LAW SOCIETY
Gazette

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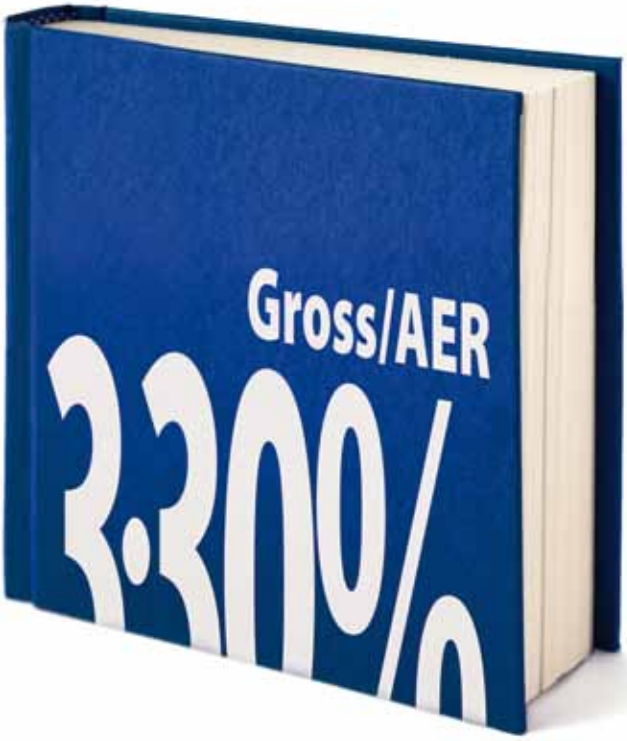

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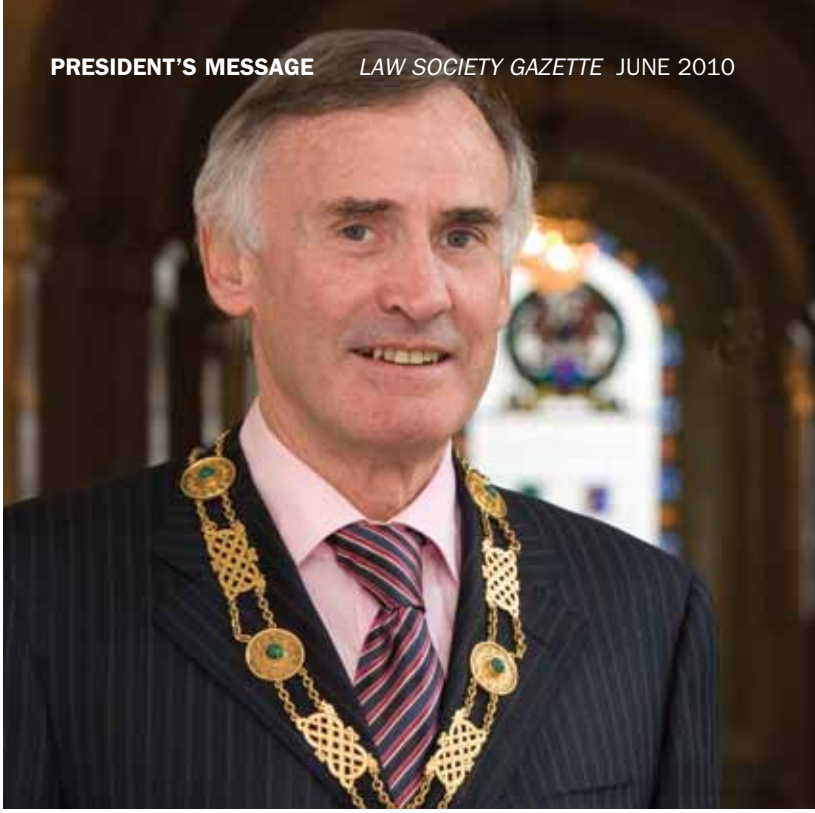
Making changes



The annual dinner of the Law Society was held on 21 May. The Minister for Justice and Law Reform, Dermot Ahern, was the guest of honour and the guest speaker. As is traditional, the president of the Law Society also delivered a speech. I took the opportunity to speak about the current economic situation and its impact on the profession, while also trying to remain optimistic about the future.

I noted that the Minister for Justice and Law Reform had been the guest of honour two years previously, at the same dinner, albeit that he was then the Minister for Foreign Affairs. The country then was just beginning to experience an extraordinarily severe economic crisis, the consequences of which have since impacted on everyone.

The government has had to face enormous economic challenges, including a series of very difficult budgets. We have recently seen the implementation of the NAMA legislation and the transfer of the first tranche of loans. While there is still a distance to go, we can only hope that the measures taken by the government will lead to improvements – and there appears to be at least the beginnings of signs of a recovery.

This recovery is desperately needed by everyone in the country. Our most recent estimate is that there are currently a staggering 1,200 unemployed solicitors in this jurisdiction. The great majority of these, but by no means all, have come on the roll within the last three years. In addition, there are many solicitors who are under-employed.

A year ago, the Society put in place a career development advisor and a career development service designed to assist unemployed solicitors by providing career assessment and direction. This service has been warmly welcomed and has been very successful. Unemployed solicitors remain every bit as much part of our profession as those who are in practice. While the Society cannot manufacture or find jobs for anyone, we can help to equip our colleagues with the information and skills to find employment for themselves. The creation of this service was an expression of the spirit of collegiality that, I am proud to say, still binds the solicitors' profession.

Court of Appeal

On 14 May, I was honoured to represent the profession in the Supreme Court for the valedictory speeches on the retirement of Mr Justice Hugh Geoghegan. Mr Justice Geoghegan took the opportunity of his final address to refer to the report, published last year, of the Working Group on a Court of Appeal, which was chaired by Mrs Justice Susan Denham. That report analysed in detail the causes for the completely unacceptable backlog of appeals from the High Court to the Supreme Court, which has resulted in cases having to wait as long as 30 months to get a hearing.

The need for speedy and efficient dispute resolution for the benefit of citizens and for the economy is unquestionable. A constitutional amendment is required to properly establish a Court of Appeal. The government is committed to holding a referendum in the near future to protect the rights of children in the Constitution. At the annual dinner, I urged that they take the opportunity to hold a referendum at the same time to create provision in the Constitution for the establishment of a Court of Appeal. I am pleased to report that, in response to my speech, the minister indicated that the government was prepared to follow this course of action.

"Only two solicitors have been appointed from practice to the High Court bench"

A solicitor for the Supreme Court?

Mr Justice Geoghegan's retirement created a vacancy in the Supreme Court. Whoever fills it, of course, should be a lawyer of the first rank and both suited and qualified for this demanding role in every way. That being said and agreed, I ask the question – why not a solicitor?

Solicitors have been eligible for direct appointment to both the High Court and the Supreme Court since 2002. Only two solicitors have been appointed from practice to the High Court bench. No solicitor has ever been appointed to the Supreme Court.

The statistics in relation to appointments by government to the High and Supreme Courts could give many solicitors cause to suspect that the system retains an unfair bias in favour of the appointment of barristers rather than solicitors to senior judicial office. Such a bias, if it exits, should have been consigned to history with the enactment of the 2002 act.

I am certain that Minister Dermot Ahern, a solicitor himself, does not suffer from such a bias. I urged him to redouble his efforts to persuade those who do. G

Gerard Doherty
President

On the cover

The Boomtown Rats said it best: "There's always someone looking at you. Ah-oh, ah-oh." But with a new surveillance regime now in place, what exactly are they looking at?

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REGULARS

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CORK

The Southern Law Association and the Institute of Chartered Accountants recently hosted a joint conference entitled 'How will NAMA work?' The keynote speakers were Mark Barr (Arthur Cox) and Brendan Linehan (financial controller of O'Flynn Construction Limited).

Eamon has also asked if 'Nationwide' would pass on its congratulations to two Passage West love birds, colleagues Carol Hickey and James Dorney, on the recent birth of triplets – in addition to their existing flock of three!

DONEGAL

On 19 June, in the Castlegrove Hotel in Letterkenny, Michael Staines and Dara Robinson will provide a CPD update on civil litigation, and Eoin Cullina will show how we might attract clients using the internet. He will also show how the profession might counteract the nuisance of RateYourSolicitor.com. According to Alison Parke, "this is something on which the profession as a whole, and individually, have little knowledge or guidance on, and following the right advice and by using what are straightforward IT measures, legal firms can corner a valuable market share and gain considerable competitive advantage over those who don't".

Bookings are now being accepted for the next CPD session in Rathmullen on 10 July, where Stuart Gilhooly will give his take on aggravated and exemplary damages as well as the new MIBI agreement, while Michael Kealey will update colleagues on the new regime under the *Defamation Act 2009*.

The Midlands' Bar Association held a function to mark 50 years in practice for *(l to r)*: Denis Johnston, Tom Shaw and Aidan O'Carroll

GALWAY

CPD seminars in Galway have been very well attended. An upcoming seminar on the *Land and Conveyancing Law Reform Act 2009* is to be given by local barristers Emer Meenaghan and Neil Maddox.

The annual Galway Races night will take place on Monday 26 July and has now become a staple in the social calendar. The event is open to members of other bar associations and tickets can be obtained by contacting David Higgins at 091 582 316 or davidjohnhiggins@gmail.com.

KILDARE

There was a time when I couldn't raise a peep out of the county, with colleagues telling me that nothing much ever happens apart from the odd dinner. Now, thankfully, this is all a memory and there are no end of activities going on at which colleagues are getting together exchanging war stories and the like.

Just last week, they held a seminar in the Kilashee on how to deal with complaints made to the Law Society, with no better a team than their very own Andrew Cody, who co-chairs that committee in the Law Society, as well as such luminaries as Linda Kirwan and Sean Sexton sharing their vast experiences on these matters. The essential message is communicate, communicate, and don't be an ostrich!

Meanwhile, Frank Taafe and David Osborne, along with Eva O'Brien, are putting arrangements in place for the forthcoming AGM to be held in the Kilashee in Naas on 30 June at 8pm.

KILKENNY

Owen O'Mahony and Sonya Lanigan, the powerhouse of the Kilkenny Bar Association, are greatly looking forward to the opening of the new courthouse. Says Sonya: "We don't have an exact date, but it will certainly be open by September. In fact, the Courts Service has told us to address our annual licensing court applications for the new premises, which would be indicative of a September opening."

WESTMEATH

Bubbly Susan Fay is the PRO of the Midland Bar and promises to keep this page updated on everything going on in the midlands from now on. Elsewhere in the *Gazette* is a mention of the special night towards the end of last year for legal luminaries Tom Shaw, Aidan O'Carroll and Denis Johnston on the occasion of their 50 years in practice (see above).

CPD has been going very well, and just recently Michael Staines and David Staunton BL addressed colleagues on dealing with a client in custody, as well as drink-driving charges. The speakers also graciously waived their fee in favour of the Fr Peter McVerry Trust. The Revenue briefing on e-stamping was also held in Athlone. G

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

Insurance industry should prepare for *Solvency II*

The new head of financial regulation, Matthew Elderfield, has warned insurance companies that they must be ready for new European solvency rules that will come into effect in 2012.

Speaking at the annual lunch of the Irish Insurance Federation on 10 May, he warned insurance companies not to underestimate the impact of the so-called *Solvency II Directive*, which sets out tough standards for governance and risk management (see www.solvencyii.ie/).

"The scale of change that is coming means that this is not just a regulatory challenge, but a profound commercial one, too," he said. The key message from the Financial Regulator is:

- *Solvency II* will bring significant changes to the Irish and European regulatory requirements,
- Insurers should be making effective implementation plans now,
- The board and senior management are responsible for making it work.

Of interest to legal practitioners advising corporate clients is that the Financial Regulator is clear that the implementation of *Solvency II* is a board and senior management responsibility. He has gone so far as to require of firms the names of the individuals charged with implementing *Solvency II* within each firm.

What should boards be doing now?

According to Compliance Ireland, companies should be addressing the following issues:

- Initiating a board-level discussion on the implementation strategy for *Solvency II*,
- Nominating the individual to be responsible for the *Solvency II* implementation,
- Reviewing the benefits case between an internal model and the standard formula approach and make a decision on the future direction,
- Starting to assemble a project team with representation from at least finance, actuarial, risk and IT,
- Initiating a gap analysis to define the key requirements and identify the scope of work required to meet the company's future objectives as a first step of the implementation plan,
- Reviewing existing systems of internal control and determining necessary documentation requirements,
- Considering the requirements of the own-risk and solvency assessment, and the likely impact of its findings, and
- Seeking advice from industry experts.

Financial regulator Matthew Elderfield

Ireland's reputation

Elderfield said that Ireland's reputation as an international financial centre would be stronger if we could "knock on the head the lingering perception that corporate governance is sometimes compromised by concentrated personal business relationships that have the effect of deflecting effective challenge around the board table".

When it came to regulating the insurance companies, he said that he would be developing "assertive risk-based supervision underpinned by the credible threat of enforcement" – the same approach he has adopted with the banks.

"I've been surprised at the thin level of resources for supervision available," he told the insurers. "In particular, we need to ensure that those insurance firms with the biggest inherent risk profile due to their size, complexity or retail involvement have the right level of supervisory cover and engagement."

Money-laundering act signed

The *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* was signed into law by the President on 10 May 2010. The act will introduce changes to the current anti-money-laundering duties of solicitors (see www.oireachtas.ie/viewdoc.asp?DocID=12583)

The date for implementation of the act has not yet been finalised, however, and is not expected to be any earlier than July 2010.

The Society's Working Group on Money Laundering Legislation is finalising updated guidance notes for solicitors to assist them when complying with their obligations under the new act. An electronic version of these guidance notes will be available for solicitors to download prior to the implementation of the act on the Society's website, www.lawsociety.ie. Solicitors will be notified when this goes live.

In the meantime, solicitors should continue to adhere to existing guidance notes, which are available in the members' area of the Society's website. Queries should be emailed to Emma-Jane Williams (policy development executive) at: e.williams@lawsociety.ie.

AWARDS FOR EXCELLENCE

Irish law firm Ronan Daly Jermyn (RDJ) has taken the 'Client Service Award for Ireland' at the Chambers Europe Awards 2010 in London, on 20 May.

The awards recognise firms for outstanding work, impressive strategic growth and excellence in client service – regardless of the client or size of the deal.

RDJ managing partner, John Dwyer said: "RDJ is very proud to receive this award. It is a great tribute to the superb team at the firm and recognises the importance we place on providing a client-focused approach."

Sovereign risk in the Eurozone

The Institute of International and European Affairs (IIEA) and the EU and International Affairs Committee of the Law Society are jointly hosting a seminar on 'Sovereign risk in Europe and the Eurozone' on 14 June from 5.30pm to 7pm, at the IIEA, 8 North Great Georges Street, Dublin 1. The seminar will address the topic of sovereign debt in Europe, including the recently agreed bailout package, the sustainability of current debt levels, the role of rating agencies, the impact of naked credit default swaps, and the viability of existing legal mechanisms for dealing with sovereign default. The speakers include Lee C Buchheit (partner in the New York office of Cleary Gottlieb Steen & Hamilton LLP), an expert on sovereign debt issues. Deitmar Hornung, the vice-president and senior analyst of Moody's Sovereign Risk Group; Ann Pettifor, executive director of Advocacy International and a fellow of the New Economics Foundation, and an author on economic matters.

Attendance is free for members, with a fee due for non-members. To register, call 01 874 6756, or email reception@iiea.com.

The highs and lows of the in-house lawyer

'Life as an in-house and public sector solicitor' was the theme of a panel discussion organised by the Law Society's In-house and Public Sector Committee on 29 April at Blackhall Place, Dublin.

The discussion highlighted the skills, experience and knowledge required by in-house and public sector solicitors in a variety of roles. It provided an insight into what it's like to work in-house and in the public sector, and dealt with some of the challenges these roles present. Career development opportunities were also addressed. In all, 106 members of the Society and 16 trainees attended. The committee also held an abridged version of the discussion specifically for trainees on 13 May.

Information about the committee and its work can be found on its section of the Society's website, www.lawsociety.ie.

In-house and Public Sector Committee members with speakers at the panel discussion on 29 April, including *(back, l to r)*: Bill Fleury, Mary O'Connor, Keith O'Malley and Brian Connolly. *(Front, l to r)*: James Kinch, Louise Campbell, Michael Hennigan and Caroline Dee Brown

New director for Equality Tribunal

Niall McCutcheon has been appointed director of the Equality Tribunal. He replaces Ms Melanie Pine, who has retired. For the past ten years, Mr McCutcheon was principal officer in the Department of Justice, Equality and Law Reform with responsibility for diversity, equality and human rights matters. He was also a member of the board of the Equality Authority.

In his time in the Department of Justice, Equality and Law Reform, he was Ireland's representative on the European Commission's Governmental Expert Group on Non-Discrimination, and national liaison officer with the EU's Fundamental Rights Agency.

He was born in Dublin in 1955 and educated in Oatlands College. He studied politics and economics in UCD, receiving an MA degree in 1976. He obtained a BA in law from the Dublin Institute of Technology in 2008.

Competition Authority extends existing exemptions

The Competition Authority announced on 18 May that it has amended two declarations and a notice that are due to expire in the coming months. The three documents that have been amended are:

1) Declaration 03/001 (as amended), dated 5 December 2003: *Declaration in Respect of Vertical Agreements and Concerted Practices*,
2) Notice N/03/002, dated 5 December 2003: *Notice in respect of Vertical Agreements and Concerted Practices Declaration 05/001* (as amended),
3) Declaration 08/001, dated 1 July 2008: *Motor Fuels Category Declaration*.

Each of these documents, which were due to expire in May and June of 2010, has now been amended to extend its validity until 30 November 2010, at which point it will be revoked and replaced as appropriate.

The documents have been amended to ensure that they remain in force while a public consultation takes place this summer to determine whether each of the declarations currently in force should be replaced on reaching its expiry date. Further details will be made available on the consultation webpage, www.tca.ie/EN/News--Publications/Public-Notices~.aspx.

Section 4(3) of the *Competition Act 2002* gives the authority the power to issue declarations where, in its opinion, a specified category of agreements meets the conditions for exemption set out at section 4(5) of the act. Similarly, under section 30(1)(d) of the act, the authority may publish, in the form of a notice, practical guidance on how the act may be complied with.

Notices and declarations assist businesses and consumers by providing clarity on how certain agreements can be structured to maximise efficiency, while ensuring that they do not run the risk of breaching competition law.

Prime Time for parchment ceremony

Listeners to RTÉ Radio 1 will be familiar with the Saturday morning programme *Miriam Meets*. Newly-qualified solicitors got their opportunity to meet top broadcaster Miriam O'Callaghan herself at their parchment ceremony on 29 April, *writes Mark McDermott*. Ireland's leading current affairs television broadcaster happens to be a qualified solicitor and proved a charming guest speaker, making lots of time afterwards for photographs with the newly-enrolled solicitors and their families before heading back to Montrose to anchor that evening's *Prime Time* programme.

She spoke about the background to her decision to go into law. It had all started with her father, who had followed the route into the civil service, "but secretly wanted to be a solicitor, but because he was the eldest, he had to go away and provide money for the family".

On the day she received her Leaving Certificate results in Dingle, she reported a conversation with her dad. "I had not put much thought into what I wanted to be, actually, and my dad said: 'Now, Miriam, I think you should be a doctor', and I said, 'No, I don't like the sight of blood', and he said, 'Okay, what about being a vet?' but I told him I wouldn't be very good with animals. Then he said, 'What about law?' and that was the way in which I chose to be a lawyer, which was not the most intelligent way to do it, but, in fact, I was delighted I did it.

"Although I did not remain a solicitor, it has been an extraordinarily powerful and instructive influence throughout my career. I did become a solicitor. I went to UCD, did a BCL – which I loved – came here to Blackhall Place to be a solicitor and I loved every moment of it."

PIC: JASON CLARKE PHOTOGRAPHY

Miriam meets new solicitors

She went on to speak about her decision to leave law – "much to my parent's horror!" – after two years in practice. "Life led me to London, where I 'fell' into television."

She urged the newly-qualified solicitors not to despair about their employment prospects in the current economic climate. "At the moment, obviously, it is a very difficult time in Ireland. Some of you – and hopefully a lot of you – will be going straight into jobs. I remember when I qualified in the 1980s there were no jobs. Yet all of my friends then are working as solicitors now – 99% of them remained as solicitors. So don't feel despondent. Life goes in cycles, economies go in cycles, and all you have to do is retain your confidence and your belief in yourself.

"Maybe 1% of you will decide to stop being a solicitor and do what I did. You can actually divert and go into other careers that are not legally framed, as such. For instance, take tonight's *Prime Time*, or when I did the leaders' debate, I find my legal training extraordinarily useful, because it helps you to sort out the key points: what matters, what were the key points of that judgment, why did this minister do that, why should I ask Bertie Ahern this on this night, in this way? So, it is an extraordinarily brilliant education, which you should forever value and be proud of. It is a big privilege to be a lawyer today, and with privilege comes enormous responsibility, and I think, as lawyers, you should remember that."

In conclusion, she urged the solicitors starting out on their careers to look forward and enjoy their careers, "but make sure you live your life and make it the best life you can".

Director general Ken Murphy, Miriam O'Callaghan and President of the High Court Mr Justice Nicholas Kearns

Tender opportunities for solicitors

The eTenders Public Procurement website for Irish public tenders is a very useful source for legal firms seeking out new business opportunities in Ireland.

Developed by the Department of Finance, it is designed to help web users find and publish tender notices relating to government and public sector procurement across Ireland. Visitors can register as buyers or suppliers of services in order to experience the immediate benefits of e-tendering and e-sourcing. The site offers a support team to guide users through the process of setting up profiles, and is available to "give advice on various legislation and directives".

To view the legal opportunities offered on the eTenders website, go to www.etenders.gov.ie. On the home page, you'll see 'Categories' in the right-hand menu bar. Click 'Professional and consultancy services', which will present a 'Sub-categories' menu bar, where you'll find the 'Legal' sub-category.

What's on offer?

At time of going to press, the following opportunity was being advertised: 'Tender for legal services published by Waterways Ireland'. The deadline for submitting the application is 16 June 2010. The abstract is presented as follows:

"Waterways Ireland is inviting tenders for the provision of a comprehensive range of legal services covering all aspects of the functions of the body. Property and claims management are the two largest areas of work for which legal services are required.

"Waterways Ireland emphasises the requirement for effective management of cases assigned to successful tenderers. Applicants will be required to provide detail of how they will manage the body's case workload and ensure there are adequate resources to cope with workload fluctuations.

"Two lots of service provision are required: Lot 1 – Waterways Ireland's seeks to create a framework of legal firms who best meet the organisation's requirements in this lot. The intention is to admit the top four tenderers to the framework for legal service. However, this number may be reduced in light of the numbers of tenders received. The framework will run for a period of 24 months but may be extended for a further 12 months if deemed necessary. Call-off from the framework will be based on price and availability to undertake the case within the time required.

"Lot 2 – In addition to creating a framework of solicitors for the provision of legal services, Waterways Ireland is seeking to enter into a contract with an established firm of solicitors for the provision of legal services to be delivered by a nominated solicitor who will work four days a week from the organisations' Enniskillen headquarters for a period of 24 months.

"The solicitors' firm must provide a nominated solicitor(s) qualified to practice in the south of Ireland, with a minimum of seven years' post qualification experience gained covering a wide range of property cases."

