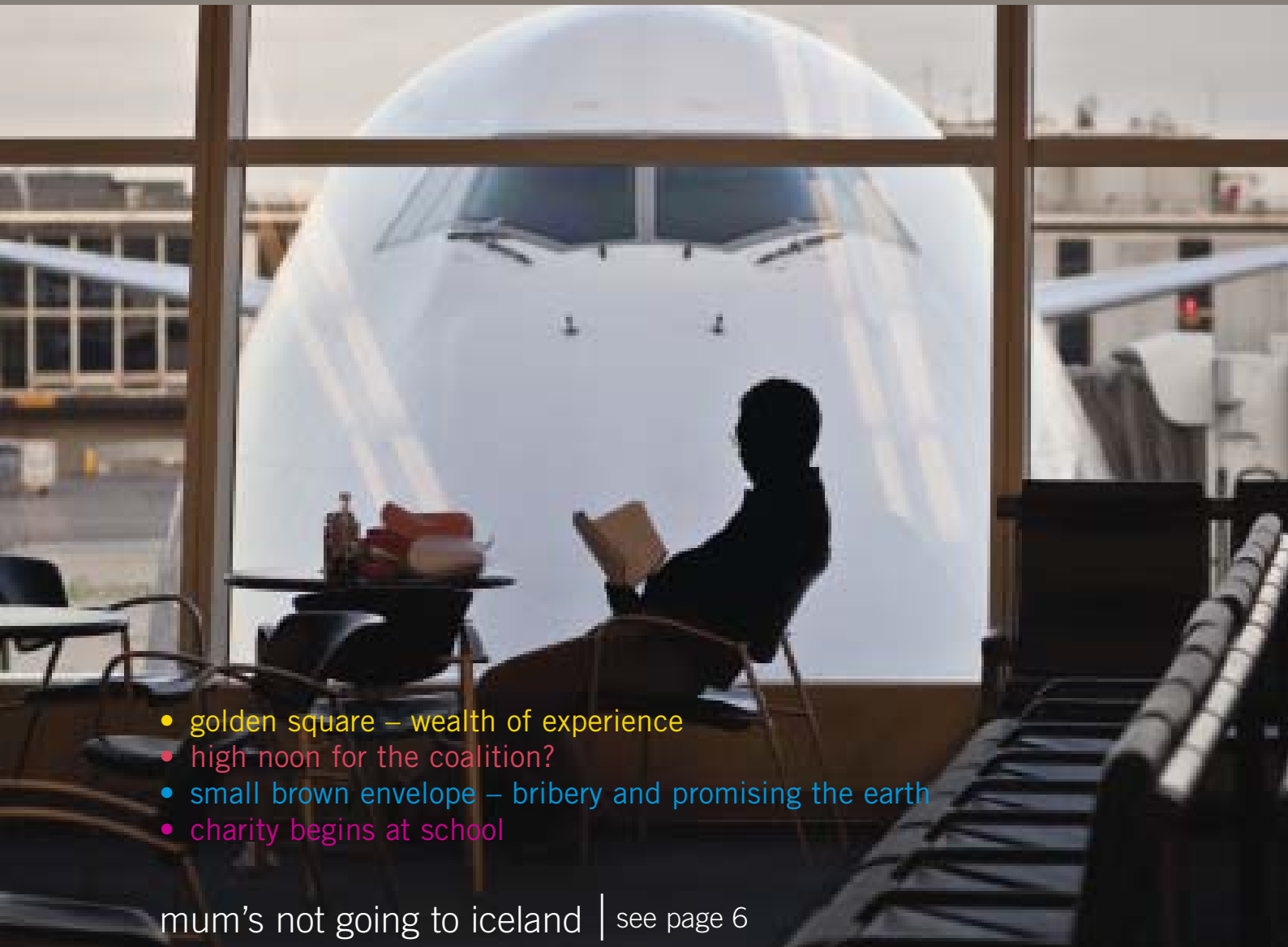


# inform

the magazine of ledingham chalmers LLP • summer 2010

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ledingham|chalmers<sup>LLP</sup>



## introducing...

Some past issues of *inform* seem to have gelled around a common theme. As this summer approached we found ourselves with a surfeit of interesting material so this issue really does illustrate the breadth of our practice. From arbitration to financing football, from social networking to the minefield of tendering along with profiles of two interesting clients in the third sector – Aberdeen Endowments Trust and The Hoy Trust.

It is always a pleasure and a privilege to congratulate colleagues on special achievement and success. Erica Buchan in our private client team has achieved national recognition as Scotland Student of the Year from the Society of Trust and Estates Practitioners as well as passing both her STEP Diploma exams with distinction. In May we were pleased to hear that our family law partner Marion McDonald had been appointed as a Sheriff. This is a part-time appointment

which allows Marion to continue her work as a partner of the firm while sitting on the bench from time to time in the Sheriff Court. Congratulations to Erica and Marion as well as to Julie Hamill, also in our private client team, who has completed a part-time law course and graduated LLB, Stephen McLaren admitted as a solicitor-advocate and Wendy Jappy on her paralegal qualification – and my apologies if I have missed others!

During August we expect to report on our results for the year ended 31 March 2010 and that report should appear in the next issue of *inform*. There is no doubt that like everyone else we continue to feel the draught of recession but the firm is in good heart and looking forward with confidence. As always I encourage you to contact me if you wish to discuss any of the topics raised in this issue – and if I feel that the query is beyond me, I will certainly know a colleague who can handle it effectively!

**David Laing, Chairman**

**david.laing@ledinghamchalmers.com**

## from cologne to constantinople

In May, Cologne was host to the 2010 Europe, Africa and Middle East regional meeting of Lawyers Alliance Worldwide (LAW) a legal network of independent law firms. Representing Ledingham Chalmers was partner Sarah Stuart who reports “Lawyers from Cape Town to Reykjavik and Cleveland to Xiamen converged on Cologne to discuss current hot topics in business. Top of the agenda (predictably) was the economic crisis (including troubles in single currency states). Delegates grappled with the complexities of reflating the economy in a talk from sponsors Bank Julius Bär and had the opportunity to discuss and compare experiences in cross border issues in insolvency, real estate and corporate finance with colleagues from other jurisdictions.

