THE SHAPE OF THINGS TO COME

2020 visions: focus on best advice could be crucial USP for Scotland’s solicitor firms

ALSO INSIDE

Powers of attorney: relief all round at Inner House decision

“It is not a career for everyone, but it is just ideal for me and my life’s direction”

Pinsent Masons’ Varios: why they choose to work freelance – page 22
In five years’ time...

As the Journal continues its focus on the likely shape of legal services provision in 2020, this month it is the turn of solicitors from outside the big firms to gaze into the crystal ball.

Opening our account for 2015, the Journal last month surveyed some of the leaders of our largest practices for their thoughts on the shape of the profession in 2020, now only five years away. But how does the picture look from further down the scale? We tried to cover the spectrum of legal services provision.

Still the personal touch?

How will individuals and businesses access legal advice and legal services, in the next decade? “Bluntly, in the way that best suits those clients”, Stephen Cotton of niche commercial practice CCW replies; and overall our panel predict trends rather than any “one size fits all” answer. Certainly, many believe that people will continue to value face-to-face contact with a solicitor.

Blaigowrie sole practitioner Farah Adams, for example, believes that the most important interactions with clients will still be in meetings or by phone: “While electronic communications do play a big part in transactions, the key messages to clients in such communications are in most cases lost, because experience shows that clients, on the whole, do not appear to have the patience to properly read or comprehend letters or emails written to them.” Personal contact, she adds, is much more effective for this.

Cotton too maintains that for businesses as well as individuals, legal advice “remains a remarkably intimate matter for most people”. As a result, “far from dying, many old truisms (such as ‘people buy people’) seem more relevant than ever. So Skype and Face Time help, rather than replace, that ‘getting to know you’ process. Indeed, one great advantage of growing older has been to discover just how little the fundamentals of the solicitor-client relationship have changed, despite various Doomsday predictions”.

Some advisers do see trends towards IT. Eric Baijal, of Wick-based commercial firm BBM, predicts that legal services will increasingly be accessed online and from legal knowledge providers: more and more businesses (of all sizes) will be doing “what law firms already do on a different scale, and paying subscriptions to various services to be able to access legal knowledge content”. While some firms may attempt to respond, Baijal suspects that “successful law firms will concentrate on the provision of advice, as opposed to simply the provision of information”.

He continues, however: “While the size of the traditional high street market may contract, and it is a different market from what BBM is in, there still will be a need for high street lawyers in Scotland. In five years’ time I fully anticipate that a certain percentage of people will want to meet a lawyer face to face, particularly when they are dealing with issues that are important to them and their families”.

Gus Macaulay, head of litigation at Inksters, a technologically forward thinking practice, foresees “both continuity and discontinuity in how legal services will be accessed over the next five years”. Both must be embraced, or firms will struggle. Clients “will still want to interact with a real human being and talk with someone who has ownership of their case”, but they are becoming more IT-aware and will want to use their technology for some aspects of legal services. For him, the aim is to provide the client with the choice.

Ian Ferguson, of Mitchells Robertson and the Scottish Law Agents Society, predicts somewhat boldly that whereas younger people are more likely to use IT or social media routes to access legal advice than their older counterparts, who will choose a recommended or the family solicitor, “As younger people become older I expect many will come to prefer the recommended route.”

From south of the border, Fiona Kendall, a Scots qualified family lawyer working in Leeds, sees a contrary trend to some. “Whilst there are clear benefits in having face-to-face contact with clients, many consider travel to and from appointments to be inefficient and expensive... An average individual can use a tablet to communicate in ways which would previously have been the realm of the super-rich. Excellent technical support will accordingly be at least as important as legal knowledge in providing legal services.”

She also suspects that, particularly with remote provision, “The wrapper will be significantly less important for many than the quality of advice, quality of service and price paid.”

Competition: new or familiar?

That point leads into the question of how the competitive picture will change, and how solicitors’ firms will have to respond. Virtually everyone foresees increased competition from outside the profession, though Ian Ferguson is not the first to suggest that “Solicitors competing amongst themselves create much fiercer competition than outsiders.”

Baijal expects supermarkets and others to want to expand their range of services, to include for example residential conveyancing, house letting, estate agency, and wills and executries. Accountants will increasingly seek to offer corporate law advice and transaction support. Consequently, “It will become even...
more important to differentiate one’s practice from the competition. Clients “will pay attractive rates if the advice is expert, adds value, and meets need”; market rates for work that could be performed by other providers may well drop.

SYLA President Emma Boffey also expects non-law firm competition in both the consumer and corporate/commercial sectors. “I, along with many other young lawyers, are keeping a close eye on what Ernst & Young, PricewaterhouseCoopers etc are doing south, as they gain their legal services licences. These firms have already reinvented the professional services business model in one field (accountancy) and it no doubt has the potential to happen again in law.”

For Adams, the most likely competitive threat is from non-legal estate agencies, “which also may by then have become more regulated, creating a more level playing field” – though she suggests that without such regulation, many people will not entrust their case or transaction to a non-legally qualified person.

“The most successful lawyers”, she maintains, “will be those who can communicate without hesitation using the most suitable method for the particular circumstance at any given time.” That means taking account of what the particular client prefers at each stage of the transaction, rather than insisting on post/email/electronic portal or anything else.

Macaulay too expects a different way of practising law and delivering legal services to emerge – an “adapt or die” environment for solicitors. He adds: “Personally, I regard the next stage as one of opportunity rather than threat, but not everybody will share that perspective... The small, local firm can offer something that remote, generic legal service providers never could. If you can play to your strengths, there is a future for you.”

However, “business imagination and entrepreneurial courage” will be required, and “There will have to be an extent of unlearning in smaller firms about the way legal services should be delivered. Out of that process of deconstruction will emerge new analyses and methods of delivering what clients want and at a price they can afford.”

Tom Marshall, President of the Society of Solicitor Advocates, has another angle: “The challenge for lawyers, as for all professionals, is to get clients and potential clients to come direct and not through some form of intermediary whose only interest is to cream off some of the value in the transaction. In 30 years in practice nothing in principle has changed in this respect, save for the identity of the predators who are trying to cash in on the professionals’ expertise. This raises not only a question of profit but also of independence.”

Cotton suggests it is “far too defensive” to focus on where the competition might come from. “Instead, we need to ask what is the largely invisible service we are providing, how proud of it are we, and how do we value it?” If solicitors are prepared to provide what he calls the “factor X” advice, they have little to fear. “We regularly have clients coming in for a second view when another adviser has set out any number of ‘clever’ possibilities, but has not been prepared to answer that most simple teaser: if this were my problem and my money on the line, what would I do?”

As for adapting, don’t overlook your business entity: “All solicitors need to realise the rules of the market apply to them as much as their clients. As a simple example, why are so few of us trading as limited companies and using corporation tax rates to build up proper working capital and reduce reliance on our banks?”