Other legal opportunities are also presented. Happy hunting!

New managing partner for McDowell Purcell

McDowell Purcell has appointed Thomas O'Malley as its managing partner. Coinciding with this announcement is the launch of its new pensions law unit, headed up by James McConville, who has joined the firm as partner. James has over ten years' experience as a specialist pensions lawyer.

His expertise in pensions encompasses regulatory, compliance and investment issues, the pensions aspects of M&A transactions, scheme reorganisations and corporate recoveries. He also advises on occupational pension schemes, including the legal aspects of approved retirement funds and personal pension plans.

Thomas O'Malley *(left)*, new managing partner at McDowell Purcell, and new partner and head of the pensions law unit James McConville

Web-invisible firms need to 'decloak'

Law firms in Britain are failing to reach online consumers who carry out searches for specific legal terms – with many law firms' sites simply failing to be picked up by search engines, according to a consultant's report. And it's likely that the findings would be similar in Ireland were the same research to be carried out here.

The study by Greenlight found that over half of all legal searches by potential clients include words like 'solicitor', 'solicitors', 'attorney', 'divorce' and 'barristers'. Unsurprisingly, websites facilitating searches for these terms were the first to come up in Google and other search engine results.

Incredibly, only ten legal websites were listed in the results for 132,000 legal searches performed in February 2010. As a result, the report suggests that huge gains can be made within the online market by individual law firms.

Of the 1.2 million searches performed in February 2010 for legal-related keywords, 450,000 were for the term 'solicitor'. In addition, the research revealed that searches for 'solicitor' has increased significantly every month since September 2009. Other popular keywords or phrases included: 'lawyer', 'wills', 'legal aid', 'conveyancing', 'find a solicitor', 'legal advice', 'injury lawyers' and 'no win, no fee'.

Klingons are no strangers to decloaking their technology

Many law firms' sites are simply failing to be picked up by search engines, however, due to bad 'metadata' and insufficient 'linkage' design. Search terms are not being embedded properly in legal firms' websites, meaning that they remain invisible to people searching for them on the web. In addition, too few websites feature links to other relevant websites, which "is a primary way to determine the credibility of websites, because links from third-party websites are considered similar to votes … This popularity-based indicator is exactly what search engines need in order to cut through the noise of a brand website's self-optimised content, and ascertain the true worth of a site," says the Greenlight report. "The top-ranking sites pursue these kinds of strategies aggressively and comprehensively at a keyword level, hence their considerable success."

The report offers the following advice: "In order for your site to perform better, considerable investment should be made into improving the quality, depth and breadth of content around the keyword topics [mentioned above]. You should ensure your site is accessible to search engines. In addition, you should focus on developing linking strategies around each product to rapidly and dramatically improve the quantity and quality of links from third-party websites, and point to the relevant pages within your own website."

Unemployment among solicitors starting to fall

The number of job opportunities becoming available for solicitors in Ireland continues to increase, and the Society's Career Support service reports that more solicitors are currently getting jobs than losing them.

"We are seeing unemployment among solicitors starting to fall for the first time in 18 months," says career development advisor Keith O'Malley. "This has been happening since the start of April – despite the fact that there are still trainees finishing training contracts and a proportion of them not being kept on."

Most job opportunities arising in recent months have been in non-practice employment but, according to Keith, legal firms are now starting to recruit, too. "We are not talking about anything explosive," he says, "but there has been a definite shift forward."

For the moment, however, large numbers of solicitors remain out of work and still others are in short-term contracts and jobs that they do not intend to stay in. "Many solicitors need to re-establish themselves within their professional career," says Keith, "and it will take a sustained period of job-market growth for this to happen."

Career Support is encouraging both employers and employees to familiarise themselves with online resources that facilitate recruitment and finding out about opportunities.

"The job-seekers' register on the Society's website is an excellent, but often overlooked, facility," says Keith O'Malley. "There is no faster way that an employer can access details on solicitors, and this facility is especially useful for an employer under pressure to fill a locum vacancy."

Also worth checking out is the international business social networking site www.linkedin.com, where there is a well-established group of Irish solicitors.

The keys to the gates of justice

Groundbreaking US civil rights lawyer Morris Dees gave this year's annual human rights lecture. Joyce Mortimer listened to what he had to say

Mr Morris Dees, the co-founder and chief trial counsel for the Southern Poverty Law Centre, was the guest speaker at the Law Society's sixth annual human rights lecture on 19 May at Blackhall Place. The Southern Poverty Law Centre is an American legal advocacy organisation, internationally renowned for its tolerance education programmes.

Dees began with an example from history, that of John Adams' successful 1774 defence of a ship's captain who had been imprisoned by the British.

"It is easy to look back in history at these times and think that times are different today," Dees said. "However, we still have many civil rights issues." He described how, as the world grows closer together, it becomes a world without borders – and all countries have common issues. "Migrants are coming in to do the work our people don't want to do."

ALL PICS: LENSMEN

At the Society's Annual Human Rights Lecture *(back, l to r)*: Chair of the Society's Human Rights Committee Colin Daly, director general Ken Murphy and deputy director general Mary Keane. *(Front, l to r)*: Betsy Keys Farrell, Susan Starr, Maurice Dees and Law Society president Gerard Doherty

Questions and answers – at the human rights lecture

In the US, there are currently two million Latino migrants doing such economically vital labour. But in Arizona, a law has been passed allowing police to pick up someone if they have reason to believe they are an illegal immigrant. This is done by racial profiling – they just look at colour. While in Ireland, Dees met some Irish human rights lawyers and realised that the treatment of migrants is a common issue to the US and Ireland.

Mr Dees said that there was a great responsibility on young lawyers to ensure that justice is done: "You and we together hold the keys to the gates of justice."

Morris Dees

He also spoke about what was possibly his most famous case – representing an African-American woman, whose 19-year-old son had been lynched in 1981, in a suit against the United Klans of America.

Michael Donald had been chosen at random, abducted, beaten and hanged by two Klansmen in Mobile, Alabama. An all-white jury decided the criminal case and gave the death penalty. After the trial, Dees approached one of the young men convicted, James, and questioned him over a number of weeks to try to find out who else had been involved in the killing. It transpired that Klan leaders had encouraged the action. As a result, the lawyer decided to take a civil lawsuit – the first time a lawsuit of this type had been taken against a hate group for the actions of its members.

He sued the Klan and several individual Klansmen. At the trial, Dees asked the jury to "render verdict so that when one day they call the names of those men and women who died in the American civil rights movement, who gave their lives in the struggle for human dignity ... that they call out the name of Michael Donald".

Attentive listeners at the annual human rights lecture

As the judge began to charge the jury, James jumped to his feet and asked if he could say something. He walked over to the jury, right beside Mrs Donald, and said: "I've lost everything. I'm never going to be with my family again. I'm going to spend the rest of my life in prison." He looked over at Mrs Donald, choked up and starting sobbing. He cleared his throat and said: "Mrs Donald, can you forgive me for what I did to Michael?"

Mr Dees said that, if he tried a hundred other cases, nothing would ever be as meaningful as what Mrs Donald then said: "Son, I've already forgiven you."

Dees said that he thought her words were a higher justice than the $7 million awarded. He said that it is these kind of cases that mean so much, and that we must challenge ourselves to take the opportunity to help those who have few friends and few champions. G

Joyce Mortimer is the Law Society's human rights executive.

Subprime mortgages

In the US, the Securities and Exchange Commission has accused Goldman Sachs of fraud in the marketing of collateralised debt obligations. John King asks whether the directors of Dublin-based investment companies should be catching the same litigation wave

In the United States, the Securities and Exchange Commission has accused Goldman Sachs of fraud in the marketing of collateralised debt obligations (CDOs). The directors of Dublin-based investment companies that have suffered losses in this market should look at whether they should join in a new wave of subprime litigation.

In 2007, the ground began to shudder under the US housing market. In the ensuing collapse of the subprime market, the global economy was shaken to its foundations. Regulators have since struggled to understand just what went wrong. Astonished citizens, peering into the newly-revealed world of mortgage-backed securities, have had to come to grips with its arcane language and its apparently outlandish practices.

The 'great pool of money'

By now, the origins of the crisis are widely understood. Institutions in the US rushed to lend money to poor people on the security of their homes. Investment banks bundled together the resulting mortgages, and by some form of financial alchemy, they created from them 'Triple A' securities.

This explains how the problem developed, but not why the actors in the drama behaved as they did. How was it that buyers and sellers were gripped by what now seems to have been a mass delusion?

There is no single answer to this question. In their May 2008 National Public Radio (NPR) report, Alex Blumberg (contributing editor for NPR's *Planet Money*) and Adam Davidson (NPR economics correspondent) explained how the boom in subprime lending was fuelled and, in doing so, left us with an arresting image.

Over the period from 2000 to 2006, the amount that pension funds, insurance companies and governments around the world were looking to invest was climbing rapidly. In 2008, the IMF estimated that there were $70 trillion in this 'great pool of money'.

Those charged with investing these funds were looking for something that would give them a better rate of return than government or municipal bonds. Wall Street investment banks obliged them by creating CDOs – securities that derived their value from pools of subprime mortgages.

Boom and bust

Faced with the demands of buyers who were ready to snap up these securities, mortgage originators and investment banks went into overdrive. High-risk borrowers across the country were besieged with loan offers.

The mortgage originators were natural winners in this game of pass the parcel. The investment banks that sold on the mortgages as neatly-packaged CDOs should also have come out in front. Bizarrely, most of them did not. All of the major investment banks, except for Goldman Sachs, were taken in by their own propaganda and squirreled away subprime investments. They suffered huge losses when the bottom fell out of the market.

Some clear-sighted operators could see that the CDO market was heading for a fall. They placed their bets accordingly, and these subprime sceptics made billions of dollars in what has come to be called 'The Big Short'. It seems that Goldman Sachs saw the writing on the wall before it was too late. They joined the ranks of the realists, and emerged from the débacle relatively unscathed.

Fraud allegations

Inevitably, the subprime collapse was followed by a wave of litigation, in which investors have tried to show that they have been victims of misrepresentation or fraud.

The Securities and Exchange Commission (SEC) gave a new impetus to plaintiffs and potential plaintiffs in April of this year when it filed fraud charges against Goldman Sachs (see http://publicintelligence.net/sec-goldman-sachs-securities-fraud-complaint). Rather startlingly, the SEC has suggested that the Wall Street firm helped to inveigle investors into putting money into ABACUS 2007-ACI, a so-called 'synthetic CDO', which was designed to fail.

The success of this CDO depended on the value of a portfolio of mortgage-backed securities. According to the commission, investors were not told that Paulson & Co, who

PIC: JIM WATSON/AFP/GETTY IMAGES

Sworn in to testify on Capitol Hill in Washington DC on 27 April 2010 before the Senate Homeland Security and Governmental Affairs Committee are *(l to r)*: Daniel Sparks (a former Goldman Sachs partner who ran the mortgage department), Josh Birnbaum (Goldman Sachs trader), Michael Swenson (managing director in the mortgage department at Goldman Sachs) and Fabrice Tourre (the Goldman Sachs employee principally responsible for the structuring and marketing of ABACUS 2007-AC1) – all accused of fraud in a Securities and Exchange Commission lawsuit over a mortgage-linked investment

– time to sue?

PIC: JIM WATSON/AFP/GETTY IMAGES

Goldman Sachs CEO Lloyd Blankfein prepares to testify before a Senate investigative committee on Capitol Hill in Washington DC on 27 April 2010. Goldman Sachs denied reaping vast profits from the collapse of the US housing market as its top executive and a star trader faced hostile questions in Congress over the 2008 financial meltdown

were betting on the failure of ABACUS, helped to choose those securities.

Irish funds

The Irish funds industry is responsible for looking after a very significant part of the 'great pool of money'. According to the Irish Funds Industry Association (the representative body for the international investment fund community in Ireland), assets worth more than €1,600 billion were under administration here in June 2008.

Irish-based entities, including some Irish-registered companies, will have suffered major losses in the subprime collapse. How should the directors of such a company react to continuing revelations concerning practices in the sector? Clearly, they should look at whether the company is in a position to sue those from whom it bought CDOs.

It is now common knowledge that mortgage originators cut corners in their rush to lend. Directors should look at the process by which the company bought into pools of loans. Did the seller in every case give a warts-and-all picture of the underlying assets? If there is evidence of misrepresentation, the company should sue, unless there are compelling reasons for believing that this would not be in its interests.

Directors should also follow the progress of US investigations, which suggest that some CDOs may have been designed to fail. They should ask themselves whether their company could have been the victim of an elaborate fraud of the kind that the SEC has described in its charges against Goldman Sachs.

Fiduciary duties

A person who serves as a director of an Irish company has fiduciary duties to the company. He or she must exercise appropriate care and skill in the discharge of their duties, and may not act recklessly.

Directors who fail to discharge their obligations to the company may be sued for damages. If they act recklessly, they may become responsible for the company's debts. The defendants in any action arising from the subprime débacle may be blue chip investment banks.

Where a company is considering whether to make a claim against one of these banks, it should be careful to ensure that neither the decision makers, nor their advisors, are exposed to conflict of interest.

A potential plaintiff should act quickly, so as to minimise the risk that its action will be statute barred.

If an Irish company can recover from a seller of CDOs, its directors should not duck their obligation to sue. A director who fails to energetically champion the interests of the company may himself suffer serious consequences. G

John King is a partner at Ivor Fitzpatrick and Company, St Stephens Green, Dublin 2.

EU law opportunities beckon

The director of the Irish Centre for European Law, barrister Andrew Beck, spoke on business opportunities in EU law at the Society's annual conference. Mark McDermott reports

'Building the solicitors' practice of tomorrow: opportunities and challenges' was the theme of the Law Society's annual conference in Kilkenny from 9-10 April (see *Gazette*, May 2010, p12). The director of the Irish Centre for European Law (ICEL), Andrew Beck, was invited to speak about business opportunities in EU law for Irish legal practices.

Andrew looked at business opportunities within existing legal practices. He identified three key areas to consider when building EU-related legal business:

- Developing EU law opportunities on a case-by-case basis,
- Developing a strategic EU law direction, and
- The skills required to accomplish these objectives.

EU law is both "critical and expanding", he said. 'Critical' because EU law trumps Irish law due to the doctrine of supremacy of EU law. It is 'expanding' because some 60-70% of Irish legislation annually implements EU directives.

It has been estimated that as much as 70% of new business law originates from the EU. Commercial law is not the only area to be affected by EU law and few areas remain untouched. Knowledge of EU law, then, allows the Irish lawyer to add value to the services he or she provides – and to be more competitive. It gives an opportunity to Irish lawyers to advise their clients more fully on their options, to develop their practice and reputation, and to avoid negligence.

Individual files or cases may be approached by asking whether or not there is an EU law aspect to a client's case, whether this EU law aspect will help the client, and how best to deploy EU law to help the client.

Director of the Irish Centre for European Law, Andrew Beck

"Clients can be greatly served by EU law," he stated. "This is because a robust EU law point can serve as a trump card for your client." He referred to a number of examples where EU law arises on a case-by-case basis, among them:

- In cross-border litigation, jurisdiction may be resisted where a summons served does not establish jurisdiction under the *Brussels I Regulation*,
- In competition law, the lawyer may find himself advising on the risks of a client being accused of cartel activity, or of pursuing a claim against a dominant undertaking for abuse of a dominant position,
- In the area of commercial agents, one can claim compensation upon termination of a commercial agency agreement, and
- In the area of public procurement law, it is possible to challenge a contract award for breach of public procurement rules.

Additional remedies

EU law affords additional remedies, an example being that of damages for non-implementation of EU directives. In this way, Irish lawyers may add value to the services they provide to clients, not merely by advising them on domestic remedies, but also on remedies available at EU level.

EU law also affords additional procedural routes – including less costly routes – for example, a complaint to the EU Commission.

"Knowledge and experience of such procedural routes may make the practitioner more competitive to a cost-conscious target client", he said.

David and Goliath

He stressed that larger firms and larger clients do not have a monopoly on EU law. "It is perfectly possible for smaller firms or a sole practitioner to very effectively deploy EU law remedies as against a larger opponent. In many cases, properly fashioned, it serves as a stone that David may throw at Goliath, for example in competition law, state aid cases, immigration law and so on."

Strategic EU law direction

Moving from opportunities that can arise on a case-by-case basis, Andrew then suggested that it is open to practitioners to develop a strategic EU law direction. He gave specific examples of where that strategic direction might lead. Identifying several pieces of legislation, he stated: "There is a range of incoming legislation in the area of financial services … that clearly demonstrates that financial services legislation is EU driven." He also noted that advisory work in the financial services sector was not the only work available – a significant amount of litigation was also active.

Environmental law was another strategic direction worth pursuing. "There is an expansive legal skill set that is required to properly exploit this particular opportunity," he said. "It includes knowledge

of European environmental law, Irish environmental law, planning law, regulatory and compliance, administrative law and criminal law – and that may have resource implications."

The range of work available under environmental law is "remarkable and broad", including:

- Waste management,
- Prosecuting and defending enforcement proceedings, (local authorities and the environmental protection agency),
- Environmental regulatory compliance,
- Permissions and licences,
- Environmental impact assessments, and
- Habitats legislation.

European succession law

A third potential strategic direction lies in European succession legislation.

Describing this opportunity as "a slower burner", he reminded the audience that, in late 2009, the EU Commission proposed common rules in relation to succession.

"It is a significant development, which is of great interest. The EU Commission proposes to reduce red tape for Europeans who inherit property in another EU country. The goal is to overcome differing and confusing inheritance laws. It proposes to allow people living abroad to choose to have the laws of their country of origin applied to the entire estate, or to have the laws of the country of residence applied to the entire estate … Essentially, this would mean taking out a European certificate of succession to enable beneficiaries and administrators to prove their status within the EU."

There are 450,000 probate cases in the EU annually that involve an international element, he said. "The total value of these estates is estimated by the commission at €120 billion. It strikes me that the opportunity that might present itself here is that, in addition to the work one does in respect of a typical domestic estate, an additional tier of work would involve taking out a European certificate of succession and having it recognised across the European Union – effectively 'hoovering up' the estate across the union.

"I mentioned that this is a 'slow burner'. It appears there are concerns in relation to clawback and the habitual residence test in common law countries. However, it is expected that both Britain and Ireland will engage in negotiations in relation to the regulation."

He added that emerging opportunities and EU legislative developments may be tracked through membership of the Irish Centre for European Law.

Acquiring the skill set

The ICEL director argued that fully exploiting these opportunities requires a differing skill set to existing common law expertise. "EU law is a blend of common law and continental civil law. The volume of EU law is enormous, but there are key skills that can aid the Irish lawyer in navigating this space." He mentioned that "EU law judgments often possess admirable brevity and clarity making them accessible to the reader".

"What is this skill set? One needs a substantive knowledge of the fundamental principles of EU law, which include supremacy, the four freedoms, the institutional structure of the European Union and a knowledge of the different legislative instruments that are used. Further, one needs particular skills to properly analyse EU legislation, and also a knowledge of EU law remedies.

"Why is any of this relevant? It is relevant because advising clients on legislation is at the core of what we, as lawyers, do. EU law is propagating across Irish law. It is really no longer possible to avoid it – if one ever wanted to. EU law is essential to properly and fully advise a range of clients, in particular, commercial clients, but not exclusively so. EU law adds value to the services we provide to our clients. EU law makes the Irish lawyer more competitive and affords real business opportunities." G

For more information, visit www.icel.ie.

Rejecting the '*de facto* family' and the

A recent High Court case underscores "the recognition of the 'family' under the Constitution and the denial of any recognition of the *de facto* family" in Irish jurisprudence, writes Joyce Mortimer

In the recent case of *J McB v LE*, the High Court rejected an unmarried father's challenge regarding the legality of the removal to England by his former partner of their three children following the breakdown of their relationship. The case centred on the rights of an unmarried father whose children had been moved to another jurisdiction without his consent. This was a complex case giving rise to considerations of the application of the provisions of the *Hague Convention on the Civil Aspects of International Child Abduction 1980*, the *Brussels Regulation* (Council Regulation 2201/2003 EC) ('*Brussels II bis*') and the *European Convention on Human Rights*.

The facts of the case

The parties in this case were in a long-term relationship for many years, but never married. During this time, they had three children together. The mother portrayed the relationship as unhappy and unstable and described the father as violent, possessive and jealous. The father stated that the mother was erratic and irresponsible and suggested that she was, at one stage, neglectful of the children. The children subject to these proceedings are aged nine, seven and two years.

On 25 July 2009, the mother removed the children from this jurisdiction and brought them to England, without the knowledge or consent of the father. The mother and children have remained living in England since that date. In the proceedings brought before the High Court, the father sought:

1) An order appointing him as guardian of the children,
2) An order granting the parties joint custody of the children and regulating the question of access,
3) A declaration that the removal of the children from their home in Ireland and their continued retention outside the jurisdiction of this court was wrongful.

Rejecting the *de facto* family

Justice MacMenamin stated: "The first step where the plaintiff's case weakens lies in the recognition of the family under the Constitution and the denial of any recognition of the *de facto* family in our national jurisprudence." The High Court referred to the decision of the Supreme Court in *McD v L* to ascertain what rights the father had under Irish law at the time of the children's removal. Justice MacMenamin held that the father had merely the right to apply to the District Court for guardianship, access and custody rights. The judge referred to the judgment of Denham J in *McD v L*, in which she examined earlier decisions regarding the nature of the family as protected by the Constitution and the "inextricable link with marriage". Denham J further stated that "there is no institution in Ireland of a *de facto* family." Justice MacMenamin, therefore, concluded that the High Court was "precluded as a matter of national law from giving recognition to the concept of a *de facto* family."

Wrongful removal

The pertinent issue in this case was whether there was a wrongful removal of the children from Ireland. To answer this question, the High Court examined the rights of the father under Irish law, specifically determining whether any rights could be deemed

ONE TO WATCH

Consultation Paper CP41 on Corporate Governance Requirements for Credit Institutions and Insurance Undertakings

The Central Bank and Financial Regulator recently announced the commencement of a public consultation process on new corporate governance standards for banks and insurance companies. According to a press release published by the regulator, "*Consultation Paper CP41 on Corporate Governance Requirements for Credit Institutions and Insurance Undertakings* sets out minimum requirements as to how banks and insurance companies should organise the governance of their institutions, including membership of the board of directors, the role of the chairman and the operation of various board committees".

The purpose of the proposed new standards is to enhance corporate governance by way of more demanding regulatory requirements and intrusive supervision. The consultation paper proposes a regulatory framework for corporate governance for credit institutions and insurance undertakings.

Scope of the requirements

It is proposed that the requirements will apply to all credit institutions and insurers licensed or authorised by the Financial Regulator, including Irish licensed and authorised subsidiaries of international financial services groups. The requirements are not to apply to foreign incorporated subsidiaries of an Irish financial institution.

