

# inform

the magazine of ledingham chalmers LLP • winter 2011



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- celebrating 20 years in the Highlands
- dissolved companies – getting something out of nothing
- SDLT – let the buyer beware
- good news for developers – planning gain relief

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## introduction

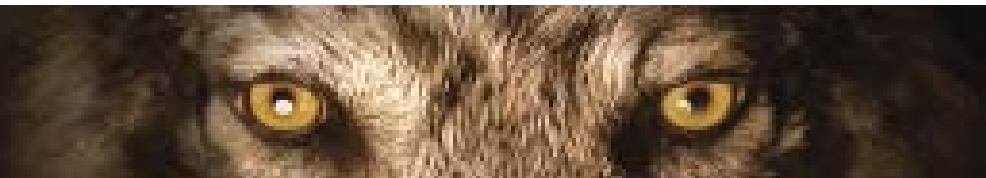
This issue of *inform* illustrates the breadth of legal practice here at Ledingham Chalmers and introduces some of the interesting people who work here. During 2011 we marked 20 years of service to the business community of the Highlands and Islands – it seems only yesterday that we took a lease of top floor offices in Academy Street, since when we have moved to the busy Beechwood business district. We have also traded under the Ledingham Chalmers name for 20 years during which that name has developed an excellent national reputation within Scotland and beyond.

As many readers will know, I will step down as the firm's chairman on 31 December when my colleague Jennifer Young will take the helm. This gives me the opportunity to thank many people for their strong support to me personally over my years in the "chair". I will remain with the firm as a partner and am confident that the firm and its people have a bright future.

I do hope you enjoy reading this issue and, if you are reading a paper copy, please let us know if you would prefer to receive *inform* electronically.

**David Laing, Chairman**  
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## wild at heart



**For the fourth year in succession, a Ledingham Chalmers' team took on Wildhearts' Wolftek Challenge. Described as one of '9 Events Everyone Must Do' by Men's Fitness Magazine, the Wolftek is an epic 45 mile walk through the night from Forres to the Cairngorm Mountain passing through Lochindorb where the ghost of the Wolf of Badenoch (according to local legend) is said to roam.**

Participating for the first time, Ledingham Chalmers solicitor Lianne McPherson tells us; "This was one of the most physical and mentally challenging events I have ever participated in. Last minute preparation was a toast to the Wolf of Badenoch and a warm up to the Proclaimers' I Would Walk 500 Miles! So many lives would be transformed by the money raised by the Wildhearts that we were so determined to finish. We were not to be defeated by darkness, fatigue, relentless rain, sore legs and blisters or the howl of the Wolf of Badenoch."

Wildhearts provide micro-loans to people in Ghana to start up their own micro businesses to work their own way out of poverty. When the micro-loan has been repaid, it is then re-lent to others in need.

Ayisetu Osman from Sawla, northern Ghana who runs a shop selling soft drinks has benefitted from a Wildheart's micro-loan. Prior to receiving a loan from Wildhearts, Ayisetu could not afford to feed her family or send her children to school. Shortly before receiving her micro-loan, her husband left with their three children because he said she could not look after them properly. With the help of a micro-loan of £240, Ayisetu purchased a fridge to store "ice water" and with such a high demand for chilled drinks, Ayisetu's business went from strength to strength and she now has her children back. Ayiseta has plans for expansion as she explains "My profits quadrupled overnight. Now thanks to my increased profits, I can provide food for my family and send my children to school. Next, I hope to expand my range of soft drinks to attract more customers".

This year's team have raised £2,310 adding to the £17,000 raised since 2008 (including donations from Ledingham Chalmers' Charitable Trust) all contribute to many lives like Ayisetu's being transformed every year.

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# stone cold success

For the last two years, Ledingham Chalmers has sponsored curling skip Jackie Lockhart and her team, Team Lockhart. For those that are not avid followers of curling, Jackie is one of Scotland's most successful female curlers having competed in four Olympic Games, ten World Championships and 11 European Championships. She competes regularly at home and abroad. *inform* caught up with Jackie before she sets off for a big international competition in Canada.

In terms of historical pedigree, forget football as Scotland's national sport. The home of golf may be St Andrews but the Romans arguably introduced that sport to the world. Curling, a sport involving the throwing of lumps of rock along a sheet of ice, does however appear to have a uniquely Scottish heritage believed to have originated as long ago as the sixteenth century. Curling spread worldwide with Scots emigrants making it a popular sport in Canada, USA, New Zealand and elsewhere.

Curling has developed from the early days into a highly competitive Olympic sport. It is also a sport in which Scotland has seen incredible success at European, World and Olympic levels.

A regular wearer of the Scottish team shirt is Jackie Lockhart. She has already won Silver at a European level and Gold at the World Championships. Not content with that, Jackie and her team mates Karen Kennedy, Kay Adams and Sarah MacIntyre are building up for the Scottish Championships early next year. The Scottish Championships are the play-offs to decide who will represent Scotland at next year's World Championships.