Working where non-law firm providers are already commonplace, and in a sector where legal aid is generally no longer available, Kendall expects that the greatest threat may in fact come from the proliferation of online legal information, often posted by lawyers themselves. “In family law we have seen a significant rise in numbers attempting to minimise their requirement for legal advice by conducting their own research, drafting their own documents, representing themselves or seeking representation for only discrete pieces of work. It may be frustrating for lawyers to unpick the mess which can be created by basic legal services provided online on a fixed fee basis, but that offering is likely to remain attractive to the average person in the street.”

The small, local firm can offer something that remote, generic legal service providers never could. If you can play to your strengths, there is a future for you.

---

Gus Macaulay, Head of Litigation, Inksters

For the have-nots

One practice area has reasons not to go along with the “design your own future” school of thought. Criminal lawyers, as Ranald Lindsay of Dumfries points out, are at the mercy of “a rigid and structured procedural framework defining the job we do and imposed on us from outside”; allied to which, “Our funding is rigidly constrained by SLAB and, again, largely imposed on us no matter what we say or do.”

With the regulatory scene also changing (think quality assurance, for example), he continues: “In Darwinian terms, criminal practitioners have had to become very, very good at evolving quickly every time there’s a change in the environmental niche we occupy... it is absolutely vital to be very good at being reactive, and essential to be able to react almost instantaneously...
whenever change is dropped on you from a great height."

Equally, you have to be good with IT to survive: “Most criminal lawyers still in practice are there because they are already very good at using available technology and skilled staff to keep their practices as efficient and cost effective as possible.” But if the justice authorities and SLAB “could please get their act together and organise some properly compatible wi-fi which we could all use, then the criminal bar will quite happily exploit it to the full”.

What of those who have difficulty accessing legal advice at all? Paul Brown of Legal Services Agency in Glasgow believes that in Scotland as elsewhere, there is “an increasing underclass of people who have difficulty accessing housing, work and indeed social security benefits”. But with expectations raised by the independence campaign, they will, he believes, become more assertive against inequality and, having little political leverage, will use the law much more, particularly human rights and public law remedies.

Hence legal services will be accessed by campaign organisations and groups, and information on who does what “will crucially much more be via a wider range of media rather than people simply calling into a high street lawyer”. The legal profession will need to become more nimble and creative, which means “being prepared, not only to take the lead in difficult issues, but also to act as a ‘guide from the side’ as opposed to ‘sage on the stage’ in other issues”.

Family lawyers may be subject to similar pressures, says Karen Gibbons, Scottish chair of the Family Law Association. Whether through cutbacks in legal aid or otherwise, accessing legal advice is likely to become more difficult. “Paying privately for family law services is simply not an option for many people, and even for those with that option, I think we can reasonably expect an increasing unwillingness to pay for services as clients do in the current environment.”

The result will be more private arrangements, more party litigants, more reliance on CAB and other advisers (including the web based, along with “DIY” solutions accessed online: she echoes Kendall here), and further movement towards ADR – with low cost competition potentially coming from outside the profession.

Who will be needed?
What does all this mean for people requirements? “There will be no reduction in staff”, Adams believes. “However, the most useful staff will be those who have a good understanding of the Scottish legal system and services, combined with technology, as one without the other will not be as useful in modern law firms.”

Ian Ferguson points to paralegals, “who will be in every specialism of law, not just conveyancing, private client and court”. He adds: “Working from home is growing, but there is a need to ensure they feel part of the team.”

Stephen Cotton describes his team as a “broad church for mavericks” – the ethos set out for CCW when it launched in 2003, meaning people who are prepared to provide his “factor X” for clients. “We know we won’t suit every solicitor or client, and there is nothing wrong with that”, he comments – but there will be a need for more like them.

Baijal believes there is growth potential in bespoke areas of law requiring expert advice, such as insolvency; and Macaulay hesitates to try and predict as far as 2020 but emphasises that Inksters is constantly looking at its processes and “considering whether we can push the envelope of delivering our legal services to the benefit of our clients”. The practice already has a legal process engineer to streamline its provision of legal services, which benefits the whole firm.

Reflecting her earlier views, Gibbons believes family law practitioners will have to be open to acquiring new skills: “Those who can offer a range of cost effective ADR services will be more attractive to individuals with a limited budget.”

Perhaps the biggest influence will be the prospects for the next generation of professionals. Boffey believes there will be serious competition for the best people: “For new entrants to the profession, it is a truly exciting time to be a young lawyer in Scotland... many young lawyers are now discussing their opportunities and ambition for their careers in terms of an international footprint. “For all the technology available to us, people and relationships still drive the provision of legal services. To attract quality people, you need to have a quality proposition for new talent...”

For all the technology available to us, people and relationships still drive the provision of legal services. To attract quality people, you need to have a quality proposition for new talent.

EMMA BOFFEY, SYLA PRESIDENT

A selection of further comments appears in the online version of this article: bit.ly/1D34JRy
WHAT ROLE FOR THE SOCIETY?

Once again, we asked for views on the likely impact on the Law Society of Scotland. Here are the key comments in reply

Farah Adams: “I see the Society continuing in its regulatory and supportive role, but also within a more electronic and technological framework which would make it more inclusive for non-city based lawyers in terms of their voluntary input and involvement in regulatory or support committees.”

Stephen Cotton: “I have always believed that we need a single, independent regulator to handle all regulation/complaints/discipline. Paying for two regulators (Society/SLCC) and relying on good people to make a flawed creation work in practice is not sustainable. Mind you, if I’m still about in five years, my bet would be on no change (and, in all honesty, I can’t see me protesting in the streets about that).”

Ian Ferguson: “It will probably have to give up its role as a representative body if it still wishes to regulate other legal providers. If however it still wants to remain a representative body for solicitors, the ‘solicitor brand’ has to be at the heart of the future for the Society” – to be promoted and enhanced as widely as possible.

Eric Baijal: “Given that some high street firms are already running on very low profit margins, it seems to me there will have to be even more effort by the Society to justify the value that it brings its members and the public. That may well mean a more streamlined organisation, concentrating on core areas; ultimately, however, it may really depend on how the profession evolves and therefore what members demand.”

Karen Gibbons: “The Society will need to embrace the changes which are set to come to remain relevant in its role as regulator and to continue to support its members”

Gus Macaulay: “As the legal profession changes, there will be an increase in multi-disciplinary professionals... The Society is going to have to adapt to those changes and consider how best to regulate Scottish solicitors (and others) to maintain a high level of professionalism.” In addition: “Without ensuring that the poor and disadvantaged have access to justice and necessary legal services, we will fail those in our society who are often most in need of legal provision. That would be a moral scandal, and if we as a profession do not do something about it, the moral scandal will become ours. The Society should be doing all it can to ensure that does not happen.”