“It wasn’t all work. Delegates had the opportunity to take a rooftop tour (not for the fainthearted) of Cologne Cathedral (which in 1996 was added to the UNESCO list of world heritage sites). Once the tallest building in the world, the remains of the Three Wise Men are traditionally believed to rest there. The Cathedral took over 632 years to

complete (with a break of 300 years): started in the 13th century it was completed in 1890. There must be a claim for delay penalties there!”

As a member of LAW, Ledingham Chalmers can access legal advice for clients in over 150 commercial centres throughout the world. In the increasing globalisation of markets, access to these services is invaluable in meeting the needs of clients doing business abroad. This was the last regional meeting for outgoing chairman Martin Davies of London member firm Howard Kennedy, who leaves the organisation in excellent shape for new chairman, Bill Savarino. Bill, a partner with Washington DC firm Cohen Mohr, will chair the LAW AGM in November in Istanbul.

We will report on the delights of Turkey in a later edition.

**Contact Sarah Stuart –**

**sarah.stuart@ledinghamchalmers.com**

# trust in education

**You may pass Number 19 Albert Street, Aberdeen, home to Aberdeen Endowments Trust, without a thought, but over the years it has come to symbolise the opportunity for many youngsters to improve their prospects by gaining education in times when even basic schooling was reserved to the fortunate few.**

For the past century the Trust has strived to provide the less fortunate in Aberdeen with educational opportunities, most notably through foundations and bursaries to Robert Gordon's College. The Trust also awards bursaries for undergraduate study at Aberdeen University and to local authority school pupils in Aberdeen allowing them to take advantage of opportunities for travel.

While educational opportunities have expanded since it was first created, the Trust remains steadfast in its objective of assisting those in need to fulfil their educational potential.

Chairman of the Trust, Reverend James Stewart explains its origins: "The Trust was established in 1910 to amalgamate and reorganise several older education endowments, and to facilitate the establishment of Robert Gordon's Technical College. The most significant single endowment stems from the legacy of Robert Gordon whose Hospital opened in 1750, 19 years after his death. Hospital schools for the accommodation and education of the poor and the orphaned were common at those times before state funded education.

"Another hospital school subsumed into the Trust opened in 1739 when the Town Council, Brethren of Guild, Kirk Session and Convener Court of the Trades of Aberdeen agreed to erect an infirmary and Poor's Hospital (workhouse) to educate resident children. It evolved into "The Boys' and Girls' Hospital" eventually situated on King Street (former site of the RGIT training facility). In the late 19th century that hospital amalgamated with a number of other charities (including Mrs Emslie's Female Orphan Asylum) to become the Aberdeen Educational Trust. In 1909 a new Trust was formed. The endowments in land were transferred to the Endowments Trust and their city sites and buildings went to the new body of Governors at Robert Gordon's College. The award of Robert Gordon's benefactions became a function of the Trust."

Testament to the benefits of bursary assistance is William Russell, Clerk to the Trust. He attended Robert Gordon's College with the assistance of the Trust and sees his current role in the Trust as putting something back.



Mr Russell explains the support given today: "Currently the Trust supports the equivalent of 59 full fee students at Robert Gordon's through the provision of two types of awards; presentation foundations and assisted bursaries. Those bursaries are awarded after consideration by the Trust of each applicant's performance in Robert Gordon's entrance exams together with their family's financial circumstances."

Mr Stewart and Mr Russell recognise that the provision of education has moved on considerably since the Trust's inception and that the Scheme setting out how the Trust's funds must be distributed may no longer match the needs of today's beneficiaries. They explain: "When the charities which the Trust amalgamated were set up there was no free access to education as there is today. The poorest children would often be constrained from completing an even basic education due to financial pressures. That is no longer the case with the advent of state funded education. That raises the issue of how best the Trust can support those in genuine need; whether that is through bursaries or supporting needy children to develop life skills is something we are considering."

We close with words from Lord Cockburn whilst on circuit in the North East in 1844. Following a visit to Mrs Emslie's Female Orphan Asylum he was obviously impressed: "Nothing with the object of preventing juvenile delinquency seems ever to succeed, but this seems as plausibly calculated as anything." These words may seem reminiscent of a Jane Austen novel and although now dealing with education rather than delinquency, the fundamental aims of bettering lives still hold true for the Trust in the 21st century.

**Contact Aberdeen Endowments Trust at  
19 Albert Street, Aberdeen AB25 1QF**

# wealth of experience

**In June of this year Ledingham Chalmers re-launched its financial services company under the name *Golden Square Wealth Management* to coincide with the return of Colin Morgan as managing director after spending several years successfully developing a similar business for another law firm. The name change reflects Ledingham Chalmers' history in Aberdeen as well as the company's change of focus.**

Colin brings back a wealth of experience of over 30 years during which he has advised clients on wealth management, financial planning and tax mitigation. His entry to the sector came through accountancy and he completed his training as a financial accountant with a large firm in Glasgow. He was first registered as an insurance broker in 1988 and has specialised since then on investment advisory work, investment management for trusts, capital gains tax and inheritance tax mitigation and general tax planning strategies. He speaks regularly at seminars on these subjects.

Reflecting on the progression of his career and his return to *Golden Square*, Colin says: "There was a time when the insurance desk of a law office handled household insurance and the odd life policy but this has changed dramatically with, first the increasing popularity of endowment policies to secure mortgage repayment and more recently a broadening in the range and sophistication of investment products. Add to that the fact that products and services can be bought on demand on line and you have some idea of the changes we have seen over 30 years.

"I have seen *Golden Square* adapt its business offering accordingly and the recent name change is a logical step to reflect the change. We are now much less focused on the sale of products and concentrating almost entirely on providing services – evaluating a client's individual requirements and delivering advice. This change of emphasis runs in parallel with a helpful change in the way we are paid which is no longer linked to commission on financial products. The fundamental point for me, however, is that we are taking a much more holistic approach so that, rather than simply selling a policy to secure repayment of a loan, we are looking at a client's overall investment plan, income and capital requirements and tax consequences."

