Letterhead of Solicitors and Estate Agents

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Mrs. M.A. Percy,
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Legislative Council Building,
8 Jackson Road,
CENTRAL,
Hong Kong

Our Ref:DS/LMCL 16 September, 1998
Your Ref:

Dear Mrs. Percy,

Evidence (Amendment) Bill 1998

I refer to your letter of 31 July addressed to the President of the Law Society and must apologise for not responding to you earlier.

The Law Society Judicial Procedure Committee referred the matter to me as a Solicitor largely acting for pursuers. The bulk of my work relates to personal injury claims for trade union members involving work accidents.

My views on the Civil Evidence (Scotland) Act 1988 are that this act is helpful to plaintiffs (pursuers in Scotland) and is helpful for serving the ends of justice.

Section 2 of the 1988 Act abolished the hearsay rule in respect of all civil proceedings; under that section, a Court may find a fact established, not withstanding that the evidence in support of it is hearsay. Under Section 2, hearsay is admissible as evidence of the facts narrated in the statement; this use of hearsay was specifically forbidden under the hearsay rule.

The Court now has no discretion to exclude hearsay evidence but provided the other requirements of the Section are met, the Court must at least consider the evidence. The weight that the Court places on the evidence is of course a matter for the discretion of the Judge. It might be possible in theory to establish a case on the basis of one uncorroborated hearsay/

hearsay statement although this is unlikely unless the circumstances were exceptional.

The Judge's discretion is clearly important when looking at the reliance that the Courts have placed on hearsay statements since the Act has come into force. In the case of Davies -v- McGuire (SLT 1995 page 775), Lord Gill made comments on the interpretation of the Act saying "the effect of the 1988 Act is to entitle the Court not only to accept hearsay where the maker of the statement is not a witness .... but to accept hearsay of a witness in preference to his evidence in Court ... I consider that the Court should proceed with extreme caution in applying the provisions of the 1988 Act in such circumstances". In the case of Glaser 1997 SLT 458, Lord MacFadyen allowed Affidavits to be lodged in a family action when there was to be no witnesses to speak to them and where the other spouse objected; the Judge confirmed that he had no discretion to refuse the application for the documents to be allowed where they fell within the relevant criteria under the Court Rules for allowing them, again he stressed "Reception of the documents in evidence without their being spoken to by witnesses does not, in my opinion, imply that the opposing party accepts the evidence which they contain, whether a fact or opinion".

Acting for pursuers I welcome any statutory feature which allows as much evidence to be presented to the Court as possible. In Scotland, there has always been a problem with the lodging of statements taken by agents and their use as evidence; these statements known as precognitions have not been allowed to be used in evidence, on the basis that you cannot be sure that you are getting what the potential witness has to say in a pure and undefiled form, recent cases have confirmed that the law is now that although the precognitions may still be excluded, the person taking the precognition can give direct evidence of what was said to him. In Anderson (1992 SCLR 417) Lord Morton stated "the only reason for the exclusion or precognition is that what is stated in the precognition is or may be coloured by the mind of the precognoser ... this would exclude the actual document prepared by the precognoser but would not exclude evidence of what the witness actually said to the precognoser prior to the preparation of the document". One area of law in which this has been particularly useful relates to fatal cases were a Solicitor has taken a statement from a disease victim who has then died before litigation has concluded. Under Scots Law, the means of preserving the evidence of a party who is terminally ill is to take his evidence on Commission which means having a shorthand writer record before a Court Commissioner, under cross-examination, the evidence of the party. If such evidence was not taken under these means, the evidence might die with the claimant. Under the new Act, a statement or information given to an agent or other party can be used in evidence. This has been particularly helpful. Generally speaking I would therefore welcome the change that the Civil Evidence Act brought in and if you would like to have any further information please do not hesitate to contact me.

Kind regards.

Yours sincerely,

David Sandison