



BUILDING BOOM

Homeowners will now be subject to the construction health-and-safety scheme



PIP PIP, OLD BOY

The personal insolvency law aims to help both debtors and creditors



TOP OF HER GAME

The *Gazette* speaks with Myra Garrett, William Fry's managing partner

LAW SOCIETY

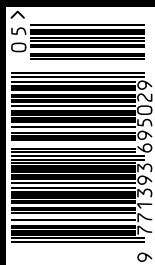
GAZETTE

€4.00 May 2013



A PUNGENT PROBLEM FOR PRACTITIONERS?

How the Revenue always gets its cut



Practice Management Masterclass

TUESDAY 11TH JUNE, DUBLIN

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PRESENTED BY

Andrew Otterburn, Otterburn Legal Consulting and Caroline Murphy, Legalwise



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Afternoon 14.00 – 16.30

Registration 09.30

Registration 13.30

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MANAGEMENT, PLANNING & CLIENTS

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- Admin, management and leadership
- Characteristics of successful firms
- A professional business culture

Strategic Planning

- Target market position
- Values and staff engagement
- Sector focus and differentiation

Clients

- Client expectations
- Achieving uniform service standards
- Pricing strategies

AFTERNOON:

ECONOMICS, LEADERSHIP & CHANGE

Financial Awareness

- Key profitability drivers
- Improving team profitability
- Financial reporting & KPIs

Leadership & Motivation

- Different styles of leadership
- People management and motivation
- Roles of partners & professional managers

Achieving Change

- Influencing senior people
- Overcoming resistance to change
- Making time to manage

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Both Andrew and Caroline are Accredited Consultants for Lexcel, the international Practice Management Standard for Solicitors. Andrew is also a founder member and Caroline an Associate Member of the Law Consultancy Network.

To reserve a place: mail andrew.otterburn@otterburn.co.uk, or caroline.murphy@legalwise.ie

or

download an application form from www.otterburn.co.uk or www.legalwise.ie



CONSTRUCTIVE ENGAGEMENT WINS

In a month in which a dangerous and damaging public row broke out between the judicial and executive branches of government – hopefully now on the way to resolution in the type of private forum that it should never have left – I am happy to point to an example of speedy and successful dispute resolution. It is also an illustration of how the Society effectively represents the profession, in a way that we already do constantly – and which we hope to be able to do even more of in the future, with the implementation of the recommendations of the Future of the Law Society Task Force.

The issue I am referring to was this. In recent weeks, colleagues reported to the Society that AIB Bank was proposing to require solicitors to sign ‘non-disclosure agreements’ – in addition to those sought from the solicitors’ clients – in advance of negotiations under the *Personal Insolvency Act* relating to the clients’ debts. The Society’s Business Law Committee and the Council, at its meeting on 5 April, viewed this as unprecedented, legally unnecessary, and objectionable in principle.

On foot of this, I sought a meeting with senior figures of the legal department of AIB, and I was gratified to be granted one very quickly. I was accompanied at the meeting in Bankcentre by the chairman of the Business Law Committee, Paul Keane, and by director general Ken Murphy. The Society’s arguments, both of law and principle, were listened to with open minds and, having been thoroughly tested, I am pleased to say they prevailed. AIB agreed to drop the heavy-handed requirement for non-disclosure agreements to be signed by solicitors in such cases, in return for the Society bringing to the attention of the profession in this *Gazette* the obligations of confidentiality that solicitors have in such cases anyway.

It is, in the view of the Law Society, perfectly reasonable for the bank to remind every practitioner of the need to keep confidential all matters discussed in such discreet negotiations. I want to thank our colleague Paul Keane for his and his committee’s hard work in immediately addressing the issues. His most helpful article on the topic appears on page 9 of this *Gazette*, and I commend it to you.

I want to place on record my appreciation for the very constructive and professional approach taken by the AIB legal department in engaging with the Society to produce a speedy and satisfactory resolution to this issue.


Future of the Law Society

I very much want to point you towards the excellent report of the Future of the Law Society Task Force. Sterling work was undertaken by the task force, which was well steered by its chairman, John P Shaw. A survey was undertaken, together with a lengthy and detailed consultation process with solicitors around the country, as well as bar associations. The task force also liaised with the Law Society of England and Wales, the Law Society of Northern Ireland and the Law Society of Scotland. The report has now been circulated by e-bulletin to all solicitors and I would encourage you to read it.

Unheralded work

It is a sad fact of our lives that much of the good work carried out by solicitors goes unremarked or unreported. I said last month that the Calcutta Run was worthy of support. Given the huge benefits that accrue to the Peter McVerry Trust and to GOAL, it is perhaps surprising that the event has not been the subject of greater media support. You may not know, for example, that by the time the Calcutta Run has finished this year, it is hoped that the total sum contributed over the lifetime of the event will be close to €3 million.

I am also aware that law firms throughout the country involve themselves in *pro bono* work and charitable work that largely go unheralded. Indeed, our biggest and leading law firms show the way, and the smaller firms contribute handsomely as well. Again, these initiatives are commendable, but they usually go unnoticed and unreported.

It is the duty of all of us to promote our profession and ourselves in the right way through our words and our deeds. We should not apologise for being leaders in our local communities, if that is the case. Neither should we apologise for a job well done and for insisting on a fair reward for that. 



“The Society’s concerns at this unprecedented, objectionable and unnecessary proposal in relation to solicitors were speedily considered and addressed satisfactorily by AIB”

James McCourt
President



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Editor: Mark McDermott FIIC
Deputy editor: Dr Garrett O'Boyle
Art director: Nuala Redmond
Editorial secretaries: Catherine Kearney,
Valerie Farrell

Commercial advertising:
Seán Ó hOisín, tel: 086 811 7116,
email: sean@lawsociety.ie

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Paul Egan, Richard Hammond, Mary Keane,
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LAW SOCIETY GAZETTE

REGULARS

4 News

12 Analysis

- 12 **News feature:** Carol Coulter describes the Child Care Law Reporting Project
- 14 **News feature:** New construction regulations are set to impose a greater financial burden on homeowners
- 16 **Human rights watch:** Making fundamental rights more accessible

19 Comment

- 19 **Letters**
- 20 **Viewpoint:** Changes to the monetary jurisdiction limits of the Circuit and District Courts in civil proceedings

41 People and places

45 Obituaries

Rosemary Fallon
Judge Patrick Keenan Johnson

47 Student spotlight

48 Books

- 48 **Book reviews:** *An Introduction to Irish Planning Law (2nd edition)* and *Intellectual Property Law*

49 Reading room

51 Briefing

- 51 **Council report:** 22 February and 5 April 2013
- 52 **Practice notes**
- 55 **Regulation:** Solicitors Disciplinary Tribunal
- 56 **Legislation update:** 12 March – 8 April 2013
- 57 **One to watch:** *National Vetting Bureau (Children and Vulnerable Persons) Act 2012*
- 58 **Brief cases**
- 60 **Eurlegal:** the EU's clean fuel strategy for the future; recent developments in European law

62 Professional notices

64 Captain's blawg





38



26



COVER STORY

22 A pungent problem

The *Begley* case has highlighted some important issues for solicitors and accountants, specifically in the context of criminal prosecutions that may arise from Revenue investigations – not to mention the potential for self-incrimination in such proceedings. Conor Kennedy and Michael Tuite explain



14

FEATURES

26 Doing the deal

Myra Garrett is managing partner of William Fry and is consistently voted one of the top ten mergers and acquisitions lawyers in the country. Her passion for her work puts her among some exalted company, says Lorcan Roche

34 Credit where its due

The *Credit Union and Cooperation with Overseas Regulators Act 2012* sets out substantive changes in the regulation of Ireland's credit unions. Claire Moran looks at things differently

30 Pipped at the post

The *Personal Insolvency Act* has the aim of making things easier for both debtors and creditors, write Paul Keane and Mark Homan

38 Virtual reality

Futurists were once convinced that, in the 21st century, all courtrooms would be modern, wired and efficient. 'Where are our jetpacks?' ask Mark Dillon and Philipp Amann



30

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You can also check out:

- Current news
 - Forthcoming events, including the **Law Society Annual Conference 2013 in the Europe Hotel and Resort, Killarney, on 10/11 May**
 - 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*

Cross-border cooperation

LOUTH

The County Louth Solicitors' Bar Association is collaborating with Law Society Skillnets and the Law Society of Northern Ireland on a cross-border seminar on enforcement of judgments and other matters. This will take place in the Nuremore Hotel, Carrickmacross, on 14 June 2013.

Conor MacGuill is organising a forum on District Court practice and procedure on 12 July 2013 at the Ballymascanlon House Hotel. Focusing on recent developments in this area, it will be chaired by Judge Flann Brennan. A social evening will follow, to which spouses, partners and 'significant others' are welcome to attend. Conor is also putting the final touches to a litigation seminar dealing with *quantum*, costs and the *Civil Liability Act 2004*, which he hopes to organise in advance of the forthcoming sittings of the High Court personal injuries list at Dundalk, scheduled to begin on 4 June.

Kerry gold

KERRY

The Law Society's annual conference takes place in the sumptuous surroundings of the Europe Hotel, Killarney, from 10-11 May. Over 250 colleagues are expected from far and wide. An action-packed programme of CPD and social activities will take place. Patrick Mann and his colleagues in the Kerry Law Society will be there to welcome Law Society President James McCourt and colleagues from around the country.

Dublin solicitors host a capital gathering

DUBLIN

Dublin, Belfast and Liverpool Bar Associations will meet in Dublin this year. In-keeping with the 2013 theme of 'The Gathering', the association is hosting a weekend event from 21-22 June that is designed to appeal to both younger and older members.

The Friday events will take place in the impressive surroundings of the Guinness Storehouse and will include a CPD seminar (by Carol Eager of William Fry on the topic of insolvency), as well as a tour and evening event with dinner and entertainment. Saturday's

events will feature a tour for visiting members (Croke Park and Glasnevin Cemetery) and the DSBA Tag Rugby Festival. Bar associations around the country have been invited to attend. Contact maura@dsba.ie for details, or check www.dsba.ie.

ROG flies flag for FOD!

CORK



PICT: DAVID O'LEARY

Ireland and Munster rugby legend Ronan O'Gara helped launch the new office of FOD Solicitors, which celebrated its recent move from Grand Parade to 11 Pembroke Street, Cork. The 'who's who' guest list partied like it was 2008! O'Gara swapped a rugby ball for a chance to try out his legal skills as he posed for a shot with the team of FOD Solicitors, seated at their boardroom table. (l to r): John Powell (solicitor), Eva Spitere (legal and marketing administrator), Trina Murphy (office manager), Finghin O'Driscoll (principal), Jonathan Lynam (solicitor), Ronan O'Gara (Ireland and Munster fly-half) and Christina Nash (solicitor)

Forum proves a winner

CORK

On 17 April, the SLA held a closed forum for solicitors to discuss those matters of greatest concern to their practices. The event was organised by Pat Mullins and Robert Baker, with contributions from Mary Linehan and Mary Dorgan. The event was attended by over 100 members, and the discussion proved to be frank and engaging. The issues of most concern to members included **undertakings, solicitors' relationships with the banks, representing clients in bank negotiations, and the future of the Law Society.** Pat and Robert will be arranging a forum soon to deal with undertakings.

Here's MUD in your eye!

WEXFORD

According to Helen Doyle, the most recent CPD course was attended by about 60 members of the local bar. Presentations were made on the local property tax and on the *Solicitors' Accounts Regulations*. Rory O'Donnell made a presentation on points of practice

and conveyancing, including the *MUD Act* and the requirement to register rights of way. After lunch in the recently refurbished National Heritage Park, the Law Society's Keith O'Malley spoke on management and professional development.

Marble City pays tribute

KILKENNY

Tributes were made at Kilkenny Courthouse last week on the occasion of the retirement of Liam Nolan, combined office manager with the Courts Service there. Liam arrived in

the Marble City in 1994 and worked initially in the Circuit Court office before becoming the District Court clerk and, thereafter, the combined office manager.

NPP seeks higher levels of electronic payments

The National Payments Plan (NPP), launched on 24 April, aims to encourage a greater level of electronic payments in Ireland. A link to the plan in both English and Irish can be found at: www.centralbank.ie/press-area/press-releases/Pages/NationalPaymentsPlan.aspx.

The NPP aims to:

- Introduce electronic forms of payment that will be universally accepted and be the preferred payment of choice for most,
- Give Irish consumers and businesses access to the advantages of the most innovative payment methods, and the knowledge and confidence to fully utilise them,
- Ensure that payment systems will be robust and reliable,
- Introduce pricing for payments that will foster the migration from cash and cheques to cards and electronic payments.

The plan acknowledges that cash will remain a widely used method of payment, which must be provided in an efficient, secure manner, and aims to reduce the usage of cheques, though these will remain available to those consumers who wish to use them and consumers will not be obliged to discontinue using them.

The NPP is now moving into implementation phase and welcomes feedback on how best to deliver the plan. Solicitors and their firms can email their views to nppfeedback@centralbank.ie.

In News this month...

- | | |
|------------------------------------------------------------|-------------------------------------------------|
| 6 Arthur Cox Foundation seeks new publishing projects | 8 Solicitor numbers exceed 14,000 |
| 7 Chief Justice moves to heal judiciary and executive rift | 9 Society wins at IITD awards |
| | 10 Upward-only rent reviews come under scrutiny |

Expert advises on Circuit Court practice direction

A new Circuit Court practice direction came into effect on 1 January 2013. According to Ronan O'Neill (head of the Circuit Criminals Trials Section at the Office of the DPP), the practice direction will transform the way cases are listed in the Circuit Criminal Courts "by introducing efficiencies".

"It seeks to avoid unnecessary delays, identify cases in which a plea could be entered at an earlier stage, and facilitate the commencement of criminal trials on the trial date," says Ronan.

Ronan has produced an article in this *Gazette* (see page 52 in Briefing).



Make a date with Courtdat.ie

A new website that aims to identify solicitors available to take instructions at a particular court has been launched. Registration and subscription on www.courtdat.ie is free, but is limited to a maximum of five courts per practice.

By going to the 'list your firm' tab on www.courtdat.ie, any solicitor can list their practice

and select the courts where they wish to appear. Solicitors experiencing difficulty with listing the courts should email courtdatelimited@gmail.com where assistance will be provided.

For practices that wish to exceed the maximum of five free listings on this site, each additional court can be purchased for €299 (plus VAT) per annum.

ISIS gets shot in the arm

A series of initiatives to bring additional sentencing information to the judiciary, lawyers and the public were announced recently by the Irish Sentencing Information System (ISIS) Committee.

The committee will recommence populating its online database with information on sentencing. This will add to the existing information in relation to over 1,000 cases on the ISIS website at www.irishsentencing.ie. The

committee will be providing information on sentencing in relation to specific issues and will hold further seminars on issues relevant to sentencing.

The website, which is free to all, contains statistics on sentencing, case law on issues surrounding sentencing, synopses of the decisions of the superior courts on sentencing issues, links to full judgments, and access to searching a database on actual sentences imposed in various crimes and cases.

Electronic Official Journal is officially definitive

In the interests of better access to law, the Council of the EU has recently adopted a new regulation that provides that only the *Official Journal* published in electronic format shall be authentic and shall produce legal effects, writes Mary Gaynor.

In exceptional and temporary cases of unforeseen disruption of the electronic publication, the printed edition would have legal value. The regulation will enter into force on 1 July 2013. The *Official Journal* of the EU has been published in printed format since 1952 and is available in electronic format (PDF) on the EUR-Lex database at <http://eur-lex.europa.eu>.

Legal drama at Bewley's



Bewley's Lunchtime Cafe Theatre on Grafton Street will present the world premiere of *Under Pressure*, written by barrister Rachel Fehily, from 27 May to 8 June 2013.

Under Pressure is a contemporary play set in the Law Library. It dramatises a senior counsel's intense consultation with one of her clients – a surgeon accused of murdering his wife. Was it an accident or did he do it on purpose? What is the prosecution offering the defence? What will the dead wife of the accused say?

Bookings can be made at: www.bewleyscafe theatre.com.

Foundation casts far and wide for new publishing ideas

The Arthur Cox Foundation will celebrate its 52nd birthday in October 2013, writes Mark McDermott, and is seeking to identify suitable new publishing projects that require financial support.

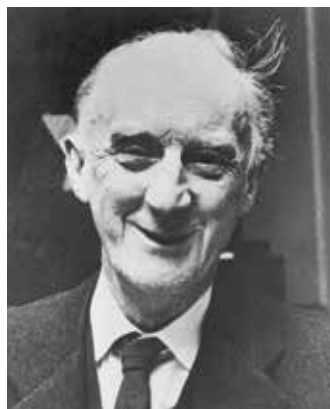
Initially the brainchild of a group of friends and acquaintances of Mr Arthur Cox – the founder of the law firm of the same name – the foundation was initially established in his honour after he had refused to accept a presentation to mark his retirement from practice in 1961.

The former senator, president of the Law Society, chairman of the Company Law Reform Committee and director of several of Ireland's largest public companies, had taken the highly unusual step of retiring at the age of 70 in order to pursue a vocation to the priesthood.

Launching the foundation on 10 October 1961, Mr DSA Carroll said that the fund would be used to encourage the publication of a "series of text books on company law" as well as a number of scholarships.

Coach and four

A fascinating cameo of Mr Cox, taken from the 'Dubliner's Diary' in the *Evening Press* on 11 October 1961, reads: "Arthur Cox was the acknowledged contemporary expert on company law. He could not



Arthur Cox: worked 12 hours a day on cups of tea and sandwiches and an occasional pipe

only interpret the law as it stood, but he could also, as all good lawyers should, drive a coach and four through it when it suited him. From the infant industries of the '20s to our own day, he advised and moulded, sat on countless boards, administered a large staff of up-and-coming young solicitors, lectured, attended to his duties as a senator, and worked 12 hours a day apparently on cups of tea and sandwiches and an occasional pipe.

"No one will ever know the delicate and forever-secret cases in which his almost infallible help was sought, for his conception of professional etiquette was absolute."

According to the original notice requesting funds, sent

out in 1961, the primary object of the foundation was "the publication of a much-needed book on company law. The publication of such a book, associated with the name of Arthur Cox, would be a permanent reminder of his connection with this branch of the law. He has often commented on the scarcity of books on many aspects of Irish law and accountancy. Such books cannot be published without financial assistance."

To date, the funds from this charitable trust have been used to assist the writing and publication of Irish legal textbooks and the development of electronic databases of Irish legal materials. It provides funding to authors to carry out research and meet other costs of the preparation and publication of a text – and may require recipients to refund the grants out of royalties. Grants are in the range of €2,000 to €5,000.

First book

The first book assisted appears to have been JSR Cole's *Irish Cases On Evidence* in 1972. Other early works given grants were JCW Wylie's *Irish Land Law* (1975) and McMahon and Binchy's *Irish Law of Torts* (1981).

Approximately 40 applications have been granted since

1961. Recent projects have included support for two legal databases, one of which has yet to come to fruition.

The foundation also supports an annual student prize of €1,500 for best overall results in Law Society PPCI Business Law, combined with PPC2 Corporate Transactions elective.

New direction

The Arthur Cox Foundation Board, on behalf of the Law Society (the trustee of the foundation), is now seeking to identify suitable new projects that require financial support – outside of mainstream projects undertaken by commercial publishers. It is inviting legal practitioners to suggest new ideas for novel or worthwhile legal projects that could benefit from foundation funding. Consideration may be given to beneficial legal projects that aim to incorporate new technology, the development of new legal databases, or new software (such as apps).

All suggestions should be accompanied by a detailed project description, to include content, costings and potential market. All correspondence should be addressed to Mary Gaynor, Secretary, Arthur Cox Foundation Board, Blackhall Place, Dublin 7 or by email to: m.gaynor@lawsociety.ie.





To celebrate the re-launch of www.claruspress.ie when you visit our site and purchase a book from us during the month of May 2013, we will give you a 10% DISCOUNT off the normal retail price.

Simply quote coupon code: LSGMAY*

*Offer expires 30th May 2013. This offer cannot be used in conjunction with other offers. Terms and conditions apply.

Chief Justice moves to heal rift between judges and executive

Chief Justice Susan Denham has announced that a new forum for communication between the judiciary and the executive has been formed – and that its work has already begun, *Mark McDermott reports*.

Speaking on 17 April 2013, the Chief Justice said that the Government had accepted her proposal for such a forum, where matters of mutual concern to the judiciary and the executive could be considered.

The new forum comprises the Chief Justice, Attorney General Máire Whelan, secretary general of the Department of the Taoiseach Martin Fraser, and the president of the Association of Judges of Ireland (AJI) Mr Justice Peter Kelly.

AJI fears

The AJI's concerns were laid out by Mr Justice Kelly, in media reports of a speech on 14 April, which said that "all structures, both formal and informal, which existed for communication between these two branches of government [the judiciary and the executive] have ceased".

Judges had accepted at all stages that they had to bear their fair share of salary cuts, the organisation said, but as the constitutional guarantee concerning judicial remuneration had been removed, the AJI had asked that an independent body be established to fix such remuneration so as to ensure judicial independence. "This request was dismissed out of hand," the statement read.

The AJI also expressed its concerns with subsequent legislation that had been passed in relation to pension provisions of new judges "without notice or consultation", which had "major consequences" for judicial recruitment in the future.

The AJI referred to the enactment of the *Personal Insolvency Act* "without any notice or debate concerning



Chief Justice: currently 'issues of serious concern to the judiciary'

insolvency judges to be initially recruited solely from the ranks of county registrars".

No information

Finally, it expressed its concern with the dearth of wording for three constitutional referenda to take place within months, "all [of which] have huge implications for the judiciary". While the AJI accepted the need for a Court of Appeal, it was "concerned as to the form of amendment to the Constitution which may be proposed".

Neither had the judiciary been informed about the proposal concerning specialist family courts.

"All of these matters have implications for judicial independence," it said. "An independent judiciary and the perception of an independent judiciary is a vital element in a properly functioning constitutional democracy."

Society's 'dismay'

Such was its concern with the public nature of the disagreement between the Government and the judiciary that the Law Society issued a statement on 16 April on the matter, expressing its "dismay at both the existence and the



Director general: *Morning Ireland* appeal to both to 'take it private'

recent public expressions of deep tensions between the Government and the judiciary".

"It is clear from these public comments that the mutual respect that should always characterise the relationship between the Government and the judiciary is under great strain," the Society stated. "This strain has the potential to cause major damage to the democratic system in Ireland and to the country's reputation abroad. It must be resolved without delay."

The Society refused to come out in support of either side in the dispute, however, but said that it shared the sincerely held concerns of the judiciary "about serious under-resourcing of the courts system and about the proposed appointment of specialised judges of the Circuit Court through an unprecedented and restricted recruitment process. On both of these issues, the Society has written to express its concerns to the Minister for Justice, Equality and Defence in recent weeks."

Speaking on behalf of the Society on RTE's *Morning Ireland* radio programme, director general Ken Murphy called on both sides to "dial it down, take it private and sort it

out". He urged them "to engage constructively, respectfully and privately in returning their relationship very quickly to an even keel".

"We don't take the cynical view that it's all about judges' pay," he continued. "We think there are substantive issues here that need to be addressed."

The AJI's complaint that the judiciary was not being consulted had received criticism, but Murphy contended that there was nothing unusual about it. "People who are affected by upcoming changes in legislation are consulted by governments all the time."

Chief Justice's intervention

The Chief Justice intervened quickly to pour oil on troubled waters. Taking the opportunity of a speaking engagement at Griffith College, Dublin, on 17 April, she said: "While I have had constructive discussions with the Taoiseach on matters relevant to the executive and the judiciary, the normal conduit between the judiciary and the executive is the Attorney General. That avenue of contact continues as a positive and proper route."

"Issues of importance to the judiciary have been the subject of regular meetings I have had with the Attorney General," she continued.

She added, however, that it was clear that "new structures" were needed: "Because of the concerns of the judiciary, I suggested to the Government that there should be more regular engagement to facilitate constructive discussion on these and other matters of mutual concern and interest to the judiciary and the executive."

This process of engagement had now commenced, she said, and a meeting had been held as recently as Monday 15 April. In due course, she said that she intended to meet with the Taoiseach to discuss any issues of mutual concern that emerged.

Number on the Roll of Solicitors now exceeds 14,000

The number of solicitors on the Roll on 31 December 2012 was 13,965, meaning that, with new admissions in 2013 taken into account, the number of solicitors on the Roll now comfortably exceeds 14,000.

The number of practising certificates taken out by solicitors rose once again in the calendar year of 2012 by 197, which was an increase of 2.3% on the previous year. All of the figures on this page relate to the number of practising certificates on the final date of



the practising year in question, namely 31 December. As a result, all comparisons are made on the same basis.

The increase in practising certificates in 2011 was 236, which was 39 higher than in 2012. However, the conversion rate of new admissions into new practising certificates in 2012 was higher – at 37.5% – than it was in 2011 when the figure was 32.8%. This is because considerably more new admissions to the Roll, a total of 718, occurred in 2011 than the

525 new admissions in 2012.

Measured in terms of annual increase in practising certificates, the peak of the economic boom was 2007 when a staggering 460 practising certificates were added to the number for the previous year. The low point was 2009 when following a shockingly precipitous fall, the number of practising certificates actually contracted, by six, over the number for 2008.

Numbers have bounced back reasonably well since then, however, as the table shows, with the result that, on 31 December 2012, there were 8,768 solicitors holding practising certificates. It can confidently be expected that the number of solicitors holding practising certificates will pass the 9,000 mark within the next year.