*Golden Square Wealth Management Limited is authorised and regulated by the Financial Services Authority and is a subsidiary of Ledingham Chalmers LLP*

Colin will shortly be joined by another specialist with long experience and a proven track record in the sector. John McCafferty, a chartered financial planner, began work in the pension industry in 1967 and worked for a number of insurers until he established his own business in 1978. He sold that business in 1991 to a major insurance broker and will join *Golden Square* from PSFM where he is a principal. John is a recognised Trust and Estates Practitioner and is a specialist in pension matters which is reflected in his chairmanship of the Church of Scotland Pension Trustees.

Commenting on his imminent move John says: "Retirement planning means different things to different people but generally involves consolidating pension plans and passing assets tax efficiently to the next generations. I am enthusiastic about joining Colin and his colleagues at *Golden Square* to help clients through the pension maze. "Simplification" of pensions was anything but that!"

A final word from Colin: "I am pleased to be back within the Ledingham Chalmers group and delighted that John is joining the team. The team is completed by para-planner Carol Lamb who has 20 years experience of business administration in life companies and our administrative manager Lesley Addison.

"They say it's never too late to accumulate the wealth you should have had... but we prefer to say it's high time you consulted **Golden Square Wealth Management!**"

**Contact Colin Morgan –**  
[colin.morgan@goldensquarewealth.com](mailto:colin.morgan@goldensquarewealth.com)



# UEFA or bust?

**With the fever pitch of the World Cup subsiding and Spain triumphant as campeones del mundi, fans of the beautiful game return to pondering domestic matters: money for new signings, winning the league and a spot in Europe ... But for those clubs which don't get their finances right, the whistle will be blown on their European football dreams.**

"The European football regulatory body, UEFA, has approved historic new regulations which will dramatically change the playing field for clubs participating in European football," explains Ledingham Chalmers' associate Tim Thomas. "Financial fair play is enshrined in these regulations, the core principle being the "break-even" requirement where a club must not repeatedly spend more than its income. Protecting the long term health and viability of European football is a key aim of the regulations."

Tim tells us why these new rules are necessary at all. "For many years football has been hitting the headlines as premier (and lower) league clubs go into administration or sign up to company voluntary arrangements (CVA). In Scotland the rise and fall of Gretna has been well publicised and further south we've seen the recent high profile insolvency of Portsmouth. UEFA reports that almost 50% of Europe's top clubs reported net losses for 2008. Football clubs are commercial businesses and, like so many others, they too have felt the impact of the economic slump."

Beyond the downturn, clubs continue to struggle with high salaries and exorbitant transfer fees, year on year. The new regulations aim to slow this trend by ensuring that clubs cannot simply borrow more money to service these debts. Does this signal the end to the wealthy sugar daddies propping up ailing clubs with loans? It may be welcome news to those clubs which don't benefit from billionaire benefactors but will it level the playing field?

Gordon MacLure, a partner with accountants Johnston Carmichael, who was appointed administrator of Highland League Club, Clachnacuddin FC, recently had a CVA approved to enable the club to survive. Gordon says "On the face of it UEFA are moving in the right direction: clubs can only spend from income they earn, including gate receipts. It remains to be seen how enforceable the regulations will be in practice in harsh current economic conditions. Financial hardship for fans is a real possibility and the expensive season ticket may be the first to go as fans tighten their belts.

It looks like times may get even harder for football clubs. Creditors, like HMRC, are now taking a less lenient approach to payment of outstanding debts which could force some clubs to the wall."

The new regime will be phased in over three years with the break-even requirement coming into force for financial reporting at the end of 2012. Clubs falling short of the new regulations could face sanctions in the 2013/14 season.

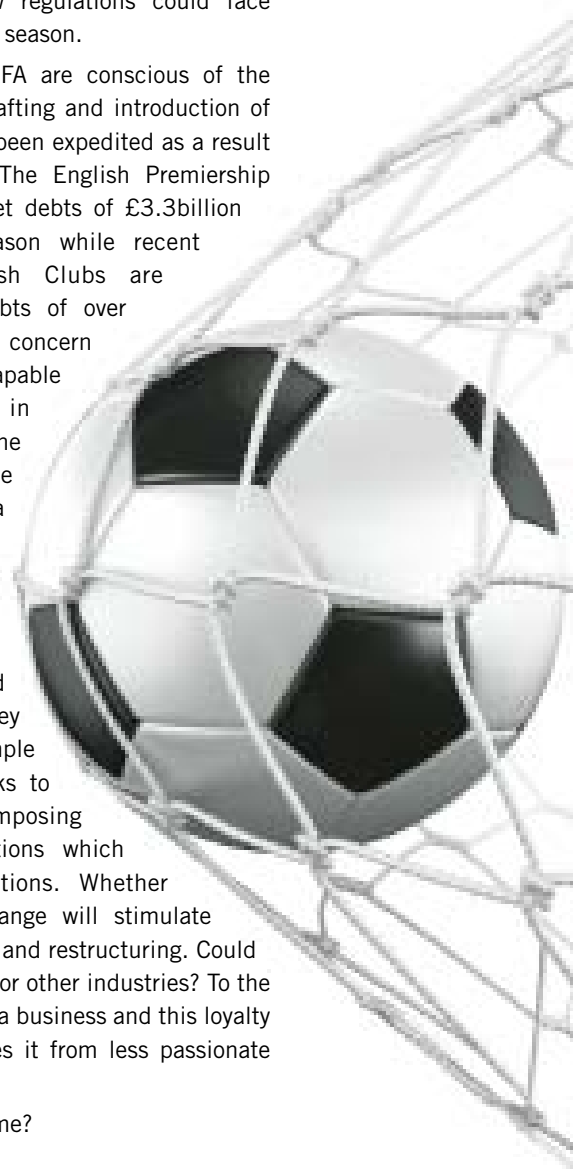
Gordon explains that UEFA are conscious of the global downturn. "The drafting and introduction of the new regulations have been expedited as a result of the current climate. The English Premiership were maintaining total net debts of £3.3billion for the 2008/2009 season while recent reports suggest Scottish Clubs are harbouring combined debts of over £100million. There is real concern whether these clubs are capable of getting their house in order by 2013/14 but the consequences of failure would be unthinkable – a bar from competing in Europe!"

