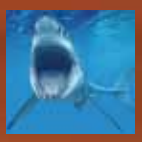
Who's next?
Proper planning for passing on your practice is a pressing problem

Under review
You need to be aware of the recent major changes in judicial review



Once bitten...
Is reform of financial services regulation calming the waters?

LAW SOCIETY GAZETTE

€4.00 **March 2012**

GOING SEPARATE WAYS:

How to handle business partnership break-up

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THE LAW SOCIETY OF IRELAND, IN COLLABORATION WITH LAW SOCIETY SKILLNET, PRESENTS

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Minister for Justice, Equality and Defence

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Law Society Annual Conference

13th/14th April 2012

Regulation, Representation and the Future of the Legal Profession

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The Law Society Skillnet is funded by member companies and the Training Networks Programme, an initiative of Skillnets Ltd. funded from the National Training Fund through the Department of Education and Skills.

CONSTRUCTIVE ENGAGEMENT

Economy aside, one of the biggest issues facing the profession today is the *Legal Services Regulation Bill*. As I write, the bill has just completed the second stage in the Dáil. Minister for Justice Alan Shatter was the guest speaker at the Society's parchment ceremony on that day. He put it on record that he "looks forward to a productive committee stage and fine-tuning of the bill". He added that he is "continuing consultations and consideration of written submissions prior to finalising proposed committee-stage amendments".

As we have made clear from the beginning, the Law Society recognises that there is a need for change, and there is much in the bill that the Law Society welcomes.

The Society has many concerns in relation to the bill, however, and it has just made a comprehensive submission to the minister, running to 100 pages. We will be making supplementary submissions as soon as possible by providing a section-based review of the proposed legislation.

Ministerial assurances

In its initial response to the publication of the bill, the Society raised concerns that it posed a threat to the independence of the legal profession, which exists primarily for the benefit of the public – and not for the benefit of the profession.

The Society proposes that, instead of the members of the Legal Services Regulatory Authority being appointed by the Government, they should be appointed by the President of the High Court – to help preserve the separation of powers – following selection by the Public Appointments Service, with the President of the High Court, or his nominee, participating in the interview panel.

The minister has given assurances that he has no intention of undermining the independence of the profession. On the contrary, he has stated that it is his intention to promote a strong and independent legal profession into the future. We welcome those assurances.

For our part, we recognise that Minister Shatter has certain objectives that he wishes to achieve in the public interest, and in the context of fulfilling Ireland's obligations under the EU/IMF agreement. It is our view that, by constructive engagement, the Government can achieve its objectives and, at the same time, address the concerns that we have expressed, without in any way compromising the bill's objectives.

We are committed to such constructive engagement and look forward to working with the minister and his officials over the coming months in that spirit.

This is a vast and complex piece of legislation. It is extremely important that the structures and procedures put in place by the bill must be clear and workable from the outset. As much time as is necessary should be allowed to the drafting of amendments to the proposed legislation, and in allowing appropriate consultation with all stakeholders – the legislation will not benefit from being hastily enacted.

"The structures and procedures put in place by the bill must be clear and workable from the outset"

Court delays

On a separate matter, information is reaching us from colleagues around the country that indicates that there are now very substantial delays in all kinds of litigation, in every court – District, Circuit, High and Supreme. I understand that the difficulties are most acute in the Circuit Court, and especially in family law matters.

There may be a number of reasons for such delays but, to the extent that they may arise as a result of judicial vacancies, I would urge that these vacancies are filled as soon as possible.

To the extent that problems may also be surfacing owing to the retirement of support staff in the courts, it is incumbent on the minister to ensure that the resources of the Courts Service are not cut back so much as to undermine the effective administration of justice.

We all know that we are living in stringent times, but equally we know that the proper administration of justice is not a luxury to be curtailed in times of fiscal hardship. The Society is committed to working with the minister and his department, the judiciary, the Courts Service and all other interested parties to resolve these problems. In addition, the Society is committed to obtaining as much empirical data as is available on this subject in order to make appropriate representations in the near future.

Donald Binchy
President

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HAVE YOU MOVED? Members of the profession should send change-of-address details to: IT Section, Blackhall Place, Dublin 7, or to: customerservice@lawsociety.ie

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Gazette readers can access back issues of the magazine as far back as Jan/Feb 1997, right up to the current issue at lawsociety.ie.
You can also check out:

- Current news
- Forthcoming events, including the **Law Society's annual conference in the Castlemartyr Resort Hotel, Co Cork, on 13 and 14 April 2012**
- Employment opportunities
- The latest CPD courses

... as well as lots of other useful information

Nationwide

Compiled by Kevin O'Higgins

Kevin O'Higgins has been a Council member of the Law Society since 1998

French connection for DSBA conference

DUBLIN

This year, the conference of the Dublin Solicitors' Bar Association (DSBA) will take place in Bordeaux from Wednesday 19 to Sunday 23 September. Geraldine Kelly and her team are doing their utmost to ensure that the conference will be truly memorable – and a relatively short flight away.

The venue is the Grand Regent Hotel, a beautiful hotel in the centre of Bordeaux. Trips to St Emilion and the Lynch Bage, Margaux and Medoc vineyards will ensure a very interesting trip for lovers of viniculture. The brochure will be ready shortly.

The package will not include flights, given the expense of block-booking with Aer Lingus. Geraldine suggests that anyone interested should consider booking a direct flight with Aer Lingus now, before prices increase.

Interest is already building for the Irish Law Awards 2012. This is an inaugural event covering a diverse and varied category of awards, covering all types and sizes of firms throughout the country. The closing date for nominations was 22 February. The winners will be announced at a gala lunch in the Shelbourne Hotel on 7 May. Further details can be obtained from the DSBA website.

The West's awake and is feeling lively!

GALWAY

James Seymour, that very energetic president of the Galway Bar Association, has a very impressive CPD programme. The association has committed to providing at least 20 hours of CPD this year for members only. The subscription is a modest €50. James hopes to hold at least one seminar outside the city and Gort has been suggested as the setting for one of its summer seminars (TBA).

The first CPD seminar (two hours' management, one hour general) took place in early February on 'Defence of your home – changes to the law' by James Fahy BL; 'The Law Society audit' by DV Mannion & Company (accountants); and 'Budget 2012, changes to the tax regime' by Rick Grogan (accountant).

The second CPD seminar will consist of two hours' management, one hour regulatory. Three hours of general CPD is scheduled for Friday 24 February 2012 at 10am until 5pm.

The third CPD seminar will be a four-hour general CPD seminar and is scheduled for a date before Easter. Members will be informed by email when confirmed. Other CPD seminars will be organised later in the year.

In addition to all that learning, James is planning an Easter social in Galway city before the Easter holiday. An art exhibition and social at Galway Courthouse during the June High Court sessions is also in the pipeline, in aid of Croí, the West of Ireland cardiology foundation.

The Galway Bar Association annual day at the Galway Races has become a tradition and is scheduled for Monday 30 July 2012. Tickets will be on sale closer to the date. A final social event will be held in early December after the AGM.

To become a member of this very active bar association, send your €50 subscriptions to James Seymour or Cairbre O'Donnell (treasurer) of John C O'Donnell & Sons, Atlanta House, Prospect Hill, Galway; DX 4502 Galway, Mary Street.

Judge Donnchadh Ó Buachalla bows out

WEXFORD

PIC: HOREPHOTO@EIRCOM.NET

Judge Ó Buachalla and guests at the retirement dinner held in his honour recently

A retirement dinner was held in honour of Judge Donnchadh Ó Buachalla before Christmas. Special guests included his wife Therese and three of their children. There was a significant turnout of legal practitioners, court staff, members the probation service and the Garda Síochána. During the many presentations, tributes to the judge referred to his empathy for the litigant and defendant, his considerable courtesy, and the consistency of his approach to all appearing in his court.

Sadly, retired District Court clerk Andy Cullen lost his battle with cancer earlier this month. Members who attended his funeral in his New Ross recalled his breadth of knowledge, his great administrative ability and his unfailing politeness. Although retired for some years, he was a familiar figure around town and will be sadly missed.

One retirement brings another appointment, that of Judge Gerard Haughton, to the District Court area of Wexford. He was warmly welcomed at sittings of the court in Wexford and Gorey. His arrival coincides with the amalgamation of New Ross and Enniscorthy in the district, with court sittings in Wexford and Gorey.

NOTICE

Solicitors' Benevolent Association AGM

Notice is hereby given that the 148th annual general meeting of the Solicitors' Benevolent Association will be held at the Law Society, Blackhall Place, Dublin 7, on Friday 20 April 2012, at 12.30pm, to consider the annual report and accounts for the year ended 30 November 2011, to elect directors, and to deal with other matters appropriate to a general meeting.

In News this month...

Double-marathon solicitor

Robert Manson and his son George (3) with *Late Late Show* host Ryan Tubridy

Robert Manson (Chris Ryan Solicitors, Dublin) is halfway through his plan to run the Dublin and London marathons in support of the Down Syndrome Centre. He ran the Dublin marathon on 31 October 2011 (in three hours, 29 minutes). London beckons on 22 April.

For more information and to make a donation, visit www.downsyndromecentre.ie or email Robert at robert.manson@chrisryansolicitor.ie.

2012 Human Rights Essay Prize

The Law Society has announced the annual Human Rights Essay Prize. Law students, including trainee solicitors and trainee barristers, are invited to submit an essay identifying a particular aspect of human rights law that they believe will have importance in the application or interpretation of Irish law.

Entries should be typed and approximately 2,000-3,500 words in length. Entries are restricted to one per candidate and may be co-authored.

All entries must be received no later than Tuesday 17 April 2012.

Entries should be emailed to s.mcdonald@lawsociety.ie or by post to Sarah McDonald, human rights executive, Law Society of Ireland, Blackhall Place, Dublin 7.

For further information, see the competition poster at www.lawsociety.ie.

NUI Galway Law Society chain stolen

Galway gardaí are investigating the theft of a ceremonial chain from NUI Galway. The chain, which belongs to the college's Law Society, was taken from a press in an office near Áras na Mac Léinn (not far from the students' bar) sometime between 1 and 8 February. It is estimated to be worth between €3,000 to €4,000.

The city's Garda Divisional Unit has confirmed to the *Gazette* that CCTV footage is being reviewed, though this is proving time consuming, given the delay in notifying the theft and the large timeframe in which the crime could have occurred. Gardaí are liaising with 'cash for gold' shops in the city in case an attempt is made to sell the chain.

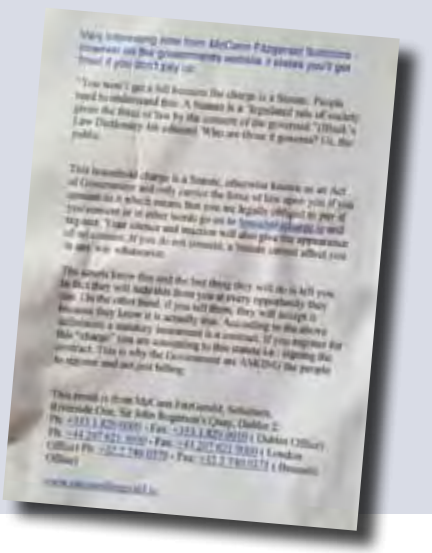
Anyone with information is asked to contact Millstreet Garda Station, Galway, at 091 538 000 or the Garda's confidential telephone line at: 1800 666 111.

McCann FitzGerald warns of hoax memo

Copies of an email purporting to originate from Dublin firm McCann FitzGerald – which states that people are not legally obliged to pay the household charge and which is currently being distributed via various social media – is a hoax.

The hoax memo is peddling the relatively recent 'Freeman on the Land' ideology, and makes the spurious claim that the charge "only carries the force of law if you consent to it, which means you are legally obliged to pay if you consent ... If you do not consent, a statute cannot affect you in any way whatsoever."

McCann FitzGerald has said that the memo/email is not a McCann FitzGerald document, has not been prepared by the firm, and does not express the legal opinion of the firm. The firm is investigating how its name has come to be associated with the hoax email.



Should price lists be posted outside solicitors' offices?

How good are solicitors about advertising their prices to consumers prior to being engaged? Can you offer an explanation for huge differences in the fees charged by solicitors for basic jobs of work? Why was there such a low participation rate of solicitors in a recent price survey? Shouldn't solicitors be required to post a price list outside their offices?

These are just some of the questions answered on behalf of the Law Society by the director general, Ken Murphy, on 9 February in national radio interviews, firstly with Matt Cooper on Today FM's *The Last Word* and secondly with Mary Wilson on RTE1's *Drivetime*.

The interviews followed the publication earlier that day of a report by the National Consumer Agency entitled *Solicitors – Fees Charged and Price Availability*. The agency undertook a nationwide survey of solicitors in the period October to December 2011. The survey focused on what the consumer watchdog described as "three common services provided by solicitors directly to consumers, namely a typical conveyancing transaction, making a will and taking out a grant of probate. The professional fee charged and details of any outlays were requested in relation to each of these services".

Matt Cooper: 'How good are solicitors about advertising prices?'

Mary Wilson: 'Why the huge differences in fees quoted?'

Ken Murphy: 'With 2,200 firms competing, consumers are well served'

Typical conveyance

The 'typical conveyance' sought to establish the cost of conveyancing on a semi-detached, second-hand house in a housing estate, where the title was registered with the Land Registry, for a single, first-time purchaser. The purchaser would be the sole owner with a loan approval of 90% from a financial institution. The house would be the primary residence of the purchaser. A price of €220,000 had been agreed.

Sixty-four firms of solicitors gave quotations. The NCA was somewhat critical of the fact that this represented only 20% of the firms approached.

The lowest professional fee quoted was €750 and the highest was €3,250. The average fee quoted by these 64 firms was €1,302.

Vicious competition

Ken Murphy pointed out to Matt Cooper that, in Ireland, there is a very liberal regime for advertising by solicitors. If there are solicitors who aren't offering quotations to people who are only seeking to retain solicitors on the basis of such quotations, then these solicitors are going to lose out. People should shop around to get competitive prices, he said, although they should bear in mind, as the report of the National Consumer Agency acknowledged, that solicitors don't just compete on price. "They compete on other things as well – such as the quality of their service."

In relation to residential property conveyancing, as Murphy pointed out to the listeners, this was a thriving area of work five or six years ago and there was vicious competition on the basis of price. However, there is almost no conveyancing going on at the moment and the solicitors' profession has suffered a massive collapse in one of its major areas of income. "There was a lot of fixed-fee charging in conveyancing, which had reached cut-throat levels in the past, and this had probably ended up reducing standards," Murphy continued, indicating that he had recently heard Minister for Justice Alan Shatter making comments to this effect.

Pressed by Mary Wilson to offer an explanation for huge differences in the fees being quoted by solicitors, Murphy responded: "Yes, there is an explanation, and the explanation is competition. If everybody was quoting the same fee, it would show an absence of competition – but the fact that there are many people quoting different fees shows a presence of competition."

Consumers well served

"The Law Society supported the work of the National Consumer Agency and was always happy to cooperate with it," Murphy continued. "If solicitors' firms knew, as they did, that it was an NCA survey and there was no possibility of any work being obtained for their quote, it might explain why more firms did not participate in the survey, although the Society would have encouraged them to do so, regardless."

With over 2,200 solicitors' firms in the country competing in particular for general practice-type work like this, consumers are well served, he insisted.

However, Murphy was deeply sceptical about there being any benefit if solicitors were required to post price lists outside their offices. Solicitors were perfectly free to do it at the moment so, if none did, there was probably a good reason for it. He said: "The complexity of legal services is such that a list of prices, even for the most apparently straightforward of services, would in all likelihood have to be hedged around by so many definitions, qualifications and general small print as to be almost unreadable to passers-by.

"Such a list would probably be next to useless," he continued. "What people actually do get, what clients in Ireland receive by law, is something far more informative and valuable than anything they could obtain from a price list. They receive customised price information based on an assessment of the law and facts specific to their individual case or transaction. They receive it in the form of a letter from their solicitor very shortly after the commencement of the action. This is much more valuable than a crude price list could ever be."

The director general has since written to the chief executive of the National Consumer Agency, Ann Fitzgerald, informing her that he was circulating the NCA report to the Council of the Law Society. The report would receive proper study and any appropriate action for the Society to take based on its findings would be considered.

OUTLAWS AND INLAWS

Life outside legal practice

KEITH FARNAN
Comedian and writer

Hailing from Cobh, Co Cork, Keith walked away from a career in litigation to move, full-time, into the entertainment industry as a stand-up comic – but he doesn't regard it as a huge leap.

"My one man shows have dealt, so far, with everything from the death penalty to racism to women's rights. The common thread, as with my work in law, has always been aimed at addressing inequality in society."

From the Boston International Comedy Festival, to Hong Kong, to Edinburgh, he has enjoyed great success in his chosen genre.

He's also appeared on TV, on the likes of the *Michael McIntyre Comedy Roadshow*, and will soon be on ShowTime's *Live from Amsterdam* in the USA.

It is on his own TV show, however, that the full range of Keith's talent is most evident. In *Money, Money, Money*, screened on RTÉ, Keith wandered hilariously through Ireland's economic difficulties, focusing on how we could repay the €85 billion in debt.

JULIE COBBE
Style Fish

Julie Cobbe got a lot of attention when she secured investment from Gavin Duffy and Norah Casey for her business on RTÉ's *Dragon's Den*.

That business, www.stylefish.ie, is Ireland's first fashion school for women. Julie initially trained and qualified as a solicitor in Ireland, worked internationally for several years in a variety of jobs, before establishing Style Fish in 2009.

She was nominated for *Image* magazine's 'Young Entrepreneur of the Year' award in 2009 and was a National Enterprise Awards finalist in 2011.

Style Fish seeks to combine the immediacy of the classroom with the convenience of online shopping for women. They deliver personalised Style Fish courses in key shopping centres and department stores around the country.

Each course graduate can sign up to the Style Fish monthly subscription service and receive information on best buys for their shape and colouring each month.

SIOBHAN BYRNE
Harmony Hypnosis

Siobhan grew up between the West of Ireland and England. She qualified first as a solicitor in England and worked there for many years before deciding to move to Ireland.

Locating herself in Ballinasloe, Co Galway, she spent several years working with a law firm in the Midlands, while also training part time in wide-ranging therapy areas – focusing on hypnotherapy in particular. She set up Harmony Hypnosis in 2008.

The majority of Siobhan's work is with couples experiencing fertility problems. She is also involved in hypnobirthing and in other general areas, such as treating phobias and addictions.

People from throughout Ireland use the Harmony Hypnosis service and, in an unexpected but interesting development, Siobhan is increasingly contacted by people from abroad who are interested in support from her, via Skype.

She is a qualified mediator and provides mediation services within Harmony Hypnosis. More information is available at www.harmonyhypnosis.ie.

Career information events

The Society's Career Support service has announced a new schedule of information events for the next three months. All events will take place in the evening time to facilitate people who are working.

All solicitors are welcome to attend – free of charge – provided places are available. A different career theme will be addressed each month.

International opportunities

During March, in-depth information evenings will deal with work opportunities for solicitors outside Ireland:

- *Canada and USA* – Dublin (Tuesday 13 March),
- *Canada and USA* – Galway (Thursday 15 March),
- *Britain and Europe* – Dublin (Tuesday 20 March),
- *Britain and Europe* – Galway (Thursday 22 March),
- *Australasia and Asia* – Dublin (Tuesday 27 March), and
- *Australasia and Asia* – Galway (Thursday 29 March).

Speakers will have expertise in matters such as visa availability, access to job opportunities and qualifying in these jurisdictions. Those attending can establish the latest situation in the locations of interest to them.

Hear from employers

In April, employers will attend Blackhall Place to present information on their hiring plans, the most in-demand skills and the qualities they prefer to see in candidates:

- *Professional firms* – Dublin (Tuesday 3 April),
- *Financial services* – Dublin (Tuesday 17 April), and
- *Commercial and public sector* – Dublin (Tuesday 24 April).

It is hoped to arrange a number of events outside of Dublin if employers can be found who are willing to participate.

Hear from experts

In May, consultants with specialist expertise in career management and job-seeking will speak about the strategies and tactics they consider to be most effective in the current market:

- *CVs and letters* – Dublin (Tuesday 1 May),
- *CVs and letters* – Galway (Thursday, 3 May),
- *Sourcing jobs* – Dublin (Tuesday 15 May),
- *Sourcing jobs* – Galway (Thursday 17 May),
- *Interviews* – Dublin (Tuesday 22 May),
- *Interviews* – Galway (Thursday 24 May).

All events will start at 6pm and conclude at 8pm. Capacity is limited at most venues, so solicitors who wish to attend are asked to book their places in advance by emailing careers@lawsociety.ie.

The Law Society's Career Support initiative offers a wide range of supports to help solicitors faced with career challenges, including CV reviews and feedback, and one-to-one consultations. Support is available by telephone and email.

Get up to speed with a Law Society diploma

The Government's proposals on the State's insolvency laws will mark a major reform of this area of practice, when enacted. The proposals are contained in the heads of the *Personal Insolvency Bill*, published on 25 January 2012. Minister for Justice Alan Shatter has said that the planned legislation is designed to free those "enslaved" by personal debt and will be "one of the key legislative instruments for addressing the financial difficulties of general insolvency, mortgage debt and negative equity".

In anticipating these legislative developments, the Society's Diploma in Insolvency and Corporate Restructuring will explore, in-depth, the emerging reform programme, including:

- The proposed insolvency service,
- Debt relief certificates,
- Debt settlement,
- Personal insolvency arrangements, and
- The proposed role of personal insolvency trustees.

Drawing on the experience of those already involved with this area, the course will consider how the reform programme will affect current practice and procedure, and will analysing new and emerging opportunities for solicitors.

The course starts on Saturday, 28 April. The fee is €2,550, which includes an iPad2. (This diploma is designed with mobile learning devices in mind – the iPad2 in this case – allowing course participants to access the course anytime, anywhere.)

It is expected, also, that the terms of the proposed legislation will have a significant impact on banking and security law. In that respect, the Society's new Certificate in Banking Law and Practice will consider the potential implications of the proposed legislation for practitioners dealing with property transactions and general banking, security and enforcement issues. This certificate programme will begin on Tuesday 1 May. The course fee is €1,160.

Genning up on human rights

For those who wish to hone their human rights legal skills, the Society's Certificate in Human Rights course will begin on Saturday 28 April 2012. It will run for three-months, culminating in a written assessment, to be submitted by 27 July 2012.

This course aims to introduce participants to the international, regional and national human rights framework. It will also provide practical guidance on enforcing human rights in the legal arena. The overall objective is to encourage participants to develop the skills needed for human-rights-based arguments, including practice and procedure, the use of human rights' legal databases and the identification of the issues involved.

The course will combine best practice in both online and on-site learning. For those who cannot easily travel to Dublin on a weekly basis, course materials will be released online each Thursday on the diploma website. It will feature webcast lectures. Two additional on-site sessions will take place on Saturday 12 May and Saturday 23 June.

The fee for the course is €1,160 (a supplement fee applies for non-lawyer applications).

For further information on all courses, fees, the application process and entry criteria, visit www.lawsociety.ie/diplomas. Alternatively, email diplomateam@lawsociety.ie or contact a member of the team at tel 01 672 4802.

Thomas Byrne in court on €50m fraud charges

Struck-off solicitor, Thomas Byrne, appeared in court in Dublin on 3 February 2012, charged with theft and fraud offences totalling over €50 million.

The Dublin District Court was told that Mr Byrne (45), with an address at Aungier Street, Dublin, made no comment when 50 new charges were put to him. He now faces a total of 52 fraud offences relating to more than 20 residential properties and six banks.

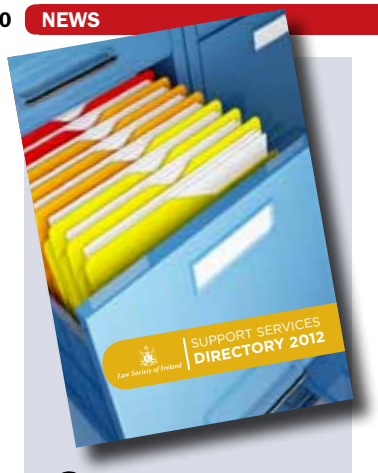
The DPP has directed trial on indictment. The court heard that the book of evidence would be ready for service in March.

Mr Byrne, who had a solicitor's practice in Walkinstown, Dublin, now faces 21 charges of theft relating to mortgage funds, 14 charges relating to deeds of transfer and assignment on properties, nine charges of deception and eight charges of using false instruments.


Struck-off solicitor, Thomas Byrne

All of the offences are alleged to have occurred between 2004 and 2007 and relate to residential properties in Dorset Street, Crumlin, Clondalkin and south Dublin, as well as six banks, Anglo Irish Bank, Bank of Scotland (Ireland), EBS, IIB, Irish Nationwide and NIB.

Judge John O'Neill granted Mr Byrne free legal aid and remanded him on continuing bail until 2 March 2012 for service of the book of evidence.



Get your *Support Services Directory* 2012

The Society has issued a new *Support Services Directory* as part of the membership/practising certificate renewal process for 2012.

The directory summarises the support services on offer to the profession, including the contact details of the relevant individual (either within the Society or elsewhere) who co-ordinates each service, as follows:

- **Employment and career development,**
- **Education and training,**
- **Information/guidance services,**
- **Personal benefits,**
- **Services to help with professional and/or personal issues, and**
- **Facilities, accommodation and catering.**

The *Support Services Directory* is available to download from the Support Services section of the members' area at www.lawsociety.ie.

For further information, login to the members' area of the website or contact Louise Campbell, support services executive, Law Society of Ireland, Blackhall Place, Dublin 7; tel 01 881 5712; or email l.campbell@lawsociety.ie.

Periphrastic practitioners a perennial problem

The National Adult Literacy Agency (NALA) has been in touch to issue a challenge to lawyers – how about trying to communicate in plain English?

Can you spot the difference between the following words?

