

LAW SOCIETY Gazette

€3.75 November 2010

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EMI v UPC – a treasure trove
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Protecting our profession



This is my last president's message and, of course, I write it with some regret that my year is now coming to an end. It is a great honour to have served as president of the Law Society of Ireland, albeit at a particularly difficult and demanding time. This time last year, we had what can only be described as an upheaval in relation to the professional indemnity insurance (PII) market and the continuing economic difficulties. The matter of PII did ultimately proceed and, while insurance was available to most, it was at a significantly increased premium. We are now undergoing the process again, and it is hoped that the matter will be somewhat smoother, although it must be understood that the market remains fragile. In view of the large number of claims, it is unlikely that there will be any decrease in premium levels.

At this time last year, while the economy was at a low ebb, it was hoped that there would have been some increase in economic activity in the second half of 2010. Regrettably, this has not happened. We must hope that next year will be better.

Characteristics of professionalism

Presiding at my final parchment ceremony, I was particularly fortunate to have as one of my guest speakers Professor Ailish McGovern, president of the Royal College of Surgeons. She spoke at some length about the concept of professionalism and the characteristics common to both professions. To quote her:

"To both of us, the concept of being part of a profession is critically important. We know that our professions arose from the guilds of medicine, law and divinity. Typical characteristics of the professions are that each is a monopoly or single discipline, associated with specialised knowledge, skills and expertise. There is the concept of altruism – that our actions are for the benefit of the client – and trustworthiness, because the client may not be able to assess our skills. Descriptors such as independence, impartiality of advice and objectivity of service resonate with us. The erosion of trust in our professions largely arose from *unprofessional* behaviour by members of our respective professions."

More importantly, Prof McGovern spoke of issues that should be highlighted: ethical behaviour, demonstrating respect, compassion and integrity, and responsiveness to the needs of the patient/client and society that precedes self-interest. Her speech

resonates for both of our professions.

The task force dealing with commercial undertakings has completed its work, and new regulations will come into force on 1 December 2010. These will place an almost complete prohibition on the giving of commercial undertakings. The same firm cannot now act for both the borrower and lender.

During the year, the question of conflict arose as a result of our deliberations on the matter of commercial undertakings.

At each of the bar associations I attended, it was the one issue that was common to all. Arising out of this, at the most recent meeting of the Council, it was decided to establish a task force to examine the question of the solicitor acting for both sides in conveyancing transactions. It is hoped that the task force will complete its deliberations during the lifetime of the next Council.

Great privilege

With the director general, Ken Murphy, I attended bar association meetings all over the country in 2010. While they elicited, on occasions, difficult and demanding questions, I was treated with the utmost courtesy and hospitality wherever I went.

At the annual conference of the International Institute of Law Association Chief Executives (IILACE) in Vancouver from 30 September to 2 October, Ken Murphy was elected IILACE president. He will hold this post for two years. It is gratifying that Ireland should produce a president of such a significant international organisation, and

I wish Ken well during his term of office.

Finally, I would like to thank my business partner, Paul O'Reilly, who carried a heavy burden during my year in office. In addition, I wish my successor John Costello a successful presidential term. It has been my great privilege to serve as president. **G**

Gerard Doherty
President

"At the most recent meeting of the Council, it was decided to establish a task force to examine the question of the solicitor acting for both sides in conveyancing transactions"



On the cover
Music piracy has little to do with salty dogs and crusty old seamen, but can the buccaneers be broadsided?

PIC: REX FEATURES/GAZETTE STUDIO



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A finding that a person lacks capacity may result in the restriction of their fundamental rights at the most basic and practical levels. A solicitor faces particular demands in advising a client whose capacity is at issue, writes Margaret Walsh

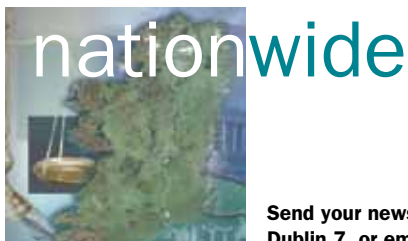
40 The right note

Sometimes described as the third arm of the legal profession, the office of the notary public is the oldest surviving branch of the legal profession. Eamonn Hall traces the history, current functions and duties of the office, and tells how to become a notary



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■ CORK

Eamon Murray, president of the SLA, tells a tale of 12 frazzled solicitors emerging from the River Lee Hotel recently, having spent the preceding five days in a CEDR mediation course. The course, which was extremely intensive and challenging, was universally regarded as being most worthwhile by the participants.

Eamon also sheepishly tells me that the SLA's golfing society (SLAGS) enjoyed a two-day event in Killarney recently, at which the Captain's Prize was won by none other than himself. Mercifully, his own President's Prize was won by Willis Walshe SC. The 40 or so participants had a great time.

The now annual ecumenical service of morning prayer, organised by the SLA, was held in St Francis's Church on 4 October, the first day of term. The event was attended by Bishop John Buckley, Deacon Bantry White and members of the judiciary, an Garda Síochána, the Prison Service, solicitors and barristers. The homily on Christianity and the law was given by Father Gerard Garrett.

■ DONEGAL

Recently, the Donegal Bar Association held a successful CPD seminar on professional indemnity insurance (PII) and financial management. Alison Parke, with Geraldine Conaghan of the Inishowen Bar Association, organised the event, which included a presentation from Dermot Doherty and Paul Sherry of Murray & Spelman insurance brokers. The speakers gave a detailed overview of the PII marketplace for solicitors and advised on completing proposal



Members of the Waterford Law Society attended a Waterford Institute of Technology sponsored Canadian/Irish family law conference at Carton House Hotel, Maynooth, Co Kildare on 8 October 2010. Pictured are (*front, l to r*): Deirdre Adams (law lecturer, WIT), Roisin O'Shea (conference organiser, WIT), Madam Justice Geraldine Waldman (Ontario Court of Justice), Elizabeth O'Dea (Law Centre, Waterford) and Dr Sinead Conneely (law lecturer, WIT); (*back, l to r*): Mr Justice Henry Abbott, Elizabeth Walsh (president, Limerick Bar Association), Jackie Ellis (Canadian embassy), Judge Olive Buttimer, Mr Justice George Czutrin (Ontario Superior Court), Mr Justice Liam McKechnie, Judge Thomas Trent Lewis (Los Angeles Superior Court), Sean Ormonde (solicitor), Dr Michael Howlett (head of Department of Applied Arts, WIT), Deirdre Treacy (solicitor), Morette Kinsella (solicitor), Bernadette Cahill (president, Waterford Law Society) and Kathrine Murphy (JP, England and Wales)

forms and navigating the renewal process, emphasising the importance of risk management. Registrar of Solicitors John Elliot gave an interesting presentation on what insurers expect from solicitors' firms. It was apparent that solicitors in Donegal still have serious concerns about the following matters:

- Why PII is dealt with on a claims-made basis at international level,
- Why one renewal date of 1 December each year is considered in the best interests of the profession,
- Why a master policy similar to that operated in Northern Ireland cannot be put in place by the Law Society.

Máirín McCartney tells me that the next event planned by the Donegal Bar Association will be the bi-annual dinner dance, due to take place at the beautiful Solis Lough Eske Castle Hotel on 27 November 2010.

■ DUBLIN

The bar association has held a number of practice management seminars in recent weeks. As a follow-on to the free seminar on the PII market in late July, a further meeting was convened by president John O'Malley in conjunction with the Law Society, at which President of the Law Society Gerard Doherty, director general Ken Murphy and chairman of the Commercial Undertakings Task Force John Shaw gave excellent accounts as to where matters stand, both on the PII issue and the pending regulations prohibiting commercial undertakings and other current issues. A useful and lively exchange followed.

The DSBA conference to Istanbul was a huge success, with plenty to see and a very worthwhile and stimulating business session in which our very own William Aylmer and Aine Hynes were the star performers.

■ KILKENNY

Bar association president Owen O'Mahony is pleased to confirm that the refurbished and extended Kilkenny Courthouse re-opened for business on 1 October 2010. It was officially opened by Minister for Justice Dermot Ahern and Chief Justice John Murray on Friday 15 October.

The courthouse now comprises four courtrooms, two of which have jury facilities.

The High Court will be returning to Kilkenny after a three-year absence for personal injuries cases for a two-week sitting in the latter half of November. Owen has asked that practitioners would note that there are adequate and comfortable facilities now available in the courthouse for High Court non-jury litigation also, for much of the year. **G**

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

Solicitor Disciplinary Search allows for full transparency

'Solicitor Disciplinary Search' is a new service from the Law Society that will allow members of the public – and members of the profession – to search the disciplinary records of solicitors. The Law Society believes that it is in the public interest, and also in the interests of the profession, that full transparency be provided in relation to findings of misconduct against solicitors.

The service, available at www.lawsociety.ie/disciplinarysearch, includes a facility to search against the names of individual solicitors in order to view disciplinary records. The database contains all findings of misconduct made by the Solicitors Disciplinary Tribunal that have been published in the *Law Society Gazette* on or after 1 January 2004 – the date when such reports first appeared in the *Gazette*.

Search by name

Now, in addition to these records, website visitors can search by surname and/or practice address of the solicitor about whom they wish to



enquire. Visitors can scroll through searched results. To view more details for a particular record, they can click on the 'show details' link. It should be noted that, by law, findings of misconduct are made against individual solicitors – not against firms of solicitors.

In cases where the finding of misconduct has been sent forward to the High Court to make a decision on sanction, the database includes details of the decision on sanction

by the High Court.

Since 2004, it has been the policy of the Law Society to publish all findings of misconduct made by the Solicitors Disciplinary Tribunal in the *Law Society Gazette*. These findings of misconduct, as published in the *Gazette*, have been available to the public from Eason's newsagents. In addition, the magazine is also accessible in the public area of the Law Society's website and at www.gazette.ie.

Criminal legal aid to be reformed

The system of criminal legal aid is to be reformed – and responsibility for its administration will be transferred to the Legal Aid Board, according to Minister for Justice and Law Reform Dermot Ahern. The minister announced that he would shortly be bringing proposals on the matter before government.

Speaking at a conference celebrating the 30th anniversary of the Legal Aid Board, Minister Ahern expressed confidence in the Legal Aid Board's capacity to take on this new role, but acknowledged that the board would need to be appropriately resourced for the task.

The conference theme was 'Access to justice and legal aid: learning from the past, looking to the future'. Among the guest speakers who addressed the topic were President Mary McAleese and Chief Justice John L. Murray.

The President acknowledged the role of the board in providing access to justice that enabled citizens with legal problems to address their difficulties in an appropriate manner. She spoke strongly in favour of alternative dispute resolution mechanisms as a means of resolving legal issues, particularly in family-law disputes.

The Chief Justice congratulated the board on its work over the past 30 years. He indicated that the mediation of disputes as an alternative to litigation before the courts should be given greater emphasis in the future.

Legal Aid Board chairperson Anne Colley, Dr Maurice Hayes and Patricia Rickard Clarke of the Law Reform Commission also spoke on the theme of 'Access to Justice'.

IMPORTANT NOTICE TO ALL SOLICITORS' FIRMS

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Notification of claims by 30 November 2010

All claims made against your firm and circumstances that may give rise to such a claim should be notified to your firm's insurer as soon as possible.

In addition, claims made between 1 December 2009 and 30 November 2010 (both dates

inclusive) must be notified by 30 November 2010. Special care will be needed in the weeks and days approaching 30 November and on the day itself in case the deadline is missed.

Your firm's insurer will be entitled to deny cover in respect

of any claim first made against your firm on or before 30 November 2010 and only notified after 30 November 2010.

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Ireland's director general to lead world body of law association chiefs

How does the legal profession deal with 'this issue' or 'that problem' in other jurisdictions around the world? What can we learn from the insight and experience of others?

If the Law Society of Ireland's director general, Ken Murphy, doesn't already know the answers to such questions, he is now in an excellent position to find out.

He has just been elected by his peers – the chief executives of law societies and bar associations across the globe – to a two-year term as the president of the International Institute of Law Association Chief Executives (IILACE).

The body, now in its 12th year, comprises only chief executives of law societies and bar associations. The CEOs actively involved in IILACE are from more than 60 jurisdictions across the globe and represent law societies and bar associations that number, between them, well over one million lawyers. Among the new members attending this year's conference in Vancouver were, for the first time, CEOs from such very diverse jurisdictions as Wisconsin, Malawi, Queensland and China.

Murphy previously was president for four years of the 26-strong European CEOs body CEEBA (Chief Executives of European Bar Associations). On his initiative last year, IILACE and CEEBA held a special joint conference, attended by 50 CEOs, in Dublin (see *Gazette*, November 2009, pages 12 and 13).

Core values

Among the questions under consideration by IILACE in Vancouver were the core values of the profession (which are



All smiles from the newly elected members of the executive at the end of the IILACE AGM (*front, l to r*): Jan Martin (new IILACE vice-president, Law Society of South Australia), Ken Murphy (new IILACE president) and Retha Steinmann (Law Society of Namibia); (*back, l to r*): Tim McGee (Law Society of British Columbia), Cord Brugmann (German Bar Association), John Hoyles (IILACE immediate past-president, Canadian Bar Association) and Don Deya (East Africa Law Society)

under pressure everywhere from a variety of challenges, including over-reaching governments and sometimes excessive commercialism), the growing divide between large and small firms, strategic planning in law societies and bar associations, the challenge of communicating effectively with members and, of course, the impact of the global financial and economic crisis on the profession. A subset of the latter issue concentrated on the problems of the different models, around the world, of professional indemnity insurance for lawyers.

"CEOs of law societies and bar associations have a unique perspective. Not only must they provide continuity and high-quality advice on policy matters to the elected leaders of their professional bodies, they must also practically, effectively and efficiently manage their organisations in the best

interests of their members and in the public interest," Murphy remarked.

"Legal professional bodies are complex organisations, and they face complex challenges. To be in regular communication with a network of contacts doing essentially the same job, in different cultures and conditions, in different parts of the world – able and experienced individuals to bounce ideas off – is very helpful," he added.

Powerful forces

He observed that many of the powerful forces at work, both on and within the legal profession, are global in nature. The problems tend to be the same everywhere. Comparing what works or does not work in addressing them is always of interest.

"It is a great honour for me and also, in a way, for the solicitors' profession in Ireland

that my peers from around the world have entrusted me with the presidency of IILACE for the next two years," Murphy said. "Ireland is a relatively small jurisdiction on the world stage. Many IILACE members – for example, the CEOs of the American Bar Association, the German Bar Association, the Law Society of England and Wales, and the All China Lawyers Association – have memberships in the hundreds of thousands," he continued.

"It's my objective that IILACE will not only continue to grow in membership, but that the already cutting-edge analysis of the challenges facing the legal profession around the world will lead to ever better and more practical solutions to these problems. We seek practical solutions which can be applied to the benefit of the profession and the public in every jurisdiction."

Finance offer for members

The Law Society is pleased to advise that it has selected Allied Irish Banks plc as the provider of a finance facility for members who wish to apply for funding for payment of preliminary tax, pension contributions, professional indemnity insurance and practising certificate(s). AIB has a strong relationship with the Law Society of Ireland and the profession.

AIB's short-term finance products known as 'insurance premium finance and prompt pay finance' will enable you or your firm to spread the cost of any large annual payment(s) over a term of up to 11 months, thereby improving your business cash flow.

If a member wishes to obtain details of cost of credit, monthly repayment and APR for any particular amount, they can do so before submitting a finance



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If you are already an AIB customer and wish to apply for finance, you should contact your 'relationship manager' at your AIB branch. If you are not an AIB customer and wish to apply for finance, simply contact your nearest AIB branch and make an application through a

relationship manager.

Finance decisions are made quickly where all necessary information is available. In assessing a finance application, the following information may be requested, especially for non-AIB customers:

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- The asset/liability profile of the applicant,
- Background details of the partnership and/or
- Copy bank statements.

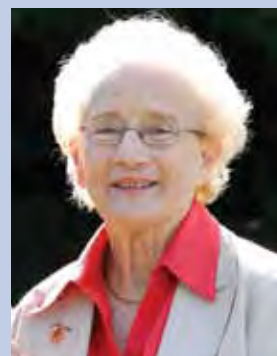
This is the normal, up-to-date information for any finance application and its availability will expedite any finance application. Finance approved is subject to AIB's standard lending criteria.

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Judge McGuinness honoured



Judge Catherine McGuinness has received a 'People of the Year Award'. Judge McGuinness received the award "for her pioneering and vast contribution to Irish life in many roles over a lengthy career".

'At debt's door' – clarification

In the article 'At debt's door' in the October 2010 issue of the *Gazette* (p28), attention was drawn to section 10 of the *Conveyancing Act 1634*. For the avoidance of doubt, the author, Patrick Shee, wishes us to point out that this was included solely for its historical value. Practitioners will be aware that this act was repealed by the *Land and Conveyancing Law Reform Act 2009*.

Repayments vary depending on amount borrowed. For example*:

Loan amount	APR	Term in months	Monthly repayment	Total cost of credit
€10,000	11.16%	11	€952.09	€536.48
€20,000	9.25%	11	€1,893.94	€896.83
€30,000	9.02%	11	€2,840.91	€1,313.50
€50,000	8.84%	11	€4,734.85	€2,146.84

*Above rates are correct as at 7 October 2010 but rates/repayments can vary. Total cost of credit includes a documentation fee of €63.49, payable with the first monthly instalment.

NOTICE TO PRACTITIONERS: CRIMINAL LEGAL AID SCHEME

Retention of name on Criminal Legal Aid Panel for the panel year 1 December 2010 – 30 November 2011

Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations 1999

The Department of Justice and Law Reform has advised that a solicitor who wishes to have his/her name retained on the legal aid panel(s) beyond 30 November 2010 must submit to the relevant county registrar(s) a tax clearance certificate (TCC) with an expiry date later than 30 November 2010.

A solicitor whose TCC has an expiry date on or before 30 November 2010, and who wishes

to have their name retained on the Criminal Legal Aid Panel(s) for the panel year beginning on 1 December 2010, must apply to the Revenue Commissioners for a new TCC.

Applying for a TCC in writing

Local Revenue districts now deal with the processing of written applications for TCCs. The contact names, addresses and telephone numbers of the relevant Revenue

districts are available on the Revenue's website www.revenue.ie. You should contact your local Revenue district office for an application form (TC1).

Applying for a TCC through Revenue's online application facility

This facility is to be found at www.revenue.ie. The arrangements which have been introduced to allow taxpayers to apply online

for a tax clearance certificate do not apply to solicitors who are employees.

On receipt of your certificate, it should be forwarded to the relevant county registrar(s).

NB: No fees under the *Criminal Justice (Legal Aid) Regulations* shall be payable to a solicitor who accepts an assignment to a case if his/her name is not, at the time of assignment, on the relevant solicitors' panel.

Thinking outside the career box

The wide range of opportunities that exist for solicitors outside the traditional practice of law was explored in a series of Society-sponsored information evenings in September and October. The 'Thinking outside the career box' series kicked off with a new independent film on career choices. A film discussion was facilitated by Barre Fitzpatrick of change consultancy firm, Stride.

The next information evening discussed 'Setting up a business' and was chaired by Law Society President Gerard Doherty. Gerard Maguire spoke about setting up a legal practice – and a quality wine shop. Laura Monk, who quite recently formed the legal partnership, Butler Monk, spoke about her experiences.

David Bell discussed leveraging his legal knowledge to set up The HR Department. Hannah Carney outlined her experience of establishing her coaching and training business, while Darragh McElligott talked about setting up The Training Store.

Next in the series was 'Breaking into financial services'. Chaired by the Society's deputy



At the information evening that discussed setting up a business were (l to r): David Bell, Gerard Maguire, Laura Monk, Law Society President Gerard Doherty and Darragh McElligott

director general Mary Keane, speakers included Sylvia McNeece (Irish Pensions Board), Colin Babe (Mercer) and Michelle Geraghty (Ion Trading).

This was followed by presentations on working in regulation by Peter Oakes (Compliance Ireland), Caroline Murphy (formally of RSA Insurance, now managing director of LegalWise) and Colm Kincaid of the Central Bank. Financial recruiter Dave Riordan gave a market overview.

'Doing something additional to law' looked at new territory, and heard from Yvonne Nolan about playing rugby for Ireland,

and from Catherine Noone who was recently elected in the local elections for Fine Gael.

Brendan Dillon's involvement in sport has dovetailed into his legal practice, leading into new and emerging work opportunities. Two solicitors from Cork, Bill Holohan and Colin Carroll, spoke about their wide-ranging experiences both inside and outside the legal arena.

The issue of 'Breaking into the not-for-profit sector' was addressed by Noeline Blackwell (FLAC), Colin Daly (Northside Community Law Centre) and Mary Forde (Amnesty International). Other

speakers included Hilkka Becker (Immigrant Council of Ireland), Rose Wall (Mercy Law Resource Centre) and Eamonn Purcell (Legal Aid Board).

'Getting a job in the public sector' enjoyed the largest turnout, with more than 60 attendees. They heard from Donal King about opportunities for solicitors in the health sector and from Aisling Kelly about how she used volunteering for a UN organisation to win her a role in the Office of the Director of Public Prosecutions.

Patricia Cronin enthralled her audience with her career story to date. She was followed by Gerard Murphy (Public Appointments Commission) who provided valuable job-seeking advice. Collette Bennett spoke about her transition from a role in corporate law into the Money and Budgeting Service (MABS).

The Society's Career Support service wishes to thank all those who took part in its information evenings' initiative. Most talks were filmed and copies are available to interested members on DVD. Requests should be sent to careers@lawsociety.ie.

Society website adds employment support options for solicitors

The 'legal vacancies' section on the Society's website, www.lawsociety.ie, is popular among employers and is used extensively to recruit all types of legal staff – at all levels of seniority. Now, a new range of options has been introduced.

Employers are being offered an extended choice of supports, such as candidate shortlisting and other options. These additional supports have been organised through an independent candidate-screening company and priced very attractively.

The traditional option, where employers list opportunities free of charge and have all applications routed directly to them, remains available.

The new supports are structured to complement the traditional service and to provide employers who desire it an extended level of support. There are benefits for job-seekers too. The new arrangements are structured to ensure that no person's details go anywhere before the employer's identity has been

disclosed to them. In addition, employers can opt to update applicants on how a selection process is progressing – and whether their application is still being considered or not.

These service upgrades, organised by the Society's Career Support service, have been introduced to assist employers in their recruitment searches – and to optimise work opportunities for the Society's membership. For information, email: employersupport@lawsociety.ie.

CPD – reminder!

As year-end approaches, you should check that you are on target to complete the 2010 CPD requirement by 31 December 2010. This requirement is 11 hours of CPD, including the minimum three hours' requirement of management and professional development skills, and the new one-hour regulatory matters requirement.