Tim concludes: "Whether these regulations will be implemented as envisaged remains to be seen. They provide a fascinating example of how one industry looks to secure its future by imposing industry specific regulations which overlay domestic regulations. Whether welcome or not, the change will stimulate serious financial planning and restructuring. Could this be a business model for other industries? To the fans football is more than a business and this loyalty and devotion differentiates it from less passionate business pursuits."

Who said it was just a game?

## Contact

**Tim Thomas - [tim.thomas@ledinghamchalmers.com](mailto:tim.thomas@ledinghamchalmers.com)  
Gordon MacLure - [gordon.maclure@jcca.co.uk](mailto:gordon.maclure@jcca.co.uk)**



# int-eruption

**In June 1982, British Airways' Boeing 747 "City of Edinburgh" was en route from London to Auckland when, south of Jakarta, Indonesia, all four engines failed as it flew through a cloud of volcanic ash. Almost 28 years later in April this year tourists and business travellers alike experienced the serious consequences of volcanic ash, at closer hand, following the eruption of Eyjafjallajökull in Iceland.**

While movement in international airspace was severely restricted it was not only stranded holiday makers who suffered but also businesses relying on air travel for the movement of personnel and goods which felt the financial impact.

Although many companies may have assumed that insurance would cover losses arising from volcanic eruptions, Ledingham Chalmers' solicitor Rosalind Barrie comments: "There are clearly different types of policy for business interruption but these may not cover all parties in the supply chain. Risk will generally come down to what is written in your contract and your policy. The supply chain may be long or complex and it does not necessarily follow that all contracts will contain the same terms and conditions and so each party has to absorb its losses in different ways."

Take an example: oilfield drilling is going well for Drillco which is working for Supermajor on Block X. Drillco realises it needs a crucial part within the next week if operations are not to be interrupted. The value of the part itself is a fraction of the day rate. Drillco orders the part from Supplyco in Texas insisting that it is delivered within seven days. Air freight schedules grind to a halt as flights are grounded and passenger flights take priority. The only chance of reaching Block X in time is that a Supplyco rep stands by to hand carry the part at considerable cost.

Rosalind explains how far Supplyco might have to go in these circumstances: "Acts of God and events out with the control of contracting parties are often dealt with in a force majeure clause. In the LOGIC oil and

gas industry conditions, for example, force majeure includes natural physical disaster such as the eruption of Eyjafjallajökull.

"In our example Supplyco will liable for any delays to the drilling timetable. It cannot claim force majeure as using reasonable endeavours to avoid the delay was within its control, and even if personal transport of the part will cost Supplyco considerably more, it will have to absorb that. Only if the failure was wholly outwith the fault and control of Supplyco and it delivers the part late will it not be liable to Supermajor's losses for delay in the timetable."

Generally the consequences of acts of God are that the contract is treated as at an end or performance is delayed until some future date. So what if a contract can still be performed late if the parties agreed that time is of the essence?

In most contracts for construction of buildings and installations for example force majeure has a neutral effect: "Most contracts will have fixed completion dates and if those are missed the contractor will normally have to pay liquidated damages to its client. If a force majeure event delays completion then, subject to any notices which the contract requires to be given (see page 12), the completion date will be delayed. Although the contractor may not have to pay liquidated damages it will not be entitled to any additional costs incurred as a result of the delay (e.g. price increases, transport costs for re-routing etc)."

Caution: In the absence of contractual clauses dealing with force majeure, contracts can still come to an end if they cannot be performed (or if performance is substantially different from what was envisaged) because of an event outwith the fault or control of the parties. So even if there is no force majeure clause in your contract keep watching the skies and looking for alternatives!

**Contact Rosalind Barrie -  
rosalind.barrie@ledinghamchalmers.com**

# high noon for the coalition?

**For the first time in over 30 years the UK has a coalition government between the Conservatives and the Liberal Democrats. While parliamentary coalitions are a rare beast in UK history, business coalitions are formed every day.**

These business ventures commonly take the form of a limited liability company with the parties who provide capital and share risk as shareholders in their joint venture company (“JVC”).

Ledingham Chalmers’ associate Sonia Cameron says that there are many reasons for establishing a joint venture: “Generally one of the parties lacks resources or skills to establish or carry out a project alone. By pooling resources (whether it be finance, personnel, technology or services) with someone else, the joint venture parties can collaborate together to achieve a common goal. We’ve yet to see whether the two political parties have identified that common goal!”

Readers of *inform* will recall the public spat between BP and a consortium of Russian billionaires (AAF) over their JV TNK-BP. Among other issues they disagreed publicly over the payment of dividends, payments to BP (using secondees on the JV staff) and BP’s aversion to AAF’s aims of expanding TNK-BP’s interests outside Russia and the Ukraine. However, the shareholders eventually put their differences aside and reported earlier this year that 2009 had been a “very strong year” for the joint venture.

“Although it is crucial to document the detail of how a JVC will be funded, managed and how shareholders will be rewarded,” Sonia advises, “it is equally important to ensure an effective mechanism for resolving shareholder disputes, otherwise the only outcome for a deadlocked JVC is its liquidation. Even where there are detailed dispute resolution procedures a deadlock may still arise.”

If shareholders cannot agree even using informal dispute resolution processes such as mediation, Sonia describes two common alternatives: “It might sound like something straight out of a Clint Eastwood movie but shareholders often resort to “Russian Roulette” or “Texas Shoot Out”! This is not what it seems: Russian Roulette allows Shareholder A to give notice to Shareholder B offering the choice of either buying its shares at its chosen price or selling its own shares to Shareholder A at the same price. If Shareholder B fails to respond it is deemed to have accepted the offer to sell its shares to Shareholder A.

“The effect of “playing Russian Roulette” is that Shareholder B must either buy Shareholder A’s shares at the price offered or sell its own shares in the JVC at the same price. There are no valuation provisions attached to the share price – it’s based purely on what one shareholder offers to the other to purchase or sell shares in the JVC and it is designed to achieve a realistic price either way.”

Texas Shoot Out is a different story as Sonia tells us: “If a dispute cannot be resolved and both shareholders are interested in buying out the other, they submit sealed bids to a third party “auctioneer”. The party who makes the highest bid wins but this will work only if both parties submit to the process!”