NUMBERS OF PRACTISING CERTIFICATES 2006 – 2012

	2006	2007	2008	2009	2010	2011	2012
No of practising certs	7,416	7,876	8,231	8,225	8,335	8,571	8,768
PCs increase/decline	379	460	355	-6	110	236	197
Admissions	536	642	777	705	729	718	525
Roll	10,111	10,753	11,288	11,993	12,722	13,440	13,965

The larger the firm, the faster the growth

The number of practising certificates is a traditional measure of the size of a solicitor's firm. Based on this measurement, the two biggest firms in the country were in a dead heat at 228 practising certificates each on the last day of the most recent practice year, namely 31 December 2012.

The very slight lead of just two practising certificates that Matheson enjoyed over Arthur Cox on 31 December 2011 – a total of 208 practising certificates to 206 – was close to exact parity a year later. In the year 2012, Matheson grew its practising certificate number by 9.6% while Arthur Cox grew by 10.6%.

By far the biggest growth story in 2012, however, was that of the third-largest firm, A&L Goodbody, which added no less than 29 new practising certificates. It shot from 183 to 212 – a remarkable expansion of 15.8% in one year.

Matheson, Arthur Cox and A&L Goodbody are the three firms with more than 200 practising certificates. There are three firms with practising certificate numbers between 100 and 200, namely McCann FitzGerald (170), William Fry (156) and Mason

Hayes & Curran (126).

ByrneWallace comes next on 85 practising certificates, followed by the very rapidly expanding Maples and Calder which, in 2012, added 13 practising certificates to the 58 they had at the end of 2011 – a surge of no less than 22.6%.

There are just two firms based outside Dublin among the 20 largest in the jurisdiction – namely Cork-based Ronan Daly Jermyn, which grew by six practising certificates or 13% to rise to 12th in size, and Holmes O'Malley Sexton of Limerick which is 17th based on this measurement.

LARGEST FIRMS

Largest firms as at 31/12/2011

Firm name	No of solicitors
1. Matheson	208
2. Arthur Cox	206
3. A&L Goodbody	183
4. McCann FitzGerald	177
5. William Fry	154
6. Mason, Hayes & Curran	125
7. ByrneWallace	95
8. Eversheds	71
9. Dillon Eustace	62
10. Maples and Calder	58
11. Beauchamps	56
12. LK Shields Solicitors	48
13. Ronan Daly Jermyn	46
13. Eugene F Collins	46
15. Hayes Solicitors	31
16. Holmes O'Malley Sexton	26
17. DAC Beachcroft Dublin	23
18. Whitney Moore	22
19. McDowell Purcell	20
20. Lavelle Coleman	19

Largest firms as at 31/12/2012

Firm name	No of solicitors
1. Arthur Cox	228
2. Matheson	228
3. A&L Goodbody	212
4. McCann FitzGerald	170
5. William Fry	156
6. Mason, Hayes & Curran	126
7. ByrneWallace	85
8. Maples and Calder	71
9. Eversheds	70
10. Dillon Eustace	63
11. Beauchamps	61
12. Ronan Daly Jermyn	52
13. LK Shields Solicitors	47
13. Eugene F Collins	47
15. Hayes Solicitors	31
16. DAC Beachcroft Dublin	28
17. Holmes O'Malley Sexton	26
18. Philip Lee	20
18. Whitney Moore	20
20. Walkers Ireland	19

Former Chief Justice appointed chancellor of UL

Former Chief Justice John Murray has been appointed as chancellor of the University of Limerick and chairman of its governing authority.

A Limerick man, Judge Murray was Chief Justice of Ireland from 2004–2011, having been a member of the Supreme Court since 1999.

He also serves as a member of the Council of State and deputy chairman of the advisory panel of experts on the appointment of judges to the European Court of Human Rights.

Mr Justice Murray said he was proud of his links with the university, which extend back to his late father, Cecil, who was a leading member of the committee that campaigned for a university for Limerick.

Solicitors' confidentiality duty extends to clients – and others

It is at the core of a solicitor's practice that confidentiality be maintained in relation to information imparted by the client. Such an obligation is implied in the contract between the solicitor and the client, writes *Paul Keane (Reddy Charlton)*.

But what of a situation where a third party has given confidential information to a client and which is, in turn, passed on by the client to the solicitor? Does the solicitor have any obligation to that third party, with whom the solicitor has no contractual relationship?

The liability of a person who becomes aware of confidential information, but is not bound by any contract or undertaking of confidentiality, was dealt with by Keane J in *Oblique Financial Services Limited v The Promise Production Company* (1994): "Now it is also obvious ... that the obligation of confidentiality which is enforced by the courts is not merely applicable to the parties to the contract, but also in relation to third parties who may also come into possession of that information. In this

case, a similar obligation arises, whether by reason of some contractual obligation or some moral obligation. It is obvious from the cases and, indeed, it is a matter of common sense that the right of confidentiality, which the law recognises in these cases, would be of little value if the third parties to whom this information had been communicated were at liberty to publish it to another party or, in this case, to publish it to the general public, without the court being in a position to intervene."

The 2007 Supreme Court decision in *Mahon v Post Publications* also dealt with the issue. That was a case where the planning tribunal asked the court to hold that it had power to require the documents, which it circulated prior to public hearing, to be treated as confidential and to make orders restraining the *Sunday Business Post* from publishing those documents.

Fennelly J considered the British and Irish authorities and summarised the position as follows at paragraph 74 of

his judgment: "From all of these cases, the contours of the equitable doctrine of confidence can be described sufficiently for the purposes of this appeal, as follows:

- 1) The information must, in fact, be confidential or secret: it must, to quote Lord Green 'have the necessary quality of confidence about it',
- 2) It must have been communicated by the possessor of the information in circumstances which impose an obligation of confidence or trust on the person receiving it,
- 3) It must be wrongfully communicated by the person receiving it or by another person who is aware of the obligation of confidence."

It follows, accordingly, that a solicitor who receives confidential information from a client, knowing that it is confidential, may have a duty not only to the client, but also to the confider of the information. That duty is enforceable by injunction and an action for damages.

There may be arguments as to whether the solicitor must be actually aware that the information is confidential, and when that information ceases to be confidential. There is a useful discussion in Lavery.

However, it is clear that we must not only keep our clients' secrets, but we have to keep other people's secrets as well.

LOOK IT UP

Cases:

- *House of Spring Gardens v Point Blank Limited* [1984] IR 611
- *Mahon v Post Publications* [2007] IESC 15
- *Oblique Financial Services Limited v The Promise Production Company* [1994] 1 ILRM 74

Legislation:

- Lavery, Paul (1996), *The Action for Breach of Confidence in Ireland* (Round Hall Sweet & Maxwell)

Society a winner at IITD Awards 2013



The Law Society's Professional Training Network has won the Irish Institute of Training and Development (IITD) award for most innovative use of technology and an outstanding achievement award in the 'Networks and Groups' category. Celebrating at the awards ceremony were (l to r): Alan Nuzum (CEO Skillnets Ltd), Tracey Donnelly (programme manager, Finuas), Michelle Nolan (programme manager, Law Society), Attracta O'Regan (head of Law Society Professional Training), Sinéad Heneghan (CEO IITD), James O'Neill (president IITD), Kevin Hannigan (Law Society Finuas Network Steering Committee), Edward McDermot (Law Society), Simon Murphy (chairman, Education Committee)

Upwards-only rent reviews come under scrutiny

Another blow has been struck in the campaign to curtail the effect of upwards-only rent reviews in commercial leases, writes Joanne Lynch. Since 28 February 2010, section 132 of the *Land and Conveyancing Law Reform Act 2009* prohibited upwards-only review clauses in commercial leases or agreements for a lease entered after that date. However, this has been little comfort for the hundreds of tenants who have pre-existing long commercial leases and who have rents set at open market rates from the Celtic Tiger era, without any possibility of a future reduction, for example, Korky's, HMV, and others.

On 25 March 2013, the High Court delivered its judgment in *Ickendell Ltd v Bewley's Café Grafton Street Limited*. This is a case where the plaintiff landlord, Ickendell, applied to court to clarify the meaning of the rent review clause contained in the lease of their premises on Grafton Street, because the tenant, Bewley's Café Grafton Street Ltd, claimed the review clause was ambiguous.

Background

The 35-year lease was agreed in 1987 and rent reviews were held every five years. The initial rent in 1987 was €213,000. At the last review in 2007, the rent was fixed at €1,463,964 at the height of the property boom. At the 2012 review, the tenant raised the issue that, due to market deflation since 2007, it would not be possible for the landlord to achieve such a rent if they



Landmark decision to curtail upwards-only rent reviews?

surrendered the lease and sought a new tenant on the open market.

The landlord argued that the rent review clause only allowed the rent to be increased, but conceded that, given market deflation, the last rent should be maintained. It argued that a lower rent than the last agreed rent was not possible. The tenant argued that a lower rent than the 2007 rent could be agreed, provided the rent did not fall below the threshold rent set in 1987. Each rent fixed subsequently could reflect the open market, whether upwards or downwards.

The judge noted the main principles a court must consider when interpreting a commercial agreement between two legally advised parties, including:

- That the wording of the agreement be given its ordinary and natural meaning, as understood by a reasonable person having an interest or knowledge in the material circumstances,

- If the meaning is ambiguous, then a meaning should be given that allows the agreement operate more effectively ('business efficacy' rule),
- In interpreting the agreement, the broader context of the agreement could be considered and, in commercial agreements, the commercial background.

Judge's reasoning

The rent review clause provided that the rent payable is the 'second revised rent', which is defined as being equal to the greater of the rent payable during the 'preceding period', or such revised rent as may, from time to time, be ascertained ('the market rent'), whichever is the greater. The judge held that the term 'preceding period' was ambiguous, since it did not refer to 'immediately preceding period', which would prohibit the rent being decreased; nor did it refer to the 'original rent' fixed in 1987, and either construction could be given to the term. The landlord's interpretation that the clause allowed ever-increasing rents every five years while deflation had decreased the appropriate return was rejected. The judge held that that would substitute an unreal figure for the rent of these premises in place of what the lease provided expressly for – which is "the full open market yearly rent for the interior building let as a whole

without fine or premium ... on the basis of a letting with vacant possession thereof to a willing lessee for a term equal to that granted by the within written lease".

The parties had agreed that there would be a minimum rent, which was the initial rent from 1987, but the parties could not have agreed a 'market rent', which no willing lessee would offer.

Therefore, the lease was constructed so that 'second revised rent' is the greater of either the current open market rate at the date of the rent review, or the initial rent in 1987.

This judgment, of course, turns on the language of the lease in question and the fact that the term 'preceding' rather than 'immediately preceding' was used.

It is understood that the landlord intends to appeal this decision. Such an appeal will probably turn on whether there was any real ambiguity, as occurred when Clarke J's judgment was overturned by the Supreme Court in *Analog Devices BV v Zurich Insurance*. A court's jurisdiction to construe an ambiguous term only comes into play if there is genuine uncertainty as to the meaning of what the parties have agreed in writing.

The author wishes to thank Angus Buttanshaw BL for reviewing this article

LAW TAKEN INTO ACCOUNT

- Decision of Barron J in *Erin Executors and Trustee Co Ltd v Farmer* [1987] IEHC 18 (unreported, High Court, Barron J, 11 November 1987),
- Supreme Court decision in *Analog Devices BV v Zurich Insurance Company* [2005] 1 IR 274, where, from paragraph 13, Geoghegan J approves

the analysis of Lord Hoffman in *ICS v West Bromwich BS* [1998],

- *Co-operative Wholesale Society v National Westminster Bank plc* [1995] EGLR 97 at paragraphs G-H,
- *Amax International Ltd v Custodian Holdings Ltd* [1986] EGLR 111.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Independence, ethics and the in-house lawyer

IN-HOUSE AND PUBLIC SECTOR COMMITTEE

How independent is the in-house lawyer? The In-house and Public Sector Committee, in partnership with Law Society Professional Training, will host a panel discussion dealing with the unique issues faced by in-house lawyers in managing their relationships with their employer and maintaining professional independence.

The experienced panel of speakers will include: Orla Muldoon (chief counsel, Kellogg Europe), Mike Shea

(European chief counsel, Elavon Financial Services) and Noreen Mackey (Competition Authority).

Issues to be discussed include:

- Can a lawyer truly be an effective legal advisor to a company while retaining their independence?
- Does membership of the board change the dynamic of that lawyer's relationship with the company?
- How do you deal with unethical behaviour on

the part of the company/its employees?

This panel discussion will take place on Thursday 30 May 2013 at Blackhall Place, from 2pm to 4.30pm. Cost: €25.



For more details, email Law Society Professional Training at lspt@lawsociety.ie, tel: 01 881 5727, web: www.lawsociety.ie/lspt.

CAT Users Group

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

Representatives of the Probate, Administration and Trusts Committee of the Law Society, together with representatives of the Irish Tax Institute and the Consultative Committee of Accountancy Bodies – Ireland, met with senior Revenue officials dealing with capital acquisitions tax (CAT) online recently to discuss issues of mutual concern. It was agreed that a Capital Acquisitions Tax Users Group be set up among those present to act as a liaison group for practical issues arising in the processing of CAT returns using ROS (Revenue Online System) to keep those matters of concern under review.

Arising from this meeting, ongoing issues were discussed and certain solutions agreed, which should be of interest to solicitors filing CAT returns online using ROS. The matters at issue can be accessed in an article written by Aileen Keogan and

Tom Martyn, published for the benefit of all practitioners. This article has also been published in the *Irish Tax Review* (Irish Tax Institute) and can be viewed here: www.lawsociety.ie/probate-resources. (Members should log in with their member details to view this page.)

The CAT Users Group will continue to meet to review any issues of concern still outstanding and will update the profession from time to time.

Solicitors with any queries in relation to filing CAT returns using ROS should initially raise any concerns with their regional office (contact details for regional offices are contained in the clarification article, or can be found on the Revenue website at www.revenue.ie/en/contact/index). If the issue cannot be resolved at regional level, please contact the secretary of the PAT Committee at p.courtney@lawsociety.ie.

Cork, Galway seminars seek views on family law matters

FAMILY AND CHILD LAW COMMITTEE

As it celebrates its 20th anniversary, the Family and Child Law Committee is reaching out beyond the Pale to congregate with colleagues in the regions. The committee will hold seminars in Cork on 16 May and, later in the summer, in Galway.

The seminars will consist of short presentations on issues relating to child law, repossessions, mediation, personal insolvency and proposed reforms in the courts structure. Speakers will be a mix of committee members and lawyers from local bar associations.

In reaching out to the regions,

the committee aims to stimulate debate on these topics and to ascertain the views of family lawyers and the profession locally. These seminars will help to inform the committee on submissions it might make on the topics discussed, and it looks forward to lively debates on these matters.

Seminars are free – and the good news is that two CPD points will be available for those attending. Each event will be followed by a wine reception. For further details and to enrol for the first seminar in Cork on 16 May, email c.farrell@lawsociety.ie.

Dublin Metropolitan District, Dolphin House – practice direction: case management in child care proceedings

FAMILY AND CHILD LAW COMMITTEE

It is six months since the introduction of a formal review of this practice direction. At present, the practice direction is only operative in Dolphin House. It is likely to be extended.

In advance of a formal review


of the practice direction, the Family and Child Law Committee is seeking your views on the workings of the practice direction and suggestions for any refinements or amendments to same.

The committee is particularly

interested in receiving recommendations in respect of:

- Case management,
- Directions hearings,
- Guardian *ad litem*,
- Statement of proposed findings of fact (and acceptance of same), and

- Dispute resolution conferences.

All views are welcome. Please forward same to Colleen Farrell, secretary of the Family and Child Law Committee, at c.farrell@lawsociety.ie before 25 May. 

MENTAL-HEALTH PROBLEMS A FACTOR IN CHILD CARE CASES

The Child Care Law Reporting Project has launched the first tranche of reports on its new website. Project director **Carol Coulter** outlines the advantages of such reporting



Dr Carol Coulter is director of the Child Care Law Reporting Project, www.childlawproject.ie

The first reports released by the Child Care Law Reporting Project reveal a prevalence of mental-health problems in neglect and certain abuse cases. The project launched its website, www.childlawproject.ie, on 4 April with a first tranche of reports of proceedings from the courts, primarily child care applications in the District Court. The reports do not identify the children or their families, nor do they contain any details that could lead to their identification.

The demand for the opening up of these courts to more public scrutiny had been growing for some time. For example, the Shannon/Gibbons report on the deaths of children in State care or known to the social services, published in June 2012, recommended that the *in camera* rule in childcare proceedings be changed to permit reporting. "By allowing a veil of secrecy to cover the work of the court in these types of issues, public confidence in the system is damaged

and it prevents the recognition of good work and, in equal measures, the recognition of areas in need of reform," the report said.

The report also noted a recent decision of Mr Justice George Birmingham in the *McAnaspie* case, where he ruled the court could, if it saw fit, release documents relating to a child who had died (*HSE v McAnaspie*, 15 December 2011). In this case, Daniel McAnaspie's family was seeking guardian *ad litem* reports prepared for the multiple hearings that took place around his care by the HSE. He went missing from care and was later found dead; a criminal prosecution is pending.

The authors of the child deaths report also pointed out that judgments in such cases are made public in most European countries and that, in Australia and Canada, the media

are permitted to report on them while protecting the anonymity of the parties. The child welfare courts are also being opened up in Britain.

Legal framework

In fact, the legal framework for modifying the rule already existed in the 2007 *Child Care (Amendment) Act*, which provided for reporting of child care proceedings, subject to protecting the anonymity of the families concerned, and under regulations to be made by the responsible minister.

This act mirrored the *Civil Liability and Courts Act 2004* and 2005 regulations (SI 337 of 2005) that permitted the setting up of the Courts Service Family Law Reporting Project on a pilot basis in 2006, which produced reports on family law proceedings over two years.

No regulations permitting the implementation of the 2007 act were made until November 2012, when they were signed by Minister for Children Frances Fitzgerald.

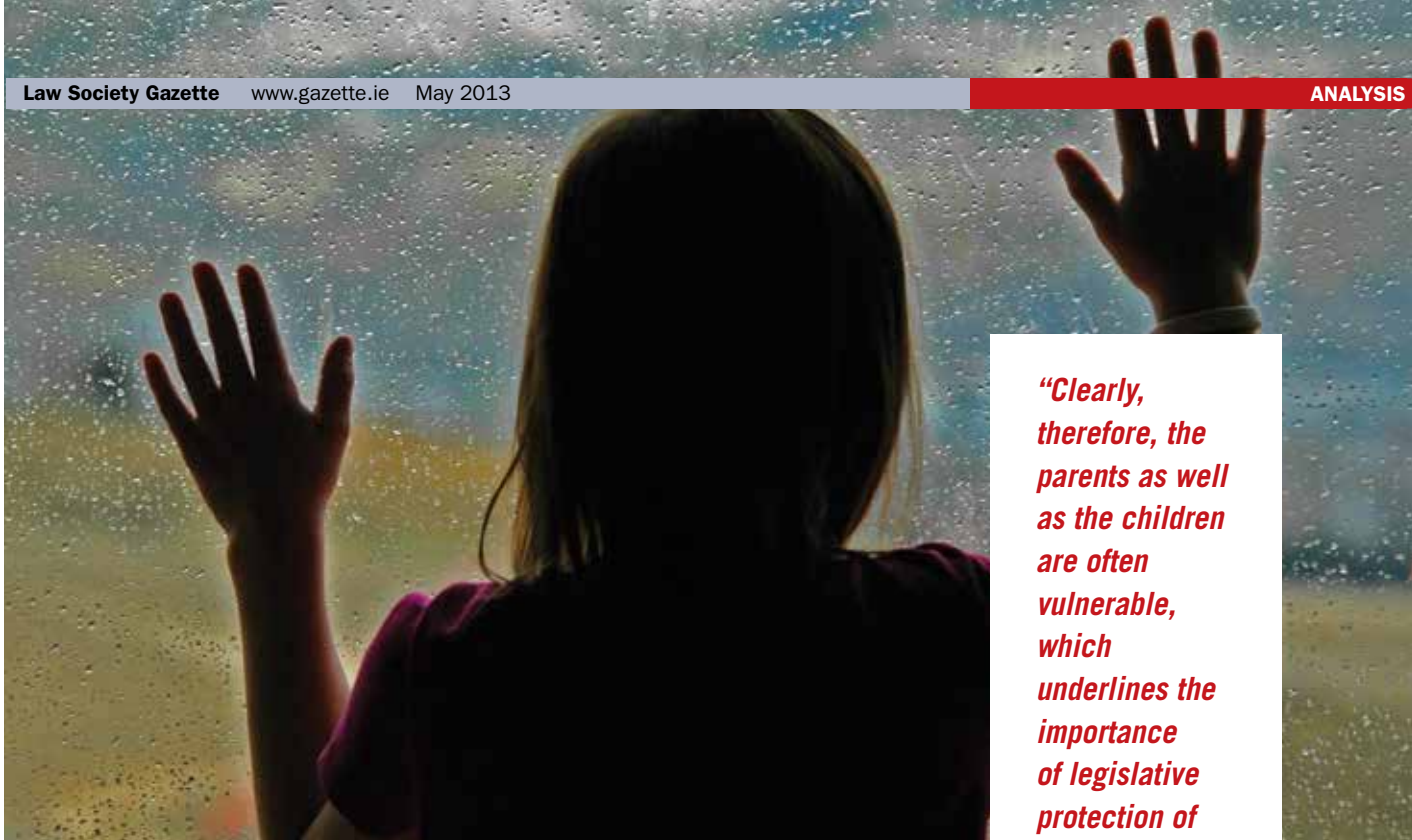
The regulations name a number of bodies that can attend and report on child care proceedings, including the major academic institutions, the ESRI and the Free Legal Advice Centres (FLAC). The act does not include the media, which will be permitted to attend both child care and private family law cases under new legislation being prepared by Minister for Justice Alan Shatter.

The making of the 2012 regulations (SI 467 of 2012) permitted the establishment of the Child Care Law

"The reports will be carried on the project's dedicated website at regular intervals and eventually several hundred will be available to professionals and members of the public"



(From l to r): Noeline Blackwell (director general, FLAC), Judge Rosemary Horgan (President of the District Court) and Dr Carol Coulter (director of the Child Care Law Reporting Project) at the launch of the project's dedicated website



“Clearly, therefore, the parents as well as the children are often vulnerable, which underlines the importance of legislative protection of the anonymity of the children and their families”

Reporting Project, under the umbrella of FLAC, to attend and report on child care cases and conduct additional research. The reports will be carried on the project’s dedicated website, www.childlawproject.ie, at regular intervals and eventually several hundred will be available to professionals and members of the public.

Central to Irish society

The project and website have been widely welcomed by practitioners, the judiciary, and those working in the child protection and welfare area, including the minister herself.

Speaking at the launch, President of the District Court Rosemary Horgan said that the matters raised were central to some of the most important and talked-about aspects of Irish society, including the supports provided for vulnerable families; the circumstances in which child care and supervision order proceedings are brought; how the rules of evidence are applied; how litigants, including vulnerable litigants, are represented and otherwise supported; how child neglect is identified and remediated; and how family reunification can be achieved.

“The area of public child law

is certainly in need of greater transparency,” she said. “The issue at the core of public child care cases is whether the State should remove the child from their parents’ care. The rights of parents and children, whether under the Constitution or under international or national legal provisions, must be respected and taken into consideration.”

One of the persistent themes to emerge from the cases attended was the prevalence of mental-health problems as a contributing factor to the neglect and, in some cases, abuse of children. Parental alcohol and drug abuse also featured very strongly, and

sometimes cases involved all three. Above all, child neglect and abuse are seen linked to poverty, educational disadvantage and social marginalisation.

Clearly, therefore, the parents as well as the children are often vulnerable, which underlines the importance of legislative protection of the anonymity of the children and their families. Of course, some of the parties may identify themselves from the description of the circumstances of cases. But such identification will only be possible to those who are already aware of these circumstances – the family itself

and the professionals involved. The measures for ensuring

anonymity are outlined in the project protocol, which is also published on the website.

The legislation does contain a provision for the court to restrict the publication of reports, but only in “special circumstances”, and the court must give its reasons as to what those circumstances are. There has been no such ruling in any case attended by the project so far.

A similar provision existed in the 2004 act relating to the reporting of private family law, but the issue arose only once, when the parties to the proceedings were work colleagues of the reporter. There was no need to invoke the provision, as the reporter was happy to absent herself from these proceedings.

As the project continues, it will eventually build up a collection of hundreds of reports, a database of statistics and trends, and observations on the operation of the child-protection system that will, it is hoped, contribute to an informed debate on how the law protects and upholds the rights of vulnerable children and their families. **G**

REPORTED CASES REFLECT JUDGE’S ASSESSMENT

The cases reported on so far by the Child Care Law Reporting Project team certainly reflect the wide gamut of issues mentioned by Judge Horgan.

Children of all ages, from very young infants to 18-year-olds emerging from the care system and requiring after-care plans, have been represented. Examples of neglect include three very young children, all under the age of five, being left alone in a flat without food, light or heat; and a teenage boy who ran away from a residential

centre and ricocheted between his grandmother’s and his mother’s house, not being fed or cared for in either.

Examples of abuse included a young girl being forced by her drug-addict mother to provide a urine sample the mother could use for urinalysis, and another young girl forced fully clothed into a cold shower, locked out of the kitchen, and denied food. The cases reported also include a number where the judge was severely critical of the care being provided by the HSE.