Paul Brown: “A well informed representative body aimed at both maintaining standards and promoting the profession has been, and will continue to be, crucial. It will be necessary for the Society to both formally and informally engage in housing and social welfare law in the broader sense, as well as uncompromisingly and vigorously assert the best traditions of the legal profession; and that involves continual rigorous promotion of a comprehensive legal aid system (both civil and criminal). Going forward, the Society needs to engage in a debate about remedies, including representative, class and group actions, as well as working closely with civic society to maintain an independent legal profession capable of addressing unmet legal need wherever it may occur.”

The Society will need to embrace the changes which are set to come to remain relevant in its role as regulator and to continue to support its members

Karen Gibbons, Chair, Family Law Association

will see it focus its efforts to export Scottish legal services to the global market.”

For Ranald Lindsay the question is “problematic”. “There are a lot of good people working very hard at the Society in criminal law and legal aid, but the difficulty is that the majority of criminal court solicitors are used to seeing things from an adversarial point of view and see little in the way the Scottish Government and SLAB treat the profession to persuade them that this view is not appropriate... So when the Society talks about ‘working with’ these organisations, there is automatic and instinctive suspicion, particularly when it usually ends up with legal aid rates being cut... If we weren’t around, the whole of society would be in a bit of a mess. The Society is good at the rhetoric of acknowledging that, but actions speak louder than words and most criminal lawyers, used to fighting an unpopular corner, would rather see more fight happening every now and again. If too much time is spent on other interest groups within the profession in what is sometimes seen as a sort of proportional representation based on numbers of practising certificates, then, to the criminal bar, the relevance of the Society will continue to diminish.”

Fiona Kendall: “Its help in re-skilling the profession to provide a wider service to the public, and in marketing the value we add, will be key.” Growth in remote client services may lead to more sole or self-employed practitioners, and “Additional support may therefore be needed from the Society for that type of practitioner, who may not have the in-house support available in larger practices.”

Emma Boffey: “One could be pessimistic and predict that the pattern of Scottish firm mergers with English SRA-regulated entities will perhaps result in a reduced role for the Society. The optimist would however see that the brand and mark of quality of being a Scottish solicitor has never been stronger. That is the Society’s product and I hope we can promote and enhance it as widely as possible.

The optimist would however see that the brand and mark of quality of being a Scottish solicitor has never been stronger. That is the Society’s product and I hope we can promote and enhance it as widely as possible.

Going forward, the Society needs to engage in a debate about remedies, including representative, class and group actions, as well as working closely with civic society to maintain an independent legal profession capable of addressing unmet legal need wherever it may occur.”

FEBRUARY 2015 | 15
Human rights challenges and failures around the Commonwealth will come under scrutiny at a major international conference in Glasgow.

The 19th Commonwealth Law Conference – “Resources, Responsibilities and the Rule of Law” – takes place from 12-16 April at the Scottish Exhibition and Conference Centre. It marks the 800th anniversary of the Magna Carta, a symbol of the rule of law across the Commonwealth, and will highlight issues such as women’s rights, the criminalisation of homosexuality, child marriage, human trafficking and the influence of Sharia law on national law.

Returning to Scotland for the first time in almost four decades – it was last hosted in Edinburgh in 1977 – the conference is one of the most prestigious events in the international legal calendar.

Lawyers and other legal professionals from more than 50 Commonwealth countries are expected to attend, with lawyers and legal experts exploring four key themes: corporate and commercial law; constitutionalism, human rights and the rule of law; the legal and judicial profession; and contemporary legal topics.

The conference will examine the role of a strong, independent judiciary and legal profession in enforcing clear, modern and effective laws that govern societies, commerce and the management of resources. It will also explore how ethical corporate behaviour and business practice can improve the lives of other communities around the world.

Gay people: end the persecution

Michael Kirby, a former Justice of the High Court of Australia who was recently appointed by the UN Human Rights Council to lead an enquiry into human rights abuses in North Korea, will give one of the keynote addresses and also speak on the issue of “homosexuality as a crime”.

It looks certain that he will deliver a forthright condemnation of the “unacceptable” lack of progress on the prohibition of discrimination on the ground of sexual orientation. Giving an indication of what delegates can expect from the event, he says: “The Commonwealth, members and secretariat have failed to act on the human rights imperative of getting rid of the inherited British colonial laws against gays, even though we have known since the 1940s, at the latest, that sexual orientation is not a chosen ‘lifestyle’ but an in-built, probably mainly genetic, characteristic of human beings that is not chosen and cannot be changed.

“It is outrageous that countries that were in the forefront of the struggle for independence and to end racial discrimination should now be leaders of the global oppression of their own citizens on the basis of their sexual orientation. More needs to be done to break the logjam that presently exists in the Commonwealth of Nations.

“Apart from a recent initiative in Mozambique, a new Commonwealth country of non-British colonial tradition where a new criminal code has omitted the so-called ‘unnatural crimes’, and an enlightened decision of the Delhi High Court in India, later reversed by the Supreme Court, there has been no progress. It is completely unacceptable. It is contrary to the spirit of the Commonwealth Charter. It has to be changed, and quickly.”

Kirby explains that the Eminent Persons Group (EPG) on the future of the Commonwealth of Nations – on which he served in 2010 and 2011 – made recommendations designed to refresh the Commonwealth. He continues: “One recommendation, the adoption of a Commonwealth Charter, was accepted, although the instrument did not include express reference to prohibition of discrimination on the ground of sexual orientation. But its language and spirit were addressed to universal human rights, and it is now accepted that sexual orientation is protected.

“The EPG recommended the appointment of a Commonwealth Commissioner to help ensure that the principles of the Charter were implemented. This proposal was ditched at the Perth Commonwealth Heads of Government Meeting in October 2011. At the conference in Glasgow, I will tell the story of how that happened and...
how, effectively, the proposal was torpedoed. Without a Commissioner, the Charter is basically a toothless tiger. This needs to be corrected. It also needs to be changed quickly.”

Challenging abuses
Other keynote speakers include Hina Jilani, a pioneering lawyer and pro-democracy campaigner, who will explain the challenges she has faced as a leading activist in Pakistan's women's rights movement and in her international work to empower and protect defenders of human rights. She is a member of The Elders – an independent group of global leaders who were brought together by Nelson Mandela to work for peace and human rights – and was one of the founding members of the Human Rights Commission of Pakistan, a vital body for monitoring human rights. Although her work has made her a target of hostile propaganda, arrests, threats and abuse, she continues to live in Lahore and works tirelessly to mobilise civil society and promote human rights.

Dame Silvia Cartwright, a former Governor General of New Zealand who was recently appointed by the UN Human Rights Council to investigate alleged war crimes and human rights abuses in Sri Lanka, will also give a keynote address, as will Scotland’s Lord President. Lord Gill will examine the relationship between the independence of the judiciary, the independence of the legal profession and safeguarding the rule of law.