For advice on the CPD scheme generally, contact the CPD scheme unit, by tel: 01 672 4802, or email: cpdscheme@lawsociety.ie.

Leaving Cert falls foul of

A recent case upheld the ‘flagging’ of the results of Leaving Cert students who require particular accommodations, writes Joyce Mortimer

The provision of reasonable accommodation in education has always been a highly controversial issue. Concerns are continuously raised over the competing interests of ensuring equal educational opportunity while maintaining the integrity of examinations. Irish law mandates the provision of reasonable accommodation in education by way of the *Equal Status Act 2000*. Testing accommodations involve customising materials and testing conditions to the candidate’s needs.

The practice of ‘flagging’ non-standard test results has developed in response to concerns over illegitimate advantages and the integrity of examinations. Flagging involves placing an asterisk beside the result, with an accompanying footnote indicating that the test was not administered under standard conditions. In June 2010, the High Court upheld the practice of annotating (flagging) the test scores

of a student with dyslexia who had received certain accommodations in her Leaving Certificate examinations in 2001. In October, Mr Justice Eamon de Valera, in the High Court, also made an order of costs against the applicant.

Ms Kim Cahill requested and received accommodation in her Leaving Certificate examinations in the form of a waiver in relation to assessment of spelling and grammar in language subjects. When Ms Cahill obtained her exam results, her transcript was annotated to highlight the accommodations received. The plaintiff claimed the annotations and explanatory note on her certificate had the effect of labelling her as disabled. The Equality Tribunal

“The practice of flagging non-standard test results has developed in response to concerns over illegitimate advantages and the integrity of examinations”

agreed with Ms Cahill and made an order directing the Department of Education to pay compensation of €6,000 to her and another student (who made a similar complaint). The Minister for Education was also directed to issue both students

with new Leaving Certificates without the annotations.

Integrity of the testing process

In 2007, the Minister for Education appealed the decision to the Circuit Court, which upheld the appeal. Ms Cahill subsequently appealed to the High Court, where Mr Justice Eamon

de Valera dismissed her appeal. He ruled that the Department of Education had acted at all times in accordance with best international practice in the

annotation of the appellant’s Leaving Certificate. The High Court upheld Minister Mary Coughlan’s argument that the absence or deletion of the annotation from Ms Cahill’s transcript would amount to a misrepresentation to employers or other persons who might rely on the document, and would also call the integrity of the exam into question.

Mr Justice de Valera stated that a failure to make note of the “reasonable accommodation” received by Ms Cahill would “adversely affect the integrity of the testing process”, and “essentially defeat the purpose of the exam in the first place”. Furthermore, he stated that the Leaving Certificate occupied “an important place in the Irish educational system and abroad” and “must stand for something”. Justice de Valera opined that the Leaving Certificate transcript was a record of the level of achievement of a person at the end of their secondary education and, if a person was not assessed in spelling and grammar elements of subjects, then that

■ ONE TO WATCH: RECENT JUDGMENT

Akzo Nobel Chemicals and Ackros Chemicals v European Commission (case C-550/07 P)

On 14 September 2010, the European Court of Justice issued judgment in the *Akzo Nobel* case, refusing to extend legal professional privilege to internal company communications with in-house lawyers. The judgment confirms that written

communications between a company-client and its employed in-house lawyers are not protected by legal professional privilege and are, therefore, not protected against disclosure in the context of EU competition law investigations.

In 2003, Akzo Chemical Limited and Ackros Chemicals Limited were subjected to an investigation by the European

Commission and Britain’s Office of Fair Trading. During the course of the investigation, the commission seized a number of documents, including two emails with in-house counsel. In May 2003, the commission rejected a claim made by Akzo and Ackros that the emails were subject to legal professional privilege. The companies appealed to the

General Court of the European Union, which also rejected their contention of privilege. The matter was subsequently appealed to the European Court of Justice.

Legal professional privilege in the EU

In *AM & S Europe v Commission of European Communities* ([1982] ECR 1575; case 155/79), the

human rights watch

test-score flagging



“should and must be reflected” in the resulting certificate. It was also necessary for the reputation of the exam to be preserved, and the Department of Education, in supervising the exam system, acted as “guarantor of fairness and equality to all candidates”.

Mr Justice de Valera rejected Ms Cahill’s claim that the Leaving Certificate examination itself was inherently discriminatory. While acknowledging that it was a standardised exam, which he stated was “in fact its purpose”, the judge disagreed that it was an inflexible standardised examination or an unreasonably standardised one. He stated: “All candidates for the examination, including the appellant, have a legitimate interest in the uniform application of the rules and procedures of the examination to all candidates.” He said that no legal system anywhere in the world considered some form of accommodation without some indication of the accommodation having been made. The judge expressly relied on the fact that the assessment of a fundamental



Testing time for students who request accommodations in the Leaving Cert

skill was affected by the granting of the accommodation. He concluded: “The contention advanced on the part of the appellant invites the court to embrace an unreasonable definition of ‘reasonable accommodation’, which tips the balance too far in favour of the appellant, to the detriment of

other parties with a legitimate interest in the fair and equitable administration of the Leaving Certificate examination.”

‘Mortuary for the ethics of hard work’

The Equality Authority and the Dyslexia Association have expressed their disappointment

with the High Court decision to uphold the practice of test score flagging. The Equality Authority stated that it regrets “that Leaving Certificates for students with dyslexia can still be annotated for students who, despite their disability, successfully sit the Leaving Certificate examinations”.

ECJ ruled that the test for legal professional privilege consists of two requirements:

- 1) That the communications are made for the purpose of a client’s rights of defence, and
- 2) The exchange must be between a client and an “independent lawyer, that is to say, one who is not bound to his client by a relationship of employment”.

Therefore, as in-house lawyers are employees, the ECJ concluded that communications with in-house counsel fail to be protected by legal professional privilege.

The Akzo judgment

According to the court, in-house lawyers are less able to deal effectively with conflicts

of interest between their professional obligations and the aims of their clients. The fact that an employed lawyer might be subject to ethical rules and standards was not sufficient to satisfy the court of their independence. The court stated that the position of an employed lawyer, “by its very nature, does not allow [the

lawyer] to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence”.

On this basis, the court concluded that, “both from the in-house lawyers’ economic dependence and the close ties with his employer, that he does not enjoy a level of professional



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- | | |
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The chief executive of the authority stated: "The authority urges the t  naiste to take this opportunity to review the practices in the department to improve the accommodation of people with disabilities."

In numerous jurisdictions, the practice of flagging has been utilised as a means of ensuring the comparability of test results of examinees provided with accommodation and those not provided with accommodations. Some critics of learning disability accommodations have suggested that easing academic requirements merely rewards underachievers and weakens academic standards.

Boston University president Jon Westling has made several public speeches voicing his opinion that individuals with learning disabilities could overcome their academic difficulties "with concentrated effort". Westling blamed the learning disabled "movement" for creating a "mortality for the ethics of hard work, individual responsibility, and pursuit of excellence".

Equality denied

Other critics have argued that granting accommodations to individuals with learning disabilities gives them an advantage over their non-disabled peers. These critics misunderstand two fundamental concepts. First, the learning disabled are a classified group protected by legislation,

distinguishable from students who are simply slow learning. The very essence of having a learning disability is that the person cannot learn in the standard way. These individuals are failed by the standardised education system. They are denied equality by being expected to conform to a 'one-size-fits-all' education system.

Second, to assert that accommodating such students gives them an educational advantage is to misinterpret the very purpose behind the *Equal Status Act 2000*. The act seeks to make the playing field *reasonably* level. Ensuring equal educational opportunity under the ESA may involve adapting existing academic programmes to the needs of persons with disabilities, but it does not guarantee their educational outcome. It does not confer any advantage whatsoever. Their disabilities remain. What the legislation does is to put the student with a disability on the starting line with all the other non-

"The very essence of having a learning disability is that the person cannot learn in the standard way. These individuals ... are denied equality by being expected to conform to a 'one-size-fits-all' education system"

disabled students. Without the accommodation, the student with a disability cannot compete on an equal basis. The *Equal Status Act* gives these students an opportunity – not an advantage.

In the American case of *Breimborst v Educational Testing Service*, a student with a physical disability took the Graduate Management Admission Test (GMAT) with accommodations. He sued Educational Testing Service (ETS) because his scores were flagged. The ETS settled the case and agreed to stop flagging GMAT scores, as well as scores on two of their other high-profile tests. The Scholastic Assessment Tests (SATs) were owned by the College Board and so were not covered

by this lawsuit. Subsequently, the College Board and Disability Rights advocates jointly convened a 'Blue Ribbon Panel on Flagging' to examine the appropriateness of flagging SAT scores. The majority recommended that

the College Board end the practice of flagging. Two weeks later, American College Testing (ACT) made a similar announcement.

Accessibility

Universally accessible examinations are based on the idea that exams should be constructed and administered more flexibly so that accommodations are unnecessary. Just as building codes now require wheelchair access ramps and other features to make them more accessible to people with disabilities, examinations should be drawn up with everyone in mind. The *Equal Status Act 2000* promotes equal educational opportunity for individuals with disabilities.

The focus needs to shift from accommodating each student on an individual basis to making institutional changes. The act advances structural reform and an expansive goal of equality. The duty to make reasonable accommodations in education should reflect a social model of disability, acknowledging that attitudinal and social barriers compound individual impairments. The standardised Leaving Certificate examination is a socially constructed obstacle preventing students with disabilities from participating on an equal footing with their non-disabled peers. **G**

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

independence comparable to that of an external lawyer".

The ECJ considered the contention that the evolution of member states' legal systems warranted a departure from the *AM & S* rule. Responding, the court held that "the legal situation in the member states of the European Union has not evolved, since the judgment in

AM & S Europe v Commission was delivered, to an extent that would justify a change in the case law and recognition for in-house lawyers of the benefit of legal professional privilege". Regarding Council Regulation 1/2003, the ECJ held that legal professional privilege is not "at all the subject-matter of the regulation" and therefore does not "aim to

require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege".

The European Court of Justice has confirmed the scope of legal professional privilege protection in EU competition law investigations. The judgment effectively excludes protection for in-house lawyers, regardless

of whether they are subject to ethical standards. It is noteworthy that the *Akzo* ruling only applies to enforcement proceedings by the European Commission. National rules on legal professional privilege will remain applicable. **G**

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

Arbitration Act spells

Some radical changes to the law and practice of arbitration have been introduced by the *Arbitration Act 2010*, writes Michael W Carrigan



The *Arbitration Act 2010* came into effect on 8 June and will apply to all arbitrations – both domestic and international – commenced on or after that date. It repeals the *Arbitration Acts 1954–1998*, save in respect of arbitrations commenced before 8 June 2010.

The new act adopts the UNCITRAL (United Nations Commission on International Trade Law) model law, subject to a few identifiable amendments. The model law, which has no legislative force on its own but is available to countries that wish to adopt it, with or without amendment, reflects a worldwide consensus on the principles and important aspects of international arbitration practice.

The way the new act is

drafted is to adopt the model law (the text of which is set out in the first schedule to the act) in its entirety, and then to incorporate the amendments in the text of the act itself, which makes the amendments to the model law more readily identifiable. This will be of considerable assistance to people involved in international arbitration who might be considering Ireland as the venue for the arbitration of their disputes. Indeed, one of the primary reasons for adopting the model law was to assist in the promotion of Ireland as an attractive venue for international arbitration.

Arbitration autonomy

A particular feature of the *Arbitration Act 2010* is that it

gives the parties autonomy over a range of issues, which include not only the arbitration procedure but the powers to be given to the arbitral tribunal and the court. However, the act contains important default provisions where the parties have not directed otherwise and, accordingly, when drafting an arbitration clause, solicitors should give careful consideration to whether or not their clients are agreeable to the default provisions that apply.

While the act merits a thorough examination, solicitors should note the following provisions, which change the existing laws in relation to domestic arbitration:

1) The arbitral tribunal (which may consist of one or more arbitrators, depending on

the arbitration agreement) is empowered to rule on its own jurisdiction. A party may appeal the determination of the arbitral tribunal to the High Court within 30 days.

- 2) The High Court is designated as the relevant court for the purposes of the act and provides that the functions of the High Court shall be performed by the President of the High Court, or by such other judge of the High Court as the President of the High Court may nominate.
- 3) Any determination by the High Court of any application under the act is, in almost all cases, final and there is no right of appeal to the Supreme Court.

radical changes

- 4) Unless the parties agree otherwise, the arbitral tribunal is obliged to give reasons for its award. The practice of many arbitrators to date, and particularly in areas such as rent review, was not to include reasons for their awards.
- 5) The High Court no longer has power to make an order for security of costs unless the parties agree. However, unless the parties agree otherwise, the arbitral tribunal has power to make such an order.
- 6) The bar in section 26 of the *Arbitration Act 1954* on the arbitral tribunal making an award requiring specific performance of “a contract relating to land or any interest in land” applies under the new act only to “a contract for the sale of land”.
- 7) Parties are now at liberty, whether before or after the dispute has arisen, to agree on how the costs of the arbitration shall be borne. Under section 30 of the *Arbitration Act 1954*, any provision in an arbitration agreement (except where the dispute had already arisen) that a party pay all or any part of its own costs if the reference or the award was void.
- 8) The case-stated procedure, whereby questions of law arising in the course of an arbitration could be referred to the High Court for determination, has been abolished. Questions of law are now to be determined by the arbitral tribunal.
- 9) The only method of challenging an arbitral award under the new act is under the very limited grounds permitted by article 34 of the model law. An arbitration award can no longer be challenged on the grounds of an error of law.
- 10) The arbitral tribunal is now given power to strike out arbitration proceedings for want of prosecution. This is a power that was not given by the *Arbitration Acts 1954-1998*.
- 11) Immunity is conferred on arbitrators for anything done or omitted to be done in the discharge or purported discharge of their functions. Immunity is also conferred on institutions designated or requested by the parties to appoint an arbitrator.
- 12) An arbitration agreement is not binding on a consumer where the claim is less than €5,000, unless the consumer agrees to go to arbitration after the dispute has arisen or the agreement has been individually negotiated.

To cater for the new act, the *Rules of the Superior Courts* have been amended by statutory instrument no 361 of 2010 (*Rules of the Superior Courts (Arbitration) 2010*), which amend order 11 and substitute a new order 56 for orders 56 and 56A of the existing rules. **G**

Michael W Carrigan is a solicitor with Eugene F Collins.

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Trial by television

The take-up of videoconferencing in criminal and civil trials has been disappointing. Kevin O'Neill encourages practitioners to embrace the savings that such technology brings

In January 2005, the Committee on Videoconferencing, chaired by Mrs Justice Denham, reported that "videoconferencing technology has a significant potential to improve the efficiency and effectiveness of the conduct of criminal and civil trials".

The benefits from availing of videoconferencing facilities include significant cost savings, better use of witnesses' time, and the possibility of earlier trial dates and settlement of cases. Court venues in 11 counties are now equipped with combined videoconferencing and video-display facilities, and a further seven can facilitate video display – but practitioners have, so far, made little use of these facilities. This may well be because the availability of this service is not widely known.

The most obvious benefit of videoconferencing is that the witness need not be physically present in the courtroom. Whether the witness is based in Ireland or on the other side of the world – or indeed is in custody – the savings in cost and time that can be made using videoconferencing to give evidence is immediately apparent. Witnesses based in Australia, Korea, the US, England and mainland Europe, to mention only a few locations, have given evidence over a live TV link to the District, Circuit or High Courts in criminal or civil proceedings, with tangible cost savings for both the state and for the parties.

Limerick pilot project

A pilot project linking Limerick Courthouse and Limerick



'Judge Judy', but not as we know it...

Prison has proved to be a particularly successful use of videoconferencing. Instead

of being transported from the prison to the court, a person in custody now gives his evidence from a facility within the prison. At all times, this person has the opportunity to consult, in confidence, with his legal representative via a secure link. The Courts Service and the Irish Prison Service are working closely

with a view to extending this project to include other courthouses and prisons,

which will bring a newer, more efficient approach to remand and bail hearings.

"Court venues in 11 counties are now equipped with combined videoconferencing and video-display facilities, and a further seven can facilitate video display – but practitioners have, so far, made little use of these facilities"

The experience to date in civil actions has been equally positive. Unfortunately, many practitioners will have encountered delays in the commencement of cases for a variety of reasons, with the knock-on effect of delaying witnesses. Naturally, such delays can make experts reluctant to agree to testify

in certain venues. However, the Courts Service has

demonstrated that, with good videoconference scheduling, witnesses need not be inconvenienced in this way.

Using videoconferencing enables parties to secure the availability of a witness months or even years earlier than that same witness might be available to travel to give evidence in person. This possibility may allow parties to apply for earlier trial dates than would otherwise have been the case.

While the Courts Service only has anecdotal evidence of its effectiveness, it seems that the availability of such a witness facilitates an earlier settlement of cases. The experience in the High Court, for example, has been that relatively few of the applications made for videoconferencing actually result in live evidence being taken, as the cases tend to settle.

How to organise it

Practitioners must organise a venue from which their witness can avail of videoconferencing facilities. Many hospitals, universities and large corporations worldwide (including some in Ireland) have these facilities, enabling expert witnesses to give evidence from their place of work, live into a courtroom. In other cases, private facilities have been hired out convenient to a witness's location. The permission of the appropriate court to give evidence via that medium must also be obtained.

Prior to the trial date, Courts Service staff will organise, through the practitioners, a test call to that location to ensure that there are no technical issues

BENEFITS OF VIDEOCONFERENCING

- Saving of costs to parties,
- Reduced costs to the state in transferring of prisoners to court venues,
- The saving of time for witnesses by not having to attend at courthouses,
- The availability of expert witnesses to give evidence sooner than might otherwise have been the case, facilitating earlier trial dates,
- Earlier settlement of cases.



with the connection. For that reason, as well as to ensure that the facilities are available when required, application to court should be several days in advance of the hearing date.

The procedure in the High Court is set out in a practice direction dated 3 May 2007 (see HC45, at www.courts.ie).

Videoconferencing is available in the Four Courts, the Criminal Courts of Justice, Limerick District Court and

in the Circuit Courts in Cavan, Letterkenny, Galway, Kilkenny, Dundalk, Castlebar, Monaghan, Tullamore and Nenagh.

Video display

Video display enables the playing of video and audio recordings in the courtroom without the need for practitioners to use or hire equipment themselves for that purpose. This has been an important aspect of many criminal trials over the past few

years, but has also been used to display recordings in civil cases such as personal injury actions.

The equipment in the courtroom can display DVDs or videotapes. There is also a facility for display from portable devices such as a practitioner's laptop or USB memory stick. It is always wise to test CCTV in advance of a trial date, as this medium can come in many different formats. It is, however, safe to assume that if it works on a VCR,

DVD player, or laptop, it can be displayed in the courtroom environment.

In addition to the videoconferencing venues, video-display equipment is available in Dublin in Richmond 50 and Dolphin House 49 and in Carlow, Cork, Tralee, Naas, Limerick, Longford, Trim, Clonmel and Bray. **G**

Kevin O'Neill is principal registrar at the High Court.



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People-power saves local courthouse

From: Keenan Johnson, Johnson & Johnson, Solicitors, Ballymote, Co Sligo

I think your readers will be interested to know that, in our current dire financial difficulties, there are some positive spin-offs. A particular 'goods news' story is the effort made by the community in Ballymote, Co Sligo, to retain its District Court. The Courts Service had indicated its intention to close the premises on the basis that it needed upgrading, and it would be a more efficient use of resources to have the business of the court transferred to Sligo. The local community was determined to retain the courthouse, as it was felt that the removal of court facilities to Sligo would be detrimental for the community. It was also felt that, taking the greater picture into account, the state's resources would be much better utilised if the court were to remain in Ballymote, as it is the home to the garda division of South Sligo and has a compliment of in excess of 32 gardaí. If the court were moved to Sligo, it would mean that the gardaí would have to travel into and out of Sligo to have their cases heard, and this would have resulted in a considerable increase in costs to the state and a waste of valuable garda resources.

All of the stakeholders – such as the community, the gardaí, the legal profession and the state solicitor – felt that the closure of the courthouse would be a retrograde step and result in considerable inconvenience to court users, such as the gardaí



At the official opening of Ballymote Courthouse and Mediation Centre were (l to r): Paul Stephenson, Keenan Johnson, Eamon Óg Gallagher, John Perry, Tom McSharry, Pat McGrath, Peter Mullin and Frank Brennan

and the public. Accordingly, the local community came together under the auspices of the local development company, Ballymote Community Enterprise Limited (BCE), and with the legal profession to refurbish the courthouse. The refurbishment involved the painting of the inside and outside of the building, the revarnishing of court furniture, the fitting of new carpets, the installation of new furniture, and the fitting of a state-of-the-art public address system, together with window blinds. The total cost of the refurbishment was €15,000 approximately, and this was funded by a substantial and generous contribution from the local legal profession, the Sligo Bar Association and BCE.

The courthouse, which was originally built in 1813 for the sum of £600, is one of the oldest courthouses in the country. It was rededicated

by Judge Kevin Kilrane, the local judge, on Tuesday, 14 September 2010. The rededication ceremony was covered by the local media and by Eileen Magner of RTÉ.

The work done to date constitutes phase one of a development plan for the courthouse. Phase two involves the installation of a family-law suite and the upgrading of toilet facilities and disability access. The rededication of the courthouse involved its renaming as 'Ballymote Courthouse and Mediation Centre'. It was considered appropriate that the courthouse should also double as a mediation centre, given the promotion and growth in alternative dispute resolution. Judge Kilrane remarked that mediation and alternative dispute resolution were to be encouraged. The refurbished courthouse will also double up as a venue for lectures and

meetings. This ensures that the whole community benefits from the use of the premises.

It is to be hoped that the Courts Service will now allow the courthouse and the court facilities in Ballymote to remain in use. The cost to the Courts Service of maintaining the court facilities is minimal and only involves the travelling expenses of the District Court clerk. The heating and maintenance of the courthouse will be paid for by the local community. Sligo County Council, the owner of the courthouse, was very supportive of the work.

On a general note, I believe it is important that District Courts are maintained in local areas, even if the amount of work is relatively small. There is a socioeconomic benefit from maintaining District Courts, as they allow the public to see the law in action. Furthermore, the existence of the local District Court acts as a deterrent to small-time criminals. I firmly believe that the Law Society should be fighting against the Courts Service policy of closing smaller District Courts. The removal of the District Court from local areas means that justice is not 'seen to be done'. Furthermore, the removal of District Courts from local areas will remove the administration of justice from the community, thereby diminishing respect for law and order and the rule of law.

