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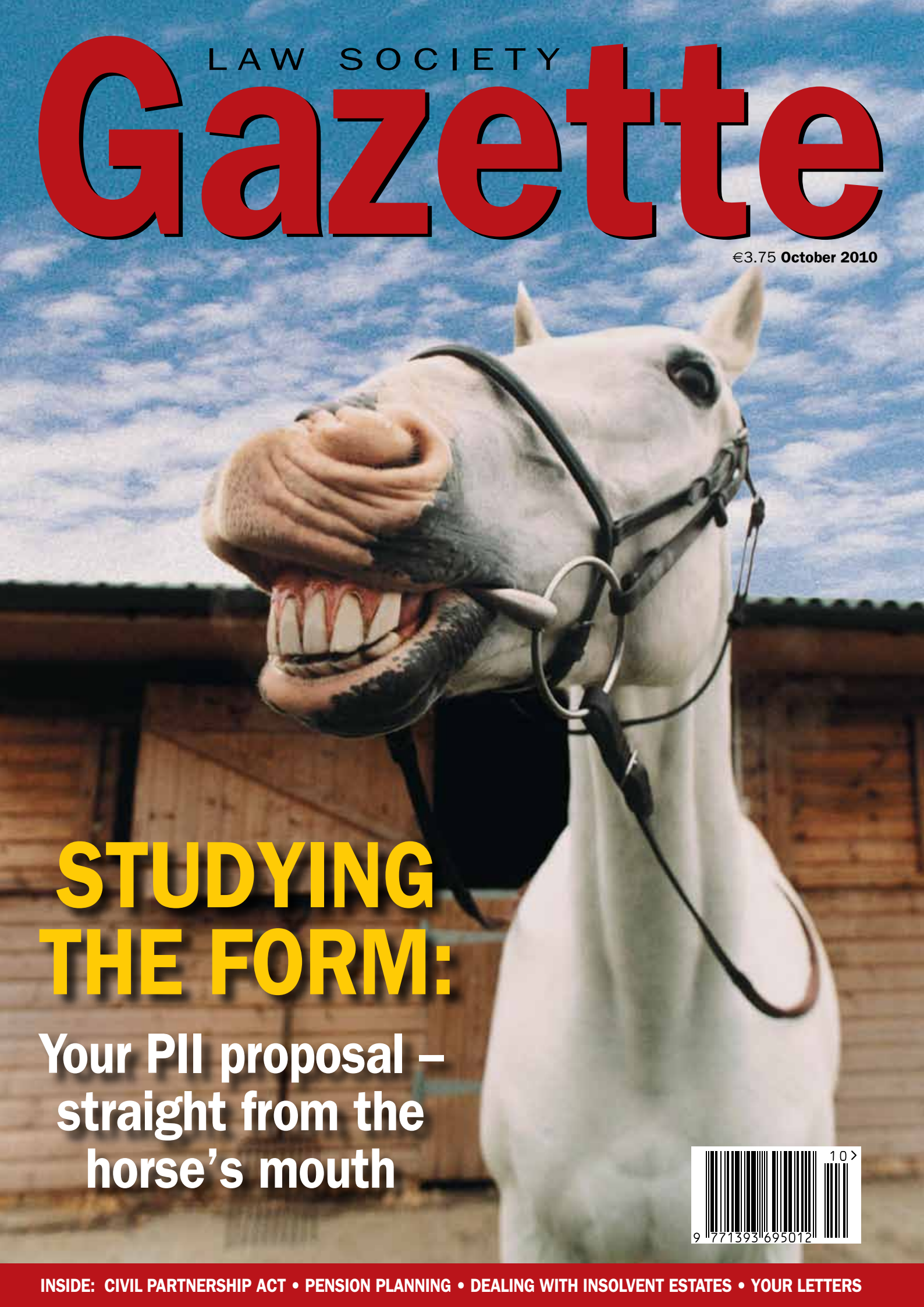

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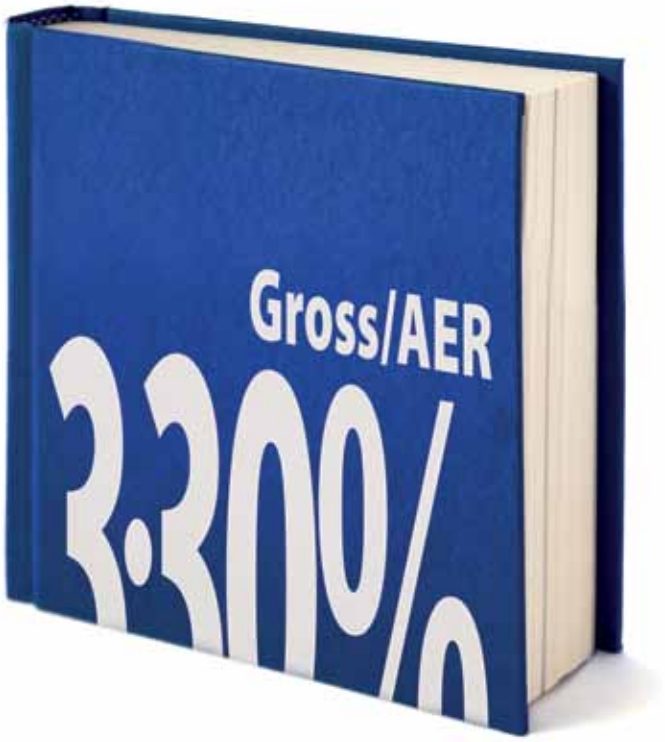

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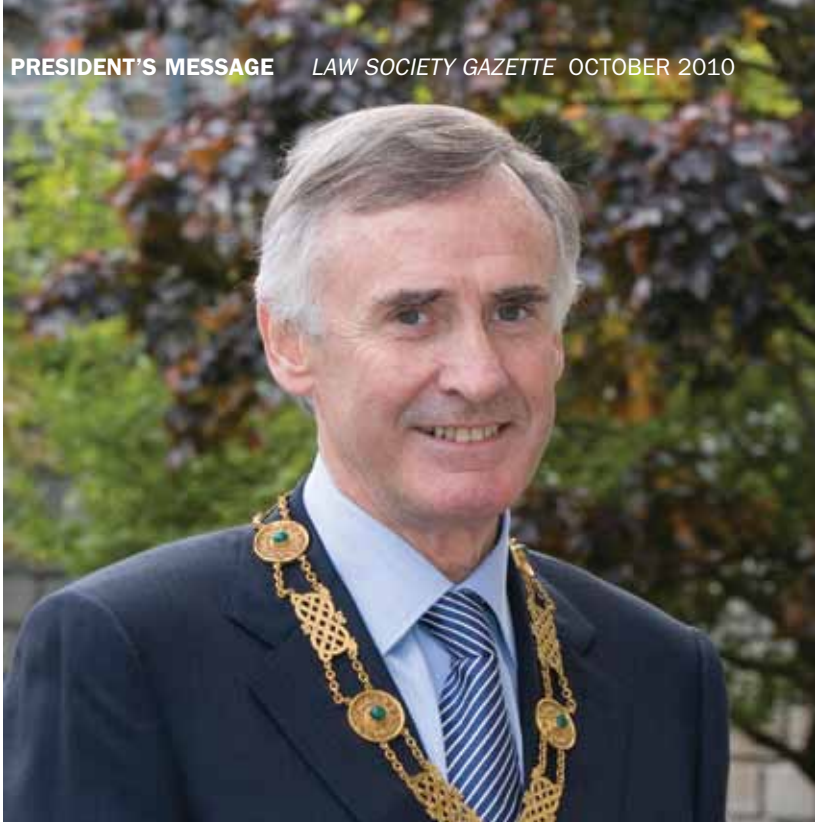


As we go to press, the scrutineers' report on this year's Council election has become available. The most surprising aspect this year is the fact that only 15 candidates were nominated – as a result of which, no ballot of members was required. Therefore, all 15 candidates were provisionally declared elected. Before going any further, I wish to congratulate all members who have been returned: Donald Binchy, Maura Derivan, Patrick Dorgan, Eamon Harrington, Barry MacCarthy, James MacGuill, James B McCourt, Simon Murphy, Michelle Ní Longáin, Daniel E O Connor, Gerard O Donnell, Michael Quinlan, John P Shaw and Brendan J Twomey.

Congratulations aside, insofar as we can tell, this situation is unprecedented in the history of the Society. Moya Quinlan, who recently celebrated 41 years serving the profession on the Council, tells me that she had never encountered a situation before when a ballot had not been required, and had never heard tell of it previously.

We might reasonably ask why this has occurred. One must assume that, given the current economic difficulties being faced by large and small firms around the country, practitioners have no option but to devote their entire energies to running their practices in order to stay in business. The challenges we are facing have been detailed in these pages, time and again – the downturn in legal business, the effective disappearance of conveyancing work, the difficulties associated with professional indemnity insurance, the possible increase in premiums this year, as well as the difficulty of getting paid for the work we are doing.

In drawing attention to this matter, I wish to acknowledge the great work being done by those members who continue to serve on Council, as well as all those who serve on the Society's many committees and task forces. Your selfless service is much appreciated by your fellow practitioners – I would encourage others who can do so to follow suit.

> *"I cannot overstress that the insurance market is very fragile and a smooth renewal is dependent on quite a number of factors outside the control of the Law Society"*

Outsourcing impact?

In August, I attended the annual meetings of the American Bar Association in San Francisco, and the conference of the Canadian Bar Association in Niagara, Ontario. One of the main topics – apart from the effects of the recession – was outsourcing. Outsourcing is taking place, not only in relation to secretarial services, but also in terms of legal research. Indeed, I am aware of a number of Irish practices that outsource some or all of their secretarial work to South Africa and India.

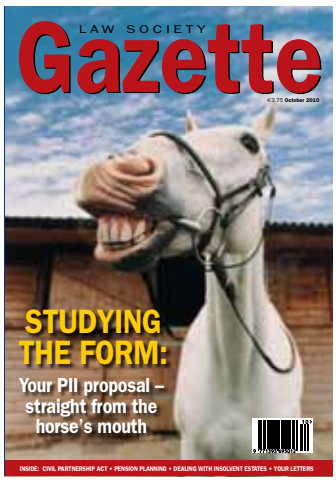
I am of the opinion that discussion needs to take place in order to examine the impact of outsourcing on the long-term health of the legal profession here in Ireland, and whether that impact will be a positive or negative one. One thing is for certain, however, outsourcing is a phenomenon that is already taking place here, and looks set to expand as a result of the requirement to drive down costs.

Main concerns

On 13 September, I met the Mayo Solicitors' Bar Association (MSBA). As with other meetings in recent months, the main concern has been with the up-coming renewal of cover for professional indemnity insurance. I would strongly recommend that members follow the comprehensive advice in this issue, with a view to obtaining the best possible premium. I cannot overstress that the insurance market is very fragile, and a smooth renewal is dependent on quite a number of factors outside the control of the Law Society.

I am glad to report that the recent Law Society regulations prohibiting solicitors from giving commercial undertakings, and from acting for the lending institutions and borrower in such circumstances, were well received by MSBA members. In addition, there was an overwhelming acceptance that the Law Society should introduce regulations prohibiting solicitors from acting on both sides of conveyancing transactions. G

Gerard Doherty
President



On the cover

Don't be looking a gift horse in the mouth, now: your glorious *Gazette* has all the info you need to get over that PII hurdle nicely, and with a head to spare

PIC: JUPITER IMAGES

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CARLOW

Congratulations to Terry Doyle and Frank Lanigan who successfully completed the Wicklow 200 amateur cycling challenge and raised €3,000 for Headway, the Malcomson Law charity of the year. The 200km route peaked at a height of 500m – tough going guys! Terry only started training last February, while Frank takes on the challenge every year.

CORK

The SLA has arranged a number of CPD seminars for the coming months. Topics will include 'The tax implications of settlements and awards in dismissal and redundancy cases', 'The *Civil Partnership Act*' and 'Summary of the law on bankruptcy'.

The AGM of the SLA will be held at 5.30pm on Tuesday, 2 November 2010, at the Law School, Courthouse Chambers, Washington Street, Cork.

DUBLIN

The DSBA's end-of-term party took place at Blackhall Place, with a great crowd attending. In addition, John O'Malley and the hard-working DSBA committee, particularly Eamon Shannon and John Hogan, have been busy organising golf, soccer, cricket and tennis outings to distract frazzled nerves.

A useful forum was arranged for colleagues to discuss the pending insurance round, with a very frank exchange taking place between colleagues and both the SMDF and XL, which clarified a number of misconceptions. A more in-depth forum took place on 27 September in Blackhall Place attended by the Law Society president and the director general.

Rising to the challenge for Headway were Terry Doyle *(left)* and Frank Lanigan, both of Malcomson Law in Carlow

We are delighted to send best wishes to our Council member Keith Walsh and his wife Moira on the birth of their first child, Katie.

KILDARE

The Kilashee House in Naas will be the venue for the next CPD course on risk management, with Anne Neary, Paul Kelly, David Osborne, Andrew Cody and Brian McMahon all contributing. Tony Hanahoe will address the topic of 'Drunk driving, drug driving and disclosure'.

LIMERICK

Many from the Limerick legal fraternity were delighted to celebrate the recent marriage of two very popular local solicitors, Philip Deeney and Eileen Whelan, who had a summer wedding in Connemara.

Much is taking place on the CPD front. According to bar association president Elizabeth Walsh: "A busy autumn schedule will include an address by Leonie Hussey BL on the *Land & Conveyancing Law Reform Act 2009*, a talk on PII and a presentation on defamation and solicitors' accounts and regulations."

MAYO

The Mayo Solicitors' Bar Association hosted the President of the Law Society Gerard Doherty (himself a Mayo man) and director general Ken Murphy at a meeting on 13 September 2010, which was attended by three past-presidents from Mayo, namely Adrian Bourke, Ward McEllin and Pat O'Connor.

As ever, the renewal of their PII cover was the main concern for members. In relation to the coming year, the president indicated his belief that there would be up to a dozen insurers in the market. The director general suggested that members make multiple applications, with a view to obtaining the best possible level of premium.

Many questions were raised and answered during the course of the meeting, including the issue of undertakings. The Society's recent regulations prohibiting solicitors from giving commercial undertakings and acting for a lending institution and borrower in such circumstances were well received – these come into effect on 1 December 2010. There was an overwhelming view that the Society should introduce regulations prohibiting solicitors from acting on both sides of conveyancing transactions.

MONAGHAN

Lynda Smith of the Monaghan Bar Association has asked us to mention the CPD programme on 22 October in the Glencarn Hotel, Castleblayney. Says Lynda: "Last year was a great success, with over 100 solicitors attending from the county and beyond. Justine Carthy of our CPD committee has lined up an excellent agenda. This will include talks on employment and equality law, costs survival of legal firms and the *Civil Partnership Act*."

This will be followed by dinner, drinks and dancing – and there will be no early-morning radio interviews entertained!

WATERFORD

Waterford Law Society, in conjunction with the local bar, held its summer barbeque at The Strand Hotel in Dunmore East during the June High Court sessions. A crowd of 80 strong enjoyed an informal evening of good food, music and fun. The event was organised by Jill Walsh, Rosa Eivers and Fiona FitzGerald on behalf of Waterford Law Society, and by Gareth Hayden BL on behalf of the bar. The barbecue was preceded by a challenge soccer match between the solicitors and Bar, with victory going to the solicitors. G

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

Commercial property transaction rules

The *Solicitors (Professional Practice, Conduct and Discipline – Commercial Property Transactions) Regulations 2010* (SI no 366 of 2010) introduce significant restrictions on solicitors acting in commercial property transactions that involve the provision of financial accommodation by a financial institution. The effect of the regulations is as follows:

1) From 1 December 2010, a solicitor's firm shall not act for both an obligor and a financial institution in connection with a commercial property transaction where the financial institution provides financial accommodation in connection with the commercial property transaction.
2) From 1 December 2010, a solicitor's firm acting for an obligor shall not give an undertaking that is a relevant undertaking (as defined – see below) in the course of a commercial property transaction to a financial institution in connection with the provision by the financial institution of financial accommodation to effect the commercial property transaction.

This prohibition on certain commercial undertakings does not apply to so-called '*de minimis* loans', where the undertaking expressly provides that the solicitor's firm's liability – whether direct, indirect or consequential and howsoever arising – to the financial institution, pursuant to the undertaking, shall not exceed €75,000 or any lesser amount. There will be a Law Society-approved form of undertaking and certificate of title for use under this exemption. The prohibition on acting for both an obligor and a financial institution applies in relation to *de minimis* loans and the Law Society-approved forms will specifically provide that the basis for giving the undertaking and the certificate of title is that the solicitor is not acting for the financial institution in the transaction.

Undertakings given prior to the coming into force of the regulations, and which remain to be honoured in whole or in part after the coming into force of the regulations, are unaffected by the prohibition.

For the purposes of the regulations, certain expressions have defined meanings.

An 'obligor' is a borrower, guarantor, indemnifier or security provider.

A 'commercial property transaction' is any property transaction (including a mortgage), other than a residential property transaction.

A 'residential property transaction' is any transaction (including a mortgage) carried out by what is called a 'relevant person' in connection with residential property for non-business purposes, other than any transaction whereby it is intended to use the property exclusively to earn rental income (so-called 'buy-to-let' or 'residential investment property').

A 'relevant person' is widely defined as any person, whether acting in that person's own right or as a personal representative, trustee, agent, attorney, committee of a ward of court or otherwise, including any individual, firm, company, corporation, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the foregoing.

The definition of 'residential property' encompasses:

- A building that, at the date of the residential property transaction, is intended to be used as a private dwelling,
- Land on which, at the date of the residential property transaction, it is intended to construct a private dwelling,
- Land that is incidental to the enjoyment of the private dwelling or the intended private dwelling and that is used, or is intended to be used, for non-business purposes.

Private dwellings include buildings to be occupied on an occasional basis, such as holiday homes, and a building includes part of a building.

A 'relevant undertaking' is an undertaking to do or procure the doing of any of the following (in all cases referring to land or buildings the subject of a commercial property transaction):

- Discharge a mortgage or other security over, or a loan advanced on the security of, any land or buildings,
- Furnish a certificate of title relating to any land or buildings to the financial institution,
- Furnish title deeds to any land or buildings to the financial institution,
- Pay any stamp duty accruing due in connection with any land or buildings,
- Register title to any land or buildings,
- Register a mortgage or other security over any land or buildings.

'Relevant undertaking' does not include an 'accountable trust receipt', which is an undertaking to hold title deeds to any land or buildings on behalf of a financial institution, and either to return such title deeds to the financial institution on demand in the same condition as they were received by the solicitor's firm, or to discharge or procure the discharge of a mortgage or other security on, or a loan advanced on security of, such land or buildings.

All references in the regulations to the giving of relevant undertakings, or the furnishing of documents, to financial institutions include the giving of relevant undertakings, or the furnishing of documents, to 'representatives' of the financial institutions, which are any director, officer, employee, agent or advisor of the financial institution.

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by Martin Anthony McDonnell BL, Consultant Editor: Paul McDermott SC
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Road Traffic Law Handbook by Katie Dawson
ISBN: 978 184766 7199, Format: Paperback, Pub Date: Oct-10, Price €120.00(approx)

NOVEMBER 2010

Civil Service Regulation by Brian Gallagher and Cathy Maguire
ISBN: 978 184766 5515, Format: Paperback, Pub Date: Nov-10, Price €110.00(approx)

Intellectual Property Law in Ireland 3rd Edition by Robert Clark, Shane Smyth & Niamh Hall
ISBN: 978 184766 3665, Format: Hardback, Pub Date: Nov-10, Price €180.00(approx)

Criminal Legislation by Lynn O'Sullivan
ISBN: 978 184766 7182, Format: Paperback, Pub Date: Nov-10, Price €95.00(approx)

DECEMBER 2010

Planning Law in Ireland by John Gore-Grimes
ISBN: 978 184766 3658, Format: Paperback, Pub Date: Dec-10, Price €155.00(approx)

Corporate Insolvency & Rescue 2nd Edition by Prof Irene Lynch-Fannon and Gerard Murphy
First edition by Lynch, Marshall & O'Ferrell, published 1996
ISBN: 978 184766 3795, Format: Hardback, Pub Date: Dec-10, Price €165.00(approx)

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Irish Company Secretary's Handbook by Jacqueline McGowan-Smyth and Eleanor Daly
ISBN: 978 184766 1463, Format: Paperback + CD ROM, Pub Date: Dec-10, Price €150.00(approx)

Taxation of Company Reorganisations by Evelyn Forde
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Corporate Crime in Ireland by Shelley Horan, Consultant Editor: Shane Murphy SC
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Disciplinary Procedures in the Statutory Professions by Mills, Burke, McDowell & Ryan
ISBN: 978 184766 6697, Format: Hardback, Pub Date: Dec-10, Price €160 (approx.)

Competition Law: Questions and Answers for Practice by Nathy Dunleavy, Consultant Editor: Paul Sreenan SC
ISBN: 978 184766 6871, Format: Hardback + CD Rom, Pub Date: Dec-10, Price €150 (approx)

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Society inspires partnership changes

On 1 July 2010, the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* was passed by the Oireachtas and is currently awaiting a commencement order and necessary corollary adjustments to the taxation and social welfare code, *writes Richard Hammond*.

The bill as enacted was noticeably different to the bill as presented at committee stage. In particular, provisions pertaining to succession law were the subject of a comprehensive submission prepared by the Law Society's Probate, Administration and Trusts Committee and submitted jointly with the Society of Trust and Estate Practitioners Ireland.

The submission drew attention to a number of potential difficulties that the bill, as drafted, could pose in practice. The submission was very well received by the Oireachtas Select Committee on Justice, Equality, Defence and Women's Rights, and the work of the Probate, Administration and Trusts Committee was highly commended.

Four significant adjustments were made as a consequence of

the submission. Firstly, it had initially been proposed that any issue could challenge an estate of a deceased civil partner, such that the entitlement of a surviving civil partner on intestacy would be diminished. This right to challenge is now confined to children.

Secondly, in respect of a qualified cohabitant claiming against the estate of a deceased cohabitant, there was no time limit with regard to the proximity between the termination of the period of cohabitation and the death of the cohabitant. Thus, a former cohabitant from decades past could theoretically make a claim against an estate. The submission argued that, for the other *inter vivos* entitlements in the bill, a claim had to be made within two years of the end of the period of cohabitation and that this should also apply to estate applications. Unless certain special circumstances apply, the act now confines entitlement to make an application for provision from an estate to qualified cohabitants, where the period of cohabitation ended not less than two years before the death of the deceased cohabitant.

Thirdly, unlike the other *inter vivos* entitlements in the bill, there was no requirement for the surviving qualified cohabitant to be financially dependent on the other, now deceased, cohabitant before being entitled to make an application for provision from the estate. Following the submission, the bill was modified in this regard and applicants must now show that they were financially dependent on the deceased cohabitant to be entitled to make an application for provision from the estate.

Cohabitants' agreement

Finally, there had been some dispute among commentators as to whether the bill enabled cohabitants to reach an agreement pertaining to financial matters arising on the death of one of the cohabitants. The statute, as enacted, clarifies this point, and cohabitants are free to enter into a cohabitants' agreement, that makes provision for financial matters where the relationship is terminated by the death of one or other of the cohabitants.

While the act does contain provisions that will make for interesting practice, the amendments to the bill arising from the Probate, Administration and Trusts Committee submission ensures that the new regime is more amenable to succession law practice than it might otherwise have been.

IMPORTANT NOTICE TO ALL SOLICITORS' FIRMS – PROFESSIONAL INDEMNITY INSURANCE

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 particular, 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.

The background to this requirement is as follows – the minimum terms and conditions for professional indemnity insurance, in clause 2.2, state that the insurance must indemnify each insured against civil liability incurred by an insured arising from any provision of legal services, provided that:

a) A claim in respect of such civil liability is first made against the insured and notified to the insurer during the coverage period, or
b) Such civil liability arises from circumstances first notified to the insurer during the coverage period.

In all cases, the coverage period expires on 30 November. Therefore, all current insurance will expire on 30 November 2010. The consequence of this is that all claims first made against your firm on or before 30 November 2010 must be notified to the insurer by 30 November 2010. The 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.

In addition, your firm should comply with any notification requirements set out in the insurance policy.

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Pension rule changes: time for you to take action?

The government plans to alter the pensions system, as outlined in the *National Pensions Framework* document published in early 2010. The changes are due to be implemented by 2014 – but measures that help state finances could come into force a lot sooner than that.

You should consider two immediate implications:

- Changes to the tax relief on contributions suggest that it makes sense to maximise pension contributions before the changes take effect,
- Changes to the rules governing tax-free lump sums at retirement imply that anyone over age 60, with a fund worth more than €800,000, may wish to consider taking retirement benefits now.

Changes to tax relief on pension contributions

If you are currently a higher rate taxpayer, you get full 41% relief on any pension contributions made, within age and salary-related limits. You also get relief from PRSI and the health levy.

The government plans to introduce a single 33% rate of relief on private pension contributions for all taxpayers. Relief from PRSI and the health levy should continue to be provided.

When the change happens (and the timing is unclear), it will significantly reduce the tax effectiveness of pension contributions for higher-rate taxpayers. *So, if you pay 41% tax, you may want to increase your pension contributions in order to maximise the benefit from the current tax regime.*

If you currently have other savings, these could be diverted to your pension plan over the next few years – provided you don't need to avail of this money until you take your benefits.

Note: As with any investment, the value of pension contributions can go down as well as up.

The difference between the current and proposed tax relief system for higher-rate taxpayers is outlined in the table above.

	Current system (41% relief)	Future system (33% relief)
You make annual pension contributions of:	€1,000	€1,000
Tax relief:	€410	€330
PRSI and health levy relief*:	€80	€80
Net cost to you:	**€510**	**€590**

** Assumes 4% PRSI and 4% health levy. If you earn over €75,036 per annum, you may receive only 5% relief (that is, health levy only).*

How much can you contribute?

You can contribute as much as you like. However, you only get tax relief within the Revenue tax limits set out below (subject to a current maximum annual earnings limit of €150,000).

Age	% of earnings
29 or under	15%
30 - 39	20%
40 - 49	25%
50 - 54	30%
55 - 59	35%
60+	40%

Changes to tax-free lump sums at retirement

Personal pension holders can currently take up to 25% of their fund as a tax-free lump sum at retirement. In the *National Pensions Framework*, the government confirmed that they intend to introduce a cap of €200,000 on this tax-free lump sum.

Personal pension holders have the right to take their retirement benefits any time from age 60, whether they keep working or not. So, any Law Society member with either a personal pension worth substantially more than €800,000, or total pensions from all sources producing a tax-free lump sum of more than €200,000, might be well advised to consider taking their benefits now, to pre-empt this change.

LAW SOCIETY OF IRELAND RETIREMENT TRUST SCHEME

Set up by the Law Society in 1975, this group personal pension arrangement facilitates the full range of tax reliefs available on contributions, on investment and on draw-down.

Members of the Law Society who are self-employed, in partnership or in non-pensionable employment can join the scheme. Pension savings within the scheme currently exceed €120,000,000.

For queries or a member booklet, contact Mercer by email at justask@mercer.com, or tel: 1890 275 275 (from outside Ireland, please dial +353 (1) 4118505).

A copy of the latest updated booklet is also available at www.lawsociety.ie (in the members' area).

INTERVIEWING SUSPECTS

The Minister for Justice has set up an advisory committee to oversee policy and procedure on the interviewing of suspects by the gardaí. Its members are Mr Justice Esmond Smyth (chair, and former president of the Circuit Court), Martin Callinan (deputy commissioner, An Garda Síochána), Ruth Fitzgerald (Office of the Attorney General), Patrick Gageby SC (Bar Council), Claire Loftus (Office of the DPP), John Lohan (Department of Justice and Law Reform), James MacGuill (Law Society), and Roger Sweetman SC (Irish Human Rights Commission).

MARATHON MAN

The *Gazette's* 'Nationwide' contributor, Kevin O'Higgins, is planning to run the Dublin City Marathon on 25 October to raise funds for the Solicitors' Benevolent Association (SBA). "I'm hoping to raise a fair bit of money for that cause, as many of our colleagues are now in dire straits," he says.

SBA chairman Thomas A Menton says: "I would urge you to make a contribution to assist Kevin in his efforts of raising funds for the association. Please give generously. I need hardly remind you that if you give €250 or more, it is a perfectly legitimate tax deduction."

All those who contribute €250 or more to the fund will be entered into a draw for two tickets for the Ireland v New Zealand rugby match on Saturday 20 November 2010.

Cheques should be made payable to the Solicitors' Benevolent Association and sent to the association, care of the Law Society of Ireland, Blackhall Place, Dublin 7; DX 79; or care of Law Society of Northern Ireland, 96 Victoria Street, Belfast BT1 3GN, Northern Ireland; DX 422 NR Belfast (marked ref: 'Kevin O'Higgins Dublin City Marathon').

New diploma programme launched

Following the success of its spring programme, the Society's diploma programme is now taking bookings for its autumn courses. Longstanding popular courses include those on intellectual property and information technology law, family law, human rights, insolvency and corporate restructuring.

Two new courses will be of interest to practitioners, however. The Diploma in Environmental and Planning Law will start on 12 October and will run weekly, culminating in an exam on 26 March 2011. All lecturers are experienced lawyers or consultants in this ever-developing technical and specialised area of law. The overall objective is to assist practitioners in determining what planning and environment legislation applies in different scenarios and any arising exposure for clients including, for example, due diligence on the sale and purchase of land, construction and building

regulations, the interplay with the EPA, and other responsibilities arising from dealings in land. Workshops and case study examples will be used to maximise the learning experience.

First of its kind

The Certificate in Capacity, Mental Health and the Law will start on 9 November and run until March 2011. This course is the first of its kind in the Law Society and aims to provide practitioners with a solid grounding to the existing legal framework, current case law and best practice guidelines when dealing with vulnerable clients in this jurisdiction.

The course will comprise two modules: the first half will focus on mental health and the law, including the *Mental Health Act 2001*, the distinction between an involuntary/voluntary patient, the role of the Mental Health Commission, mental health tribunals, and the role of the legal representative. The second half will deal with capacity and the law, including the legal framework dealing with the vulnerable client, the current approach and structures in the assessment of capacity, the *Mental Capacity Bill*, the interface with international conventions, enduring powers of attorney, wards of court and testamentary capacity. The course will also touch upon the rights of children. The lecturers on the course are leading figures in this area of practice.

Lectures on demand

As part of our ongoing commitment to provide access countrywide to the diploma programme, many of our courses will be webcast. This means that students can access the lectures 'live' on home or office PC or, alternatively, watch the lectures back on demand at a later date for the duration of the course.

The fee for diploma courses is €2,150 and for certificate courses is €1,160. However, there are further reductions of 20% available for out-of-work solicitors attending these courses.

For further information on these and the full diploma programme, visit the diploma programme pages on our website, www.lawsociety.ie/diplomas, or contact us by email at diplomateam@lawsociety.ie, or tel: 01 672 4802.

ONE TO WATCH: NEW LEGISLATION

Personal Data Security Breach Code of Practice

On 7 July 2010, the Data Protection Commissioner (DPC) approved a *Personal Data Security Breach Code of Practice* (the approved code). Previously, the DPC had published a draft *Data Security Breach Code of Practice* on which comments and observations from the public were invited. The DPC has approved the code under section 13(2)(b) of the *Data Protection Acts 1988 and 2003*. According to section 13(2)(b), the DPC has the power, where he considers it necessary or desirable to do so, and after consultation with any trade associations or other bodies having an interest in the matter, and data subjects or persons representing data subjects as he or she considers appropriate, to prepare and arrange for the dissemination of guidance as to good practice in dealing with personal data. At present, the code does not have force of law, but can be taken into consideration in court proceedings. The code will attain legislative effect if/when approved by the Houses of the Oireachtas. The approved code is accompanied by 'breach notification guidance' (BNG).

Key obligations

- Where an incident gives rise to a risk of unauthorised disclosure, loss, destruction, or alteration of personal data, in manual or electronic form, the data controller must give immediate consideration to informing those affected.
- Data controllers should also, where appropriate, notify organisations that may be in a position to assist in protecting data subjects including, where relevant, An Garda Síochána, financial institutions, and so on.
- The data controller may conclude that there is no risk to the data and therefore no need to inform data subjects where the data concerned is protected by technological measures such as to make it unintelligible to any person who is not authorised to access it. Such a conclusion would only be justified where the technological measures (such as encryption) were of a high standard.
- All incidents of loss of control of personal data in manual or electronic form by a data processor must be reported to the relevant data controller as soon as the data processor becomes aware of the incident.
- All incidents involving risks to personal data should be reported to the Data Protection Commissioner as soon as the data controller becomes aware of the incident, save in circumstances when the full extent and consequences of the incident have been

McFarlane wins case against state

The state has lost a case in the European Court of Human Rights brought by former Republican activist Brendan McFarlane, *writes Mark McDermott*. The court ruled that proceedings taken against him had taken too long and ordered that he be paid compensation of €15,500.

McFarlane, a prominent Republican activist in the 1970s and '80s, was suspected of involvement in the 1983 kidnapping of supermarket executive Don Tidey. On the run, having escaped from the Maze Prison, he was arrested in 1986 and sent back to prison, where he stayed until 1998.

In January 1998, Mr McFarlane was released on parole. A few days after his release, he was arrested and detained by the Garda Síochána. He was subsequently charged with false imprisonment and the unlawful possession of firearms by the Special Criminal Court in Dublin – offences he was alleged to have committed in 1983 when he had escaped from prison. On 13 January 1998, he was released on bail, subject to reporting restrictions.

The ECtHR case concerned unjustified delays in the criminal proceedings brought against him for offences allegedly committed in 1983, of which he was acquitted in 2008.

McFarlane brought judicial review proceedings in relation to his prosecution, claiming that the delay in bringing criminal proceedings against him had prejudiced his chance of having a fair trial. In addition, the failure of the prosecuting authorities to maintain and have available for inspection certain items of evidence (such as fingerprints) had limited his ability to fully contest the nature and strength of the evidence to be introduced at his trial.

McFarlane was represented by solicitor James MacGuill, who single-handedly took on the might of three senior counsel in the Strasbourg court.

The state argued that, while

'Bik' McFarlane: 'proceedings had taken too long'

no one had ever requested damages for breach of a right to reasonable expedition, this remedy did exist. By not seeking it, McFarlane had not exhausted all domestic remedies.

In his argument, Mr MacGuill pointed out that no one had ever successfully sued for damages in such an action. Aside from that, as his client's main objective was in having his trial stopped, it was unrealistic to expect him to simultaneously seek to have the case expedited on what he regarded as tainted evidence.

Such a course of action before both the High and the Supreme Courts would have taken many years, due to the backlog of cases, which only would have served to add to further delay.

The ECtHR concluded that the Irish government had not demonstrated that any of the remedies proposed by them constituted effective remedies available to the applicant. It also concluded that the overall length of the criminal proceedings against the applicant were excessive, in violation of article 6, section 1.

Finding in McFarlane's favour, the court ordered Ireland to pay the applicant a total of €15,500 encompassing €5,500 for non-pecuniary damage and €10,000 for costs and expenses.

It will be interesting to see whether other litigants will rely on the Strasbourg decision to pursue claims for compensation on grounds of delay in the Irish courts.

reported to the affected data subject(s) and it affects no more than 100 data subjects and it does not include sensitive personal data or personal data of a financial nature.

- Data controllers should report incidents to the office within two working days of becoming aware of such incidents, outlining the circumstances surrounding the incident. Reports can be in the form of email (preferably), telephone or fax and must not involve the communication of personal data. Subsequently, the Data Protection Commissioner will conclude whether there is a need for a detailed report and/or subsequent investigation.
- Any detailed written report of the incident requested by the Data Protection Commissioner must be provided within a specified timeframe and should include the following elements:
  - The amount and nature of the personal data that has been compromised,
  - The action being taken to secure and/or recover the personal data that has been compromised,
  - The action being taken to inform those affected by the incident or reasons for the decision not to do so,
  - The action being taken to limit damage or distress to those affected by the incident,
  - A chronology of the events leading up to the loss of control of the personal data, and
  - The measures being taken to prevent repetition of the incident.
- The DPC may undertake further investigation of the circumstances surrounding the personal data security breach. Investigations may include on-site examination of systems and procedures and could lead to a recommendation to inform data subjects about a security breach incident where a data controller has not already done so. Where required, the commissioner may use his enforcement powers to compel appropriate action to protect the interests of data subjects.
- In circumstances where there is no notification of the Office of the Data Protection Commissioner, the data controller should nevertheless keep a summary record of each data security breach incident. The record should outline the nature of the incident and explain why the data controller did not consider it necessary to inform the Office of the Data Protection Commissioner. Such records should be available to the Office of the Data Protection Commissioner upon request. G

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

Negotiating the re

PII renewal in 2009 was very difficult, so David Rowe gives ten tips on how to successfully negotiate your way through the insurance renewal process

1 Take it seriously

Treat the insurance renewal and the associated documentation as if you were preparing a tender for an important piece of work – it is at least of equal importance. This includes how you present the renewal form, the clarity of your responses, typing rather than handwriting, and so on. Feel free to include supplementary information that helps your submission, such as the result of a risk-management audit.

2 Now is the time

Start working on this now. Picture the scene: the underwriter has 150 proposal forms in front of him and his first job is to grade the proposal forms between the 'yes' pile, the 'maybes' and the 'no' pile. The 'yes' forms will probably get quotes, the 'maybes' may never be looked at again, and the 'no' pile will not get a look in. By completing your renewal form early, you get ahead of this process.

3 Know your potential insurers

There are six continuing insurers in the Irish market: Royal & Sun Alliance, Liberty Mutual Insurance Europe Limited, Chartis, the SMDF, XL and Quinn, and possibly a couple of new entrants. The first three of these primarily deal with mid to larger sized firms, and the latter three mainly deal with small to medium sized firms. There are, of course, exceptions to this, but most small to medium sized firms should be targeting all three potential insurers and maybe having a broker work on their behalf to target the three larger insurers. Understanding which insurers are in the market for which size of firm is important – it avoids wasting valuable time and effort.

4 Use brokers intelligently

If you are going to use a broker, use a specialist PI broker who has connections and knowledge of the market. General brokers tend to lean on the specialist brokers and therefore share commission or charge more, which makes the proposition less interesting to both parties.

Avoid having multiple brokers submit your proposition to the same insurance companies. Where the insurers see your proposition in front of them from several different brokers, they feel that you are not taking the process seriously and you have scattered your proposal to every insurer in sight.

5 Know the route

It is vital that you know where to go to get insurance. For example, XL use Aon only as a broker, and Quinn Insurance will either deal with you directly or through O'Leary's Insurances only. The SMDF deals with its clients directly, while to get terms from RSA, Liberty or Chartis you need to have a broker working on your behalf. The larger-firm insurers also prefer to work with five or six specialist PI brokers who know their clients, and those brokers are likely to have more influence on your behalf.

> *"Having a plan, commencing it early and differentiating your firm for the insurance renewal have become a critical part of doing business"*

6 Differentiate your firm

The 2009 renewal saw increased differentiation between well-run firms and those with poor records. This trend will continue and accelerate in the 2010 renewal.

Differentiation means having a risk-management strategy – this is either being committed to a standard or having achieved one and having put in place procedures so you can answer positively all the questions on the renewal form.

7 Do not change insurers every year

Regard your insurer as a business partner – that is how they would like to see the relationship. Do not change insurer for a minor reduction in premium – see it as a long-term relationship. If you do have claims and your relationship is long term, the insurer is likely to view you differently.

8 Keep your options open

All firms should be looking at alternative insurers and keeping their options open. If you are a small firm, this probably means completing a proposal form for all three insurers who are in that market. If you are a medium-sized firm, that will mean doing exactly the same and using a specialist broker to take your proposal to the three larger firm insurers.

9 Look beyond the renewal

Look at risk management as a long-term process. It is understandable – but misguided – to focus entirely on the short-term renewal process. An effective risk-management strategy is a long-term plan that benefits the practice in terms of improved efficiencies, ways of working, controls, and ultimately leads to an improved claims record. It is not a short-term memory test similar to passing an exam – the real benefit is in having the controls in place that prevent future claims.

10 See it as an insurer does

Your claims record is critical. If you have a good claims record, you can use it positively to shop around between insurers: the insurers are all interested in chasing the same profile of risk, which is well-managed low claims or claims-free firms with robust risk-management standards. If you have had a number of claims, the nature and frequency of those claims will be important, as will be your ability to demonstrate that you have taken the necessary post-loss corrective actions to prevent such claims reoccurring. This will be best shown by having voluntarily engaged in

newal

attaining a risk-management standard, and at the very least having commenced this process. You also need to ensure that all known matters that may give rise to a claim are reported to the incumbent insurer to ensure protection against any future claims.

More difficult?

The 2010 renewal looks as if it may, if anything, be more difficult than in 2009.

A number of insurers have indicated that they want to reduce their book of business, one has left the market, and there may be two new insurers in the market. Having a plan, commencing it early, and differentiating your firm for the insurance renewal have become a critical part of doing business.

This year, having achieved a risk-management standard will be a positive step. Over time, it is likely to become a necessity. You might as well get the benefit early. G

David Rowe is managing director of Outsource, recently appointed to the panel of approved risk-management consultants to the profession.

Changes introduced by *Lisbon*

Now that the dust has settled after the *Lisbon Treaty* debate, it's time to review some of the key changes the treaty introduced that are relevant for practitioners. David Geary explains

The *Lisbon Treaty* entered into force on 1 December 2009 and introduced a number of changes to the treaties that govern the EU, beginning with renaming them.

Lisbon abolished the distinction between the European Union and the European Community and merged both to create a single entity, the European Union or EU. Under *Lisbon*, the rules governing the EU are set out in the *Treaty on European Union* (TEU) and *Treaty on the Functioning of the European Union* (TFEU – the new name for the former *EC Treaty*). Article 47 of the TEU provides that the EU will have legal personality.

The charter

Article 6(1) TEU provides that the *Charter of Fundamental Rights*, as adapted at Strasbourg on 12 December 2007, has the same legal value as the treaties. The charter itself may be found in the *Official Journal of the EU* (OJ [2010] C 83/389).

The charter sets out the rights all EU citizens enjoy vis-à-vis the EU institutions and EU member states when they are implementing EU legislation. The six chapters of the charter encompass individual rights related to dignity, freedoms, equality, solidarity, rights linked to citizenship status, and justice. Many observers expect that the rights provided by the charter will become a feature in pleadings before the courts.

The EU courts

Articles 251 to 281 TFEU set out the treaty provisions regarding the courts. The existing system of courts has been retained – although, under *Lisbon*, the Court of First Instance is renamed the 'General Court', while the Court of Justice retains its name. Together, the courts are referred to as 'the Court of Justice of the European Union', and this phrase also includes the Civil Service Tribunal. A new appointments panel is established by article 255 TFEU to advise on the suitability of proposed judges or advocates general.

Lisbon introduces some significant changes in relation to the jurisdiction of the Court of Justice of the European Union.

In relation to police and judicial cooperation in criminal matters, the jurisdiction of the Court of Justice to give preliminary rulings will become binding and will no longer be subject to a declaration by each member state recognising that jurisdiction and specifying the national courts that may request a preliminary ruling. Under *Lisbon*, the field of police and criminal justice will become part of the general law, and any court or tribunal will be able to request a preliminary ruling from the Court of Justice following the expiry of the transitional period (five years after the entry into force of *Lisbon*).

> ***"In general terms, it may be observed that Lisbon marks a transition from a treaty system based on economic rights to one that stresses the rights of EU citizens"***

In relation to visas, asylum, immigration and other policies related to free movement of persons (in particular, judicial cooperation in civil matters, recognition and enforcement of judgments), any national court or tribunal – no longer just the higher courts – can, from the date of entry into force of *Lisbon*, request preliminary rulings, and the Court of Justice will have jurisdiction to rule on measures taken on grounds of public policy in connection with cross-border controls.

However, as Ireland has generally opted out of the TFEU provisions on the area of freedom, security and justice (with the ability to opt-in to specific acts), protocol 21 to the *Lisbon Treaty* provides that decisions of the Court of Justice interpreting these provisions will not apply in Ireland (unless the decision relates to an act in relation to which Ireland has opted-in). In this context, it is worth noting that Ireland has declared its intention to opt-in to acts whenever possible and also that it will review the necessity of the general opt-out within the first three years of the coming into force of *Lisbon*. Therefore the role of the Court of Justice in these fields may be significant for Ireland.

The Court of Justice will also ensure that the *Charter of Fundamental Rights* is applied correctly.

Article 267 TFEU extends the preliminary ruling procedure to acts of EU bodies, offices or agencies that can be interpreted, and the validity of which can be reviewed by the Court of Justice at the request of national courts or tribunals, enabling those courts or tribunals, for example, to ascertain whether their national legislation is in conformity with EU law.

Article 263 TFEU eases the conditions for the admissibility of actions brought by individuals (natural or legal persons) against decisions of the institutions, bodies, offices or agencies of the EU. Individuals may bring proceedings against a regulatory act if they are directly affected by it and if it does not entail implementing measures – therefore they no longer have

– a practical guide

to demonstrate that they are "individually concerned" by the act in question.

Citizens' rights

In general terms, it may be observed that *Lisbon* marks a transition from a treaty system based on economic rights to one that stresses the rights of EU citizens. The provisions regarding the charter, the objectives of the EU (article 3 TEU) and the provisions regarding citizenship of the EU set out in articles 18 to 25 TFEU support this view. It seems likely that the rights of EU citizens will become a more significant feature of litigation before the courts in the years to come.

In addition, article 11 TEU provides for a 'citizen's initiative', whereby one million citizens may request the European Commission to propose legislation on an issue of concern to them.

The European Commission published a draft regulation (COM (2010) 119) on how the citizens' initiative should work in practice, and this is likely to be adopted during the second half of 2010. It appears that quite a number of citizens' initiatives are already underway, and further information on the citizens' initiative may be found at www.citizens-initiative.eu. G

David Geary is chairman of the EU and International Affairs Committee of the Law Society.

RENUMBERING OF ARTICLES

Lisbon introduces a number of new articles to both the TEU and the TFEU and also renumbers the articles in these treaties. Some of the key provisions of the TFEU are:

PROVISION	OLD NUMBER(S) (IN EC TREATY)	NEW NUMBER(S)
• Prohibition on discrimination on grounds of nationality:	12	18
• Free movement of goods:	23, 28, 29	28, 34, 35
• Free movement of workers:	39	45
• Agriculture and fisheries:	32-38	38-44
• Right of establishment:	43	49
• Free movement of services:	49	56
• Free movement of capital:	56	63
• Competition and state aid:	81-89	101-109

A full table of the equivalent treaty provisions may be found with the consolidated versions of the TEU and TFEU published in the *Official Journal of the EU* (OJ [2010] C83/361).

letters

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

Kanturk Courthouse Commission complaint?

From: Tom O'Sullivan, Tom O'Sullivan & Co, Kanturk, Co Cork

I am writing to you in connection with the closure of Kanturk Courthouse. As a matter of interest, I decided to check up the law with a barrister in relation to the change-of-use of courthouses when they are closed down, and I have been informed that, under section 181 of the *Local Government Planning and Development Act 2000*, the minister may exempt specified classes of development where the development is, in the opinion of the minister, in connection with or for the purposes of public safety or order, the administration of justice, or national security or defence. The minister, in his wisdom, has specified that development consisting of the provision of courthouses and other premises or installations or other structural facilities (whether provided on a permanent or temporary basis, used for the purposes of, or in connection with, the transaction of any business relating to courts tribunals, enquiries or inquests established by statute) do not require planning permission.

I wrote a letter of complaint to An Taisce in relation to this matter, and the Courts Service has responded to An Taisce on the basis that the Courts Service board approved a proposal to amalgamate the District Court area of Kanturk and District Court area of Mallow earlier this year. They don't give the date on which this happened.

The closure of the courthouse has caused quite a degree of controversy in our local area. Kanturk courthouse has functioned quite effectively as a courthouse since 1827, when it was originally built, and the court has been closed with little or no notice whatsoever to the people of the area and, in my opinion, in disregard of the rights of local people to have their justice administered locally, which has been the position for the last 180 years approximately. It would appear that the courthouse in Ballinamore, Co Leitrim, was dealt with in exactly the same way, and I am anxious to hear from other solicitors around the country as to how other courthouses have been closed down.

PICS: GERRY MURPHY

Operating since 1827, Kanturk Courthouse has closed with little or no notice

The reason why I am doing this is that I am giving serious consideration to making a complaint to the European Commission arising out of this section, as the government has, under European legislation, an obligation to maintain the architectural heritage of the country. As things currently exist, it would appear to me that the Courts Service could close down any court, to include the Four Courts, without any public consultation whatsoever. There is little or no justification for a blanket exemption of courts from the provisions of the planning legislation.

Any information in relation to the method of closures of other buildings around the country would be greatly appreciated.

Trademarking the word 'architect' reduces choice

From: Brian Montaut, spokesperson for Architects' Alliance, Bray, Co Wicklow.

I refer to the new compulsory registration of architects in Ireland, which is being managed on behalf of the state by the Royal Institute of the Architects of Ireland Limited (RIAI). I write for the Architects' Alliance, which represents long-established, non-RIAI architects, who, because they were not members of the RIAI, were denied automatic registration. That exclusion has placed their hard-won livelihoods in jeopardy to the advantage of their competitors.

An EU directive is being incorrectly cited by our detractors in support of the new regime. In fact, the EU is specifically neutral on both the state registration of architects and the 'protection of title'. Nor does state registration confer any rights of access into the European market – it is purely an internal and entirely discretionary policy.

In the general discussion that has ensued, a mistaken comparison with doctors has been drawn in order to explain the 'protection' of the common-usage word 'architect'. My reply is that many important professions are conducted without a need to commandeer the language. Doctor is not a 'protected title', nor for example are the descriptions 'teacher', 'nurse', 'engineer', 'lawyer' or 'journalist'. The inevitable consequence of trademarking the plain word 'architect' is to create a closed shop and to reduce consumer choice.

This trouble can be reduced by ceasing to exclude the 1,000 or so non-RIAI architects,

whose established presence in the Irish market has been acknowledged by the Architects' Council of Europe. It is simply achieved through the adoption, within the current legislation, of a standard, self-extinguishing 'grandfather clause' for long-established, market-proven architects. New entrants to the profession would continue to be bound by the new regime, for they can make no claim of prior establishment and market accreditation. A clause similar or identical to that already provided in the *Building Control Act 2007* for the equally important professions of quantity surveyor and building surveyor, will suffice.

In addition to being made state registrar, the RIAI was also made a competent authority for architects. It is therefore particularly disturbing to learn of its newly launched political lobbying campaign, which is targeted against a parliamentary bill for just such a 'grandfather clause'. Of course, it was hardly anticipated that the Royal Institute would use its state appointments in this way. But to also learn that RIAI credits for continuing professional development are awarded to members attending this week's lobbying briefings takes the breath away. Only vested interests are served by continuing to deny us equity. G

Digital mapping –

The PRA's digital mapping project has brought many benefits – but one of its main drawbacks can be in failing to indicate the boundary of a property correctly. The potential problems for freeholders and leaseholders could be serious, warns Gordon White

The Property Registration Authority (PRA) has recently completed a project, begun in 2005, to digitise the property registration mapping of all properties registered with it. This was a 'best project' award winner in the 2007 eGovernment Awards, with the PRA's project partner and software developer, 1Spatial, winning the 2006 Association for Geographic Information Award for innovation and best practice.

This digitisation has resulted in a significant improvement in the ease of access to mapping information and in the accuracy of maps that can now be lodged, based on digital Ordnance Survey mapping. However, the conversion of old transfer maps and folio maps onto modern digital Ordnance Survey mapping has resulted in some mapping errors that may, with time, affect the holders of freehold and leasehold interests that are registered with the PRA and on first registrations of lands abutting registered lands.

Benefits and drawbacks

The benefits to the user of the PRA's services, particularly the professional user, are impressive. The excellent website, www.landdirect.ie, allows for searches to be carried out by folio reference, by registered owner details (either an individual or an organisation), by address or by map. Homophonous and shortened names can also be allowed for in the search (for example, 'Patrick Kehoe' and 'Pat Keogh' can be included equivalently in the search). Map searching can be zoomed-in to a level of detail equivalent to the current digital Ordnance Survey mapping, and mapping can be overlain onto the current Ordnance Survey aerial photography. The onscreen mapping shows freeholds, leaseholds, sub-leaseholds, easements and other appurtenant (or incidental) rights.

There is also a benefit in terms of the preparation and lodgment of maps for registration purposes, both in terms of accuracy and in terms of the ease of preparation. Digital Ordinance Survey mapping can be purchased from the OSI in *AutoCAD* or *Microstation* format and used as the background for the transfer maps, which can then be accurately prepared in CAD, printed to heavy-duty paper and lodged with the PRA. This applies both to individual transfer maps and to scheme maps for developments.

The main drawback of the new digitised system occurs where mapping defining a property was lodged prior to the digitisation of the OS and PRA maps, and where a property boundary is close to, but not coincident with, a feature subsequently mapped on the digital mapping. Where this is the case, the digitisation process has 'snapped' the boundary to the mapped feature. That is to say, if there is a feature within circa 5m (on 1:2,500 mapping) of the previously defined boundary, the mapping will assume that that feature is the boundary. For example, where the boundary of a property is defined as 4.0m offset from a kerb, but there is no mapped feature at this offset, the folio mapping provided by the PRA can indicate the boundary as the kerb itself.

> ***"If this mapping were incorrect, significant problems might occur in the future when the error came to the attention of an adjacent landowner disadvantaged by the error"***

Similarly, if a development site boundary is defined in advance of development by an arbitrary line not relating to a mapped feature, and the developer constructs, say, a car park up to within 2m of this line to allow services to run within their property but outside the car park, the folio mapping provided by the PRA will show the boundary as the face of the car park kerb (the mapped feature) and not the originally defined boundary.

While folio maps issued by the PRA include a disclaimer that "the description of the lands on the folio and map is not conclusive as to the boundaries or extent of the land", the fact remains that these are formal maps provided by the statutory body for property registration and, as such, are seen to have a certain authority.

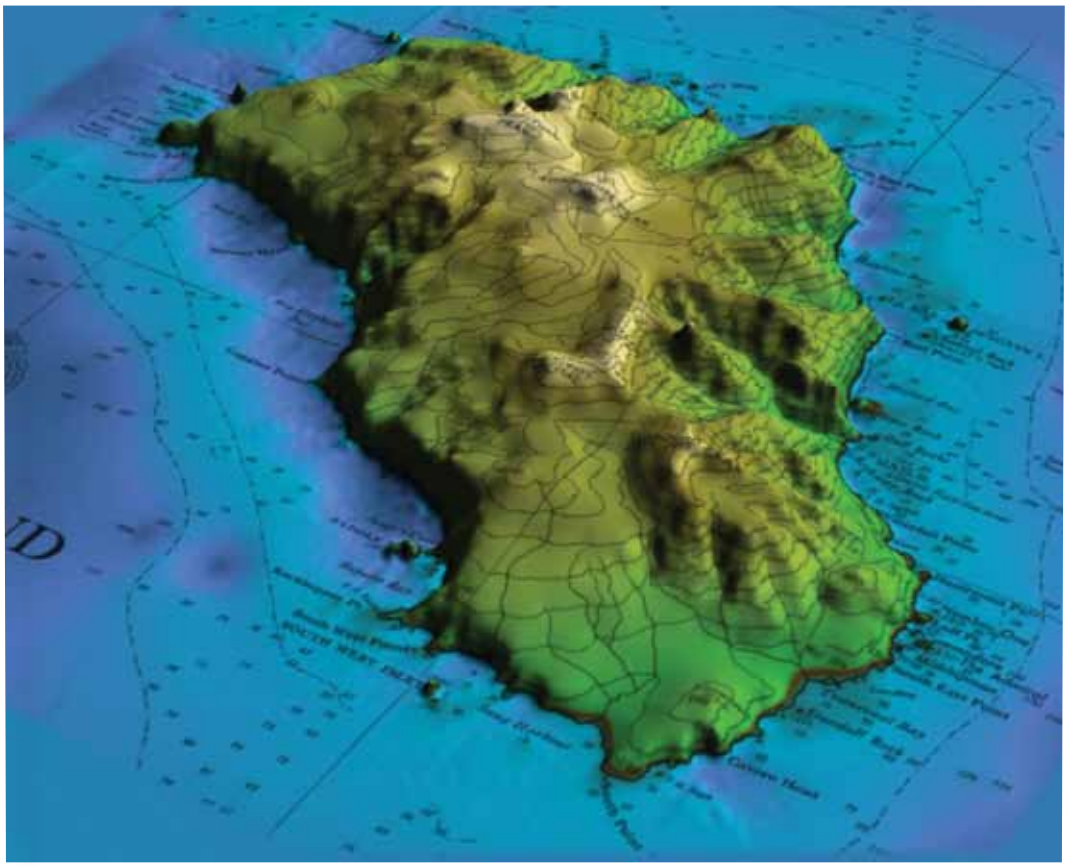
Potential consequences

Where the mapping indicates a holding extending beyond that originally intended, and the adjacent folio holder does not become aware of this, the holder of the folio could, with time, claim the lands between the original boundary and the boundary shown on the digital folio map provided by the PRA to be theirs under adverse possession.

More critically, PRA-certified folio maps may be used for the transfer of property. If the mapping of a folio provided by the PRA does not indicate the boundary of the property correctly in accordance with the original mapping, then the original mapping can readily be referred to. However, if the property changes hands and the PRA digital folio mapping is used for the transfer, then the tie-in with the original mapping will become more tenuous. In particular, it would be realistic that, if the property were to change hands twice or more, neither the vendor nor the purchaser might have had

viewpoint

the drawbacks



sight of the original mapping and would only be aware of the digital PRA folio mapping used for the transfers. If this mapping were incorrect, and despite the disclaimer on the maps, significant problems might occur in the future when the error came to the attention of an adjacent landowner disadvantaged by the error.

It is worth noting that, while there is ready public access to the digital folio mapping, the dealing maps can only be provided by the PRA to the registered owner, or their representatives, so any third-party considering the purchase of a property can only access the original mapping through the vendor.

Mapping compliance

It will be very important that professional advisors to property developers – including solicitors, engineers and architects – ensure that their clients are aware that PRA mapping has been digitised and that they should have their mapping checked for compliance with the intention of the original transfer mapping.

It may be necessary to provide the PRA with new digital mapping, indicating the correct transcription of the transfer map(s) or scheme map(s) onto the current digital Ordnance Survey mapping in order to ensure that the sites are correctly mapped with the PRA. This is particularly important on development sites, where lands were parcelled off prior to the development of the site based on a proposed development scheme, but shown on the Ordnance Survey mapping of an undeveloped site. It is also vital that professionals who advise the purchasers of properties should point out that the fact that the physical boundaries of the property on the ground match those on the electronic PRA folio map simply means that the folio mapping followed these boundaries as surveyed by the Ordnance Survey. It does *not* mean that the boundaries are coincident with the legal extents of the folio as defined when the folio was created.

Equally, individual property holders – whether domestic or commercial – will need to be reminded that the folio mapping provided by the PRA is not definitive. Where a folio and map are provided by the PRA, the notes on the folio state: "On receipt of this record, please check to verify that all the details contained therein are correct. If this is not the case, please return the document to the Property Registration Authority immediately."

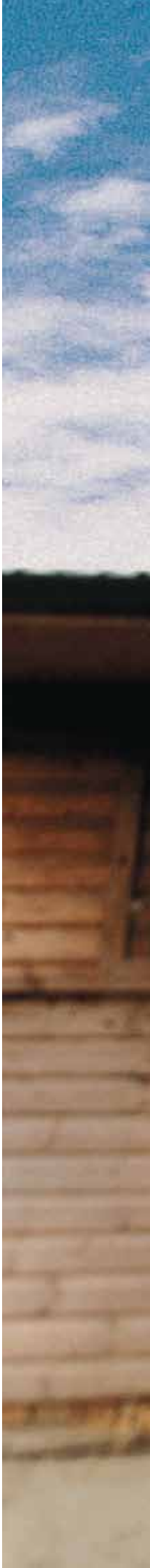
Check for errors

Property holders should check their digital mapping for errors and advise the PRA if they are incorrect. Again, new digital maps, based on the digital OS mapping, can be prepared to correctly reflect the intention of the original mapping. There is a department within the PRA, namely the Filed Plan Resolution Group, which is specifically tasked with dealing with errors in filed plans.

It should be noted that new mapping should not be defined as 'rectification mapping', as it is not correcting a transfer or a folio but, rather, correcting the representation of a folio on the associated folio map. As such, unlike a deed of rectification, adjacent landowners should not need to be contacted to confirm – or be given the chance to deny – acquiescence. It should be noted that an interprofessional task force on property boundaries has been set up to examine issues related to the mapping of boundaries and title mapping in Ireland, including the issues referred to above. G

Gordon White is a chartered engineer, a director of Fahy Fitzpatrick Consulting Engineers, and has 16 years' experience in dealing with land registration and property registration issues.

STUDYING THE FORM



PII renewal is akin to studying form for some – but more like sticking a pin in a paper for others. Rather than gambling with your firm's future, Anne Neary advises practitioners to prepare well in advance by doing all they can to make their PII renewal a safe bet

Once again, PII renewal is upon us. There is a great deal of trepidation in the profession after the difficulties experienced last year by so many firms. However, there is more information available about the whole renewal process, and this article sets out some guidelines about preparing for renewal this year.

The final application forms are not available until the end of September, so for the purposes of this article, I have assessed a number of draft forms kindly supplied to me by insurers and brokers. Questions may be deleted or added before the forms are finalised, so my comments are based on the drafts I have seen. There is quite a wide variance in the questions asked by different insurers, and there are also subtle differences in the way similar questions are worded, which makes answering these forms quite a difficult task.

The trend is that, with the exception of the Solicitors' Mutual Defence Fund's (SMDF) form, the application forms contain more searching questions on issues such as risk management and regulatory history. Some forms require documentation to support certain questions, and PII applications will have to be more detailed this year than ever before.

Underwriting criteria

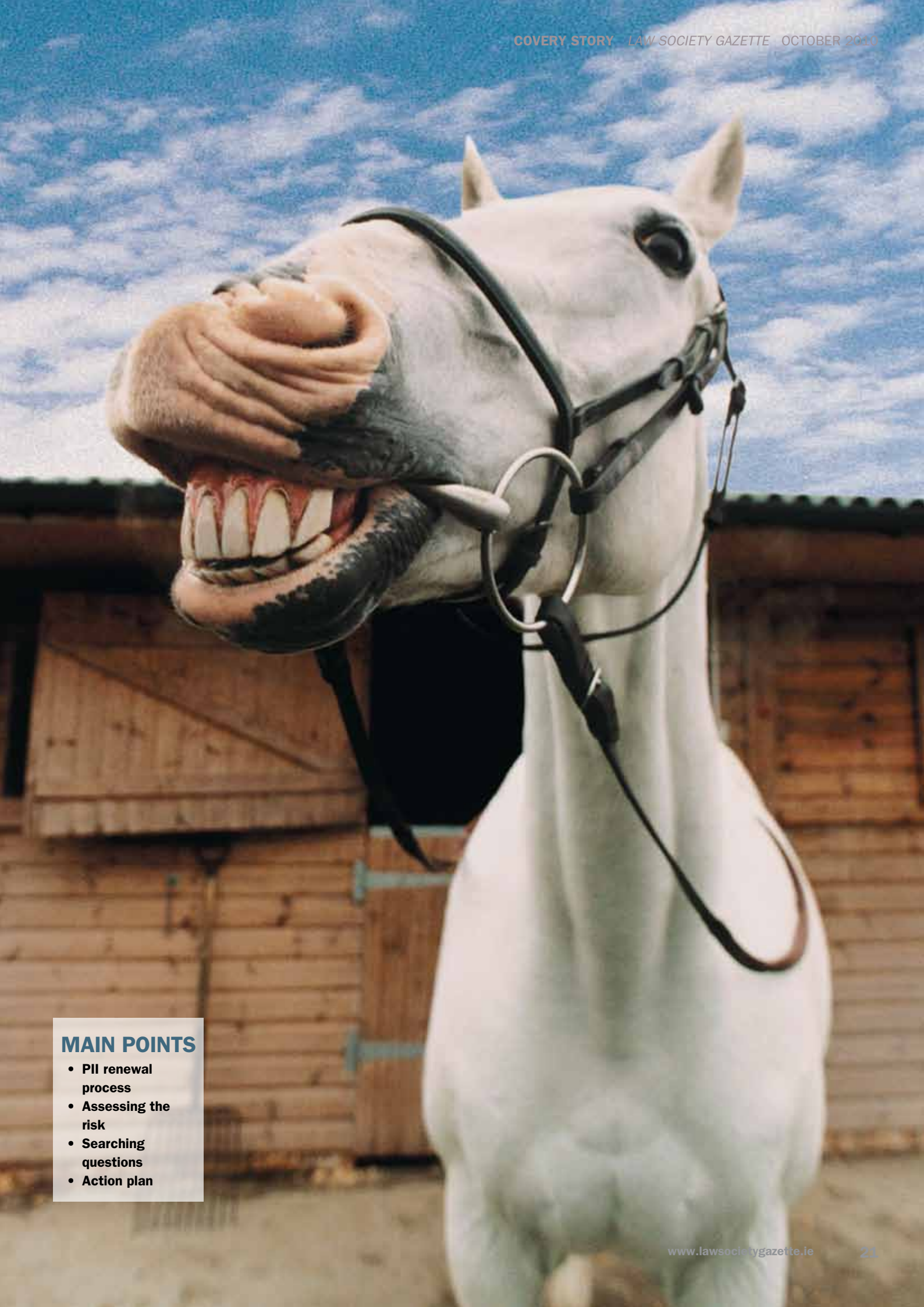
In assessing a firm's proposal, an underwriter is trying to assess the risk that the firm presents and the actions that the firm has taken to mitigate that risk. This is quite a difficult task, as the underwriter is working from very limited information. If a firm is changing insurer, an underwriter will have no background knowledge of the firm and, therefore, will rely on full disclosure of material facts, the information in the PII application form, the supporting material offered by the firm, and the firm's claims history. Insurers tend to focus on certain categories of information in assessing what type of insurance risk a firm presents. Each insurer assesses risk differently and has its own underwriting criteria.

I have analysed the underwriting criteria behind the questions on this year's application forms, and compared them with the questions that were asked last year. I have identified some of the main areas of concern to insurers, and I set them out below.

Risk management

There is a much greater emphasis on risk-management issues in this year's forms. The SMDF has kept this set of questions quite simple and straightforward. Last year, there were 12 risk-management questions and, so far this year, there are 13 questions, some of which have several parts. The new questions are whether firms have a risk-management accreditation, whether the firm limits its liability by contract, and whether the firm has a register of undertakings.

By contrast, the forms from other insurers are very searching. One has 38 risk-management questions – up from 18 questions last year. Another has a checklist at the end, where it looks for up to 27 documents supporting the application, including written procedures such as conflict of interest procedures, procedures for checking work quality, undertakings policy and undertakings register, authorisation procedures for client monies, among others. Another form has incorporated its previous voluntary risk-management questionnaire into the renewal form, under the heading 'differentiate your risk'. These risk-



MAIN POINTS

- PII renewal process
- Assessing the risk
- Searching questions
- Action plan

management questions ask for confirmation that the firm has formal documented procedures in a number of areas, such as letters of engagement, non-engagement and disengagement, conflict of interest, money laundering and new client intake procedures.

All of the draft forms ask about accreditation to a risk-management standard or the firm's commitment to obtaining accreditation. Having an accreditation is not a requirement for PI insurance. Insurers are more likely to consider your proposal favourably if you demonstrate that you are aware of your risk and have written risk-management procedures to minimise that risk.

High-risk legal services

There are some legal services that insurers commonly regard as constituting a higher risk. Last year's and this year's high-risk areas, once again, constitute undertakings given in conveyancing transactions, particularly in commercial conveyancing.

Insurers are very worried about the potential effect of the due diligence that banks have had to carry out on loans transferred to NAMA. Where NAMA has penalised banks for inadequate paperwork, the question is whether the underlying legal work was part of the problem. Insurers are not reporting large claims from NAMA-associated loans, but they are on high alert. Other high-risk areas are the standard ones: statute barred PI cases, wills and probate and commercial work.

Claims history

A firm's premium or difficulties in obtaining PII may increase if it has a poor claims history. Firms, principals or partners that have had previous claims are seen as high risk.

Insurers link a poor claims history with a strong likelihood of further claims. So, even if you are moving insurance provider and have notified all potential claims, a new insurer will look at your claims history in considerable detail. If you are in the fortunate position of having a claims-free history, this is a good indicator of future performance, but you should link your claims-free history to your good risk-management systems.

Disciplinary and regulatory history

These questions cover issues such as practising certificates, Solicitors Disciplinary Tribunal

ACTION PLAN FOR PII RENEWAL 2010/2011

- Start preparing for renewal immediately and submit your application by the end of October.
- An early submission demonstrates that you are professional and well managed, so try to have a final application ready to submit by the end of October at the latest. Applications that are sent in close to the deadline are viewed as 'distressed' by the insurers.
- Obtain a printout of paid-claims notifications and reserves from your insurer, as soon as possible.
- Prepare a clear explanation of any current claims or notifications that appear on the printout.
- Ensure that your financial records include a breakdown of practice areas.
- Select your broker carefully. Ensure that he has the necessary expertise in placing solicitors' professional indemnity insurance. Some brokers are tied to one insurance company – check that you are covering all your bases.
- Make sure that your application only goes to an insurance company once.
- Ascertain which insurance companies are willing to offer cover to a firm of your size – for example, some companies will not entertain applications from sole practitioners.
- Draft your covering letter early so that you do not have to do this under pressure.
- Have your PII form checked by someone else before sending it out. The SMDF has the simplest form in the market, and yet reports that up to 60% of these renewal forms are incorrectly filled out. Other insurers report the same problem:
  - Avoid obvious errors like spelling mistakes and inaccurate figures,
  - Ensure the proposal is legible and easy to read,
  - Provide all the information requested. If forms are not completely filled in, insurers may refuse to quote.
- Use the proposal form as an opportunity to convince insurers that they should offer PII to your firm – consider it marketing material for your firm.

proceedings and Law Society complaints history. Last year, a firm that disclosed disciplinary proceedings found it very difficult to obtain PI insurance. So if you or another solicitor in your firm has been before the disciplinary tribunal, you should set out the circumstances of the case and the action you have taken to ensure that the problem will not reoccur. Equally, if you have a number of complaints before the Law Society, you should detail your client complaints procedure and set out your proposals to reduce the number of complaints.

Insurers are frequently asking about the Law Society's investigating accountants' reports. They are interested in whether recommendations made by the accountant have been implemented. So if you have had a recent Law Society inspection, and the report is good, include a copy with your renewal application.

Expertise in core legal services

Insurers rely on you to show competence, experience and expertise in your core areas of business. In the SMDF LQ Basic Standard for example, one of the elements is the requirement to define your core business. You should do this even if your firm is a general practice, because there are a number of practice areas that you will offer and a number that you will not. Smaller firms that offer a very wide range of services may be seen as presenting a higher risk. Many claims have arisen in the past few years because solicitors agreed to act in a transaction where they were not sufficiently experienced or knowledgeable.

Firms that have been set up recently and have little or no experience in their practice areas are also seen as high risk. They are asked to produce business plans, cash-flow projections and CVs of the principal or partners.

"The trend is that, with the exception of the Solicitors' Mutual Defence Fund's form, the application forms contain more searching questions on issues such as risk management and regulatory history"

Fee turnover

Many firms feel that, because their fee turnover has decreased substantially, the PI premium should also decrease. Because PII is offered on a claims-made basis, however, your risk exposure is determined by the firm's past. Therefore, if the firm had a high turnover in conveyancing for many years, and that has almost disappeared, the risk of claims unfortunately has not.

What if you fall into a high-risk category?

Insurers are trying to establish whether your firm is likely to have claims during the insurance period. Your application should address the areas of concern to insurers. Use the opportunity to provide all the information you can with your application, write a comprehensive cover letter describing the processes and procedures in your firm, and double check your application form for mistakes. Treat your PI application like an important tender submission.

Accreditation to a risk management standard such as the SMDF LQ Basic, together with its detailed report and score, provides underwriters with very detailed information on the exact systems that are in place in the firm, and reassures them that there has been an independent assessment.

Preparation is the key

The key to renewal this year is preparation. If you discover that you have problems, tackle them early – do not wait until November. The underwriters will read many hundreds of applications between early October and mid November, and they have very little interest or energy in dealing with problems. Underwriters are actively looking for good firms to insure, and your job is to ensure that your firm ranks in that number. G

Anne Neary is a practising solicitor, management consultant and risk advisor.

The *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* was signed into law last July. Jennifer O'Brien outlines the main developments and asks whether it's now time to beware those comely maidens dancing at the crossroads...

Dancing at CROSS

MAIN POINTS

- **Defining 'qualified cohabitant'**
- **Ancillary relief orders**
- **New rights enshrined in the act**

The *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, signed by the President on 19 July 2010, is expected to commence following certain changes to the tax and social welfare code in the next *Finance Act*.

The act covers civil partnerships where same-sex couples register their status on a voluntary basis and also creates, on an involuntary basis, a scheme of rights for cohabiting couples who meet prescribed criteria.

It provides a system of registration in respect of same-sex couples, affording rights akin to married couples for the purposes of shared home protection, maintenance, succession and protection from domestic violence. Provision is made for the recognition of foreign civil partnerships, for termination of a partnership, nullity and decrees of dissolution. A full range of ancillary relief orders can be made by a court, similar to those available in the context of a divorce application.

Part 15 of the act deals with cohabiting couples (whether same-sex or opposite sex), and introduces a redress or presumptive scheme for the first time in the Irish jurisdiction. Qualified cohabitants can apply to court for the purpose of seeking property orders, ma intenance orders, pension orders and provision from the estate of the deceased cohabitant. This article will focus on those provisions of the act dealing with cohabiting couples; however, the provisions have yet to be commenced.

A cohabitant is defined as one of two adults (whether of the same or the opposite sex) who live

the ROADS

Comely maidens or gold-diggers? The new *Civil Partnership Act* may come at a price

together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship, or married to each other, or civil partners of each other. In determining whether or not two adults are cohabitants, a court must take into account the circumstances of the relationship, including:

- The duration of the relationship,
- The basis on which the couple live together,
- The degree of financial dependence,
- Any agreements in respect of their finances,
- Contributions made to the acquisition of land or other assets,
- Whether there are any dependent children, and
- The degree to which the adults present themselves to others as a couple.

The section goes on to clarify, for the avoidance of doubt, that a relationship does not cease to be an intimate relationship for the purpose of this section merely because it is no longer sexual in nature. A qualified cohabitant means an adult who was in a relationship of cohabitation with another adult for a period of two years or more, where they are the parents of one or more dependent children, or for a period of five years or more in any other case. A person cannot become a qualified cohabitant if married to someone else. Where a qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant, and that that financial dependence arises from the relationship or the ending of the relationship, the court may make certain orders. The court is obliged

NEW RIGHTS ENSHRINED IN THE ACT

Financial relief: the financial relief available to qualified cohabitants includes property adjustment orders, compensatory maintenance orders including lump sums, attachment of earnings, pension adjustment orders and provision from estate of deceased cohabitant. This is a quantum leap from the pre-existing law, which made no provision whatsoever for non-marital couples, save where an actual financial contribution could be proved or where maintenance was required for a dependent child of the relationship.

Property adjustment: prior to making a property adjustment order, section 174(2) provides that the court shall have regard as to whether, in all the circumstances, it would be practicable for the financial needs of the qualified cohabitant to be met by an order made under section 175 or 187 – that is, compensatory maintenance or pension adjustment. Similarly, the court is obliged to consider whether a compensatory maintenance order would suffice for the purpose of making proper provision prior to making a pension adjustment order.

Taxation issues: the act does not deal with taxation issues that arise for cohabiting couples or, indeed, for civil partners. It is anticipated that this would be dealt with in the next *Finance Bill*. The Law Reform Commission has made certain recommendations in this regard, such that civil partners would be afforded similar tax treatment as currently afforded to spouses. It is anticipated that cohabitants will be afforded certain tax relief, albeit not as generous as those currently available to spouses.

Cohabitation agreements: section 202 of the act provides for the validity of certain agreements between cohabitants, such that cohabitants can opt out of the presumptive scheme where they enter into a valid cohabitants' agreement, such that they have each received independent legal advice and entered into a written agreement that complies with the general law of contract. The court may vary or set aside a cohabitants' agreement in exceptional circumstances where its enforceability would cause serious injustice.

International relevance: from an international perspective, part 2 provides for recognition of registered foreign relationships, where one of the civil partners is domiciled in Ireland on the date of the application or where one of the civil partners is ordinarily resident in Ireland for a period of one year preceding the date of the application. Provision is made for declarations regarding the status of foreign civil partnerships, and recognition of these is provided for in certain circumstances.

to have regard to certain factors, including:

- The financial circumstances of the parties,
- The rights and entitlements of any spouse or former spouse,
- The rights and entitlements of any civil partner or former civil partner,
- The rights and entitlements of any dependent child,
- The duration of the parties' relationship,
- The contributions made by each cohabitant, including contributions made in looking after the home,
- The effect on the earning capacity of each cohabitant on the responsibilities assumed by each of them during the period they lived together,
- Any physical or mental disability, and
- The conduct of the cohabitants where it would be unjust to disregard it.

Provision is made for giving notice to other persons in appropriate cases. However, the court cannot make an order that would affect any right of any person to whom a cohabitant is or was married.

It is worth noting that, where one or both adults "is or was, at any time during the relationship concerned, an adult who was married to someone else and, at the time the relationship concerned ends, each adult who is or was married has not lived apart from his or her spouse for a period or periods of at least four years during the previous five years", then such a person is not a 'qualified cohabitant'. Another issue arises on account of the prerequisite four years of living apart for the purpose of grounding an application for a decree of divorce in Ireland. Cohabitation while married to another may, in fact, constitute the norm for many caught in this waiting period. Such individuals may have obtained a judicial separation or signed a separation agreement – but they remain married and therefore incapable of becoming qualified cohabitants.

"Cohabitation while married to another may, in fact, constitute the norm for many caught in this waiting period – but they remain married and therefore incapable of becoming 'qualified cohabitants'

Section 196(3) provides, in relation to cohabitants, that the court shall only exercise its jurisdiction to hear and determine an application if both cohabitants concerned were ordinarily resident in Ireland throughout the one-year period prior to the end of their relationship, and where one of the cohabitants is domiciled or ordinarily resident in Ireland throughout the one-year period that ends on that date. This section is likely to prevent wholesale 'forum shopping', although it may, in certain circumstances, result in

Article 162

5. For the purposes of this part, a qualified cohabitant means an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period

a) Of 2 years or more, in the case where they are the parents of one or more dependent children, and

b) Of 5 years or more, in any other case.

6. Notwithstanding subsection 5, an adult who would otherwise be a qualified cohabitant is not a qualified cohabitant if:

a) One or both of the adults is or was, at any time during the relationship concerned, an adult who was married to someone else, and

b) At the time the relationship concerned ends, each adult who is or was married has not lived apart from his or her spouse for a period or periods of at least 4 years during the previous 5 years.

hardship – for instance, where one of the cohabitants emigrates from Ireland for employment purposes.

Given the extent of movement between Dublin, London and elsewhere, in circumstances where no similar cohabitant scheme operates in Britain, we may see some interesting developments in EU law. It is worth noting that, for the first time, or possibly in the longest of times, Ireland now has a more liberal family law regime than its nearest neighbour – who would have thought? Time perhaps to beware those comely maidens dancing at the crossroads! G

Jennifer O'Brien is a partner and family law specialist at Mason Hayes & Curran.

Where a family member dies leaving an insolvent estate, practitioners dealing with the estate must be mindful of a number of factors, including the rules of payment and the rules of priority. Patrick Shee leads practitioners into the light

MAIN POINTS

- Insolvent estates
- Rules of payment and rules of priority
- Initiating proceedings

AT DEBT'S DOOR

Due to the current economic downturn, more and more people are finding themselves in financial difficulty. This can be exacerbated where a family member dies leaving only debts behind. Where a person who owes money has passed away, his estate is said to be insolvent, as the assets are not adequate to discharge his liabilities, such as funeral, testamentary, administration expenses or debts. The *Succession Act 1965* is the required legislation and main reference point for such matters. However, it must be read in conjunction with the *Bankruptcy Act 1988* and the *Rules of the Superior Courts*.

When administering an estate, it will, at some point, become apparent if the estate is insolvent. This can be glaringly obvious right away, or it may not become clear until the CA24 (Inland Revenue affidavit) has been completed. When this occurs, practitioners dealing with the estate must be mindful of a number of factors. Under schedule 1 of the *Succession Act 1965*, the rules of payment for insolvent estates are set out – first in line are funeral and testamentary expenses, along with the costs of administering the estate.

Next, the schedule states that the rules of priority as set out in section 81 of the *Bankruptcy Act 1988* take over in regard to insolvent estates. Section 81(9) states that the section shall apply in the case of a deceased person who dies insolvent, as if he were a bankrupt and, in such circumstances, the date of death substitutes for the date of the order of bankruptcy. Thus, the *Succession Act* is clear that the funeral home and other such expenses are discharged first, followed by the solicitor's fee in administering the estate. This is important, so that practitioners can be sure they will be paid for any work done, and, as such, it is essential that a section 68 letter be sent at the outset.

A thankless job

Under section 115 of the *Bankruptcy Act 1988*, there is power for a creditor to petition the court in order to administer the estate. This power is restricted to those with a debt that could also have prompted a bankruptcy petition *inter vivos*. The act goes on to provide that, once the personal representative has received notice of such a petition, he should discontinue administering the estate, as the official assignee will hold him accountable for any assets administered after notice has been received. The reality, however, is that this type of grant has not really

been seen since the 1980s, but the act does provide for it. The real reason there hasn't been such a grant is that the court cannot be asked to decide which unsecured creditor's debt would be first in line. The person who petitions the court is not ahead in the pecking order. This is not to be mistaken with the section 81 rules of priority, which apply when a personal representative is administering an insolvent estate.

What is happening on the ground, however, is that creditors, mainly banks, are applying for limited grants to substantiate proceedings, that is, a grant *ad litem*. In most cases, the personal representatives are refusing to perform their duties and, as such, the banks are applying to the court to have someone appointed so that they can sue the estate for their particular debt. Leave for such an application is given under section 27(4) of the *Succession Act*, and notice must be given to the personal representative or whoever is entitled to extract the general grant. It is worth noting that the time limit for such actions is two years, as stated at section 9 of the *Civil Liability Act 1961*, but this is covered in more detail later.

"It is important for people to realise, therefore, that disposing of property, whether to a family member or otherwise in contemplation of death, can be voidable as against a creditor"

Favourable position

A creditor whose debt is secured by way of a mortgage or charge is in a more favourable position, as the loan is adequately covered if the value of the security equals or exceeds the amount of the debt. As in all administrations of an estate, any property passing on survivorship will not be included in the estate of the deceased. This includes any life policies, joint tenancies or joint accounts, among others.

The main asset of any individual will most likely be their principal private residence, and the ownership of such a property is crucial for insolvency matters. Legislation for this stretches as far back as the *Conveyancing Act 1634* (see section 10), but section 59 of the much more recent *Bankruptcy Act 1988* states that any settlement of property, be it for natural love or affection or for market value, made within two years of the donor going bankrupt, is voidable. If, after two years and still within five years, the donor is made bankrupt, the transaction is void unless the donor can establish that (s)he was solvent at the time of the transaction without relying on the property. It is important for people to realise, therefore, that disposing of property, whether to a family member or otherwise, in contemplation of death, can be voidable as against a creditor. In the case of a voluntary transfer to a family member, a statutory declaration of solvency must be declared by the disponer in order to dispense with presumption of fraudulent disposition.

Part V of the *Succession Act 1965* sets out the

FYI – the *Conveyancing Act 1634*, section 10

"And furthermore for the avoiding and abolishing of fainted, covenous and fraudulent feoffments, gifts, grants, alienations, conveyance, bonds, suites, judgements and executions, as well of lands, and tenements, as of goods and chattels more commonly used and practised in these days, then hath been seen or heard of before; which feoffments, gifts, grants, alienations, bonds, suits, judgements and executions have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accompts, damages, penalties, forfeitures, herriots, mortuaries, and reliefs, not only to the letter or hinderance of the due course of execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no common wealth or civil society can be maintained or continued; Be it therefore further declared, ordained and enacted, by the authority of this present Parliament, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgement and execution at any time had or made, sithence the beginning of the reign of his said late Majesty King James of blessed memory, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accompts, damages, penalties, forfeitures, herriots, mortuaries and reliefs, by such guileful, covenous and fraudulent devises and practices, as is aforesaid, are, shall, or ought to be in any wise disturbed, hindered, delayed or defrauded to be clearly and utterly void, and of none effect: any pretence, colour, fained consideration, expressing of use, or any other matter or thing to the contrary notwithstanding."

LOOK IT UP

Legislation:

- *Bankruptcy Act 1988*
- *Civil Liability Act 1961*
- *Conveyancing Act 1634*
- *European Communities (Personal Insolvency) Regulations 2002* (SI 334 of 2002)
- *European Insolvency Regulation* (1346/2000)
- *Rules of the Superior Courts*
- *Statute of Limitations Act 1957*
- *Succession Act 1965*

Literature:

- *Wills, Probate and Estates* (Law Society, OUP Manual, December 2009), edited by Padraic Courtney

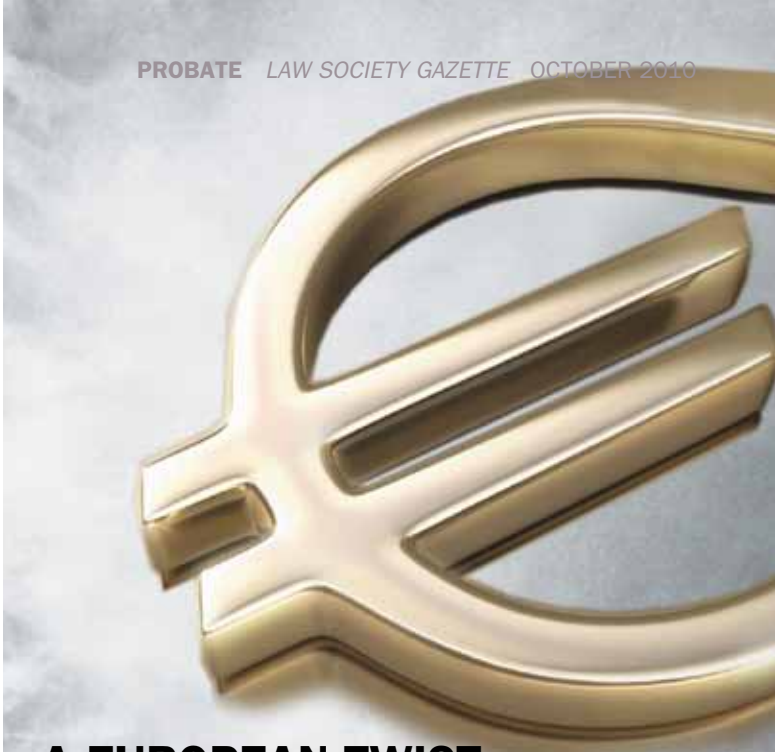
position between the personal representative and the creditors. Section 45 states that any of the deceased person's assets are assets that can be used for the payment of their expenses and debts, and the court can declare any bequest void in order to distribute it to pay off a debt. Furthermore, section 48 holds that the personal representatives may sue, and be sued, in respect of all causes of action that come under the *Civil Liability Act 1961* and that satisfy the rules of limitation under the *Statute of Limitations Act 1957*. In a nutshell, this means that the estate can be sued by a creditor for the outstanding debt, but the rules under the above-mentioned acts must be adhered to. Of course, this presupposes that the personal representative will take out a grant in the first place.

Initiating proceedings

Section 8 of the *Civil Liability Act 1961* states that any action subsisting as against the deceased before death will continue against the estate, and section 9(2)(b) goes on to say that proceedings of this kind must be initiated either within "the relevant period" set out in the *Statute of Limitations* or within the expiration of two years, whichever comes first. In reality, this puts a limitation of two years from the date of death for creditors to initiate proceedings. The practicalities of this are that the personal representative is liable to the creditors if (s)he distributes assets that could have been used to discharge the debt owed.

One way of circumventing this is seen in section 49 of the *Succession Act 1965*, where the personal representative has given satisfactory notice to creditors by way of an advertisement in a national newspaper for two consecutive weeks, specifying who died, identifying the personal representative, and stating that the estate is about to be distributed. It is usual for a time period of one month to be given to any creditor to contact the personal representative. This protects the personal representative from any action by a disgruntled creditor where the assets have been distributed to the beneficiaries. However, such a creditor can still seek to reclaim his/her debt from that particular beneficiary, provided the *Statute of Limitations* has not run out (see section 59 of the *Succession Act*). For the personal representative, it can be an expensive process, but it is the only means of protection available and, as such, it would seem to give more credence to the belief that the "role of a personal representative is often an onerous one" (*Wills, Probate and Estates*). G

Patrick Shee is a solicitor with Pearts Solicitors, Upper Ormond Quay, Dublin.



A EUROPEAN TWIST

After many years of negotiations among member states, a uniform set of private international law rules has been established to determine the conduct of cross-border insolvency proceedings within the European Community. This is the *European Insolvency Regulation* of May 2000. Although each state still retains its own insolvency law, the regulation greatly reduces the risk of opportunistic behaviour by providing certainty as to which European courts have jurisdiction to open insolvency proceedings and which state's laws apply, in addition to ensuring the cross-border effectiveness within the EU of the decisions handed down by those courts. Article 3 states that the courts of the member state where the debtor's main interests exist shall have jurisdiction to open insolvency proceedings. However, in article 27, authorisation is given for secondary proceedings to be enacted in the appropriate court in that new jurisdiction. The decision of that court will be restricted to the assets of the debtor situated within that secondary member state. For further information on this aspect of trans-European insolvency, see the *European Communities (Personal Insolvency) Regulations 2002*.

As always, when administering an estate with foreign assets, practitioners must look to see whether a will was made in that jurisdiction. Importantly, where tax has to be considered, it is the law of the land of that jurisdiction that must be applied. This may include the extracting of a foreign grant. It is worth noting that the rate of exchange is always taken from the date of death, and not at any other time.

Moving

One of the most useful ways in which to enforce judgment debt is through the process of judgment mortgages. Sarah Cazabon helps move that mountain

In these uncertain economic times, debt collection has assumed an unprecedented level of importance for all businesses. Accordingly, it is essential that a legal infrastructure commensurate with modern requirements exists to enable creditors to efficiently realise debts due and owing to them. One of the most useful ways in which to enforce a judgment debt is through the process of a judgment mortgage.

A judgment mortgage can be described as the process by which a judgment creditor can convert a judgment into a mortgage against land owned by the judgment debtor. Prior to the enactment of the *Land and Conveyancing Law Reform Act 2009*, the area was governed by the *Judgment Mortgage (Ireland) Acts* of 1850 and 1858. The legislation was outdated and the Law Reform Commission's consultation paper in 2004 on the subject was sharply critical of it. It is submitted that the LRC paper of 2004 prompted the enactment of the 2009 act, with a view to revamping Irish land law. Part 11 of the act attempts to clarify and modernise the law relating to judgment mortgages.

In terms of the impact of the 2009 act on procedure for registration of a judgment mortgage, the main change is that it has abolished the requirement that the amount of the judgment debt be included on the judgment mortgage affidavit. This may not have the most desirable effect in terms of ensuring effective enforcement of the judgment debtor's interests, because a folio or memorial cannot now reflect the true extent of its encumbrance.

Regarding the enforceability of judgment mortgages, the 2009 act states at section 116 that, "for the avoidance of doubt, it is and has always been the case that … there is no requirement to re-register a judgment mortgage in order to maintain its validity or enforceability against the land or a purchaser of land".

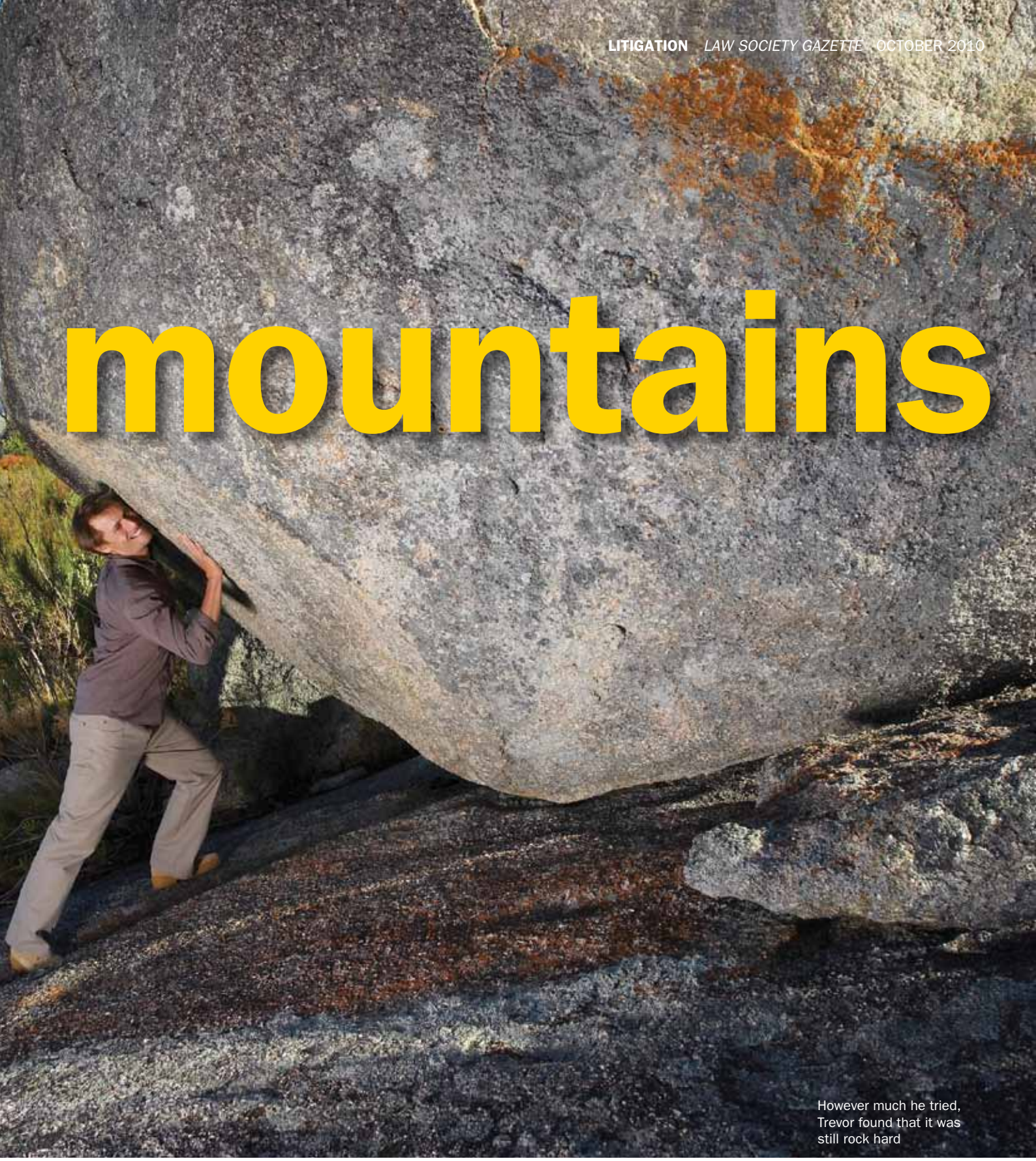
A judgment mortgage need not be 'renewed' *per se*, so it will remain physically present on the folio in perpetuity unless satisfied by payment or cancellation. However, this does not mean that a judgment mortgage, once registered, remains enforceable forever – quite the contrary. Section 119 of the 2009 act amends section 32 of the *Statute of Limitations Act 1957* to the effect that the right of action (to enforce a judgment mortgage) accrues from the date that the judgment is obtained, rather than the date upon which it is registered as a mortgage. The effect of this section is that a creditor must enforce a judgment mortgage within 12 years of the date of *obtaining* a judgment in the case of an ordinary person, or within 30 years if the judgment creditor is a state body. Therefore, the statute begins to run from the date of judgment – and not from the date of registration of the judgment mortgage.

The traditional way to enforce a judgment mortgage was to apply to the court for an order for partition or for sale of the land as a whole. However, there was a distinction made regarding a judgment mortgage registered against 'registered land' – that is, land registered in the Land

MAIN POINTS

- **Debt collection**
- **Judgment debt and judgment mortgages**
- **The impact of the *Land and Conveyancing Law Reform Act 2009***

mountains



However much he tried, Trevor found that it was still rock hard

Registry – and 'unregistered land', that is, land registered with the Registry of Deeds. The 2009 act abolishes the distinction between registered and unregistered land. Arguably, this has been the most welcome consequence of the act, since it has adequately addressed the unfortunate lacuna in the law bemoaned of in *Irwin v Deasy*.

In cases where land is owned solely by the judgment debtor, section 117 allows the court broad discretionary powers in this regard and stipulates that the court may make the following orders with regard to enforcement of a judgment mortgage:

- An order taking account of any other incumbrances affecting the land, if any, and the making of enquiries as to the respective priorities of any such incumbrances,

BLIND DATE?

One issue that has caused some controversy is whether the provisions of the *Land and Conveyancing Law Reform Act 2009* affect judgment mortgages registered before 1 December 2009. The general view is that the provisions of the 2009 act will not be retrospective in effect, and so will not cover judgment mortgages registered before 1 December 2009.

Indeed, section 30(3) of the act stipulates that "from the commencement of this part, registration of a judgment mortgage against the estate or interest in land of a joint tenant does not sever the joint tenancy". The instructive point here is the use of the phrase "from the commencement of this act", as this would suggest that the act as a whole is non-retrospective.

This may unfairly prejudice the interests of judgment creditors registered before 1 December 2009 and would essentially mean that judgment creditors registered after 1 December 2009 could be subjected to more favourable treatment by the court than those registered before 1 December 2009.

If this were the case, it would be anathema to the traditional system of priorities: a subsequent registration would be covered by the act, while anything registered before that date would not. This remains untested as yet, and it remains to be seen how the courts will interpret this issue.

- An order for sale of the land and, where appropriate, the distribution of the proceeds of sale,
- Such other order for enforcement of the judgment mortgage as the court thinks appropriate.

Thorny issue

From a purely practical perspective, the issue of co-owned land is far less clear-cut, but sections 30 and 31 of the 2009 act attempt to simplify the position. Prior to the act, the position regarding unregistered land was that a judgment mortgage effectively severed the joint tenancy, meaning that ownership would be converted into a tenancy in common upon registration of a judgment mortgage. This, in turn, meant that the judgment mortgage transferred the debtor's interest in the property to the judgment creditor, and this was sufficient to satisfy the *locus standi* requirement under the *Partition Acts* to ground an application by the judgment creditor for sale of the entire property.

However, the position in relation to registered land was not so forgiving, as was highlighted by the case of *Irwin v Deasy*. Judgment mortgages on registered land did not sever a joint tenancy. Therefore, the judgment creditor could not satisfy the *locus standi* requirement inherent in the *Partition Acts* and could not seek a remedy therein. Judgment creditors could apply to the court under section 71(4) of the *Registration of Title Act 1964* for an order for sale of the entire property. However, the courts would not make such an order, save in the most exceptional circumstances, as to do so would be to deprive the innocent co-owner of their rights. As Laffoy J opined in *Irwin v Deasy*, "where, as here, the land on which the judgment mortgage is registered is co-owned but the judgment mortgage is only registered against the interest of one of the co-owners, in order to give the judgment creditor an effective remedy for the enforcement of the judgment mortgages, it would be necessary to either order partition of the land between the judgment debtor and the co-owner or a sale in lieu of partition and a division of the proceeds of sale. To do so would interfere with the property rights of the co-owner."

It should be noted that the decision in *Irwin v Deasy* is under appeal by the Revenue Commissioners and is due to be heard by the Supreme Court next term. It will be interesting to see how the courts will interpret section 71(4) of the *Registration of Title Act 1964* in light of the new provisions in the 2009 act.

Distinction abolished

The distinction between registered and unregistered land has been abolished by the 2009 act in this context, stating at section 30(3) that "registration of a judgment mortgage against the estate or interest in land of a joint tenant does not sever the joint tenancy and if the joint tenancy remains unsevered, the judgment mortgage is extinguished upon the death of the judgment debtor". The practical implication of the new section is that, because a judgment mortgage is extinguished upon the death of the judgment debtor, it almost compels a judgment creditor to make an application under section 31 to realise their interest in the property.

LOOK IT UP

Cases:

- *Irwin v Deasy* [2006] IEHC 25

Legislation:

- *Land and Conveyancing Law Reform Act 2009*
- *Partition Acts 1868-1876*
- *Registration of Title Act 1964*
- *Statute of Limitations Act 1957*

Literature:

- 'Judgment mortgages', practice direction published on 1 December 2009 by the Property Registration Authority, available at www.prai.ie (use the 'search our website' facility to find it easily)

Section 31 states that the court may make, among other things, the following orders with regard to co-owned land:

- An order for partition among the co-owners,
- An order for the taking account of incumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such incumbrances,
- An order for sale of the land and distribution of the proceeds of sale as the court directs,
- An order dispensing with consent to severance of a joint tenancy, as required by section 30, where such consent is being unreasonably withheld,
- Such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case.

The 2009 act has also had an impact on the position of a purchaser, where a judgment mortgage is registered either during the purchase process, or after the property has been purchased, but before they have been registered as owner. