggested that the data indicated that sellers were becoming more realistic about the price they could expect to achieve and were adjusting their expectations.

GSPC chairman Michael Samuel said: “Any recovery in the economy will not have an impact on the property market for some time to come – at least until real incomes start to rise again and insecurity about jobs fades. At the same time, more houses coming on to the market will widen choice and so help to spread demand. The impact of low interest rates and better mortgage availability is likely to be offset by continued economic weakness and concerns about jobs.”

A big player in the Edinburgh property market also predicts a stable outlook in 2010. Warners, solicitors and estate agents believe that prices will remain stable in the first half of the year, due in part to the end of the VAT and stamp duty concessions, but will then start to rise as confidence returns to the market.

Partner Scott Brown however warned that the market could be hampered if the Bank of England decides to raise its base rate dramatically in response to a perceived threat of inflation.

“I would hope that any move to increase interest rates is resisted until there has been a sustained period of recovery in both the economy in general and the property market in particular”, he said.

“If this common sense prevails, I think there is genuine reason to be optimistic about the property market in the second half of 2010.”

Estate agency triumph for maloco

Dunfermline-based solicitors and estate agents maloco + associates are celebrating after beating off property sector competition to win the Best Scottish Estate Agency in the small firm category at the 2009 Estate Agency of the Year Awards. The UK-wide awards, now in their sixth year and held for the first time in association with The Sunday Times, were announced at Chelsea Football Club’s presentation suite at Stamford Bridge.

Senior partner Michael Maloco said the firm had twice previously won a silver medal but this was the first time a solicitor-based agency had taken top slot.

Entries were scrutinised by a panel of independent industry experts and the judging process was overseen by the Property Ombudsman, Christopher Hamer. Judges highlighted maloco + associates’ drive, commitment, knowledge and team spirit.

Registers of Scotland

Turnaround times as at 19 December 2009

The Keeper’s turnaround targets for 2009-2010, endorsed by Scottish Ministers, are set to drive continuous improvement in RoS’s performance. This year the targets again set specific timeframes rather than relying on averaging. The targets and performance are as follows:

Where it is in the Keeper’s power and is legally appropriate, to complete the recording and registration of:

<table>
<thead>
<tr>
<th>Target</th>
<th>80% of standard first registration applications within 70 working days.</th>
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<tbody>
<tr>
<td>9,580 received since 1 April 2009</td>
<td>105,598 received since 1 April 2009</td>
</tr>
<tr>
<td>5,959 despatched of which 5,601 (94.0%) within 70 working days</td>
<td>93,596 despatched of which 76,755 (82.0%) within 30 working days</td>
</tr>
<tr>
<td>358 (6.0%) despatched in more than 70 working days</td>
<td>16,841 (18.0%) despatched within 31 to 100 working days</td>
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<tr>
<td>3,621 (37.8%) received since 1 April are in process</td>
<td>12,002 (11.4%) are in process</td>
</tr>
<tr>
<td>0 despatched in more than 100 working days</td>
<td>0 despatched in more than 40 days</td>
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Target: 80% of dealings with whole within 30 working days, with no dealing taking longer than 100 working days.

Target: 80% of sasine writs within 20 working days, with no writ taking longer than 40 working days.

<table>
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<tr>
<th>Target</th>
<th>80% of casine writs within 20 working days, with no writ taking longer than 40 working days.</th>
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<tr>
<td>40,876 received since 1 April 2009</td>
<td>36,694 despatched of which 32,506 (88.6%) within 20 working days</td>
</tr>
<tr>
<td>36,694 (11.4%) despatched within 21 to 40 working days</td>
<td>4,188 (11.4%) are in process</td>
</tr>
<tr>
<td>4,182 (10.2%) are in process</td>
<td>0 despatched in more than 40 days</td>
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How I learned to love the law

The PCC – carefree days out of the office? Nope, just boring classes, was Manus Straw’s experience

Towards the end of my traineeship I went on the PCC (Professional Competence Course). According to everybody at the firm the PCC was the land of milk and honey – eight days of skiving back at uni, where classes were short, the laughter long and the students all beautiful, joyful and liable to break into song at any opportunity.

If true, the Law School had changed spectacularly in the three years since I’d been there. Fortunately I didn’t take this “Law School Musical” vision too seriously. I prepared myself for boredom and some overly serious legal chat – and (un)funnily enough, that’s pretty much what I got.

