LAW SOCIETY
Gazette
€3.75 May 2009

COMING HOME TO ROOST:

Marital breakdown and the division of farming assets

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ESSENTIALS OF LEGAL PRACTICE COURSE 2009

LAW SOCIETY OF IRELAND

CPDFOCUS

Dates: **21 July 2009 to 13 August 2009 (weekdays only)**
Venue: **Law Society of Ireland, Blackhall Place, Dublin 7**
Times: **9.30am to 5.15pm approximately each day**
Cost: **€2,800 per person**

Who Should Apply:

- Barristers with 3 years' experience in practice who wish to transfer to the solicitors' profession and who have been pre-approved by the Society's Education Committee.
- Solicitors who have been out of practice for a number of years and are seeking to refresh their knowledge before re-entering practice.
- Registered European Lawyers and Qualified Lawyers Transfer Test candidates.

Aim and Objectives:

This course aims to cover the core essentials of legal practice. Topics include Professional Conduct, Solicitors' Accounts Regulations, Conveyancing and Probate/Tax modules. Intensive in its nature, the course will bring professionals up-to-speed in these areas, in a concise and condensed manner.

Upon successful completion of this course (and an in-office period of up to 6 months), barrister candidates are eligible to be entered on the Roll of Solicitors.

Course Outline:

Topics to be covered include:

1. Professional Practice, Conduct and Management
2. Solicitors' Accounts Regulations
3. Probate and Taxation
4. Conveyancing

The course will be delivered through a combination of lectures and tutorial based teaching and learning methodology. Attendance at all elements is mandatory.

Contact Details:

For further details please contact Vanessa Bainbridge, Education Department, Law Society of Ireland
phone: 01 672 4802 | email: bltransfer@lawsociety.ie
website www.lawsociety.ie.

On the road

In the last few weeks, the director general and I have had the privilege of addressing the Midland, Wicklow, Clare and Galway bar associations to inform them of current developments and also to get feedback from our colleagues on the ground. In addition, we are scheduled to have visited both the Wexford and Waterford bar associations by the time you read this. It has been a very useful exercise, and our initial impressions are that the overall situation is slightly more resilient as one goes west. We were also encouraged by the stoic realism that was evident and, notwithstanding the painful adjustments that nearly every practice has had to make, there is a strong sense that we can get through this recession.

Conversely, as one gets closer to Dublin, there is an increasing level of unemployment and, therefore, I am very glad that we are now in a position to announce that the Society has just appointed its new careers development advisor, who is due to commence work shortly. The new careers development advisor – both the role and the individual appointed to it – will be profiled in next month's *Gazette*. It is important that we have realistic expectations of what can be achieved, but the clear message we have got from those who have unfortunately lost their jobs is that they do need a central focal point for information and support, and this will very much be the advisor's primary purpose.

Managing expectations

Speaking of managing expectations, we have also noticed that many firms, now that they have some time on their hands, are looking at how they manage their practices. I would suggest that, if there is one change that you should make, it is that your firm should have a standard letter of engagement. The Guidance and Ethics Committee of the Law Society has already published draft letters that are available on the website. I believe it is only a matter of time before we, like other jurisdictions, introduce a rule requiring solicitors to have a formal written retainer with our clients. If you rely on an oral retainer, you will always be on the back foot in trying to resolve any dispute with your client.

I would also bring to your attention that we procured a change in legislation last year and, under the *Civil Law (Miscellaneous Provisions) Act 2008*, it is now possible for solicitors to limit their liability, by contract. This issue of the *Gazette* has a precedent draft clause to limit liability which can be inserted in the letter of engagement (see p58). If I were to recommend just one single change to improve your practice management and client care, this would be it.

> ***"Even though he was in the middle of preparing for the most important budget in the country's history, it says a lot about his own pride in being a solicitor that he took the time out to attend the dinner"***

Annual dinner

On 3 April, the annual dinner of the Law Society took place. This is a very important function for us, as it firstly gives us a chance to reciprocate the hospitality we receive from other bodies and, secondly, it provides a great networking opportunity. This year we were delighted that Taoiseach Brian Cowen accepted our invitation to be the guest of honour. Details of his address are included in this *Gazette* (see p5).

It was a signal honour for the Society, as Brian Cowen is the first solicitor to hold the office of taoiseach. It was also the first time that a sitting taoiseach had addressed our annual dinner. Even though he was in the middle of preparing for the most important budget in the country's history, it says a lot about his own pride in being a solicitor that he took the time out to attend the dinner. Equally, as a Society, we can be very proud that one of our own is taoiseach, and we wish him well in his endeavours to put the country back on track.

John D Shaw
President

On the cover

You thought you were cock-of-the-walk, bringing home the bacon. But you'll reap the wild oats you sowed, as the chickens come home to roost.

PIC: GETTY IMAGES

Volume 103, number 4
Subscriptions: €57

LAW SOCIETY
Gazette
May 2009

REGULARS

Editor: Mark McDermott. **Deputy editor:** Dr Garrett O'Boyle. **Designer:** Nuala Redmond. **Editorial secretaries:** Valerie Farrell, Marsha Dunne. For professional notice rates (lost land certificates, wills, title deeds, employment, miscellaneous), see page 69.

Commercial advertising: Seán Ó hOisín, 10 Arran Road, Dublin 9; tel: 01 837 5018, fax: 01 884 4626, mobile: 086 811 7116, email: sean@lawsociety.ie.
Printing: Turner's Printing Company Ltd, Longford.

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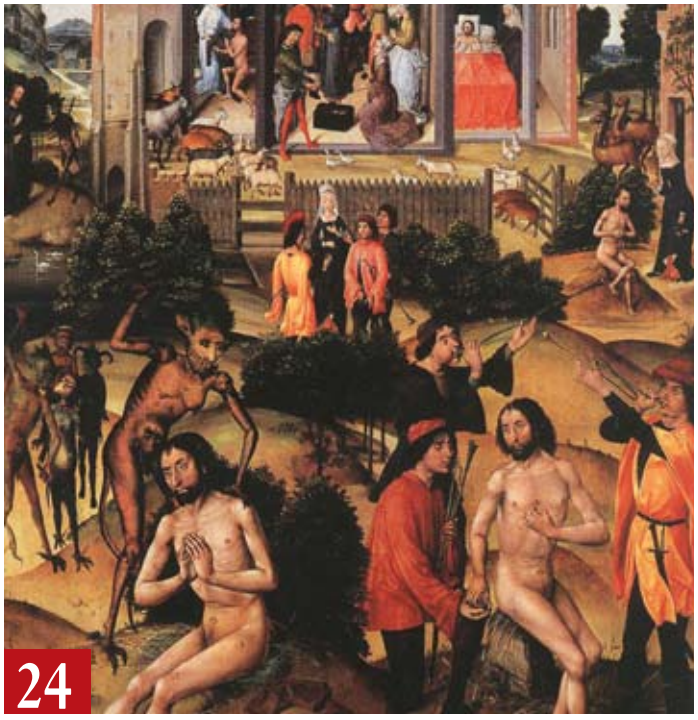
FEATURES



Published at Blackhall Place, Dublin 7, tel: 01 672 4800, fax: 01 672 4877.
Email: gazette@lawsociety.ie Website: www.lawsocietygazette.ie

nationwide

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SLIGO

The Sligo Bar Association hosted a gala ball to celebrate the recent retirement of Judge Oliver McGuinness. Over 200 members of the legal profession attended a very enjoyable night. Among the dignitaries in attendance were 19 esteemed District Court judges, senior and junior counsel, Circuit and District Court staff, garda síochána and many other distinguished local solicitors and their partners.

After practising as a solicitor for 15 years, Judge McGuinness served 26 years on the bench, initially as a moveable judge (appearing in every county in Ireland and at 240 different venues) before serving as the resident District Court judge in Sligo for the last 14 years.

The master of ceremonies, Seamus Monaghan (president of the Sligo Bar Association), and other distinguished speakers paid glowing tributes to Judge McGuinness and wished him and his wife Marie well in their retirement.

The function took place in the picturesque surrounds of the Castle Dargan Hotel in Sligo. (See 'People and places', next issue.)

Members of the Sligo Bar Association organised a gala ball to mark the recent retirement of Judge Oliver McGuinness. Over 200 members of the legal profession attended the event, which was held at the Castle Dargan Hotel, Sligo

DUBLIN

Young Dublin Solicitors (YDS) are compiling the results of a survey of their peers. Although the results have yet to be collated, the response rate has been very positive and will be shared with the profession in due course. In the meantime, great excitement abounds as our younger colleagues look forward to the YDS ball in the Mansion House on Saturday 23 May. This event was a great success last year and upwards of 200 are expected to attend on the night.

The long-awaited launch of the share purchase agreement, being a revamp of the agreement last undertaken some seven years ago, has been finalised and is being proofed, with an expected launch date towards the end of May.

Details of the itinerary and costings of the DSBA conference in Chicago (16-20 September) will be mailed to members shortly and, as indicated previously, will be on an accommodation-basis only. This is because significant savings can be obtained by self-booking.

As a result of generous sponsorship from our co-sponsors, Custom House Finance and DX, the cost of the trip will plunge even further, such is our determination to make the trip as affordable as possible.

The DSBA's family mediation course, to be run over six full days in May and June, has proven very popular with colleagues. If you have not been able to get on this unique course, which affords accreditation recognition, it is expected to run again in September.

Anyone wishing to sponsor Law Society President John D Shaw and the president of the DSBA (yours truly) in the forthcoming Calcutta Run on Saturday 16 May in aid of GOAL in Calcutta and the Peter McVerry Trust in Dublin would be more than welcome. We hope to finish the race! It is a hugely popular and important event in which our beautiful premises at Blackhall Place come into their own with all the ancillary activities throughout the day.

GALWAY

The CPD courses headed up by the Galway Bar Association are proving to be a great success. Recently, well in excess of 100 colleagues attended the Galway Harbour Hotel. The topics for discussion were wills, for which a talk was given by Ciara O'Callaghan, solicitor. A special wills week is being planned in Galway and most solicitors have expressed an interest in participating.

The second matter was a brief address by Gerard O'Donnell, Council member of the Law Society, who updated the members of the bar association on matters being dealt with by the Council.

The third item was the county registrar's address on case progression in the Circuit Family Court. Extensive rules governing the progression of family law cases before the Circuit Family Court were brought to the attention of members.

Colleagues in Galway will be aware of the merger of the practice of FM Fitzgerald & Company and Purdy Legal. Both firms have come together and are now known as Purdy Fitzgerald Solicitors, practising in Forster Street, Galway. We wish them every success for the future. G

'Nationwide' is compiled by Kevin O'Higgins, principal of the Dublin law firm Kevin O'Higgins.

Taoiseach praises Society's ability to manage change in challenging times

The first solicitor in the history of the state to be elected Taoiseach, Brian Cowen, TD, was the guest of honour and main speaker at the Law Society's annual dinner on 3 April. "It has always been a privilege to say I am a member of this profession," he said and expressed himself "very pleased to attend this dinner as the first member of the solicitors' profession in my position".

Acknowledging that "we have seen great change" and live in "a very challenging time", he said he wished to recognise the vital role that the legal profession had played in ensuring that trade and commerce had been effectively transacted in Ireland. In particular, he went on to praise the role that the Law Society had played in managing change.

He continued: "I pay tribute to the director general Ken Murphy and all of the members of the Council and successive Councils who have always been prepared in their interface with government to act in a very responsible way. Change, whilst being inevitable, can be robustly debated. But the Society has always sought to put the concerns of the profession in the wider context of the public good. That is what one would expect of a professional body and the Law Society, I think, can take a lot of credit for its ability to manage change."

Highest standards

He said he was pleased to recognise "the Society's ability to maintain the highest standards of the profession and also to work with government constructively". He continued: "I know that in my colleague, Dermot Ahern, the present Minister for Justice, you have a person who not only understands the profession but also a person with whom you can interact on a mutually respectful basis in the interests of maintaining that constructive relationship in the future".

The Taoiseach specifically thanked the president, John D Shaw, for his invitation to be guest of honour at the annual dinner saying, "I am delighted as a fellow midlander and member of the Midland Bar Association to acknowledge the tremendous respect in which the Shaw family has been held. John is the third generation to hold the Presidency of the Law Society and he follows in the eminent footsteps of his father and grandfather. I recall when Tom was president of the Society myself. That's when I practised. I hear it's a totally different ballgame now. But I do say, genuinely, it has always been a great source of support for

Taoiseach Brian Cowen: "It has always been a privilege to say I am a member of this profession"

me that colleagues throughout the country, whatever their political affiliation, have always been supportive and courteous towards me in any of my public duties. I have been eternally grateful to the Society who, in a great collegiate way, acknowledged the esteem, I hope, I brought to the profession through my public duties in the many ministries I have had the privilege to hold, and now hold in the office of Taoiseach."

Turning to the wider issue of the economy, he acknowledged that there was a huge challenge to be faced, "the magnitude and scale of which is far greater than any of us ever expected. But I do believe that we will be able to chart a way forward. There are pathways to recovery. It will involve us taking a drop in our standard of living. There is a need for it to be fair and proportionate to ensure that, at the end of the day, we come out of it a better and stronger country. A country that will maintain a sense of community and society; and a profession like the solicitors' profession that will continue, I hope, to show an example in terms of its professionalism, competence and integrity".

The importance of client retention

The most important area of practice that solicitors need to focus on during tight economic times is client retention. While generating new business is important, to survive through tougher periods it's vital to keep your existing clients. Client satisfaction is key to success and should be a top priority in every firm. The Law Society's Client Care Task Force has delivered a number of seminars in conjunction with local bar associations around the country, aimed at creating awareness of key client-care issues and how to increase client satisfaction. Due to their success, the task force plans to deliver further bar association seminars around the country this summer and autumn. The client focus seminar in Cork, organised by the Client Care Task Force with the Southern Law Association, was attended by over 120 members.

(L to r): Tom Murran (Chairman of the Client Care Task Force), Linda Kirwan (Task Force member), Mort Kelleher (SLA president), Jonathan Lynch (Chairman of the Southern Law Association CPD Committee) and John Glynn (Task Force member)

One in 200 solicitors call LawCare

LawCare was a totally new concept to Irish solicitors at the beginning of 2008. It was very fortunate in having available to it the assistance of 'Consult a Colleague' (operated by the Dublin Solicitors' Bar Association) and 'The Panel' – both of which continue to offer support and are as busy as ever.

LawCare, however, provided a new facility for Irish solicitors, which proved complementary to the existing services. The charity provides support and assistance to solicitors, their families and staff who suffer from stress, depression, alcohol/drug abuse and eating disorders. It is part-funded by the Law Society of Ireland, but operates completely independently of it. It provides help through its 365-day-a-year helpline, through stress recognition and management training, informative articles and information packs. Its website is packed with useful information, where lawyers can carry out a personal and confidential analysis of the stress in their lives and develop a plan to deal with it.

Irish case files

During 2008, 48 new case files were opened relating to Irish solicitors, together with 175 follow-up calls. Some callers raised more than one issue, but the main concern lay with stress and depression.

The Law Society of Ireland has 10,400 members, so effectively, almost one in every 200 Irish solicitors called LawCare during its first year of operation – twice the take-up rate in England and Wales, where approximately one in every 425 solicitors called the helpline during 2008.

The numbers of sole practitioners calling was far higher than for other regions, but this reflects the fact that almost two-thirds of Irish practices are run by a sole principal.

Bullying was an issue, with more complaints coming from men than women.

The level of calls reporting alcohol abuse was far lower than for other regions. Typically, alcohol calls would account for 15-20% of all helpline calls – in Ireland, it is only 0.3%. However, one year of new case files is far too small a sample to start drawing conclusions.

Source of help

Great efforts have been made by the Law Society and LawCare to inform Irish solicitors about the additional help that is now available to them. The severity of the change in the economic climate has hit everyone quite unexpectedly and has come as something of a shock to most practitioners. Previous sources of work have disappeared overnight. Solid, hard-working solicitors are suffering badly, which also affects their staff and family. Every possible source of help is needed at the present time – a need that will continue for the foreseeable future. So, make a note of LawCare's helpline number *(see panel, below)*. Hopefully, you will never need LawCare's help, but if you do – or if someone you know does – it's on hand to listen and assist.

FAST FACTS ABOUT LAWCARE'S FIRST YEAR IN IRELAND

REASONS FOR CONTACT

Gender	Alcohol	Stress/ depression	Bullying	Other*
Male	3	20	7	1
Female	1	18	2	6

** For example: obsessive compulsive disorder; eating disorder*

WHERE THE CALLS CAME FROM

Gender	Assistant solicitor	Partner	Sole practitioner	Trainee	Other*
Male	5	2	10	1	5
Female	13	1	4	5	2

**For example: staff, family, non-practising, did not disclose*

LAWCARE'S HELPLINE

Tel: 1800 018 4299

9am to 7.30pm, Monday to Friday
10am to 4pm weekends and public holidays

Website address:
www.lawcare.ie

New training contract regulations will counter effects of recession

The Law Society is introducing new training contract regulations to help counter the effects of the recession by making it easier for solicitors to take on a trainee, *writes James O'Sullivan (chairman of the Education Committee)*.

Many practices suffering from the recession report that the current salary regime – whereby trainees during their first year of training must be paid a minimum of €20,623.20 per annum – means that taking on a trainee is simply not a viable option in the current climate. It is particularly hard for firms to afford to pay this sum when they may also have obligations placed on them by the *National Minimum Wage Act 2000*.

The change to the regulations means that, for new contracts, training solicitors will be under an obligation to pay their trainees, at a minimum, €8.65 per hour. The new regulations will commence on 18 May 2009.

The new regulations work by amending the indentures of apprenticeship deed, removing the covenant by the training solicitor to pay to the trainee solicitor the amount recommended by the Law Society. The deletion of this express covenant means that the *National Minimum Wage Act 2000* will stipulate the minimum level of payment to trainees.

James O'Sullivan, chairman of the Education Committee

Firms have repeatedly expressed the view that, without a change to the regulations, few new contracts would be offered. This change will encourage the creation of new training contracts – thus helping to sustain the profession into the future.

Trainees who have already entered into indentures of apprenticeship are unaffected by the change, since the regulations do not apply retrospectively.

The Education Committee will continue to closely monitor the situation in order to ensure a fair and equal relationship between the parties to deeds of apprenticeship, having regard to the ongoing economic crisis.

The revised regulations will amend the current regulations as contained in the *Solicitors Acts 1954 to 1994 (Apprenticeship and Education) Regulations 2001* (SI No 546 of 2001) and, in addition to the change above, will introduce three other significant changes.

Firstly, the 'blocks' of areas of legal practice that are required to be covered during a trainee solicitor's period of in-office training are to be increased from four blocks to five.

Block 1 (conveyancing and landlord and tenant law) and block 2 (litigation) are mandatory, and at least *two* of the three remaining blocks are also required – block 3 being wills, probate and administration of estates; block 4 being commercial law, company law and insolvency law; and block 5 being at least two from the following list: criminal law and procedure, employment law, European Union law, family law, intellectual property law, pensions law, planning and environmental law, revenue law and taxation. This change will give training solicitors greater flexibility in the discharge of their duties under the indentures and reflects the areas of legal practice available in offices today.

Secondly, the permitted maximum period of secondment during the in-office training period is to be increased from six to eight months. This will allow more leeway to a trainee solicitor obtaining experience in the required areas of legal practice.

Finally, the regulations reflect the changes brought in by the *Legal Practitioners (Irish Language) Act 2008*, which abolished the first and second Irish language examinations.

Collaborative practice – coming to a venue near you

Due to the increased demand by family law clients for collaborative law, and given the large number of professionals now trained to practice collaboratively, the Association of Collaborative Practitioners (ACP) will be hosting a series of nationwide information evenings during the month of May.

These meetings will be free to all and will be of benefit to both the general public and professionals interested in learning more about this revolutionary approach to family law and dispute resolution.

The events will be held in Dublin on 7 May, Cork on 14 May, Galway on 21 May, Rosscarbery (West Cork) on 28 May, and in Belfast (date to be confirmed). Guest speakers will cover the following topics:

- Collaborative practice in family law,
- Managing stress during separation,
- Seeing the bigger picture,
- Empowering clients,
- Multidisciplinary approach to dispute resolution,
- The voice of the child during separation and divorce,
- Real and sustainable solutions to family disputes,
- Economic recession and family law, and
- Collaborative practice and civil disputes.

Further information on venues, times and guest speakers will be confirmed shortly. Anyone interested in learning more about these events should visit the ACP website, www.acp.ie.

Autumn diploma programme launched

The Law Society's diploma team has announced an expanded and diverse portfolio of courses in its autumn 2009 programme. In all, 11 courses are on offer, including the launch of two new diplomas – the Diploma in Insolvency and Corporate Restructuring and the Diploma in Civil Litigation. In addition, three new certificates will be offered in the new programme, including a Certificate in Human Rights in Dublin, and taxation and litigation courses in Cork.

The Diploma in Insolvency and Corporate Restructuring will provide in-depth and practical knowledge of the practice and procedure of insolvency and corporate restructuring in Ireland. Lectures will be video-linked to the law school in Cork, as will lectures for the Diploma in Trust and Estate Planning. The Diploma in Civil Litigation will provide practitioners with a comprehensive understanding of civil litigation practice in this jurisdiction.

The Certificate in Human Rights will introduce participants to the international, regional and national human rights framework. The Certificate in Taxation in Cork will provide professionals who have not yet specialised in tax with an understanding of taxation issues that they need to be aware of as advisers. The Certificate in Litigation aims to expose practitioners to some of the key areas in this field of law.

The diploma team has designed a number of 'blended learning' courses that combine periodic on-site lectures and workshops with a weekly online release of lecture materials. These blended learning courses are designed with the student in mind and promote a deeper type of learning, encouraging students to work through the lecture material at their own pace. From the autumn 2009 programme, such courses will include the Diploma in Family Law and the Certificates in Criminal Litigation and Procedure, and Human Rights.

Finally, in response to the current needs of the profession to up-skill and retrain, the spring 2009 programme now offers:

- District Court Certificate (4 April)
- Certificate in Judicial Review (18 April)
- Critical Legal Issues in Recessionary Times (21 April)
- Diploma in Employment Law (9 May)
- Diploma in Commercial Litigation (23 May).

For further information on these and all other diploma programme courses, refer to the diploma programme pages at www.lawsociety.ie, email: diplomateam@lawsociety.ie, or tel: 01 672 4802.

Revenue and practice opportunities for solicitor advocates

Civil and criminal litigation are sustainable practice areas that represent opportunities for solicitors who choose to advocate on behalf of their clients.

The Law Society's CPD Focus team is now promoting its annual advanced advocacy course. Taking place from Monday 14 September to Friday 18 September 2009, it's the ideal forum for sharpening skills and creating practice opportunities in a first-rate learning environment.

Those giving the course will be tutors and mentors of the National Institute of Trial Advocates – the recognised world leaders in trial-skills training. As CPD Focus says: "We're bringing you the best to ensure you achieve the best!" The course will provide participants with all their CPD scheme requirements for 2009.

This course will especially suit those involved in civil or criminal practice. Ideally, participants should have courtroom or representational experience.

The course is restricted to those with a minimum of three years' post-qualification experience.

Numbers are strictly limited in order to maximise the learning experience for participants, so book early to avoid disappointment.

Contact the CPD Focus team, email: cpdfocus@lawsociety.ie or tel: 01 881 5727. More details are available at www.lawsociety.ie/cpdfocus.

Essentials of legal practice

Are you a solicitor seeking a refresher on the essentials of legal practice? Are you a barrister with three years' experience in practice who wishes to transfer to the solicitors' profession? Are you a registered European lawyer or qualified lawyers' transfer test candidate?

If the answer to any of these questions is yes, the Essentials of Legal Practice course from 21 July 2009 to 13 August 2009 (weekdays only) is for you.

This course will cover the core essentials of legal practice: professional conduct, solicitors' accounts regulations, conveyancing and probate/tax. There is no examination; however, attendance at all elements is mandatory. The course fee is €2,800.

For further details, contact Vanessa Bainbridge in the Law School, tel: 01 672 4802 or email: bltransfer@lawsociety.ie.

Careers database needs you

In advance of the commencement date of the Society's new career development advisor, the Society wishes to update its database in relation to those solicitors who are currently out-of-work or who anticipate such an occurrence in the near future.

The purpose of the database is to establish the most up-to-date contact information for such solicitors, in order that they can be included in mailshots, e-bulletins, SMS notices and other communications relevant to careers, events or services that may be of interest or assistance. For some colleagues, the Society's current information relates to their last practice address and may now be out of date.

The database will also act as a mechanism for establishing a network of colleagues who wish to participate in opportunities to share information, provide support and share experiences over the coming months.

The following details are requested:

- Name:
- Home address:
- Other contact address (if applicable):
- E-mail address:
- Phone number:
- Mobile phone number:
- Year of qualification:

Please email these details to careers@lawsociety.ie in order that they can be updated on the database.

Lawyers fare better on trust barometer

British lawyers can draw some comfort from a recent survey showing that the profession's reputation is much higher than previously thought.

The survey on trust in the professions, commissioned by the Bar Standards Board in Britain, found that, surprise, surprise, bankers are held in as low public esteem as estate agents and politicians. Journalists fare only marginally better. The good news – lawyers were more highly rated than any of them. Only 1% of the 2,000 adults polled trusted estate agents and politicians; 2% bankers; while 3% trusted journalists. In all, 24% trusted lawyers.

Mind you, a sizeable 57% of those polled do not trust any of these professions. Chairman of the Bar Standards Board Ruth Deech was quoted in *The Times* as saying: "Lack of public trust in the professions is clearly a substantial issue. While legal professionals do not fare too badly, their net trust rating of 24% is at best underwhelming."

Nevertheless, the findings should help boost the legal profession's morale when many are feeling the effect of government cutbacks, lay-offs and the recession.

Enduring powers of attorney

The fifth practice note in the series to assist solicitors when instructed by elderly clients is published in this *Gazette* (p52). This month's topic covers enduring powers of attorney.

Padraic Courtney, a member of the group reviewing these matters, explains: "The client must understand that he or she will be effectively passing control of their assets to the attorney, to take decisions with regard to these assets when they become incapacitated. The choice of attorney is important. It should be explained to the client that, under current legislation, an attorney is subject to little or no supervision."

'ALCOHOL' DEFENCE CRUMBLES WITH RESEARCH

Research for a new study led by the School of Psychology in the University of Leicester has shown that consuming alcohol does not affect how men judge the age of women. The authors of the study, Professor Vince Egan (University of Leicester) and Giray Cordan (University of Exeter), say that this has important legal implications if alcohol is cited as a cause of impairing judgement in cases of unlawful sex with a minor. "Our study suggests that even heavy alcohol consumption does not interfere with age-perception tasks in men, so does not excuse apparent mistaken sex in cases of unlawful sex with a minor." The research is due to be published in the *British Journal of Psychology* in June 2009.

McCANN FITZGERALD TAKES THE LAURELS

McCann FitzGerald has been awarded 'Ireland Law Firm of the Year' by the *International Financial Law Review* at a ceremony in London. The award is presented annually to the Irish law firm that demonstrates the best legal performance based on a review of Ireland's most significant corporate and finance transactions over the past year. The firm has won the award three times in the last six years.

'MOP-PING' UP THE AWARDS!

For the third year running, Matheson Ormsby Prentice (MOP) has been selected as one of the '50 best workplaces in Ireland'. The announcement was made recently at the annual awards ceremony of the Great Place to Work Institute Ireland. MOP has also won an award for 'Best large organisation' at the National Training Awards 2009 of the Irish Institute of Training and Development – the first law firm in the country to receive this accolade.

Banks' credit-rating process for

The Irish Banking Federation has provided the following overview of the credit-rating process used by credit institutions when assessing applications for loans

The *European Capital Requirements Directive* (directive 2006/48/EC, article 145(4)) requires institutions, if requested to do so, to explain their credit-rating process to SMEs and other corporate applicants for loans. The following information is intended to provide an overview of the credit-rating process used by credit institutions when assessing applications for loans.

The credit-rating process

A credit rating is a formal evaluation of an individual's or a company's credit history and ability to repay obligations. A credit rating therefore assesses the credit-worthiness of an applicant. The term 'credit-rating process' is used to describe the methodologies used by banks to determine the credit rating of a loan applicant.

Credit ratings are assessed in a number of ways. For **larger corporates**, the rating is more likely to be based on an assessment of financial accounts, the operation of customer accounts, and non-financial factors such as the experience and track record of management. Transactional factors, such as the length of loan requested and the amount of security available, may also be taken into account. For **smaller businesses**, credit scoring will frequently be used.

There are essentially two different credit-scoring techniques used by banks:

- Application scoring, and
- Behavioural scoring.

Application scoring

Application scoring is often used to help inform decisions about lending to small businesses and the opening of new small business accounts. Application scoring takes into account information banks may hold about you or your business, and any information that you supply or that they may obtain from other organisations such as credit-reference agencies or fraud-prevention agencies.

Behavioural scoring

Behavioural scoring, also known as customer or predictive scoring, rates customers on the way they operate their financial affairs, based on the pattern of activity observed by banks on existing customer accounts.

Behavioural scoring is typically used where customers have been with a bank for a period of time. This information is used to consider credit applications and for the ongoing management of account facilities, as it builds up a picture of how a customer manages their money, with the underlying principle that previous performance trends can be used to reflect future patterns, particularly with smaller business loans. An example of a negative indicator might be where cheques or other items have been returned unpaid. Statistically, this approach has been shown to be more consistent in identifying acceptable credit risks to banks than manual assessments of borrowing requests. Behavioural scoring may be used in conjunction with application scoring to enable a lender to consider whether they should lend money or not.

> ***"If your application is not accepted by an institution, you are entitled to discuss this with it. On request, the institution can also provide details of the reasons why it was unable to accept your application"***

It is important to note that lenders have different lending policies and scoring systems. As a result, applications may be assessed differently by banks. This means that one lender may accept an application that another may not. Credit ratings are internal measures used by banks and, as such, are not comparable between lenders.

What happens if your application is declined?

If your application is not accepted by an institution, you are entitled to discuss this with it. On request, the institution can also provide details of the reasons why it was unable to accept your application. Examples of why an application may be declined could include:

- The applicant's ability to repay the loan does not meet the institution's criteria,
- The risk profile of the loan is outside the risk tolerance level of the institution,
- Risk factors have come to light as part of the bank's assessment of the application, or
- Further information is required from the applicant to help the bank's complete assessment of the application.

The precise reasons why an application is declined may differ from institution to institution. As part of their ongoing commitment to responsible lending, banks want to ensure that they make financial decisions that best suit the circumstances of your business. Responsible lending is essential for both you and your bank.

Is credit rating fair?

We believe that credit rating is fair and impartial. It does not single out a specific piece of information as the reason for declining an application and is based on the use of objective criteria to make a decision. Credit-rating methods are tested regularly to make sure they continue to be fair and unbiased.

It is important to stress that, although credit rating has an important part to play in determining the price at which a bank will offer to lend money, it is just one of several factors that are taken into account.

European Capital Requirements Directive

All EU credit institutions are required to comply with the *European Capital Requirements Directive* (CRD). The CRD determines the minimum amount of capital that a bank must set aside for each lending transaction. This capital protects the bank against the risk or threat of

business customers explained

the counterparty failing to repay the bank. The risk that a counterparty may fail to repay the money lent is known as credit risk.

There are three alternative ways that can be used by banks to determine the amount of capital they should hold to protect against credit risk:

- **Standardised approach to credit risk:** institutions calculating the required capital under the 'standardised approach' use methods wholly prescribed by the CRD. The majority of these methods determine the applicable risk charge based on the external credit ratings attached to the borrower. Where there is no external credit rating available, a predetermined risk charge will be applied.
- **Foundation – internal ratings based (IRB):** institutions calculating the required capital under the 'foundation IRB approach' are permitted to use their own models to estimate the risk of customer default ('probability of default'). The additional factors used to calculate required capital are prescribed by the CRD. These factors include the amount likely to be drawn if a customer defaults ('exposure at default') and the amount of loss likely to be incurred ('loss given default').
- **Advanced – internal ratings based (IRB):** institutions calculating the required capital under the 'advanced IRB approach' are permitted to use their internal models to estimate both customer and transactional risks.

In Ireland, banks using either the foundation IRB or advanced IRB approach require the specific prior approval of the Irish Financial Regulator. More details on the *Capital Requirements Directive* and *Basel II* may be found on the Financial Regulator's website at www.financialregulator.ie/index.asp. G

Implementing human rights

A recent Dublin conference organised by leading Irish human rights organisations addressed concerns identified by the UN's Human Rights Committee in relation to Ireland. Colin Murphy reports

When times are hard, the most vulnerable suffer. Human rights organisations will be needed more than ever, even as they themselves struggle with funding pressures. That was the core message to come from a recent conference in Dublin on "implementing human rights in a time of change".

Organised by a trio of leading Irish human rights organisations – the Irish Penal Reform Trust (IPRT), the Free Legal Advice Centres (FLAC) and the Irish Council for Civil Liberties (ICCL) – the conference marked Ireland's appearance before the UN's Human Rights Committee last summer. That occasion had highlighted various shortcomings in human rights protection in Ireland, and the conference was intended to follow up on these.

'Irritants'

Human rights organisations will often be seen as "irritants in the body politic" and "gadflies hopping to a new demand when the last one has been settled", warned former senator Maurice Hayes, who brought a distinguished pedigree in both human rights and administration to his role as chairman.

Suggesting that Ireland was "an often compliant and conformist society", he said there was "a need, from time to time, for some independent body to point to the Emperor's lack of clothes" and that such organisations should be "essential and valued partners in ensuring that protections for the citizen in Ireland are quality-controlled to the best international standards".

"A more mature country would recognise this," he said. "It is a mark of a mature democracy that dissent and constructive criticism is welcomed as a contribution to national policy making, and that politics belongs to the people as a whole, and not only to a limited circle or an administrative elite."

Ireland, he implied, had some way to travel yet, and human rights organisations would be vital in shepherding the country on this journey.

"At a time when, we are told, the world economic order is being redrawn and the rules being revised, it is all the more important that the new rules be rights-based. And it is also important that the measures required to correct past failings are not only effective and proportionate, but founded in equity and the protection of the weakest."

Specific concerns

Judge Elisabeth Palm, who was formerly rapporteur for Ireland on the UN Human Rights Committee and is a vice-president of the European Court of Human Rights, raised a series of specific concerns relating to human rights protection in Ireland. These included inequality between women and men, where she pointed to the continuing existence of article 41.2 of the Constitution (in which "the state recognises that, by her life within the home, woman gives to the state a support

INTERNATIONAL COVENANT

Under the *International Covenant on Civil and Political Rights*, Ireland reports periodically to the Human Rights Committee of the United Nations, which consists of a panel of experts elected by member governments. The committee then issues 'concluding observations', setting out the areas where it feels the state needs to make progress in protecting human rights. Since the early 1990s, it has been common for non-governmental organisations to make submissions to bodies like the Human Rights Committee in parallel with the formal reports by member states. These are known as 'shadow reports' (a term originated by an Irish NGO representation in 1991). Last year, in anticipation of the state's third periodic report to the committee, the IPRT, FLAC and the ICCL came together to prepare a shadow report that was subsequently endorsed by a further 15 NGOs as well as by various religious and academic bodies. That shadow report, accompanied by an extensive lobbying process undertaken by the NGOs, influenced the direction of the Human Rights Committee's questioning of Ireland, and many of the concluding observations issued by the committee echoed points made in the shadow report. The NGOs have also set up a dedicated website, www.rightsmonitor.org, to disseminate the shadow report and to follow up on the issues raised in it.

At the *International Covenant on Civil and Political Rights* follow-up conference organised by FLAC, ICCL and IPRT on 6 April 2009 were *(standing, l to r)*: Liam Herrick (IPRT director), Tanya Ward (ICCL deputy director), Dr Maurice Hayes and Mark Kelly (ICCL director). *(Seated, l to r)*: Judge Elisabeth Palm, Prof Michael O'Flaherty and Noeline Blackwell (FLAC director)

in a time of change

without which the common good cannot be achieved") as problematic; the "highly unsatisfactory conditions in prisons"; the ongoing detention of asylum seekers; the existence of the special criminal courts; the continuing requirement for judges to take religious oaths; and the threat of imprisonment for debtors.

She concluded: "So although many significant and important steps have been taken in Ireland to improve human rights in recent years, it is noteworthy that there still remains all these areas where there appears to be little or no progress at all."

Judge Palm also noted the "very useful role" that NGOs have to play in the rights-monitoring process, referring particularly to the shadow report. "We were – I wouldn't say attacked – but surrounded by members from various NGOs," she said, to laughter. She also noted the vital role NGOs have to play in disseminating the Human Rights Committee's observations.

Strategic approach

Tanya Ward of the ICCL told how she and her NGO colleagues had approached this issue of lobbying the committee. They took a careful "strategic" approach, identifying which committee members had personal interests in which key issues, and obtaining informal briefing sessions with committee members in both New York and Geneva prior to the government's appearance. These sessions allowed them to further prioritise the issues highlighted in the shadow report and make sure that committee members were armed with specific details and case studies to put to the government. This enabled the committee to ask 'closed' questions, which required a specific response on key issues, rather than merely open questions, which are easily avoided, she said.

Michael O'Flaherty, the Irish member of the Human Rights Committee, described the campaign run by Ward and her colleagues as "the best civil society lobbying that I've seen in five years on the committee".

"The government perhaps doesn't get enough credit for the extent to which it supports NGO participation in the process." He gave the government credit for "good practice" in its own dealings with the committee and in its practical support for those NGOs wishing to be involved, but noted that it was "still too much the case that we have human rights in bits of government".

"They are not system wide, and certainly not at the local level. Human rights are as relevant to the village and the parish as to the institutions of state," he said. He called for a "national human rights plan of action", with the "goal of getting the human rights paradigm into the centre of governance in Ireland". G

PICS: DEREK SPEIRS

Judge Elisabeth Palm was a keynote speaker at the ICCPR conference

CUTS TO IRELAND'S HUMAN RIGHTS SECTOR

There was strident criticism of the recent cuts to the budgets of the Equality Authority and the Irish Human Rights Commission at the conference. The former vice-president of the Human Rights Committee, Judge Elisabeth Palm, expressed "great disappointment" at the cut to the Equality Authority, which, she said, had been "highlighted by the state during the dialogue" with the Human Rights Committee. The authority had its budget cut by 43%. The current committee member, Prof Michael O'Flaherty, said that "what was done to the Equality Authority is beyond belief" and was "so disproportionate that we'd have to use terms like 'scandal'." He also said that what had "been happening to the Human Rights Commission here is nothing short of scandalous". The commission had its budget cut by 23%. In a further critical comment on political developments, referring to recent legislation on charities, he said that it "beggars belief that human rights isn't recognised as a charitable purpose in recent legislation". Michael Farrell of FLAC also addressed these cuts, describing them as "the serial dismantling of the state's equality and human rights infrastructure, just when it looks like it'll be needed more than ever". "Human rights and equality have been the first casualties of the first slight breeze of the recession," he concluded.

Assisted suicide, participants

A recent English case considered the issue of the DPP prosecuting those who participate in an assisted suicide, writes Elaine Dewhurst

In a recent English case (*Purdy, R (on the application of) v Director of Public Prosecutions & Ors*, [2009] EWCA Civ 92) reminiscent of the *Pretty* case in 2001, a 45-year-old appellant, Ms Purdy, suffering from a debilitating illness, intended to travel abroad to seek assistance in ending her own life in a jurisdiction where assisted suicide is lawful. However, she wished to assess whether or not her partner, Mr Puente, would be prosecuted if he aided or abetted her suicide. In order to make this assessment, the appellant sought an order requiring the DPP to promulgate and/or disclose his policy in relation to the circumstances in which he will consent to or not consent to a prosecution under the *Suicide Act 1961*. The case rested on an interpretation of article 8 of the *European Convention on Human Rights*, which had been discussed at length in both the House of Lords and in the European Court of Human Rights in the *Pretty* case.

The court recognised that Ms Purdy was "confronted with an impossible dilemma". However, it held that it was bound to follow the decision of the Lords in *Pretty* and held that article 8 of the ECHR was not engaged. The court also held that, even if article 8 were engaged, the current arrangements and general guidelines provided by the DPP and the added protection of the court system were sufficient to justify the present law in relation to assisted suicide.

Was article 8 engaged?

Does the right to choose the manner of one's own death fall within the scope of article 8(1)? In *Pretty*, the Lords held that article 8 was not engaged, as the right to private life related to the manner in which a person conducts his life, not the manner in which he departs from it. However, the European Court in the same case held that it was not prepared to exclude that this choice constitutes an interference with the rights of the applicant under article 8(1) and proceeded to make their determination as if article 8(1) had been engaged.

The Court of Appeal in this case faced a dilemma. There was a clear inconsistency between the decisions of the House of Lords and the European Court

ONE TO WATCH: NEW LEGISLATION

***Rules of the Superior Courts (Discovery) 2009* (SI no 93 of 2009)**

From 16 April 2009, new rules in relation to discovery and, in particular, to the discovery of electronically-stored information come into operation.

Application for discovery

An application for discovery (order 31, rule 12(1)) shall be made to the court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents that are or have been in his possession, power or procurement relating to any matter in question therein. The rules now provide that every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery, which shall:

- Verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs,
- Furnish the reasons why each category of documents is required to be discovered, and
- Where the discovery sought includes electronically stored information, specify whether such party seeks the production of any documents in searchable form and, if so, whether for that purpose the party seeking discovery seeks the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested.

Hearing of an application

On hearing an application for discovery (order 31, rule 12(2)), the court has a number of options:

- Either refuse or adjourn the application, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non-compliance with the provisions relating to voluntary discovery, or
- Make an order for discovery either in terms of some or all of the categories of documents sought or limited to certain documents or classes of documents within any or all of those categories, or otherwise as may be thought fit, and on terms as to security for the costs of discovery or otherwise, and for this purpose may adjourn the application in part,
- Where the discovery ordered includes electronically-stored information and the court is satisfied that such electronically-stored information is held in searchable form and can be provided in the manner hereinafter referred to without significant cost to the party from whom discovery is requested,
  - Further order that the documents or classes of documents specified in such order be provided electronically in the searchable form in which they are held by the party ordered to make discovery, or
  - Where the court is satisfied that such documents or classes of documents, or any information within such documents, could not, if provided electronically, be subjected to a search by the party seeking discovery without incurring unreasonable expense, further order that the party ordered to make discovery make available inspection and searching facilities using

human rights watch

and the role of the DPP

of Human Rights in *Pretty*. Was it bound to faithfully follow the decision of the Lords in *Pretty* or was it free to follow the decision of the European Court? The Court of Appeal held that the Lords' decision would always be binding unless it is clearly inconsistent with a subsequent decision of the European Court. However, even if it is clearly inconsistent, it must also be such an exceptional case such that the Court of Appeal would no longer be bound by the decision of the House of Lords.

The Court of Appeal was clear in its assessment that the decisions of the Lords and the European Court were in fact inconsistent. The court then considered whether the case was of so exceptional a nature that the Court of Appeal would not be bound by the decision of the Lords. The court held that the case would have to be of an extreme character or the circumstances would have to be wholly exceptional. The Court of Appeal held that the Lords would probably agree with the decision of the European Court in *Pretty*, but that this case was not of such a character that it would warrant not following the decision of the Lords. Therefore, the Court of Appeal held that, in the circumstances, article 8 was not engaged.

Debbie Purdy and Omar Puente face the media

If article 8 was engaged, was there a breach of article 8(2)?

The Court of Appeal, despite their initial decision that article 8(1) was not engaged, went on to consider the impact of the absence of a published policy by the DPP in relation to the prosecution of an individual who participates in an assisted suicide. The purpose of the

its own information and communications technology system, so as to allow the party seeking discovery to avail of any search functionality available to the party ordered to make discovery.

Security of documents

The rules also make provisions for the security of documents that are not subject to an order for discovery (order 31, rule 12(3)). In such circumstances, the court may include such provision or restriction and make the discovery subject to such undertakings from any party or person as the court may consider necessary to ensure that documents are not accessed or accessible, and otherwise to secure the information and communications technology system concerned.

The rules make provision for the inspection and searching of documents by an independent expert or person agreed between the parties, or appointed by the court in default of agreement (instead of being undertaken by the party seeking discovery), who may conduct such inspections and searches as may be required and report the results to the party seeking discovery. In such circumstances, the party seeking the order shall indemnify the independent expert or person in respect of all fees and expenses reasonably incurred by him, and the fees and expenses so indemnified shall form part of the costs of that party for the purposes of order 99.

Documents of the same or similar nature

The rules provide that documents of the same or a similar nature and not in electronic form, when numerous, shall, so far as possible, be grouped together and numbered or otherwise sufficiently marked so as to be identifiable (order 31, rule 12(4)). The parties providing discovery shall list the documents or categories of information, and shall provide the documents and information for inspection, in a manner corresponding with the categories in the agreement or order for discovery and, subject to any such agreement or order, in a sequence corresponding with the manner in which the documents or information have been stored or kept in the usual course of business by the party making discovery.

Necessity

The rules provides that an order for discovery shall not be made if and so far as the court shall be of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs (order 31, rule 12(5)).

Voluntary discovery

The new rules provide that an order for discovery against any party or third party shall not be made unless an application by letter in writing requesting voluntary discovery has previously been made, a reasonable period of time for such discovery has been allowed, and the party or person requested has failed, refused or neglected to make such discovery or has ignored such request (order 31, rule 12(6)). The application in writing shall (a) specify the precise categories of documents in respect of which discovery is sought, (b) furnish the reasons why each category of documents is required to be discovered, and (c) where the discovery sought includes electronically-stored information, specify whether the applicant seeks the production of any documents in searchable form and, if so, whether for that purpose the applicant seeks the provision

requirement that the DPP consent to a prosecution is to avoid prosecution where the public interest would not be served by any penal sanction. The appellant argued that the DPP should publish guidance in relation to assisted suicide in sufficiently specific terms for those contemplating the commission of the crime to be reasonably able to know whether they could avoid the ordinary consequences of committing it. In the absence of such a policy, any interference with article 8(1) could not be justified, as it could not be said to be "in accordance with law". The DPP defended the current arrangements by submitting that sufficient guidance has been given to crown prosecutors in the *Code for Crown Prosecutors* and that this code is readily available to any member of the public with an interest in it.

The Court of Appeal held that the appellant knows that, as the law stands at present, if her partner were to assist in her suicide, he would be contravening the criminal law and exposing himself to the risk of prosecution. The statute is clear, not vague. Once the offence has been committed, the DPP will have to make an informed decision whether to consent to a prosecution based on the circumstances as they appear at the time. The DPP has no duty to promulgate a crime-specific policy, and the absence of such a specific policy does not mean that article 8 is unjustifiably infringed. Indeed, the court went on to note that the appellant had the added protection of the court process to protect against an abuse of process. The Court of Appeal noted that, if the prosecution amounted to an abuse of process, the court would dismiss it. However, even if a defendant were to be convicted, but the circumstances were such that, in the judgement of the court, no penal sanctions were to be imposed, the court would order the offender to be discharged and "might well question publicly the decision to prosecute". In effect, the Court of Appeal assured the appellant that the "court is part of the protective system which discourages and would prevent or extinguish the effect of any arbitrary or unprincipled exercise by the DPP of his responsibilities".

Irish perspective

This case raises a number of interesting issues from an Irish perspective should such a case arise in this jurisdiction. In relation to the engagement of article 8 in these cases, it is likely that an Irish court would follow the decision of the European Court of Human Rights and determine that article 8 is engaged. However, the impact of the constitutional protection of the right to life would also have to be considered. The case also raises the issue of the role of the DPP and the decision to prosecute in certain circumstances. The decision of the Court of Appeal in this case would appear to support the general guidelines issued by the DPP and held that this is sufficient to make the crime of assisted suicide "in accordance with law" as required by the ECHR. In Ireland, the DPP has published the *Guidelines for Prosecutors*, which sets out in general terms the principles used to guide the initiation and conduct of prosecutions in Ireland, and are available at www.dppireland.ie. These guidelines would appear to be sufficient to satisfy the requirement that a criminal offence be "in accordance with law" as required by article 8(2). G

Elaine Dewhurst is the Law Society's parliamentary and law reform executive.

of inspection and searching facilities using any information and communications technology system owned or operated by the party requested. The court may dispense with this requirement for voluntary discovery in writing where the matter is urgent, the parties consent, where the case is of a particular nature, or any other circumstances that, to the court, seem appropriate.

Any such discovery sought and agreed between parties or between parties and any other person shall be made in like manner and form and have such effect as if directed by order of the court. In any case in which discovery has been sought and agreed and has not been made within the time agreed, the party who has sought same may make an application pursuant to rule 21, provided that when seeking discovery, the party requested was informed (a) that such voluntary discovery was being sought pursuant to order 31, rule 12; (b) that agreement to make discovery would require it to be made in like manner and form and would have such effect as if directed by order; and (c) that failure to make the discovery may result in an application pursuant to rule 21. The court may, if satisfied that it is proper so to do, make such order under this rule, rule 19 or rule 21, as is appropriate, or such other order as appears just in the circumstances.

Time limits

An application for discovery shall be made not later than 28 days after the action has been set down or, in matters that are not set down, 28 days after it has been listed for trial (order 31, rule 12(9)). The court may order or the party requested might agree to extend the time for the application for discovery in any case in which it appears just and reasonable to do so.

Costs

The costs of an application for discovery in any case in which prior written application has not been made, or in which application has not been made within the time provided, shall be at the discretion of the court (order 31, rule 12(10)).

Variation of an order

An application for variation of an order of discovery can be made by any party concerned by the effect of an order or agreement for discovery (order 31, rule 12(11)). The application shall be made by motion on notice to each other party concerned. The court may vary the terms of such order or agreement where it is satisfied that further discovery is necessary for disposing fairly of the case or for saving costs, or that the discovery originally ordered or agreed is unreasonable, having regard to the cost or other burden of providing discovery.

An order for variation shall not be made unless:

- The applicant shall have previously applied by letter in writing to the other party specifying the variations sought to the order, furnishing the reasons why each variation is sought, and requesting that party's agreement to the variations sought, and
- A reasonable period of time for agreement has been allowed, and
- The party or person requested has failed, refused or neglected to agree to such variation or has ignored such request.

Affidavit as to documents

The rules specify for a new form 10, which is set out in the rules and is available at www.courts.ie. G

Elaine Dewhurst is the Law Society's parliamentary and law reform executive.

letters

Send your letters to: *Law Society Gazette*, Blackhall Place, Dublin 7, or email: gazette@lawsociety.ie

Anti-US libel law argument is one-sided

From: Michael Williams, Grosvenor Square, Dublin 6

Paul Tweed argues (*Gazette*, March 2009, p16-17) against US legislation to prevent libel judgments of other jurisdictions being enforced there, but his argument seems to me one-sided and I think the other side should be heard. I would put it like this. Our libel law reflects our public policy of giving priority to reputation and not allowing freedom of speech to be exercised in a way that unjustly damages another's good name. US policy, reflected in the First Amendment to the Constitution, gives priority to freedom of speech and assumes that someone who claims his reputation has been damaged by false statements should vindicate it by publishing the truth, and that truth will prevail. As a result, there are comparatively few defamation actions in the US, since defendants can plead their constitutional right of free speech. To lawyers accustomed to an environment where reputation is an asset protected by law, this may seem strange, but it results from a legitimate policy.

For the US courts to enforce a judgment of a foreign court against a US publisher in defamation proceedings that would have failed if taken in the US would be to substitute foreign values – or, if you prefer, another country's political judgement on how to balance freedom of expression against the right to reputation – for the values or balance which the US has chosen to adopt. To put it another way, if a US resident may be inhibited in expressing views because a libel award against him obtained in another country may be enforced in the US, then protection of the constitutional right requires the removal of that inhibition.

Mr Tweed suggests it is illogical that the US courts will enforce a foreign judgment for damages for physical injury, but not one for damage to reputation. It could also be argued that it would be illogical for the US courts to enforce a judgment obtained in a foreign country on a complaint that would not have constituted a valid cause of action in the US.

In this letter I do not want to take a position as between the policies and laws of a country where libel actions are rare and those of countries where they are common, but I think your readers should have the opportunity to consider the arguments on both sides.

Request for tenders for legal prosecution services for the Road Safety Authority

From: Liam Duggan, manager, Road Haulage Enforcement, Road Safety Authority, Clonfert House, Bride Street, Loughrea, Co Galway

The Road Safety Authority (RSA) has placed an advertisement on the e-tenders website (www.e-tenders.gov.ie) inviting tenders for the provision of legal prosecution services to the authority.

The RSA is not proposing to issue invitations to tender to individual solicitors. Your members may be interested in responding to the invitation to tender. The deadline for receipt of tenders is 12.00 hours on 14 May 2009. All queries concerning the request for tenders must be received by 4 May 2009. Queries will only be accepted via the e-tenders question and answer facility. G

Are judicial salaries ab

By excluding judges from a levy applied to all who are paid from the public purse, the government has rejected the wisdom of the Supreme Court in *O'Byrne*. Worse, it has put the judiciary in a bind and therefore encroached on their independence, argues Patrick J Hume

Recently, the government increased the public service pension levy and applied it to all public servants, except for the President of Ireland and those serving as judges and military judges. Comments in the media brought judicial salaries under the spotlight. After some weeks, Chief Justice John Murray proposed that judges could voluntarily pay the levy, stating in a press release on 1 April that "it must remain constitutionally a matter for each individual judge to decide whether he or she will voluntarily make the contribution in question".

The following comments seek to place the problem in a broader international context and to suggest that, in all probability, the judiciary and courts have been restricted by the exemption and may well have preferred the decision in the Supreme Court case of *O'Byrne v Minister for Finance* ([1959] IR 1).

Controversy concerning the protection of judicial salaries and payment of taxes or levies is not unique to Ireland. The protection of judicial salaries dates from the *Act of Settlement 1701* and was made explicit in the *Commissions and Salaries of Judges Act 1760*, section 3. Courts in the US and Australia see the 1760 act as prohibiting the reduction of judges' salaries (*US v Will* (1980) 449 US 200 and *Cooper* (1907) 4 CLR 1304).