Proposed requirements

The Financial Regulator is proposing to:

- Impose requirements regarding the minimum number of directors on the board,
- Limit the number of directorships that directors may hold,
- Require that board membership is reviewed, at a minimum, every three years,
- Require clear separation of the roles of chairman and CEO,
- Set out clearly the role of the independent non-executive directors,
- Require the board to set the 'risk appetite' for the institution and to monitor adherence to this,
- Set out the minimum requirements for board committees, and
- Require annual confirmation of compliance to the Financial Regulator.

human rights watch

rights of unmarried fathers

'rights of custody' under the *Hague Convention*, or otherwise. The applicant (the father) argued that the term 'rights of custody' must be given a broad interpretation, having regard to the terms of *Brussels II bis*, the *European Convention on Human Rights* (as applied in this jurisdiction), the jurisprudence of the ECtHR, decisions of the EU courts, EU primary and secondary law, the *Lisbon Treaty* and the *Charter of Fundamental Rights of the European Union*.

Justice MacMenamin considered the application of the *Hague Convention* and *Brussels II bis* and held that the removal or retention of a child to be "wrongful", must be in breach of rights of custody, and such rights of custody must have been "actually exercised either jointly or alone or would have been so exercised but for their removal or retention". The judge found that, as the term "rights of custody" was qualified by the use of the words "actually exercised", any wrongful removal or retention could only be proven in the event of a breach of an existing or exercised right of custody. Under Irish statute law, an unmarried father has no automatic right of guardianship and must apply to the court to be appointed as guardian and for ancillary orders regarding custody and access.

Under Irish statute law, an unmarried father has no automatic right of guardianship

To invoke the jurisdiction of the District Court in this regard, the proceedings must have been served on the respondent. This action is sufficient to vest the court with "custody" of the children, resulting in the consequence that their removal from the jurisdiction would have been wrongful within the meaning of the *Hague Convention* and *Brussels II bis*. On an examination of the evidence, the judge found that the guardianship proceedings were never served on the respondent. The High Court, therefore, rejected the assertion

Composition of the board
It is proposed that the board of an institution shall have a minimum of five directors and be of sufficient size and expertise to effectively oversee the operations of the institution. It is proposed that, for major institutions, a larger board may be required.

Number of directorships permitted
It is proposed that the number of directorships held by directors of institutions shall be limited: "The Financial Regulator requires that the number of directorships of credit institutions and insurance undertakings held by a director shall not exceed three."

Review of board of membership
It is proposed that institutions shall review board memberships at least once every three years. Also, there should be a formal review of the membership of the board "of any person who is a member for nine years or more and it shall document its rationale for any continuance and so advise the Financial Regulator in writing".

Roles of chairman and CEO
It is proposed that there should be clear separation of the roles of chairman and CEO.

Independent non-executive directors
Independent non-executive directors are seen as vital to the provision of an objective oversight of the activities of an institution. It is proposed that independent non-executive directors be identified clearly in the institution's annual report. It is proposed that independent non-executive directors shall comprise "individuals with relevant skills, experience and knowledge … who are able to provide an independent challenge to the executive directors of the board".

'Risk appetite'
It is proposed to place a requirement on the board to understand the risks to which the institution is exposed and to document the 'risk appetite' of the institution. It is proposed that there should be "adequate arrangements in place to ensure that there is regular reporting to the board on compliance with the risk appetite".

Committees of the board
It is proposed that the board shall, at a minimum, establish both an audit committee and a risk committee. Major institutions

that the applicant father enjoyed any custody rights within the meaning of the *Hague Convention* as complemented by the *Brussels II bis Regulation*.

Habitual residence

Justice MacMenamin analysed the issue of the present habitual residence of the children in an effort to determine whether the English or Irish courts should exercise jurisdiction in relation to the broader claims made by the applicant. It was held that this question turns on the issue of whether there was a "wrongful removal or retention". The judge stated that, if the removal was lawful, then the court was under a duty to determine if the removal changed the habitual residence of the children. If the answer to the latter was in the affirmative, it followed that, under article 19(2) of *Brussels II bis*, the High Court is "second seised" and must stay its proceedings in favour of the English court.

In an effort to determine the habitual residence of the children in this case, Justice MacMenamin stated that, in certain circumstances, the court may look to the common intention of the parents to settle permanently with the child

in another state. The judge said: "The habitual residence of a child may *ipso facto* be the habitual residence of his or her parents." However, in the given case, where the parents of the children are unmarried and the father does not have a right of custody at the time of movement, Justice MacMenamin found that it is the intention of the mother that must be considered. The factors that the court considered were the degree of integration into a social or family environment, school attendance, the conditions and the reasons for the move and stay. On an examination of the evidence provided by the respondent, the High Court decided that the new residence of the mother and children reflected "not just a degree of integration but went further than that". The judge concluded that the English courts should exercise jurisdiction on the substantive issues in the case.

This case highlights the reality that the Constitution deals with the 'family' and not with the broader concept of 'family life'. In the absence of legislation governing this area, the task of determining the rights of unmarried fathers falls on the courts. The courts are obliged to interpret and apply the law, as it exists. The current legal framework does not provide protection, consistency or certainty for people in families outside of marriage. G

Joyce Mortimer is the Law Society's human rights executive.

shall be required to establish remuneration and nomination committees. It is proposed that committees shall document their terms of reference, providing evidence of all delegated authorities given to them.

Compliance statement

It is proposed that each institution shall submit to the Financial Regulator a compliance statement specifying whether it has complied with these requirements for the duration of the period to which the statement relates.

Submissions

All interested parties are invited to comment on the proposals contained in the consultation paper by 30 June 2010. Comments can be emailed to corpgov@centralbank.ie. G

Joyce Mortimer is the Law Society's human rights executive.

ARBITRATION ACT 2010 – CLARIFICATION

In the 'One to Watch' article in the May 2010 issue, which referred to the *Arbitration Act 2010*, readers' notice is drawn to the section, 'Number of arbitrators', on page 16, where the following was stated:

"The *Arbitration Act 2010* states that the parties are free to determine the number of arbitrators. Failing such a decision, the number of arbitrators should be three."

It should be clarified that the *Arbitration Act 2010* states that the default number of arbitrators shall be one – and not three – as specified by the *Model Law*. (See section 13 of the *Arbitration Act 2010*.)

For the avoidance of doubt, the new act affects all arbitrations (where no commencement date was agreed) that commence after 8 June 2010.

The commencement date is "the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent"; see section 7(1)(b) of the act.

The solicitors' lien: a

The *Guide to Professional Conduct* should be amended and restated in light of the 2008 High Court decision in *John Ahern and Others v Minister for Agriculture*, argues Patrick Mullins

The *Guide to Professional Conduct of Solicitors in Ireland* (second edition) deals with the provisions that apply in relation to a solicitor's lien.

In short, when a file is being transferred from a former solicitor to the current solicitor, the former solicitor is entitled to exercise a lien on the file in relation to the former solicitor's costs. There are some exceptions to this. However, this article proposes to deal with a general lien on costs in a litigation matter. The procedure as per the *Guide to Professional Conduct* is that a courteous request for files should be made by the new solicitor to the former solicitor. The former solicitor then draws a bill of costs. The fees may then be agreed, arbitrated or taxed.

According to the *Guide to Professional Conduct*, the former solicitor is under no obligation to furnish his or her original file and papers to the new solicitor without first being paid. The former solicitor may opt to accept an undertaking in respect to the payment of costs, as alternative security to the solicitor's common law lien. Even in those circumstances, the *Guide* provides that all outlays should be refunded immediately to the former solicitor.

This is a matter that arises on numerous occasions during the lifetime of a litigation solicitor. A client may leave a former solicitor for a myriad of reasons. The client may leave because of a perceived lack of service, or simply because the client has moved to a different part of the country and finds it difficult to deal with a solicitor now operating a significant distance from where that client resides.

In any event, the *Guide* does not draw a distinction – which ought to be made – between a retainer of a solicitor that is discharged by the client and a retainer that is discharged by the solicitor.

Off record

The matter came up for discussion in a decision of the High Court made by Ms Justice Laffoy on 11 July 2008 in the case of *John Ahern and Others v the Minister for Agriculture and Food, Ireland and the Attorney General*.

It is clear that the *Guide to Professional Conduct* deals only with a situation where the client discharges the solicitor.

However, there are many occasions upon which a solicitor may discharge a retainer. When a solicitor comes on record for a client in litigation, a solicitor is accountable to the client, and also accountable to the court and to the other side in relation to the delivery of pleadings. That is an obligation that can only be withdrawn by leave of the court. Solicitors come off record all the time. Solicitors may come off record because they cannot receive proper instructions, or because irreconcilable differences have arisen between the solicitor and the client – or, in other words, the client refuses to take the advice of the solicitor. It may also be the case that the client has refused to comply with the terms and conditions of the solicitor's retainer as regards payment of fees.

> ***"The court drew a distinction between a client discharging the retainer of a solicitor and the solicitor discharging his or her retainer by the client"***

In the case decided by Ms Justice Laffoy, the solicitors had applied to come off record. The court granted leave to the solicitor to come off record.

The new solicitor then sought the original files and papers, and offered the former solicitors to accept an unqualified undertaking from the new solicitors to pay in full the costs as to be agreed or taxed, before a certain date. If that undertaking was forthcoming, the former solicitors would then release the client's files to the new solicitors.

The court drew a distinction between a client discharging the retainer of a solicitor and the solicitor discharging his or her retainer by the client.

Ms Justice Laffoy indicated that "where the solicitor has discharged his retainer, the court will then normally make a mandatory order, obliging the original solicitor to hand over the client's papers to the new solicitor, against an undertaking by the new solicitor to preserve the lien of the original solicitor."

In this particular case, there was a dispute as to who terminated the retainer. The former solicitors argued that it was the client who discharged the retainer. The client argued that it was the solicitor who discharged the retainer. Ms Justice Laffoy found that there was no evidence of an expressed discharge by the client of the former solicitor's retainer.

She went on to say that "whether there was an implied or a constructive discharge is not something which can be determined on the basis of the affidavit evidence, no more than, if it were an issue, the court could determine whether the former solicitor terminated the retainer for reasonable cause. Affidavit evidence, which is the type which is before the court, is not an appropriate foundation for the non-exercise by the court of the equitable jurisdiction identified in *Gamlen Chemical Company v Rochem Ltd*, which I have no doubt the courts in this jurisdiction enjoy. Therefore, I am constrained to adopt the approach I adopted in *Mulheir v Gannon* and deal with the matter on the basis that it was the former solicitors who terminated the retainer, but that they did so for reasonable cause."

viewpoint

word of warning

Ms Justice Laffoy made an order directing the former solicitors to deliver to the current solicitors the client's files, provided that the current solicitors gave to the former solicitors an undertaking in writing to hold the said file subject to the former solicitors' lien and to return them to the former solicitors on the conclusion of the plaintiff's claim in the proceedings. The court indicated that the delivery of the files must be without prejudice to the former solicitors' claim for costs against the client, such a delivery to be effected within two weeks of the furnishing of the undertaking.

Matter of contract

The court made it clear that the former solicitors' entitlement to recover costs from the client, and the client's liability therefor, were matters of contract between the client and the former solicitors, and the court had no jurisdiction in this particular case to adjudicate on that matter.

An application had been made in the case by the client to defer payment of the former solicitors' costs to the successful outcome of the client's claim. Ms Justice Laffoy found that this application was "totally misconceived" and dismissed it.

She made it clear that the court had to maintain a "fair balance between the proponents".

Care is needed when exercising a solicitor's lion

The order made in this case preserved the former solicitors' lien, while at the same time enabling the client to prosecute his claim.

It is clear that each case will be taken on its merits. However, it is also clear that, where the court determines that the solicitor discharged his or her retainer, the provisions of paragraph 7.6 of the *Guide to Professional Conduct* will not apply.

There was nothing in the order made by Ms Justice Laffoy preventing the former solicitors from immediately taxing their costs and pursuing those costs against the former client.

> The current edition of the *Guide to Professional Conduct of Solicitors in Ireland* (2002) is being revised by the Guidance and Ethics Committee. It is hoped to publish the next edition at the end of the year.

However, the solicitors' lien, as we understand it, did not apply – fundamentally, because the solicitor had been deemed to discharge his retainer.

Balancing act

In summary, the provisions of the *Guide to Professional Conduct* apply in circumstances where the client discharges the solicitor's retainer. However, the *Guide* will not apply to a situation in which the solicitors come off record for failure to receive instructions, or in any manner discharge their retainer by the client.

It is my view that the *Guide to Professional Conduct* needs to be amended and restated in light of the decision made by Ms Justice Laffoy and that a clear distinction should be drawn between the two types of discharge of retainer. This would be to the benefit of all solicitors dealing with such situations.

In practice, these situations are quite difficult, because the former solicitor is normally aggrieved about the discharge of his or her retainer and the new solicitor is also keen to ensure that the former solicitor gets paid. It is a balancing act, which is quite often difficult to maintain. G

Patrick Mullins is managing partner of Mullins Lynch Byrne solicitors, Cork.

I spy with my little

The *Criminal Justice (Surveillance) Act 2009* has attracted relatively little public attention, despite its importance and novelty. Dara Robinson puts a tail on

The *Criminal Justice (Surveillance) Act 2009* is a significant piece of legislation. Seen by some as yet more 'Big Brother', and by others as a welcome attempt to limit the power of the state to intrude into the lives of citizens, it has attracted relatively little public attention, despite its importance and novelty.

As well as being in compliance with the Constitution, the act has also had to be seen as European convention-proof. An increasing number of cases have been brought to Strasbourg in recent years, complaining of infringements of article 8, the right to respect for privacy and family life, home and correspondence. Infringements on these rights by the state must be "in accordance with law … and necessary … in the interests of national security, public safety … (or) … for the prevention of disorder or crime". As will be suggested, some aspects of the act are marginally compliant, if at all.

Although the act grants similar powers to the gardaí, Defence Forces, and Revenue, this article refers only, for simplicity's sake, to the gardaí. The act will allow an array of powers to be deployed, following an authorisation by a judge of the District Court or, in an exigency, a short-term approval by a garda of at least the rank of superintendent. It will permit entry into premises and vehicles, the planting of audio and video-recording equipment, the use of tracking devices, and the collection and storage of information from such activities.

The act also provides a regulatory framework for the storing and safeguarding of all information obtained under the act, as well as the material used in obtaining the authorisation or approval in question. It also provides, in section 12, for the nomination of a High Court judge to review the operation of the act and report annually to the Taoiseach, such report to be laid before the Houses of the Oireachtas, unless it contains material "prejudicial to the security of the state".

MAIN POINTS

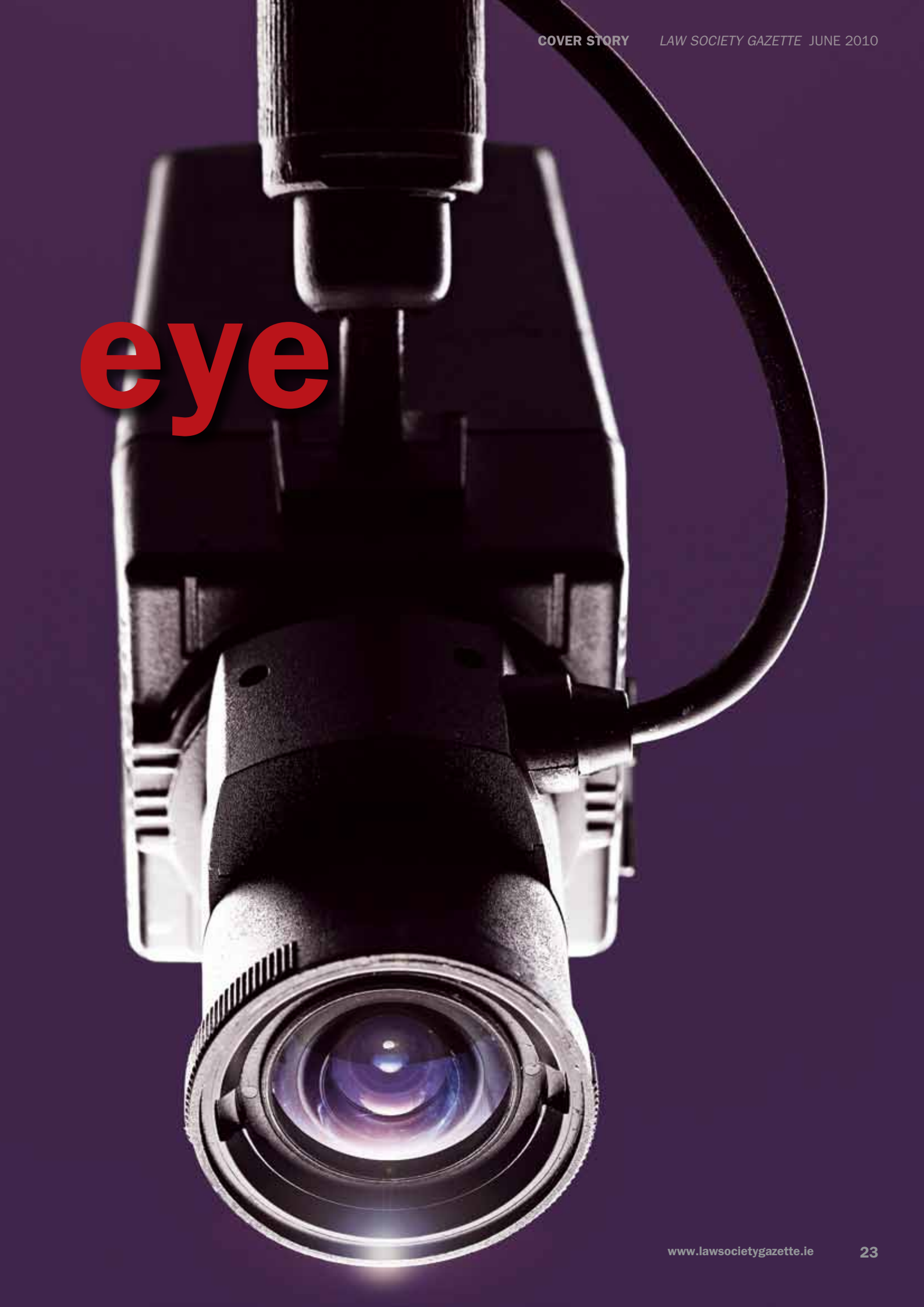
- ***Criminal Justice (Surveillance) Act 2009***
- **Array of powers open to the gardaí**
- **Surveillance and tracking devices**
- **Regulatory framework for storing and safeguarding information**

I am the owl

The mechanics of the act's primary function are set out in sections 4 through 8. Section 4 provides for an application to be made by a garda superintendent to a judge for an authorisation in three circumstances. The proposed surveillance must:

1) "Be necessary" for the collection of information as to the commission (or not) of an arrestable offence, or evidence relating to such an offence,
2) Be to prevent the commission of such offences, or
3) Be to maintain the security of the state.

eye



LOOK IT UP

Cases:

- *Ekimdzhiev v Bulgaria* (application 62540/2000; final judgment 30 January 2008)
- *Mirilashvili v Russia* (application 6293/2004; final judgment 5 June 2009)

Legislation:

- *Criminal Justice (Surveillance) Act 2009*
- *European Convention on Human Rights*, specifically articles 6 and 8

It should be noted that 'arrestable offence', as defined, is an extremely low threshold, and includes offences as minor as common theft. Rather oddly, section 5(3) provides that no particular arrestable offence need be specified. Section 4(5) provides that the applying superintendent must have regard to the requirements of necessity and proportionality, the intended surveillance being "the least intrusive means available" and of a reasonable duration.

Section 5 provides for the hearing of such applications *ex parte* and in private. There appears to be no formal provision for recording the evidence of the application. An authorisation when granted under section 5 must be in writing, has a maximum life of three months, and can be renewed. There is no limit placed on the number of renewals. It must specify, among other things, the particulars of the proposed surveillance device and the person or place due to be the subject of the surveillance. A power of entry into "any place" may be granted, by virtue of section 5(7), for the purpose of placing or removing a device.

Section 7 provides for the approval of a surveillance device in cases of urgency without recourse to a judge. Limited to a 72-hour period, such approval can only be granted by a superintendent if he has reasonable grounds for believing that:

- Before an application could be made to a judge, a person would abscond, obstruct the course of justice, or commit an offence,
- Information or evidence relating to an offence would likely be lost or destroyed, or
- The security of the state would be compromised.

Approval under this section can include an authority to "enter … any place" without the consent of the owner. If it is proposed to continue surveillance beyond 72 hours, an application must be made to court.

It should be noted, in passing, that there is no limitation within the act on the type of premises that can be entered to place a device. Offices of solicitors, doctors and other professionals are therefore not exempt. One hopes that any such entry would be rare in the extreme. There is no absolute protection against infringement on privileged communications, which are exempt only if the authorisation sought relates "primarily" to them (section 5(4)).

Another stakeout

Tracking devices are the subject of section 8. Different to surveillance devices, in that they are used only to obtain information as to the "location of a person, vehicle or thing", there is no judicial involvement in their use. Instead, a garda superintendent may approve their use. The device may be planted for not more than four months. The section provides that a tracking device may only be approved where surveillance under section 4 would be justified, but the use of a device would achieve the same result, and in a shorter time. The planter of the device is empowered to place and remove it without the consent of the owner of the "vehicle or thing", but there is no provision to allow entry on to private property. Records must be created of any approval, and reported to an assistant garda commissioner, together with a summary of the results.

The act provides a remedy of sorts for a disgruntled citizen in section 11, with the creation of a complaints procedure. The section creates an entitlement to complain to a referee (being the complaints referee under the 1993 postal interception legislation). The referee, provided that the complaint is not frivolous or vexatious, shall investigate the complaint. Various outcomes are provided for, including a report to the Taoiseach and the payment of compensation to the complainant. Rather worryingly, the referee is empowered, if he or she so decides, in the public interest, to decline to notify the complainant of a breach of the statutory safeguards, and such a decision is made final by the act.

"There is no limitation within the act on the type of premises that can be entered to place a device. Offices of solicitors, doctors and other professionals are therefore not exempt"

A key question, of course, is how a citizen is to become aware of the surveillance in the first place – a potential article 8 problem. Indeed, in a recent case in Strasbourg, *Ekimdzhiev v Bulgaria*, the European Court of Human Rights, not for the first time, referred to the "risk of abuse intrinsic to any system of secret surveillance" in overtly critical language. The Bulgarian system was found wanting precisely because "the persons concerned [that is, placed under surveillance] cannot learn (that) they have been monitored, and are accordingly unable to seek redress". It appears that the absence of provision for notifying the subject in the act may similarly offend against the convention. Note that section 10 entitles, but does not oblige, the minister to make regulations about such notification.

Some comfort for citizens is contained in section 13, which imposes a duty of confidentiality on those with information about the use of any of the powers of the act. Offences are created for unauthorised disclosure. It remains to be seen how stringently this section will be operated by the powers that be – the steady drip-feed of information from 'informed sources' to certain crime writers is already suggestive

Jonathan's tarmac fetish was getting out of hand

of breaches of confidentiality on a regular basis.

Controversy and litigation seem bound to emerge from section 14, which governs the admissibility of evidence. The stated aim of the section is to secure the admission into evidence in criminal trials of "information or material" obtained through use of the act. However, the section proposes a framework for the admission of the results of surveillance or tracking devices, even where there have been errors or omissions on the face of the authorisations or approvals. This is so, notwithstanding that the obtaining of such permissions is probably unlikely to be difficult to begin with. A trial court will have to consider factors such as the urgency of the situation, the scale of the error, the nature of any right infringed, and the interests of justice. These issues will have to be teased out by a painstaking jurisprudence. Also contained in section 14 is a presumption, until the contrary is shown, of the accuracy of the devices used. This threatens to impose an insurmountable burden on accused persons, who may find it impossible to meaningfully raise a challenge at trial unless strict controls are maintained over the devices, enabling independent technical verification.

