LAW SOCIETY
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No shortage of challenges

I am painfully aware of the sad fact that a great many colleagues in solicitors' practices of all sizes around the country are suffering from a shortage of work at present. However, lack of work is not a feature of the role of the Law Society. Here is just a flavour of what we have been engaged with, on your behalf, over the course of just one day, 19 April, recently.

Presidents' and secretaries' meeting

Perhaps the most important event of the last two weeks was the meeting that I chaired in Blackhall Place on 19 April of the presidents, secretaries and public relations officers of all bar associations. This was a very well-attended and valuable opportunity for me, the director general and other colleagues in the Society to give detailed briefings on a wide range of issues and work in progress and, most importantly, to hear considered views and feedback from local representatives of the practising profession from all over the country.

The two dominant items on the agenda at the meeting of the leaders of the bar associations were professional indemnity insurance and commercial undertakings. The chair of the Society's PII Task Force, Eamon Harrington, described all of the issues being reviewed in depth (with the benefit of expert advice from Marsh in London), with a view to making early decisions designed to ensure, to the greatest extent possible, that nothing resembling last autumn's experience of PII renewal will be experienced by the profession again.

The chair of the Society's Commercial Undertakings Task Force, John D Shaw, went through in detail the draft regulations and supporting documentation that were sent by email to every solicitor on 1 April 2010. They were circulated to all solicitors in order to allow the widest possible consultation with the profession about the proposed changes. The leaders of bar associations were broadly supportive of the thrust of the proposed regulations and contributed a number of helpful thoughts on aspects of the detail. As you know, it is expected that decisions in relation to all of this will be made by the Society's Council at its meeting on 21 May 2010.

"Lack of work is not a feature of the role of the Law Society"

The Frontline

Solicitors' undertakings in property transactions, and the problems caused when the agreed system was misapplied by the banks, was a central theme of a segment of *The Frontline* programme, hosted by Pat Kenny, on RTÉ television on 19 April. The Society was ably represented on the panel by director general Ken Murphy, with John D Shaw, James MacGuill and Kevin O'Higgins present, although ignored, in the audience.

The atmosphere in the studio, presided over by Pat Kenny, was remarkably hostile towards the solicitors' profession. The attacks on solicitors were based largely on wholly false assertions of what NAMA chief executive Brendan McDonagh had said the previous week to a Dáil committee.

These false assertions were forcefully challenged by Ken Murphy and by Graham Kenny, a solicitor who contributed effectively from the audience.

All in all, a spirited defence of the profession was given, with strong arguments that would have made sense to any reasonable and open-minded viewer.

The good news is that *The Frontline's* preposterous assertion – that solicitors are partly responsible for the collapse of the banks and the beggaring of the taxpayers – has, since the programme, received precisely the same level of media coverage and credibility it had received before the programme – precisely the amount it deserves – none.

Gerard Doherty
President

On the cover

Do you come from a land down under? Oops, wrong direction! But if you weren't born in the USA and don't want to be an American idiot, you can still be a fortunate son. But is it the land of the free and the home of the brave, or just the fairy tale of New York?

PIC: THINKSTOCK

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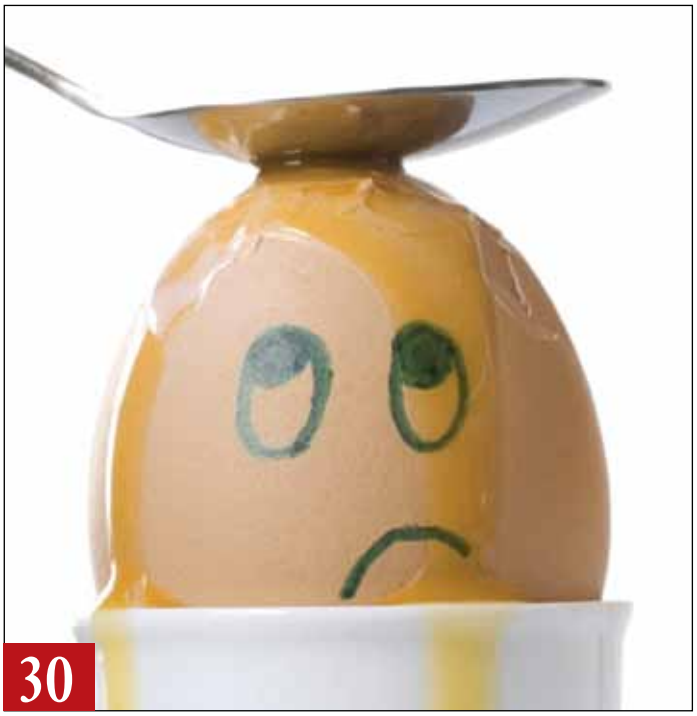

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DONEGAL

Alison Parke has organised a seminar for Saturday 8 May 2010 at the Rosapenna Hotel and Golf Resort, Rosapenna, Downings, Letterkenny, Co Donegal.

From 9am to 12 noon, speakers will include Eamonn Harrington, Michael Quinlan and Seamus McGrath, covering recent developments in professional indemnity insurance; appearing before the Regulation of Practice Committee; and the *Solicitors' Accounts Regulations* and investigation. From 1pm to 3pm, David Soden and Suzanne Bainton will cover the practical implications of the *Land and Conveyancing Law Reform Act 2009*.

The cost is €160 per solicitor, with five CPD hours available, comprising three hours of regulation and two hours of CPD training.

The president of the Donegal Bar Association, Máirín McCartney, spoke with great conviction on a number of matters of concern to Donegal practitioners at the recent presidents and secretaries meeting at the Law Society.

DUBLIN

Advance bookings for the DSBA annual conference to Istanbul, which John O'Malley has managed to price very competitively, are going very well. All appropriate details are on dsba.ie.

May will be a very active and sporting month in Dublin, what with the DSBA tag rugby event in Terenure College on Saturday 8 May, the Calcutta Run starting from Blackhall Place at 2pm on 15 May (in which yours truly hopes to run and is open to sponsorship from all and sundry), and a forthcoming cricket event with our Leeside country cousins, as well as a tennis encounter – details of which are to be announced shortly. The legal offices' football competition for the DSBA Cup might be regarded as our blue-ribbon event. Matheson Ormsby Prentice are the current holders, with the event taking place later in the summer.

We are looking forward to the DSBA dinner, which this year will be held in the Radisson Hotel, Booterstown, on Saturday 15 May (the same evening as the Calcutta Run). Tables are going fast, and all enquiries should be made through Maura Smith or Geraldine Kelly at dsba.ie.

Dublin practitioners, particularly in the smaller offices, were delighted to note the appointment of our great friend Patricia McNamara to the District Court bench. She was always a most helpful colleague, particularly among the smaller offices.

Most property lawyers are at sixes and sevens in relation to the matter of commercial undertakings and whether to give them or not. The Law Society recently met representatives of bar associations throughout the country, at which the Society's draft regulations seeking to ban the giving of undertakings in commercial cases was considered. For its part, the DSBA has been very closely monitoring this issue, and Julie Doyle's Conveyancing Committee will be making its own submission in advance of the response date of 7 May 2010. Any colleagues wishing to make observations should contact or email Maura at www.dsba.ie.

At the WIT Law Society annual ball were *(l to r)*: Deirdre Adams (law lecturer, WIT), Colm Murphy (education officer, WIT Law Society), Patrick McKee (president, WIT Law Society), Bernadette Cahill (president, Waterford Law Society), Elliott Payne (law lecturer, WIT) and Walter O'Leary (law lecturer, WIT)

KILKENNY

Owen O'Mahony, president of the Kilkenny Bar Association, is looking forward to the opening of the Marble City's new courthouse. It has been a long time coming. Owen says that he will be welcoming the return of High Court and chancery cases to Kilkenny.

Owen was particularly pleased to welcome many colleagues from throughout the country to the beautiful Lyrath Estate Hotel in recent weeks, on the occasion of the Law Society's annual conference. Local solicitor Michael Lanigan spoke with great humour about how he crossed over to the 'merger' side of the road and found nirvana!

LIMERICK

Bar association president Elizabeth Walsh informs me of a forthcoming event in the Strand Hotel in aid of funds for Special Olympics Ireland. All practitioners are cordially invited and should contact either Elizabeth or Brian Malone for details – email: info@elizabethwalsh.eu or bmalone@harrisonodowd.ie.

LOUTH

Also attending the Dublin meeting of presidents and secretaries were Tim Ahern (County Louth Solicitors' Bar Association) and Fergus Minogue (PRO of the Drogheda Bar Association). I could not resist asking Fergus why the wee county has two bar associations serving local colleagues! If jurisdiction is the right word, it seems that the Louth association covers both 'the town' and Ardee, with Drogheda looking after itself. Both bar associations, of course, enjoy a very cordial and happy co-existence – but it appears that unification is not on the agenda.

WATERFORD

Waterford Law Society president Bernadette Cahill convened a meeting with Waterford colleagues recently, attended by Law Society president Gerard Doherty and director general Ken Murphy, to discuss matters of concern. G

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

'Outstanding Achievement' award for Society's CPD Focus Skillnet team

The Law Society's CPD Focus Skillnet team has taken the 'Outstanding Achievement Training Award 2010' at the annual awards of the Irish Institute of Training and Development (IITD), held on 26 March 2010.

The award in the 'Networks and Groups Category' acknowledges the Society's work in designing and delivering excellence in training to members of the legal profession through its CPD networks – CPD Focus, CPD Focus Skillnet and the Law Society Finuas Network.

CPD Focus Skillnet is funded by member companies and from the National Training Fund. The Law Society Finuas Network is jointly funded by the government and companies within the financial services sector. Both networks are co-funded and managed by Skillnets Ltd on behalf of the Department of Enterprise, Trade and Innovation.

Celebrating the Society's 'Outstanding Achievement Training Award 2010' are *(l to r)*: Michelle Nolan (communications executive, Law School), Ken Murphy (director general), Attracta O'Regan (head of CPD) John Gorman (president, IITD), Sinead Heneghan (director, IITD), Michelle Ní Longáin (chair, Law Society Education Committee), Tracey Donnery (Finuas programme manager, Skillnets), John O'Connor (vice-chair, Law Society Education Committee), and Antoinette Moriarty (Law School)

Job-seeking training goes nationwide

The Society's Career Support service has developed new, intensive training courses in job-seeking matters. These courses are being provided in locations countrywide during May and June.

Effective CV preparation

The preparation of an effective CV and other aspects of self-marketing, such as writing covering letters, will be addressed in workshops at the following locations on the dates scheduled:

- Waterford: Thursday 6 May
- Dublin: Wednesday 12 May
- Portlaoise: Thursday 13 May
- Cork: Thursday 20 May
- Sligo: Thursday 27 May
- Limerick: Thursday 3 June
- Mullingar: Thursday 10 June
- Dublin: Wednesday 16 June
- Galway: Thursday 17 June.

Interviewing and negotiation

Training in successful interview performance and negotiation is being organised in a separate training course, where people will be given the opportunity to role-play and work through all the questions and challenges that tend to cause people difficulty. These workshops will take place as follows:

- Limerick: Tuesday 4 May
- Cork: Tuesday 11 May
- Mullingar: Tuesday 18 May
- Dublin: Wednesday 19 May
- Galway: Tuesday 25 May
- Portlaoise: Tuesday 1 June
- Waterford: Tuesday 8 June

- Sligo: Tuesday 15 June
- Dublin: Wednesday 23 June

All these courses are half-day in duration, from 1.30pm to 5.30pm. All qualify for CPD group-study credits. The courses are free of charge to solicitors registered with the Career Support service – a charge of €25 applies to all other attendees.

Capacity is limited at most venues, however, and anyone who wishes to attend any event is asked to book a place by emailing careers@lawsociety.ie. More details on these events are available on the society's website at www.lawsociety.ie/en/pages/careersupport.

Career Support is a Law Society initiative set up to assist solicitors faced with career challenges, such as unemployment, underemployment and uncertainty about what to do next, career-wise. A range of supports can be accessed countrywide, including CV review, telephone, email support and one-to-one consultations.

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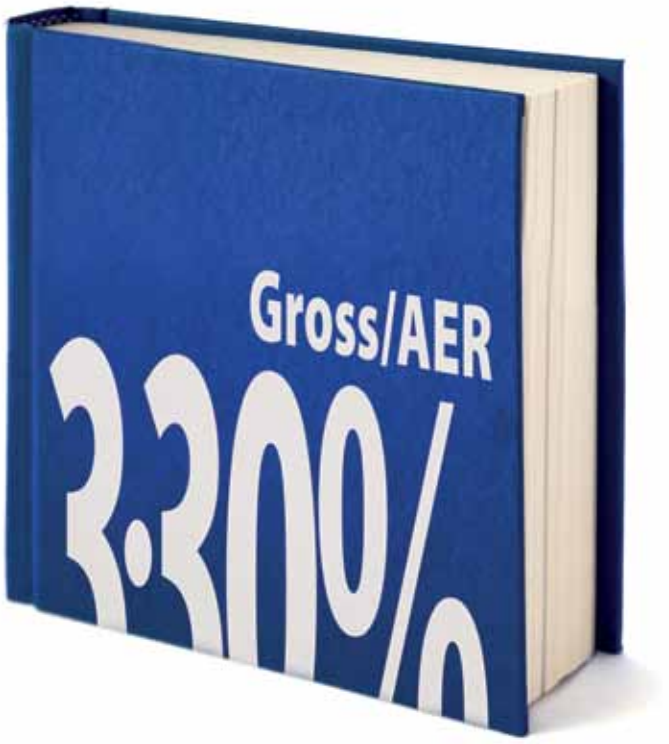

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ITM Law Centre proves popular

The Irish Traveller Movement Law Centre opened in June 2009 and provides a specialist legal service to Travellers in Ireland. The centre recognises the unmet legal need in the Traveller community and the importance of a specialist legal service for Travellers to the advancement of Traveller rights in Ireland. Its aims are:

- To advance the ability of members of the Traveller Community to access expert legal advice and representation,
- To advance recognition of Travellers as an ethnic minority,
- To take a series of test cases to challenge laws that attack Traveller culture.

The law centre operates as an independent centre within ITM and is one of six independent law centres in the country.

Solicitor for the ITM Law Centre, Siobhán Cummiskey

The new law centre is pursuing strategic test cases specifically relating to accommodation, equality and human rights, education, access to services, and ethnicity.

To date, the Irish Traveller Movement Law Centre has dealt with over 100 legal queries and has 20 strategic cases at litigation and pre-litigation stage. Among cases being taken are two equality cases under appeal to the Circuit Court in relation to refusal of service by a hotel to members of the Traveller community and an application to the Equality Tribunal against a management company.

Two High Court judicial review applications began in September, challenging the use of the criminal trespass legislation, one of which was preceded by a successful mandatory injunction application for the return to the applicant of her caravan home. Two cases in relation to the standard of Traveller accommodation are also at pre-litigation stage.

The law centre is also involved in applications and complaints to European and UN bodies.

Siobhán Cummiskey is the solicitor for the Irish Traveller Movement Law Centre and can be contacted at: itmlawcentre@gmail.com.

Public interest law is an easy PIL to swallow

The Public Interest Law Alliance (PILA) – a project of FLAC – held a conference on 16 April that aimed to find practical ways of promoting the use of law to respond to challenges such as debt, housing and children's rights.

There were presentations about international experiences of public interest law (PIL). Human rights lawyer, academic and author, Andrea Durbach, related the situation of the 'stolen generation' in Australia, where state policy removed aboriginal children from their families up until the 1970s, and how public interest law played its role in helping them.

Edwin Rekosh, founder and director of the Public Interest Law Institute (PILI), discussed how public interest law has developed in Central and Eastern Europe. There was an overview, too, of developments in Ireland, north and south, with contributions from FLAC senior solicitor Michael Farrell, PILA legal officer Jo Kenny, Melissa Murray and Paul Mageean, both of PILS Northern Ireland.

PIC: DEREK SPEIRS

Speakers at the Public Interest Law Alliance conference included *(from l to r)*: Paul Mageean, Melissa Murray, Jo Kenny, Colin Daly *(standing)* and Michael Farrell

Workshops followed on the topics of debt, housing, children's rights and social welfare, with the focus on Irish case studies in these areas. Solicitor Colin Daly of the Northside Community Law Centre spoke about the *McCann* case that led to law reform in the debt area, Geoffrey Shannon (Law Society, and the government's special rapporteur on child protection) addressed the issue of child law, while solicitor Siobhan Cummiskey spoke about the work of the Irish Traveller Movement Law Centre (see above).

The final session – a public interview hosted by broadcaster and journalist Vincent Browne – debated public interest law with a panel comprising Prof Gerry Whyte (TCD), Noeline Blackwell (FLAC director general) and Mark O'Brien (director of the US-wide, non-profit organisation probono.net).

PILA is seeking to bring together community/voluntary organisations and lawyers to explore ways they can work to mutual advantage – offering opportunities for lawyers to use their legal skills in a new context and for organisations to add a legal strand to their campaigning, administrative and policy work.

Property Registration Authority apologises for disruptive action

Delays caused by the work to rule in the Property Registration Authority (PRA) are having a significant impact on applications for registration and e-discharges.

The Society has made contact with the PRA in order to communicate its dissatisfaction with the current adverse effect that the situation is having on conveyancing.

The PRA has replied, saying that it apologises for the difficulties caused to solicitors. The authority has assured the Society that it is "making efforts to minimise the impact both immediately and in the long term on services for practitioners".

It has summarised the position as follows:

1) All applications for registration, with the general exception of examiner and section 49 applications, have been affected by the work to rule by staff. The work to rule also includes the non-completion of e-discharges and the non-completion of the vast majority of registration applications.
2) The PRA offices are open during the normal hours of 10.30am to 4.30pm and is continuing to provide the same services to customers at its public counters. Similarly, the telephone services, including the handling of queries and other telephone calls, continue to be provided. However, from time to time, the public counter services and telephone services have been affected by lightning actions, including a refusal to answer telephones and the suspension of public counter services. This form of work to rule typically happens at very short notice and, to date, has affected public counter duties generally during the mornings from 10.30am until 1pm, and telephone services generally during the afternoon. During the suspension of public counter services, senior staff in the offices are trying to provide cover and are responding to urgent enquiries and will take in applications for registration.
3) Solicitors can still obtain official copies of folios and maps in the normal way. The processing of applications for copy folios and maps that are lodged manually is not included in the work to rule and is being processed to completion. Applications for copies that are lodged with applications for registration – such as subdivisions, transfers and so on – are affected by the action, as they cannot issue until the registration applications are completed.
4) Solicitors can still obtain official copies of instruments in the normal way, and such applications are being considered.
5) The landdirect.ie services and all other online services are working as normal and are not affected. Where other services such as counters and telephones are affected, notices are posted on landdirect.ie as soon as the PRA is aware of the service impact.
6) Ground rents cases are being completed as normal. However, the non-handling of telephone queries action also affects ground rents, and callers may be asked to submit their queries in writing.
7) Applications lodged for registration are being examined and are being processed. They will be rejected or queried as appropriate and, in the case of subdivision applications, are being mapped. In effect, applications that are in order are being processed to pre-completion (that is, the final stage of the registration process). In the case of examiner and section 49 applications or other applications being handled by senior staff, they are being completed as normal.
8) Where applications are being processed to pre-completion, the status of the application will show in landdirect.ie as 'pre-completion' or 'finalised'.
9) In the Registry of Deeds, applications for registration are being processed fully to completion, as are official searches and requests for copy memorials and so on. Phones are not answered on the occasions of action in the same manner and on the same occasions as in the Land Registry. As a result of the work to rule, staff tend to be more insistent on queries from customers being in writing. Public offices in the Registry of Deeds are kept open by management at all times. Nevertheless, on the days of action in the public offices, members of the public are advised at reception to come back later when the public offices are fully staffed for business. Public law searchers can still gain access and use the landdirect.ie facility in the public room.
10) In the case of applications where requests are made to expedite applications or reference is made to urgent or hardship cases, senior managers are responding to any hardship or urgent request and will complete the applications if they are in order.

Criminal fee cuts condemned

The Law Society has condemned the government decision to slash, by a further 8%, the fees paid to solicitors and barristers under the Criminal Legal Aid Scheme. The cut came into effect on 1 April 2010.

Society representatives had met with representatives of the Department of Justice, Equality and Law Reform when the cuts were first mooted earlier this year. However, it quickly became clear that the 'consultation process' held out not the slightest possibility of reversing a government decision already made.

This 8% cut comes on top of an 8% cut last year and a 2.5% increment – applied, but then rescinded – just six months prior to that.

Ken Murphy: 'Society is not free without access to justice'

Responding in *The Irish Times* the day after the new 8% cut was announced, director general Ken Murphy said: "This cut will further reduce the quality of service that accused persons, with rights but without financial means, will receive in our courts. Access to justice is not free – but a society is not free without it."

He continued: "Solicitors want to contribute positively to the reductions in public expenditure that we accept are necessary. The solicitors' profession is more than willing to bear its fair share of the pain.

"But the reality is that solicitors who practise on the Criminal Legal Aid panel were under severe financial pressure even before this latest cut. The area of practice is not lucrative, and firms engaged in it have not generated reserves on which they can now draw to subsidise their practice.

"These cuts will result in a further addition to the already huge level of unemployment in the solicitors' profession. The current reality is one of too many solicitors, too little work, and too many clients who simply cannot pay even the greatly reduced fees that firms are now offering to charge."

Revenue e-stamping workshops

Throughout April and May 2010, Revenue is presenting workshops to assist practitioners with practical issues on the electronic filing of stamp-duty returns. The remaining dates in the series are listed below, with workshops beginning at 6pm on each day. Attendance is free. Practitioners, law clerks, legal executives and office staff dealing with stamp duty are most welcome to attend.

In addition, Revenue staff will be available on the following day (from 10am until 1pm) at the venues on the dates listed, to assist other practitioners locally who may not yet be using the system and who are still filing paper returns. One-to-one tuition and guidance will be available for those attending on the morning after the workshops. Again, attendance is free.

DATE	VENUE
Tuesday 11 May	Savoy Hotel, Limerick
Wednesday 12 May	Seven Oaks Hotel, Carlow
Tuesday 18 May	Silversprings Hotel, Cork
Wednesday 19 May	Tower Hotel, Waterford

Ahern grants recognition of Press Council

Minister for Justice Dermot Ahern signed a ministerial order on 23 April 2010 declaring the formal statutory recognition of the Press Council of Ireland as the 'Press Council'. The order, entitled the *Defamation Act 2009 (Press Council) Order 2010*, has immediate effect.

This order completes the final element outstanding from the passage of the *Defamation Act 2009*, which comprehensively reforms the law on defamation and replaces the previous legislation, which dates back to 1961.

Formal statutory recognition of the Press Council confers certain benefits on it. For instance, qualified privilege will attach to its reports and decisions, as well as those of the Press Ombudsman.

Subscription to the Press Council and adherence to the *Code of Practice for Newspapers and Periodicals* will strengthen the entitlement to avail of the new defence of reasonable publication in any court action.

Non-members of the Press Council will be required to have in place an equivalent fairness regime, or to operate an equivalent and publicised code of standards to avail of that defence.

PI BOOKLET – ERRATA

In the *Guidelines for Solicitors in Personal Injuries Board Cases*, under '*Statute of Limitations*', practitioners are asked to note that, in the example given on page 7 of the booklet, the *Statute of Limitations* expiry date should read 30 November 2010, not 30 November 2009, as is stated in the booklet. Apologies for any inconvenience caused.

STUDENT HUMAN RIGHTS ESSAY PRIZE

The Law Society of Ireland, in conjunction with the Southern Law Association, is pleased to announce the fourth annual competition for the Human Rights Essay Prize. All law students, including all trainee solicitors and barristers, are invited to submit an essay identifying a particular aspect of human rights law that they believe will have importance in the application or interpretation of Irish law. They should briefly explain the current understanding of law in this area and outline their argument for the influence of human rights law. Entries should be typed and approximately 2,000 to 3,500 words in length. Entries may be co-authored. Prize-winning and short-listed essays may be published. Information on marking, prizes and eligibility are available at www.lawsociety.ie under 'Human Rights Committee'. Email your entries to: j.mortimer@lawsociety.ie; or send to: Joyce Mortimer, human rights executive, Human Rights Committee, Law Society of Ireland, Blackhall Place, Dublin 7.