Despite this, judges' salaries were reduced in Britain in 1832 and, more recently, in 1931, pursuant to the *National Economy Act*, whereby salaries in excess of £5,000 were reduced by 20%. It is fair to say that such reductions were not universally welcome. Similarly, in Australia, judges' salaries were reduced in the early 1930s with the agreement of the judiciary, and even as recently as 1986, the salaries of judges were reduced in Tasmania.

'Shall not be reduced'

The matter of the constitutional protection of judicial salaries was recently addressed in a decision of the Supreme Court of Uganda (*AG of the Republic of Uganda v Masalu Musene Wilson & Ors* [2008] UGSC 13). This case concerned protection of judicial salaries under article 128(7) of their constitution: "The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage." Not that dissimilar to the Irish Constitution at article 35(5): "The remuneration of a judge shall not be reduced during his continuance in office." The AG of Uganda was appealing a decision of the Constitutional Court, which found that the imposition of income tax on the judiciary violated the protection of salaries under the constitution.

> ***"To require a judge to pay taxes on his income on the same basis as other citizens and thus contribute to the expenses of government cannot be said to be an attack on his independence" – Maguire CJ***

In the report of this case, there are references to similar cases in the United States and Canada, where some form of protection of judicial salaries also operates (US Constitution, article III, section 1, and Canada's *Constitution Act 1867*, section 100).

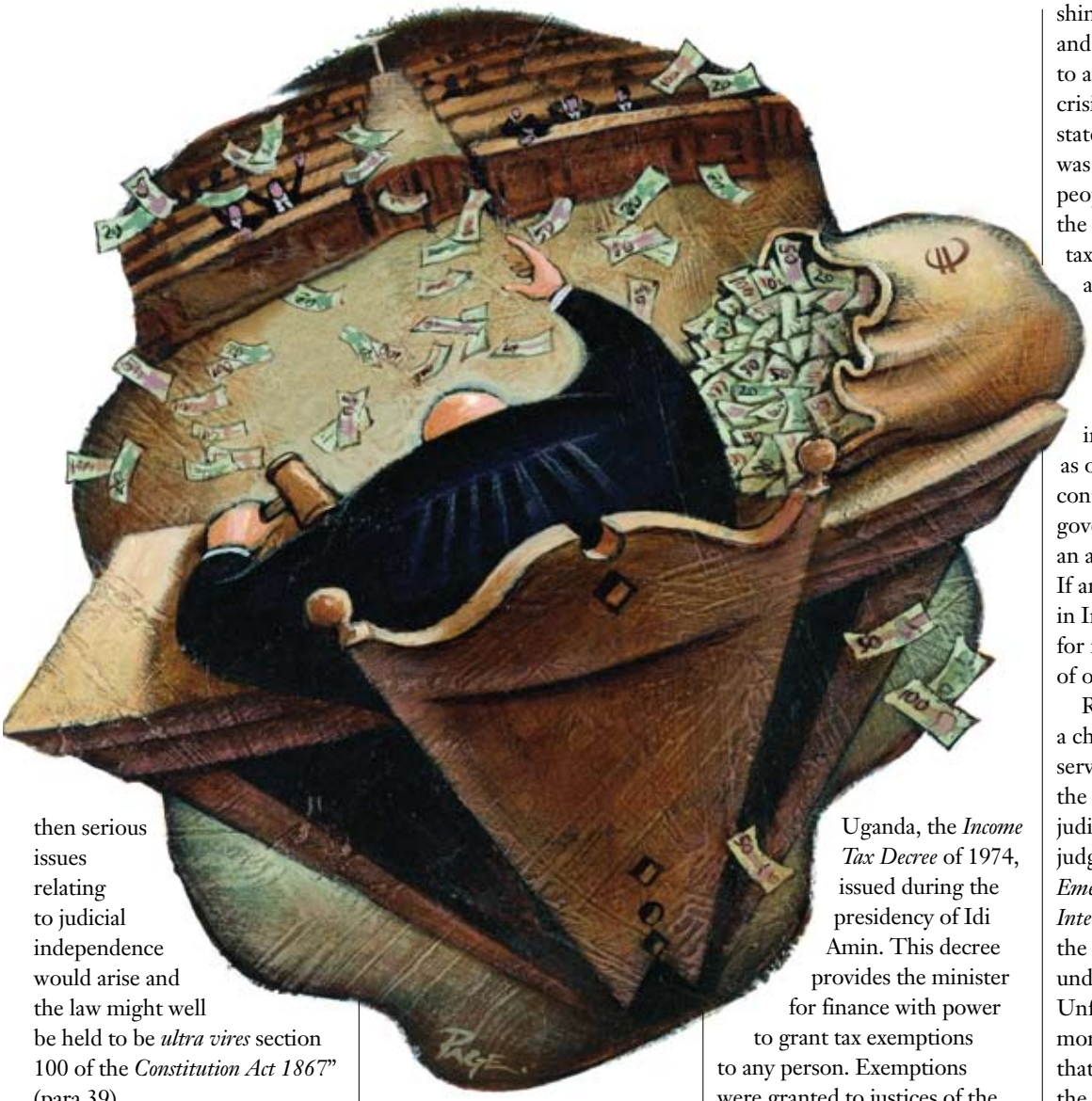
There is a progression in the US courts from *Evans v Gore* (253 US 245 [1920]), which held that a judge's salary could not be taxed because such taxation amounted to diminishing his salary. Yet one eminent judge, Justice Holmes, dissented: "I see nothing in the purpose of this clause of the constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being, if not their life depends" (p265). Later, the court moved to a view that the constitution does not prevent Congress from imposing a "non-discriminatory tax laid generally" upon judges and other citizens (*O'Malley v Woodrough*, 307 US 277, 282 [1939]). Finally, it does prohibit taxation that singles out judges for specially unfavourable treatment – but not a general nondiscriminatory tax (Medicare tax) that results in a diminished take-home pay (*US v Hatter*, 532 US 557, 561, 576 [2001]).

Independence

The Canadian cases give further light to salary protection. In the seminal case *Queen v Beauregard* ([1986] 2 SCR 56), the court elaborates on the central purpose of the protection – that is, the protection of the independence of the judiciary. This case concerned a change in the pension contributions of judges, among other matters. The court remarked, as a general observation, that "Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country" (para 38). The court went on to offer a test as to the applicability or not of a law impinging on judicial salaries, stating that: "If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis à vis* other citizens,

viewpoint

solutely protected?



then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* section 100 of the *Constitution Act 1867*" (para 39).

In a later Canadian case, the eminent Chief Justice Lamer brings the matter radically further when considering what kinds of reductions are consistent with judicial independence. In *Re Remuneration of Judges* ([1997] 3 SCR 3), he states: "Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are *prima facie* rational. For example, an across-the-board reduction in salaries that includes judges will typically be designed to effectuate the government's overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest" (para 184).

Returning to the 2008 Ugandan decision, the court, following the persuasive value of the US and Canadian Supreme Courts, agreed that the imposition of income tax did not violate the relevant constitutional protection of judicial salaries. However, the court then turned to a special provision unique to Uganda, the *Income Tax Decree* of 1974, issued during the presidency of Idi Amin. This decree provides the minister for finance with power to grant tax exemptions to any person. Exemptions were granted to justices of the Supreme and High Courts in 1991, but not to the lower benches. The court clearly indicated that taxes could be applied to judges, but went on to exempt all judges from income tax on another legal technicality specific to the case.

Beacon of truth

The Irish Supreme Court case of *O'Byrne v Minister for Finance* ([1959] IR 1) was decided before most of the above cases in the US and all the other cases. It shines like a beacon of truth and seems more than adequate to address the current financial crisis. Judge Kingsmill Moore stated (at 64): "The legislation was for the protection of the people, not for the interests of the judges … I fail to see how a tax which is non-discriminatory against judges can assail the judicial independence…" Furthermore, Maguire CJ stated that: "To require a judge to pay taxes on his income on the same basis as other citizens and thus contribute to the expenses of government cannot be said to be an attack on his independence." If anything, the Supreme Court in Ireland can be commended for reaching its decision ahead of other jurisdictions.

Recent legislation concerning a change in levies on all public servants specifically excludes the President, members of the judiciary and some military judges (section 1(d) of *Financial Emergency Measures in the Public Interest Act 2009*). This echoes the Ugandan decree issued under President Idi Amin. Unfortunately, it is this statute more than the Constitution that limits the application of the levy to the judiciary. The government, by excluding judges from a levy applied to all who are paid from the public purse, has rejected the great wisdom of our Supreme Court in *O'Byrne* and has perhaps done worse by putting the judiciary in a bind and therefore encroaching on their independence – the very matter that article 35(5) sought to avoid. G

Patrick J Hume SJ is a solicitor with the Jesuit Centre for Faith and Justice, Dublin.

DOWN ON

When marriages break down in a farm setting, things can get complicated. The courts seek to balance the viability of the farm with the need for 'proper provision' for both spouses. Ann FitzGerald explains the role of the agricultural consultant

Marriage breakdown in a farm setting is keenly felt where, in a rural community, family ties remain close-knit and farmland is passed from one generation to the next – as it has been over many decades. Since its introduction in 1997, the numbers of couples filing for divorce has grown significantly – although the associated financial aspects of divorce settlements continue to cause ripples.

The courts desire to see farming enterprises remain viable, while also seeking to ensure that 'proper provision' in financial terms is made for both spouses. This is the challenge for the judiciary and family lawyers alike. The same considerations that apply in the urban setting apply to farming families: firstly, the fact that two households now require to be supported, leaving less money to go around; and secondly, the likelihood that there will be less opportunity to offset household necessaries against the farm accounts, where one spouse is no longer connected to that business.

Agricultural consultants

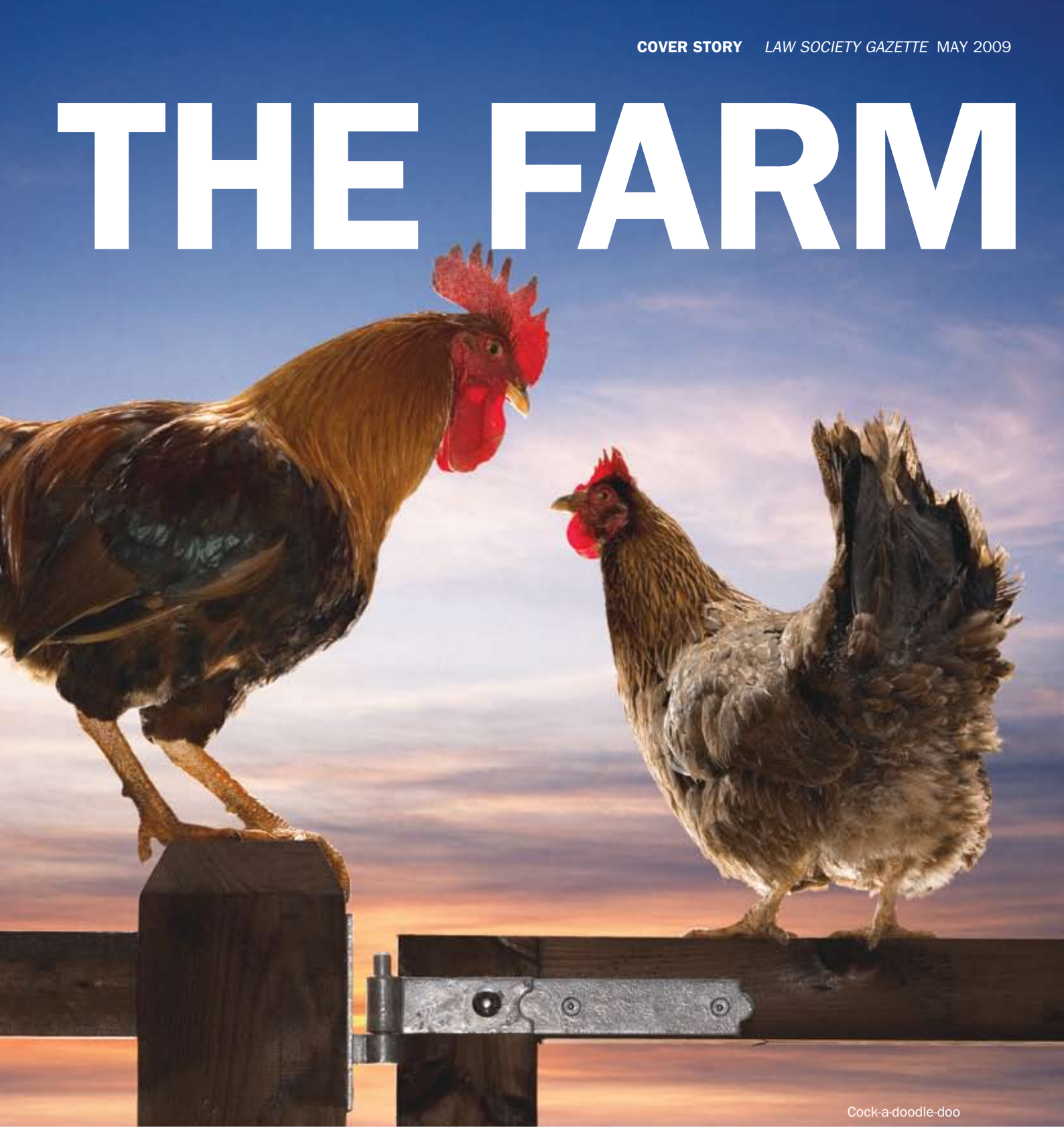
In family law cases, how does the expert agricultural consultant assist in seeking to conclude a separation/divorce case involving a farming business? Their role should be to:

- Summarise in simple terms a complex financial situation and provide a report to the solicitor,
- Review the value given on the financial assets, such as shares in private companies,
- Advise on how a settlement may be financed, having regard to liquidity issues and taxation consequences,
- Assist in the preparation of a complex affidavit of means,
- Assist in drafting a list of documents required to ensure that voluntary discovery is in place,
- Advise on valuations issues arising,
- Conduct investigations and asset tracing,
- Prepare adverse inference reports – are there contra-indicators on the accounts? In other words, a summary will not suffice – the agricultural consultant should point to where the problems lie and where the accounts do not add up,
- Prepare affidavits to support interim maintenance or a freezing-order application,
- Analyse income and potential future income, budgets and liquidity,
- Consider the taxation issues on maintenance and financing of the settlement,
- Conduct a 'reasonableness review' – stand back and look at the overall picture: does it add up and make sense? Is there anything

MAIN POINTS

- **Marriage breakdown in a farm setting**
- **Farm viability and proper provision**
- **Role of the agricultural consultant**

THE FARM



Cock-a-doodle-doo

obviously missing, like the proverbial 'elephant in the room'? For example, look at income, if it is shown to be much less than expenditure. Is there a corresponding overdraft or borrowing? The truth has intrinsic and internal logic. Common sense rules!

What is required?

The report of the agricultural consultant should be short, accurate, easily intelligible and with a 'one-page' balance sheet attached, being the matrimonial balance sheet showing the assets and liabilities of both spouses, net of any inherent capital gains tax liability (see *BD v JD*).

The report should include a comment on tax issues arising on maintenance and the anticipated net position of the parties – net to husband and net to wife on maintenance of €X. The report should identify the literature or other material that the expert has relied on in compiling the report and give a summary of the conclusions reached. The report may need to be qualified and should indicate the


Moo

basis for any opinion given. The right expert will be impartial, independent, credible and have the appropriate expertise.

The purpose of the agricultural consultant's report is to provide the following guidance:

- Assess the farm business net worth,
- Comment on the farm business net profit,
- Assess options for a potential division of assets, and
- Identify other issues of relevance.

The report is based on information collated from discussions with the client, a farm visit, and copies of pleadings and affidavits of means, together with the financial documentation referred to earlier. The report will detail the farm resources, including land, livestock, labour, buildings and machinery.

Assessing the net profit

An assessment of the net profit of the farming enterprise will point to the ability to borrow and ability to pay maintenance. In some instances, planning potential for sites, zoning or compulsory purchase will take centre stage. The availability of a site nearby, either on the lands or adjacent to the farm, may assist in offering possible solutions. Accordingly, check for road frontage and the division of each of the holdings to ascertain whether a natural division of the lands is possible, or sale of sites, and whether compulsory purchase for road widening is coming down the tracks.

"The farming business (if being run reasonably well as a going concern) may be left largely untouched in a family-law settlement where the farm profit provides the income for the family"

Check whether the lands are adjacent to each other or whether some of the lands are in 'outside farms' some miles away. Check the location of the family home and whether it is in a separate 'take' or parcel of land. If the farm is to be subdivided between the spouses, the practical wisdom of such division must be examined to ensure that such a plan works on the ground as well as on paper. Maps of the farmlands should be examined and carefully checked. Whether any single farm payment or forestry grant can be divided should be considered.

If compulsory purchase is relevant, the land will be located on one of the preferred routes, for example, the N8 road from Cork to Dublin, and this will have the potential to produce liquid cash to fund a possible settlement. At present, the NRA offers up to €80,000 to €100,000 per acre.

In some cases, there will be a unique element for the farm in question, such as whether the early retirement scheme from farming pension (ERS) may be available for both parties when they reach 55 years of age – although this relief

GETTING DOWN AND DIRTY

The farm business may consist, for example, of a dairy/ beef/ tillage or other enterprise. In the case of a farming business, the following information will usually be required, where appropriate:

- Farm accounts for the last three years,
- Income tax returns and notices of assessment for the previous three years,
- Copy of the single payments scheme application form for the current year,
- Digitised maps of land declared on single farm payment form,
- Map of holdings,
- Copy folios and file plans of all owned lands,
- A list of the animals submitted for the animal-herd tests for the two previous years from the veterinary surgeon,
- A list of all vehicles and agricultural machinery, stating the age, value and balance of outstanding finance agreements,
- Statement and breakdown of categories and number of animals currently on the holding,
- Confirmation of the annual milk quota,
- Copies of all land lease/rental agreements (if any),
- Certified balances of all bank accounts, certified balances of all equities and business, and a
- Certified balance of all pension plans.

has been suspended in the 2009 budget. This ERS is not to be confused with retirement relief from capital gains tax (see *SN v FN*, where much of the evidence centred on the development potential of the farmlands).

Figures on a farm business net profit will include interest and depreciation and, hence, in order to arrive at the farmer's net income, these items should first be deducted. In many cases, the farm accounts include overheads for personal outgoings, such as running costs of a car, phone, ESB – and this is legitimate. However, these should be checked for in the fourth schedule of the affidavit of means, as double accounting is not acceptable. It is usual to allow one-third of these outgoings as referable to ordinary domestic usage.

The farm consultant will look at the current farming programme and farm profitability, as to room for improvement, whether the profit has been suppressed or whether the farmer is not running an efficient enterprise.

Settlement options

As to settlement options, in some instances the property can be easily subdivided and this may form the basis for settlement where both spouses continue to run the subdivided farm, or one employs a manager or sublets the land. However, a cash settlement for the non-farming spouse is frequently the preferred outcome in reaching settlement. The farming business (if being run reasonably well as a going concern) may be left largely untouched in a family law settlement where the farm profit provides the income for the family – which might be seriously undermined otherwise, in the event of a sale of part or more of the lands.

Currently, there is effectively a 'Mexican stand-off' between sellers and buyers, so that land is now difficult to sell. Until the markets stabilise, sales are unlikely to be concluded and total stagnation is the order of the day. This has resulted in a change in the structure of settlements – from cash deals to the division of land assets. In fact, some cash settlements agreed in 2007 and early 2008 are now being revisited, as land has not sold to raise the cash, and penalty interest is accruing. 'Land equivalence reports' are now in vogue with agricultural consultants, prepared to aid reaching a settlement in the current depressed economic climate. The value of different lots of land is assessed and valued so that an appropriate allocation of land might be made in an individual case, while ensuring ongoing viability of the farming enterprise.

The farm consultant may also be in a position to give taxation advice – if not, then taxation advice is essential in addressing settlement options. Special care should be taken on the disposal of certain assets from one spouse to another spouse, which could give rise to a clawback of agricultural relief/business relief and dwellinghouse relief, or a possible clawback of the young trained farmers' stamp-duty exemption. Specific advice is required on capital gains, capital acquisitions tax and stamp duty in all these instances, and taxation issues are not addressed here in any detail. G

LOOK IT UP

Cases:

- *BD v JD* (unreported, Supreme Court, 8 December 2004)
- *C v C* (2005 IEHC 276, Mr Justice O'Higgins)
- *F v F* (Mr Justice O'Sullivan, unreported, June 2002)
- *MK v JPK* (Mr Justice McCracken, Supreme Court, 9 February 2006)
- *SN v FN* (Mr Justice Abbott, unreported, 8 December 2003)
- *T v T* (Supreme Court, 2002 3IR 334 at 383, Mrs Justice Susan Denham)

Ann FitzGerald is a partner in FitzGerald Solicitors, Cork. *This is an edited version of a lecture delivered on 6 December 2008 at the Thompson Round Hall Annual Family Law Conference. With thanks to Mike Brady (agricultural consultant, the Brady Group, Cork) and Pat Lane (tax director FDC Group, Cork).*

THE SUFFER

Employees need to stay alert to changing circumstances in their organisation and be more conscious of the things that might help them keep that job. Declan Farrell and Aoife Coonagh give you the once over

The parable of the boiled frog is often used to illustrate how people respond to change in an organisation. If you drop a frog into a pot of boiling water, the story goes, the sudden shock will send it leaping straight out of the pot. If, however, you put the frog in warm water, it will be happy. Gently raise the temperature and the frog won't notice – until it's too late. The point of the story is that gradual change can creep up on us – we get comfortable, we slow down, and we are less alert to threats. Dramatic and sudden change at least has the benefit of generating a rapid response.

'Dramatic' and 'sudden' certainly describe the recession. All certainties have evaporated overnight. Economic recovery will come, but we don't know when that will happen. And meanwhile, for those of you fortunate enough still to have a job, you may now be far more conscious of the things you need to do to retain it.

Believe in you

Now may be the time for a rapid personal reassessment. You should assess yourself under a number of headings – the key headings that, in our experience, always separate the highly effective and the highly successful from everyone else.

The highly effective have strong technical expertise – that is almost a given. But technical expertise alone does not distinguish you. Here's what does. The key to success at a certain level in any career lies increasingly in a set of intangibles, the so-called 'soft' skills: the ability to deliver, the relationships and networks you develop, the way you listen to people, the way you communicate, the atmosphere you create around you, how professionally you present yourself. You should assess yourself honestly under all of these headings and manage them just as carefully as you manage your continuing professional development.

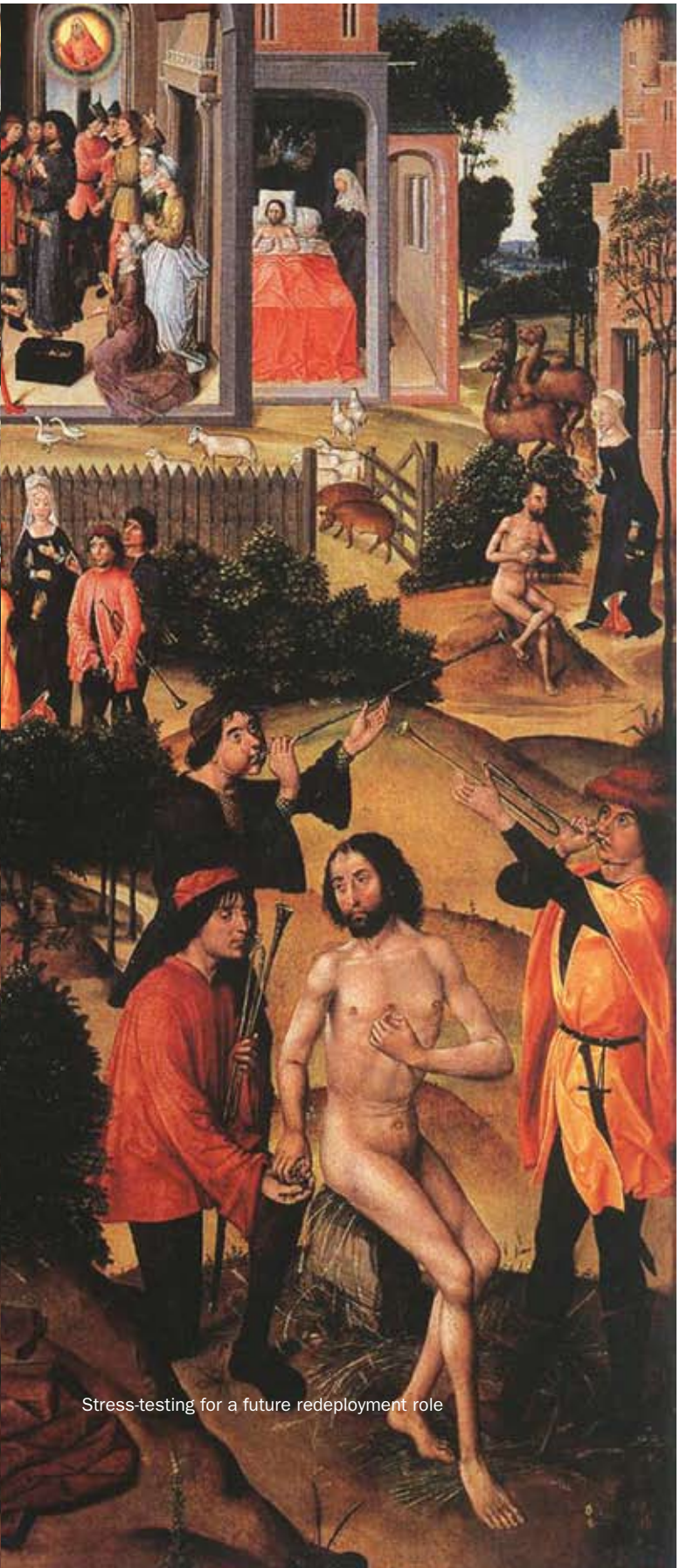
Rate yourself on a scale of one to ten under the following questions. This may not appear to be a scientific approach, but your own honest assessment will probably highlight areas you need to work on, soon:

- Do you deliver results, consistently, on time?
- Do you have strong, positive working relationships

MAIN POINTS

- How to boil frogs and influence people
- Assess yourself and your networks
- Communicate and listen
- Don't take internal restructuring interviews for granted

ING OF JOB



Stress-testing for a future redeployment role

with a wide range of colleagues?
- Are you well networked externally?
- Do you communicate professionally?
- Do you listen?
- Are you always well presented?

These questions may seem simple and obvious – but then, the important insights usually are. And, in any organisation, when the time comes where a HR manager or director is assessing roles with a view to making cuts, he or she will inevitably look at the affected people to assess their potential for redeployment. And the people who rate highly on the questions we just posed have a greater chance of being retained.

On the job

So, results. Do you deliver? The most immediate way to increase your chances of recession-proofing your position is to make yourself an asset to your firm, no matter where you sit in the hierarchy. Newly qualified solicitors, apprentices, associates and partners – figure out a way to become even more valuable than you currently are. Resist the temptation to stick rigidly to your role as it used to be defined and be prepared to pitch in. Don't just deliver your own results – help others to deliver theirs. Since most firms and companies are now trying to do the same work with fewer resources, the same amount of work still needs to be done, but by a smaller pool of people. You should be recognised as one of the willing.