- *Duress – Pressure*
- *Forfeit – Lose*
- *Onus – Duty*
- *Proviso – Condition*.

The words on the right, they point out, are in 'plain' English.

An estimated one in four adults has a significant literacy difficulty. As a result, NALA says that the legal profession faces particular challenges when the public is faced with understanding and using legal services.

The cure? Use plain English. This can help lawyers to be more efficient, since clearer information is more likely to save time, money and possible frustration from having to make repeated requests for information, or when contesting legal agreements.

"The legal profession is not alone in having its own shorthand," says NALA, "but for some reason, lawyers, in particular, have a reputation for bamboozling non-lawyers with obscure jargon."

Help is available for periphrastic practitioners. NALA has developed a free resource to help people write in plain English. Visit www.simplyput.ie, where you'll even find recommendations on legal words to avoid and a handy *Plain English Guide to Legal Terms* for the public (and lawyers) to use.

NALA's Clare McNally tells the *Gazette* that she is happy to consider requests to appear at CPD courses around the country. She can be contacted at tel 01 412 7909 or email media@nala.ie.

Joining the Irish Language Register – *Clár na Gaeilge (An Dlí-Chumann)*

A solicitor who wishes to be registered on the Irish Language Register (Law Society) as a solicitor who practises law through Irish, **must** take the PPCII Advanced Legal Practice Irish/*Ardchúrsa Chleachtadh Dlí as Gaeilge* elective course **and** pass all course assessments.

The course will run on six consecutive Thursday evenings from 6pm-8pm, commencing on 10 May 2012.

This 'blended learning' course will include a mixture of direct contact time, online interaction and the completion of course tasks. Assessment will combine continuous assessment and an end-of-course examination. This course will fulfil the full practitioner CPD requirement for 2012.

The fee is €625 and the application closing date is Tuesday 24 April 2012 at 5pm.

For further details and an application form, contact: Robert Lowney, Education Centre, Law Society of Ireland, Blackhall Place, Dublin 7; tel: 01 672 4952, email: r.lowney@lawsociety.ie.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

New PRA prescribed forms of charge/mortgage

CONVEYANCING COMMITTEE

Practitioners should familiarise themselves with the content of the publication by the PRA, *Deeds of Charge/Mortgage* (Legal Office Notice 1 of 2012), which is available on the PRA website.

For **charges/mortgages executed on or after 1 March 2012**, the charge/mortgage must be in the new form prescribed by the PRA.

Separately, practitioners should note that a new edition of the Law Society's certificate of title documentation was drafted last year, in consultation with the IBF, to reflect changes in the law brought about by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, and to update the list of participating lenders and the reference in the documentation to PII legislation.

The new edition – the 2011 edition – has an effective date of **2 April 2012** and will be used by participating lenders for all loans approved on or after that date. (For further details on both these items, see this month's relevant practice notes on page 49.)

Ideas sought for annual conference topics

IN-HOUSE AND PUBLIC SECTOR COMMITTEE

The In-House and Public Sector Committee is planning its annual conference, which will take place in November 2012. In the last issue of the *Gazette*, we highlighted the topics that were discussed at our last conference.

To assist further, the previous two conferences discussed and gave practical guidance on:

- Data protection and topical compliance issues (2009),
- Competition law (2009),
- Current issues in procurement law (2009),
- Public procurement (2009),
- Compliance – policy formulation and implementation (2009),
- Managing legal privilege and avoiding the pitfalls (2010),
- Stress management in the workplace (2010), and
- Regulation – the implications for the in-house and public sector solicitor (2010).

In our forums during the past few years, we have covered:

- Surviving the downturn, with guidance given on:
  - Examinerships, receiverships, liquidations and insolvency,
  - Negotiating commercial contracts,
  - The most frequently asked questions about human resources matters,
  - Governance and compliance – recent developments in procurement and dawn-raids (2009).
- Life as an in-house solicitor, with several solicitors who work in the public and private sectors providing a description of the knowledge, skills and experience required to work in these roles (2010), and
- The legal intricacies of working in-house in the Football Association of Ireland, Swim Ireland and the Federation of Irish Sport (2011).

We are inviting practitioners who work in the in-house and public-sector arenas to inform us of your current areas of interest and concern, so that these may be considered for inclusion as topics in November's annual conference, and at our forum, which is expected to take place in April or May.

Contact Louise Campbell, committee secretary, at tel: 01 881 5712 or email: l.campbell@lawsociety.ie.

Copying *inter partes* correspondence to the court

LITIGATION COMMITTEE

The Litigation Committee wishes to draw practitioners' attention to recent judicial comment on the furnishing of *inter partes* documentation to the court registrar, particularly in cases before the Commercial Court. (For further information, see this month's practice notes section on page 44.)

Transactions involving vulnerable/older adults – guidelines for solicitors

GUIDANCE AND ETHICS COMMITTEE

The committee has published an extensive practice note in this issue, entitled 'Transactions involving vulnerable/older adults (to include requests for visits to residential care settings): guidelines for solicitors. (See practice note on page 45)

Family law cases taking brunt of judge shortages

FAMILY LAW COMMITTEE

The Family Law Committee is aware of significant difficulties with family law court listings around the country, both in the District and Circuit Courts.

Specifically in relation to the Circuit Court, it is understood that there is currently a shortage of more than ten judges for a variety of reasons, including retirements, tribunal work and illness. As a consequence, many circuits are experiencing the cancellation of entire family law sittings, with consequent substantial delay in cases getting dates for hearing. In both the District and Circuit Courts around the country, unacceptably lengthy lists are also the norm, which cause delay, frustration and increased costs.

The Family Law Committee views these circumstances with great concern. In particular, it would appear that in some circuits, family law sittings are taking the brunt caused by the shortage of judges, notwithstanding the vital issues, in particular in relation to children, that are dealt with in family law cases.

The committee hopes to meet with the Courts Service to raise this and other important issues of concern. In advance of that meeting, the committee would welcome information from practitioners in relation to these issues and how they are impacting on the ground.

SOCIETY'S SUBMISSION RAISES SERIOUS CONCERNS ON LSRB

The Law Society has submitted its detailed submission to the Minister for Justice on the *Legal Services Regulation Bill*. Mark McDermott pores over the details

Mark McDermott is editor of the Law Society Gazette

In its 100-page submission to Justice Minister Alan Shatter on the *Legal Services Regulation Bill 2011*, the Law Society underlines its support for certain aspects of the bill, lays out its opposition to many elements of it, and proposes detailed policy and technical improvements to the proposed legislation.

The submission is an intense review of the *Legal Services Regulation Bill*, following extensive consultation with the profession. This included the National Convention Centre conference in early December, a special information forum at Blackhall Place on 23 January 2012, individual meetings with bar associations around the country, to which all solicitors were invited, and *Gazette* articles and special eBulletins on the topic.

Guarded support

The Society has been quick to express its support for certain elements of the bill – but it takes serious issue with others. The submission states that solicitors are by no means opposed to all change.

In fact, the Society has welcomed a number of positive changes in the proposed legislation, including the move to a much more transparent, modern and predictable system for the assessment of legal costs; the provisions in the bill permitting the appointment of solicitors as senior counsel; and the provisions in the bill dealing with decisions about which legal practitioner should lead court proceedings.

The Law Society's submission, however, sets out its serious concerns about a large number of the bill's provisions, the reasons for such concerns, and proposed amendments to the bill to address them.

> ***"The authority should pay close attention to the current cost of regulation and be required to justify or provide adequate reasons for any proposed increase in costs"***

Litany of concerns

Matters of concern to the Society in, or arising from, the bill are dealt with in significant detail, including the following.

The myths of 'self-regulation' and regulatory failure – the Society emphasises that its complaints handling "has always been conducted to the highest standards of fairness and objectivity and that this has been guaranteed by the involvement of lay members". Nevertheless, the Council has taken the decision that the time has come to address the public perception that the Society should not adjudicate upon complaints against members of its own profession. Accordingly, all complaints should, in the future, be made to and dealt with by an independent body.

Independence issues – the Society states that the new Legal Services Regulatory Authority should be independent in the performance of its functions.

Introduction of Government-controlled regulation – amendments to the bill are necessary, the Society says, to ensure that the legal profession in Ireland, and its regulator, remain independent of Government control. Independence would be maintained "through the removal of all of the powers of the Government and the minister, provided in the bill, which would effectively enable the Government to control the so-called 'independent regulator' and, by extension, the legal profession".

Serious threats to legal professional privilege and client confidentiality – the Society insists that amendments be made to the bill "to remove the serious and unacceptable threat to legal professional privilege and client confidentiality created in the bill".

Threats to confidential information pertaining to legal practitioners – as the bill currently stands, the minister, among others, would have access to privileged confidential client information, including legal advice, through the inspection powers of the authority. In the interest of preserving the rule of law, the Society wants this changed.

Complaints handling – the Society agrees that complaints

COST OF THE NEW STRUCTURES

Regarding the cost of the new regulator to the public and the profession, the Society recommends that a 'regulatory impact assessment' and costings should be prepared, in consultation with the legal professional bodies. This should be published by the Government before the commencement of the committee stage of the bill, to enable meaningful consultation.

The authority should pay close attention to the current cost of regulation and be required to justify or provide adequate reasons for any proposed increase in costs. The levy should be capped at the current rate, subject to adjustments in line with inflation or increased membership of either profession, in order to control costs.

In addition, only expenses relating to the regulation of legal practitioners should be borne by the profession. Other ancillary costs – in particular, the set-up costs of the authority and preparation of policy documents for the Government – should be paid for by the Government. The professional bodies should be involved in the budgetary process for the authority.

"As the bill currently stands, the minister would have access to privileged confidential client information, including legal advice"

alleging misconduct or inadequate professional services should be made to the authority. Complaints alleging the charging of excessive fees should be made to the legal costs adjudicator.

Complaints mechanism

In addition, the Society recommends that a series of mechanisms for maintaining the current high standard of complaints handling should be included in the bill:

- Amendments should be made to the bill to ensure that the legal professional bodies continue to play a substantial and direct role in the regulation of their profession, as is the norm in all other democratic states.
- The power of the minister to direct the authority to prepare and publish codes of practice, and the power of the minister to develop policy on the provision of legal services, should be removed. In addition, the minister should not be able to modify the policies or codes of practice.
- The Society should retain all of the regulatory powers associated with the compensation fund in relation to regulation of practice and inspections, subject to oversight by the authority. The bill should be amended to give a right of review to the authority for claims on the compensation fund.
- The Society should also retain all of the regulatory powers for professional indemnity insurance, subject to oversight by the authority. The power to decide the minimum level of cover should rest with the authority.
- Regulatory powers regarding advertising of legal services by solicitors should remain with the Society, subject to oversight by the authority. However, regulatory powers regarding advertising of legal services by non-legal practitioners should be under the control of the authority. In addition, the current advertising restrictions regarding personal injury claims should be retained.
- All Society staff employed to deal with regulatory functions who will be transferred to the authority should be transferred on terms and conditions, including remuneration and superannuation, no less favourable than those already in place, to avoid increased costs, ensure continuity of service for the public, and to retain invaluable and unique experience.
- Some of the fair procedures in relation to complaints and certain rights of consumers should be reinstated in the bill. Also, the distinction between allegations of misconduct and inadequate professional services should be maintained.

More to come

In addition to this initial submission, the Society will also be providing "a subsequent detailed 'section-based' review of the bill". This will set out the considerable number of drafting and technical errors and unworkable provisions in the bill.

The Society's submission is part of a process that, to date, has included a meeting with the minister on 16 January 2012. Constructive engagement on this highly significant matter for the rule of law and the legal profession in Ireland continues apace. Indeed, the Society has sought an early meeting with the minister on its submission. G

STRUCTURE OF THE PROFESSION

The Society's submission recommends that all provisions in the bill concerning legal partnerships should be placed in separate legislation and be subject to separate review. The same applies to the provision in the bill dealing with direct access to barristers. Both of these provisions should not be introduced until the necessary report has been completed on whether such changes should be introduced.

In addition, all provisions in the bill concerning multi-disciplinary practices should be removed.

Finally, the Government should immediately approve the introduction of regulations under section 70 of the *Solicitors (Amendment) Act 1994* to allow solicitors to deliver their services through limited liability entities, whether individual profession corporations, limited liability partnerships or companies.

ADVANCING ONLINE ACCESS TO THE IRISH STATUTE BOOK

The complexity and inaccessibility of Irish legislation has been a longstanding problem for practitioners trying to stay current with amended legislation. The LRC continues to make inroads to address this perplexing problem. Aoife Maeve Clarke logs on

Aoife Maeve Clarke is the project supervisor of the Legislation Directory of Statutory Instruments *at the LRC*

The Irish Statute Book is a complex conglomeration of thousands of pieces of primary and secondary legislation. Each year, dozens of acts and hundreds of statutory instruments (SIs) are enacted and made, adding to the already voluminous regulatory stock. A significant amount of this newly created legislation amends existing acts and SIs, resulting in piecemeal changes. Apart from a handful of consolidated acts, these amendments are never integrated into the original act, and individuals are often unaware of the existence of these amendments and are uninformed about where to access them. Considerable research, resulting in increased legal costs is, therefore, necessary to determine the current state of the law in its amended form.

The complexity and inaccessibility of legislation in Ireland is a longstanding problem and has been highlighted by the OECD in reports on regulatory reform in Ireland in 2001 and 2010. The Government has also acknowledged the importance of addressing these problems in numerous reports. Significant progress has been made with the availability of a web-based statute book at www.irishstatutebook.ie and through the Statute Law Revision Programme, which continues to repeal many obsolete pre-independence acts.

Notwithstanding these developments, much remains to be done, and simplifying access to legislation has never been so important. Practitioners may be interested in the work being carried out by the Law Reform Commission (LRC), and the tools it has developed to ease access to legislation and to identify what legislation (and amendments) remains on the statute book.

The *Legislation Directory*

The *Legislation Directory* (available at www.irishstatutebook.ie/legislation_directory.html) is a searchable guide to legislative amendments. It enables users to track the legislative history of acts by documenting whether an act has been modified by subsequent legislation. This addresses the problem of inaccessibility of the law caused by our system of legislative enactment. A detailed list of commencement information is also provided for post-2006 acts.

Originally, the *Legislation Directory* addressed modifications made to primary legislation only, but the commission has recently expanded the remit of this project to include SIs. A *Legislation Directory of Statutory Instruments* was launched in September 2011, which tracks the effects that SIs from 2003 to the present have had on both primary and secondary legislation. As a result, users may track the complete legislative history of SIs made between 2003 and 2011. This means, for example, that users can track all amendments made to the *Companies (Forms) Order 2004* (SI no133 of 2004). Users can also track changes made since 2003 to pre-2003 SIs, such as the *European Communities (Internal Market in Electricity) Regulations 2000* (SI no 445 of 2000). The LRC aims to further extend this back as far as 2000 by September 2012.

CLASSIFIED LIST OF LEGISLATION

The LRC has also drafted a classified list of legislation in Ireland to identify which acts on the statute book remain in force – in particular those enacted since 1922. The *Statute Law Revision Act 2007* provides a definitive list of the pre-1922 acts that remain in force.)

Over 3,000 acts have been enacted since 1922, but about 1,000 of these have been repealed since then. Before the development of the classified list, individuals had to search the *Legislation Directory* to ascertain if the relevant act had been repealed.

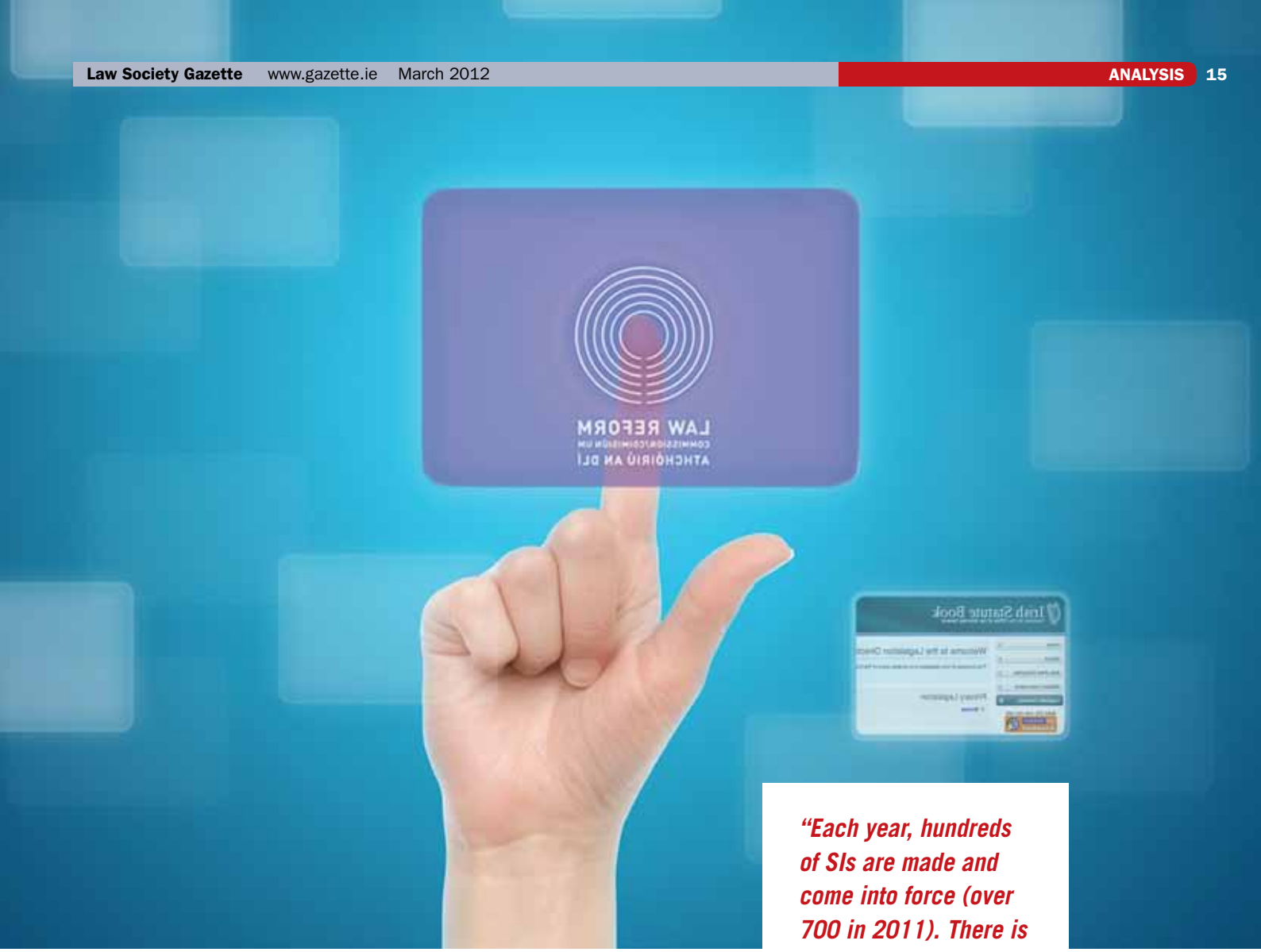
A draft list was first published as part of a consultation paper published by the commission in 2010. Following submissions from Government departments, the list has been regularly updated, and version four is currently available on the LRC's website, at www.lawreform.ie/classified-list-of-extant-post-1922-acts-in-ireland.329.html.

The list is divided into 36 subject-matter headings, broadly based upon federal and legislative codes of the United States. Every extant (in force) act in the State is inserted onto the list under the relevant heading, along with its applicable department, number and year of enactment.

LISTS OF STATUTORY INSTRUMENTS

Each year, hundreds of SIs are made and come into force (over 700 in 2011). There is currently no database or list that deals comprehensively with the status of these SIs. The classified list contains information regarding primary legislation only and, to date, the *Legislation Directory of Statutory Instruments* documents SIs amended since 2003.

Over the past year, the LRC has begun to identify which SIs are extant and which have been revoked, with a view to compiling complete lists of revoked and extant SIs from 1922 to present. The commission hopes to tie the extant list of SIs together with the classified list of legislation, so that extant SIs are listed under their enabling act. This project, coupled with the classified list, advances considerably the aim of compiling a complete picture of the Irish Statute Book.



The *Statute Law Revision Act 2007* comprehensively addressed the issue of pre-1922 legislation that remained on the statute book by repealing a large amount of obsolete pre-1922 public and general acts and by explicitly retaining 1,364 pre-1922 acts, which is a definitive list of such acts.

Until recently, the *Legislation Directory* tracked post-1922 amendments to legislation, including post-1922 amendments to pre-1922 acts. More recently, the commission has begun to include amendments made pre-1922 to those pre-1922 acts saved by the *Statute Law Revision Act 2007*. To date, complete tracking is now shown on the *Legislation Directory* for acts enacted from 1867 to 1922 (which covers the majority of the retained pre-1922 acts). The LRC intends to continue this process in reverse chronological order.

Statute law restatement is the administrative consolidation of legislation. This project works in tandem with the *Legislation Directory*, documenting the legislative history of legislation. Restatement, however, goes one step further than the *Legislation Directory*, integrating subsequent amendments into the principal act, thus allowing users to access seamless-looking acts in their amended form. All amendments are annotated, so readers can easily ascertain the origin, date and effect of amendments. The *Statute Law (Restatement) Act 2002* provides that, once restatements are certified by the Attorney General, they shall be *prima facie* evidence of the law.

As the report published in 2008 by the commission in this area discusses, restatements are extremely beneficial to individuals, practitioners and the legal system as a whole. They provide a clear account of the current state of the law in many areas, reduce legal research costs, and greatly assist legislators and drafters throughout the legislative process.

To date, the LRC has completed its First Programme of Statute Law Restatement, containing 70 restatements, and has recently launched a second, more extensive, programme. Completed pre-certified restatements, and details on each programme, are available on the commission's website, at www.lawreform.ie/restatement.84.html. Practitioners may find the restatements in the areas of road traffic, employment law, freedom of information and criminal procedure of particular use.

"Each year, hundreds of SIs are made and come into force (over 700 in 2011). There is currently no database or list that deals comprehensively with the status of these SIs. Over the past year, the LRC has begun compiling complete lists of revoked and extant SIs from 1922 to the present"

(Readers should also refer to 'The profession's best-kept secrets' in the Gazette, *Aug/Sept 2010, p12).*

DENIAL OF BASIC EDUCATION CONSTITUTES PERSECUTION

Denial of basic education constitutes persecution within the meaning of section 2 of the *Refugee Act 1996*, writes Sarah McDonald

Sarah McDonald is the Law Society's human rights executive

The recent Irish High Court decision in the case of *D (a minor) v Refugee Appeals Tribunal & Anor* ([2011] IEHC 431) has ruled that the potential denial of access to the basic primary education of a Serbian national is a violation of basic human rights and amounts to persecution under the *Refugee Act 1996*.

The applicant, D, was born in Ireland in 2006, though he is not an Irish citizen. His parents were born in Serbia and are of Ashkali ethnicity (regarded by Serbians as Roma). An application for asylum was made on the applicant's behalf, but was refused by the Refugee Appeals Tribunal in a decision delivered in August 2009.

Although the Refugee Appeals Tribunal agreed that the applicant would likely face discrimination if deported to Serbia, it was not persuaded on evidence submitted that "such discrimination [would] rise to the level of persecution". The fact that the applicant may not receive a full – or indeed a basic – education was not sufficient in the view of the tribunal to "lead to a conclusion that the requirement of persecution [was] satisfied".

The applicant appealed, on the basis that he would suffer persecution on returning to Serbia and be prevented from receiving a basic education.

> ***"The potential denial of access to the basic primary education of a Serbian national is a violation of basic human rights and amounts to persecution under the* Refugee Act 1996"**

What constitutes persecution?

The essential question presented to the High Court, presided over by Mr Justice Hogan, was whether the tribunal's finding against D – who contended that, if returned, he would face pervasive discrimination that would impair his right to receive a basic education – was correct.

Mr Justice Hogan agreed that the Refugee Appeals Tribunal had correctly observed that "not all infringements of even basic civil liberties or even acts of discrimination will amount to persecution within the meaning of section 2 of the *Refugee Act 1996*". He said that "something in the nature of systematic and pervasive infringements of a basic human right is generally required".

However, he observed further that "the concept of what constitutes persecution does not lend itself to precise analysis". He quoted paragraph 51 of the *UNHCR Handbook*, which states: "There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success."

Since there is " no universally accepted definition of persecution" and that "serious violations of human rights … also constitute persecution" (paragraph 51 of the *UNHCR Handbook*), the judge considered it necessary to analyse the level of discrimination that the applicant was likely to receive if returned to Serbia, and whether these infringements would violate his basic human rights and amount to persecution.

Roma discrimination

The available country-of-origin information presented to the court showed that the Ashkali and Roma communities in Serbia are often subjected to widespread discrimination, as evidenced by a climate of indifference, hostility and intolerance among the general public.

In its report on Serbia in June 2008, the UN Committee on the Rights of the Child stated that it is deeply concerned by "the negative attitudes and prejudices of the general public and the overall situation of children of minorities and, in particular, Roma children. The committee is concerned at the effect this has had with regard to discrimination and disparity, poverty and the denial of their equal access to health, education, housing, employment, non-enrolment in school, cases of early marriage and decent standard of living. The committee is also concerned at the very low levels of participation in early childhood development programmes and day-care and the deprivation of education."

The views expressed by the European Commission in the *Serbia 2008 Progress Report* outline similar sentiments. It found: "There have been some improvements in the number of Roma children attending secondary schools … however, the generally low school attendance by Roma children remains a serious problem, in particular among Roma girls. In practice, the Roma population continues to face extremely difficult living conditions, exclusion and discrimination."

In addition, a 2008 US State Department report on Serbia found that: "Romani education remained a serious problem. Many Romani children, especially girls, did not attend primary school … According to an Open Society Institute report presented in October, only 2% of Romani children were in preschool, while fewer than 40% attended

primary school. In some cases, children who attended school sat in separate Roma-only classrooms or in a group at the back of regular classes."