Away from the ice rink, Jackie's day job is Document Control Lead for oil company Shell UK Limited in Aberdeen where she has worked for the last 22 years. "I'm lucky to work for an organisation like Shell who are very flexible when it comes to me disappearing off to compete in international competitions. Without the support of Shell (and my family of course!) it would be very difficult for me to compete at an international level."

The extent of Jackie's commitment to competing at the highest levels should not be underestimated. In the run up to the 2010 Olympic Games in Vancouver she had to take

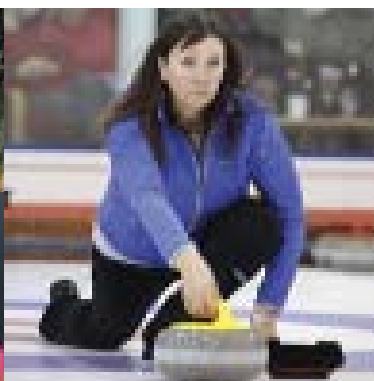
an eight month sabbatical from work so that she could go out to Canada to train with the rest of the Olympic squad full time. Even in non-Olympic years training and competing is non-stop.

There is also a financial commitment as Jackie explains. "When you are taking part in competitions at home and abroad the costs rapidly mount up. You need to factor in entry fees, travel and accommodation costs as well as ensuring that all your equipment works. There is no funding from the Institute of Sport this year and so the sponsorship we are given is critical in terms of our ability to continue as a team. As a consequence we are very grateful for the support we've received from Ledingham Chalmers and our other sponsors – particularly in the current economic climate."

Team Lockhart narrowly missed out in the Scottish qualifiers for the European Championships this year but are still hopeful for (and focused on) success at the Scottish Championships early next year.

As a warm up to the Scottish Championships, the team is flying out to the Sunlife Grand Slam Championships in Canada. The Grand Slam, like all curling championships in Canada attracts spectators in their thousands. "It's a different world over there" Jackie remarks. "Curling fans in Canada are really fanatical and you get a real buzz out of competing in Canadian arenas. It's a great experience for us as well as being really valuable preparation before the Scottish Championships."

**We wish Team Lockhart continued success. If you are interested in supporting Team Lockhart, Jackie would be delighted to hear from you. Please contact her on: [Jackie.lockhart@shell.com](mailto:Jackie.lockhart@shell.com)**



# partners in debt

Joining a business partnership can be an exciting opportunity with the prospect of participating in the management of a business and, hopefully, the profits! In the heat of the moment, however, there are some key risks which a new partner might overlook when weighing up the risks of assumption to partner.

Ledingham Chalmers associate, Rebecca Riddell illustrates these with an example. Smilie was the last surviving partner of Dentists R Us, a successful dentistry practice. Partners had come and gone but the business had always traded as Dentists R Us. He carried on the business as sole proprietor until, in 2005 with his retirement looming, he decided to assume Payne and Savage as partners. Both were delighted. Neither thought to check the business accounts or draw up a partnership agreement. Between 2005 and 2010 all three traded as Dentists R Us. In 2010 Smilie retired.



The parties agreed that Payne and Savage would pay Smilie the sum of £200,000 by instalments to pay out his capital interest in the business. While Payne and Savage were pleased to see Smilie go, they recognised the goodwill that he had built up and decided to continue trading as Dentists R Us.

All was well until Dentists R Us received a claim for outstanding contributions to a pension fund which the former partners had established but to which they ceased contributing long before 2005. While Smilie had a vague recollection of the contributions, it was news to Payne and Savage. They immediately ceased payments to Smilie on the basis that he had failed to disclose the liability to them. Smilie retaliated by raising an action against Payne and Savage for his capital repayments on the basis that the Dentists R Us partnership had assumed liability for the debts of the old business ▶.

## bribery update

Readers will recall our Bribery Act overview in *inform* Summer 2010. Since the Act came into force in July this year there has been much commentary on the Act: cue frantic activity within companies to implement (and enforce) anti-bribery policies.

“The Act introduces a new offence of failing to prevent a bribe,” Ledingham Chalmers partner Rod Hutchison reminds us. “While organisations are taking steps to ensure that they have adequate procedures in place to prevent bribery (a defence under the Act), it is clear that the UK Government intends to take a zero tolerance approach to any form of bribery or corruption.”

Rod continues “An initiative for businesses to self report bribery offences has been launched by the Crown Office in Scotland (similar to a scheme operated by the Serious Fraud Office in England). From 1 July 2011, the Crown Office has been accepting reports from businesses who wish to disclose the discovery of conduct within their organisation which may amount to an offence under the Act or under the law prior to 1 July 2011.