Law on the edge
Glasgow lawyer and former Society President Austin Lafferty will host the plenary events in the main hall. In his experience, the conference allows delegates to learn about “law on the edge”.

“Attending the conference in Cape Town, South Africa, as part of the Society’s delegation in 2013 was a revelation,” he says. “Although, as you would expect, there were opportunities to network and socialise with new and interesting lawyers from other countries, it was the business sessions, seminars, lectures and discussions that were unlike any conference I had ever been to before.”

He explains: “We heard about female genital mutilation in several African Commonwealth countries, and the efforts to use the law to hold it back. We were told first-hand of the experiences of lawyers in Sri Lanka, suffering government corruption and being beaten in the street for demonstrating in favour of the rule of law.

“We saw a video of the shooting by police in South Africa itself of striking miners, as we were lectured on the efforts being made by union lawyers to get the truth of the Marikana massacre, which led to the deaths of 44 people following strike action at the mine. And lots more. One legal delegate was refused permission to leave Zimbabwe to come and address us on that country's judicial ills, and her speech had to be read out on her behalf.

“We think of ourselves as working hard for clients and for the interests of justice. But I had the privilege of learning about law on the edge, as legal professionals in various parts of the world battled – literally in many cases – to uphold or hang on to some semblance of law and order.

“Meeting and interacting with so many lawyers from around the world provides a valuable, positive opportunity to compare practice – whether it be in legal aid, judicial process, alternative dispute resolution, commercial practice or environmental law – with partners in Canada, New Zealand, Nigeria, Tanzania, Guyana. Although we are proud of the Scottish legal system, there is always something to learn.”

Showcasing Scotland
Mark Stephens, President of the Commonwealth Lawyers Association, agrees. He promises that the innovative programme of events will allow delegates to “conduct business, meet colleagues from different jurisdictions, exchange experiences, renew and build friendships that will continue long after the closing ceremony”.

Stressing that the conference will provide an excellent opportunity to showcase Glasgow, Scotland and the Scottish legal profession, Society President Alistair Morris says he is thrilled to welcome so many colleagues from around the world.

He adds: “We are delighted to demonstrate how our modern and flexible devolved legislature seeks to address the social, economic and legal challenges of our time. The conference programme promises to be engaging and thought-provoking – I would urge Scottish solicitors to take advantage of Glasgow hosting a major international conference on their doorstep.”

Full conference programme and registration details are at www.clc2015.co.uk
I appreciate that there was some anxiety about the validity of the standard form of power of attorney. It is helpful that we now have a clear and authoritative position which supports the validity of the standard style.”

Many may regard as something of an understatement this response from Sandra McDonald, Public Guardian, to the outcome of the Special Case between Great Stuart Trustees Ltd and the Public Guardian [2014] CSIH 114. It could equally be said that she and the Scottish legal system are to be commended for moving promptly to obtain an authoritative judgment which effectively resolves huge concerns as to whether some 282,000 powers of attorney, registered as being continuing powers of attorney in terms of the Adults with Incapacity (Scotland) Act 2000, were in fact valid.

The document before the court appointed the trustee company “to be my continuing attorney in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000”. That, in context, was held by the Inner House to be sufficient for the document to comply with s 15(3)(b) of the Act, which requires, for compliance a document which inter alia “incorporates a statement which clearly expresses the granter’s intention that the power be a continuing power”. In addition, the Inner House helpfully expressed an opinion (obiter) on the proper application of the requirement in s 15(3)(ba) that “where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, [it] states that the granter has considered how such a determination may be made”.

The decision is significant on the general question of when a special case is competent, and the application of those principles to the case before the court. Procedural aspects are also worthy of comment. However, although the court obviously had to deal with competency before the merits, this article comments on competency and procedure later. It is appropriate first to summarise briefly the history of decisions giving rise to this case, and the terms and circumstances of the particular document before the court.

Seismic effect
The context for this litigation is one in which public perceptions of the concept of a power of attorney being operable during incapacity of the granter have shifted from something suspiciously novel to the main reason for granting the great majority of such documents. This shift has been international. Among many examples, Belgium introduced the concept last year; the Netherlands is doing so currently, drawing upon Scottish experience – also sought by the Nordic states, and by the Council of Europe in recommending the adoption of “continuing powers of attorney” (using that term to include welfare powers), in Ministerial Recommendation (2009) 11.

On 29 April 2014, an opposed hearing took place before Sheriff Baird in Glasgow Sheriff Court. An application for guardianship by relatives of W was opposed by a bank that held a power of attorney which had been registered as a continuing power of attorney. The operative clause was substantially the same as in the document before the Inner House, quoted above. Sheriff Baird held (Application for guardianship in respect of W 2014 SLT (Sh Ct) 83) that this was insufficient to comply with s 15(3)(b). He also held that the document failed to comply with s 15(3)(ba).

The shockwaves spread rapidly. Not only did the document in relevant respects comply with the bank’s standard style; it substantially complied with the “sample” style of power of attorney published on the Public Guardian’s website, and very widely adopted. Moreover, Sheriff Baird’s “inexorable logic”, as he put it, potentially invalidated many welfare (and combined) powers of attorney, by reference to the corresponding requirements of s 16(3)(b) and (ba).

A few months later, in a case decided at Forfar Sheriff Court, Sheriff Murray reached the opposite conclusion on yet another substantially similar document. In the context of a dispute among joint attorneys, Sheriff Murray held
(B v H 2014 SLT (Sh Ct) 160) that the document before him was a valid continuing power of attorney in terms of the Act. In terms of s 14 of the Act, the route of appeal is to the sheriff principal and thence, with leave, to the Court of Session. In W, an appeal was marked but withdrawn. There was no appeal against the decision of Sheriff Murray. Those cases and the issues raised by them were discussed in the Journal (MacLeod, September 2014, 26; Ward, October 2014, 20).

Expressions of intention

It was against this background that concerns arose regarding a power of attorney granted on 8 July 2004 by JS in favour of his wife, whom failing the trustee company. The granter’s wife had died and the trustee company had been acting as continuing attorney. It was anticipated that the attorney would shortly require to sell the granter’s house. The granter was advised by senior counsel that W cast doubt upon whether the attorney could competently sell the house and grant good title to it. It was in these circumstances that the attorney as first party and the Public Guardian as second party brought the special case before the Court of Session.