The first class, “Legal Drafting”, was taught by a gentleman sporting an incredibly long tie. It descended well past his belt, almost to his knees. This proved extremely distracting, because whenever he rounded up a point by asking “Any questions?”, I could only think “Why the long tie?” It also took the concept of the tie as phallic symbol to extraordinary lengths.

I circulated a note round the class with these thoughts, and though my wrist a dotted-line-scissors symbol, similar to the “open here” diagram on a milk carton. I showed it round, provoking responses ranging from hilarity to horror.

Thanks to my rigorous vetting system (if you laughed at my jokes you were probably OK), by the end of the day I was forming a pretty good idea of the various characters on the course. The acid test came at home time. The decent sorts seized the opportunity to bunk off early, while the bores reckoned they should head back to their offices, just in case their bosses were lonely. (The particularly creepy bores created the impression that if they didn’t, some crucial piece of work wouldn’t be finished.)

Overall there were about four Good Eggs, eight Bores and three folk who could only be described as Living Dead. They showed no reaction whatsoever to jokes but just kind of sat there, slack-jawed and glassy-eyed. Amongst them was a girl who looked like she could rub up pretty well. Regular readers will know that at this time my fingers were not so much burned by encounters with legal ladies as scorched to a smouldering crisp. I was therefore content to let the girl slumber in Living Dead status. However one of the Good Eggs started to take an obvious shine to her. He would talk at her for minutes on end but receive virtually no response. It was like the Smiths song “Girlfriend in a coma” brought to life.

Other than the Good Egg’s fruitless pursuit, the eight days played out in mostly predictable fashion. Some classes were useful, others less so. In “Client Interviewing” you were videotaped as you spoke to a chap from drama school who grabbed his big Oscar chance and hammed things up no end, and the footage was then reviewed with the class. It turned out that I displayed an impressive array of behavioural and verbal tics. I swung round on my chair as if it was a roundabout, and said “like” about, like, every four seconds. It was good to know that I spoke to a client like a demented, loon. In contrast, “Legal Negotiation” was tackled by a chap who looked like he wouldn’t be able to negotiate his way out of a paper bag.

A few of the Bores worked at the same modest middle-tier firm and, emboldened by each other, began to make increasingly outlandish claims on their firm’s behalf. This came to a head in “IT and the Legal Office”, in which one of the Bores stated that her firm was “investigating hologram conferencing”.

On the last day we were asked to reflect on our developing understanding of legal practice. Even the Bores were jaded by then. A timely diversion arrived in the form of the Living Dead girl, who had smarnted herself up to such an impressive degree that the Good Egg who had his eye on her thought that all his Law School Musicals had come at once. For a moment I envisioned a fantastic John Travolta/Olivia Newton John finale to the course. Sadly it turned out that her boyfriend was coming back off the oil rigs. The Good Egg returned to doing what he did best – irritating the Bores.
As the wife of a minister with a foreign calling, Patricia Purves found herself facing the challenges of life in Sri Lanka

What has been your career to date and how did you come to be working where you are?

After graduating from Aberdeen University, I was an apprentice and then assistant at Campbell Connon in Aberdeen. In 1978 I married John Purves, a minister in the Church of Scotland and in 1983 we travelled to Jamaica as appointees of the Church’s Board of World Mission to serve the United Church of Jamaica and Grand Cayman. I taught constitutional and business law at Knox Community College there.

We returned to Scotland when John was called to be minister in Dollar, Glendevon and Muckhart. I joined Jardine Donaldson in Alloa as a court assistant in 1990, and four years later joined CALM. I then worked at watersnle, Tillicoultry for two years until 2003, when we moved to Sri Lanka on John being called to be minister of the Church of Scotland St Andrews, Colombo.

From 2004 to 2007 I did consultancy work with UNICEF, and this year I became protection officer with World Vision International, serving World Vision Lanka on a programme entitled “Strengthening Humanitarian Protection Capacity”. Its goals include the training of agency staff, communities and Government staff in protection standards and the field testing of a handbook of minimum agency standards. The training includes a review of the relevant legal framework, a part of the work I especially enjoy – sharing legal principles with people in a conflict-affected environment is supremely empowering for them and their communities.

Do you see yourself as staying there long term?

Like all international staff in this organisation I am on a yearly contract. There is funding in place for a three year programme and I am hopeful that my contract will be extended. My husband is committed to being here until he retires in 2013.