WOMEN LAWYERS' ASSOCIATION AGM

The Irish Women Lawyers' Association is holding its annual general meeting on 12 May, followed by a seminar on the *Civil Partnership Bill*, in the Green Hall, Law Society, Blackhall Place, Dublin 7. The 6pm seminar will feature contributions from Brian Barrington BL and Muriel Walls (partner in McCann FitzGerald). For further information, email: admin@iwla.ie or phone 01 817 5267 or 087 290 6294.

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Companies Consolidation and Reform Bill likely in 2011

The long-awaited *Companies Consolidation and Reform Bill* is not now expected before the autumn of 2011.

In 2007, the Company Law Review Group published its general scheme of *Companies Consolidation and Reform Bill*, representing the culmination of six years' work. Following this publication, the Office of the Parliamentary Counsel began the painstaking exercise of converting the drafting of the general scheme into legislative language.

Legislative amendments related to the financial crisis and a very large company law workload generally (including the requirement to transpose European directives) have contributed to this delay: 2009 saw the enactment of two *Companies Acts*, two other acts that amended the *Companies Acts*, as well as the transposition of two significant company law directives:

- *Companies (Amendment) Act 2009*, which clarifies and expands the inspection powers of the Director of Corporate Enforcement,
- *Companies (Miscellaneous Provisions) Act 2009*, which allows NASDAQ and NYSE-listed companies migrating (or 'inverting') into Ireland to continue to use US GAAP for a period of five years, as well as facilitating investment funds to migrate into Ireland,
- *Financial Measures (Miscellaneous Provisions) Act 2009*, part 4, which amends the transposition of the *Prospectus Directive*, removing the requirement of the Minister for Finance as guarantor of certain debt securities to accept liability in relation to the accuracy of information contained in prospectuses,
- *National Asset Management Agency Act 2009*, part 15, which amends the *Companies Act 1963*, section 216 and the *Companies (Amendment) Act 1990*, section 2, so that before a court makes an order winding up a company or placing it in examinership, either:
  a) The court must be satisfied that the company has no obligations in relation to a 'bank asset' that has been transferred to NAMA or a NAMA group entity, or
  b) If the company has any such obligation, a copy of the petition must be served on NAMA or such entity, and the court must hear NAMA or such entity in relation to the making of the order,
- *Shareholders' Rights (Directive 2007/36/EC) Regulations 2009* (SI no 316 of 2009), which make significant changes to the law regarding the convening and conduct of general meetings of listed companies; for example, requiring the publication on the internet of the date of the company's AGM no later than the financial year end, and giving shareholders the right to place resolutions on the agenda,
- *European Communities (Directive 2006/46/EC) Regulations 2009* (SI no 450 of 2009), which amend the fourth and seventh directives to require listed companies to include a corporate governance statement in the directors' report on the annual accounts.

The transposition of the new *Audit Directive* (2006/43/EC) was to have taken place by 29 June 2008, and following the initiation by the European Commission of proceedings against Ireland, is now due to be transposed before the summer.

The good news should be that the *Consolidation Bill*, when published, will have all of the above, and legal practitioners may be spared the deconsolidation of the law that so frequently follows consolidation enactments.

MOP WINS 'CLIENT CHOICE'

Ireland's largest law firm, Matheson Ormsby Prentice (MOP), was awarded the International Law Office 'Client Choice' award in central London on 22 April for the fourth time in five years. Winners were chosen through extensive research and polling of senior corporate counsel at Fortune 500, FT Global 500, FT Euro 500 and FT Asia-Pacific 100 companies. The awards focus on law firms' ability to add real value to their clients' businesses, including quality of legal advice, value for money, commercial awareness, effective communication, billing transparency, depth of team, response time, sharing of expertise and use of technology. In addition, three MOP partners were named as individual winners for Ireland. Bonnie Costelloe (competition), Noreen Howard (litigation) and Robert O'Shea (international business group) were honoured by corporate counsel for their work.

IRISHMAN ELECTED WORLD PRESIDENT OF CIArb

An Irish alternative dispute resolution (ADR) practitioner, Joe Behan, has been elected world president of the 12,000-strong Chartered Institute of Arbitrators (CIArb) for the year 2010. He is a council member of the Irish Commercial Mediation Association, a certified mediator with the International Mediators Institute and a practitioner member of Mediators' Institute Ireland. He sits on a number of institutional and industrial panels of arbitrators, including those for the Law Society, Engineers Ireland and the CIArb.

21ST CENTURY LAW FIRM

A new report warns law firms that they need to modernise or lose out if they are to take advantage of a major power shift currently taking place in favour of the in-house client. The report – *Law Firm of the 21st Century – the Clients' Revolution* was commissioned by international law firm Eversheds. It canvassed the opinions of 130 general counsel and 80 law firm partners around the world.

Everything is possible: gen

The Law Society's annual conference in Kilkenny borrowed from the legacy of punk, focusing on how the profession can pull itself out of the recession. Mark McDermott reports

The legacy of punk, and in particular the Sex Pistols, crashed its way into the Law Society's annual conference at Lyrath Estate, Kilkenny, from 9-10 April – and we had local lawyer Michael Lanigan (Poe Kiely Hogan Lanigan) to thank for it. Not that Michael had issued any surreptitious invites to Sid Vicious and Johnny Rotten wannabes in the Marble City – it's unlikely they'd have taken up the offer anyway – but his unique perspective on his decision to take part in a merger with another Kilkenny firm had turned him all reminiscent.

"Two years ago, if you'd met me on a Friday afternoon, you probably would have been in the lobby of a courthouse and I would have been ready to go back in to do yet another drunk-driving case. I would have been hoping that I had remembered to sign the cheques, but probably didn't, and somebody would be texting me saying 'you have to get back to sign the cheques'.

"I was managing on the basis of crisis. It was reactive management, not proactive management. I don't believe I would be on my own in that, but it was something that was becoming increasingly obvious."

PIC: MARK MCDERMOTT

Speakers Andrew Beck, Tony Cherry, Law Society President Gerard Doherty, Michael Lanigan and Peter Oakes

PIC: MICHAEL BROPHY

Roger Quail, Valerie Peart, Gerard Wade and Gail O'Keeffe

That's where Malcolm McLaren – former manager of the Sex Pistols – came in. "For those of you who don't know of him," said Michael, "he was a person who, in effect, invented punk rock. He had a great slogan, which he used for the Sex Pistols – 'cash from chaos'. And while it wasn't all cash and it wasn't all chaos, there were times when I did have my Malcolm McLaren moments!"

It was the invitation to a cup of coffee with Brian Kiely, a partner in Poe Kiely Hogan, that got him thinking about engaging in a merger. As the first cup progressed into a second, then a third, it became clear to Michael that there were enough points of common interest for both firms to explore it as a realistic idea.

The process lasted five months. Michael spoke about the process of merging – following a path, comprehensive, decisive and objective. It became quickly obvious that the process was less about negotiation and more about reaching consensus on many issues. A merger would end in tears if the strategy was the wrong one and the implementation was not thought through, he said.

"Both sides had to be honest and upfront about the 'cobweb corners', as much as the beautiful fields to be ploughed. We concentrated on working out a vision as to what we wanted to end up with, and a culture for the firm, rather than working on the financials at the start. The financials will in some respects work themselves out, but if you don't get the vision right and the

Kilkenny practitioners *(l to r)*: Mandy and Tom Walsh, Martin and Colette Crotty, Law Society President Gerry Doherty, Shirley and Michael Lanigan, Eugene and Celine O'Sullivan, and Tim and Trini Kiely

erating cash from chaos

culture right and feel that you can actually knit together, there is no point in going on."

NAMA opportunities

'Cash from chaos' could easily have been the theme for the two NAMA talks – by Mark Barr (specialist in commercial property with Arthur Cox) and Peter Murray (specialist in banking with A&L Goodbody). They spoke about the significance of NAMA for legal practitioners and their practices.

Both were of the opinion that many opportunities would flow for solicitors from the National Asset Management Agency. Mr Barr told the conference that the participating institutions, borrowers, potential investors and banks involved in NAMA's refinancing transactions would require solicitors to represent them.

Already a 'due diligence' panel of solicitors had been established, and NAMA had advertised for the appointment of a further panel to deal with enforcement. It was up to solicitors to showcase their expertise in NAMA legislation, he said. NAMA-inspired joint ventures and partnerships would undoubtedly ensue.

Peter Murray turned his attention to NAMA and the consequences for banks. It was a self-evident fact, he said, that their performance and ability and willingness to lend would be key to the recovery of the Irish economy. There were probably more than 1,500 borrowers involved, and at least 15,000 loans to be acquired.

He pointed out that the NAMA legislation dealt with "all relevant contracts – quite a broad definition", which included certificates of title, solicitors' undertakings and certain ancillary rights – unless the acquisition schedule provided otherwise. General terms and conditions of acquisition were quite onerous on the institutions. These would include various warranties in terms of marketable title and enforceability of the security, as well as accuracy of the information provided throughout the due-diligence process.

While the geographical breakdown of the NAMA loans was concentrated in the South of Ireland, quite a significant portion was overseas. "Obviously, the Irish legislation won't have any extraterritorial effect," Mr Murray said. "So all of the statutory protections and advantages afforded to NAMA and the statutory transfer mechanic won't work in the UK, for example, and it may not be enforced or recognised in foreign jurisdictions."

NAMA would be the key player in the Irish property market and in many of our lives for the foreseeable future in a professional context, he said.

The director of the Irish

PIC: MARK MCDERMOTT

Speakers Peter Murray, Mr Justice Nicholas Kearns, Gerard Doherty (Law Society president) and Mark Barr

Ellen Twomey with her seven-week old daughter Eimear

PRESIDENT OF HIGH COURT SPEAKS OF CHANGES

"We are acutely conscious of the seismic changes brought about by developments such as NAMA, but other developments of considerable importance to practitioners can often slide up on us more quietly," said the President of the High Court, Mr Justice Nicholas Kearns, addressing the Law Society's annual conference.

Paramount among his concerns was to "cooperate in every way possible with efforts to bring the long-awaited Judicial Council into existence this year". Such a council would have responsibility for the establishment of a code of judicial ethics and would set out a process for the investigation of complaints of breaches of ethics by members of the judiciary.

"Contrary to some media reports, this is a development which the judiciary fully support, not least because it is in their own best interest to have such a body, both to promote the welfare and good standing of the judiciary, and also to provide a fair and calibrated method of dealing with complaints against judges."

Mr Justice Kearns also said that changes were being examined in the area of personal injuries litigation. A working group was examining how to improve efficiency and reduce the cost of legal proceedings in medical negligence cases.

He asked whether a separate list should be created for medical negligence cases. At present, such cases were listed as part of the general personal injuries list. However, the scarcity of judges meant that, even when dates were fixed for hearing, there was no guarantee that a particular case would get on. "This is a horrendous situation for claimants and individual medical practitioner defendants alike."

On the subject of asylum cases, he said that there were 650 pre-leave applications awaiting disposal last month, and 105 post-leave applications. The sheer volume of such cases imposed a significant financial burden on the state. To help ease the burden, he said he had obtained a commitment from the majority of the judges of the High Court to provide supplemental and additional sitting days in September to clear or at least reduce this caseload. He hoped and expected that the bar and solicitors' profession would cooperate in every way they could.

Group from Michael Houlihan and Partners, Ennis Co Clare *(l to r)*: Paul and Catherine Tuohy, Marina Keane, Helen Rackard, Kostas Wootis, Joan and Michael Houlihan, Mairead Doyle, Ronan Higgins, Sinead Nunan, Mary Nolan and John P Shaw

Diane Miller and Maxine Hunter

Centre for European Law, Andrew Beck, seized the 'opportunities baton' and gave an upbeat assessment of business opportunities arising from EU law. (The *Gazette* hopes to reproduce much of his presentation in the June issue.) Andrew identified three key areas that solicitors' practices might consider prospecting. He recommended:

- Developing EU law opportunities on a case-by-case basis,
- Encouraging practices to consider developing a strategic EU-law direction, and
- Identifying the skill-sets required to accomplish these objectives.

EU law is "both critical and expanding", he said. It is critical because EU law trumps Irish law due to the supremacy of EU law over Irish law. It is expanding because some 60-70% of Irish legislation annually implements EU directives. He reminded listeners that 70% of commercial law emanates from the EU, though all areas of law were likewise affected.

"Knowledge of EU law allows the Irish lawyer to add value to the service she or he provides – and to be more competitive. It allows the Irish lawyer to advise their clients more fully on their options, to recognise opportunities for developing one's reputation and one's practice, and to avoid negligence," he said.

Sinead Kearney and Simon Murphy

Road map

The head of governance and risk at Beachcroft LLP, Tony Cherry, spoke on risk management in a legal firm. "There is one very compelling reason why you should be considering risk management – and that is the impact of professional indemnity premiums on the profession.

"The whole point about enterprise risk-management is that it embraces both risk and opportunity. And if you can capture both risk and opportunity in your risk-management programme, then that is a fantastic support for your business strategy."

Addressing the question of why law firms should look to achieving a quality standard, Tony cited "client recognition, because I think there's a great deal to be said for doing something that your clients will recognise … Apart from the external benefits, we achieved a huge range of internal benefits, including a fantastic business planning environment. A planned business that knows where it's going is one that is so much more likely to get there. It's just like having a map."

Having a map was one of the top priorities of sports psychologist Gerry Hussey. Gerry mentors the Irish boxing team, the Irish velo cycling team and the Munster rugby team, encouraging them to set personal and team goals in order to achieve their very best.

"In every situation," he said, "there are elements you can control and elements you cannot control. In the middle of this recession, there is stuff we can control and stuff we can't. Where do I apply my energy? Too many people spend too much of their energy on 'ifs, coulds, shoulds and mights'. Too many people are demotivated in the present because of what they might think may happen in the future. Too many people are stunted in the present because of something that happened in the past.

He challenged his audience to take a very close look at their personal lives. "We talk about performance indicators all of the time in terms of what we do in our jobs, but what are the performance indicators of your life?

"Whether it is personal, financial, business, relationship, pick a situation, state clearly what you want to achieve. What lifestyle do I want? What dream do I want? Is this it? How do you know you are on track? What is the prime role for you personally this year, this month, this week? Map where you want to go by saying: 'everything is possible'." G

Building trust in the new Kosovo

The International Civilian Representative in Kosovo, Pieter Feith, spoke to the *Gazette* during a visit to Dublin – saying that he prefers persuasion rather than the threat of sanctions to get results

Speaking with the International Civilian Representative in Kosovo, Pieter Feith, recently, the *Gazette* was reminded of a quip about the Balkan conflicts:

"How many Bosnia war correspondents does it take to change a light bulb?

"You don't know?! *Of course* you don't know – *you* weren't *there*!"

(The joke is from the former war correspondent Ed O'Loughlin's recent debut novel, *Not Untrue and Not Unkind*.)

The *Gazette* started the interview by asking Feith for a brief explanation of his mandate. Five minutes and multiple acronyms later, and despite the patience and clarity with which they were explained, this reporter was reeling. Feith is both the International Civilian Representative (ICR) in Kosovo and, under an entirely different mandate, the EU Special Representative (EUSR). "I wear two hats," he noted, wryly.

The tricky thing is that the hats do not necessarily match.

As ICR, Feith was appointed by a steering group of a selection of those states that have recognised Kosovo since its unilateral declaration of independence in February 2008 (Ireland among them). As EUSR, however, he represents the 27 member states of the European Union, some of which, such as Spain, do not recognise Kosovo's independence.

If that two-fold mandate were not complicated enough, he also has to balance roles as both an advisor to EU presences in Kosovo as EUSR and as someone with executive powers in his own right as ICR. It is fortunate, clearly, that Feith – by temperament as well as by profession – is a diplomat.

His executive authority includes powers to dismiss officials, to amend laws and to "intervene when government actions run counter to their international obligations". He has taken "a soft approach" to this role, he says, preferring to "persuade the government" rather than relying on the threat of sanctions. "I build my actions on the principle of local responsibility."

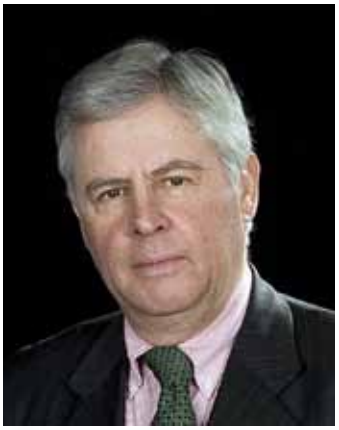
Will of the people

That principle evidently runs deep in his attitude to Kosovo. The argument on Kosovan sovereignty centres on questions of international law. Kosovan independence, which entailed its secession from Serbia, was not explicitly authorised by a United Nations' Security Council resolution and was arguably in violation of existing resolution 1244. This resolution, which established the UN administration in Kosovo in 1999, after the Kosovan war, guaranteed respect for the territorial integrity of the former Yugoslavia – a principle which, it is argued, was violated by Kosovo's secession.

As Feith points out, however, resolution 1244 also guaranteed respect for the will of the people. "It was the very clear wish of the Kosovar Albanian majority to become independent," he says. With the failure to achieve a consensual outcome after years of negotiations with Serbia on the status of Kosovo, "it became clear that there was simply no alternative to independence".

The legal situation was complicated by the fact that international law "has no rules about declarations of independence", he says.

Though the above interpretation can be contested, the situation may be clarified later this year by a judgment from the International Court of Justice, which is due to issue an advisory opinion on the legality of Kosovo's declaration of independence under international law.



The International Civilian Representative in Kosovo, Pieter Feith

In the meantime, Feith takes a pragmatic approach to his mandate in Kosovo, taking the view that it is vital, in any case, that the EU facilitate economic development and the imposition of the rule of law in Kosovo.

The rule of law is the "crucial area" being focused on by the EU in Kosovo, he says, with the EU's rule of law mission, EULEX, employing some 1,600 international police officers, judges, prosecutors and other experts to help reform and embed the Kosovan legal system.

Challenges facing Kosovo

In a lecture at the Institute of International and European Affairs in Dublin on 13 April, Feith outlined the challenges facing Kosovo in this area, including the fight against organised crime and corruption and the need to revamp the judicial system.

"The rule of law is the bedrock on which all democratic states rest," he said, and quoted former President of Ireland Mary Robinson: "Without the rule of law, the dignity and equality of all people is not affirmed and their ability to seek redress for grievances and fulfilment of societal commitments is limited."

"This must not be so in the case of Kosovo," he said, noting that progress was being made. "It is encouraging to see the establishment of new judicial institutions, new entities that have recently handed down legally sound, well-reasoned opinions in a case involving community rights and in addressing elections challenges. In the fight against corruption and fraud, this judicial independence becomes even more of an imperative."

The prospect of eventual EU membership for Kosovo and Serbia was "hugely helpful" in promoting development there, he said, as it provided motivation for the public and a source of discipline for the political system. "The attraction of the EU helps people overcome their ethnic past. It is, indeed, the best way to deal with the past."

Concluding on an optimistic note, he said that the overarching theme of the European mission in Kosovo was "to ensure eventual local ownership and a solid European identity. A certain dynamism and hope has descended all over Kosovo".

He also referred to the withdrawal of the Irish contingent with KFOR, the NATO-led international security force in Kosovo, last month, by acknowledging the "enormous contribution made by Irish soldiers in Kosovo". G

Colin Murphy is a freelance journalist. (The text of Pieter Feith's address is available at www.eusrinkosovo.eu).

Fundamental education 'is a

The right to education for adults with disabilities – denied by the Supreme Court in *Sinnott v Minister for Education* – is a right for all age groups in international law, writes Joyce Mortimer

On 30 March 2010, the Irish Human Rights Commission (IHRC) published an inquiry report into the standard of care provided by the John Paul Centre in Galway. The centre is a residential home for adults with severe to profound learning disabilities. A group of parents approached the IHRC regarding the care and welfare of their adult children living in the John Paul Centre. The parents expressed their concerns that their children's human rights were not being respected or protected.

President of the IHRC, Dr Maurice Manning, stated: "The people at the heart of this inquiry are one of the most vulnerable groups in our society. They are adults, many of whom have been living at the centre since they were children. Many of them have never benefited from interventions now available to children. As a result of their severe to profound intellectual disability, their parents and care workers are their human rights defenders. Our inquiry has found that the human rights of the individuals in the centre have not been fully protected. There are severe gaps in service because the centre has not been properly supported. Lack of speech and language services are hampering people's ability to communicate, while the physical conditions at the centre are more suitable to children than adults. All of these issues are having a detrimental impact on the dignity and wellbeing of the people affected. Urgent action is needed to increase multidisciplinary services, including speech and language and occupational therapy in particular."

Standard of care

The IHRC measured the standard of care provided in the John Paul Centre in the context of domestic legislation, as well as against relevant international human rights benchmarks. With regard to the right to education, domestic legislation (the *Education for Persons with Special Education Needs Act 2004* and the *Disability Act 2005*) does not apply to individuals over the age of 18 years and, therefore, has little relevance to the people resident in the John Paul Centre.

The right to education for adults (over 18 years of age) with disabilities was denied by the Supreme Court in the case of *Sinnott v Minister for Education*. Barr J in the High Court rejected the age limitation of 18 years, stating: "There is nothing in article 42.4 which supports the contention that there is an age limitation on a citizen's right to ongoing primary education provided by or on behalf of the state. It is evident that the right to primary education would be fundamentally flawed if narrowly interpreted as ending at an arbitrary age – 18 years … the ultimate criterion in interpreting the state's constitutional obligation to provide for primary education of the grievously disabled is 'need' not 'age'."

While the High Court focused on the needs of the individual, the Supreme Court, on appeal, focused on chronological age instead. Geoghegan J stated: "I am unable to discern in article 42, no matter what contemporary interpretation one gives to it, any justification for the view that it continues to apply into adulthood." Murray J held that article 42 is "child centred".

Dissenting, Chief Justice Keane said that the state was "obliged by article 42.4 of the Constitution to provide for free primary education for the plaintiff appropriate to his needs for as long as he was capable of benefiting from the

ONE TO WATCH: NEW LEGISLATION

Arbitration Act 2010

The *Arbitration Act 2010* was passed by the Oireachtas on 8 March, and has been signed into law by the President. The act will apply to all domestic and international arbitrations that commence after the legislation comes into operation.

The 2010 act comes into operation on 8 June 2010. It is noteworthy that arbitration clauses contained in agreements existing prior to 8 June 2010 will be subject to the old rules.

Domestic/international alignment

The *Arbitration Act 2010* brings Ireland's arbitration rules in line with international standards. The new legislation applies the *UNICTRAL (United Nations' Commission on International Trade Law) Model Law*. The 2010 act repeals and replaces preceding Irish legislation, that is, the *Arbitration Act 1954*, the *Arbitration Act 1980* and the *Arbitration (International Commercial) Act 1998*. Until now, there were separate rules for domestic and international arbitrations. The 2010 act will apply the *Model Law* to all arbitrations in Ireland and hence streamlines the procedure.

Number of arbitrators

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.

Equal treatment of parties

Article 18 of the *Model Law* states that the parties shall be treated with equality and each party shall be given a full opportunity to present his case.

Costs

Under the current framework, any agreement on costs can only be made after the dispute has arisen and not prior to. Under section 21 of the new legislation, parties have the option to agree allocating cost prior to, or post, the dispute.

Reasoned awards

According to article 31 of the *Model Law*, the award shall state the reasons upon which it is based,

human rights watch

right for all age groups'

same". The Chief Justice stated: "No principled basis exists in law or in the evidence for the contention … that a person … ceases to be in need of primary education at age 18, at age 22, or at any stage in the future which can now be identified with precision."

No protection under Irish law

Finding no protection under Irish law, the IHRC looked to the international legal framework for guidance. On the specific issue of age, the IHRC highlights the views of the European Committee on Social Rights (ECSR). In the case of *Association International Autism-Europe (AIAE) v France*, the ECSR held that the right to education under the *European Social Charter* applies to all people with disabilities, irrespective of their age. The IHRC also examined state party conclusions, finding that the ECSR believes that there ought to be no distinction between older and younger adults.