The judgment in the special case narrates the relevant statutory provisions and notes that s 15(3)(ba) was inserted and took effect after the granting by JS of his power of attorney. It narrates the background to s 15, quoting in particular from the Scottish Law Commission’s Report on Incapable Adults (No 151, July 1995), noting that the main advantage of contractually conferred powers of attorney is that they are relatively cheap and flexible compared with court-appointed guardians; that at common law the appointment of an attorney lapsed in the event of the subsequent mental incapacity of the granter (though the present writer has always questioned that assertion in relation to documents specifically asserting that they should continue beyond incapacity); that s 71(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 created a presumption in favour of continuation unless the granter opted out; and that this was reversed by the Act, which created a requirement to opt in, and thus the need for s 15(3)(b).

The Commission rejected the use of a prescribed style of document, as that could create difficulties if there were any deviation, or in unusual cases. Thus: “The only requirement should be that the document clearly shows that the granter intended the attorney to have continuing power.”

The Inner House held that s 15 must be construed purposively. The policy clearly was that the creation of a continuing power should not be a matter of implication but should be done expressly, but the use of a prescribed style was rejected. That indicated that no particular significance should be attached to the precise wording used, as long as the intention was sufficiently clear. Section 15(3)(b) was concerned solely with the expression of the granter’s intention, and should be construed accordingly.

On that basis, the court held that the document granted by JS “is unquestionably a valid continuing power of attorney for the purposes of s 15”. The terms of the operative clause, as quoted above, sufficed for that. “Continuing attorney” is defined in s 15(2) as a person on whom a continuing power of attorney is conferred. There is express reference to s 15, quoting in particular from the Scottish Law Commission’s Report on Incapable Adults (No 151, July 1995), noting that the main advantage of contractually conferred powers of attorney is that they are relatively cheap and flexible compared with court-appointed guardians; that at common law the appointment of an attorney lapsed in the event of the subsequent mental incapacity of the granter (though the present writer has always questioned that assertion in relation to documents specifically asserting that they should continue beyond incapacity); that s 71(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 created a presumption in favour of continuation unless the granter opted out; and that this was reversed by the Act, which created a requirement to opt in, and thus the need for s 15(3)(b).

The Commission rejected the use of a prescribed style of document, as that could create difficulties if there were any deviation, or in unusual cases. Thus: “The only requirement should be that the document clearly shows that the granter intended the attorney to have continuing power.”

The Inner House held that s 15 must be construed purposively. The policy clearly was that the creation of a continuing power should not be a matter of implication but should be done expressly, but the use of a prescribed style was rejected. That indicated that no particular significance should be attached to the precise wording used, as long as the intention was sufficiently clear. Section 15(3)(b) was concerned solely with the expression of the granter’s intention, and should be construed accordingly.

On that basis, the court held that the document granted by JS “is unquestionably a valid continuing power of attorney for the purposes of s 15”. The terms of the operative clause, as quoted above, sufficed for that. “Continuing attorney” is defined in s 15(2) as a person on whom a continuing power of attorney is conferred. There is express reference to s 15, quoting in particular from the Scottish Law Commission’s Report on Incapable Adults (No 151, July 1995), noting that the main advantage of contractually conferred powers of attorney is that they are relatively cheap and flexible compared with court-appointed guardians; that at common law the appointment of an attorney lapsed in the event of the subsequent mental incapacity of the granter (though the present writer has always questioned that assertion in relation to documents specifically asserting that they should continue beyond incapacity); that s 71(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 created a presumption in favour of continuation unless the granter opted out; and that this was reversed by the Act, which created a requirement to opt in, and thus the need for s 15(3)(b).

The Commission rejected the use of a prescribed style of document, as that could create difficulties if there were any deviation, or in unusual cases. Thus: “The only requirement should be that the document clearly shows that the granter intended the attorney to have continuing power.”

The Inner House held that s 15 must be construed purposively. The policy clearly was that the creation of a continuing power should not be a matter of implication but should be done expressly, but the use of a prescribed style was rejected. That indicated that no particular significance should be attached to the precise wording used, as long as the intention was sufficiently clear. Section 15(3)(b) was concerned solely with the expression of the granter’s intention, and should be construed accordingly.

On that basis, the court held that the document granted by JS “is unquestionably a valid continuing power of attorney for the purposes of s 15”. The terms of the operative clause, as quoted above, sufficed for that. “Continuing attorney” is defined in s 15(2) as a person on whom a continuing power of attorney is conferred. There is express reference to s 15, quoting in particular from the Scottish Law Commission’s Report on Incapable Adults (No 151, July 1995), noting that the main advantage of contractually conferred powers of attorney is that they are relatively cheap and flexible compared with court-appointed guardians; that at common law the appointment of an attorney lapsed in the event of the subsequent mental incapacity of the granter (though the present writer has always questioned that assertion in relation to documents specifically asserting that they should continue beyond incapacity); that s 71(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 created a presumption in favour of continuation unless the granter opted out; and that this was reversed by the Act, which created a requirement to opt in, and thus the need for s 15(3)(b).
terminology of s 15(3)(c). As to the two sheriff court cases, the court preferred the reasoning of Sheriff Murray.

Helpfully, the court also addressed the issues concerning s 15(3)(ba), albeit on an obiter basis. That paragraph is concerned only with “springing” powers of attorney. The power of attorney granted by JS was immediately exercisable. The court considered that the same would apply to the document before the sheriff in W, notwithstanding that the bank in that case had accepted an argument that it was never intended that the bank should act as attorney while the granter retained capacity: the wording of the document appeared to be to the contrary.

Valedictory

One trusts that the fact that the reasoning of Sheriff John Baird in W has thus been rejected by the Inner House will not in any way detract from appreciation of his huge personal contribution to the development of adult incapacity law in Scotland, as he approaches his retirement. With leave to take, it is understood that his last day in court will be 24 March 2015.

It would take an article longer than this to describe that contribution. Even a short summary must include several elements. As the lead sheriff in Glasgow dealing with adult incapacity matters, he has contributed substantially and uniquely towards the development of adult incapacity law in Scotland, as he approaches his retirement. With leave to take, it is understood that his last day in court will be 24 March 2015.

It would take an article longer than this to describe that contribution. Even a short summary must include several elements. As the lead sheriff in Glasgow dealing with adult incapacity matters, he has contributed substantially and uniquely towards the development of adult incapacity law in Scotland, as he approaches his retirement. With leave to take, it is understood that his last day in court will be 24 March 2015.

Preliminary Questions

On competency (Adrian Ward writes), the court noted that both parties to the special case agreed that the document before the court was a valid continuing power of attorney in terms of s 15. In general, special case procedure, now provided for in s 27 of the Court of Session Act 1988, is not available to decide questions that are not in dispute.

The court reviewed relevant authorities, namely Mackinnon’s Trs v MacNeill (1897) 24 R 981, Mitchell Innes’ Trs v Mitchell Innes 1912 SC 228, and Turner’s Trs v Turner 1943 SC 389. From Turner’s Trs the court derived the following two principles: “first, if another form of action would be competent, a special case will normally be competent; and secondly, the underlying principle is that the court will decide questions that are practical, not questions that are hypothetical or academic.”