Mr Justice Hogan stated that the country of origin information uniformly "painted a picture of pervasive discrimination against Roma children" with regard to access to even basic education. Arguably, there was a high probability that, if returned to Serbia, the applicant would more than likely be pervasively discriminated against.

The equality principle

Summing up the case, Mr Justice Hogan pointed out that, almost 60 years ago, the US Supreme Court famously declared in *Brown v Board of Education of Topeka* (347 US 483 [1954]) that segregated schooling violated the equality principle contained in the 14th Amendment to the US Constitution. While this did not mean that it was persecution, Judge Hogan stated that *Brown* illustrates the point that segregated schooling "is a general hallmark of a society where the disadvantaged group will be subjected to pervasive discrimination and exclusion which, in some circumstances at least, can amount to persecution".

In this case, the statistics suggest that the applicant is unlikely to receive even a basic education in Serbia. However, the judge questioned whether this official indifference could amount to persecution?

In addressing this, Mr Justice Hogan quoted from Hathaway's *The Law of Refugee Status* , where persecution is defined as the "failure to implement a right within the category which is either discriminatory or not grounded in the absolute lack of resources".

> ***"The right to education is regarded as a most significant human right, since the denial of that right means that many other human rights are likely to be beyond reach"***

He further acknowledged that the right to education is widely regarded as fundamental in article 42 of the *Irish Constitution*, article 2 of the first protocol of the *European Convention on Human Rights*, and article 14 of the *EU Charter of Fundamental Rights*, as well as the *UN Convention on the Rights of the Child*.

He quoted from Dympna Glendenning's *Education and the Law*, where the right to education is regarded as a most "significant human right, since the denial of that right means that many other human rights are likely to be beyond reach". Indeed, Mr Justice Hogan added: "If D is denied the right to even a basic education, he will effectively be excluded from any meaningful participation in Serbian society."

The court held that, although the applicant's situation was "outside the classic types of persecution envisaged by the *Geneva Convention*", it was impossible to avoid the conclusion "that the denial of even a basic education amounts to a severe violation of basic human rights". Mr Justice Hogan concluded that the treatment the applicant may face in Serbia would amount to persecution within the meaning of section 2 of the *Refugee Act 1996*, and quashed the tribunal's decision.

HOIST THE JOLLY ROGER

Proposed Irish legislation will place the responsibility, expense and risk of policing private rights on the internet at the door of internet service providers. It's uninformed and ill considered, warns Yvonne McNamara

Yvonne McNamara is a barrister who specialises in intellectual property law

Draft regulations have been tabled by the Minister of State for Research and Innovation as a proposed response to the problem of online copyright infringement. The regulations, which would insert a new provision into Irish copyright legislation, appear to aim to facilitate the granting of injunctions against internet service providers (ISPs) where the ISPs' services are used by others to infringe copyright.

The draft regulations are flawed. They do not exhibit the clarity of provision, or calibration of remedy to legal obligation necessary to make good law. The root of the problem appears to lie at policy level, and more precisely, the failure to formulate policy at all.

The problem

Peer-to-peer technology enables online copyright infringement on a grand scale. Whatever about the *impact* of online copyright infringement on the music and film industries – often a cause for debate and 'lobbynomics' between those industries and ISPs – most will not argue about the *extent* of it.

Individuals who download infringing material are liable for copyright infringement. However, the nature and expense of the measures currently needed to identify and take action against such individuals and the potential numbers involved have tended to cast the prospect of tackling infringement via conventional infringement action in a Sisyphean light – endless and ultimately unavailing. Bringing one's own customers and potential customers to court is also, of course, unhelpful in the winning of hearts and minds.

In these circumstances, attention has turned to the role of ISPs as the providers of the transmission services by which content is borne to its legitimate – or not so legitimate – receivers. One swoop on an ISP, resulting in cutting off infringers from their means of transmission, is conceived of as a more effective measure than going against the individual infringers themselves. On this basis, copyright owners have sought a variety of injunctions, such as injunctions to require ISPs to block subscribers' access to infringing sites (not hosted by the ISP), and to require ISPs to cut off their own subscribers where certain proofs of infringement are provided to the ISP by copyright owners.

> ***"The root of the problem appears to lie at policy level, and more precisely, the failure to formulate policy at all"***

There is a key legal problem with seeking such injunctions against ISPs who merely provide transmission services – they are not, under the law as it currently stands, liable for copyright infringement, any more than An Post would be for delivering infringing material by post. If this was not already evident from the wording of the *Copyright and Related Rights Act 2000*, as amended, it must now be considered authoritatively established following the detailed judgment of Mr Justice Charleton in *EMI and others v UPC*. When one additionally considers that the injunctive relief typically sought imposes an expense on ISPs, that it may be potentially disruptive of their businesses and, indeed, potentially impactful on fundamental rights (such as free speech and privacy) of third parties, then the prospect of seeking such injunctions becomes distinctly problematic.

A response to the *UPC* judgment

The proposed amending legislation is trailed as a response to the *UPC* judgment. It purports to give a right to *apply* for an injunction, but leaves the substantive law underpinning any such remedies unchanged. Nevertheless, if promulgated, it will be argued to have provided a separate stand-alone cause of action against ISPs, which is plainly not copyright infringement but rather a different mechanism by which to get and keep ISPs before the court for the sole purpose of facilitating the grant of a remedy against them.

The effect will surely be to pass to the High Court the job of adjudication, not only between individual litigants but, by dint of requiring the court to adjudicate in a legal and policy vacuum, between entire sectors in the new legal frontier of cyberspace.

The principles of proportionality and fairness, however, remain. They have a role to play, not only under domestic law, but under the very EU law designed to be implemented by the new measure. This fact has tended to be obscured by a tendency among the courts of the member states thus far, although not uniformly, to interpret the mention of injunctions in article 8(3) as a mandate to grant wide injunctions against ISPs.

It should be recalled that, while article 8(3) exists, so, too, do the provisions of the e-commerce directive exempting ISPs supplying transmission services from liability for traffic on the service, prohibiting the imposition of monitoring duties on them in respect of that traffic, and emphasising the importance of free-movement-of-information society services and of universal connectivity

to information society services – all diametrically opposed to the kind of injunctions being sought against ISPs.

These countervailing factors were recalled, and given due weight, in the recent ECJ decision in *Scarlet v SABAM*, where the court additionally directed that effect had to be given, in considering requests for injunctions, to the rights of ISPs to conduct a business (guaranteed under article 16 of the *Charter of Fundamental Rights*) and to the rights of third parties to freedom of expression and the right to receive and impart information.

This is not to suggest that rights holders have to put up with wholesale online infringement – it is simply to say that passing a law that places the responsibility, expense and risk of policing private rights on the internet at the door of the providers of transmission services does not smack of a fully informed or well-considered policy approach. All kinds of other measures to address the problem suggest themselves, including:

- Modernisation of copyright law,
- Updating online business models,
- A modicum of telecommunications regulation,
- Easier access to *Norwich Pharmacal* relief, and
- Remedies for copyright infringement.

As it currently stands, the legislation now proposed for Ireland is the same in all material respects as the form of Belgian legislation regarded by Advocate General Cruz Villalón in his opinion in *Scarlet v SABAM*. It is insufficiently clear to stand as a measure under which rights guaranteed in the *Charter on Fundamental Rights* – of which the freedom to run a business is one – can be restricted. G

THE LEGISLATIVE PROPOSAL

The draft regulations would insert a new section into the *Copyright Act* to provide that rights-holders will have a right to *apply* for an injunction against intermediaries whose services are used by a *third party* to infringe copyright. In so doing, the provision incorporates those of article 8(3) of the *Copyright Directive*, which are in similar bare terms. The provisions of the act on substantive liability remain unaffected.

The new proposal, therefore, appears to address the jurisdiction of the High Court to award injunctions. Considering that that jurisdiction – conferred by section 28(8) of the *Supreme Court of Judicature (Ireland) Act 1877* – has long been understood to confer a power on the court to grant injunctions whenever it is 'just or convenient' to do so, the existing jurisdiction could hardly be broader. The issue, therefore, does not revolve around the extent of the jurisdiction to grant injunctions – which needs no augmentation – but rather its exercise.

In this regard, foremost among the very well-established principles governing the granting of injunctions are the principles of fairness and proportionality – whereby the apprehended injury to be remedied, on the one hand, is to be weighed against the hardship to the person to be enjoined, on the other. Applying these principles, how could it plausibly be argued that a court should exercise its power to grant an injunction requiring the person enjoined to undertake expensive positive action for an indefinite period, in circumstances where that person is not himself liable for the legal wrong that creates the injury to be remedied? In *EMI and others v UPC*, the court could not see its way clear to granting an injunction against ISPs who merely provided transmission services in circumstances where the legislature had not made such ISPs liable for the infringement complained of.

SO LONG, *pardner*

Traditionally, solicitors' partnerships in Ireland have been more like marriages than business arrangements – and a partnership break-up can be similar in many ways to a divorce, with the same rancour, bitterness and personal agendas. Anne Neary takes her leave

Anne Neary is a solicitor and management consultant and is the author of The Solicitor's Toolkit. *She also represents colleagues before the Law Society in regulatory matters*

In any partnership, there can be strains and pressures that can make everyone's working life very difficult. However, many partnerships are experiencing unprecedented strains in the past five years due to the economic climate. There are a number of particular difficulties that are arising with increasing frequency, including:

- The personal insolvency of one or more of the partners,
- An increasing disparity in fee generation between the partners,
- One partner is responsible for negligence claims being made against the partnership,
- The partners disagree on the future direction of the business, or
- The general stress of working in straitened economic times causes breakdowns in personal relationships between the partners.

Usually, a break-up in the partnership occurs when any one of the strains becomes intolerable, and the pain of the break-up is justified by the gain of breaking the deadlock. However, some partners may be in a situation that no one could have foreseen just a few years previously. The partnership relationship may have irretrievably broken down, but a break-up can be particularly difficult for various reasons. One of the most common reasons is that the partners bought or developed an office building that is in negative equity. All the partners are liable for the mortgage and the only income they have to pay the instalments comes from their drawings. Many partners in firms are also partners in other fields, such as property developments, and a partnership break-up usually means that these other interests have to be divided up also. So, there can be far-reaching consequences to a partnership break-up, and these have to be carefully considered before the final decision is made.

"Negotiating and executing an agreement is not the end of a partnership split – there is rarely a clean break. Problems will arise in the future, sometimes unexpected problems"

Partnership agreement

If there is a partnership agreement in place, a review of this agreement will be the first step to determine what, if any, terms relate to the break-up or dissolution of the partnership. Partnership agreements generally contain terms in relation to the resignation or retirement of a partner from a partnership. A typical agreement deals with matters such as the drawings and bonus arrangements of a retiring partner and contains terms in relation to the distribution of the capital account. The partnership agreements that I have seen are often silent on the issue of a partnership break-up. There are also often no provisions governing the expulsion of a partner, and this can really complicate the situation. Frequently, the agreement does not adequately address the issue of whether the partnership goes into dissolution in the event of one partner leaving.

Where the partnership agreement is silent on these issues, then either all the parties must come to an agreement together, or the law will apply. The law relating to partnership is basically that of contract superimposed on the statutory framework. Much of the law relating to partnerships is contained in the *Partnership Act 1890*, which was a codification of the existing law. It is not a complete code, as the rules of equity and of common law continue in force as long as they are not inconsistent.

FAST FACTS

- There can be far-reaching consequences to a partnership break-up, and these have to be carefully considered
- Partnership agreements frequently do not adequately address the issue of a partnership break-up
- The regulatory requirements relating to the break-up of a partnership can be a minefield

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The *Partnership Act 1890* operates for partnerships like Table A of the *Companies Act 1963* operates for companies. It brings a default partnership agreement into effect, the terms of which automatically apply unless they are excluded. Some of the provisions of the *Partnership Act* can have unexpected effects, and are often unsuitable for modern partnerships: for example, a partner cannot be expelled, and any partner can dissolve the partnership by a simple oral communication to the other partner or partners.

Implications for PII

If the partnership is breaking up rather than dissolving, certain issues need to be considered. In this scenario, the main firm remains in existence and the partner or partners who are leaving will either retire, set up a new practice or join another practice.

Where the partner who is leaving joins another firm and takes all of his or her current files, it is important to ensure that this other firm does not become a successor practice, with the old firm retaining the liability for the departing partner's closed files.

If the former partners are concerned that the closed files represent a high risk to the practice, they should request the partner who is leaving to take the closed files also. This is a matter for negotiation between the parties. The insurer should be consulted to ensure that, whatever the decision, the existing professional indemnity cover is not affected and that a new policy will be offered to the departing partner.

If the partnership is dissolving, then the issue is whether run-off cover is available. The new run-off rules are designed to prevent 'phoenix firms' walking away from historical liability and setting up anew. The succeeding practice rule will apply where, for example, a two-partner firm ceases and the two partners move with all files to another firm in which they become partners. Those other firms become succeeding practices, and their insurance will bear the liability associated with the preceding firm's files and any potential claims arising from them. The preceding practice will not be entitled to run-off cover.

The succeeding practice rule will be removed for certain situations where, for example, (a) sole practitioners cease practice and pass their files on to another firm or (b) where a two-partner practice ceases and only one partner moves to another firm – in both cases, subject to the other firm not holding itself out as a successor and not assuming liabilities. Run-off cover will apply in these situations.

These rules are complicated, and each situation is different and merits detailed consideration. We have heard of partners leaving a firm, joining another, but leaving all current files with the old firm because of the fear that the new firm would become a succeeding practice. This is a very expensive decision, so it is vital to get it right. We have seen other situations where a firm inadvertently became a successor firm and became uninsurable as a result. Take advice before you act – one phone call to an expert could make all the difference. The regulatory requirements relating to the break-up of a partnership can be a minefield, so proceed with caution.

"Litigation between partners is to be avoided at all costs, because of the expense and reputational damage"

Material circumstance

A partnership break-up gives rise to a material circumstance that must be reported to the firm's insurer. Insurers often don't react as anticipated. The attitude of your insurer has to be clarified well in advance of taking any irreversible action. Professional indemnity insurance (PII) is one of the key considerations in the case of partnership break-up. The main worry for partners who are going their separate ways is whether or not each partner will be able to secure PII for their new entity.

Drafting an agreement is difficult as, all too often, negotiations can break down over the most unexpected issues. Negotiating and executing an agreement is not the end of a partnership split – there is rarely a clean break. Problems will arise in the future, sometimes unexpected problems, which have to be resolved. These issues can go on for years, so the agreement needs to deal with how this is to be done. Remember that there may be little goodwill left between the parties, so it is a good idea to nominate an independent person who will mediate on any matters arising after the signing of the agreement. Litigation between partners is to be avoided at all costs, because of the expense and reputational damage.

The agreement will also have to deal with the public relations aspects of the break-up, which needs to be planned and agreed in advance. Clients need continuing representation. They will also need to be informed of what is happening as soon as possible, and this should be done by agreement between all the partners. Pre-emptive actions by one party can damage months of negotiations.

Planning for the future

A partnership break-up is a good time for the remaining partners to take a look at the existing business and introduce or improve business structures. It is critically important to establish the strategic direction of the firm for the next three to five years. A good business plan should be drafted to work out the aims and goals of the practice and set out targets and action plans for meeting them. Financial projections for the new firm should also be calculated.

Use your business plan to set benchmarks for partnership performance. Finally, review and improve your internal procedures. G

PROJECT MANAGEMENT PLAN

Where a decision is made to proceed with a partnership split, then it is vital to treat the break-up as a particularly difficult project and draw up a project management plan. The main aim of the plan is to limit the damage to the ongoing firm if there is no dissolution, and to ensure that the partner who is leaving does so in a manner that best supports his chances of setting up a viable business on his own.

There are many practical issues that should be dealt with in the plan, including:

- **Splitting files and practice areas,**
- **Dealing with closed files,**
- **How to treat goodwill,**
- **Dividing equipment and fixed assets,**
- **Dealing with partnership debts and capital accounts,**
- **Obtaining the consent of the firm's professional indemnity insurers,**
- **Taxation considerations, and**
- **Staff.**

LOOK IT UP

Legislation:

- *Partnership Act 1890*
- *Solicitors Acts 1954 to 2008 (Professional Indemnity Insurance) Regulations 2011* (SI 366/2010, SI 409/2011 and SI 495/2010)

Literature:

- *Professional Indemnity Insurance: Guide to Renewal* (September 2011), Law Society of Ireland

COACH AND FOUR

Practitioners regularly have pre-trial contact with witnesses, says Michael McCormack, and recent case law has delivered some desirable guidance as to their obligations in this respect

Michael McCormack is a barrister in general practice. He would like to thank Cathal McGreal BL for his assistance with this article

Recent case law has highlighted the issues that can arise in pre-trial witness preparation by non-practitioners, particularly in the form of counselling or therapy. In *O'R v DPP*, the applicant brought judicial review proceedings seeking to prevent his trial for sexual assault on the grounds that the complainant was coached on how to give her evidence. Charleton J refused to restrain the trial, notwithstanding that the complainant had done a 'role play' of giving evidence with a psychologist. He held that the alleged coaching could be addressed by the defence at trial.

The applicant claimed in the judicial review proceedings that the psychologist had engaged in a role-play exercise, whereby the psychologist assumed the role of the defence barrister. The psychologist's notes record the complainant as suffering from fear about the trial, specifically "how she will be in court" and also record that "we practised 'role-play' scenarios of what the court situation would be like".

The applicant claimed that this had "irremediably tarnished the prospect of a fair trial".

The psychologist also made a statement to the gardaí in which she said that "a 'role-play' model was used, whereby I asked [the complainant] what she thought the atmosphere would be like in court, what did she envisage would happen, and how this might make her feel".

Pre-trial consultation

Charleton J accepted that preparation for a trial necessarily involves prosecution and defence speaking with witnesses; otherwise the leading of evidence "would become drawn out, unstructured and lacking in concision". The correct approach to pre-trial consultations with witnesses is to avoid any suggestion that a particular emphasis is needed or that a witness should embellish or invent facts, and "formal enquiry in preparation for trial is necessary and appropriate".

He noted that a person cannot be prevented from receiving therapy and that the notes of any therapy session will be sought by the defence. The availability of, and any privilege attaching to, such notes is relevant. Charleton J simply noted that a privilege for psychotherapy does not currently exist in law. In this case, the alleged coaching was by a clinical psychologist, not a psychotherapist. Members of the Psychological Society of Ireland are required to "maintain records of all psychological procedures and interventions for an appropriate period of time".

> ***"It is clear from Charleton J's comments, albeit obiter, that in this jurisdiction pre-trial contact, per se, does not make a fair trial impossible"***

It is not unusual in trials for sexual offences in this jurisdiction for the prosecution to call a psychologist to give evidence of what occurred in counselling sessions in an attempt to avoid the possibility of a mistrial.

In relation to the nature of counselling, the judge opined that "it is difficult to see counselling as a process which might unfairly influence a trial. Therapeutic intervention is, of its nature, independent of the trial process, is concerned with mental stress issues, and is divorced from any immediate desire to seek a particular result."

However, it could be argued that even counselling with the sole objective of making the complainant feel secure and justified presupposes the truth of their allegations and therefore bolsters the complainant, gives them an

FAST FACTS

- Issues can arise in pre-trial witness preparation by non-practitioners, particularly in the form of counselling or therapy
- The correct approach to pre-trial consultations with witnesses is to avoid any suggestion that a particular emphasis is needed or that a witness should embellish or invent facts
- Witness preparation that risks trespassing into the realm of coaching will not necessarily prevent a trial

opportunity to rehearse their account, and therefore unfairly strengthens their evidence.

The judgment reveals very little about the nature of the alleged witness coaching, or even whether there was any significant enquiry into it in the course of the judicial review proceedings. In relation to the events in this case, Charleton J simply concluded that "the addition to psychotherapy or counselling of any acting out of the trial process in the therapeutic setting" is undesirable, but queries whether such an undesirable practice necessarily creates a real risk of unfairness.

VICTIM SUPPORT AT COURT

Victim Support at Court is a voluntary organisation funded by the Commission for the Support of Victims of Crime. V-SAC provides pre-trial familiarisation visits to courtrooms (including an explanation of court procedures), accompanies witnesses during the trial, and provides access to a secure private area. It also provides information and referral to other organisations for counselling and long-term support.

Witness preparation in general

Charleton J also referred to *R v Momodou*. This case came about by way of an appeal from conviction on the grounds, among other things, that the trial should have been stayed due to witness coaching. The Court of Appeal found that the employer arranged witness training for its employees and that the training used a case study that had obvious similarities to the incident in question in the case. The training was "designed to give [the] witness an experience very similar to going to court" and included practice cross-examination "on real-life experiences which were not connected with the [incident]". It was denied that there occurred coaching or rehearsal of evidence.

The court made a distinction between witness coaching and witness familiarisation but noted that: "Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying,

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or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be 'improved'."

The court noted that the training of prosecution witnesses by their employer "redounded, as the Crown feared it would, against the prosecution". The likelihood of inappropriate witness preparation backfiring on the party engaging in it is also reflected in the Law Society's *Guide to Professional Conduct*. The trial judge in *Momodou* withdrew from the jury the case of one of the defendants, the evidence against whom was largely from witnesses who had been trained.

Undesirable intervention

In *O'R*, Charleton J concluded that the intervention consisted of a "brief acting out of the roles of defence counsel and witness ... [which] was not directive towards any particular result and nor could it be regarded as distorting the evidence" and that this intervention was undesirable, created an issue that may be argued by the defence, and was "a matter within the discretion of the trial judge in the running of the case on which no final guidance from a judge hearing a judicial review application is appropriate or possible".

In *Momodou*, the trial judge undertook a detailed investigation into the pre-trial events, and the Court of Appeal found it was significant that there was sufficient information about these events for the trial judge to make his decision that the trial should proceed.

Unfortunately, while *O'R* traverses the general principles in relation to witness preparation and makes it clear that witness preparation which risks trespassing into the realm of coaching will not necessarily prevent a trial, it does not sufficiently analyse the detailed nature of the alleged witness coaching, such that specific rules can be distilled for the guidance of counsellors of complainants before trial. It is clear from Charleton J's comments, albeit *obiter*, that in this jurisdiction, pre-trial contact, per se, does not make a fair trial impossible. G

PROFESSIONAL OBLIGATIONS

Section 5.1 of the Law Society's *Guide to Professional Conduct of Solicitors in Ireland* states, among other things: "A solicitor should not call a witness whose evidence is untrue to the solicitor's knowledge, as opposed to his belief."

Section 5.6 states: "A solicitor is entitled to interview a witness and to take statements from him in any civil or criminal proceedings, whether that witness has been interviewed or called as a witness by the other party, provided there is no question of tampering with the evidence of a witness or suborning him to change his story.

"In criminal cases, it is recommended that a solicitor for the prosecution or the defence who may wish to interview witnesses who have already given evidence on the preliminary enquiry into an indictable offence [since the *Criminal Justice Act 1999*, there is no longer any such preliminary enquiry], or who it is known are to be called as witnesses for the other side, should communicate first with the solicitor for the other side informing him of his intention. It may be a wise precaution in such circumstances for the interview on behalf of the defence to take place in the presence of a representative of the Garda Síochána who is not involved in the case."

Section 8.3 states: "It is the duty of a solicitor to ensure that counsel is adequately attended on by a solicitor or a responsible member of his staff in court or whenever counsel is interviewing the client or any witness for the client."

DIRECTOR OF PUBLIC PROSECUTIONS

The DPP's' *Guidelines for Prosecutors* states that "information regarding proposed prosecution witnesses that might reasonably be considered relevant to their credibility" should ordinarily be disclosed to the defence.

In relation to the prosecution solicitor's responsibilities to victims, it states: "Solicitor and counsel do not discuss evidence with witnesses in advance of a case. There are strict rules which prevent barristers discussing in advance the actual evidence that victims will give. This is intended to prevent the witness being told what evidence to give or to avoid any suggestion that this has happened."

ENGLAND AND WALES

The Crown Prosecution Service publishes a number of documents that practitioners may find of assistance, should issues arise in the provision of pre-trial counselling. The CPS states that, if therapy is provided, the prosecution must be made aware of the fact, records must be kept, and the therapy should normally not take place until after the witness has made a statement.

It specifically states that: "The therapist should be made aware of any pending criminal proceedings before commencing the therapy and should also be aware of the implications of using techniques that may result in the evidence of the witness being discredited."

Also: "Prosecutors must then obtain an assurance that the witness did not, in the therapy session(s), say anything inconsistent with the statements made by the witness to the police. Prosecutors may need to be made aware of the contents of the therapy sessions, as well as other details specified in the paragraph above, when considering whether or not to prosecute and their duties of disclosure."

LOOK IT UP

Cases:

- *O'R v DPP* [2011] IEHC 368
- *R v Momodou* [2005] WLR 3442

Reviewing THE SITUATION

Major changes in judicial review procedures were introduced on 1 January, and practitioners urgently need to inform themselves, writes David O'Neill

David O'Neill is a barrister specialising in administrative law and is the author of Ancillary Discovery

Time limit for *certiorari* down to three months. Remote prospects of having time extended. Full factual background to be pleaded in the statement of grounds – and possible elimination of oral argument from the substantive hearing. These are just some of the major changes in judicial review procedure introduced on 1 January 2012, of which practitioners urgently need to inform themselves.

The time limit for seeking leave to apply for *certiorari* has been reduced from six to three months (rule 21(1)). In this one instance, a transitional provision was included in the statutory instrument (regulation 4), preserving the six-month time limit where the grounds for seeking *certiorari* arose before 1 January.

Under the new rule 21(3), in addition to showing other good and sufficient reason, an applicant who needs an extension of time for applying for leave must also show that either:

- The circumstances that led to the application being late were outside his or her control (delays by the applicant's lawyers will probably be found to be within the control of the applicant), or
- Those circumstances could not reasonably have been anticipated by the applicant.

