

Find the cheese but watch out for traps

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MUCH of the focus in legal pages recently has been on what is expected of our new cabinet secretary for justice.

Rightly so. And most of the emphasis has been on the criminal justice system. Again, with good reason.

Last week, Douglas Connell touched on the business structure of law firms, and Jim Gallagher expressed his hope that the neglected civil justice system would be given some political priority.

There seems little doubt that there is both scope and a need for these aspects to be considered seriously if encouragement is to be given to law firms to play their part in the creation of a more effective Scottish economy and if Scotland is to flourish as a centre for modern dispute resolution.

I had the privilege of hearing Kenny MacAskill address a group of senior lawyers recently. What he said was encouraging, positive and realistic. One clear message was that he wished to support Scottish initiative at home and abroad. No more of the "I kent his faither" attitude.

I addressed the same group of lawyers, and took as my theme Hem and Haw, two mice in the best-selling business book *Who Moved My Cheese?*. Hem and Haw have come to rely on a big lump of cheese in a corner in a maze. It has always been there. They assume that it always will be there. They don't notice that it is diminishing in size. Then one day the cheese has all gone. They look for someone to blame. After all, were they not entitled to expect that the cheese would always be there? As it happens, Sniff and Scurry were ahead of Hem and Haw. They had anticipated the change that would occur. They had already taken a risk and ventured out bravely into a new world. They had found new cheese. One moral of the story is that there is always new cheese. You just have to find it - and be prepared to look for it. That modern parable should not be lost on Scotland's legal profession or on those who are responsible for changes within it.

A leading academic observer in the US has argued we have entered the "post-litigation era" - just as we moved from trial by combat to trial by jury many years ago, we are now moving from trial by court to a new stage, where disputes are being resolved in different ways, usually involving more co-operative and time-effective approaches.

Some say the Scots - or at least the Scottish courts - have been significantly slower than those in other jurisdictions to seize the opportunities to transform dispute resolution. In many jurisdictions around the world, alternatives to court procedure are emphatically promoted by legislation and court rules. When very few civil cases in the court system are ever finally adjudicated upon by a judge, that makes sense. But it goes further. There is a genuine, growing global desire to see the courts as a last resort. When so many small claims and summary causes, not to mention larger

disputes, become snarled in a still costly and time-consuming system, it is time to look for new ways.

It is to be hoped that the recently established review of civil justice under Lord Gill will not only address issues of practice and procedure within the present civil system but also grasp the opportunity to fashion new approaches to helping people resolve their civil disputes. That might offer the courts a new role in a modern Scottish justice system which people will use with confidence. Otherwise, it is at least possible that the system will simply be by-passed by those who elect to go elsewhere, either to another jurisdiction or to other processes. There is always new cheese.