Are there other projects you could become involved in? If you believe you have the time for it, ask if there is more you can take on or if there are ways you can help. Be careful not to stretch your workload beyond the bounds of what you can achieve. But the wider your ability, the more capable you are of being redeployed if roles are being assessed for further cuts.

Expand your networks

You should make a point of expanding your networks, internally and externally. Strong external networks lead to more business development opportunities. Strong internal networks lead to an enhanced ability to deliver, since there are more people you can pick up the phone to. Also, it helps to have a network of people championing your cause when difficult decisions have to be made.

Don't wait for these relationships to develop accidentally over time. Be proactive. Seek people out.

GILBA
(German-Irish Law and Business Association)

EU & International Affairs Committee
Law Society of Ireland

ANNUAL THEMED CONFERENCE

Competition Law in Ireland and Germany

(A CONFERENCE FOR LEGAL PRACTITIONERS, IN-HOUSE COUNSEL, CIVIL SERVANTS AND BUSINESS PEOPLE)

Friday, 22 May 2009. 2pm – 5.15pm
Presidents' Hall, Law Society of Ireland

SESSION I

Chair: Philip Andrews, partner in McCann Fitzgerald's competition law group

Competition law in Ireland
The Honourable Mr Justice Liam McKechnie, High Court

Competition law in Ireland – Case Study
John Kettle and Emma Keavney, Mason Hayes & Curran

SESSION II

Chair: Dr Stanley Wong, Member of the Competition Authority and Director of Mergers

Objectives of European competition law
Professor Daniel Zimmer, LLM, Director of the Institute of Commercial and Economic Law at the University of Bonn, Member of the German Monopolies Commission

Competition law in a downturn: from crisis to recovery
John Handoll and Cormac Little, William Fry Solicitors

Followed by reception hosted by HE Christian Pauls, German Ambassador to Ireland, 7pm, 'Danesfield', 1 Seaview Terrace, Donnybrook, Dublin 4

Fees: €70 per person (members of the German-Irish Lawyers and Business Association), fee after 11 May is €90 per member. For non-members, fee is €100 for registration prior to 11 May, thereafter €120 per person.

And offer help, wherever you can. You help others, they will help you – that is the unwritten rule of work relationships and networks.

I'm listening

When we talk about communication, most people think of the transmission end – talking, presenting. Relationships, however, start with listening. If you want to show people that you are genuinely interested in them – interested in their careers, in their development, interested in helping them – then you have to listen to them.

Although most people will acknowledge the importance of listening, the reality is that many are lousy at it. They recognise that it's a personal weakness. They'll even tell you that this deficit has been pointed out to them, in both work and personal relationships – then they shrug and move on as though it were some unalterable trait, like the colour of their eyes. We run a training programme on listening, yet very few executives ever ask for it.

People tend to ignore this critical skill because they don't see any immediate consequences to doing it badly. They may be leaving a trail of small resentments and damaged relationships, developing a reputation for brusqueness, impatience or even arrogance without realising it – until, one fine day, they discover that their 'people skills' are considered a real problem and a potential barrier to further progression.

If you don't mean it, don't do it

Real listening starts with real interest. It doesn't start with technique or tricks. This is not a box-ticking exercise where you decide that, starting on Monday, you will cock your head and look directly into people's faces when they're talking to you. People have a nose for feigned interest, for insincerity. Either you're interested in people or you're not, but don't try to pretend.

In her wonderful book on Abraham Lincoln, Doris Kearns Goodwin tells how, even when his beloved young son Tad was dying of typhoid, the president still found time to ask the woman nursing his son about her life. "Always curious and compassionate about other people's lives, Lincoln asked the new nurse about her family. She explained that she was a widow and had lost two children. Her one remaining child was in the army. Hearing her painful story, he began to cry, both for her and for his own stricken family."

Real listening, real attention, may only take a few minutes. But it starts with real interest. And right now, when the reality in many organisations is cutbacks, smaller teams, people trying to achieve even more with fewer resources, it may seem that you don't even have those few minutes. The problem is, now more than ever, you need to find them. Remember

Frog and nettle soup: start at a low temperature for the best flavour

the adage: 'Doing the things you've always done will give you the results you always got'. If you want different results, then change the one thing you control completely – your own behaviour, your own approach.

We're not talking here about giving up on the day job and becoming a counsellor. But we are talking about real listening when the opportunity presents itself. Someone stops by your desk to ask you a question. You half-listen, indicating with every fibre of your being that you're impatient to get back to what you were doing. Opportunity lost. You half-listened. The five minutes were sacrificed anyway. If you're going to give those minutes away, then make sure they are well spent. Listen fully. Five minutes of real attention is worth twice as many minutes of divided attention. And if you can't give your undivided attention there and then, just say so. Tell them when they can have it.

> ***"Doing the things you've always done will give you the results you always got"***

Interviewing to keep your role

I have seen an increasing number of people coming to us preparing to be interviewed after internal restructuring. The role they are now interviewing for has many of the elements of the role they already held prior to the restructuring. This interview cannot be taken for granted. Assume that the panel knows nothing about you. Treat it as a real competition – which it is.

Spread a little happiness

Finally, spread a little happiness and good cheer. Some people bring a good atmosphere with them – you're happy to see them coming. Be one of these people. It may seem like a small thing, but a smile goes a long way. G

Declan Farrell is career consultant and Aoife Coonagh is head of career development in Carr Communications.

Bridging

Although not a special guardianship order, the new court order available under the *Child Care Act 1991* is to be welcomed as a measure that bridges the gap between foster care and adoption, writes Geoffrey Shannon

Twenty-five years ago, the *Report of the Review Committee on Adoption Services* recommended the availability of guardianship to substitute carers of children in long-term care: "We have examined guardianship only in the context of adoption applications because we understand that the new *Children Bill* may contain proposals for a legal procedure which would enable persons who are providing care for a child on a long-term basis to seek guardianship. We would welcome the introduction of such a procedure. While we consider that adoption is a beneficial arrangement for a child who lacks the security of a family, it is, as we have pointed out, quite inappropriate in some circumstances. A generally available means, short of adoption, by which persons who are bringing up a child, apart from his natural parents, could obtain a legal status in relation to the child would have considerable merit."

The 1984 review committee recommended legislation to create greater stability for parents and children in long-term foster care by permitting some or all guardianship rights to be vested in the foster parents. That said, if such vesting were to involve a severance of the natural marital parents' guardianship rights, such reform might be unconstitutional, involving as it does the transfer of "inalienable rights and duties". A proposal to provide foster carer guardianship under the *Guardianship of Infants Act 1964* would mean that the foster carer would become the guardian of the child and the estate of the child. Such a relationship between a foster carer and child would have the effect of overriding the care plan and removing the HSE from the management of the care of the child, leaving any proposal of this nature vulnerable to constitutional challenge. Any legislative proposal had therefore to focus on suspending rather than supplanting rights, and had to be effected under the *Child Care Act 1991*.

Until the enactment of the *Child Care (Amendment) Act 2007*, the options available to provide permanence for children in long-term care were very limited. Only adoption provides legal permanence, but it requires a complete severance of links with the child's natural family.

Working within the current constitutional framework and having regard to international law, the *Child Care (Amendment) Act 2007* provides a necessary mechanism to grant long-term foster parents/relative carers increased autonomy in relation to issues such as consent to medical examinations and treatment and the issue of passports, as well as day-to-day issues such as, for example, giving permission for children or young people to travel on a school tour or attend a concert.

While the overarching objective of the 2007 amendment act is to regularise the situation for foster children or children placed with relatives in respect of routine decisions, it does not supplant the HSE's statutory role in the case of children in respect of whom court orders are granted or who are in voluntary care.

Increased autonomy

Where a child has been in the care of a foster parent or parents under section 36 of the *Child Care Act 1991* for at least five continuous years, the foster parent/relative carer is permitted to apply to the court for an order. This order gives foster parents/relative carers increased autonomy in respect of such children such that they will be authorised:

"a) To have, on behalf of the Health Service Executive, the like control over the child as if the foster parent or relative were the child's parent, and

b) To do, on behalf of the Health Service Executive, what is reasonable (subject to the provisions of this act and of the regulations for the time being in force under this act) in all the circumstances of the case for the purpose of safeguarding and promoting the child's health, development or welfare and, in particular, give consent to:

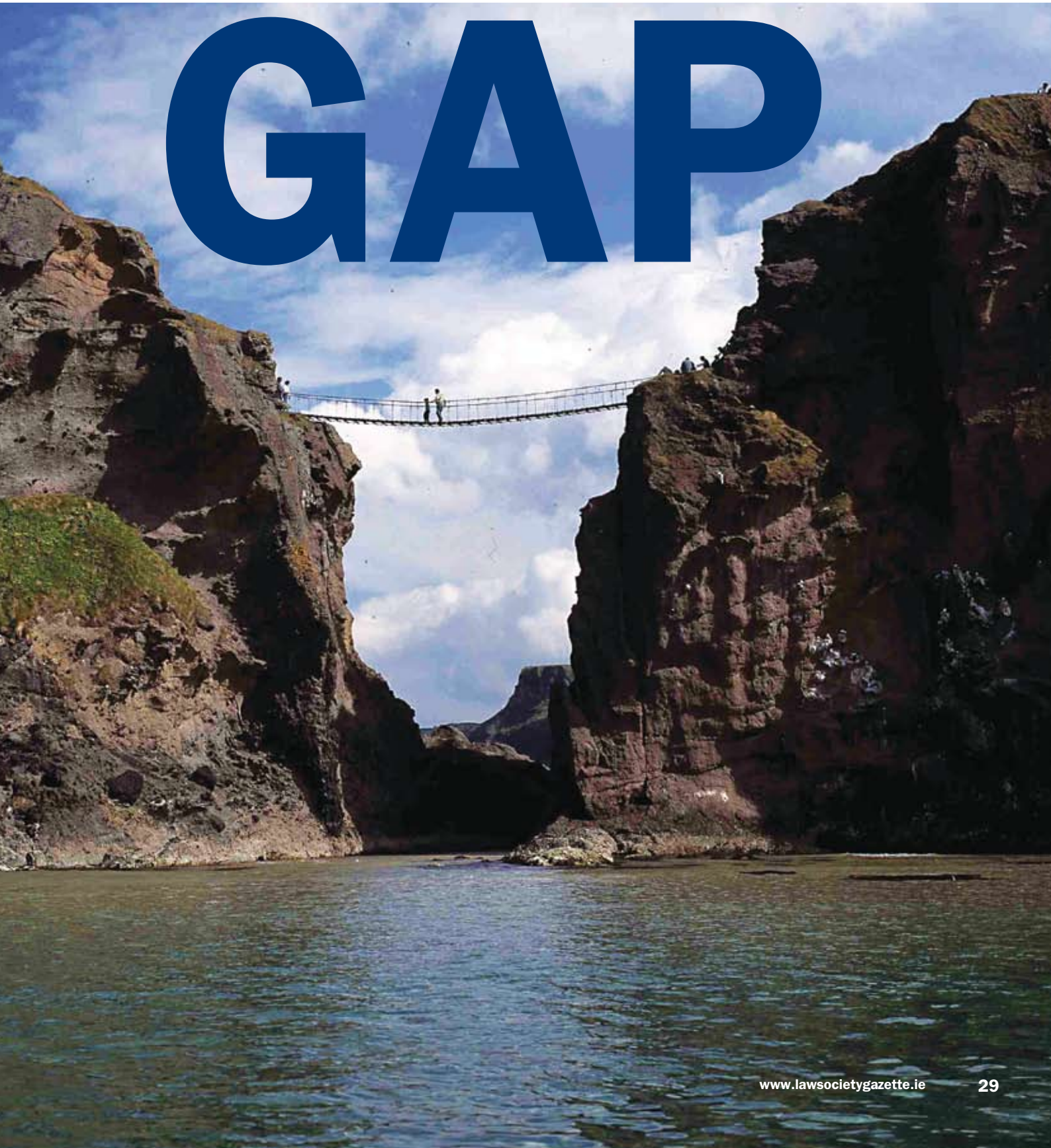
i) Any necessary medical or psychiatric examination, treatment or assessment with respect to the child, and

ii) The issue of a passport to, or the provision of passport facilities for, the child to enable the child to travel abroad for a limited period."

MAIN POINTS

- Permanence for children in long-term care
- New court order available
- Special guardianship orders in England and Wales

the GAP



SPECIAL GUARDIANSHIP ORDERS IN ENGLAND AND WALES

A special guardianship order, intended to provide permanence for children for whom adoption is not appropriate, was introduced in s115 of the *Adoption and Children Act 2002* in England and Wales. Section 115 of that act introduced a number of new sections into the *Children Act 1989*. A foster parent with whom a child has lived for a period of at least one year preceding the application may apply for the order. Section 14A of the *Children Act 1989* sets out who may apply for a special guardianship order and the process for making an application. Applicants must give three months' written notice to the local authority of their intention to apply for the new order. The local authority must then investigate and prepare a report to the court about the suitability of the applicants. The matters covered by the report are set out in regulations. The court cannot make an order unless it has received a report covering the suitability of the prospective guardians.

When a foster carer/relative carer indicates his/her intention to apply for an order under the 2007 amendment act, the HSE will adopt the following procedure:

- Convene a 'child in care review', unless one is imminent,
- Present a report to the review based on an evaluation of whether or not an application would be in the child's best interests,
- If the parents cannot be contacted or object to the granting of the application under the 2007 amendment act, the HSE must include in the aforementioned report a recommendation based on an assessment of whether it is in the child's best interests to dispense with parental consent, and
- Outline in the report any conditions that should be attached to the granting of the order.

For the length of time of the order, the foster parent/relative carer is authorised to give:

- Consent to any medical or psychiatric examination, treatment or assessment, and
- Consent to the issue of a passport for the child to enable the child to travel abroad for a limited period.

Such an order is not final and can always be altered by a court if changed circumstances so demand. (The court may vary or discharge an order on the application of the HSE, the person to whom the order was granted, a parent having custody at the time the child came into care, or a person acting *in loco parentis*.)

Foster carers/relative carers should notify the HSE of the following events in advance or as soon as possible thereafter:

- Significant activities not outlined in the child's care plan,
- Immunisations,
- Elective/emergency medical treatments,
- Travel outside the jurisdiction, and
- The issue of a passport for the child.

Conditions

Five conditions must be satisfied before the court will grant an order. These are:

- The child must have been in the care of the foster parent/relative for a continuous period of five years,
- The granting of the order must be in the best interests of the child,
- The HSE must have consented,
- The parents having custody or the person acting *in loco parentis* must have consented if the child is in voluntary care or been informed if the child is the subject of a care order. The requirement that the HSE obtains the consent of the parent having custody or the person acting *in loco parentis* does not apply if the court is satisfied that he/she is missing and cannot be found by the HSE, or the court, having regard to the child's best interests, decides to waive this requirement,
- The wishes of the child have to be given due consideration, having regard to the age and understanding of the child.

The new provisions are confined to issues of consent. Therefore, any access arrangements in place before the granting of the order will continue unless the court orders otherwise. Similarly, any statutory functions of the HSE under the *Child Care Act 1991* and the 1995 regulations, such as care planning, will continue in force.

The circumstances where an order under section 43 of the *Child Care Act 1991* may cease to have effect are as follows:

- Where a child in voluntary care returns to his/her parents or other person,
- Where a care order is discharged or ceases to have effect,
- The child is adopted,
- If the child concerned is removed from the custody of the foster parent/relative carer by the HSE,
- If the foster parent/relative carer requests that the

LOOK IT UP

- *Adoption and Children Act 2002* (England and Wales)
- *Child Care Act 1991*
- *Child Care (Amendment) Act 2007*
- *Children Act 1989* (England and Wales)
- *District Court (Child Care) Rules 2008* (SI no 469 of 2008)
- *District Court Rules 1997* (SI no 93 of 1997)
- *Guardianship of Infants Act 1964*

child be removed by the HSE, or
- Where the child concerned attains the age of 18 years or marries.

The court rules giving effect to section 4 of the *Child Care (Amendment) Act 2007* came into operation on 16 December 2008. The *District Court (Child Care) Rules 2008* (SI no 469 of 2008) amend order 84 of the *District Court Rules 1997* (SI no 93 of 1997) and set out the documents necessary and how an application under sections 43A and B should be dealt with.

Any formal notification of an intention to apply outside of the care-planning review process must be submitted in writing by the applicant foster parents/relative carers to the principal social worker for the child. In particular, by virtue of order 84, rule 27A(1), such application must be preceded by the issue and service by the applicant of a notice upon the HSE. Form 84.53A of schedule C outlines the form that such notice should take. Such a notice is also to be served by the HSE on the parent having custody of the child at the time the child came into care or a person acting *in loco parentis* to the child.

The consent of the HSE and/or parent or person acting *in loco parentis* to the granting of the order is to be in writing and is to be appended to the application. Where a written consent is not produced, the consent must, where required, "be proved by such other means as the court considers appropriate".

A copy of the notice of application must be served not later than four days before the hearing date and has to be lodged with the District Court clerk at least two days before the date fixed for the hearing of the application.

The order, if any, made by the District Court is to be in the manner outlined in form 84.53B of schedule C and must be served upon a parent, a person acting *in loco parentis* and "upon any other person directly affected by the order" (order 84, rule 27A(3); see appendix).

The District Court may vary or discharge an order in the manner outlined in order 84, rule 27(a)(4) of the *District Court Rules 1997*.

HSE protocol

At the time of writing, the HSE was in the process of drawing up a standardised protocol for staff and a set of guidelines for foster carers. It is likely in all applications that the HSE will request the judge to impose conditions on the order requiring the foster carers to notify the HSE of the following events:
- Any medical treatments, routine, elective or emergency,
- Any travel outside the jurisdiction,
- Any significant change in the care arrangements,
- Any issue of a passport or the provision of passport facilities,
- Any other event as identified by the HSE as being in the interests of the particular child.

"Until the enactment of the Child Care (Amendment) Act 2007, the options available to provide permanence for children in long-term care were very limited"

In the vast majority of cases, the application will not be contested by the HSE and should be of a routine nature. Any costs incurred by applicant foster parents/relative carers in the legal process may be reimbursed by the HSE. In circumstances where foster parents/relative carers seek legal representation, there is no automatic entitlement to legal aid.

While the new court order available under sections 43A and 43B of the *Child Care Act 1991*, as inserted by section 4 of the *Child Care (Amendment) Act 2007*, is not a special guardianship order, it is to be welcomed as a measure that bridges the gap between foster care and adoption. It most importantly offers a positive new option for delivering permanence for children. G

Geoffrey Shannon is deputy director of education with the Law Society of Ireland.

ON AUTH

When faced with an agreement that is to be entered into by a company, solicitors must be sure as to which individual has the authority to bind the company to that agreement, writes Eleanor Daly

MAIN POINTS

- Capacity and authority
- Articles of association
- Individual director acting on his own

When advising on any agreement, whether in the context of a conveyance, the sale of shares or even a settlement, solicitors may be faced with a contracting party that is a corporation rather than an individual. Corporations take many forms, such as a private limited company, a local authority, a statutory company or even a credit union. In each case, the solicitor must be satisfied that the individual who is signing on behalf of the corporation has the authority to sign that agreement on its behalf. This article, however, deals only with the authority of individuals to sign on behalf of a private limited company incorporated in Ireland.

Capacity and authority

Before considering the concept of authority, it is useful to examine the difference between it and the concept of capacity. These terms are often used interchangeably, but it is important that they should not be confused in this context. 'Capacity' refers to the *power of an individual or company to enter into an agreement*, whereas 'authority' refers to the *power of an individual or company to enter into a contract on behalf of another*. Where the person is signing on behalf of another, particularly when that other is a company, the question arises as to whether an individual has the authority to sign on behalf of the company, which, of necessity, must act through an individual to execute any document. Under the *Companies Act 1963*, section 38, any person may enter into a contract on behalf of a company where that person is acting under the authority of that company, express or implied.

Board of directors

The first step for any solicitor, in deciding whether the person or persons executing on behalf of a company have authority to do so, will be to

WHOSE ORITY?

consider the terms of the articles of association of the company. In any company where table A of the first schedule of the *Companies Act 1963* applies, regulation 80 operates to give the board comprehensive powers to manage the company on behalf of its members. Where regulation 80 applies, there is no doubt that, where appropriate authority has been delegated to a director by resolution of the board, such a director has authority to enter into a contract on behalf of the company.

It should also be borne in mind that a solicitor has constructive notice of the contents of the documents registered by the company at the Companies Registration Office (CRO). This places a significant responsibility on solicitors to make themselves aware of the information available from the CRO when dealing with a company. The harshness of this doctrine of constructive notice is mitigated somewhat by common law. The 'indoor management rule' (also known as the 'Rule in Turquand's Case') permits an outsider, acting in good faith, to assume that acts of internal management, which are necessary to perfect a director's authority, have in fact been taken.

A good example of how the indoor management rule works can be found in *Ulster Investment Bank Ltd v Euro Estates Ltd*, where a resolution to approve and authorise the sealing of a mortgage was passed at a board meeting that was not quorate; the outsider, who did not have notice of the fact that the quorum was not present at that meeting, was entitled to enforce the mortgage. The position of third parties is further strengthened by the *European Communities (Companies) Regulations 1973*, which introduced protections for third parties when dealing in good faith with limited companies.

Individual directors

More complex issues arise when faced with a director acting on his own. The authority of a director, where his or her authority has not been specifically delegated by the members in the articles of association or by resolution, or by resolution of the board, is a matter of agency law. Where the director, acting as an agent of a company, acts within that company's powers (that is, the action is not *ultra vires* the company), then he will bind the company where he acts within the limits of his own actual authority. A director will have actual authority by virtue of the terms of his or her appointment, the terms of the

articles of association, or the terms of a resolution expressly authorising him to enter into a contract.

The difficulty then arises as to whether a director has 'ostensible' or 'apparent' authority. In *Kett v Shannon & English*, Henchy J expressed the state of ostensible authority as being "founded on a representation made by the principal to the third party which is intended to convey and does convey to the third party that the arrangement entered into under the apparent authority of the agent will be binding on the principal".

Where a director is signing on his own, it is prudent to seek confirmation that the person in question is, in fact, a director of the company and, furthermore, that the person is authorised, whether under the articles of association or by a resolution of the board or the members, to bind the company in connection with a particular agreement. A solicitor might also seek a certificate from an officer of the company that the resolution authorising the director has not been revoked since the date it was passed.

Managing director

Table A, part I, regulations 110-112 make provision for the election of a managing director by the members of the board. The board may delegate any of the powers exercisable by it to such a managing director. When regulations 80 and 112 apply, the 'apparent authority' of a managing director to bind the company is very significant indeed. In that circumstance, the managing director can have all of the authority of the board acting collectively.

"When faced with an agreement that is to be entered into by a company, a solicitor should always consult the most recent articles of association of that company to ascertain who has authority to bind the company"

Alternate directors

Where a director has appointed an alternate, a solicitor will need to be satisfied as to the authority of the director who appointed that alternate director in the first instance. If the appointing director does not have authority to bind the company, then the alternate director will not have such authority. It should also be ascertained whether the alternate director was appointed correctly. Table A, part II, regulation 9 provides for the appointment of an alternate director where a majority of the board approves such an appointment. The appointment of an alternate director requires notification to the CRO in the same way as any other director, and it would be prudent to be satisfied that all necessary formalities have been observed.

Company secretary

The authority of the company secretary is quite limited. While a company secretary can attest the affixation of the company seal under table A, he or she does not usually have authority to enter into contracts on behalf of the company. The only limited exception to this general rule is set out in *Panorama Developments (Guildford) Ltd v Fidelis Furnishings Fabrics Ltd*. In that case, it was found that a secretary is considered to have ostensible authority to enter into contracts of an administrative nature relating to the day-to-day running of the company.

Authority of an attorney

Where a company proposes to appoint an attorney to sign on its behalf, the solicitor must ensure that the power of attorney itself is correctly executed by a person or persons having authority to bind the company. Neither the *Powers of Attorney Act 1996* nor table A requires a power of attorney to be under seal. However, the articles of association will have to be consulted to confirm the requirements of any particular company. Notwithstanding the fact that there is no statutory requirement, it is not unusual for table A to be amended to require powers of attorney to be given under seal. If the directors of a company do not have the power to appoint an attorney under table A, part I, regulation 81 or similar, then the attorney would have to be appointed by the members rather than the directors.

LOOK IT UP

Cases:

- *Royal British Bank v Turquand* [1843–60] All ER Rep 435
- *Ulster Investment Bank Ltd v Euro Estates Ltd* [1982] ILRM 57
- *Kett v Shannon & English* [1987] ILRM 364
- *Panorama Developments (Guildford) Ltd v Fidelis Furnishings Fabrics Ltd* [1971] 3 All ER 16

Legislation:

- *Companies Act 1963*, s38 and schedule 1, table A
- *European Communities (Companies) Regulations 1973*
- *Powers of Attorney Act 1996*

The common seal of the company may only be used with the authority of the board of directors

Use of the common seal

Under table A, part I, regulation 115, the common seal of the company may only be used with the authority of the board of directors. The authority to affix the seal should be evidenced by a resolution of the board or of a committee of the board formed for that purpose. A solicitor should always consult the articles of association of a company to confirm the specific requirements of that company as to the use of the company's common seal.

Regulation 115 provides that any two directors, or a director and secretary, or a director and any other person authorised by the directors for the purpose, are authorised to countersign the affixing of the common seal. There is no specific requirement in table A for the seal to be affixed in the presence of the directors or secretary who attest the affixing of the seal. If the individuals attesting the affixing of the seal are not present when it is affixed, the execution clause should include the statement "given under the Common Seal of..." rather than "present when the Common Seal of...".

Prudence

When faced with an agreement that is to be entered into by a company, a solicitor should always consult the most recent articles of association of that company to ascertain who has authority to bind the company. Where a director is signing on behalf of a company, and that director is not a managing director to whom full authority has been delegated by virtue of table A, regulation 112, it would be prudent to seek a resolution of the board of directors demonstrating clearly the authority of that director to bind the company and, if the agreement is under seal, to affix the common seal. G

Eleanor Daly is a solicitor with FEXCO. She is also a chartered secretary and co-author of the Irish Company Secretary's Handbook, *published by Tottel Publishing.*

Walk on the WILD side

The past 15 months have been very busy in terms of pensions in Ireland, and Michael Wolfe and Peggy Hughes highlight some significant developments

It is no surprise that some of the more significant developments in the realm of pensions took place in the latter half of 2008 as a consequence of poor investment performance on the back of the global economic downturn. No doubt, fellow practitioners may be experiencing similar patterns worldwide.