What do you most like about living where you are?

The stimulus and challenges of living in a situation where the culture is different!

From the start we have felt at home in the church and community where we are located. We enjoy the pleasures of life in a tropical country where beaches and mountains are a few hours’ drive away. Colombo is a fairly compact capital city in which we can enjoy urban culture, the arts and shopping.

Are there any downsides?

The stimulus and challenges of living in a situation where the culture is different!

There has been a civil war in Sri Lanka for almost three decades. Living and participating in a society riven by violence, prejudice and discrimination can be testing. On top of manmade disaster, there is always the threat of natural disaster – monsoon flooding is a regular feature of life.

We came here in 2003 when the ceasefire agreement brokered by the Norwegian Government was in place. In December 2004 we experienced the tsunami and were actively involved in relief, rehabilitation and reconstruction programmes.

By 2005 the Sri Lankan Government was determined to seek a military solution to the “ethnic problem”. The CFA was ignored, the conflict intensified and many were killed, maimed or injured. Victory was declared in May 2009. In the preceding months 280,000 civilians were forced to flee the conflict area and were transported to military-run closed camps, where 148,000 now remain, the others having been released to return to their bombed-out villages or to live with relatives. Each month Parliament renews emergency regulations which have the effect of suspending human rights.

What is the value to you of retaining your Law Society of Scotland membership?

Being a solicitor in Scotland and a member of the Society is part of my identity. I treasure my legal education and background, and membership of the Society is part of that. Receiving the Journal assists me in updating my professional expertise.

Do you miss Scotland?

Yes. Friends and family are very dear to us and we try to maintain contact by email.

What would be your advice to anyone thinking of making a similar move?

Go for it!

What do you do when you are not working?

I play violin in the orchestra of the Chamber Music Society of Sri Lanka. Our concerts last year celebrated Handel, Haydn, and Mendelssohn.

I work to raise funds for charitable initiatives not funded otherwise, for example mental health care in the community, helping urban poor to find work or afford medicines, community development, building wells and toilets for rural communities. Currently I am searching for funds for an initiative by Save the Children, working with the Ministry of Justice, to turn two Government buildings into child friendly courts – Save have funded the research and have raised part of the funding for the work. So, if there are funds out there, and those managing them are looking for a worthy cause to support, please think of Sri Lanka.

My email address is patricia.purves@wvi.org

Sidelines Members abroad

Working the world

Patricia Purves

patricia.purves@wvi.org
The curtains rustled, fluttered, and then with a whoosh blew in, leaving me petrified but wide awake. A gigantic figure, wearing a tattered black gown and sporting a mildewed wig, was standing at the foot of my bed.

The figure roared “Stand up when I’m talking to you!”

“I am sorry,” I responded meekly, “I didn’t think that you were addressing me.”

“Be silent!” the figure commanded. “Don’t speak back to me! Listen. I am the ghost of Sheriffs past! I have come to warn thee. The days when a sheriff could do and say almost anything, evict crofters at will and was generally finished by 11 am (most days) have gone. Our historic task of intimidating the punters, impressing the gentry with our erudition and listening carefully only to counsel are passing. Heed ye Scott Rettie!”

He shook his head sadly. “Unless all our ancient privileges are restored, woe for…” (the spirit seemed overcome with emotion).

“Well, to get to the point,” he said, “I am the ghost of Sheriffs present and I am teeing off shortly so I will be brief. I get to do lots of things in my job, you know, some routine, some important and some quite interesting. I get to say much of what is on my mind but I take a care to say it mostly when the reporters have left, and I am often finished at a reasonable time, but best of all I have a huge pension!” On this comforting note he smiled and disappeared and I fell contentedly back to sleep.

On the third night a strange fellow appeared. He had no wig or gown and clutched a booklet entitled Measurable Strategies for the roll out of Dignification of service users. “Who on earth are you?” I gasped, feeling for the first time a little afraid. “I am the ghost of Sheriffs future”, he said. “I am not part time! I am very full time! I only do important things so I can’t stop to chat. I am both learned and specialised.”

“I only do important things so I can’t stop to chat. I am both learned and specialised.”

“So you don’t do things like child welfare hearings?” I asked. With colouring of purple on his cheeks he was gone. Behind him stood a disconsolate figure who was left behind. “Who are you?” I asked. “I am the District Drudge”, he whispered. “You mean Judge”, I said. With a sigh he replied “I know what I am”, and disappeared. I felt a sudden chill.