As both of these options effectively mean the end of what might be a successful collaboration, the prospect of the Russian Roulette or Texas Shoot Out scenario might be enough to get shareholders round the table. In any type of alliance, joint venture or partnership the choice of partner is of critical importance – and it is of equal importance to ensure that aims and expectations are aligned or harmonised from the outset.

What advice can we offer the “joint venture partners” at Westminster? There are some parallels with the commercial scenario – ensuring some alignment from the outset and setting the management parameters are obvious, but the funding arrangements are probably the most challenging part. On dispute resolution, however, let’s hope it won’t be pistols at dawn in Westminster!

**Contact Sonia Cameron –  
[sonia.cameron@ledinghamchalmers.com](mailto:sonia.cameron@ledinghamchalmers.com)**



# bidding work

**Sting operations by bogus Arabian sheikhs which catch out the rich and famous certainly sell newspapers! Recently, the Duchess of York, Sarah Ferguson, was caught on camera seeking payment in return for opening doors to her former husband. It is not however necessary to be a celebrity to fall foul of the law. Ledingham Chalmers associate Roddy Cormack and his colleague solicitor Andrew Stott explore some recent developments and what businesses need to know to keep on the straight and narrow.**

The Bribery Act 2010 (“the Act”) is expected to come into force in October this year to bring UK legislation into line with the Organisation of Economic Co-operation and Development (OECD) Bribery Convention which the UK signed up to in 1998. In a recent report the OECD levelled criticism at the judicial handling of the investigations into the allegations of bribery at BAE Systems.

Andrew explains the main features of the new Act: “It brings together the common law offences of bribery and statutory bribery offences under one piece of legislation and applies to all commercial organisations operating in the UK. However, the long arm of the law reaches beyond these shores: if a bribery offence is committed by a person with a close connection to the UK then the organisation can be prosecuted.”

Summarising the crimes under the offence Andrew explains: “It will be an offence to offer, promise or give a bribe and to request, agree to receive or accept a bribe or to bribe a public official. These are not new offences but the Act also creates a new offence: a commercial organisation will be guilty of an offence if a person associated with it bribes another person in order to derive benefit for the organisation.

“While the law previously targeted bribery involving public officials and organisations, it is important to note that the Act now applies to the private sector.”

Andrew gives an example: “A manager, a British national working for UK Company A, pays money in India to a manager (an Indian national but resident in the UK) of UK Company B to ensure that Company B will not tender for a particular project. Here, the two managers and both Company A and Company B are guilty under the Act. If the bribe were given with the connivance of a director of Company A, this director will also be guilty under the Act if he or she is a British citizen or is UK resident. But the conduct need not be so obvious to be caught by the Act – offering inducements to create access to decision makers could constitute an offence.

Andrew warns not to forget that individuals must also comply: “Committing an offence under the Act brings with it harsh penalties. Companies will be subject to a fine but the severity of the fine is not yet clear. By way of comparison, the German engineering giant, Siemens A.G. was fined \$1.6 billion in 2008 under the US Foreign Corrupt Practices Act. Where an offence is committed by a commercial organisation with the consent or connivance of a senior officer, that person can be convicted of a bribery offence: that’s up to ten years inside on top of any fine for the individual and the company!”

It is a defence to a bribery charge if an organisation can demonstrate that it had adequate procedures in place to prevent its people from undertaking illegal conduct. What constitutes “adequate procedures” has not been clarified but the Government is required to provide guidance on this matter.

Andrew suggests what businesses might do to protect themselves: “A good starting point is to develop policies and procedures on gifts and hospitality and other activities that could be (mis-)interpreted as greasing the wheels of a commercial transaction. Businesses should develop anti-corruption guidance for all personnel with compulsory training. Keeping that guidance and training up-to-date and relevant is critical and may assist the defence of a charge.”



# promising the earth

**Another important legal development for those involved in the bidding world is the decision in BSkyB Ltd v Electronic Data Systems Ltd. It dealt with the consequences of pre-contract representations.**

Roddy Cormack explains: “EDS, now part of Hewlett Packard, submitted a tender to BSkyB to deliver a new customer relationship management system. The tender contained a number of statements from EDS to BSkyB as to its available resources, technological capabilities, time required for performance and likely cost to deliver the project.

“The time period for delivery under a contract is often as critical as the cost. BSkyB had made it clear to tenderers that the project had to be completed within specified timescales and EDS won the tender on the back of their statement that they could meet those timescales. Completion of the project was delayed substantially causing BSkyB significant losses (which they valued at £700million).”

BSkyB's claim fell under a number of heads, most importantly fraudulent and negligent misrepresentation. Fraudulent misrepresentation is where one party makes a statement it knows to be false in order to induce the other to enter into the contract. Negligent misrepresentation occurs where an untrue statement is made carelessly but it is not known to be false. Either form of misrepresentation (fraudulent or negligent) can give grounds for bringing the contractual relationship to an end. In Scotland, the law is not clear as to whether negligent misrepresentation can give grounds for a claim of damages - fraudulent misrepresentation, however, definitely does.

The Court decided that EDS had committed fraudulent misrepresentation in relation to its capability to deliver the project on time. In particular, the Managing Director of EDS's customer relationship management practice had made representations as to when the project could be delivered. He did this on the basis of what he thought BSkyB wanted to hear rather than on a proper analysis of how long his company would take to deliver the work. The Court said that these statements were made dishonestly and that, as BSkyB had relied upon them, EDS was liable for any losses which flowed from the misrepresentations.

Roddy explains that anyone tendering needs to carefully consider any statements made in its bid: “Any contractor tendering for work needs to ensure that it can justify any statement about its ability to

deliver a project within timescales. For its own protection it should have supporting reports and analysis. If the contractor cannot later substantiate the representation, it may be exposed to claims for negligent misrepresentation or, at worst, if those controlling the company knew that the representations were patently not true, fraudulent misrepresentation.”

One final thought: The contract between EDS and BSkyB contained a contractual limitation of £30million (remember BSkyB sued for £700million). By claiming fraud, BSkyB was able to argue that the contractual limitation would not apply which left EDS open to unlimited liability in respect of any representations made in tender documents. It is possible to exclude liability for negligent misrepresentations made prior to the contract if the contract contains an “entire contract clause”.