DONNING THE HARD HAT

New health and safety legislation is set to impose a greater financial burden on domestic homeowners and employers in 2013, argue **Greg Ryan** and **Shay Fleming**



Greg Ryan is principal of Greg Ryan Solicitors



Shay Fleming is a practising barrister

The end of 2012 saw the introduction of significant amending regulations to construction health and safety through the new *Safety, Health and Welfare at Work (Construction) (Amendment) Regulations 2012* (SI 461 of 2012). The new statutory change in the definition of 'client' will arguably bring homeowners within the highly technical and complex web of health and safety legislation, which is underpinned by the criminal law.

In addition, the *Safety, Health and Welfare at Work (General Application) Regulations 2012* (SI 445 of 2012) revoked earlier rules made under the *Factories Act 1955* dealing with air and steam receivers and steam boilers, and introduce newer rules dealing with pressure systems and associated pressure equipment into the well-known statutory workplace protective and preventive scheme.

A new part 10 and schedule 12, based on the adaptation of established technical practice, are introduced into the *Safety, Health and Welfare at Work (General Application) Regulations 2007* by the 2012 regulations. It is clear, however, that the amendments to both statutory regimes will increase the cost of health and safety to homeowners and businesses alike.

The 'client' definition

Homeowners will now be subject to the construction health-and-safety scheme by the change in the definition of the word 'client'.

The *Safety, Health and Welfare at*

Work (Construction) (Amendment) Regulations 2012 are possibly the most far-reaching of the statutory construction health-and-safety codes to date – and they come into operation on 1 June 2013. The alarming aspect of the latest regulations relates to a retrospective realigning of the definition of 'client' as "a person for whom a project is carried out" with the definition in article 2(b) of Council Directive 92/57/EEC. That article defines 'client' as "any natural or legal person for whom a project is carried out".

The previous, more restrictive definition in the 2006 construction regulations described a client as "a person for whom a project is carried out, in the course or furtherance of a trade, business or undertaking, or who undertakes a project directly in the course or furtherance of such trade, business or undertaking". This definition clearly excluded a person or persons commissioning construction work on their own homes.

The lacuna in the heretofore technical transposition has now been addressed by amending provisions, set out in SI 461 of 2012. This latest realignment of the definition of what constitutes a client removes a previous derogation from section 17 of the *Safety, Health and Welfare at Work Act 2005*.

The explanatory note accompanying the new regulations says that construction work commissioned by persons on their

own domestic dwellings has been brought within the scope of the construction regulations. The new provision on clients and/or project supervisors does not relieve them (the 'client' or project supervisor) of any duty imposed on them by these regulations.

Financial, civil and criminal considerations

A major economic consequence for homeowners considering commissioning work to either build a new home for themselves or to carry out renovations to their existing homes is that, where such work involves any of the particular risks specified in schedule 1 to the *Construction Regulations 2006*, including 'work at height', an additional financial cost burden will be incurred in complying with the very onerous design and management duties as set out in regulations 6 to 10 of SI 461 of 2006. This includes:

- The appointment of project supervisors (regulation 6),
- The duty to ascertain the suitability of project supervisor, as well as designer and contractor appointees,
- Duties of clients regarding the safety file (regulation 8),
- Duties of clients regarding safety and health plans (regulation 9), and
- Duties of clients in notifying the Health and Safety Authority.

Consequently, homeowners carrying out construction work involving specified risks on their own homes may, in future, be served with enforcement notices for alleged breaches of the statutory code, including directions for improvement plans (see section 65 of the *Safety, Health and Welfare at Work Act 2005*), and an improvement notice or prohibition notice (see sections 66 and 67 of the 2005 act).

"Homeowners carrying out construction work involving specified risks on their own homes may, in future, be served with enforcement notices for alleged breaches of the statutory code"



Homeowners had better don their helmets when it comes to complying with new health-and-safety burdens

Indeed, homeowners may be prosecuted on indictment in the Circuit Criminal Court for more serious contraventions, including personal injury occasioned during construction projects commissioned by them (see sections 77 and 78 of the 2005 act). The effect of any such prosecutions will be to criminalise homeowners and potentially expose them to substantial fines and/or imprisonment/suspended sentences for breaches of their statutory duties as clients when building new homes for themselves or, indeed, when carrying out renovations to their existing homes.

Homeowners will also need to have adequate insurance in place before work is carried out and will need to be aware of their obligations in ensuring that statutory appointees, including contractors, project supervisors, and safety advisers are competent

and that such appointees are carrying appropriate employer and public liability insurance.

The Nussbaumer case

A reference for preliminary ruling under article 234 of the *EC Treaty* was sent by the Italian Tribunale di Bolzano to the European Court of Justice in February 2009, as part of criminal proceedings taken against Mrs Martha Nussbaumer, who was the client/supervisor for the replacement of the roof of a dwellinghouse.

The ECJ's ruling was handed down in October 2010 (case C-224/09). The facts in this case were that the protective railing placed along the edge of the roof, the crane used to hoist

up materials, and the workforce were all provided by three different contractors, present on the site at the same time. Under the applicable Italian legislation, a building permit was not required for the works, although a commencement certificate

indicating that the works had commenced had been lodged with the municipal authorities.

In its ruling, the ECJ referred to its earlier ruling on article 3 of directive 92/57/EEC in *Commission v Italy* (case C-504/06), dated 25 July 2008.

In *Nussbaumer*, the court ruled that the requirement to draw up a health-and-safety plan, prior to the setting up of a construction site (as laid down in article 3(2) of

directive 92/57/EEC), must be understood as being applicable to any construction site on which the works involve particular risks, as listed in annex II to the directive, or for which prior notice must be given.

Effect in Ireland

Undoubtedly, the effect of the new regulations will impose an extra financial burden on already hard-pressed and financially stressed homeowners. However, the requirement for competent persons to be appointed by homeowners in their new statutory role as client will generate greater employment opportunities for suitably qualified architects and engineers, as well as for those health-and-safety consultants (who must hold recognised qualifications) to have suitable and relevant experience and carry appropriate professional indemnity insurance. **G**

“Homeowners will now be subject to the construction health-and-safety scheme by the change in the definition of the word ‘client’”

MAKING FUNDAMENTAL RIGHTS MORE ACCESSIBLE

The *Charter of Fundamental Rights of the EU* makes fundamental rights more readily accessible and offers lawyers a new tool in their legal arsenal. **Benjamin Koltermann** and **Killian O'Brien** report



Benjamin Koltermann is public relations officer at the Academy of European Law



Killian O'Brien is course director at the Academy of European Law

With the entry into force of the *Lisbon Treaty*, the *Charter of Fundamental Rights of the European Union* has finally become a legally binding document. The charter purports to make fundamental rights more readily accessible and offers lawyers a potentially effective new tool to defend the rights of their clients. As the charter is an integral part of EU primary law, the rights can be enforced before the CJEU and before national courts where EU law is concerned. However, the scope of application of the charter is still unclear and somewhat disputed.

Scope of application

Article 51(1) of the charter provides that its provisions are addressed primarily to the institutions, bodies, offices and agencies of the European Union. It also applies to the member states, however, "only when they are implementing union law". It is not always immediately evident whether national institutions are acting within the so-called scope of EU law. Moreover, although the charter states that the fundamental rights must be respected by the member states "only" when they implement EU law, the explanations of the charter would

seem to indicate a wider application of fundamental rights.

Recently, by way of example, the Court of Justice of the EU pronounced on the scope of application of the charter in the case of *Iida v Ulm* (C-40/11). This reference for a preliminary ruling concerned the question of whether a Japanese national residing legally in the member state of origin of his daughter and wife can rely on their EU citizenship as grounds for his stay in this state, despite his family moving to another member state. Mr Iida submitted, among other things, that his right to full enjoyment of his family rights under article 7 of the charter, which is analogous with article 8 of the ECHR, were affected.

This would appear to be a classic example of the exercise of free movement by a union citizen (Mr Iida's daughter) and would appear to fall squarely within the scope of EU law covered by the charter. The

CJEU held, nonetheless, that Mr Iida's "situation shows no connection with European Union law" since he cannot claim a right of residence based on Directive 2004/38/EC (directive on the right of movement of union citizens and their family members) and has not applied for a right of residence within the meaning of Directive 2003/109/EC (*Long Term Residents Directive*).

Hence, the CJEU made clear,

the case does not fall within the scope of application of the charter. Notwithstanding the apparent clarity of this particular decision and the seemingly strict interpretation of the scope of the charter's application pursued thus far, the exact reading of article 51(1) remains unclear, and it will be up to the CJEU to further delineate the limits of the scope of application of the charter.

"The charter potentially constitutes an important additional tool for legal practitioners in many areas of domestic law as long as the case falls within the scope of EU law"

The charter in practice

Concerning the material scope of the charter, the CJEU has made some tentative initial statements on the content of individual norms, as it did in the Irish request for a preliminary ruling in *NS v SSHD* and *ME v Refugee Applications Commissioner; Minister for Justice, Equality and Law Reform* (joined cases C-411/10 and C-493/10). These joined cases concerned several third-party nationals who had been arrested following their illegal entry into Greece and who then made a subsequent application to be granted

SEMINAR SERIES

A training project organised by the Academy of European Law, with support from the European Commission, aims to shed light on how to make use of the charter in practice.

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domestic experts in this area, the series will bring the charter closer to the practitioner and enhance its practical applicability.

The next seminar for lawyers in private practice will take place in Edinburgh, in cooperation with the Faculty of Advocates. Further information can be found at www.era.int/charter.



“As the charter is an integral part of EU primary law, the rights can be enforced before the CJEU and before national courts where EU law is concerned”

international protection in Britain and Ireland respectively. The CJEU was asked whether a member state that intends to return an asylum seeker to the member state responsible for examining the asylum request (Greece) in accordance with article 3(1) of the *Dublin Regulation* (343/2003) was obliged to assess whether that state respects fundamental rights.

The CJEU first made clear that national authorities exercising the discretionary power conferred on the member states by article 3(2) of the *Dublin Regulation* must be considered as acting within the scope of article 51(1) of the charter. The CJEU further held that the transfer of an asylum seeker to a member state where he would face the serious risk of inhuman or degrading treatment would amount to a

breach of article 4 of the charter (prohibition of torture and inhuman or degrading treatment or punishment). The court went on to state that member states and, by corollary, national courts may not initiate a *Dublin* transfer where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that member state amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision. This would seem to indicate a positive duty on member states to ensure that the content of article 4 of the charter is observed in all other member states. The CJEU additionally turned its attention to the comparative scope of protection offered by articles 1, 18 and 47 of the charter when

considered opposite article 3 of the ECHR. The court in its decision seems to have equated the scope of these articles from the respective treaties with each other and, for that reason, it held that the application of articles 1, 18 and 47 would not result in a different answer than the application of article 4 of the charter. This illustrates the complex but potentially useful relationship between the jurisprudence of the Luxembourg and Strasbourg courts.

Relevance for legal practitioners

These examples show that the charter potentially constitutes an important additional tool for legal practitioners in many areas of domestic law, as long as the

case falls within the scope of EU law. In several other cases, the provisions of the charter on the prohibition of discrimination were used to stop discrimination based on age and

sex (see, for example, *Hennigs* C-297/10 and *Test-Achats* C-236/09). As a consequence, practitioners would be well advised to take the provisions of the charter into consideration in arguing cases with a nexus to EU law. The challenge, however, is twofold: first, to assess whether recourse to the provisions of the charter is possible with regard to the scope of application laid down in article 51(1) and, second, what is the extent of the substantive content of the right protected by the charter? **G**

SPEAKERS

Paula Fallon: Cross-Border Legal Issues

Ann Williams: Cross-Border Taxation Issues

Richard Frimston: EU Succession Regulation

Gráinne Duggan B.L.: Bequeathing Digital Assets

Teresa Pilkington S.C.: Litigation Update

Gerry Durkan S.C.: Family Law Update



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Tilting at windmills not within PIAB job specifications

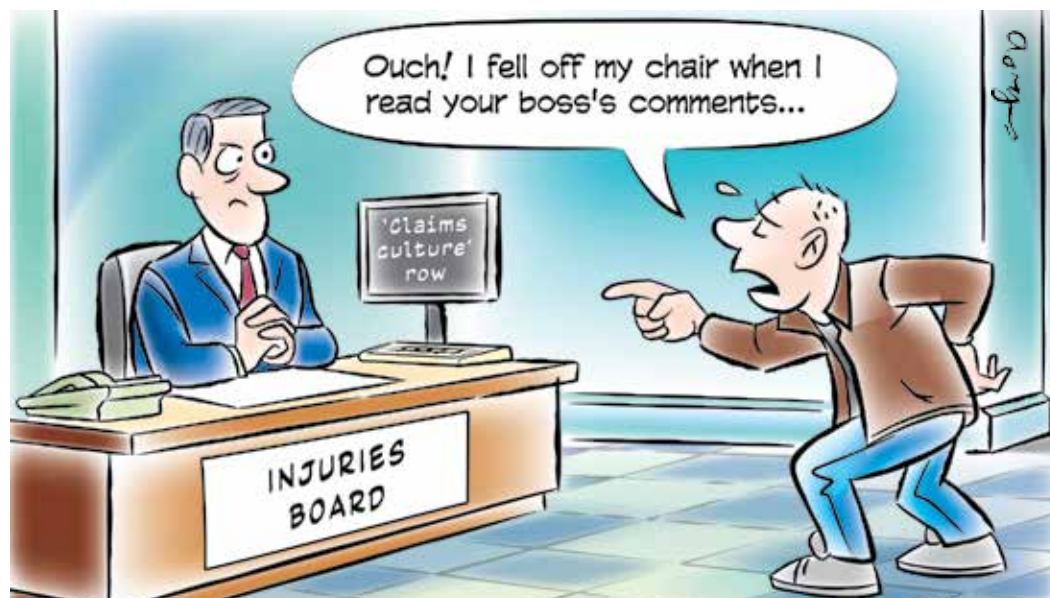
From: Gordon Murphy, Niall Murphy & Co, Solicitors, Ballincollig, Co Cork

On Tuesday 26 March, Patricia Byron, CEO of the Injuries Board, gave an interview on RTÉ's flagship news programme, *Morning Ireland*, to discuss the most recent statistics revealed by her organisation's annual report. While her comments have been reported largely without challenge by the mainstream media, various aspects of her performance have led to considerable comment online. In my view, it ranks as one of the more bizarre performances by the head of a statutory body for some time.

Ms Byron bemoaned the increase in claims of 5% in the preceding 12 months that were processed through her offices at the Injuries Board and opined that it reflected an "emerging claims culture".

Now, firstly, let us remind ourselves that, for claims to be assessed through PIAB, there must be agreement between the parties for assessment or, at the very least, a failure to contest that assessment. Therefore, there appears to be no suggestion that any of these claims referred to by Ms Byron were other than legitimate claims for damages arising out of injury.

Secondly, Ms Byron is CEO of a statutory body mandated to process legitimate personal injury claims made to it. Her comments, therefore, seem to



represent a clear annoyance and disappointment that more people are availing of the service she and her organisation are commissioned to provide by law.

That is not all, however. Ms Byron, when challenged on that particular point, indicated her deep concern that "thoughts were being put in people's heads" to pursue their claims.

Now let us for a moment ignore the frankly condescending attitude to claimants implicit in such language and focus on the substance of her complaint. What she really objects to is that, through the nefarious influence of third parties, individuals are now more aware of their entitlement to bring claims for compensation for injuries sustained through the negligence of others. She would,

one can only deduce, much prefer it if these individuals remained blissfully unaware of their entitlements and suffered their injuries in silence in order to keep the claims statistics low.

Surely the head of the Injuries Board was able to adduce data to substantiate her allegations of claims harvesting? Well, not quite. She, not for the first time, referred to "anecdotal evidence", which reminded one of the words of Lionel Hutz [lawyer in *The Simpsons*]: "Hearsay and conjecture are *kinds* of evidence."

This, from a well-paid State appointee on the national airwaves, is nothing short of pathetic.

The most puzzling aspect of all of this is why she is concerned at all. Surely speculating on an

"emerging claims culture" and scaremongering about insurance premium rises does not form part of her remit. Ms Byron's role under the 2003 *PIAB Act* is to "carry on and manage and control, generally, the administration of the board". Tilting at windmills does not appear within her job specification. She must, however, be doing a good job. How else can one explain the 'bonus' of €31,000 awarded in 2010?

If one had tuned in late, one would have been forgiven for thinking that the comments on *Morning Ireland* were made from a representative of one of the State's large insurance companies. They were not. They were from the independent head of the State's personal injury claims processing body. Truly bizarre! **G**

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Wed 22 May		
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Thur 23 May		
Westmeath	14.00 – 17.00	Mullingar Park Hotel, Dublin Rd
Fri 24 May		
Donegal	10:30 – 13:30	Abbey Hotel, The Diamond

JURISDICTION GAME CHANGER?

Changes to the monetary jurisdiction limits of the Circuit and District Courts in civil proceedings have been proposed in the *Courts Bill 2013*. **Richard Lee** discusses the pros and cons



Richard Lee has been practising as a solicitor for 22 years, is an accredited mediator, a collaborative law practitioner, and a fellow of the Chartered Institute of Arbitrators

The *Courts Bill 2013* proposes to increase the monetary jurisdiction limits of the Circuit Court and District Court in civil proceedings. The District Court limit will rise from €6,348.69 to €15,000. The Circuit Court limit will rise from €38,092.14 to €75,000 – except in personal injury actions, where the limit will be €60,000.

In making the announcement, Justice Minister Alan Shatter said that the proposed changes “should ultimately lead to a reduction in the burden of legal costs for individuals and companies involved in litigation”.

The minister also commented: “It is almost 22 years since change was effected to the monetary jurisdictions of our courts. This is far too long. I believe it is in the public interest that jurisdictional issues be revisited more frequently, and I am considering what steps might be taken in the context of this bill to ensure this occurs in the future.”

The *Courts Act 1991* doubled the jurisdiction of the District Court from IR£2,500 to IR£5,000 and doubled the jurisdiction of the Circuit Court from IR£15,000 to IR£30,000. The 1991 act redistributed work within the courts system – as will the *Courts Bill*, when enacted. This redistribution of work will lead to a need to review practice and procedure. When the jurisdiction changes occurred in 1991, no insurmountable problems arose – but my memory is that waiting times got longer.

The bill proposes a separate jurisdiction limit of €60,000 for personal injury actions in the Circuit Court. The minister explained: “As a further measure to deal with concerns relating to possible inflation of awards and a consequent effect on insurance costs, I am proposing to restrict the jurisdiction of the Circuit Court to €60,000 in respect of personal injury actions.”

To my mind, this is the

questionable aspect of the bill. Effectively, it is proposing to put a specific cap on Circuit Court judges in terms of what they can award for personal injury claims, which is not warranted.

The existence of insurance should not affect how parties are treated before the courts. To my mind, it is not appropriate that a defendant represented by an insurance company should be treated differently to any other defendant. Given that High Court awards are falling, it would

be preferred if the jurisdiction of the Circuit Court should be €60,000 for all civil actions, with no distinction made for personal injury actions.

The Injuries Board Annual Review 2012 states that its average award was €21,502. The Injuries Board statistics for 2011 indicated that less than 9% of its awards exceeded €38,000. According to the annual report of the Courts Service 2011, the High Court and Circuit Court together made 1,556 personal injury awards. Approximately 82% were less than €38,000.

“To my mind, this is the questionable aspect of the bill. Effectively, it is proposing to put a specific cap on Circuit Court judges in terms of what they can award for personal injury claims, which is not warranted”

The point I am making is that only a small percentage of personal injury claims will be in the €60,000 to €75,000 category – in my view, not enough to merit a separate jurisdiction.

High Court workload

The effect of the bill should be to reduce the workload of the High Court over time. The minister said: “The changes will also result in a proportion of litigation presently being conducted in the High Court in the future being dealt with at Circuit Court level. Over time, this should effect a reduction in the number of appeals that have to be dealt with by our Supreme Court.”

Only part of the work undertaken by the High Court will be affected by the proposed changes, that is, civil actions with a value between €38,092.14 and €75,000 and personal injury actions with a value between €38,092.14 and €60,000 – which would be handled by the Circuit Court.

The 2011 annual report of the Courts Service states that, in civil business, a total of 26,378 summonses, petitions and originating motions issued in the High Court (including 8,179 personal injury cases; 1,539 breach-of-contract and recovery-of-debt cases; 5,282 summary summonses; and 1,120 revenue summonses).

The proposed jurisdiction change should significantly reduce this number. Over time, the changes should result in shorter waiting times in the High Court.

Circuit Court

The Circuit Court will see its civil jurisdiction increase to €75,000 – except for personal injury actions, where it will also increase, but to an upper limit of €60,000. On the



other hand, all civil cases with a value between €6,348.69 and €15,000 will no longer fall into its jurisdiction.

The explanatory memorandum to the bill states: "The changes in jurisdiction levels will result in fewer cases in the High Court, while the additional work arising from the increase in the jurisdiction in the Circuit Court will be balanced by the reduction in the caseload at the lower end of the jurisdiction when it transfers to the District Court."

The Courts Service annual report 2011 indicates that, in civil business, a total of 42,696 civil bills were issued in the Circuit Court (including 7,881 personal injury cases and 21,741 breach-of-contract and recovery-of-debt cases).

District Court

The bill proposes that the jurisdiction limit for civil actions in the District Court will increase to €15,000. The 2011 annual report of the Courts Service states that, in civil business, 117,498 civil summonses were issued in the District Court.

The explanatory memorandum to the bill states: "There will be some additional civil work for the District Court and the impact of this will be monitored."

It is likely that the workload of the District Court will increase significantly, with consequential effects on waiting times, which is bad news for certain District Court areas compared with others. For example, the 2011 annual report of the Courts Service indicates that the waiting time for civil applications in Dublin District Court in 2011 was 30 weeks (though I understand this has now been

reduced), while in many District Court areas, it was eight weeks or less.

Costs and practice

The explanatory memorandum to the bill states: "However, overall, the bill should result in reduced legal costs for all parties to litigation, including the State."

The minister, in announcing the bill, indicated that it should reduce the burden of legal costs for individuals and companies. It is normal for solicitors to run cases in the District Court without counsel, to retain counsel in the Circuit Court, and retain both senior and junior counsel in the High Court. It may be prudent to review this practice, particularly at the upper limits of the proposed jurisdictions.

For example, in a District Court case with a value in excess of €10,000, it may be in a client's

interest to engage counsel. Similarly, for a Circuit Court case with a value in excess of €50,000, it may be beneficial to engage senior counsel.

A difficulty arises in relation to District Court costs, in that they are measured on a set scale that is not reviewed regularly. The reality is that many cases in the District Court can involve a

very substantial amount of time and work, which is not reflected in the scale fee. In my view, the scale should be abolished and a system put in place similar to that of the Circuit Court, particularly given the proposed jurisdiction change to €15,000. **G**

"It is likely that the workload of the District Court will increase significantly, with consequential effects on waiting times, which is bad news for certain District Court areas compared with others"

IN CAMERA RULE

The bill also importantly proposes changes to the *in camera* rule, which will permit the attendance of *bona fide* representatives of the press in the family courts. This should serve to create a better understanding of family law and outcomes in divorce and separation cases and is very much to be welcomed.

A pungent PROBLEM



Conor Kennedy is a Dublin-based barrister specialising exclusively in tax law



Michael Tuíte SC practises in the areas of chancery, commercial and taxation law

The *Begley* case has highlighted some important issues for solicitors and accountants, specifically in the context of criminal prosecutions that may arise from Revenue investigations – not to mention the potential for self-incrimination in such proceedings.

Conor Kennedy and Michael Tuíte explain

The imposition of a two-year custodial sentence in the Court of Criminal Appeal for Mr Paul Begley in February 2013 for the fraudulent reclassification of imported garlic (reduced

from the six-year custodial sentence imposed in the Circuit Criminal Court), together with a significant increase in the number of custodial sentences imposed by the courts for tax evasion, has changed the manner in which individuals with tax difficulties now deal with the Revenue Commissioners.

While Mr Begley was successful in appealing the severity of the sentence to the Court of Criminal Appeal, it was highlighted in that appeal that Mr Begley was the architect of his own misfortune by cooperating with Revenue to the extent that he had furnished incriminating evidence and documentation and had waived his right to silence during the investigation stage.

In this regard, the *Begley* case has highlighted a number of issues for solicitors and accountants, specifically in the context of criminal prosecutions that may arise from Revenue investigations and the issue of self-incrimination in such proceedings by virtue of the cooperation given to Revenue.

In considering these issues, one must also have regard to the various and conflicting statutory reporting requirements and the associated ramifications for solicitors and accountants when advising and representing corporate clients.

By its nature, tax evasion involves the failure to declare and remit taxes when required. The subsequent use of the unremitted taxes also constitutes the proceeds of criminal conduct and, therefore, a money-laundering offence.

Both the *Taxes Consolidation Act 1997* and the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* are, therefore, relevant in circumstances where an accountant becomes aware of a client's steps to evade tax – and both potentially expose an accountant to criminal sanctions.

Revenue obligations

Section 1078 of the *Taxes Consolidation Act 1997* provides that it is an offence to be knowingly involved in the fraudulent evasion of tax. Furthermore, a person is guilty of an offence where that person knows or is reckless as to whether a client is engaged in tax evasion or facilitates the client in the fraudulent evasion of tax.