Much more advanced conceptual thinking was evident in the United Nations' legal framework on the right to education. The report quotes from General Comment No 13 of the Committee on Economic, Social and Cultural Rights (CESCR), where it states: "Education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."

Kathryn Sinnott outside the Supreme Court in 2001

Significantly, regarding the right to education for adults with disabilities, the CESCR stated: "It should be emphasised that enjoyment of the right to fundamental education is not limited by age … it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and lifelong learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages."

The most recent relevant piece of international legislation is the United Nations' *Convention on the Rights of Persons with Disabilities*, article 24 of which protects the rights of persons with disabilities to education. "This landmark convention is a powerful tool to achieve the right to education," states Kenneth Eklindh, chief of UNESCO's Section for Inclusion and Quality Learning Enhancement.

In its analysis, conclusions and recommendations, the Irish Human Rights Commission states that, "notwithstanding the position articulated by the domestic courts in *Sinnott v Minister for Education*, as a matter of international law, it questionable whether the state can justify the non-provision of any educational facilities to them in their adulthood". G

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

unless the parties have agreed otherwise.

'Case stated' change

The new legislation does not make provision for the 'case stated' procedure. Arbitrators will, therefore, no longer be able to refer questions of law to the courts for interpretation.

Recourse against award

The sole method of challenging an arbitration award is by way of article 34 of the *Model Law*. The grounds specified under this article are limited. It states that an arbitral award may be set aside by the court if:

- A party was under some incapacity,
- The agreement was not valid under law,
- The party making the application was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings,
- The award deals with a dispute not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration,
- The composition of the arbitral tribunal or procedure was not in accordance with the agreement of the parties,
- The subject matter is not capable of settlement by arbitration under law,
- The award is in conflict with public policy.

Small claims

According to section 31 of the new act, a party to an arbitration agreement who is a consumer shall not be bound by an arbitration agreement where the dispute involves a claim for an amount under €5,000, unless (s)he agrees to the arbitration after the dispute has arisen or the agreement has been individually negotiated.

Functions of the High Court

According to section 9 of the new legislation, the functions of the High Court will be performed by the president or such other judge of the High Court as may be nominated by the president. G

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

letters

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

Postcards from the edge

From: a solicitor who was recently made redundant

I am a solicitor and, a short time ago, I was made redundant. I can honestly say that it was one of the most harrowing experiences of my life. This was not due to the fact that I was made redundant, but rather the way the whole procedure was handled by my employer.

I had absolutely no idea that I was being made redundant. I was, like all solicitors, fully aware of the decrease in business, and therefore I strove to work harder and, as a fee earner, I became more vigilant about my fee income. I was, however, effectively ignored in my workplace by my employer for a significant period prior to the redundancy – that was

difficult. Files I had been working on were slowly but surely taken from me.

The dreaded day eventually arrived, and that meeting with my former employer was horrendous. My employer's speech was cold, callous and calculating. As I struggled to take in the news, my employer took telephone calls, and other staff even attempted to gain entry to the room for the purpose of dealing with office administration matters. As you can imagine, I just left – head reeling, heart pounding.

Times are tough, and I am sure it is not easy being an employer. I do believe, however, that an employer has a moral duty to inform the relevant employee of a possible impending redundancy as soon as possible. It is imperative that the employee has time to prepare financially and, more importantly, has time to deal psychologically with the impact of being made redundant. In my case and with hindsight, I do believe my employer was aware for some time that I was to be made redundant.

Finally, as I said at the outset, as a solicitor, being made redundant was and is, of course, difficult – but I can deal with that. I was just disappointed and saddened that my employer, when faced with a difficult decision, failed abysmally to be kind, honest and respectful towards me. I deserved that.

Good luck to all of you in the months ahead.

Wanted: judgments on dangerous driving cases

From: Gerard O'Keeffe, Park House, Kanturk, Co Cork

I would appreciate it if the *Gazette* would publish my request as to the furnishing of details relating to any judgments in the District or Circuit Courts in relation to dangerous driving and other driving cases, or indeed any other unpublished judgments.

In explaining my request, I would draw the attention of *Gazette* readers to the foreword of the second edition of *Dangerous and Other Driving Cases*, by O'Keeffe and Hill, which foreword was written by legal executive Christina Aspell:

"As someone in their mid-20s, I believe that an objective view of a situation is better than a subjective one. I am encouraged also by the maxim 'It's not what happens to you that is important – it is how you deal with it.'

"Some ten years ago, in my mid teens, I went one night to a film in Kanturk. My mother picked me up after the film and, on our return, a vehicle came across the road, destroying my father's car and causing injury to my mother, who was the driver, and I, who was the sole passenger.

"The gardaí and ambulance arrived and my mother and I and the driver of the other car were taken to hospital in Mallow by ambulance. On the journey to the hospital, the driver of the other vehicle died.

"No fault was attributed to my mother's driving, or of course, indeed to me.

"I was in third year in secondary school at the time, and my ambition was to join an international Irish step dancing troupe. I had won a number of both national and international prizes as to Irish dancing.

"The accident was such that whilst I was financially compensated, I could not pursue my career as a dancer. I am given to understand that most Irish dancers have a career until they attain the age of approximately 30 years.

"I went to Mr O'Keeffe with my parents who acted for me in my case to deal with my claim and then, subsequently, I did work experience in his office.

"Life took different turns for me and I am now a legal executive working for Mr O'Keeffe, my intention being to do, initially, a diploma in law in UCC, then do a degree in law and, subsequently, qualify as a lawyer.

"My tangential initial intention is to attempt to ascertain as to how many drivers over the age of 25 years are those who are convicted of excess alcohol. I believe the rule of thumb is approximately two-thirds are over that age.

"Younger drivers seem to be much more careful as to driving with excess alcohol and, indeed, make use of taxis.

"It is my intention to circulate all judges of the District Courts of Ireland as to whether they have given written judgments in driving cases, to include excess alcohol cases, in the hope they will give me copies of such judgments, with their permission to publish same, or extracts therefrom.

"As a matter of practice, perhaps, the *District Court Rules* should be amended, thus allowing a defendant once a summons has been served on him, to immediately apply personally or through his solicitor for copies of the appropriate garda, civilian and other documents and statements of relevance concerning a prosecution, as it appears, in many areas, an initial application has been made to the court for same.

Gerard O'Keeffe and Christina Aspell are looking for copies of District and Circuit Court judgments in relation to dangerous driving cases

"It appears to me also, and this is indicated in the introduction in the first edition, that consideration should be given to amend legislation in cases of excess alcohol where it is proven to the court that a defendant relies totally on being capable of driving for his livelihood, and that his or her disqualification would be in respect of particular hours of particular days to enable he or she to continue on as a breadwinner.

This applies, of course, more so in rural areas where transport is difficult and, sometimes, very expensive to obtain…"

I also have a suggestion to make, namely that since there are many thousands of solicitors in practice and appear before judges who do not know them, nor they he or she, that when they start to address the court, they hand in to the court registrar a copy of their business card so that the judge and they may be more capable of communicating in a less treadmill-like fashion, primarily as to a judge referring to them by their full name in appropriate cases.

In relation to my request above on behalf of Ms Aspell, I would appreciate it if judgments could be sent to the postal address above, or by email to goksolicitor@eircom.net. G

Gwen Malone!
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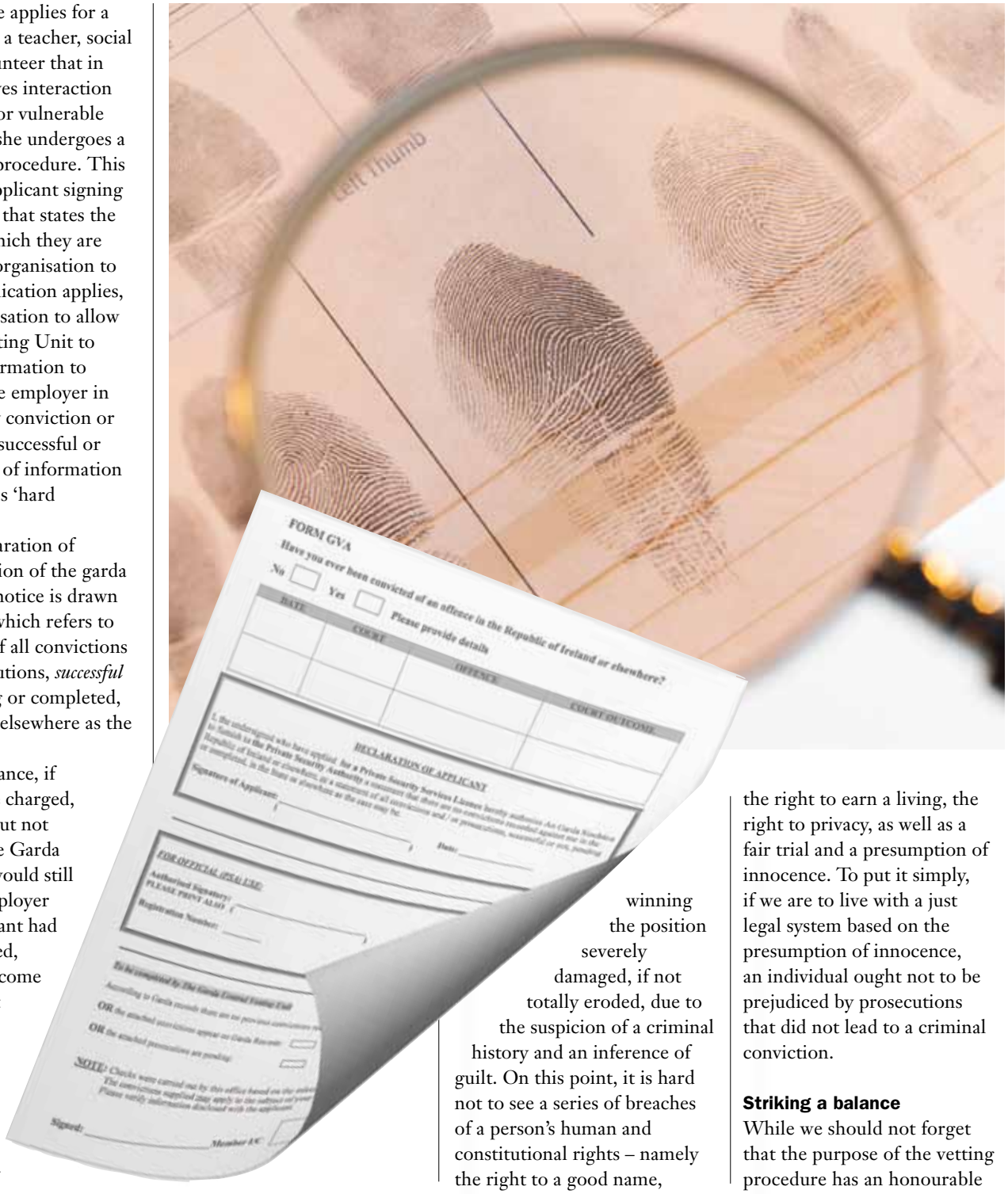
Innocent until proven

The garda vetting procedure, ostensibly introduced to protect children and the vulnerable, is leading to breaches of people's human and constitutional rights, argues Fergal Mawe

Today, if one applies for a position as a teacher, social worker or volunteer that in any way involves interaction with children or vulnerable groups, he or she undergoes a garda vetting procedure. This involves the applicant signing a vetting form that states the position for which they are applying, the organisation to which the application applies, and an authorisation to allow the Garda Vetting Unit to release all information to the prospective employer in relation to any conviction or prosecution – successful or not. This type of information is referred to as 'hard information'.

In the 'declaration of applicant' section of the garda vetting form, notice is drawn to line three, which refers to "a statement of all convictions and/or prosecutions, *successful or not*, pending or completed, in the state or elsewhere as the case may be".

Say, for instance, if one were to be charged, prosecuted – but not convicted – the Garda Vetting Unit would still inform the employer that the applicant had been prosecuted, even if the outcome had been a not guilty verdict. To this end, the applicant would undoubtedly have his or her chances of winning the position severely damaged, if not totally eroded, due to the suspicion of a criminal history and an inference of guilt. On this point, it is hard not to see a series of breaches of a person's human and constitutional rights – namely the right to a good name, the right to earn a living, the right to privacy, as well as a fair trial and a presumption of innocence. To put it simply, if we are to live with a just legal system based on the presumption of innocence, an individual ought not to be prejudiced by prosecutions that did not lead to a criminal conviction.



Striking a balance

While we should not forget that the purpose of the vetting procedure has an honourable

viewpoint

guilty – or not?

intention of protecting children and the vulnerable (and they undoubtedly deserve the highest level of protection), the measures implemented, on the other hand, cannot be taken to be absolutes over all other human and constitutional rights. In essence, a just balance needs to be struck between (a) preventing individuals from having their careers blighted and rights infringed and (b) protecting children and the vulnerable. The current system lacks this balance and proportionality, as an individual's rights can be damaged by unreliable charges, including even minor out-of-date prosecutions – for example, the person who was caught smoking cannabis at the age of 16 and given a probation order. From this, one could rightly call into question the purpose of having a criminal record system if a charge and prosecution were deemed sufficient to warrant third-party consideration.

However, it is not just employer or voluntary organisations, clubs and church groups that have taken to vetting, but also universities. In UCD, for example, there are currently a total of five undergraduate courses and six postgraduate courses that require the applicant to complete the vetting procedure outlined above. What's to stop every other employer, university and NGO in every other sector from following suit? And, in the words of the then Minister of State for Children, Brian Lenihan, it would seem that this might well transpire: "I look forward to the full realisation of the ambitious plan to make criminal history vetting available to all relevant sectors and organisations."

National vetting bureau

Currently, and rather interestingly, there is no legislation that allows for the vetting outlined above to take place, or for the Garda Vetting Unit to carry on its business, or even for the drafting of the declaration (reproduced on the left), which, in turn, brings us to the issue of new *National Vetting Bureau Bill*, which is due by the end of August 2010.

The current Minister of State for Children, Barry Andrews, stated in December 2009 that preparation of legislation was under way for the establishment of a national vetting bureau, where both 'hard' and 'soft' information would be collected, stored and exchanged. 'Soft information', in the words of the Joint Oireachtas Committee on the Constitutional Amendment on Children, refers to information on matters such as allegations or criminal investigations that do not result in a criminal conviction. Practically speaking, this will mean rumours, gossip and unproven allegations and, to this end, it is envisaged that vetting will come to consist of releasing both 'hard information' and 'soft information'.

> ***"Currently, and rather interestingly, there is no legislation that allows for vetting to take place, or for the Garda Vetting Unit to carry on its business"***

In reading article 40.1 of the Constitution, one will see that a citizen is entitled to his or her good name, and, as such, is entitled not to have a job application ruined because somebody once reported them to the gardaí for 'suspicious activity'. This, in turn, could easily determine the future employment prospects of an individual who did nothing illegal or inappropriate.

In Britain, a similar procedure exists where an applicant has to get an 'enhanced clearance certificate' if (s)he wants to work with children or vulnerable groups. This allows every criminal conviction, caution, spent conviction and any information that the chief officer of police considers to be relevant, to be included, as set down in section 115(7) of the *Police Act 1997*.

Legal assessment

In December 2009, the House of Lords revisited the legality of this in *L, R v Commissioner of Police of the Metropolis*. While the plaintiff failed in her action, the court noted that article 8 (privacy) of the ECHR fell within the remits of section 115(7) of the *Police Act 1997*, as the police must give due weight to the applicant's right to respect for his or her private life.

The main findings from this action are that:

- It should no longer be assumed that the presumption is for disclosure,
- Child protection procedures should be proportionate and contain adequate safeguards, and
- Soft information may constitute nothing more than allegations or mere suspicion of matters that are disputed by the applicant.

In the future, where doubts exist, the individual shall be allowed to make representations before the information is released. It was also rightly pointed out that if proportionality is not achieved, it will not only fall foul of the convention, but will redound to the disadvantage of the very group they are designed to protect.

Overall, one can argue that the current releasing of 'hard information' is a breach of one's rights. The soon-to-be-proposed releasing of 'soft information' is an extreme violation of human rights and has been criticised in Britain. To this end, and in the interest of maintaining a sound Constitution, the releasing of such information should be challenged. G

Fergal Mawe MA is awaiting admission to the Roll of Solicitors.

Fairy tale

It's no secret that newly qualified solicitors and even law students are looking abroad for brighter opportunities. For those considering America – specifically New York – Patrick Mair asks whether the Big Apple holds out much promise for Irish-qualified solicitors

At a time when solicitors' firms in Ireland are faced with exceptionally difficult circumstances, newly qualified solicitors and even law students (who would in better times have easily obtained traineeships) are looking abroad for brighter opportunities. America, and New York in particular, was traditionally and remains today a favoured destination for the Irish. But in the aftermath of the worst economic crisis in 80 years, does New York hold as much promise for Irish-qualified solicitors and what are the options for those looking to try their hand at the practice of law in the Big Apple?

The first wave of Irish lawyers to seek their fortune in New York began to arrive in the mid to late '80s when, like today, Ireland's economy was in the doldrums and opportunities were scarce. New York, on the other hand, was booming because of the rapid expansion of the financial services sector (interrupted, of course, by the 1987 crash), and law firms were riding the crest of the wave. These early arrivals blazed a trail that many would later follow, and it was because of the new ground broken by this first wave that later arrivals could reasonably expect their Irish

MAIN POINTS

- Irish lawyers blaze a trail in the US of the '80s and '90s
- Getting a foot in the door
- No typical route to follow

# of New York

credentials to be recognised and respected.

Over the succeeding decade, all but a handful of that first wave of lawyers eventually returned home, as Ireland's economic situation improved and the need for solicitors spiked. With their invaluable experience of sophisticated commercial transactions and litigation, many went on to fill the partnership ranks in Ireland's large commercial firms. Among that number, for example, is John Coman, head of inward investment at A&L Goodbody; Grace Smith, head of IP in McCann FitzGerald; and Pádraig Ó'Ríordáin, managing partner of Arthur Cox.

New York belongs to me

While numerous Irish lawyers who returned to Ireland from New York in the early days of the 'Celtic Tiger' achieved great success, many of those who put down roots in New York and remained there did very well also. Clare O'Brien, for instance, who in 1985 arrived in New York as a newly minted solicitor from Eugene F Collins, is now a highly regarded mergers and acquisitions partner in the international law firm Shearman & Sterling. Like many Irish solicitors who moved to New York, Clare's start in the city was not smooth. The city's law firms were not accustomed to assessing applicants with foreign qualifications. So, despite her impressive credentials, after 30 applications around the city, all she had were 30 rejection letters. Eventually, Clare was able to get a job in a small firm with the help of a friend, and two years later moved to Shearman, where she went from strength to strength.

"It can be hard for an Irish lawyer to get their foot in the door, but once it's in, everything is up to you. Irish lawyers are well able to hold their own against Juris Doctor students"

Life in the big corporate firms of New York can be very pressurised, stressful and demanding. Working hours are typically very long, and the working environment can place great strain on an associate. To keep their head above water, let alone rise to the top of the ranks and become a partner, an associate must be clever, hard working and determined to succeed. For all that, though, associates are very well paid. Last year, for instance, the standard starting salary for an associate in the large commercial firms was $160,000.

Sinead Carroll, who trained with Arthur Cox in Dublin before moving to McCann FitzGerald for three years and then to a large Wall Street firm in New York, observes that, while she works very long hours in New York, she also worked these hours in Dublin, and the tasks she performs day to day are similar to what she was doing before. There are other big differences between the two work cultures, though, which can diminish the quality of a New York associate's life. In particular, says Sinead, associates are expected to be available at all times. And at the start of her time in New York, Sinead found the working environment very formal compared with what she was used to in Ireland.

Empire State of mind

But given the significant number of Irish-qualified lawyers practising in New York, it is clear that Irish-trained lawyers can do very well there, despite the more intense and, some might say, cut-throat working environment. Ronan Harty, who came to New York over 20 years ago and is now a partner in Davis Polk (a prestigious commercial firm), agrees. "It can be hard for an Irish lawyer to get their foot in the door, but once it's in, everything is up to you. Irish lawyers are well able to hold their own against Juris Doctor students." (Juris Doctor or 'JD' students are those studying for their Doctor of Law or Doctor of Jurisprudence degree, the primary professional law degree in the US.) That is the case even though the large commercial firms recruit heavily from the top law schools in America, like Harvard, Yale, Columbia and others, where admission


Pádraig Ó Ríordáin (managing partner of Arthur Cox)


Grace Smith (head of IP in McCann FitzGerald)


John Coman (head of inward investment in A&L Goodbody)

is fiercely competitive and the pressure to succeed among some of the brightest minds in the country is unrelenting.

But just how easy is it for Irish-qualified solicitors and law graduates to find work in New York law firms, and how should they go about looking for it? Every Irish lawyer in New York has their own story about how they got their job, and there is no typical route into New York law firms for an Irish-qualified lawyer to follow. One thing for certain, however, is that the recruitment procedures differ hugely between foreign-qualified lawyers and American law school graduates. Traditionally, New York law firms would populate their ranks by hiring students in their second year of law school for the following summer, wining and dining them, and paying them a very generous salary for their summer's work. An offer of full-time employment would invariably follow. Accordingly, the recruitment procedure for American law school graduates is predictable, orthodox and uniform. In contrast, for Irish qualified lawyers who do not have those conventional hiring procedures available to them, it can be a tedious, uncertain and frustrating process.

The key to Gramercy Park

Given those obstacles, Sinead Carroll thought at first that she had no hope of finding a job as a corporate lawyer in New York. Despite her excellent credentials, Sinead looked for two years before landing her current job. In the end, it was her experience and expertise developed over the years in Ireland that got Sinead her offer – but getting to that point was a tortuous process and took no small determination.

Having good legal experience may not only increase the chances of being hired, but can also ease the transition into the new working environment. Lorna Bowen, for example, a partner in the New York

CITY OF DREAMS?

As well as knocking on doors and building up contacts, one route that is increasingly common among Irish lawyers wishing to work in New York is to undertake an LLM degree in a US university. Costing upwards of $40,000 for tuition fees alone, an LLM can be very useful in getting one's foot in the door of a firm, as it demonstrates a candidate's ability to perform alongside US law students – and it introduces a foreign-qualified lawyer to the US legal system. Indeed, for some firms in New York, it is mandatory for foreign applicants to have a US LLM degree if they are to be seriously considered.

When Irish lawyers contact Clare O'Brien, for instance, seeking advice on how to land the big job, Clare normally tells them to "be prepared to spend time and money getting a qualification". But giving no guarantee of success, the costly enterprise of obtaining an LLM in the hope of finding a job afterwards is not without its risks.

Yet another step that Irish lawyers take in an effort to make themselves more attractive to employers is to sit the New York bar exam before even embarking on the job search. For the commercial firms in New York, however, while it is expected that associates will become admitted to the bar, being admitted or not is largely a peripheral concern when making hiring decisions. Sinead Carroll, who only sat for the exam after she started working in her firm in New York, says: "If a firm is going to offer you a job, having passed the New York bar exam already will not tip the scale one way or another."

That, however, has not stopped many people from studying in Ireland for the exam, sometimes at a cost of almost €4,500.

Ronan Harty, partner in Davis Polk

Sinead Carroll, who works with a large Wall Street legal firm

Lorna Bowen, partner in the New York office of Linklaters

office of the international firm Linklaters, believes that "the practical experience gained from being a trainee in a solicitor's firm can better prepare you for day one of being a qualified lawyer than being in law school, where practical experience gained from summer placements tends to be less meaningful".

Lorna says that she was very well prepared by her traineeship and post-qualification experience in Matheson Ormsby Prentice for life as a New York lawyer. While at first there was a huge amount of US law to get her head around, she found herself well prepared for the extra challenge because of her experience in a busy and growing practice, with a large, international (and demanding) client base in Ireland.

While having strong qualifications and experience is necessary to get the big job, it is not sufficient. Sinead Carroll cautions that "you really need contacts. Sending out CVs speculatively will get you nowhere. Reaching out to a contact might get that CV under the nose of the person who needs to see it."