The Crown may decide not to prosecute businesses who self report. Instead the matter could be referred to the Civil Recovery unit for a civil settlement (by way of fine). While there are no guarantees that self-reporting will avoid prosecution, the amnesty provided by self-reporting is likely to reduce the risk of serious criminal proceedings (and a criminal record) against an organisation and its officials.”

The initiative is due to run for 12 months and, in order to participate, businesses must submit a report via a solicitor before June 2012. For further information on the initiative or information relating generally to the Bribery Act 2010 contact:

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Payne and Savage were dumbfounded when the court agreed with Smilie.

The court's decision highlights the importance of tying up all loose ends when a partner joins or leaves an existing partnership as Rebecca explains: "The law of partnership is a complex area particularly where third party rights are involved. A change in the membership of

a partnership effectively creates a new partnership, but the business will often continue trading under the same name with no outward changes in order to preserve business continuity."

Rebecca observes that the law of Scotland differs in some respects to the law in England when dealing with transfer of liabilities "In England, there is no presumption (or inference) that, where the whole business of a partnership is taken over by a different partnership – including where a new partnership is created when a new partner is assumed – without paying for the old partnership, liabilities are transferred as well as assets to the new partnership. In Scotland there is an inference that where there is a gratuitous transfer of the business of a partnership - or sole trader - to another partnership, the new partnership assumes the liability for prior debts."

The Court of Session was faced with similar facts in a recent case (Sim v Howat & McLaren). There were four factors in this case which supported the inference that the new partnership had assumed old partnership liabilities: (1) the partnership continued with no outward change, (2) the partners did not keep separate accounts for the old and new partnerships in a way that the old partnership could have been wound up in an orderly manner, (3) any fees paid for work carried out by both the old and the new partnership were not apportioned between the two entities – the new partnership received the benefit of the income and (4) the liabilities were not allocated between the new and old partnerships and the new partnership continued to pay debts out of its receipts. The new partnership had simply continued on where the old one left off and no thought had been given to the fact they were separate legal entities.

Given the complexities of partnership law it is imperative to give proper consideration to responsibilities for liabilities of the business when a partner leaves or joins the partnership. Rebecca points out that the safest course is to complete accounts for the old partnership and start with new accounts for the current partnership. "Old and new partners should seriously consider whether the old partnership should be wound up. There should then be a discussion as to how assets, liabilities and income are to be dealt with.

"In practical terms, however, partnerships are often not wound up on the resignation or assumption of a partner. It is imperative that those joining a partnership are clear as to exactly what liabilities they are taking on.

A well drafted partnership agreement or a deed of assumption should address all those issues so as to avoid any nasty surprises. For example, the former partners might agree to indemnify an incoming partner for old debts. To the outside world (including any third party creditors or suppliers to the partnerships) any incoming partner would be liable for its debts, but the new partner could claim indemnity from the former partners for any old partnership debts."

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# highland score



This year marks the 20th anniversary of Ledingham Chalmers establishing an office in Inverness. Over those 20 years the profile of the Highlands and Islands has changed dramatically, nationally, globally and economically. *inform* talks to Ledingham Chalmers' three Inverness partners, Kirk Tudhope, Fiona Neilson and John Smart, and to local entrepreneur Freda Newton of Jacobite Cruises Ltd to get their personal reflections on how business in the Highlands has developed.

Freda Newton, who has developed an award winning cruise, tour and charter business on Loch Ness was born and educated in the Highlands. Some of her earliest memories date back to the time of the excitement around the construction yards of Nigg and Ardersier during the height of the oil boom.

"It was a time of great prosperity and the wages paid and training given were something never before seen in the Highlands – it gave a huge boost to the Highland economy. The development of the oil fabrication yards was definitely a boom era. I think we have a more stable economy now, quite diverse and therefore less prone to peaks and troughs."

Corporate partner Fiona Neilson agrees that the diversification of the local economy away from a purely oil focus has been a key factor in terms of growth.

"Fish farming and processing, agriculture, food and drink, creative industries and tourism sectors are all still significant, with improvements to local facilities, developments on Loch Ness and the arrival of the Scottish Open all playing their part. Following considerable wind power development over the last 20 years, new opportunities are forecast to come from exploiting marine renewable energy around our coastline, in not only off-shore wind but also wave and tidal power.

"Business opportunities in the energy sector, such as the redevelopment of Nigg and developments in the renewable energy industry genuinely offer the Highlands and Islands a significant role in Scotland's energy future."

John Smart, whose focus is on commercial property work, says that the public sector has also been important in driving the Highland economy forward.

"While we must be wary of becoming overly dependent on the public sector, this should not detract from the importance of its position as a major contributor to the region's ongoing success, not only as an employer and procurer of services but also as a leader in major projects."

This is a view echoed by Freda who particularly notes the role of Highland and Islands Enterprise. "HIE do a great job encouraging and promoting development and building on the basic can-do attitude of local business people."