The court may have regard, in assessing the sufficiency of the reason advanced for seeking the extension, to any prejudice to the respondent or some third person that might result from granting it (rule 21(4)). The need for the extension must be explained on affidavit (rule 21(5)). An argument may yet arise as to whether rule 21(3) is *ultra vires* because it seeks to unduly circumscribe the court's discretion in extending time.

> ***"An argument may yet arise as to whether rule 21(3) is ultra vires because it seeks to unduly circumscribe the court's discretion in extending time"***

In cases where the grounds for seeking *certiorari* arose before 1 January, the time limit is still six months, but the new rules would appear to apply to any application to extend that six months. On the other hand, rule 21(7) provides: "The preceding sub-rules are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

This probably means that, if the statute in question also indicates the basis on which the time limit may be extended, that provision applies rather than rule 21(3).

Promptness, delay and pleading

There is no longer any independent requirement that an application for leave be made 'promptly', so an application for leave that is otherwise in time possibly (and subject to common law considerations in relation to the court's discretion) can no longer be refused simply because it could have been brought sooner.

On the other hand, a defence of delay is, for the first time, specifically introduced, although in this instance, the court must be satisfied that the delay "has caused or is likely to cause prejudice to a respondent or third party" (rule 21(6)). That defence may be raised whether or not an extension of time has been granted. But it appears to be a defence only to the substantive application, and not to an application for leave.

Rule 21(6) appears to apply both to *certiorari* applications that can still be brought within six months because the grounds for them arose before 1 January, and to procedures for judicial review that are established by statute.

FAST FACTS

- New rules 18 through 29 have been inserted into the *Rules of the Superior Courts*, order 84, from 1 January 2012
- The time limit for seeking leave to apply for *certiorari* has been reduced from six to three months
- An applicant who needs an extension of time for applying for leave must also show sufficiency of the reason advanced for seeking the extension, which must be explained on affidavit
- There is no longer any independent requirement that an application for leave be made 'promptly'
- For the first time, a defence of delay is specifically introduced, though the court must be satisfied that the delay "has caused or is likely to cause prejudice to a respondent or third party"
- Substantial changes have been made in relation to the pleading of judicial review applications

Very substantial changes have been made in relation to the pleading of judicial review applications. The underlying purpose of the changes seems to be to facilitate rule 22(8), which provides: "The court may on the return date of the notice of motion, or any adjournment thereof, give directions as to whether it shall require at the hearing of the application for judicial review oral submissions in respect of any of the written submissions of the parties on points or issues of law."

The Rules Committee's hope seems to be that, in many cases, once a case is ready for 'hearing', the court will simply take in the papers and deliver a judgment in due course, without any oral argument. In other instances, oral argument may be limited to specific points, or to points in reply to the written submissions.

These changes are of general application and apply, for example, to planning and immigration judicial reviews as well as to standard applications, leave for which is made *ex parte*.

Under the previous version of the rules, the grounding affidavit:

- Allowed the background to the decision to be exhibited,
- Enabled the applicant to disclose factors that, though they did not constitute grounds of challenge, might constitute grounds on which an application should be refused, thereby discharging the applicant's duty to show the utmost good faith to the court in applying *ex parte*,
- Enabled the verification of the statement of grounds to be achieved by an affidavit

...I think I'd better think it out again!

LEAVE/TELESCOPED HEARING

The common law power of the court to direct that an *ex parte* application for leave proceed instead on notice to the respondent is incorporated into rule 24(1). The power is to be exercised "having regard to the issues arising, the likely impact of the proceedings on the respondent or another party, or for other good and sufficient reason".

Either by consent, or on application, or of its own motion, the court may direct a so-called 'telescoped hearing' under rule 24(2), by which the application for leave is to be treated as the application for judicial review. Probably a court could only decide to treat the application for leave as the substantive hearing if the respondent is put on notice of the application for leave before that decision is taken. Rule 24(2)(III) envisages that a telescoped hearing may take place on the papers unless the court specifically permits oral submissions.

Where leave has been granted, although rule 22(3) cuts the time for serving the respondent to seven days, it usefully makes the time run from the date of perfection of the order, whereas, at the moment, the 14 days for service runs from the grant of leave, which can be awkward if there is a delay in perfecting the order.

AFTER LEAVE HAS BEEN GRANTED

The new rule 22(4) also gives a slightly more realistic interval of three weeks from service for the service of the statement of opposition (as opposed to the current seven days). In any event, rule 22(3) normally requires an interval of seven weeks between the grant of leave and the first return date.

Written submissions are to be exchanged within the three weeks after service of the statement of opposition (rule 22(7)). Rule 24(3) sets out various other directions that the court may give on the return date, including the filing and delivery of further affidavits (rule 24(3)(b)), discovery (rule 24(3)(d)), the fixing of issues of fact or law by agreement or order (rule 24(3)(e)), written submissions (rule 24(3)(g)), and publication of notice of the proceedings, or the giving of notice of the proceedings to any specified non-party (rule 24(3)(h)). As noted above, the court may also give directions under rule 22(8) regarding whether the court will require oral submissions at the hearing of the application for judicial review.

The guiding principle under rule 24(3) is that the directions must be "convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings".

Where a telescoped hearing is directed, the court may give similar directions, although there has been no leave hearing and, in particular, may give directions with regard to the exchange and filing of written submissions and the need for any oral argument of the case (rule 24(2)).

sworn by the applicant's solicitor (*PO'C v DPP* [2000] 3 IR 87 at 116), an important consideration where the time limit is short or the applicant has limited command of English, and

- Could be backed up by other supporting affidavits, thereby permitting the applicant to advance direct evidence from a witness in addition to himself or herself, and the court either to disregard hearsay in the principal affidavit or to accord it less weight where direct evidence could have been given by a further deponent.

Now, not only must the grounds for the application be particularised in the statement of grounds, but the facts relied on must all be transferred to the statement as well (rule 20(3)). Admittedly, a similar obligation of particularity is imposed on respondents in respect of their statements of opposition (rule 22(4) and (5)), and in this respect the days of a statement of opposition being largely a general traverse would appear to be over. A court seised of an application for leave may direct that the grounds be further particularised (rule 20(4)(b)). No method is provided for obtaining further particulars of a statement of opposition.

"The Rules Committee's hope seems to be that, in many cases, once a case is ready for 'hearing', the court will simply take in the papers and deliver a judgment in due course without any oral argument"

At least initially, the only affidavit on either side will be a two-paragraph annex to the statement of grounds or opposition sworn by the applicant or respondent verifying the statement (amended Schedule T). It is not clear how an applicant is expected to furnish the court with any underlying evidence if this is the only affidavit to be filed initially. Since, where the court chooses to direct that the leave hearing proceed on notice, it may give directions as to the service of exhibits pursuant to rule 24(1), the rules already seem to envisage some expansion of the two-paragraph annex for the exhibition of evidence. The decision itself is supposed to be verified by affidavit and lodged in court before the substantive hearing (rule 27(2)).

Any matter that must be disclosed as part of the applicant's duty of good faith to the court will probably have to be expressed as part of the facts in the statement of grounds, or by expanding the two-paragraph annex. Where the court directs that the leave application be heard on notice, or on the return date of the originating notice of motion in any other instance, among the directions the court may give are directions with regard to the filing of further affidavits (rule 24(3)(b)). This gives each side the chance to object to the inclusion of hearsay in any affidavit or to any deponent's means of knowledge; failure to object may well be read as a waiver of any objection on such grounds.

Another innovation is that rule 20(2)(b)(iii) requires the applicant to specify any interim relief sought and the grounds on which it is sought.

SAFE TO GO BACK IN THE *water?*

Keith Blizzard is a financial services lawyer, the author of The Law of Financial Derivatives in Ireland *(Round Hall 2011), and is a lecturer and examiner on the Law Society's diploma programme*

After the collapse of the financial markets in 2008, regulators in Ireland and Europe have been working to dramatically reshape the regulation of the financial services industry. Keith Blizzard dips his toe in

The credit crunch was essentially a banking crisis, the effects of which sent shock waves across the financial services industry. Banks had been heavily reliant on borrowing from other banks to lend to their customers. They had also been major users of collateral to support that borrowing. The loss of confidence in collateral, which originated with concerns as to the strength of securitisation bonds, led to a collapse in inter-bank lending. By October 2008, central banks had to step in with emergency funding.

The credit crunch showed that the banks are at the heart of the financial services industry, and the challenge for regulators and governments started with the question of how to fix the banks. For Ireland, there are three aspects to this: the creation of NAMA in 2009; the increased regulation for credit institutions in Ireland; and the international reform of the capital adequacy requirements.

NAMA

Under the *National Asset Management Agency Act 2009*, NAMA would buy bad loans from failed banks: with the proceeds, banks could begin lending again. The NAMA legislation was radical, cutting into established property rights. The Supreme Court confirmed that the NAMA legislation was not unconstitutional in the case of *Dellway Investments Limited v The National Asset Management Agency*. On coming into office, however, the current Government suspended the transfer of new loans into NAMA.

Corporate governance

The Central Bank has identified that the management of financial services firms was below the standard required in an industry in which failure has major repercussions for the wider economy. The *Corporate Governance Code for Credit Institutions and Insurance Undertakings* contains a number of principles, including:

- The board of directors must run the company (as opposed to a dominant chief executive, chairman or foreign parent),
- Non-executive and executive functions of the board are to be split, with the executive directors responsible for business strategy and the non-executives overseeing compliance with regulatory requirements,
- Directors are to be appropriately qualified, with experience to match their specific functions – they will be accountable for their decisions and subject to regular review and limited in the number of other directorships that they can hold,

FAST FACTS

- For Ireland, there are three aspects to financial regulation reform: (a) NAMA, (b) increased regulation for credit institutions, and (c) international reform of the capital adequacy requirements for banks
- The *Central Bank (Supervision and Enforcement) Bill 2011* will further increase the powers of the regulator
- The Central Bank is ahead of the curve in its reforms in some areas but, in others, has a lot of catching up to do
- Gaps in financial regulation are being filled, leading to a more comprehensive set of rules for financial services providers and consistent enforcement policies

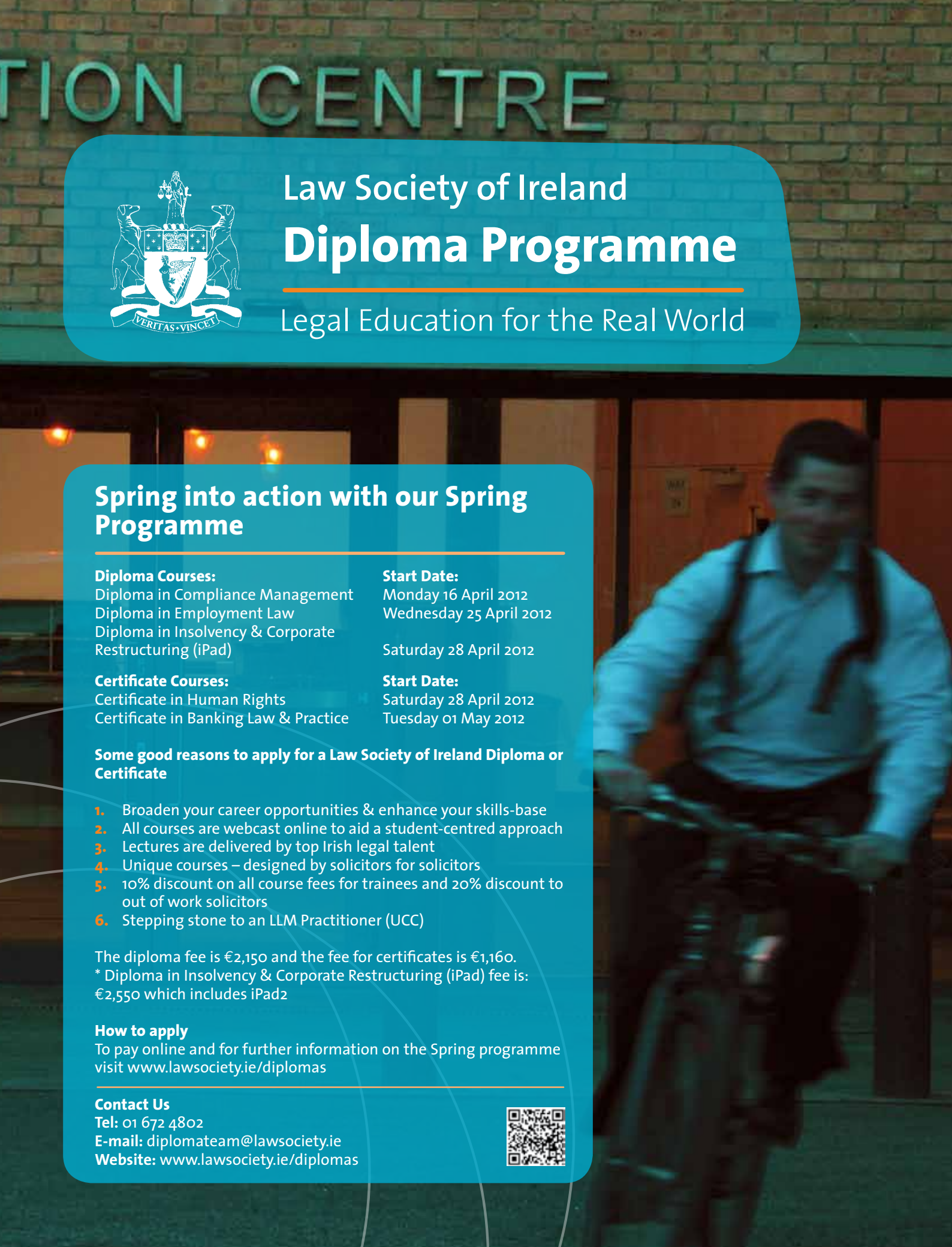
- Boards are required to have a majority of independent non-executive directors, who can demonstrate judgement and decision-making independent of the views of management, political interests and inappropriate outside interests.

The *Central Bank Reform Act 2010* has further introduced a 'fit and proper' test for people performing key roles in financial institutions. Those holding, or applying for, the most senior jobs will now need to satisfy the Central Bank of their credentials – a serious failing may result in exclusion from the industry.

The European focus to the banking crisis has been on the capital adequacy requirements of banks. The *Basel Agreements* produced a global framework as to the amount of capital that banks must hold as a buffer. Banks were previously required to hold in reserve about 8% of the amount of money they had lent out. This was shown to have been an insufficient buffer to protect a bank at a time of stress. The use of securitisation bonds in making up that capital reserve proved disastrous, as the value of that collateral was quickly eroded. The *Basel III* reforms are currently being implemented in the EU in the *Capital Requirements Directive IV*: banks must hold much higher amounts in reserve, the use of non-cash assets has been restricted, and the problems of short-term liquidity and the calculation of risk levels for each loan have all been addressed. Regular stress tests are being conducted by the European Banking Authority to measure compliance with these requirements.

Hedge funds

Hedge funds are to be subject to EU regulation under the *Alternative Investment Fund Managers' Directive*. This directive will apply to EU managers of non-UCITS funds. It requires managers to be authorised by their local regulator, to comply with capital adequacy requirements and standards, such as acting with due care and skill. In part, the regulation is a response to the growth of the hedge-fund industry and recognition that much of their activity constitutes 'shadow banking' – the performance of banking



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CENTRAL BANK AND CREDIT INSTITUTIONS (RESOLUTIONS ACT 2011)

This act provides a mechanism for the Government to deal with failing or likely-to-fail credit institutions and to make provision for the protection of the financial system. It amends the *Credit Institutions (Stabilisation) Act 2010*, which covers similar ground. It makes provision for a resolution fund to bail out institutions in trouble or recompense expenditure by the government. The fund will come from the contributions of credit institutions, and it is a condition of their authority to act that they contribute. The Central Bank has the power to transfer assets and liabilities of a credit institution under a transfer order. A special manager may also be appointed by court order to take over the running of a credit institution. The powers were recently used in a successful application in the High Court to appoint a special manager to Newbridge Credit Union. In addition, the act requires that credit institutions put in place a recovery plan – that plan cannot presume that state funding will be available.

activities by non-banks. For financial regulators, shadow banking disrupts their traditional model of managing systemic risk through the monitoring and regulation of separate industries within financial services.

Financial derivatives

The largely unregulated market in financial derivatives had been causing financial regulators sleepless nights before 2008, and there was enough evidence after the credit crunch to confirm those fears. The fear is that the collapse of a significant institution will leave unsettled contracts that will threaten the stability of other institutions. The collapse of Lehman Brothers was an example of this. The European Union is currently drafting legislation requiring the settlement of financial derivative contracts through central clearing houses, much the same as shares trading on stock exchanges. The new rules will be set out in the revision of the *Markets in Financial Instruments Directive*, expected in 2013.

> ***"The largely unregulated market in financial derivatives had been causing financial regulators sleepless nights before 2008, and there was enough evidence after the credit crunch to confirm those fears"***

The Central Bank – upping its game?

By way of a response to its failings in the crisis, the *Central Bank Reform Act 2010* removed the separate institution that was the Irish Financial Services Regulatory Authority and brought the regulatory function under the direct management of the governor of the Central Bank.

The Central Bank has increased its enforcement activity, but had to await the approval of new powers before it was seriously able to act. Now it is acting with real purpose: it took decisive action on concerns about the levels of reserves at Quinn Insurance; it appointed inspectors at Custom House Capital on concerns about client money handling; and it levied a record fine on Combined Insurance Company of Europe for breaches of insurance regulations.

The *Central Bank (Supervision and Enforcement) Bill 2011* will further increase the powers of the regulator. The bill introduces the concept of 'skilled person' reports, by which the Central Bank will be able to request that a regulated financial services provider commission an external reviewer to report to them on subject matter specified by the Central Bank. The regulator will also gain wider powers to enter the premises of financial services firms; to view, copy or take records; and to question persons. Whistleblowers also receive protection under the bill. The Central Bank will have a new power to give directions "in the interest of proper and effective regulation of financial services providers" in certain scenarios, such as the potential insolvency of a financial services firm. Some of these powers were previously in place, but there was a lack of uniformity of application across the whole industry.

In addition, protection of consumers has been enhanced through a revised *Consumer Protection Code*, the role of auditors has been set out in an auditor protocol, and requirements around lending activities and handling of mortgage arrears have also been tightened up. The Irish Funds Industry Association has produced a corporate governance code that will operate on a voluntary basis. A similar code for captive insurance and reinsurance undertakings has also been introduced by the Central Bank. The capital requirements of insurance companies are also being revised in the *Solvency II* reform, and the *Capital Requirements Directive IV* also applies to investment firms.

Choppy waters

Financial regulators, national governments, and the EU are trying to reshape financial regulation at a time of extreme stress in financial markets. The waters remain extremely choppy, and it is difficult to see clear land at this stage of the reform process. In many respects, the Central Bank is ahead of the curve in its reforms compared with other countries – but, in other areas, it has a lot of catching up to do. The gaps in financial regulation are being filled, leading to a more comprehensive set of rules for financial services providers and consistent enforcement policies. Although the project will take a few more years to complete, Ireland's 'light touch' regime looks to be a thing of the past. G

LOOK IT UP

Cases:

- *Dellway Investments Limited & Ors v The National Asset Management Agency and Ors* [2011] IESC 14
- *In the Matter of Custom House Capital Limited* [2011] IEHC 298
- *In the Matter of Custom House Capital Limited (No 2)* [2011] IEHC 399

Legislation:

- *Auditor Protocol 2011*
- *Central Bank and Credit Institutions (Resolution) Act 2011*
- *Central Bank (Supervision and Enforcement) Bill 2011*
- *Central Bank Reform Act 2010*
- *Consumer Protection Code 2012*
- *Corporate Governance Code for Captive Insurance and Captive Reinsurance Undertakings 2011*
- *Corporate Governance Code: Collective Investment Schemes and Management Companies 2012*
- *Corporate Governance Code for Credit Institutions and Insurance Undertakings 2011*
- *Credit Institutions (Stabilisation) Act 2010*
- *National Asset Management Agency Act 2009*

PASSING THE BATON

According to Benjamin Franklin, "nothing can be said to be certain except death and taxes". For those who own their own businesses, he could have included business succession, say Mary Nyhan and Geraldine Beattie

Mary Nyhan is tax partner at RSM Farrell Grant Sparks, Dublin

Geraldine Beattie is a senior manager at RSM Farrell Grant Sparks, Longford

Due to the uniqueness of each business and individual, it is perhaps impossible to come up with a concise set of rules to be followed when it comes to business succession. In the current economic environment, there is often a sense that succession planning is not a matter to be on the agenda. Depleted asset values and looming creditors may prevent current transfers to the next generation. However – as long as time marches on – business succession plans remain essential, while the owners are still active, in order to plan for the future and ensure the survival and replenishment of Irish private businesses.

As a result, succession planning needs to be on the radar of professionals acting for these businesses. Importantly, the changes outlined in the *Finance Bill 2012* that restrict the availability of retirement relief, where the donor is over 66 years of age, will bring increased focus on having a succession plan in place prior to attaining this age.

Starting with a plan

Without careful planning, there is no doubt that significant tax costs arise that could otherwise have been avoided. The identification of the commercial objectives of a business is critical when formulating a business succession plan. Such a plan should also incorporate a contingency plan and controls in the event that these objectives or circumstances change. It is also crucial that the right person is selected to identify and plan these objectives with the donor. This person has a multitude of roles to fulfil, with the most critical being the provision of independent and objective advice after listening to the donor's objectives. In most cases, it is preferable that this individual is not a beneficiary and also has previously played a trusted role with the donor, given that the objectives are often personal and deal with relationships between various family members. While the donor's objectives may not always be those that generate the best financial and tax result, they are overriding – but the pros and cons of each objective need to be considered carefully.

The identification of beneficiaries for a family business is more complex when the next family generation will not be actively involved in the business. In that case, management or third parties may be identified as the key persons to drive the business forward. In such cases, a dual type share structure will allow management to participate as owners and decision makers, and the family can participate in a non-active manner.

Going a step further, in many cases, management/third parties would have shares that give value, based on the future growth of the business, and the next family generation has shares that give an annual financial return based on current value. Not only in family cases (but also in general), the identification

FAST FACTS

- Succession planning needs to be on the radar of professionals acting for businesses
- The identification of the commercial objectives of a business is critical
- It is common that reorganisation of corporate structures is required prior to the implementation of a succession plan
- Where multiple beneficiaries are involved, shareholders' agreements are essential

"The identification of beneficiaries for a family business is more complex when the next family generation will not be actively involved in the business"

of specific rights attached to different classes of shares held by different parties is key in terms of achieving commercial objectives and optimising the tax position – for example, voting rights, limiting the value of the shares, or attributing value to certain parts of the company only.

Reorganisation

As businesses are now more diverse, it is common that reorganisation of corporate structures is required prior to the implementation of a succession plan. For example, if the business holds property, then this element of the business could be retained in a separate corporate structure so as to allow for these assets to give a definitive income stream to non-active beneficiaries.

However, in our experience, this approach is an important tax pitfall. The segregation of property assets results in a loss of business property relief for these assets and hence significantly increases the gift/inheritance tax payable.

However, reorganisations have merit where there are a number of beneficiaries and business areas involved, with the preference, as is often the case, for beneficiaries to carry out their businesses independently of each other. Tax legislation does not provide for the segregation of a business so that each shareholder can move from part ownership of the entire business to complete ownership of a particular sector. By concession, the Revenue allows for relief from capital gains tax (not stamp duty) where a family (spouse, child, parent, sibling) business is involved and there is no change in

the value held by each individual after the segregation.

It should be noted that, for this purpose, a clawback of tax reliefs could arise if such a reorganisation occurs within six years after a gift/inheritance. Therefore, at the outset, there is merit in seeking to establish separate corporate groups for separate business sectors if the intention is to pass value to a number of independent beneficiaries in the future. This is particularly the case where a lifetime transfer is not proposed, but arrangements are being made for post-death operations.

Shareholders' agreements

Where multiple beneficiaries are involved, shareholders' agreements are essential to provide for mechanisms for dealing with disputes, voting procedures, sale arrangements (with both drag-along and tag-along provisions to facilitate the sale of the entire company as required), and this agreement should be signed as a condition of the gift/inheritance. It is surprising how many Irish private companies do not have such agreements in place.

The shareholders' agreement is also an ideal thing to act as the principal legal document, which is private, to protect against changing circumstances – for example, the insertion of a provision that provides for the automatic buyback of the inherited/gifted shares in the event of certain circumstances arising. This could include a premature death, so as to ensure that the business stays within the immediate family. Any buyback provisions would normally be for market value at the time of the buyback.

"It is key that the tax analysis of each succession plan is identified well before implementation and adjusted accordingly in order to ensure that any cash-flow costs are minimised"

The valuation basis adopted may be a factor of the preferences for the terms of buyback. For example, the reflection of a minority interest in the shareholding significantly reduces its value. There are also circumstances where a buyback of shares can qualify for capital gains tax (30%) rather than income tax (top rate of 55%), with tax payable on the increase in value of the shares since acquisition. Share buybacks also give the opportunity for the business, rather than the individual, to fund gift/inheritance tax liabilities, which is critical in this environment.

Retirement relief (an exemption from capital gains tax where the donor is over 55 years of age) and business property relief (reduces the gift/inheritance tax payable by 90%) are reliefs that appear simple; however, the key tax pitfall in relation to succession planning is the assumption that these reliefs are available before a detailed analysis of each condition is undertaken. In particular, the following questions need to be addressed:

- Does property ownership affect the availability of the reliefs?
- Does the level and nature of bank and inter-company borrowings affect the availability of the reliefs?
- If a spouse owns part of the business, has this spouse met the various conditions to avail of retirement relief or is a transfer to the other owner required?
- In order to avail of business property relief, have the activities of the business been qualifying for the entire duration of the holding period?
- Could the financial effect of the economic downturn affect entitlement to the reliefs?
- Could subsequent plans for the introduction of new shareholders, expansion of business activities or restructuring result in a clawback of the reliefs?
- A number of the conditions for business property relief are considered at the valuation date rather than the date of death. This gives some flexibility, and hence it is important that entitlement to the relief is considered prior to the valuation date.

The above tax pitfalls could result in an otherwise highly effective succession plan, which meets the commercial objectives of the donor, leading to significant tax costs. Therefore, it is key that the tax analysis of each succession plan is identified well before implementation and adjusted accordingly in order to ensure that any cash-flow costs are minimised. Also, the plan should be reviewed and adjusted if any significant tax changes to succession planning are announced in the annual *Finance Bills*, as the tax aspects in relation to succession planning are subject to ongoing change. G

THE *FINANCE BILL 2012* AND SUCCESSION PLANNING

The *Finance Bill 2012* proposes the following changes that are relevant in relation to business succession:

- **Previously, in order to avail of a full exemption for capital gains under the retirement relief provisions for disposals to non-family, the consideration must be less than €750,000. In order to facilitate early transfers, this amount is reduced to €500,000 where the individual is over 66 years of age. Also, there was previously no limit in relation to transfers to family members, but a limit of €3 million has been introduced where the individual is aged 66 or older. However, the existing rules will continue for two years for those who are currently over 66 years or those who will reach this age by 31 December 2013.**
- **No changes to business property relief have taken place.**
- **The capital gains tax and gift/inheritance tax rate have risen from 25% to 30%.**
- **There has been a significant reduction in the tax-free threshold for gift/inheritance purposes from parents to children, from €332,084 to €250,000. There is no change to other thresholds.**

Minister Shatter is guest speaker at parchment ceremony

Legal consultation *(from l to r)*: Law Society Director General Ken Murphy, President of the High Court Nicholas Kearns, Minister for Justice Alan Shatter and Law Society President Donald Binchy

PICS: LENSMEN PHOTOGRAPHIC AGENCY

Minister Shatter shares a joke with President of the High Court Nicholas Kearns and Law Society President Donald Binchy

Only three degrees of separation – the Law Society parchment ceremony on 23 February

Leap of faith

Everybody knows that 2012 is a leap year, so we were delighted when this photograph found its way to the *Gazette* office, given the fact that it was taken on 29 February 1952 at the Four Courts, Dublin.

We managed to track down James Mackey *(back row, left)* who was able to tell us that only two other people in the picture actually qualified with him on that day – Una O'Higgins (daughter of Cumann na nGaedheal Minister for Justice Kevin O'Higgins) and Dermot Devlin. The remaining solicitors qualified on other dates in either January or February 1952. James was presented with his parchment by past-president of the Law Society Arthur Cox at an official ceremony later in the year.

Now 82 years of age, James served as a practitioner for 48-and-a-half years, retiring at the age of 70. He started practising in Dalkey in 1952. Five years later, he married Mary Fearon. They had four children.

PIC: IRISH PRESS, 1952

Class of '52 *(back, l to r)*: James Mackey (Dun Laoghaire), possibly Arthur Dey (Finglas, Co Dublin), Dermot Devlin (Sandycove, Co Dublin), William (Bill) O'Brien (law agent in AIB) and possibly Patrick O'Gara (Skibbereen, Co Cork). *(Front l to r)*: Una O'Higgins (Baily, Co Dublin) and possibly Mrs Teresa Whelan (Carrick-on-Suir, Co Tipperary

In 1961, he moved his practice to Merrion Square. Later, in 1988, he established the Mackey O'Sullivan partnership with solicitor Anne O'Sullivan.

An interesting detail is that a grand uncle on his mother's side of the family, barrister Paddy Lynch, was appointed by Eamon De Valera as Attorney General (serving from 22 December 1936 to 1 March 1940). Paddy's youngest brother, James, was state solicitor for Clare under the Cumann na nGaedheal government.

At a ceremony in Dublin Castle, the President of Ireland, Dr Michael D Higgins, was conferred with an honorary degree of Doctor of Laws by the Chancellor of the National University of Ireland, Dr Maurice Manning. *(From l to r)*: Dr Jim Browne (Vice-Chancellor of NUI), President Higgins and Dr Maurice Manning (Chancellor of NUI)

Road Traffic Law by Robert Pierse was launched on 1 February 2012. Published by Bloomsbury Professional, this up-to-date and comprehensive guide covers Irish *Road Traffic Acts* passed from 1961 to 2011. *(From l to r)*: Robert Pierse, former Fine Gael politician Mary Banotti, and Mr Justice Nicholas J Kearns (President of the High Court)

CHARITY EVENT

Charity CPD event raises €16k for Straight Ahead

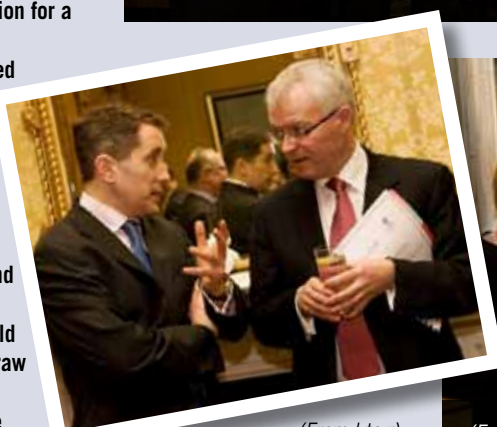
Reddy Charlton hosted a CPD event with a twist recently. All the proceeds went to the charity, Straight Ahead, which provides life-changing spinal surgery for children. Organised by Lorna McAuliffe, who sits on the charity's board, and Joanne Cooney, the event was held in the Shelbourne Hotel on 31 January. Such was its success that people had to be turned away.

A total of €16,000 was raised on the night, which will go towards providing urgent emergency orthopaedic surgery to children in Ireland. The proceeds, when added to monies already collected, total €30,000 to date, exceeding the cost of a transformational operation for a child.

The CPD event was chaired by Paul Keane. Speakers on the night included Paul Gallagher SC (former attorney general), Dr Constantin Gurdgiev (economist), and Marc Westlake (financial, trust and estate planner). The topic? Whether or not Ireland should stick with the euro or withdraw from the single currency.

Thanks to everyone in the legal profession and their friends who were so generous in their support.

(From l to r): Paul Keane, Shane Holland, Constantin Gurdgiev, Marc Westlake and Paul Gallagher SC



(From l to r): Shane Holland and Dan O'Connor

(From l to r): Helen Marren, Goretti McKechnie, Mr Justice Liam McKechnie and Tom Marren

ALL PICS: LENSMEN

Diploma in Finance Law

At the conferring ceremony for the Diploma in Finance Law on 9 November were guests *(front, l to r)*: Keith Blizzard BL (lecturer), Rory O'Boyle (Law Society), Freda Grealy (Law Society), Peter Oakes (Director of Enforcement, Central Bank of Ireland), Mr Justice Michael White, John O'Connor (Vice-Chairman, Education Committee), Mary O'Malley (Meath County Registrar) and Geoffrey Shannon (Deputy Director of Education); *(conferees)*: Jonathan Brady, Shane Carroll, Brochan Cocoman , Emily Corkery, Mark Devane, Mark Donnellan, Carol Eager, Ryan Gibbons, Andrea Hannon, Niamh Hayes, Rachel Kevans, Amy Lawless, Bronwyn Long, Cian Martin, Aoife McCluskey, Deirdre McDermott, Brid McDonnell, Aisling McGowan, Sile McHugh, Eoin Mullowney, Tomas Murray, Aine Ní Dhuibhir, Eimear O'Brien, Aaron O'Donohue, Marta Piatkowska, Lauren Theodoulou, Erc Walsh and Joanna Walsh

Diploma in Family Law

At the conferring ceremony for the Diploma in Family Law on 9 November were guests *(front, l to r)*: Rory O'Boyle (Law Society), Freda Grealy (Law Society), Peter Oakes (Director of Enforcement, Central Bank of Ireland), Mr Justice Michael White, John O'Connor, (Vice-Chairman, Education Committee), Mary O'Malley (Meath County Registrar) and Geoffrey Shannon (Deputy Director of Education); *(conferees)*: Derek Dennison, Lorraine Dooley, Ian Foley, Scarlett Naomi Griffin O'Sullivan, Gemma Hennessy, Sarah Lipsett, Niamh Orla Matthews, Eileen McGowan, Elizabeth McGuinness, Anne McSharry, Mary Miles, Kate O'Brien, Michael O'Neill, Ali O'Reilly, Robert O'Reilly, Sarah O'Toole, Damien Sheridan and Susan Webster

Diploma in Corporate Law and Governance

At the conferring ceremony for the Diploma in Corporate Law and Governance on 9 November were guests *(front, l to r)*: Geoffrey Shannon (Deputy Director of Education), Paul Egan (lecturer), Freda Grealy (Law Society), Peter Oakes (Director of Enforcement, Central Bank of Ireland), Mr Justice Michael White, John O'Connor (Vice-Chairman, Education Committee), Mary O'Malley (Meath County Registrar) and Gavin Simons (lecturer); *(standing)*: Rory O'Boyle (Law Society) and Kevin O'Doherty; *(conferees)*: Glenn Cahill, Enda Collins, Kate Graham, Denise Healy, Jennifer Heerey, Aisling Hogan, Niamh Kimber, Kevin Lavin, Jennifer Lee, Sarah McGrath, Sinead O'Brien, John O'Mara, Sean O'Toole, Oyewo Oluwatimilehin, Claire Scannell and Joe Coleman

Guide to Trade Mark Law and Practice in Ireland

Helen Johnson. Bloomsbury Professional (2011), www.bloomsburyprofessional.com. ISBN: 978-1-8476-671-68. Price: €120 (incl VAT).

There has been, and continues to be, a growth in the number of solicitors advising in the area of trademark law, whether as specialists in the area or as part of general practice. Understanding trademark law and practice has now been made much simpler by the publication of this book, which is, in the author's own words, a "user-friendly guide intended to steer individuals through the trademark process".

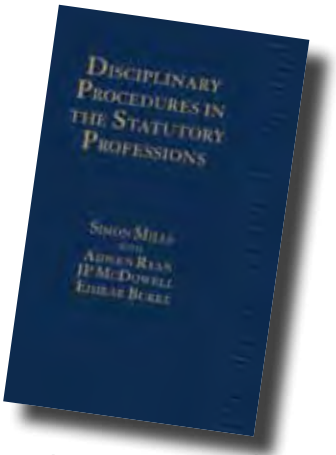
This book covers the law and practice of trademark law in Ireland, at the Office for Harmonization in the Internal Market, and at the World Intellectual Property Organisation. It clearly and concisely explains the basic legal principles and practical procedures surrounding the registration and enforcement of trademarks. Helpfully, it has a section on counterfeit goods and customs law and reproduces the necessary application forms used by customs authorities. Indeed, the most commonly used trademark forms, from application to notice of opposition forms, are reproduced and explained in the book.

If you are new to the practicalities of trademark law, this book should be at the top of your 'to buy' list. The author readily admits that "it is not a legal tome" – but that is not its intended purpose. This book will be useful to those starting off in trademark law, those preparing for the trademark agent examination, or the lay individual who wishes to file their own trademark application. It may be best described as an essential practical companion to those new to trademark law and filing and a very welcome addition to our book shelves.

Áine Matthews is an associate solicitor at LK Shields Solicitors, specialising in intellectual property law.

Disciplinary Procedures in the Statutory Professions

Simon Mills, JP McDowell, Aideen Ryan and Eimear Burke. Bloomsbury Professional (2011), www.bloomsburyprofessional.com. ISBN: 978-1-8476-666-97. Price: €175 (incl VAT).



Until recently, anyone looking for a specialist book on the law of disciplinary proceedings had to turn to the leading English text, Harris's *Disciplinary and Regulatory Proceedings*. The fact that that book is now in its sixth edition illustrates the dramatic increase in reported cases concerning every aspect of disciplinary proceedings, particularly in the light of the *European Convention on Human Rights*.

It was surprising that no one had sought to fill the gap with an Irish text. This was particularly so, given the fact that English law was not always a certain guide to what Irish courts would do, and so one always had to exercise care when citing Harris here.

The authors of *Disciplinary Procedures in the Statutory Professions* have thus performed an invaluable task in seeking to ascertain and set out the distinctive Irish law of disciplinary proceedings.

The best recommendation that I can give the book is the fact that I have already plundered it many times for quotations and authorities for submissions, and it has proved to be a valuable and thought-provoking guide in that regard.

An aspect of the book that makes it particularly user-friendly is the fact that you can turn to the first few chapters in order to ascertain what the general legal principles on an issue are, and then turn to a more specific later chapter that deals with the particular profession in question, be it law, medicine or accounting.

It is one of the most useful Irish textbooks published in recent years and will, undoubtedly, become the 'Irish Harris': that is, the standard text on the subject for many years to come.

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The Collaborative Law Companion

Neil Denny. Jordan Publishing Ltd (2011), www.jordanpublishing.co.uk. ISBN: 978-1-8466-125-03. Price: Stg£45 (incl VAT), paperback.

The practice of collaborative law is one that looks to the future after a separation.

The author of this book identifies seven aspects of separation and divorce: legal, financial, parental, emotional, uncoupling, social and narrative. A lawyer participating in the collaborative process is advised not to position themselves as having all the answers or to be too completely focused on the legal outcome of a separation or divorce. The lawyer, in this instance, should be seen as part of a team of experts who are able to give advice on the various aspects, as outlined above (see chapters 1 and 2).

Denny identifies two models that may be of assistance in assessing the suitability of collaborative law – the 'wheel' and 'GROW' models (chapter 4). The book also suggests a team of professionals who can assist the separating couple (chapter 5). It is asserted that collaborative law uses a client-centred approach that seeks to actively involve the client, who, after all, is "the expert in his or her own life" (chapters 8 and 9).

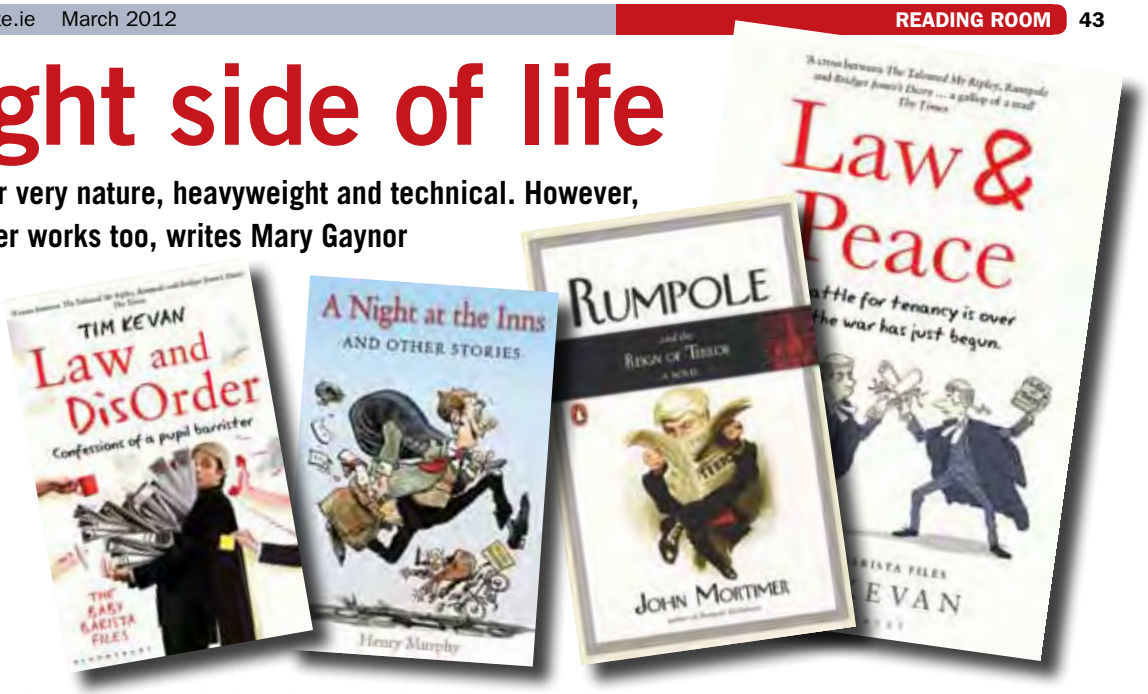
This book should be required reading for every family law practitioner in this jurisdiction. Denny delivers a user-friendly, comprehensive analysis of the collaborative process. It is a vital *aide memoire*. One of the book's stated goals is to inspire collaborative practitioners to become more active in adopting collaborative practice within their day-to-day work. The author most certainly achieves that goal.

Josepha Madigan is the family law partner at Madigan's solicitors.

The bright side of life

Legal textbooks are, by their very nature, heavyweight and technical. However, the library holds some lighter works too, writes Mary Gaynor

Mary Gaynor is head of library and information services at the Law Society of Ireland



Despite its gravitas, the subject of law and the environment of the courtroom have inspired many literary publications of a lighter tone. Works in this genre include biographies, memoirs and a blend of historical and humorous works, typified in modern times by the very popular *Rumpole* books written by barrister and dramatist John Mortimer.

The library holds a selection of books in this genre, all of which are available to borrow. An early example is *Our Judges* by Rhadamanthus, published in Dublin in 1890 by the Irish Society Office. This contains biographies of Irish judges with accompanying portraits. The biographies are personal sketches by the anonymous author, who describes the appointment of Mr Justice James Murphy to the Common Pleas Division in the following manner: "Murphy the judge is a very different person from Murphy the QC. A few years on the bench have sufficed to alter his character completely. Much in it that was ungentle and harsh, has been mollified into mildness and benignity. At the Bar, he was considered to be a man without too much of the milk of human kindness; but he is now known as a judge of peculiarly tender feelings and warm emotions. He sometimes allows himself to be so overcome by the pathetic side of a case that his sober, logical judgment seems to be lost in the flood of his more human sentiments."

In the 20th century, the human side of life at the Bar was further explored by Maurice Healy, who wrote *The Old Munster Circuit* (published in 1939). Rex Mackey, in his book *Windward of the Law* (2nd ed, 1991) writes about his experiences at the Irish Bar, and Henry Murphy contributes to this genre with his two volumes of short stories, *An Eye on the Whiplash and Other Stories* (1997) and *A Night at the Inns and Other Stories* (2008). Patrick MacKenzie, in the opening pages of *Lawful Occasions: the Old Eastern Circuit* (1991), describes his first journey on circuit: "I was going to try my hand in Wicklow, some 30 miles away. The money in my pocket was less than £3; it would pay the train fare and get me some lunch for several days. I could cover my expenses if I got the most meagre brief, which of course I did not."

For a totally irreverent account of a young barrister's life in present times, the *Baby Barista* files are in two volumes by Tim Kevan, *Law and Disorder: Confessions of a Pupil Barrister* (2010) and *Law and Peace* (2011), both published by Bloomsbury. G

RECORD BREAKERS

It's a record: 7,325 books borrowed during 2011! If you wish to borrow from the library, you can request a loan online or contact the library at tel: 01 672 4843/4, email: library@lawsociety.ie.

JUST PUBLISHED

New books available to borrow

- Bracken, Tim and Margaret Campbell, *The Probate Handbook Companion* (Dublin: Clarus Press, 2011)
- Brown, Andrew, *Corporate Fraud* (Dublin: Chartered Accountants Ireland, 2010)
- Forde, Michael and Kieran Kelly, *Extradition Law and Transnational Criminal Procedure* (4th ed) (Dublin: Round Hall, 2011)
- Goff and Jones, *The Law of Unjust Enrichment* (London: Sweet & Maxwell, 2011)
- Howley, James and Martin Lang, *CIF Public Sector Sub-Contracts* (Dublin: Clarus Press, 2011)
- Irish Business and Employers Federation, *Employee Absenteeism: A Guide to Managing Absence* (Dublin: IBEC, 2011)
- Kevan, Tim, *Law and Disorder* (London: Bloomsbury, 2010)
- Kevan, Tim, *Law and Peace* (London: Bloomsbury, 2011)
- Law Reform Commission, *Civil Law Aspects of Missing Persons* (Dublin: LRC Consultation Paper, 2011)
- Law Reform Commission, *Insurance Contracts* (Dublin: LRC Consultation Paper, 2011)
- Law Reform Commission, *Limitation of Actions* (Dublin: LRC Consultation Paper, 2011)
- Lawrence, Sir Ivan, *My Life of Crime: Cases and Causes* (Brighton: Book Guild Publishing, 2010)
- MacMillan, Catherine, *Mistakes in Contract Law* (Oxford: Hart Publishing, 2011)
- McLaughlin, Mark, *Inheritance Tax 2011/2012* (Haywards Heath: Bloomsbury Professional, 2011)
- Morris, Terence and Louis Blom-Cooper, *Fine Lines and Distinctions: Murder, Manslaughter and the Unlawful Taking of Human Life* (Hook: Waterside Press, 2011)
- Munkman, John, *Damages for Personal Injuries and Death* (12th ed) (London: LexisNexis, 2012)
- O'Malley, Thomas, *Sentencing – Towards a Coherent System* (Dublin: Round Hall, 2011)
- Roberts, Harry (ed), *Riley on Business Interruption Insurance* (9th ed) (London: Sweet & Maxwell, 2011)
- Wood, Kieron, *Contempt of Parliament* (Dublin: Clarus Press, 2012)

BRIEFING

Practice notes

Threat by a solicitor to sue an opposing solicitor personally

GUIDANCE AND ETHICS COMMITTEE

A solicitor should not threaten to sue an opposing solicitor personally, for instance, for costs that may be awarded against his plaintiff client. Such a threat has no basis in law and, accordingly, it is not appropriate to make such a threat.

An analogy can be made with a threat against a medical practitioner to bring medical negligence litigation. This issue has been considered by the courts on several occasions. In *Reidy v The National Maternity Hospital*, Barr J stated as follows: "It is irresponsible and an abuse of the process of the court to lodge a professional negligence action against institutions such as hospitals and professional personnel without first ascertaining that there are reasonable grounds for so doing. Initiation and prosecution of an action in negligence on behalf of the plaintiff against the hospital necessarily requires appropriate expert evidence to support it."

In another case, *Cooke v Cronin*, Denham J in the Supreme Court endorsed the statement of Barr J in Reidy and stated: "While bearing in mind the important right of access to the courts, I am satisfied that these statements of law are correct. To issue proceedings alleging professional negligence puts an individual in a situation where, for professional or practice reasons, to have the case proceed in open court may be perceived and feared by that professional as being detrimental to his professional reputation and practice. This fear should not be utilised by unprofessional conduct."

A solicitor who receives a threat that he will be sued personally, when there is not appropriate evidence to support the litigation, should call on the solicitor making the threat, or the managing partner of the solicitor's firm, to withdraw the threat. If it is not withdrawn, the solicitor threatened could consider writing again, pointing out that he will have no option but to hold the other solicitor responsible for any loss arising as a result of the threat to pursue him personally, such as an increase in his insurance premium.

Start of non-personal filing of documents

LITIGATION COMMITTEE

SI 692/2011 provides for the lodgment of documents in each of the offices of the Superior Courts by means other than personal delivery, with effect from 11 January 2012.

In addition to personal filing of documents in the Central Office, documents may now be lodged by means of pre-paid registered post, pre-paid ordinary post, through a document exchange service accepted by the officer, for the time being, managing the Central Office, or by depositing the document in a box or facility maintained for that purpose by the Central Office.

The new methods of delivery do not apply to certain categories of document, as specified in SI 692/2011. Practitioners are urged to take care to ensure that any issues relating to the running of the *Statute of Limitations* are taken into account when deciding which method of delivery to use, and to consider whether personal filing would be preferable in cases where the time remaining on the statute is short.

Copying *inter partes* correspondence to court

LITIGATION COMMITTEE

The Litigation Committee wishes to draw practitioners' attention to recent judicial comment on the furnishing of *inter partes* documentation to the court registrar, particularly in cases before the Commercial Court. In the recent case of *Thema International Fund PLC v HSBC Institutional Trust Services (Ireland)* ([2011] IEHC 344), Clarke J noted that there is a growing tendency for solicitors acting for parties to copy to the court registrar argumentative correspondence about issues that may be due to come before the court. Clarke J was of the view that it is not appropriate for one side to communicate to the court general complaints, intimations of possible applications in the future, or positions that might be adopted, by way of letters passing between the parties being copied to the court, outside of either a specific application in respect of which the documents are properly before the court, or as an agreed set of documents, which both parties are happy to have placed before the court.

Clarke J further noted that there is nothing inappropriate, and, indeed, it is often required, that there be relevant communications associated with ensuring that all of the documentation properly before the court has been filed and is available to the judge.

Where late filing of documents occurs, difficulties can arise where there is a known dispute between the parties as to whether such late-filed documentation is to be properly admissible. Clarke J urged that practitioners take care to ensure that documents that may not ultimately be admitted are not brought to the court's attention until such time as there has been a proper decision as to whether the relevant documentation should be so admitted.

VAT invoices issued by solicitors

TAXATION COMMITTEE

Practitioners should note that a solicitor should issue VAT invoices for services only to his own client and in the name of his own client. A solicitor should not issue a VAT invoice in the name of a person who is not his client, even if his costs are being paid by a third party. For example, a plaintiff's solicitor should not issue a VAT invoice in the name of the defendant, and a lender's solicitor should not issue a VAT invoice in the name of the borrower. **Section 66 of the *VAT Consolidation Act 2010*, as amended, provides that a VAT invoice can only be issued to the person to whom a service is supplied.**

Furthermore, pursuant to section 28(3) of that act, where a person is indemnified under an insurance policy in respect of the services of a solicitor, the solicitor's services are deemed to be supplied to, and received by, that person, and any VAT invoice to be issued in respect of the service must be issued to that person, and not the insurer.

BRIEFING

Transactions involving vulnerable/older adults (to include requests for visits to residential care settings) – guidelines for solicitors

GUIDANCE AND ETHICS COMMITTEE

1. Introduction

1.1: It must be recognised that all individuals, no matter how vulnerable, have a fundamental right to control and manage their affairs and to have access to a solicitor. However, vulnerable/older adults also have a right to be protected against financial abuse. Solicitors, working in co-operation with others caring for an individual, can have a pivotal role to play in ensuring that the correct balance is achieved.

