

Welcome

to the latest edition of Mackinnons' Highlight magazine.

As the leaves take on their Autumn colours it's a time to reflect on a momentous year and to look forward to interesting times ahead for Mackinnons and the UK. Since our last Highlight in May the political landscape has changed beyond recognition and many legal and commercial issues arise following the Referendum vote in June. While we are all waiting to see how things develop, the outcome will be of particular importance to our fishing clients and we discuss Brexit and the Fishing Industry in this issue. We also look at interesting topics in employment and contract law and address the sensitive issue of the Living Will. A real mixed bag of contributions this time which I hope you will find interesting.

We also have news of recent developments at Mackinnons, welcoming Nicola Gray as a Partner and saying farewell to Charles Scott.

2017 will see Mackinnons' 175th anniversary. Change and renewal are essential in business as in nature itself and we look forward not only to celebrating a great milestone but to many more years to come.

Keith MacRae, Partner
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Pre-meditated Claims Are Employers Protected?

The European Court of Justice (ECJ) confirmed recently in the case of *Kratzer -v- R+V Allgemeine Versicherung AG*, that where an individual applies for a position with the intention of seeking compensation for discrimination rather than seeking employment, they will not be covered by the anti-discrimination protections of the Equal Treatment Framework Directive and the Equal Treatment Directive ("the Directives"), which are implemented in the UK by the Equality Act 2010.

Mr Kratzer applied for a graduate trainee position with R+V Allgemeine Versicherung AG (AV). His application explained that he was more than adequately qualified for the position but AV mistakenly responded to Mr Kratzer rejecting his application. Mr Kratzer wrote to AV seeking compensation for age discrimination. AV then invited Mr Kratzer to an interview explaining that the rejection had been auto-generated by mistake. Mr Kratzer refused to attend the interview until his compensation claim was satisfied. Mr Kratzer subsequently brought a claim of age discrimination against AV in the German courts, which he later amended to include

also a claim of sex discrimination as AV had subsequently hired four female graduate trainees.

The claim was ultimately referred to the ECJ which concluded that where an individual submitted an application solely to entitle them to claim compensation, they would not fall within the protection of the Directives. In reaching its conclusion, the ECJ considered the applicable parts of the Directives which clearly stated that the protection extended to those "seeking employment". The ECJ explained that where that was not the individual's purpose, they were not protected. Accordingly, as they were not a "victim" of discrimination, they were not entitled to compensation.

This case supports the previous UK decision of *Keane -v- Investigo & Others* which confirmed that where the job applicant demonstrated that they would not be interested in accepting the role if it was offered to them, they could not claim discrimination if the application was unsuccessful.

These are helpful reminders to employers sifting through numerous job applications, but a cautionary tale where auto-rejection rules are applied to deal with high volumes of applications as it will be rare that a job applicant has such ulterior motives. Employers should be careful to avoid intentional discrimination.



Nicola Gray - Partner

Graham Davidson

our Cashier, has been with the firm for 20 years as of 5th August 2016.

Graham joined the Mackinnons team back in 1996 as the 'man in charge' of our finances and has kept a careful and watchful eye over our business throughout that time. He is and remains a key member of our team and we are most appreciative of all his hard work and efforts over the years.



New Partner Appointment At Mackinnons

Mackinnons are delighted to announce that their Associate Solicitor, Nicola Gray, has been promoted to Partner with effect from 1st October. An accredited employment lawyer and graduate of Aberdeen University, Nicola has, during her time with the firm successfully further developed Mackinnons' employment law practice.

Commenting on the changes, Mackinnons Partner Graham Jones said:

"As we enter our 175th year in business we continue to remain one of the most progressive firms in Scotland. Nicola's appointment underlines our commitment to servicing our clients' employment needs and rewards her hard work in delivering effective solutions. She is a valued member of the Mackinnons team and brings many additional qualities to the Partnership. Throughout all departments, the model for our success remains in creating long term relationships and delivering high quality advice and her appointment underlines that."



Partner, Nicola Gray and Senior Partner, Keith MacRae

Further news from Mackinnons is that Charles Scott has retired from the Partnership also with effect from 1st October after a long career with Mackinnons and Keith MacRae takes over as Senior Partner from that date. Charles is joining Shepherd & Wedderburn as a consultant and Mackinnons wish him well for the future.