Kirk Tudhope, who leads Ledingham Chalmers' employment law team across Scotland, recognises another possible positive influence.

"The key has, and will continue to be, attracting talented people with the promise of a challenging and rewarding career while still maintaining a high quality of life. The improvements in facilities in Inverness over this period have



been a real advantage in, helping all of us in the business community to engage people who, in the past, might not have seen the Highlands and Islands as meeting their professional or personal ambitions. Obvious examples are the increase in the range and quality of restaurants and the re-establishment of Eden Court as the primary centre for the performing arts.”

Looking to the future, the importance of UHI’s achievement of university status earlier this year should not be underestimated.

Freda says “UHI, if allowed to fulfil its potential will change the Highlands for the better. It will help retain and attract a younger workforce which will change both the social and the economic dynamic for the region.”

Notwithstanding the potential for building a more vibrant and younger future workforce which the University will bring, John sees a more immediate benefit. “The construction of the new educational campus at Beechwood on the southern gateway to the city will be a significant boost for Inverness. HIE and UHI, along with the other stakeholders involved, have worked very hard to create this opportunity and it is refreshing to see a significant project like this flourishing against such a difficult economic backdrop. The Beechwood development as a whole should create significant business opportunities, not least for the construction sector.”

Aside from its importance for UHI, Fiona highlights the potential for economic growth in the Highlands through the development of superfast broadband. “Given the almost universal acceptance of the ability to do business on-line, geography is no longer a barrier to being successful north of the central belt. Through the internet, businesses based in

the Highlands can sell to a global rather than merely a local market.”

Freda also recognises the importance of the internet; particularly the role played by social media. Freda’s business, Jacobite Cruises Ltd, has a presence on Facebook, Twitter, and YouTube as well as having its own website at [www.jacobite.co.uk](http://www.jacobite.co.uk). “Tools like Trip Adviser and Facebook are hugely important in driving sales at Jacobite. It’s great for customers to have so much power... and also quite frightening!”

Picking up on the importance of customer relations to the success of a business, Kirk highlights the advantage of having an established presence in Inverness. “The challenge we all face, in whatever sector, is to continue to provide services which allow us all not only to compete with, but out-perform competitors who are either not based here, or who are not fully committed to the Highland economy. At Ledingham Chalmers we have been delivering a range of business law services right on the door step of Highland organisations for the last 20 years. We are looking forward enthusiastically to the next 20 years and beyond.”

To mark the firm’s 20th anniversary in Inverness we held an informal celebration at the Kingsmills Hotel, Inverness on 1 September 2011. Many thanks to all our clients who were able to attend and also to the Kingsmills Hotel for helping us have a very enjoyable evening.

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# keeping on track...

In last Autumn's issue of *inform* when we reported to you on our results for the year ended on 31 March 2010, we said that the partners were not anticipating any significant short term recovery. That outlook has been confirmed by reference to both the market generally and our own overall performance in particular.

Our published accounts consolidate the results for both the law firm and its subsidiary Golden Square Wealth Management which together form a group for accounts purposes. From time to time you may see different figures published in business magazines where these have asked for law firm results only. The group turnover for the year ended 31 March 2011 (ie last year) totalled £9.9m which shows a modest 3% increase on the comparative figure for the previous year.

“It remains our intention to grow the firm's business in order to continue to serve our extensive and diverse client base in each of the public, private and third sectors”

Turnover from property work, both residential and commercial, showed increases on the previous year reflecting the recovery in that sector.

Costs during last year were contained at £6.2m which is broadly in line with the previous year. The rate of inflation has however risen and we cannot expect costs to be pegged through the current year.

The group result for last year was a net profit before tax of £3.5m which showed an

increase of 2.5% on the previous year. Modest growth against a background of continuing uncertainty is a satisfactory financial outcome in the current economic climate.

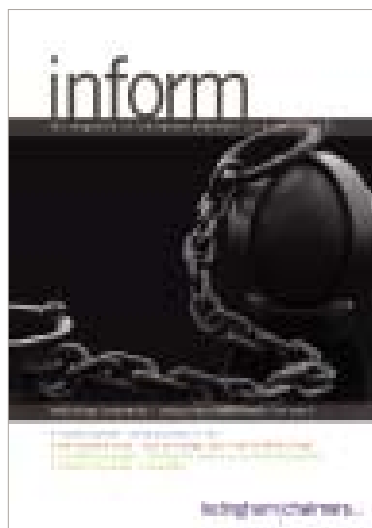
At this time last year Robin Brodie and Eunice McConnach had signalled their intention to retire as partners which they did at 31 March 2011. Paul Lewis also retired at that date to take up an in-house position with a national company based in Aberdeen.

Our partner body was strengthened however with the appointment of private client partner Douglas Watson from Adam Cochran and the promotion of Rod Hutchison who was an associate in our corporate team in Aberdeen.