Roddy explains the effect of such a clause: “If a contract contains an entire contract clause then all terms of the contract are included in the contract. Parties cannot seek to widen the contractual terms to include other material not included in the contract document itself. Contracting parties can also seek to extend the terms of the entire contract clause to exclude liability for any negligent (not fraudulent) representations made prior to the contract.”

So the moral of our two work stories is this - be careful what you do and what you say as it may well come back to bite!

## Contacts

**Roddy Cormack –**  
[roddy.cormack@ledinghamchalmers.com](mailto:roddy.cormack@ledinghamchalmers.com)

**Andrew Stott –**  
[andrew.stott@ledinghamchalmers.com](mailto:andrew.stott@ledinghamchalmers.com)



# business schools

**It seems that you're never too young to learn business skills! For the past three years, Scottish charity Blythwood Care has been encouraging primary schools across Scotland to take part in its Schools Enterprise Challenge to raise funds. Each participating school receives a starter fund of £20 and is challenged to use its own fundraising ideas to multiply this over a four week period. The Challenge also offers teachers a useful outlet for curriculum activity under several headings.**

Funds raised from this year's Challenge are helping Blythwood's partner Sathyam Ministries provide specialist teacher training in Kerala, India, focused particularly on delivering education to children with special needs. This facility is the only one of its kind in the state and as such is invaluable in a place where many people do not have access to even the most basic amenities.

Ledingham Chalmers Charitable Trust supported the Challenge again this year along with the Souter Foundation, IBM and AF Cruden. The sponsors provided the £20 floats to kick start the schools' fundraising activities as well as the prize money awarded at the final. Ledingham Chalmers Chairman, David Laing, said "We've been working with Blythwood Care since 1982 and we were delighted to get involved in the Schools Enterprise Challenge for the third year running, especially for such a worthy cause as the specialist teacher training programme".

At the end of the fundraising period, each team prepared a report on their activities covering how they solved any problems, how they worked together, how they came up with original fundraising ideas

and most importantly how they financed their activities using only £20. The reports were circulated to a panel of judges comprising representatives of each sponsor, including Ledingham Chalmers' associate, Sonia Cameron. After much deliberation, seven schools from Inverness, Dingwall, Dumfries, Dornoch, Stonehaven, Lothian and Lewis were invited to attend the final event in Perth to give their presentations.

Sonia explains: "Using a combination of PowerPoint® slides, props and samples of their wares, pupils from each finalist school gave a 10 minute presentation on their fundraising activities. They all took the presentation and the Q&A session that followed in their stride without much evidence of nerves. I was amazed at some of the ideas the children had developed. One school invited parents and relatives to a World War II afternoon, dressing up in clothes and uniforms of that time and providing entertainment and refreshments. This activity also served as a valuable history lesson to the children. One or two schools combined their fundraising activities with their school's own initiatives such as working towards achieving the "Green Flag" which is an international environmental award for eco-schools. One school made bird tables and bird feeders entirely from recycled materials."

The overall prize was won by Sanquhar Primary School from Dumfries who raised a total of £789 – not bad from a starter of £20! The schools which took part in the Challenge raised over £3,000 in total for the project. Hilton Primary from Inverness actually handed back their cash prize to Blythwood and offered this to purchase specific gifts for needy children.

James Campbell, Chief Executive of Blythwood Care is delighted with the response from Scottish schools, "We get a great response to the Challenge from schools throughout the country. We're very grateful to all schools for the time and effort they put in, particularly when fitting the four week event into the school curriculum. The children have come up with some fantastic fundraising ideas and I have no doubt that we've met some entrepreneurs of the future!".

Blythwood Care is a Christian charity that provides humanitarian aid, disaster relief and development and social aid across Europe, Africa and Asia.

**Contact James Campbell, Chief Executive –**  
[james.campbell@blythwood.org](mailto:james.campbell@blythwood.org)  
[www.blythwood.org](http://www.blythwood.org)



# social networking

**In an age where every thought, feeling and opinion can be published for immediate dissection by a willing audience, professional boundaries have become increasingly blurred. Comments made in the heat of the moment about an employer or colleague are increasingly leading to difficulties in the workplace. But while employees are told to exercise caution in what they post in cyberspace, employers should also take care in how they respond to perceived transgressions by their staff - or risk litigation.**

There are generally three ways in which an employment contract can be brought to an end – by mutual agreement, by resignation of the employee; or by dismissal by the employer. Where once everyone was clear about what amounted to misconduct and employees wrote polite letters tendering their resignation, employers now have the opportunity to interpret an employee's intentions by what they post on social networking sites - and then make an appropriate judgment.

Most employers recognise that they won't be an employee's closest confidant. Despite that, the expectation is that an employee will at least advise an employer when he or she is resigning. But what if an employer gleans this information from a Tweet already read by hundreds, if not thousands, of others? And what if said employee is a key cast member of a well known TV soap? That was the situation faced by Hollyoaks producers when they read a post by Hollie-Jay Bowes advising fans that she was leaving the show. The actress was reportedly dismissed.

Many may have sympathy for the producers' hasty decision, but Ledingham Chalmers' employment solicitor Veli-Matti Raikonen cautions: "Where ambiguous language has been used, the courts will approach matters by deciding whether it was the intention of the individual to resign; whether the words used were understood as a resignation; or whether a reasonable listener would understand the words as resignation. Ambiguous comments made by individuals on social networking sites, such as those made by Hollie-Jay Bowes, may not always be construed strictly – context is clearly important. Wrongly interpreting an employee's words may result in a finding of unfair dismissal".

Negative comments by employees about their employer on social networking sites are a fertile ground for disputes. With emotions running high on both sides, employers need to be careful that an employee's words are taken in context and the appropriate weight is given to them.

Take the example of the young office worker who posted that her job was "boring". Her bosses interpreted her comments to mean that she was not happy at her job and dismissed her. Her response was that it was currently boring but she knew that in time she would be given more challenging tasks. "In instances where employers are unclear about the true nature of comments, written clarification should be sought to remove confusion and avoid any unnecessary employment law disputes" advises Veli-Matti. Comments that damage the reputation of the company or disclose confidential information could amount to gross misconduct. However, an idle post after a difficult day may not.