Minority report

A further major potential problem is contained in section 15. The section seeks to limit, for obvious reasons, disclosure, "by way of discovery or otherwise", of the background to any surveillance to the defence in the course of a prosecution, including critical information that may touch on the lawfulness of the obtaining of the relevant material.

This obvious tension between defendants' entitlement to disclosure and the state's wish to, among other things, protect witnesses or state security will not be easily resolved. While the court of trial will be obliged to rule, ultimately, on what should or should not be disclosed to the defence, the process of such a determination may be both unwieldy and unsatisfactory. It is easy to envisage a 'case by case' approach being developed, adding to the length and complexity of serious criminal trials. This situation may well arise even if the prosecution does not seek to rely for its case on material obtained under the act, as trials over the years in the Special Criminal Court have demonstrated.

Jurisprudence from Strasbourg in applications brought under article 6 of the convention (the right to a fair trial) suggests that domestic courts should tend towards disclosure – failure to do so leading to the likelihood of an adverse finding. One of the many cases in point is *Mirilashvili v Russia*, where an article 6 violation was grounded, among other things, on the decision of the Russian trial court to withhold materials relating to a surveillance operation, such failure "unaccompanied by adequate procedural safeguards" (for the defence).

Seen by some as legitimising further invasions of privacy, and by others as belated but necessary legislative control of long-established practices, the act at least provides a framework for proper authorisation of covert surveillance. But it may be that the shortcomings in the new provisions expose the state to a potential challenge in the European Court of Human Rights. As always with groundbreaking new legislation, only time will tell. G

Dara Robinson is a partner in Garrett Sheehan and Partners and is chairman of the Criminal Law Committee of the Law Society.

Doing the BUSIN

The Commercial Court has been in existence since January 2004, yet there continues to be confusion about the procedural requirements of conducting litigation there. Noreen Howard clarifies some of the more common queries that arise

Commercial litigation in this jurisdiction was revolutionised by the introduction, on 12 January 2004, of the Commercial Court. The inception of this court stemmed from a recognition that existing High Court procedures were slow and often inefficient. This new court (as it was then) aimed to resolve commercial disputes quickly through active, court-led case management. The *Superior Court Rules* were therefore amended so as to provide for the establishment and operation of a Commercial Court. Order 63A of the *Superior Court Rules* details how the Commercial Court operates and the procedures to be followed in that court.

Six-and-a-half years have passed since these rules were first introduced and, although the court has seen year-on-year growth in its caseload since it began, there still appears to be considerable confusion among practitioners in relation to the procedural requirements of conducting litigation in the Commercial Court.

Firstly, practitioners must be alive to the fact that admission to the list is ultimately at the discretion of the judge in charge of the list. The Commercial Court is not a separate division of the High Court, but rather operates by way of a formal listing system within the High Court, with disputes being obliged to fall into one or more prescribed categories of 'commercial proceedings' to gain admission to the list. Eleven categories are set out in the *Commercial Court Rules* (order 63A(1)) and are defined by reference to different types of commercial disputes, with a current minimum claim value of €1,000,000. The court has, however, retained a discretion to admit complex commercial disputes that do not meet the €1,000,000 threshold. Furthermore, there is an acceptance that not all commercial disputes can be readily quantified and, on that basis, provision is made under the rules, for example, for all intellectual property disputes and judicial reviews (with an underlying commercial quality) to be admitted. There is, however, no automatic right for any case to be admitted to the Commercial Court, irrespective of what category of claim the dispute falls into.

Seeking entry to the list

The rules provide (order 63A, rule 4(2)) that all applications for admission to the list must be made before the close of pleadings by way of notice of motion and a solicitor's certificate. Contrary to common belief, an affidavit is not required to ground this application – all information relevant to the application should be contained in the solicitor's certificate. In practice, however, one exception to this rule has developed, whereby applicants for admission to the list who are seeking summary judgment swear an affidavit. These affidavits are primarily focused on providing information relevant to the application for summary judgment and addressing the necessary proofs for such an application, rather than the application for entry to the list.

The solicitor's certificate itself should set out clearly the category (or categories) of 'commercial proceedings' upon which the applicant is relying to seek admission to the list. In practice, these certificates also include detail as to the background to the proceedings and any other information that would be of assistance to the court in understanding the exact nature of the dispute between the parties.

As all practitioners will be aware, on 1 June 2009, the *Commercial Court Rules* dealing with solicitors' certificates were amended, placing more stringent requirements on all solicitors practising in the Commercial Court. The rules now require

MAIN POINTS

- Practice and procedure in the Commercial Court's list
- Prescribed categories of 'commercial proceedings'
- Discovery and witness statements
- Preparing for the hearing

PIC: CIAN REDMOND

ESS

Mr Justice Peter Kelly

that the solicitor's certificate is signed by an individual solicitor rather than in the name of a firm. Furthermore, the rules now direct that the solicitor for the applicant must undertake in the certificate that the court's directions will be complied with in full. This is an extremely onerous undertaking, and one that cannot be given lightly by any practitioner. Its introduction into the rules in June 2009 caused considerable disquiet among practitioners. Mr Justice Peter Kelly did, however, clarify to the Commercial Court Users' Committee, following the amendment to the rules, that he would accept undertakings that are qualified to the effect that the solicitor will use his or her best endeavours to comply with the court's directions. Certificates that are so qualified are now commonly used in the Commercial Court. Providing such a qualified certificate is the practice recommended by the Law Society's Litigation Committee.

The respondent's solicitor must also provide the name of an individual solicitor who will handle the proceedings, although that solicitor does not need to give any form of undertaking. The solicitor's name must be given to the court at the hearing of the application for entry to the list.

Application for entry to the list can be made any

time after the proceedings are issued, but before the pleadings are closed. However, any inexplicable delay in bringing the application may be of relevance when the court is exercising its discretion to admit the proceedings. Therefore, all applications for admission to the list should be brought as expeditiously as possible.

Although the rules provide for an initial directions hearing, in practice, that directions hearing, more often than not, takes place on the same day as the application for entry to the list. If a claim is admitted to the list, then, in the normal course of events, the judge in charge of the list will issue directions regarding the exchange of pleadings, requests for discovery and any other interlocutory applications that are anticipated. It is therefore prudent, if at all possible, to agree a timetable for the exchange of pleadings with the respondent. This timetable should be realistic and should allow sufficient time for the receipt of proper instructions, the drafting of pleadings and the progression of the case. In practice, regard must also be had to the availability of counsel and their ability to work to the agreed timetable. Ideally, client, counsel and practitioner should identify the timelines within which they can work and then negotiate those timelines with the respondent.

It is the obligation of the applicant for entry to the list to lodge the relevant papers with the Commercial Court registrar in advance of the application. It should be noted that any documentation required to be filed in the central office pursuant to the *Rules of Superior Courts* should continue to be filed in the usual way. Therefore, the notice of motion seeking entry to the list (or any subsequent interlocutory motion) must be issued and filed in the normal way in the central office. Once issued and filed, the relevant papers should be lodged with the Commercial Court registrar before 4.30pm on the Wednesday of the week preceding the date on which the case is listed for an application for admission. Papers can be so filed by leaving them in the list room. If the proceedings are admitted to the list, it is the plaintiff's obligation to lodge the relevant papers with the registrar; however, it is often the case, where interlocutory applications are concerned, that the moving party lodges the relevant papers. Again, in practice, a copy of the book(s) as lodged with the Commercial Court registrar is copied to the respondent's solicitor.

Considerable confusion exists as to what should be contained in the book(s) of relevant papers to be lodged with the Commercial Court registrar. The applicant for admission to the list must lodge a copy of the notice of motion, solicitor's certificate, and any pleadings that have been exchanged to date. It is also prudent to include any relevant recent correspondent with the respondent (or his solicitor). Again, depending on the nature of the dispute, it may be that copy key documents should also be made available to the court. Judge Kelly has indicated that only necessary documents should be included in the books that are lodged with the registrar and has requested that the parties address their minds to what is needed. Any orders that have been made in the proceedings to date should also be included. The 1 June 2009 amendment to the *Commercial Court Rules* requires that a booklet of orders be maintained and lodged as part of the relevant papers on an ongoing basis.

"Previously, any piece of litigation only moved as quickly as the parties wished (or not as the case may be). This* laissez faire *approach had a cost, both in time and money. No such approach is tolerated in the Commercial Court"

Discovery

As mentioned above, the initial directions made may provide for the exchange of requests for discovery and the time limits for the bringing of any applications for discovery. As with agreeing the timetable for the exchange of pleadings, a sufficient amount of time should be agreed to prepare and deliver requests for discovery and also to consider any requests for discovery received. Additionally, the time period required to provide discovery should be realistic. As is apparent from the recent decision of Judge Gilligan in the case of *Hansfield Developments and Ors v Irish Asphalt Limited and Ors*, discovery in Commercial Court matters can be a very complex business. A thorough evaluation of the amount of documentation (held electronically and otherwise) that may have to be provided on discovery should be carried out so that an accurate estimate of the time required to gather, review and list all documents is provided to the court. All too often, the time required to provide discovery is underestimated, which, in turn, leads to rushed discovery being provided, which is subsequently found to be deficient and could potentially result in costs orders being made against the defaulting party.

Witness statements

Once discovery has been provided, the court will give directions in relation to the exchange of witness statements. The level of detail to be included in witness statements has been an ongoing source of confusion since the Commercial Court first opened its doors. The rules direct that the witness statement outlines the "essential elements" of that witness's

evidence. In practice, this has ranged from a list of bullet points to voluminous detailed scripts. Judge Kelly has, on more than one occasion, indicated that he would like the witness statements to be a *précis* of the critical evidence to be given by a witness. Furthermore, where a core book of documents has been agreed with the respondent, it can be of assistance to cross-reference any key core documents in the witness statement.

Preparing for the hearing

Depending on the complexity of the proceedings, a hearing date will be allocated either at one of the directions hearings once discovery has been exchanged or once any other pre-trial issues have been addressed. The rules detail what must be done in order to prepare for a pre-trial conference and, in particular, what books are be lodged with the registrar four days in advance of that conference. Currently, neither case management nor pre-trial conferences are being held. Judge Kelly has advised that, given the level of case management operated by the court, there is no necessity for such conferences. Furthermore, neither the case summary nor the pre-trial questionnaires are currently required to be completed.

In the absence of the pre-trial conference, the books that are identified for that conference should now be prepared for the hearing. If at all possible, any books to go before the court should be agreed in advance with the respondent. As before, a copy of all books lodged with the registrar should be provided to the respondents. All books for the hearing must be lodged by the plaintiff with the registrar four days in advance of the hearing.

Efficient and expeditious

With the introduction of the Commercial Court in January 2004, the practice of commercial litigation in this jurisdiction changed immeasurably. Previously, any piece of litigation only moved as quickly as the parties wished (or not as the case may be). This *laissez faire* approach had a cost, both in time and money. No such approach is tolerated in the Commercial Court. Parties come to that court to resolve disputes efficiently and expeditiously so that they can move forward with their businesses. To allow the court to provide such a service, its rules must be understood and adhered to. Where good practice and procedure is followed, it will be for the merits of the claim to inform the outcome. G

Noreen Howard is a partner in the commercial litigation and dispute resolution department at Matheson Ormsby Prentice and is one of the two solicitor members on the Commercial Court Users' Committee.

LOOK IT UP

Cases:

- *Hansfield Developments and Ors v Irish Asphalt Limited and Ors* [2010] IEHC 32

Legislation:

- *Rules of the Superior Courts*
- *Commercial Court Rules*

Burden of

The default position in tax litigation requires the taxpayer to provide sufficient evidence to reduce or displace a tax assessment. In European jurisprudence, where the burden of proof on the asserting party is too onerous or palpably unfair, however, the burden can be reversed. Conor Kennedy explains

The general principle of 'he who asserts must prove' is the civil burden of proof imposing an obligation to sustain an assertion or proposition by positive argument. This principle is entirely logical in many tort or contractual disagreements – but questionable in certain tax disputes with the Revenue Commissioners. The default position in tax litigation requires the taxpayer to provide sufficient evidence to reduce or displace a tax assessment. This obligation can be onerous and, in some cases, impossible.

Recently, in *Menolly Homes Limited v The Appeal Commissioners and the Revenue Commissioners*, the High Court conclusively determined that, in general tax litigation, the burden of proof is on the taxpayer. Prior to *Menolly Homes*, the burden of proof in tax litigation was an infrequent visitor to the Irish courts. While there have been some cursory references, the issue has only had a thorough outing in cases where the responsibility for bearing the burden of proof was actually contained within the statute.

Despite the ruling in *Menolly Homes*, the issue of whether a taxpayer in litigation with Revenue should always be responsible for bearing the burden of proof may be in some doubt. Jurisprudence from the European courts, the *European Convention on Human Rights* and certain Supreme Court decisions have determined that, if the burden of proof on the asserting party is too onerous or palpably unfair, the burden can be reversed.

MAIN POINTS

- Burden of proof on the taxpayer
- In European jurisprudence, the burden can be reversed
- Judicial review of a Revenue decision

Appeal process

Section 934 of the *Taxes Consolidation Act 1997* permits a Revenue official to attend every hearing of an appeal, be entitled to produce any lawful evidence, and give reasons in support of the assessment. After examination of the appellant, the Appeal Commissioners will thereafter determine whether the assessment should be increased, stand or be reduced.

The view of Revenue is that the burden of proof is on the taxpayer to demonstrate that the tax assessment is incorrect. This perception assumes that there is no requirement on Revenue to produce lawful evidence or give reasons in support of the assessment. In such cases, a taxpayer would be quite justified in having the decision of Revenue judicially reviewed.

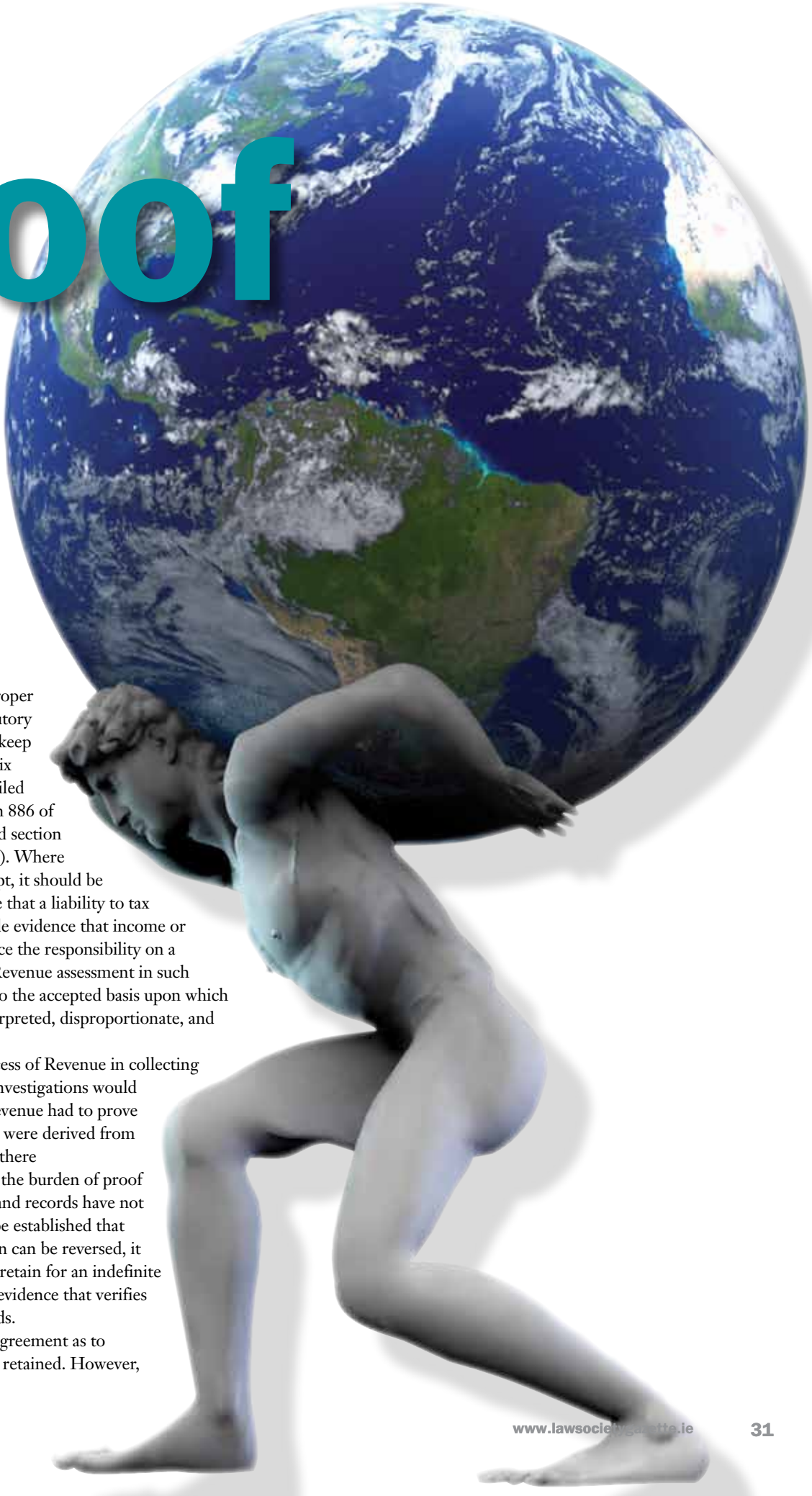
Judicial review is a supervisory function. It allows a court to review the manner in which a decision is made rather than the substance or the merits of the decision. The court determines whether proper procedures were followed, whether the public body or tribunal had proper jurisdiction to make the decision, and whether the correct legal principles were applied.

In civil litigation, there is an obligation on the claimant to persuade the court or tribunal, where appropriate, of the truth or the sufficient probability of every essential 'fact in issue' for the purposes of establishing a *prima facie* case. A *prima facie* case is established when there is sufficient evidence for a judgment to be made, unless the evidence is contested. Therefore, a significant onus is placed on the party bearing the burden of proof.

Letter of the law

In *O'Flynn Construction*, Smyth J noted that the general anti-avoidance provision imposed an obligation on the taxpayer to satisfy the court that a transaction was not a tax-avoidance transaction (section 811 of the *Taxes Consolidation Act 1997*). The judge also cited *Doorley* as the authority for placing the obligation on the taxpayer when seeking to avail of an exemption from tax to show that the exemption applied. Correspondingly, where a liability to tax is imposed, it is settled law that the charge to tax must be in accordance with the strict

proof



letter of the law. Therefore, in determining whether a liability to tax arises, it is submitted that the burden of proof should be on Revenue where the taxpayer has kept proper books and records.

Difficulties, however, can arise where the taxpayer has not kept proper books and records. There are statutory obligations requiring taxpayers to keep all records for a period of at least six years to ensure that a full and detailed tax return can be made (see section 886 of the *Taxes Consolidation Act 1997* and section 16 of the *Value Added Tax Act 1972*). Where the required records have been kept, it should be incumbent upon Revenue to prove that a liability to tax exists in the first place or to provide evidence that income or sales have been suppressed. To place the responsibility on a compliant taxpayer to disprove a Revenue assessment in such circumstances would be contrary to the accepted basis upon which Irish taxing statutes should be interpreted, disproportionate, and extremely onerous.

It is acknowledged that the success of Revenue in collecting €2.6 billion from various special investigations would have been severely hampered if Revenue had to prove that the relevant income or capital were derived from undeclared sources. In such cases, there is ample justification for imposing the burden of proof on taxpayers where proper books and records have not been kept. Furthermore, if it can be established that the burden of proof in tax litigation can be reversed, it would be prudent for taxpayers to retain for an indefinite period the requisite documentary evidence that verifies the legitimacy of accumulated funds.

In some cases, there will be disagreement as to whether proper records have been retained. However,

LOOK IT UP

Cases:

- C-147/01, *Weber's Wine World v Abgabenberufungskommission*
- C-354/03, *Optigen Ltd*
- C-435/03, *British American Tobacco International Ltd and Another v Belgian State*
- *Hanrahan v Merck Sharp & Dohme* [1988] IESC 1
- *Menolly Homes Limited v The Appeal Commissioners and the Revenue Commissioners* [2010] IEHC 49
- *Revenue Commissioners v O'Flynn Construction Co Ltd, John and Michael O'Flynn* [2006] ITR 81
- *Revenue Commissioners v Doorley* [1933] IR 750
- *SA Dangeville v France* [2003] STC 771

Legislation:

- *Taxes Consolidation Act 1997*
- *Value Added Tax Act 1972*

Literature:

- *Tax and Duty Manuals – Section 16*: www.revenue.ie/en/about/foi/s16/vat/index.html
- *Tax and Duty Appeals Manual*, May 2008, published by the Tax and Duty Appeals Committee, Office of the Revenue Commissioners

in such cases, prior to the main proceedings before an appeal commissioner or the court, a preliminary hearing should take place to decide if proper books and records have been kept or, in the absence of such records, the materiality of any omissions, before deciding on which party should bear the burden of proof.

Too onerous

There is now a considerable amount of jurisprudence that questions the validity of placing the burden of proof on a party where that party is unable to provide evidence to prove his/her case. In *Hanrahan*, the Supreme Court held that it would have been palpably unfair to require the plaintiff to prove something that was beyond his reach and that was peculiarly within range of the defendant's capacity of proof. This view was also endorsed by the European Court of Justice in cases involving unjust enrichment, theft and missing traders, where the burden of proof was held to be too onerous an obligation for the taxpayer.

The European Court of Human Rights has held that the lack of domestic remedies to protect any natural or legal person constitutes a breach of human rights (see *SA Dangeville v France*). While recourse to the Appeal Commissioners or the courts could offer a sufficient remedy, the placing of the burden of proof on a taxpayer will not ameliorate the position where the default position requires a compliant taxpayer to disprove a tax assessment.

The recommendation of the court in *Menolly Homes* to seek judicial review when challenging the basis upon which the Revenue Commissioners raise an assessment would be a regressive step in the administration of taxation. The cost associated with High Court litigation, together with the public nature of those proceedings, would act as major obstacles in contesting the imposition of a tax charge upon compliant taxpayers.

"Jurisprudence from the European courts, the European Convention on Human Rights and certain Supreme Court decisions have determined that, if the burden of proof on the asserting party is too onerous or palpably unfair, the burden can be reversed"

In seeking to avail of an exemption from tax, a taxpayer must prove entitlement. Correspondingly, in imposing a tax liability, the Revenue Commissioners must show that the charge is appropriate. Therefore, the burden of proof should fall on the party claiming the entitlement or justifying the charge respectively.

A taxpayer, in disputing a tax assessment, may seek judicial review. However, this procedure would be a regressive step in the administration of tax to the extent that a substantial number of taxpayers would be denied access to fiscal justice. Therefore, the Appeal Commissioners should be the appropriate forum in the resolution of the preliminary stages of a tax dispute.

The obligation on a taxpayer to provide evidence to disprove a tax assessment can be disproportionate and palpably unfair. Therefore, to preserve the level of fairness and to adhere to the developing jurisprudence in this area, it is submitted that the burden of proof should not automatically apply to the taxpayer. Where the obligation on a compliant taxpayer to provide evidence to reduce or abate a tax assessment is too onerous, the Appeal Commissioners and indeed the courts should consider reversing the burden of proof. G

Conor Kennedy is a Dublin-based barrister.