We are glad that our trainee complement is back up to strength with five recruits now arriving for their first year and seven moving into their second year. We have also seen new appointments at solicitor level across the firm's work areas.

We have always said that it remains our intention to grow the firm's business in order to continue to serve our extensive and diverse client base in each of the public, private and third sectors. This is aimed at maintaining the core services expected of a law firm as well as developing the specialisms which are expected by our markets.

Ledingham Chalmers people have always made a valuable contribution to the communities in which they work. To a large extent this goes on quietly as colleagues provide voluntary support at different levels within not-for profit organisations. In addition, during the last year, the Ledingham Chalmers Charitable Trust received donations from the law firm of £13,283 and from colleagues and friends of £3,342 (inclusive of Gift Aid) and paid out donations to good causes totalling £16,625.



# ...in difficult times

Perhaps the most significant change in the overall shape of our business in recent years has been the drop in transactional work. This has applied to both corporate finance transactions (merger, acquisition and disposal of companies and businesses) and to larger scale commercial property sales and purchases, and is an experience we share with most other law firms across the country. At the same time the demand for non transactional advisory and litigation services has grown and this has helped to maintain and indeed increase our overall level of activity.

While our fee earning teams (lawyers and non-lawyers alike) are out there in an increasingly competitive market place, our chief executive Brian Hay leads a very effective central services team in providing the infrastructure which keep the show on the road!

Many of us enjoy the thanks of grateful clients for the services we deliver on the front line and this is an opportune time to thank Brian and his supporting cast for their invaluable contribution.

As we look back on the completion of five years as Ledingham Chalmers LLP it does no harm to remind ourselves of three key descriptions of the firm which remain as true today as ever:

“A household name in business circles”

“A firm where people really want to work”

“A firm with which people really want to do business”

**David Laing, Chairman**

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# damages... simples!

The Damages (Scotland) Act 2011 came into force on 7 July and represents a major restatement of the law of damages for wrongful death in Scotland. The existing law was felt to be over complex and at times contradictory. Ledingham Chalmers associate Ian Scott explains that this restatement of the law is intended to reflect the economic realities of modern family life, where, in many families both spouses contribute towards the family finances.

There has been almost no criticism of the new Act which, in many ways, is a positive reflection on the legislative process adopted by the Scottish Parliament.

Ian comments that there are similarities with the previous law. "The new Act provides for financial loss claims by injured persons during their lifetime, and for claims made by their families following death. Awards for suffering during lifetime and loss of society to the bereaved family remain essentially as they were under the old law as matters requiring proof in court."

Ian explains what has changed "In a major departure from the previous law, the Act fixes the basis for calculating awards for loss of financial support for relatives: financial support includes feeding, housing and educating a dependent relative. This award can be given during lifetime of and on death of the injured person, if as a result of his injury or death, financial support is not available. These awards are to be calculated on the basis of 75% of the deceased's net annual income prior to death. The Scottish Government determined that this represented the percentage of income which the average man or woman spends maintaining and supporting his family. The Court can depart from this mechanism only when its application would produce manifestly and material unfairness."

Who can claim? Loss of support can be claimed by anyone falling within the defined category of relatives, normally a spouse and any dependent children (who are living at home under the age of 16), but also by brothers, sisters, parents, grandparents and grandchildren. Any claim by a party other than a spouse or dependent child must be explained by evidence of the level of support actually provided. So a full time student living away from home has to prove the level

of support provided whereas claim by a spouse or dependent child requires no such proof.

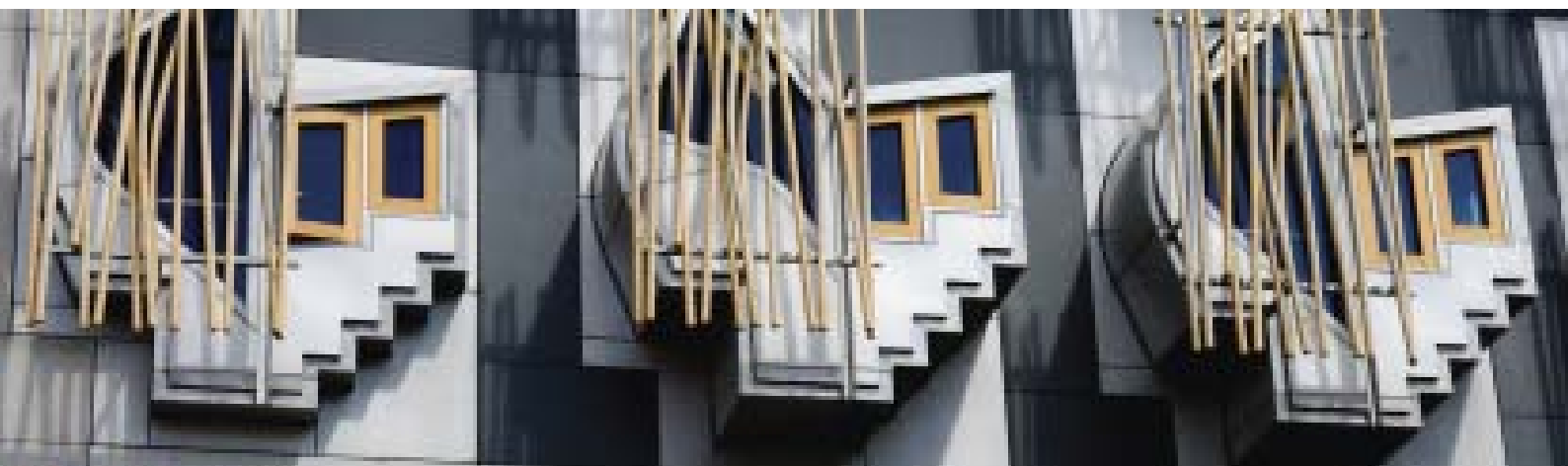
It should make it easier to advise clients on the level of awards which will be made by a court. This renders obsolete the complex formula for calculating loss of support, which required a close analysis of the deceased's financial situation.