Despite the pitfalls, it's not all bad news for social networking in the employment arena. A recent survey has shown that social recruiting (recruitment via social networking websites such as Twitter, LinkedIn and Facebook) is, at some companies at least, beginning to eclipse traditional forms of recruitment. Employers are reported to be increasingly using social networking sites to recruit and vet prospective employees to save time and cost. Candidates too are embracing the new approach. Social recruitment does however call for a more sophisticated and professional approach to social networking. Employers recruiting on social networking sites are likely to check a candidate's online profile and do not expect to see negative comments about colleagues, inappropriate photographs or evidence of illegal activities.

Despite technological progress, the age old adage "think before you speak" remains as relevant today as ever - provided you also "think before you tweet!"

**Contact Veli-Matti Raikonen –  
vmr@ledinghamchalmers.com**



# sit up and take notice

**How to prepare and issue a valid notice under a contract is not necessarily as simple as it seems. If you want to terminate a lease the chances are that your lease specifies some kind of formal notice. If you want to demand a payment under your construction contract you may well have to give formal notice to the main contractor. While in the past notices were often treated as a mere formality, in today's environment the consequences of getting a notice wrong can have significant consequences.**

Does it really matter if a notice is not quite correct in terms of the contract or legislation? Surely it is the substance of the notice and the fact that it is communicated to the required parties that is important? Apparently not. Take for example the termination of a lease. If the lease states that written notice must be given by a certain date and that date is missed, the lease will likely continue, along with the obligations to pay rent, carry out repairs etc. The fact that everyone may have been aware that one party wished to terminate the lease is not enough if the contractual requirement is to issue notice timeously and effectively.

There are a number of ways in which a notice can be invalid, explains Ledingham Chalmers associate Karen Cameron. "The most obvious problem is where no notice is issued at all. Many contracts now require a notice to be issued before rights are enforceable such as the right to be paid under construction contracts. Once confined to the construction industry this practice is spreading to other sectors and types of contract. In such cases payment can be legitimately withheld until the correct notice is issued in the correct manner."

Recognising the need to issue a notice is not however the end of the story. As Karen points out, "A contract or legislation may set out who should receive the notice and when and how it is to be served.

A mistake with any of these essential details could be fatal." It is particularly important to check where a notice is to be served and on whom. Legislation often requires service to be effected on a company's registered office, which may be different from its business address. Similarly, a contract may stipulate that service must be made on the company secretary so that service on the managing director or a familiar name at the company is unlikely to be sufficient.

The method of serving a notice must also not be overlooked. In a decision which surprised many solicitors, the Court of Session recently stated that when legislation requires service of a notice by recorded delivery, personal service by Sheriff Officers is not adequate. In that case a landlord wished to issue a pre-irritancy notice to its tenants. There was a postal strike and the landlord instructed Sheriff Officers to serve the notice to ensure it reached the tenants timeously. The Court of Session however found that the legislation was unambiguous in its requirements and the fact that the notice had been brought to the tenant's attention was not enough to override the statutory requirements.

While the Court's decision may seem to overlook commercial realities, it is a timely reminder to check the contractual and legislative requirements for the service of notices. The safest course is always to comply with the requirements.

The general approach of the Courts is to insist upon strict performance of the contract requirements if the notice is to stick and, as ever, ignorance is no excuse! The requirement to issue notices may seem an unnecessarily fussy administrative burden, but in today's economic climate getting the notice "right first time" closes off one less avenue for dispute, saving both time and money.

**Contact Karen Cameron -  
[karen.cameron@ledinghamchalmers.com](mailto:karen.cameron@ledinghamchalmers.com)**



# caveat arbitrator

**7 June 2010 marked a momentous day in the history of dispute resolution in Scotland when the Arbitration (Scotland) Act 2010 came into force and Scotland finally got its long awaited codified system of arbitration. This was almost 20 years in the making but will we see a difference?**

Ledingham Chalmers' partner Sarah Stuart summarises the state of the law prior to June: "Trying to find the law relating to the conduct of arbitration in Scotland was like a treasure hunt. The law was found in statutes from the 1970s and 1990s and in case law dating back to 1207! Despite this miscellany of sources, arbitration had been used extensively in construction disputes until 1998 when a short form of dispute resolution called adjudication became mandatory in construction contracts. This almost eradicated arbitration from dispute resolution in the construction sector."

"It was difficult to see how arbitration might survive that near fatal blow" Sarah explains "but there was some light at the end of the tunnel. Following Lord Gill's review of the civil court system we wait for what Lord Gill described as our "Victorian system" to be reformed so that access to justice is efficient, effective and at reasonable cost. Is this where arbitration can step in with the brand new Act?"

In 1996 the Arbitration Act came into force in England while Scotland, which likes to think it does everything first and best, seemed left behind. We may however have been wise to wait.

Sarah selects some highlights where the 2010 Act deals with issues omitted or unclear in the English Act and where the intervention of the Courts was required: "Confidentiality is key to dispute resolution: no-one wants to air their dirty laundry in public if they can avoid it! Scottish drafters were ahead of others in providing clear practical protection of parties' confidentiality and privacy within the four corners of the legislation. Where the arbitration clause in a contract does not state which law governs the arbitration, the 2010 Act provides that the law of the place (seat) of arbitration governs procedure regardless of the law governing the contract. The 2010 Act also gives the arbitrator the power to correct clerical errors in his award.

"The text of the 2010 Act sits squarely with international UNCITRAL rules relating to arbitration and the New York Convention on the enforcement of foreign arbitral awards.

If any of these rules change, the Scottish Government can make consequential changes to the 2010 Act by an expedited simplified procedure. That allows the 2010 Act to remain in step with international developments in arbitration. The Act and its accompanying set of rules (some applying to every arbitration and the others applying unless parties contract out) set out all that is required for the conduct of arbitration in one place. That is unique."