1.2: As a result of several studies undertaken in recent years, the issue of the financial abuse of vulnerable/older people has come into focus. There is a greater awareness of this issue generally, and, in particular, among those who provide frontline services to this group. For instance, the Health Service Executive (HSE) now trains its staff to be alert to the issue and to respond appropriately. Likewise, the Health Information and Quality Authority (HIQA) has introduced new standards for dealing with this problem.

1.3: Solicitors have always had a role in detecting and preventing financial abuse, for instance, when making wills for clients or transferring their assets to others. The legal issues of capacity and undue influence must always be addressed by solicitors. The aim of this practice note is to focus on the practical steps to be taken by solicitors when dealing with vulnerable/older adults, so as to ensure that they fulfil their ethical and professional obligations to these clients. The risk factors for abuse of any type are outlined. The importance of the solicitor identifying which family member is actually the client is discussed. The related issue of potential conflict of interests is addressed. For example, if a solicitor is asked by a son/daughter to visit an elderly parent in hospital or a nursing home, what issues arise for consideration by the solicitor?

1.4: Finally, guidelines are offered for solicitors who are visiting clients in a hospital or nursing-home setting. It is suggested that solicitors follow certain procedures that take into account the fact that the staff of the unit they are visiting also have obligations in the matter.

1.5: The results of the study report *Abuse and Neglect of Older People in Ireland*[1] indicated that financial abuse (which included being forced to give money or property, forced/misled to sign over ownership of home or property, forced to change a will and other issues) featured as one of the most prevalent areas of abuse. The study also indicated that the most frequent identified group of perpetrators of abuse, and within a relationship of trust, were adult children, followed by other relatives and spouses and partners.

1.6: The *National Quality Standards for Residential Care Settings for Older People in Ireland*[2] provide that there must be a policy on the prevention, detection and response to abuse in any form within each residential care setting. The policy outlines the procedures for the prevention of abuse, responding to suspicion, allegation or evidence of abuse and reporting concerns and/or allegations of abuse to,[3] the Garda Síochána and the Chief Inspector of Social Services. In addition, the HSE has formulated a number of guidelines for its staff, which provide that where staff have concerns about the possible financial abuse of older people in a residential care setting, HIQA should be notified within three days of the concern being raised. The Law Society has formulated these guidelines to complement these various policy objectives.

2. Risk factors

2.1: The most significant risk factors to emerge in the study conducted by the National Centre for the Protection of Older People (NCPOP)[4] were related to poor or below-average health, whether as perceived by the person themselves, or as measured clinically. Below-average physical health increased a person's risk of mistreatment (abuse) threefold, while below-average mental health resulted in a sixfold increase of risk. For the vast majority of older people who took part in the NCPOP survey, the experiences they described had a serious impact on them, even though a large number of them did not report their experiences to anyone.

2.2: A solicitor acting for an elderly client has an obligation to understand the risk factors involved and to ensure that the advice they are giving is in the best interest of the client, taking into account all of the relevant circumstances. A solicitor must inform him/herself as to what these relevant circumstances are.

3. Legal issues

3.1: Solicitors have a duty of care towards their clients, and this duty is heightened when acting for a vulnerable/elderly client, or a client whose capacity to make decisions is diminishing. In some cases, even though a person may have the capacity to contract, the quality of the consent may not be free and voluntary in the fullest sense because of the influence of others. In other cases, a person may simply take advantage of an older person, which may amount to what is considered in law as 'unconscionable conduct'. This may give rise to a question as to whether the transaction in question was in the best interests of the older client.[5]

i) Capacity:[6] There is a presumption that a person who has reached the age of 18 years has capacity to make decisions. It is important that solicitors do not assume that, because of vulnerability or age, a person lacks capacity. On the other hand, people with age-related disabilities, for example, dementia, may have excellent long-term memory but have difficulty in making decisions. Where questions arise as to the ability of a person to make decisions, an assessment of capacity is necessary. The assessment of capacity should be carried out sensitively, and a solicitor should assist the client, insofar as possible, to make a decision and to give instructions. This may mean taking more time to ensure that the solicitor obtains the necessary information to make the assessment and that the client understands the issues.

Disorientation or confusion should not be mistaken for a lack of capacity. In this context, it may be necessary to organise visits with the client at a time of day that is the most suitable or best time for the client. The degree of capacity required depends on the significance of the decision to be made. A person may lack the capacity to make a particular decision or a range of decisions. A lack of capacity means that the person lacks the ability to understand the nature of the decision, or the ability to assimilate the information necessary to make the decision, or the risks and consequences of a decision. A solicitor in assessing capacity must make sure that the

correct test of capacity is applied in relation to the particular transaction in question,[7] taking account of the individual circumstances.

Capacity to make a decision with legal consequences is a legal test and not a medical test. Medical evidence may be of assistance to a solicitor in determining if the client has a medical condition that may affect the client's ability to make a decision, but is not necessarily indicative of a lack of capacity. It is necessary for a solicitor to satisfy him/herself that the client has the capacity to give instructions and to understand the implications of the decision with regard to, for example, the transfer of assets, the making of a will, the appointment of an attorney, or the appointment of an agent for the purpose of collecting pension benefit.

A solicitor who wishes to obtain a medical report should request the client's consent to obtain the medical report. When requesting the medical report from the medical expert, the solicitor should indicate the reason for which the report is required. The medical report must be contemporaneous, and the client must be examined in or about the time the report is required. If the client is unable to give consent to the obtaining of the medical report, then the solicitor should, in seeking such a report, have regard to the client's right to privacy and confidentiality. It should be noted that a solicitor may make limited disclosure of otherwise confidential information to seek assistance from a medical expert.

Where capacity is at issue, it is necessary for a solicitor to take detailed contemporaneous file notes. If the client's mental capacity is subsequently challenged, the file notes will be of great assistance.

ii) Undue influence:[8] A solicitor should see the client alone to ensure that the client is acting freely, to confirm the client's wishes and to avoid undue influence by family members or other persons. "The doctrine of undue influence enables a court to set aside transfers of property *inter vivos* whenever it appears that one party has not freely consented to the transaction." [9]

Undue influence may be *actual* (express influence of one person over another and improper conduct) or *presumed* (which arises from a relationship of trust and confidence, together with an improvident transaction). Actual undue influence requires proof of improper conduct, whereas presumed undue influence does not require proof that improper influence was exercised – it will be for the recipient of the transferred assets to rebut the presumption and establish that the transaction was not improper, but was the free outcome of the other person's uninfluenced will: "The actual fact of the transaction and the circumstances surrounding it was such as could be relied on as well as the relationship itself to raise the presumption. Moreover, it is not necessary that the court find a wrongful act. Where the presumption arises, the court intervenes in order to prevent an abuse of influence possessed by one over the other" (see *Carroll v Carroll* [2000] 1 ILRM 210.[10]

Separate representation is an important factor in determining whether the transfer is a purely voluntary act and likely to rebut the claim of improper conduct.

The courts have reviewed a solicitor's duty in cases of undue influence. In *Kenward v Adams*,[11] the court stated that a solicitor who is instructed to advise a person who may be subject to undue influence must bear in mind that it is not sufficient that the client understands the nature and effect of the transaction, if the client is so affected by the influence of the other that the client cannot make an independent decision of his/her own. It is not sufficient for the solicitor to simply explain the documentation and ensure that the client understands the nature of the transaction and wishes to carry it out. Rather, a solicitor's duty is to satisfy him/herself that the client is free from improper influence, and the first step must be to ensure whether the transaction is one into which the client could sensibly be advised to enter if free from influence. If the solicitor is not so satisfied, it is the solicitor's duty to advise the client not to enter into the transaction.

In *Carroll v Carroll*,[12] the Supreme Court stated that "a solicitor or other professional person does not fulfil his obligation to his client or patient by simply doing what he is asked or instructed to do. He owes such a person a duty to exercise his professional skill and judgement, and he does not fulfil that duty by blithely following instructions without stopping to consider whether to do so is appropriate."

iii) Unconscionable conduct: Unconscionable dealing is a separate equitable doctrine to undue influence. Undue influence looks to the quality of the consent or assent of the weaker party, while unconscionable dealing looks to the conduct of the stronger party.

Unconscionable conduct has been described[13] as taking unconscientious advantage of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgement as to what is in their best interests. To attract the equitable jurisdiction, a person who takes unconscientious advantage of another need only be aware of facts raising that possibility in the mind of a reasonable person.

Shanley J, in the High Court, stated: "While I have concluded that the 1990 transaction should be set aside on the grounds of undue influence, I should also state that I am also satisfied that the transaction would be set aside, and should be set aside, on the grounds that it was an improvident transaction. It is worth recalling that the donor disposing of the … premises was disposing of the only real asset he possessed."

The Supreme Court was also critical of the fact that the solicitor in *Carroll v Carroll* did not have knowledge of all the relevant circumstances that were essential in order to advise the client, taking all factors into account, whether the client should proceed with the transaction, including advising the client to make provision for his future needs.

In the *Estate of Lily Louisa Morris deceased*,[14] the court found that the transaction in question was manifestly disadvantageous to Mrs Morris, in that she gave her house away and, in the circumstances, it was highly imprudent to do so.

In *Hammond v Osborn and another*,[15] Sir Martin Nourse stated that the elderly Mr Pritler was not told the effect of the transfer: "No consideration was given as to whether those assets would be sufficient to satisfy his future needs. Nor was any consideration given to the extremely serious fiscal consequences of the realisation of his investments."

A solicitor must ensure that any transaction that a vulnerable/older client is entering into is in that client's best interest. This includes advising the client that they have an obligation to make provision for themselves, including their own future care needs.[16] Solicitors advising clients on making provision for future care needs should also inform themselves fully of the provisions of the *Nursing Home Support Scheme Act 2009*.[17]

4. Who is the client/conflict of interest?

4.1: Solicitors have a role in detecting and preventing the abuse of older people, and this is particularly so in the case of financial abuse, where the making of a will or the transfer of assets do require the assistance of a solicitor. When an older person is admitted to hospital or residential care, it may be that they need to make decisions about the management of their affairs, and often need legal advice to do so. It may simply not be convenient for some older people to make personal contact with their solicitor to visit them,

and may ask a family member or friend to request their solicitor to visit. In other cases, it may be that the family members/relatives themselves are anxious that the older person's affairs should be organised, and it is they who may make contact with a solicitor to visit the older relative.

4.2: It is important that a solicitor is clear who they are acting for and who they are advising, particularly with regard to the transfer of assets or the making of a will by older clients. When a solicitor is approached, which may be by a family member/friend/potential donee, the solicitor should clarify who they will be acting for and who will, in fact, be giving instructions. A solicitor must be careful not to take indirect instructions on behalf of an older client, but arrange to take instructions personally and without any other members of the family or other persons being present. If a solicitor is already the solicitor for a potential donor (older person), then they should refuse instructions from a donee (family member) and act in the best interest of their client – the older person. Where the client of the solicitor is the family member, it is imperative that the solicitor insist that the older person has separate legal representation. **The solicitor in question should not, in any circumstances, act for both parties, as there is a potential conflict of interest.** The circumstances of any request to visit a client in a hospital or nursing home should be clearly documented in a file note.

i) Is the older person a new client? Before agreeing to act for an older person who may be a potential new client, it is important that a solicitor check with the potential client if they have been advised by another solicitor previously. If the older person has been advised by another solicitor, it would be important to establish whether or not the client has now decided to change adviser. A solicitor should be slow to take on a new elderly client unless the potential new client has indicated compelling reasons for doing so. If there is no clear intention to change adviser, then it is prudent to advise the older person to consult again with their original adviser. However, if the client indicates that they wish to change adviser, it would be important to establish the facts as to why this is so. It is also important for the solicitor to establish if the wish to change adviser is the clear intention of the older person, and is not being influenced by the wish of any other person. In such circumstances, it is prudent for a solicitor to obtain the potential new client's consent to contact the previous adviser.

ii) Is the older person seeking advice for the first time? It may be the case that the older person has no previous adviser and wishes to consult with regard to the organisation/management of their affairs. In such circumstances, it is important for a solicitor to establish that it is the clear wish of the potential client to organise their affairs, and that they are not being induced to do so by the influence of family members or another person. For example, an older person may not have made any will previously and may be encouraged now by family members to do so. A solicitor should be suspicious where an older person has not taken any steps previously to seek legal advice with regard to their affairs and now the matter has become an urgent one. The urgency may be being dictated by the family member, and the solicitor should be able to decipher this fact. It is important that the older person is seen alone in either communicating or formulating their wishes, in addition to the giving of any instructions. A solicitor must be satisfied that there is a clear intention by the older person to organise their affairs and that they have the capacity to give instructions free from the influences of any other person.

iii) Is the older person an existing client? If the older person is an existing client and the solicitor is being asked to visit the older person by a family member or relative, it is important that the solicitor obtain clear communication and instructions from the older person directly of their wish to give instructions. Ensure that any proposal to transfer property or assets at this stage is in the best interests of the client, and not at the instigation of adult children who are impatient to receive their inheritance or who consider the needs of the older person to be secondary to their own. Make sure that the client, in making any decision to transfer property, has considered not only the benefits, but also the risks involved.

4.3: The issue of client confidentiality arises in each of the above scenarios, and a solicitor must not breach such confidentiality, even where a request to visit the client may not have come directly from the client. The client, of course, may direct a solicitor to discuss issues with regard to their affairs with a family member, and may wish to obtain the views of a family member, but the solicitor must ensure that instructions come directly from the client.

5. Access to a solicitor

5.1: An older person, no matter how vulnerable, has a fundamental constitutional and human right to privacy and to consult with their solicitor without the requirement to inform any other person of their doing so. The HIQA guidelines, *National Quality Standards for Residential Care Settings for Older People in Ireland*, acknowledges a resident's right to privacy.[18] The guidelines also acknowledge the right to autonomy and independence of a resident, to include the right to manage their own financial affairs for as long as they wish, and have the capacity, to do so. However, as stated at 1.4 above, staff in residential-care settings have particular obligations to protect older/vulnerable people from abuse or potential abuse.[19]

In addition, residential units are obliged to maintain certain records with regard to residents, and good practice suggests that a record should be made of any 'visitors' visiting the resident. Solicitors should be alert to these various requirements and, to minimise any perceived difficulty in visiting a client, should encourage their client to inform the residential unit of the wish to have access to legal advice and to inform the residential unit of any impending visit by the solicitor.

5.2: Solicitors must be alert to the fact that signs of diminished or diminishing capacity (which are also observed by others) puts a solicitor on notice that the client's capacity may be at issue, but is only the initial step for a solicitor in evaluating a client's capacity. A solicitor must act in the best interest of their client, and this includes assisting the client maximise their decision-making ability. A solicitor having observed 'red flags' or 'warning signs' about the client's capacity, must then evaluate if the client has the capacity to give instructions and carry out the specific transaction. (The test of capacity may be different for different transactions.) This should be the approach taken, unless it is very evident that the client simply does not have the capacity to proceed to this stage. This can place solicitors in a difficult position when attempts are made to dissuade a solicitor from visiting the client where there are perceived deficits in capacity.

5.3: It is a matter for each individual solicitor to exercise professional judgement as to how to deal with sensitive situations that arise in carrying out their professional duty to their client. Taking account of the issues addressed in these guidelines, the following may be of assistance for those solicitors visiting clients in residential care settings:

- As stated above, and subject to client agreeing, the residential

care unit should be informed of proposed visit.
- Insofar as possible, a solicitor should try and arrange private space to be available to consult with the client.
- Solicitors who receive a communication to visit a client in a residential care unit should arrange to visit as soon as possible.[20]
- If a solicitor arriving to see a client at a residential care facility is alerted to the possibility that the client may have diminished capacity, the solicitor should acknowledge the concerns raised by the communicator, but point out that the solicitor has a positive duty to satisfy him/herself as to the client's capacity.
- In the event that a solicitor is requested to postpone visiting a client in a residential care unit, a solicitor should use his/her professional judgement as to whether the visit should, in fact, be postponed. It is a matter for the client and solicitor to decide if the consultation should proceed.[21] If the client is temporarily unwell, it may be prudent to postpone the visit for a short period and arrange to visit at a better time for the client.
- If a solicitor is being refused access to visit a client (which should not arise), then the solicitor should deal directly with a senior member of staff to arrange for the visit with the client to take place.
- A solicitor who is attending a client in a residential care facility, for the purpose of having the client execute a document that requires to be witnessed, should arrange to bring another person who can act as witness.

6. Conclusion

It is important for a solicitor who may be faced with sensitive and difficult situations when dealing with vulnerable/elderly clients, or potential clients, to make a clear contemporaneous file note. The reasons why advice was given, including, perhaps, why the solicitor suggested to a client not to proceed with a particular transaction, should be clearly stated. It is particularly important that detailed file notes are made if an assessment of capacity is necessary when taking instructions from a client, or during any part of a transaction with a client. If a solicitor is asked to visit an elderly client in a residential care facility, the particulars of that request to visit should also be documented. If concerns about a client's capacity were communicated to a solicitor, a clear file note of that communication and solicitor's response should also be recorded.

Related practice notes

This practice note is supplemental to the following practice notes published by the Law Society (see www.lawsociety.ie):
- Joint bank accounts (*Gazette* – December 2008); '*Drafting wills for the elderly client*' (*Gazette* – January/February 2009); 'Administration of estates' (*Gazette* – March 2009);
- 'Gifts: acting for an elderly client' (*Gazette* – April 2009); Enduring power of attorney (practice note – June 2009).

Footnotes

1. The National Centre for the Protection of Older People (NCPOP) at University College Dublin published the study in November 2010. The study was funded by the HSE.
2. Health Information and Quality Authority, February 2009
3. The HSE has appointed dedicated elder abuse officers who are responsible for the development, implementation and evaluation of the HSE's response to elder abuse. A National Steering Committee on Elder Abuse and area committees have been established to oversee and ensure a nationally consistent approach in the provision of elder abuse services by the HSE.
4. *Abuse and Neglect of Older People in Ireland*, November 2010, at page 69
5. *Carroll v Carroll* [1999] 4IR
6. The Government legislation programme, Spring 2012, indicates that the *Mental Capacity Bill* will be published in early 2012.
7. See the Law Society's guidelines on 'Drafting wills for the elderly client', January/February 2009 and 'Gifts: acting for an elderly client', April 2009.
8. See 'Gifts: acting for an elderly client', April 2009
9. *Bourke v O'Donnell & Others* [2010] IEHC 348
10. Hedigan J in *Bourke v O'Donnell & Others* [2010] IEHC 348
11. *The Times*, 29 November 1975
12. [1999] 4IR
13. Mason J in *Commercial Bank v Amadio* (1983)151 CLR 447
14. [2001] WTLR 1137
15. [2002] EWCA Civ 885
16. This is particularly important, given the predicted rise in number of people aged over 65 and the predicted improvements in life expectancy. The study *Fifty Plus in Ireland 2011: First Results from the Irish Longitudinal Study on Ageing* states that that the proportion of people over the age of 65 will double in the next 20 years. The number of those aged 80 and over is expected to rise by 45% over the next ten years. The study also predicted that the life expectancy for males will increase from 76.7 years in 2005 to 86.5 in 2041. For females, it is expected that life expectancy will increase from 81.5 years in 2005 to 88.2 years in 2041.
17. See also Nursing Home Support Scheme information booklet from the Department of Health. This scheme is currently limited to people in residential care settings outside of their own home.
18. HIQA *National Quality Standards for Residential Care Settings for Older People in Ireland* (2009), standard 4, provides: "Each resident's right to privacy and dignity is respected."
19. HIQA *National Quality Standards for Residential Care Settings for Older People in Ireland* (2009), standard 8, obliges a residential care setting as follows: "There is a policy on the prevention, detection and response to abuse within the residential care setting. The policy outlines procedures for:
    - The prevention of abuse,
    - Responding to suspicion, allegation or evidence of abuse or neglect,
    - Reporting concerns and/or allegations of abuse, to the Health Service Executive, the Garda Síochána and the chief inspector."
20. In *X v Woollcombe-Yonge* [2001]WTLR, Neuberger J held that seven days would be a sufficiently short period in most cases where the client was elderly or likely to die but "where there is a plain and substantial risk of the client's imminent death, anything other than a handwritten rough codicil prepared on the spot for signature may be negligent. It is a question of the solicitor's judgement based on his assessment of the client's age and health."
21. In *Hooper v Fynmores (a firm)* [2002] Lloyd's Rep PN, a solicitor who cancelled an appointment to visit a client in hospital for execution of a will, was held liable to a disappointed beneficiary when the client died without executing the will. The court held that there is a positive duty on the solicitor to satisfy himself that any delay caused by the solicitor is not to the client's detriment.

New PRA prescribed forms of charge/mortgage

CONVEYANCING COMMITTEE

Practitioners are advised to familiarise themselves with the content of the publication by the PRA, *Deeds of Charge/Mortgage* (Legal Office Notice 1 of 2012), which is available on the PRA website.

For **charges/mortgages executed on or after 1 March 2012**, the charge/mortgage must be in the new form prescribed by the PRA.

Form 114 relates to residential mortgages, while Form 115 relates to debentures and commercial mortgages where a specific charge on registered land is intended to firm part of the security.

Sheriff's Office searches

CONVEYANCING COMMITTEE

Purchasers' solicitors might note that it is still standard conveyancing practice to carry out Sheriff's Office searches against commercial or partly commercial leasehold property.

Since the *Land and Conveyancing Law Reform Act 2009* came into effect, there has been no need for Sheriff's Office searches in relation to the purchase of wholly residential leasehold property.

Revised certificate of title documentation – 2011 edition for residential mortgage lending

CONVEYANCING COMMITTEE

Practitioners should note that a new edition of the Law Society's certificate of title documentation was drafted last year, in consultation with the IBF, to reflect changes in the law brought about by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* and to update the list of participating lenders and the reference in the documentation to PII legislation. The new edition – the 2011 edition – has an **effective date of 2 April 2012** and will be used by participating lenders for all loans approved on or after that date.

The Society has provided the participating lenders with the text of the new edition to allow them print stocks of the new edition in advance of the effective date for inclusion in solicitors' packs in respect of loans approved on, or after, 2 April 2012.

The text of the new documentation is also available for solicitors to check in the members' area of the Law Society's website in both the 'precedents' section and in the Conveyancing Committee's precedent documentation area. G

BRIEFING

Legislation update 5 January – 3 February 2012

Details of all bills, acts and statutory instruments since 1997 are on the library catalogue – www.lawsociety.ie (members' and students' area) – with updated information on the current stage a bill has reached and the commencement date(s) of each act. All recent bills and acts (full text in PDF) are on www.oireachtas.ie and recent statutory instruments are on a link to electronic statutory instruments from www.irishstatutebook.ie

ACT PASSED

Patents (Amendment) Act 2012
Number: 1/2012
Gives effect to necessary changes to the *Patents Act 1992* to provide for the ratification by Ireland of the *London Agreement*. The *London Agreement* aims to reduce the cost to applicants of the patent process by reducing the requirements to file translations of granted patents under the *European Patent Convention*.
Enacted: 1/2/2012
Commencement: Commencement order(s) to be made per s5(3) of the act

SELECTED STATUTORY INSTRUMENTS

Criminal Law (Defence and the Dwelling) Act 2011 (Commencement) Order 2012
Number: SI 2/2012
Appoints 13/1/2012 as the commencement date for all sections of the act.

Dog Breeding Establishments Act 2010 (Commencement) Order 2011
Number: SI 699/2011
Appoints 1/1/2012 as the commencement date for all sections of the act.

European Communities (Artist's Resale Right) (Amendment) Regulations 2011
Number: SI 709/2011
Extends the artist's resale right to those whom a resale right is transmitted (or deemed to be transmitted) after the death of the author of an original work of art. The right is extended for a period of 70 years after the death, in respect of sales whose contract date is on or after 1/1/2012. The artist's resale right allows the creators of original works of visual and plastic art, through a system of royalty payments, to benefit from resales of those works when they are sold through the professional art market.
Commencement: 1/1/2012

Nurses and Midwives Act 2011 (Commencement) Order 2011
Number: SI 715/2011
Appoints 1/1/2012 as the commencement date for ss1, 2 and part 12 (dissolution of the National Council for the Professional Development of Nursing and Midwifery) of the act.

Rules of the Superior Courts (Service) 2012
Number: SI 15/2012
Amends order 121, rule 2 to permit, subject to certain conditions, service by document exchange of a document for which personal service is not required to be effected.
Commencement: 1/2/2012

Social Welfare and Pensions Act 2010 (Sections 29, 30, 34 and 35) (Commencement) Order 2011
Number: SI 703/2011
Appoints 1/1/2012 as the commencement date for ss29, 30, 34 and 35 relating to the transfer of administrative responsibility for the employment and community services of An Foras Áiseanna Saothair (FÁS) and the associated FÁS resources to the Department of Social Protection.

Social Welfare and Pensions Act 2011 (Section 16(6)) (Commencement) Order 2011)
Number: SI 704/2011
Appoints 1/1/2012 as the commencement date for s16(6) of the act, amending the *Social Welfare Consolidation Act 2005* in relation to references to schemes and programmes that had previously been administered by An Foras Áiseanna Saothair (FÁS). G

Prepared by the Law Society Library

ONE TO WATCH

One to watch: new legislation

Criminal Law (Defence and the Dwelling) Act 2011

The act came into effect on 13 January 2012 and clarifies the law concerning the defence of the home. It recognises the constitutional status of a person's dwelling and makes it clear that a person may use reasonable force to defend themselves from intruders unlawfully in their home. It allows for the use of such force as is reasonable in the circumstances to protect people in the dwelling from assault, to protect property, to prevent the commission of crime, or to make a lawful arrest.

The act also extends the protection to the curtilage of the dwelling and explicitly provides that a person is not under an obligation to retreat from their home during an intrusion. It also provides that a person who uses reasonable force, as provided for in the act, cannot be sued for damages by a burglar and will not be guilty of an offence.