It is my sincere hope that the example set by Ballymote will be followed in many other communities throughout the country.

PG: PETER MCPARLAND

Clarifying the family law practice of the PRA

From: Conveyancing Committee, Law Society of Ireland, Blackhall Place, Dublin 7

The Conveyancing Committee would like to refer to the letter from Patricia McHugh of Richard H McDonnell, Solicitors, which was published in the August/September issue of the *Gazette* (see page 17).

In October 2008, representatives of the Conveyancing Committee met with representatives of the Property Registration Authority to discuss certain family law matters, including a proposal from the PRA that they would not check documentation lodged with dealings concerning compliance with the various pieces of family law legislation.

The Conveyancing Committee agreed that the Property Registration Authority's proposal was a correct statement of the law. In the course of this discussion, the Conveyancing Committee representatives made the point that solicitors needed to rely on the conclusiveness of the register and not to have to enquire into previous transactions. The PRA confirmed the position – that is, section 31 of the *Registration of Title Act 1964* continues to apply, as does the judgment in *Guckian v Brennan*. The register remains conclusive.

The Conveyancing Committee representatives also made the point that solicitors would prefer to continue to lodge

family law documentation with each dealing, so that it would be kept in the Land Registry. This was also agreed by the PRA side.

It is, therefore, not necessary for solicitors to go behind the register. Solicitors acting for purchasers are entitled to rely on the register and may confine their enquiries to the current transaction.

The Conveyancing Committee has issued a new practice note, which appears in this *Gazette*, and which supplements the practice note published in the May 2009 *Gazette*.



'Architect' debate continues

From: John Graby, director, RIAI, 8 Merrion Square, Dublin 2

Brian Montaut of the Architects' Alliance complains that the Architects' Alliance have been denied automatic recognition under the *Building Control Act 2007*. The reason that alliance members are not on the register is that they do not have the qualifications listed in the legislation, that is, a qualification in architecture and a professional qualification, or, as a citizen of another EU state, a qualification listed in the *Professional Qualifications Directive*. There is a 'grandfather' process in the legislation for those not having qualifications that, in summary, requires ten years' experience in the state working at the level of an architect, and demonstration of compliance with the minimum EU standards for the formation of an architect as set out in article 46 of the *Professional Qualifications Directive* (PQD).



As to the misuse of an EU directive (PQD), as claimed by Brian Montaut, the RIAI has received an opinion from Gerard Hogan SC (until recently, and now appointed to the High Court) on whether the amendment to the act, proposed by John O'Donoghue TD, and supported by the alliance, was compatible with the *Professional Qualifications Directive* 2005/36/EC. His conclusions are unambiguous. These are as follows:

"A) Article 46 of the directive sets out the education standards which architects who qualified in Ireland after August 1987 must

attain. Article 49 provides for a derogation in the case of persons qualified before that date, even if their educational qualifications did not otherwise satisfy the requirements of article 46.

B) If enacted, the 2010 bill would, in effect, create a new category of persons entitled to be regarded as architects, even though they might not otherwise have satisfied the requirements of article 46 and would not be in a position to do so, even though they did not hold themselves out as architects prior to August 1987.

C) But the PQD Directive precludes – certainly by necessary implication – national legislation of this kind, since it sets out the requirements (pre and post-August 1987) for the recognition and training of architects. Member states are not, in effect, free to create such a new category of persons, as, post-August 1987, all Irish qualified architects must be in a position to satisfy the requirements of article 46. As the 2010 bill would allow Ireland to circumvent the requirements of

article 46 and the requirements of the directive generally, in my view such a measure would plainly be unlawful as contrary to requirements of EU law."

Brian Montaut appears to find the regulation and legal protection of the title 'architect', which he refers to as "trademarking", as an unusual concept. Out of 27 EU member states, 25 regulate the title 'architect'; some also regulate aspects of the function of an architect. Internationally, the protection of the title 'architect' is commonplace and usual. Mr Montaut also draws comparisons with doctors, nurses, lawyers, and so on, on the basis that the titles of their profession are not protected. However, he is missing the point. These professions are regulated by law and those included on a respected professional register have had their competence independently assessed.

He also seeks to further confuse matters by referring

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to an Architects' Council of Europe survey which showed there were 2,500 members of the RIAI and a further 1,000 architects estimated to be in the country. This survey was carried out in 2007, when there was no registration system in operation, when it was estimated that there were some 400 architects from the EU and around the world working in Ireland because of the construction boom, 200 Irish architects with qualifications and several hundred architectural graduates who were preparing for professional practice examinations. Market research indicates that there could be between 250 to 300 people in the field of architecture who could benefit from the 'grandfather' process as set out in the act, not 1,000.

He also claims to represent those who have "market accreditation". The market is not in a position to accredit architects. To our cost, we know the market is not a reliable test. Until now, the architectural services market was not regulated in such a

way as to ensure its reliability as a test providing consumers with an appropriate level of competence. Given that the majority of clients buy architectural services on a very infrequent basis, it is unreasonable to expect that the market would be in a position to make a fully informed choice without some form of additional regulations, such as registration.

A Red C poll commissioned by the RIAI in November 2009 found that three-quarters of those surveyed believed the word 'architect' meant the person held formal qualifications.

It is revealing that, in this debate, no mention is made of the original purpose of registration – namely consumer protection. This requires that a common standard of competence be put in place and requires that professions are independently assessed to that standard. The issue of consumer protection is no academic matter.

A regulatory body must act in the public interest. The integrity and credibility

of a register depends on independent assessment of competence. No regulatory body could have other than grave concerns if a person were to be admitted to a register whose competence had not been independently assessed and where relevant EU standards were to be ignored. Architects on the register have sought and have been given briefings on the implications of the *Building Control (Amendment) Bill*, which excludes any form of qualitative assessment of competence or reference to minimum EU standards. While the RIAI is engaged with government on this matter, the RIAI is not instructing or requiring architects on the register to take any particular stance. If, however, they have concerns, then they have a democratic right to make these concerns known.

The RIAI, in its role as a competent authority, has responsibility to other EU member states to provide evidence; this documentation is issued and accepted on the basis of mutual trust. If there

were architects on the register in this state who have not been assessed to the EU minimum standards, then the competence and access to EU markets of all Irish architects would be called into question. This is not a theoretical position, as the competent authorities in Germany and Britain have already raised questions.

Brian Montaut refers to vested interests. The only vested interest that the proposed amendment being supported by the Architects' Alliance will serve are those who, for whatever reason, are not prepared to have their competence independently assessed to EU minimum standards.

Since 16 November 2009, when the statutory register was launched, it has been illegal to use the title 'architect' either alone or in combination with any other words or letters, or name, title or description – implying that the person is registered under section 18(i)(a) of the *Building Control Act 2007*. The register can be checked at www.riai.ie. **G**



Last Chance To Register For An Autumn 2010 Diploma Course

The Diploma Team's expanded and diverse portfolio of courses for the Autumn 2010 Programme has got off to a successful start. In total there are eleven courses on offer, which includes the launch of the **Diploma in Environmental & Planning Law** and the addition of a new certificate – **Capacity, Mental Health & the Law**. As most of the courses are being Webcast – **LATE APPLICATIONS ARE NOW BEING ACCEPTED**.

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• Diploma in Environmental & Planning Law (New) (webcast)	Tues 12 October 2010
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• Diploma in Civil Litigation Cork	Thurs 14 October 2010
• Diploma in Family Law (webcast)	Sat 16 October 2010
• Diploma in Intellectual Property and Information Technology Law (webcast)	Wed 20 October 2010
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Begging the

The *Criminal Justice (Public Order) Bill 2010* proposes restricting the activity of begging. Rose Wall and Michele O'Kelly argue that the bill suffers from vagueness and ambiguity, creating the possibility that it will be applied arbitrarily if enacted in its current form

The *Criminal Justice (Public Order) Bill 2010*, currently at select committee stage, introduces new laws restricting the activity of begging. It is a response to the judgment of the High Court in *Dillon v DPP* (2007), which found that the previous law in this area, section 3 of the *Vagrancy (Ireland) Act 1847*, was unconstitutional. Section 3 was found to constitute a prohibition against begging in any public place in all circumstances. It was accepted by the High Court that such an unrestricted prohibition was in breach of article 40.6.1, which protects the right to freedom of expression. It was also found that, because the offence of begging was “so arbitrary, so vague, so difficult to rebut” and “so ambiguous” in the way it was defined, it was considered to be unconstitutional, violating several articles, namely articles 34.1, 40.4.1, 40.1, and 40.3.

However, the High Court also made clear that the right to freedom of expression can be regulated in the interests of the common good, leaving open the possibility of making more clearly defined and nuanced laws to control the location, manner and other circumstances in which begging might take place.

In light of the *Dillon* case, the aforementioned bill does not seek to impose an overall ban on all forms of begging. Instead, section 2 seeks to make begging

an offence only where it is accompanied by unacceptable behaviour, such as harassment, intimidation, assault, threat or obstruction. Section 2 creates a summary offence that attracts a maximum fine of €400, a custodial sentence of up to one month, or both.

Section 3 gives new powers to the gardaí to direct persons begging within ten metres of an ATM, a dwelling, or the entrance to a business premises to move on. Failure to comply with such directions will also be an offence, and a person is liable, on summary conviction, to a fine of up to €300.

Section 4 provides that a garda may arrest, without warrant, any person whom he or she suspects, upon reasonable grounds, of having committed an offence under sections 2 or 3, and may require the person arrested to give their name and address. Failure to comply with this request or to give false information shall be an offence and shall be liable to a fine not

exceeding €200 upon conviction.

The Mercy Law Resource Centre has several concerns about the new bill.

Firstly, the new law as established by the bill suffers from similar defects of vagueness, arbitrariness and ambiguity as did the previous law, and is similarly open

to misuse by enforcement authorities. The offences criminalised by the bill are duplicated elsewhere, for example, the *Offences Against the Person Act 1861*, the *Criminal Justice (Public Order) Act 1994* and the *Criminal Justice Act 2006*. This raises the question as to why these new offences are being created.

The government's regulatory impact analysis justifies the duplication

on the grounds that, in the new legislation, “begging is the activity which is itself being targeted”. However, begging itself is not the activity criminalised by the bill; rather, it is the accompanying behaviour (harassment, and so on), which

is already criminalised under pre-existing legislation. If there is no difference between the offences criminalised under the bill and pre-existing legislation, then the bill is not necessary. If there is a difference, then that difference needs to be clearly spelt out, so that the public at large knows what kind of behaviour constitutes this offence. In the absence of such clarity, the law suffers from vagueness and ambiguity, which creates the possibility that it will be applied arbitrarily.

Secondly, the bill fails to take a holistic approach to the problem of begging and associated behaviours. It focuses on enforcement to the exclusion of rehabilitative intervention and support. Research in Britain by Johnsen and Fitzpatrick has shown that enforcement alone tends only to displace and often exacerbate the problems, whereas enforcement as part of an overall coordinated approach offering targeted intervention and support is more likely to be successful in dealing with the problems and their underlying causes. A holistic approach is therefore in the interests of the public who seek protection from problematic begging behaviour.

The research also confirms that people who beg are highly vulnerable individuals, the great majority of whom suffer from a combination of one or more of the problems of homelessness, substance addiction, mental illness, or a traumatic childhood.

question

viewpoint



If the needs of these highly vulnerable people are to be taken into account, criminal law enforcement must be integrated with intensive support interventions tailored to the individual's needs. The cost of imprisonment provided for in the bill could be directed towards such rehabilitative intervention and support.

Thirdly, the regulatory impact analysis that accompanies the 2010 bill states repeatedly that begging cannot be justified on economic grounds due to the comprehensive range of income supports, health care, and housing supports available.

However, a variety of factors can cause people to find themselves in a situation where they have to beg, and this is only likely to increase in the coming years in light of the ongoing financial downturn.

The impact of the habitual residence condition often results in people not having any access to regular social welfare entitlements. In a case where a negative decision has been appealed, a person often has no option but to beg in order to remain in the state long enough to vindicate their rights on appeal. Rough sleepers who are unable to provide proof of address, and asylum

seekers who have limited social assistance and who are ejected from their direct provision accommodation, represent a further group of people who are compelled to beg.

The assumption that there is no economic justification for begging must therefore be questioned. It is incumbent on the government to put in place adequate social protection for people who have no alternative but to beg, in line with its obligations under article 11 of the *International Covenant on Economic, Social and Cultural Rights*, which protects the right of everyone in this jurisdiction to an adequate standard of

living, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

In conclusion, the bill is ineffective, as it does not address the root causes of begging. Research needs to be carried out in consultation with organisations working with people who beg so as to work towards solutions that are just and effective. This may require changes in policy and practice rather than legislation. **G**

Rose Wall is a solicitor at the Mercy Law Resource Centre in Dublin, and Michele O'Kelly is a solicitor formerly employed by the centre.

PIRATES'

Music pirates got their hands on some unexpected booty following the judgment in the recent *EMI v UPC* case. Iain McDonald goes aloft to scan the horizon from the crow's nest

On 11 October, five major record companies failed in a High Court action aimed at compelling internet service provider UPC to take action to prevent the practice of illegally downloading music files across their network.

Mr Justice Charleton, while strongly critical of UPC over its failure to act against music pirates, said that the *Copyright and Related Rights Act 2000* made no provision for the blocking, diverting or interrupting of internet communications intent on breaching copyright.

This judgment effectively prohibits record companies in Ireland from compelling internet service providers (ISPs) from applying the 'three-strikes' rule against customers who illegally download music. The three-strikes rule essentially meant that ISP customers detected illegally downloading media files received two warnings to stop this behaviour, before having their internet connection 'throttled' by the ISP.

While the defeat of the three-strikes rule may be good news for poor students in dimly lit rooms, it is a decision that has disappointed many in the Irish music industry who regarded the rule as a vital weapon in their armoury in the fight against music piracy. It is also reputationally damaging for Ireland as a knowledge economy, if it is to pitch itself as a hub for intellectual property.

Ahoy, me hearties

In Ireland, it is estimated that nearly 700,000 people are likely to be engaged in some form of illegal downloading from time to time. In the *UPC* judgment, Mr Justice Charleton accepted that "a substantial portion of [UPC's] 150,000 customers are using the internet service provided by UPC to steal copyright material which is the property of the recording companies".

Between 2005 and 2009, Irish record companies have experienced a reduction of 40% in legal music sales, which has translated into a loss of €64 million. While there are a number of factors that may have

contributed to this loss, the Irish Recorded Music Association (IRMA) maintains that illegal file-sharing is a key factor.

However, it's not just the 'suits' in the record companies who are feeling the pinch. In circumstances where artists are not able to generate sales from album releases, Willie Kavanagh, chairman of EMI Ireland, has stated that the likelihood is that record companies will cease to invest in new music.

Shiver me timbers

In *EMI v Eircom Limited*, Mr Justice Kelly made a number of orders in favour of the record companies (who were also the plaintiffs in the *UPC* case), compelling Eircom, as an ISP, to disclose the names of individual customers who were identified as illegally downloading music files. The record companies successfully proved that their copyright had been infringed and had identified the IP addresses of the subscribers responsible. In that case, it was held that, where a wrongful activity had been committed by unknown persons, an order might be made requiring a defendant to identify such persons for the purposes of legal action.

However, the process of identifying and pursuing individuals through the courts on an *ad hoc* basis for copyright infringement has been described as burdensome and, ultimately, futile as a potential solution to the problem of internet piracy.

In January 2009, in a similar action to the *UPC* case, Eircom settled in the course of the hearing before the High Court when it agreed to act in cooperation, month-by-month, with the recording companies' detection of internet piracy – first, by warning their customers twice that what they were doing was illegal, and then by shutting them off from internet access upon a third infringement (the three-strikes rule).

Eircom has an 'acceptable usage contract' with its customers, mandating termination for illegal internet use, and the three-strikes rule is merely a means of enforcing this contractually agreed policy.

MAIN POINTS

- Music piracy and the *EMI v UPC* case
- The exclusive right to copy work and make it available
- The economic and moral obligations of ISPs versus the current legal obligation
- Ireland not yet fully compliant with the *E-Commerce Directive*

PARADISE



In settling the case with Eircom, the record companies agreed to bring proceedings against the other ISPs, including UPC.

Hoist the jolly roger

In the *UPC* case, five major record labels were seeking an injunction requiring UPC to stop illegal music piracy from taking place over its network, and to effectively enforce the three-strikes rule that had previously been agreed between Eircom and the record companies.

The record companies argued that UPC, despite having a customer-use policy that prohibited illegal downloading, was turning a blind eye to such activity on its network.

The claim for injunctive relief was based on sections 37 and 40(4) of the *Copyright and Related Rights Act 2000*. Section 37 of the act grants the copyright owner (in this case, the record labels) the exclusive right to copy the work and to make it available to the public. Section 40(4) provides that, where a person facilitates the making available to the public of a copyright work, that person shall be liable for infringement if it “fails to remove” the infringing material upon notice from the copyright owner.

In defending the claim, UPC stated that there should be no liability for acting as a mere conduit for copyright infringement, and that it neither initiated the communication involved in piracy, chose the recipient, altered the information, nor condoned the activity.

Blow me down

The judgment of Mr Justice Charleton in the *UPC* case was clearly sympathetic towards recording companies in Ireland. He said that the “business of the recording companies is being devastated by internet piracy” and that music piracy not only undermines the record companies’ business, but “ruins the ability of a generation of creative people in Ireland, and elsewhere, to establish a viable living”.

He said that there was no doubt that copyright was being infringed on the UPC network and that a failure to address this problem was not excusable. Music piracy constitutes the abuse of the economic interests

of the creative community, and “this kind of theft is shameful”.

Interestingly, Mr Justice Charleton stated that ISPs have an “economic and moral obligation” to address the issue of music piracy, which, in his view, “constitutes a huge pilfering of the resources of creative artists”.

However, the question to be considered was whether these economic and moral obligations of ISPs would translate to a legal obligation to prohibit such activity on the UPC network.

The case ultimately turned on the interpretation of the scope of section 40(4) of the *Copyright and Related Rights Act*.

Given the nature of traffic across the internet, while UPC is capable of preventing the transmission of music files across its network, it has no means of removing these files from a peer-to-peer music-sharing system. While the ability to remove infringing material could apply to a DVD library, section 40(4) does not permit digital blocking or diverting stratagems, such as throttling a subscriber’s internet connection. Essentially the ‘removal’ of content is simply not possible in the context of a transient communication across ISPs.

It followed that blocking and diverting mechanisms, as opposed to any removal mechanism, such as in relation to hosting, is not available under section 40(4) of the act.

In refusing the injunction sought by the record companies, section 40(4)

was compared with recent legislative provisions in the United States and Britain, where they specifically provide for a remedy against hosting, allowing for a three-strikes policy and the disablement of transmissions involving copyright theft over the internet. The High Court was convinced that the absence of similar provisions in Irish law means that legislative intervention is required if ISPs are to be forced to effectively monitor and cut off subscribers who illegally download music.

Pieces of eight

The refusal to grant the injunctive relief sought in the *UPC* case is an undoubted blow to the music industry

“Music piracy not only undermines the record companies’ business, ‘but ruins the ability of a generation of creative people in Ireland, and elsewhere, to establish a viable living’”

LOOK IT UP

Cases:

- *EMI v Eircom Limited* (2005) 4 IR 148
- *EMI Records (Ireland) Limited, Sony Music Entertainment Ireland Limited, Universal Music Ireland Limited, Warner Music Ireland Limited and WEA International Incorporated v UPC*

Communications Ireland Limited (2009 no 5472 P)

Legislation:

- *Copyright and Related Rights Act 2000*
- *E-Commerce Directive* (2000/31/EC)



Aaaargh,
where did
I leave me
blasted
laptop?

in Ireland. As the law stands, these companies have little, if any, effective remedy for policing music piracy in this jurisdiction. In circumstances where ISPs, such as UPC, refuse to fully enforce their customer-use policy against unauthorised users of their service, any protection offered by these policies is essentially rendered useless.

However, since the record companies have no means of enforcing a three-strikes rule, any ISP that voluntarily chooses to implement such a rule will be placing itself at a competitive disadvantage to other ISPs who do not supervise unauthorised internet traffic. This is particularly worrying for the record industry amid reports that Eircom is seeking legal advice as to whether it should continue with its implementation of a three-strikes policy in the wake of the *UPC* judgment.

However, there may be a small ray of light for the record companies arising from the judgment. Mr Justice Charleton has stated that, in failing to provide legislative provisions for blocking, diverting and interrupting internet copyright theft, Ireland is not yet fully in compliance with its obligations under the *E-Commerce Directive*. By highlighting the government's failure to implement such legislative reform, this decision has surely increased pressure on the Oireachtas to introduce a regime whereby ISPs are obligated to prevent transmission of illegally downloaded files.

Additionally, the court held that there are no privacy or data-protection implications to detecting unauthorised downloads of copyright material using

peer-to-peer technology. This should, arguably facilitate the introduction of robust copyright protection for the record companies, although the decision may not be the last word on the potential data privacy issues involved.

IRMA is currently considering whether to appeal to the Supreme Court or to lobby the government to change the legislation.

Up the old sea dog

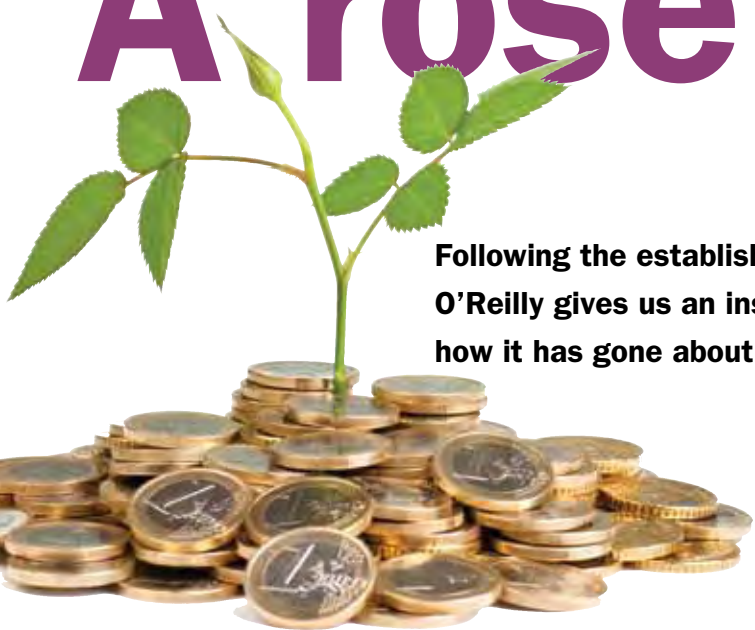
Clearly the *UPC* decision is a blow to the Irish record industry and, without better monitoring of online music theft, revenues generated from music sales will continue to be significantly undercut. The present regime for combating music piracy is clearly flawed, with its legislative basis ill-equipped to deal with the problem that music piracy has become.

