

The Journal

OF THE LAW SOCIETY OF SCOTLAND

VOL.60 NO.3 - MARCH 2015

WWW.JOURNALONLINE.CO.UK
£7.00 (FREE TO MEMBERS)



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IN THE DRIVING SEAT

It's rare for a practising solicitor to sit on the Scottish Law Commission and Caroline Drummond plans to take advantage of the opportunity by using her property expertise to champion reform

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Interview

CAROLINE DRUMMOND

Commercial property lawyer Caroline Drummond is one of the few practising solicitors to have made the transition to commissioner at the Scottish Law Commission. She tells the Journal about the challenges that await her and the reasons she wanted the role, as the Commission embarks on its Ninth Programme



LEASE *of* LIFE

WORDS: PETER NICHOLSON

IMAGES: MIKE WILKINSON

Judges, QCs, law professors. Think of the Scottish Law Commission and those who have served as law commissioners, and some of the leading figures of the legal profession over the past half century come to mind.

Very few practising solicitors, however, have made it to the Commission's top table. Professors John M Halliday and Robert Jack straddled practice and academia; two others who come to mind are Robert Bertram WS, then a partner with Dundas & Wilson, a part-time commissioner from 1978-1986, and Neil Whitty, originally a Government solicitor who moved to the Commission's staff, whose scholarship led to his being appointed a commissioner from 1995-2000. But there have not been many among the roll of commissioners since 1965.

Until February of this year. Enter Caroline Drummond, previously a career property solicitor with Burness's (or Burness Paul's) Edinburgh office. Her 34 years with the firm (27 as a partner) came to a sudden end with the announcement at Christmas that she and David Johnston QC were to fill the vacancies created when Laura Dunlop QC and Patrick Layden QC completed their respective terms.

Confessing herself somewhat perplexed as to why more solicitors have not pursued a similar path, Drummond had her own reasons for applying for the post.

She explained: "I had got to the stage of my life where one tends to take a step back and think, what would I still like to do? Law reform always interested me, so when I saw this post advertised, I thought, I'm going to apply. See how it goes!"

Not that she was immersed solely in client files all those years, having "done various bits and pieces" regarding legal education and policy. "I was on the WS Society education committee for a few years; I was at one point in charge of legal education in Burness; I have sat on the Scottish Property Federation policy board. I've always taken a keen interest in legal education in the firm, so when I wasn't in charge of that I was still very much involved in helping to run seminars."

She would in fact like to see the bigger firms become more involved in law reform proposals – they are often reticent about making submissions due, she believes, to a fear of upsetting someone somewhere in their client base. "A submission that suits one of them maybe won't suit another," she comments. "There is sometimes a disinclination to get

involved, which is a shame. Some of the bigger firms are more enlightened about that, but not all."

More property work?

There are no prizes for guessing that the Commission was interested in someone with commercial property experience. That is the field where Drummond has spent most of her career, albeit in less specialised roles in her early days. She was also instrumental in setting up Burness's construction department, and had some involvement with planning law through helping clients negotiate the commercial development process, but commercial property is really her thing.

She arrives as the Commission makes something of a fresh start, with its Ninth Programme of Law Reform having come into effect with the present year. Drummond was not around to help shape its content, but it contains a great deal of interest to the property lawyer.

At first sight that may seem surprising. The Commission, with the assistance of the Scottish Parliament, has already transformed Scots property law, and its most recent major project has just come to fruition with the implementation of the Land Registration (Scotland) Act 2012.

Yet there is more to do. Drummond's first assignment is to take charge of the project on compulsory purchase. Diligent observers of its work will know that, in December, the Commission published a comprehensive discussion paper on the subject, one still based on 19th century statutes passed to empower the age of railway building. "Discussion paper" is a euphemism for a tome extending to 21 chapters and 364 pages, but the Commission has mercifully allowed six months rather than the usual three for interested parties to read, digest and respond to its contents. In its current form, those contents will result in a comprehensive new statute.

Repairing leases law

Also included in the Ninth Programme, as raised during the Commission's consultation, is proposed work on proprietary aspects of leases – "a very substantial project, which should perhaps be undertaken in stages", the Programme states. Responding to representations that uncertainties in the current law are leading to increased costs and discouraging





investment in the commercial sector, the Commission aims to target reform where it is most needed, including the areas of registration and termination of leases.