Defined benefit scheme funding

Last year proved to be something of a watershed in terms of the funding of defined benefit pension schemes, with employers considering how to reduce their liabilities in the face of sometimes catastrophic scheme funding deficits and trustees exploring what action, if any, they can take in the interests of scheme members. Last autumn, the Minister for Social and Family Affairs asked the Pensions Board to:

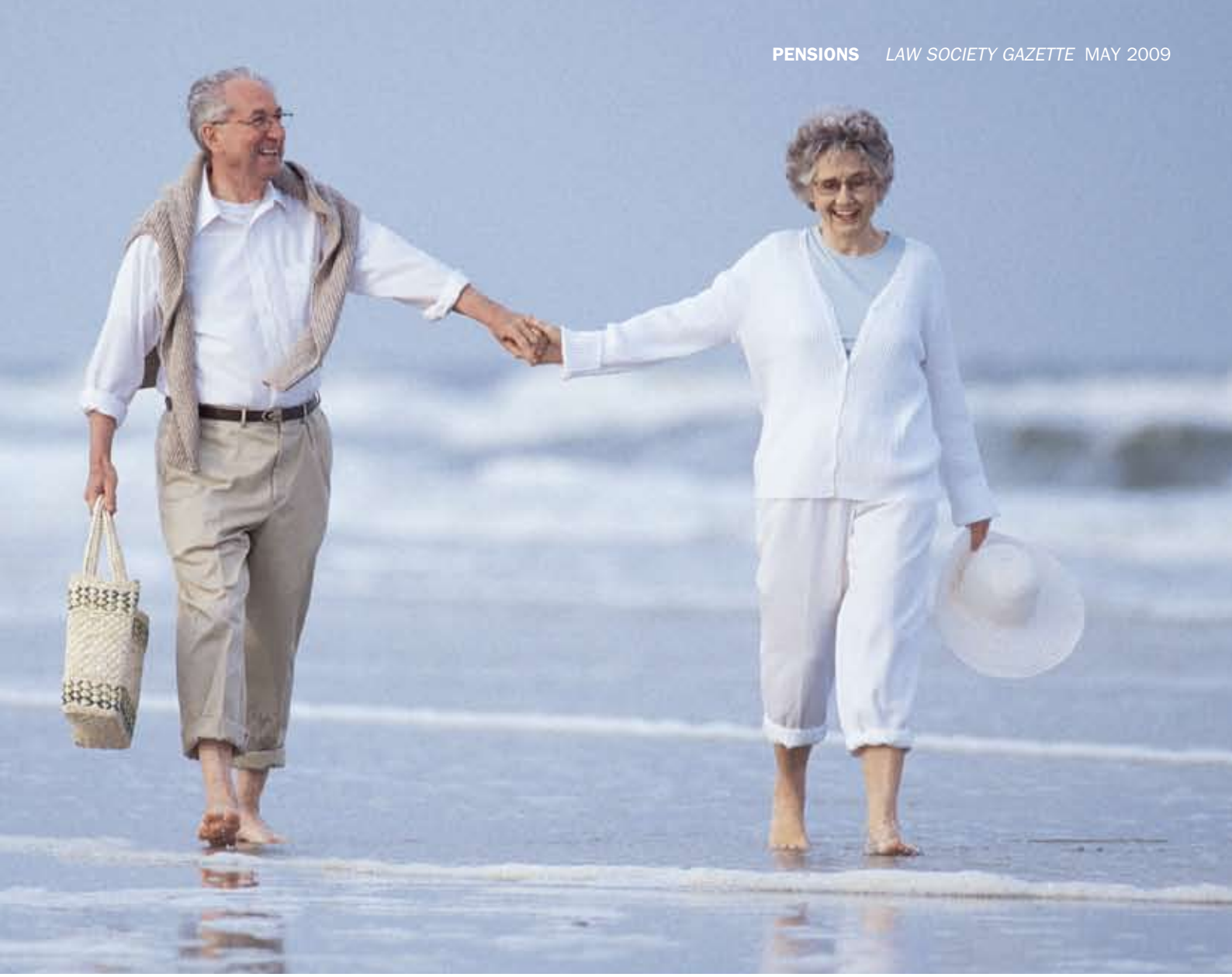
- Grant additional time for the preparation of funding proposals/recovery plans to address scheme deficits. Essentially, all funding proposals in respect of actuarial funding certificates (AFCs) with an effective date falling between 31 December 2007 and 31 December 2008, inclusive, have been allowed 18 months for completion. This gives an additional nine months to submit a funding proposal in respect of AFCs completed as part of a triennial valuation, and an additional six months for those submitted as part of an annual intervaluation review. This is a temporary measure, with normal deadlines due to be enforced for AFCs with an effective date on or after 1 January 2009.
- Deal flexibly with applications for approval of funding proposals/recovery plans.

Concerns about the funding of defined benefit schemes became sufficiently heightened that, on 19 December, the minister announced changes to the governance of such schemes to assist with recent investment losses.

The minister issued a press release stating that "the Department of Social and Family Affairs and the Pensions Board are actively monitoring the impact of global financial market developments and the effect of investment losses on defined benefit pension schemes. The current significant funding pressures on pension schemes, which reflect the impact of unprecedented developments in worldwide financial markets, are a particular concern."

Given the deterioration and ongoing problems in investment markets, the minister asked the board to implement further changes to the supervision of defined benefit schemes as follows:

- The board is to allow longer periods for recovery plans (that is, greater than ten years) in appropriate circumstances,
- The board is to allow the term of a replacement recovery plan to extend beyond the end date of the original recovery plan where



the scheme is part-way through a previous recovery plan but is off track due to investment losses,
- The board is to take account of voluntary employer guarantees in approving recovery plans, and
- To ensure that these extensions are not seen as a weakening of supervision, the board will reject recovery plans that fail to demonstrate an appropriate investment approach.

The Pensions Board was due to publish technical details of these revisions in early 2009 and will review these proposed changes before 1 January 2011. The minister has made it clear that she and her officials will maintain ongoing contact with the board and has asked the board to update her on the effectiveness of these new measures.

Defined contribution annuity deferral

Given the volatility in financial markets, submissions were made by the Irish Association of Pension Funds to the Department of Finance, the Department of Social and Family Affairs and the Revenue Commissioners to allow the trustees and members of defined contribution pension schemes greater flexibility in relation to the purchase of annuities on retirement. It was intended that this measure would provide relief and flexibility to members of defined contribution schemes who are retiring in the current economic climate and are forced to purchase annuities with their fund, which is likely to have lost significant value in recent months.

The Minister for Finance subsequently announced a temporary deferral arrangement to be administered by the Revenue Commissioners. Under this arrangement, members of defined contribution schemes who retire between 4 December 2008 and 31 December 2010 have the option to take a tax-free lump sum and purchase a retirement annuity immediately on retirement, or to take a lump sum and defer the purchase of an annuity up to and including 31 December 2010 (by which date this option is currently due to cease).

In December 2008, the Pensions Board issued guidance on such deferral of annuity purchase. This suggests that scheme members who avail of the deferral option should, along with the scheme trustees, sign a declaration, which the board has published in a suggested form.

MAIN POINTS

- **Defined benefit scheme funding**
- **Defined contribution annuity deferral**
- ***Green Paper on Pensions***

Additionally, the Revenue Commissioners have advised pension providers of certain administrative rules on how this deferral arrangement will operate. The Revenue Commissioners administrative rules are as follows:

- The deferral period will operate from 4 December 2008 until 31 December 2010. All individuals who choose the deferral option must purchase an annuity on or before 31 December 2010, regardless of their date of retirement.
- The concession does not apply to holders of a retirement annuity contract, a personal retirement savings account, or to proprietary directors who qualify for approved retirement fund (ARF) options.
- An individual who wishes to exercise an ARF option in respect of additional voluntary contributions should do so on or before the date of annuity purchase.
- Prior to availing of the purchase deferral option, the individual should consider taking appropriate professional advice. Any guidance notes issued by the Pensions Board must be complied with.
- Any alteration to scheme deeds, rules and/or policy conditions to reflect the deferred annuity option will not impact on the existing Revenue approval of the scheme/arrangement.
- The concession is entirely optional, and can only take place with the agreement of the scheme trustees and the member.
- In the event of the death of the member prior to annuity purchase, the deferred annuity purchase option may be offered to a spouse and/or a dependant. In the event of there being no dependants, the value of the deceased member's fund will form part of his/her estate.

Green Paper on Pensions

The government's *Green Paper on Pensions*, which was published in October 2007, introduced a consultation process inviting all pension stakeholders to contribute towards the creation of a framework for addressing the challenge of pension provision in Ireland. This consultation process has since been completed and, on 30 September 2008, the Minister for Social and Family Affairs published the *Report on the Consultation Process for the Green Paper on Pensions*.

Over 380 submissions were made as part of the consultation process. The report set out the many issues raised and summarised proceedings from a major pensions conference held in Dublin in May 2008 and six regional public consultation seminars held earlier in the year. More than 300 submissions were from individual members of the public, and the remainder were from organisations. The report summarises the key issues that emerged during the consultation process, including:

- Options for pensions reform (for example, mandatory or auto-enrolment options),
- Retirement age,
- State pension eligibility, and
- Security of pension benefits.

Commenting at the publication of the report, the minister remarked that, while it is clear from the report that there is very little consensus on the future of pensions in Ireland, the report would assist the government in developing a long-term framework on pensions that, at the time, the government was committed to producing by the end of 2008.

Given the developments in relation to funding and annuity purchase as outlined above, it is clear that energies were diverted to more immediate concerns. Production of the government's long-term framework on pensions is now awaited in due course.

> ***"It will certainly be interesting and, indeed, sobering to see how pensions will withstand the pressure and what further measures will be taken in Ireland to reduce that pressure"***

Registered administrators

The first day of November 2008 was the deadline for registering as a registered administrator (RA) with the Pensions Board, following recent legislative changes requiring pension scheme administrators to effect such registration. The board has published a register of administrators, each of whom has a unique RA number assigned to it. The register is available on the board's website. Any new pension scheme administrators must register before commencing business. The RA must renew its administration annually, within 30 days of the end of the registration year. This new system was introduced following the publication, in 2007, of *A Report on Trusteeship in Ireland*, which recommended that pension scheme administrators should be registered and supervised.

The past year has been eventful for pensions, both in Ireland and globally. Given the severity of the global economic downturn, this trend is likely to continue into the remainder of 2009. It will certainly be interesting and, indeed, sobering to see how pensions will withstand the pressure and what further measures will be taken in Ireland to reduce that pressure. G

Michael Wolfe is a partner and Peggy Hughes is an associate solicitor in the Employment and Pensions Department of William Fry.

AN INCONVENIENT TRUTH

In the second article looking at the effect of the *Civil Liability and Courts Act 2004*, Stuart Gilhooly examines how the courts have treated the signature provision of the act – section 26

There is nothing insurance companies hate more than exaggerated claims. Yet they are guilty of the most exaggerated claim of all. At the height of the 'compo culture' hysteria in 2002, it was claimed that as many as 50% of claims were fraudulent. What's worse is that these completely fabricated figures were given credence by both a media and government determined to be seen to be taking strong action against rising insurance premiums.

The furore eventually resulted in the then Minister for Justice introducing the *Civil Liability and Courts Act 2004*, which had section 26 as its headline provision.

Section 26 essentially provides that, where a plaintiff in a personal injuries action knowingly gives material false and misleading evidence, the court must dismiss the entire action unless it can be shown that this would result in an injustice to the plaintiff.

It was notable that, in common with the tenor of the entire 2004 act, no provision existed whereby defendants would receive sanction where they gave false and misleading evidence. Minister McDowell claimed at the time that there was never an intention that the statute would be "symmetrical".

Notwithstanding this fundamental unfairness towards plaintiffs, the legal profession has always welcomed any initiative that would see fraudulent claims punished. This was no different, and the hope was that its very existence would dissuade would-be claimants from exaggerating or even fabricating claims.

It did not receive the whole-hearted and unequivocal backing of the legal profession, however, as those involved in personal injuries litigation over the years had never seen anything close to the amount of so-called fraudulent claims as the insurance companies had alleged. The feeling was, firstly and ironically, that this and the Irish Insurance Federation's successful advertising campaigns would, in fact, put genuine claimants off making a claim due to fear and misunderstanding. Secondly, the profession was concerned that this provision would be used as a stick to beat claimants with on a regular basis where the slightest inaccuracy in evidence would be minutely dissected and presented as a reason to dismiss the plaintiff's claim.

Thankfully, to a large extent, neither fear has come to pass. The courts have generally taken a sensible and understanding stance in the cases that have come before them – but have not been afraid to wield the axe where the circumstances dictated.

MAIN POINTS

- ***Civil Liability and Courts Act 2004*, section 26**
- **Personal injuries claims**
- **Recent case law**

True confessions

The first reported case to come before the courts was *Mulkern v Flesk*, which was heard by Mr Justice Peter Kelly on 25 November 2005. In this action, the plaintiff claimed for an injury to her lower back in the accident, but failed to disclose the back injury to prospective employers following the accident. The defendants claimed that this suggested that no such injury existed and that, therefore, her claim should be dismissed. Mr Justice Kelly said that while "it was not to her credit that she told untruths to her prospective

employer", he was of the opinion that the back injury was genuine and she misled her employer as she wished to obtain employment. He was satisfied that she did not mislead the court and refused to make an order under section 26.

The most significant case to date has remained unreported, but was the subject of an appeal to and decision of the Supreme Court. In *Powers v Jordan*, the plaintiff was involved in an accident in a public house and told her doctors she was unable to work. Although she withdrew an unquantified claim for loss of earnings long before the trial of the action, it emerged before the trial that she had misled her doctors and had, in fact, been working. In opening the case, her counsel alluded to this fact and it was common case that she gave truthful evidence on oath. The defendants, however, maintained that the medical reports that had been admitted as evidence contained the inaccurate claims of inability to work and, as such, constituted false and misleading evidence.

"The courts have correctly taken a conservative stance to what is now universally described as a draconian provision"

Mr Justice Paul Butler refused to accept this argument and said that, while she had misled her doctors, she had been truthful in her evidence to the court and that he had to have regard to the totality of the evidence. He was satisfied that the overall nature of her evidence was truthful and refused to apply section 26.

It was appealed to the Supreme Court and heard on 15 April 2005 in front of the Chief Justice, Ms Justice McGuinness and Mr Justice Hardiman. They agreed that the trial judge had taken all relevant matters into account and had properly exercised his discretion not to dismiss the claim on the grounds that an injustice would occur. They did, however, go on to say that there would be cases in the future in which the provision would be properly applied.

Several other cases came before the courts subsequently in which minor inaccuracies in evidence were not deemed sufficient to apply the ultimate

sanction, and the courts continued to show a marked reluctance to let the guillotine fall unless the false and misleading evidence was of a serious nature.

Truth or dare

The prescient words of the Supreme Court, however, came to pass when Mr Justice Peart heard the matter of *Damien Carmello v Terence Casey and Geraldine Casey*. This involved a road traffic accident in which the plaintiff claimed, among other things, that he sustained a facial injury. It emerged, however, that he failed to inform his solicitors or doctors of a similar injury he had suffered some seven months after the accident involving the branch of a tree. He claimed in evidence that the incident with the tree had "slipped my mind". Mr Justice Peart refused to accept that this was credible and was satisfied that he knowingly gave false and misleading evidence in a material respect. Although he had assessed general damages for the injury at €50,000, he could not attribute the injury to the accident. He reached the conclusion that although "the section was of a draconian nature", it was "mandatory in its terms" and that no injustice would occur if he were to dismiss the plaintiff's claim. In those circumstances, he felt it was incumbent upon him to apply the provisions of the section.

No doubt, there have been other unreported cases in which defendants have sought to apply the section, but it is clear that the expected deluge has not occurred. The courts have correctly taken a conservative stance to what is now universally described as a draconian provision.

However, Mr Justice Peart has also demonstrated that the judiciary will not be afraid to take action where appropriate.

It remains for us to continue as we always have done – namely, to remind our clients of the paramount importance of truthfulness at all times. The simple reality is that claimants who don't mislead have nothing to fear from the courts and that judges will generally make every effort to accommodate the genuine plaintiff. But when they practice to deceive, what a tangled web they'll weave. G

Stuart Gilhooly is chairman of the Law Society's Litigation Committee.

LOOK IT UP

Cases:

- *Mulkern v Flesk* (2005 IEHC 48)
- *Damien Carmello v Terence Casey and Geraldine Casey* (2007 IEHC 362)
- *Powers v Jordan* (unreported, Supreme Court, 15 April 2005)

Taoiseach attends annual dinner

The annual dinner of the Law Society was held at Blackhall Place on 3 April 2009. This year's annual dinner was a considerably scaled-down event, in recognition of the very difficult economic times. For the first time in the history of the annual dinner, a taoiseach was the guest of honour and main speaker.

Taoiseach Brian Cowen was welcomed to the Society by president John D Shaw and director general Ken Murphy.

Mr Cowen said that it was a great honour for him to return to Blackhall Place "after all those years of hard study". "It's a privilege for me to say that I'm a member of this profession. I have always been proud of that," he said.

ALL PICS: LENSMEN

Taoiseach Brian Cowen is welcomed to Blackhall Place by Law Society President John D Shaw

Labour spokesperson on justice Pat Rabbitte meets senior vice-president Gerard Doherty and junior vice-president James McCourt

(L to R): President John D Shaw, Minister Mary Hanafin, Taoiseach Brian Cowen, Minister for Justice Dermot Ahern and director general Ken Murphy

Attorney General Paul Gallagher SC and president of the High Court Mr Justice Richard Johnson

Minister for Social and Family Affairs Mary Hanafin and past-president Moya Quinlan

Past-president Tom Shaw, Eileen Shaw and president John D Shaw

Past-president Anthony Collins, Michele O'Boyle (council member), past-president Michael V O'Mahony and *Gazette* editor Mark McDermott

PIC: LENSMEN

At a dinner in honour of Judge Elisabeth Palm (the rapporteur on Ireland for the UN Human Rights Committee) at Blackhall Place on 7 April 2009 were *(front, l to r)*: Alma Clissmann, Judge Elisabeth Palm, Gerard Doherty (senior vice-president of the Law Society) and Tanya Ward. *(Back, l to r)*: Colin Daly, Noeline Blackwell, Mark Kelly, Edel Quinn and Elaine Dewhurst. Judge Palm is a former judge of the Swedish courts and former vice-president of the European Court of Human Rights

Brendan retires after 30 years

Brendan Walsh retired from the office of Registrar of the Faculty of Notaries Public in Ireland on 3 March 2009 after more than 30 years' service.

Earlier in the day, prior to the hearing of petitions for appointments of new notaries public, the Chief Justice, Mr Justice John L Murray, paid tribute to Brendan's work and achievements during his period of service and thanked him for his assistance and erudition in the discharge of his office.

At the annual dinner of the faculty on 27 February, a presentation was made to Brendan on behalf of the faculty. The dean, E Rory O'Connor, acknowledged the Trojan work that Brendan had carried out during his 30 years of service and wished him a stress-free retirement.

At Brendan Walsh's retirement dinner were *(l to r)*: David Walsh (incoming registrar), Cara Walsh (Brendan's daughter and a partner in SOR Mullany Walsh), Ruth Walsh, Brendan and the dean of the faculty, E Rory O'Connor

PIC: GERALD SHARP PHOTOGRAPHY

At the City of London Solicitors Company Banquet in the Mansion House, London, on 25 March 2009 were *(l to r)*: Michael Howell, Cliona O'Tuama (president, London Irish Solicitors' Association), Gillian O'Connor and Pat O'Connor (past-president, Law Society of Ireland and Mayo Solicitors' Bar Association)

Saddle-sore BBCC pedals the Slieve Blooms

At a recent convocation of the rather colourfully titled Bum-Bum Cycling Club (BBCC) held in Birr, Co Offaly, the club's founder Brendan Walsh celebrated a 'certain' birthday in the company of fellow velocipedists, *writes Justin McKenna*. (Ed's comment: Do their feet ever leave the ground?)

The solicitors among them included Brendan's younger brother John (Ranelagh), Brendan O'Flynn (Kildare, who, it is said, has been using the free pass for the past ten years), Frank Lanigan (high sheriff of the low country around Carlow/Kilkenny), Vivian Matthews (of the flowing locks near the Grand Canal in Dublin 4), Justin Sadlier (the wiry solicitor from Gort, Co Galway) and Justin McKenna of Dun Laoghaire (minus the bow tie).

Earlier in the day, they cycled the roads from Athy, over the Slieve Blooms and into Birr, covering 50 miles in total. The following day, they skirted the mountains, following the route of the Grand Canal back to Athy. During the evening, the group was hosted by the gracious Tom Enright, who apparently owns Birr! The members of the BBCC have been touring the roads of Ireland on a monthly basis for almost a quarter of a century.

Brendan Walsh *(right)*, BBCC founder, celebrated a 'certain' birthday in Birr, Co Offaly, with fellow cyclists Johnny Walsh and Tom Enright

ALL PICS: EAMON WARD

At the Clare Law Association meeting at the Temple Gate Hotel, Ennis, on 7 April were *(front row, l to r)*: Aideen Pendred (vice-president, Clare Law Association), Gareth O'Connell (secretary), Ken Murphy (director general, Law Society), Sharon Cahir (president, Clare Law Association), John D Shaw (president, Law Society), Marie Keane (treasurer) and Mary Cashin (solicitor). *(Second row, l to r)*: Michael Nolan, Tara Godfrey, Isabel O'Dea, Kate McInerney, Aine O'Dwyer, Lisa Walsh, Marina Keane, Marguerite Phillips, Aisling Meehan, Karol Casey, Mairead Doyle and Ruth Casey. *(Third row, l to r)*: Michelle Nolan, Sinead O'Dea, John Halpin, John Callinan, Lorraine Burke, Gearoid Williams, William Cahir, Patrick Moylan, Fergal O'Dulaing and Sheila Lynch

Meeting up at the CLA event were *(l to r)*: Marguerite Phillips, Tara Godfrey, Aideen Pendred, Mairead Doyle and Lorraine Burke

Attendees at the CLA meeting listen to a presentation from President of the Law Society John D Shaw

At the Clare Law Association meeting on 7 April were *(l to r):* Marie Keane (treasurer), John D Shaw (president of the Law Society), Sharon Cahir (president, Clare Law Association), Ken Murphy (director general), Aideen Pendred and Gareth O'Connell (secretary CLA)

Southern Law Association annual dinner

It was all glamour and style at the recent annual dinner of the Southern Law Association (SLA), held at Maryborough House Hotel in Cork, which was attended by 250 guests. Special guests included Bishops Buckley and Colton, who were attending for the first time.

The ecclesiastical theme was reflected in SLA president Mortimer Kelleher's speech, which exhorted members to embrace the theological virtues of faith, hope and charity in these trying times. His speech was counterpointed by the witty deliveries of the Law Society's senior vice-president Gerard Doherty and Norville Connolly on behalf of the Law Society of Northern Ireland.

The famed 'topical song' was delivered with aplomb by Patrick Dorgan and Kieran McCarthy, accompanied by the versatile Patrick Mullins. Everybody is looking forward to next year already! Thanks are due to the organising committee, president Mortimer Kelleher, Fiona Twomey and Jerry Cronin.

ALL PIX: DEE BAUMANN

At the SLA annual dinner were *(l to r)*: Rev Dr John Buckley (bishop of Cork and Ross), David Power (Cork Chamber of Commerce), Norville Connolly (junior vice-president, Law Society of Northern Ireland), Mortimer Kelleher (president of the SLA), Bernadette Cahill (president, Waterford Law Society), Alec McNeill (president, Devon and Somerset Law Society) and Rev Paul Colton (bishop of Cork, Cloyne and Ross)

Eamon Murray and Emer Murphy

Philip Comyn and Kate Murphy

Dermot Conway and Geraldine Crean

Southern Law Association past-presidents meet up *(l to r)*: Jerome O'Sullivan, Eamon Harrington and Fiona Twomey

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student spotlight

Law Society team on 'Top of the World'!

A team of students from the Law Society of Ireland has won the 13th Annual International Environmental Moot Court Competition at Stetson University College of Law in Florida, USA. Crowning the achievement, the Irish team's Carol Eager was named best speaker.

In all, 16 teams from eight countries competed in the international three-day finals at the end of March. Participants travelled to the Tampa Bay campus from Brazil, China, India, Indonesia, Ireland, Nepal, Ukraine and within the US. These had been chosen from a total of 80 global teams in the earlier regional rounds. In the final, the Law Society team defeated the University of California's Hastings College of Law.

The Law Society team comprised Carol Eager (William Fry), Ellie Dunne (A&L Goodbody) and Michelle Cunningham (Arthur Cox). The team was coached by the Law School's director of education, TP Kennedy.

This is the most prestigious moot court honour ever won by students of the Law Society. In addition to winning the overall prize and the 'best speaker' award, the team also took second place overall for their written submission, while Ellie Dunne was named third-best speaker in the international competition.

Celebrating their win at the International Environmental Moot Court Competition at Stetson University College were *(l to r)*: TP Kennedy (Law Society's Director of Education and team coach), Ellie Dunne (A&L Goodbody), Carol Eager (William Fry) and Michelle Cunningham (Arthur Cox)

The competing teams had to represent a fictitious nation in a hypothetical environmental dispute before the International Court of Justice. Written submissions and oral advocacy were the obligatory weapons for attack and defence. This year's case concentrated on defending and protecting endangered species in their habitat in the Antarctic, pitted against a country seeking to exploit its natural resources to aid economic development and alleviate poverty.

The Irish team's preparations began in September 2008, with the first stage culminating in the submission of its written argument in November. Continuing research followed in preparation for the national final in February 2009, where the team was declared the national champion.

In the international preliminary rounds, team members argued their position in front of distinguished judges from the Florida superior courts and international environmental experts. The Law Society team won its quarter-final against the University of Beijing and the semi-final against the Army Institute of Law, Mohali, India. In the international final, the Irish team defeated the North American (Pacific) champions from the University of California's Hastings College of Law.

The finals were judged by scholars and practitioners of environmental and international law and included Will Burns (senior fellow, Santa Clara Law School and editor-in-chief of the *Journal of International Wildlife Law and Policy*), Johannes Huber (executive secretary of the Antarctic Treaty Secretariat) and Andi Pearl (manager of the Antarctic Krill Conservation Project for the Pew Charitable Trusts in Washington, DC). G

For 3 days in August, Dublin (Ireland) will be the centre of Canada's legal world.

This August 16 – 18, Dublin is hosting the Canadian Legal Conference. Learn about international law and human rights from former Irish President, Mary Robinson. Understand the patterns impacting the business of law with visionary Leonard Brody. Recognize the trends that will transform the global practice of law with legal futurist Richard Susskind. And connect with Canadian and other European colleagues to debate how law is practiced in a complex, changing world. **To learn more and to register using an exclusive Irish delegate rate, visit www.cba.org/dublin2009/eu or contact mtgs@cba.org.**

THE CANADIAN BAR ASSOCIATION
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books

Financial Services Advertising: Law and Regulation

Max Barrett. Clarus Press (2008), Griffith Campus, South Circular Road, Dublin 8. ISBN: 978-1-905536-17-7. Price: €120.

Having worked as in-house counsel with an 'advertisement intensive' internet bank before joining the Financial Regulator, I was very keen to review Dr Barrett's book.

To use the blasé terminology that I quickly learned to dread when working with the marketing department of one of my old employers, 'signing off' on the compliance of a financial services advertisement is no mean feat. It is an activity that should be approached with the foreboding of a bomb-disposal expert.

As Dr Barrett says in the first line of his book, there is an "array" of law and regulation on the content of financial advertisements in Ireland. To safely advise on the suitability of a promotion, you really need the high-level view that this book gives before daring to delve into the darker corners of the maze.