And what of Scotland as a forum of choice for international arbitration? Sarah comments: "Traditionally the seats of arbitration which excelled were chosen for their neutrality (such as Stockholm, Zurich or Vienna), or because they were major commercial centres (London, Paris or Singapore)."

What has Scotland to offer? "We have excellent legal personnel educated in a mixed common and civil law system which draws on both the English common law and Continental civil law systems. Like London we are geographically placed between East and West and (with some exceptions) speak pretty good English (being the common language of arbitration)! Scotland, although part of the UK is actually perceived as being more neutral than London. We have a judiciary and legal institutions who are receptive of alternative dispute resolution, the greater use of which is advocated by Lord Gill in his review. And above all else we have world class legislation designed for fast and cost effective dispute resolution!"

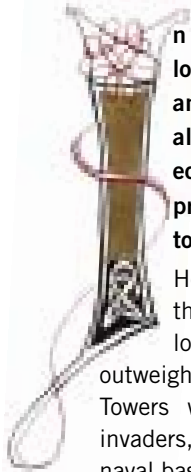
It seems that Scotland has more to offer than golf, whisky and great people – but that helps!

**Contact Sarah Stuart –  
[sarah.stuart@ledinghamchalmers.com](mailto:sarah.stuart@ledinghamchalmers.com)**





## island a-hoy



**In Norse mythology, the island of Hoy is the location of the eternal battle between Hedin and Högni. Today Hoy is fighting an altogether more familiar battle between economic and demographic viability and the protection of the environment. Leading today's battle for Hoy is The Hoy Trust.**

Hoy, the second largest of the islands forming the Orkney archipelago, may be only 11 miles long and five miles wide, but its reputation outweighs its size. In the early 19th century Martello Towers were built on Hoy to repel Napoleonic invaders, long before the island became home to the naval base for the main British fleet in both the First and Second World Wars. The Hoy of today is, however, a more serene place and attracts many visitors, from climbers aiming to conquer the Old Man of Hoy to birdwatchers and those wishing to enjoy the serenity of the beautiful Rackwick valley. The management and conservation of these outstanding natural resources is the role of The Hoy Trust.

The Trust's Chairman, Dr Tony Trickett MBE explains how it all began: "In the late 1960s Malcolm Stewart, who was the laird of 24,000 acres on Hoy wanted to put his estate into trust. He initially offered it to the National Trust for Scotland but the maintenance bill was considered prohibitive and the offer was refused. Not giving up, he set up a local trust himself and The Hoy Trust was born in 1973."

Along with the task of conserving, improving, administering and managing the estate as an area of outstanding natural beauty and wild life, the Hoy Trustees were directed to use the estate funds for the benefit of the inhabitants of Hoy as a community. No mean feat considering a local headline at that time read "£250,000 needed to save Hoy"!

As Dr Trickett explains, financial difficulties continued throughout the 1970's with "the Trust facing near bankruptcy after paying for necessary repairs and improvements on the farms and crofts on the estate." The financial situation was ironically

exacerbated by the sale of land to tenants under new crofting laws, which generated only modest capital receipts while reducing an income stream. After a sale of land to the Royal Society for the Protection of Birds in 1979, the Trust slowly clawed its way back from its financial difficulties and began focusing on forward looking projects.

One of the more notable projects successfully completed by the Trust was the restoration of Burnmouth in Rackwick, which is now used as a bothy and as a camping ground. These facilities are provided free of charge and have proved popular.

In addition to conservation, the Trust remains mindful of its obligations to the local community, including the provision of housing. Despite financial difficulties, the Trust refuses to sell derelict or vacant cottages for use as holiday homes. Dr Trickett explains the reason for this policy: "Firstly this would reduce the number of properties available to the local population and secondly, because the housing stock is small and finite, the price of property would quickly rise well above that which local people are able to afford." Trust properties are sold to sitting tenants who wish to remain in their island homes.

The Trust is expanding its offering as Dr Trickett explains: "As well as supporting the island community by sponsoring local events and good causes, we continue to promote natural regeneration, expanding the provision of paths, stiles and picnic sites for the public and increasing our support for ecological tourism. The Hoy Outdoor Centre allows school children to enjoy the unique experience of orienteering activities."

With its original goals firmly in focus, the Trust is looking forward to developing new projects to benefit Hoy indefinitely – like the epic battle between Hedin and Högni.

**Contact: The Hoy Trust,  
Rehaurie, Harray, Orkney KW17 2JR**



# key

**Ledingham Chalmers LLP** is a regional law firm with a national reputation and, with offices in Aberdeen, Inverness and Edinburgh, is one of the largest full service firms in North and North East Scotland.

Key features are the emphasis on long term client relationships and a high level of partner delivery. The firm's development has tracked Aberdeen's emergence as the capital of the European oil and gas exploration and production sector and as a centre of excellence for professional services.

Ledingham Chalmers has a strong focus on those business sectors which drive the regional economy – agriculture/food/fisheries, energy (both oil and gas and renewables), construction, leisure and tourism, and education – and an international outlook which reflects its involvement in the international energy sector.

The Inverness office has a strong emphasis on supporting public sector clients while the Edinburgh office houses a niche litigation practice advising public authorities and insurers.

In addition to the usual range of corporate, business law and private client services, the firm's specialist work areas include agriculture, construction, energy, health & safety, insolvency and planning.

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72	DELAYED
34	DELAYED
4	DELAYED
9	DELAYED
10	DELAYED
3	DELAYED
2	DELAYED
1	DELAYED

**Aberdeen**

Johnstone House  
 52-54 Rose Street  
 Aberdeen AB10 1HA  
 t: 01224 408408  
 f: 01224 408400  
 e: mail@ledinghamchalmers.com  
 Residential Property:  
 01224 632500

**Edinburgh**

Crichton House  
 Crichton's Close  
 Holyrood  
 Edinburgh EH8 8DT  
 t: 0131 200 1000  
 f: 0131 200 1060  
 e: mail@ledinghamchalmers.com

**Inverness**

Kintail House  
 Beechwood Business Park  
 Inverness IV2 3BW  
 t: 01463 667400  
 f: 01463 713755  
 e: mail@ledinghamchalmers.com

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

Design + Print: ramsaygillies@bnternet.com



ledingham|chalmers<sup>LLP</sup>