The Devil is in the Detail

With apologies to any “Nokia 3310” users reading this, but how many of us agree to our smartphone software updates without so much as a cursory glance at the terms and conditions before clicking “I Agree” and moving on to check for texts or e-mails?

The imposition of contract terms and the so called “battle of the forms”, where one party seeks to argue that its conditions take precedence over another has long been an issue with commercial disputes and ensuing legal actions.

The increase of websites in recent years where terms and conditions are often conveniently hidden away but can be accessed readily enough when problems later arise mean that both businesses and individuals alike must be vigilant before blindly agreeing to contract.

Few of us would ever willingly waive our legal rights, particularly if we thought that we might need to rely upon them at a later point. Without advocating the need to pass every set of terms and conditions that come before us to a solicitor, attitude to risk and cost must always be borne in mind, as well as considering whether any third party, such as an insurer, should see the terms and conditions in advance too. Indemnities and “hold harmless” clauses within a contract require particular thought to ensure they do not impose obligations which “pass the buck” on responsibilities that should remain with the contracting

party, and are often terms which should be reviewed by the appropriate insurer in advance before cover will be honoured.

Many of us in employment will also scan over terms which restrict future work or places of work in the event that the current employment terminates. Again, these should never be signed on the basis that “this will never happen to me”.

In any commercial relationship, there is always scope for parties to compromise on terms and conditions and raising queries prior to contracting not only demonstrates due diligence but may well cause the other contracting party to ensure that it provides a “Rolls Royce service”.

We are all guilty of spending too little time examining the small print on matters and assuming that all will be well. Spending a little extra time and potentially some limited expense on contracts where we can see even minor possibilities of major issues arising is likely to always be worthwhile.



Martin Sinclair - Partner



As of 1st September 2016, **Fiona Stevenson**, has been with us for 25 years.

Fiona joined us back in “Albert Street” days, initially as Secretary to Keith MacRae and then became Secretarial Supervisor. In 2001, as a result of her efforts and acquired knowledge of Norwegian shipping, she was appointed as Vice Consul and was honoured for her services to Norway in 2012. Fiona is now primarily based in our Aboyne office in a changed role, “front of house”.

Brexit and the Fishing Industry

As we all know, on Thursday 23 June this year, the UK voted to leave the European Union. No doubt uppermost in the minds of those in the fishing industry is what will change now that the decision to leave has been taken.

In this regard, whilst the politics of Brexit will surely mean that the UK will cease to be bound by the EU Common Fisheries Policy, several global treaties in the regulation of fisheries will continue to apply to the UK, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1995 UN Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

Part V of UNCLOS in particular contains a complex set of provisions regulating fisheries both on the high seas and in nations’ Exclusive Economic Zones (EEZs), i.e. the area extending up to 200 nautical miles from a country’s coastline within which it enjoys certain sovereign rights.

Ninety per cent of the world’s fish stocks are located within such EEZs, and whilst a coastal state’s sovereign rights within its own EEZ include “exploring and exploiting” both the living and non-living resources, it also has specific duties in relation to fish stocks, such as ensuring that they are not endangered by overfishing, that measures to ensure a maximum sustainable yield are adopted, and that an allowable catch for each stock within the EEZ is established.

In addition, UNCLOS provides that “where the same stock or stocks of associated species occur within the EEZ of two or more coastal States, these States shall seek, either directly or through appropriate sub-regional or regional organisations, to agree upon the measures necessary to co-

ordinate and ensure the conservation and development of such stocks ...”

Consequently, one change arising from the UK’s departure from the EU seems obvious....currently, the EU has the exclusive competence to conclude fisheries agreements in place of its Member States, which is why there are annual negotiations between the EU and Norway. Now that the UK has voted to leave, it seems very likely that to comply with its treaty obligations, the UK will have to join these annual negotiations and reach a tripartite deal with the EU and Norway.