The act makes the provision for the following:

- Definitions for such terms as 'dwelling', 'property' and the 'curtilage' of the dwelling,
- The extent to which justifiable force may be used against an intruder,
- That the use of justifiable force against another intruder with criminal intent would not exclude the use of force causing death,
- The absence of a requirement on the part of an occupier to retreat when defending the dwelling or the people in it against an intruder entering with criminal intent, and
- That a person who uses such force as is permitted by the act will not be liable in tort in respect of injury, loss or damage arising from such force.

Section 2

Section 2 of the act is arguably one of its most significant features. It focuses on the use of force by an occupier against an intruder entering the dwelling with criminal intent.

Under section 2(1), the act provides that it will not be an offence for a homeowner – or a lawful occupant of the home – to use force against an intruder where he or she believes the other person is a trespasser and is in the dwelling in order to commit a crime. However, the force used against the intruder must only be such as is reasonable, in the circumstances the occupier believes them to be, in order to:

- Protect himself or herself or another person present in the dwelling from injury, assault, detention or death, or
- To protect his or her property or the property of another person from appropriation, destruction or damage caused by a criminal act, or
- To prevent the commission of a crime or to effect a lawful arrest.

Homeowners may be mistaken as to the circumstances, but if their belief is honestly held, they will enjoy the protection of the act. It will be up to a court or jury to decide whether the occupier's belief was honestly held.

It can be suggested that the act adopts the 'castle doctrine' into Irish law. In section 2(5), it states: "It is immaterial whether the person using force had a safe and practicable opportunity to retreat from the dwelling before using the force concerned." Homeowners are therefore not under a duty to retreat.

In section 2(6), the act outlines that a person is regarded as using force in relation to another person if he or she:

- Applies force in relation to or causes an impact on the body or that person,
- Threatens to apply force in relation to or cause an impact on the body of another person, or
- Detains that other person.

The act states in section 2(7) that "the use of force shall not exclude the use of force causing death". The Minister for Justice has commented on this provision and has stated that it is "in no way an encouragement or licence for unwarranted violence", as it is subject to the reasonable force provisions of the legislation. G

BRIEFING

Solicitors Disciplinary Tribunal

Reports of the outcomes of Solicitors Disciplinary Tribunal inquiries are published by the Law Society of Ireland as provided for in section 23 (as amended by section 17 of the *Solicitors (Amendment) Act 2002*) of the *Solicitors (Amendment) Act 1994*

In the matter of Angela Farrell, a solicitor practising as Farrell Solicitors, 28 North Great Georges Street, Dublin 1, and in the matter of the *Solicitors Acts 1954-2008* [6102/DT112/09]

Law Society of Ireland (applicant) Angela Farrell (respondent solicitor)

On 6 October 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor, in that she failed to comply with an undertaking dated 22 January 2009 and signed by her, in which she undertook to make certain payments to a former employee.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €1,000 to the compensation fund,
c) Make restitution to her former employee of all monies due on foot of the undertaking given by her on 22 January 2009, and
d) Pay the whole of the costs of the Society, including witnesses' expenses, as taxed by a taxing master of the High Court in default of agreement.

In the matter of Katherine MA Ryan, a solicitor practising under the style and title of Ryan & Company, Solicitors, at 42 Woodley Park, Kilmacud, Dublin 14, and in the matter of the *Solicitors Acts 1954-2008* [6970/DT96/09, 6970/DT99/09, 6970/DT111/09 and the High Court record no 2011 no 9SA]

Law Society of Ireland (applicant) Katherine MA Ryan (respondent solicitor)

On 13 October 2010, in disciplinary matter 6970/DT96/09, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she failed to respond in a timely manner to the Society's correspondence and, in particular, the Society's letters of 14 January 2009, 12 March 2009 and 24 June 2009 in a timely manner or at all.

On 13 October 2010, in disciplinary matter 6970/DT99/09, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

a) Up to the date of the referral of this matter to the tribunal, failed to comply with an undertaking given to the complainants, IIB Homeloans (now known as KBC Homeloans), on 9 August 2006 in a timely manner or at all,
b) Failed to reply to the Society's correspondence and, in particular, the Society's letters of 2 October 2008, 14 October 2008, 22 October 2008, 12 November 2008, 26 November 2008, 12 December 2008, 6 January 2009, 14 January 2009, 9 March 2009, and 16 April 2009 in a timely manner or at all,
c) Failed to comply with the direction of the Complaints and Client Relations Committee made on 29 May 2009 to furnish within ten days a full report on the complaint file, supported by vouching documentation, and to furnish an updated report by 26 June 2009 in a timely manner or at all.

On 13 October 2010, in disciplinary matter 6970/DT111/09, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

a) Failed to comply with an undertaking dated 15 November 1998 in respect of a named property in Dublin 3, furnished to Irish Life and Permanent plc, in a timely manner or at all,
b) Failed to comply with an undertaking dated 20 June 2000, furnished in respect of a named property in Dublin 7, furnished to Irish Life and Permanent plc, in a timely manner,
c) Failed to comply with an undertaking dated 23 April 2003 in respect of a named property in Co Wicklow, furnished to Irish Life and Permanent plc, in a timely manner or at all,
d) Failed to comply with an undertaking dated 29 March 2004 in respect of a named property in Co Dublin, furnished to Irish Life and Permanent plc, in a timely manner or at all,
e) Failed to comply with an undertaking dated 28 April 2004 in respect of a named property in Co Kildare, furnished to Irish Life and Permanent plc, in a timely manner or at all,
f) Failed to comply with an undertaking dated 10 December 2004 in respect of a named property in Co Meath, furnished to Irish Life and Permanent plc, in a timely manner,
g) Failed to comply with an undertaking dated 20 May 2005 in respect of a named property in Co Dublin, furnished to Irish Life and Permanent plc, in a timely manner or at all,
h) Failed to comply with an undertaking dated 1 December 2005 in respect of a named property in Dublin 12, furnished to Irish Life and Permanent plc, in a timely manner,
i) Failed to comply with an undertaking dated 1 December 2005 in respect of a named property in Co Kilkenny, furnished to Irish Life and Permanent plc, in a timely manner or at all,
j) Failed to comply with an undertaking dated 6 September 2005 in respect of a named property in Co Cork, furnished to Irish Life and Permanent plc, in a timely manner,
k) Failed to comply with an undertaking dated 1 February 2006 in respect of a named property in Co Dublin, furnished to Irish Life and Permanent plc, in a timely manner or at all,
l) Failed to comply with an undertaking dated 24 February 2006 in respect of a named property in Co Wicklow, furnished to Irish Life and Permanent plc, in a timely manner or at all,
m) Failed to comply with an undertaking dated 28 March 2006 in respect of a named property in Co Dublin, furnished to Irish Life and Permanent plc, in a timely manner or at all,
n) Failed to comply with an undertaking dated 29 September 2006 in respect of a named property in Co Meath, furnished to Irish Life and Permanent plc, in a timely manner or at all,
o) Failed to comply with an undertaking dated 23 November 2006 in respect of a named property in Dublin 24, furnished to Irish Life and Permanent plc, in a timely manner or at all,
p) Failed to comply with an undertaking dated 1 May 2007 in respect of a named property in Dublin 15, furnished to Irish Life and Permanent plc, in a timely manner or at all,
q) Failed to comply with an undertaking dated 31 July 2007 in respect of a named property in Dublin 8, furnished to Irish Life and Permanent plc, in a timely manner or at all,
r) Failed to comply with an undertaking dated 30 October

BRIEFING

2007 in respect of a named property in Dublin 15, furnished to Irish Life and Permanent plc, in a timely manner or at all,

s) Failed to comply with an undertaking dated 7 May 2008 in respect of named properties in Dublin 18, Dublin 20, Dublin 8 and Dublin 18, furnished to Irish life and Permanent plc, in a timely manner or at all,

t) Failed to comply with an undertaking dated 9 June 2008 in respect of a property in Dublin 22, furnished to Irish Life and Permanent plc, in a timely manner,

u) Failed to comply with an undertaking dated 24 July 2008 in respect of another named property in Co Wicklow, furnished to Irish Life and Permanent plc, in a timely manner or at all,

v) Failed to furnish a report on each file within ten days of the Complaints and Client Relations Committee meeting of 29 May 2009 and failed to furnish a progress report for the Complaints and Client Relations Committee on or before 26 June 2009, as directed by the Complaints and Client Relations Committee.

The Solicitors Disciplinary Tribunal, having made findings of misconduct in relation to the above three disciplinary matters, recommended that the Society bring the matter forward to the President of the High Court with a recommendation that the respondent solicitor was not a fit person to be a member of the solicitors' profession and that the name of the respondent solicitor be struck off the Roll of Solicitors and that the respondent solicitor pay the whole of the costs of the Society, including witnesses' expenses, to be taxed by a taxing master of the High Court in default of agreement.

On 24 October 2011, the President of the High Court ordered that the name of the respondent solicitor be struck off the Roll of Solicitors and that the society do recover the costs of the High Court proceedings and the costs of the proceedings before the Solicitors Disciplinary Tribunal as against the respondent solicitor when taxed or ascertained. G

BRIEFING

Justis update

News of Irish case law information and legislation is available from FirstLaw's current awareness service on www.justis.com

Compiled by Bart Daly

COMPANY

Arbitration

Practice and procedure – whether delay in making application – whether security for costs should be ordered – Companies Act 1963 – Arbitration Act 1954.

The claimant was engaged by the respondent to carry out certain works regarding the construction of a hotel. As a result of the contract, the claimant contended that it was owed a sum of over €2 million, while the respondent denied liability and counterclaimed for €400,000 approximately. Arbitration proceedings were entered into, and the respondent brought the present application seeking an order pursuant to section 390 of the *Companies Act 1963* directing the claimant to provide security for the costs of the respondent in the arbitration proceedings. Separately, the claimant was seeking an order pursuant to section 201(1) of the 1963 act regarding a compromise proposal involving its creditors.

Laffoy J granted the order sought, holding that the respondent had established that it had a *prima facie* defence to the plaintiff's claim. The respondent had established that the claimant would not be able to pay its costs if it was successful in the arbitration. It could not be held that the loss attributable to the respondent's alleged wrongdoing could explain, by itself, the claimant's inability to pay costs. It would be unfair to refuse to make the order sought by reason of any delay. The respondent was entitled to seek an order for security for costs, applying the usual principles and without regard to the position of third parties.

***Frank McGrath Construction Limited v One Pery Square Hotel Limited*, High Court, 9/9/2010**

Credit and security

Banking law – order of garnishee – registration of security – whether solicitor's undertaking regarding future payments regarded as charge over book debts – whether charge void for want of registration – Companies Act 1963.

The plaintiff company had been granted judgment against the defendant for a sum of monies. The defendant itself was owed monies by a local authority. The local authority was holding the sum of monies pending the outcome of court proceedings. The plaintiff had obtained a conditional order of garnishee and, when it sought to have the conditional order made absolute, a bank (AIB) appeared before the court and contended that it had acquired an interest in the sum held by the local authority and contended that this equitable charge took priority over any claim made by the plaintiff. On behalf of the bank, it was contended that a letter of undertaking by a solicitor acting on behalf of the defendant entitled it to the funds in question and these should be made payable to the bank. In addition, it was contended that the court should exercise its discretion in refusing to make the order of garnishee conditional.

Hogan J found in favour of the plaintiff, holding that the entire case turned on whether the undertaking constituted a registerable charge within the meaning of section 99 of the *Companies Act 1963*. The payment in question clearly amounted to a book debt. The real question was whether the local authority's debt had been effectively sold to the bank by way of assignment via the solicitor's undertaking or whether the defendant retained an equity of redemption in the monies in the event that the bank debt was to be discharged. The evidence was that the bank wanted security for its debt, and it was not in the business of effectively purchasing the debt by providing additional overdraft facilities to the defendant. The solicitor's undertaking was by way of security and not assignment and, accordingly, the undertaking was void as against any creditor of the company for want of registration, as required by section 99(2)(e) of the 1963 act. There was no contractual or quasi-contractual nexus between the bank and the plaintiff that would make it inherently inequitable for the plaintiff to obtain an order of garnishee.

***Response Engineering Limited (plaintiff) v Caherconlish Treatment Plant Limited (defendant)*, High Court, 6/9/2011**

CRIMINAL

Appeal

Sexual offences – failure to discharge jury – warning to jury – evidence – meaning of 'corroboration' – whether indictment should have been severed – whether applicant received fair trial – Offences Against the Person Act 1861 – Criminal Justice Administration Act 1924.

The applicant was convicted following a trial in respect of a number of sexual offences. The applicant received various sentences ranging from two to five years. It was contended by the applicant that the convictions were unsafe, in that the trial judge failed to sever the indictment so as to provide for separate trials in respect of each complainant. There was no corroboration in the individual cases, and there was an obvious danger that the evidence of one complainant would be taken as the evidence of the other complainant. It was also submitted that the jury should have been discharged during the course of the trial and that evidence was admitted in the trial that was more prejudicial than probative. Issue was also taken with the fairness of the trial judge's charge to the jury.

The Court of Criminal Appeal (Macken J delivering judgment) refused leave to appeal against conviction, holding that there was no evidence of any prejudice to the accused in the evidence of either complainant as a result of the way in which the trial had been run. No error in law could be identified in the manner in which the trial judge had dealt with the application to sever the indictment. There was no automatic entitlement to have a jury discharged in circumstances where evidence had been given inadvertently in the course of a trial. The trial judge had reminded the jury that there was no corroborative evidence and had furnished warnings regarding the possible corroboration contended for by the prosecution. A charge to the jury did not have to include every single comment adduced on behalf of the defence or the prosecution, but must fairly draw the jury's attention to the important elements in the case. There was no risk that the trial was unfair arising from the content of the trial judge's charge.

***Director of Public Prosecutions v Hardiman*, Court of Criminal Appeal, 19/10/2011**

FAMILY

Land law

Partition of property – effect of nullity on property ownership – whether court had necessary jurisdiction to grant order – whether court should order sale of property – Partition Acts 1868-1876 – Registration of Title Act 1964 – Family Home Protection Act 1976.

The parties had been married and had children. A family home had been purchased and both were registered as joint owners of the property. Subsequently, the parties separated, and the wife moved out of the family home and the respondent stayed in the property with the children. The marriage was subsequently declared null and void. Evidence was given as to the financial input of the parties regarding payments made on the mortgage. The applicant (the former wife) sought an order pursuant to the provisions of the 1868 and 1876 *Partition Acts* providing for the sale, in lieu of partition,

of the property in question. MC also sought a declaration that she was entitled to a 50% beneficial interest in the premises and in the contents of the premises.

Herbert J held that the correct approach was to regard the property as having been purchased by strangers. Equity therefore presumed that the person who paid the greater share did not intend to make a gift of the difference to the other person and that they therefore hold the joint tenancy in trust for themselves as tenants in common in proportion to the amounts contributed. The court was not satisfied that MC had expended such money on the premises that it would be fair and reasonable that she should be entitled to acquire the interest of BS. The evidence established that BS had managed with great difficulty to retain possession of this property. There was no evidence that the motive of MC in seeking a sale was vindictive, but the court was satisfied that it was wholly mercenary. The court was not satisfied that it should exercise its discretion to direct a sale of this property. If BS were to voluntarily undertake to purchase the share of MC and MC were to accept that offer, the court could still order a valuation of her share and she would then have the option of accepting that valuation or not.

***C(M) v S(B)*, High Court, 17/6/2008**

FINANCIAL SERVICES

Financial Services Ombudsman

Right to oral hearing – fair procedures – challenge to findings – whether oral hearing necessary to establish veracity of claims – whether findings should be quashed – Central Bank Act 1942 – Central Bank and Financial Services Authority Act 2004.

The appellant had brought a complaint regarding a financial institution to the Financial Services Ombudsman. The ombudsman had found in favour of the appellant in respect of one matter but not in respect of others. The appellant sought to appeal against the majority of the findings. It had been the contention of the appellant that a loan facility had been agreed upon for a certain amount. The bank had allegedly reneged on providing the full amount promised and, instead, had demanded repayment and attempted to alter the original conditions of the loan. In addition, it was contended that a period of time had been granted to the appellant before payments would commence. The ombudsman primarily found that the bank was not at fault for missed payments and that the appellant must have seen certain correspondence (which had been disputed). It was also found that the bank had not agreed to extend further finance to the appellant. On behalf of the appellant, it was contended that the ombudsman should have held an oral hearing to establish the veracity of certain claims, which could not have been done by examining documents alone.

Cross J found in favour of the appellant, holding that the respondent clearly enjoyed a broad discretion as to whether or not to hold an oral hearing. It was clear that the appellant's complaints in this instance could not have been fairly determined without an oral hearing so that witness's credibility could be properly assessed, and this amounted to a serious error. The errors outlined were significant, and the appeal would be allowed. The matter would be remitted to the ombudsman for further consideration of the appellant's complaints.

***Roisín Hyde (appellant) v Financial Services Ombudsman (respondent)*, High Court, 16/11/2011**

Practice and procedure

Ombudsman – serious error – fiduciary relationship – conflict of fact – misstatement of fact – remedy – remit for review – section 57CI(2) of the Central Bank Act 1942, *as inserted by section 16 of the* Central Bank and Financial Services Authority Act 2004.

An appeal was made from a finding of the Financial Services Ombudsman when a complaint made by the notice parties was substantiated pursuant to section 57CI(2) of the *Central Bank Act 1942*, as inserted by section 16 of the *Central Bank and Financial Services Authority Act 2004*. The notice parties had a mortgage with the appellant and complained that they had lost the benefit of a preferential rate of interest tied to the European Central Bank rate by switching from a fixed to a variable rate. The appellant alleged serious errors of law and misstatement of fact. The ombudsman had found that the bank was in a fiduciary relationship with its customer. The appellant argued that the ombudsman had misstated the factual position of the appellant in resolving the conflict of fact.

White J held that there was a combination of serious and significant errors in the finding of the Financial Services Ombudsman, in that the conflict of evidence was not addressed and the legal relationship of fiduciary was incorrectly applied to the parties and, as a result, a finding of misrepresentation by silence was incorrectly made. The appropriate remedy was to remit the matter back to the Financial Services Ombudsman for review.

***Irish Life and Permanent PLC (appellant) v Financial Services Ombudsman (respondent) & Others*, High Court, 16/11/2011**

TORT

Causation

Liability – third party – injuries – medical condition – fitness to drive – dizziness – negligence – medication –treatment – whether third party doctor negligent and liable for certification of defendant to drive.

The defendant claimed that he was not liable for injuries suffered by the plaintiff when she was a backseat passenger, on account of a medical ailment experienced by him immediately prior to the collision, causing him to lose control of the vehicle.

The defendant caused the third-party medical practitioner, his general practitioner, to be joined as a third party. It was alleged that the third party was negligent in certifying that the defendant was fit to drive, pursuant to the *Road Traffic (Licensing of Drivers) Regulations 1999*, and that he was negligent in failing to advise the defendant to stop driving, the defendant having complained to him of fainting spells for which he had been hospitalised in the past. The third party had concluded that the dizziness complained of was as a result of blood pressure medication.

O'Neill J held that the defendant's claim for indemnity or contribution against the third party failed. There was no negligence or breach of duty on the part of the third party in relation to any advice given by him to the defendant concerning driving. There was no negligence at all on the part of the third party in the manner in which he dealt with the defendant concerning the defendant's ability to drive, or in failing to give him any advice that was required in that regard, or in the advice given. No opinion would be expressed on the duty of care that might or might not be owed by the third party. The third party's approach was a reasonable and appropriate means of discharging his professional duties.

***McGarvey (A Minor) suing by her father and next friend McGarvey v Barr & Delap*, High Court, 21/12/2011** G

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Eurlegal

Edited by TP Kennedy, Director of Education

'Pub football' and the distribution of digital content

Last October, the Court of Justice of the European Union (CJEU) found that a ban on the use of foreign decoders to watch live broadcasts of English Premier League football matches is unlawful. This judgment, in what is commonly referred to as the 'pub football case', represents welcome news for consumers wishing to watch foreign pay-TV, since they cannot be prevented from purchasing decoding equipment sourced from abroad. Moreover, the CJEU's decision has important consequences for the licensing of digital content on a member-state-by-member-state basis (see 'Europe pulls off great save for TV football', *Gazette*, Aug/Sept 2011, p62).

Sale of exclusive rights

Football Association Premier League Limited (FAPL) runs the Premier League, the leading domestic competition for English and Welsh-based professional football clubs. The company's activities include organising TV coverage of Premier League matches, including adding on-screen graphics, music and commentary. FAPL also exercises the relevant broadcast rights to make games available to viewers while maximising revenues for the participating clubs. The rights are awarded following an open-tender process, where broadcasters are invited to submit bids based on a global, regional or territorial basis. FAPL usually licences its broadcast rights on a national basis, since there is limited demand for pan-European rights.

When a bidder wins a tender for a particular region or country, FAPL awards this broadcaster the exclusive right to show live Premier League games in that area. The company believes that this approach allows it to optimise the value of its broadcast rights, since TV stations are prepared to pay a premium to acquire exclusivity. In order to protect this exclusivity, FAPL requires each licensee to 'scramble the picture' provided to its subscribers who, in turn, require decoders to decrypt the signal. In addition, FAPL seeks to prevent the circulation of decoders outside the territory of the relevant licensee.

FAPL awarded a company called NetMed Hellas SA the licence to show live Premier League games in Greece. These matches are broadcast via satellite on the NOVA package. Commercial or private subscribers must provide both a Greek address and telephone number to avail of this service. At the relevant time, the British licensee for live TV coverage of Premier League matches was BSkyB Limited. In general, subscribers to NOVA pay less than BSkyB's customers. Accordingly, certain British pubs and restaurants purchased a card and decoding box allowing them to receive the NOVA package and show live Premier League games to their customers. This contravenes NetMed Hellas's stipulation that this decoding equipment should not be used outside Greece.

Court proceedings

FAPL was concerned that the pubs/restaurants showing matches on NOVA were undermining BSkyB's British exclusivity, thus diminishing the value of the underlying TV rights. Consequently, FAPL brought a series of 'test cases' in the High Court of Justice of England and Wales, alleging that British-based suppliers of foreign decoders and British pubs showing the Premier League matches on NOVA are each in breach of domestic copyright legislation.

In a separate case, Media Protection Services Limited (MPS), a company hired by FAPL to prosecute pubs using foreign decoders, issued proceedings before Portsmouth Magistrates' Court against Karen Murphy, the manager of a pub that acquired a NOVA decoder card with the purpose of showing live Premier League matches to her pub's customers.

Ms Murphy was convicted under British copyright legislation, but eventually appealed, by way of case stated, to the High Court. Each case was referred to the CJEU for preliminary ruling under what is now article 267 of the *Treaty on the Functioning of the European Union* (TFEU). All told, the High Court's questions address key issues under EU rules regarding freedom to provide services, competition and intellectual property.

Free movement of services

Article 56 of the TFEU seeks to abolish any restrictions on the freedom to provide services, irrespective of whether these apply in the absence of any discrimination based on the ground of nationality, where they adversely affect the business activities of a service provider based in another EU member state. The relevant British copyright legislation confers legal protection both on the absolute territorial restriction clauses included

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Prof. William A. Schabas, Chairman of the Irish Centre for Human Rights at NUI Galway. Former member of the Sierra Leone Truth and Reconciliation Commission. Participant in international human rights missions to Rwanda, Burundi, South Africa, Kenya, Uganda & Sudan.

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in the agreements between FAPL and NetMed Hellas, on the one hand, and the contracts between the latter and its Greek subscribers on the other. Since access to NOVA's broadcasts outside Greece requires a decoder whose use is prevented, this ban constitutes an infringement on the freedom to provide services unless it is capable of objective justification. FAPL and MPS thus argued that this restriction might be justified in light of the necessity of ensuring appropriate payment for the intellectual property rights holder.

The CJEU held that a restriction of a fundamental TFEU freedom can only be justified if it serves an overriding public interest. FAPL argued that the protection of intellectual property rights was one such public interest. However, the court found that FAPL cannot claim copyright in the actual Premier League matches, since they are not the original work of an author's own intellectual creation. That said, the CJEU recognises the right of member states to adopt laws safeguarding certain intellectual property rights with the ultimate aim of protecting sporting events.

The relevant British legislation/contractual provisions may be capable of justifying a restriction on the freedom to provide services, provided it allows a rights' holder to exploit the protected subject-matter commercially. However, this does not mean an organisation like FAPL is entitled to demand the highest possible earnings. Indeed, the relevant remuneration must be reasonable *vis-à-vis* the scope of the relevant broadcast, including the actual/potential audience.

For starters, NetMed Hellas won an FAPL-organised auction for the right to broadcast Premier League games to a Greek audience. This obviously gives FAPL the opportunity to request an amount of money that both reflects the actual/potential audience and includes a premium for territorial exclusivity. However, the payment of a premium in order to guarantee absolute territorial protection resulting in price differences between partitioned national markets runs counter to the aim of a single market. Accordingly, the payment of such a premium goes beyond what is necessary to ensure appropriate remuneration. Therefore, the ban on the use of foreign decoders for the purposes of protecting intellectual property rights relating to a sporting event is not justified and thus infringes article 56.

Article 101

Article 101 of the TFEU generally prohibits agreements between companies, decisions by associations of undertakings, and concerted practices that have the object or effect of restricting competition in the EU. However, restrictive agreements may be exempted where their overall effect is to promote competition.

In order to determine whether an agreement is an object breach of article 101, the CJEU examines its content and purpose, as well as the relevant legal/economic context. Relying on previous case law, the court found in this case that the fact that FAPL grants a licensee the exclusive right to broadcast Premier League games is not, in itself, sufficient to establish that this agreement is anti-competitive by object.