Section 1079 of the *Taxes Consolidation Act 1997* applies only to companies. It places an obligation on a certain classification of persons, including accountants, who in

“Tax evasion involves the failure to declare and remit taxes when required. The subsequent use of the unremitted taxes also constitutes the proceeds of criminal conduct and, therefore, a money-laundering offence”



FAST FACTS

- > Tax evasion is a criminal offence, and there is a growing trend for individuals to seek legal advice
- > Such advice would invariably caution against the dangers of self-incrimination or providing information that could be used against an individual in a criminal trial
- > But failure to provide information to Revenue may compound the taxpayer's difficulties
- > Legal advisers will have to carefully formulate advice and consider the possibility that Revenue may have sufficient evidence to commence a criminal prosecution

the normal course of work become aware that a client company has knowingly, or is in the process of, furnishing inaccurate information to Revenue to communicate the nature of the offence to the company in writing and request that the matter be rectified within six months from the date of that communication.

If, at the end of six months, the company does not rectify the tax offence or fails to report the matter to Revenue, the accountant must cease to act as auditor, or cease to advise the company in tax matters, for a period of either three years from the date of the report to the company or until the accountant is satisfied that the matter has been rectified or reported, whichever is the earlier.

Notice of the resignation must also be furnished to Revenue. Failure to report the offence to the company, resign as auditor where the tax default is not corrected, and notify Revenue of that resignation constitute an offence.

Money-laundering obligations

The *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* consolidates the anti-money-laundering legislation in a single statute. This act increases the obligations on a wide range of legal persons, referred to as designated persons, and includes credit and financial institutions, lawyers, accountants, trust and company service providers, and tax advisers. The act contains requirements to identify customers, to report suspicious transactions to the gardaí and Revenue, and to have specific procedures in place to provide, to the fullest extent possible, for the prevention of money laundering and terrorist financing.

Under the act, the deriving or obtaining of property through criminal conduct constitutes an offence. The subsequent use of that property is considered to be "proceeds of criminal conduct". The failure or the misreporting of income to Revenue, and the retention of funds lawfully due to the exchequer, constitutes tax evasion and, therefore, proceeds derived from criminal conduct.

An accountant is defined as a 'designated person' for the purposes of compliance with and reporting of money-laundering

offences to the appropriate State agencies, and a 'relevant professional advisor' for the purposes of availing of the privilege of ascertaining the legal position of the client pursuant to section 46(2) of the act.

Accountants, as designated persons, are required to report to the gardaí and Revenue any knowledge or suspicion that they have that another person is engaged in money laundering or terrorist financing as soon as practicable after acquiring that knowledge or forming that suspicion. The penalties for failing to make the statutory report range from a fine or a term of imprisonment not exceeding five years, or both.

As a relevant professional advisor, an accountant is not obliged to disclose information received from, or obtained in relation to, a client in the course of ascertaining the legal position of the client. The act does not define 'legal position'; however, the revised *Anti-Money-Laundering Guidance for the Accountancy Sector* document (issued by the Consultative Committee of Accountancy Bodies in Ireland on 23 September 2010) states that the activities associated with ascertaining "the legal position of the client are taken to encompass the involvement of the relevant professional adviser in the provision of advice on, defending or representing the client, in relation to judicial proceedings".

However, that document notes that audit work, routine book-keeping, accounts preparation and tax compliance assignments do not give rise to privileged circumstances, as the relevant professional adviser is neither providing legal advice, nor instructed in respect of litigation.

Most importantly, the 'tipping off' by a designated person is prohibited, as is the making of any disclosure that is likely to prejudice any ongoing or future investigation.

Predicament

The receipt of a Revenue audit/investigation letter invariably prompts a client to inform his or her accountant of the commission of a tax offence. In the event of an audit, Revenue undertakes not to prosecute where the taxpayer makes a qualifying disclosure of the tax offence. However, no such undertaking is given to those individuals

who have received a letter of investigation. Revenue defines an investigation as "an examination of a customer's affairs where Revenue has strong concerns of serious tax offences having occurred".

Where an accountant receives information from a client about a tax offence that was prompted by the receipt of an investigation letter from Revenue, it is reasonable to assume that such information constitutes a confidential communication made for the dominant or overriding purpose of pending or contemplated litigation. In such circumstances, privilege exemption may apply to that communication.

However, where the discovery of a tax offence arises during the course of preparing accounts, tax submissions or an audit, such a discovery would not constitute information subject to such privilege. In such circumstances, there is a statutory requirement to disclose the offence to Revenue. Failure to make such a disclosure will place an obligation on an accountant to issue a section 1079-type letter to the company, containing details of the offence and directing that the matter be rectified within six months.

While the notification of the tax offence to the company is in contravention of the money-laundering provisions, the protection afforded under the *Tax Acts* arguably ensures that no liability or action can be taken against an accountant for having initially notified the company.

Where the company fails to rectify the tax default within the six-month window, the accountant must cease to act and notify Revenue of the resignation. At the same time, the accountant must also prepare and submit a money-laundering report to the gardaí and to Revenue.

The submission of the money-laundering report to the gardaí and Revenue is made, unknown, to the company. This report must be made as soon as practicable after acquiring the knowledge or forming the suspicion that money laundering has occurred and would almost certainly contain sufficient information to enable Revenue undertake an investigation with a view to initiating a criminal prosecution.

The British experience

The practice in Britain is of interest, as it has sought to deal with similar issues. In February 2012, HM Revenue and Customs (HMRC) issued a new code of practice to govern the procedures to deal with suspicion of serious fraud. Under the new system, taxpayers suspected of tax fraud will receive a letter from HMRC offering an opportunity to make a disclosure. Taxpayers will have 60 days to agree to the contractual disclosure

"Where the discovery of a tax offence arises during the course of preparing accounts, tax submissions or a revenue audit, such a discovery would not constitute information subject to such privilege. In such circumstances there is a statutory requirement to disclose the offence to Revenue"

facility (CDF) terms and provide an outline disclosure or deny that any tax fraud has been committed. Agreement to the CDF terms will involve a full disclosure within a set period of time and the completion of a number of certificates.

To secure penalty mitigation and immunity from prosecution, a taxpayer must provide full cooperation. However, HMRC retains the option to conduct a criminal investigation in cases where cooperation breaks down, or into matters not included in the outline disclosure. If a taxpayer decides not to cooperate or denies involvement in any tax fraud, HMRC may commence a criminal investigation into any suspected tax fraud.

Anomaly

While tax evasion constitutes an offence under the *Tax Acts* and the *Money Laundering Acts*, there is an anomaly between the statutes. On the discovery of a tax offence, the *Tax Acts* require an accountant to notify

the company, despite its prejudicial effect to any ongoing or future money-laundering investigation. Therefore, clarification either by legislative or practice statement is required to address this anomaly.

In addition, and mindful of the fate suffered by Mr Begley, there appears to be little incentive for a taxpayer to make full disclosure of a tax default where that individual's affairs, or that of his or her company, are under investigation.

Because tax evasion is a criminal offence punishable by imprisonment, there is a growing trend for individuals to seek legal advice. Such advice would invariably caution against the dangers of self-incrimination or providing information that could be used against an individual in a criminal trial. However, the failure to provide information and assistance to Revenue may compound the taxpayer's difficulties in light of the incriminating information furnished by the accountant in the money-laundering report.

Legal advisers, therefore, will have to carefully formulate advice and consider the possibility that Revenue may have sufficient evidence to commence a criminal prosecution. In this regard, it is submitted that the procedures adopted in Britain should be considered as one means of meeting some of these problems.

LOOK IT UP

Legislation:

- *Taxes Consolidation Act 1997*
- *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*

Literature:

- *Anti-Money-Laundering Guidance for the Accountancy Sector* (Consultative Committee of Accountancy Bodies in Ireland, 23 September 2010)

BRITISH DECISION ON PROFESSIONAL PRIVILEGE

I WANT MY LAWYER!

There is a clear need for legal advice when engaging with regulators, but clients need to understand their advisors' potential disclosure obligations to the relevant regulatory authorities, write **Liam Kennedy** and **Davinia Brennan**



Liam Kennedy is a partner in A&L Goodbody and is a Law Society Council member



Davinia Brennan is a professional support lawyer in A&L Goodbody

Last month, we reported on the British Supreme Court decision in *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and Another*, which confirmed that privilege will not extend to legal advice given by non-lawyers, such as accountants. The recent *Begley* case highlights the importance of instructing lawyers for legal advice in respect of tax issues, particularly in regard to Revenue investigations, and also when dealing with other regulators to ensure a client's position is not prejudiced.

Clients should be aware of the implications of section 1079 of the *Taxes Consolidation Act 1997*. In simple terms, accountants (or other advisors) who assist or advise in preparing tax returns, and so on, may be obliged to inform Revenue if they discover that a corporate client has knowingly furnished false information to Revenue (unless the company rectifies the matter within six months or reports the matter to Revenue). Careful analysis would be required before determining whether an advisor was obliged to make a report in a particular situation, especially if the advisor was a lawyer, in which case it would also be necessary to consider whether the information was privileged. If a report was required, then a breach of the obligation is punishable by a fine and/or up to two years' jail.

In addition, an accountant (like a lawyer), is a 'designated person' under the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* and is required to report and disclose any suspected tax evasion discovered in the course

of their work to Revenue and the gardaí. Breach of such a reporting obligation is punishable by a fine and/or up to five years' jail.

While solicitors have no obligation to disclose information that is subject to legal professional privilege under the 2010 act (section 46(1)) or information obtained from a client in the course of ascertaining the legal position of the client (section 46(2)), an accountant, as a 'relevant professional advisor', will generally not be able to rely on the privilege exemption (unless, for example, they were preparing a forensic report on lawyers' instructions for use in litigation), but may be able to rely on section 46(2).

It is important that professionals bear such reporting obligations in mind when advising corporate clients, and ensure that their clients understand their advisors' potential disclosure obligations to the relevant regulatory authorities. Lawyers are well placed to guide the client in respect of such issues, because of the complexity of the legal issues involved and because such lawyer/client communications in respect of the client's legal obligations will be protected by privilege.

In many cases, it may make sense for the client to adopt a proactive strategy of communicating directly with the authorities to resolve the issue, rather than 'playing catch up' following an advisor's report. In any communications with regulators, the lawyer should ensure that the client understands the need to be truthful in any communications, but also appreciates the risk of self-incrimination. ©

Doing the DEAL

Myra Garrett is managing partner of William Fry and is consistently voted one of the top ten mergers and acquisitions lawyers in the country. Her passion for her work puts her among some exalted company, says Lorcan Roche



Lorcan Roche is an award-winning writer and journalist

In 30 years, I can recall only a dozen or so times when it was palpable and real: Springsteen on the almost addictive catharsis of live performance; Fay Weldon on learning to trust her instincts as a novelist and the attendant satisfaction of feeling the work grow stronger; Salman Rushdie on the inspiration, as well as sheer relief, of having survived (fatwa, divorce, self-doubt); sean-nós singer Iarla Ó Lionáird on the joy that suffuses his body, and perhaps soul, when he closes his eyes and is transported; Stephen Fry on the reliable pleasures of Shakespeare; Prof Jonathan Miller on the (eventual) rewards of devotion to a life of the mind; Hurt on Beckett; Pinter on precision; Nuala O'Loan on her love of God, justice, and 'balm' that came from ordinary decent people up North.

Moments where the interviewee's passion comes alive, when eyes shine. Where the interviewer understands – "Ah, this is one of those lucky few who've located something they truly love in their work."

Not to generalise or be dismissive, but one doesn't always expect the 'love-factor' to reveal itself when interviewing a lawyer. (It does happen, however – I have more than once been surprised by the intensity with which some practitioners engage with their craft.) But let's just

say I wasn't expecting a moment of transcendence when dispatched to interview Myra Garrett, managing partner of William Fry.

I mean, come on. Mergers and bloody acquisitions?

"I thoroughly enjoy the cut and thrust of the deal. I enjoy it when you are putting it together, when you are trying to establish what your priorities are, what you might hold back, what you are prepared to give. I enjoy that process. Immensely"

Hooked on doing deals

She is small, bird-like. Shy in front of the camera. She agrees to be photographed in the boardroom, but prefers a more intimate space for the interview. A farmer's daughter, no airs or graces. Self-effacing, personable. Voice gentle. Accent neutral, some traces of Mount Merrion where she was brought up. Some Mount Anville and UCD, where she was educated.

Photos out of the way, she is more relaxed. She laughs easily, and often.

Put it to her that she is, demonstrably, very good at what she does, she smiles, arches an eyebrow: "Am I?"

Well. She is consistently voted one of the top ten mergers and acquisitions lawyers in the country. She has twice been nominated for the 'European Women in Business Law Awards'. She has accolades from various...

She interrupts, gently: "I think at the end of the day, to do well in your job, you have to have some basic affinity for the task in hand. You should be prepared to work hard, obviously. And, ideally you should enjoy it, or at least enjoy certain aspects of it."



PIC: FERGAL WARD

So she enjoys mergers and acquisitions?

“Oh yeah. The thing about mergers and acquisitions is, it’s basically negotiating, it is doing deals. And that involves sitting down with the client, understanding their business, what they are trying to achieve, what their tactics are – coming up with strategies. Being aware that the game plan can change as you get into it. That your planning and preparation is vital. I’m lucky, in that I really enjoy that part of it – the

planning – and I also really enjoy getting to know a client’s business, getting to know the client, the personal interaction. And then the negotiations...”

Her eyes shine, and it is evident: Myra Garrett is hooked. On doing deals.

She becomes animated: “I thoroughly enjoy the cut-and-thrust of the deal. I enjoy it when you are putting it together, when you are trying to establish what your priorities are, what you might hold back, what you

FAST FACTS

- > **Educated at Mount Anville and UCD, Myra Garrett is managing partner at William Fry**
- > **She says that, to do well in your job, you have to have some basic affinity for the task in hand**
- > **What does she look for in a candidate? Someone who is independent minded, not afraid to speak out**

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are prepared to give. I enjoy that process. Immensely."

She explains her *modus operandi*: "When I am working out a deal with a client, I will always ask, 'Okay, what is really important to you?' And then I will look at the business and establish what is really important from a business point of view. And with those fundamentals clearly established and agreed upon, I will work out the negotiating goals, the things we really must have, the things we really want to hold on to. But at the same time, I am always aware, and I make the client aware, that in any deal you never get everything you want."

Sort of like marriage? She laughs (but says nothing: she is, after all, a lawyer).

Is the ability to plan and to put together a deal a natural talent? Is it something you can be taught?

"I don't know," she says. "Not everyone has it. Not everyone can do it. And not everyone enjoys it. But I do."

Clearly.

The ideal candidate

She says she thoroughly enjoyed law and UCD, but not for a moment did she imagine that she'd wind up a senior partner in an international firm. Moreover, she hadn't a clue what M&A really entailed: "I was open-minded as to what practice area I would go into. Obviously, even all those years ago, you had to specialise. You went into commercial property, or corporate, or litigation. I did my rotations in all of the main departments. By pure chance, I finished my rotations in corporate, and I stayed in corporate."

There was an affinity; she felt she just 'clicked' there.

Is she directly involved in hiring? "I would be aware of most hires that are going on, but I would not be actively involved in them all. But certainly at more senior levels, I would have a role."

What does she look for in a candidate? "I look for someone who is independent minded. Not afraid to speak out. Has their own views on things."

Given that the majority of lawyers generally come from middle-class backgrounds, does she find there is sometimes a sameness or predictability in those views?

She stops to think: "Traditionally, maybe you are right; it would have been middle class, but I think that that was the same for most professions and for most careers that required a college degree. I think that is changing, slowly. I realise it is not entirely open yet, but there is much broader access to college now, and we are seeing quite a range of people. And we are open to that because it is – and I realise it can be something a cliché – but it really is important to have diversity, to engage with different viewpoints."

She continues describing her ideal candidate (and, without being all Freudian, she could possibly be describing herself): "Someone who has a bit of spunk, who is interesting, and interested, and who is personable. I think interpersonal skills in our business are essential. So, someone who is able to engage with people. Who likes people. And also someone who is practical. Yes, of course, you want someone who is academically bright, but they need to be practical. And business minded."

"At the moment, at least 60% of our graduate intake would be female. But by the time they get to their mid or late 30s, that differential has all but disappeared"

Down to business

We discuss how events such as the banking crisis in Cyprus (announced the day of the interview) impact on M&A: "There is still a lot of nervousness in the markets. All it takes is something like that, which is quite extreme, for international buyers in particular to be given pause

for reflection. But obviously, as we know, any jolt to the European system will create nervousness."

Ireland, she emphasises, is still seen as "good value". Obviously, people are moving away from bonds. "The area where we are seeing a big increase in interest at the moment is loan-book portfolios and commercial property, especially where you have good grade commercial property with good tenants."


The recent sale of the State Street building in the south Dublin docklands is a good example. It was structured by way of debt sale."

M&A last year, she says, was "very good", while 2009 was obviously "devastating" as the M&A tap turned off. But there has been a consistent increase in activity, in particular in 2011 and 2012. "It has been a bit slower this

year, but that can happen. M&A can tend to go in cycles. When you've had a busy cycle, like we did at the end of 2012, it can take a bit of time to regain momentum."

We discuss gender balance. "At the moment, at least 60% of our graduate intake would be female. But by the time they get to their mid or late 30s, that differential has all but disappeared. In our firm, at senior level, it is about 30% female – and that, by the way, is high. But we do lose a lot of our very strong female associates. And not just for family reasons. I have seen a lot of women who just say 'this is not for me'."

The long hours, she says, can be gruelling, energy sapping. She explains that clients in the US west coast are just starting to get going when it is 'supposed' to be close-of-day here. She does her best – gym sessions, walking to and from work, keeping life uncluttered (for example, no holiday home).

But, really, the deal is what keeps her going: "For some people, it is not enough. For me, it is." 

SLICE OF LIFE

Your father is a dairy farmer, your mother a lecturer in UCD. There were no family connections, so why law?

"I really don't know. I suppose I went up the hill to Mount Anville and came back down to UCD. I wasn't completely sure what I wanted to do. Law was considered a good, general kind of degree. You could move into business, you could do accountancy. So I did law."

Your younger sister Kathleen is a senior partner at Arthur Cox. Who's smarter, you or her?

"She is."

Home life?

She lives in Rathmines. She is married to an accountant. She has two daughters, 18 and 16, and a 12-year-old son. "Yes, they are always on the go, which, as a result, means you are always on the go."

How do you combine work and family?

"I was asked back to my old school to give a talk on that very topic for a past pupils' networking event. And my husband had been up at the school and had seen my name on a poster – I had forgotten to tell him, which in itself is kind of revealing – and he said, 'Oh, I see you are giving a talk at your old school'. And the girls asked what it was about, and I said it was about work/life balance, and they literally rolled around the place laughing at the idea that I, of all people, had conquered that one!"

Pipped

AT THE POST



Paul Keane is managing partner at Reddy Charlton McKnight, an associate of the Institute of Taxation in Ireland, and a member of the Society of Trust and Estate Practitioners

The economic crisis has produced an enormous level of insolvency and resultant misery. However, the *Personal Insolvency Act* has the aim of making things easier for both debtors and creditors, write **Paul Keane** and **Mark Homan**

“Annual income 20 pounds, annual expenditure 19 pounds 19 and 6, result happiness. Annual income 20 pounds, annual expenditure 20 pounds ought and 6, result misery.” These were the words

of Mr Micawber, a character with considerable personal experience of insolvency, in Charles Dickens’ *David Copperfield*.

The *Personal Insolvency Act 2012* has the objectives of:

- Ameliorating the difficulties experienced by debtors in discharging their indebtedness due to insolvency,
- Enabling creditors to recover debts due to them in an orderly and rational manner, and
- Enabling insolvent debtors to resolve their indebtedness without recourse to bankruptcy and thereby facilitating their active participation in economic activity.

The Minister for Justice has estimated that, in the first year of its operation, the new legislation will result in nearly 20,000 applications for the debt relief mechanisms and 3,000 bankruptcies.

Three mechanisms have been introduced by the act for the resolution of the debts of insolvent persons: debt relief notice (DRN), debt settlement agreement (DSA)

and personal insolvency arrangement (PIA).

The DRN is designed for no income, no asset consumer debt cases where the levels of qualifying debts do not exceed €20,000. The authorised intermediaries responsible for supporting applications will be MABS or similar organisations.

Insolvency Service of Ireland

The Insolvency Service of Ireland (ISI), established with effect from 1 March 2013, will administer the provisions of the *Personal Insolvency Act* and oversee the implementation of the legislative regime. The ISI will be responsible for overseeing the three new debt settlement arrangements contained in the act. It will serve as a checks and balances mechanism to ensure compliance with the act, and it shall have the structures, functions and powers consistent with an effective independent body.

The principal functions of the ISI are set out at section 9(1) of the act. They are to:

- Monitor the operation of the arrangements relating to personal insolvency,
- Consider applications for DRNs,
- Process applications for protective certificates,
- Maintain the registers,
- Provide information to the public,



Mark Homan is a partner in Baily, Homan, Smyth, McVeigh and a member of the Law Society’s Business Law Committee

“PIP applicants must provide evidence of professional indemnity insurance, and a compensation fund of not less than €9,000,000 is envisaged for the protection of debtors and creditors”

Wilkins Micawber: “Welcome poverty!
Welcome misery, welcome houselessness,
welcome hunger, rags, tempest and beggary!
Mutual confidence will sustain us to the end!”

- Advise the Minister for Justice and Equality in relation to its functions,
- Authorise persons to perform the functions of an approved intermediary,
- Authorise individuals to carry on practice as personal insolvency practitioners,
- Supervise and regulate persons practising as personal insolvency practitioners,
- Prepare and issue guidelines as to what constitutes a reasonable standard of living and reasonable living expenses,
- Arrange for the education and training of approved intermediaries and personal insolvency practitioners (PIPs), and
- Contribute to the development of policy in the area of personal insolvency.

FAST FACTS

- > Three mechanisms have been introduced by the act for the resolution of the debts of insolvent persons: debt relief notices, debt settlement agreements, and personal insolvency arrangements
- > The Insolvency Service of Ireland will be responsible for overseeing the three new debt settlement arrangements contained in the act
- > Another key function of the service is its role in authorising and supervising personal insolvency practitioners

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Dr. Basil Elnazir, Consultant Respiratory Paediatrician & Medical Advisor to Make-A-Wish

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The ISI will be more directly involved with the implementation of DRNs than DSAs or PIAs. In the case of DRNs, the ISI must assess the application and, if appropriate, certify to the court that the application is in order. In relation to the DRN process, the ISI may liaise with creditors and other parties, make payments under the DRN, investigate relevant matters, seek to extend the process, and bring the DRN process to an end if necessary.

The ISI has recently embarked on an information campaign. Pursuant to section 23(1) of the act, the ISI has published guidelines as to what constitutes a reasonable standard of living and reasonable living expenses for debtors (see www.isi.gov.ie). The guidelines will effectively inform an intermediary or PIP, when compiling an arrangement, as to what level of living expenses are reasonable for a debtor after the payment of a portion of debt – that is, after the payment of debt, what will be left for the debtor to live on?

The publishing of these guidelines is a crucial role for the ISI. The act provides that the ISI must have had regard to certain considerations in doing so, including poverty indicators, CSO surveys in relation to household income and expenditure, the Consumer Price Index, differences in household size and composition, differing needs of persons, and the need to facilitate social inclusion of debtors and their active participation in economic activity.

While having regard to the differing needs of persons, the ISI should pay particular regard to the age and health of family members and whether they have a physical, sensory, mental health or intellectual disability. The ISI must consult widely on this matter, and the guidelines will be reviewed annually.

Personal insolvency practitioners

Another key function of the ISI is its role in authorising and supervising PIPs. As stated above, we are not concerned in this article in the ISI's role *vis-à-vis* the authorised intermediary's role in DRNs, as these positions will be taken up mostly by MABS or similar organisations

In order to avail of a DSA or PIA, a debtor must appoint a PIP, which will invariably be an accountant or lawyer, although qualification for the role is not confined to those two professions. PIPs will be responsible for providing advice to a debtor and making the

application for the particular arrangement.

Section 161 of the act provides that the ISI may regulate the procedures governing the authorisation of persons to carry on practice as a PIP, standards to be observed by a PIP, qualifications (including levels of training, education and experience) of a PIP, records to be maintained, and the information and returns to be provided to the ISI. The ISI may authorise or refuse applications. However, when exercising this discretion, it must provide the reasons for such a refusal and inform the PIP applicant of his/her entitlement to make representations in this regard.

The PIP authorisation process is rigorous. Applications must be accompanied by evidence of competency and proof of satisfactory knowledge of the act and the law generally in relation to the insolvency of individuals. In consultation with the ISI, the Law Society and some of the accountancy bodies are set to run short courses, which will culminate in an exam. Applications must also be accompanied by a report by a qualified accountant, in the prescribed format, confirming that the appropriate financial systems and controls are, or will be, in place for the protection of debtors' monies.

PIP applicants must provide evidence of professional indemnity insurance, and a compensation fund of not less than €9,000,000 is envisaged for the protection of debtors and creditors. Finally, a registration fee, as of yet

undetermined, will be payable to the ISI.

The ISI may also prepare and publish guidelines in relation to the duties of PIPs, which the PIP must have regard to in carrying out his/her duties.

Once authorisation is granted, it remains in force for one year and, unless revoked, may be renewed by the ISI. Upon appointment, the PIP must confirm consent in writing to the debtor and notify the ISI. Similarly, should the PIP resign, he/she must notify the ISI and provide a statement of reasons for the resignation. The ISI will have investigatory powers and may inspect PIPs and investigate complaints made against them.

In becoming a PIP, the practitioner will agree to keep proper books and records and dedicated DSA and PIA accounts.

Role of PIPs

The PIP holds meetings with the debtor and advises whether or not the eligibility criteria for a proposal have been satisfied. The PIP

WHAT PIPS DO

- Act on behalf of a debtor for DSA and PIA,
- Analyse debtor's financial position,
- Advise in relation to appropriate arrangement,
- Apply for protective certificate,
- Arrange and manage creditors' meeting,
- Draft DSA or PIA,
- Manage the process throughout the lifetime of the arrangement.

must provide the debtor with information on the procedure, general effect and the likely costs. The PIP is also responsible for preparing proposals to creditors regarding the arrangement.

PIPs are responsible for assisting debtors in compiling a prescribed financial statement and, in doing so, they must give full and honest disclosure of all the facts. Based on this statement, the PIP will advise the debtor as to any alternative options.

PIPs will have ongoing supervision by the ISI to ensure compliance with the act, ISI guidelines and regulations.

Section 161 of the act provides that the ISI may regulate the circumstances and purposes for which a PIP may charge fees, costs or seek to recover outlays. The payment of fees is ultimately a contractual matter between the PIP and the debtor, subject to the agreement of the creditors. The PIP should provide the debtor with details of fees and the likely cost of the arrangement. It is envisaged that the regulations will provide that the fees should be paid throughout the life of the arrangement, as opposed to them being paid all up front. While some level of upfront fees will be allowed, the structure will be designed to avoid all fees being paid up front for fear that the incentive for a PIP to push through a particularly difficult arrangement might be lessened. Anecdotally, it appears from other jurisdictions that the banks, who are ordinarily the largest creditor and who usually hold the veto, have a view in relation to what the PIP's fee should be and will only agree fees within that band. It remains to be seen what level of fees will be palatable for the creditors.

The court's role

The final piece of the new personal insolvency structure is, of course, the court. Applications for DSAs and PIAs are brought to the Circuit Court, except in circumstances where the debtor's debts are over €2.5 million. The Circuit Court applications will be dealt with by specialist judges, who mostly currently comprise county registrars. **G**



Claire Moran is a solicitor in the commercial and credit union law department of Michael Powell Solicitors, Cork. She wishes to thank Finbarr O'Leary, partner, for his assistance in reviewing this article

CREDIT

where it's due

The *Credit Union and Cooperation with Overseas Regulators Act 2012* sets out substantive changes in the regulation and compliance, governance and restructuring of Ireland's credit unions. **Claire Moran** looks at things differently

It is undeniable that the credit union sector in Ireland has been subjected to considerable upheaval in recent times. The keenly anticipated work of the Government-appointed Commission on Credit Unions manifested itself in the final report of the commission in April. This report sets out wide-ranging recommendations to change the way in which credit unions are regulated and governed – both internally and externally.

It was on foot of this report that the *Credit Union and Cooperation with Overseas Regulators Act 2012*, a landmark piece of legislation setting out substantive changes in the areas of regulation and compliance, governance and restructuring came into being. When one considers also the developments brought about by the Central Bank's proposed fitness and probity regime and the *Personal Insolvency Act 2012*, and it is clear that the challenges now faced by the credit union sector are great and plentiful.

Tiered regulation

The act has introduced measures for the regulation of credit unions on a basis proportionate to their asset value. In a move broadly welcomed by credit unions, the act provides for 'tiered' regulation and specifically states that, in making regulations under the act, the Central Bank shall have regard to the need to ensure that the requirements imposed by the new regulations are effective and proportionate to the nature, scale and complexity of the credit union, or the category of credit union to which

the regulations apply. To this end, the Central Bank has conducted a nationwide exercise of visiting credit unions to assess the risk categories into which they fall.

These 'probability, risk and impact system', known as PRISM inspections, have resulted in the compilation of a centralised database by the Central Bank, which provides the yardstick by which credit unions will be regulated. While, in the past, some elements within the sector were strongly opposed to tighter regulation, it is clear that opposition is no longer an option, with hundreds of thousands of people and small businesses dependent on credit unions for access to cheap credit.

Sophisticated model

The act has introduced increased regulatory requirements on credit unions and has effectively introduced a sophisticated compliance model. This model is designed to ensure that each credit union adopts a compliance programme. Each credit union must also implement policies, procedures, systems and plans to monitor compliance on an ongoing basis, including requirements under all legal and regulatory requirements.

This programme is to be overseen by a compliance officer, who must be appointed by the board of directors and who must have the necessary authority and resources to manage the compliance programme. The intention of the Central Bank to police the new regulations has been made clear – shortly after the enactment of the *Credit Union Bill*

"The intention of the Central Bank to police the new regulations has been made clear – shortly after the enactment of the Credit Union Bill in December 2012, a Dublin-based credit union was fined €21,000 for a breach of anti-money-laundering regulations"



in December 2012, a Dublin-based credit union was fined €21,000 for a breach of anti-money-laundering regulations.

Reporting requirements have also increased. Credit unions will be required to submit an annual compliance statement to the Central Bank certifying their compliance within two months of their financial year-end, or within such other period as the regulator may decide. Credit unions are further required to develop and maintain a risk-management system and controls to allow it to identify, assess, measure and report risks to which it is or might be exposed. A risk-management officer is to be appointed in each credit union to oversee this function.

Reporting lines

Clear organisational structures with well-defined, transparent and consistent reporting lines and governance arrangements will

be required in order to ensure that there is effective oversight of the activities of the credit union. As with the regulation of credit unions, the governance arrangements will take into account the nature, scale and complexity of the business being conducted by the credit union.

In line with good governance standards, credit unions will be required to document in writing their governance arrangements, setting out the roles, responsibilities and accountabilities of each officer. They will be required also to have in place the necessary oversight, policies, procedures, practices, systems, controls, skills, expertise and reporting arrangements to ensure compliance with these requirements. These new requirements will pose quite a challenge for credit unions, where previously an informal approach may often have been taken to such matters.

FAST FACTS

- > The *Credit Union and Cooperation with Overseas Regulators Act 2012* has introduced measures for the regulation of credit unions on a basis proportionate to their asset value
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- > Each credit union must implement policies, procedures, systems and plans to monitor compliance on an ongoing basis, including requirements under all legal and regulatory requirements
- > Credit unions must develop and maintain a risk-management system and controls

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Minister Alan Shatter will be the keynote speaker at the 2013 Law Society Annual Conference.



Mícheál Ó Muircheartaigh, the legendary GAA commentator, has also been confirmed for the 2013 conference.

The theme of the conference is **'Firming up for the Future: Building Legal Agility and a Positive Perspective'** and takes place in the Europe Hotel and Resort, Killarney.

Minister Shatter will speak on 'Courts Reform and the *Personal Insolvency Act, 2012*', while Mr Ó Muircheartaigh will encourage delegates to move 'Up the Field and Face the Ball – Exercising a Positive Perspective'.

While the programme for each day is still being finalised, the following speakers have also been confirmed:

Simon Murphy, Barry M O'Meara & Son Solicitors
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Chris Callan, Callan Tansey Solicitors
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A policy is to be drawn up for identifying, managing and resolving conflicts of interest, which will apply to all officers of a credit union. There will be an increased responsibility for each officer of the credit union to ensure that no conflict of interest exist between his or her own interests and the interests of the credit union, and also in terms of declaring his or her own interests to the board.

Fitness and probity

The Central Bank has also launched a consultation process with respect to a proposed fitness-and-probity regime. It is planned to introduce the scheme from July 2013 for credit unions with assets of greater than €10 million. Smaller credit unions will be afforded an additional grace period and will have to comply two years later.

The implementation of these standards for credit unions will ensure that members have confidence that those individuals holding senior and board positions in credit unions can demonstrate that they are competent, capable, acting honestly, ethically and with integrity, and are financially sound. The introduction of this fitness-and-probity regime complements the governance framework brought about by the act. Ultimately, the regime will involve the Central Bank designating certain job functions as 'pre-approval controlled functions' (PCF), where those positions are of such a nature that the people occupying them would exercise a significant influence over the affairs of the credit union.

The Central Bank may then examine the proposed appointment of any individual to a PCF to ensure that they are fit and proper to discharge their responsibilities. In the event that the Central Bank is not satisfied, then the proposed appointment could be refused.

The regime will require increased reporting to the Central Bank on the part of the credit union and its cooperation with it. Credit

unions will be expected to conduct extensive due diligence to assess the fitness and probity of candidates to ensure that they meet the new standards – and will continue to meet the standards on an ongoing basis.

Reserve requirements

The final report of the Commission on Credit Unions established that 51 of the country's 403 credit unions are failing to meet the requirement that their reserves exceed 10% of their assets. Of these, 25 are seriously undercapitalised.

In addition to those 51 credit unions that fail to meet the minimum reserve requirements, a further 50 are reckoned not to be strong enough to survive on their own. With this in mind, the act has provided for the establishment of the Credit Union Restructuring Board (REBO).

A statutory body, REBO is expected to be in place for three years or more with a view to overseeing and assisting in any mergers or transfer of engagements between credit unions.

REBO will initially encourage credit unions to put forward their own proposals as to how to move forward. There is no denying, however, the steel within the velvet glove here – should these proposals not be accepted as viable, REBO itself can then act in pairing credit unions together in a merger, or a 'transfer of engagements' situation. The funding for this restructuring will be provided, in part, by the Credit Union Fund, which has been established for this purpose and for the purpose of meeting the costs and expenses of REBO itself.

Credit unions shall contribute to the fund by paying a levy, the level of which will vary in accordance with the capacity of the credit union to pay and the nature, scale, risk and complexity of the business of each individual credit union. The fund is also at the disposal of a newly appointed Stabilisation Committee to provide financial support to credit unions that are not meeting their regulatory reserve requirements, but that are, in the opinion of the Central Bank, viable credit unions.

Hard-hitting legislation


The Credit Union Commission has predicted that the personal insolvency legislation will hit credit unions hard and will add further to the worsening of the financial position of the sector. The provisions of the legislation

will affect credit union members at every end of the spectrum, ranging from those with borrowings of less than €20,000 – who will be able to apply for debt-relief certificates allowing for the write-off of their debt, subject to a three-year supervision period – to those with secured debt of up to €3 million and unsecured debt up to an unlimited amount, who may be entitled to secure a settlement arrangement with their creditors.

The report of the commission highlighted that loan arrears across the sector collectively stand at €1 billion and that credit unions have had to put aside €801 million to provide for bad debts. The Credit Union Development Association, headed up by chief executive officer Kevin Johnson, has voiced its concerns that the impact of the personal

insolvency legislation could be such that it will deter credit unions from lending to those who are financially excluded by the banks – and may potentially lead to the emergence of widespread unregulated moneylending. The Irish League of Credit Unions has also expressed the view that the legislation is weighted against the sector.

The full impact of these new measures for reform in the sector remain to be seen. Despite an increased enthusiasm by those spearheading the need for reform within credit union circles, it is clear, however, that never before have boards of directors and managers of credit unions faced such a challenge in

progressing and securing the future of their credit unions. The question is, can the bridge be built between the sector's volunteer ethos and the need to bring the sector into line with the professional financial services establishment? 

"The Credit Union Fund is at the disposal of a newly appointed Stabilisation Committee to provide financial support to credit unions that are not meeting their regulatory reserve requirements, but which are, in the opinion of the Central Bank, viable credit unions"

LOOK IT UP

Legislation:

- Credit Union and Cooperation with Overseas Regulators Act 2012
- Credit Union Bill 2012
- Personal Insolvency Act 2012

Literature:

- Report of the Commission on Credit Unions (30 March 2012)

Virtual REALITY



Mark Dillon is head of information and evidence at the International Criminal Court in The Hague

Futurists were once convinced that, in the 21st century, all courtrooms would be modern, wired and efficient buildings. Now the once prohibitive costs have fallen dramatically, and the idea of 'e-courts' is no longer unrealistic. 'Where are our jetpacks?' ask Mark Dillon and Philipp Amann



Dr Philipp Amann is the information management officer of the Organisation for Security and Cooperation in Europe's Transnational Threats Coordination Cell

In the mid 1990s, when commentators first started to discuss technology in the courts in earnest, the impression given was that the demise of paper records was imminent, to be replaced by electronic records. The term 'e-court' became fashionable, and reformists and futurists were convinced that, by the beginning of the new century, all courtrooms would be modern, wired and efficient buildings. In Britain, Richard Susskind, IT adviser to the current Lord Chief Justice of England, even published a book called *The End of Lawyers?*, in which he predicted that courts and court users would be transformed by the use of technology.

When the Bloody Sunday Inquiry opened its public hearings in Derry in 2000, the future had arrived. This was an e-court in every sense of the word. The use of technology received a huge amount of press coverage, and judges from other courts were given tours and demonstrations of the future at work.

Today, the concept is less often written about, and the term 'e-court' appears to have slipped from the contemporary legal lexicon. For most of us, the new model court never materialised, and even though a paperless courtroom concept is contained in the Courts Service's strategic ICT plan, it is unlikely to materialise in the near term because of fiscal tightening in all areas of the public service.

While the vision and the reality were somehow misaligned, it does not mean we should give up hope. The costs that were once prohibitive have dropped dramatically, and the reality of e-courts nationally, in the medium term, is no longer unrealistic.

The matrix

The term e-court is an abbreviation of the term 'electronic court' and, although sometimes defined as a virtual web-based court, the most common usage refers to a physical courtroom with technology that allows proceedings to operate without the use of paper records – from filings, to the issuing of judgments, and the electronic disclosure and presentation of evidence.

For many, an e-court is understood to be the use of videoconferencing, but while an e-court may have this facility, it is insufficient alone to transform a court to an e-court.

Typically, an e-court should include all of the following:

- A 'virtual', web-based courthouse that provides 24/7 online access to court services,
- Online access to relevant records and information, such as court calendars to all parties,
- A modern courtroom that offers audio and video capabilities, with the ability to allow for the electronic presentation of evidence and, finally,



- The capability to upload and present evidence in an electronic format.

The International Criminal Court (ICC) recently celebrated its tenth anniversary. It is a treaty-based tribunal established to investigate and try international crimes, such as war crimes, crimes against humanity, and genocide. It is a permanent court and is different from the *ad hoc* tribunals established to try the crimes committed in the former Yugoslavia and Rwanda. The UN's International Court of Justice is also based in The Hague.

Disclosure

In our context, what is special about the ICC is that its courtrooms are e-courts and the legislation governing the administration of the proceedings specifically

“Lawyers need to appreciate that the technology that exists in society is going to have an increasing impact on the nature of trials, and they will need to be able to comprehend this technology in order to litigate effectively and to present evidence in an appropriate form”

supports the e-court model.

The courtrooms are fitted with state-of-the-art technology. In addition to each participant having access to email, there is an electronic evidence presentation system in place. When a witness needs to mark an exhibit, this is done electronically, saved and stored with his/her testimony. Proceedings are captured on video, using several cameras operated by technicians, and broadcast via the web.

They are also equipped for capturing electronic transcripts in real time and have full interpretation services. This is important, because several languages

may be spoken in the same hearing.

An e-court protocol determines how participants should submit evidence, and a user group meets regularly to review and

analyse how the process works. When new situations arise, they are discussed in this forum and practical solutions can be agreed upon. Parties, including representatives of the defence and victims, feel they have an input on any changes, which is an important element in getting buy-in and user acceptance.

While the ICC functions differently to the national courts, lessons can be learned

FAST FACTS

- > Typically, an e-court should include a ‘virtual’, web-based courthouse that provides 24/7 online access to court services, as well as
- > Online access to relevant records and information, such as court calendars to all parties,
- > A modern courtroom that offers audio and video capabilities, with the ability to allow for the electronic presentation of evidence and, finally,
- > The capability to upload and present evidence in an electronic format

and transferred to other courts. But first let us look at when it might be viable to use this e-court model.

Avatar

The authors, who have both worked in this type of environment for a long time, are supporters of the concept of e-courts generally.

However, it is important to acknowledge that the organisational, technical and human resources required to design, implement and support the functioning of an e-court are considerable. The infrastructure is expensive to install and manage and becomes obsolete quickly.

Another factor is the number of documents used in the case. The ICC took a policy decision at its inception that “in proceedings before the court, evidence ... shall be presented in electronic form whenever possible” – perhaps anticipating that they would be dealing with large volumes of evidence. However, even in cases with a small volume of electronically stored information, the e-court is always used. This is largely because the infrastructure is in place and the users – the judges, the prosecution and the registry – are familiar with and trust the system. Generally speaking, however, the larger the volume of documentary evidence, the more efficient it becomes to present and manage documents in an electronic format.

The question to be addressed is: what is the tipping point – 100 documents? 1,000? 15,000? This is a difficult question to answer, and the reality is that it is more intuitive than scientific. It was often said about the Bloody Sunday Inquiry that technology reduced the time spent in oral hearings by a third. Although this figure is not based on any empirical analysis, it reflects the perception that, in big cases – that is to say, cases with a large volume of documentary evidence – technology can speed up oral hearings and therefore reduce costs.

We mention the Bloody Sunday Inquiry because it is a good model for when it was useful to use the e-court model. There were multiple parties

involved during the oral hearings, a need to make the proceedings accessible to a wider audience, and a large number of documents. In the United States, it is often used in white-collar criminal cases and civil cases involving banks, pharmaceutical and energy companies. In fact, there is a growing body of knowledge internationally related to developing and implementing e-courts.

Last but not least, the nature of the evidence collected also plays an important role in the decision. Since the volume of evidence that is electronic in nature is increasing, there is a need to adapt the infrastructure to process it efficiently – that is, electronically.

The 13th floor

Will we see e-courts in Ireland? In short, the answer is yes, although it

may take some time. As previously mentioned, the Courts Service is already aware of the concept and, consequently, it forms part of their current strategic goal to see how technology can positively affect the administration of the courts.

In addition to offering a remedy to ‘big data’, technology will play a significant role in streamlining, standardising, and automating judicial procedures. This can reduce the time of proceedings, lower the costs in the mid and long term, and help increase the quality of decisions through improved access to information, increased transparency and accuracy.

The fact that an increasing amount of evidence will be created primarily in electronic form is another reason for the necessity to have e-courts in Ireland, if we are to process such cases in a timely, economical and effective manner.

There are numerous examples in other common law jurisdictions, especially Australia and the United States, of the model working well. Planners and policymakers in this country will not be obliged to re-invent the process

Governments are generally more constrained than industry in investing in development, but inevitably are forced to develop. Lawyers too are often accused

of being conservative and slow to change their habits.

However, now that support and back-office staff in the courts as well as in law firms are embracing IT developments, it is only a matter of time before it gets inside the courtroom. How soon it becomes a reality will largely depend on the emergence of someone or some group to champion the cause.

Minority report

What has changed in the decade since the Bloody Sunday Inquiry is that increased availability and use of (mobile) communication technologies and cheaper hardware costs have made the e-court more accessible to users and, in theory, the public. Any new developments to the physical infrastructure of our courts cannot ignore this.

Lawyers need to appreciate that the technology that exists in society is going to have an increasing impact on the nature of trials, and they will need to be able to comprehend this technology in order to litigate effectively and to present evidence in an appropriate form.

The technical challenges that come with the increased use of networked and mobile devices, but also the increased use of cloud storage solutions, will make prosecutions and litigation difficult without a modern judicial infrastructure capable of examining the data/evidence.

Therefore, the main driver of change will be the need to react to a changing world. Costs will be driven down and already we are seeing the emergence of open-source solutions that are very effective.

We believe that creating secure, easy-to-use, and efficient web-based courthouses and incentivising users to bring their own device to the courtroom could be a viable and efficient approach in implementing e-courts in this country. Pushing some of the costs to the users can be justified by the benefit gained.

Finally, any new systems introduced to the courts must meet the highest standards in terms of integrity, security and reliability to have the trust of all parties. The design, development and implementation will require effective change management, particularly senior-level support to manage all stakeholders and guide the project to success. Given the rapidly evolving nature of technology, an e-court must be capable of growth and development. Moreover, it should be compatible with the technology used by the parties and should be standardised throughout the entire country. **G**

“The technical challenges that come with the increased use of networked and mobile devices, but also the increased use of cloud storage solutions, will make prosecutions and litigation difficult without a modern judicial infrastructure capable of examining the data/evidence”



PIC: LENS MEN

To honour Galway-based solicitor Billy Glynn's year as president of the Irish Rugby Football Union, a dinner was held in Blackhall Place on 7 March 2013 – just two days prior to Ireland's draw with France in the final home match of this year's Six Nations Championship. Some guests were chosen by the Society. Some were chosen by Billy Glynn. All had played rugby at some level and were lifelong lovers of the game. A very special category was solicitors (together with one barrister who subsequently became a judge) who had worn the green jersey of Ireland. (*Seated, l to r*): Colin Patterson (won 11 caps for Ireland, 1978-80, and played in three tests for the Lions in South Africa in 1980), retired High Court Judge John Quirke (won three caps for Ireland, 1961-1968), president of the IRFU Billy Glynn, President of the Law Society James McCourt, retired Circuit Court Judge Frank O'Donnell, retired Dublin City sheriff Brendan Walsh and Donal Spring (won seven caps for Ireland, 1977-1981). (*Standing, l to r*): Trevor Ringland (won 34 caps for Ireland, 1981-1988 winning two Triple Crowns and toured New Zealand with the Lions in 1983), Brian Woodcock, former TD Tom Enright, director general Ken Murphy, Tony Ensor (won 22 caps for Ireland, 1972-1978), Donald Binchy and James MacGuill (both former presidents of the Law Society)



PIC: LENS MEN

The Society has always valued its relationship with the solicitor colleagues who have pursued careers as members of the Oireachtas. There are fewer in this Oireachtas than previously, which makes each solicitor TD or senator all the more important. At a dinner for a number of them recently were (*front, l to r*): Joanna Tuffy TD (Dublin Mid-West), Senator Colm Burke, Senator Catherine Noone, Law Society President James McCourt, Michelle Mulherin TD (Mayo), Charlie Flanagan TD (Laois Offaly) and Sean Conlan TD (Cavan Monaghan). (*Back, l to r*): Director general Ken Murphy, senior vice-president John P Shaw, deputy director general Mary Keane, junior vice-president Stuart Gilhooly, Kevin O'Higgins and Martin Lawlor (both Council members). Some solicitor TDs and senators were unavailable on the evening in question, including Minister for Justice Alan Shatter, who was abroad on official business

President meets Laois solicitors



James McCourt (Law Society President) and Eimear Dunne



At the Laois Solicitors' Association meeting at the Heritage Hotel on 13 March 2013 were (from l to r): Tom O'Grady, James McCourt (Law Society President), John White and Ken Murphy (director general)

ALL PICS: DENIS BYRNE PHOTOGRAPHY



Elaine Dunne, Gerard O'Donoghue, James McCourt (Law Society President) and Brian Hutchinson



Jim Binchy, James McCourt (Law Society President) and Vincent Garty

Win a two-night break at the Cliff House Hotel, Ardmore



Regarded as one of the finest smaller luxury five-star hotels in Ireland, the Cliff House Hotel in Ardmore, Co Waterford, is a 39-room Irish seaside boutique hotel on the south side of Ardmore Bay.

This privately owned hotel features an intimate destination spa, The Well – and a Michelin-star restaurant. All of its luxury rooms and suites are sea facing, while many are interconnected to provide family-friendly configurations.

Split-level, loft-style suites suggest the atmosphere of a chic, private home. Ground-floor living areas are accented with pieces from the hotel's collection of

original 18th century campaign furniture, including deep sofas and cosy fireplaces.

Upstairs, rooms are defined by their cliffside location, with floor-to-ceiling glass doors that open onto large private verandas. Huge stone baths are a novel feature, while glass-sided showers ensure that ocean views and fresh sea air are always present.

ANSWER THIS QUESTION

To win a mid-week, two-night break in the two-floored Cliff Veranda Suite, exclusive to readers of the *Law Society Gazette*, simply answer the following question: The Cliff House Hotel's executive chef,

Martijn Kajuter, is the driving force behind the hotel's Michelin-star restaurant, bar food and breakfast menus. What nationality is he?

The answer can be found at www.thecliffhousehotel.com. Answers should be emailed to gazettestaff@lawsociety.ie no later than Friday, 17 May 2013. The first correct entry drawn wins.

This prize is valid from Sundays to Thursdays inclusive; it is not valid during bank holidays or school-holiday periods and it expires on 15 December 2013.

More information on the stunning Cliff House Hotel can be found at www.thecliffhousehotel.com.

Irish Legal History Society celebrates Silver Anniversary

The Irish Legal History Society held its Silver Anniversary (spring) meeting in the debating chamber of the Graduates' Memorial Building of Trinity College Dublin on 15 February 2013. Chaired by the president, Robert D Marshall (solicitor), the society was pleased to welcome the Dr Patrick Hegarty (provost of TCD) and Thomas A Finlay who, as Chief Justice of Ireland, with the late Lord Lowry (then Lord Chief Justice of Northern Ireland), was patron of the society upon its foundation 1988.

The meeting was held in the format of the College Historical Society (the 'Hist'), which kindly lent the ballot box and auditor's bell for the occasion. Also present were Ken Murphy (director general of the Law Society), David Nolan SC (chairman of the Bar Council), Mark Mulholland QC (chairman of the Bar Council of Northern Ireland), Dr David McConnell (president of the Hist) and Prof



Daire Hogan delivers the 25th Anniversary address in TCD

Michael Laffan (UCD). The meeting was sponsored by the Law Society of Ireland and the Bar Council of Ireland.

'Curious incident'

The WN Osborough Composition Prize in Irish Legal History was inaugurated by the society in 2012 and the prize of €500 for the first bi-annual

completion was presented at the meeting to Dr Maebh Harding (solicitor) of Portsmouth University for her article entitled 'The Curious Incident of the Marriage Act (No 2) 1537 and the Irish Statute Book'.

Daire Hogan (solicitor and former president) addressed the society in a talk entitled 'I want the chancellorship. You can

get it for me" – James Campbell's path to judicial office, 1915-1918', in which he described, from vivid correspondence, how Campbell became the penultimate Lord Chancellor of Ireland.

A vote of thanks to Mr Hogan was proposed by Mr Justice Hardiman and seconded by Dr David Capper (QUB), the northern secretary of the society. The auditor of the Hist, Hannah MacCarthy, proposed the motion that the society was worthy of support, which was seconded by Dr Patrick Geoghegan, a vice-president of both the society and the Hist.

An enjoyable reception followed in the saloon of the Provost's House, where Dr Hegarty, in welcoming the society, spoke about a number of his predecessors who were lawyers.

The next meeting will be held at Stormont on Friday 8 November 2013.

ON THE MOVE

McCann FitzGerald appoints five new partners



McCann FitzGerald has appointed five new partners at the firm's Dublin offices. They are Joshua Hogan (banking and financial services), Richard Leonard (real estate), Jenny Mellerick (procurement), Rory O'Malley (corporate) and Lisa Smyth (restructuring and insolvency). This brings the total number of partners at the all-equity firm to 67

Leman welcomes Ursula Tipp



Ursula Tipp is the newest partner at Leman Solicitors and heads up the international business and tax team. Ursula joins Lemans from Byrne Wallace. As a dual-qualified German Rechtsanwältin and Irish solicitor, she has multijurisdictional experience, representing businesses from the US and Europe. She has practised in a number of law firms across Europe, EU institutions and a multinational company

Taking on the Ring of Kerry with the ring of confidence!

Members of Dublin law firm Leman will be taking to the roads (and lakes!) of Kerry in September for the 'Iron Leman' challenge, which is being held in aid of Youth Suicide Prevention Ireland.

Two teams will race against each other around the Ring of Kerry – by boat, bicycle and on foot – on 7 September 2013. They expect to cover a combined distance of 384km in an effort to raise €20,000 for the charity.

The firm will be covering the transport, logistics and accommodation costs, but are asking supporters to make a contribution by visiting www.yspi.eu/leman.

Supporters are being invited to sponsor a kilometre or more, at €25 per kilometre. For updates on the tally, follow Leman on Twitter (@LemanSolicitors) or 'like' them on Facebook. All sponsorship offers will be gratefully considered.



Participants in last year's 'Iron Leman' Malin to Mizen challenge were (from l to r): Larry Fenelon, John Walsh, Lisa Jackson, Orlaith Doorley, Sarah Keenan, Declan Tormey, Maria Edgeworth, Linda Hynes, Catherine Lyons, John Hogan, Gavin Bluett, Gearóid Grogan. Kerry beckons this year



Attending the closing reception for the Diploma in Aviation Leasing and Finance, run in collaboration with the Law Society Diploma Programme, the Law Society Finuas Network and the Aviation Finuas Network were (front, l to r): Noreen Fitzpatrick (Skillnets Ltd), Philip Shepherd QC and Marie O'Brien (A&L Goodbody). (Back, l to r): Michelle Nolan, (Law Society Finuas Network), Conor Stafford (Aircastle), William Johnston (Arthur Cox) and Julie Shackleton (Law Society Diploma Programme)



Terry Browne (country manager at Danske Bank) and Dr Eamonn Hall, chairman of the adjudication panel comprising 25 legal experts, have announced the shortlist for this year's Danske Bank Irish Law Awards, which will take place on 3 May in the Four Seasons Hotel, Dublin, hosted by Miriam O'Callaghan. For a full list of all categories and finalists, visit the awards website at www.irishlawawards.ie



The Law Society's rugby team recently overcame the King's Inns team on 22 February. The winning side conceded an early try but went on to win 22-13

ROSEMARY FALLON

1946 – 2013

Rosemary died on 6 March 2013 after a short illness, bravely borne, and is survived particularly by her loving brother, Joseph Dunne, to whom she was always affectionately 'Rolly'. Rosemary was the only member of staff to have worked with Eric Plunkett when he was secretary of the Society, and subsequently with three successive directors general: Jim Ivers, Noel Ryan and Ken Murphy. She retired in early 2012 after more than 40 years' service with the Law Society, many of them as its executive officer responsible for issuing annual practising certificates and overseeing the requirements for professional indemnity insurance. To the solicitors' profession and fellow staff alike, Rosemary will always be associated with that important area of the Society's regulatory functions.

Rosemary's death was a shocking tragedy, particularly when seen in the context of the very recent death (in October 2012) of her beloved husband Tom Fallon (barrister and former journalist). Tom's name was also long associated with the Society as counsel in disciplinary matters.

To all who personally knew her, Rosemary was the jewel in the crown of much collegiality and friendship. Those of us who



worked with her will remember those qualities that bonded us to her, including her playfully mischievous but totally innocent sense of fun. Some of us can still recall, many years later, our very

first meeting with her and the impact of her extraordinary grace and presence.

Those who have been lucky enough to have worked with her will know of her complete

integrity and her sensitivity to the needs of others. While she spared no effort in assisting anyone in need, she was always utterly fair, with a powerful sense of what was – and was not – right and just. She never showed any favouritism or bowed to any pressure to do so.

She was there for everybody, treating all with equal respect and dignity. Those in the Society whom Rosemary assisted, without anybody else's knowing about it, will remember her generosity and complete discretion.

Many will remember her with enduring gratitude as an exemplary mentor, who supported, encouraged and challenged them in their professional and personal development.

Others will remember her as a loyal confidante who had the character to keep her counsel.

Those fortunate to have worked with her beloved husband Tom, to whom the Society is also hugely indebted, recall that they were well matched in their respective work ethics. Both of them worked to the highest standards, with meticulous attention to detail and, never counting the hours, gave total commitment to the tasks at hand.

Rosemary was a very special person. We are better people for having known her.

VD

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The **Consult a Colleague helpline** is available to assist every member of the profession with any problem, whether personal or professional

THE SERVICE IS COMPLETELY CONFIDENTIAL AND TOTALLY INDEPENDENT OF THE LAW SOCIETY

JUDGE PATRICK KEENAN JOHNSON

1922 – 2013

Judge Patrick Keenan Johnson was born in Ballymote, Co Sligo, in 1922. He was the second youngest of six children and attended Ballymote National School, where he was taught by the late John A Barnes (father of former DPP Eamonn Barnes). At that time, very few children got the opportunity to avail of a second-level education. Keenan was fortunate that Master Barnes took a keen interest in his pupils and in developing their talents. Master Barnes tutored Keenan for his matriculation examination, which enabled him to proceed to university and study law in 1938 at the age of 16 years.

It is a notable achievement that Keenan went directly to university from national school, without ever attending secondary school. In 1939, he was awarded a silver medal in the Law Society Preliminary Examination. He qualified as a solicitor in 1943 and was awarded a special certificate in his final examination. As he was only 20 when he qualified, at that time he was still considered a minor, so he had to wait seven months post-qualification to reach his 21st birthday – then the age of majority – before setting up his own practice in Ballymote, with a sub-office in Riverstown.

In the early years, together with a group of friends, he took great delight in putting on shows featuring local artists. He wrote many of the comic sketches and sometimes rendered piano accompaniment. He married Helen Stephens in 1949 and they had five children. Keenan was devastated at Helen's untimely death after a short illness in 1966.



His deep religious conviction was his mainstay during this difficult and lonely period. He also immersed himself in his work and in providing support and guidance to his children.

In 1970, Keenan married Therese Campbell, the newly appointed district health nurse from Trillick, Co Tyrone. It was a whirlwind romance, with Keenan proposing after four weeks of courtship and marrying within five months. It proved to be a long and happy union. Keenan and Therese were blessed with two girls, Helen and Geraldine. Keenan was also blessed with ten grandchildren and four great-

grandchildren. He always said that Helen and Geraldine kept him young at heart, and he revelled in the fact that his daughters were the same age as his older grandsons.

Keenan always took a genuine interest in young people and was a great man to provoke debate and discussion with them. In later years, this was to prove an immense benefit to him and, following his retirement as a judge of the District Court, he went on to lecture and tutor law students at the Society's Law School.

Keenan was appointed a judge of the District Court in 1975 and, having spent a year as a moveable

judge, he was assigned to the then district of Rathfarnham and Dundrum. He was appointed to the District Court area of Waterford and Kilkenny in 1979 and served there until his retirement in 1992. In 1982, he was appointed a member of the Special Criminal Court.

While serving as a judge, Keenan was renowned for his energy as a worker and his keen interest in the law. He always liked to administer justice with compassion and humanity. Outside of the law, he continued to be involved in community activity and was a driving force behind the acquisition of a permanent residence for the Waterford charity, Children's Group Link. In his years working as a judge, Keenan realised that children from troubled backgrounds and difficult home environments needed the stability and consistency that organisations like Children's Group Link provide.

In 2005, he returned to his native Sligo, where he continued to enjoy a happy and fulfilled retirement. Fortunately, Keenan's final illness was relatively short and, though his passing leaves a huge gap in the lives of his family and friends, they have the consolation of knowing that he led a happy, complete and fulfilled life. He died on 23 February 2013, aged 90 years.

Our deepest sympathy goes to his wife, Therese; his daughters, Ann, Patricia, Helen and Geraldine; his sons, Brendan, Keenan and Hugh; and to his extended family.

Ar dbeis Dé go raibh a anam dílis.

TE T

Top marks for PPC1 trainees at annual awards reception

Eight trainees were crowned winners at the Law Society's annual awards reception on 19 February for the client consultation, negotiation and mediation competitions. Four trainees also received runners-up awards at the Blackhall Place ceremony.

Competition winners were presented with individual trophies, certificates and cheques to mark their achievements, and winners' names will be engraved on the various competition cups.

The awards reception was well-attended by training solicitors and by their parents, who travelled from as far afield as Clare and Cork to show their support for these up-and-coming solicitors.

Ciara Burke (Carmody & Company, Solicitors) and Fiona Shipsey (Hayes Solicitors) came first in the client consultation competition, beating 22 other teams to the top spot. Dónal Ó Néill (John Quigley & Co) and MacDara Norris (Crowley Millar) were runners-up.

This year's theme was 'Serious crimes against the person', and all teams performed well in grappling



with some difficult scenarios. Ciara and Fiona went on to represent Ireland at the Brown-Mosten International Client Consultation Competition, hosted by the University of Glasgow in April, which was won by students from Canada's Osgoode Hall Law School.

Vincent McConnon and Genevieve Ryan (Matheson) beat 17 other teams to claim first place in the negotiation competition.

Aisling O'Reilly (Maples & Calder) and Ciara O'Buachalla (William Fry) were declared runners-up.

Nine days after the awards reception, Vincent and Genevieve went up against King's Inns, NUI Maynooth and NUI Galway in the National Negotiation Competition – winning through to represent Ireland at the International Negotiation Competition in Chapman

University, California, from 1-5 July.

Last year also saw the introduction of a new legal skills event – the mediation competition. This competition involves a team of three trainees, with each one being assigned the role of client, solicitor advocate and mediator. The clients and solicitors seek a resolution to a fictional dispute with another client/solicitor pair, at which a pair of co-mediators seek to bring all parties to an amenable resolution.

Sizing Europe – ECtHR moot competition



PIG: COUNCIL OF EUROPE

The leading Irish team that represented Ireland at the Moot Court Competition at the European Court of Human Rights from 25-27 February were (l to r): Rian Derrig, Brian O'Beirne (coach), Hannah Hassell, Eileen Scollan and Laura Twomey

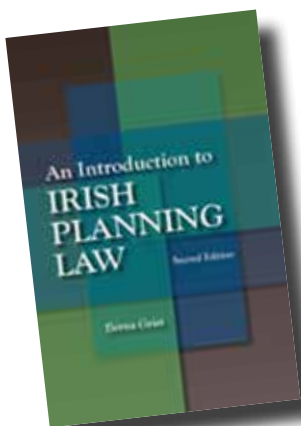
Unusual twist

In an unusual twist for the inaugural competition, two teams attained the exact same mark and were declared joint winners, namely: Christine O'Sullivan (Fagan Bergin), Aoife Redmond (Lavelle Coleman), Olivia Higgins (Keane Solicitors), Barry Connolly (Flynn O'Driscoll), Thomas Ryan and Fiachra Cork (ByrneWallace).

Both teams will go forward to represent Ireland at the 13th Annual International Law School Mediation Tournament in 2014, at a venue yet to be decided. This tournament is held under the auspices of the International Academy of Dispute Resolution (www.inadr.org). The Law Society had the privilege of hosting the 12th Annual Tournament from 11 to 15 March.

An Introduction to Irish Planning Law (2nd edition)

Berna Grist. Institute of Public Administration (2012), www.ipa.ie. ISBN: 978-1-9045-411-65. Price: €30 (incl VAT).



The author notes in the preface that changes to planning legislation in the recent past “have turned the acts and associated regulations into

a labyrinth to be negotiated solely by the valiant and then with considerable trepidation”. I wholeheartedly agree. *An Introduction to Irish Planning Law* goes a way towards providing a comprehensive review for practitioners and students that is well referenced and gives effective signposting for those wishing to do further research.

The book starts with a short introductory chapter that sets out the Irish and European legislative framework. The following chapters give a short review of development plans, local area plans, regional planning guidelines and planning policy – giving an interesting and

informative review of the role of national and local policy, which the practitioner would do well to consider in any planning issue.

The book then goes into the ‘nuts and bolts’ of planning, with short chapters on planning permission, appeals and judicial review, exempted development, enforcement and compensation. Dr Grist also covers strategic infrastructure applications and strategic development zones.

Of particular interest is the chapter ‘Planning for conservation’, where Dr Grist outlines the basic principles of conservation and explains the requirements of environmental impact assessment, strategic

environmental assessment, and appropriate assessment in the planning process.

I particularly liked the concluding chapters, which review relevant legislation, unfinished housing estates, and future developments in the area of planning law, confirming that this area of the law still remains a political football. For practitioners, this is a useful publication to have at hand, and I am quite happy that it is now on my bookshelf!

Yvonne Kelly is a senior executive solicitor in Dublin City Council.

Intellectual Property Law

Eva Nagle. Thomson Reuters (2012), www.roundhall.ie. ISBN: 978-1-8580-067-10. Price: €225 (hardback, incl VAT).

The increasing prominence and mainstream prevalence of aspects of intellectual property law in legal practice has been palpable over the past two decades. So, too, has the proliferation of legal books, either on individual topics within intellectual property law or in relation to the overarching topics in broad terms. *Intellectual Property Law* by Eva Nagle falls into this latter category.

Within its 441 pages and 15 chapters, the author covers the key headline areas, together with useful treatment of ancillary topics. The first four chapters consider the nature of copyright, ownership and authorship, infringement and defences thereto. Ever the ‘ugly duckling’ of intellectual property topics, design merits a solitary chapter that usefully summarises

the relevant concepts and will, hopefully, see expansion in future editions.

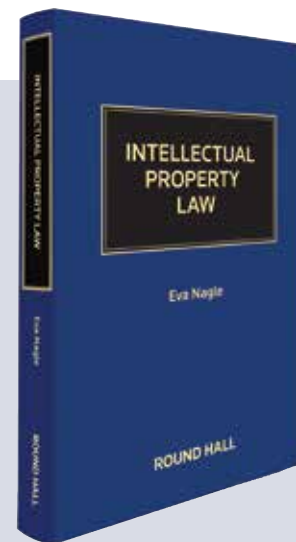
A further four chapters detail the law in relation to trademarks, discussing registrability and use, before concluding with a particularly helpful chapter pertaining to the principles that may arise whether taking or defending infringement actions. Two chapters examine patents, again from the perspectives of registrability and infringement actions.

The foregoing is undoubtedly the *sine qua non* of any broad book on intellectual property law. However, merely noting that those core topics are covered does not do justice to the work of the author in setting out each of these topics in a logical, cohesive manner, building from general overviews through to

detailed analysis. Perhaps the key feature of this book is its impressive balance between accessibility and relevant detail.

Other features are worthy of note. The author has provided three chapters relating to allied issues, namely passing off; endorsement, personality merchandising and character merchandising; and breach of confidence. In addition, the final chapter of the book provides helpful guidance regarding enforcement and remedies, including consideration of transnational jurisdictional issues that will be of interest to practitioners. Finally, the table of cases runs to 16 pages across 14 jurisdictions, which aptly demonstrates the authoritative nature of the text.

Where other books have focused



on capacious depth, this author has opted for extensive breadth and has crucially so done without comprising vital content. She has written, in an accessible manner, a worthy tome that will be of benefit to any practitioner in the field of intellectual property law.

Richard Hammond is partner in Hammond Good, Mallow. ©

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A website run by the UCC law faculty aims to be a very useful resource to help you to keep abreast of Irish law journal contents

UCC's Irish Legal Information Initiative (www.legalperiodicals.org) seeks to complement its contribution to BAILII (British and Irish Legal Information Institute) and IRLII (Irish Legal Information Institute). It contains an index to Irish legal periodicals from 1997 (some earlier!) to date. Links are provided to online articles where copyright permission allows.

Journals indexed total 27 Irish titles, including mainstream journals such as *Commercial Law Practitioner*, *Dublin University Law Journal*, *Irish Employment Law Journal*, *The Irish Jurist* and your *Gazette*!

You can use the index by selecting a



journal title from the menu and browsing volume contents, or you can search with keywords.

JUST PUBLISHED

New books available to borrow

- Anderson, Mark and Victor Warner, *A-Z Guide to Boilerplate Commercial Clauses* (Bloomsbury Professional, 2012)
- Arthur Cox *Employment Law Yearbook 2012* (Bloomsbury Professional, 2013)
- Brownlie, Ian, *Principles of Public International Law* (8th ed; Oxford University Press, 2012)
- Bullen & Leake & Jacob's *Precedents of Pleadings* (17th ed; Sweet & Maxwell, 2012)
- Byrne, Raymond and William Binchy, *Annual Review of Irish Law 2011* (Round Hall, 2012)
- Cartwright, John, *Misrepresentation* (Sweet & Maxwell, 2012)
- Gale, Charles James, *Gale on Easements* (19th ed; Sweet & Maxwell, 2012)
- Kingston, Suzanne, *European Perspectives on Environmental Law and Governance* (Routledge, 2013)
- Lewis, Amanda, *Business Services, Partnering and Outsourcing Contracts: a Practical Guide* (4th ed; Thomson Reuters, 2012)
- Petersen, Andrew V, *Commercial Mortgage Loans and CMBS: Developments in the European Market* (Sweet & Maxwell, 2012)
- Sara, Colin, *Boundaries and Easements* (5th

ed; Sweet & Maxwell, 2011)

- Sinclair, Neil, *Sinclair on Warranties and Indemnities on Share and Asset Sales* (8th ed; Sweet & Maxwell, 2011)
- Spierin, Brian, *Wills: Irish Precedents and Drafting* (2nd ed; Bloomsbury Professional, 2013)
- Toulson, RG and CM Phipps, *Confidentiality* (3rd ed; Sweet & Maxwell, 2012)

New e-books available to borrow – contact the library for login details

- Ashford (ed), *The IBA Rules on Taking Evidence in International Arbitration* (Cambridge University Press, 2013)
- Harrison, Karen and Nicholas Ry, *The Law Relating to Financial Crime in the United Kingdom* (Ashgate, 2012)
- Loughrey, J, *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar, 2012)
- Matrisian, Matt, *The Power of Practice Management* (John Wiley & Sons, 2013)
- Monopoli, Paula, *Law and Leadership* (Ashgate, 2012)
- Susskind, Richard, *Tomorrow's Lawyers* (Oxford University Press, 2013)

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10/11 May	Law Society Annual Conference: Presented in partnership with Law Society Skillnet - Hotel Europe Killarney	For full details and to register contact lawsociety@ovation.ie		3 General (by Group study) - 10 May 3 General (by Group study) - 11 May
17 May	The New Companies Bill - Demystified. Law Society Business Law Committee in partnership with Law Society Professional Training	€147	€196	3 General (by Group study)
23 May	Tactical Negotiation Skills	€105	€140	3 M & PD Skills (by Group study)
21 May - 25 June	Post-Graduate Certificate in Learning Teaching and Assessment in partnership with DIT and the Law Society Skillnet	€896	€1,280	Full CPD requirement for 2013 (including M & PD and Regulatory Matters)
May	Job Seeker Support Programme Law Society Skillnet: <i>Personal Injury/Medical Negligence/Civil Litigation Course</i>	Free for Eligible Jobseekers. Contact jssp@lawsociety.ie		
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14 June	North/South CPD Forum - Legal Issues of Mutual Interest in partnership with Law Society Professional Training, Cavan Solicitors' Bar Association, Drogheda Solicitors' Association, Louth Solicitors' Bar Association - Nuremore Hotel, Monaghan	€102	€136	5 General plus 1 Regulatory Matters (by Group Study)
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5 - 12 July	Certificate in Civil Litigation Updates in partnership with the Law Society Diploma Programme and the Law Society Skillnet	€900	€1,200	Full CPD requirement for 2013 (provided relevant sessions attended)
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Law Society Council meetings 22 February and 5 April 2013

Court jurisdictional changes

Serious concerns were expressed by a number of Council members regarding the dramatically increased workload that would be placed on the Circuit and District Courts as a consequence of the proposed increases in jurisdictions contained in the *Courts Bill 2013*. The view was expressed that more judges and court staff would unquestionably be required in order to avoid increases in the delays that already existed in both courts and which would be greatly exacerbated by the changes. It was agreed that the president should write to the minister requesting that the Government would provide the resources necessary to make the changes in jurisdiction work and to make no increase in the jurisdictional limits until the necessary resources were available. Failing this, the proposed increases should be reduced to the levels recommended by the Law Reform Commission in its 2010 report.

Specialist judges of the Circuit Court

The Council discussed correspondence between the president and the minister regarding the pending appointment of specialist judges of the Circuit Court to deal with cases under the *Personal Insolvency Act 2012*. The president had expressed the Society's concerns that the appointments were to be made solely

from the ranks of county registrars rather than the wider pool of practising solicitors. The minister's response had focused on the desire to provide extra judicial resources at little or no cost. It was agreed that the president should reiterate the Society's concerns and request a response to the principle expressed in his earlier letter.

Professional indemnity insurance

Stuart Gilhooly reported that the members' survey on PII had indicated a significant improvement in the most recent renewal process, with a reduction in premiums of an average of 23%.

Garda interviews

The Council discussed the practical and cost issues that would have to be considered by the working group being established by the minister to advise on a system providing for the presence of a legal representative during garda interviews.

Delays in taxation of costs

The Council discussed the serious delays that were arising in relation to matters being heard by the taxing masters, which were causing significant difficulties for practitioners and businesses around the country. For a myriad of reasons, the pressure on both taxing masters was considerable, and significant backlogs were building up.

It was agreed that the president should write to the Minister for Justice seeking the appointment of a third taxing master.

Anti-money-laundering

The Council was briefed on the contents of the *Fourth Anti-Money-Laundering Directive*, which had been published on 5 February, together with the proposed response of the CCBE to its provisions.


Future of the Law Society Task Force

At its meeting on 5 April, the Council approved the report and recommendations of the Future of the Law Society Task Force, which had been appointed by the Council with the following terms of reference: "In light of the contents of the *Legal Services Regulation Bill*, to consider the ongoing role to be played by the Law Society, its functions in promoting the solicitors' profession, and in continuing to safeguard the public interest and to make recommendations to the Council in relation to same."

The Council noted that the task force had consulted with representatives of 24 bar associations and that an independent research agency had surveyed the views of the entire profession through an online survey and telephone interviews. The survey was the most comprehensive survey of attitudes

and views of members of the profession in Ireland ever undertaken. The task force had also conducted comprehensive research into the activities of other law societies and had examined the Society's governance, following meetings with each of the Society's directors to learn more about how the Society delivers its core functions.

A number of clear messages had emerged from the task force's research, which indicated that the profession wanted the Society to re-balance its objectives to put more emphasis on representation. In addition, the task force's research indicated a need for the Society to strengthen its communication function and had also identified a number of measures to improve the way the Society does business.

The task force had acknowledged that the implementation of its report would have cost implications for the Society, as would the implementation, in due course, of the *Legal Services Regulation Bill*. The Council endorsed the unanimous view of the task force that the Society has an obligation to ensure that these cost implications are minimised. The Council approved the report of the task force on the basis that the cost of implementing its recommendations could be met from current resources, without any increase in the practising certificate fee. 



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Practice direction

Practice direction for Dublin, Midlands and South Eastern Circuits

A working group was established in November 2011 to identify and report on efficiency measures in the criminal justice system in respect of the Circuit Court and District Court. It was established at the request of Chief Justice Denham and Minister for Justice and Equality Alan Shatter. The workings of the group culminated in the signing of the practice direction in Dublin by the President of the Circuit Court on 17 October 2012, in the Midlands by Judge Hunt on 6 November 2012, and in the South Eastern Circuit by Judge Alice T Doyle on 13 December 2012. The practice direction seeks to avoid unnecessary delays, identify cases in which a plea could be entered at an earlier stage, and facilitate commencement of trials on the trial date.

Practice direction in Dublin

The practice direction in Dublin came into effect on 1 January 2013 and, in many ways, it is seeking to recalibrate the work practices of all criminal practitioners in Dublin. A pre-trial hearing will take place on a Friday at least four weeks prior to the trial date. Since October, when a trial date is fixed, the Circuit Court in Dublin has been fixing (in anticipation of the practice direction) a pre-trial hearing date. This, in essence, requires both the prosecution and the defence to more or less be at the same stage of preparation for a trial as they actually would be on the morning of a trial.

By 'moving the goalposts' forward by a month, unnecessary adjournments should be avoided. The pre-trial hearing should help eliminate issues such as last-minute disclosure requests or last-minute service of additional evidence, which can lead to trials being adjourned. It now means the defence have to take instructions from their client at least a month

prior to the trial date, because the accused will be formally arraigned at this pre-trial hearing. Under the old system, approximately 50% of accused entered a plea on the morning of the trial, and we would expect the vast majority of these cases now to enter the plea at the pre-trial hearing date.

The practice direction also provides for the assigning of a specific mention date on a Friday in the Circuit Court, not less than three weeks after the return for trial. Under the old system, we sought a return to the present or next sittings, and the gardaí had to caution the accused once the Courts Service provided the DPP's Office with a date, which often led to adjournments, as the accused could not be cautioned.

The practice direction further provides that "guilty pleas will be accepted on the first mention date" and that "the court will fix an arraignment date not less than eight weeks later, by which time all usual pre-arraignment matters must be dealt with and a plea must be entered or a trial date requested. In more complex cases, a longer adjournment can be requested, but no further mention dates will be requested, save in exceptional circumstances."

This clearly puts pressure on the prosecution, and we have revised our work practices accordingly. We have introduced the following new procedures:

- 1) All section 56 orders are sought in the District Court when the DPP directs trial on indictment. Section 56 of the *Criminal Justice Act 2007* says that a copy of the recording of the interview with the accused can be given to the defence only where the court has so ordered. Historically, on the first mention date in the Circuit Court, defence counsel asked for a section 56 order and the matter was remanded to a further date.

- 2) Once a case is proceeding on indictment, we write to An Garda Síochána requesting all secondary disclosure that the defence normally requests after the return for trial. We would hope to be in a position to provide all primary and secondary disclosure prior to the first mention date, and certainly in advance of the arraignment date. This change moves the goalposts forward in respect of disclosure by two to three months.

- 3) We now write to the defence solicitors after the first mention date, drawing their attention to section 29 of the *Criminal Justice Act 1999*, which essentially sets out that a court shall take into account, in sentencing an accused, the stage at which the accused entered a plea of guilty.

The pre-trial hearing in Dublin

At the time of writing this article, 17 pre-trial hearings have taken place. To date, pleas of guilty have been entered in four cases, hearings have been confirmed in six, and adjournments have been granted in seven cases. While it is acknowledged that this is a very small number and, therefore, may not be representative, it translates as 24% pleas, 35% hearings and 41% adjournments. Half of the adjournments have been requested by the defence. Both pleas of guilty and adjournments generate savings for An Garda Síochána.

I believe that, over time, a tweaking of the questions might be desirable to make it more user-friendly for practitioners. In my view, some of the questions are too prescriptive and there are some questions that could have been omitted. It is running as a pilot scheme for a year, and I think all parties to the hearings should not be afraid to suggest incremental improvements as to how the hearings are conducted, and

raise issues if they consider them relevant.

The pre-trial hearing is attended by the accused and a legal representative of both the prosecution and defence. At the hearing, the accused is required to enter a formal plea before the court and, if it is intended to proceed to trial at that stage, a plea to one count without prejudice will suffice. This is an important aspect of the pre-trial hearing and was not part of the working group's original plan. It subsequently emerged as an idea to ensure that the defence would engage with the process.

There are a number of issues that the prosecution must address at the pre-trial hearing. These are:

- a) An indication whether section 21 notices have been served and are being relied upon,
- b) An indication under section 22 whether a formal admission is being made or relied upon,
- c) Whether there is any CCTV or video-link requirements or whether there is a use of a possible intermediary,
- d) Does the complainant require representation under section 4 of the *Criminal Law (Rape) Act 1981*?
- e) Are there any witness difficulties?
- f) Are there any requirements for interpreters?
- g) Are there any outstanding disclosure requests?
- h) Has the prosecution engaged with the defence with a view to agreeing memorandums of interview?

The requirements in relation to the defence are arguably less onerous. They are:

- a) Are there any factors affecting the possibility of the trial not proceeding (to prevent applications for adjournment on the morning of trial)?
- b) Are there any outstanding dis-

closure requests?

- c) Will interpreters be required and, if so, will the defence be in a position to indicate same?
- d) If there is confirmation that any requirements might affect the running of the trial (like the need for CCTV or an interpreter), that this would be attended to by the defence.

Given that their client will now be arraigned, the defence has to engage with the client and take instructions a month prior to the trial date.

No additional fee is payable, as there is no additional work for either side, as the pre-trial procedure merely requires that existing work that would have been completed at a later stage is concluded earlier in the process. By streamlining the dates to one mention date and one arraignment date, superfluous mention dates have been eliminated.

Suggested areas for the expansion of the pre-trial hearing

- a) Applications to sever the indictment could be made at the pre-trial hearing,
- b) Applications in relation to fit-

ness to be tried could be made at the pre-trial hearing,

- c) Imputations as to character – the defence requirement to give seven days' notice to the prosecution pursuant to section 33 of the *Criminal Procedure Act 2010* could be extended to 28 days notice prior to the pre-trial hearing,
- d) Expert evidence adduced by the defence pursuant to section 34 of the *Criminal Procedure Act 2010*. The defence requirement to give ten days' notice to the prosecution could be extended to 28 days notice prior to the pre-trial hearing.

Midlands and South Eastern Circuit

The questionnaire for practitioners on circuit is to be completed and be returned to the Circuit Court office in the county in which the proceedings are listed for trial, and a copy served on the other side not later than one month before the date fixed for trial. The questions for the prosecution are the same as those asked in Dublin. The defence is asked, in addition to the questions on the Dublin questionnaire, about the

memos of interview. This question, I think, should also be on the Dublin questionnaire.

Reform of the pre-trial procedure

While the initiative is to be welcomed, the pre-trial hearing and questionnaire will, undoubtedly, require practitioners to re-calibrate their work practices by moving the goalposts to a month prior to the trial date. I feel that the real strength of the practice direction in Dublin is the fact that all parties are in court and the accused is formally arraigned.

Accordingly, and while I appreciate it may be more difficult to engineer outside of Dublin, it would be immensely beneficial if the time could be found, say a month before the trial date, to conduct a full pre-trial hearing. Furthermore, it may be preferable to fix the pre-trial hearings to two months prior to the trial date, so that, if a trial date is vacated, there is time to fill the vacated trial date with another trial.

Ronan O'Neill is head of the Circuit Criminal Trials Section, Office of the Director of Public Prosecutions.

Dublin Circuit: assignment of hearing dates

FAMILY AND CHILD LAW COMMITTEE

Solicitors are reminded that, not alone are hearing dates assigned from the list to fix dates in the court, but also dates are assigned in the case progression process by the county registrar. Practitioners are encouraged to, if possible, agree in advance with their opposing solicitor on possible dates for the hearing of the case.

Following recent discussions with county registrar Susan Ryan, it appears that a considerable amount of difficulty is being caused in the administration of the lists by solicitors coming in and seeking to vacate dates already assigned. This is particularly true if there is only a short time to the hearing date. Ⓜ

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Certificate in District Court Advocacy	Saturday 13 April	€1,160
Certificate in Civil Litigation Updates <i>(new)</i> <i>(Friday 5 July, Saturday 6 July, Thursday 11 July, Friday 12 July, assignment due date 26 July)</i>	Friday 5 July	€1,200**
Certificate in Intellectual Property Rights Management <i>(new)</i> <i>(intensive one week course)</i>	Monday 15 July to Friday 19 July	€1,200

(*) Fees quoted are for solicitors. Non-legal personnel are subject to an application process and supplemental fee.

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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 Brian Johnston, a solicitor formerly practising as Brian Johnston & Co, Solicitors, 79 Park Street, Dundalk, Co Louth and in the matter of the *Solicitors Acts 1954-2008* [6927/DT65/10 and High Court record no 2013/1 SA]

Law Society of Ireland (applicant) Brian Johnston (respondent solicitor)

On 16 November 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to honour an undertaking to pay a named lending institution the net funds due to be paid by his clients by Tipperary County Council under the terms of the compulsory purchase order,
- b) Failed to adequately respond to the Society's correspondence and, in particular, letters dated 1 December 2009 and 5 January 2010 respectively.

The tribunal ordered that the matters go forward to the High Court, and the President of the High Court, on 21 January 2013, made the following orders:

- 1) That the name of the respondent solicitor shall be struck from the Roll of Solicitors,
- 2) That the Society do recover the costs of the Solicitors Disciplinary Tribunal when taxed or ascertained,
- 3) That the Society do recover the costs of the High Court proceedings when taxed or ascertained.

In the matter of Brian Johnston, a solicitor formerly practising as Brian Johnston & Co, Solicitors, 79 Park Street, Dundalk, Co Louth and in the matter of the *Solicitors Acts 1954-2008* [6927/DT78/09 and High Court record no 2013/2 SA]

Law Society of Ireland (applicant) Brian Johnston (respondent solicitor)

On 16 November 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) Failed to comply with instructions from the bank to ensure the bank obtained good and marketable title to properties and that the bank's security was in place,
- b) Informed the bank in letters dated 14 August 2006, 15 August 2006, 18 August 2006 and 19 February 2007 that security requirements had been fulfilled, that the borrower had good marketable title to the properties over which it was anticipated that the bank would have a fixed charge, and that the bank's security was in order, when this was not the case,
- c) Failed to adequately reply to the bank and the complainant in relation to the security position of properties to which the bank had loaned approximately €7 million,
- d) Failed to reply to correspondence from the Society dated 7 April 2008, 23 April 2008, 6 May 2008, 23 May 2008, 13 October 2008 and 23 October 2008,
- e) Failed to comply with a direction of the Complaints and Client Relations Committee made at its meeting of 3 September 2008 to respond within 48 hours,
- f) Failed to comply with a direction of the Complaints and Client Relations Committee at its meeting held on 7 October 2008 to send copies of the mortgages lodged at the Land Registry to the complainant,
- g) Stated in a letter to the Society dated 29 September 2008 and to the Complaints and Client Re-

lations Committee at its meetings held on 7 October 2008 and 11 November 2008 that deeds of charges were lodged at the Land Registry for registration, when this was not the case,

- h) Failed to comply with a direction of the Complaints and Client Relations Committee made at its meeting held on 11 November 2008 to respond to the Society within 48 hours of the meeting to provide confirmation of the charges lodged in the Land Registry.

The tribunal ordered that the matters go forward to the High Court, and the President of the High Court, on 21 January 2013, made the following orders:

- 1) That the name of the respondent solicitor shall be struck from the Roll of Solicitors,
- 2) That the Society do recover the costs of the Solicitors Disciplinary Tribunal when taxed or ascertained,
- 3) That the Society do recover the costs of the High Court proceedings when taxed or ascertained.

In the matter of Brian Johnston, a solicitor formerly practising as Brian Johnston & Co, Solicitors, 79 Park Street, Dundalk, Co Louth and in the matter of the *Solicitors Acts 1954-2008* [6927/DT113/10; 6927/DT114/10; 6927/DT117/10 and High Court record no 2013/9 SA]


Law Society of Ireland (applicant)

Brian Johnston (respondent solicitor)

On 31 July 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

- a) **6927/DT113/10** – failed to reply adequately or at all to correspondence from the Society and, in particular, letters dated 29 May 2009, 5 August 2009, 25 September 2009, 28 October 2009, 9 February 2010 and 2 March 2010,
- b) **6927/DT114/10** – failed to reply adequately or at all to correspondence from the Society and, in particular, letters dated 29 May 2009, 5 August 2009, 25 September 2009, 28 October 2009, 9 February 2010 and 2 March 2010,
- c) **6927/DT117/10** – failed to reply adequately or at all to correspondence from the Society and, in particular, letters dated 29 May 2009, 5 August 2009, 25 September 2009, 9 February 2010 and 2 March 2010.

The tribunal ordered that the matters go forward to the High Court, and the President of the High Court, on 18 February 2013, made the following orders:

- 1) That the name of the respondent solicitor shall be struck from the Roll of Solicitors,
- 2) That the respondent solicitor do pay the Society the costs of the Solicitors Disciplinary Tribunal in each of the three applications, to be taxed in default of agreement,
- 3) That the Society do recover the costs of the High Court proceedings against the respondent solicitor, to be taxed in default of agreement. 

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BRIEFING

Legislation update 12 March – 8 April 2013

Details of all bills, acts and statutory instruments since 1997 are on the library catalogue – www.lawsociety.ie (members' and students' areas) – 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

ACTS PASSED

Child Care (Amendment) Act 2013

Number: 5/2013

Amends section 17(2)(a) of the *Child Care Act 1991* to provide that the maximum duration of an interim care order (where parental consent has not been provided) is increased from 28 days (as amended by section 267 of the *Children Act 2001*) to 29 days. Amends section 17(2)(b) of the act to provide that where there is Health Service Executive (HSE) and parental consent, the duration of an interim care order can exceed 29 days. Also provides that the maximum duration of an extension to an interim care order (where HSE and parental consent has not been provided) is increased from eight days to 29 days.

Commencement: 13/3/2013

Electoral (Amendment) (Dáil Constituencies) Act 2013

Number: 7/2013

Provides for the number of members of Dáil Éireann, for the revision of constituencies, and for the number of members to be elected for such constituencies. Implements the recommendations of the Constituency Commission Report 2012, *Dáil and European Parliament Constituencies* (Prn A12/0834), which was established under the *Electoral Act 1997* to report on the constituencies in light of the results of the 2011 census.

Commencement: 20/3/2013

Finance Act 2013

Number: 8/2013

Provides for the imposition, repeal, remission, alteration and regulation of taxation, of stamp duties, and of duties relating to excise, and otherwise makes further provision in connection with

finance including the regulation of customs.

Commencement: Various dates (see act)

Finance (Local Property Tax) (Amendment) Act 2013

Number: 5/2013

Amends part 2 of the *Finance (Local Property Tax) Act 2012* by providing exemptions from local property tax for residential properties used by a charitable body for recreational activities connected with its charitable purpose and for residential properties purchased or adapted for occupation by permanently and totally incapacitated individuals. Also amends part 2 of the *Finance (Local Property Tax) Act 2012* to provide an exemption for a temporary period of at least three years for residential properties that have been affected by a significant level of pyrite-induced damage. Provides for related matters.

Commencement: 13/3/2013

Health (Alteration of Criteria for Eligibility) Act 2013

Number: 10/2013

Amends the *Health Act 1970* to change the eligibility rules for medical cards for persons aged 70 years and over; provides for the furnishing of personal data in certain circumstances and provides for related matters.

Commencement: Commencement order(s) to be made as per section 1(3) of the act

Motor Vehicle (Duties and Licences) Act 2013

Number: 9/2013

Sets out the legislative basis to the increases in motor tax rates and trade plate licences contained in the financial resolution passed by Dáil Éireann on 6/12/2011. Amends and extends the *Finance*

(*Excise Duties*) (*Vehicles*) *Act 1952* and the *Finance (No 2) Act 1992*, and provides for related matters.

Commencement: Sections 3 to 5 apply as respects licences taken out, under section 1 of the *Finance (Excise Duties) (Vehicles) Act 1952* or, as the case may be, the provision concerned of the *Finance (No 2) Act 1992*, for period beginning on or after 1/1/2012 (per section 2 of the act); 2/4/2012 for section 1 and section 6; 1/5/2012 for section 7(1) (per section 7(2) of the act)

Water Services Act 2013

Number: 6/2013

Makes provision in relation to the installation and maintenance of water meters in dwellings; for that purpose provides for the formation of a subsidiary company, Irish Water, by Bord Gáis Éireann and the performance of certain functions under the *Water Services Act 2007* by Bord Gáis Éireann and Irish Water; amends the *Gas Act 1976* and the *Water Services Act 2007*; provides for the collection of certain information by Bord Gáis Éireann and Irish Water; and provides for related matters.

Commencement: Commencement order(s) to be made as per section 1(2) of the act

SELECTED STATUTORY INSTRUMENTS

Circuit Court Rules (Recording of Proceedings) Rules 2013

Number: SI 100/2013

Inserts a new order 67A in the *Circuit Court Rules* to provide for the procedure regulating the making of, and application for access to, a record made of court proceedings, including an audio recording.

Commencement: 23/3/2013

District Court (Recording of Proceedings) Rules 2013

Number: SI 99/2013

Inserts a new order 12B in the *District Court Rules* to provide for the procedure regulating the making of, and application for access to, a record made of court proceedings, including an audio recording.

Commencement: 23/3/2013

Rules of the Superior Courts (Order 123) 2013

Number: SI 101/2013


Amends order 123 of the *Superior Court Rules* to provide for the procedure regulating the making of, and application for access to, a record made of court proceedings, including an audio recording.

Commencement: 23/3/2013

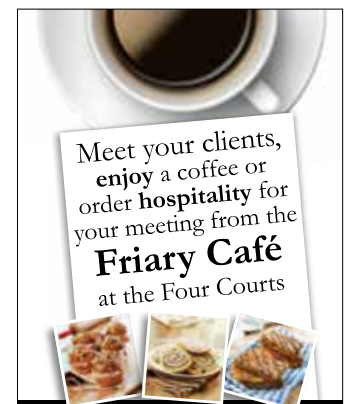
Rules of the Superior Courts (International Criminal Court Act 2006) 2013

Number: SI 117/2013

These rules amend the title and rule 1 and insert a new part IX into order 98; substitute part VI of order 136; insert forms 14 to 18 inclusive and amend the title of appendix AA of the *Rules of the Superior Courts* to regulate the procedure in the High Court under part 3 of the *International Criminal Court Act 2006* for the issue of arrest warrants under section 20, provisional arrest warrants under section 22 and surrender orders under section 25, and to provide for procedure under part 4 of the *International Criminal Court Act 2006* in relation to applications to the High Court for the issue of a freezing order under section 38 and the discharge or variation of such an order under that section, for the issue of an enforcement order under section 40, and for the appointment of a receiver under sections 38 and 41.

Commencement: 18/3/2013 

Prepared by the
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One to watch: new legislation

National Vetting Bureau (Children and Vulnerable Persons) Act 2012

The *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* was enacted by the Oireachtas on 26 December 2012. The act aims to make provision for the protection of children and vulnerable persons and provides for the establishment and maintenance of a database system to be known as the National Vetting Bureau (Children and Vulnerable Persons) Database System. The act also provides for establishment of a system of procedures for vetting disclosures in respect of certain work or activities.

Vulnerable person

Section 2 defines a 'vulnerable person' as a person, other than a child, who:

- a) Is suffering from a disorder of the mind, whether as a result of mental illness or dementia,
- b) Has an intellectual disability,
- c) Is suffering from a physical impairment, whether as a result of injury, illness or age, or
- d) Has a physical disability, which is of such a nature or degree:
 - i) As to restrict the capacity of the person to guard himself or herself against harm by another person, or
 - ii) That results in the person requiring assistance with the activities of daily living including dressing, eating, walking, washing and bathing.

Database system

Section 6 of the act provides for the establishment by the chief bureau officer of a database system. The act

provides that the database shall be comprised of three registers:

- 1) The register of relevant organisations,
- 2) The register of specified information,
- 3) The register of vetted persons.

Relevant organisation

Section 2 defines a 'relevant organisation' as a person (including a body corporate or an unincorporated body of persons):

- a) Who
 - i) Employs (whether under contract of employment of otherwise) any person to undertake relevant work or activities,
 - ii) Enters into a contact for services with any person for the provision by that person of services that constitute relevant work or activities,
 - iii) Permits any person (whether or not for commercial of any other consideration) to undertake relevant work or activities on the person's behalf,
 - iv) Is a provider of courses of education or training, including internship schemes, for persons and, as part of such education or training or scheme, places or makes arrangements for the placement of any person in work experience or activities where a necessary part of the placement involves participation in relevant work or activities.
- b) Who carries on the business of any employment agency within the meaning of the *Employment Agency Act 1971* for the employment of persons to undertake relevant work or activities.

- c) Established by or under an enactment (other than the *Companies Acts*) whose functions include the regulation, registration, licensing or other authorisation of persons who undertake relevant work or activities.
- d) Who represents for the purposes of the vetting procedures under this act, another person, trade, profession or body, organisation or group or other body of persons that undertakes relevant work or activities.

Specified information

'Specified information' is defined under section 2, in relation to a person who is the subject of an application for vetting disclosure, as information concerning a finding or allegation of harm to another person that, if received by the bureau from:

- a) The Garda Síochána pursuant to an investigation of an offence or pursuant to any other function conferred on the Garda Síochána by or under any enactment or the common law, or
- b) A scheduled organisation pursuant to subsection (1) or (2) of section 19, in respect of a person and which is of such a nature as to reasonably give rise to a bona fide concern that the person may:
 - i) Harm any child or vulnerable person,
 - ii) Cause any child or vulnerable person to be harmed,
 - iii) Put to harm any child or vulnerable person, or
 - iv) Incite another person to harm any child or vulnerable person.

Functions of the bureau

The bureau shall perform the following functions in relation to the provision of vetting services:

- a) The consideration and processing of applications for vetting disclosure received by it from relevant organisations registered in the register of relevant organisations,
- b) The making of such enquiries within the Garda Síochána as the bureau deems necessary to establish whether there are any criminal records or specified information relating to persons who are the subject of applications for vetting disclosure,
- c) The examination of the database to establish whether it contains particulars of specified information relating to persons concerned,
- d) The making of such enquiries as the bureau deems necessary for the purposes of establishing the identity of the persons concerned,
- e) The assessment for the purposes of disclosure (or otherwise) of specified information relating to the persons concerned for the purposes of determining whether or not it should be disclosed,
- f) The making of such enquiries of scheduled bodies or the Garda Síochána, as the case may be, as the bureau deems necessary for the purposes of assessing certain information relating to the persons concerned,
- g) The making, in accordance with the provisions of this act, of vetting disclosures in respect of the persons concerned to relevant organisations. ©

Brief cases

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BANKING LAW



Financial Services Ombudsman

Appeal – mortgage – duty to explain consequences of switching

from fixed to variable rate mortgage – respondent upholding notice parties' complaint – whether fiduciary relationship – whether misrepresentation by silence – whether factual assertions misstated – whether serious and significant errors in findings.

Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare [1998] 1 IR 34 applied – *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323 (unreported, Finnegan P, 1/11/2006) followed – *Central Bank Act 1942*, s57CL – *Central Bank and Financial Services Authority of Ireland Act 2004*, s16.

Appeal allowed, matter remitted to respondent (2011/84MCA – M White J – 16/11/2011) [2011] IEHC 439.

Irish Life and Permanent plc v Financial Services Ombudsman

Financial Services Ombudsman

Loan – terms – remainder of agreed loan funds – refusal of drawdown – whether failure to hold oral hearing constituting serious and significant error – whether erroneous analysis of correspondence – whether compensation of €350 reasonable for failure to comply with instructions.

Ulster Bank Investment Funds Ltd v Financial Services Ombudsman [2006] IEHC 323 (unreported, Finnegan P, 1/11/2006) followed – *J&E Davy t/a Davy v Financial Services Ombudsman* [2010] IESC 30, [2010] 3 IR 324 considered – *Central Bank Act 1942*, s57CL – *Central Bank and Financial Services Authority of Ireland Act 2004*, s16.

Appeal allowed, matter remitted to respondent (2011/169MCA – Cross J – 16/11/2011) [2011] IEHC 422.

Hyde v Financial Services Ombudsman

CONSTITUTIONAL



Family rights

Right to marry – applicants engaged to be married – second applicant arrested

for deportation – right of applicants to apply to any High Court judge for article 40 inquiry – court declining to order production of second applicant – whether marriage to Irish national conferring automatic right on foreign national to reside in State – whether deportation of second applicant unlawful.

O'Shea v Ireland [2006] IEHC 305, [2007] 2 IR 313 considered – *Izmailovic v Garda Commissioner* [2011] IEHC 32, [2011] 2 IR 522 distinguished – *Constitution of Ireland 1937*, article 40.

Application refused (2012/435 SS – Hogan J – 9/3/2012) [2012] IEHC 110.

McHugh v Minister for Justice and Equality

Personal rights

Journalist – expression – educate public opinion – new media – whether rights confined to traditional journalists – balancing with other public interests – discretion of court.

In re O'Kelly (1974) 108 ILTR 97 distinguished – *Mabon v Keena* [2009] IESC 64, [2010] 1 IR 336 applied – *Goodwin v UK* (app no 17488/90) (1996) 22 EHRR 123 followed – *Howlin v Morris* [2005] IESC 85, [2006] 2 IR 324 considered – *Constitution of Ireland 1937*, article 40.6.1.

Ex parte order vacated (2012/4FTE – Hogan J – 18/9/2012) [2012] IEHC 376.

Cornec v Morrice

Right to property

Right to religious freedom – principle of proportionality – prohibition on diversion of religious property – discrimination – whether possible to assess effect of measure on rights in absence of reasons for

measure – whether zoning was diversion of religious property.

Planning and Development Act 2000, ss9, 10, 11, 12, 34 and first schedule – *Constitution of Ireland 1937*, articles 28A, 40.3, 43, and 44.2.6 – *European Convention on Human Rights and Fundamental Freedoms 1950*.

Portions of development plan quashed (2011/56JR – Clarke J – 27/4/2012) [2012] IEHC 163.

Christian v Dublin City Council

CRIMINAL



Evidence

Right to silence – privilege against self-incrimination – inferences – direction to

appellant to answer questions put to him by garda – failure to inform garda of information where not detained and no access to solicitor – whether direction breached right to silence – whether breach led to unfair hearing – whether entitled to take into account failure to deny offence where such evidence not given by prosecution – whether entitled to draw inferences – whether accused's failure to previously deny offence was pivotal to judge's decision.

People (DPP) v Finnerty [1999] 4 IR 364 followed – *Summary Jurisdiction Act 1857* (c43), s2 – *Criminal Damage Act 1991*, s2 – *Constitution of Ireland 1937*, article 38.1.

Questions answered in the negative and case dismissed (2011/2461SS – Hedigan J – 7/6/2012) [2012] IEHC 421.

DPP (Sweeney) v Roibu

Insanity

Detention – legality – jurisdiction – *ultra vires* – mental health – fitness to be tried – in-patient treatment – procedure where accused found unfit to be tried – procedure where court ordered detention for in-patient treatment – whether court required to remand accused following finding of unfitness to be tried – whether court required to con-

sider fresh evidence of approved medical officer before detaining accused for in-patient treatment – whether failure to consider fresh report rendered order for detention *ultra vires* – whether detention unlawful – whether fact that invalid order for detention could be rectified could validate order for purpose of article 40 inquiry – Mental Health (Criminal Law) Review Board – whether referral of patient to board superseded original district court order – whether board made subsequent order for detention – statutory interpretation – purposive approach – interests and welfare of patient – whether court should interpret act purposively to protect interests and welfare of patient.

JB v Mental Health (Criminal Law) Review Board [2008] IEHC 303, [2011] 2 IR 15 considered – *L v Kennedy* [2010] IEHC 195, [2011] 2 IR 124 not followed – *Ejerenwa v Governor of Cloverhill Prison* [2011] IESC 41 (unreported, SC, 28/10/2011); *Liu v Governor of the Dóchas Centre* [2011] IEHC 372 (unreported, Hogan J, 6/10/2011); *JO'G v Governor of Cork Prison* [2006] IEHC 236, [2007] 2 IR 203 approved – *BG v District Judge Murphy (No 1)* [2011] IEHC 359 (unreported, Hogan J, 20/9/2011) distinguished – *In re Philip Clarke* [1950] IR 235; *MR v Byrne* [2007] IEHC 73, [2007] 3 IR 211 approved – *Criminal Law (Insanity) Act 2006*, ss4 and 13 – *Constitution of Ireland 1937*, article 40.4.2.

Release ordered (2012/637SS – Hogan J – 5/4/2012) [2012] IEHC 152.

C(E) v Central Mental Hospital

DEFAMATION



Discovery

Journalistic privilege – source – object of privilege – false story about plaintiff published by defendants – plaintiff seeking discovery of documents –

defendants claiming journalistic privilege – whether documents privileged – whether plaintiff entitled to discovery.

Garda Síochána Act 2005, s62 – *Defamation Act 2009*, ss25 and 26 – *European Convention on Human Rights and Fundamental Freedoms*, article 10.

Discovery ordered (2011/5977P – O'Neill J – 10/8/2012) [2012] IEHC 353.

Walsh v News Group Newspapers Ltd

INTELLECTUAL PROPERTY



Copyright

Data protection – infringement of copyright – unknown internet subscribers

– applicants notifying notice party of breaching of copyright – notice party terminating internet service of subscribers repeatedly breaching copyright – respondent directing notice party to cease scheme with applicants – whether reasons provided by respondent – whether respondent obliged to provide reasons – notice party entitled to appeal direction of respondent – whether applicants entitled to seek *certiorari* of respondent's direction.

EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd [2010] IEHC 377 (unreported, Charleton J, 11/10/2010) followed – *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (Case C-70/10) (unreported, ECJ, 24/11/2011); *L'Oréal SA v eBay International AG* (Case C-324/09) (unreported, ECJ, 12/7/2011) considered – *Data Protection Act 1998*, s10.

Notice quashed (2012/167JR – Charleton J – 27/6/2012) [2012] IEHC 264.

EMI Records Ireland Ltd v Data Protection Commissioner

PRACTICE AND PROCEDURE



Dismissal of proceedings

Solicitor's undertakings – plaintiff alleging negligence and breach

of duty by directors of credit union

– professional conduct – whether undertakings binding the plaintiff – whether plaintiff aware of undertakings – whether defendants owing duty of care to plaintiff – whether proceedings bound to fail – whether abuse of process.

Shangan Construction Ltd v TP Robinson & Co (unreported, HC, 10/7/1990); *United Bank of Kuwait Ltd v Hammoud* [1988] 1 WLR 1051 considered – *Rules of the Superior Courts 1986* (SI 15/1986), order 19, rule 28.

Proceedings dismissed (2011/3035P – Murphy J – 8/3/2012) [2012] IEHC 112.

Coleman v O'Neill

PROBATE



Costs

Action to prove will in solemn form – testamentary capacity – entitlement of unsuccessful party to probate action to costs – successful opposition to plaintiff acting as executrix – conflict of interest – whether reasonable ground for litigation – whether conducted *bona fide* – whether costs should be awarded against plaintiff personally or out of estate – whether plaintiff acted unreasonably in fiduciary capacity in contesting second issue.

In bonis Morelli: Vella v Morelli [1968] IR 11; *Elliot v Stamp* [2008] IESC 10, [2008] 3 IR 387; *Re ELO & R Trusts* [2008] JRC 150; *Re Y Trust* [2011] JRC 135; *Bristol & West Building Society v Mothew* [1998] Ch 1; *Hunter v Hunter* [1938] NZLR 520; and *Re Beddow* [1892] 1 Ch 547 considered – *Succession Act 1965*, ss10(3), 27(4), 78 and 120 – *Rules of the Superior Courts 1986* (SI 15/1986), order 99.

Costs of first module awarded to both parties out of estate and costs of second module awarded to defendant out of estate (2009/3286P – Laffoy J – 1/10/2012) [2012] IEHC 387.

Re Rhatigan: Scally v Rhatigan

Executor

Grant of probate – conflict of interest – professional duties of

solicitor/executrix – conflict between interests of estate beneficiaries and non-estate beneficiaries – test for removal of executor – 'serious misconduct' test – 'serious special circumstances' test – onus of proof – executrix formerly solicitor to testator and to companies associated with non-estate assets – defendant principal beneficiary of estate assets – solicitor's duty of confidentiality – solicitor's duty of disclosure – solicitor having irremovable duties – whether grant of probate should issue to executrix – whether executrix conflicted in professional capacity – whether conflict between interests of estate and non-estate beneficiaries.

Dunne v Heffernan [1997] 3 IR 431 applied – *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, [2005] 1 WLR 567 approved – *Flood v Flood* [1999] 2 IR 234; *Spencer v Kinsella* [1996] 2 ILRM 401; *Moody v Cox and Hatt* [1917] 2 Ch 71; *O'Carroll v Diamond* [2005] IESC 21, [2005] 4 IR 41; *Carroll v Carroll* [1999] 4 IR 241; and *Bristol and West Building Society v Mothew* [1998] Ch 1 considered – *Succession Act 1965*, ss10(3), 26 and 27.

Defendant's claim allowed (2009/3286P – Laffoy J – 28/3/2012) [2012] IEHC 140.

Re Rhatigan: Scally v Rhatigan

TORT



Personal injuries

Conflict of laws – injury incurred in France – assessment of

damages – choice of law – French law – whether practice of French judges to have regard to book of previous awards non-obligated practice – whether court bound by previous awards of French judges – whether assessment of damages matter of practice – whether court could have regard to levels of compensation in Irish courts – categories of compensation – temporary disablement – pain and suffering – deprivation or disruption of specific practices or activities – permanent non-pecuniary loss – aesthetic injury – sexual damage.

European Communities (Fourth

Motor Insurance Directive) Regulations 2003 (SI 651/2003) – Regulation 864/2007/EC.

Damages awarded (2010/5675P – O'Neill J – 20/4/2012) [2012] IEHC 177.

Kelly v Groupama

Personal Injuries

Road traffic – evidence – liability – contributory negligence – whether plaintiff driving on correct side of road – whether plaintiff travelling at excessive speed – whether defendant failed to keep proper lookout – apportionment of liability – *quantum* – injuries – pain and suffering – loss of earnings – loss of employment opportunity – whether plaintiff's loss of earnings claim based on credible figures – whether evidential basis for future loss of earnings claim – credibility – false or misleading evidence – application for dismissal – test to be applied – onus of proof – standard of proof – whether plaintiff's evidence false or misleading – whether plaintiff knowingly tendered false or misleading evidence – whether information supplied to expert actuary was false or misleading – whether plaintiff deliberately exaggerated claim – whether plaintiff tendered false or misleading evidence concerning ability to engage in driving post-accident – whether false or misleading aspects of claim severable – whether injustice would result from dismissal.

Carmello v Casey [2007] IEHC 362, [2008] 3 IR 524 and *Higgins v Caldack Ltd* [2010] IEHC 527 (unreported, Quirke J, 18/11/2010) followed – *Ahern v Bus Éireann* [2011] IESC 44 (unreported, SC, 2/12/2011) applied in part – *Gammell v Doyle* [2009] IEHC 416 (unreported, Hanna J, 28/7/2009); *Farrell v Dublin Bus* [2010] IEHC 327 (unreported, Quirke J, 30/7/2010); and *Shelly-Morris v Bus Atha Cliath* [2003] 1 IR 232 considered – *Civil Liability and Courts Act 2004*, s26.

Proceedings dismissed (2007/9146P – Smyth J – 20/1/2012) [2012] IEHC 151.

Nolan v Mitchell

Eurlegal

Edited by TP Kennedy, Director of Education

The EU's clean fuel strategy for the future

Breaking the oil dependence of transport and setting a target of 60% greenhouse gas emissions reduction from transport by 2050 were called for in the European Commission's 2011 white paper, *Roadmap to a Single European Transport Area – Towards a Competitive and Resource Efficient Transport System*. Included in the white paper's initiatives was development of a sustainable alternative fuels strategy with an appropriate infrastructure, as well as guidelines and standards for refuelling infrastructures.

Prior to that, the *Renewable Energy Directive* (2009/28/EC) set a target of 10% market share of renewables in transport fuels. Earlier this year, on 24 January 2013, the commission published a package of measures setting out a 'clean fuel strategy', which comprised a commission communication, *Clean Power for Transport: A European Alternative Fuels Strategy* (COM (2013) 17 final), a proposal for a directive on the deployment of alternative fuels infrastructure (COM (2013) 18 final), and a commission staff working document, *Actions Towards a Comprehensive EU Framework on LNG for Shipping* (SWD (2013) 4 final).

Commission communication

In its communication, the commission draws attention to the fact that the EU's "supply of oil, and thus our mobility, depend to a large degree on politically unstable regions ... Price hikes driven by speculation on the impact of oil supply disruptions have cost the European economy an additional €50 billion per year over the last three years."

To move away from such a vulnerable position, the strategy is to gradually replace oil with alternative fuels and to construct the necessary infrastructure to support that replacement. It is envisaged that this will also boost growth and jobs in the EU.



Post 2020, the commission will not be supporting biofuels based on food crops and animal fats

To date, market development of alternative fuels has been obstructed by technological shortcomings, consumers' lack of acceptance, and lack of adequate infrastructure. While initiatives for alternative transport fuels exist at EU and national level, an overarching coherent and stable strategy with an investment-friendly regulatory framework was identified as essential.

The communication outlines the alternative fuel strategy and maps its implementation across every form of transport. As there is no single fuel solution, the strategy is built on a comprehensive mix of alternative fuels, namely liquefied petroleum gas (LPG); natural gas (including biomethane) in the form of LNG, compressed natural gas (CNG), and gas-to-liquid (GTL); electricity; liquid biofuels; and hydrogen. The commission is of the view that, post 2020, only biofuels made from ligno-cellulosic biomass, residues, waste and other non-food biomass, including algae and microorganisms, should

receive public support – and not biofuels based on food crops and animal fats.

Staff working document

The complementing staff working document highlights that LNG is the most promising alternative shipping technology in the short to medium term, at least for short sea and possibly inland waterways, as well as fisheries and offshore services. A case has been made for LNG in shipping, in terms of both economics and the environment. Economically, it is a potential viable alternative to heavy fuel oil, and a viable spot market for LNG for shipping is expected to establish, which may see prices drop further. On the environmental front, in comparison to bunker oil used currently, LNG reduces sulphur emissions down to almost 0%, which fulfils existing and planned emission limits for designated sulphur emission control areas (SECAs) in the EU (for example, English Channel, North Sea, Baltic Sea). A minimal infrastructure

for LNG bunkering is seen as vital to kick-start the development, as well as further decrease prices for technology and LNG fuel. In April 2012, the commission and the European Maritime Safety Agency, with stakeholders, launched activities to progress the introduction of LNG for shipping in the EU. The next steps include establishment of a European Sustainable Shipping Forum, with member states and EU industry to progress the sustainable waterborne transport toolbox, which the commission had outlined in its staff working paper (SEC (2011) 1052 final) in September 2011. The commission also identified a need to provide information to 'demystify' LNG, as public perception is that it is a dangerous technology – despite its excellent safety record. Targets on development of LNG bunkering facilities and infrastructure are set out in the proposed directive.

Proposed directive

The proposed directive is aimed at addressing the 'chicken and egg'

problem of a lack of alternative fuel infrastructure due to insufficient number of vehicles/vessels, resulting from scarce consumer demand (arising from non-competitive prices of the self same vehicles/vessels). Without consumers buying the requisite vehicles/vessels, no real incentive has been seen for development of infrastructure. The proposed directive aims to put in place measures to ensure sufficient infrastructure coverage for economies of scale on the supply side and network effects on the demand side. In short, it is expected to establish a common framework of measures for the deployment of alternative fuels infrastructure.

At the outset, it is envisaged that each member state will adopt a national policy framework for the market development of alternative fuels and their infrastructure. Annex I to the proposed directive lists the elements that each framework is to contain, and they include measures to support the build-up of alternative fuels infrastructure (such as building permits, parking lots permits, fuel stations concessions); supporting measures (for example, tax incentives, public procurement, preferential access to restricted areas, dedicated lanes); deployment and manufacturing support (such as yearly public budget allocation for alternative fuels infrastructure deployment and to support manufacturing plants for alternative fuels technologies); research, technological development and demonstration; as well as national targets (2020 targets and annual targets).

Under the proposals, member states are expected to cooperate through consultations or joint policy frameworks. Only fuels included in the national policy frameworks would be eligible for EU and national support measures for alternative fuels infrastructure.

Separate articles in the proposed directive deal with the topics of electricity supply for transport, hydrogen supply for transport, and natural gas supply for transport.

Electricity supply

With respect to electricity supply, the proposals require member states to ensure a minimum number of recharging points for electric vehicles by 31 December 2020. In the case of Ireland, that number is 22,000 – 2,000 of which have to be publicly accessible. Recharging points are categorised as ‘slow’ (that is, a recharging point that allows for a direct supply of electricity to an electric vehicle with a power of less than or equal to 22 kW) and ‘fast’ (a recharging point that allows for a direct supply of electricity to an electric vehicle with a power of more than 22 kW) and would have to comply with the technical specifications in annex III of the proposed directive. Shoreside electricity supply for waterborne vessels is expected to be provided in ports, provided it is cost-effective and has environmental benefits. All publicly accessible recharging points would be equipped with intelligent metering systems (see article 2(28) of

directive 2012/27/EU on energy efficiency). Consumers would have the right to contract electricity simultaneously with numerous suppliers. The rationale behind this is that they could then contract separately for electricity supply for their electric vehicle. Prices charged at publicly accessible charging points have to be reasonable. Any penalty or prohibitive fees for recharging an electric vehicle by a user not having contractual relations with the recharging point operator are forbidden.

Hydrogen supply

In terms of hydrogen supply, it is foreseen that member states where hydrogen refuelling points already exist would ensure availability of a sufficient number of publicly accessible refuelling points. Distances between refuelling points are set within 300km to facilitate circulation of hydrogen vehicles by 31 December 2020. Moreover, refuelling points have to be compliant with the technical specifications in annex III of the proposed directive.


Natural gas

For natural gas supply, member states are tasked with ensuring publicly accessible LNG refuelling points for maritime and inland waterway transport in all maritime ports of the Trans-European Transport (TEN-T) Core Network by 31 December 2020. In addition, publicly accessible LNG refuelling points for inland waterway transport are to be provided in all

inland ports of the TEN-T Core Network by 31 December 2025. For road travel, publicly accessible LNG refuelling points would have to be established within distances of 400km by 31 December 2020. The proposed directive also sets out technical specifications with which the refuelling points would have to comply. Similarly, CNG refuelling points are to be within 150km by 31 December 2020, to allow circulation of CNG vehicles EU wide and to comply with technical specifications by 31 December 2015.

The proposals also envisage relevant, clear and simple information on the compatibility between all fuels on the market and vehicles to be available: (a) at the pumps in all refuelling points, at vehicle dealerships, and at technical control facilities; (b) in vehicle manuals; and (c) on vehicles.

Moving forward

It is clear from the measures envisaged in the commission’s package that Europe-wide coordination will form the backbone of the move to large-scale deployment of alternative fuels. The build-up of alternative transport fuel infrastructure is expected to be grounded in private investment. However, EU support is to be made available by way of TEN-T funds, cohesion and structural funds, and European Investment Bank lending. 

Diane Balding is a member of the Law Society’s EU and International Affairs Committee.

Recent developments in European law

LITIGATION

Case C-543/10, case C-325/11, *Alder v Orlowska*, 7 January 2013




Polish law requires the appointment of a representative in Poland to serve judicial

documents on behalf of a non-Polish party to proceedings. If no such representative is authorised, the court documents addressed to that party shall be placed in the case file and shall be deemed to have been served.

The CJEU ruled that such provisions were incompatible with

Regulation 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters. Where the regulation applies, service must be carried out by one of the means of transmission provided for by the regulation. Other means provided for by national law are precluded.

Furthermore, the Polish provision does not comply with fundamental rights. It does not guarantee the rights of the defence. The Polish system does not guarantee the non-Polish party knowledge of the judicial act in sufficient time to prepare a defence or a translation of that document. 

NOTICES

WILLS

Cahir, Noreen (deceased), late of 16 Killian Park, Shannon, Co Clare, and formerly of Kells, Corofin, Co Clare, who died on 28 January 2013. Would any person having knowledge of a will made by the above-named deceased please contact Ruth Casey at Messrs John Casey & Company, Solicitors, Bindon House, Ennis, Co Clare; DX 25 007 Ennis; tel: 065 682 8159, fax: 065 682 0519, email: ruth.casey@caseylaw.biz

Coleman, Maurice (deceased), late of 52 Ramleh Park, Milltown, Dublin 6. Would any person having knowledge of any will made by the above-named deceased, who died on 12 February 2013, please contact John O'Connor, Solicitors, 168 Pembroke Road, Ballsbridge, Dublin 4; tel: 01 668 4366, fax: 01 668 4203, email: info@johnconnorsolicitors.ie

Gillespie, Donal Gerard (deceased), late of Dooley, Glencolmcille, Co Donegal, and 36 Orpen Drive, Belfast, Co Antrim, Northern Ireland, who died on 26 July 2009. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact DP Barry & Co, Solicitors, Bridge Street, Killybegs, Co Donegal; tel: 074 973 1174, fax: 074 973 1639, email: info@barrylaw.ie

Holmes, Nuala (deceased), late of 6 Chantiere Gate, Portlaoise,

Co Laois. Would any person having knowledge of a will (or documents relating to a will) made by the above-named deceased, who died on 1 December 2012, please contact Sheehan & Co, Solicitors, 1 Clare Street, Dublin 2; DX 168; tel: 01 661 6922; email: sheehan@sheehanandco.ie

Mullins, Colm Anthanius (deceased), late of Riverside House, Ardgroom Village, Beara, Co Cork, and Flat 5, Chilern Court, 61 Pages Hill, London N10 1EN. Would any person having knowledge of a will made by the above-named deceased, who died on 27 December 2012, please contact Maria O'Sullivan & Co, Solicitors, Bank Place, Castletownbere, Beara, Co Cork; tel: 027 71772, email: info@bearalaw.ie

Murphy, Margaret (deceased), late of Tonacrick, Lahardane, Ballina, Co Mayo, who died on 10 October 2006. Would any person

having knowledge of a will made by the above-named deceased please contact Adrian P Bourke, solicitor, at Adrian P Bourke & Company, Solicitors, Victoria House, Ballina, Co Mayo; tel: 096 22055, fax: 096 21070, email: adrianpbourke@eircom.net

Oakes, Carmel (deceased), late of 145 Downpatrick Road, Crumlin, Dublin 12, who died on 14 February 2013. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Brendan D O'Connor & Co, Solicitors, 179 Crumlin Road, Dublin 12; tel: 01 453 6218, email: brendandoconnor@eircom.net

RATES

Professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

- **Wills** – €147 (incl VAT at 23%)
- **Title deeds** – €294 per deed (incl VAT at 23%)
- **Employment/miscellaneous** – €147 (incl VAT at 23%)

HIGHLIGHT YOUR NOTICE BY PUTTING A BOX AROUND IT – €33 EXTRA

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for June *Gazette*: 22 May 2013. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

MISCELLANEOUS

Contents of legal practice for sale, to include a selection of framed antique and modern legal cartoon prints, large collection of legal books, server, PCs and printers, telephone system, scanner, fax, photocopier; binding machine, Dictaphone Thought Tank with two handsets, stationery press, desks, filing cabinets and associated equipment. Contact: irenedonnelly@eircom.net

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NOTICES

and Meath with a good mix of litigation, conveyancing and probate. Would suit an ambitious solicitor seeking to work for himself/herself and build on an established client base. All expressions of interest will be treated with the strictest confidence. Closing date 15 June 2013. Contact box no 01/05/13

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 the Parochial House, Croom, situate in the townland of Croom, barony of Coshma and county of Limerick – applicants: Fr Joseph Kennedy PP and Fr Anthony Mullins, diocesan administrator

Take notice that any person having any interest in the freehold estate

of the following property, that is, the Parochial House, Croom, in the county of Limerick.

Take notice that Fr Joseph Kennedy PP and Fr Anthony Mullins, diocesan administrator, intend to submit an application to the county registrar for the county of Limerick for the acquisition of the freehold interest in the foresaid property, and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicants intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Limerick for directions as may be

appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in the aforementioned premises are unknown

or unascertained.

Date: 3 May 2013

Signed: Maurice Power, Solicitors (solicitors for the applicants), Lord Edward Street, Kilmallock, Co Limerick

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.

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



Horns of a dilemma

Gardaí are investigating the theft of rhino heads and horns from the National Museum Archives in Swords, Co Dublin, RTÉ reports. Three masked men entered the building and tied up the security man on duty at around 10.40pm on 17 April.

The three men loaded the rhino heads and horns from the building into a large white van.

The raiders were in the building for approximately one hour. The security man, who was uninjured, later freed himself and raised the alarm. The value of the property stolen is estimated to be in the region of €500,000.

Stickler judge holds himself in contempt

When a mobile phone rang in court during a prosecutor's closing argument in a domestic violence trial, a Michigan judge didn't have to look far to find the culprit.

Chief Ionia District Judge Raymond Voet himself was to blame, MLive.com reports. He had failed to lock his new phone properly before court proceedings got started – and then had trouble turning it off, as it offered him suggestions about voice-dialling.

"I got very embarrassed, and I'm sure my face turned red," Voet told the publication later. "I thought it would never happen to me."

The judge is known for being a stickler about mobile-phone use in court and has signs posted outside his courtroom warning the public that individuals face a \$25 fine and could lose their electronic device if it goes off during a hearing. In the past, phones have been removed from police officers, lawyers,

witnesses and personal friends.

Voet held himself in contempt and walked downstairs during a court recess to pay the same \$25 fine he imposes on other offenders!

Attorney files suit over suit



seeking \$7,646. According to the suit, the amount represents the price of the suit (\$646), the cost of his time when he argued with store personnel for 90 minutes (\$2,000) and punitive damages (\$5,000).

"Leave it to a lawyer to file suit over a suit," the story says.

Ginsberg claims that he purchased a three-button suit with a faint pinstripe in December, but when he returned to pick up the garment, he was given a used grey jacket and trousers that were two sizes too big. He says that he tried returning the suit at Brooks Brothers' Liberty Street store in Manhattan, but store staff refused it.

David Rees, the manager of the Liberty Street store in Manhattan, told the *New York Daily News* that Ginsberg should contact him and he would be happy to help.

Lawyer says 70% of clients want to strangle him

A California criminal defence lawyer who asked a judge to remove him from a case because of a client assault is now moderating his accusations.

The client is now on trial for the alleged incident and lawyer Andy Tursi is being called as a witness, the *San Jose Mercury News* reports.

In a 2010 private conference with the judge, Tursi originally claimed that his client, Ernesto Mirabal, had slammed the lawyer's head into a jail wall, made threats and mentioned his family. Prosecutors unsealed the transcript

and filed criminal-threat charges against Mirabal.

Tursi is now downplaying the confrontation, saying that he and his client "kind of veered off to the left and bada-boom", the lawyer fell against the wall. In testimony before a grand jury, Tursi said conflicts aren't unusual: "70% of my clients want to strangle me (at) one time or another."

Mirabal testified at his trial in mid April that he never assaulted or threatened Tursi, but did threaten to reveal damaging information unless the lawyer changed his strategy in the 2010 trial.

A Manhattan personal injuries lawyer claims in a lawsuit that Brooks Brothers gave him the wrong suit after he asked the store to do some alterations on his new purchase.

The *New York Daily News* reports that Robert Ginsberg is



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Our Client, a top law firm, is actively seeking an experienced litigator to join their dedicated white-collar crime unit. This is a unique opportunity for a good litigator to specialise in the rapidly expanding field of corporate crime and fraud litigation. Relevant experience is preferred but not essential. Impressive academics and strong commercial litigation experience from a top 15 firm are a prerequisite.

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