Ian believes that this can only be welcomed on all sides: "This will remove one burden of proof from the injured person and his family at a stressful time. For defenders, while there might be an increase in the level of awards for loss of support this should be offset by the savings in time and cost in investigating family circumstances and arguing over the sum to be awarded. It should also allow insurers to estimate reserve figures more accurately from the outset. Whether this results in more cases settling will remain to be seen, although it would seem likely that there will be greater scope to agree loss of support, leaving only loss of society in dispute."

The uncertainty over awards for lifetime anxiety and loss of society remain but as these are more difficult to assess on a formulaic calculation this is not necessarily negative: it is important that the level of award should come down to the circumstances of each case. The alternative would be a table of awards similar to the English system where, for example, an award for a surviving spouse is fixed at around £11,800, which is below the reported awards of judges and juries in Scotland to date.

We eagerly await the first judicial encounter with the new Act.

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# caveat purchaser

An increasing number of companies are offering online tax planning schemes to reduce or negate payment of Stamp Duty Land Tax (SDLT). However such schemes are under serious scrutiny by HM Revenue and Customs (HMRC) which is diligent in pursuing what it sees as lost revenue.

Ledingham Chalmers associate, Nicola Reid explains why a house buyer should be wary “SDLT is generally payable on the purchase or transfer of property in the UK. The rate ranges from 1% to 5% depending on the value of the property. All transactions must be notified to HMRC who monitor returns. If HMRC are suspicious that a transaction has been set up to evade SDLT, they will seek information from the submitting agent. Any returns purposely and artificially reducing the true amount of tax payable will result in demands being issued for recovery of the tax. HMRC can look back six years from the settlement date - or even longer where fraud is believed to have taken place.”

Nicola believes that while companies offering SDLT tax planning schemes claim that they are simply exploiting loopholes which exist in the current legislation from HMRC, such schemes often rely on an interpretation of the law far removed from what was intended by Parliament or accepted by HMRC. “It is reported that £35,000,000 of unpaid tax is currently being pursued by HMRC as result of such schemes and non payment of stamp duty through these schemes was a likely contributory factor behind the decision of HMRC to introduce a new rate top rate of SDLT of 5% in the 2011 budget (for purchases and transfers of property over £1,000,000). Prior to the budget, the top rate of SDLT payable was 4% (for property over £500,000)”.

There are however methods of reducing liability to SDLT as Nicola explains. “In residential house purchases, a proportion of the purchase price may be apportioned quite justifiably to moveable items such as carpets, curtains and white goods. SDLT is not paid on moveable items but any apportionment must be fair and reasonable and accurately reflect the value of these moveables. Apportionment is frequently used where a property value moves into the range where higher tax is payable. Take an example: Mr and Mrs Smith buy a property for £253,000 (just into the 3% SDLT threshold). Their lawyer could recommend an apportionment of £3,000 to moveables for carpets, curtains and white goods if it is reasonable to do so. This would reduce the SDLT liability to 1% resulting in a welcome saving of around £5,000. On the other hand it would be a struggle to justify an apportionment of £20,000 in a house purchased for £269,000 where no moveables other than carpets were to be included.”

Some advisers recommend setting up a limited liability company to buy a property and then sell it back to an individual as one way of avoiding SDLT. It is a common misconception that SDLT can be avoided this way if the property is bought through a company. The true position is that a company purchaser will be liable to the same rate of tax as an individual on any such purchase.

Buyers should also be aware of other implications of these tax planning schemes says Nicola “Lenders are aware of these schemes and may not lend in circumstances where, in their opinion, the transaction structured to avoid SDLT or other taxes. That could result in a loan being withdrawn or the mortgage being called up.”