In Inner the question was whether trustees had power to sell certain heritable subjects, and although there was no real contention between the parties, the special case was competent because the person with the greatest interest to challenge the decision of the trustees would be a prospective purchaser. In Turner’s Trs, the disposal of the deceased’s estate was a practical issue for the trustees.

In the case of the power of attorney by JS, the court noted that the questions raised were certainly not hypothetical or academic, given the imminent need to sell the house. In consequence, other forms of action, such as an action for declarator, would be competent, even if the merits of the case were conceded by the defenders in the special case. Declarator would not bind third parties, but “it is obvious that others who practise or carry on business in the area in question are likely to follow the court’s decision”. A special case was no different.

However, aspects of the decision appear to be novel. In careful language, the court commented that “although it is not technically relevant to the competency of the special case, we note that the fundamental issues raised in this special case are of great general importance”. The court appointed an amicus curiae so that “while our decision cannot bind third parties, it has been reached following proper argument, and is therefore likely to command greater authority than a decision reached without a contradictor”. And the court offered its obiter opinion, similarly argued, on a point of “great general importance” not relevant to the special case at all, namely the issues concerning s 15(3)(ba).

Finally, in procedural and organisational terms, it is notable that the special case was lodged on 2 December 2014, and heard and decided on 10 December 2014. Within that short space of time, not only was an Extra Division convened and the hearing arranged, but formidable representation was assembled in the form of James McNeill QC for the attorney, James Wolfe QC (Dean of Faculty) for the Public Guardian, and Kenneth McBrearty QC as amicus curiae.
Freelancing goes mainstream

The challenge of meeting client legal teams’ fluctuating needs led Pinsent Masons to set up its Vario hub, utilising the talents of solicitors who wish to work freelance. Peter Nicholson investigates how it works, for the firm and the individuals it selects.

Looking to balance a legal career with other interests, work or otherwise? Do you want specific types of work, or working hours, and to be able to turn down work that doesn’t suit?

Can you envisage working freelance, but with the support of a big firm’s resources? There have always been solicitors who worked freelance, often as locums, but in these days of increasingly flexible working arrangements, many more are exploring its potential as a career choice. There is also at least one legal firm that has a whole resource network built of those who choose flexibility and variety ahead of personal security.

The firm is international practice Pinsent Masons; its “hub” of freelance lawyers goes by the name of Vario. Naturally, it is also built round particular client needs, whether providing maternity cover, backfilling a team departure, specific projects or an extra pair of hands to manage peaks in workflow – essentially, providing flexible access to resource, without a balance sheet commitment.

For a firm like Pinsents to meet this need is one way to answer the demand from in-house general counsel to provide “more for less”, that mantra of post-financial crash in-house general counsel to provide “more is one way to answer the demand from clients when developing the Vario proposition. We sat down with in-house counsel to understand their requirements for temporary legal resource, how we could better help them manage their legal risk and what qualities they were looking for from their freelance lawyers.

“Two main themes emerged. The first, no surprise, was a demand for legal professionals with high-quality skills and experience at a top law firm or in-house equivalent. Second, and equally important, was a need to ensure that our freelance lawyers possess the right skills, behaviours and approaches to enable them to fit right in to a variety of working environments, and add value from day one.”

With around 150 Varios on its books and still recruiting, that focus on “fit” involves a measure of profiling at the selection stage. Pinsents has devised an online questionnaire that helps identify behaviours, preferences and motivations likely to make a successful Vario. “While this helps to establish whether a candidate is the right fit for us, it’s as much about giving the candidate a better understanding of whether we are the right fit for them. In our experience, fantastic lawyers will not always make fantastic freelance lawyers because it is a very different way of working: it won’t suit everyone,” Kelm observes.

She continues: “Given the many different types of Vario assignments, getting the right “fit” becomes very important at the point we are placing our Varios, and myself and the rest of the Vario team have a key part to play here. As well as working closely with our Varios, we’ll speak to our clients to understand exactly what they need, what their drivers are: we’ll talk to the Pinsent Masons partners and lawyers who know and work most closely with them, and then we can fit the person to each organisation and assignment. It’s a very bespoke approach.”

All different motives

Who, then, are these people who are content, in effect, not to know where their next piece of work is coming from?

“One of the things I’ve enjoyed most about the role of looking after the operation is getting to know the many different drivers that Varios have for making the move into freelancing,” Kelm responds. “Underlying it all is a desire to balance career and personal needs with enjoyable, satisfying and interesting legal work, which will develop their skills and enhance their CV.”

Some have many years’ experience but have been out of the profession for a time, perhaps to look after family, and want to pick up their career again, but in a way that gives them some flexibility and control over what work they do and when they do it. The right assignment will enable them to upskill again and rebuild their confidence.

Some want to balance having a career in law with other business interests, or indeed something non-business related. One Vario completed a six-month assignment with a bank in the autumn, and is taking time out from the law over the winter months to focus on his ski business, his other passion in life. Another senior in-house lawyer was looking to balance her legal career with other pursuits, including project managing the conversion of an old church into a family home.

“Many of our Varios have interests outside the law and so welcome the balance that freelancing can bring. For others, it enables them to gain a different working perspective, perhaps before making a more permanent move in-house, or simply to broaden out their experience. And for some it’s the attraction of working for themselves.”

Finding the right fit

Simple though the concept sounds, managing it is quite a sophisticated exercise, as Geraldine Kelm, Vario’s manager in Scotland, explains. While the individual lawyers – also known as Varios – remain freelance, being self-employed and operating through vehicles such as personal services companies, they are carefully vetted before coming on to Vario’s books.

“This is essential – when a lawyer comes through our selection process and joins the Vario hub, we are giving them the Pinsent Masons’ stamp of quality and they are carrying the firm’s brand when out on assignment with our clients,” Kelm points out. “We carried out a due diligence exercise with clients when developing the Vario proposition. We sat down with in-house counsel to understand their requirements for temporary legal resource, how we could better help them manage their legal risk and what qualities they were looking for from their freelance lawyers. “Two main themes emerged. The first, no surprise, was a demand for legal professionals with high-quality skills and experience at a top law firm or in-house equivalent. Second, and equally important, was a need to ensure that our freelance lawyers possess the right skills, behaviours and approaches to enable them to fit right in to a variety of working environments, and add value from day one.”

With around 150 Varios on its books and still recruiting, that focus on “fit” involves a measure of profiling at the selection stage. Pinsents has devised an online questionnaire that helps identify behaviours, preferences and motivations likely to make a successful Vario. “While this helps to establish whether a candidate is the right fit for us, it’s as much about giving the candidate a better understanding of whether we are the right fit for them. In our experience, fantastic lawyers will not always make fantastic freelance lawyers because it is a very different way of working: it won’t suit everyone,” Kelm observes.