I have to agree with the writer when he says: "Given the extent to which the general public is exposed to [financial services] advertising, one might expect there to be a single statute that would address the difficulties which inappropriate and unregulated advertising presents. Instead, there are a number of key laws and regulatory codes that overlap to a greater or lesser extent."

Pending a sorely-needed overhaul and consolidation of financial services law and regulation on advertising, Dr Barrett's book provides an excellent signpost from which to navigate through this multi-agency, multi-tiered area of law.

What I find particularly pragmatic and helpful about the book is that it is structured in such a way that lawyers, marketing copywriters and compliance officers can use it, serially and to good effect, in their work.

The marketing copywriters and compliance officers will be able to use the book's detailed index and unique 'compliance checklists' in appendices C to F to analyse each element of the financial promotion work in which they propose to engage.

When the baton is passed to the legal department for final review, lawyers of all degrees

of experience in this area will be able to use the preface's clear summary of the book's content and the detailed table of legislation as starting points for scrutinising the law itself. In addition, lawyers will like the well-informed précis of the key legislation, codes and agencies found in chapters 1 to 9. As an example of Dr Barrett's firm grasp of this tortuous area of law, see page 35 on the *Consumer Protection Code*: "The significance of this is that a breach of the code constitutes a 'prescribed contravention' for the purposes of section 33AN of the *Central Bank Act 1942*, punishable in the first instance by the Financial Regulator pursuant to the sanctions regime established by part IIIC of the 1942 act."

To sum up, I think the book deserves a well-read future in multiple reprints. The current climate calls for simplicity, both in the way laws and regulations are presented and in the structuring of agencies responsible for this area.

Future changes in laws and shifts in responsibilities may require web-based updates between editions of this excellent manual and, indeed, the layered nature of the content may lend itself very well to that medium.

From the public service, better-regulation perspective, the expertise of people like Dr Barrett could and should be called upon when the time comes to properly consolidate the law. G

Brendan Nagle is a solicitor with the Financial Regulator. Views expressed in this review are those of the reviewer alone and do not necessarily represent the views of the Financial Regulator.

BRIEFING

practice notes

ENDURING POWERS OF ATTORNEY – GUIDELINES FOR SOLICITORS

Introduction

The following guidelines are intended to assist solicitors when advising clients who wish to execute an enduring power of attorney (EPA). These guidelines should be read in conjunction with *A Guide to Professional Conduct of Solicitors in Ireland*, 2nd edition, 2002, and this note is in substitution for the Society's earlier note, published in 2004.

In advising clients with regard to the execution of an EPA, solicitors should note that different considerations apply in relation to donors who have full capacity and who wish to provide for future incapacity, and those donors who are of borderline mental capacity due to ill health or age, are at a vulnerable stage, and are more likely to be vulnerable to undue influence and exploitation.

The guidelines are drafted in accordance with the laws of Ireland (the general law of agency applies), but if there is property in other jurisdictions, it will be necessary for the client to obtain advice as to what is appropriate in relation to those jurisdictions.

PART 1: EXECUTION OF EPA

1.1. Who is the client?

A solicitor should ensure that instructions are taken directly from the intending donor of an EPA.

When written instructions are received from a client, a solicitor should consider whether such instructions are adequate, but the more prudent course is for a solicitor to meet with the client and discuss the implications of, and advise the client with regard to, the execution of an EPA

When instructions are received from a third party for the preparation of an EPA, a solicitor should obtain instructions directly from the intending donor as to whether the intending donor wishes the solicitor to act for him/her and, if such instructions are received, then a solicitor must ensure that the donor is being fully and independently advised without regard to the interests of any third party.

As a solicitor is obliged as part of the formal execution of an EPA to certify that the solicitor is satisfied that the donor "understood the effect of creating the enduring power and [has] no reason to believe that [the] document is being executed by the donor as a result of fraud or undue pressure", a solicitor should ensure that instructions are given freely by the client (see *A Guide to Professional Conduct of Solicitors in Ireland*, page 9).

Part A of the EPA, containing explanatory information, is part of the EPA form and should not be detached from it. The intending donor should be advised to read part A, or have it read to him/her. However, the fact that part A has been read by or to the intending donor does not relieve a solicitor of the obligation to interview the intending donor and make enquiries to satisfy the solicitor that the intending donor understands the effect of creating the EPA.

1.2. Capacity

It is important for a solicitor to explain fully the effect of creating the power and ensure that the client understands this. (By explaining the provisions in detail and questioning the client as to his/her wishes, it should be possible to ascertain whether or not the client understands the provisions of the EPA. If the client is elderly, it would be prudent, in the attendance note of the meeting, to record the client's understanding of the effect of creating the EPA.)

Many older people execute an EPA when they are losing capacity. A solicitor should be satisfied that the client has the mental capacity **to give instructions** and to execute an EPA. As part of the formal execution of an EPA, a statement is required from a registered medical practitioner (at part D of the form) that "at the time [the] document was executed by the donor [he/she] had the mental capacity … to understand the effect of creating the power".

Understanding the effect of creating the EPA means the client must understand that he or she will be effectively passing over control of their assets to the attorney to take decisions with regard to those assets when they become incapacitated.

However, if a solicitor has doubts about the mental capacity of the client **at the time of taking instructions**, then it would be prudent to obtain a medical opinion at that initial stage. A solicitor should explain to the doctor the circumstance for which the opinion is sought (see *A Guide to Professional Conduct of Solicitors in Ireland*, page 12).

Even where no such doubt exists, a solicitor should ensure that the registered medical practitioner completing the statement at part D of the form has examined the donor at a time sufficiently proximate to the execution of the EPA as to be able to make a judgement as to the donor's mental capacity to understand the effect of creating the power (see below, under 'Order of execution', where reference is made to a maximum period of 30 days after execution as the preferable timescale).

1.3. Is an EPA appropriate?

A solicitor should advise the client, in addition to the benefits involved in the execution of an EPA, of the risks – that, in the event of the client's incapacity, the attorney(s) has/have control over the assets of the client and can make certain decisions on behalf of the client (see below, under 'Scope of authority').

A client should be advised of the alternative substitute decision-making mechanisms available. Good and appropriate advice also includes advising the intending donor of the EPA of the alternative to having a registered power in place at the time of incapacity – that is, being made a ward of court.

An EPA may not be appropriate in the particular client's circumstances where:

- There have been persistent family disagreements, particularly if there is likely to be a dispute between family members as to the management of assets. (However,

in certain circumstances, the client may have specific wishes as to what is to happen in the event of incapacity, and perhaps an EPA limited to personal-care decisions would be appropriate. If this is the case, then it should then be pointed out to the client that, in the event of incapacity, it may be necessary to have the client made a ward of court in relation to their general affairs.)
- The value of the client's assets is substantial and there is no person with the appropriate skills to manage the assets.

1.4. Attorney

Although the choice of an attorney is a personal matter for the client, a solicitor should stress the need to appoint an attorney or attorneys who is or are trustworthy (see 3.1 below). A solicitor should also advise the client that, on the registration of the EPA, the attorney's actions will be subject to little or no supervision under current legislation.

A solicitor should make enquiries about the client's choice of potential attorney – in terms of relationship with the client, suitability, trustworthiness and skills necessary to manage the client's financial affairs. A solicitor should also advise the client that a conflict of interest may arise for an attorney where the attorney is also a potential beneficiary in the donor's estate. (Note the provisions of section 5(3) and 5(4) of the *Powers of Attorney Act 1996*.)

The issue as to whether the client should appoint joint attorneys should include advice on the greater opportunity for abuse that the appointment of a sole attorney provides. The solicitor should explain the donor's choice when appointing more than one attorney, to specify whether the attorneys are to be permitted to act jointly or jointly and severally, that is, whether they must act together when making decisions.

In such circumstances, the client should be advised of the implications of section 14(3) of the *Powers of Attorney Act 1996*, which provides: "Where two or more persons are appointed (or are deemed to have been appointed) to act jointly, then, in the case of the death, incapacity, or disqualification of any one or more of them, the remaining attorney or attorneys may continue to act whether solely or jointly as the case may be**, unless the instrument creating the power expressly provides to the contrary**."

A solicitor should take clear instructions as to whether the client wishes to appoint joint attorneys, or whether the client wishes to appoint a sole attorney or joint attorneys with substitute(s). Any provision for a substitute attorney must be made at the time of execution of the EPA (see sections 5(3) and 5(5), *Powers of Attorney Act 1996*).

1.5. Notice parties

Notice of the execution of an EPA is required to be given to at least two persons. It is important that a solicitor advises the client carefully of **the order of persons who must be notified**, which are clearly set out in paragraph 7 of the *Enduring Powers of Attorney Regulations 1996*.

The donor must give notice of the execution of the EPA as soon as practicable to at least two persons. None of them may be an attorney under the power. At least one must be:

1) The donor's spouse, if living with the donor, or
2) If (1) does not apply (if the donor is unmarried, widowed or separated), notification must be given to a child of the donor (if applicable), or
3) If (1) and (2) do not apply, to any relative (that is, parent, sibling, grandchild, widow(er) of a child, nephew or niece, in that order).

Where a spouse is appointed as attorney, the spouse may not be a notice party and the donor should notify a child, or another relative if there are no children or the child/children are also appointed as attorneys under the power.

There is no period of notice prescribed by the legislation, but the notice should be served by registered or recorded post *as soon as practicable* (preferably within 30 days) of the execution of the EPA. Care should be taken to retain the documentary evidence of posting safely, as this will be the subject of averment – perhaps many years later – in the affidavit grounding the application to register the EPA (see 1.13 below).

1.6. Scope of authority

a) Business and financial affairs. A solicitor should advise the client of the meaning of giving a general authority or limited power to the attorney. The type of restrictions that are possible in an EPA should be explained to the client, for example, a restriction that the attorney may not sell the donor's house. A solicitor should then obtain clear instructions as to whether the authority to be given is with regard to all, or only specified, assets of the client. If the client wishes the authority to be subject to *restrictions and conditions*, then careful drafting is required. (A solicitor should point out to the client that, if assets are sold during incapacity, then this may have implications for specific bequests contained in a will – the client should be encouraged to review a will at the time of the execution of an EPA.)

If the EPA is being executed with limitations, a solicitor should advise the client of the consequences of that – that is, that the client would have to be taken into wardship should it become necessary to take a decision for which authority is not given by the power (see section 5(9), *Powers of Attorney Act 1996*).

A solicitor should ascertain if the client owns any property jointly with others and, if so, to ascertain:
- Does a presumption of a resulting trust arise?
- Does the presumption of advancement arise?
- Was there an intention to benefit the joint owner, either at the date of transfer or at the date of death?

Details of the client's investments should be ascertained, and the client's wishes with regard to investments should also be ascertained and discussed.

b) Personal care decisions. A solicitor should advise the client of the possibility of granting powers over personal-care decisions and ascertain if the client wishes anyone, other than the attorney, to be consulted with regard to such decisions.

Where it is intended to grant powers over personal care to the attorney, a solicitor should draw the attention of the donor to the categories of personal-care decisions in respect of which an attorney may be given authority, and delete any which the intending donor does not wish to grant. Note that personal-care decisions under an EPA do not extend to consents to medical treatment (note also the provisions of section 5(8), *Powers of Attorney Act 1996*). The cost of long-term care should be discussed with the client and his/her wishes with regard to care at home or in a long-term care facility should also be discussed. The conferring of personal care decisions does not give the attorney any authority to detain the donor of the power of attorney. (Article 40.4.1 of the *Con-*

stitution of Ireland and article 5 of the *European Convention on Human Rights* provide that a person cannot be deprived of liberty save in accordance with law or as prescribed by law.)

In preparing the statutory form for an EPA, a solicitor should ensure the correct schedule is being completed. The form set out in the first schedule is appropriate when general authority is being given and it includes personal-care decisions. The form in the second schedule should only be used if the authority being given is restricted to personal-care decisions only.

c) Donor as trustee/personal representative. A donor cannot authorise an attorney to carry out any functions that a donor has as a trustee or personal representative (see section 16(2), *Powers of Attorney Act 1996*).

1.7. Gifts and remuneration

A donor of an EPA can specifically provide that an attorney has the authority to make gifts out of the donor's assets when the EPA takes effect. As the provision of making gifts is open to abuse, a solicitor should advise the client of the provisions of section 6(5) of the *Powers of Attorney Act 1996*, which limits the making of gifts **of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including the attorney) who are related to or connected with the donor and gifts to any charity to which the donor made or might be expected to make gifts, provided the value of each such gift is not unreasonable, having regard to all the circumstances and, in particular, the extent of the donor's assets**.

In the case of provision for remunerating the attorney(s), clear instructions should be obtained from the client as to the circumstances in which remuneration should be paid. A solicitor should discuss with the client whether it is necessary to provide for the payment of remuneration at all.

In cases where a professional advisor is being appointed, a charging clause should be included, as the attorney is acting in a fiduciary capacity and would otherwise be unable to charge.

1.8. Solicitor-attorney

For the avoidance of doubt, when a solicitor is being appointed an attorney, then a charging clause should be included in the EPA (see *Guide to Professional Conduct of Solicitors in Ireland*, page 10).

A solicitor should also advise the client that, in the event of the registration of the EPA, provision could be made for the solicitor's costs to be approved by an independent third party.

A solicitor who is appointed as an attorney should not sign the prescribed certificate (a potential conflict of interest may arise where a solicitor is being appointed, particularly as sole attorney. It is best to avoid any circumstances where such an issue can be raised). For the avoidance of doubt, a partner or a colleague in the same firm may sign the certificate.

1.9. Order of execution

When the donor has signed the EPA, then the attorney(s) should sign. The statement of capacity by a medical practitioner (who should indicate medical qualifications) and the certificate of the solicitor should ideally be completed within 30 days of the signing by the donor.

When the document has been completed, a solicitor should ensure that it is properly executed in accordance with the *Powers of Attorney Act 1996* (see section 5, *Powers of Attorney Act 1996*) and should discuss with the client where the original of the EPA should be kept (see 1.13 below).

1.10. Revocation before registration

A solicitor should advise the client that the client can revoke an EPA at any time **before** it is registered.

The form of revocation (which need not be by deed) should specifically identify the EPA being revoked. The original EPA, or a copy thereof, should be exhibited in the revocation.

Notice of revocation should be served on the named attorney(s).

As a matter of prudence, and in order to avoid difficulties at a later stage, the formalities that apply for the execution of an EPA should be complied with – that is, notice should also be served on the notice parties and a solicitor's certificate should confirm that the client understands the effect of revocation, and a medical practitioner should certify that the donor had the mental capacity to understand the effect of revocation (see 3.4 below).

1.11. Disclaimer by attorney prior to registration

No disclaimer, whether by deed or otherwise, of an EPA that has not been registered shall be valid unless and until the attorney gives notice of it to the donor (section 5(10), *Powers of Attorney Act 1996*).

1.12. Invalidation of an EPA

See the provisions of section 5, subsections (6), (7), (8) and (9) of the *Powers of Attorney Act 1996* and of section 50(a) of the *Family Law (Divorce) Act 1996* (amending section 5(7) aforementioned) for the circumstances in which an EPA shall be invalidated.

1.13. Storage of documents

If the client is not retaining the original documents personally, a solicitor should ensure that the original EPA, together with relevant certificates, copy of notices to notice parties, and evidence of service of notices should be stored as original documents and not retained on or with a file.

PART 2: PRIOR TO REGISTRATION

2.1. Jurisdiction of the court

On application by any interested party, and whether or not the attorney has made application for registration of the EPA, the court, if it is of the opinion that it is necessary, may exercise any power with respect to the EPA, or to the attorney appointed to act under it. This could apply where, for example, the attorney has not taken steps to register the EPA (see section 8, *Powers of Attorney Act 1996*).

2.2. Substitute attorney

Where a named attorney has died or disclaimed the EPA, evidence of death or disclaimer must be produced to the Registrar of Wards of Court to enable registration of the EPA with the substitute attorney.

2.3. Validity of EPA

If there is any question as to the validity of the EPA prior to registration, then an application may be made by the attorney to the court for its determination (see section 9(3), *Powers of Attorney Act 1996*).

2.4. Defective EPA

Where the EPA differs in an immaterial respect, in form or mode of expression, from the form prescribed in the regulations, the Registrar of Wards of Court may register the EPA (see section 10(5)(a), *Powers of Attorney Act 1996*).

Notwithstanding that the EPA does not comply with the legislative provisions, the court may

admit the EPA for registration (see section 10(5)(b), *Powers of Attorney Act 1996*).

2.5. Foreign EPAs

There have been instances where EPAs under the legislation of England and Wales have been admitted for registration under section 10(5) of the *Powers of Attorney Act 1996* (see practice direction of the Wards of Court Office on www.courts.ie).

PART 3: REGISTRATION OF EPA

Prior to, and on the registration of an EPA, instructions may be accepted from an attorney, but a solicitor continues to owe a duty to the client (donor of the EPA).

3.1. Attorneys

A solicitor should advise the attorney of his/her role and obligation to the donor and, in particular, should deal specifically with the following points:

- The circumstances in which a person is disqualified from acting as an attorney. It should be explained to the client that, in certain circumstances, a person will be disqualified from acting as an attorney – for example, where the attorney is a spouse and there has been a subsequent annulment or dissolution of marriage (section 5(7), *Powers of Attorney Act 1996*, as amended by section 50(a) *Family Law (Divorce) Act 1996*), minority, disqualification under the *Companies Acts* or a connection with the nursing home in which the donor resides (see section 5(4), *Powers of Attorney Act 1996*).
- The scope of the authority given in the EPA and the fact that the EPA does not come into force until it has been registered, but that the attorney may take certain actions/decisions pending registration once an application for registration has been made (see section 7(2), *Powers of Attorney Act 1996*).
- If the scope of the authority includes personal-care decisions, advise what decisions can be made, and if the EPA provides that any other party be consulted.
- The requirement to act 'in the best interests' of the donor in making personal-care decisions. This includes having regard to the past and present wishes and feelings of the donor, facilitating the donor's participation as fully as possible in any decision, and consulting with persons caring for the donor or interested in the donor's welfare. The concept of best interest also involves considering whether there is an alternative method of obtaining the same result, which would be less restrictive of the donor's freedom of action (see section 6(7), *Powers of Attorney Act 1996*).
- Where the scope of the authority permits the attorney to decide where the donor may live, the solicitor should advise the attorney of the significance, both legally and for the donor, of considering whether the donor should change residence from their home to a care facility, including the need for the attorney to seek relevant medical and legal advice (and to consult with named individuals, discussed below).
- The requirement to keep accounts of the donor's property and affairs and to produce the accounting records to the court if required.
- The requirement, if applicable, to make tax returns in respect of income and capital gains to the Revenue Commissioners on behalf of the donor.
- The requirement to keep the donor's property separate from the attorney's property – an attorney is simply an agent of the donor. (The registration of the EPA should be noted on the accounts of the donor held by financial institutions, and the proceeds of the accounts should not be transferred into the name of the attorney.)
- The requirement not to profit from position as an attorney.
- If relevant, the requirement to consult with named individuals. (Even if not required by the EPA to consult with named individuals, a solicitor should advise an attorney that it is prudent to keep family members generally informed of transactions in relation to the donor's assets on an annual basis.)
- The provisions in the EPA and the legislation in relation to gifts (see section 6(5), *Powers of Attorney Act 1996*).
- The provisions in the EPA and legislation in relation to expenses incurred by attorney(s) and remuneration of attorneys.
- The provisions in the legislation and the EPA in relation to the use of the donor's assets for the benefit of others (including the attorney) and the limitations of this power (see section 6(4), *Powers of Attorney Act 1996*).
- The fact that the attorney is in a fiduciary relationship with the donor and that the attorney must use proper care in exercising the authority under the EPA.
- The fact that the attorney may disclaim at any time up to registration of the EPA, and thereafter only on notice to the donor and with the consent of the High Court.

The attorney should also be advised that the court has extensive functions with regard to registered EPAs, which include the cancellation of the registration of an EPA (see, generally, section 12, *Powers of Attorney Act 1996*). An example would be if the attorney had become mentally incapable.

If a solicitor suspects that an attorney may be misusing an EPA or acting dishonestly, he/she should notify the Registrar of Wards of Court. The court may cancel the registration of an instrument – for example "on being satisfied that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney; … on being satisfied that fraud or undue pressure was used to induce the donor to create the power" (see section 12(4)(f) and (g), *Powers of Attorney Act 1996*).

In the case of theft or fraud, the gardaí should be notified.

3.2. Formalities

A solicitor, on receiving instructions to register an EPA, should personally satisfy him/herself that the donor is, or is becoming, incapable of managing his/her affairs.

The following steps should be taken in registering an EPA:

1) Obtain a medical certificate from a registered medical practitioner to the effect that the donor is, or where appropriate, is becoming incapable, by reason of a mental condition, of managing and administering his/her own property and affairs.
2) Arrange with the attorney(s) to sign the following forms of notice of intention to apply for registration (a separate form is signed in respect of each notice party):
   a) Notice of intention to apply for registration addressed to the donor,
   b) Notice of intention to apply for registration addressed to the notice parties (note part 1, first

schedule to the 1996 act as to the order of precedence of entitlement to notice of intention to apply, where notice parties are deceased or otherwise),
c) Notice of intention to apply for registration addressed to the Registrar of Wards of Court.

3) Serve the donor by registered post with the notice at 2(a) above, that is, notice of intention to apply for registration.
4) Have an affidavit of service in connection with serving the notice of intention to apply for registration on the donor sworn.
5) Serve the notice parties by registered post with the notice at 2(b) above, that is, notice of intention to apply for registration.
6) Have affidavits of service in connection with serving the notice of intention to apply for registration on the notice parties sworn.
7) Serve notice (by ordinary post) on the Registrar of Wards of Court of the intention to apply for registration.
8) Wait for five-week notice period to expire.
9) Arrange for the attorney(s) to swear an affidavit grounding the application for registration, setting forth fully the facts and/or circumstances giving rise to the application (see order 129, rule 3, *Rules of the Superior Courts 1986*).
10) File the following documentation (together with affidavits of service at 12 below) with the Registrar of Wards of Court Office:
a) Application for registration of EPA (see form no 1 in the appendix to order 129, rule 3, *Rules of Superior Courts 1986*),
b) Original EPA,
c) Copy notice of execution by the donor of the EPA given to the notice parties at the time of the execution of the EPA,
d) Copy notice of intention to apply for registration given to the donor,
e) Copy notice of intention to apply for registration given to the notice parties,
f) Affidavit of service in relation to the service on the notice parties of the notice of execution,
g) Affidavit of service in relation to the service on the donor of the notice of intention to apply for registration,
h) Affidavit of service in relation to service on the notice parties of the notice of intention to apply for registration,
i) Medical certificate from a registered medical practitioner,
j) Affidavit sworn by attorney(s), at 9 above.
11) a) A copy of this application for registration should be personally served on the donor, and
b) A copy of this application for registration should be served on the notice parties by registered post.
12) a) Swear affidavit of service of application for registration on donor,
b) Swear affidavit of service of application for registration on notice parties.

3.3. Notification to the Registrar of Wards of Court after registration

The attorney should be advised that the Registrar of Wards of Court should be notified if any of the following events occur after the registration of the EPA:

- Change of address of attorney,
- Change of address of donor,
- Death of donor,
- Where the attorney becomes mentally incapable, then their committee/attorney should notify the registrar,
- Where the attorney dies, their personal representative should notify the registrar,
- Any other event that would terminate or invalidate the EPA, for example, if the donor were to recover capacity, or if the attorney was adjudicated a bankrupt.

3.4. Revocation by donor after registration

A revocation by a donor of an EPA is not valid unless and until the court confirms the revocation. The application to the court must be on notice to the attorney(s). (See sections 11(1)(a) and 12(3), *Powers of Attorney Act 1996*.)

3.5. Disclaimer/resignation by attorney after registration

The attorney should be advised that, in the event of the attorney wishing to disclaim/resign as attorney after the EPA has been registered, he/she may only do so **with the consent of the court** upon application made on notice to the donor (see section 11(1)(b), *Powers of Attorney Act 1996*).

If there is a joint attorney and the authority provides for several liability, then the continuing attorney will be in a position to act. Likewise, if the EPA provides for a substitute attorney and the substitute attorney is willing to act, then resignation will be effective (see 2.2 above).

3.6. Inventory of assets

A solicitor should advise the attorney(s) to prepare a full inventory of assets at the time of registration, and this will act as a useful checklist if any disputes arise in the future.

On the death of the donor, a full inventory should be prepared by the attorney and passed to the personal representative of the donor.

3.7. Termination of EPA

The functions of an attorney cease on the death of the donor of the EPA.

Where the court cancels the registration of an EPA, it shall by order revoke the EPA (see section 12(5), *Powers of Attorney Act 1996*).

Subcommittee on Financial Aspects of Elder Abuse, Guidance and Ethics Committee

NEW AND REVISED PRA PRACTICE DIRECTIONS ON FAMILY LAW MATTERS

Conveyancing practitioners should look out for new and revised PRA practice directions on family law matters.

A. Cancellation of property adjustment orders

The PRA has recently issued two interim office notices to staff of the registries to facilitate the processing of pending applications for cancellation of property adjustment orders on folios and in the Registry of Deeds. This has followed on consultation with the Conveyancing Committee on the content and format of the application forms. Draft rules are in the course of preparation and, when approved, will be published in due course. In the meantime, solicitors wishing to have property adjustment orders removed from title can access the necessary forms on the PRA website, www.prai.ie:

- Click on 'Legal Notice 1/2009' with attached forms 13, 14, and 15 for the application forms for the Registry of Deeds,
- Click on 'Legal Notice 2/2009' with attached forms A, B, and C for the application forms for the Land Registry.

These notices are currently on the 'News' page of the PRA website and it is anticipated that they will, in the future, be available on the 'Legislation' page.

B. Changes to PRA practice regarding family law declarations

Practitioners should note that the PRA has recently changed its practice direction so that PRA staff will no longer check the content of family law declarations lodged with dealings in the Land Registry. Solicitors are cautioned to carefully check the content of all family law declarations, as any errors will not now be brought to their attention as heretofore. The new practice direction will replace the current practice direction no 10 and will be available under 'Practice directions', '*Family Home Protection Act* and *Family Law Acts*' on the PRA website, www.prai.ie.

The committee confirms that it is proper practice to lodge family law declarations with Land Registry dealings and stresses the importance of continuing to lodge them in the usual way. The PRA has confirmed that staff, while no longer checking them, will continue to accept them.

Conveyancing Committee

NEW VAT PRE-CONTRACT ENQUIRIES (APRIL 2009)

Since the introduction of the new VAT on property system in July 2008, members of both the Conveyancing and Taxation Committees have been monitoring the application of the new VAT system in order to formulate an appropriate set of pre-contract VAT enquiries to be raised by the solicitor acting for the purchaser of property. This task, which has been undertaken by a joint subcommittee comprising members of both committees, is now nearing completion.

Practitioners are advised that the subcommittee has published a working draft of the enquiries on the Law Society website. The enquiries may be accessed by logging onto the members' area of the website and clicking on 'Society committees' and then on either the 'Conveyancing' or 'Taxation' pages.