However, with legislative intervention, ISPs may be mandated to prevent transmission of illegal traffic across their systems, without the threat of losing market share to rivals if they implement such a strategy. Such legislative intervention would undoubtedly help protect the record companies and the artists they seek to promote.

That just leaves us with the poor students in their dimly lit rooms, weighing up the unenviable decision of paying for music or losing their internet connection. Maybe they'll head out to a gig instead. **G**

Iain McDonald is an associate in the entertainment and media group at Philip Lee. He would like to thank Anne Bateman, partner, for her advice.

A rose by any



Following the establishment of NAMA in December 2009, Aideen O'Reilly gives us an insider's view of the agency, its tasks, and how it has gone about appointing specialist legal services

Following the government decision to adopt an asset relief scheme based on an asset transfer and management model, the *National Asset Management Agency Bill* was developed and published as a draft in July 2009.

The *National Asset Management Agency Act 2009* completed its passage through the Oireachtas in November 2009. NAMA was established and its board appointed in December 2009.

EU state-aid approval for the NAMA scheme was received in February 2010, and the transfer of the first tranche of loans commenced in March 2010. Tranche 2 was completed in August 2010, and Tranche 3 will be completed during October and November.

NAMA originally had a target portfolio of €81 billion of eligible bank assets, which would be acquired from the five participating institutions in tranches. The objective was to have all the eligible bank assets acquired by the end of February 2011.

However, the finance minister, in his statement of 30 September 2010, made a number of important decisions that will materially affect how NAMA will acquire the assets.

Firstly, the threshold for exposures that are to be transferred to NAMA from AIB and Bank of Ireland was increased from €5 million to €20 million. Secondly, in the interests of financial stability, it was decided that NAMA would acquire all of the residual eligible bank assets of Anglo Irish Bank, amounting to €16 billion by the end of October 2010, based on a NAMA estimated discount of 67%. Anglo Irish Bank will be required to submit full due diligence to NAMA on an *ex post* basis. Accordingly, the detailed valuation will be conducted following acquisition, and any required balancing adjustment in the acquisition value will be made. Thirdly, AIB and Bank of Ireland agreed that they would make every effort to deliver the required due diligence in order to transfer their residual eligible bank assets to NAMA by the end of 2010.

At the conclusion of the asset transfers, NAMA is expected to have a loan portfolio of just over €70 billion, representing 10,000 loans and 850 borrowers. The expected overall NAMA discount will be approximately 58%.

Once a loan has been acquired, NAMA assumes control over the borrower relationship. The five banks participating in the NAMA scheme provide loan administration services to NAMA. The larger borrowers



MAIN POINTS

- The National Asset Management Agency's target portfolio
- NAMA and the acquisition of assets
- Specialist legal services
- Portfolio management

other NAMA...



(those with total exposure of €50 million or more) are directly managed by NAMA. This part of the portfolio amounts to €55 billion. Borrowers with total exposure to all of the participating banks below €50 million will typically be managed by the legacy banks under delegated authority from the board of NAMA and subject to ongoing monitoring and supervision by NAMA. This part of the portfolio amounts to €16 billion.

Specialist legal services

Arising from the acquisition of the loan portfolio, NAMA will require specialist legal services, primarily in Ireland and Britain, in connection with the ongoing management of the loan portfolio.

Accordingly, in March 2010, NAMA sought applications from legal firms in Ireland and Britain for the provision of legal services in connection with financing, restructuring and

enforcement. It is intended that the panel will remain in place until 2014.

Two service categories were specified in the request for applications, which was published on the government tenders website, www.etenders.gov.ie:

- 1) Enforcement of any security, guarantee, indemnity or surety held by NAMA in respect of assets that will be acquired, including but not limited to
 - (a) the requirements of and options under the act, (b) insolvency law, (c) litigation, (d) land and conveyancing law in Ireland, Britain and other jurisdictions, and (e) banking and commercial law.
- 2) Finance restructuring, the provision of credit facilities, and taking of security in respect of assets that will be acquired by NAMA, including but not limited to (a) the requirements of and options under the act, (b) banking, commercial and tax law, and (c) insolvency law.

The competition invited applications for four panels:

- Group 1 Ireland – highly complex borrowers/ transactions/ large exposures,
- Group 2 Ireland – less complex borrowers/ transactions/ exposures,
- Group 1 UK – highly complex borrowers/ transactions/ large exposures,
- Group 2 UK – less complex borrowers/ transactions/ exposures.

The NAMA portfolio across the five participating institutions will be:

	€ billion
Anglo Irish Bank	35.0
Allied Irish Bank	16.0
Bank of Ireland	10.0
INBS	8.5
EBS	0.9
Total	70.4

Some 500 applications were received. Applications were evaluated by reference to the qualifications, experience and expertise of the key personnel proposed for the performance of the services; the experience of the firm in providing similar services; fees; and a statement of key legal risks that identifies the main legal risks facing NAMA in the relevant jurisdiction, demonstrates an understanding of the statutory scheme within which NAMA operates, and demonstrates how the expertise and experience of the firm will assist NAMA in managing these risks.

The panels have been appointed, and all firms appointed have completed the pre-appointment conditions, which include provision of a current tax-clearance certificate, evidence of professional indemnity insurance of at least €20 million, and a declaration that the applicant will comply with the provisions of section 45 of the act regarding professional standards, conflicts of interest and audit (see panel, below).

Portfolio management

Following the transfer of their loans, NAMA contacts each borrower and begins a process of engagement with them and their advisers. The borrower is requested to provide a business plan that sets out the borrower's current situation; levels of debt; assets and liabilities; and short, medium and long-term business objectives, including assets requiring working capital and development finance. The ultimate beneficial owner (UBO) is requested to provide a sworn statement of affairs, which includes a statement of assets transferred by him or her to third parties, whether connected or unconnected in the past five years.

APPOINTMENTS TO PANELS FOR THE PROVISION OF CERTAIN LEGAL SERVICES TO NAMA

Provisional panel – Ireland Enforcement Group 1

A&L Goodbody – Arthur Cox – Byrne Wallace – Eugene F Collins – Eversheds O'Donnell Sweeney – Gartlan Furey – Maples and Calder – Matheson Ormsby Prentice – McCann FitzGerald – Whitney Moore – William Fry

Provisional panel – Ireland Enforcement Group 2

A&L Goodbody – Arthur Cox – Byrne Wallace – Eugene F Collins – Eversheds O'Donnell Sweeney – Gartlan Furey – Hayes Solicitors – Lavelle Coleman – LK Shields – Maples and Calder – Matheson Ormsby Prentice – McCann FitzGerald – McDowell Purcell – Ronan Daly Jermyn – Whitney Moore – William Fry

Provisional panel – Ireland Refinancing Group 1

A&L Goodbody – Arthur Cox – Byrne Wallace – Eugene F Collins – Eversheds O'Donnell Sweeney – Gartlan Furey – Matheson Ormsby Prentice – McCann FitzGerald – William Fry

Provisional panel – Ireland Refinancing Group 2

A&L Goodbody – Arthur Cox – Beauchamps Solicitors – Byrne Wallace – Eugene F Collins – Eversheds O'Donnell Sweeney – Gartlan Furey – Mason Hayes & Curran – Matheson Ormsby Prentice – McCann FitzGerald – McDowell Purcell – Ronan Daly Jermyn – William Fry

Provisional panel – UK Enforcement Group 1

A&L Goodbody – Allen & Overy – Arthur Cox – Ashurst – Brodies – Burness – C&H Jefferson – Carson McDowell

– Denton Wilde Sapte – DLA Piper – Dundas & Wilson – Herbert Smith – John McKee & Son – Lovells LLP – Simmons & Simmons – Taylor Wessing – Tods Murray LLP – Tughans

Provisional panel – UK Enforcement Group 2

A&L Goodbody – Allen & Overy – Arthur Cox – Brodies – Burness – C&H Jefferson – Carson McDowell – Denton Wilde Sapte – DLA Piper – Dundas & Wilson – Eversheds – John McKee & Son – Lovells LLP – MacFarlanes LLP – Nabarro – Simmons & Simmons – Taylor Wessing – Tods Murray LLP – Tughans – Wragge & Co LLP

Provisional panel – UK Refinancing Group 1

A&L Goodbody – Allen & Overy – Arthur Cox – Brodies – Burges Salmon – Burness – Carson McDowell – Clifford Chance – Denton Wilde Sapte – DLA Piper – Dundas & Wilson – Eversheds – Herbert Smith – John McKee & Son – Lovells LLP – Nabarro – Olswang – Simmons & Simmons – Slaughter and May – Taylor Wessing – Tods Murray LLP – Tughans

Provisional Panel – UK Refinancing Group 2

A&L Goodbody – Allen & Overy – Arthur Cox – Brodies – Burges Salmon – Burness – Carson McDowell – Clifford Chance – Denton Wilde Sapte – DLA Piper – Dundas & Wilson – DWF LLP – Eversheds – John McKee & Son – Lovells LLP – MacFarlanes LLP – Nabarro – Olswang – Simmons & Simmons – Taylor Wessing – Tods Murray LLP – Tughans – Wragge & Company

Each borrower business plan is reviewed by NAMA and, in certain cases, a business plan may be rejected by NAMA if it is considered to be inadequate in terms of data provided, or to be unrealistic. Where a business plan is rejected, NAMA will expect the borrower to improve upon the plan and submit a reworked plan. Once the final business plan is received, NAMA carries out a full review and its portfolio management, lending, and credit and risk divisions make recommendations to the NAMA Credit Committee.

Decisions concerning the resolution of borrower exposures – whether consensual workout, restructuring, or enforcement – are made by the NAMA board, the NAMA Credit Committee or senior NAMA executives, depending on the *quantum* of the borrower exposure.

NAMA strategy

The board of NAMA has taken a number of strategic decisions, and these are set out in the NAMA business plan, which was published on 30 June 2010:

- All debts and borrowers will be pursued to the greatest extent possible – this includes personal guarantees,
- Targets have been set for debt reduction, as follows:
 - 25% 2013
 - 40% 2015
 - 80% 2017
 - 95% 2018
 - 100% 2019
- NAMA will work with borrowers where it takes the view that this is the optimal commercial strategy in the circumstances, and where the borrower is fully cooperative, makes full disclosure, and is realistic in terms of asset-funding and of the lifestyle implications for them of NAMA support,
- Borrowers who are supported by NAMA must accept close monitoring of their activities,
- While new money is available, it is a scarce resource and will be advanced only when it enhances NAMA's financial position,
- Where the borrower or its management is not adding value and the borrower is in default, NAMA will, where appropriate, seek to take control of secured assets,
- NAMA will restructure and simplify existing structures and utilise NAMA's own legal documentation to standardise and consolidate loans,
- NAMA will pursue all personal guarantees to the greatest extent feasible,
- NAMA will pursue recovery of assets transferred to third parties.



Approximately 67% of the underlying security is located in Ireland, with an additional 6% located in Northern Ireland. Of the remaining 27%, 21%

is located in Britain, with smaller concentrations in the US and throughout Europe.

NAMA is expected to have a life of ten years and, during that time, it has been mandated to deal expeditiously with the acquired bank assets, to protect or otherwise enhance the value of those assets in the interest of the state, and to obtain the best achievable financial return for the state.

NAMA will require the services of a wide range of service providers in order to achieve its statutory objective of obtaining the best achievable financial return to the state. The board of NAMA is very conscious of the need to retain top-quality legal services, and for such services to be delivered for the best price possible.

There has been a long debate about whether NAMA represents the right policy response, but that debate ended when the legislation was enacted by the Oireachtas. Since establishment, the board and NAMA's senior executive team have concentrated on delivering NAMA's

commercial objectives, and NAMA will pursue what it believes to be the best possible outcome for the state in each case. **G**

“At the conclusion of the asset transfers, NAMA is expected to have a loan portfolio of just over €70 billion, representing 10,000 loans and 850 borrowers. The expected overall NAMA discount will be approximately 58%”

Aideen O'Reilly is head of legal and tax at the National Asset Management Agency.



BALAN

The *Criminal Procedure Act 2010* was passed into law on 1 September 2010 and institutes far-reaching changes to our criminal justice system. Orla Keenan wonders whether the seismic changes it heralds amount to a step too far in favour of the victim

The *Criminal Procedure Act 2010* was passed into law on 1 September 2010. The act institutes far-reaching changes to our criminal justice system and introduces a radically altered landscape for an accused. The act has largely been welcomed by advocates of a more 'victim-centred' approach, but others have argued that the act goes too far in eroding traditional due-process values.

Part 2 of the act reforms the law relating to victim impact evidence. The act limits the application of this section to the victims of sexual offences and offences involving violence, or the threat of violence. Under the *Criminal Justice Act 1993*, the sentencing court was only entitled to take into account the effect of the offence in question on the direct victim, and the entitlement to make oral submissions to the court, commonly known as a 'victim impact statement', was similarly circumscribed. The new act expands the concept of 'victim' to include family members of a victim who has died, is ill or otherwise incapacitated – an omission from the 1993 act that proved to be highly controversial.

The act makes it clear that the purpose of such evidence is to assist the court in reaching an appropriate sentence for the convicted offender. This expansion arguably runs uneasily alongside the well-hallowed principles of sentencing, which emphasise the role of the court as an objective and detached adjudicator, functioning on behalf of the state and focusing on the

CING ACT?

gravity of the offence and the personal circumstances of the offender to reach a just punishment removed from any suggestion of vengeance or personal retaliation. Critics of this new development may argue that this widening of the concept of victim may introduce a risk of inconsistency and unfairness where, the more popular or well-loved the victim appears, a person is punished more harshly.

An alternative view of the new regime is that any such statement from a family member is simply a specific illustration of the general impact of the offence on the wider community, which the court can validly and objectively consider in deciding a just penalty. Furthermore, supporters contend that this section of the act is a welcome improvement to the position of families of victims who can often feel excluded in the trial process.

Under section 4, provision is made for a parent, guardian or family member to make the victim impact statement on behalf of a child or person with a mental disorder – but this does not preclude such persons from making a submission or giving evidence themselves, and this can be done by video-link or through an intermediary. Under section 4(5) the court may, in the interests of justice, prohibit the broadcasting or publication of all or part of any victim impact statement. This is a welcome safeguard and should go some way to protecting the integrity of the court process and ensuring the rights of the convicted offender.

Double jeopardy

Perhaps the most fundamental change in criminal procedure introduced by the act is contained in part 3, which amends the rule against double jeopardy or the principle that, once a person has been acquitted of an offence, that acquittal is to be regarded as irrevocable. Under sections 8 and 9, the rule is modified by entitling the Director of Public Prosecutions to make

an application to the Court of Criminal Appeal for a retrial order for a person who is acquitted of an offence on the grounds of “new and compelling evidence” that emerges post-acquittal, or where an acquittal is “tainted” by an offence against the administration of justice. In both instances, the court must be satisfied that an order for retrial is in the public interest and in the interests of justice, having regard to:

- The likelihood that any retrial could be conducted fairly,
- The time that has passed since the commission of the offence,
- The interests of the victim, and
- Any other matters the court considers relevant.

‘New and compelling evidence’ is defined as evidence that was not and could not, with the exercise of due diligence, have been adduced in the previous proceedings. It must be reliable, of significant probative value, and be such that, taken with all the other evidence, a jury might reasonably be satisfied beyond a reasonable doubt of the person’s guilt.

‘Fresh evidence’ appeals can only be taken in respect of certain specified serious offences; however, an application by the DPP for a retrial order where the previous acquittal was ‘tainted’ can be made in respect of any trial on indictment. In both instances, the relevant sections are to have prospective application only, and the DPP can make only one application for a retrial order under each section. Under section 14, a further appeal may be possible to the Supreme Court in limited circumstances.

This radical legislation is compatible with the state’s obligations under the *European Convention on Human Rights* and, in particular, article 4 of protocol 7, which provides that a person should not be tried again for an offence for which he or she “has already been finally acquitted or convicted” – except where there is evidence of “new or newly discovered facts” or where

MAIN POINTS

- **Criminal Procedure Act 2010**
- **How it affects the accused**
- **Victim impact evidence**
- **Double jeopardy modifications**



LAW SOCIETY

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19 Nov	Tactical negotiation skills workshop (Dublin)	€126	€168	3 Management and professional development skills
25 Nov	Annual family law conference 2010 (Dublin and via video-link to Cork)	€231	€308	5.5 General by group study
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2 Dec	Legal issues in wind farm development	€168/€84	€224/€112	1 – 4 General by group study – depending of number of sessions attended
10 Dec	Tactical negotiation skills workshop (Cork)	€126	€168	3 Management and professional development skills

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LAW SOCIETY

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6 Nov	International financial services law – regulatory capital requirements and credit institutions – <i>Basel II</i> and the capital requirements directive. Robert Cain – partner, Arthur Cox (10am – 12pm)	€298	€397	2 General by group study
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20 Nov	International financial services law – international bond markets. Colin Bamford – barrister-at-law, London (10am – 12pm)	€298	€397	2 General by group study
27 Nov	International financial services law – debt securitisation and its role in the post-credit crisis world. Kevin Ingram – partner, Clifford Chance, London (10am – 12pm)	€298	€397	2 General by group study
4 Dec	International financial services law – principles of Islamic finance. Farmidi Bi – partner, Norton Rose, London (10am – 12pm)	€298	€397	2 General by group study
11 Dec	International financial services law – double taxation treaties and Ireland's network. Pat Wall – partner, PricewaterhouseCoopers, Dublin (10am – 12pm)	€298	€397	2 General by group study

All of the lectures will be held in the National College of Ireland, International Financial Services Centre, Dublin 1.

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'WITH PREJUDICE' APPEALS

Part 4 of the *Criminal Procedure Act 2010* provides the DPP and the attorney general with a right of appeal to the Supreme Court on a 'with prejudice' basis against an acquittal, which arises from an erroneous ruling by the trial judge on a point of law arising during the trial.

Critics, such as the Irish Council for Civil Liberties, have argued that a natural corollary to the article 38.5 guarantee that "no person shall be charged on any criminal charge without a jury" is the assurance that a judge cannot overturn the decision of a jury.

However, it can also be asserted that, as matters

stood, the criminal justice system was continuously reviewing potentially flawed convictions, scrutinising and adjusting the rules to reduce the likelihood of erroneous convictions in the future. This provision now introduces a comparable process with respect to correcting rules that are conducive to mistaken acquittals, thus addressing an unwarranted and unjustifiable imbalance in the system.

Section 23(2) of the act also allows the DPP or attorney general a right of appeal against a decision of the Court of Criminal Appeal not to order a retrial following the quashing of a conviction.



Modifications to the rule of double jeopardy are, perhaps, the most fundamental change in criminal procedure

there has been a "fundamental defect" in the previous proceedings. Similarly, this fundamental break with tradition can be said to be constitutionally sound. In *Considine v Shannon Fisheries Board*, the Supreme Court ruled that statutory exceptions to the protection against double jeopardy were permissible, provided that they were expressed in clear terms.

Proponents of the traditional double-jeopardy rule will point to the necessity of finality for the accused, the need to encourage efficient investigation and, most importantly, the increased risk of a wrongful conviction in a second trial. In this regard, it has been argued that the chance that a particular defendant will be perversely convicted must increase if she or he is tried more than once. Furthermore, on a second prosecution, the strategy of the accused and the version of events they will advance is known, and this fact may enable the prosecution to unfairly mend their hand by making superficial changes to their approach, which might nonetheless increase the likelihood of conviction.

On the other hand, supporters of the reform in the law in this area see the asymmetry and bias in the old system, which insulates an acquittal from review no matter how flawed, but provides for a number of safeguards against a wrongful conviction through the appeal process. It should be noted, however, that the impact of this provision may be more symbolic than actual, given the British experience, where, in the seven years since the equivalent law was similarly reformed, only two applications for a retrial after an acquittal have been made.

Expert evidence

Another novel introduction of the new act is contained in section 34, where an accused is no longer entitled, as of right, to call an expert witness or adduce expert evidence, and must be given leave to do so by the court. The defence must generally give the prosecution ten days' notice of their intention to call such a witness.

While the prosecution is obliged to give an accused notice of expert evidence they intend to adduce, they do not require the leave of the court to do so. This imbalance between the prosecution and the defence is,

at present, the subject of a constitutional challenge.

The final substantial reform introduced by the act concerns the amendment of the *Criminal Justice (Evidence) Act 1924*, which relates to the giving of evidence relating to the bad character or previous convictions of an accused. The 1924 act precludes an accused being cross-examined as to bad character except in very limited circumstances, which include, among others, when he or she has given evidence of his own good character, has questioned a witness for the prosecution with a view to establishing his or her good character, or has made imputations against a prosecution witness. The rationale behind these restrictions is that such evidence may be disproportionately prejudicial and may thus undermine the principle of the presumption of innocence and the burden of proof.

Character evidence

Section 33(a) of the act expands the situations when the 'shield' may be dropped to include circumstances where the defence leads evidence from a defence witness about the accused's good character, or a defence witness makes imputations against a prosecution witness. Furthermore, if an accused gives evidence or leads evidence from any witness, leading to allegations as to the character of a deceased or incapacitated victim, the shield may also be lost. Again, this controversial amendment can be seen as a significant weakening of an accused's position at trial.

The framers of the legislation have cast the act as a further step in the recalibration of the justice system, from the interests of accused persons in favour of victims of crime. While certain provisions in the act address very obvious *lacunae* in the criminal justice system, it remains to be seen whether the seismic changes instituted by the act amount to a step too far. **G**

Orla Keenan is a solicitor at Garrett Sheehan and Partners. The author is grateful for the advice of Dara Robinson, a partner in Garrett Sheehan and Partners and chairman of the Criminal Law Committee of the Law Society.

LOOK IT UP

Cases:

- *Considine v Shannon Fisheries Board* (1997) 2 IR 404

Legislation:

- *Bunreacht na hÉireann*
- *Criminal Justice Act 1993*
- *Criminal Justice (Evidence) Act 1924*
- *Criminal Procedure Act 2010*
- *European Convention on Human Rights*

A finding that a person lacks capacity may result in the restriction of their fundamental rights at the most basic and practical levels. A solicitor faces particular demands in advising a client whose capacity is at issue, writes Margaret Walsh

Full to ca

Legal capacity and mental capacity are two different creatures. In the legal context, ‘capacity’ is the ability to enter into a transaction or to exercise rights that may have consequences for other people, such as making a will, a gift, a contract, an enduring power of attorney, or being able to manage one’s property and affairs. Incapacity generally arises by reason of an inability to make a decision through ‘mental incapacity’ or by operation of law such as applies to legal minors and children. A finding that a person lacks legal capacity may result in the restriction – even removal – of their fundamental rights at the most basic and practical levels: where and with whom they live, their ability to make financial decisions and to deal with their assets.