Drummond explains the issues from a practitioner's viewpoint: "From my own perspective, I think there are various things in commercial leases that are preventing what the Government likes to call sustainable economic development, and the resurgence of town and city centres. We have a lot of landlords sitting on properties that they are not making use of and are not being leased. Simple things like getting out of a lease at the end of the day, notices to quit – these need to be looked at, as well as dilapidations towards the end of a lease, another subject ripe for the Commission. There are also a fair number of things the Commission has looked at in commercial leases before that have not been implemented, such as irritancies. So I would like to think that, having been involved at the sharp end with some of these issues, I can bring something to the party when we are issuing discussion papers and consulting not just with the profession but surveyors, architects and the like."

Weaknesses in the Conveyancing and Feudal Reform (Scotland) Act 1970 as it relates to heritable securities form another proposed project, although not one under her direct supervision.

All in all, then, Drummond will have her work cut out, but she relishes the challenge, while recognising that Commission projects do not as a rule bring results overnight. "I think if we can get compulsory purchase through to a bill, and also commercial leases through to a bill or maybe more, that will be a good goal for me to aim for," she asserts. "Law reform takes time of course, and as I can see already, reading into a subject, getting right under the skin, takes time."

New habitat

Was it a culture shock, moving from practice to an environment like the Commission? Seemingly she has rather more office space than she was used to at Burness! And her diary now has a lot more legal lectures and other events to attend. However, the Commission's total complement of 25 people makes the place seem less busy in other ways. "But everyone has been very friendly and helpful, and there is quite a lot going on, with the 50th anniversary, and the conference coming up in April" – when Edinburgh hosts the biennial conference of the Commonwealth Association of Law Reform Agencies, dovetailing with the Commonwealth Law Conference in Glasgow.

Will she miss the client contact? With a laugh, Drummond hastens to reassure me that of course she will. At the same time, "What's wonderful though is sitting down and getting three hours to read and understand things without interruptions from phone calls saying 'we need this in half an hour'; 'can you email me this?'; 'I want that'; so yes, I'll miss the clients in some ways, but in other ways I won't."

The level of legal analysis at the Commission is a departure in itself, she adds. "Of course, in the profession, you may be working almost at getting around the law, achieving what the clients want with the law really being slightly sidelined, but

here it's crucial that you are getting to the nub of it. It's definitely more in-depth study. It's really interesting; I'm enjoying that, I have to say."

Naturally she will retain plenty of contacts with practice. "When you have been at a firm for 34 years you make a lot of friends, and I will see people regularly – I've already got plans to pick some ex-colleagues' brains on various aspects of the compulsory purchase paper.

I anticipate that I will still have a lot of dealing with the profession; I think

it will be essential in my role moving forward to make sure that I continue to hear what they are doing at the coal face, and that we take account of that. Likewise if there is anything that has been missed in the paper – for example, it says it is not going to touch airspace or wayleaves, which the profession may have views on – whether these should be looked at."

Legislative priority?

I am interested to know how the Commission goes about tackling a new project. "There is a detailed analysis of what the law currently is," Drummond replies. "We all try to get to grips as far as possible with what the law is, and have discussions with the people involved. We consider who might be impacted by changes in the law. We then look at other jurisdictions to see how they deal with things. The results are collated, and a discussion paper is produced and put out for submissions."

Given the differing expertise among the commissioners, to what extent do they each get involved in the others' projects, when reports are signed off by them all?

"Peer review is a big thing here.

There are regular meetings, and as I've just started I've only been to one, but each commissioner's work is focused on and discussed and views are given, so I'm looking forward to getting into things other than property law."

At the end of it all, whether a report is translated into new law is beyond the Commission's control. Positive action in the first years of the Scottish Parliament was followed by a period of more patchy attention to Commission proposals; but much is expected of the new procedure under Holyrood's

Delegated Powers & Law Reform Committee (see *Journal*, January 2015, 22). "It does seem as if the Scottish Government has now grasped the fact there is all this wealth of expertise and wealth of papers that have been produced," Drummond agrees, "and I suppose it's getting the political will to push them forward, but I do sense that there is more impetus now."

Anyone impatient for change might cast envious eyes at the newly passed Insurance Act 2015, implementing a joint report of the Law Commissions for England & Wales and for Scotland – introduced as a bill last July, the same month as the Commissions' report was published. That is understood to have been aided by the influence of then-commissioner David Hertzell, a City solicitor. It too went through (minus one clause) under a special parliamentary procedure for Law Commission bills; in Scotland, another round of consultation would likely have been needed before any parliamentary action.

Drummond claims no more influence than anyone else on the Commission, but concludes: "I'm delighted to have got this job and I'm looking forward to adding, I hope, some different experience to the law reform programme."

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CAROLINE DRUMMOND