She continues: “Given the many different types of Vario assignments, getting the right “fit” becomes very important at the point we are placing our Varios, and myself and the rest of the Vario team have a key part to play here. As well as working closely with our Varios, we’ll speak to our clients to understand exactly what they need, what their drivers are: we’ll talk to the Pinsent Masons partners and lawyers who know and work most closely with them, and then we can fit the person to each organisation and assignment. It’s a very bespoke approach.”

All different motives

Who, then, are these people who are content, in effect, not to know where their next piece of work is coming from?

“One of the things I’ve enjoyed most about the role of looking after the operation is getting to know the many different drivers that Varios have for making the move into freelancing,” Kelm responds. “Underlying it all is a desire to balance career and personal needs with enjoyable, satisfying and interesting legal work, which will develop their skills and enhance their CV.”

Some have many years’ experience but have been out of the profession for a time, perhaps to look after family, and want to pick up their career again, but in a way that gives them some flexibility and control over what work they do and when they do it. The right assignment will enable them to upskill again and rebuild their confidence.

Some want to balance having a career in law with other business interests, or indeed something non-business related. One Vario completed a six-month assignment with a bank in the autumn, and is taking time out from the law over the winter months to focus on his ski business, his other passion in life. Another senior in-house lawyer was looking to balance her legal career with other pursuits, including project managing the conversion of an old church into a family home.

“Many of our Varios have interests outside the law and so welcome the balance that freelancing can bring. For others, it enables them to gain a different working perspective, perhaps before making a more permanent move in-house, or simply to broaden out their experience. And for some it’s the attraction of working for themselves.”
Seniority is not an essential prerequisite for a Vario: “We have lawyers from a breadth of disciplines and at all stages, from newly qualified to experienced partner-level professionals,” Kelm claims. “At NQ level, we are talking to lawyers who are making an active decision to switch into freelancing, because they see it as a route to getting great experience on their CV at an earlier stage than they might otherwise. We’ve recently placed a couple of newly qualified Varios on assignments with key clients, which will be really good experience for them going forward.”

Pinsents itself can benefit from the resource, even if that is not its primary purpose – its teams can draw on the pool as needed to supplement their own capability. And when on a client assignment, Varios in turn have the backup of Pinsents’ infrastructure. “They have support in terms of knowledge and online resources, as well as access to a Pinsents professional support lawyer; we also link them with the partners in the firm who work most closely with the client, so they have that contact throughout the time they are on assignment,” Kelm states. “This recognises that our Varios are placed with clients as part of the wider client relationship. It’s absolutely critical for us to make sure that they feel supported.”
One solicitor who is wholly at home with working from contract to contract is Laurence Edwards. Qualified in 1982, he had a varied career with Bank of Scotland and was in at the setting up of Sainsbury’s Bank. After redundancy and a spell trying stockbroking, he returned to the profession in 2001 and found himself having to take a series of short-term contracts as a way of getting back in. Longer spells of work followed, also with financial institutions, but after again being made redundant in 2014, he joined Vario.

“One of the good things is they are good at bringing you opportunities,” he comments, “but it’s a non-exclusive basis, so you are free if you can get opportunities from other sources to do those as well.” Currently he is working in London on a contract he obtained independently.

Edwards’ first Vario assignment was, as it happens, locum deputy registrar at the Law Society of Scotland. He got the call on the Wednesday, went in that afternoon, and started the following lunchtime. He was there three or four weeks; he knows of others with assignments of several months or even a couple of years.

How does he plan for the future? “There are challenges. I think it depends on your personal circumstances. On the plus side, you get lots of variety of work and organisations you are working for, you experience different cultures, and I think you change your outlook mentally in how you prepare for things.

“The hardest thing is getting started. I guess it’s the story of the good years and the lean years. So you put something aside if you have a contract, because there could be a gap between contracts. I’ve always been quite fortunate; I think the longest I’ve had between contracts is two or three weeks. When I started 10 years ago, it was quite scary – you were worried where the next job would come from.”

He adds: “When you’re on a short contract, people generally don’t want you to take holidays; you come in and you’re doing a specific piece of work. You also want to maximise the amount you are earning, because you don’t know when you’re going to get your next contract and the danger is you end up not taking sufficient holidays, so it works both ways.

“It does depend on your lifestyle, you being in the right place and comfortable with the uncertainty that comes from it. People of the right sort of mindset enjoy it. I’ve certainly enjoyed it.”

### FREELANCING FOR 10 YEARS

If personal circumstances require, Varios can be very selective about which assignments they take on, as Elaine Nelson illustrates. A corporate lawyer who qualified in 2002, she took a career break to look after her three children, but when the recession intervened, she found it much harder to get back into work, beyond keeping up a couple of hours of university teaching each week.

“I wanted part-time work, which is difficult to get when you have been out of the market for a few years,” she comments. “When I got to hear of Vario, I didn’t really understand the model or whether it would work out at the other end, but I went along with the process and quickly got a part-time assignment with a local government client.”

That contract lasted eight or nine months, from August 2013 to May 2014; Nelson was asked to extend it, but opted not to because the school holidays were coming. “It’s about work-life balance,” she states. “I’m keeping up my university work meantime. I’ve been offered other jobs, but they haven’t been the right fit. There was one that looked interesting, but it involved more travelling and it wasn’t the right thing.

“There is no impact if I say no. You just make sure they know what you are looking for. They don’t give you ridiculous options – they sort of expected me to turn down the travel job, though the work would have fitted me quite well. As time goes on, I may be able to take on more, or different hours, but I’m not going to take something unless it’s the right thing."

As for her experience as a Vario, she welcomed having Pinsent Masons’ support on her assignment. “It all worked perfectly. I was put in touch with their PSLs, and helped with other resources, and seminars. For work outside my usual field, such as procurement, it was good to have their backup. It was a good first assignment for me. Pinsent Masons helped to refresh my skills after a period away from work, and having current in-house experience on my CV increases my marketability.”

Nelson sums up: “A lot of people like certainty, and contracting is not for them. It’s a niche market, but it’s ideal for me.”

### FREELANCE GOT ME BACK INTO WORK

Dual-qualified real estate lawyer Ruth Chapman chose Vario for lifestyle reasons of a different type.

Formerly with CMS Cameron McKenna in Edinburgh, Chapman became one of the first Varios in Scotland after deciding to move her career in the direction of freelancing.

Since then, she has undertaken a number of different Vario assignments. These have included working in-house with a leading UK property developer, and various spells with Pinsent Masons, providing additional resource for its property group, sometimes working from one of the firm’s offices and sometimes remotely from home.