Scott Rettie has some strange dreams, and a premonition...
Scotland offers plenty of fascinating hideaways for a do-it-yourself break, as Louise Farquhar discovers

Six of the best...

Self-catering houses

If the thought of a self-catering holiday invokes scary images of damp smells, nylon sheets and broken crockery then think again. Scotland has changed! Now, “staycationers” can rent gorgeous houses in spectacular locations, from a luxury cottage by the beach to a remote bothy or even the former home of a famous writer. Forget those tiresome airport queues in 2010 and head for the bracing hills, shimmering sands or city lights of Scotland instead.

Here are my top six ideas:

Shore Croft, Wester Ross
Windswept beaches and craggy mountains dominate the remote landscape of Wester Ross, offering visitors a chance to experience a pure and unblemished Scotland. Shorecroft, a luxury house perched on the edge of Loch Lve, offers the perfect antidote to this wild ruggedness. The modern interior has four bedrooms and spacious living areas. An open fire, views that stretch over the sea, a great kitchen, broadband and a full Sky package means something for everyone!

www.shorecroft.co.uk

Blue Reef Cottages, Isle of Harris
For those of a more starry-eyed disposition these lovely little one-bedroom cottages offer the perfect romantic retreat. There are two houses at Blue Reef; both nestle into the machair and look out over an expanse of white sand towards the Atlantic. Their turf roofs and unique “Neolithic” design belie the luxury inside: jacuzzi bath, sauna, underfloor heating, king-size bed and fully equipped office. Two bicycles, golf clubs, a picnic basket and beach towels are also on hand to encourage guests to explore this dazzling Hebridean island.

www.stay-hebrides.com

Panhole Cottages, Auchterarder
Two high-quality cottages were created when a 200-year-old barn was successfully converted. The location, near the Gleneagles Hotel, couldn’t be more convenient and the cottages themselves are well equipped and nicely furnished. The owners live in the adjacent farmhouse so are always available to provide information or assistance. Deer roam in the grounds and birds of prey are commonly spotted by guests. Well-behaved pets are welcome.

www.panholecottages.co.uk

21 Hanover Street, Edinburgh
Holidays aren’t always about the countryside; sometimes the city beckons. No 21 Hanover Street comprises three apartments located in what was once the workshop of Alexander Bain (1810-1877), the famous Scottish inventor of the electric clock and fax machine. The traditional flats have bright, modern interiors and are equipped to a five star standard. Princes Street is very nearly on the doorstep!

www.21hanoverstreet.co.uk

Jenny’s Bothy, Cairngorm National Park
Jenny’s Bothy is located half a mile down a rough track in Upper Donside, where Scots pine reach for the sky, mountain hare hop around and alpine flowers blossom in the dry terrain. This is a true escape. Up to 10 people can be accommodated in the simple interior which is wonderfully devoid of modern distractions like television and internet. A wood burning stove provides warmth and a great place to sit with friends to share tall tales from fishing or mountain adventures.

www.jennysbothy.co.uk

Barnhill, Isle of Jura
George Orwell came to this house in Jura seeking the solitude he needed to write 1984. That isolation still exists today with no road, track, telephone, pub, hotel or shop for miles. A four-wheel drive is essential for access, but the owners can help out with this if needed. There are no other people around at all, except those that may come with you to the house, which can sleep seven. Instead, deer and seals will keep you company. If you do plan to write your bestseller here then remember a notepad – a small electricity generator can only provide basic power, so laptops are redundant!

www.theisleofjura.co.uk

For further ideas see:

National Trust for Scotland
www.ntsholidays.com

Kirkbride Cottages,
Dumfries & Galloway
www.kirkbridecottages.co.uk

50 years ago
From “Costs in High Court Litigation in England”, January 1960: “ Solicitors well know that in Scotland party-and-party expenses actually incurred in no way meet the expenses in England [under the Supreme Court Costs Rules, 1959] shows that there is not the same wide margin.”

25 years ago
From "Professional Justice", January 1985: “It is the unanimous view of the [Society’s Criminal Law] Committee that the system of lay justice having been given an opportunity to become established since 1975 has been shown to be inadequate and that the time has now come to replace it by a fully professional court system…. The Criminal Law Committee is unanimous in its view that district courts as at present constituted should be abolished and replaced by stipendiary magistrates’ courts.”