A solicitor faces particular demands in taking instructions from and advising a client whose capacity is at issue. To quote Barron J in *Carroll v Carroll*:

“A solicitor or other professional person does not fulfil his obligation to his client ... by simply doing what he is instructed to do. He owes such person a duty to exercise his professional skill and judgement and he does not fulfil that duty blithely following instructions without stopping to consider whether to do so is appropriate. Having done so, he must then give advice as to whether or not what is required of him is appropriate.”

Models of capacity

In Ireland, we have no generally applicable definition of capacity at common law or statute. There are essentially three capacity models:

- The ‘status approach’, used in the wards of court system and for enduring powers of attorney (made pursuant to the *Powers of Attorney Act 1996*), assesses a person’s legal capacity based on the presence or absence of certain characteristics. It is an across-the-board assessment, based on disability.

MAIN POINTS

- Legal capacity and mental capacity
- Assessing capacity
- Guidelines for solicitors advising clients

capacity

- In the 'outcome approach', the assessment is determined by the individual's decision, which, if it does not conform to societal values or those of the assessor, might be deemed to be evidence of incapacity.
- The 'functional approach' is now generally accepted as the most appropriate. It focuses on the person's cognitive ability to understand the nature and consequences of a decision, based on the choices available. Capacity is assessed on an issue-specific basis, such as the capacity to make a will, a gift, marry, or consent to medical treatment. Confirmation that a person lacks capacity in relation to one issue will not necessarily carry through into another. This model has the benefit of minimum interference with an individual's decision-making autonomy, as capacity is not fixed for all time but is time and issue specific. The HSE has adopted the functional model in its *Patients' Private Property Guidelines* and for doctors providing mental capacity reports in the Nursing Home Support Scheme.

Irish law presumes capacity – a presumption that may be displaced by a person seeking to establish lack of capacity. In the legal context, the assessment of capacity is ultimately a judicial rather than a medical decision. The doctor's role is as expert witness. While courts do attach weight to the evidence of medical practitioners, they will not always prefer the doctor's opinion. Solicitors

will be aware that medical evidence is essential in wardship applications and on the creation and registration of enduring powers of attorney. However, the desirability of obtaining medical evidence in relation to capacity as a matter of good practice, such as when drawing up a will for a client who may be elderly, vulnerable, or both, has been well reviewed and affirmed by the courts. Where this is necessary, the solicitor should provide the doctor with all necessary background information and details of the relevant legal test to be applied.

Different levels of understanding are required of the client for different transactions, such as making a will, separation and divorce, making a gift, creating an enduring power of attorney, entering into a contract, and many others. Different information will be relevant when a solicitor is enquiring whether or not a client is incapable of managing his or her own affairs, as opposed to whether a client is capable of making a valid will or entering into a contract. It has been said that the highest level of capacity is that required to make a will. In *Park v Park*, a man of advanced years who married and executed a will on the same day was found to have had the capacity to marry, but not to make the will.

Assessing capacity

For the solicitor, capacity is not an exact science. A client who is unwell may have lucid intervals. The guidelines to assist with assessment of capacity set out below, reproduced from the Law Society's recently updated guidelines *Drafting Wills for the Elderly Client*, are based on those in *Tolley's/STEP Finance and Law for the Older Client*:

- 1) The party assessing capacity should understand the nature and effect of the transaction involved, making sure that they have all the relevant documentation and background information.
- 2) Corroborative information should be obtained

LOOK IT UP

Cases:

- *Banks v Goodfellow* [1870] LR 5 QB 549
- *Carroll v Carroll* [1999] 4 IR 241
- *M v M* (High Court, judgment of Hedigan J, 30/10/2009)
- *Park v Park* [1953] 2 AER 408
- *Powell v Powell* [1900] 1 Chapter 243
- *Schtukaturv v Russia* (EctHR 2008)

Literature:

- Health Service Executive, *Nursing Home Support Scheme – Guidance Document of the Functional*

Assessment of Capacity

- Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC CP83-2006)
- Law Society, *Drafting Wills for the Elderly Client*
- Scheme of *Mental Capacity Bill 2008*
- *Tolley's/STEP Finance and Law for the Older Client*

Legislation:

- *Lunacy Regulation Ireland Act 1871*
- *Mental Health Act 2001*
- *Powers of Attorney Act 1996*

where necessary, and this may include a diagnostic assessment of the client (medical advice).

- 3) Medical evidence that has assessed the client's cognitive skills should be regarded as a supplement to, not a substitute for, the legal test for capacity.
- 4) Be fully aware of the legal test (if there is one) for assessing the capacity required and its particular context.
- 5) All information relevant to making the decision or the nature and effect of the transaction should be explained to the client in broad terms and simple language.
- 6) After a reasonable time span, the client should be able to paraphrase roughly the explanation he or she has been given.
- 7) Avoid questions that are likely to produce the answers 'yes' or 'no'.
- 8) Don't be misled by the client's preserved social skills into believing that they have the requisite capacity to enter into a particular transaction or make a particular decision.
- 9) Assessment of capacity or the lack of it is, on the balance of probabilities, not beyond reasonable doubt.
- 10) Consider whether to repeat the assessment of capacity within a day or two.
- 11) An individual does not lack capacity merely because he/she makes a decision that seems imprudent or eccentric.
- 12) Always make immediate and comprehensive notes.

Although it can be difficult, such as when someone is introduced by a family member, it is important at the outset that a solicitor establishes which person is the client and whether that person wishes to retain him. Instructions should be obtained solely from the client – seen alone – and not from a third party. The benefit of the solicitor's full and independent advice as to whether what the client proposes is appropriate for their circumstances should be given without reference

to the needs or issues of a third party. Transactions that will trigger particular concern for the person whose capacity is in doubt include wills, joint accounts, enduring powers of attorney, gifts/voluntary disposals, and particularly so where some person is in a dominant position over the client.

“The solicitor should be aware of the future needs of the client and alert to the possibility of undue influence, the improvident or unconscionable bargain, conflict of interest or duress”

The solicitor should be aware of the future needs of the client and alert to the possibility of undue influence, the improvident or unconscionable bargain, conflict of interest or duress. As Farwell J stated in *Powell v Powell*, it is the duty of the solicitor “to protect the donor against himself and not merely against the person in influence of the donor”. If a solicitor is not satisfied that his client is free from improper influence due to vulnerability arising from a lack of capacity, then there is a duty to advise the client not to enter into the transaction or to refuse to act. As a minimum, a solicitor might consider setting out clearly in writing the reasons for the advice and what action or inaction is believed to be in the best interests of the client. Careful and contemporaneous notes should be recorded where the client lacks capacity and the solicitor concludes it is not possible to obtain instructions. Likewise, where there is a doubt, but the solicitor opts to proceed, very careful and

detailed notes should be made regarding the taking of instructions and the execution of any documentation.

Reform of the law

The Law Reform Commission published three documents in this area between 2003 and 2006, the last being its *Report on Vulnerable Adults and the Law*. The commission recommended that the law emphasise capacity rather than lack of capacity, be enabling rather than restrictive, and reflect the shift from the medical model of disability towards a rights-based model affirming the dignity of the individual.

The *Mental Health Act 2001*, in its definition of mental disorder in section 3, may give rise to capacity

Statistics from the Alzheimer's Society of Ireland indicate that approximately 40,000 new cases of dementia are diagnosed in Ireland every year – more than 100 people a day. Reform of the law in this area is well overdue. **G**

Margaret Walsh is a partner in Sheil Solicitors, Dublin. She is a member of the Law Society's Probate, Administration and Trusts Committee and the sub-committee of the Guidance and Ethics Committee addressing the financial abuse of the elderly.

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The right

Sometimes described as the third arm of the legal profession, the office of the notary public is the oldest surviving branch of the legal profession. Eamonn Hall traces the history, current functions and duties of the office, and tells how to become a notary

Originally described by the title of ‘public notary’, the present day office of the notary public is the oldest surviving branch of the legal profession – and is sometimes described as the third arm of that profession. In non-contentious legal business, the notary has a comparable standing to that of a solicitor or barrister and has a unique place in international business affairs.

The profession of notary traces its origins to the scribes in ancient Egyptian civilisation and the *tabelliones* of Rome. The *tabelliones*, a class of professionals who transacted legal business, became prominent in Rome between the second and third century AD. The influences of the East, the importance of commerce in the Roman Empire, and the necessity to have written legal documents governing transactions all fostered the development of the profession of notary. A significant evolution of the notary was when *notarii* became secretaries to the authorities – principally the emperor and leading ecclesiastics.

The emperor and the Pope appointed notaries, and the status of the notary subsequently flourished on mainland Europe. In the days of Charlemagne (742-814), whose empire united most of Western Europe, instruments drafted by notaries on the continent of Europe acquired the same status and effect as a conclusive judgment. Such is the same today on mainland Europe with the notary’s authentic instrument. Christopher Columbus took a notary with him on his epic voyage to America to certify the truth of what he saw and to take possession of the land.

The notary came to some prominence in Ireland after the Norman invasion and later English conquest.

In Lambeth Palace Library, I discovered a notarial instrument of 16 February 1395, in which Art MacMurrough and other leading Irish chiefs at Ballygory, near Carlow, in the presence of Thomas Earl of Nottingham, Marshal of England, took oaths of allegiance to King Richard II, and certain other oaths to observe covenants in an indenture. There are statements in notarial instruments in Ireland around this time that King Richard II (who spent seven months in Ireland between October 1394 and May 1395) and the party to the instrument “requested the notary to make the agreements public instruments”.

The Reformation affected the appointment of notaries in Ireland as in England. Henry VIII (1509-1547) denied the Pope any authority in the appointment of notaries and the Archbishop of Canterbury became the ‘civil’ appointing authority in England. (Today, in England and Wales, the candidate notary receives his or her faculty from the Archbishop of Canterbury.) In Ireland, the Archbishop of Armagh and the Court of Faculties, later to become the Court of Prerogative and Faculties, were constituted as the appointing authorities for the notary public. The Lord Chancellor exercised the power to appoint notaries from 1871 until 1924, when, under the *Courts of Justice Act* of that year, the power was transferred to the Chief Justice of Ireland. Since 1924 (confirmed by the *Courts (Supplemental Provisions) Act 1961*), the Chief Justice has been and remains the appointing authority.

Regulation of notaries

The principal statute regulating notaries public in Ireland is the *Public Notaries (Ireland) Act 1821*, which, though obsolete for the most part, remains part of applicable law. This statute does not set out

MAIN POINTS

- The office of notary public
- Functions and powers
- Admission to the profession

note



the powers, functions and duties of a notary public, but section 1 provides (with criminal sanctions) that “no person may act as a public notary, or use and exercise the office of a notary public, or do a notarial act, unless such person shall have been duly sworn, admitted, and enrolled”. Other provisions of the 1821 act relate to apprenticeship, and the appointing authority for notaries is specified to be the Court of Faculties and “the Lord Archbishop of Armagh”, as referred to above. There is also provision for certain disciplinary sanction against the notary, including

provision for striking the notary “off the roll of faculties”. The Chief Justice exercises regulatory control over the notary, pursuant to directions issued under the *Rules of the Superior Courts*.

Functions and powers

The functions of the notary public in Ireland today are intertwined with the history of Ireland and its legal inheritance from the United Kingdom of Great Britain and Ireland. Article 73 of the *Constitution of the Irish Free State* (1922) provided that “laws in force”



at the coming into effect of the constitution “shall continue to be of full force and effect” to the extent that they are not inconsistent with the constitution and until repealed or amended by enactment of the Oireachtas.

The laws of Ireland (as part of the United Kingdom of Britain and Ireland) prior to the foundation of the state in 1922 may be found principally in statute law and the various manifestations of the common law. There is no specific statute that sets out the functions of the notary public. This is not surprising, as there is no definitive statement of law as to the specific powers, functions and duties statute of a solicitor, barrister or medical doctor. The powers, functions and duties of the regulated professions evolved over time.

As in many other matters, where there is no specific statute setting out the law, we depend on a statement of the law set out in judicial decisions or in the textbooks of legal scholars. Apart from statutes and judicial case law, the most authoritative statement of the law in Ireland immediately prior to the dissolution of the political entity of the United Kingdom of Great Britain and Ireland in 1922 may be gleaned from the celebrated *Laws of England* with its subtitle *A Complete Statement of the Whole Law of England* by the Earl of Halsbury, then a former Lord Chancellor of Great Britain, and other lawyers. The edition to which I refer is the first edition of 1907, with the title of ‘Notaries’ published in volume 21 in 1912. The aim of the work known as *Halsbury* was to supply a consolidation or complete statement of the law of England and to set out “the whole living law” relating to the subject in question. (In 1922, the law of England was the same as the law in Ireland, unless there was some particular Irish statute law or judicial

case law to the contrary.) I set out the background to *Halsbury* because it is partly being relied upon here for convenience as a statement on the functions and powers of notaries, about which there appears to be some confusion expressed from time to time.

The opening words of the title on notaries in *Halsbury* (1912) comprise a succinct statement of the notary’s functions. A notary public is stated to be a duly appointed officer whose public office it is, among other matters, to draw, attest or certify, usually under his official seal:

- Deeds and other documents, including conveyances of real and personal property,
- Powers of attorney relating to real and personal property situate (domestically) or in foreign countries,
- Note or certify transactions relating to negotiable instruments,
- Prepare wills or other testamentary documents, and
- Draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation, as well as the carriage of cargo in ships.

The functions set out above are specifically repeated and expanded upon under the heading ‘Functions’ in the *Halsbury* title on notaries, prefaced by the words “a notary is entitled to prepare deeds, agreements and wills relating to real and personal property”, and the list of functions above is effectively repeated.

Among the functions expanded upon in this section of *Halsbury* is the well-known function of verifying, authenticating and attesting the execution of deeds or other documents, and powers of attorney. There is also a specific reference to the notary’s function in protesting bills of exchange. There is also a reference to the noting and drawing up of ships’ protests. *Halsbury* concluded the section on the functions of the notary by noting that “from an early period”, notaries have exercised the right of administering oaths and taking declarations.

I am fortified as to the correctness of my description of the functions of the notary set out above by provisions in the *Solicitors Acts*. Section 58 of the *Solicitors Act 1954* as inserted by section 77(a) of the *Solicitors (Amendment) Act 1994* prohibits unqualified persons from drawing or preparing a document relating to real or personal estate or any legal proceedings, land registration matters and probate and letters of administration. The penalties specified include fines on conviction on indictment and summarily. However, section 58(3) of the *Solicitors Act 1954* provides for an exemption from the strictures above in relation to acts done by a barrister practising in the state or by a notary public as such.

Admission to the profession

The rules relating to admission to the profession are set out in the *Notaries Public Examination Regulations 2007-2010*. These regulations may be found on the website of the Faculty of Notaries Public in

LOOK IT UP

Literature:

- O'Connor, *The Irish Notary* (1987)
- Hall and O'Connor, *Supplement to The Irish Notary* (2007)
- Website of Faculty of Notaries Public in Ireland, www.notarypublic.ie
- Website of the Supreme Court (Business of the Office), www.courts.ie (see under 'Appointment of notaries public/practice directions/notary public petition document/certificates of authentication')
- Website of the United Kingdom and Ireland Notarial Forum, www.ukinf.org.uk
- Website of the International Union of Notaries, www.uinl.org

Ireland, www.notarypublic.ie, under 'Admission to the profession'. At the time of writing, there is no specified course of education at a university that the aspiring notary must pursue. This is in contrast to England and Wales, where a barrister, solicitor or other legally qualified person with training approved by the Master of the Faculties (Faculty Office of the Archbishop of Canterbury) must pursue and pass a two-year, part-time, postgraduate diploma in notarial law and practice from the University of Cambridge – the only institution in England and Wales authorised to provide that course of study.

In Ireland, a person must pass the faculty examination set by the Faculty of Notaries Public in Ireland. To be eligible to sit the faculty examination (held in May of each year), an applicant "must be a practising solicitor or barrister in good standing who on the date of his or her application to sit the faculty examination, has not less than five years' post-qualification experience in the general practice of law (at least two consecutive years of which shall be in the period immediately preceding the application)". The syllabus is set out in the *Examination Regulations* stated above and comprises the following:

- History of the notary public in Ireland,
- Ethics for the notary public,
- Private international law,
- Roman law,
- Aspects of company law and practice,
- Bills of exchange, including noting and protesting for non-acceptance/non payment,
- Ships' protests,
- The *Hague Convention* of 5 October 1961 and relevant EU conventions,
- Powers of attorney, including enduring powers,
- Intercountry adoption,
- Money-laundering legislation,
- Notarial practice, including oaths: substance form and procedure; attestation, authentication and certification of documents, deeds and transactions.

Candidate notaries are referred to specific sections of O'Connor, and Hall and O'Connor, mentioned above and papers published on the faculty website for guidance. (A candidate may use any other relevant textbook.)

The requirement for a candidate notary to show an immediate need for his or her appointment was dispensed with by the Chief Justice by direction dated 25 January 2006. The candidate notary applies by way of petition to the Chief Justice in open court referring, among other things, to his or her certificate of the result of the faculty examination.

"Christopher Columbus took a notary with him on his epic voyage to America to certify the truth of what he saw and to take possession of the land"

Independent branch

The office of notary public is an independent branch of the legal profession in Ireland with significant legal functions. The 'Celtic Tiger' and the influx of immigrants to Ireland breathed life into the profession of notary in Ireland. The Faculty of Notaries Public in Ireland (and its governing council, which, in part, regulates the office of notary in Ireland) has been reinvigorated in recent times and plays its role in international affairs by being a full member of the United Kingdom and Ireland Notarial Forum, which meets

quarterly in the domestic capitals. The faculty also played a significant role in the inauguration in Dun Laoghaire, Dublin, of the World Organisation of Notaries in March 2010, intended to represent the interests of notaries public worldwide, especially in common law jurisdictions. The faculty has also taken a keen interest in the development of e-notarisation and the forthcoming extension of the e-apostille pursuant to the relevant *Hague Convention*. **G**

Dr Eamonn G Hall is a notary public, director of education with the Faculty of Notaries Public in Ireland, a member of its governing council and an associate member of the International Union of Latin Notaries. This article is written in a personal capacity.

Portrait of a lady – Society honours Moya Quinlan



(Front, l to r): Michael Quinlan (Chair, Regulation of Practice Committee), John L Murray (Chief Justice), Moya Quinlan (Past-President of the Law Society, 1980-1981), Gerard Doherty (President of the Law Society) and Brendan Quinlan. (Back, l to r): Richard Johnson (retired President of the High Court), Mary Keane (deputy director general), Fr Martin Clarke (solicitor), Frank Murphy (solicitor), Ken Murphy (director general), Frank O'Donnell (Circuit Court judge and Past-President of the Law Society, 1983-1984), Maurice Gaffney (SC) and John Costello (senior vice-president)

A very special dinner was held by the Law Society recently for a very special lady. Earlier this year, Moya Quinlan celebrated her 90th birthday. She has been an elected member of the Council of the Law Society continuously for more than 40 years. She was president of the Law Society exactly 30 years ago – the first woman ever

to be elected to that office in the 170 or so years of its existence.

The guests at the dinner in her honour were chosen by her. It was appropriate that they should be photographed beforehand under the portrait of Moya that hangs in the Society's Council Chamber at Blackhall Place.



Moya stands in front of her portrait by David Hone, which hangs in the Council Chamber



PIC: LENS MEN

The Society invited a group of recently-qualified solicitors to Blackhall Place on 21 September to discuss matters of interest. At the meeting were (front, l to r): Melanie Evans, Tracey Lyne, Ellie Dunne, Gerard Doherty (president, Law Society) Gemma Neylon, Susan Roe and Carol Eager. (Back, l to r): Emma Brogan, Mary Keane (deputy director general), John Costello (senior vice-president), Eamonn Freyne, Keith O'Malley and Ken Murphy (director general)



In his last days as President of the Dublin Solicitors' Bar Association, John O'Malley kept the best wine till last. In recognition of the 75th anniversary of the DSBA, John was invited to afternoon tea with the President of Ireland, Mrs Mary McAleese, at Áras an Uachtaráin. Accompanying him were past-presidents of the DSBA and present and past council members. To mark the occasion, John presented the President with a beautifully inscribed silver salver on behalf of the association



PIC: COLLINS PHOTO AGENCY

Mr Justice Gerard Hogan has been appointed to the High Court by President Mary McAleese. Mr Hogan graduated in law from UCD in 1979, was called to the Bar in 1984 and fills a vacancy arising from the promotion of Mr Justice Liam McKechnie to the Supreme Court. Celebrating on 15 October after a ceremony in the Supreme Court were (l to r): his son Hugh, wife Karen, son Emmet and daughter Hilary



PIC: LENS MEN

Attending the recent annual advanced advocacy course run by Law Society Professional Training were (back, l to r): Stephen Walsh, Joanne Kangley, Mike Dale (NITA), Paul Kelly, Rory O'Boyle, Donagh McGowan, Sandra Johnson (NITA), Colette Reid, John O'Keefe and Bo McDowell. (Front, l to r): Carol Sinnott, Rachael Hession (course manager), Judge Carroll Moran, Gerard Doherty (Law Society president), Attracta O'Regan (head of Law Society Professional Training) and Sylvia McNeece



At the launch of the LLM (Practitioner) course, a collaboration between University College Cork and the Law Society's diploma programme, were (l to r): Past-President of the Law Society James MacGuill, Freda Grealy (diploma manager), Rory O'Boyle (diploma co-ordinator), TP Kennedy (director of education) and Professor Steve Hedley (dean of the Faculty of Law, UCC)



Celebrating the launch of *Landlord and Tenant Law – The Residential Sector* at King's Inns on 14 October were (l to r): Jennifer Ring (solicitor and author), Ms Justice Mary Laffoy and Úna Cassidy BL (author)



Before



After

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Law Society of Ireland

books



National Asset Management Agency Act 2009: Annotations and Commentary

Hugh B Byrne and Louis McEntagart. Bloomsbury Professional (2010), www.bloomsburyprofessional.com. ISBN: 978-1-84766-504-1. Price: €95.

As Mr Justice Finnegan says in the foreword to this extremely useful work, the *NAMA Act* “will be a feature of the economic, social and legal landscape of Ireland for many years to come”. Running to 241 sections in 14 parts and with three schedules – schedule 3 having 11 parts amending other enactments – the *NAMA Act* is a formidable piece of complex legislation that has also spawned several statutory instruments (also reproduced in this book). No act of the Oireachtas has received more publicity or sustained media commentary than the *NAMA Act*, so it is entirely appropriate that it should be the subject of this monograph, published soon after its enactment.

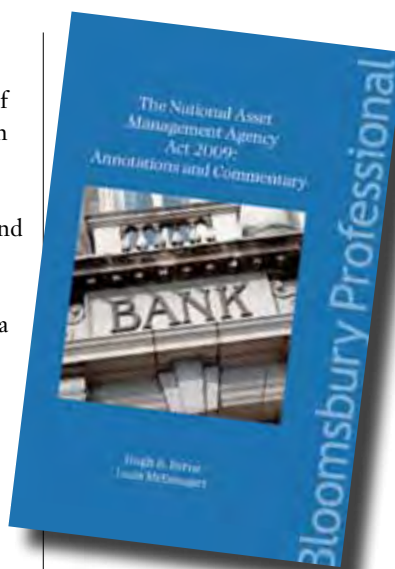
The purpose of the act is to address the serious threat to the economy and the stability of credit institutions in the state generally, and the need for the maintenance and stabilisation of the financial system in the state, and to address a number of other compelling needs, including facilitating the availability of credit, resolving problems created by the financial crisis expeditiously and efficiently, and protecting the interests of the state and taxpayers.

The primary means of achieving those purposes was to establish *NAMA* as a statutory corporation and mandate it to *acquire eligible bank assets* (primarily *credit facilities* of debtors and *related debtors* and the *security* (including *charges*) for such credit facilities) from *participating institutions*. The reason for the parentheses

is that each of the words or phrases in italics are all terms that are defined in section 4 of the act. In NAMA-speak, even a short sentence can import a multitude of precise, clearly defined statutory meanings, and it is against that background that this book is an essential tool for practitioners seeking a path through the legislation.

In its treatment of each provision in the act, the book carefully points out (in a ‘definitions’ section) those terms that are defined and carry a meaning under the act that is additional to their ordinary dictionary meaning. And within each annotated section, this is repeated, prompting the authors to point out that, while this may appear to be unnecessarily duplicated, “it is hoped that their inclusion will be of assistance, particularly to readers who are only interested in specific sections”. The authors’ decision in this respect was, to my mind, undoubtedly correct. Few people will have cause to sit down and read this book from cover to cover; many will, on the other hand, have reason to examine particular provisions, most likely in great detail, and it is a great advantage to such readers that they can obtain a comprehensive analysis in each provision.

One of the main purposes of the *NAMA Act* is to transfer to NAMA the ownership of loans and other credit facilities from the participating institutions (banks and building societies) that originated those loans in return for their long-term economic value. The same time,



diligence and effort that one would expect the banks to have put into the making of those loans and the taking of security for them is simply not available to NAMA. Accordingly, the *NAMA Act* facilitates the effective and efficient transfer of loans to NAMA by providing a statutory mechanism whereby ownership transfers by operation of law and also by disapplying certain laws that might otherwise operate to taint or impair NAMA’s ownership of an acquired loan and its security. One such provision is section 218, which provides that “an acquired bank asset is not invalidated or rendered void or voidable as against NAMA or a NAMA group entity or their successors in title – (a) by section 60, 99, 100, 111, 286 or 288 of the *Companies Act 1963*, (b) by section 29, 31 or 139 of the *Companies Act 1990*...” Here, the book is superb in saving its readers a trek through the *Companies Acts*, as it reproduces each of the foregoing provisions as amended.

One small omission is the absence of commentary on the provisions contained in the schedules to the *NAMA Act*. Schedule 3, part 1, for example, which amended the *Building Societies Act 1989*, was the legislative basis for the issue of special investment shares in INBS and EBS Building Society that, when issued to the Minister for Finance, gave him effective control over those societies.

No commentary is provided on these and other changes to the *Companies Acts*, *Finance Act*, landlord and tenant legislation, and so on, set out in the schedules. However, while such commentary would make this book more comprehensive, it is accepted that they are peripheral to the main purposes of the *NAMA Act*, and the foregoing observation is more in the nature of a quibble than a gripe.

In producing and publishing this book so quickly, Mr Byrne and Mr McEntagart could not include any developments in the interpretation of the provisions of the act, whether by the courts or in its practical application. This is unavoidable where a book comes to market so quickly and, given that NAMA is likely to be around for many years to come, any developments or omissions in this work might well be picked up in a second edition.

For anyone and everyone affected by NAMA, whether as borrower, banker or advisor, this book is a must. **G**

Dr Thomas B Courtney is a partner in Arthur Cox.



BRIEFING

council report

Law Society Council meeting, 24 September 2010

Motion: guidelines on vulnerable clients

"That this Council approves guidelines for solicitors when acting for vulnerable clients in property transactions in the form attached."

Proposed: Brendan Twomey

Seconded: James Cahill

Brendan Twomey outlined the background to the motion and made reference to relevant case law where the judiciary had expressed concerns about solicitors acting for both parties in property transactions, particularly where one party might be regarded as vulnerable. He accepted that there were difficulties in defining what constituted 'vulnerable' and he noted that the guidelines did not seek to do so, but gave practitioners a 'signpost' towards those factors that might, in certain circumstances, constitute vulnerability. Keith Walsh expressed concern that the guidelines could be used by a client against a solicitor in circumstances where the solicitor was not aware of the vulnerability at the time of the provision of legal advice.

Liam Kennedy said that the motion sought to address a significant issue of public interest. He noted that the guidelines did not suggest that a solicitor could not act at all in circumstances where one party was vulnerable. The guidelines suggested that, in those circumstances, a solicitor could not act on both sides. The Council approved the guidelines and agreed that they should be issued to the profession in the form of a practice note.

Motion: PII regulations

"That this Council approves the Solicitors Acts 1954 to 2008 (Professional Indemnity Insur-

ance) (Amendment) Regulations 2010."

Proposed: Eamon Harrington

Seconded: Stuart Gilhooly

Eamon Harrington noted that the underlying policy in relation to the regulations had already been approved by the Council in its adoption of the report and recommendations of the PII Task Force. In addition to the draft statutory instrument, draft qualified insurers agreement, and the proposed changes to the minimum terms and conditions, he referred the Council to a memorandum clarifying two matters in relation to the meaning of a 'defaulting run-off firm' and the time limit for making an application to join the ARP. The Council approved the draft regulations and other documentation that had been circulated.

Prescriptive easements

Kevin O'Higgins outlined a difficulty that had been identified by the Conveyancing Committee in relation to prescriptive easements and part 8 of the *Land and Conveyancing Law Reform Act 2009*. The Council approved a draft letter to the Department of Justice seeking a legislative amendment to rectify the difficulty.

Prohibition on commercial undertakings

Past-president John Shaw confirmed that the Commercial Undertakings Task Force would issue precedent documentation to the profession shortly, and it was important that practitioners would not sign certificates of title that did not adhere to the format recommended by the Society.

Meeting with Minister for Enterprise, Trade and Innovation

The president briefed the Council on a meeting with the Minister for Enterprise, Trade and Innovation to discuss the contents of a Forfás report on the costs of doing business in Ireland, including legal costs. The Council noted the contents of a comprehensive letter from the director general to the minister, which summarised the principal points raised at the meeting.

The letter addressed the Society's position in relation to costs in the economy generally, the fact that the Society had no role to play in relation to solicitors' fees, the Society's response to the Forfás report, international legal costs comparisons, the economic reality for solicitors in Ireland at present, a suggestion that solicitors should display price for legal services, the Competition Authority report of 2006, business disputes resolution, and the Society's intention to constructively engage with the Central Statistics Office to devise an improved basis for the collection of data on levels of legal fees in Ireland.

Heads of bill to establish a judicial council

The Council noted that the heads of bill to establish a judicial council specifically excluded the involvement of the practising profession. The Council agreed that, in accordance with its long-standing policy on the matter, the Society should seek a provision in the bill that would provide the legal profession with a right of nomination to the board of the judicial council.

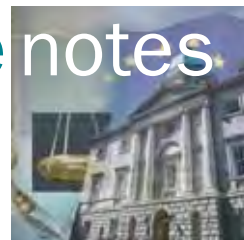
The Council noted that 80% of litigation was conducted by solicitors in the District Court, and it was at complete variance with established models in other jurisdictions that solicitors should be excluded from a judicial council of this nature. Concern was also expressed about the lack of openness and transparency proposed in the heads of bill in respect of the conduct of business and the publication of findings of the judicial council.

Judicial review of Solicitors Regulation Authority (SRA)

The director general reported that the judicial review proceedings by the Society in relation to the recognition of Irish solicitors' qualifications for transfer to England and Wales had been stayed on consent on particular terms, pending consultation between the SRA and the Law Society of Ireland.

Council election 2010

The Council discussed the fact that there had not been a contested election for the Council in 2010, which was unprecedented. It was agreed that this was probably a reflection of the commercial pressures being encountered by practitioners and the fact that many solicitors did not have the time to devote to involvement with the Society. Nevertheless, it was a disappointing development, and it was agreed that the Society should examine why participation in the work of the Society was so unattractive to members, including issues such as workload, time commitment, and the perception that it was difficult for new Council members to be elected. **G**



CHANGES TO PROFESSIONAL INDEMNITY INSURANCE REGULATIONS FOR THE 2010/2011 INDEMNITY PERIOD COMMENCING 1 DECEMBER 2010

The Council of the Law Society has approved changes to the professional indemnity insurance regulations (including the minimum terms and conditions) to take effect for the next indemnity period commencing on 1 December 2010. The amending regulations are available at www.lawsociety.ie/PII. This practice note is intended as a guide to the important practical changes. There are other technical changes to clarify and improve the existing regulations and minimum terms and conditions. This practice note is not a definitive statement or interpretation of the law.

1. Commercial undertakings

The concept of 'commercial undertaking' refers to certain common types of solicitors' undertakings given to financial institutions in commercial property transactions. The concept is given effect to by the definition of 'relevant undertaking' and related provisions in the minimum terms and conditions. The definition of 'relevant undertaking' is being changed slightly to clear up some ambiguities and difficulties that have been observed in practice. From 1 December 2010, the applicable definition that will apply is set out in the amending regulations. In cases of doubt, reference should be made to the text of the definition and ancillary definitions in the minimum terms and conditions contained in clause 7.16 and the applicable operative provisions in clause 7.15, both as set out in the amending regulations.

For the assistance of solicitors,

the existing position (for the current 2009/2010 indemnity period ending on 30 November 2010) and the new position (for the indemnity period 2010/2011 commencing on 1 December 2010) are set out below for comparative purposes. **The changes are in bold.**

Existing position:

- Residential undertakings are permitted and are covered by professional indemnity insurance,
- Commercial undertakings, including commercial accountable trust receipts (ATRs), issued before 1 December 2009 were permitted and are covered if not resulting from a wrongful act or omission,
- Commercial undertakings (including commercial ATRs) issued on or after 1 December 2009 are permitted, but are not covered unless additional cover has been obtained.

New position:

- Residential undertakings will be permitted and will be covered by professional indemnity insurance,
- Commercial undertakings (including commercial ATRs) issued before 1 December 2009 were permitted and will be covered if not resulting from a wrongful act or omission,
- Commercial undertakings (including commercial ATRs) issued on or after 1 December 2010 are permitted, but will not be covered unless addi-

tional cover in respect of any such undertakings is renewed.

- **Important note:** *If your firm gave any commercial undertakings between 1 December 2009 and 30 November 2010 inclusive, due to the 'claims made' basis of insurance cover, additional cover for commercial undertakings should be renewed for at least six years after the last such commercial undertaking was given. 'Claims made' basis means that the insurance policy that will meet a claim is the policy that is in place when the claim is made and notified to the insurer, or the policy that is in place when the insurer is notified of circumstances that may give rise to a claim – not necessarily in the policy in place when the alleged negligence occurred. Your firm must notify to the insurer any claim made during an indemnity period before the end of that indemnity period; your firm's insurer will be entitled to deny cover in respect of any claim first made against your firm during an indemnity period and only notified after the end of that indemnity period. If your firm did not, in fact, give any commercial undertakings between 1 December 2009 and 30 November 2010 inclusive, there is no need for any additional cover for commercial undertakings your firm may have taken out to be renewed.*

- **Commercial undertakings (excluding commercial ATRs) issued on or after 1 December**

2010 will not be permitted and will not be covered.

- **Commercial ATRs issued on or after 1 December 2010 will be permitted and will be covered.**
- **Commercial undertakings for so-called 'de minimis' loans with a limit of liability of up to €75,000 (intended for loans considered too small for three-way closings) will be permitted and will be covered.**

As provided for in the Commercial Property Regulations (which are available at www.lawsociety.ie/PII), acting for both borrower or guarantor or indemnifier or security provider and financial institution in connection with a commercial property transaction, where the financial institution provides financial accommodation in connection with the transaction, will not be permitted. Acting in breach of this prohibition will not be covered.

'Buy-to-let' residential property transactions continue to be classified as commercial property transactions.

All references to a matter being covered by professional indemnity insurance or simply 'covered' are references to a matter being covered by professional indemnity insurance under the minimum terms and conditions.

2. Renewal deadlines for insurers

Insurers will be required to provide proposal forms at least 21 days in advance of the renewal date and to respond to properly completed proposal forms within ten working days of receipt.

3. Succeeding practices

The succeeding firm and preceding firm will be allowed to elect whether run-off cover or the succeeding practice rule will apply in their case. If they decide to make an election, such election must be made prior to merger or acquisition taking place. If they do not make an election, then the default position will be that the succeeding practice rule applies. More information on the succeeding practice rule is available at www.lawsociety.ie/PIL.

4. Assigned Risks Pool

The Assigned Risks Pool (ARP), which is the safety net for firms unable to obtain cover in the market, will be reintroduced for the 2010/2011 indemnity period on the following modified terms:

- There will be an aggregate limit for all claims of €1.5 million,
- All claims by financial institutions (regardless of whether the financial institution is a client of the firm) will be excluded,
- There will be defaulting firm status for firms for non-payment of ARP premium,

- An ARP premium pricing schedule will be published – as it is expected that in all cases the premium will exceed market rates by a substantial margin, and given the significantly reduced cover in the ARP, the ARP should be regarded in all cases as a place of last resort and not as an alternative to cover in the market,
- If a qualified insurer experiences an insolvency event, the other qualified insurers are not required to close the gap and take up the insolvent insurer's share of the ARP. This will result in cover for the claim being reduced pro rata.

The following points (which are not changes) may be noted for purposes of clarity:

- ARP and closed firms – closed firms may only reopen by obtaining cover in the market,
- ARP defence costs – these remain unlimited,
- ARP defaulting firms will be covered in the first indemnity period of defaulting status whether or not the premium is paid. Thereafter, run-off cover

will be provided by the ARP only if the premium is paid (as for compliant firms). Defaulting firms and their principals will be liable to fully indemnify the ARP for any claims. It is the policy of the Law Society to seek High Court orders for the closure of defaulting firms that do not close voluntarily.

The previously planned ARP levy will not be introduced for the 2010/2011 indemnity period.

5. Cancellation of run-off cover for non-payment of premium

The right of insurers to cancel run-off cover for non-payment of premium remains in place with the following changes:

- Insurers are required to provide 20 working days' notice of cancellation of cover to the Law Society and the insured firm,
- The former principals of the firm will have a legal obligation to pay the run-off cover premium and the Law Society will be able to seek orders from the High Court to compel the former principals to pay the premium, and

- Insurers will be required to reinstate run-off cover backdated to date of cancellation if payment is made in arrears. Sixty days will be allowed to pay the premium to reinstate cover. Reinstated cover will exclude any claims or circumstances the firm was aware of during the period in which the premium was unpaid.

6. Failure to cooperate with insurers

The regulations will be amended to make it clear that insurers are permitted to make complaints to the Law Society about the principals of firms for failure to cooperate in dealing with claims.

7. Failure to pay stamp duty

The regulations will be amended to make it clear that insurers are permitted to inform the Law Society regarding failure by firms to pay stamp duty.

Further information: queries relating to the PII regulations should be addressed to the Law Society PII helpline for solicitors at 01 879 8790 or pii@lawsociety.ie

THE DOS AND DON'TS OF SECTION 68

Section 68(1) – information in writing about legal charges

Do:

- Recognise that all clients need to budget for all expenditure in relation to their legal business.
- Recognise that strict compliance with all aspects of s68 protects both consumers and solicitors and manages the client's expectations.
- In all cases, give the client information in writing in relation to legal charges that will be incurred in their case or transaction.
- Explain that charges include fees and any money that will be paid to another person or

organisation on their behalf.

- Always include information in relation to VAT.
- Give the actual amount, if this is practical and possible:
 - If this is not practical and possible, give an estimate,
 - If this is not practical and possible, give the basis of charge,
 - If the basis of charge is being used, give the client details of how they will be charged in their particular case,
 - If time is the basis of charge, time records must be maintained and must be available for inspection in the event of a dispute.

- Inform the client if you intend asking for money up front, or for the discharge of costs and/or outlays at intervals, prior to the conclusion of the case or transaction.
- Check out the precedent s68 letters on the members' area of the Law Society website, www.lawsociety.ie.
- Check out the Law Society client information leaflet *Information in Relation to Legal Charges* in the public area of the Law Society website – www.lawsociety.ie, 'consumer interest'.
- Use the client leaflet in conjunction with an appropriate s68 letter to the client, so

that the client receives all the information as required by the legislation.

- Purchase stocks of the client information leaflet from the Law Society (100 per pack, price €21.57 plus €8.50 p&p – contact Esther McCormack at the Law Society).
- Always include a clause allowing for a revised s68 letter if unforeseen complexities arise.
- Diary the s68 letter for review at regular intervals during the case or transaction, to check if unforeseen complexities mean that the first letter is no longer correct.
- Issue a revised s68 if the first

letter is no longer correct.

- Be aware that failure to issue a revised letter, when this should have been done, is viewed as coming within the definition of "inadequate professional services" in terms of conduct.

A signed copy of an up-to-date s68 letter is the solicitor's best defence in the event of a complaint. Even though a s68 letter may have been sent, in the event of a dispute, it may be difficult to prove that the client received it, if a signed copy is not on file.

Maintain your files in a way that makes compliance with s68(1) easy to check in the event of a Law Society accounts regulation inspection or of a complaint being made to the Law Society.

Section 68(3), (4), and (5) –

dealing with the client's award or settlement

Do:

- Ask the client if they are agreeable to any outstanding costs being deducted from their award or settlement.
- Get the client's written authority to make the deduction.
- Explain that any monies that the solicitor, with the client's authority, formally undertook to pay to another party out of the proceeds of sale must be paid out, even if the client changes their mind when the award or settlement comes in.

Don't:

- Don't make a unilateral deduction from the client's award or settlement in a litigation or other contentious matter without the client's written consent.

Section 68(6) and s68(2) – litigation or bills for other contentious matters

Do:

- Charge a professional fee that is reasonable, and state it separately in the bill.
- State the charges for general expenses, such as stationery or postage.
- State the charges for people or organisations such as government agencies or experts.
- State the VAT.
- Give a summary of the legal work done for the client.
- Give the total amount of money, if any, recovered from the other side.
- Give details of any charges recovered from the other side.

Don't:

- Don't state the professional fee as a percentage of any

award or settlement, except in debt collection cases.

S68(8) – disputes about bills

Do:

- Answer any questions the client may have.
- Discuss the matter with the client and try to resolve all issues.
- If the matter is not resolved, write to the client explaining their right to have the bill taxed or to make a complaint to the Law Society.

Effective office systems

Have a good office system in place, whether manual or electronic, which will trigger compliance with all parts of s68 automatically.

Guidance and Ethics Committee

FAMILY LAW DECLARATIONS: REGISTERED TITLE

The committee has recently had a number of calls from members of the profession to the effect that Property Registration Authority (PRA) staff members are refusing to accept lodgement of family law declarations along with Land Registry dealings and that the form of application for registration does not list the fam-

ily law declaration as a requirement for registration.

The committee refers practitioners to its previous practice note on this topic as published in the May 2009 *Gazette*. The committee's clear recommendation was as follows:

"The committee confirms that it is proper practice to

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

The committee reiterates the content of its previous practice

note and recommends that solicitors insist that the PRA accepts the declarations along with dealings when lodged. The PRA has confirmed it will publish a legal office notice to remind its staff that it has agreed to accept lodgement of these declarations.

Conveyancing Committee

SOLICITORS' UNDERTAKINGS TO VHI

Practitioners will be aware of previous practice notes issued by the Society recommending that solicitors do not give undertakings to third parties while the claim remains within the Injuries Board process. Specifically, members were advised of difficulties with the form of undertaking that VHI issues to practitioners for completion, and the Society recommended that solicitors should not sign the undertaking. **Practitioners should**

note that this recommendation remains in force. In recent times, there have been instances where solicitors have given the undertaking and only later realised that the requirement that solicitors repay to VHI – out of the proceeds that come into their hands and subject to any court order to the contrary – all monies paid by VHI on behalf of the subscriber, has resulted in the subscriber/client receiving much less compensation out of

the proceeds of the claim than had been anticipated.

The Society is aware that some clients are pressuring solicitors to give the undertaking because VHI is refusing to cover the subscriber for necessary treatment unless the undertaking is signed or because the client fears being sued by their treating hospital on foot of VHI refusing to pay the hospital bill until the undertaking is signed. It is recognised that such situ-

ations place solicitors in a very difficult position and, in instances where solicitors decide that there is no option but to sign the VHI form of undertaking, it is strongly recommended that clients are made fully aware of its implications and that solicitors ensure that clients provide a signed acknowledgement of their understanding of its implications.