The CJEU focused not on the grant of exclusive licences to broadcast the Premier League matches, but on the ancillary provisions aimed at the prevention of the sale of decoders outside the relevant territory. The court held that any arrangement aimed at eliminating trade between EU member states frustrates the establishment of a single market and therefore results in an object breach of article 101. The ban on the sale of decoders means that each licensee is granted absolute territorial exclusivity and thus competition from broadcasters based in other countries is prevented. Accordingly, these provisions result in an object infringement of article 101. The CJEU also found that such clauses do not qualify for an exemption because they go beyond what is necessary to protect the underlying intellectual property rights.

Intellectual property rules

Article 2(a) of the *Copyright Directive* (OJ L 167/10, 22 June 2001) provides that authors shall have the exclusive right to approve or prevent the reproduction of their original works. The CJEU found that FAPL may assert copyright regarding various works contained in the broadcasts, such as the opening video sequence, the Premier League anthem, pre-recorded footage showing highlights of recent Premier League games, and certain graphics. For the reasons explained above, FAPL cannot claim copyright over live broadcasts of the matches themselves.

Article 3 of this directive states that authors have the exclusive right to authorise or prohibit any communication to the public of their works, including the making available of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. The CJEU found that the main aim of the *Copyright Directive* was to establish a high level of protection for authors by allowing them to obtain appropriate reward for use of their works. Accordingly, the notion of 'communication to the public' must be construed broadly.

The court held that a publican carries out a 'communication' within the meaning of the directive where he intentionally shows works, using a television screen and speakers, to customers on his premises. The CJEU also stated that for this communication to be made 'to the public', it must be shown to a public not considered by the FAPL when it authorised the broadcast of the various works contained in the TV coverage of the Premier League. Since customers of the public houses were not considered at the relevant time, the transmission of the NOVA broadcasts in British pubs is a 'communication to the public' within the meaning of the *Copyright Directive* and thus requires FAPL's permission.

Wider implications

Ironically, the 'pub football' case might not be entirely welcomed by British publicans and restaurant owners. By including copyright elements throughout the broadcast, such as the Premier League logo and/or footage of previous matches, FAPL is in a position to make it very difficult for live matches shown on Greek TV to be shown in British or Irish pubs.

The CJEU's decision does, however, represent good news for football fans and other consumers wishing to watch foreign pay-TV in their homes, since they cannot be prevented from purchasing decoders sourced from abroad (albeit the broadcast may be the language normally used in the country for which the broadcaster has been granted exclusive rights). Moreover, this judgment clearly undermines FAPL's current model of selling exclusive broadcast rights to live games on a country-by-country basis.

Accordingly, future licences for the broadcasting of Premier League games may be packaged on a pan-European basis, with broadcasters selling packages to subscribers at a single price across the EU. Alternatively, FAPL might only sell rights to the Premier League in Britain, Ireland and/or other lucrative markets in order to optimise value. Finally, any business model for the distribution of other forms of digital content, such as books, films and music that attempts to use 'territorial exclusivity' should be re-evaluated. G

Cormac Little is a partner in the competition and regulation department of William Fry, solicitors.

Recent developments in European law

INTELLECTUAL PROPERTY

Case T-332/10, *ViaGuara SA v OHIM*, 25 January 2012

Regulation 90/94 (the *Trade Mark Regulation*) provides that registration of a trademark may be refused for certain expressly prescribed grounds. Marks that are identical or similar to an earlier mark are refused registration. Equally, refusal is given to trademarks whose use would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trademark.

In 2005, a Polish company, ViaGuara SA, applied to the Office for Harmonisation in the Internal Market (OHIM) for registration of the word sign 'ViaGuara' as a community trademark – in particular for energy drinks and alcoholic drinks.

The American company, Pfizer Inc, proprietor of the earlier trademark 'Viagra', opposed that application. On this basis, OHIM refused to register 'ViaGuara' as a community trademark. ViaGuara SA applied to the General Court to have that decision annulled. The General Court dismissed that action and confirmed the decision of OHIM. The General Court held that the reputation of the mark 'Viagra' extends not only to consumers of the drugs concerned but also to the general population.

The court then examined the similarity of the signs at issue. The court held that, when it comes to word marks, the consumer generally pays more attention to the initial part of the word and that, thus, the presence of the same stem, 'viag', in the signs at issue gives rise to a strong visual similarity that is, moreover, reinforced by the final part 'ra', which is common to the two signs. Likewise, it found that the signs are phonetically very similar and that there is nothing to distinguish the signs conceptually. The General Court, therefore, held that the marks at issue are very similar.

It then considered whether there was the risk of an unfair advantage being taken of the distinctive character or the repute of the mark 'Viagra'. It concerns the risk that the image of the mark with a reputation of the characteristics that it projects are transferred to the goods covered by the mark applied for, with the result that the marketing of those goods is made easier by that association with the earlier mark with a reputation. The court found that consumers would be inclined to buy the non-alcoholic drinks, thinking that they will find similar qualities, such an increase in libido, owing to positive associations from the earlier mark.

In relation to the alcoholic drinks containing guarana, ViaGuara SA has claimed that they have other fortifying and stimulating effects on the mind and body, as well as properties that are beneficial for health, similar to a drug. The General Court concluded that ViaGuara SA, by using a mark similar to the earlier mark, is attempting to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige; and to exploit – without paying any financial compensation – the marketing effort expended by the proprietor of that mark in order to create and maintain its image to promote its own products. The advantage resulting from such use must be considered to be an advantage that has been unfairly taken on the distinctive character or the repute of the mark 'Viagra'.

LITIGATION

Case C-327/10, *Hypoteční banka as v Udo Mike Lindner*, 17 November 2011 Hypoteční banka is a Czech bank that agreed a mortgage loan with a German national, Mr Lindner, to finance the purchase of immovable property. When the loan contract was concluded, Mr Linder was domiciled in the Czech Republic and, under the contract, was under an obligation to inform the bank of any change of domicile. The contract also provided that the local court of the bank, determined according to its registered office, would have general jurisdiction in respect of any disputes.

The bank brought an action against Mr Lindner, arguing that he was in default on the loan. The court established that Mr Lindner was no longer staying at the address indicated in the contract and it was unable to establish where he was living in the Czech Republic. The Czech court made a reference to the Court of Justice for a preliminary ruling on an interpretation of the *Brussels I Regulation* on jurisdiction. It asked whether the regulation precludes a provision of a member state's national law under which proceedings may be brought against persons whose domicile is unknown.

The court observed that the regulation does not expressly define jurisdiction in a case where the domicile of the defendant is unknown. If the national court is unable to identify the place where the consumer is domiciled within the member state of that court, it must then examine whether he is domiciled in another member state of the EU.

If it is unable to identify the place of domicile of the consumer in the territory of the EU, and has no firm evidence to support the conclusion that he is, in fact, domiciled outside the EU, the provision that jurisdiction is vested in the courts of the member state in which the consumer is domiciled must be understood as referring not only to his current domicile, but also to his last-known domicile. Such an interpretation enables the applicant to easily identify the court in which (s)he may sue, and the defendant to reasonably foresee before which court he may be sued. It enables a situation to be avoided in which the fact that it is not possible to identify the current domicile of the defendant precludes determination of the court having jurisdiction, thereby depriving the applicant of his right to judicial redress.

Thus, the CJ found that the Czech courts have jurisdiction to deal with the proceedings that the bank has brought against Mr Lindner, insofar as it has been impossible for them to identify his current domicile.

TORT

Case C-495/10, *Centre hospitalier universitaire de Besançon v Thomas Dutreux and Caisse primaire d'assurance maladie du Jura*, Opinion of Advocate General Mengozzi, 27 October 2011

The *Product Liability Directive* (85/374) establishes a principle of no-fault liability, whereby a producer is liable for damage caused by a defect in his product. Where the producer of the product cannot be identified, each supplier will be treated as a producer unless he informs the injured person, within a reasonable time, of the identity of the producer, or of the person who supplied him with the product.

The directive does not affect any rights that an injured person may have under the rules of the law of contractual or non-contractual liability, or special rules on liability existing at the time the directive is notified.

In France, the liability of public healthcare establishments towards their patients is governed by a ruling of the Conseil d'État that a public hospital must, even where it is not at fault, pay compensation for injury suffered by a patient as a result of a defect in equipment or a product used in the treatment he is given. In this case, Mr Dutreux suffered burns during surgery carried out in 2000 at a hospital in

Besançon. The burns were caused by a heated mattress on which he had been laid and which had a defective temperature-control mechanism. The hospital was ordered to pay compensation for the injury.

The Conseil d'État asked the Court of Justice whether the French rules on no-fault liability of public hospitals can exist alongside the rules of producer liability introduced by the directive. Advocate General Mengozzi stated that the EU legislature did not intend that the directive should introduce liability rules for defective products that also applied to service providers. The court has never ruled directly on expanding the scope of the directive to cover a service provider's liability for a defective product. The directive covers only the liability of the producer, or, where appropriate, the supplier of a defective product. A supplier, for the purposes of the directive, is construed as being an intermediary in the supply or distribution chain for that product.

In this case, the person concerned was not a consumer who had come for a mattress, but a patient who had been admitted to hospital. Thus, the safety of the defective mattress had to be considered in conjunction with the provision of treatment itself. The hospital cannot be regarded as being the distributor of the defective mattress and cannot be likened to a 'supplier' within the meaning of the directive. The scope of the directive does not extend to the liability of a service provider for injury caused by a defective product in connection with the provision of a service.

That position is consistent with earlier case law, according to which the directive is not intended to govern every aspect of the area of liability for defective products, but is an initial step towards further harmonisation.

The advocate general stated that the directive allows member states to lay down national rules on the liability of public healthcare establishments that use defective equipment or products in connection with the provision of a service and, in so doing, cause injury to the recipient of that service, the patient, while allowing them to exercise a right of recourse against the producer on the basis of the directive.

In the present case, only the application of the national rules concerning the liability of the service provider would afford the patient the right to compensation for the burns caused by the defective mattress. Since that injury occurred during surgery carried out on 3 October 2000, the injured person's action against the 'producer' of the defective mattress, within the meaning of the directive, would be time-barred. G

NOTICES

WILLS

Belton, Sheila (deceased), late of 56 Mount Prospect Grove, Clontarf, Dublin 3, who died on 9 February 2004. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Bohan Solicitors, 3 Inns Court, Winetavern Street, Dublin 8; tel: 01 677 9616, email: caitriona.gahan@bohan.ie

Conway, Peter (deceased), late of 38 Summer Street North, Dublin 1, and also late of 48 Middle Abbey Street, Dublin 1 and 78 Stiles Road, Clontarf, Dublin 3. Would any person who has any knowledge of any will executed by the above-named deceased, who died at the Mater Hospital, Dublin, on 12 January 2012, please contact Manus Sweeney & Co, Solicitors, Suite 226, Capel Building, Mary's Abbey, Dublin 7; tel: 01 874 6984, fax: 01 878 3565, email: info@manussweeney.com

Doyle, Patrick Gerard (deceased), late of C/Amapolas No 40, Colinas De La Zenia, Orihuela Costa, 03189, Alicante, who died on 15 September 2011. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Conor Maguire of Conor Maguire & Company, Solicitors, Blacklion House, Greystones, Co Wicklow, tel: 01 201 6380, email: conor.maguire@conormaguire.ie

RATES

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ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for April *Gazette*: 21 March 2012. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

Hannon, Mary Angela (deceased), 6 Monalea Heights, Ballymoneen Road, Knocknacurra, Galway. Would any person having knowledge of a will made by the above-mentioned deceased, who died on 21 January 2012, please contact MacDermot & Allen, Solicitors, 10 St Francis Street, Galway; tel: 091 567 071, fax: 091 567 075

Hunt, Patrick, SC (deceased), late of 19 Ashfield Road, Ranelagh, Dublin 6, who died on 6 December 2011. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Mark Ronayne of Mark Ronayne, Solicitors, Tramway Cottage, 19 Rathfarnham Road, Terenure, Dublin 6W; tel: 01 490 0020, email: mrnotarypublic@gmail.com

Kelly, Vincent (deceased), late of Ballycarrig, Tara Hill, Gorey, Co Wexford, who died on 4 October 2010. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact O'Doherty Warren & Associates, Solicitors, of Charlotte Row, Gorey, Co Wexford; tel: 053 942 1587, fax: 053 942 1313, email: info@odohwar.ie

Kirwan, Padraic James (otherwise Patrick Kirwan) (deceased), late of Kilcanavee, Kilmacthomas, Co Waterford. Would any persons having knowledge of the whereabouts of the original will executed by the above-named deceased on 8 November 1983, said deceased having died on 16 April 2010, please contact Ms T Kiersey & Co, Solicitors, 17 Catherine Street, Waterford; tel: 051 874 366, fax 051 870 390

McNamara, Agnes (deceased), late of 255 Bronx River Road, Yonkers, Westchester, New York 10704, USA. Would any person having knowledge of the whereabouts of any will executed by the above-named deceased, who died on 16 March 2011, please contact Cahir and Co, Solicitors, 36 Abbey Street, Ennis, Co Clare; tel: 065 682 8383, fax: 065 682 0548, email: reception@cahirsolicitors.com

Woodfull, Ethel (deceased), late of 29 Tyrconnell Place, Dublin 8, who died on 26 April 2011. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Corrigan & Corrigan, Solicitors, of 3 St Andrew Street, Dublin 2; tel: 01 677 6108, fax: 01 679 4392, email: info@corrigan.ie

NOTICES

Zimmerling, Klaus Hermann (deceased), late of Mount Temple, Moneygold, Grange, Co Sligo. Would any person having knowledge of a will made by the above-named deceased, who died on 15 January 1995, please contact VP McMullin, Solicitors, Tirconnell Street, Ballyshannon, Co Donegal; tel: 071 985 1187, fax: 071 985 2057, email: bsn@pmcmullin.com

TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by The Gourmet Shop Limited

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 48 Highfield Road, Rathgar, in the city of Dublin, held under lease made 7 March 1971 between John Conroy of the one part and Alfred Howard and William Howard of the other part for a term of 189 years from 1 May 1871 at a rent of £47 per annum.

Take notice that The Gourmet Shop Limited, being the person entitled to the lessee's interest under the said lease, intends to apply to the Dublin County Registrar at Áras Uí Dhálaigh, Inns Quay, Dublin 7 for the acquisition of the fee simple and/or any intermediate interest in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the said property is called upon to furnish evidence of their title thereto to the undermentioned solicitors within 21 days from the date of this notice.

In default of any such notice being received, the said The Gourmet Shop Limited intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to the said county registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the said property are unknown and unascertained.

Date: 2 March 2012

Signed: O'Connor Solicitors (solicitors for the applicant), 8 Clare Street, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Hurstgreen Limited and in the matter of 51 Upper Leeson Street, Dublin 2

Take notice that any person having any interest in the freehold or leasehold estate of the following property: all that and those the hereditaments and premises known as 51 Upper Leeson Street in the city of Dublin, held under lease dated 15 February 1957 made between John Berkeley Knox Moses and Henry Derek Hurley of the one part and Harold Spiro of the other part for a term of 94 years at a rent of £20 per annum.

Take notice that Hurstgreen Limited, being the person currently entitled to the lessee's interest under the said lease, intends to apply to the county registrar of the county of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of their title to same to the below named within 21 days from the date of this notice.

In default of any such notice being received, the said Hurstgreen Limited intends to proceed with the application before the Dublin county registrar at the end of 21 days from the date of this notice and will apply for such directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown and unascertained.

Date: 2 March 2012

Signed: Dundon Callanan (solicitors for the applicant), 17 The Crescent, Limerick

In the matter of the *Landlord and Tenant (Ground Rents) Act 1967-1984*; premises: The Harbour, Kilcock, in the county of Kildare; applicant: Thomas O'Keeffe

Notice to any person having any interest in the freehold interest and all intermediate interests in the following property: all that and those the dwellinghouse, office, yard and garden at the rear thereof, together with the four cottages fronting the High Road, formerly in the possession of Catherine Knowledge and now in the possession of Thomas O'Keeffe, meared and bounded on the north by the Christian Brothers School, on the south by the High Road, on the west by Chapel Lane and the premises in the possession of William Bryan, and on the east by the licensed premises of Thomas O'Keeffe, all of which said premises are situate, lying and being in the town of Kilcock, barony of Ikeathy and Oughterany and county of Kildare, being the property more particularly described in a lease dated 21 December 1906 and made between James Pepper, Mary Statham and Lavinia Somers of the one part and Thomas O'Keeffe of the other part for the term of 99 years from 1 November 2005, subject to the yearly rent thereby reserved and the covenants and conditions therein contained.

Take notice that the applicant, Thomas O'Keeffe, has submitted an application to the county registrar for the county of Kildare, with a return date of 4 May 2012 at 12 noon, for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned property to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for the county of Kildare at 12 noon on 4 May 2012 for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the above property are unknown and unascertained.

Date: 2 March 2012

Signed: LC O'Reilly, Timmins & Co (solicitors for the applicant), The Harbour, Kilcock, Co Kildare

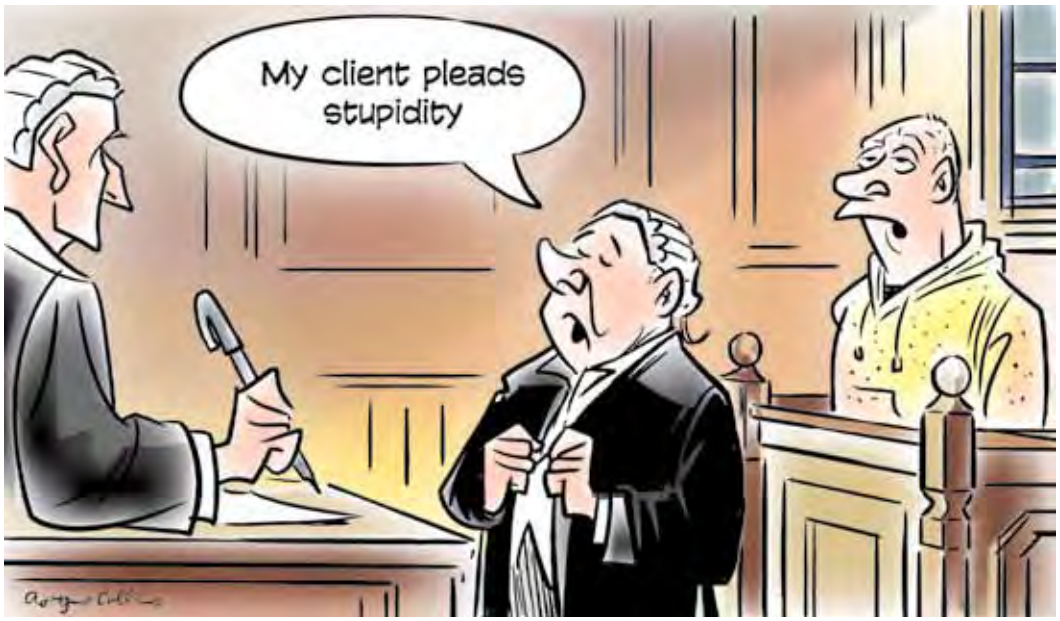
RECRUITMENT

NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE *LAW SOCIETY GAZETTE*

Please note that, as and from the August/September 2006 issue of the *Law Society Gazette*, **NO recruitment advertisements will be published that include references to years of post-qualification experience (PQE)**.

The *Gazette* Editorial Board has taken this decision based on legal advice, which indicates that such references may be in breach of the *Employment Equality Acts 1998* and *2004*.

WILD, WEIRD AND WACKY STORIES FROM LEGAL 'BLAWGS' AND MEDIA AROUND THE WORLD



GPS tracking device an illegal search

The US Supreme Court has ruled in favour of a drug defendant who argued that police should have obtained a warrant before attaching a GPS tracking device to his car to monitor his movements. The court was unanimous in its finding that the police conduct was a search within the meaning of the Fourth Amendment.

The blawg of the Supreme Court of the United States, SCOTUSblog, initially called the decision "a big loss for the federal government". The case, *United States v Jones*, was an appeal by Antoine Jones, who was convicted of conspiracy to distribute cocaine after police installed a GPS device on his Jeep Grand Cherokee.

"It is important to be clear about what occurred in this case," Scalia said. "The government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."

The *Harvard College Tech Review* commented that *Jones* may be more complicated than it appears. "The case is notable because it is unusually ambiguous and may do less than it might seem to protect individual liberty. At the same time, it is possible that *Jones* will point the way to a new legal standard regarding privacy."

Return to sender

An American woman who sent her adopted son back to Russia in April 2010 was never charged with a criminal offence – but she now faces a lawsuit by a Washington-based adoption agency, the World Association for Children and Parents.

According to the *Shelbyville Times-Gazette*, the agency asked to be appointed as a temporary guardian for the child, stating its frustration that no one was investigating claims that the boy had been abandoned and endangered.

The suit filed against Torry Hansen in Shelbyville, Tennessee, USA, is seeking child support. Last year, a court in Russia demanded that the Hansens pay support of $1,900 a month.

The *Times-Gazette* reported that the boy is now living in an SOS Children's Village in Russia. The trial has been scheduled for 27 March 2012.

Dumb and dumber

In what has been branded "one of the most farcical cases in recent criminal history in Dublin", a robber has been jailed for a botched armed robbery where the raiders had to be rescued by the fire brigade, reports *RTÉ*.

Getaway driver Gary Byrne (30) left the scene of the robbery, a gold storage business, with the keys to the safe, locking the shutters behind him. His two accomplices were trapped inside with two staff members who had been bound and gagged during the raid.

Judge Donagh McDonagh commented that "for some unknown reason", Byrne left the premises and locked the shutters behind him, leaving his accomplices "to emerge with their hands up and surrendering themselves to gardaí".

Judge McDonagh said that Byrne "ranks amongst the all-time stupidest criminals to come before the courts". He said he would give him the "benefit of his stupidity" and suspended the final two years of the sentence.

Byrne was sentenced to seven years in prison after he was found guilty of attempted robbery, possession of an imitation firearm and two counts of false imprisonment at the Bullion Room, Bolton Street, Dublin, on 10 August 2010.

Dr Phil enrages anger-management class

Luna Oraivej learned about the consequences of angry outbursts during an unintended lesson at her anger-management training in Seattle, the *ABA Journal* reports.

According to a suit filed by Oraivej (37), she was stabbed in the arms by a classmate who became enraged by a Dr Phil video. The suit is against the not-for-profit company that ran the class.

Oraivej says the teen stabbed her with a paring knife after Oraivej encouraged the girl to give Dr Phil a chance. The teen was arrested, the suit says, but Oraivej finished the class because of her fears she would go to jail if she didn't complete the work.

"Ms Oraivej stayed until the end of class while bleeding profusely, earned her certificate, and promptly went to the hospital," the suit says.

Oraivej says she was in class because she broke a DVD player during a domestic dispute. G

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OPPORTUNITIES DUBLIN

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Our client is looking to open discussions with a representative from a corporate mid tier or boutique sized firm with an established reputation in the Irish marketplace. Our client is in growth mode and is seeking to merge with or ideally acquire a suitable firm. The successful merger will provide a larger legal service base, added security and increased ability to win quality work. Partners bringing teams with specialised experience will also be considered. **Contact Sharon Swan Ref: S2007**

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Our client is a leading firm of great reputation. They are seeking to grow the corporate department by the addition of a number of associates from junior to mid-level. You will have experience in representing leading private equity funds, private and public companies in a full range of corporate transactions, including mergers and acquisitions, restructurings and reorganisations, leveraged financing and recapitalisations.

Contact Sharon Swan Ref: S2030

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This established firm is looking to hire a commercial litigation partner/team. You will be coming from a recognised commercial practice where you'll be acting for top quality clients. Your relationships and reputation will be such that you'll be expecting clients to continue to instruct you should you move. This firm is very profitable and there is a potential for equity partnership for the appropriate individual.

Contact Sharon Swan Ref: S2009

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Highly regarded law firm with a very successful financial services group aims to appoint a senior professional support lawyer. Applications are invited from lawyers with proven track records in practice support and now wish to make a career move to a more challenging and rewarding role. Candidates with a strong background in investment funds seeking to make a move from private practice or in-house will also be considered. **Contact Sharon Swan Ref: S2031**

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This banking and finance team are exceptionally busy and are looking for another junior to mid-level associate to join their team. You will have gained experience from a leading top or mid level firm. The team has a broad remit of work and some experience within asset finance would be beneficial but not essential. Excellent remuneration on offer with this position.

Contact Sharon Swan Ref: S2012

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Contact Sharon Swan Ref: S2011

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Turnover and profits have increased this year at this dynamic firm. This has been based on judicious management and an increasing emphasis on core sectors. The firm now wishes to add an additional corporate partner who can bring a network of contacts to the firm. The key is to be operating within the firm's most important sectors; being financial services or healthcare/pharma. Some following will be required, but sector expertise will be highly regarded. **Contact Sharon Swan Ref: 2032**

Partner – Professional Negligence

BEALE
AND COMPANY

Beale and Company is a niche law firm specialising in professional negligence, insurance and construction with offices in Dublin, London and Bristol.

We currently have three partners and seven solicitors in our Dublin office and are seeking to appoint one or more additional partners to continue our expansion.

The successful candidate/s will have significant experience in the defence of professional negligence claims, in particular those involving solicitors and/or construction professionals. Expertise in general contentious and non-contentious construction would be useful as would experience of insurance coverage disputes. Exposure to claims against accountants and financial institutions would also be advantageous.

Excellent technical legal skills as well as oral and written communication are an essential pre-requisite, as is the ability to manage, supervise and inspire confidence in a team of lawyers.

A client following is desirable but not essential. More important to us is that candidates will be willing and able to develop the business and establish a high profile with our insurer and other clients.

Applications from solicitors who are also qualified to practise in England and Wales and/or have strong experience in the London insurance market would be particularly welcome.

An excellent remuneration policy is on offer coupled with the opportunity to develop a thriving and successful practice.

For more information, and/or a discussion in strict confidence, please contact our recruitment consultant, Michael Benson BCL Solicitor at Benson & Associates who has been exclusively retained for this assignment.
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