Married in Italy, Chapman and her husband last year realised their dream of buying a house in Umbria. “We divide our time between Italy and Scotland, hence the reason consultancy works for me,” she comments. “My husband’s business is also in Scotland, but he gets to work from home as well.”

Her most recent assignment was with Pinsent Masons, based in its Glasgow and Edinburgh offices, while back in Scotland over the winter. “The flexibility of working freelance is ideal for my situation, and provides diverse work that keeps me interested. It feels like a new career, and a natural progression in my life.”

She adds: “The Vario team are great to work with and very supportive. It has been amazing to share and experience their journey from the beginning and see it grow. We have also seen a shift in people understanding how remote working can work for everyone involved, which is great. It is not a career for everyone, but it is just ideal for me and my life’s direction.”

### FREELANCING WITHOUT BORDERS

Case study: Laurence Edwards

Case study: Elaine Nelson

Case study: Ruth Chapman
Employee misuse of social media can pose novel disciplinary situations, but their resolution may well depend on the proper application of first principles, Graeme Dickson argues.

Social media and their unparalleled reach to the public remain for non-digital natives (which is still likely to include the majority of employers) a concerning prospect. The ability of an employer to deal fairly with an employee’s comments on Twitter and/or Facebook when the misdemeanour occurs outwith work, or using a private account, remains a contentious area.

Cautionary tales often appear in the media, such as the summary dismissal of a stockbroker who “joked” on Twitter about colliding with a cyclist but having to leave the scene immediately to avoid being late for work. In the last month, a video posted by a trainee of a Magic Circle firm concerning the events at Charlie Hebdo has also attracted attention.

Over the last few years, some of the issues that social media can cause have received judicial scrutiny, but until recently, the leading case providing guidance was in the English High Court: Smith v Trafford Housing Trust [2012] EWHC 3221. That case involved Smith, an employee of his local council who expressed views (based on his religious beliefs) regarding same sex marriage on a Facebook page. He had identified his employer, and his privacy settings allowed “friends of friends” to see his posts. This meant that such posts appeared on other people’s account pages even if they had not specifically subscribed to Smith’s feed. He was dismissed, and challenged his termination successfully. The court held that the extent of an individual’s right to privacy and freedom of expression in this context could well depend on the nature of their employment. In this case, however, the Facebook page did not have the necessary work-related nature to justify the employer’s actions.

Private account, public domain

A situation involving some similarities arose in late 2014 before the Employment Appeal Tribunal. Game Retail Ltd v Laws UKEAT/0188/14 has provided some useful guidance, but also leaves other questions unanswered. As practitioners deal with more queries from employer clients faced with the challenges of employees’ use of social media platforms, it is useful to consider the law as it stands.

Laws, a longserving employee of Game Retail Ltd, had a personal Twitter account. His employer operated a large number of stores in the UK, all of which had their own corporate social media presence. These accounts were very important to the employer’s business for the purposes of marketing and promotion. On this basis, they permitted customers to follow the individual stores’ Twitter feeds. Laws’ personal account followed a considerable number of stores, apparently so that he could monitor the feeds for inappropriate activity by other employees. Several stores (apparently as a result of encouragement from a manager) reciprocally followed Laws.

In mid-2013, a manager complained to Game Retail about some of Laws’ tweets. Following an investigation and a disciplinary process, he was dismissed on the grounds of gross misconduct. The basis for this was that his tweets contained offensive and abusive language.

He successfully challenged the decision at an employment tribunal, which found his dismissal unfair (albeit it reduced his compensation due to his contributory conduct). The tribunal held that the dismissal did not fall within the “band of reasonable responses” in terms of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. Among the reasons for the tribunal’s decision was the fact that the tweet came from a private account (which had not been set up for work purposes); that it did not identify Game Retail as Laws’ employer; and an apparent lack of clarity in the employer’s policy on social media, which was also regarded as important.

Relevant factors?
The employer appealed. The EAT allowed the appeal and remitted the case back to a new tribunal. In its decision, the EAT confirmed that the employer was entitled to take into account Laws’ failure to manage his privacy settings properly. Of particular significance, he knew that his comments would not have been offended by his tweets and this was, in his submission, a crucial omission. The EAT disagreed. Unfortunately (for practitioners and employers alike), the EAT refused to set down any specific guidance on the use (or rather misuse) of social media, despite being urged to so by the respondent in this case. Instead, it found that the tribunal had failed to look at the situation objectively and had instead substituted its own mindset on the scenario rather than that of a reasonable employer. On that basis, the EAT reiterated the correct test to be applied, namely to look at what was the reasonable band of responses for a reasonable employer. It sent the case back to a
new tribunal to look at the facts again and come to a decision on whether a dismissal in this situation was within the reasonable range of responses.

**Back to first principles**

In essence, while social media may be a relatively novel medium, employers have always had to deal with the misdemeanours of their employees, and sometimes this involves misconduct outside work. So in terms of what practitioners should be emphasising to our clients, most of it is a reiteration of first principles:

- A social media misdemeanour should be treated the same as any other accusation of misconduct, with a proper process being followed.
- If the comment on social media occurs on a “personal” account, that does not mean an employee has an automatic, unassailable right to privacy. Context and the nature of the comments are crucial, and a tribunal will consider these factors in detail. Who has access to the tweets or posts can also be very important.
- Employees are entitled to have a private life and (within legal limits) express personal views. Just because such views may not be in line with an employer's own position, that does not automatically entitle the employer to act. The employer still needs to consider whether they amount to misconduct justifying a disciplinary sanction or dismissal.
- For some employers, criticism or adverse comment about their industry or their products can be particularly relevant. This was seen a few years ago when the dismissal of Apple employees who had criticised an Apple product was deemed fair. The fact that Apple had clearly prohibited such public comment by their employees within their policies was a powerful factor for the tribunal. If an employer can demonstrate reputational damage caused (or highly likely to be caused) by the employee’s actions, their justification for taking action is much clearer.
- Social media policies need to be clear. Game Retail's own social media policy did not provide the necessary clarity (as to what would constitute gross misconduct), but this of itself was not sufficient to mean that a commonsense approach could not be taken. However, the absence of such a policy (or the fact that its terms are poor) does not prevent action being taken, albeit that it makes the battle potentially much tougher.
- Employees sometimes criticise colleagues (whether in apparent “banter” or otherwise) on social media, but do not identify the employer. Such comments may be made in what at first appears to be a private context. However, in some circumstances, an employer may still be justified in taking action, especially if the tweets or posts amount to bullying or harassment.

Most importantly, employers must be careful not to overreact just because something happens on social media. Social media do have a wide potential audience. Taking formal action against an employee can easily exacerbate a situation, thereby giving it a much higher prominence that might have occurred. It is always wise for an employer to pause before taking action, and this remains true in this context also.

*Game Retail* reminds us all that while technology changes, the tenets set down in the existing law as to how employers must deal with issues remain the same.