Nicola advises clients to approach such schemes with great care. “Providers of these schemes charge around half of what would have been payable in SDLT for their services. This is false economy if a buyer is then pursued or prosecuted for tax evasion and required to pay the higher SDLT anyway. Independent legal advice should always be sought”.

**For more information contact**

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# planning gain

Whether it's a windfarm, a housing development or a by-pass, the planning system seems to throw up all manner of controversy. However, a recent change in the law of planning gain is providing developers with some much needed relief, as Ledingham Chalmers partner David Scott explains.

"Planning gain involves the imposition of an obligation on a developer to provide necessary infrastructure to allow a development – commercial or residential – to be put to use." For example, housing requires drainage and schools, and all developments need to be accessible by roads.

As an alternative to carrying out infrastructure works themselves, however, developers will often make financial contributions by way of planning gain to the Council.

David tells us the most common method a local authority will use to secure a developer's obligation is through a Section 75 Agreement to ensure that the obligation to make payment runs with the land, and binds subsequent owners to the terms of the Agreement.

Section 75 Agreements have undergone various changes over the years, most recently following the 2006 Planning etc Scotland Act and subsidiary legislation. This introduced a new Section 75A in February this year which gives developers some relief.

"Developers and local authorities should note the introduction of a statutory right to seek modification, discharge or appeal of Section 75 Agreements under the new Section 75A. Previously, a Section 75 Agreement could be modified or discharged only with the consent of both parties, unless another method were specified in the

Agreement. However, as a result of the new Section 75A, the developer has a statutory right to seek discharge or modification of any obligation contained in a planning agreement."

What are the benefits for developers? A developer can now apply under Section 75A at any time and it neither needs to be notified to neighbours or community councils, nor appear in the local authority's planning register. Given the Scottish Government's drive for greater transparency, they may come under pressure to amend these provisions, but for now the situation remains that no notification is required.

Another benefit is that the planning authority must assess the original obligation in light of current policies rather than those that applied at the time the agreement was entered into. These may now favour the developer, for example, if the Government drops its policy on reducing school class sizes, meaning fewer schools are required, or if the Edinburgh trams are no longer going to make it as far as Leith!

The planning authority only has three options when determining an application - refuse the modification, modify in accordance with the application, or discharge the obligation. It cannot change an obligation to make it any more onerous on the developer.

The planning authority must also give reasons for any refusal. As there is no restriction on further applications, a developer, armed with the reasons for refusal, can go straight back with a further application or appeal.

David concludes "As there is no fee for submitting an application for modification or discharge of a Section 75 Agreement, and no risk of a worse outcome, a developer has nothing to lose. The provisions should also ensure that planning authorities are more careful when fixing planning gain payments to ensure they comply with policy. Planners may be wary of apparently generous offers made by a developer to secure the grant of planning consent, only to find the developer returns with an application for modification."

In the meantime, developer clients are keen to take steps to review all their existing agreements to identify whether the obligations are all still justified, or whether these can be challenged.

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# sunk without a trace?

The old adage “you can’t get blood out of a stone” does suggest that you start with at least one positive – you have a stone to work with! What happens when the metaphorical stone is a company and that company has been struck off the register at Companies House either at its own request or by the Registrar? There is no longer a stone. Ledingham Chalmers solicitor Andrew Stott and associate Victoria Leslie suggest that there may, in fact, be a way of getting something out of nothing.



Andrew explains “When a company is dissolved the legal entity that once was the company effectively ceases to exist and any assets held by the company before the date of dissolution are automatically transferred to the Crown. Nothing is left behind. That often causes problems for unpaid creditors.”

What if the company had assets prior to its removal from the register and owed a third party money? On the face of it, the third party would never be able to access those assets to satisfy the debt because the debtor company is no more – you cannot sue an entity that no longer exists!

“All would not be lost for the third party in those circumstances” says Andrew. “A creditor can, subject to certain conditions, apply to the court to have the company restored to the register. Once the company is restored to the register, the assets that had been transferred to the Crown are automatically (without further application) returned to the company.”

When the company is restored to the register there is, at least, a legal entity to sue. Moreover, if assets have been returned by the Crown, suing the company may be worthwhile.

Victoria explains that, whilst an application seeking restoration to the register may be competent, it may not always be a practical remedy. “If you are a third party creditor, restoration of the company to the register is only be the first step. You will probably need to raise formal court proceedings for recovery of the debt. If the company had few (or no) assets prior to being struck off there will be little point in going to the expense of making the application in the first place.

Where the company did have significant assets, however, the cost benefit analysis may be such that the restoration process is an effective solution to an otherwise impossible situation”.

Victoria remarks that the same process is also open to the former company’s directors and shareholders. “The company may, for example, have been struck off leaving substantial historical debts which were guaranteed by the directors. Striking off would leave the directors exposed to their guarantees with no relief from the company itself. Restoration of the company could be particularly important if creditors called for payment from the directors and they required recourse to the company’s assets to exercise their right of relief. Likewise where an individual suffering from a medical condition - caused as a result of his employment with the company - is diagnosed only after the company is dissolved, he has no right of claim against that company (or its insurers) unless it is restored to the register.”