The attention of the profession is drawn to the following points:

1) The enquiries are at present a working draft. The subcommittee has expended considerable time and effort in drafting the enquiries and has sought to ensure that they are as comprehensive and user-friendly as possible. The subcommittee is publishing the draft enquiries so that they might be applied to live transactions and any omissions or deficiencies identified by members. The subcommittee greatly welcomes all observations of members regarding the enquiries, which can be emailed to the following address: vat@lawsociety.ie. As the subcommittee must produce a final form set of enquiries in due course, it has decided to set 30 September 2009 as the closing date for acceptance of members' submissions, after which time it is hoped to publish the enquiries in their final form. If an amendment to the draft enquiries prior to 30 September 2009 is warranted, an amended draft of the enquiries will be posted on the Law Society website and members will be advised accordingly via the website, the Law Society e-zine and the *Law Society Gazette*.
2) It is the intention of the subcommittee that the enquiries should be raised by the purchaser's solicitor and responded to by the vendor at the **pre-contract** stage. This is vital if the purchaser's solicitor is to be in a position to advise his or her client on the VAT implications of the transaction.
3) Prior to issuing the enquiries to the vendor's solicitor, the solicitor acting for the purchaser must complete the purchaser's statement on page 2 of the enquiries.
4) Although the enquiries are to be raised by the purchaser's solicitor, it is the view of the Conveyancing and Taxation Committees that they will also prove to be a useful tool for a vendor's solicitor and should be completed by the vendor **prior** to the drafting of the contract for sale, thus enabling the vendor's solicitor to draft the VAT special condition appropriately according to the circumstances of the transaction. Members are reminded that it is inappropriate to issue a contract for sale with special condition 3 set out in full.
5) On closing, the purchaser's solicitor ought to seek confirmation from the vendor's solicitor that the replies to the enquiries are still correct and accurate.
6) Whether acting for a vendor **or** a purchaser, the subcommittee advises all members that, unless they are expert in the application of the new VAT system or the transaction is a straightforward one and the member is fully satisfied that he or she has been furnished with the complete VAT history of the property, they are strongly recommended to advise all clients to engage the services of a specialist VAT or tax adviser to ensure that the vendor client answers each of the enquiries correctly and the purchaser client understands the significance of each response given.

Conveyancing and Taxation Committees

LIMITATION OF A SOLICITOR'S LIABILITY

The law relating to the possibility of limiting the liability of a solicitor has changed with the introduction of the *Civil Law (Miscellaneous Provisions) Act 2008*. Section 44 of the act, which came into force on 20 July 2008, amended the *Solicitors (Amendment) Act 1994* so as to permit a solicitor to limit his liability by contract, and repealed the existing prohibition on such a limitation, which was contained in the *Attorney and Solicitors Act 1870*.

Under the new law, a limitation of liability is permitted in contracts between:

a) A solicitor and client,
b) A partner, clerk or servant of the solicitor and the client, and
c) A former partner, clerk or servant of the solicitor and the client.

A solicitor may now, by contract, limit his liability to a client to "an amount specified or referred to" in the contract with the client. That amount must not be less than the minimum level of professional indemnity insurance cover required by the *Solicitors (Amendment) Act 1994* and associated regulations; this is currently €2,500,000. In the event that the amount specified or referred to in the contract is less than that minimum level of cover, the act operates to increase the limitation up to that level.

The new act expressly preserves the client's rights as a consumer under section 30 of the *Sale of Goods and Supply of Services Act 1980* (as amended) and also his rights under regulation 6 of the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995*, which prevents a consumer being bound to a contract containing an unfair term (that is, a clause that causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer, taking into account the nature of the services for which the contract was concluded).

In light of section 44, a solicitor may consider including in any letter of engagement a provision limiting his liability, such as the following:

"**Limitation of our liability**
Our liability (and that of our present and former partners and employees) to you arising out of, or in connection with, our engagement (whether for breach of contract or of statutory duty, negligence, or otherwise) will be limited to [the higher of (a) the minimum amount of the professional indemnity insurance cover from time to time required to be maintained by us under applicable law; or (b) [*]]. Nothing in this letter shall limit our liability to you (a) for fraud or fraudulent concealment or (b) to the extent that under any applicable law liability may not be limited."
**Insert amount.*

(Practitioners should note that the Guidance and Ethics Committee published a precedent letter of engagement in May 2008, prior to the coming into force of the new act.)

Business Law Committee

REDUCTION IN FEES PAYABLE UNDER THE CRIMINAL LEGAL AID SCHEME, THE GARDA STATION LEGAL ADVICE AD HOC SCHEME AND THE CAB LEGAL ADVICE AD HOC SCHEME

SI 74 of 2009 effects an 8% reduction in respect of fees payable under the Criminal Legal Aid Scheme for work carried out in the District Court, appeals to the Circuit Court, prison visits and certain bail applications, with effect from **12 March 2009**.

In line with the government decision to reduce professional fees for work carried out on or after **1 March 2009**, fees payable to solicitors for work carried out under the Criminal Legal Aid Scheme (that is, other than work covered by SI 74/2009), the Garda Station Legal Advice Scheme and the CAB Legal Advice Scheme are reduced by 8% from that date.

The rates payable to interpreters and translators under the Criminal Legal Aid Scheme have also been reduced by 8% with effect from **12 March 2009**. Subsistence rates payable are reduced by 8% from **5 March 2009**.

The text of SI 74/2009 and the revised rates payable to solicitors for garda station visits and for interpretation/translation services are available on the Criminal Law Committee page on the Society's website, www.lawsociety.ie. G

Criminal Law Committee

legislation update

12 March – 8 April 2009

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.

ACT PASSED

Electoral Amendment (No 2) Act 2009

Number: 9/2009

Contents note: Amends the *Local Elections (Disclosure of Donations and Expenditure) Act 1999* to provide for the introduction of limits on expenditure by candidates and political parties at local elections, and to provide for administration and oversight of the scheme by local authorities as an extension of their current statutory responsibilities in relation to the existing arrangements for disclosure of donations and expenditure at local elections. Amends the *Litter Pollution Act 1997* to clarify the commencement date from which posters may be exhibited at elections and referenda.

Date enacted: 25/3/2009

Commencement date: 25/3/2009

SELECTED STATUTORY INSTRUMENTS

Criminal Justice (Legal Aid) (Amendment) (No 2) Regulations 2009

Number: SI 74/2009

Contents note: Provide for a decrease of 8%, with effect from 12/3/2009, in the fees payable under the Criminal Legal Aid Scheme to solicitors for attendance in the District Court and for appeals to the Circuit Court, and in the fees paid to solicitors and counsel in respect of essential visits to prisons and other custodial centres (other than garda stations) and for certain bail applications. Revoke the *Criminal Justice (Legal Aid) (Amendment) Regulations 2009* (SI 15/2009).

Commencement date: 12/3/2009

Circuit Court Rules (Trial) (No 2) 2009

Number: SI 94/2009

Contents note: Amend order 33, rule 2 and order 59, rule 4(12) of the *Circuit Court Rules 2001* (SI 510/2001) to facilitate the listing of an action or matter before the country registrar for allocation of hearing dates where a notice of trial has been filed and served, or a notice to fix a date for trial has been served.

Commencement date: 16/4/2009

District Court (Consumer Protection Act 2007) Rules 2009

Number: SI 106/2009

Contents note: Amend orders 23, 33, 34 and 39 of the *District Court Rules 1997* (SI 93/1997) to provide procedures for the operation of sections 30 (authorised officers), 74 (consumer's right of action for damages), 78 (defence of due diligence) and 81 (compensation of consumers for loss or damage) of the *Consumer Protection Act 2007*.

Commencement date: 24/4/2009

District Court (Criminal Justice Act 2006) Rules 2009

Number: SI 105/2009

Contents note: Amend orders 17, 18 and 28A of the *District Court Rules 1997* (SI 93/1997) in relation to forms of bail recognisance in respect of suspended sentences and on appeal and delete form 17.3 from the rules.

Commencement date: 24/4/2009

District Court (Forms) Rules 2009

Number: SI 92/2009

Contents note: Amend order 35 of the *District Court Rules 1997* (SI 93/1997) by the substitution of a new rule 1, which provides for the signing of orders or warrants by the District Court clerk in accordance with the provisions of sections 14(1) and 14(2) of the *Courts Act 1971* (as substituted by section 23 of the *Civil Law (Miscellaneous Provisions) Act 2008).*

Commencement date: 23/3/2009

Rules of the Superior Courts (Affidavits) 2009

Number: SI 95/2009

Contents note: Amend order 40 of the *Rules of the Superior Courts 1986* (SI 15/1986) by the substitution of a new rule 14, which provides that, where appropriate, a deponent to an affidavit shall provide proof of identity to the person taking the affidavit.

Commencement date: 16/4/2009

Rules of the Superior Courts (Discovery) 2009

Number: SI 93/2009

Contents note: Amend order 31 of the *Rules of the Superior Courts 1986* (SI 15/1986) by the substitution of new rules 12 and 20, which provide for the discovery of electronically stored information.

Commencement date: 16/4/2009

Finance Act 2007 (Commencement of Section 51(1)) Order 2009

Number: SI 68/2009

Contents note: Appoints 27/2/2009 as the commencement date for section 51(1) of the act. Section 51 extends the qualifying period for tax relief for corporate investment in certain renewable energy projects under section 486B of the *Taxes Consolidation Act 1997* to 31/12/2011.

Finance Act 2008 (Commencement of Section 32(1)(b)) Order 2009

Number: SI 98/2009

Contents note: Appoints 1/1/2009 as the commencement date for section 32(1)(b) of the act. This provision amends section 481(2)(c) of the *Taxes Consolidation Act 1997* by increasing the cap on qualifying expenditure for section 481 film relief from €35 million to €50 million.

Finance (No 2) Act 2008 (Commencement of Section 28(1)) Order 2009

Number: SI 97/2009

Contents note: Appoints 1/1/2009 as the commence-

ment date for section 28(1) of the act. Section 28(1) provides for an increase from 80% to 100% in the level of funding that can qualify for tax relief for investment in films under section 481 of the *Taxes Consolidation Act 2007* and also increases the annual amount that can be invested by an individual taxpayer from €31,750 to €50,000.

Finance (No 2) Act 2008 (Commencement of Section 37) Order 2009

Number: SI 91/2009

Contents note: Appoints 23/3/2009 as the commencement date for section 37 of the act. Section 37 provides for the extension, from three to seven categories of technology, of the accelerated capital allowances scheme for expenditure incurred by companies on certain energy-efficient equipment for the purposes of the trade.

Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Act 2009 (Commencement) Order 2009

Number: SI 102/2009

Contents note: Appoints 30/3/2009 as the commencement date for all sections of the act, other than section 3(d) and (e), which came into operation on 5/3/2009, the date of enactment of the act.

Planning and Development (Regional Planning Guidelines) Regulations 2009

Number: SI 100/2009

Contents note: Set out a number of procedural requirements in relation to the preparation of the review and update of the 2004 regional planning guidelines by regional authorities. Supplement procedural requirements already set out in the *Planning and Development Act 2000*. Specify the national spatial strategy as being of relevance to the determination of strategic planning policies.

Commencement date: 25/3/2009

Public Health (Tobacco) (Product Information) Regulations 2009

Number: SI 123/2009

Contents note: Set out the manner in which a retailer can provide information to customers relating to the tobacco products the retailer has available for purchase, in accordance with section 43(5) (inserted by section 14 of the *Public Health (Tobacco) (Amendment) Act 2004*) of the *Public Health (Tobacco) Act 2002*.

Commencement date: 1/7/2009

Social Welfare (Miscellaneous Provisions) Act 2008 (Section 8) (Commencement) Order 2009

Number: SI 112/2009

Contents note: Appoints 1/1/2010 as the commencement date for section 8 of the act. Section 8 amends the definition of reckonable income for PRSI purposes in the *Social Welfare Consolidation Act 2005*, as amended.

Social Welfare (Miscellaneous Provisions) Act 2008 (Section 24) (Commencement) Order 2009

Number: SI 69/2009

Contents note: Appoints 2/3/2009 as the commencement date for section 24 ('Amendments to *Pensions Act 1990*') of the *Social Welfare (Miscellaneous Provisions) Act 2008*.

Taxes Consolidation Act 1997 (Accelerated Capital Allowances for Energy Efficient Equipment) Order 2009

Number: SI 76/2009

Contents note: Amends the *Taxes Consolidation Act 1997 (Accelerated Capital Allowances for Energy Efficient Equipment) Order 2008* (SI 399/2008) to update, in accordance with the provisions of section 285A of the *Taxes Consolidation Act 1997* (inserted by section 46 of the *Finance Act 2008*), those energy-efficient products whose capital cost will be eligible for accelerated capital allowances, and updates the energy-efficiency criteria used to determine eligibility for inclusion on those product lists. The accelerated capital allowances scheme will involve quarterly updates to those product lists.

Commencement date: 5/3/2009 G

Prepared by the Law Society Library

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 David O'Shea, a solicitor formerly practising in the firm of O'Donovan Solicitors, 73 Capel Street, Dublin 1, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts 1954-2002* [6743/DT64/08]
Law Society of Ireland (applicant)
David O'Shea (respondent solicitor)

On 27 November 2008, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

1) Failed to reply adequately to the Society's correspondence and, in particular, letters dated 4 October 2007, 19 October 2007, 9 November 2007, 18 December 2007, 24 January 2008, 7 March 2008, 19 March 2008 and 9 April 2008,
2) Failed to attend the Complaints and Client Relations Committee meeting on 16 April 2008, despite being directed to do so by the committee at its meeting of 4 March 2008 and despite having undertaken to do so in his letter of 29 February 2008.

The tribunal ordered that the respondent solicitor:

- Do stand censured,
- Pay a sum of €1,000 to the compensation fund and that the respondent solicitor be given 12 months within which to pay the said sum of €1,000,
- Pay the whole of the costs of the Law Society of Ireland, as taxed by a taxing master of the High Court, in default of agreement, but such costs to be limited to the costs incurred in respect of charges (1) and (2) above. G

firstlaw update

News from Ireland's online legal awareness service
Compiled by Bart Daly for FirstLaw

CRIMINAL LAW

Prohibition

Delay – disclosure – whether the High Court judge erred in law and/or fact in refusing to prohibit the trial of the applicant.

The applicant appealed against an order of the High Court refusing to prohibit his trial on ten offences, contrary to s4(1) of the *Forgery Act 1913*, which offences were alleged to have been committed between 1 January and 23 August 1994. The applicant submitted that the High Court judge erred in law and/or in fact and, further, and/or in the alternative, that the trial judge incorrectly exercised his discretion on the facts and circumstances of the case herein. The applicant raised issues before the High Court concerning noncompliance with s6 of the *Criminal Procedure Act 1967*, as amended, with reference to exhibits. He also relied on grounds relating to delay, loss of witnesses, the existence of a sidebar agreement that the matter would not proceed if the applicant accommodated his former employer, the attack upon the applicant by the Law Society, and the discretion of the court.

The Supreme Court (Denham J, Geoghegan, Macken JJ concurring) dismissed the appeal, holding that, in the submissions before that court, the applicant failed to show any error by the High Court in reaching its decision, and no reason was advanced to warrant the reversing of that decision. Furthermore, there was no reason in law to prohibit the trial of the applicant.

***Enright (applicant/appellant) v Finn & DPP (respondents)*, Supreme Court, 29/7/2008** [FL15696]

FAMILY LAW

Foreign divorce

European Union law – Dutch divorce from 1994 – Brussels Convention – *council regulation EC no 44/2001 – council regulation EC 1347/2000* – Brussels II bis – Henderson v Henderson – *preliminary reference – article 234 EC.*

In 2000, the respondent applied for a decree of judicial separation. The issue arose as to whether a decree of divorce obtained from a Dutch court by him in 1994 was entitled to recognition in the Irish courts. It was claimed that the ancillary orders sought by the respondent in her claim conflicted with the maintenance aspect of the Dutch divorce judgment. The appellant argued that the Irish courts did not have jurisdiction as to the claim and sought to rely on the provisions of the *Brussels Convention*, *Brussels I* and *Brussels II* in support thereof. The High Court refused the application for an order that the court would decline jurisdiction, and an appeal was made to the Supreme Court on the question of the jurisdiction of the court.

The Supreme Court (Fennelly J; Denham, Hardiman, Geoghegan and Kearns JJ concurring) held that the judgment of the Dutch court was not entitled to recognition in this state on account of its date, prior to the entry into force of *Brussels I* or *II*. All of the grounds of appeal would be rejected. There was no merit in referring a question to the Court of Justice pursuant to article 234 EC. Eight years had passed since the initiation of the proceedings and further delay would not be appropriate in the proceedings.

***T(D) v L(F)*, Supreme Court, 29/7/2008** [FL15689]

HUMAN RIGHTS

Constitutional law

European Convention on Human Rights, article 8 – *local authority housing – notice to quit – factual dispute about the termination of the tenancy – procedural safeguards* – Dublin City Council v Fennell – *declaration of compatibility – damages – whether construction possible to save constitutionality by interpretation – ss2, 3, 5 of the* European Convention on Human Rights Act 2003.

The plaintiff sought a declaration that s62 of the *Housing Act 1966* was incompatible with article 8 of the ECHR and sought an injunction to restrain his eviction from local authority housing by reason of the finding of drugs, which were alleged to belong to his son. The plaintiff disputed this finding and alleged that he was not afforded an opportunity by the council to dispute the finding and that his son in fact was a heroin addict and not a drug dealer. The issue arose as to the pre-2003 challenges in the superior courts to s62 and whether s62 prevented an inquiry into its merits by an independent tribunal.

Laffoy J held that the procedure provided for in s62, where there was no opportunity in the event of a dispute to review the decision on its merits, was not proportionate. Section 62 of the 1966 act was incompatible with article 8 of the ECHR, and the incompatibility could not be circumvented by reason of s2 of the 2003 act. Section 3 of the 2003 act provided no comfort to the plaintiff. This was a proper case to grant a declaration of incompatibility, and a remedy for damages pursuant to s5(4) might lie for the plaintiff, but it was a matter for the government by reason of the provision of the system of *ex gratia* compensation.

***Donegan (plaintiff) v Dublin City Council (defendant)*, High Court, 8/5/2008** [FL15703]

MEDIATION

Award

Remittal – sale of accountancy practice – dispute as to consideration payable – interim award – fees – error in award – outside the scope of reference – internally inconsistent – whether plaintiff could establish error on the face of the award – Arbitration Act 1954.

The plaintiff sought an order, pursuant to sections 36 or 38 of the *Arbitration Act 1954*, to set aside or remit the award of an arbitrator in a dispute in respect of the sale of an accountancy practice. The arbitrator had made an interim award. A dispute arose as to the methodology used by the arbitrator and whether it was inconsistent. The plaintiff contended that the award had three patent errors on its face and the methodology adopted was outside the terms of reference of the dispute.

Laffoy J held that the plaintiff had not established errors on the face of the award. The methodology used was derived from the interim award and the plaintiff could not challenge its use at this juncture. The plaintiff had ample opportunity to address the appropriateness or otherwise of the methodology employed by the arbitrator in calculating the consideration due. There was no basis for either setting aside

or remitting the final award. The application of the plaintiff would be dismissed.

***Hogan (plaintiff) v Byrne & Curtin (defendants)*, High Court, 3/6/2008** [FL15700]

SOLICITORS' LIEN

Delivery of files

Coming off record payment of taxed costs – deferral of outlay of solicitors – order permitting them to come off record.

The client plaintiff sought an order that a solicitor's firm deliver files to a different firm currently on record for him. He also sought an order that the payment of the taxed costs and outlay of the solicitors be deferred to the outcome of the claim, subject to an undertaking to be given. The proceedings were brought by 98 plaintiffs seeking damages and declarations arising from the implementation of the milk quota regime prior to 1990.

Laffoy J held that an order would be made directing the former solicitors to deliver to the current solicitors an undertaking in writing to hold files subject to a lien and to return them on the conclusion of the plaintiffs' claim in the proceedings. The delivery of the files would be without prejudice to the claim for costs against the client. The former solicitor's entitlement to recover costs from the client was a matter of contract. The application for the deferral of the payment of such costs was misconceived.

***Ahern (plaintiff) v Minister for Agriculture and Food (defendant)*, High Court, 11/7/2008** [FL15701] G

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BRIEFING

News from the EU and International Affairs Committee
Edited by TP Kennedy, Director of Education, Law Society of Ireland

Elements of independence of the legal profession: a European perspective – part 2

The following is part 2 of an article based on a paper delivered by John Fish, the former president of the CCBE, during a conference in Warsaw in November 2008 on the general theme of elements of the independence of the legal profession. Part 1 was published in last month's *Gazette*.

Core values and the *Services Directive*

The recently-adopted EU directive (2006/123/EC) on the provision of services in the internal market may not at first sight raise concerns as to the independence of the profession, bearing in mind that, although lawyers are included within the scope of the directive, most of the issues concerning the rights of lawyers to provide services, and of establishment in other member states, are already provided for in the sectoral directives relating to lawyers.

Apart from drawing attention to the general requirement at article 14 of the directive, whereby member states are prohibited from making access to, or the exercise of, a service activity subject to compliance with a 'blacklist' of criteria, I wish to refer to two aspects of the directive, which may be relevant in the context of the independence of the profession and ethical issues, namely the subject of multidisciplinary activities and codes of conduct, both of which are dealt with in the directive.

Multidisciplinary activities

In part 1 of this article, I referred to the celebrated *Wouters* decision (Case C-309/99), which at the time was regarded by many as putting an end to the debate as to whether or not a bar association was justified in maintaining an internal regulation against a member of the bar from entering into a partnership arrangement with a professional from another profession. In that particular case, the other professional was an accountant.

The court was satisfied that the rule of the national bar (the Netherlands bar), prohibiting a multidisciplinary partnership, did not infringe the provisions of the treaty, since the bar's regulation could reasonably be considered to be necessary "for the proper practice of the legal profession".

The court's approach, at least in the case of the accountancy profession, can be discerned at paragraph 105 where, among other things, it noted that: "The bar of the Netherlands was entitled to consider that the members of the bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those activities."

No doubt those bar associations whose regulations did contain prohibitions on multidisciplinary partnerships and who wished to retain the status quo heaved a collective sigh of relief at a time when large accountancy firms were actively exploring the possibility of closer links to law firms, although the lessons learnt from the infamous Enron debacle in the United States may well have been just as significant.

To what extent have the provisions of the *Services Directive* altered the position? In one sense, not a lot, as according to the European Commission's handbook on the implementation of the *Services Directive*, it is implied that the provisions follow *Wouters*. However, it seems to me that an examination of the provisions in the directive reveals that the goalposts have been moved, insofar as whether or not a multidisciplinary activity is permissible remains to be determined by national governments and not by the bars, thus further limiting the independence of the bars and the legal profession.

Article 25.1 imposes a blanket prohibition on any restriction that would oblige a service provider from exercising a given specific activity exclusively, or that restricts the exercise jointly or in partnership of different activities. However, under subparagraph (a), the regulated professions may be made subject to such restrictions, insofar as is "justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession, and is necessary in order to ensure their independence and impartiality".

Thus the final arbiter as to whether restrictions imposed by a bar on its members remains in the hands of the state, and then only where the state is satisfied that the restrictions are justified. In passing, it should be noted that member states are obliged under article 39.1 to present a report to the commission by 28 December 2009 that shall indicate which regulated professions are subject to requirements against multidisciplinary activities, setting out details of these requirements and, more importantly for our purposes, the reasons for which the member states consider the requirements to be justified.

Article 25.2 then goes on to set out the conditions that must be satisfied where member states do in fact authorise multidisciplinary activities, namely: "That conflicts of interest and incompatibilities between certain activities are prevented; that the independence and impartiality required for certain activities is secured; that the rules governing professional ethics and conduct for different activities are compatible with one another, especially as regards matters of professional secrecy."

Once again, it will be noted that the decision-making process is left to the member states. I should emphasise that I am not suggesting that multidisciplinary

activities, subject to appropriate safeguards, are beneficial one way or another for the legal profession. Is it possible that, in these days of financial difficulty, law firms and other professionals may well see advantages in reducing costly overheads by combining their respective forms of organisation and activities?

Codes of conduct

Another aspect of the *Services Directive* that warrants some attention are the provisions relating to codes of conduct, illustrating the manner in which member states are, and will be, concerned with the contents of such codes. Apart from the specific provisions, one should bear in mind the overall requirement at article 14, whereby providers of services are prohibited from making access to, or the exercise of, a service subject to compliance with a 'blacklist' of requirements. No doubt member states are or will be in the process of screening the regulations, including national codes of conduct, of professional bodies to ensure that no transgressions of these provisions are present. The 'blacklist' identifies requirements such as those based on nationality, places of establishment and other tests.

As regards the specific treatment of codes of conduct contained in the directive, article 37 provides: "Member states shall, in cooperation with the commission, take accompanying measures to encourage the drawing up at community level, particularly by professional bodies, organisations and associations, of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in another member state, in conformity with community law."

Of practical interest to the bars is the requirement at subparagraph 2 that member states shall ensure that the codes of conduct are accessible at a distance by electronic means.

While no doubt none of these provisions will be of immediate concern to the legal profession, insofar as there are all already in place, extensive codes of conduct at the national and – through the CCBE code of conduct – at the cross-border level, care will be needed to ensure that the provisions of such codes do not infringe the general requirement under article 14.

Professional bodies and independence

The foregoing sets out at least some instances where it could be argued that lawyers are not truly independent in relation to certain activities. Reference should also be made to the moves at national levels within the EU to curtail the self-regulatory roles of bar associations and law societies and, as a consequence, to consider whether such issues in turn may impact on the core values previously discussed.

Clearly, the Council of Europe had in mind in its *Recommendation on the Freedom of Exercise of the Profession of Lawyers* at principle V2 (COE Rec (2000) 21) that "bar associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public". Paragraph 4 of the same principle goes on to state that bar associations "should be encouraged to ensure the independence of lawyers". The paragraph then goes on to specify, among other things, a number of characteristics of such independence, including – for the purposes of this paper – to "promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline".

If one accepts, therefore, that the enforcement of compliance with professional standards, including ethical standards, is an essential component of the self-regulatory role, and hence the independence, of a bar association, then it would appear that national governments need to be reminded of these principles in the event that steps were being taken to transfer these roles to a national authority in place of the bar association. Equally, bar associations have a responsibility to ensure that they in turn provide effective and transparent controls over their members. In other words, as guardian of the core values, a bar association is in the position of enforcing any breach of such values in an appropriate and proportionate manner.

Another aspect of possible concern to this principle of independence arises from the investigations carried out by competition authorities both at a European and national level into the activities of bar associations, especially in the field of entry requirements and the application of professional conduct rules. While undoubtedly the state has a duty to ensure that adequate legal services are available, the bar associations are equally under a duty to ensure that the providers of those services have been trained to a high standard with a high degree of sensitivity to the ethical standards of the profession. If the bar associations are unable to discharge this duty, the state will cast a cold eye over their activities.

It is appropriate to make a brief reference to two of the issues dealt with in the joint mission of the IBA Human Rights Institute and the CCBE to Poland in 2007/8 in relation to the rule of law – namely, the then question of extending practising rights and the requirements imposed on the bars to furnish resolutions of their governing bodies to government, coupled with the right of government to bring proceedings for the withdrawal of such resolutions (see *Justice under Siege: A Report on the Rule of Law in Poland*, November 2007, published by the IBA Human rights Institute and the CCBE).