A BITTER

The amount paid out in medical negligence compensation has risen dramatically in recent years, and it appears that patients are becoming more aware of their legal right to presume that the care they receive is up to standard. Katie Field and Brian Morton eat an apple a day

A recent international study has shown that medical accidents are a significant cause of premature death. The study by the Institute of Medicine of the National Academy of Sciences in the United States found that between 44,000 and 98,000 US citizens die each year from preventable medical errors. The Department of Health in Ireland in its 2008 report entitled *Building a Culture of Patient Safety* noted this report and stated that "although there are no available statistics for Ireland in this context, it must be assumed that the rate of preventable error in Ireland matched those described".

The State Claims Agency in Ireland has recently released figures which demonstrate the number of claims submitted to the Clinical Indemnity Scheme by Irish patients. According to the *Medical Independent*, these figures show that in 119 claims in the period between 1 July 2009 to 31 December 2009, the Health Service Executive paid €14.86 million to the State Claims Agency to deal with medical litigation settlements. These figures show that the issue of medical negligence is becoming an increasing concern for medical practitioners, legal practitioners and victims of medical malpractice.

The Irish medical insurance association Medisec stated in its annual report for 2003 that it paid out over €32 million in Irish claims for medical negligence. The organisation said that this figure represented an increase of 300% from 2002. However, as there remains a lack of reliable statistics on the number of medical negligence claims taken in Ireland each year, it is difficult to determine whether the increase in medical negligence compensation claims is still as dramatic as the 300% stated by the organisation.

Doctors owe a duty of care to their patients and, in some circumstances, even to third parties. Under this duty of care, patients have a legal right to presume that the care and attention they are receiving is of a certain standard. If the care given by medical professionals falls below a certain standard and patients suffer loss or harm as a result of a breach of the duty of care owed by a doctor, then patients may be advised to take a case in medical negligence. Many academics and legal practitioners believe that, in medical negligence cases, the question of accountability is often the main reason that patients sue their doctor (see Michael Boylan, 'When doctors are bad for your health', *Law Society Gazette*, November 2002).

Medical negligence cases can result from medical professionals breaching their duty of care in a number of different areas, such as:

- Error or delay in diagnosis,
- Failure to act on test results,
- Error in performance of a procedure,
- Error in administrating treatment or administrating drugs,
- Inadequate follow-up, and
- Failure to fully communicate the risks associated with procedures.

In Ireland, recent successful medical negligence claims have been brought by, or on behalf of, patients who have suffered as a result of negligence in accident and emergency departments, surgical errors (including those caused by cosmetic or elective procedures), cancer misdiagnosis and neonatal conditions, including claims on behalf of children who were born with conditions such as cerebral palsy as a result of injury caused to them at birth.

Recent research

Recent American research has alarmingly shown a large amount of plaintiffs who had suffered unnecessary surgeries as a result of medical practitioner negligence, with hysterectomy procedures being the most common example of unnecessary procedures occurring in America. Research found that, in a sample of about 500 women, 70 of those women should not have received the surgery for any reason at all, with a further 350 hysterectomies being performed without any tests to determine whether the surgery was appropriate for the particular women (see Dale Steinreich, '100 Years of medical robbery').

In a recent English report entitled *An Organisation with a Memory*, the British chief medical officer stated that, in an average year, there were:

MAIN POINTS

- Irish claims for medical negligence
- Duty of care and how it is breached
- Succeeding in a claim of medical negligence

PILL

- 1,150 suicides by people who had been in contact with the mental health services in the year prior to their death,
- 125 deaths of women one year after giving birth,
- 20,000 deaths within 30 days of surgery, and
- 7,800 stillbirths and infant deaths.

The report further cited evidence from the 1991 *Harvard Medical Practice Survey* and the 1995 *Australian Health Care Study*. These reports indicated that between 3.7% and 16.6% of in-patient episodes resulted in adverse harmful effects and between 0.7% and 3% of in-patient episodes resulted in death or permanent disability (see Femi Oyebode, 'Clinical errors and medical negligence'). According to British research, the extrapolation of these figures to the NHS was reported to give between 314,000 and 1.4 million potential adverse events, based on 8.5 million in-patient episodes a year, and 60,000 to 225,000 potential instances of permanen t disability or death.

Medical negligence procedures

In order for a plaintiff to succeed in a claim of medical negligence, three conditions must be met:

1) The individual bringing the action must first show that (s)he was owed a duty of care,
2) It must be shown that this duty of care was breached by the failure on the part of the doctors/hospital to provide the required standard of care, and
3) It must be shown that this failure caused the injury or loss, which was both foreseeable and reasonably avoidable.

The current practice in Ireland is for plaintiffs to sue the consultant or most senior doctor looking after them, as well as the hospital itself.

In medical negligence, there are two distinct causes of action:

- Negligent diagnosis and/or treatment,
- Breach of the doctrine of informed consent.

The duty to disclose has emerged as a distinct cause of action in negligence. Liability for non-disclosure of a risk is assessed under medical negligence law, and the claim is independent of an allegation of a doctor's negligence in diagnosis or treatment, although, in reality, both causes of action are often linked.

Negligent diagnosis and treatment

The Irish courts apply the 'professional standard model' to all cases of medical negligence involving claims of negligent diagnosis or treatment. This professional standard test was laid down by the Supreme Court in the case of *Dunne v National Maternity Hospital*.

The Supreme Court stated that the practitioner must act with the reasonable care of a practitioner of equal specialist skill and care. This means that medical professionals will be judged to the standard of other equally skilled and trained medical professionals or experts in their particular field.

Plaintiffs must be aware also that if a doctor acts in a manner that is contrary to the general and approved practice, or takes a different or unusual course of action, the plaintiff must establish that this action is one that no medical practitioner of similar skill would have taken. Importantly, the courts have held that doctors are under a duty to keep up to date with new developments regarding treatments.

STATUTE OF LIMITATIONS

Under the *Statute of Limitations*, medical negligence claims are statute barred after two years as a result of the *Civil Liability and Courts Act 2004*. Plaintiffs must be warned that medical negligence claims are excluded from the scope of the *Personal Injuries Assessment Board Act 2003*. Under section 50 of the *PIAB Act*, the period of limitation is frozen for a time beginning on the date of receipt of an application of a personal injury claim by PIAB and ending six months after the date that PIAB issues an authorisation or waiver in respect of the claim. As a result of section 50 of the *PIAB Act*, up to a further 18 months could be added on to the time limits for many personal injury claims, except for claims involving medical negligence. This means that medical negligence claims have a period of limitation much shorter than ordinary personal injury claims. The consequences of the 2003 act can cause severe difficulties, as medical negligence claims are much more complicated and difficult to investigate than straightforward personal injury claims (see Michael Boylan, 'Time waits for no man', *Law Society Gazette*, October 2005).

LOOK IT UP

Cases:

- *Bolton v Blackrock Clinic* (Supreme Court, unreported, 23 January 1997)
- *Canterbury v Spence* (USA; 464 F2d 772 [DC Cir 1972])
- *Chester v Afshar* (Britain; [2004] UKHL 41)
- *Dunne v National Maternity Hospital* [1989] IR 91
- *Geoghegan v Harris* [2000] 3 IR 536
- *Reibl v Hughes* (Canada; [1980] 2 SCR 880)
- *Walsh v Family Planning Services* [1992] 1IR 496

Legislation:

- *Civil Liability and Courts Act 2004*
- *Personal Injuries Assessment Board Act 2003*

Literature:

- *An Organisation with a Memory* (Britain; Department of Health Expert Group, 2000)
- Michael Boylan, 'When doctors are bad for your health', *Law Society Gazette*, November 2002
- Michael Boylan, 'Time waits for no man', *Law Society Gazette*, October 2005
- Dale Steinreich, '100 years of medical robbery', http.mises.org
- Femi Oyebode, Clinical Errors and Medical Negligence, www.apt.repsych.org
- www.medisec.ie

It is clear from the Supreme Court decision in *Dunne* that it can be difficult for a plaintiff to succeed in medical negligence cases; however, there has been an increase in the number of successful claims in recent years.

Informed consent

The 'doctrine of informed consent' relates to the duty on doctors to disclose all relevant and material facts to patients before operating on patients. Doctors have a duty to advise, explain and disclose all medical information that will help a patient to be aware of the risks and consequences of the medical treatment and subsequently to give informed consent to such a procedure.

Under Irish law, doctors now owe a duty of care, not only regarding the diagnosis and treatment of patients, but also to adequately discussing the risks of procedures with patients. The Supreme Court first recognised the doctrine of informed consent in *Walsh v Family planning Services*.

> ***"Under Irish law, doctors now owe a duty of care, not only regarding the diagnosis and treatment, but also to adequately discussing the risks of procedures with patients"***

Regarding the doctrine of informed consent, there remain high levels of debate over whether the standard to be applied is that of the 'professional standard model' or whether the standard should be that of a 'reasonable patient'.

That is, there is debate as to whether the scope of the duty to disclose should be assessed according to what a reasonable patient would want disclosed in the given circumstances, and not according to what is the standard procedure regarding disclosure among the medical profession. The 'professional standard approach' adopted by Finlay CJ in *Walsh* was affirmed by the Supreme Court in the case of *Bolton v Blackrock Clinic*.

In the 2000 case of *Geoghegan v Harris*, Kearns J in the High Court clearly stated his preference of the 'reasonable patient' assessment of disclosure, as favoured by the courts in America and Canada. In particular, Kearns J mentioned the landmark US case of *Canterbury v Spence* and the Canadian case of *Reibl v Hughes*, where the courts held that the standards of disclosure should be set for medical practitioners by patients, rather than standards being set for doctors by doctors.

Causation and non-disclosure

In *Geoghegan*, Kearns J favoured the reasonable patient test and said that all material risks should be disclosed by doctors, and they must have regard to:

1) The severity of the consequences,
2) The frequency of risk, and
3) The plaintiff's particular circumstances prior to the surgery.

However, in *Geoghegan*, the plaintiff failed to recover damages because, while the defendant had breached the duty to disclose, the plaintiff had failed to establish causation between non-disclosure and the injury. In particular, the court referred to the evidence given that the plaintiff had been reluctant to attend pre-operation consultations. The issue of non-disclosure and causation is important, and plaintiffs must be aware that causation must be proved between the nondisclosure and the injury suffered.

The issue of informed consent and causation was discussed in detail by the House of Lords in *Chester v Afshar*, where the court accepted that a more patient-friendly approach should be applied, but the court highlighted the need to first set out clear guidelines to determine the application of a modified approach to causation in medical negligence cases. G

Katie Field is a trainee solicitor and Brian Morton is principal of the Dublin firm Brian Morton & Co.

Trying times

The powers available under part 11 of the *Broadcasting Act 2009* could have far-reaching financial consequences for sports governing bodies. Iain McDonald and Stephen D'Ardis drop and give us 20

On 30 April 2010, communications minister Eamonn Ryan announced his intention to add a number of major Irish sporting events to those that should be broadcast by free-to-air broadcasters (essentially meaning either RTÉ, TV3 or TG4). In doing so, the minister was exercising powers conferred on him by part 11 of the *Broadcasting Act 2009* to designate "events of major importance to society" as free-to-air in the public interest. The proposed designated events are:

- Provincial finals in the senior football and hurling championships,
- All-Ireland championship senior football and hurling quarter-finals and semi-finals,
- Ireland's games in the Six Nations Rugby Football Championship,
- European Rugby Cup matches, including qualifiers, pre-quarter-final stages, quarter-finals, semi-finals and final when an Irish team is participating, and
- The Cheltenham horseracing festival.

It is clear from media coverage on the subject that the most vocal opponent to the proposal has been the Irish Rugby Football Union (IRFU). The IRFU has argued that, should the proposal go ahead, they would stand to lose up to €12 million in revenue generated from the sale of broadcasting rights of Six Nations and Heineken Cup matches.

The minister has responded that the shortfall could be made up by increased sponsorship, while describing the designated events as "part of what we are as a nation, and their enjoyment should be available to all".

MAIN POINTS

- **Free-to-air sports broadcasts**
- **'Events of major importance to society'**
- **Part 11 of the *Broadcasting Act 2009***

He shoots, he scores

The *Broadcasting Act 2009* sets out the procedure that must be followed by the minister when seeking to designate major sporting events. The minister must:

- Consult with national broadcasters and the organisers of the event he intends to designate,
- Publish an appropriate notice of the proposed event on his website,
- Invite comments on the intended designation from members of the public,
- Consult with the Minister for Tourism, Culture and Sport, and
- Lay a draft of the order designating events before each House of the Oireachtas for approval.

In addition, the *Audiovisual Media Services Directive 2007* requires Ireland to inform the European Commission of the events to be designated, which may proceed to verify and approve such designation.

In deciding whether to designate certain events, the minister must consider whether the event has a special resonance and the extent to which it has a generally recognised cultural importance for the people of Ireland.

Interestingly, another factor that may be taken into account by the minister is the past practice or experience in relation to television coverage of similar events. This calls to mind a previous controversy caused by the classification of Ireland's qualifying matches for the soccer European Championships and World Cup as 'designated events'. It is worth noting that then, as now, the FAI, the IRFU and the GAA indicated to the minister at the time that they were opposed to the existence of such ministerial power, as it would undermine their bargaining position in relation to the sale of broadcasting rights, thus jeopardising a crucial revenue stream.

Bread and circuses

Few would argue with the contention that sport is of great societal importance and that it has an increasing influence on the minds of individuals and politicians alike.

The EU is one of the most vocal proponents of the positive influence of sport on society. The European Commission's 2007 *White Paper on Sport* declared that sport brings together the citizens of Europe by "reaching out to all, regardless of age or social

PIC: SPORTSFILE

Rugby: the boys love it

origin". The commission recognised that "sport makes an important contribution to economic and social cohesion and more integrated societies".

The commission's stated aspiration is that "all residents should have access to sport", an aim that has clearly been taken on board by the minister. It is a laudable goal to seek to ensure that those 'water-cooler moments' – such as Thierry Henry's infamous handball or Ronan O'Gara's drop goal in the 2009 Grand Slam decider – are available to the widest possible audience.

It has also been argued that, if governing bodies receive substantial public funding for various projects, then their major events should be shown for free. For instance, since the government reportedly contributed €190 million to the redevelopment of Lansdowne Road, shouldn't it be entitled to dictate that marquee rugby and soccer events should be free-to-air?

"The minister must consider whether the event has a special resonance and the extent to which it has a generally recognised cultural importance for the people of Ireland"

Losing possession

The main counter-argument to the minister's proposal is that additions to the list of designated events will reduce the pool of broadcasters that can realistically broadcast these events. This is due to the fact that, under the act, only "qualifying broadcasters" are entitled to be offered broadcasting rights to designated events by the existing rights' holders at relevant market rates. Qualifying broadcasters are defined as broadcasters who provide free television coverage of the event to at least 95% of the population of the state. It is argued that this will inevitably reduce the market value of the broadcasting rights to such events and undermine a vital revenue stream for the sports governing bodies affected.

Similar debate has arisen recently in England, with the proposal that the 'home' Ashes cricket series be added to the equivalent British list of designated events by the Department of Culture, Media and Sport. The England and Wales Cricket Board has stated that the anticipated loss of revenue from the sale of broadcasting rights could have a significant negative impact on funding for the sport at a grassroots level. Similar arguments have been advanced by the IRFU in relation to the funding of rugby at a grassroots level here. It has also argued that, at an elite level, if the Irish provinces do not receive sufficient funding, they will face serious challenges

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in attracting and retaining world-class players, causing serious difficulties in maintaining the outstanding success of recent years.

In response to these arguments, the minister has stated publicly that he is obliged under statute to prepare such a list. However, it should be noted that, under the act, there is no prescriptive condition obliging the minister to add to the list of designated events – he is only obliged to review the list once every three years.

Another concern voiced by one well-known rugby commentator is whether the inclusion of the Heineken Cup and the Six Nations in the list of designated events might open up a "legal hornets' nest" in relation to the existing contracts for these events between the IRFU and the relevant broadcasters.

To a certain extent, these concerns are addressed by section 168 of the act, which states that, where an event has been designated and the event organiser (such as the IRFU) and a qualifying broadcaster have not made an agreement allowing the broadcaster to provide free coverage of the event in the state, the qualifying broadcaster may apply to the High Court for an order directing the event organiser to give rights to the qualifying broadcaster, upon such terms as may be fixed by the High Court. In these circumstances, the High Court has the power to decide to whom, and in what proportions, monies should be paid in respect of the acquisition of rights to the event and, if necessary, adjust any existing agreement between an event organiser and a non-qualifying broadcaster.

It could be argued that, while this provision addresses the conflict between the rights of existing broadcasters and qualifying broadcasters, the redress provided is limited in scope, somewhat cumbersome, and undoubtedly costly.

Moving the goalposts

The act provides for little or no cross-checks or balances to the exercise of ministerial discretion in this area. The only room for judicial oversight is in determining the *quantum* of the payment that must be made by the qualifying broadcaster to the existing owner of the broadcasting rights, where the existing owner is required to offer these rights to the qualifying broadcaster at a "reasonable market rate" under section 164 of the act.

If broadcasters are unable to agree on what constitutes reasonable market rates with respect to television coverage of an event, either of the broadcasters may apply to the High Court in a summary manner for an order determining reasonable market rates for an event. Such an order can contain such consequential or supplementary provisions as the High Court considers appropriate.

This raises a key question: is this "reasonable market rate" the price that a qualifying broadcaster would have to pay if it entered into a bidding process on the open market, or is it the price that would be paid if only competing with other qualifying broadcasters?

We can look to England for guidance on this matter, in particular the case of *R v Independent Television Commission ex parte TV Danmark 1 Ltd*. Here, the House of Lords said that, in reality, public-service broadcasters would be unable to compete with subscriber channels in an open bidding process. They concluded that such a situation was essentially what the *Audiovisual Media Services Directive* intended to avoid, by protecting the public interest against the operation of market forces in relation to major sporting events.

If such a precedent were to be followed in Ireland, this would result in very little protection for existing broadcasting rights' holders of major sporting events – and event organisers such as the IRFU. Firstly, the market value of the broadcasting rights for these events would drop dramatically. Secondly, the act does not expressly provide for an appeal mechanism against the decision of the minister.

As such, the only obvious avenue of redress for any affected party (such as those broadcasters who hold existing contracts in relation to the newly designated events) would be an application for judicial review of the minister's decision. Clearly, this would be a difficult case to make, given the minister's express powers under the national and European legislation. Additionally, given the potentially serious financial implications of the minister's proposals on sports governing bodies, it is unusual that there is no express provision for appeal contained in the act.

The ball's in your court

Whether you consider that the public interest should take precedence over the commercial rights of broadcasting rights' holders is a matter of opinion, and sure to be one of ongoing debate.

However, while this debate continues to rage, it can certainly be said that the minister's powers under part 11 of the act have far-reaching financial consequences for sports governing bodies, who have limited grounds for appeal once an event has been designated as having major importance to society.

In these circumstances, it is important that the minister exercises his powers fairly and proportionately, bearing in mind not only the public interest, but the commercial interests of sports' governing bodies and the implications that may have on the funding of sport at all levels. G

Iain McDonald and Stephen D'Ardis are commercial solicitors at Eversheds O'Donnell Sweeney.

LOOK IT UP

Cases:

- *R v Independent Television Commission ex parte TV Danmark 1 Ltd* (Britain; [2001] UKHL 42)

Legislation:

- *Audiovisual Media Services Directive 2007*
- *Broadcasting Act 2009*

Midlands honour for senior practitioners

At the Midlands Bar Association dinner, in honour of three solicitors who have served the legal profession for 50 years, were *(front, l to r)*: Charles Kelly with Aidan O'Carroll, Denis Johnston and Thomas Shaw (celebrating their golden jubilee) and Mary Ward. *(Back, l to r)*: Brian O'Meara, Anna-Marie Kelleher, John Shaw, Patricia Shaw, Anthony Barry, Veronica Kelly, Richard Whelehan, Susan Fay, Edward Tynan, Marian Stronge, Mark Cooney and Judge John O'Donnell

Attending the Midlands Bar Association event were *(front, l to r)*: Celine Johnston, Yvonne Shaw and Myrl O'Carroll. *(Back, l to r)*: Denis Johnston, Tom Shaw and Aidan O'Carroll

Meeting Miriam

PIC: JASON CLARKE PHOTOGRAPHY

Prime Time's Miriam O'Callaghan was a special guest at the Law Society's parchment ceremony on 29 April. The qualified solicitor and top TV broadcaster won over her audience in her inimitable friendly style. Prior to speaking with the newly-enrolled solicitors, the *Gazette* camera captured Miriam with *(l to r)*: senior vice-president John Costello (who spoke and presented the parchments in the unavoidable absence of the president, Gerard Doherty), past-president Philip Joyce and director general Ken Murphy

PIC: FRANK DOLAN

Two prominent Westport lawyers, Judge Seamus Hughes (recently appointed judge of the District Court) and Gerard Doherty, solicitor (president of the Law Society) received presentations from Westport solicitors following a dinner held in their honour. *(Front, l to r)*: Anne Doherty, Gerard Doherty, Judge Seamus Hughes, Mrs Marie Hughes. *(Back, l to r)*: David Scott, Patrick Durcan, Mairead Bourke, Bob McArdle, Michael Browne, James Ward, Sheila Ryan, James Hanley and Dermot Morahan

Society pays tribute to Ruairí Dunne

Trainee solicitor Ruairí Dunne sadly passed away on 31 December 2009 from cystic fibrosis. Ruairí was indentured to Garrett J Fortune & Company, Cavan, and was within months of qualifying. Unfortunately, he became extremely ill in 2009. He had been on the active list for a double-lung transplant at the time of his death. His passing is a major loss to the legal community. Our sincere condolences go to his family, who have many ties with the Law Society. Ruairí's sister Sinead (solicitor) is married to Andrew O'Brien (Law Society claims administrator), while Ruairí's uncle Cormac Dunne is a judge of the Circuit Court.

Law School chaplain Brother Richard Hendrick conducted a moving memorial service in Ruairí s memory on 6 May 2010 at the Church of St Mary of the Angels, Church Street, Dublin. Present were 175 family, friends, colleagues, fellow trainees, law school staff and other members of the legal community. His father Raymond encouraged those present to consider becoming organ donors.

Later that evening, the family attended the parchment ceremony of Ruairí's tutorial group, where Law Society President Gerard Doherty opened proceedings by welcoming the Dunne family and paying tribute to Ruairí's notable academic achievements. *Ar dheis Dé go raibh a anam.*

PIC: JASON CLARKE PHOTOGRAPHY

Following a moving memorial service in memory of trainee solicitor Ruairí Dunne, family, colleagues and friends attended the parchment ceremony on 6 May 2010 at Blackhall Place. *(Back, l to r)*: Ruairí's tutorial group (including Amy Clifford, Jennifer Devereux, Michelle Drury, Olwen Griffith, Rebecca Hearst, Thomas Kennedy, Clodagh MacNamara, James McGuinness, Deirdre Madden, Majella Mulroy, Brendan O'Connor and Sarah Woods). *(Front, l to r)*: Norville J Connolly (Law Society of Northern Ireland president), Mr Justice Joseph Finnegan (Supreme Court), Ruairí's parents Raymond and Maura Dunne, Gerard Doherty (Law Society president), Ruairí's brother Joseph Dunne, his sister Sinead Dunne, TP Kennedy (director of education) and Ken Murphy (director general)

ALL PICS: GARRETT FITZGERALD PHOTOGRAPHY

At the Waterford Law Society annual dinner in Waterford Castle on 16 April 2010 were *(front, l to r)*: Rosa Eivers, Fiona FitzGerald, Jill Walsh, Elizabeth Pope (PRA), Elizabeth Walsh (president, Limerick Bar Association), Dr Fiodna Cosgrove (president, Waterford Clinical Society), Bernadette Cahill (president, Waterford Law Society), Gerard Doherty (president, Law Society), Helen Bowe O'Brien, Morette Kinsella, Dr Michael Howlett (head of Department of Humanities, WIT), and Elizabeth Dowling. *(Middle, l to r)*: Ken Murphy (director general, Law Society), Eamon Kiely (regional manager, Courts Service), Derry O'Carroll, Eamon Murray (president, Southern Law Association), Jim Hally, Niall King and Superintendent Chris Delaney. *(Back, l to r)*: Judge David Kennedy, Judge Terence Finn, Mortimer Kelleher (SLA), Graham Farrell, Ken Cunningham and Tom Murran (Council member, Law Society)

Niall Rooney (county registrar, Waterford) and Graham Farrell

Fiona FitzGerald, Leona McDonald, Ellen Hegarty, Rosa Eivers, Gillian Murphy and Jill Walsh added lots of colour to Waterford Law Society's annual dinner

Diploma in Commercial Litigation launched

Mr Justice Peter Kelly launched the Diploma in Commercial Litigation on 20 April 2010, which was attended by *(l to r)*: Des Peelo (Peelo & Partners), John Kennedy BL, Freda Grealy (diplomas manager, Law Society), Mr Justice Peter Kelly and Owen O'Sullivan (partner, William Fry Solicitors)

PIC: JASON CLARKE PHOTOGRAPHY

Finuas conferring

At the conferring of the Post Graduate Certificate in Learning, Teaching and Assessment (joint collaboration with DIT and CPD Focus Skillnet) were Michelle Ní Longáin (chairman, Education Committee), Dr Frank McMahon (director of academic affairs, DIT) and Tracey Donnery (Finuas programme manager), photographed with the conferees and their lecturers

Calcutta Run is on a roll

Under starter's orders
Senator David Norris fires the starting gun to get the Calcutta Run 2010 off to a flying start

The Guinness Jazz Band was hopping, David Norris was dancing in the garden, and the smell of barbecue charcoals drifted through the air as runners strolled through the gates of Blackhall Place on 15 May before this year's Calcutta Run, *writes Belinda O'Keeffe*.

The buzz that rippled through the atmosphere was palpable as almost 900 athletes prepared to take their place at the starting line of the 10k run. The sun seemed to approve, lending its support to this, the 12th year of the annual charity event.

There was a good mix of solicitors, trainees, Law Society staff, families, friends – and even a 'chicken' – who set off from the Society's headquarters to run through the Phoenix Park before meandering back to Blackhall Place to be met by crowds of well-wishers. The after-party was just as successful, with hungry and thirsty athletes consuming just over 800 burgers and 1,140 pints of cool liquid refreshment!

Given the economic climate, the organising committee was acutely aware of the fundraising challenge that would be faced by the runners and their sponsors this year. Once again, expectations were exceeded, with a total of €140,000 being raised for GOAL and the Peter McVerry Trust.

The committee ensures that every cent raised goes to both charities. This is due in no small part to the generous support of the event's sponsors, namely Irishjobs.ie (the main sponsor), Bank of Ireland, which came on board this year, and the valuable support of DX, File Stores, Greyhound Recycling and 1escape health club.

Thanks to everyone who participated – runners, walkers and helpers – and to the families and friends who sponsored participants, or who made direct donations to the charity. Keep your diary free for next year!

Sunday Game presenter Michael Lyster, with 1escape fitness instructors, get the crowd warmed up

Janice Butler and Sandra Byrne

A team from commercial law firm McDowell Purcell Solicitors took part in the Calcutta Run, *(l to r)*: Thomas O'Malley (managing partner), Claire Hayes (trainee), Philip Allen (head of marketing) and Karina Cotter (trainee)

Fintan Phelan and Mick Slein

Law Society president Gerard Doherty and Senator David Norris

Law Society annual dinner 2010

Law Society's annual dinner pays tribute to Mayo

The Law Society held its annual dinner in the Presidents' Hall, Blackhall Place, on 21 May. A 'Mayo' theme echoed the background of President of the Law Society Gerard Doherty. The guest of honour and guest speaker was the Minister for Justice and Law Reform Dermot Ahern. Among the special guests were the British ambassador to Ireland Julian King, the Minister for Tourism, Culture and Sport Mary Hanafin, Fine Gael's spokesperson on justice, Charles Flanagan, judges of the Supreme Court an d High Court, Garda Commissioner Fachtna Murphy, President of the Law Society of Northern Ireland Norville Connolly and director of the Bar Council Jerry Carroll. *(From l to r)*: junior vice-president John P Shaw, Minister for Justice and Law Reform Dermot Ahern, President of the Law Society Gerard Doherty, senior vice-president John Costello and director general Ken Murphy

Law Society President Gerard Doherty and his sister Anne Doherty

ALL PICS: LENSMEN

President of the Law Society of Northern Ireland Norville Connolly with Law Society President Gerard Doherty

Junior vice-president John P Shaw, Minister for Tourism, Culture and Sport Mary Hanafin, President of the Law Society Gerard Doherty and senior vice-president John Costello

Law Society President Gerard Doherty with his sons Ronan *(left)* and Kevin

Past-president Elma Lynch, Law Society President Gerard Doherty and past-president Geraldine Clarke

Garda Commissioner Fachtna Murphy and Law Society President Gerard Doherty

Deputy director general Mary Keane and Emeritus Professor of Theology, TCD, Sean Freyne (who captained the victorious Mayo minor football tea m in the 1953 all-Ireland final)

student spotlight

Irish duo battled bravely in Hong Kong

White-collar crime was the subject, and Hong Kong was the location for the 25th annual Louis M Brown International Client Counselling Competition at Hong Kong University in April. Ireland was represented by Liam Crowley (Healy Crowley & Co) and Joseph McCarthy (Wolfe & Co) from the Law Society, Cork, with their coach, Alison Gallagher.

In all, 22 countries participated – the largest field to date. Ireland has a strong track record in the competition, and so it was with some fervour that Liam and Joe set about trying to uphold that proud tradition. Over three days, the Irish team advised, counseled and instructed the most contrary of 'clients' on issues as diverse as extradition, theft, and internet fraud in their effort to be among the top-ranking nations.

Day one saw Ireland drawn in a tough 'group four', with Indonesia, India and the USA. The team performed well, winning the group. Canada and Malaysia proved tough opponents in the second round.

At the Louis M Brown International Client Counselling Competition in Hong Kong were *(l to r)*: Jody Mosten (Louis M Brown Client Counselling Competition), Joseph McCarthy (Wolfe & Co), Forrest S Mosten (Louis M Brown Client Counselling Competition), Alison Gallagher (team coach, Law Society of Ireland) and Liam Crowley (Healy Crowley & Co)

The Irish team was narrowly beaten into second place by the North Americans – seeded third for the semi-finals on a split decision.

The Irish team's overall performance was strong enough, however, to secure it a semi-final spot against New Zealand and Cambodia. Alas, Liam and Joe's good run came to an end against New Zealand, which ran out the eventual winner. The Irish trio took some solace from the fact that the USA, whom they beat on the first day, were placed third.

Overall, it was a strong showing by Ireland. The team thanks the Law Society for the opportunity to travel to Hong Kong, coach Allison Gallagher, and Pat Mullins, Melanie Evans and Michelle Cronin (coaching).

Gratitude also goes to the families and classmates in the Law Society, Cork, who contributed so generously to the team's fundraising efforts. G

practice notes

COMPANIES REGISTRATION OFFICE SEARCHES

The Business Law Committee has considered an issue raised by one of our members in relation to Companies Registration Office (CRO) searches.

The information filed with the CRO is available for inspection by the public, either over the counter at the CRO, by postal request, or online on the web-search facility available on its website, www.cro.ie. We understand from the CRO that any search carried out on its web-search facility is against the CRO live database. As such, the information is up to date as at the time the search is carried out.

The CRO also supplies data in bulk form under licence to high volume users of its data, including firms of law searchers. The data is basic company information, updated on a daily basis. The recipient of the data may reformat the information and present it in such manner as it may wish. Most service providers choose to reproduce the information in the same or similar format as the CRO.

While the risk may be minimal, if a search is obtained from a service provider's own database instead of the CRO, the integrity of the data is also dependent on the software systems used by the service provider and cannot be guaranteed. Furthermore, the data supplied in bulk is not updated on a live basis. This means that any search carried out on a database of a service provider would be as of close of business on the previous day. If a search is made online using the CRO's web-search facility, the data is live and current as at the time the search is done.

It seems to us that practitioners should obtain the most up-to-date searches as may be available. As the facility is available to do the searches in 'real time' on the CRO website, this should be done on the day of closing, as close as practicable to the time of closing.

Where the searches are being carried out by law searchers, they should be requested to do the search at the CRO, either at the counter, or online using the CRO web-search facility.

Business Law Committee

LAW SEARCHERS

The Business Law Committee has considered the liability for errors and omissions in searches carried out by independent firms of law searchers. Some of these firms describe themselves on their notepaper or on websites as being 'fully bonded'. It is not clear whether this refers to a bonding scheme similar to that which is in operation in, for example, the travel agent industry or whether it simply refers to professional indemnity insurance. Search firms do carry PI insurance cover, but it appears that the amount of the cover is often relatively low: in many cases it may not be greatly in excess of €3 million. Insurance cover at this level might be inadequate to cover claims arising out of errors or omissions in searches in many large corporate, property or banking transactions. It would be prudent for practitioners to ascertain the level of cover maintained by searchers they retain.

If a substantial claim arose, it is quite conceivable that the party suffering loss as a result of reliance on an inaccurate search would claim against its solicitors who ordered the searches. If the law searcher is the agent or subcontractor of the law firm that requisitions the search, the law firm might indeed have a liability to the client. For this reason, practitioners might consider advising clients of the level of cover carried by search agents and also consider including, in appropriate cases, a provision in their terms of engagement with clients excluding or limiting liability for loss arising from errors and omissions in searches carried out by independent firms of law searchers.

Business Law Committee

legislation update

17 April – 13 May 2010

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

Circuit Court Rules (Land and Conveyancing Law Reform Act 2009) 2010
Number: SI 155/2010
Contents note: Amend the *Circuit Court Rules 2001* (SI 510/2001) by the insertion of order 46A to facilitate the operation of the *Land and Conveyancing Law Reform Act 2009*.
Commencement date: 15/4/2010

District Court (Land and Conveyancing Law Reform Act 2009) Rules 2010
Number: SI 162/2010
Contents note: Amend the *District Court Rules 1997* (SI 93/1997) by the insertion of order 93A to facilitate the operation of the *Land and Conveyancing Law Reform Act 2009*.
Commencement date: 17/5/2010

Rules of the Superior Courts (Land and Conveyancing Law Reform Act 2009) 2010
Number: SI 149/2010
Contents note: Amend the *Rules of the Superior Courts* (SI 15/1986) by the insertion of order 72A to facilitate the operation of the *Land and Conveyancing Law Reform Act 2009*.
Commencement date: 10/5/2010 subject to paragraph 2 relating to registration of a *lis pendens* containing the particulars required by law before 1/12/2009 for such registration that is received after 1/12/2009

ACT PASSED

Criminal Justice (Money Laundering and Terrorist Financing) Act 2010
Number: 6/2010
Contents note: Provides for the transposition of the *Third Money Laundering Directive* (2005/60/EC) and the associated implementing directive 2006/70/EC into national law. Provides for the repeal and re-enactment of all current money-laundering legislation, principally contained in the *Criminal Justice Act 1994*. Increases the obligations on a wide range of legal persons, including credit and financial institutions, lawyers, tax advisers and others in relation to money laundering and terrorist financing.
Date enacted: 5/5/2010
Commencement date: Commencement order(s) to be made (per s1(2) of the act

SELECTED STATUTORY INSTRUMENTS

Defamation Act 2009 (Press Council) Order 2010
Number: SI 163/2010
Contents note: Recognises the Press Council of Ireland as the press council for the purposes of the *Defamation Act 2009*, s44, schedule 2.
Commencement date: 21/4/2010

Finance Act 2010 (Commencement of Section 44) Order 2010
Number: SI 196/2010
Contents note: Appoints 10/5/2010 as the commencement date for section 44 of the act. Section 44 provides for the extension of a scheme of accelerated capital allowances for expenditure incurred by companies on certain energy-efficient equipment bought for the purposes of the trade.

Medical Practitioners Act 2007 (Commencement) Order 2010
Number: SI 150/2010
Contents note: Appoints 1/5/2010 as the commencement date for all remaining sections of the act. 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 Paul Derham, a solicitor of Daly Derham & Company, Solicitors, formerly of 32 Washington Street, Cork, now of 1a Washington Street West, Cork, and in the matter of the *Solicitors Acts 1954-2002*, pursuant to an application by a former client of the respondent solicitor

On 18 October 2005, the Solicitors Disciplinary Tribunal found that there had been misconduct on the part of the respondent solicitor in his practice as a solicitor in respect of the following complaints:

a) Delayed handing over of the applicant's file to the applicant's new solicitors, and
b) Failed to deal with the Law Society's correspondence in a timely manner.

The tribunal ordered that the respondent solicitor:

a) Be advised and admonished,
b) Pay a sum not exceeding a gross sum of €3,500 in respect of the applicant's expenses incurred in attending before the tribunal, with a credit for IR£1,000 that a partner in the respondent solicitor's firm gratuitously and honourably gave to the applicant in December 2002.

The applicant appealed against the finding of the Solicitors Disciplinary Tribunal that no *prima facie* case for enquiry was disclosed in respect of an allegation that the solicitor had failed to progress the case. On 6 March 2006, the High Court affirmed the decision of the tribunal. The applicant appealed the order of the High Court and, on 17 July 2009, the Supreme Court dismissed the appeal and affirmed the order of the High Court.

In the matter of Joseph W Fahey, a solicitor previously carrying on practice under the style of Joseph Fahey & Co, Solicitors, Mountbellew, Ballinasloe, Co Galway, and in the matter of the *Solicitors Acts 1954-2008* [6687/DT67/09]
Law Society of Ireland (applicant)
Joseph W Fahey (respondent solicitor)

On 16 February 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to ensure there was furnished to the Society an accountant's report for the year ended 28 February 2008 within six months of that date, in breach of regulation 21(1) of the *Solicitors' Accounts Regulations 2001* (SI no 421 of 2001) in a timely manner,
b) Failed to ensure there was furnished to the Society a closing accountant's report up to and including the date of cessation of his practice on 4 April 2008 (within six months of that date), in breach of regulation 26(2) of the *Solicitors' Accounts Regulations 2001* (SI no 421 of 2001) in a timely manner.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €1,000 to the compensation fund,
c) Pay a contribution of €1,000, being part of the costs of the Law Society of Ireland.

In the matter of Michael Browne, a solicitor practising as Michael Browne, Solicitors, James Street, Westport, Co Mayo, and in the matter of the *Solicitors Acts 1954-2008* [2072/DT116/09]
Law Society of Ireland (applicant)
Michael Browne (respondent solicitor)

On 23 February 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he failed to ensure there was furnished to the Society an accountant's report for the year ended 31 December 2008 within six months of that date, in breach of regulation 21(1) of the *Solicitors' Accounts Regulations 2001* (SI no 421 of 2001) in a timely manner.

The tribunal ordered that the respondent solicitor:

a) Do stand advised and admonished,
b) 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.

In the matter of James J O'Donoghue, solicitor, carrying on practice as James J O'Donoghue & Company, Solicitors, Shournagh House, Tower, Blarney, Co Cork, and in the matter of the *Solicitors Acts 1954-2008* [4697/DT19/09]
Law Society of Ireland (applicant)
James J O'Donoghue (respondent solicitor)

On 9 March 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) In a conveyancing matter identified in the Law Society's investigation report, deeds were updated from April 2006 to October 2007, notwithstanding the fact that the solicitor was in funds to pay the stamp duty at the correct time. The PD form was updated to 19 October 2007.
b) In another conveyancing matter identified, deeds were updated in order to reduce the penalties from €75,056 to €46,656, and the PD form in that matter, which was identified in the investigation report, was altered to 15 November 2007, although the sale closed in June 2006.
c) In another conveyancing matter, stamp duty of €19,139 remained unpaid from a transaction that closed in May 2007, notwithstanding that the money remained in the solicitor's account.
d) In a transaction involving the purchase of lands, funds of €20,000 remained in the ledger although this sale closed in January 2007.
e) In another matter identified in the investigation report, deeds were not stamped until January 2007, although the sale closed in July 2004 and penalties were paid from funds remaining in the client ledger, notwithstanding the fact that the solicitor was in funds to stamp the deeds at the correct time.
f) The solicitor acted for both vendor and purchaser in new house transactions identified in the investigation report in

apparent breach of SI no 85 of 1997, the *Solicitors (Professional Conduct and Discipline) Regulations of 1997*.

g) Section 68 letters were inserted into files requested for inspection. These section 68 letters had never been submitted to the clients and the solicitor admitted that they were prepared for the purposes of the inspection.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €7,000 to the compensation fund,
c) 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.

The tribunal noted the respondent solicitor's undertaking to discharge the Law Society's costs in respect of the investigation of the respondent solicitor's practice by the Society's investigating accountant on 9 December 2009.

In the matter of Peter Jones, a solicitor of Peter D Jones & Co, Solicitors, Church Lane, Mullingar, Co Westmeath, and in the matter of the *Solicitors Acts 1954-2008* [3976/DT16/09]
Named client of the respondent solicitor (applicant)
Peter Jones (respondent solicitor)

On 11 March 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he failed to register the applicant's ownership of sites since 2004.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €4,000 to the compensation fund,
c) Pay 50% of the costs of the applicant, as taxed by a taxing master of the High Court, in default of agreement.

In the matter of Patrick J Madigan Senior, a solicitor practising as a consultant in Madigans Solicitors, 167 Lower Kimmage Road, Dublin 6, and in the matter of the *Solicitors Acts 1954-2002* [2046/DT15/06]
Law Society of Ireland (applicant)
Patrick J Madigan (respondent solicitor)

On 25 March 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to pay beneficiaries the amounts due to them in a timely manner,
b) Misled the Society in his letter of 7 December 2004 indicating that he had sent a cheque of €4,222.75 to a named beneficiary, when this was not in fact done until June 2005.

The tribunal ordered that the respondent solicitor do stand admonished and advised.

The tribunal made no order in respect of monetary fine or the Law Society's costs.

Further, the tribunal, in making this order, was mindful of the fact that the respondent solicitor had made restitution in this matter in the following manner:

a) Paying interest to the beneficiaries of the estate,
b) Waiving his legal fees due by the estate,
c) Refunding to the estate rent paid,
d) Paying a fine to the Law Society of Ireland,
e) Waiver of costs in the High Court appeal by the Law Society.

In the matter of Margaret AM (otherwise Mairead) Casey, practising as Casey & Co, Solicitors at North Main Street, Bandon, Co Cork, and in the matter of the *Solicitors Acts 1954-2008* [8372/DT121/2009]
Law Society of Ireland (applicant)
Margaret AM (otherwise Mairead) Casey (respondent solicitor)

On 30 March 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

a) Up to the date of swearing of the affidavit of the Society on 23 November 2009, failed to comply with her assurance given to the Society by letter dated 21 July 2009 that she would send the complainant's file directly to the complainant's new solicitors,
b) Failed to reply to the Society's letters dated 8 June 2009, 22 June 2009, 23 July 2009, 6 August 2009 and 21 August 2009,
c) Failed to attend or arrange to be represented at the meeting of the Complaints and Client Relations Committee on 15 September 2009, despite having been notified by letter dated 7 September 2009 that she was required to attend the said meeting or to arrange representation,
d) Showed scant regard for the Society's statutory obligation to investigate complaints,
e) Through her conduct, effectively prevented the Society from resolving the matter,
f) Showed a complete disregard for her former client the complainant.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €1,000 to the compensation fund,
c) Pay 50% of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court, in default of agreement. G

firstlaw update

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

COMMERCIAL

Contract

Agreement for sale of property – planning permission – specific performance – whether the agreement between the parties was in the nature of a contract for sale or was an option to purchase.

The plaintiffs sought specific performance of an agreement entered into with the defendants in 2005 for the sale of certain development lands. That agreement contained a number of conditions regarding planning permission and development. The plaintiffs had applied for and obtained planning permission for 130 homes, and not 150 as anticipated. The plaintiffs submitted that, in accordance with the agreement, the defendant was obliged to purchase the property within two months of the date of the issuing of the planning permission. However, almost a year passed before the plaintiffs called on the defendants to complete the sale. The defendants informed the plaintiffs that they did not propose to proceed with the contract, on the basis that the planning permission had not been granted on terms that were 'satisfactory to him' in accordance with special condition 7(c) of the agreement. The defendants continued to maintain that argument and essentially submitted that the mode of compliance with part V of the *Planning and Development Acts 2000-2002*, which was a condition of the planning permission, was never ascertained. The defendants submitted that the plaintiffs had proposed that the part V stipulation of providing social and affordable housing to the local authority would be met by the provision of lands other than the subject of the sale. The plaintiffs submitted that the first-named defendant accepted the terms of the permission and that it was satisfactory to him and, consequently, the plaintiffs sought specific performance of the agreement. The defendants submitted that the agreement was both conditional and an option agreement, the terms of which were never fulfilled.

MacMenamin J refused the relief sought, holding that, having regard to the evidence adduced and, in particular, the first-named plaintiff's concession in his own evidence that the first-named defendant never actually expressed satisfaction with the entire planning permission as granted, the full term and consequences of the permission was never sufficiently identified and consequently the deal, such as it was, was not as a matter of fact capable of specific performance. Furthermore, having regard to the conditions of the agreement, the purported contract was in fact an option agreement. It gave latitude to the vendor and purchaser to proceed or not to proceed on certain contingencies. The parties never achieved consensus on an essential term of the agreement. The agreement as a whole was conditional on the satisfaction of the defendant as purchaser, and the option to purchase was based on the fulfillment of a prior condition that had not been fulfilled. Consequently, the contract was not enforceable.

***Devereux & Anor (plaintiffs) v Goff and Anor (defendants)*, High Court, 18/8/2009** [JIC 1803]

CRIMINAL

Sentence

Violent disorder – endangerment – rehabilitation – whether the trial court erred on principle in imposing a five-year sentence without any portion of that sentence suspended in relation to the offence of violent disorder, committed by a young man with no previous convictions.

The applicant pleaded guilty to one count of violent disorder and one count of endangerment, both offences arising out of the same incident, which involved the throwing of petrol bombs and general violent behaviour towards a group from Northern Ireland marching on O'Connell Street. The applicant cooperated fully with the gardaí; he was 18 years old at the time of the offence and had no previous convictions. The applicant sought leave to appeal against the severity of the sentence imposed by the trial judge, being a sentence of five years' detention in respect of count no 1 and three years in respect of count no 2. It was submitted on behalf of the applicant that the trial court placed too much emphasis on the nature of the offence and failed to have adequate regard to the circumstances of the applicant, including his young age at the time.

The Court of Criminal Appeal allowed the appeal, holding that, in all the circumstances, there was an error of principle by the trial judge in analysing the particular circumstances of the applicant, in not putting enough weight on the circumstances, and in not suspending a portion of the sentence in the hope of inducing the applicant, who was a young man, not to get involved in further criminality. The sentence of five years' imprisonment was entirely appropriate, but the last two years will be suspended for a period of two years on condition that the applicant be of good behaviour, live with a member of his family, and report weekly to a local garda station.

***Ciaran Maguire (applicant) v DPP (respondent)*, Court of Criminal Appeal, 19/2/2008** [2 JIC 1906]

IMMIGRATION AND ASYLUM

Judicial review

Leave application – whether the decision maker failed to take into account the applicant's claim for refugee status based upon imputed political opinion – country of origin documentation.

The applicant, a Nigerian citizen, recounted in her standard application for refugee status questionnaire events in her village involving a masquerade, potential sacrificial rites, and captivity. She stated that two men took her to a village and, in the days she was there, she heard shooting that she was told was due to civil war in the River State area. She further stated that police allegedly had entered her village to arrest youths and supporters of the political group AD, and villagers had been forced to hide in the bush. She was taken to Lagos, given a sleeping tablet, arrived in Ireland and applied for asylum. In her interview, she repeated her concerns regarding her intended sacrifice and her account of youths thought to be AD supporters being arrested. The applicant didn't state that she shared the political views of AD and neither was there anything

said from which it might have been inferred that she felt she was at risk of persecution on basis that she might be associated with AD. The s13 report of the Refugee Applications Commissioner was sceptical of the truth of the applicant's claim and concluded that the applicant should not be declared a refugee. Subsequently, it was submitted in her form 2 notice of appeal that she had a well-founded fear of persecution due to the severe fighting that had taken place in her village between AD supporters and members of the Ateke group. The applicant maintained that anyone from that region would have been identified as a supporter of AD and that the applicant would therefore be at grave risk of being killed by the Ateke group if returned to Nigeria. Submissions were furnished wherein reference was made to a number of cases dealing with applicants who had protested a fear of persecution from militia groups fighting in Nigeria and newspaper cuttings relating to the alleged abduction of the applicant's father. The tribunal member's report that followed concerned itself solely with the applicant's claim based on tribal ritual and dismissed the country of origin information as being immaterial to the claim he was considering.

Irvine J granted leave to apply for judicial review, holding that the court found that it is certainly arguable that the decision maker failed to take into account, in coming to his conclusion, the applicant's claim for refugee status based upon the political opinion imputed to her as a supporter of AD. The court further concluded that the applicant made out a reasonable case to maintain that the first-named respondent did not consider the relevant country of origin documentation material to her claim for asylum status based upon her alleged political opinion (real or imputed) as a supporter of AD.

***J (applicant) v Refugee Appeals Tribunal & Anor (respondents)*, High Court, 26/6/2009** [6 JIC 2604]

PLANNING AND DEVELOPMENT

Judicial review

Certiorari – *administrative law – European law – waste and landfill – restoration of site – granting of planning permission – fair procedures – objective bias – role of EPA – whether respondent failed to consider remediation issues – whether decision by respondent* ultra vires – Local Government (Planning and Development) Acts 1963, 1992 – Planning and Development Act 2000 – Waste Management Act 1996.

The applicants had brought proceedings against An Bord Pleanála seeking to have an order of the board granting planning permission quashed on a number of grounds. The development in question was a proposed landfill development in Usk, Co Kildare. The applicant in previous proceedings had been successful in having a previous grant of permission quashed, and the matter had been remitted to the board for consideration. The board, after further consideration, granted permission for the development for a second time, and the applicants instituted judicial review proceedings. A number of claims were made by the applicants. It was contended that the board was guilty of objective bias and had failed to address the non-implementation of a previous order of the court under section 160 of the *Planning Acts*, which directed remediation works to be carried out prior to the institution of the development. Further allegations were made that the board had failed to address itself to relevant environmental considerations that should by law have been contained in the permission, and that the board had unlawfully failed to comply with the European Community environmental directives applicable to the development.

MacMenamin J granted the relief sought and quashed the board's order, holding that the evidence established objective bias on the part of four out of the six decision makers of the board by way of pre-judgment of the same issue. It had not been justified, as the board had contended by the defence of legal duty. There had been environmental and planning consequences arising from the restoration of the site (in compliance with a previous court order) that the board had failed to address. The board had failed to address itself appropriately to its own jurisdictional remit and to ensure that highly relevant planning matters, such as noise and dust, were the subject of conditions in the permission granted. The question of environmental pollution caused by construction of the facility fell to be dealt with by the board. The landfill liner question was a construction issue. The board failed to deal with it and was in breach of its duties under the *EIA Directive*. The board should not have been over-respectful of the perceived statutory remit of the EPA, as exercised in the related waste licence. The order of *certiorari* sought would be granted.

***Usk and District Residents' Association Limited (applicant) v An Bord Pleanála and Others (respondents)*, High Court, 8/7/2009** [7 JIC 0802]

PRACTICE AND PROCEDURE

EU law

Company law – equity and trusts law – securities – fraud – investments – powers of Commercial Court judge to manage cases – breach of trust – breach of prospectus – stay pending determination of proceedings – European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2003 – *Directive 85/611 EC, as amended* (UCITS Directive) – *order 63A, rule 5*, Rules of the Superior Courts – *whether cases would be linked.*

Proceedings were instituted in a number of cases arising out of the collapse of Bernard L Madoff Investment Securities LLC, an investment service controlled by a disgraced and imprisoned financier. The respective plaintiffs were investors in funds maintained by the first-named defendant. As a result of the collapse, the investors lost very substantial sums, and the proceedings were brought with a view to recovering those funds. In the context of the multiplicity of litigation arising from the collapse, two applications were before the court, where an order was sought staying the proceedings pending a determination by the court of the proceedings. The issue arose as to the proper course of action that the court would adopt when confronted with the multiplicity of actions in being or contemplated. Thema was established in the state under the *European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2003*. Kalix was an investment company incorporated in the British Virgin Islands. The Kalix proceedings concerned an assertion by Kalix that Thema acted in breach of contract, in breach of trust, in breach of duty and/or in breach of the UCITS regulations and directive in relation to the appointment of a Madoff company as sub-custodian to Thema. Substantially similar proceedings were instituted shortly thereafter by UBI Banca, Thema and AA. Allegations were made in the proceedings, whereby assertions were made that the terms of the prospectus had been breached, as had a custodian agreement. The issue arose as to the appropriate directions that the court would grant pursuant to its powers to give directions for the conduct of proceedings entered into the commercial list of the High

Court, pursuant to order 63A, rule 5 of the *Rules of the Superior Courts*.

Clarke J held that all proceedings where an allegation was made against Thema or HTIE would be linked for the purposes of case management and trial with a view that the management of all such proceedings should be conducted together by a single judge. The court was minded to favourably consider applications to admit into the commercial list all cases coming within the definition of such similar cases, even if they would not on a stand-alone basis warrant entry into the list. The overriding consideration was the efficient administration of justice. Kalix, UBI Banca, Thema and AA cases would be tried together. The risk of not following a streamlined procedure was great. The trial would be a sequenced trial.

***Kalix Fund Limited (plaintiff) v HSBC Institutional Trust Services (Ireland) Limited and Others (defendant)*, High Court, 16/10/2009** [10 JIC 1603]

Delay

Sexual abuse proceedings – mental handicap – actions of teacher – failure to set down action – whether was injustice arising from delay.

The first-named defendant sought to strike out the claim of the plaintiff for want of prosecution due to the failure to set down the action. The plaintiffs were mentally handicapped to various degrees, and the first plaintiff alleged that she had been the victim of sexual abuse in particular in 1996 and 1997 by a teacher. The issue arose as to whether the delay was inordinate and inexcusable and where the balance of justice lay. Difficulties had been encountered in obtaining discovery.

McCarthy J held that the case was a matter of great complexity on account of the plaintiffs being persons of unsound mind. This was a marginal case. There was no doubt but that the delay was excusable, and the balance of justice favoured the plaintiffs' proceedings. The particular facts of the case excused the delay. The first defendant had failed to discharge the burden of proof on him.

***C(N) (minor) (plaintiff) v McG & Others (defendant)*, High Court, 18/9/2009** [9 JIC 1801] G

eurlegal

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

Enforcement of maintenance orders – the new regime

Council Regulation (EC) no 44/2001 (the *Brussels I Regulation*) allows for the recognition and enforcement of maintenance orders. While maintenance payments clearly fall within the remit of the regulation, a difficulty may arise in some member states in relation to lump sum orders, which – although expressed as maintenance orders – may be construed as a reallocation or division of matrimonial property. It should be noted from the case law under *Brussels I*, particularly the decision in *Van den Boogaard v Laumen* ([1997] 3 WLR 731), that lump sum orders in order to meet maintenance provisions are possible under this instrument. This was held to be the position by the Court of Justice, even though proceedings relating to the right to property arising out of a matrimonial relationship and matters of status were excluded under *Brussels I*.

In *RS v PS* (unreported, High Court, 27 July 2009), Abbott J stated the position in the following terms: "On the authority of *Van den Boogaard v Laumen* ([1997] ECR 1147, paras 21, 23), it is now widely accepted that maintenance within the meaning of *Brussels I* may include a lump sum providing for the needs of a spouse or children in the nature of maintenance. On this principle, I hold also that the concept of maintenance may be extended to pension adjustment orders where the purpose of the pension adjustment order is to provide maintenance for parents or children."

Claiming maintenance in another member state

A person domiciled in a member state may be sued for maintenance, pursuant to article 5(2) of the regulation, in another member state. Any judgment granted is generally recognisable in all other member states without any special procedure being required. The *Maintenance Act 1994*, as amended by the *Jurisdiction of Courts and Enforcement of Judgments Act 1998*, enables foreign lump sum maintenance orders to be enforced through the District Court. The High Court retains jurisdiction in respect of the enforcement of lump sum maintenance orders or accrued maintenance arrears. The *Brussels I Regulation* can be used to claim maintenance abroad.

A relevant and instructive judgment is *DT v FL* ([2002] 2 ILRM 152). Both the applicant and the respondent had a domicile of origin in Ireland. They were married in Ireland on 30 August 1980 and had three children. In 1987, they moved to the Netherlands to enable the respondent to take up employment with a Dutch company. In 1992, differences arose between the parties and the applicant and her children moved back to Ireland. In March 1994, the respondent instituted divorce proceedings. The applicant, who did not resist the divorce proceedings, sought maintenance for herself and the children. On 12 September 1994, a divorce was granted on the basis of the respondent's residence in the Netherlands for more than 12 months. A maintenance order was also made in favour of the applicant.

As outlined above, in 2000, the applicant sought a decree of judicial separation in Ireland, to which the respondent submitted that the divorce (obtained in 1994 under Dutch law) was valid on the basis, among other things, that he was domiciled in the Netherlands at the time of the divorce. However, the High Court rejected this argument, with Morris P applying the test set out in *Re Joyce; Corbet v Fagan* ([1946] IR277), holding that that he could not foresee that the respondent would remain in the Netherlands if he were without employment and that there was insufficient evidence that the respondent had abandoned, or had serious intention of abandoning, Ireland as his domicile of origin. Morris P went on to state that he was not satisfied that the respondent had formulated any intention of abandoning Ireland as his domicile of origin. In this regard, Morris P stated that the only evidence that was consistent with this intention was the sale of the family home and the cancelling of membership of clubs. When weighed against the evidence that the respondent returned to Ireland for his summer holidays, that he visited his family in Ireland on a number of occasions, and that he had arranged for his wife to return to Ireland when difficulties arose in the marriage, Morris P considered that it was clear that the respondent had never abandoned his domicile of origin.

The respondent appealed this decision to the Supreme Court. In a unanimous decision of that court delivered by Keane CJ, the respondent's appeal was dismissed and the order of the High Court was affirmed.

In January 2004, the respondent commenced a further High Court challenge to the applicant's entitlement to seek a decree of judicial separation in Ireland. He argued that the maintenance element of the 1994 Dutch order was entitled to recognition and enforcement under the *Brussels I Regulation*. This required the Irish court to apply the *lis alibi pendens* provisions of that regulation to the Irish judicial separation proceedings, in that the 1994 order, in dealing with maintenance, covered relief identical to that which the applicant was seeking in the Irish judicial separation proceedings. Moreover, the respondent pleaded the transitional and *lis pendens* provisions of *Brussels II*.

On the legal position of the 1994 maintenance order, McKechnie J placed reliance on Case 145/86, *Hoffman v Krieg* ([1988] ECR 645), where a German judgment awarding maintenance was held to be clearly irreconcilable with a subsequent

Dutch divorce, in that the respondent tried to enforce the maintenance order in the courts of the Netherlands. McKechnie J, relying on the defence of "irreconcilability" as set out in *Hoffman*, held the basis upon which the maintenance judgment was issued to be irreconcilable with the aforementioned decision of the Supreme Court.

The recognition and enforcement of the 1994 maintenance order could only take place where both parties were divorced in Ireland. That was not the case, in that the conclusion reached by the Supreme Court was to the effect that the parties remained legally married in Ireland. Therefore, McKechnie J held that the maintenance aspect of the 1994 order was not capable of enforcement, as to "enforce the maintenance order would be directly in conflict with the decision of the Supreme Court".

The High Court also held that the 1994 decree of divorce did not come within *Brussels II* or *Brussels II bis*. On the *lis pendens* provisions, McKechnie J stated that there must be in existence proceedings that are concurrent before the *lis pendens* rules can apply. As that was not the position in the instant case, the provisions of *lis alibi pendens* had no application. The judge makes some interesting comments on the transitional provisions. Article 64 is the transitional provision for *Brussels II* and states:

"1) The provisions of this regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments, and to agreements concluded between the parties after its date of application in accordance with article 72.

2) Judgments given after the date of application of this regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the member state of origin and the member state addressed which was in force when the proceedings were instituted.

3) Judgments given before the date of application of this regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter Ill of this regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

4) Judgments given before the date of application of this regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation, provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the member state of origin and the member state addressed which was in force when the proceedings were instituted."

It is clear from the foregoing that the 1994 Dutch divorce proceedings are not covered. McKechnie J commented as follows: "As with many other transitional provisions, it is very difficult indeed to see how a judgment which could well be enforceable within *Brussels II* is not now even mentioned by its successor which repealed it. Once again, the resulting uncertainty is to be seriously regretted."

The High Court therefore held that, at the time of the divorce, the respondent was not domiciled in the Netherlands. The decision of the High Court was upheld on appeal by the Supreme Court. In a 2008 ruling, the five judge Supreme Court (Fennelly J with Denham, Hardiman, Geoghegan and Kearns JJ concurring; [2009] 1 IR 434) unanimously rejected arguments by the respondent that the Irish courts should decline jurisdiction in relation to maintenance proceedings issued by his wife (the children by now being no longer dependents). This case centred on the application of *Brussels I* and *II*. The Supreme Court rejected the arguments that the regulations applied to the judgment of the Dutch court, as that judgment issued prior to the entry into force of *Brussels I* or *II*. Fennelly J adopted the view that, by seeking to refer a number of questions to the European Court of Justice for interpretation by way of an article 234 reference, the respondent, who showed a "propensity" to "use the legal system" to delay matters, merely sought to cause injustice to the wife (and then dependent children) who had initiated her case eight years previously.

European enforcement order

Council Regulation (EC) No 805/2004, creating a European enforcement order (the *EEO Regulation*), came into force on 21 October 2005. It applies only to judgments, court settlements and authentic instruments made in respect of uncontested claims. In such cases, the requirement to obtain a

declaration of enforceability as a prerequisite to the enforcement of a foreign maintenance order, the so-called *exequatur*, is not required where a judgment is certified as an EEO by the court of origin. An EEO certificate will, however, only be granted if the rules set out in article 6 of the regulation have been satisfied. This regulation does not limit the maintenance creditor's right to use the enforcement procedure outlined in *Brussels I*.

In summary, the regulation creating an EEO applies only to maintenance orders that are unopposed and court settlements and authentic instruments made in respect of uncontested claims. The *European Communities (European Enforcement Order) Regulations 2005* (SI no 648 of 2005) provide that the effect of an EEO certificate is the same as a High Court judgment and may be enforced as such. Article 21 details the grounds for the refusal to enforce a judgment certified as an EEO. This may occur if the judgment is irreconcilable with an earlier judgment given in any member state or a non-member state.

Maintenance Regulation

In April 2004, the European Commission published a green paper on the questions arising in the recovery of maintenance claims. The green paper was part of the public consultation on this difficult issue. A 'legislative package' emerged that reflected the results of the consultation process. One of the key recommendations was the removal of the *exequatur* procedure. It also included proposals permitting "precise identification of a debtor's assets in the territory of the member states" so as to facilitate mutual recognition in an environment that enhances cooperation between member states' courts. Measures for the harmonisation of conflict-law rules were also included in the legislative package.

The maintenance regulation emerging from the green paper was to come into force on 1 January 2009. On 18 December 2008, the council adopted Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of maintenance decisions and cooperation in matters relating to maintenance obligations. Article 15 of the regulation provides as follows: "The law applicable to maintenance obligations shall be determined in accordance with the *Hague Protocol* of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 *Hague Protocol*) in the member states bound by that instrument."

Article 76 of Regulation 4/2009 provides that the 2007 *Hague Protocol* is to apply from 18 June 2011 (the date of application of the regulation), subject to the protocol being applicable in the EC by that date. Otherwise, Regulation 4/2009 is to apply from the date of application of the protocol in the EC. Its provision on the continuation of legal aid will apply from 18 September 2010. This instrument will replace and augment the *Brussels I* and *EEO Regulations*. Both Ireland and Britain have opted into the regulation, but Denmark has not.

Regulation 4/2009 will determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including any maintenance obligation in respect of a non-marital child. The regulation applies not only to court judgments, but also court settlements and authentic instruments relating to maintenance obligations.

Under the regulation, as with other commission initiatives, a court decision in one member state shall be recognised and enforceable in another member state with very limited grounds for recognition to be challenged. The regulation allows a maintenance creditor to easily obtain, quickly and generally free of charge, an enforceable order capable of recognition and enforcement in the EU without any obstacles. It should be noted, however, that harmonised rules on applicable law are a condition precedent to the abolition of *exequatur*.

Article 3(1) of the regulation governs the issue of jurisdiction and provides that, in matters relating to maintenance, jurisdiction can lie in the member state:

- In which the dependant is habitually resident, or
- In which the maintenance creditor is habitually resident, or
- That has jurisdiction pursuant to the revised *Brussels II*, or
- To determine matters relating to the status of a person where maintenance obligations are ancillary to those proceedings, or
- The member state that has jurisdiction pursuant to the revised *Brussels II* to determine matters relating to parental responsibility where maintenance obligations are ancillary to those proceedings.

The regulation provides that maintenance obligations will normally be governed by the law of the state of habitual residence of the creditor. Where there is a change in the habitual residence of the creditor, the law of the new habitual residence will apply when the change occurs. Under the regulation, the parties may agree on a choice of court subject to certain conditions. It should also be noted that if a debtor enters an unconditional appearance in a member state, then that member state assumes jurisdiction. Under article 6, a special rule on defence gives the debtor the right to oppose a claim for maintenance by the creditor "on the ground that there is no such obligation under both the law of the state of the habitual residence of the debtor and the law of the state of the common nationality of the parties, if there is one". This special rule does not apply to maintenance obligations arising from a parent/child relationship. Articles 7 and 8 of the protocol state that the maintenance creditor and debtor may designate the law applicable to a maintenance obligation for the purpose of a particular proceeding in a given state or in general. The regulation allows a member state to determine maintenance proceedings if such proceedings cannot reasonably be brought or conducted in a third state to which the dispute is closely connected.

In summary, Regulation 4/2009 outlines the rules for the recognition and enforcement of decisions dependant upon whether the decision was given in a member state that was bound by the *Hague Protocol on the Law Applicable to Maintenance Obligations 2007*. Decisions in member states bound by the 2007 *Hague Protocol* are automatically recognisable in other member states without any special procedure. In seeking to enforce a decision in another member state, the maintenance creditor must provide the relevant authorities with a copy of the original decision, an extract from the decision in accordance with the form set out in annex I of Regulation 4/2009, a document setting out the areas, and a translation of the document into the language of the requested member state. Decisions in member states not bound by the 2007 *Hague Protocol* may be recognised in another member state without any special procedure being required. Article 24 of Regulation 4/2009, however, provides the grounds upon which the requested member state may refuse to enforce the decision of the member state of origin. The

grounds for non-recognition of a maintenance decision are that it is manifestly contrary to the public policy of the requested member state, it was given in default of appearance, it is irreconcilable with a decision given in a dispute between the same parties in the member state, and it is irreconcilable with an earlier decision given by a member state or a non-member state involving the same parties.

Regulation 4/2009 does not define maintenance. It is therefore likely that the Court of Justice will continue to apply the definition set out in *Van den Boogaard v Laumen*. In that case, discussed previously, it was stated that a maintenance order after divorce was covered under *Brussels I*.

(The Law Society will address the new maintenance regulations at the upcoming CPD Family and Child Law Symposium on 9 July, details of which are available at www.lawsociety.ie.) G

Geoffrey Shannon is the Law Society's deputy director of education.

Recent developments in European law

CONSUMER LAW

Case C-511/08, *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherz entrale Nordrhein-Westfalen eV*, 15 April 2010. Directive 97/7 on the protection of consumers in respect of distance contracts provides that a consumer may withdraw from a distance contract within a period of at least seven working days without penalty and without giving any reason. Where a consumer exercises his right of withdrawal, the supplier is obliged to reimburse him the sums paid free of charge. The only charge that can be levied because of the exercise of his right of withdrawal is the direct cost of returning the goods. Heine, a mail order company, provides in its general conditions of sale that the consumer is to pay a flat rate charge of €4.95 for delivery. This sum is not refunded by the supplier, even if the consumer exercises his right of withdrawal. A German consumer association brought an action against Heine for an injunction to restrain it from continuing with that practice. The German Supreme Court found that German law does not grant the buyer of goods any explicit right to reimbursement of the costs of delivering the goods ordered. However, even though Heine's practice may have been compatible with German law, it asked the ECJ to interpret the directive. The ECJ found that the directive precludes national legislation that allows the supplier under a distance contract to charge the costs of delivering the goods to the consumer where the latter exercises his right of withdrawal. The relevant provisions of the directive have as their purpose not to discourage consumers from exercising their right of withdrawal. It would be contrary to that objective to allow delivery costs to be charged to the consumer in the event of withdrawal. Charging consumers delivery costs in addition to the direct cost of returning the goods would compromise a balanced sharing of the risks between parties to distance contracts by making consumers liable to bear all the costs related to transporting the goods.

FREE MOVEMENT OF PERSONS

Case C-542/08, *Freiderich G Barth v Bundesministerium für Wissenschaft und Forschung*, 15 April 2010. Regulation 1612/68 provides that a worker who is a national of a member state may not, in the territory of another member state, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work. Dr Barth, a German national, was employed as a professor at the University of Frankfurt am Main. In 1987, he was appointed as a professor at the University of Vienna and also acquired Austrian nationality. The Austrian law on salaries provides for a special length of service increment. His service in Germany was not taken into account for calculating his length of service, and he did not receive that increment. In Case C-224/01, *Köbler*, the ECJ had held that the Austrian law requiring 15 years' experience completed solely in Austrian universities before payment of the increment was an obstacle to free movement of workers prohibited by the *EC Treaty*. The Austrian law was then amended and, in 2004, Dr Barth applied on the basis that account should be taken of the period during which he had worked at the University of Frankfurt am Main. The administrative decision recognised his right to the length of service increment from 1 January 1994, but said that the adjustment could take effect for remuneration purposes only from 1 October 2000 due to the application of a limitation rule. He appealed against that decision, and the Austrian Administrative Court asked the ECJ whether EU law precluded national law from making claims for the payment of such increments subject to a three-year limitation period, which may be extended by nine months. The ECJ noted that the limitation period under Austrian law is a procedural condition governing an action intended to ensure that a right derived by an individual from EU law is safeguarded. The law of the EU does not regulate the question as to whether the member states may, in such circumstances, provide for a limitation period. However, such rules must not be less favourable than those governing similar domestic actions, and they must not render the exercise of the rights conferred by EU law impossible or excessively difficult. The current limitation period was identical to that used in domestic actions. Thus, it could not be regarded as being contrary to the principle of equivalence. It also held that a three-year limitation period is reasonable and cannot be regarded as being contrary to the principle of effectiveness. In the current circumstances, the application of the limitation period did not deprive Dr Barth of his right to obtain the increment. Applying such a limitation period cannot be considered as indirect discrimination against a worker and a restriction on free movement for workers.

INTELLECTUAL PROPERTY

Joined Cases C-236/08 to C-238/08, *Google France and Google Inc et al v Louis Vuitton Malletier et al*, 23 March 2010. EC trademark law entitles proprietors of trademarks, subject to certain conditions, to prohibit third parties from using signs that are identical with, or similar to, their trademarks for goods or services equivalent to those for which those trademarks are registered. Google operates an internet search engine. When a search is performed on the basis of one or more key words, the search engine will display the sites that appear best to correspond to those key words, in decreasing order of relevance. These are referred to as the 'natural' results of the search. Google also operates a paid referencing service called 'AdWords'. This enables a company to reserve one or more keywords. Doing so causes an advertising link to its site, accompanied by a commercial message

to appear when an internet user enters the keyword in the search engine. The advertising link appears under the heading 'sponsored links', which is displayed either on the right-hand side of the screen, to the right of the natural results, or on the upper part of the screen, above those results. Vuitton is the proprietor of the EC trademark 'Vuitton'. Vuitton and Viaticum are the proprietors of several French trademarks, and Mr Thonet is the proprietor of the French trademark 'Eurochallenges'. They became aware that the AdWords system triggered the display of links to sites offering imitation versions of Vuitton's products and to sites of competitors of the other trademark proprietors. They brought proceedings against Google for declarations that it had infringed their trademarks. The French Court of Cassation referred questions to the ECJ on whether it is lawful to use, as keywords in the context of an internet referencing system, signs that correspond to trademarks where consent has not been given by the proprietors of those trademarks. The court found that, if a trademark has been used as a keyword, the proprietor of that trademark cannot, therefore, rely, as against Google, on the exclusive right that it derives from its mark. By contrast, it can invoke that right against those advertisers that, by means of a keyword corresponding to its mark, arrange for Google to display ads that make it impossible, or possible only with difficulty, for average internet users to establish from what undertaking the goods or services covered by the ad originate. In such a situation, the internet user may err as to the origin of the goods or services in question. The function of the trademark, which is to guarantee to consumers the origin of goods or services, is thus adversely affected. It is for the national court to assess, on a case-by-case basis, whether the facts of the dispute before it point to an adverse effect, or a risk thereof, on the function of indicating origin. The court then considered the use by internet advertisers of a sign corresponding to another person's trademark as a keyword for the purposes of the display of advertising messages. It took the view that that use is liable to have certain repercussions on the advertising use of that mark by its proprietor and on the latter's commercial strategy. Those repercussions of third parties' use of a sign identical with the trademark do not of themselves, however, constitute an adverse effect on the 'advertising function' of the trademark. The court was also asked to rule on the liability of an operator such as Google in respect of the data of its clients that it stores on its server. The *E-commerce Directive* (2000/31/EC) lays down restrictions on liability in favour of information society intermediate service providers. The court considered whether 'AdWords' was an information society service consisting in the storage of information supplied by advertisers. It held that it is for the referring court to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge of, or control over, the data that it stores. If it has not played an active role, the service provider cannot be held liable for the data that it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

LEGAL PROFESSIONAL PRIVILEGE

Case C-550/07, *P Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, opinion of Advocate General Juliane Kokott. The dispute arose from an investigation into a cartel on the plastic additives market. During a search at the premises of Akzo and Akros in Britain, the commission copied and placed on its file two emails exchanged between the general manager of Akros and a lawyer in Akzo's in-house legal department. The two companies concerned challenged this, but their action was dismissed by the General Court. They appealed that decision to the ECJ. The advocate general took the view that legal professional privilege under EU law applies solely to communications between a client and an independent lawyer. Legal professional privilege is intended not only to secure the client's rights of defence, but is also based on the lawyer's specific role as an organ of the administration of justice who has to provide legal assistance to his client in full independence and in the overriding interests of justice. A salaried in-house lawyer, notwithstanding membership of a law society or bar, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Equal treatment of both professional groups in respect of legal professional privilege is not required as a matter of law. There is a risk that an in-house lawyer will encounter a conflict of interest between his professional obligations and the aims and wishes of his company, on which he is more economically dependant and with which, as a rule, he identifies more strongly than an external lawyer. In the legal systems of the 17 member states, there is no identifiable general trend towards extending legal professional privilege to in-house lawyers who are admitted to a law society or a bar. Only in a few member states, such as Ireland, Britain and the Netherlands, does legal professional privilege apply to communications with in-house lawyers of that kind. G

PROFESSIONAL NOTICES

WILLS

Bannigan, Anna (deceased), late of Dulargy, Ravensdale, Dundalk, Co Louth. Would any person having knowledge of a will made by the above-named deceased, who died on 18 December 2009, please contact G Jones & Co, Solicitors, Main Street, Carrickmacross, Co Monaghan; tel: 042 966 1822, fax: 042 966 1464, email: clynch@gjones.ie

Cleary, Patrick J, late of 40 Collins Park, Gallows Hill, Ennis, Co Clare. Would any person with knowledge of a will executed by the above-named deceased, who died on 6 March 2010, please contact Desmond J Houlihan & Company, Solicitors, Salthouse Lane, Ennis, Co Clare; tel: 065 684 2244, email: lburke@djhoulihan.ie

Cullinane, Finbarr (deceased), late of flat no 1, 2 Clifton View, Beaumont, Blackrock/Ballintemple, Cork, and previously of Skevenish, Innishannon, Co Cork. Would any person having knowledge of a will executed by the above-named deceased, who died on 15 December 2009, please contact Richard Barrett, solicitor, of Collins Brooks & Associates, 6/7 Rossa Street, Clonakilty, Co Cork; ref: RB/MK/C.341

Deasy, John (deceased), shopkeeper, late of 27 Coolgreaney Road, Arklow, in the county of Wicklow, who was unlawfully killed in Arklow on 25 November 2009. Personal representative: Bri-Ann Finn. Would any person having knowledge of a will made by the above-named deceased please contact: BJ O'Beirne and Co, Solicitors, 3 Church Buildings, Main Street, Arklow, in the county of Wicklow; tel: 0402 302 014, email: bjobeirne@eircom.net

McCullagh, Bridget (deceased), late of 145 Claremont Estate, Navan, Co Meath who died on 18 February 2010. Would any person having any knowledge of a will made by the above-named deceased please contact Pat Rogers of Lacy & Partners, Solicitors, Kenlis Place, Kells, Co Meath; tel: 046 928 0718, email: law@nlacy.ie

McNally, Owen (deceased), late of (residential) 16 Cooldeery Road, Crossmaglen, Newry, Co Down, BT35 9JA and (nursing home) Glencarron Nursing Home, Crossmaglen, Newry, Co Down. Date of death: 19 March 2010. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Rosetta Hughes, SC Connolly & Co, Solicitors, Bank Building, 39 Hill Street, Newry, Co Down, BT34 1AF; tel: 028 3026 5311, fax: 028 3026 2096, email: rosetta.hughes@scconnolly.com

Moran, Eileen, formerly of Derrygraw, Leitrim PO, Carrick-on-Shannon, Co Roscommon, and now resident in the Sacred Heart Nursing Home, Castlebar, Co Mayo. Would any person having knowledge of a will executed by the above-named Eileen Moran, now resident in the Sacred Heart Nursing Home, Castlebar, Co Mayo, please contact Teresa Mullen, solicitor, Ballinrobe, Co Mayo, in her capacity as committee of estate of the said Eileen Moran, having been appointed by order of the High Court on 13 April 2010; tel: 094 954 1800

MISCELLANEOUS

Wanted: seven-day publican's ordinary licence. Contact: Patrick J Neilan & Sons, Solicitors, Golf Links Road, Roscommon; tel: 090 662 6245, fax: 090 662 6990, email: pjneilan@securemail.ie

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 Arkmoon Limited

Take notice that any person having an interest in the fee simple or in any superior interest in the property known as 41/41A Henry Street in the city of Dublin, comprised in folio DN171478F, being the property comprised in a fee farm grant dated 12 December 1889 from Evan Lake and others to Emily Mary Margaret Clarke, subject to the perpetual yearly fee farm rent of €35.16 (£27.13.10 pre-decimal currency).

Take notice that the applicant, Arkmoon Limited, whose registered office is at Usher House, Main Street, Dundrum, Dublin 14, intends to submit an application to the county registrar for the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple interest in the aforesaid property and that any party asserting that they hold the said fee simple interest or any superior interest in the aforesaid property are called upon to furnish evidence of title to the undermentioned within 21 days from the date of this notice.

In default of any such notice being received, Arkmoon Limited intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to 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: 4 June 2010

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

Take notice that any person having an interest in the fee simple or in any superior interest in that part of no 36 Henry Street,

Dublin 1, comprised in folio DN187345F, being a portion of the property comprised in a fee farm grant dated 15 August 1859 from Anne Worthington to Fanny Susanna Shury Daniel, Eliza Stanton Daniel and Emily Gould Sams, which reserved a perpetual yearly fee farm rent of £13.85 with 2.5 pence in the pound receiver's fees.

Take notice that the applicant, Joseph O'Reilly, intends to submit an application to the county registrar for the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple and any intermediate superior interest or interests in the aforesaid property and that any party asserting that they hold the said fee simple or any such superior interest in the aforesaid property is called upon to furnish evidence of title to the under-mentioned within 21 days from the date of this notice.

In default of any such notice being received, the said applicant 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: 4 June 2010

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 premises situate at Meatshambles Lane and Catherine Street Quay, Youghal, in the county of Cork, and in the matter of an application by the personal representatives of Maurice Keohane (deceased)

Between: personal representatives in the estate of Maurice Keohane (deceased) (applicants) and representatives of Michael English, Francis J Daly and all other owners of all superior interests (respondents).

We desire to apply for an order in respect of the premises situate at and known as Meatshambles Lane and Catherine Street Quay in the town of Youghal in the county of Cork.

Take notice that any person having knowledge of the lessor in the leases referred to in the schedule hereto contact Messrs Healy Crowley & Co, Solicitors, West Street, Tallow, in the county of Waterford, and further take notice that, in default, the said application will be listed for hearing before the county registrar of the county of Cork at such date as may be available for such hearing. Dated 17 May 2010.

1) By indenture of lease made on 18 March 1908 between

PROFESSIONAL NOTICES

Michael English of the one part and Thomas Green of the other part, the hereditaments and premises therein described (and a portion whereof is the subject matter of this application) were demised unto the said Thomas Green for the term of 99 years from 29 September 1997 at the yearly rent of £2.17.6 (then currency) and subject to the covenants on the part of the lessee and conditions therein contained.

2) By indenture of lease made on 29 August 1890 between Sarah Shaw and Noblett Mannix of the one part and Martin Fleming of the other part, there was demised unto the said Martin Fleming the premises therein described situate at Catherine Street Quay, Youghal, in the county of Cork for the term of 99 years from 25 March 1898 at a yearly rent of £15 (then currency) and subject to the covenants on the part of the lessee and conditions therein contained.

3) By indenture of lease made on 12 August 1994 between Francis J Daly and Monica English of the one part and Richard Griffin on the other part, the hereditaments and premises therein described (and a portion whereof is the subject matter of this application) were demised unto the said Richard Griffin for the term of 99 years from 25 March 1944 at the yearly rent of £0.01s (then currency), which lease was made in consideration of the payment of a fine of £20 (then currency) and subject to the covenants on the part of the lessee and conditions therein contained.

Date: 4 June 2010

Signed: Healy Crowley & Co (solicitors for the applicant), West Street, Tallow, Co Waterford; DX 19001 Fermoy

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

Take notice that any person having an interest in the fee simple or in any superior interest in the property known as 6 Moore Lane in the city of Dublin, being part of the property comprised in a fee farm grant dated 6 May 1884 from the Hon Jessie M Cowper to Henrietta McBlain, subject to the perpetual yearly fee farm rent of €5.46 (£4.30).

Take notice that the applicant, Joseph O'Reilly, intends to submit an application to the county registrar for the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple interest in the aforesaid property and that any party asserting that they hold the said fee simple interest or any superior interest in the said property are called upon to furnish evidence of title to the under-mentioned 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 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: 4 June 2010

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

RECRUITMENT

NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE LAW SOCIETY GAZETTE

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

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

Keane McDonald
executive legal recruitment

Fitzwilliam Business Centre
77 Sir John Rogerson's Quay
Dublin 2

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Fax: +353 16401899

Web: www.keanemcdonald.com
Email: info@keanemcdonald.com

Keane McDonald is an executive search firm focusing on legal appointments. We specialise in the recruitment of high calibre legal professionals.

Opportunities - Dublin

Head of Legal – Banking

Our client, a global banking group, is seeking a senior lawyer to join the Dublin office as head of legal. The role will suit an experienced banking lawyer who is familiar with Irish and EU regulations and has worked with a respected banking group in Ireland or the UK. This is an exceptional opportunity and package will reflect importance of the role.

Senior Legal Manager – Leasing

A leading global leasing operation is seeking to recruit a senior lawyer to join their expanding legal team. The successful applicant will perform a senior management role with a focus on managing a team of lawyers in the execution and completion of transactions relating to aircraft fleet. The role involves extensive client contact and requires superior communication skills together with proven transactional experience. Candidates with strong leasing or financing experience will be considered.

Senior Legal Advisor – Capital Markets

Our Client is seeking a senior banking lawyer with experience in capital markets transactions. You will have a full understanding of securities laws, bank regulation and corporate governance matters. This is a key appointment in the organisation and will suit a confident negotiator with strong management skills. You will be admitted to practice in a common law jurisdiction.

Senior Legal Advisor – Funds

A global funds operation is seeking a senior funds lawyer to manage all legal affairs for their Irish operation. You will have a thorough understanding and proven experience in the field of mutual funds, more specifically in UCITS. Attractive package on offer for the successful applicant.

Commercial Litigation Solicitors (to Partner Level)

A leading litigation practice is seeking to recruit experienced litigators to represent Insurance Clients on all contentious matters to include commercial disputes, professional negligence, policy disputes and professional indemnity matters. Financial Services experience is preferred but not essential. Solicitors with alternative dispute resolution experience are particularly welcome. Applicants from Senior Associates and Partners particularly welcome.

Commercial Property Solicitor

Our Client, a leading Irish law firm, is seeking an experienced commercial property solicitor. The successful candidate will have solid experience in the area of development and planning laws and will have knowledge of the tax efficient laws relating to commercial property.

Funds Lawyer

Our Client, a respected Irish law firm, wishes to recruit an experienced funds lawyer with solid background in negotiating, drafting and reviewing fund documentation and agreements. An impressive client portfolio includes domestic and international banks, fund managers brokers and pension funds.

To apply for any of these vacancies contact Yvonne Kelly in strict confidence on +353 18415614 or email your CV to ykelly@keanemcdonald.com
For a full list of our vacancies visit our website.

Mako Search,
Alexandra House,
The Sweepstakes,
Ballsbridge, Dublin 4.

T: 01 685 4017
E: admin@makosearch.ie
W: www.makosearch.ie

PHILIP LEE

SOLICITORS

Partners

When it comes to high-profile legal work we are getting more than our fair share. Equipped with sharp judgement and confidence we have handled landmark transactions across many business sectors. Our team provides clients with enduring value and strategic legal advice on a broad range of matters including corporate and commercial law, projects and public procurement, EU, trade and competition law.

To fulfil our ambitious growth plans we are now seeking to add complementary areas of expertise and to that end we wish to recruit partners with established practices and entrepreneurial flair. Candidates will have a commercial and pragmatic approach and will have the ability to thrive in a dynamic quality focused environment.

Opportunities exist in the following practice areas:

Energy | Pensions | Banking | Tax

For further information on these opportunities please contact our exclusively retained advisor Sharon Swan on 01 685 4017 or email sharonswan@makosearch.ie

*All third party applications will be forwarded to **MAKO Search***

T: 01 685 4017
sharonswan@makosearch.ie
www.makosearch.ie

Mako Search,
Alexandra House,
The Sweepstakes,
Ballsbridge, Dublin 4.

T: +353 1 685 4018
F: +353 1 631 9001
E: admin@makosearch.ie
W: www.makosearch.ie

COMMERCIAL LAWYER

• E-Gaming • Dublin • Salary Negotiable •

Cryptologic is a world-leading publicly traded developer and supplier of on-line casino software and branded games. Established in 1995, the company is a pioneer in the multi-billion dollar global internet gaming market. As an industry leader, the company's software and services are licensed by some of the world's most trusted gaming and entertainment brands.

To support the company's continued innovation and success, Cryptologic is seeking to recruit a motivated, business-minded and ambitious professional. As Commercial Lawyer you will work alongside the General Counsel in dealing with the legal affairs of the company.

Responsibilities will be wide and varied. The successful individual will offer legal services pertaining to the business including corporate, contracts, IP/IT and EU law. Ideally you will have gained in excess of 5 years' international corporate/commercial experience through either in-house or private practice. Exposure within the gaming, technology or retail market would be extremely beneficial. Relevant experience from an internationally renowned law firm will also be considered. The successful candidate will be Ireland/UK qualified.

To be considered for this high profile and challenging role, you must be a results driven professional with maturity, integrity and gravitas to inspire confidence and respect at all levels.

All third party applications will be forwarded to **MAKO Search**

If you would like to be considered for this role please contact our exclusively retained advisor Carol McGrath at carolmcgrath@makosearch.ie or +353 1 685 4018.

Mako Search,
Alexandra House,
The Sweepstakes,
Ballsbridge, Dublin 4.

T: +353 1 685 4018
F: +353 1 631 9001
E: admin@makosearch.ie
W: www.makosearch.ie

PROFESSIONAL NEGLIGENCE Salaried/Equity DUBLIN

This specialist firm is looking to recruit an ambitious partner who has experience in the professional negligence market particularly with regard to solicitors and the construction industry. You will be familiar with dealing with insurers and the insured alike and will adopt a commercial approach to cases handled by you. You will have gained experience within a well established law firm in Dublin and will be in a position to bring a book of business with you. **Ref: C2024**

COMMERCIAL LITIGATION Salaried £ DUBLIN

Our client is now seeking to recruit a commercial litigation partner. You will be responsible for dealing with litigation matters including the defence of all types of claims against professionals including professional negligence, corporate/commercial, employment and insolvency. You will be interested in further developing this area of practice over the next few years; therefore it would be advantageous for an individual to have had experience in business development. **Ref: C2025**

PENSIONS ASSOCIATE DUBLIN

Our client, a very successful firm is looking to recruit an experienced pension's lawyer. The successful candidate will be involved in advising on legal issues relating to pensions, liaising with the relevant clients, whether boards, commissioners or private individuals. You will also be involved in drafting and reviewing legal documents and developing new avenues of business. Individuals with a book of business will be given serious consideration. **Ref: C2026**

COMMERCIAL PROPERTY DUBLIN

This dynamic firm is looking for a lawyer who can provide assistance on a number of matters including the sale and leasing of commercial properties, loan re-structuring, security enforcement and insolvency issues, appreciating tax matters involved in all transactions and investigation of title where necessary, preparing due diligence reports and acting for financial institutions. Strong academics and experience from a top firm is advantageous. **Ref: C2027**

If you would like to be considered for this role please contact Carol McGrath at carolmcgrath@makosearch.ie or +353 1 685 4018.

New Openings

Private Practice

Banking - Associate to Senior Associate: First rate law firm seeking a strong Banking lawyer with exposure to SPVs. You will be involved in a range of transactions acting on behalf of both domestic and international clients.

Commercial Litigation – Associate: Central Dublin practice is looking for a strong practitioner with an excellent litigation background.

Commercial Litigation - Associate to Senior Associate: Strong practice with a client base ranging from SMEs to international companies requires litigators with commercial litigation expertise.

Commercial - Senior Associate: A significant Dublin practice is searching for excellent candidates with commercial nous coupled with the enthusiasm and drive to develop a first rate client base.

Corporate Finance – Assistant to Senior Associate: Leading Dublin practice requires a high calibre lawyer to deal with corporate advisory work including mergers and acquisitions, joint ventures, management buy outs, reverse takeovers and debt and equity financings as well as advising on flotations and fundraisings.

EU/Competition - Assistant: Our client is a first class legal practice whose client base includes prestigious public service and private sector organizations operating both in the domestic market and internationally. You will be a Solicitor or Barrister with excellent exposure to EU and Competition Law, gained either in private practice or in-house.

Funds - Assistant/Associate: Top ranking law firm requires excellent Funds specialists at all levels. You will advise investment managers, custodians, administrators and other service providers of investment funds on establishing operations in Ireland.

Funds - Assistant to Senior Associate : International law firm recently established in Dublin is searching for ambitious commercially-minded practitioners with strong exposure to investment funds.

In House

Senior Legal Advisor: Our client is searching for a senior solicitor or barrister with expertise in equity capital markets, corporate finance, mergers and acquisitions or general corporate practice advising Irish or UK listed companies.

Telecoms - Junior Solicitor or Barrister: Our client is searching for a junior solicitor or barrister to work with a growing team. You will be dealing with a variety of Telecoms related matters. This is a new role which requires strong people skills and business acumen. Fluency in Spanish is an essential pre-requisite.

Partnership

Our clients include the leading Irish law firms. Significant opportunities exist in the following practice areas and a client following is not essential.

Employment ; Funds ; Insolvency ; Litigation ; Regulatory/Compliance ; Environmental & Planning

For more information on these or other vacancies, please visit our website or contact Michael Benson bcl solr. in strict confidence at: Benson & Associates, Suite 113, The Capel Building, St. Mary's Abbey, Dublin 7.
T +353 (0) 1 670 3997 E mbenson@benasso.com

Benson & Associates
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