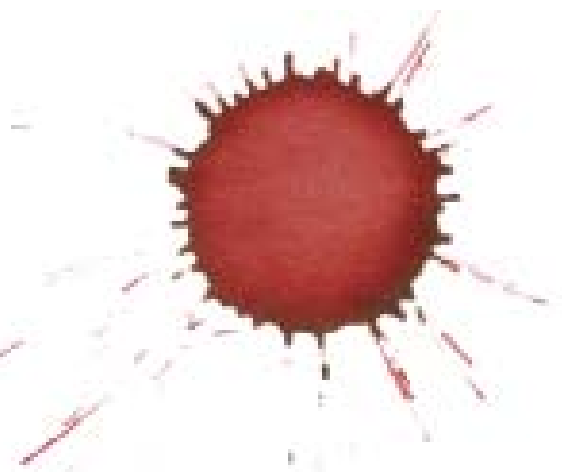
Andrew adds that financial debt may not be the only reason for seeking restoration. “People who have an interest in land in respect of which the former company also had an interest can make an application as well. The application could be the only way in which certain land related deals in which the former company was involved can be completed.”

Andrew concludes “Making an application for restoration to the register may not be the right course of action in every case. It can, however, be an effective salvage exercise when the company appears to have sunk without trace.”

## For more information contact

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# and I would ride 8000 miles... nearly

Between May and July next year, the Olympic Torch will travel an 8000 mile route around the UK in the run up to the Games themselves. Just a few miles short of that figure, Ledingham Chalmers' cycling team notched up 7,793 miles competing in this year's Cornerstone Challenge.

Taking heart from the words of Vince Lombardi (*"the achievements of an organisation are the results of the combined effort of each individual"*) Ledingham Chalmers' Stuart Leslie and Phil MacLean tell us how team work led to their success (with a little bit of friendly rivalry along the way).



"On 1 September 2011, 22 teams embarked on the Cornerstone Challenge, an initiative organised by the national charity that provides vital services for adults and children with disabilities and support needs and a charity which Ledingham Chalmers has supported for several years.

"This year's challenge would take participants to film locations around the world including those from blockbusters such as Philadelphia, Schindler's List and Out of Africa," explains Phillip. "Film posters were displayed around our static bike in keeping with our overarching theme. Posters of Mel Gibson from Braveheart and Russell Crowe from Gladiator were intended to inspire cyclists but in some cases might have been a little demoralising during each 30 minute stint on the bike!"

Was this year any different from previous years? Stuart tells us, "This year saw the challenge diversify to include other forms of exercise in addition to cycling whether it be walking, jogging or running. Ledingham Chalmers had a dedicated group of walkers leaving their cars at home and others conquering the Scottish countryside all adding to the tally. Every participant, irrespective of age or level of fitness, contributing towards the common target."

Phil describes for us how his rivalry with Stuart bumped up the miles: "A little competition developed between us after I recorded a very respectable 14.4 miles. My satisfaction was short lived when Stuart managed 14.5. The rivalry intensified each day with both of us trying to outlast the other adding 0.1 miles per session until we could manage no more!"

Cornerstone was founded in 1980 by Nick Baxter with a very simple aim "to enable the people we support to enjoy a valued life". Mr Baxter, along with several other individuals, sought to increase the number of services being offered to those with learning disabilities and their families in the Aberdeen community. Since its humble beginnings, Cornerstone has grown to support 1,249 people, operate 197 residential services and employ over 1,300 staff making it one Scotland's largest charities providing social care. Cornerstone helps people of all ages with a wide range of support needs to enjoy a valued life in the community. Services include play schemes and respite for children and their families, employment services for adults who wish to find a job or enjoy meaningful day activities to providing support for people to live independently in their own home. Many adults with incapacity are cared for by parents until they, themselves, can no longer look after their children. Cornerstone's support enables these people to live their lives to the full. Corporate partner Malcolm Laing is currently deputy chair of Cornerstone.

The Cornerstone Challenge is just one of a number of initiatives organised by the charity helping to maintain the excellent standard of care provided. Stuart looks back on his first year competing in the Cornerstone Challenge. "I have found it extremely rewarding. The firm has been an active participant for the last five years, accumulating a grand total of 7,793 miles in 2011, finishing a very respectable ninth out of the 22 competing teams. The cyclists, walkers, joggers raised the over £500 for the charity this year. One month of physical exhaustion for us but making a real difference to the lives of many."

**For more information on Cornerstone and the Cornerstone Challenge visit [www.cornerstone.org.uk](http://www.cornerstone.org.uk) or contact**  
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# succinct

**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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