Lorna Bowen agrees: "If you are a non-traditional candidate, in that you are not coming up through the US law school hiring programmes, the only way a CV will be looked at is if the person sending it in has some kind of relationship that they can rely on in getting someone to make the effort. Building relationships is essential."

Luckily, there are numerous organisations in New York that help newcomers foster relationships and make contacts. One such organisation, IN-NYC (www.irishnetwork-nyc.com), is chaired by John Murphy, a Wexford native and an associate in Linklaters. John advises Irish lawyers moving to New York that hard work and determination are needed to land a job.

"Securing a position in the New York legal world has always been difficult for foreign-educated and trained solicitors, but in the last few years, the challenge has been immense. Networking, pounding the pavement – both literally and virtually – has to be broad and deep, and downright dogged. Even then, nothing may come for some time, and, in the end, it usually takes a lucky break, whether it's through catching someone on the right day, or happening upon a position that has just become open."

While commercial firms in New York are open to foreign-trained lawyers – and Irish lawyers have a good record of success – landing a job in a New York firm is fraught with difficulty and the life of a lawyer, once hired, is tough. For those who persevere, however, the rewards can make the effort worthwhile. G

"You really need contacts. Sending out CVs speculatively will get you nowhere. Reaching out to a contact might get that CV under the nose of the person who needs to see it"

Patrick Mair is from Dublin. He qualified as a barrister in Ireland but currently practises law in a firm in New York.

SAFE AS HOUSES

Local authorities are coming under pressure to offload unsold affordable homes, originally built to accommodate those unable to buy during the boom. Mairead Cashman reveals a new strategy by Dublin City Council to move these unsold units off their books

The majority of the population lived in appalling conditions in the late 19th century. We have all heard of the slum tenements in our cities and the crowded *botháns* scattered around the countryside. The first legislative milestone tackling the primitive conditions under which people lived was the *Housing of the Working Classes Act 1890*, which represented the initial major attack on poor living standards. Since the foundation of the state, various *Housing Acts* conferred powers on local authorities to provide housing for those who were unable to do so from their own resources.

The foundation stone of housing policy throughout the state is the *Housing Act 1966*. The primary element of the 1966 act is the duty of local authorities to provide housing for those who are unable to provide accommodation for themselves. The 1966 act also introduced provisions allowing social housing tenants to purchase their own homes by means of a transfer order (tenant purchase). The idea was to condition people to the idea of home ownership and to reduce the dependency on social housing. The 1966 act also introduced restrictions on the sale of houses, thus ensuring that there was sufficient social housing stock for those in need of it.

The *Housing Act 1988* broadened the local authority housing function to include the provision of loans to enable people to either construct or purchase their own houses and give grants or loans for the reconstruction or improvement of existing housing.

During the property boom of the 1990s, it became increasingly difficult for first-time buyers to afford to purchase a house. The legislature recognised that some mechanism was needed to facilitate the purchase of a home at an affordable price. Part V of the *Planning and Development Act 2000* specified that a local authority development plan should include a housing strategy providing for the housing of the "existing and future population of the area" (section 94(1)a). Section 96(1) of the 2000 act indicated that a certain percentage of land zoned for residential use should be reserved for the provision of social and affordable housing. Section 96 also provided that the planning authority could enter into agreements with developers for the provision of social and affordable housing. The *Planning and Development (Amendment) Act 2002* gave the local authorities greater flexibility in terms of allowing better value to be achieved for the local authority in negotiating 'part V' agreements with developers.

Discounted-price housing

In addition, section 99 of the 2000 act allowed for the provision of housing at a discounted price to eligible persons. It introduced a provision for controls on the resale of 'part V' housing by introducing a clawback, based on a formula being the percentage difference between the market value and the affordable (discounted) value. Sections 9 and 10 of the *Housing (Miscellaneous Provisions) Act 2002* also introduced similar clawback provisions for affordable

MAIN POINTS

- Social and affordable housing
- DCC to introduce pilot 'rent-to-buy' scheme
- At the coalface: DCC's law department

housing that was developed on lands owned by the local authority. The local authorities also entered into negotiations with certain lending institutions that introduced loans for the purchase of affordable housing. The *Housing (Miscellaneous Provisions) Act 2004* enabled the clawback to be registered as a charge on the property, ranking as subsequent to the bank's charge.

Prior to 2006, national house prices had risen by an annual average of 14.9%. Since then, property prices have returned to 2003/2004 values. Due to the downturn in the property market, the affordable units are no longer affordable and no longer marketable, as the market value of the properties has now fallen below the affordable value. Another factor affecting affordable sales is that financial institutions have changed their credit policy and restricted their lending criteria for affordable housing purchasers. They will not now provide a mortgage unless a minimum of 20% loan-to-market value of the property is in place. In addition, they will not provide loans for one-bed apartments.

The Department of the Environment, Heritage and Local Government (DOE) issued a circular in April 2009 (circular AHS1 2009) setting out measures to deal with unsold affordable homes. Those

DCC'S LAW DEPARTMENT

The current law agent of Dublin City Council, Terence O'Keeffe, heads a department of 55 staff, comprising 16 solicitors, three trainee solicitors and administrative staff. The DCC's law department is subdivided into three sections – conveyancing, chancery litigation (including judicial review and prosecutions), and personal injury defence litigation.

The department provides legal advice to all Dublin City Council departments in relation to its local authority functions within the Dublin city area, for example, planning, waste, housing, roads, development, culture and recreation.

measures included the immediate implementation of a marketing and sales strategy to deal with the unsold units, and the transfer of units to local authority housing stock for the purposes of social housing for a five-year period.

Dublin City Council (DCC), in conjunction with the DOE, is about to launch a pilot 'rent-to-buy' scheme to deal with the remaining unsold units.

Local authority loans

Local authorities are also lenders, giving loans to tenants to facilitate the purchase of their dwellings and loans to first-time buyers who wish to get on the property ladder. The tenant-purchase scheme introduced by the 1966 act allowed social housing tenants the opportunity to purchase their homes on favourable terms. The *Housing (Miscellaneous Provisions) Act 1992* introduced the 'shared ownership loan'. Under that scheme, the borrower owns a portion of the property (usually under a 99-year lease) and the local authority retains ownership of the remainder – a charge is registered over the leasehold interest in the ownership of the borrower. Shared ownership loans have had their day, however, proving to be quite cumbersome in their application, particularly in relation to apartment leasehold titles.

One of the measures included in the DOE circular AHS 1 2009 was to increase the limit for local authority loans to €220,000. This coincided with regulations in 2009, introducing a new form of local authority loan that authorised loans of up to 97% of the value of the property to those with income limits of up to €50,000 for single borrowers, and €75,000 for joint applicants. With interest rates lower than that offered by banks (at time of going to press), the local authority loan is now the best value-for-money loan product in the market for first-time buyers.

DCC provided 3,269 units for the purposes of social and affordable housing between 2004 and 2009. While most units were acquired under part V of the 2000 act, over one-third of those units were developed by DCC on its own lands. In recent months, DCC has received approval to transfer 443 unsold affordable homes to short-term social leasing. DCC will be launching a pilot rent-to-buy scheme in relation to three of its affordable housing schemes in May 2010. Within the past few months, DCC has been successfully operating the 2009 local authority loan under the Law Society certificate of title system.

> ***"During the housing boom, the workload for DCC's law department was substantial and it was necessary to outsource some files to private solicitors, as DCC did not have the resources to deal with large volumes of cases"***

At the coalface

The law department of DCC (see panel) has been at the coalface of housing legislation since the introduction of the 1966 act. This department has been responsible for drafting documents and implementing new processes to deal with all changes and new schemes effected by legislation. For example, the law department was closely involved with the DOE in drafting the clawback documentation for affordable housing. Processes were set up to deal with the acquisition of 'part V' units, and documents were developed (similar to those used by developers' solicitors) to ensure the efficient turnaround and sale of those units to affordable purchasers within a few months of acquisition. Within the past year, the department has been instrumental in introducing the certificate of title system to the 2009 local authority loan. This necessitated drafting all relevant documents required to administer the loan, obtaining the relevant approvals from the Law Society, and providing training to administrative staff in the housing department.

During the housing boom, the workload for the law department was substantial and it was necessary to outsource some files to private solicitors, as DCC did not have the resources to deal with large volumes of cases.

DCC was the first local authority to introduce a trainee solicitor scheme. Trainee solicitors were first appointed to DCC in 2006. This coincided with the start of the busiest period of 'part V' acquisitions by DCC (the number of affordable housing transactions in DCC peaked to 724 units in 2008).

Investigation of apartment booklets of title was the ideal training tool for trainee solicitors. Each trainee was also charged with the sale of the individual units in that particular development and, thus, was very familiar with the title of the properties being sold. During the period of their traineeship, each trainee has been rotated between the three sections of the law department – chancery litigation, personal injury litigation and conveyancing – covering all aspects of the local authority's statutory functions (including planning, waste management, housing and roads, for example). Nine trainees have been tutored by DCC to date. Unfortunately, further trainees cannot be employed by DCC in the short term due to the recent public service recruitment embargo.

LOOK IT UP

Legislation:

- *Housing Acts 1966, 1988*
- *Housing (Miscellaneous Provisions) Acts 1992, 2002, 2004*
- *Housing of the Working Classes Act 1890*
- *Planning and Development Act 2000*
- *Planning and Development (Amendment) Act 2002*

Literature:

- Circular AHS1 2009 (April 2009), Department of Environment, Heritage and Local Government

The downturn in the economy has resulted in the retention of the majority of legal work in-house in DCC. While there has been a decrease in housing transactions, there has been an increase in regulatory enforcement and personal injury claims. Luckily, some of the newly qualified solicitors (trained by DCC) have been retained on contract, working in the different sections of the law department.

Although the number of affordable housing transactions has dwindled in the past few months, the law department continues to deal with the sale of affordable units and gives ongoing advice to the housing department in relation to its statutory social housing and housing loan functions. This is, of course, in addition to providing legal advice to DCC in connection with the multiplicity of operations carried out by the local authority in Dublin city. G

Mairead Cashman is senior solicitor in the conveyancing section of Dublin City Council.

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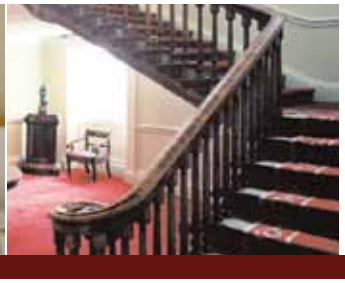


Tel: 01 672 4800

Law Society of Ireland

EGG ON YOUR FACE

The Law Society has established a Pensions Law Sub-committee. Deborah McHugh, Fiona Thornton and Deirdre O'Riordan advise solicitors to focus on how pensions law could affect their practice and benefit their business

MAIN POINTS

- Society establishes Pensions Law Sub-committee
- Pension entitlements – formal as well as side promises
- Pension benefits and marital breakdown
- Occupational pension litigation

The Law Society's Employment and Equality Law Committee has established a new sub-committee to deal specifically with the issue of pensions. The remit of the sub-committee is to monitor legislative and case law developments and to advise the profession on relevant pension-related matters.

The sub-committee is chaired by the vice-chairperson of the Employment and Equality Law Committee, Michael Kennedy, while Rory O'Boyle acts as secretary. The sub-committee also comprises Deborah McHugh (Mason Hayes & Curran), Declan Drislane (Arthur Cox), Deirdre O'Riordan (Comyn Kelleher Tobin), Fiona Thornton (LK Shields), James Campbell (Matheson Ormsby Prentice), John Cuddigan (Ronan Daly Jermyn) and Maura Connolly (Eugene F Collins).

Given the diverse range of areas in which pensions law plays a part, the expertise of the constituent members

of the sub-committee spans the practice areas of pensions law, employment law, family law and tax law.

On 8 March 2010, the sub-committee convened for the first time in Blackhall Place and agreed among its aims:

- The provision of a forum to which solicitors can have recourse when seeking direction in matters of difficulty concerning pension law practice,
- To make representations, where appropriate, to third parties insofar as the interests of the membership of the Law Society are concerned,
- To feed into the professional practice course modules, in the interests of effective training of solicitors in the basics of pensions law,
- To review and comment upon developments in case law and legislation, and disseminate that commentary to the membership.

Pension law specialists in larger law firms will have been exposed to pension-related matters in the context of corporate transactions involving the purchase, sale and restructuring of businesses. For those solicitors, the conducting of due-diligence exercises on a target company's pension documentation, as well as the drafting of indemnity and warranty cover, will be second nature. However, for those solicitors who have never had reason to consider how pensions law might affect their practice, they should consider the following areas where it will be encountered, and in which specialist knowledge might be required.

Make sure your pension nest egg doesn't end up on your face

Severance agreements

Sometimes practitioners may be so wary of pension issues that they are not expressly included in the terms of a severance agreement – or, worse still, are accidentally included without either party realising that the 'full and final settlement' language covers pension benefits, and neither side actually knows what the departing employee's benefits are. The last thing that both sides will want is a dispute about pension benefits after the settlement agreement has been signed. This can, and does, happen where the pension benefits are not dealt with when the severance terms are being negotiated.

Whether you are acting for the employer or employee, you should always ask your client what the position is regarding pensions. You'll need to enquire what formal pension entitlements there may be, as well as possible side promises, which might be dormant and not have been formally dealt with in the pension scheme.

Under the disclosure regime of the *Pensions Act 1990*, a departing employee has to receive a leaving se/rvice options statement (related to the pension scheme), which contains information about his/her pension benefits. This must be given to the employee as soon as practicable and, in any event, within two months of leaving service.

Depending on the facts and the nature of the pension rights (defined benefit, defined contribution or otherwise), it may be possible to include this statement into the terms of the agreement. Since the agreement will have been circulated in draft form, both parties then have the opportunity to review and agree the terms of the benefits being provided. If there is any difference of opinion at that stage, it can be aired during the settlement discussions and all issues addressed.

Pension adjustment orders

All family law solicitors will, at some stage, have to advise a client in relation to their and their spouse's pensions in the context of a separation or divorce.

In circumstances of marital breakdown, pension benefits are dealt with under section 12 of the *Family Law Act 1995* and section 17 of the *Family Law (Divorce) Act 1996*. These acts introduced the concept of making orders over a person's pension in separation and divorce proceedings. The orders that can be made are diverse and wide ranging and, in some circumstances, the pension can be the most valuable asset in a separation or a divorce.

To advise clients effectively, a solicitor needs to be fully conversant with common pension terms such as 'defined benefit scheme', 'defined contribution scheme', 'retirement benefit', 'contingent benefit' and 'reckonable service', as well as understanding the mechanisms for ensuring that their client's interests are best served in the context of any rights they may have in their spouse's pension.

If you are not familiar with pension practice, then you would be well advised to engage the services of a pension expert in order to advise the client in a focused and effective way in those circumstances. The reality of getting it wrong and allowing a client to walk away from a settlement, oblivious to the value of the sizeable benefit, is asking for trouble.

"The establishment of the Pensions Law Sub-committee is a long-awaited step forward for solicitors across the country"

Pensions litigation

In recent years, the value of accumulated pensions has dropped considerably in some cases and, as a result, has given rise to an increase in challenges by scheme members against acts or omissions of either or all of the trustees, the

BASIC PRINCIPLES WITH REGARD TO SEPARATION/DIVORCE

There are some basic principles that should be adhered to when dealing with pensions in the context of separation and divorce proceedings:

1) Identify the correct trustees of the scheme, as these must be notified of the proceedings pursuant to section 12(18) of the 1995 act and section 17(18) of the 1996 act.
2) Obtain a copy of the trust deed and rules that govern the scheme.
3) Obtain the up-to-date member benefit statements pertaining to the pension scheme.
4) Identify the benefits involved – retirement, contingent, spouses and children's pension.
5) If necessary, engage an actuary to carry out a valuation and comparison of the values of the relevant pension.
6) Identify whether the schemes are defined benefit, defined contribution or other type of scheme, such as a career average revaluation scheme or hybrid scheme, for example.
7) Identify whether the schemes are state schemes or private schemes.
8) Know the relevant dates when drafting pension adjustment orders. These include the date of marriage, the date of joining the scheme, the date of entering the spouses' and children's scheme, and the date of the decree of separation or decree of divorce. A pension adjustment order over retirement benefits can only be made for the period of reckonable service up to the date of the decree.
9) Enquire as to whether there are any additional voluntary contributions being paid by the scheme member, as these will, more than likely, be paid into a different scheme that will require separate pension adjustment orders.
10) Be aware that an order over a contingent benefit can only be made within 12 months of the date of the decree of divorce or separation.
11) Provide correct information and addresses for the scheme member and the person in whose favour the order is made to the trustees.
12) Ensure to serve a notice to trustees in order that the trustees may approve the draft order before lodging it in court.

The issue of pensions is not limited to separation or divorce cases in favour of husbands or wives. The *Civil Partnership Bill* (originally published in June 2008) proposes to make provision for various ancillary reliefs to be made by a court on the granting of a decree of dissolution of a civil partnership, including the making of pension adjustment orders.

LOOK IT UP

Legislation:

- *Civil Partnership Bill 2009*
- *Family Law Act 1995*
- *Family Law (Divorce) Act 1996*
- *Pensions Act 1990*

employer, the fund manager, the scheme actuary or the scheme administrator.

All occupational pension schemes must now possess a written internal dispute-resolution procedure that must be exhausted, in most cases, before the member may take his or her challenge to either the Pensions Board, the Pensions Ombudsman or to the High Court on appeal or in the first instance.

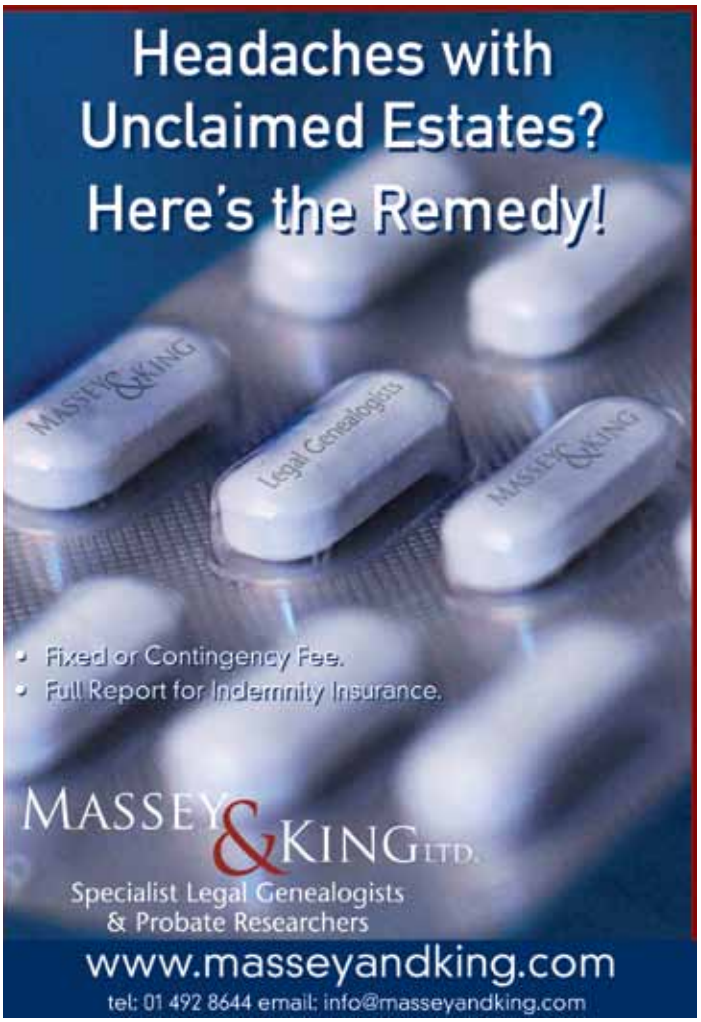
So much of this expense can be avoided through effective communication with the scheme members and by managing what information they are in receipt of. In particular, great care ought to be taken when drafting pension clauses in contracts of employment. Oftentimes, what is stated in the contract regarding the pension promise is contrary to what the pension scheme is capable of delivering. In those cases, the employer is potentially leaving themselves wide open to a breach of contract claim where the employee will be seeking the value of that pension's promise, or as close as is actuarially possible to calculate.

It is crucial, therefore, when advising an employer, that advice is given to ensure that procedures are in place within an organisation to deal effectively with grievances as and when they arise. In that way, expensive, complicated pension litigation may be avoided.

Long-awaited step

These are only some of the circumstances in which practitioners may come across pensions law in everyday practice. The establishment of the Pensions Law Sub-committee is a long-awaited step forward for solicitors across the country. The sub-committee has a lot of work ahead and, in the first instance, welcomes observations from the membership on any aspect of the practice or provision of pensions law expertise in which it can be of assistance. G

Deborah McHugh, Fiona Thornton and Deirdre O'Riordan are members of the Law Society's Pensions Law Sub-committee.



Section 21 of the *Nursing Homes Support Scheme Act 2009* regulates the appointment of care representatives who, when appointed, are empowered to take certain decisions on behalf of nursing home patients. James Mulcahy takes the temperature

DUTY OF

MAIN POINTS

- *Nursing Homes Support Scheme Act 2009*
- Applying for ancillary state support
- Role of care representatives in such applications

CARE

The *Nursing Homes Support Scheme Act 2009*, which has been in operation in its entirety since 27 October 2009, provides the legislative basis for the financial support scheme for those requiring long-term residential nursing care. There are three stages in the process: the first involves an application for a care-needs assessment; the second is the application for state support (involving a financial assessment that determines the patient's contribution to care and the corresponding state financial aid); while the third is optional, being an application for ancillary state support (referred to informally as the 'Nursing Home Loan').

This article focuses on section 21 of the act, which regulates the appointment of care representatives who, when appointed, are empowered to take certain decisions under the act on behalf of the person requiring care in a nursing home.

Appointing care representatives

Appointing a care representative is not permissible in cases where the respondent is a ward of court, has appointed an attorney under an enduring power of attorney, or where another person is permitted by law to act on his/her behalf. Care representatives are required in cases where the person requiring care does not have full capacity to make a decision about the application for ancillary state support.

Before receiving state support, the financial assessment will determine the amount that a person will have to contribute to their care, that is, 80% of their assessable income and 5% of the value of their assets per annum. Where the assets include land and property, this latter contribution can be deferred and collected from the person's estate, or if the property is sold or transferred. This deferral is what is known as 'ancillary state support' and consists of a loan advanced by the state. If an application for ancillary state support is made, consent must be given to having a charging order registered against the asset. The application for ancillary state support, the giving of consent to the charging order and related actions must be carried out by the care representative, where appointed.

Additionally, in relation to every other matter under the act, section 47 provides that a "specified person" may act on behalf of the person requiring care where the person is not of full mental capacity. Care representatives are 'specified persons' for the purpose in this regard. While they must be appointed for the purposes of applications for ancillary state support, once appointed they may act on the respondent's behalf for other matters, including applications for care needs and financial assessment, appeals and reviews. When acting in this capacity, a care representative takes priority over others.

Priority of claims

As section 21(4) makes clear, a care representative may only be appointed where the respondent does not have the capacity (for the time being) in relation to one of the above-mentioned matters. The act lists the categories of person who may apply to the court for an order appointing that person to be a care representative for a matter that is to be specified in the order.

The order in which these classes are listed in the section is important, as they are listed in order of descending priority. A person with greater priority has a better claim to have a care representative appointed. A person with a greater or equal priority may consent in writing to an application by, and appointment of, a person with a lesser priority. The order of priority is as follows:

a) Partner (including married couples and cohabiting heterosexual and same-sex couples),
b) Parent,
c) Child,
d) Brother or sister,
e) Niece or nephew,
f) Grandchild,
g) Grandparent,
h) Aunt or uncle, and
i) A person who appears to the court to have a good and sufficient interest in the welfare of the person.

The court must be further satisfied that the applicant is of full age and capacity and is a fit and proper person. Certain categories of persons are excluded

"The right of a person to whom a care representative has been appointed to deal with other matters relating to his/her property and affairs is expressly protected"

PRACTICE AND PROCEDURE

A Circuit Court practice direction (CC10), dated 5 October 2009, provides for the procedure in section 21 applications. This practice direction governs the procedure until the coming into operation of relevant *Circuit Court Rules*. Therefore, practitioners should keep abreast of developments in this regard. The county registrar is empowered to appoint care representatives in uncontested cases. All applications and proceedings under section 21 are heard *in camera*.

The application is to be commenced on the issue of an originating notice of motion grounded on affidavit. Applications must be accompanied by reports from two registered medical practitioners who have examined the person and have concluded that (s)he does not have the capacity to make the decision, along with the reasons for such conclusion.

The reports must be in the form prescribed, as set out in the *Nursing Homes Support Scheme (Assessment of Capacity Report) Regulations 2009* (SI no 409/2009), and must be exhibited. Any letters of consent to the application by notice parties must also be exhibited. The application must be initiated in either the circuit in which the respondent is residing at the time of the making of the application, or where (s)he has resided at any time during the period of three years prior to the making of the application.

The respondent and all persons with equal and greater priority must be given notice of an application under section 21, unless the court directs that notice be dispensed with. An application under section 21(17) seeking directions regarding the manner of giving notice or dispensing with the requirement to give notice is, according to the practice direction, to be made on an *ex parte* basis grounded upon an affidavit.

The notice of motion is assigned a return date before the county registrar by the Circuit Court office. The notice of motion and affidavit, including exhibits, are to be served personally on the respondent and on each person with equal or greater priority who has not given consent in writing in the manner permitted for service of a civil bill (see order 11, rule 5, RSC in this regard). The form for reply is also to be served on the respondent at this point.

On the reply, the respondent may consent or object to the application, and where (s)he does not consent, the county registrar serves a copy of the reply on the respondent who, in turn, sends a copy to persons with equal or greater priority. In all cases, these documents are to be served not later than 14 days before the return date of the originating notice of motion, unless notice has been dispensed with by the court.

Where a person with equal or greater priority does not consent to the appointment of the applicant, (s)he may file an affidavit replying to the application. This should be delivered to the applicant and respondent at least seven days prior to the return date. If an objection to the application is raised at the hearing before the county registrar of the notice of motion by any notice party, the county registrar is obliged under the practice direction to transfer the matter when in order to the judge's list.

from acting, such as undischarged bankrupts or those convicted of offences involving fraud or dishonesty. The court is empowered to appoint more than one person to be a care representative of the same respondent. Where it does so, there is a presumption that they will act jointly unless ordered otherwise.

Under section 21(30), an application may be made to the court by any person "appearing to the court to have a good and sufficient interest in the welfare" of the respondent. The court may appoint a person to be a care representative in the place of an appointed care representative where the latter has died, lost full capacity, wishes to resign, or has had their application revoked.

Section 21(31) allows a person with sufficient interest in the respondent's welfare to apply to the court for an order directing a care representative to furnish the court with a report regarding his actions as care representative or to attend before court with specified records. The court may, on hearing an application under section 21(30) or section 21(31), revoke the appointment of a person appointed as care representative and appoint another person in their place.

Significant consequences

The consequences of an application for ancillary state support regarding the respondent's assets (which will normally be their home) are significant. Thus, safeguards are needed where another person is given power to make

decisions in this regard (several of which have been set out above).

Section 21 is, on the whole, a positive development and the regime created by it contains a number of praiseworthy aspects.

Notable among these is the utilisation of what is referred to as the 'functional' approach to capacity. This, in essence, focuses on the ability of a person to make a given decision when it needs to be made. The primary motivation behind the functional approach is the preservation, to the greatest extent possible, of an individual's decision-making autonomy. This contrasts with a 'status' approach to capacity (for example, wardship). The latter has drawn adverse criticism from the Law Reform Commission, and involves a general determination of a person's capacity without regard to whether their capacity fluctuates.

The test, set out at section 21(43), focuses, among other things, on the cognitive abilities of the person – do they understand, or can they weigh up the information relevant to a particular decision? – rather than making a blanket assessment of a person's general capacity.

The right of a person to whom a care representative has been appointed to deal with other matters relating to his/her property and affairs is expressly protected. While section 47 permits the care representative to act in circumstances outside the scope of section 21, this is a pragmatic step that avoids an over-reliance on court procedures for more routine substitute decision making under the act. Section 47 provides that the HSE may refuse to deal with a 'specified person' where it believes they are not acting in the best interests of the respondent.

Other positive features

Other positive features include the strict notice and service requirements (that is, personal service on the respondent unless otherwise ordered by the court) and the requirement that the applicant provide the respondent with the reply form.

Difficulties may arise from the rigid categorisation of family relationships in terms of priority. For example, a niece providing care to her elderly aunt is not required to be given notice of an application by an estranged son. However, as notice must be personally served on the respondent, it is likely that the niece in this scenario would be made aware of the application. The aunt may object to the application in her reply, giving details of the niece's role in her care. Furthermore, the court is obliged under section 21(5)(a) to have regard to the expressed wishes of the respondent when appointing a care representative.

The system allows substituted decision making without recourse to wardship procedures and the significant loss of personal decision-making power resulting from being made a ward of court. However, without greater reform of the law on wardship and substituted decision making generally, the positive aspects of section 21 may not be fully realised. For instance, a person who lacks capacity in relation to other matters touching upon their property or person may have already been admitted to wardship, rendering recourse to section 21 impossible. Nonetheless, section 21 reflects legislative recognition of the functional approach to capacity and may represent a new trend towards widespread use of this approach in relation to all significant decisions. G

James Mulcahy is a practising barrister based in Dublin.

LOOK IT UP

Legislation:

- *Nursing Homes Support Scheme Act 2009*
- *Nursing Homes Support Scheme (Assessment of Capacity Report) Regulations 2009* (SI No 409/2009)

Literature:

- Circuit Court practice direction *CC10* (5 October 2009) – applications under section 21 of the *Nursing Homes Support Act 2009*, available at www.courts.ie
- *Nursing Homes Support Scheme Information Booklet*, published by the Health Service Executive, available as a PDF at www.hse.ie. (For further Information on the scheme, contact your local HSE Nursing Homes Support Office; call the HSE info line (1850 24 1850) or visit www.dohc.ie or www.hse.ie)
- *Report on Vulnerable Adults and the Law* (LRC 83-2006), published by the Law Reform Commission

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Hanging up

Thinking of 'hanging up your legal boots' by selling your practice – or looking to expand your current business? Before you leap, you should fully consider the tax implications of buying and selling a legal practice. Annemieke Clancy ties up loose laces

The downturn in the economic climate has affected the profitability of legal practices at every level and may result in an increase in the number of sole practitioners seeking to 'hang up their boots'. From a purchaser's perspective, the downturn could prove an opportune time to either expand their existing practice or to go it alone by taking over another practice.

It is worthwhile reminding ourselves that the purchase and sale of a solicitor's practice is essentially a commercial transaction and, as such, the objectives of the vendor and purchaser will be very different from the outset. From a vendor's perspective, the objective will be to obtain the best price possible, while the purchaser will want to minimise the costs involved. Both parties should obtain specialist tax advice at the earliest opportunity to ensure that the deal is structured to secure the most tax-efficient outcome for all.

Matters that should be considered include the timing of the deal, the various taxes involved, the dates for payment of these taxes, and the general pitfalls that exist in these transactions.

Timing issues to be considered

As with the sale of any business, the significance of the timing of the sale of a legal practice normally gets overlooked as the parties strive to get the sale over the line. The date of completion of the sale is, however, of huge significance from a tax perspective for the vendor.

As a sole practitioner, the vendor will have been operating a trade and paying income tax on a self-employed basis. On selling the business, the vendor will be ceasing his profession and would be subject to the cessation rules for income tax. These rules are quite complex, but suffice to say that the cessation of the trade would result in the reassessment of the vendor's income tax position for his last and penultimate tax year. In certain circumstances, where profits have been reducing in the years before sale, with careful planning around the length of accounting periods and the cessation date, it may be possible to minimise the vendor's income-tax exposure.

As with cessation rules for a vendor, there are specific (and complex) commencement rules for income tax that would apply for a purchaser and should be borne in mind for the first three years after commencement. This is something on which specific tax advice should be sought.

In addition, you can reduce your tax liability by ensuring that you maximise your pension contributions. Once you are over 60 years of age, you can annually contribute up to 40% of your earnings (limited to €150,000) – that is, €60,000.

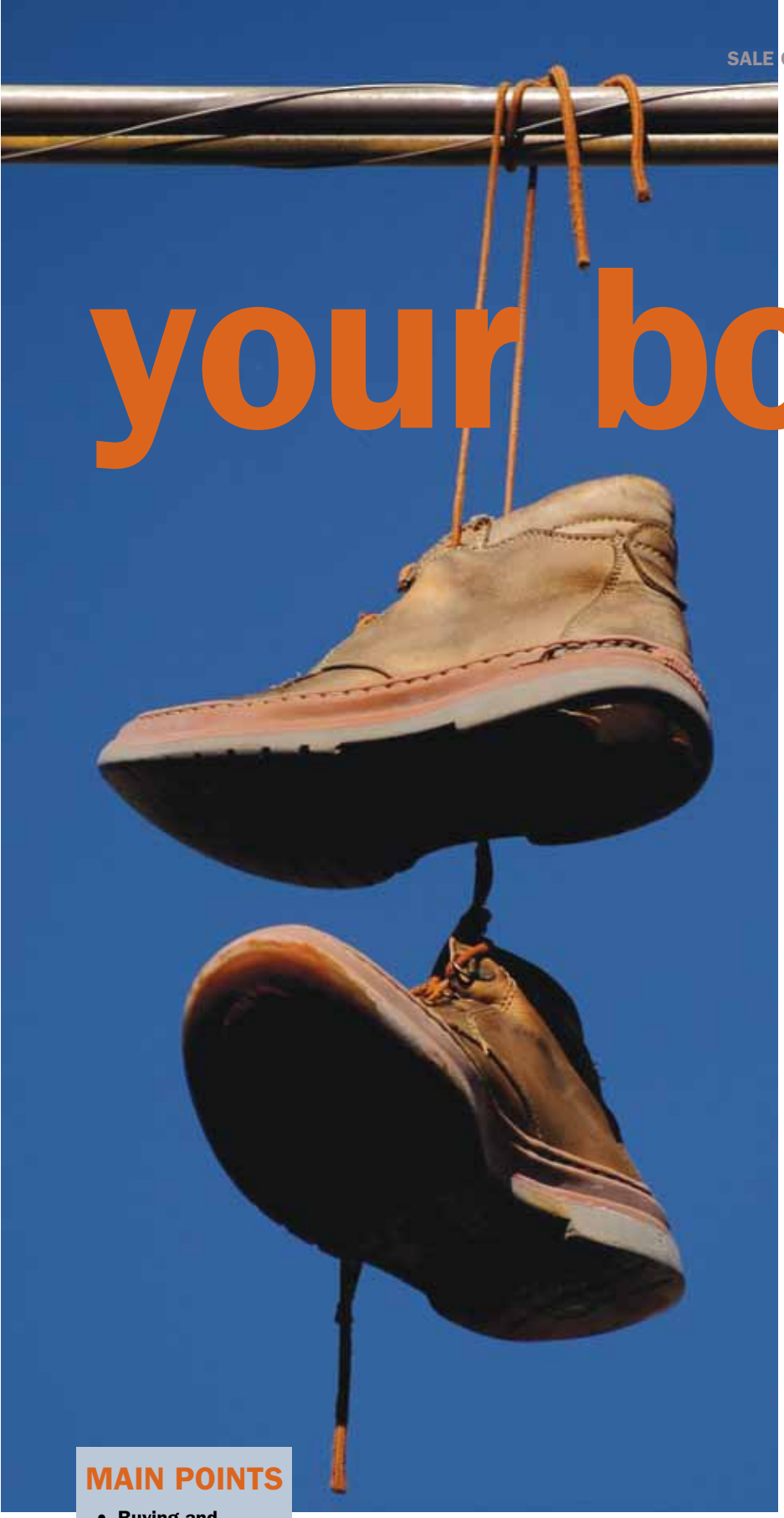
The timing of the transaction is also of great importance to the vendor where capital gains tax (CGT) is payable (see below, however, for comments on retirement relief from CGT). Since the *Finance Act 2009*, CGT is payable on 15 December in respect of disposals in the period 1 January to 30 November and, for disposals in December, the CGT will be due on 31 January the following year.

Poor timing of a sale can result in the CGT being payable almost immediately; however, with careful timing of the sale, a vendor can defer payment of his CGT liability to Revenue considerably. For example, CGT for a sale at the end of December 2009 would be payable by the end of January 2010, whereas CGT on a sale in January 2010 would not be payable until the following December.

You will appreciate from the above that there are a number of tax considerations that are relevant in timing a sale. As always, the commercialities of a deal should properly take precedence over timing, but if there is any flexibility, a vendor should be aware of the cash-flow saving that can be achieved by optimising the date of sale of the business.

Issues for the vendor

In addition to the timing consideration, there are other tax issues that should be borne in mind by the parties when preparing for sale or negotiating the transaction. It's only



your boots?

MAIN POINTS

- Buying and selling a legal practice
- Timing issues for income tax and CGT
- CGT and retirement relief

possible to give an overview of tax issues and ideas in this article. Specific advice should be sought at the earliest opportunity.

Capital gains tax

Capital gains tax will be payable by the vendor on any gain arising on the sale of the practice. One of the most noteworthy aspects of the recent budgets has been the increase in the CGT rate from 20% to 25%.

Retirement relief from CGT may be available, provided the vendor complies with the conditions set out in the provisions under sections 598 and 599 of the *Taxes Consolidation Act 1997* (TCA 1997). For the relief to apply, the vendor must be over 55 years of age. However, despite the title commonly given to the relief, there is no obligation to actually retire. Therefore, for example, the vendor can claim the relief from CGT, yet can continue to act as a consultant for the purchaser, as would commonly be required by a purchaser in such circumstances to ensure a smooth handover of the business and client relationships.

The relief is only available on the disposal of qualifying assets. Qualifying assets include chargeable business assets, which are assets (including goodwill) owned for a period of at least ten years ending with the disposal, and which have been used throughout that period for the purpose of the profession carried on by the vendor, and on which a gain accruing would be a chargeable gain.

Full relief is available if the consideration does not exceed the limit of €750,000 (which is an aggregate lifetime limit). Marginal relief is available if the consideration exceeds €750,000, which limits the CGT liability to half the excess of the consideration over €750,000. However, once the consideration exceeds a certain level, marginal relief is not worth claiming. Where the vendor sells the practice to his child, no limit applies. However, in this instance, be aware of a possible clawback if the business asset is disposed off within six years by the child.

Work in progress

The valuation of work in progress, often a matter of some discussion in negotiations for the sale of a practice, will have potentially significant tax implications for the vendor, who will have to pay

LOOK IT UP

Legislation:

- *European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003*, SI 131 of 2003
- *Finance Act 2009*
- *Taxes Consolidation Act 1997*, sections 65, 66 and 67
- *Taxes Consolidation Act 1997*, sections 598 and 599

income tax on the amount he receives. For the purchaser, the consideration paid may qualify as a tax deduction. The fact that this could lead to tax liabilities for the vendor and tax savings for the purchaser should be taken into account when negotiating the value of the work in progress.

Issues for the purchaser

Interest relief

If the purchaser borrows money for the acquisition of the business, the interest payable on an element of the monies borrowed may be a deductible expense in calculating his profits for income-tax purposes, provided certain conditions are met.

Stamp duty

While the rate of stamp duty for non-residential property has been reduced from 9% to 6%, this would still be a major cost for the purchaser of any business. With careful planning, however, this stamp-duty liability can be substantially reduced, or even eliminated. Some ideas are set out below, which may assist in reducing stamp duty for a purchaser.

The transfer of debtors would be stampable at contract stage. If practical, a method of reducing the stamp duty is to leave title to the debtors with the vendor, and to appoint the purchaser as agent for the vendor to collect these debts. Again, the practicalities of the transaction would determine if this is possible.

An instrument transferring the goodwill of a business would attract stamp duty. Parties could consider effecting the transaction in a manner that would ensure that stamp duty does not arise. However, many of the methods that would reduce the stamp-duty exposure on the transfer of goodwill may not be acceptable from a commercial perspective. It is a matter of balancing the practicalities with the desire to effect the transfer efficiently from a tax perspective.

It is possible to transfer goods and moveable plant, such as furniture, desks and computers, without incurring stamp duty by providing in the contract for sale that the title to these assets will be transferred by way of delivery. The contract should provide how and when the delivery will take place in order to avoid any suggestion that the contract, in effect, transfers the ownership of these assets.

The contract should be stamped *ad valorem* only on the value attaching to the assets liable to stamp duty at contract stage, and therefore it is important to apportion the consideration accordingly. However, it should be noted that the stamp-duty rate is based on the total consideration passing.

Value-added tax

Generally, the transfer of assets from one accountable person to another will come within the charge to value-added tax (VAT). However, if what is being transferred is an amalgam of assets capable of being operated as an independent undertaking or business, then the transfer may be relieved from VAT. The parties will have to be careful that the conditions for the relief are met before deciding not to charge VAT on the sale. Even where the conditions for the relief are met, there are additional burdens around the transfer of real property that form part of the business assets.

"Poor timing of a sale can result in the capital gains tax being payable almost immediately; however, with careful timing of the sale, a vendor can defer payment of his CGT liability to Revenue considerably"

Due diligence

Before a purchaser enters into the transfer agreement, he should, apart from the legal due diligence, also carry out a tax due diligence. The purchaser, having done a due diligence, should insist on getting appropriate warranties and/or indemnities. As this is a business rather than a shareholding that is to be acquired, the tax indemnities and warranties need not be as extensive, but, nevertheless, they should be carefully considered and negotiated. For example, if the purchaser takes over employment contracts (which, given the *European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003*, will be most likely), he must ensure that all the PRSI and PAYE tax obligations have been complied with and, if necessary, get warranties and/or indemnities to that effect.

The issues to be considered when buying or selling a legal practice are numerous. This article merely attempts to highlight some of the more pertinent issues. Before negotiations commence, it is vital that both parties seek specialist legal and tax advice and continue to liaise with their advisers as the negotiations progress. Failure to plan in this regard can result in an increased tax cost, which, ultimately, will reduce the net funds available to both parties. G

Annemieke Clancy TEP is a solicitor and registered tax consultant.

Fine Gael leader visits Law Society

ALL PICS: LENSMEN

At the Law Society dinner attended by members of the Fine Gael party on 27 April were *(back, l to r)*: Senator Paul Coghlan, Senator Eugene Regan, Jim O'Keeffe TD, John O'Connor (Council member), Kevin O'Higgins (Council member), Ken Murphy (director general), John Costello (senior vice-president of the Law Society), John P Shaw (junior vice-president) and Alan Shatter TD. *(Front, l to r)*: Jennifer Carroll (legal policy and research officer in the Fine Gael leader's office), leader of Fine Gael Enda Kenny TD, President of the Law Society Gerard Doherty, Lucinda Creighton TD and Mary Keane (deputy director general)

The Law Society was very pleased to host a dinner in honour of the Fine Gael leader, Mr Enda Kenny TD, at Blackhall Place on 27 April. Guests included solicitors and barristers of the Fine Gael parliamentary party.

Unfortunately, Charlie Flanagan TD and Olwyn Enright TD were unable to attend, but their able replacements were Senator Paul Coghlan and Jennifer Carroll, a qualified solicitor who works as legal policy and research officer in the Fine Gael leader's office. While the main purpose of the evening was to ensure that all the guests thoroughly enjoyed themselves, it was also an opportunity to make the profession's position on important issues understood by key members of the Oireachtas.

John O'Connor and Senator Eugene Regan

Attending dinner at Blackhall Place on 27 April 2010 were *(l to r)*: director general Ken Murphy, Fine Gael leader Enda Kenny TD, and Gerard Doherty

PIC: LENSMEN

Bar association executives meet at Blackhall

The presidents and secretaries of the country's bar associations met at Blackhall Place on 19 April. The meeting, convened by President of the Law Society Gerard Doherty, discussed matters of concern to the profession, including commercial undertakings, professional indemnity insurance and e-stamping

Longford leaders

At the meeting of Longford Bar Association on 4 March 2010 in the Longford Arms were *(front, l to r)*: Andrea Reynolds, Seamus Quinn, Ken Murphy (director general), Brid Mimnagh (president, Longford Bar Association), Gerard Doherty (president, Law Society), Cliadhna Sheridan, Sandra Carroll and Mark Connellan. *(Back, l to r)*: Padraic Gearty, Tina Dolan, Carol Daly, Jenny Devereux, Emer Kilroy, Karen Clabby (honorary secretary, Longford Bar Association), Thomas Queally, Lorna Groarke, Leo Branigan and Deirdre Gearty

WIT fosters links with legal practitioners

Waterford Institute of Technology (WIT) hosted a dinner for representatives of the South Eastern Circuit bar associations (including the Carlow, Kilkenny, Tipperary, Waterford and Wexford bar associations) on 23 March 2010. Hosted by Dr Michael Howlett (head of the Department of Applied Arts at WIT), its purpose was to foster links between WIT and legal practitioners in the south-east.

It is hoped that, in the future, this will lead to initiatives that will give law students in the institute a greater insight into the practical day-to-day aspects of the profession.

The meal was prepared and served by the award-winning student chefs of the tourism and leisure department of WIT.

ALL PICS: GARRETT FITZGERALD PHOTOGRAPHY

Those attending included *(back, l to r)*: Liz Dowling (secretary, Waterford Law Society), Marian O'Neill (head of the Department of Creative and Performing Arts, and programme leader BA (Hons) Legal Studies, WIT), David Clery (social secretary, Carlow BA), Grainne Callanan (lecturer, WIT), Owen O'Mahoney (president, Kilkenny BA), James Meagher (president, Tipperary BA), Dr Sinead Conneely (law lecturer, WIT), Walter O'Leary (law lecturer, WIT). *(Front l to r)*: Sonya Lanigan (secretary, Kilkenny BA), Bernadette Cahill (president, Waterford Law Society), Dr Michael Howlett (head of Department of Applied Arts, WIT) and Helen Doyle (president, Wexford BA)

'Head shops should be banned, not regulated'

At the 2010 Waterford Law Society-sponsored debate in WIT were *(back, l to r)*: Walter O'Leary (law lecturer, WIT), Jane Rockett, Tommie Ryan, Erin O'Hagan, Vanita Viron, Brendan O'Connor, Dermot O'Bernie, Patrick McKee. *(Front, l to r)*: Jennifer Kavanagh (law lecturer, WIT), Fiona FitzGerald (Waterford Law Society), Helen O'Brien (Waterford Law Society), Bernadette Cahill (president of Waterford Law Society), Deirdre Adams (law lecturer, WIT) and Colette Haycock

Bernadette Cahill (president of Waterford Law Society) and Helen O'Brien (Waterford Law Society) present Tommie Ryan with the Waterford Law Society medal, certificate and cash prize at the 2010 Waterford Law Society-sponsored debate in WIT on 24 March 2010

Waterford Law Society sponsored a debate in Waterford Institute of Technology (WIT) on 24 March 2010. The very topical motion was 'Head shops should be banned, not regulated'.

Proposing the motion were WIT law students Jane Rockett, Vanita Vyron, Patrick McKee and Tommie Ryan. Opposing the motion were their student peers Dermot O'Byrne, Erin O'Hagan, Colette Haycock and Brendan O'Connor. The adjudicators were Helen O'Brien and Fiona Fitzgerald (solicitors) and Walter O'Leary (law lecturer, WIT).

A large attendance from the student body contributed to a lively discussion following the debate. Following deliberations, Tommie Ryan was declared the winning debator. He was presented with the Waterford Law Society medal, certificate and cash prize by the president of the Waterford Law Society, Bernadette M Cahill.

The event was organised by Helen O'Brien (solicitor), Deirdre Adams and Jennifer Kavanagh (law lecturers, WIT).

Brendan McCann Trophy stays south

On a beautiful day in north Dublin, the solicitors of the Law Society of Ireland beat their Northern counterparts on a comprehensive scoreline of 4-15 to 1-7 in the Brendan McCann Trophy – the second ever 15-a-side match played between both sides.

The first game in the series (named in memory of the late Belfast-based solicitor, Brendan McCann, who passed away in December 2007) was played in December 2008 in Belfast in wintry conditions. It was fitting, then, that blue skies and a dry sod welcomed both teams onto the civil service pitch in Islandbridge.

Both sets of players and supporters were delighted that Margaret McCann and her son Séamus were on hand to present the Brendan McCann Trophy for the first time to the Law Society of Ireland team and its captain, Tipperary native Odhran Lloyd.

As for the game itself, under the watchful eye of local referee Phillip Brady, it passed without much incident, as both sets of players were content to ease themselves into the first proper game of the summer!

However, Odhran Lloyd with seven points for the Law Society of Ireland, and Michael Sweeney with five points for the Law Society of Northern Ireland, managed to break more than a sweat and certainly stood out.

Gary Rocks, Odhran Lloyd (Law Society of Ireland captain), Seamus McCann, Margaret McCann, Conor Minogue, Norville Connolly (President of the Law Society of Northern Ireland) and James MacGuill (past-president of the Law Society of Ireland)

Manager of the Law Society of Ireland, Conor Minogue, was delighted with the day's activities and commented: "We are delighted to welcome the lads down here today. It's incredible to think that this is only the second time that a Gaelic football match has ever been played between the two societies, but I think it is a wonderful sign of how far we have come in the last decade or so. Long may it last.

Sporting losers – the Law Society of Northern Ireland team

"Similarly, we are delighted that we can do something to celebrate both the legal and the sporting life of Brendan McCann, a dear friend and colleague to many of us. It is brilliant that Margaret and Séamus are here today to present the trophy to Odhran. Hopefully, the trophy will stay in our possession for a few years to come!"

Manager of the Law Society of Northern Ireland, Gary Rocks, added: "I would like to thank all those who made today possible – the McCann family, the managers, players, supporters, referee, Civil Service GAA Club, Hayes Solicitors for their kind contribution, past-president of the Law Society James MacGuill and the President of the Law Society of Northern Ireland for attending and for taking time out of their busy schedules."

Following the game, the Law Society of Ireland, represented by James MacGuill, hosted the Northern lads and their president Norville Connolly in the Blue Room back at Blackhall Place. G

The Law Society of Ireland team with past-president James MacGuill

student spotlight

Cork pipped at Stetson showdown

Beaked (not beached) whales and marine seismic surveys were among the issues debated at the 14th Stetson University International Environmental Law Moot Court competition on 10 March.

Two teams from the Law Society – one from Cork, the other from Dublin – travelled to Gulfport, Florida, USA, to compete in the event. Participants' knowledge of international environmental law was tested with rigour, and there was plenty of opportunity to show off their debating skills. The Cork team, comprising Lyndsey Clarke (Martin Sheehan & Co) and Amanda Moore (FahyLaw), argued for the applicants, while the respondents were represented by a Dublin team comprising Gavin Doyle (McDowell Purcell Solicitors) and Ryan Gibbons (Eversheds O'Donnell Sweeney).

In all, 75 teams competed from around the world. At the end of the first round of mooting, the Dublin team had won all four of its rounds, while Cork had won three. On the basis of their impressive performances, both teams advanced to the quarter finals, with both making it through to the semi-final stage.

Flying the Cork team's colours were *(l to r)*: Lyndsey Clarke (Martin Sheehan & Co) and Amanda Moore (FahyLaw)

The penultimate round saw an all-Ireland clash, with Dublin and Cork facing off. While Dublin won the round, the Cork team advanced on points. The other semi-final was won by the respondent, also on a higher points score. The third-place finish for Dublin was some compensation for narrowly failing to make it to the final.

Packed courtroom

Cork faced into the final against the University of Maryland. After relaying the good news to their friends and families back home (who were able to watch the live streaming of the final on the internet), the 'Rebels' were whisked off to a packed courtroom. They faced a tough but very knowledgeable bench of three expert judges, who tested their knowledge of the facts of the case and international law. Following a split decision, the University of Maryland was ultimately declared the winner.

It was a signal achievement for Cork to finish second at its first appearance in the competition. Other good news followed, with Lyndsey Clarke being named 'best overall speaker', while Amanda Moore was ranked tenth.

The Cork and Dublin teams learned much from their Stetson visit and made new friends from all over the world. They would like to thank the Law Society for the opportunity of representing their schools, and extend their warm thanks to coaches TP Kennedy and Eva Massa. Gratitude, too, goes to the teams' sponsors, including the students and staff of both schools for their encouragement and financial support. G

Dublin took on Ghana at the environmental law moot court competition in Stetson University, USA

council report

Law Society Council meeting, 12 March 2010

Motion: regulations prohibiting commercial undertakings

'*That this Council approves the* Solicitors (Professional Practice, Conduct and Discipline – Prohibition on Commercial Undertakings) Regulations 2010.'

Proposed: John Shaw

Seconded: Michael Quinlan

John Shaw outlined the contents of the draft regulations. He noted that they reflected the relevant definitions from the *Professional Indemnity Insurance Regulations*, together with a definition of "accountable trust receipt". One outcome from the regulations would be the reintroduction of a third solicitor in commercial property transactions. He noted that, because of their implications for professional indemnity insurance cover, it was the view of the working group that the regulations could not be introduced in the course of the year and would have to take effect from 1 December 2010.

Brendan Twomey expressed some concerns about the commencement date of 1 December 2010. He urged that the Society would also make strenuous representations at the highest level to the financial institutions about their conduct in circumstances where they were effectively urging clients to move to solicitors with commercial undertaking insurance. He also believed that the Society should organise a 'roadshow' in order to highlight to all colleagues the various complex aspects of the matter. Niall Farrell suggested that the president should write to all solicitors, recommending that they should not give commercial undertakings, notwithstanding the existence of insurance cover, and solicitors could show such a letter to their clients.

Liam Kennedy said that any regulation had to be proportionate, and it was important that the Society would consider whether there were any other means of solving the problems presented. He noted that, in the past, the financial institutions had had the luxury of using the Law Society as their 'enforcer'. He suggested that, on a practical level, the Society should (a) move the risk from the profession to the financial institutions by ensuring that such institutions would have no valid claims against the compensation fund if they chose to accept commercial undertakings notwithstanding the new rules, and (b) communicate clearly to the financial institutions that the Society would not entertain complaints made by the institutions in respect of undertakings accepted by those institutions in face of the new rules.

John Shaw confirmed that it was intended to seek the views of the bar associations and the membership generally in advance of the May Council meeting, at which stage it was hoped to approve final regulations.

Special general meeting

The Council noted the outcome of the special general meeting that had been held on the previous evening. The president said that, in his view, the meeting had provided a valuable opportunity for the Council to engage with the profession and to explain its decisions in a coherent and articulate manner. The director general said that it had been an excellent meeting that was of benefit both to the Council and to the Society's members. All relevant questions had been asked and answered, and everyone had left the meeting with a greater understanding of the reasons and consequences of the Council's decisions.

It was agreed that the president would write to Mr Vincent Crowley, formally thanking him and the other proposers of the motion for their initiative in convening the general meeting and engaging in the discussion that had ensued. Liam Kennedy urged that the Society would examine its communication processes to determine whether it could communicate more regularly and more effectively with its members.

Professional indemnity insurance

Eamon Harrington reported that, as of that morning, three firms had indicated that they had secured insurance cover, although they had not yet provided evidence of this fact; three other firms had not responded in any respect to the Society and it was believed that these firms had, in fact, ceased to practise; and seven firms had notified the Society that they did not have insurance cover. Mr Harrington confirmed that those firms without professional indemnity insurance cover had each been put on formal notice of an application to the High Court to close their practice unless insurance was obtained or the practice was closed voluntarily. G

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practice notes

EXPLANATORY MEMORANDUM

NEW LAW SOCIETY *GENERAL CONDITIONS OF SALE 2009* EDITION

The following are the changes that have been made to the 2009 edition of the *General Conditions of Sale*, compared with the 2001 (revised) edition (last revised in November 2008) (hereinafter referred to as the 'previous edition').

The 2009 edition reflects all legislative changes up to 31 December 2009, including the *Land and Conveyancing Law Reform Act 2009*, and e-stamping requirements, which came into effect on 30 December 2009.

As practitioners are familiar with the existing *General Conditions of Sale*, efforts have been made to retain the existing numbering and format.

The substantive changes are:

1) Tax numbers of the parties

Obtaining accurate tax numbers of the parties is of critical importance to a purchaser to enable the purchaser to stamp the Deed of Assurance, and without incurring penalties. Boxes have been provided under the names of each of the parties in the Memorandum to insert their tax numbers.

In addition, new General Condition 20(d) requires that the vendor furnish the tax number of the vendor, properly vouched, to the purchaser prior to or on completion of the sale.

The Revenue eStamping procedure has a drop-down menu to select the type of tax number for the parties to the assurance, and distinguishes between, for example, an income tax number and a PAYE number. The purchaser should therefore obtain not only the vendor's tax number, but the description of that tax number.

Vouching the tax number might be by way of production of a copy extract from correspondence with the Revenue, or the certificate of an accountant.

2) VAT

Special Condition 3 is by way of reminder to insert the current recommended form of VAT Special Condition, and amend it as appropriate.

3) Non-title information sheet

New paragraph 3(c) deals with the new charge for non principal private residences, introduced under the *Local Government (Charges) Act 2009*.

New paragraph 4 deals with Building Energy Rating (BER) certificates.

4) Definitions

The definition of 'Working Day' has been reworded for greater clarity but without changing the import of the phrase.

5) Auction

General Condition 4(c)(i) of the previous edition, which permitted a vendor to bid himself or by an agent up to the reserve price, has been deleted in anticipation of the coming into law of the *Property Services (Regulation) Bill 2009*, section 57 of which will prohibit this practice.

6) Delivery of title

General Condition 7 has been expanded to clarify that the vendor is only required to deliver within seven Working Days after the Date of Sale copies of those documents which have not already been furnished to the purchaser.

7) Requisitions

The first two lines of General Condition 17 have been amended, reflecting the amendments at General Condition 7 referred to above. The changes are intended to bring greater clarity to the timeframe within which Objections and Requisitions on Title may be made.

8) Deed of assurance

General Condition 20(a) has been amended and a new General Condition 20(b) inserted. The new provision clarifies that a purchaser is required to accept delivery of an assurance of the property on completion in favour of the purchaser or the purchaser's nominee.

Where the parties envisage that a Deed of Assurance will not be delivered on completion, the matter should be addressed by way of Special Condition.

9) Completion and interest

General Condition 24(c)(iii) has been amended to substitute reference to the *Land and Conveyancing Law Reform Act 2009* for the *Conveyancing and Law of Property Act 1881*. This provision relates to undertakings given by the vendor's solicitor where completion is being effected by post, or other means than by attendance at the office of the vendor's solicitor.

10) *Land Act 1965*, section 45

General Condition 28 of the previous edition has been omitted, as section 45 of the *Land Act 1965* has been repealed. In order to maintain the numbering elsewhere in the General Conditions, General Condition 29(a) and (b) of the previous edition (Compulsory Registration) has been renumbered as new General Conditions 28 and 29.

11) Forfeiture of deposit and resale

General Condition 41 has been amended at (a) and (b) to add the words "or other stakeholder" after "Solicitor" to address the fact that part of the monies paid by a purchaser may be held by a party other than the vendor's solicitor, for example, an auctioneer.

12) Arbitration

The reference in General Condition 51(a) has been amended by the substitution of "Condition 10(b)(iii)" for "Condition 10(c)".

In addition, a new General Condition 51(d) has been inserted relating to disputes under General Condition 35 (Disclosure of Notices), and General Condition 51(e) (formerly General Condition 51(d)) expands the remit of the arbitration provision in respect of General Condition 36 (Development). G

Conveyancing Committee

legislation update

16 March – 16 April 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.

ACTS PASSED

Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010

Number: 2/2010

Contents note: Provides for the regulation of premium rate services (broadcasting service is excluded from the definition of premium rate service) by the Commission for Communications Regulation. Substitutes a new section 53, 'Opening of public road for establishment of underground electronic communications infrastructure', of the *Communications Regulation Act 2002*. The revised section designates the National Roads Authority as the consent-giving and charging authority for the opening of national roads, including motorways. Local authorities remain the authority for the opening of local and regional roads. Amends further the *Communications Regulation Act 2002* and provides for related matters.

Date enacted: 3/3/2010

Commencement date: 16/3/2010

George Mitchell Scholarship Fund (Amendment) Act 2010

Number: 3/2010

Contents note: Amends the *George Mitchell Scholarship Fund Act 1998* to provide for an increase in the government's contribution to the fund, conditional on matching funding being raised from sources other than public funds in Ireland or Northern Ireland, and provides for related matters.

Date enacted: 30/3/2010

Commencement date: Commencement order(s) to be made (per s6(3) of the act)

Petroleum (Exploration and Extraction) Safety Act 2010

Number: 4/2010

Contents note: Confers statutory responsibility for the safety, both onshore and offshore, of petroleum exploration and extraction activities, including drilling, transmission and processing of untreated gas and oil, on the Commission for Energy Regulation. Amends the *Electricity Regulation Act 1999* and provides for related matters.

Date enacted: 3/4/2010

Commencement date: Commencement order(s) to be made (per s1(2) of the act)

Finance Act 2010

Number: 5/2010

Contents note: Provides for the imposition, repeal, remission, alteration and regulation of taxation, stamp duties and duties relating to excise, and otherwise makes further provision in connection with finance, including the regulation of customs.

Date enacted: 3/4/2010

Commencement date: 8/4/2010 for s133(1) amending the *VAT Act 1972*, ss8, 12 and 17; 3/4/2010 for other sections except where otherwise expressly provided or where commencement order(s) are to be made. See act for details

SELECTED STATUTORY INSTRUMENTS

District Court (Criminal Justice (Mutual Assistance) Act 2008 Rules 2010

Number: SI 94/2010

Contents note: Amend the *District Court Rules 1997* (SI 93/1997) by the amendment of orders 21, 31A, 34 prescribing the procedure and forms in respect of the *Criminal Justice (Mutual Assistance) Act 2008*.

Commencement date: 5/4/2010

Companies (Recognised Stock Exchanges) Regulations 2010

Number: SI 100/2010

Contents note: Prescribe the main market of the London Stock Exchange, the New York Stock Exchange, and the market known as NASDAQ, operated by Nasdaq Stock Market Incorporated, for the purposes of s212 of the *Companies Act 1990* to permit Irish public companies to make overseas market purchases on a recognised stock exchange.

Commencement date: 10/3/2010

Companies (Forms) Regulations 2010

Number: SI 101/2010

Contents note: Amends and updates various forms prescribed for filing information in the Companies Registration Office.

Commencement date: 10/3/2010

Criminal Justice (Legal Aid) (Amendment) Regulations 2010

Number: SI 136/2010

Contents note: Provide for a decrease of 8%, with effect from 1/4/2010, in the fees payable under the Criminal Legal Aid Scheme to solicitors for attendance in the District Court and for appeals to the Circuit Court, and in the fees paid to solicitors and counsel in respect of essential visits to prisons and other custodial centres (other than garda stations) and for certain bail applications. Revoke the *Criminal Justice (Legal Aid) (Amendment) Regulations 2009* (SI 15/2009).

Commencement date: 1/4/2010

Enforcement of Court Orders (Legal Aid) (Amendment) Regulations 2010

Number: SI 137/2010

Contents note: Provide for a decrease of 8% from 1/4/2010 in the fees payable in proceedings under *Enforcement of Court Orders Act 1940*, s6 (inserted by the *Enforcement of Court Orders (Amendment) Act 2009*, s2).

Commencement date: 1/4/2010

European Communities (Assessment and Management of Flood Risks) Regulations 2010

Number: SI 122/2010

Contents note: Give effect to Directive 2007/60, establishing a framework for community action in the field of assessment and management of flood risks; provides for the appointment of the Commissioner of Public Works in Ireland as competent authority

under the directive and related matters.
Commencement date: 15/3/2010

European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010
Number: SI 131/2010
Contents note: Give effect to Directive 2007/66 insofar as it amends Directive 92/13 covering procurement procedures of entities operating in the water, energy, transport and postal sectors. Strengthens the remedies available to candidates and tenderers who feel their rights have been infringed in the award of contracts.
Commencement date: 25/3/2010

European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010
Number: SI 130/2010
Contents note: Give effect to Directive 89/665, as amended by Directive 2007/66 covering procurement procedures of public sector bodies. Strengthens the remedies available to candidates and tenderers who feel their rights have been infringed in the award of public contracts.
Commencement date: 25/3/2010

Finance Act 2010 (Section 133(1)) (Commencement) Order 2010
Number: SI 147/2010
Contents note: Appoints 8/4/2010 as the commencement date for section 133(1) of the act, amending the *VAT Act 1972*, ss8, 12 and 17. Provides for the reverse charge mechanism to apply where a taxable person who carries on a business in the state receives greenhouse gas emission allowances from another taxable person who carries on a business in the state.

Health (Miscellaneous Provisions) Act 2009 (Commencement) Order 2010
Number: SI 118/2010
Contents note: Appoints 1/4/2010 as the commencement date for part 4 of the act. Part 4 provides for the dissolution of the National Cancer Screening Service Board and for the transfer of the agency's employees, liabilities, property, etc, to the Health Service Executive. G

Prepared by the Law Society Library

COMMITTEE NOTES

GUIDELINES FOR SOLICITORS IN PERSONAL INJURIES BOARD CASES
ERRATA

***Statute of Limitations* – page 7:** practitioners are asked to note that, in the example given on page 7 of the booklet (*Guidelines for Solicitors in Personal Injuries Board Cases*), the *Statute of Limitations* expiry date should read 30 November **2010**, not 30 November 2009 as is stated in the booklet.

Apologies for any inconvenience caused.

DISTRICT COURT SITTINGS IN CRIMINAL COURTS OF JUSTICE

Practitioners may wish to note that the President of the District Court has announced that there will be no special court sittings dealing with criminal business in the CCJ in August 2010.

Criminal Law Committee

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Solicitors Disciplinary Tribunal

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

In the matter of Michael Browne, a solicitor practising as Michael Browne, Solicitors, James Street, Westport, Co Mayo, and in the matter of the *Solicitors Acts 1954 to 2008* (2072/DT 116/09)
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. G

CPD FOCUS SKILLNET TRAINING PROGRAMME MAY/JUNE 2010

DATE	EVENT	SKILLNET/ PUBLIC SECTOR FEE	FULL FEE	CPD HOURS
11 May 2010	Advising the client in custody	€84	€112	**2** General
13 May 2010	Probate litigation	€147	€196	**3.5** General
19 May 2010	Finance for non-finance professionals	€168	€224	**3** Management and professional development skills* + **1** regulatory matters
25 May 2010	Time management: making the most of your day	€126	€168	**3.5** Management and professional development skills*
25 May 2010	Arbitration: how your clients will benefit under the new act	€84	€112	**2** General
31 May 2010	Working smart with *Outlook*	€126	€168	**3** Management and professional development skills*
4 June 2010	Radical changes to CAT in the *Finance Act 2010* and will drafting for the new decade	€126	€168	**3.5** General
9 June 2010	Law Society regulation: what every practitioner needs to know	€105	€140	**2.5** Practice management and professional development skills/regulatory matters
12 June 2010	Setting up in practice: a practical guide	€131	€175	**5.5** Management and professional development skills* + **1** regulatory matters**
14 June 2010	How to work smart with Microsoft *Outlook*	€84	€112	**3** Management and professional development skills*
14 June 2010	Radical changes to CAT in the *Finance Act 2010* and will drafting for the new decade	€126	€168	**3.5** General
14 June 2010	Current trends in examinership	€84	€112	**2** General

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The *Land and Conveyancing Law Reform Act 2009* – DVD and materials available for purchase: €55

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CPDFOCUS SKILLNET

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Compiled by Bart Daly

INTELLECTUAL PROPERTY

Copyright

Interlocutory injunction – Copyright and Related Rights Amendment Act 2007 – *infringement of copyright – whether an innocent transmitter of infringing material can be made subject of an injunctive order – damages.*

The plaintiffs applied for an interlocutory injunction requiring the defendants to block access by its internet subscribers to the website thepiratebay.org, which permits the infringement of copyright owned by the plaintiffs in their musical works.

Charleton J granted the injunctive relief (on the basis of affidavit evidence), holding that an innocent party whose facilities are being used (publicly available channels over the internet) for the transmission of copyright materials, thereby infringing copyrighted works, can be made the subject of injunctive relief under Directive 2001/29 EC, as implemented in s40(4) of the *Copyright and Related Rights Act*, as amended. No decision was made in relation to damages.

***EMI Records (Ireland) Ltd (plaintiff) v Eircom PLC (defendant)*, High Court, 24/7/2009**

CRIMINAL LAW

Road traffic offences

Case stated – powers of arrest – detention – evidence – wording of relevant statutory provision – whether accused lawfully detained – whether arresting garda had properly formed opinion – Road Traffic Acts 1961-2006 – Courts Supplemental Provisions Act 1961.

The accused had been stopped at a garda checkpoint and had given a breath sample under section 4 of the *Road Traffic Act 2006*. The accused returned a fail result and was arrested pursuant to s49 of the *Road Traffic Act 1961*, as amended, on the opinion of the arresting garda that the accused had consumed an intoxicant to such an extent that he had improper control of a motor vehicle in a public place. It was submitted by counsel for the accused that the arrest of the accused had been unlawful and that all that occurred subsequently in the garda station was therefore inadmissible in evidence. It was submitted that the offence the garda had purported to arrest the accused for was one not known to the law (as the wording in the relevant section was in fact different). In addition, it was claimed that, although the garda had used the phrase 'improper control', there had been nothing unusual in the driving of the accused as he approached the checkpoint. A case was then stated for the opinion of the High Court as to whether the arrest of the accused had been lawful.

Hedigan J answered the case stated as follows. The slightly incorrect description provided by the garda while giving his evidence at trial was an error of the utmost triviality. There could be no doubt in the mind of the district judge, or indeed the parties to these proceedings, as to which offence was suspected by the arresting garda. It was also clear that a garda was not obliged to be satisfied beyond doubt of the commission of an offence before effecting an arrest. The burden was a light one, and did not even rise to the level of *prima facie* proof of guilt. It was readily conceivable that, where a garda encountered an individual driving a vehicle after midnight on a Friday night, and where that individual gave off a smell of an intoxicant and failed an alcometer test, that the garda in question might reasonably suspect that the individual was under the influence as to be incapable of having proper control of their vehicle. The accused was at all material times in lawful custody.

***Director of Public Prosecutions (prosecutor) v Shay O'Rourke (respondent)*, High Court, 2/7/2009**

Delay

Want of prosecution – dismissal of proceedings – alleged sexual assault – pre-commencement and post-commencement delay – whether real and serious risk of an unfair trial – whether prejudice established by death of first-named defendant and importance of oral testimony.

The plaintiffs brought proceedings against the defendants in respect of a series of alleged sexual assaults, alleged to have taken place in the course of medical treatment on dates between 1976 and 1991. The first-named defendant was now deceased, and the second-named defendant was a religious order. The defendants sought to dismiss the claim of the plaintiffs for want of prosecution on the grounds of inordinate delay. The defendants contended that there was culpable pre-commencement and post-commencement delay in respect of the proceedings. The passage of time was alleged to have given rise to serious prejudice.

Hedigan J held that very little had been offered by the plaintiffs by way of explanation for their extraordinary failure to progress the case since proceedings issued. The defendants had waited 11 years since proceedings commenced as to events occurring 33 years ago. The pre-commencement delay ranged from six years and three months to 17 years and nine months from the last alleged incident of abuse. A heavy reliance would be placed on oral testimony. No particulars had been furnished, despite the defendants demands. The first-named defendant was dead, and none of the delay was attributable to the defendants. Any trial that would take place could not be said to have occurred within a reasonable period of time. The relief sought would be granted and the proceedings dismissed. No order for costs was sought.

***D(J) & Others (plaintiffs) v O'K (DJL) and Brothers of Charity (defendants)*, High Court, 6/10/2009**

FAMILY LAW

Child abduction

Hague Convention on the Civil Aspects of International Child Abduction – *wrongful removal – habitual residence – England – grave risk defence – proofs* – Child Abduction and Enforcement of Custody Orders Act 1991 – *Council Regulation 2201/2003* (Brussels II) – Convention on the Rights of the Child.

An application was made pursuant to the provisions of the *Child Abduction and Enforcement of Custody Orders Act 1991* for the return of children. The applicant was the father of two of the children and claimed to be father to the third. The children were

habitually resident in England prior to their removal to Ireland, wrongfully, as was accepted by the parties. The father sought an order pursuant to article 12 of the convention for the return of the children to England. The mother alleged that the father had been violent in the past and that a grave risk to the safety of the children existed in the event of their return. The mother had commenced proceedings in an English county court and had obtained a non-molestation order in 2008, restraining the father of the children from certain actions or behaviour.

Finlay Geoghegan J held that the court would exercise its discretion to make an order for the return of all three children. A stay would be put on the order for return. The move made by the mother was in breach of an English court order of which she was aware. Having regard to the nature of the children's objections, the ages thereof and degrees of maturity, the court would not depart from the policy of the convention. The mother had to give undertakings to promptly pursue her application to the English courts for permission to relocate with the children to Ireland and that she would attend any court hearings of meetings as directed.

***In the matter of A(C), A(C) and A(C) (Minors); A(C) (applicant) v A (C) (otherwise McC (C) (respondent)*, High Court, 21/10/2009**

IMMIGRATION AND ASYLUM

Judicial review

Leave application – deportation – whether, under the Refugee Act 1996, *it is competent for the tribunal to adjudicate by way of appeal on an individual asylum application that has been joined with one or more existing applications under appeal, but which has not been the subject of an investigation by the commissioner or been covered by a section 13 report and recommendation, nor included in a notice of appeal.*

The fourth-named applicant, H (suing by her mother and next friend PI), sought an order of *certiorari* to quash the deportation order made in respect of H. On 18 October 2005, her mother, the first-named applicant, completed an asylum application initially on her own behalf and later on behalf of her newly born son. The commissioner recommended that refugee status be refused; the first-named applicant's subsequent appeal, held on 29 July 2008, covering mother and son, was subsequently unsuccessful; and, by a decision of 23 September 2008, it was rejected and the section 13 report and negative recommendation were affirmed. This decision purported to determine the appeals of both her dependant children, O and H. H was born in the state in 2007, was never included in the asylum application, and was only included after the section 13 report. It was submitted that the net issue directed that, because the fourth-named applicant was never included in the asylum application or, at any rate, not included until after the section 13 report had been given and the investigation stage of the procedure concluded, the tribunal had no jurisdiction to conclude her claim in its decision and to purport to determine an asylum application in respect of her. She could therefore not be considered a failed asylum seeker and, as a result, she is not a person in respect of whom the minister had the power to make a deportation order under s3(2)(f) of the *Immigration Act 1999*.

Cooke J granted leave to apply for judicial review, holding that the issue of whether, on a correct construction of the *Refugee Act 1996*, it is competent for the tribunal to adjudicate by way of appeal on an individual asylum application, which has been joined with one or more existing applications under appeal, but which has not been the subject of an investigation by the commissioner or been covered by a section 13 report and recommendation, nor included in a notice of appeal, raised a ground of sufficient weight and arguability to warrant that it be examined fully on a substantive application for relief.

***I & Ors (applicants) v Refugee Appeals Tribunal & Ors (respondent)*, High Court, 31/7/2009**

FISHERIES

Judicial review

Certiorari – *bye-law – ministerial powers – extent thereof – fair procedures* – audi alteram partem – *discrimination – whether introduction of bye-law* ultra vires – *whether applicants afforded sufficient opportunity to be make submissions on introduction of bye-law – whether bye-law made in breach of right to fair procedures of those affected by it – whether applicants discriminated against* – European Communities (Natural Habitats) Regulations 1997 *(SI no 94 of 1997)* – South Western Fisheries Region No 7 Kerry District Conservation of Salmon and Sea Trout Bye-Law 2008 *(no 844 of 2008)* – Fisheries (Consolidation) Act 1959 *(no 14), sections 9, 67 – statutory interpretation – primary rule – literal approach – construction of section – whether words used clear and unambiguous.*

The appellants were drift-net fishermen who depended upon fishing in Castlemaine harbour for their livelihood. The harbour is designated as a special area of conservation by Council Directive 92/43/EC (the *Habitats Directive*). They had been granted licences by the notice party, the South Western Regional Fisheries Board, subject to a number of conditions. Shortly afterwards, the respondent, to ensure compliance with the *Habitats Directive* and the preservation of fish stocks, passed the *South Western Fisheries No 7 Kerry District Conservation of Salmon and Sea Trout Bye-Law 2008*, which prohibited them from fishing the harbour, notwithstanding the grant of licences. The applicants were granted leave to seek, among other things, an order of *certiorari* quashing the 2008 bye-law and an order of prohibition restraining the respondent from purporting to close the harbour. They also sought various related declarations. They contended, among other things, that the respondent had acted *ultra vires* in purporting to introduce the 2008 bye-law, in that neither the provisions of section 9 of the *Fisheries (Consolidation) Act 1959* or any other provision were broad enough to permit a blanket ban on fishing. They also submitted that it had been made without due regard to fair procedures, in that they had not been afforded sufficient time to make representations in respect of it, and that it discriminated in respect of different types of fishermen operating within the same area.

Mr Justice Hedigan refused the relief sought, holding that section 9 of the 1959 act granted the respondent a broad array of powers to make bye-laws relating to the fisheries of the state. The default rule of statutory interpretation was that a literal approach had to be taken to the provision under examination, and it was only in limited circumstances that the principle could be departed from. In interpreting section 9 of the 1959 act, therefore, it was not the function of the court to read any limitations or qualifications into the powers conferred on the respondent, in the absence of some patent ambiguity or absurdity. Affording the terms of section 9 their plain meaning and thus upholding the 2008 bye-law as lawful did not result in any degree of absurdity. As a general rule, decision-making bodies whose determinations were likely to impact heavily upon the livelihood of citizens were obliged to afford a certain

degree of consultation and to provide certain items of information to those affected. The consultation process engaged in by the respondent with the applicants met that requirement. The 2008 bye-law did not amount to an act of invidious discrimination, as its introduction was necessitated by the state's obligations under European law.

***Teahan & Others (applicants) v Minister for Communications, Energy and Natural Resources (respondent)*, High Court, 18/8/2009**

JUDICIAL REVIEW

Practice and procedure

Interpretation of legislation – Criminal Justice Act 1994 – Proceeds of Crime Act 2005 – *whether the issuing of a notice of motion was sufficient to amount to an application to court or whether the applicant was required to actually address the judge in order for an application to be made.*

The applicant sought an injunction prohibiting the first-named respondent from making any application in purported reliance of s39 of the *Criminal Justice Act 1994*, as amended by s20 of the *Proceeds of Crime Act 2005*, and an order returning a sum of €100,604.66 seized by the second-named respondent. A sum of money had been seized from the applicant and was detained from time to time following applications to the District Court. At no stage did the applicant seek the return of the money. Subsequently, the respondent issued a notice of motion pursuant to s39 of the 1994 act, seeking the forfeiture of the seized money. However, due to the volume of work in the court, the matter did not proceed on the return date. The applicant then sought the aforementioned orders by way of judicial review, on the basis that the respondents were out of time for seeking an order of forfeiture. Essentially, the applicant submitted that the two-year time limit provided for in the legislation required that the application for forfeiture be made while the money in question was being detained, and that the phrase 'application is made' required the respondent to actually stand up in court and request the order, which was not done in this case, the application having been adjourned.

Clark J refused the application, holding that ss38, 39 and 42 did not create any offences or penalties and were not provisions of a penal nature. Section 39(1) of the 1994 act was an enabling provision. The applicant was entitled, at any time during the investigative process into the origins of the money, to apply for the return of the money. The narrow and strict interpretation of the wording 'where an application is made', sought to be applied by the applicant, was not appropriate. The term 'application is made' was familiar court language with a specific meaning, and not a phrase that required to be construed for being obscure or ambiguous or where a literal interpretation would be absurd or where it would fail to reflect the plain intention of the Oireachtas. Application by way of originating notice of motion was a well-recognised method for initiating proceedings without pleadings and generally supported by affidavit. The meaning of the phrase 'application is made' included the issue of a notice of motion and did not require that an actual oral demand be made to the judge.

***R(JG) (applicant) v DPP & Others (respondents)*, High Court, 31/7/2009**

PLANNING AND DEVELOPMENT

Quarrying

Extent to which existing land use rights may be encroached upon – imposition of planning conditions on operation of existing quarries – whether ultra vires *– whether decision irrational – duty to give reasons for planning decision – whether reasons inadequate – whether condition void for uncertainty or ambiguity – whether respondent breaching requirement to abide by fair procedures* – Planning and Development Act 2000, *section 261.*

Section 261 of the *Planning and Development Act 2000* introduced a system of registration for quarries, and subsection 6 thereof authorised the imposition of conditions on the operation of a quarry that had commenced operations prior to 1964 and that had been previously granted planning permission. Section 261(7) requires the making of a fresh application for planning permission for certain extant quarries that are over a threshold size or are located within a nature conservation area, and compensation is provided for in subsection 8 where such permission is refused or conditions are attached under subsection 7. The applicants were all owners of quarries that had been in operation prior to 1964. They had been granted leave to apply, among other things, for orders of *certiorari* quashing the decisions of the respondent to impose various conditions upon them pursuant to section 261(6) of the *Planning and Development Act 2000* in relation of the operation of quarries in various locations in the state. They submitted that the imposition of the conditions, principally the prohibition of blasting, would make the operation of the quarries so onerous as to lead to the cessation of quarrying thereon. They also contended that the decision to impose conditions under subsection 6 rather than 7 was unlawful, unfair and irrational, as it meant that they were not entitled to apply for compensation therefor.

Mr Justice O'Neill refused the relief sought, holding that, as blasting was merely a method of extraction, it could not be considered to be synonymous with or an integral part of an existing right to quarry and, as such, was an activity that could be controlled under section 261 of the 2000 act. Property rights, as protected by the Constitution, were not absolute, and the power of the state to regulate the use of land was a recognised fetter on that right. It could never be said that there was an unrestricted right to use property for any activity, including quarrying, regardless of the effects that activity had on the enjoyment of other persons of their lives, health and properties. Not all interferences with property rights would require compensation to be paid to ensure constitutional legitimacy. Compensation would be required in circumstances where property was wholly expropriated or where the bundle of rights that constituted ownership was substantially taken away, but lesser interferences with the right to private property would not require compensation. The absence of a proviso for compensation in section 261(6) of the 2000 act was not a material consideration in arriving at the construction of section 261(6), as the mere requirement to obtain planning permission could not, *per se*, be said to injure property rights to an extent sufficient to warrant compensation. Neither could the imposition of conditions necessary for proper planning and sustainable development give rise to a right to compensation. In the absence of a description of the types of conditions to be imposed in section 261(6) of the 2000 act, and in light of the wide criteria under which conditions could be imposed, the conditions that could be imposed on the operation of quarries could encompass the wide spectrum of the various normal planning concerns, as these were likely to be affected by the works carried out at a given quarry in its particular location.

***M & F Quirke (applicants) v An Bord Pleanála & Others (respondents)*, High Court 6/10/2009** G

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

Buyers beware – public procurement and the new *Remedies Regulations*

An important milestone in the field of public procurement law was reached on 25 March 2010: it was the date on which the new *European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010* and the *European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010* (together, the '*Remedies Regulations*') were signed by the Minister for Finance.

The *Remedies Regulations* transpose into Irish law Directive 2007/66/EC (amending Directives 89/665/EEC and 92/13/EEC) with regard to improving the effectiveness of review procedures concerning the award of public contracts. Generally speaking, the principal effects of the directive are:

- Introducing a higher level of coordination of rules governing procurement procedures and challenges across the EU,
- Clarifying and improving the effectiveness of pre-contractual review procedures, and
- Providing national courts with unified stronger corrective mechanisms in the field of public procurement law.

The ultimate goal of the directive appears to be to encourage increased cross-border tendering within the EU by providing greater certainty of rights and strengthened review procedures for tenderers.

The directive gives some scope regarding implementation; some provisions are mandatory, while others leave EU member states with an element of choice. The transitional policy of the *Remedies Regulations* is that they apply to decisions taken by public authorities after their coming into operation, regardless of when the relevant tender competition started. Contrast this with the position in Britain, where the national legislation transposing the directive applies only to procurement processes beginning on or after the date of implementation of the legislation (that is, 20 December 2009).

The key changes contained in the *Remedies Regulations* are:

1) Additional up-front notification obligations are imposed on procuring public authorities,
2) Formalisation of the standstill requirement (which previously existed at EU level only in case law),
3) Introduction of important changes to the time limits for applications to court for review of decisions made in the context of a tender competition,
4) Automatic suspension of the contract award when court proceedings are commenced, and
5) The 'new' remedy of ineffectiveness.

Notification requirements

Several important changes have been made to the notification requirements imposed on a public authority when it makes the decision to award a contract the subject of a tender competition. It is essential to note that sending due and proper notice of the contract award decision triggers the commencement of the standstill period. If notice that complies with all the requirements in the *Remedies Regulations* is not issued, it is possible that a court will consider that the standstill period did not commence and, consequently, that the contract was awarded in breach of the requirement to observe a standstill period; this would potentially have drastic implications.

The *Remedies Regulations* state that notification of the decision of the authority to award the contract must be sent to all "concerned" candidates and tenderers. This will naturally include the successful and the unsuccessful tenderers, but also includes candidates that did not pre-qualify to tender to whom the contracting authority did not, at the time of their exclusion from the competition, make available information about their rejection. It might thus be expedient for public authorities to make a habit of issuing unsuccessful candidates with information about the rejection immediately, so that further notification requirements do not arise at the award stage of the competition.

According to the *Remedies Regulations*, the award decision notice letters must inform the recipients of the decision made, and the exact standstill period applicable to the contract (as this is not the same in all EU member states). For each unsuccessful tenderer, the notice must also include a summary of the reasons for rejection of its tender, which must comprise the name and the "characteristics and relative advantages" of the winning tenderer. The phrase quoted will be familiar to practitioners from the *European Communities (Award of Public Authorities' Contracts) Regulations 2006* and the *European Communities (Award of Contracts by Utility Undertakings) Regulations 2007* (the '*Utilities Regulations*') (together, the '*Procurement Regulations*'), wherein a similar requirement to provide this information is imposed on public authorities that receive a request from an unsuccessful tenderer. Note the difference, however, that this information must now be provided in the initial unsuccessful tenderer letter. Having regard to the above requirements, it will not be possible for a public authority to issue generic notice letters to unsuccessful participants, as each letter will have to be amended to reflect the relative advantages of the winning tender when compared with the submission of the recipient.

The *Remedies Regulations* also provide that the summary reasons for rejection of a tender *may* be provided by setting out the scores obtained by the unsuccessful tenderer and those of the successful tenderer. On the basis of EU case law (see Cases T-272/06 and T-59/05, *Evropa-*

iki Dynamik), however, it is unlikely that simply setting out the scores of the winner and recipient will satisfy the information requirements. Public authorities are well advised to include some form of explanatory narrative as to why the winning tender achieved higher scores. Information required to be provided in the notification letters may be withheld by the public authority in certain circumstances, which are equivalent to the derogations set out in the *Procurement Regulations*.

Standstill period

In Ireland, a legislative standstill period was already enacted in the *Procurement Regulations*, but this situation was not reflected across the EU. Rather, in a number of EU member states, the requirement to observe a standstill was simply derived from the case law of the ECJ (per Case C-81/98, *Alcatel Austria and Others v Bundesministerium für Wissenschaft und Verkehr*). The duration of the standstill period in Ireland will not change: it will still be 14 calendar days (provided the unsuccessful tenderer notice letters are sent by email or fax). The *Remedies Regulations* state that the standstill period for a contract begins on the day after the day on which each tenderer and candidate concerned is sent a notice in accordance with the requirements of the *Remedies Regulations* of the outcome of its tender or application. Moreover, the contract that is the subject of the competition should not be executed until after the final 14th day of the standstill period. The minimum required standstill period differs from country to country – for example, in Britain, it is ten calendar days where notification is sent by email or fax.

The *Remedies Regulations* state that a standstill period is not required prior to the award of a contract where:

a) The relevant *Procurement Regulations* do not require prior publication of a contract notice in respect of such a contract, for example, for 'Part B' service contracts subject to the *Public Sector Regulations*, or
b) No concerned tenderers or candidates remain in the tender competition except the winning entity, or
c) For call-offs under framework agreements or dynamic purchasing systems (although, in such case, a public authority may protect itself from the possibility of a mandatory declaration of ineffectiveness by voluntarily observing a standstill; this will be discussed later on).

Goujons or tenders: you decide

Public authorities are advised to be cautious about disposing with a standstill period in relation to the award of any contract, however, even where one of the specified permitted derogations in the *Remedies Regulations* apply, on the basis of a recent judgment in Northern Ireland (*Federal Security Services Limited v The Northern Ireland Court Service* ([2009] NIQB 15), in which the court held that there are circumstances in which a procuring authority is bound to observe a standstill in relation to a contract not governed by the *Procurement Regulations*, having voluntarily bound itself the procedures set out therein.

Time limits for applications

Prior to enactment of the *Remedies Regulations*, the limitation period applicable to procurement challenges was set out in order 84A of the *Rules of the Superior Courts*, which stated that applications had to be made "at the earliest opportunity and in any event within three months from the date when the grounds for the application first arose". One of the most important changes in the *Remedies Regulations* is that the limitation period is now amended to "30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application". While an earlier version of the draft remedies regulations had repeated the requirement that challenges be taken "at the earliest opportunity", this was hastily removed following a recent ECJ decision in cases C-456/08, *Commission v Ireland* and C-406/08, *Uniplex UK Ltd v NHS Business Services Authority* affecting such wording.

The *Remedies Regulations* state that the rules of court may provide for the court to grant leave to make an application after the latest permitted time if it considers that there is "good reason to do so". This wording mirrors the equivalent provision previously included in order 84A.

While the 30-day time limit applies to most procurement challenges, the limitation period will be six months from the date of conclusion of the contract where the remedy sought is a declaration of ineffectiveness. This creates an anomaly whereby different review periods may apply to the same alleged infringement, depending on the remedy sought.

The six-month time limit for ineffectiveness claims is not absolute; it can be intentionally reduced by a procuring authority to 30 calendar days where:

a) An award notice in respect of the concluded contract is published, or
b) The procuring authority notifies each tenderer and candidate concerned of the "outcome of his tender or application" and such notice contains summary reasons for rejection of the tender or application. This should not be confused with the (pre-contract) award decision notification requirement. In both the directive and the British transposing legislation, it is the "conclusion of the contract" that is the subject of this notification, rather than the outcome of the tender/application (which could be interpreted as simply being the rejection decision). This appears to make more sense, as the intention is a post-award notification for the purposes of shortening the limitation period, in which case the fact that the contract had been concluded would be relevant information for

unsuccessful entities, and perhaps the Irish provisions will be interpreted in line with the wording of the directive.

Automatic suspension

The *Remedies Regulations* include new automatic suspension provisions, whereby a procuring authority is prohibited from concluding a contract if court proceedings are initiated to challenge any decision it has made in the context of the tender competition for the award of such contract. An applicant is not required to apply for an injunction to prevent the conclusion of the contract, and the *Remedies Regulations* prevent the public authority from doing so until (i) the subject matter of the proceedings is determined by court; (ii) the court lifts the suspension; or (iii) the proceedings are discontinued or disposed of. Before commencing review procedures, the claimant must notify the procuring authority in writing of the alleged infringement and its intention to make an application to court.

Declaration of ineffectiveness

The remedy of 'ineffectiveness', while new in terminology, is not a novel concept for the Irish courts, as they already had the power (though seldom used) to set aside concluded contracts, unlike some of their European counterparts. The consequences of a declaration of ineffectiveness are that, from the date of the declaration, all future contractual obligations of both contracting parties are completely cancelled.

Ineffectiveness is reserved for the most serious of procurement breaches. The *Remedies Regulations* state that a court must declare a concluded contract ineffective in three situations:

i) Where the public authority has breached the *Official Journal of the European Union* (OJEU) advertising obligation,
ii) Where the contract is concluded during the standstill period or automatic suspension, provided that:
   - This was coupled with a separate infringement of the *Remedies Regulations* that affected the claimant's chances of obtaining the contract, and
   - The conclusion of the contract has deprived the claimant of the possibility of pursuing pre-contractual remedies, and
iii) Where the procedural rules for awarding call-off contracts under a framework or dynamic purchasing system are not followed, provided that:
   - The value of the call-off contract exceeds the relevant EU threshold, and
   - No standstill period in respect of the call-off was observed by the procuring authority.

These are all circumstances in which a court is compelled to make a declaration of ineffectiveness (subject to certain exceptions discussed below). Note that, otherwise, the court has a general power to declare the awarded contract ineffective, but is not obliged to do so.

The first of these three situations ((i) above) is likely to create the most headaches for contracting authorities, since there are many diverse circumstances conceivable in which the contract advertising obligation could be breached. Not only does this cover deliberate illegal direct award of contracts, but also tainted are diverse situations such as where a public authority in good faith considers that an exemption to the advertising requirement applies, for example, by adopting the negotiated procedure without prior publication of contract notice, where the preconditions are not actually satisfied or by presuming that the 'Teckal in-house rules' (per Case C-107/98, *Teckal Srl v Commune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*) apply when they do not. In addition, and perhaps most worryingly, the ECJ has held that variations to the provisions of a public contract during its currency will actually be considered a new award of a contract if the amended contract is materially different in character from the originally tendered contract. Such a 'new' contract should have been separately advertised in the OJEU, and, if so, the above requirement that it be declared ineffective by a court applies.

The implications of a public contract being declared ineffective may be considered drastic, but there are a number of measures that a procuring authority can take to protect itself from the possibility of a mandatory declaration of ineffectiveness.

Firstly, where no OJEU notice has been published in respect of a contract, but the procuring authority fears inadvertent breach of the obligation to advertise, the public authority can protect itself from the possibility of a mandatory declaration of ineffectiveness by publishing in the OJEU a voluntary prior transparency notice, stating that it intends to conclude a contract and by thereafter observing a 14-day standstill period. This standard form notice, referred to as a "voluntary *ex ante* transparency notice", is now available on the tenders' electronic daily website (http://ted.europa.eu).

Secondly, when granting high-value call-off contracts, a contracting authority can avoid the possibility of mandatory ineffectiveness by issuing notice of the call-off contract award decision (including summary reasons for rejection) to the unsuccessful tenderers and respecting a voluntary 14-day standstill period.

Even if a mandatory requirement of ineffectiveness applies, the *Remedies Regulations* give the court discretion to decline to declare a contract ineffective if it finds (having considered all aspects of the matter that it considers relevant) that "overriding reasons relating to a general interest" require that the effects of the contract should be maintained. In such circumstances, a court must impose alternative penalties in the form of either or both of:

a) A penalty fine of up to 10% of the value of the contract, and
b) Termination, or shortening of the duration, of the contract. It is specified that an award of damages alone is not an appropriate alternative penalty.

The *Remedies Regulations* set out detailed guidance on the interpretation of the phrase "overriding reasons relating to a general interest". They state that economic reasons can only be a permitted justification in exceptional circumstances if ineffectiveness would lead to disproportionate consequences. Moreover, it is specified that economic reasons directly linked to the contract in question can never be overriding reasons; this would include all costs from delay in carrying out the remainder of the contract, launching a new tender competition, as well as costs and expenses resulting from the change of contractor and the procuring authority's legal obligations resulting from the ineffectiveness.

As mentioned previously, the consequence of ineffectiveness is prospective cancellation, such that contractual obligations not already performed are cancelled but performed obligations are not affected. Although this appears drastic, private sector contracting parties may get additional comfort from the fact that the *Remedies Regulations* specify that a court may make any order necessary in the interests of justice to ensure proper payment is made

for any obligation performed in good faith, prior to the declaration of ineffectiveness being made.

Significant changes

The *Remedies Regulations* introduce a number of significant changes to the review regime applicable to infringements of public procurement law. Practitioners should take note, in particular, of the significant change to the limitation period for taking procurement challenges, the mandatory suspension requirements, and the dire implications on a concluded contract of a declaration of ineffectiveness.

The new remedies regime, together with the lower EU procurement thresholds applicable from 1 January 2010, are an indication of the ever-increasing prevalence of public procurement law – which should not be considered by practitioners as a discrete specialist area of the law – but must instead be a real, present consideration for all professionals advising public-sector purchasers. G

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Recent developments in European law

FAMILY LAW

On 24 March, the European Commission announced that it was releasing a proposal for a regulation setting out choice-of-law rules in divorce. The proposal will allow international couples (couples with different nationality) to choose the applicable law if they were to separate. They must have a close connection to the applicable law, such as long-term residence or nationality.

The partners' choice of law must be in writing and signed by both spouses. If the spouses cannot agree on the applicable law, it is determined on the basis of a number of connecting factors. Divorce and legal separation are primarily subject to the law of the state where the spouses have their common habitual residence.

Failing that, the applicable law is that of the state where they had their last recent common habitual residence if one of them still resides there. Failing that, the law applied is that of the spouses' common nationality and, failing that, it is the law of the state before which the matter is brought.

This proposal would be adopted under the enhanced co-operation provisions of the treaties. It would apply in ten EU member states: Austria, Bulgaria, France, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain.

FREE MOVEMENT OF PERSONS

Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United FC,* 16 March 2010. The charter of the French football association contains rules relating to the employment of football players in France. Trainee players are aged between 16 and 22 and are employed as trainees by a professional club under a fixed-term contract. At the end of his training, the charter obliges the trainee to sign his first professional contract with the club that has trained him, if the club requires him to do so.

In 1997, Olivier Bernard signed a trainee contract with Olympique Lyonnais for three seasons. Before that contract was due to expire, the club offered him a professional contract for a year. He refused to sign that contract and signed a professional contract with Newcastle United FC. Olympique Lyonnais sued Mr Bernard, seeking an award of damages against him and Newcastle United. The Court de Cassation asked the ECJ whether the principle of free movement of workers permitted training clubs from preventing or discouraging trainees from signing a professional contract with a football club in another member state, as doing so might give rise to an order to pay damages.

The ECJ held that the employment of the trainee was an economic activity and thus subject to EU law. The charter has the status of a national collective agreement aimed at regulating employment and, thus, also falls within the scope of EU law. The rules at issue are likely to discourage a trainee player from exercising his right of free movement. Thus, the rules are a restriction on freedom of movement for workers.

However, the court had accepted in Case C-415/93, *Bosman* that, in view of the considerable importance of sporting activities, and, in particular football in the EU, the objective of encouraging the recruitment and training of young players must be accepted as legitimate. In considering whether a system that restricts the freedom of movement of such players is suitable to ensure this objective is attained and does not go beyond what it necessary, account must be taken of the specific characteristics of sport in general, and football in particular, and of their social and educational function.

The court took the view that the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players. A scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one that trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be capable of actually attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally. Thus, freedom of movement for workers does not preclude such a scheme.

The French scheme at issue required payment to the training club, not of compensation for training but of damages – the amount of which was unrelated to the real training costs incurred by the training club but in relation to the total loss suffered by it. Therefore, the French scheme went beyond what is necessary to encourage recruitment and training of young players and to fund those activities.

LITIGATION

Switzerland has decided to ratify the *Lugano Convention* on jurisdiction and enforcement of judgments with effect from 1 January 2011. The convention, which applies jurisdictional and enforcement of judgment rules (broadly similar to those in Regulation 44/2001), entered into force between the EU member states and Norway on 1 January 2010.

REFUGEE LAW

Joined cases C-175/08, C-27/08, C-178/08 and C-179/08, *Ayin Salahadin Abdulla and Others,* 2 March 2010. The applicants are Iraqi nationals who were granted refugee status in Germany in 2001 and 2002. They relied on a number of reasons that made them fear being persecuted in Iraq by the Saddam Hussein government.

In 2005, circumstances in Iraq had changed and their recognition as refugees was revoked. The higher administrative courts

in Germany ruled that they were now safe from any persecution suffered under the previous regime and they were not under any significantly likely new threat of further persecution on any other grounds.

The Federal Administrative Court asked the Court of Justice for its assistance on the interpretation of some provisions in Directive 2004/83 on minimum standards for the qualification of third country nationals as refugees.

The directive provides that a person ceases to be a refugee when the circumstances that led him to be recognised as such have ceased to exist. The CJ stated that, in order to be classified as a refugee, the person must, by reason of circumstances existing in his state of origin, have a well-founded fear of being persecuted on the basis of race, religion, nationality, political opinion or membership of a particular social group. These circumstances form the reason why the person concerned cannot, or justifiably refuses to avail himself of, the protection of his state of origin in terms of that state's ability to prevent or punish acts of persecution.

The court held that a person loses refugee status when, following a change of circumstances of a significant and non-temporary nature in the third state concerned, the circumstances that had justified the person's fear of persecution no longer exist and he has no other reason to fear being persecuted.

In order to reach the conclusion that the refugee's fear of being prosecuted is no longer well founded, the competent authorities must verify that the actor or actors of protection of the third state have taken reasonable steps to prevent the persecution.

They must operate an effective legal system for the detection, prosecution and punishment of acts constituting persecution and ensure that the national concerned will have access to such protection if he ceases to have refugee status. The change in circumstances will be of a "significant and non-temporary" nature when the factors that formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated. There must be no well-founded fears of being exposed to acts of persecution amounting to "severe violations of human rights".

The actors of protection with respect to which the reality of a change of circumstances in the state of origin is to be assessed are either the state itself or parties or organisations, including international organisations that control the state itself, or a part of its territory.

The court acknowledged that the directive does not preclude the protection guaranteed by international organisations from being ensured through the presence of a multinational force in the territory of the third state. In this context, the standard of probability used to assess the risk is the same as that applied when refugee status was granted. G

WILLS

Dennehy, Anne (deceased), late of 72 Palmerstown Avenue, Palmerstown, Dublin 20. Would any person having knowledge of a will executed by the above-named deceased, who died on 10 December 2009, please contact Bowman McCabe, Solicitors, 5/6 The Mall, Lucan, Co Dublin; tel: 01 628 0734, fax: 01 628 0832, email: info@bowmanmccabe.ie

Gaynor, Mary Ellen (otherwise May) (deceased), late of 81 St Mobhi Road, Glasnevin, Dublin 9. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 1 October 2007, please contact Daly Lynch Crowe & Morris, Solicitors, The Corn Exchange, Burgh Quay, Dublin 2; tel: 01 671 5618 (Mr Kenneth Morris, solicitor)

Landy, Margaret (deceased), late of Greystone Street, Carrick-on-Suir, Co Tipperary, who died on 18 August 2006. Would any person having knowledge of a will made by the above-named deceased please contact Paul Foskin of Kinsella Heffernan Foskin, Solicitors, Otteran House, South Parade, Waterford; email: khf@khfsolicitors.com, tel: 051 877 766

McGrath, James (deceased), late of Cloondahara, Castlerea, Co Roscommon. Would any person having knowledge of a will executed by the above-named deceased, who died on 17 December 2008, please contact Padraig Kelly, Solicitors, Strokestown, Co Roscommon; DX 130002 Strokestown; tel: 071 963 3666, fax: 071 963 3182, quoting ref: B/10/10

McGrath, Mary (also known as Mai McGrath) (deceased), late of Cloondahara, Castlerea, Co Roscommon. Would any person having knowledge of a will executed by the above-named deceased, who died on 19 January 2010, please contact Padraig Kelly, Solicitors, Strokestown, Co Roscommon; DX 130002 Strokestown; tel: 071 963 3666, fax: 071 963 3182, quoting ref B/7/10

McGuire, Fergus (deceased), late of 26 Cherrywood Grove, Clondalkin, Dublin, and previously of Tallaght (address unknown) and 57 Castlekevin Road, Kilmore West, Dublin 5. Would any person having knowledge of a will executed by the above-named deceased, who died on 30 March 2010, please contact Fiona O'Sullivan, Woulfe Murphy, Solicitors, The Square, Abbeyfeale, Co Limerick; DX 58001; tel: 068 31106, fax: 068 31394, email: woulfemurphy@eircom.net

McKenna, Sarah Frances (deceased), late of 12 Connaught Street, Phibsboro, Dublin 7. Would anybody having knowledge of the whereabouts of any will made by the above-named deceased, who died on 26 March 2010, please contact McEnroe, Solicitors, 11-12 John Street, Sligo; tel: 071 915 0555, fax: 071 917 1764, email: info@mcenroesolicitors.ie

O'Malley, Joseph (deceased), late of Rossclave, Newport, Co Mayo; who also resided in Buncrana, Co Donegal; Henry Street, Limerick; and last known of the municipality of Pallini, Polichrono, Halkidiki, Greece. Would any person having knowledge of a will executed by the above-named deceased, who died on 5 May 2009, please contact William Henry, Callan Tansey Solicitors, Crescent House, Boyle, Co Roscommon; tel: 071 966 2019, fax: 071 966 2869

O'Sullivan, Donal (Domnhail O'Suilleabhain) (deceased), late of 3 St Canice's Road, Glasnevin, Dublin 11. Would any person holding or having knowledge of a will made by the above-named deceased, who died on 26 June 2009, please contact Frances O'Sullivan, 69 Brooklands, Nutley Lane, Dublin 4; tel: 01 283 9339

Reynolds, Joseph (deceased), late of The Bungalow, Haggardstown, Mayglass, Killinick, Co Wexford; and formerly of 38 Melrose Court, Georges Street, Wexford; 56 Cois Mara, Rosetown, Rosslare Strand, Co Wexford (also previously resided in Derry, Antrim, Leitrim and Scotland), who died on 13 February 2009. Would any person having

PROFESSIONAL NOTICE RATES

RATES IN THE PROFESSIONAL NOTICE SECTION ARE AS FOLLOWS:

- **Lost land certificates** – €144 (incl VAT at 21%)
- **Wills** – €144 (incl VAT at 21%)
- **Title deeds** – €288 per deed (incl VAT at 21%)
- **Employment/miscellaneous** – €144 (incl VAT at 21%)

HIGHLIGHT YOUR NOTICE BY PUTTING A BOX AROUND IT – €33 EXTRA

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for June *Gazette*: 19 May 2010. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

IMPORTANT NOTICE:
Abolition of land certificates and certificates of charge

Section 73(1) of the *Registration of Title Act 2006* provides that the Property Registration Authority (PRA) shall cease to issue land certificates and certificates of charge under the *Registration of Title Act 1964*. The section commenced on 1 January 2007.

The subsection also provides that section 105 of the *Registration of Title Act 1964* (requirement to produce land certificates or certificates of charge) will only apply to certificates issued before commencement, and then only for a three-year period after the commencement of the section.

Section 73(2) of the 2006 act provides that land certificates and certificates of charge issued before commencement of section 73 that are not already cancelled will cease to have force or effect three years after the commencement of the section, that is on 31 December 2009. Until that date, land certificates must be furnished with all applications by the registered owner. Certificates of charge, where issued, must be produced on all releases of charge except where such release is by discharge.

From 1 January 2010, both land and charge certificates will cease to have any force and effect and should not be lodged with applications. In the interim, if an application is lodged without the land certificate, where one issued, it will be rejected. If the land certificate is not forthcoming, the application should be held over and relodged after 31 December 2009.

Registration of lien created through deposit or possession of land certificate or certificate of charge

Section 73(3)(b) of the 2006 act provides that a holder of a lien may apply to the authority for registration of the lien in such manner as the authority may determine.

The section applies to a person holding a lien. This may include a solicitor's letter of undertaking to lodge a land certificate or certificate of charge.

The application shall be on notice by the applicant to the registered owner and must be accompanied by the original certificate (see section 73(3)(c)).

The last date for lodgement of applications was 31 December 2009. Applications lodged after that date will not be accepted. Applicants must therefore ensure that the prescribed notices are served in good time, as the application may only be lodged after the expiration of 26 days from such service.

Where the certificate is claimed to be lost or destroyed, the applicant for a lien must first apply for its production to be dispensed with, pursuant to rule 170(2) *Land Registration Rules 1972*.

This procedure can be lengthy, as the authority must satisfy itself that the certificate has been lost or destroyed and has not been pledged as security (other than in respect of the application before it). Proofs would include affidavits from the applicant and registered owner and notices would be directed in the *Law Society Gazette* and a local or national newspaper.

PROFESSIONAL NOTICES

knowledge of a will for the above-named deceased please contact MJ O'Connor, Solicitors, Drinagh, Wexford; tel: 053 912 2555, fax: 053 912 4365, email: amwalsh@mjoc.ie

Ryan, Martin (deceased), late of Chapel Street, Borrisoleigh; or Ballyroan, Borrisoleigh; or Flat 6, No 8 Rutland Street, Limerick, who died on 11 November 2009. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact James O'Brien & Co, Solicitors, 30 Castle Street, Nenagh, Co Tipperary; tel: 067 31218

Rynne, Patrick Francis (Francis Rynne) (deceased), late of Boghill, Kilfenora, Co Clare. Would any person having knowledge of a will executed by the above-named deceased, who died on 19 February 2010, please contact Chambers & Co, Solicitors, Parliament Street, Ennistymon, Co Clare

Waters, Mary (deceased), late of 55 Ross Road, Enniscorthy, Co Wexford, who died on 12 March 1997 at St John's Hospital, Enniscorthy, Co Wexford. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Sheena Lally, Office of the General Solicitors for Minor and Wards of Court, Courts Service, Phoenix House, 2nd Floor, 15-24 Phoenix Street North, Smithfield, Dublin 7; tel: 01 888 6231, fax: 01 872 2681

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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 certain lands and premises situate on the west side of St Vincent Street West and forming part of Emmet Crescent, situate in the parish of St Jude, Dublin 8: an application by Dublin City Council.

Take notice that any person having an interest in the freehold estate in the following property: all that, that part of the town and lands of Kilmainham conveyed by a fee farm grant dated 21 June 1860, made between William Stewart (1) and Henrietta O'Callaghan (2) and therein described as the "house or tenement wherein William Smith formerly dwelt together with a piece of land commonly called the Seven Acres all the Quarry Banks which Samuel Hill formerly kept in his own possession the Furry Field adjoining to the land formerly in the possession of Mr Halpin the Great Field adjoining to the land of Crumlin with the Quarry Field the slip of ground adjoining to the said Mr Halpin's orchard and meadow and all three fields formerly held by Edward Barton containing by estimation fourteen acres two roods the said premises containing in the whole forty eight acres two roods and three perches Irish plantation measure be the same more or less and by the said lease described as meared and bounded on the west to the said Mr Halpin's land on the south to the lands of Crumlin on the east partly to the lands of William Domvile Esq and partly to the Petty Cannon Land and on the north partly to the lands of Mullinagrove Sir George Herbert's land the Petty Cannon land and other part of the lands of Kilmainham held by Christopher Browne with the rights members and appurtenances thereunto belonging except the house and meadow where the said Edward Barton formerly dwelt which said premises are situate in the barony of Upper Cross and county of Dublin" and which said part of the lands held under the fee farm grant are now known as Emmet Crescent, off St Vincent Street West, Goldenbridge, Dublin 8, held with the other lands subject to the perpetual yearly fee farm rent of £114.3s.8d (€144.98) and the covenants and conditions contained in the said fee farm grant, should give notice of their interest to the undersigned solicitor.

Take notice that Dublin City Council (as statutory successor to the Right Honourable the Lord Mayor, Aldermen and Burgesses of Dublin) intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest therein is called upon to furnish evidence of title to the aforementioned property to the below named within 21 days from the date of this notice.

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

Date: 7 May 2010

Signed: Terence O'Keeffe (solicitor for the applicant), Civic Offices, Wood Quay, Dublin 8

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 certain lands and premises situate on the west side of St Vincent Street West and forming part of Emmet Crescent, situate in the parish of St Jude, Dublin 8: an application by Dublin City Council

Take notice that any person having an interest in the freehold estate in the following property: all that the land demised by a lease dated 7 July 1828 made between Thomas Coulton (1) and William Haughton (2) and therein described as "that plot of ground situate on the Richmond Road next adjoining the Richmond Barracks containing in depth from front to rear 78 feet and in breadth to the Richmond Road 46 feet or thereabouts be the said several admeasurements or either of them more or less bounded on the north and south by ground in possession of said Thomas Coulton on the east by the Richmond Road leading to the Grand Canal and on the west by the lawn of Mr William Smith, said plot of ground being situate lying and being on the Richmond Road next adjoining the Richmond Barracks and county of Dublin aforesaid" and now comprising part of Emmet Crescent, off St Vincent Street West, Goldenbridge, Dublin 8, held for the term of 270 years from the date of the lease, subject to the yearly rent of £2.10s.0d (€3.17) and the covenants and conditions therein contained, should give notice of their interest to the undersigned solicitor.

Take notice that Dublin City Council (as statutory successor to the Right Honourable the Lord Mayor, Aldermen and Burgesses of Dublin) intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and any party asserting that they hold a superior interest therein is called upon to furnish evidence of title to the aforementioned property to the below named within 21 days from the date of this notice.

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

Date: 7 May 2010

Signed: Terence O'Keeffe (solicitor for the applicant), Civic Offices, Wood Quay, Dublin 8

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

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 3 Moore Street in the parish of St Mary and city of Dublin, held with other property under a fee farm grant dated 25 April 1900 made between Evan Lake, the Reverend Charles William Henry Reynolds, Emily Frances Daniel Reynolds, George Wood, Henry Exley Edwards and William Russell of the one part, and the Everton and West Derby Permanent Benefit Building Society of the other part, subject to two perpetual yearly rents totalling €93.77 (£73.85) thereby reserved.

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

In default of any such notice being received, the said Joseph O'Reilly intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to 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.

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(REPORT OF THE NATIONAL ADVISORY COMMITTEE ON PALLIATIVE CARE, 2001)

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www.hospice-foundation.ie

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THE IRISH HOSPICE FOUNDATION 20th 1986-2006

PROFESSIONAL NOTICES

Date: 7 May 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 matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application made by Brian O'Gorman and Monica Kennedy

Take notice that any person having any interest in the freehold estate of the following property: no 32 Silchester Park, Glenageary, Co Dublin, held under lease dated 12 April 1955 between AJ Jennings & Company Limited of the one part and Robert O'Riordan of the other part for a term of 150 years from 1 May 1945, subject to the yearly rent of £15.

Take notice that Brian O'Gorman and Monica Kennedy, being the persons entitled to the lessee's interest under the said lease, intend to submit an application to the county registrar for the county of Dublin for acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of the title to the aforementioned property to the below-named solicitors within 21 days from the date of this notice.

In default of any such notice being received, Brian O'Gorman and Monica Kennedy intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Dublin for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in the property are unknown and unascertained.

Date: 7 May 2010
Signed: Mason Hayes & Curran (solicitors for the applicant), South Bank House, Barrow Street, Dublin 4; ref: CO'S/3748.1

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the property 10 Wexford Street, Dublin 2: an application by Brendan Lynham and Miriam Lynham

Take notice that any person having any interest in the freehold estate of the following property: all that and those the shop and dwelling known as no 10 Wexford Street in the city of Dublin, held (*inter alia*) for the residue of a term of 150 years from 25 March 1908 and made between the Right Honourable the Lord Mayor, Aldermen and Burgesses of Dublin of the first part, the Local Government Board for Ireland of the second part, and Michael Gallagher of the third part.

Take notice that Brendan Lynham and Miriam Lynham intend to submit an application to the county registrar for the city of Dublin for acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

Date: 7 May 2010
Signed: Brian Morton & Company (solicitors for the applicant), Firhouse Inns Chambers, Firhouse, Dublin 24

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*. Premises: 29 Morrisson's Road, Waterford, in the county of Waterford

Take notice that any person having an interest in the freehold estate or any intermediate interest in the property known as no 29 Morrisson's Road, Waterford, in the county of Waterford, held partly under transfer order dated 31 March 1977 and made between Waterford Corporation of the one part and Patrick Forristal and Bridget Forristal of the other part (hereinafter called 'the first transfer order') for a term of 99 years from 1 April 1977, subject to the yearly rent of 0.05 pence (if demanded) and subject to transfer order dated December 1996 and made between Waterford Corporation of the one part and Gerry O'Sullivan of the other part (hereinafter called 'the second transfer order') in fee simple.

Take notice that Robert Power and Marion Power intend to submit an application to the county registrar for the city and county of Waterford for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior or any intermediary interest in the aforesaid property are called upon to furnish evidence of title to the said property to the solicitors named hereunder within 21 days from the date of this notice.

In default of any such notice being received, Robert Power and Marion Power intend to proceed with the application before the county registrar at the expiry of the period of 21 days from the date of this notice and will apply to the county registrar for the city and county of Waterford for such directions as may be appropriate on the basis that the person or person beneficially entitled to the superior or any intermediary interest including the freehold reversion in the aforesaid property are unknown or unascertained.

Date: 7 May 2010
Signed: Smyth & Son (solicitors for the applicant), 56/57 Rope Walk, Drogheda, Co Louth

RECRUITMENT

Apprenticeship wanted: MBA grad, eight FE1s. All parts of country considered. Ex banker/broker. Please reply to 087 2462230.

NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE LAW SOCIETY GAZETTE

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

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

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Law Society of Ireland

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This role will suit a proven expert in the field of corporate law who will have managed multi million euro deals to include mergers and acquisitions, cross border deals, equity offerings and joint ventures. You will have represented a wide range of high calibre clients. Applicants must have worked with a top tier Irish or international law firm and be admitted to practice in a common law jurisdiction.

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- Management of all associated activities regarding repossession proceedings in the Circuit Court and High Court.
- Undertaking all associated activities regarding judgement proceedings in the District Court, Circuit Court and High Court.
- Calling and meeting customers to negotiate arrangements to recover arrears or re-negotiate mortgage terms.
- Supporting the deeds registration and chase process.
- Handling the sales of repossessed properties.
- Interacting with third parties such as Law Society, solicitors, title insurers, property registration authority, professional indemnity insurers, customers and debt mediators involving both telephone and letter contact.
- Analysing and reporting on litigation cases.

Criteria:

- Qualified solicitor with some years PQE involving debt collection experience in a solicitor firm or financial institution. Financial services background an advantage.
- Excellent knowledge of Irish residential and commercial mortgage process and associated Irish legal processes.
- Excellent knowledge and understanding of all relevant legislation, regulations, policies and codes. Good commercial awareness.
- Excellent PC Skills (use of Word, Excel, Outlook). Experience of business systems.

Please forward an up-to-date CV to Linda Burns, Human Resources Manager, Start Mortgages, Trimleston House, Beech Hill Office Campus, Clonskeagh, Dublin 4. Email: linda.burns@start.ie, phone 01 2096353 (d). A more detailed role profile is also available. For information about our company, visit www.start.ie

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

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

The Right Move...
Partners & Associates

Our client is a profitable firm with a clear strategic vision. They have built an enviable practice and are now seeking to grow the firm substantially to accommodate the needs of their existing and prospective client base.

Opportunities exist for entrepreneurial lawyers to join this dynamic firm.

Partners practicing in the following areas with a portable client base are invited to apply.

- Pensions
- Energy
- Banking
- Commercial Litigation
- Financial Services Regulatory Law
- ADR

In addition senior associates demonstrating a strong business plan specialising in these fields will also be considered.

If you would like to consider these opportunities further please contact Sharon Swan in confidence.

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

New Openings

Private Practice

Banking – Associate/Senior Associate: Leading practice requires an experienced practitioner to join a dedicated team.

Commercial Litigation - Assistant: Our client is a Top Tier law firm with an enviable client base searching for exceptional candidates to deal with a broad mix of Commercial Litigation. You will have a first class academic background coupled with excellent communication skills.

Commercial Litigation - Associate to Senior Associate level: 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 level: 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 level: 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 Solicitors: A major player in the Telecoms industry is looking for bright solicitors with outgoing personalities to work with its international sales team focusing on opening up new markets. This is very much a sales oriented role and fluency in either Spanish or French 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

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