Both issues are highly sensitive and do not sit easily with the principles of independence referred to previously and, in particular, with the *UN Basic Principles on the Role of Lawyers*. I would, as a member of the joint mission that issued the reports, reiterate the recommendation that, in the first instance, there should be consultation with the bars and that, as regards the second issue, this should be repealed or, at a minimum, a workable compromise should be negotiated.

Observations

In conclusion, I would like to make the following observations.

The core values of the confidentiality of the lawyer/client relationship and the principle of not acting in circumstances where a conflict of interest would arise have been eroded as a consequence of the provisions of the European anti-money laundering legislation.

However, there are exceptional circumstances where, having regard to the public interest, derogations from a strict interpretation of the confidential lawyer/client relationship may be justified. Ideally, such derogations should be set out in the deontological codes of the profession, subject to the supervision by the bar associations and law societies, thus preserving the independent role of the profession.

As a consequence, consideration should be given at a European level to the reconciliation of the rules governing the lawyer/client relationship, in particular in the light of the practical difficulties that lawyers may experience in not only applying the provisions of the *Third Money Laundering Directive* as to the exemptions from reporting, but also having regard to other instances at a European level where the issue has arisen.

Having regard to the provisions of the *Services Directive*,

one cannot rule out the possibility that the issue of multidisciplinary activities will become a live issue and bring into focus the independence of the profession once again.

I cannot help feeling that, over the last decade, there has been a steady decline in the independence of the profession and professional bodies. Furthermore, the profession – through its representative bodies – should continually be on the alert to defend and, if necessary, promote reforms of principles whose primary purpose is to maintain a proper balance between the rights of the individual and the public interest. G

John Fish is a former president of the CCBE.

Working in Brussels an attractive prospect

Working in Brussels has been an attractive prospect for many young Irish solicitors, regardless of the economic climate here at home. The Belgian capital offers a great quality of life and cultural variety. Although sometimes viewed as a place of bureaucracy and dullness by those who have either never visited or only visited briefly, this could not be further from the truth for many of those living or settled there. A good work/life balance, excellent cuisine and bars, and proximity to other European destinations are some of the main attractions. For those interested in the arts, the offerings in live music, film, theatre and art galleries are exceptional. In terms of living arrangements, accommodation in Brussels is cheaper than Dublin and it is very feasible to find a flat or apartment within walking distance of the institutions and the city centre. Flat sharing is common among *stagiares* and is a great way of expanding one's social circle.

Brussels spouts: a golden opportunity, so never let it be said that you came down in the last shower

Deciding to make the move to Brussels involves consideration of the type of work environment one would like. The choice is varied, ranging from one of the European institutions and NGOs to private law firms. The traditional route by which many lawyers find themselves living in Brussels is via a *stage* at the commission, parliament or council. A *stage* is a three to five-month post and, as the name implies, is a period of traineeship in a particular area of EU policy, administration or law. The payment is minimal (about €1,000 per month), and some *stagiares* will take up part-time work to supplement their income. However, the experience is invaluable in terms of gaining insight into the inner workings of the institutions that are unfairly lumped together in common parlance as 'Brussels'. The *stage* is also a great opportunity to make new friends and valuable contacts from all over Europe. Although most *stagiares* tend to be university graduates, the *stage* is also open to qualified and trainee solicitors. It is a requirement to have a second European language in order to secure a place. The selection procedure for the *stage* is described on the websites of the various institutions.

Many who have completed a *stage* discover that they enjoy living in Brussels. By using the contacts they have made or simply sending out their CV, it is quite common for many former *stagiares* to find a longer-term position with one of the many law firms or lobbying groups. A second or third language and a masters in European law or integration is a distinct advantage. For a solicitor, the most obvious option is to work with one of the many international law firms practising EU law in the city. Some of the law firms invite direct applications on their websites. Alternatively, using a good recruitment agent who is knowledgeable on the requirements and cultures of the various firms can pay off. Having experience in competition law is highly desirable. Moreover, some employers may require a masters in a field of EU law. There are a number of universities in Brussels and other towns in Belgium (Leuven and Bruges) that provide well-recognised courses.

Working on a permanent basis in one of the European institutions involves undergoing a competition procedure. Competitions are published on the website of the European personnel selection office. Non-permanent posts are also available in the form of contract work and temporary staff. The advantage of working with one of the European institutions is that the tax is extremely low. Working in the private sector in Belgium, however, means paying very high taxes – about 65%.

Finally, it is worth noting that the European Commission has recently drawn attention to the shortage of English language translators in the commission. For solicitors or trainees with strong skills in another EU language, this is another option to consider, particularly for translation of legal documents. Also, one is not limited to Brussels in this regard: the European Court of Justice in Luxembourg is currently advertising for English language legal translators on its website.

Useful websites

- Procedure for obtaining a *stage*: http://ec.europa.eu/stages
- Links to vacancies in Brussels law firms: www.eurobrussels.com/lawFirms.php
- European personnel selection office: http://europa.eu/epso
- Court of Justice of the European Communities: http://curia.eu.int G

Rosemary O'Loughlin is currently a solicitor with the Commission for Communications Regulation who has formerly lived and worked in Brussels.

Recent developments in European law

DATA PROTECTION

Case C-304/07, *Directmedia Publishing GmbH v Albert-Ludwigs-Universität Freiburg*, 9 October 2008. The University of Freiburg put a list of verse titles on the internet entitled 'The 1,100 most important poems in German literature between 1730 and 1900'. This list was drawn up as part of the 'vocabulary of the classics' project under the supervision of Prof Knoop. The university spent €34,900 in project costs. Directmedia issued a CD-ROM, '1,000 poems everyone should have' – 856 of those poems are also mentioned in the list of verse titles drawn up by Prof Knoop. Directmedia had used that list as a guide in selecting the poems for inclusion on its CD-ROM. The ECJ held that, where the maker of a database makes the contents of that database accessible to third parties, even if he does so on a paid basis, he may not prevent those third parties from consulting that database for information purposes. It is only when onscreen display of the contents of that database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that such an act of consultation may be subject to authorisation by the maker. The maker of a protected database may prevent 'extraction' from his database. 'Extraction' refers to any unauthorised act of appropriation of the whole or the part of the contents of a database. The court concluded that the transfer of material from a protected database to another database following an onscreen consultation of the first database and an individual assessment of the material contained in the first database is capable of constituting an 'extraction'. The maker of the database may prevent this to the extent that the operation amounts to the transfer of a substantial part of the contents of the protected database.

TRADEMARKS

Case T-191/07, *Anheuser-Busch, Inc v OHIM*, 25 March 2009. Anheuser-Busch applied to the Office for Harmonisation in the Internal Market (OHIM) for the registration of 'Budweiser' as a community trademark for beer, ale, porter, malted alcoholic and non-alcoholic beverages. The Czech brewery Budvar brought opposition proceedings. It relied on its own earlier international trademarks and designations of origin, including the word 'Budweiser' registered for beer. OHIM rejected the US application on the basis that the mark applied for was essentially identical to the earlier mark registered for beer. Anheuser-Busch then challenged this decision before the CFI. The CFI pointed out that Budvar had used advertisements and invoices with the mark in Germany and Austria during the five years preceding the publication of the application for a community trademark. The CFI accepted these as proof of genuine use by the Czech brewery of the earlier trademark. If the US application succeeded, there would be a likelihood of confusion on the part of German and Austrian consumers. G

LOST LAND CERTIFICATES

Registration of Deeds and Title Acts 1964 and 2006

An application has been received from the registered owners mentioned in the schedule hereto for an order dispensing with the land certificate issued in respect of the lands specified in the schedule, which original land certificate is stated to have been lost or inadvertently destroyed. The land certificate will be dispensed with unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Property Registration Authority, Chancery Street, Dublin 7
(published 1 May 2009)

Regd owner: Nicholas P Phelan (deceased); folio: 7912F; lands: Wells and barony of Idrone West; **Co Carlow**

Regd owner: Garrett Moore; folio: 2552F (previously 6062); lands: Mountwolseley or Crosslow and barony of Rathvilly; **Co Carlow**

Regd owner: Denis McArdle, Skerrig, Cootehill, Co Cavan; folio: 5324, 10829, 19866; lands: Skerrig re folios 19866 and 5324 and Aghagashlan re 10829; **Co Cavan**

Regd owner: Desmond Burke; folio: 2525 and 2526 Co Clare; lands: townland of Errina and barony of Tulla Lower; **Co Clare**

Regd owner: Patrick Cooney; folio: 10185 and 14134; lands: townland of Drimmeennagun and Drummin and barony of Tulla Lower, **Co Clare**

Regd owner: Patrick J Crowley and Bernadette Crowley; folio: 3139; lands: townland of Kilmihil and barony of Clonderalaw; area: 1.4417 hectares; **Co Clare**

Regd owner: Barry Heeran and Oonagh O'Connor Heeran; folio: 13679F; lands: townland of Crag and barony of Corcomroe; area: 0.2730 hectares; **Co Clare**

Regd owner: Michael Paul Dillon and Dympna Dillon, Clonreddan, Cooraclare, Co Clare; folio: 12586; lands: townland of Cloonreddan and barony of Moyarta; **Co Clare**

Regd owner: Thomas Joseph Madigan; folio: 7283; lands: townland of Cross Beg and Derrybrick and barony of Clonderalaw; **Co Clare**

Regd owner: Cuan Baoi Fisheries Ltd; folio: (1) CK 47246F and (2) CK47247F; lands: (1) townland of Deerynafinchin and barony of Bantry and in the county of Cork, (2) townland of Derryclogher and barony of Bantry and in the county of Cork; **Co Cork**

Regd owner: Desmond Kelleher; folio: 20053F; lands: townland of Glashaboy South and barony of Barrymore; **Co Cork**

Regd owner: Thomas McNamara; folios: (1) 7667, (2) 6868, (3) 7677; lands: (1) townland of Labbamolaga Middle and barony of Condons and Clangibbon, (2) townland of Gortnaminna and barony of Condons and Clangibbon, (3) townland of Gortroe and barony of Condons and Clangibbon and in the county of Cork; **Co Cork**

Regd owner: Thomas Coughlin, Kildoney, Glebe, Ballyshannon, Co Donegal; folio: 2407; lands: Kildoney, Glebe; **Co Donegal**

Regd owner: David Cady and Catriona Cady, Geordie Cottage, Edmonstown Road, Rathfarnham, Dublin 14; folio: 14525F; lands: townland of Ballybrack and barony of Rathdown; area: 0.202; **Co Dublin**

Regd owner: Thelma Allen Henes (deceased), c/o Joeseph H Dixon & Co, Solicitors, 8 Parnell Square, Dublin 1; folio: 2675; lands: townland of Newtown and barony of Uppercross; area: 0.835; **Co Dublin**

Regd owner: Robert Hennessy and Blanaid Hennessy, 163 Balally Drive, Dundrum, Dublin 14; lands: townland of Balally and barony of Rathdown; **Co Dublin**

Regd owner: Colin McMahon, 65 Ballygall Road East, Glasnevin, Dublin 11; folio: 88526L; lands: property 65, Ballygall Road East, Glasnevin, Dublin 11; **Co Dublin**

Regd owner: Barbara Kenny; folio: 18232F; lands: townland of Knock South and barony of Moycullen; **Co Galway**

Regd owner: Patrick Hession (deceased), Perssepark, Ballinasloe, Co Galway; folio: 26743; lands: townland of Knockroe, Killeen and barony of Clonmacnowen; **Co Galway**

Regd owner: John W Lacey; folio: 29389F; lands: townland of Gowlan West and barony of Ballynahinch; **Co Galway**

Regd owner: Peter Hayes; folio: 4401 Co Kerry; lands: townland of Bedford and barony of Iraghticonnor; **Co Kerry**

Regd owner: John Godley, Michael McGrath, Maurice McElligott, Donal Nealon, Frank King; folio: 21155F; lands: townland of Lerrig North and barony of Clanmaurice; **Co Kerry**

Regd owner: Michael J O'Connor; folio: 15333 Co Kerry; lands: townland of Kilshannig and barony of Corkaguiny; **Co Kerry**

Regd owner: Maurice Hayes and Joanne Ryan; folio: 42748F; lands: townland of Caherconreafy and barony of Clanwilliam; **Co Limerick**

Regd owner: Killian Slattery and Majella Slattery; folio: LK6610L; lands: townland of Broad Street and barony of St Michael's; **Co Limerick**

Regd owner: James Behan, Red Hills, Kildare, Co Kildare; folio: 1615; lands: townland of Knavinstown and barony of Offaly West; area: 7.0213; **Co Kildare**

Regd owner: Michael Herbert, Barnacrow, Kilmeague, Co Kildare; folio: 15516F; lands: townland of Barnacrow, Rathernan, Dunbyrne and barony of Connell; **Co Kildare**

Regd owner: Sean McEvoy (deceased), Toomore, Foxford, Co Mayo; folio: 37409; lands: townland of Cloonmung and barony of Gallen; **Co Mayo**

Regd owner: Margaret Heneghan; folio: 31153; lands: townland of Garravlagh, Lisrobert and barony of Clanmorris; **Co Mayo**

Regd owner: Michael Gargan and Mary Gargan, Mullaghvally, Moynalty, Kells, Co Meath; folio: 22060; lands: Mullaghvally; **Co Meath**

Regd owner: John D Hickey, Baltrasna, Ashbourne, Co Meath; folio: 3316; lands: Greenoge; **Co Meath**

Regd owner: Alan Graham, Tullyherim, Monaghan, Co Monaghan; folio: 20331; lands: Tullyhirm; **Co Monaghan**

Regd owner: Patrick Sheridan, Carrickartha, Corvally, Carrickmacross, Co Monaghan; folio: 4799; lands: Lisnafeddaly; **Co Monaghan**

Regd owner: Mary Young (deceased) and Richard Young; folio: 9157F; lands: Rathlihen and barony of Ballyboy; **Co Offaly**

Regd owner: Michael Frain and Olivia Frain, New Street, Ballaghadereen, Co Roscommon; folio: 26837F; lands: townland of Banada and barony of Frenchpark; area: 4.3080 hectares; **Co Roscommon**

Regd owner: James Gallagher (deceased), Carrowloughlin, Bunninadden, Ballymote, Co Sligo; folio: 11716; lands: townlands of Carrowloughlin and barony of Corran; area: 13.8301 hectares; **Co Sligo**

Regd owner: Patrick Gildea; folio: 158; lands: townland of Corsallagh and barony of Leyny; area: 6.0551 hectares; **Co Sligo**

Regd owner: Vincent Dyer; folio: 37890; lands: townland of Lorrha and Redwood and barony of Ormond Lower; **Co Tipperary**

Regd owner: Joseph Mary Hayes; folio: 2423F and 10728 Co Tipperary; lands: townland of Cassestown and Athnid More and barony of Eliogarty; **Co Tipperary**

Regd owner: Edward J O'Brien; folio: 12143; lands: townland of Curragh and barony of Decies-without-Drum and in the county of Waterford; **Co Waterford**

Regd owner: Patrick Golden, Coosan, Athlone, Co Westmeath; folio: 3193F; lands: Meehan, **Co Westmeath**

Regd owner: Bartle Spollen, 'The Villas', Glasson, Athlone, Co Westmeath; folio: 32F; lands: Glasson; **Co Westmeath**

Regd owner: John Furlong (deceased); folio: 15222; lands: Newhouse known as Newhouse, Bridgetown and barony of Bargy; **Co Wexford**

Regd owner: the Mayor, Aldermen and Burgesses of the Borough of Wexford; folio: 11509F; lands: Townparks and barony of Forth; **Co Wexford**

Regd owner: Eleanor Pearl Geeves; folio: 1542F; lands: townland of Ballinastoe, Roundwood, Bray and barony of Ballinacor North; **Co Wicklow**

WILLS

Chapman, Elizabeth (deceased), late of 86 Blacklion Road, Greystones, in the county of Wicklow (formerly of Elsinor Lodge, Delgany, Co Wicklow). Would any person having knowledge of a will made by the above-named deceased, who died on 27 April 1995, please contact Maguire McNeice & Co, Solicitors, Bray House, 2 Main Street, Bray, Co Wicklow; tel: 01 286 2399, fax: 01 282 9428

Kinsella, John (deceased), late of 7 Ballygannon, Greenane Road, Rathdrum, Co Wicklow. Would any person having knowledge of a will made by the above-named deceased, who died on 11 August 1976, please contact the Office of the General Solicitor for Minors and Wards of Court, Courts Service, 15/24 Phoenix Street North, Smithfield, Dublin 7; reference: AC/1855; tel: 01 888 6231, fax: 01 872 2681

Lenihan, Patrick (deceased), late of Ballyhea, Fedamore, Co Limerick. Would any person having knowledge of a will executed by the above-named deceased, who died on 9 October 1993, please contact Delores Lenihan, Ballyhea, Fedamore, Co Limerick

Morris, John (deceased), late of Loughcurra, Kinvara, Co Galway. Would any person having knowledge of a will made by the above-named deceased, who died on 18 February 2009, please contact Patrick A Burke & Co, Solicitors, of Middle Yard, Kin-

vara, Co Galway; tel: 091 637 733, email: info@patrickburke.ie

O'Dowd, Liam (deceased), late of 10 McAuley Park, Artane, Dublin 5. Would any person having knowledge of a will executed by the above-named deceased, who died on 13 March 2009, please contact Cunningham McCormack Solicitors, 89 Upper Leeson Street, Dublin 4; DX no 117009 Morehampton; tel: 01 669 9030, email: info@cunninghammccormack.ie

Starkey, Vincent (deceased), late of 17 Courtview, Castle Avenue, Clontarf in the city of Dublin, and formerly of 7 Vernon Gardens, Clontarf in the city of Dublin. Would any person having knowledge of a will made by the above-named deceased, who died on or about 23 March 2009, please contact Early & Baldwin, Solicitors, 27/28 Marino Mart, Fairview, Dublin 3; tel: 01 833 3097, fax: 01 833 2515, email: mod@baldwinlegal.com

Tobin, Thomas (deceased), late of Pound Street, Newport, Co Tipperary, who died on 27 September 2006. Would any person having knowledge of a will made by the above-named deceased please contact Messrs R Neville & Co, Solicitors, South Main Street, Bandon, Co Cork

Ward, Gerard (deceased), late of Castle Kelly, Glenasmole, Bohernabreena, Tallaght, Co Dublin, who died on 26 November 2008. Would any person having knowledge of a will made by the above-named deceased please contact John Glynn & Company, Solicitors, The Village Square, Tallaght, Dublin 24; tel: 01 451 5099, fax: 01 451 5120

MISCELLANEOUS

Small legal practice in Stephen's Lane, at rear Upper Mount Street, Dublin 2, seeks to share surplus accommodation with practice of similar size. Exclusive occupation of one room, approx 132 square feet with shared use of waiting and interview rooms, photocopier and fax. Suit single solicitor and secretary. Tel: 086 264 1497

TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Noel and Margaret Redmond

Any person having a freehold estate or any intermediate interest in all that and those the dwellinghouse, garden and walled-in plot at and known as number 4 Leinster Crescent in the town, parish, and barony of Co Carlow, the subject of an indenture of lease (hereinafter 'the lease') dated 26 July 1933 between Ruth Mary Maffett of the one part and Evangeline Mary Donohue of the other part for the term of 999 years from 1 November 1886, less the last day thereof, at a rent of £5 per annum, and also the subject of a superior lease dated 18 February 1887 between the Right Honourable Henry Bruen of the one part and Patrick Devine of the other part for a term of 999 years from 1 November 1886 at a rent of £17.

Take notice that Noel and Margaret Redmond, being the persons currently entitled to the lessee's interest under the lease, intend to apply to the county registrar of the county of Carlow for the acquisition of the fee simple and all intermediate interests in the aforesaid property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of title to same to the below named within 21 days from the date of this notice.

In default of any such notice being received, Noel and Margaret Redmond intend to proceed with the application before the county registrar at the end of the 21 days from the date of this notice and will apply to the county registrar for the county of Carlow for such directions as may be appropriate on the basis that the person or persons beneficially entitled to the fee simple and any intermediate interests in the aforesaid premises are unknown and unascertained.

Date: 1 May 2009

Signed: PJ Byrne & Co (solicitors for the applicants), Athy Road, Carlow

In the matter of the *Landlord and Tenant Acts 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*: an application by Shelbourne Hotel Holdings Limited

Take notice that any person having an interest in the freehold estate or any superior interest in the property known as: all that and those the premises comprising the cottage at the rear of 17 Kildare Street in the city of Dublin and now known as 17a Kildare Street, with portion of the yard at the rear of said premises 17 Kildare Street, being a portion of the premises comprised in and held under an indenture of lease dated 18 June 1752 between (1) John Seymor and (2) the Honourable Bysse Molesworth for a term of 999 years from 24 June 1752 and subject to a yearly rent of £32.

Take notice that the applicant, Shelbourne Hotel Holdings Limited, intends to submit an application to the county registrar for the county of Dublin for the acquisition of the freehold interest in the aforesaid prop-

erty, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to the aforesaid property to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicant, Shelbourne Hotel Holdings Limited, intends to proceed with the application before the county registrar for the county of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid property are unknown and unascertained.

Date: 1 May 2009

Signed: William Fry Solicitors, Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*: notice of intention to acquire fee simple

Take notice that any person having any interest in the freehold estate in the following: all that and those the dwellinghouse, shop, yard and premises situate at Lough Street in the town of Carrick-on-Suir, barony of Iffa and Offa East and county of Tipperary, which said premises are bounded on the north by a vacant space, formerly the site of Kennedy's Hotel, on the south by premises in the occupation of Michael Tobin, on the east by Kirwan's land and on the west by Lough Street aforesaid, and now known as Nicholas Finnegan Bookmakers, Lough Street (Kickham Street), Carrick-on-Suir, Co Tipperary.

Aforesaid land was demised to Mary Muldoon by the lessors Richard A McGrath and Bridget Mary Imelda McGrath for the term of 99 years from 25 March 1959 at the yearly rent of £32, ten shillings (£32.10.0) and whereas the said Mary Muldoon died intestate a spinster on 20 March 1963 leaving her surviving the vendor her lawful sister her heir at law and sole next of kin and whereas letters of administration (intestate) in the estate of the said Mary Muldoon were granted forth of the district probate registry at Waterford on 13 May 1963 to the vendor and whereas the said premises demised by the lease are now vested in the vendor for the unexpired residue of the said term of years subject to the rent reserved by and the covenants conditions and stipulations contained in the lease and whereas the vendor has agreed with the purchaser (Dermot Finnegan) for the sale to him of the said leasehold premises at the price of £1,400 on 30 September 1964. Now that indenture witnesseth that in consideration of £1,400 by the purchaser to the vendor (the receipt of which sum the vendor hereby acknowledges), the vendor as beneficial owner and as personal representative of the said Mary Muldoon hereby assigns to the purchaser all and singular the hereditaments and premises comprised in and demised by the lease to hold the same to the purchaser for the residue now unexpired of the term of 99 years created by the lease, subject to the payment of the rent and observances of the covenants conditions and stipulations in the lease reserved and contained and henceforth on the lessee's part to be paid performed and observed.

Take notice that I, Dermot Finnegan, the applicant, intend to submit an application to the county registrar for the county of Tipperary/city of Clonmel for acquisition of the freehold/fee simple interest in the aforesaid 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 applicant intends 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 Tipperary/city of Clonmel for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid property are unknown or unascertained.

Date: 1 May 2009

Signed: Ronan Regan (solicitor for the applicant), Regan McEntee Partners & Solicitors, High Street, Trim, Co Meath

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Joseph O'Reilly

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 16 Moore Street in the parish of Saint Mary and city of Dublin, the subject of a lease dated 31 October 1892 made between Hugh Pollock of the one part and James Norton of the other part for a term of 200 years from 1 July 1892, subject to the yearly rent of £20 thereby reserved.

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

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

Date: 1 May 2009

Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Joseph O'Reilly

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 36 Henry Street and 2/3 (otherwise 2, 2A and 3) Henry Place in the parish of Saint Mary and city of Dublin, the subject of a lease dated 21 June 1810 made between George Daniel of the one part and Edward Mulligan of the other part for a term of 900 years from 29 September 1810, subject to the yearly rent of £100 thereby reserved since adjusted to £90 (late Irish currency).

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

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

Date: 1 May 2009

Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Kevin Guerin and Mary McCarthy

Any person having a freehold interest or any intermediate interest in all that and those that plot or ground with the house and premises erected thereon known as number 6 Mountview Terrace, Ballyhooley Road, being part of the lands of Glankittane in the parish of St Ann Shandon and city of Cork, being premises demised by deed of lease dated 28 September 1950 and made between Marion Vera O'Sullivan of the one part and John O'Connell of the other part for a term of 128 years from 1 May 1950, subject to a yearly rent of £5.

Take notice that Kevin Guerin and Mary McCarthy, being the persons currently entitled to the lessee's interest under the said lease, intend to apply to the registrar of titles pursuant to section 21(1) of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* for the acquisition of the freehold interest and all intermediate interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of their title to same to the below named within 21 days from the date of this notice.

In default of any such notice being received, the said Kevin Guerin and Mary McCarthy intend to proceed with the application before the registrar of titles at the end of the 21 days from the date of this notice and will apply for such directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premise are unknown and unascertained.

Date: 1 May 2009

Signed: Hughes & Liddy (solicitors for the applicant), 2 Upper Fitzwilliam Street, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Joseph O'Reilly

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as

17/18 Henry Place in the parish of St Mary's and city of Dublin, comprised in folio DN117163L and held under a lease dated 26 July 1789 from William Betty to James Mooney for 999 years from 1 May 1789 at the yearly rent of £13.13.0, since adjusted to £12.2.0, now €16.

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

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

Date: 1 May 2009

Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Joseph O'Reilly

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 18 Moore Street in the parish of St Mary and city of Dublin, being part of the property comprised in a lease dated 7 November 1759, made between John Darragh of the one part and George Newton of the other part for a term of 900 years from 29 September 1759, subject to the yearly rent of £4.16.8 and sixpence in the pound receiver's fees (late predecimal Irish currency) thereby reserved.

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

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

Date: 1 May 2009

Signed: William Fry (solicitors for the applicant), Fitzwilton House, Wilton Place, Dublin 2

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Eileen Cooney and Noel O'Leary, 2 Cathedral Walk, Watercourse Road, in the city of Cork

Any person having an interest in the freehold estate in the above property take notice that Eileen Cooney and Noel O'Leary intend to submit an application to the county registrar of the county of Cork for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any person asserting that they hold a superior interest in the property are called upon to furnish evidence of title to the premises to the below named.

In particular, any person having an interest in a lease of 18 December 1893 between Elizabeth Jane Minchin of the one part and John Murphy of the other part for a term of 79 years from 29 September 1893 should provide evidence of title to the below named.

In default of any such information being received by the applicants, Eileen Cooney and Noel O'Leary intend to proceed with the application before the county registrar and will apply to the county registrar for the county of Cork for directions as may be appropriate on the basis that the person or persons entitled to the superior interest, including the freehold interest, in the said premises are unknown and unascertained.

Date: 1 May 2009

Signed: Mary Dorgan (solicitor for the applicant), 96 South Mall, Cork

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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*.