On the other hand, the great unknown is of course where fisheries will fit into the Government’s overall priorities in negotiating Brexit and the extent to which concessions may be made to the EU from the outset to secure other objectives. For example, it is not difficult to imagine the Government giving precedence to “passporting” for London’s financial firms to allow them to continue to trade unhindered across the EU. So, as ever, the industry will have to make sure its voice is heard.



Angus Easton - Solicitor

"LIVING WILLS" – What are they?



Pat Gray - Partner

A "Living Will" is also commonly known as an Advance Directive (AD) and is a document which records your wishes regarding the circumstances under which you would NOT want to receive certain life-sustaining medical treatments and the kinds of medical treatment you would wish to REFUSE if you became seriously ill and were incapable of making your own healthcare decisions.

The aim of an AD is to advise a medical practitioner of these wishes at the necessary time if you are unable to do so physically due to mental incapacity or an inability to communicate.

ARE THEY ENFORCEABLE?

Unlike in England, Advance Directives in Scotland are not currently enforceable but the Adults with Incapacity (Scotland) Act 2000 states "that the present and past wishes and feelings of the adult" should be taken into consideration when acting or making a decision on their behalf. This principle therefore allows formal statements (such as AD's) to be used as evidence of prior wishes in the event of a medical intervention.

IS THIS FOR ME?

If you know what kind of medical treatment you would wish to refuse, it can be important to set out your wishes in a document now, when you are able to consider such matters properly.

WHO SHOULD BE INFORMED?

It may be appropriate to inform family or close friends that you have made an AD and where it can be found. You should notify your Welfare Attorney and also your general practitioner or any other health professional who may require instruction

If you would like further information and advice on living wills, please contact Pat Gray, Ashleigh McConnell or Kim Harkness in our Private Client Department.

Consular Services

Mackinnons partner, Keith MacRae, is the Honorary Norwegian Consul and Danish Vice Consul and Fiona Stevenson is the Honorary Norwegian Vice-Consul in Aberdeen.

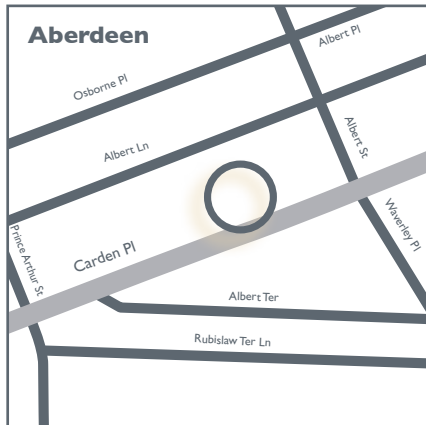
Our consular services include:

- Mustering crew for Norwegian vessels, ship authorisations and Change of flag for Norway;
- Danish passports for children up to 12 years old
- Danish Emergency Passports
- Laissez Passer documents for Denmark
- Norwegian passports for children up to 12 years old
- Norwegian Travel Documents

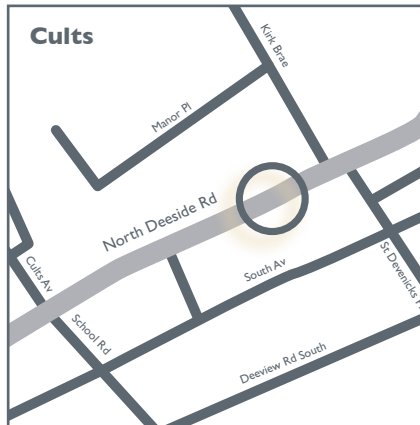


In addition, general consular services and assistance are offered to Norwegian and Danish citizens and businesses in the North East of Scotland.

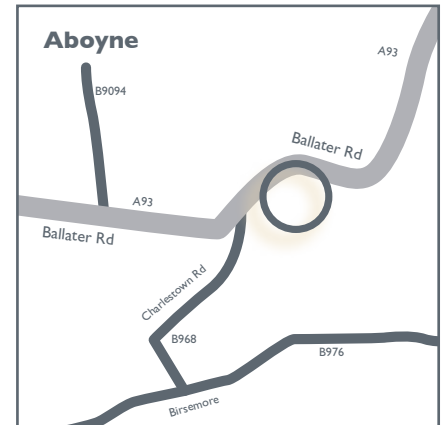
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