Litigation Committee

LENDERS' FAILURE TO HONOUR REDEMPTION FIGURES QUOTED AND/OR ISSUE VACATE

It has been brought to the attention of the committee that, despite the agreement reached with the IBF and its members in 2009 as part of the revised certificate of title system, some lenders are not honouring redemption figures quoted by them and/or are not issuing vacated mortgages to solicitors who have relied on the redemption figures quoted and paid the requested sums to the relevant lenders. The committee reminds practitioners of the relevant terms of the *Law Society Approved Guidelines and Agreement* (2009 edition) (available in the members' area of the Law Society website and in all residential mortgage lending solicitors' packs) as follows:

- Paragraph 5(d) provides: "If, after completion, the redemption sum quoted by the Lender is found to be inadequate to redeem the loan(s), the Lender shall not withhold the release/discharge/vacate (see paragraph 23 below) but shall be free to pursue any other remedies against the Borrower that are available to the Lender."
- Paragraph 23(a) provides that "on payment of the sum requested to redeem a Borrower's outstanding mortgage and a written request to release the Mortgage, a release/discharge/vacate (as appropriate) will be furnished to the requesting solicitor within one month of receipt of payment or the request, whichever is later".
- Paragraph 24 sets out the detail of how delays on the part of the lenders in, *inter alia*, issuing vacates are to be resolved. Practitioners should familiarise themselves with this procedure, and should ensure that they

invoke it when necessary by specifically referring the relevant lender to the terms of the agreement and calling on the lender to comply with the *Guidelines and Agreement*. In summary:

- 1) If the lender automatically issues a vacate following redemption, the vacate should issue within one month of receipt of the redemption monies,
- 2) If the lender requires a written request for a vacated mortgage, the vacate should issue within one month of receipt of the solicitor's written request,
- 3) If the vacate has not been received within the one-month period, the solicitor should write to the lender, reminding it that the vacate is overdue,
- 4) If the lender does not supply the vacate or does not set out in writing a good reason for the delay within ten working days, the solicitor should notify the lender in writing of the solicitor's intention to initiate a customer complaint to the lender, and allow the lender a further ten working days to furnish the vacate or a good reason for the delay,
- 5) If the vacate or good reason for the delay is not furnished within the second ten-day period, the solicitor should initiate a customer complaint with the lender – see the Rule 2.46 procedure (of the *Consumer Protection Code* as issued by the Financial Regulator), which is at the back of the *Guidelines and Agreement*,
- 6) If the customer complaint procedure is not success-

ful, the solicitor should make a complaint to the Financial Services Ombudsman as agent of the client.

- The committee has drafted sample letters to lenders for resolving delays in furnishing matters to solicitors as agreed under the certificate of title system for residential mortgage lending (2009 edition). **These sample letters are available in the members' area of the Law Society's website** by following either the links for the Conveyancing Committee or for 'precedent documentation'. The sample letters have been drafted for use where there are delays by lenders in furnishing vacated mortgages, but they may be adapted and used as necessary where there are other breaches by lenders of their agreed obligations under the *Guidelines and Agreement*, such as delays in issuing deeds on ATR, delays in issuing redemption figures, or delays in releasing solicitors from their undertakings.
- It should be noted that nothing in the foregoing or in any other part of the *Guidelines and Agreement* restricts or postpones any remedy a solicitor or a client of a solicitor may have against a lender where they reasonably believe that failure to furnish a vacate may result in financial loss to the solicitor or the client or which may affect the ability of either of them to fulfil their contractual obligations to any third party in respect of the property to which the outstanding vacate relates.

Practitioners should also note that the above procedure for

resolving delays on the part of the lenders may also be used where there are other breaches by lenders of obligations under the *Guidelines and Agreement*, such as:

- Delay in issuing deeds on ATR (paragraph 4(a) – within ten working days where the lender has possession of the deeds; or paragraph 4(b) – within ten working days of the deeds coming into the possession of the lender),
- Delay in issuing redemption figures (paragraph 5(b) – within ten working days of the solicitor's written request), or
- Delay in releasing solicitors from their undertakings (paragraph 21(d) – within ten working days of the solicitor furnishing deeds to the lender).

Participating lenders:

The IBF members who have agreed to be bound by the *Guidelines and Agreement for Residential Mortgage Lending* (2009 edition) are:

- ACC Bank,
- EBS Building Society,
- AIB plc,
- Bank of Ireland,
- Bank of Scotland (Ireland) Ltd,
- First Active plc,
- ICS Building Society,
- KBC Bank,
- Irish Nationwide Building Society,
- National Irish Bank,
- Permanent TSB,
- Ulster Bank Ltd.

Any other lenders who use the Law Society's certificate of title documentation with the consent of the Society have agreed to so do on the same basis as IBF members and as set out in the documentation.

Conveyancing Committee

QUALIFICATIONS TO UNDERTAKINGS REGARDING PLANNING MATTERS: HOUSES IN THE COURSE OF CONSTRUCTION

The committee has been asked to again highlight the dangers of giving undertakings in relation to houses in the course of construction. It refers practitioners to its two previous practice notes, published in the *Gazette* in November 1990 and April 1999 (both of which are also republished in the committee's *Conveyancing Handbook*). The necessity of qualifying title to a lender in relation to houses in the course of construction and stage-payment loans was more recently highlighted in the covering letter to the profession launching the 2009 certificate of title documentation.

The standard solicitor's certificate of title for residential mortgage lending includes a certificate that planning matters are in order and that an appropriate certificate of compliance has been obtained. Clearly, an undertaking to furnish such a certificate of title cannot be given where a house is in the course of construction. The potential difficulties that may arise in relation to providing such an undertaking include:

- The house may not be completed at all,
- The house may be completed, but may be in breach of the planning permission,

- There may be a lack of cooperation between the client and the architect/engineer, resulting in a certificate of compliance not being forthcoming,
- There may be a lack of cooperation between the client and the solicitor, resulting in the client failing to attend to the procurement of the final certificate of compliance.

In the case of houses in the course of construction, a solicitor should qualify the undertaking to the lender **before drawdown (or first drawdown if it is a stage-payment loan)** to the effect that (s)he cannot undertake that (s)he will certify title as regards **planning matters**. The amount of the loan and the stated purpose of the loan will usually indicate to a solicitor whether the loan is for the purchase of the site only, or whether it is for the construction of a house – either on a site that the client already owns, or on a site that the client is purchasing. The solicitor should then bring the draft qualification to the attention of the lender for the purpose of agreeing it with the lender prior to drawdown. In cases where it is intended to issue the loan in stages, the solicitor will also need to insert the standard qualification regarding

stage payments – as set out in the *Certificate of Title Guidelines and Agreement* (2009 edition).

The lender, on seeing the draft qualification to the undertaking, will usually:

- Make it a condition of drawdown/first drawdown that the solicitor ensures that there is evidence of planning permission, etc, being in place for any house to be constructed.
- Arrange for drawdown to take place in stages, on foot of certificates of interim compliance by an architect or engineer, which certificates usually also confirm the value of the work done at each stage. Most lenders deal directly with the client and the architect/engineer on these interim certificates, but the stage payments usually come through the solicitor.
- Introduce a requirement pre-drawdown that the solicitor will not release the final stage payment to the client/builder until the architect or engineer produces the final certificate of compliance with planning and building regulations.

In this way, even though a solicitor qualifies the undertaking, the lender, in effect, usually draws the solicitor back into the mat-

ter – but, at least, all sides know that it is on the basis that the lender will monitor the interim payments and that the solicitor will obtain the final certificate of compliance before releasing the final stage payment.

If there is a financial condition in the planning permission, then the solicitor would also need to either:

- Exclude the financial condition from the certificate of title – of course, this would have to be specifically notified to the lender in advance of drawdown/first drawdown by qualifying the undertaking to the lender in this regard, or
- Obtain from the client a receipt for discharge of the financial condition before drawdown/first drawdown of the loan.

The above principle also applies in relation to undertakings in respect of apartments and commercial property in the course of construction. The requirement for the additional stage payment qualification should not arise in relation to apartments, because a stage-payment loan in relation to a new apartment should not arise in practice.

Conveyancing Committee



FOR BOOKINGS CONTACT MARY BISSETT
TEL: 01 668 1806

Meet at the Four Courts

PRE-CONTRACT VAT ENQUIRIES (OCTOBER 2010)

The pre-contract VAT enquiries are for use in the context of the sale of a freehold, the sale of a freehold equivalent (that is, a long leasehold interest disposed of for a premium with a peppercorn rent), and the surrender or assignment of a legacy leasehold interest (that is, a leasehold interest of ten years or more created before 1 July 2008). **They are not suitable for use, and should not be used, in the context of an occupational type lease.**

The Society's initial set of pre-contract VAT enquiries was published as a working draft on the website in April 2009 and circulated to the profession in May 2009. At that time, members of the profession were invited to submit comments and suggestions for improvement, based on their experience of using the working draft in practice and applying them to live transactions. Relatively few comments were received by the Society, and no significant changes were requested. The committees have made some minor changes and have decided to adopt the working draft as final and publish it as the October 2010 edition.

The pre-contract VAT enquiries (October 2010) are now available in the members' area of the Society's website by following links for the committees. Solicitors are reminded of the following five guidelines when using the precedent enquiries document:

- 1) It is the intention of the committees that the enquiries should be raised by the purchaser's solicitor and responded to by the vendor at the **pre-contract** stage. This is vital if the purchaser's solicitor is to be in a position to advise his or her client on the VAT implications of the transaction.
- 2) Prior to issuing the enquiries to the vendor's solicitor, the solicitor acting for the purchaser must complete the purchaser's statement on page 2 of the enquiries.
- 3) Although the enquiries are to be raised by the purchaser's solicitor, it is the view of the Conveyancing and Taxation Committees that they will also prove to be a useful tool for a vendor's solicitor and should be completed by the vendor

prior to the drafting of the contract for sale, thus enabling the vendor's solicitor to draft the VAT special condition appropriately, according to the circumstances of the transaction. Members are reminded that, unless special condition 3 is struck out in its entirety because no VAT issues arise, it is inappropriate to issue a contract for sale without deleting inapplicable option paragraphs in that special condition.

- 4) On closing, the purchaser's solicitor ought to seek confirmation from the vendor's solicitor that the replies to the enquiries are still correct and accurate.
- 5) Whether acting for a vendor or a purchaser, the committees advise all members that, unless they are expert in the application of the new VAT system or the transaction is a straightforward one and the member is fully satisfied that he or she has been furnished with the complete VAT history of the property, they are strongly recommended to advise all clients to engage the

services of a specialist VAT or tax adviser to ensure that the vendor client answers each of the enquiries correctly, and the purchaser client understands the significance of each response given.

The vendor's solicitor should bear in mind that a vendor may have acquired a property utilising transfer of business relief (section 3(5)(b)(iii)), using a VAT 13B authorisation (section 13A), or using a VAT 4B (section 4A). In such circumstances, a vendor may be under the impression that no VAT arose on acquisition, but, for most VAT on property rules, one must consider what VAT would have been chargeable to the vendor on acquisition, but for the application of these reliefs.

Because the committees are conscious of the fact that these enquiries have not been stress-tested in a fully-functioning property market, they are open to a review of same in future, if required.

*Conveyancing Committee and
Taxation Committee*



Law Society of Ireland

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legislation update



11 September – 11 October 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.

SELECTED STATUTORY INSTRUMENTS

Central Bank Reform Act 2010 (Commencement of Certain Provisions) Order 2010
Number: SI 469/2010

Contents note: Appoints 1/10/2010 as the commencement date for all sections of the act, with the exception of s6, s15(5), so much of schedule 1, paragraph 1, item 39 as inserts s32B into the *Central Bank Act 1942*, schedule 2, part 5.

Companies Act 1990 (Relevant Jurisdictions under Section 256F) Regulations 2010
Number: SI 425/2010

Contents note: Prescribes six jurisdictions – Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man and Jersey – for the purposes of the inward migrating funds mechanism contained in the *Companies (Miscellaneous Provisions) Act 2009*.
Commencement date: 7/9/2010

Companies Act 1990 (Relevant Jurisdictions under Section 256G) Regulations 2010
Number: SI 427/2010

Contents note: Prescribes six jurisdictions – Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man and Jersey – for the purposes of the outward migrating funds mechanism contained in the *Companies (Miscellaneous Provisions) Act 2009*.
Commencement date: 7/9/2010

Companies Act 1990 (Section 256F) (Registration Documents) Regulations 2010
Number: SI 426/2010

Contents note: Prescribes the method of certifying and authenticating certain documents that an applicant under the *Companies Act 1990*, section 256F, must send to the Companies Registration Office. An applicant under this section would be seeking to migrate the registered office of a certain type of collective investment fund entity to Ireland from a prescribed jurisdiction without firstly having to wind up in that jurisdiction.
Commencement date: 7/9/2010

Companies (Fees) Order 2010
Number: SI 430/2010

Contents note: Prescribes the fees to be paid to the Companies Registration Office by applicants under the *Companies Act 1990*, section 256G.
Commencement date: 7/9/2010

Companies (Forms) Regulations 2010
Number: SI 429/2010

Contents note: Prescribes the forms to be used by applicants under the *Companies Act 1990*, ss256F and 256G.
Commencement date: 7/9/2010

Companies (Forms) (No 2) Regulations 2010

Number: SI 436/2010

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

Commencement date: 7/9/2010

Companies (Forms) (No 3) Regulations 2010

Number: SI 428/2010

Contents note: Prescribes forms to be used by applicants under the *Companies Act 1990*, section 256F-H, where applicants would be seeking to migrate the registered office of a certain type of collective investment fund entity to or from Ireland from or to a prescribed jurisdiction without firstly having to wind up the entity in its original jurisdiction.

Commencement date: 7/9/2010

Companies (Miscellaneous Provisions) Act 2009 (Commencement) Order 2010

Number: SI 424/2010

Contents note: Appoints 7/9/2010 as the commencement date for s3(i) and s5(j) of the act, providing for a mechanism whereby certain collective investment fund entities currently based in relevant jurisdictions can migrate their registered offices into Ireland without firstly having to wind up in their current jurisdictions.

Criminal Justice Act 2006 (Electronic Monitoring Devices) Regulations 2010

Number: SI 409/2010

Contents note: Prescribes types of electronic monitoring devices that may be used for the purpose of monitoring

the compliance of persons with the *Criminal Justice Act 2006*, s108(4).

Commencement date: 25/8/2010

Criminal Procedure Act 2010 (Commencement) Order 2010
Number: SI 414/2010

Contents note: Appoints 1/9/2010 as the commencement date for all sections of the act.

European Communities (European Economic Interest Groupings) (Amendment) Regulations 2010
Number: SI 447/2010

Contents note: Removes the cap of 20 on the permissible number of members of a European Economic Interest Grouping.

Commencement date: 15/9/2010

Intoxicating Liquor Act 2008 (Commencement) Order 2010
Number: SI 449/2010

Contents note: Appoints 1/10/2010 as the commencement date for s14 (as it applies to test purchasing) insofar as it relates to inserting s37C into the *Intoxicating Liquor Act 1988*.

Irish Medicines Board (Miscellaneous Provisions) Act 2006 (Commencement) Order 2010

Number: SI 441/2010

Contents note: Appoints 1/10/2010 as the commencement date for ss11(a)(iii), 11(a)(iv) and 11(a)(v) of the act. Section 11(a) relates to the role of the competent authority for cosmetic products and receiving applications from and issuing certificates to persons proposing to export any description of medicinal products, cosmetic

products, veterinary medicinal products, or medical devices as is considered appropriate after having regard to the law.

Patents (Amendment) Act 2006 (Section 41)

(Commencement) Order 2010
Number: SI 432/2010

Contents note: Appoints 4/10/2010 as the commencement date for s41 (registrable transactions) of the act.

Planning and Development (Amendment) Act 2010

(Commencement) (No 2) Order 2010

Number: SI 451/2010

Contents note: Appoints 28/9/2010 as the commencement date for ss32 (amendment of *Planning and Development Act 2000*, s50A, relating to applications to the High Court) and s33 (costs in environmental matters) of the act.

Road Traffic Act 1994 (Section 17) (Prescribed Form and Manner of Statement) Regulations 2010

Number: SI 433/2010

Contents note: Prescribes the form and manner of the statements, both in Irish and English, to be produced by an apparatus for determining the concentration of alcohol in the breath pursuant to the *Road Traffic Act 1994*, s17(2), and prescribes the manner in which the statements are to be duly completed by a member of the Garda Síochána.
Commencement date: 11/10/2010

Circuit Court Rules (Costs) 2010

Number: SI 444/2010

Contents note: Amends order 66, rule 1 of the *Circuit Court Rules 2001* (SI 510/2001) to extend to the county registrar the power exercisable by the court under that provision to require production and exchange by the parties of estimates of costs.

Commencement date: 12/9/2010

Circuit Court Rules (Miscellaneous) 2010

Number: SI 445/2010

Contents note: Amends the numbering of provisions and forms identified as requiring correction in the *Circuit Court Rules 2001* (SI 510/2001).

Commencement date: 12/9/2010

Circuit Court Rules (Pensions Ombudsman) 2010

Number: SI 446/2010

Contents note: Amends order 63E of the *Circuit Court Rules 2001* (SI 510/2001) as order 57B and amends that order to take into account the transfer to the Pensions Ombudsman from the Minister for Social Protection of the function of applying

to court for enforcement of the ombudsman's determinations, by virtue of the amendment of the *Pensions Act 1990*, s141(1) (as inserted by the *Pensions (Amendment) Act 2001*, s5) by the *Social Welfare and Pensions (No 2) Act 2009*.

Commencement date: 12/9/2010

District Court (Intellectual Property) Rules 2010

Number: SI 421/2010

Contents note: Substitutes order 31B and adds forms 31B.10 to 31B.13 in schedule B of the *District Court Rules 1997* (SI 93/1997) to facilitate the operation of the *Copyright and Related Rights Act 2000*, ss133 and 257.

Commencement date: 20/9/2010

Rules of the Superior Courts (Review of the Award of Public Contracts) 2010

Number: SI 420/2010

Contents note: Substitutes order 84A of the *Rules of the Superior Courts* (SI 15/1986) in respect of applications to the High Court under public contracts legislation.

Commencement date: 1/9/2010

Road Traffic Act 1994 (Section 22) (Costs and Expenses) Regulations 2010

Number: SI 435/2010

Contents note: Provides for

the increase in the maximum contribution towards the costs and expenses incurred by the Medical Bureau of Road Safety in the performance of its func-

tions under the *Road Traffic Act 1994* from £75 (€95) to €250 in the case of analysis for the concentration of alcohol and to €350 in the case of analysis for the presence of a drug or drugs.
Commencement date: 1/9/2010

Road Traffic Act 1994 (Sections 18 and 19) (Prescribed Forms) Regulations 2010

Number: SI 434/2010

Contents note: Prescribes the form to be completed by a designated doctor under the *Road Traffic Act 1994*, s18, and the certificate, both in Irish and English, to be issued by the Medical Bureau of Road Safety under the *Road Traffic Act 1994*, s19.

Commencement date: 11/10/2010

Social Welfare (Miscellaneous Provisions) Act 2010 (Part 4) (Commencement) Order 2010

Number: SI 443/2010

Contents note: Appoints 1/9/2010 as the commencement date for part 4 and s34, insofar as it relates to part 4 of the act. Part 4 provides that the minister may, with the consent of the Minister for Finance, develop, implement and expand schemes with the objective of providing income support and generating employment or opportunities for employment. **G**

*Prepared by the
Law Society Library*

Are you getting your e-zine?



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receiving it again, you can sign up by visiting the members' section on the Law Society's website at www.lawsociety.ie. Click on the 'e-zine and e-bulletins' section in the left-hand menu bar and follow the instructions. You will need your solicitor's number, which is on your 2010 practising certificate and can also be obtained by emailing the records department at: l.dolan@lawsociety.ie.

NOTICES: THE HIGH COURT

2010 no 47SA

In the matter of Mary TA Kennedy, solicitor, of Barrington Solicitors, 97 Middle Abbey Street, Dublin 1, and in the matter of the Solicitors Acts 1954 to 2008

Take notice that, by order of the High Court made on Monday 14 June 2010, it was ordered that Mary TA Kennedy, solicitor, of Barrington Solicitors, 97

Middle Abbey Street, Dublin 1, be suspended from practising as a solicitor until the report, as prescribed by the *Solicitors' Accounts Regulations 2001* for the financial year ended 31 December 2008, was furnished to the Law Society of Ireland.

John Elliot,
Registrar of Solicitors,
Law Society of Ireland,
13 July 2010

2010 no 12SA

In the matter of Owen A MacCarthy, solicitor, and in the matter of the Solicitors Acts 1954 to 2008

Take notice that, by order of the High Court made on 18 October 2010, it was ordered that Owen A MacCarthy, solicitor, of 7 Grattan Crescent, Inchicore, Dublin 8, be suspended from practising as a solicitor until

such time as he complies with the Society's requirements in relation to the orderly wind-down of his practice and transfer of his files, documents and client funds in compliance with all the Society's requirements in respect of same.

John Elliot,
Registrar of Solicitors,
Law Society of Ireland,
21 October 2010

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 John F Condon, a solicitor practising as McMahon & Tweedy Solicitors, Merchant's House, 27-30 Merchant's Quay, Dublin 8, and in the matter of the Solicitors Acts 1954 to 2008 [3127/DT/100/09]

Law Society of Ireland (applicant)
John F Condon (respondent solicitor)

On 18 May 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with an

undertaking given to the complainants on 18 December 2006 in a timely manner, having only finally complied with same on 20 May 2009,

b) Failed to respond adequately or at all to correspondence from the Society in the investigation of the complaint and, in particular, the Society's letters of 19 December 2007, 18 January 2008, 1 April 2008 and 23 June 2008.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €3,000 to the

compensation fund,
c) Pay the whole of the costs of the Law Society of Ireland, to be taxed by a taxing master of the High Court, in default of agreement.

In the matter of Linda McEvoy, a solicitor previously practising as Linda McEvoy, Solicitor, DMG Business Centre, 12 Camden Row, Dublin 8, and in the matter of the Solicitors Acts 1954 to 2008 [8576/DT118/09]
Law Society of Ireland (applicant)
Linda McEvoy (respondent solicitor)

On 20 July 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she 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).

The tribunal ordered that the respondent solicitor:

a) Do stand admonished and advised,
b) Pay a contribution to the costs of the Law Society measured at €250. **G**

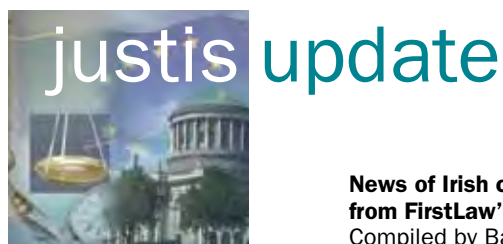


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CONTRACT

Banking

Summary judgment – guarantee – representation not to enforce guarantee – experienced solicitors – lack of documentary evidence – whether arguably defence existed.

The plaintiff sought summary judgment against the defendant solicitors for the sum of €21,460,077.38 arising from the involvement of the defendants in two limited companies and two partnerships. The proceedings related to guarantees executed by the defendants in favour of the plaintiff as to the liabilities of the companies and borrowings of the partnerships. The defendants alleged that it was represented to them that the plaintiff would not enforce the guarantees against them. The defendants contended, among other things, that they genuinely believed the representations made to them by a person named Mr Daly, an accountant and shareholder in the limited companies, as having some form of special status and that they had sufficient security for the borrowings and that Anglo never required any form of statement of means from them. The plaintiff argued that it was incredible that experienced solicitors could genuinely believe in the non-enforceability of the guarantees, having regard, among other things, to the actual wording of the guarantees, the lack of supporting documentation, or contemporaneous note thereof. The defendants asserted the existence of an arguable defence to the claim. Mr Daly was being sued by the plaintiff in the Commercial Court, in proceedings antedating the present proceedings, for

the recovery of €84 million, and the High Court had held that an arguable defence had been made out. The defendants alleged that the activities of the partnerships were being carried out in a fraudulent, unlawful or irregular fashion. A firm of accountants was appointed by the plaintiff to undertake a review.

Kelly J held that, given the lack of documentation, the focus turned to Mr Daly and what it was alleged that he said in respect of being picked out as a favoured developer. In respect of the guarantee claim, the court would, in the interests of justice, adjourn the action for plenary hearing and refuse summary judgment, on the basis of an earlier decision of the High Court. For similar reasons, the partnership allegations would also be adjourned for plenary hearing. The accountants report would be significant.

Anglo Irish Bank Corporation Limited (plaintiff) v Sherry & Others (defendant), High Court, 20/7/2010, [2010] 7 JIC 2001

EMPLOYMENT

Force majeure

Administrative law – defence forces – jurisdiction – Rights Commissioner – transposition – Parental Leave Act 1998.

The applicant was a soldier and he sought, among other things, to quash the decision of the respondent Rights Commissioner, who had found that they had no jurisdiction to investigate the case pursuant to the *Parental Leave Act 1998*, as the applicant was a member of the defence forces. The applicant did not attend for duty and was marked absent on an internal

army form. The applicant subsequently applied for *force majeure* leave and took issue with the fact that he was recorded as being absent without leave. The applicant argued that the 1998 act failed to properly transpose Council Directive 96/34/EC on the framework agreement on parental leave. The respondents and notice parties contended that the applicant lacked standing to seek *certiorari*.

Hedigan J held that, in the circumstances where, at the time the complaint was made, the applicant already had his *force majeure* leave approved and was not aware whether his form was destroyed or not, the applicant had no *locus standi* in this application. On the facts, there was no dispute for the Rights Commissioner to adjudicate. The case of the applicant had to fail.

McGonagle (applicant) v O'Shea (respondent) and Others, High Court, 25/3/2010, [2010] 3 JIC 2505

TORT

Garda compensation

Malicious injuries – test for damages – foreseeability – causation – mitigation of loss – interpretation of act – Garda Síochána (Compensation) Acts 1941-1945.

The plaintiffs brought test claims pursuant to the *Garda Síochána (Compensation) Acts 1941-1945*, seeking compensation for injuries maliciously inflicted on them. Each of the cases concerned an alleged fear of contraction of hepatitis B, C or HIV. It was submitted on behalf of the plaintiffs that an application for compensation was a two-stage process, involving the minister and High Court, where the former determined

liability and causation, which was then conclusive and binding on the latter. The respondent submitted that the court had an independent function and was entitled to consider *de novo* whether the applicant's claim qualified for compensation. The plaintiff contended that the court, in measuring the damages to be awarded, had to approach the issue of compensation based upon the conclusion of the minister that the injuries were not minor in character. It was argued that the test for the recoverability of compensation was not the test of reasonable foreseeability in negligence, but rather that a purposive approach to the interpretation of the statute itself was appropriate. The plaintiff argued that the court had no jurisdiction to consider causation, and the question arose of whether the injuries of the plaintiff were caused by incorrect medical advice subsequent to the malicious act.

Irvine J held that the court would make an order, in each of the test cases, that the applicant make discovery of all GP notes, consultant notes, hospital records and all test results. The court fixed a date for the hearing of the test cases. The court could not accept the submission of the plaintiff that the court could not be involved in issues of liability or causation. The approach to be taken by the court in assessing damages in a case such as this was clearly set out in the act. As to mitigation of loss, the court had to take into account any failure on the part of the claimant to seek to obtain results of blood tests. The court had to take a purposive approach to the act.

Carey & Others (plaintiffs) v

Minister for Finance (defendant), High Court, 15/6/2010, 2008 [2010] 6 JIC 1502

Personal injuries

Assault in nightclub – injuries sustained – misleading court – evidence – parachute jump – nightclub use of force – whether unreasonable – whether plaintiff had misled the court – Civil Liability and Courts Act 2004.

The plaintiff claimed damages in respect of an assault that he alleged was perpetrated on him by the security staff of the defendant in 2005 at a nightclub, where he was knocked to the ground. He claimed to have suffered soft-tissue injuries to his neck and back requiring significant physiotherapy. The court had to consider whether the plaintiff was ejected from the premises of the defendant by use of unreasonable force,

thus rendering the defendant liable to the plaintiff in damages for assault and/or negligence. Counsel for the defendant sought to rely upon section 26 of the *Civil Liability and Courts Act 2004*, on the basis that the plaintiff had knowingly given false and misleading evidence in relation to a material aspect of the claim, thus warranting the dismissal of the claim. The issue arose as to the accuracy of the evidence of the plaintiff as to the extent of his injuries and the relevance of a parachute jump undertaken by the plaintiff and its timing after the disputed events. The general physical well-being of the plaintiff in the aftermath of the incident also arose for consideration, and it was contended that the plaintiff had misled the court as to his health and recovery from the incident in question.

Irvine J held that, having regard to the findings of fact, the defendant had discharged its duty of care to the plaintiff and other patrons on the night in question. Having heard all of the oral evidence and viewed the video recording, the defendant acted in a professional and responsible fashion, and the use of force was neither unnecessary nor unreasonable. The intervention was warranted. The physical resistance of the plaintiff had caused him his injuries. The claim of the plaintiff for liability on this matter thus failed. The court was satisfied that, when the plaintiff told the court definitively that the parachute jump had taken place the year before the incident, he did so deliberately, hoping to mislead the court on this most material issue, which would undermine the extent of

his injuries. The plaintiff further misled the court in maintaining that he had attended his physiotherapist on over 70 occasions and his general practitioner on some 50 occasions. The defendant had succeeded in establishing that the plaintiff sought to deliberately mislead the court as to the extent of his alleged psychological injury. Recent entries on the plaintiff's Facebook page had recorded the participation of the plaintiff in physical activities. The plaintiff had deliberately overstated his injuries. There was no need for the court to consider the effects of section 26 of the *Civil Liability and Courts Act 2004*. The claim pursued would fail.

Danagher (plaintiff) v Glantine Inns Limited (defendant), High Court, 26/3/2010, [2010] 3 JIC 2610 **G**

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News from the EU and International Affairs Committee

Edited by TP Kennedy, Director of Education, Law Society of Ireland

Public procurement – Commission consultation on concessions

The European Commission recently launched a consultation on concessions addressed to contracting authorities, social partners, and the business community, with a view to improving the current legal framework. In this context, the commission prepared a consultation questionnaire, the aim of which is to learn from the target groups' participation in, and experience of, concessions and to gather suggestions for improvements. The commission envisages that an EU initiative on concessions would aim to facilitate the use of concessions and ensure best value for money by providing all interested parties with legal security and guaranteeing transparency and equal treatment for economic operators.

The distinguishing feature in relation to the definition of 'concession' in EU law is that the consideration for the execution of the subject matter of the concession consists either solely in the right to exploit the work or service, or in this right together with payment. Participants were invited to canvass their views as to the possible shortcomings and operational downsides, if any, associated with the present definition of concession in EU law. In particular, participants were asked whether they had experienced difficulty in distinguishing between public contracts and concessions, whether they had difficulty in defining a 'substantial' or 'significant part' of the operating risk, and how much of the consideration could

be paid by the contracting authority.

Participants were asked whether they would be in favour of EU rules in this area, including rules providing for:

- a) The obligation for the contracting authority to publish a concession notice in the *Official Journal of the EU*,
- b) The obligation to respect minimal deadlines for the presentation of applications for the concession,
- c) The obligation for a concession holder to respect the principle of non-discrimination while selecting holders of sub-contracts,
- d) The possibility for the contracting authority to require the concession holder to award a minimum of 30% of

- e) Effective remedies for aggrieved bidders with the same guarantees as those provided under the *Remedies Directives*.

In relation to service concessions (to which Directive 2004/18/EC is generally inapplicable), participants were invited to express their views regarding the impact of new legislation, if any, providing for compulsory advertisement of service concessions at European level.

It is submitted that, while greater clarity as to the practical application of the definition of 'concession' would be useful,

care should be taken to ensure that the margin for manoeuvre for potential concessionaires to prepare dynamic and innovative proposals – particularly where a contracting authority is unable to specify its requirements in sufficiently precise terms – would not be delimited by overly restrictive requirements.

With that aim in mind, it is submitted that a means to preserve the scope for innovation would be for the commission to provide an updated interpretative communication in relation to the practical application of the definition of 'concession' in this area. **G**

James Kinch is a senior executive solicitor in the law department of Dublin City Council.



Recent developments in European law

INSOLVENCY

INSOLVENCY

Case C-44/07, *MG Probud Gdynia Sp z oo*, 21 January 2010. MG Probud is a building company registered in Poland. It carried out construction work in Germany through a branch. In 2005, it was declared insolvent by a Polish court. Proceedings had been taken in Germany against the manager of the German branch for failure to pay workers and to make social security contributions. The German court had ordered the freezing of assets held in German banks and the attachment of various claims by it against German parties with whom it had entered into contracts.

In the Polish insolvency proceedings, the court questioned whether these German orders were lawful. Polish law applies to the insolvency proceedings and it does not allow such orders after an undertaking has been declared insolvent. The Polish court asked the Court of Justice whether, after main insolvency proceedings have been initiated in one member state, the courts in another member state are permitted to order the attachment of assets of the undertaking that has declared insolvent in the latter state and, secondly, to refuse to recognise and to enforce judgments concerning the course and closure of insolvency proceedings opened in the first member state.

The Court of Justice noted that the *Insolvency Regulation* makes provision for two kinds of insolvency proceedings. Proceedings opened by the court of a member state within the territory where the debtor's main interest are located produce universal effects, in that the proceedings apply to the debtor's assets located in all the member states. Subsequent proceedings may be

opened by the competent court of a member state where the debtor has an establishment. These 'secondary proceedings' produce effects that are restricted to the assets of the debtor situated in the territory of that state.

The judgment opening insolvency proceedings in a member state is to be recognised in all the other member states from the time that it becomes effective in the state of the proceedings; it is, with no further formalities, to produce the same effects in any other member state.

There are only two grounds to refuse to enforce judgments relating to insolvency proceedings. Member states are not obliged to enforce a judgment that may result in a limitation of personal freedom or postal secrecy. Member states are also entitled to refuse to recognise judgments that would be manifestly contrary to its public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

The court held that, due to the universal effect of the main insolvency proceedings, the proceedings opened in Poland encompassed all of MG Probud's assets, including those in Germany. Polish law determines not only the opening of insolvency proceedings but also their course and closure. It governs the treatment of assets in other member states and the effects of the insolvency proceedings on the measures to which those assets are liable to be subject. As Polish law does not permit enforcement proceedings relating to the pool of assets in the insolvency to be brought against the debtor after insolvency proceedings have been opened, German authorities could not validly order enforcement measures relating to MG Probud's assets situated in Germany.

LITIGATION

Case C-144/09, *Hotel Alpenhof* and Case C-585/08, *Pammer*, 18 May 2010, opinion of Advocate General Verica Trstenjak. Ms Heller lived in Germany and booked a one-week stay for herself and a number of friends through the website of the Austrian Hotel Alpenhof. She left the hotel without paying for her stay.

Mr Pammer lives in Austria and booked a trip with a German company specialising in boat excursions. Through a website, he booked a boat trip from Trier to Fernost. The boat did not match the one advertised on the website – cabins were for one person rather than two, there was no outdoor swimming pool, no fitness centre, no functioning television and no possibility to use the deck. He cancelled his trip and asked for his money back.

The question raised by the national court was whether the German or Austrian courts should have jurisdiction in the dispute. The case turned on the interpretation of article 15(1)(c) of the *Brussels I Regulation*. This provides that the consumer rules apply if a consumer concludes a contract with a person who directs professional or commercial activities to the consumer's state or to several states, including the consumer's state. Thus, a consumer is able to sue in his/her own state. The advocate general considered the interpretation of the concept of 'directing activity to'. She concluded that it is not broad enough simply to cover the mere accessibility of a website. Several criteria will be relevant in assessing whether a person is directing commercial or professional activities to a state (whether he is inviting and encouraging a consumer to enter a direct contract). These include

the information published on the site, indication of the international code before the telephone or fax number, information indicating the route to get from other member states to the where the professional operates, and information on the possibility of checking the availability of the stock of a commodity.

The inclusion of an email address on a website is insufficient to conclude that a merchant is directing its activity to another state. If a professional had in the past concluded distance contracts with consumers of a given member state, there is no doubt that it directs its activities towards that member state. In contrast, the conclusion of one contract with one consumer of a particular member state will not suffice for the direction of activity to that state. The language used on the website may be an index of the direction of activity towards a particular member state or to several member states. If a language is used on a site, but it can be changed to another language, that may be an indication that it is directed to other member states. It demonstrates that the merchant wishes to conclude contracts with consumers from other member states.

Another criterion is using the top-level domain of a given state, especially where it is of a state where he is not established. Likewise, the use of email to ensure that consumers in various member states are informed of offers is a criterion. In *Pammer*, the advocate general considered whether a tourist trip on board a cargo ship could be considered as part of a package holiday, defined in article 15(3) of the regulation as a contract for a fixed-price combining travel and accommodation. She said that the court should find that it is. **G**

WILLS

Armstrong, Eric John (deceased), late of Creighanroe, Castleblayney, Co Monaghan, who died on 8 November 2009. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased please contact Anne Stephenson, Stephenson Solicitors, 55 Carysfort Avenue, Blackrock, Co Dublin; tel: 01 275 6759, fax: 01 210 9845, email: stephensonsolicitors@eircom.net

Barry, Phyllis (otherwise Mary Philomena) (deceased), late of 34 Summerstown Road, Wilton, Cork. Would any person having knowledge of a will made by the above-named deceased, who died on 21 June 2009, please contact Michael Nestor, solicitor, 4C Iveagh Trust Buildings, New Bride Street, Dublin 8; tel: 087 066 1532, email: mnestordublin@eircom.net

Coyne, Bridget (deceased), late of Laragh, Ballymoe, Co Roscommon. Would any person having knowledge of a will executed by the above-named deceased, who died on 24 July 2004, please contact the Office of the General Solicitor for Minors and Wards of Court, Courts Service, 15/24 Phoenix Street North, Smithfield, Dublin 7; tel: 01 888 6231, fax: 01 872 2681, email: gensol@courts.ie (reference DS/1959)

Delahunt, Phyllis (Philomena) (deceased), late of 23 Watson Road, Killiney, Co Dublin. Would any person having knowledge of a will made by the above-named deceased, who died on 20 May 2008, please contact Delahunt, Solicitors, 357 North Circular Road, Phibsborough, Dublin 7; tel: 01 830 4711, fax: 01 830 4781, email: delahuntsolicitors@eircom.net

Delahunt, Thomas (deceased), late of 23 Watson Road, Killiney, Co Dublin. Would any person having knowledge of a will made by the above-named deceased, who died on 26 May 2010, please contact Delahunt, Solicitors, 357 North Circular Road, Phibsborough, Dublin 7; tel: 01 830 4711, fax: 01 830 4781, email: delahuntsolicitors@eircom.net

Fitzpatrick, Mary (otherwise Maura) (deceased), late of 7 Lower Kindlestown, Greystones, Co Wicklow. Would any person having knowledge of a will made by the above-named deceased, who died on 15 December 2009, please contact Rutherford, Solicitors, 41 Fitzwilliam Square, Dublin 2; tel: 01 661 6466, email: law@rutherford-solicitors.ie

Garland, Edward Francis (deceased), late of 1 Laurel Park, Clondalkin, Dublin 22, who died on 2 August 1994. Would any person having knowledge of the whereabouts of the original will, dated 19 February 1985, or any other will made by the above-named deceased, please contact Terence E Dixon of KMB Solicitors, 127 Lower Baggot Street, Dublin 2; tel: 01 639 8200, fax: 01 639 8202, email: terrydixon@kmb.ie

McCormack, James (deceased), late of Tongalee, Tang, Ballymahon, Co Longford, who died on 18 July 2010. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Byrne Carolan Cunningham Solicitors, Main Street, Moate, Co Westmeath; tel: 090 648 2090, fax: 090 648 2091, email: kcostello@bcsolicitors.ie

Murphy, Frank (otherwise Francis) (deceased), late of Main Street,

Graiguenamanagh, Co Kilkenny. If any person who has knowledge of any will executed by the above-named deceased, who died at Main Street, Graiguenamanagh, Co Kilkenny, on 21 April 2010, please contact Grace Solicitors, Old Courthouse, Green Street, Callan, Co Kilkenny, tel: 056 775 5035, fax: 056 775 5135, email: lgrace@gracesolicitors.ie

O'Leary, John (deceased), late of 20 Liffey Vale, Liffey Valley Park, Lucan, Co Dublin. Would any person having knowledge of a will executed by the above-named deceased, who died on 10 June 2010, please contact Bowman McCabe, Solicitors, 5/6 The Mall, Lucan, Co Dublin; tel: 01 628 0734, fax: 01 628 0832, email: info@bowmanmccabe.ie

O'Sullivan, Mary (deceased), late of 44 Greenlawn, Kinsale Road, Cork. Would any person who has knowledge of any will executed by the above-named deceased, who died at St Finbarr's Hospital, Cork, on 28 July 2009, please contact Paula Desmond, solicitor, Irwin Kilcullen & Co, Solicitors, 56 Grand Parade, Cork; tel: 021 427 1361

Reilly, Patrick (deceased), late of 34 Leixlip Park, Leixlip, Co Kildare. Would any person having knowledge of a will executed by the above-named deceased, who died on 28 December 2005, please contact Paul Kelly & Co, Solicitors, Rye Cottage, Main Street, Leixlip, Co Kildare; tel: 01 624 3624, email: paul.kelly@pkelly.ie

Webster, Stephen Raymond (deceased), late of 3 Kilakee Gardens, Kilakee, Firhouse, Dublin 24. Would any person with knowledge of a will executed by the above-named deceased, who died on 1 July 2010, please contact Cogan Daly & Co,

Solicitors, Brighton House, 50 Terenure Road East, Rathgar, Dublin 6; tel: 01 490 3394, fax: 01 490 3190, email: cdaly@iol.ie

MISCELLANEOUS

Round Hall seeks co-author

Round Hall, part of Thomson Reuters, is seeking an assistant to update the previous edition of *Drunken Driving and the Law* by Mark de Blacam SC. To be considered, please email your CV and a sample of your legal writing to: catherine.dolan@thomsonreuters.com by 30 November 2010

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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 an application by Carrick Hill Developments Limited

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Take notice that Carrick Hill Developments Limited 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 following property, being all that and those that piece or plot of ground situate at Portmarnock on the west side of the road leading from Portmarnock Railway Station to the strand and Carrick Hill, known as part of the lands of Burrow, containing 23-and-a-half perches statute measure or thereabouts, situate in the barony of Coolock and county of Dublin, with the timber bungalow residence erected thereon, held under a lease dated 7 June 1926 between Violet Carey of the one part and Anne Brady of the other part for the term of 92 years from 1 May 1926, subject to the yearly rent of four pounds.

And take notice that said lease is inferior to a lease dated 30 December 1944 between Helena M Early and Bridget O'Neill for a term of 200 years from 29 September 1852, subject to a yearly rent of £0.00.01.

And take notice that any person having an interest in the freehold estate of the aforesaid property and any party asserting that they hold a superior interest in the aforesaid property (or any of them) are called upon to furnish evidence of title to the below named within 21 days from the date of this notice.

In default of any such notice being received, Carrick Hill Developments Limited 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/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: 5 November 2010

Signed: Eugene Smartt (solicitor for the applicant), Newlands Retail Centre, Newlands Cross, Clondalkin, Dublin 22

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 Sally Cronan of 118 Griffith Avenue, Dublin 9

Take notice that any person having an interest in the fee simple or any superior or intermediate interest in the property known as 43/44 Wellington Quay, Dublin 2, held under an indenture of lease dated 7 October 1732, Henry Aston to Adam

Summerwell, for the term of 500 years from 1 November 1732, at the yearly rent of £50, should give notice to the undersigned solicitors.

Take notice that the applicant, Sally Cronan, intends to submit an application to the county registrar for the county of Dublin for the acquisition of the freehold interest and all intermediate interests (if any) in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid properties is called upon to furnish evidence of the title to the aforesaid property to the undersigned within 21 days from the date of this notice.

In default, Sally Cronan intends to proceed with an application before the said county registrar to acquire the freehold and all intermediate interests (if any) in the properties on the expiry of 21 days from the date of this notice and will apply to the said county registrar for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest(s) including the freehold reversion in the said property are unknown or unascertained.

Date: 5 November 2010

Signed: Donal T McAuliffe & Co (solicitors for the applicant), 57 Merrion Square, Dublin 2

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

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 56 O'Connell Street Upper, Dublin 1, comprised in folio

DN187403F, the subject to a perpetual yearly rent of €88.88 (£70), created by a lease for lives renewable forever dated 2 November 1754 from George Stewart to Michael Ward.

Take notice that Joseph O'Reilly, being the person entitled to the lessee's interest in the said lease, intends to apply to the Dublin county registrar for the acquisition of the fee simple estate and all intermediate interests in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the 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 said registrar for such directions as may be appropriate on the basis

that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the said property are unknown and unascertained.

Date: 5 November 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 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 42 Upper O'Connell Street, in the parish of St Thomas and city of Dublin, the subject of a perpetual yearly rent of €13.01 (£10.4.11 pre-decimal currency), created by a fee-farm grant dated 24 September 1858 from William Vance to the Right Honourable Archibald Earl of Gosford.

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Take notice that Joseph O'Reilly, being the person entitled to the grantee's interest in the said fee-farm grant, intends to apply to the Dublin county registrar 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 said registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to all superior interests up to and including the fee simple in the said property are unknown and unascertained.

Date: 5 November 2010

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

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NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE LAW SOCIETY GAZETTE

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

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

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Law Society of Ireland

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(Must have excellent academics and strong exposure to commercial contracts)
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EU/Competition – Associate
Funds – Junior (Must have strong academics and prior exposure to Funds work in training contract)
Funds – Associate
Funds – Senior Associate
Insurance (Contentious & Non-Contentious) – Associate to Senior Associate
Professional Indemnity – Associate to Senior Associate
Commercial Litigation – Associate to Senior Associate
Tax – Senior Associate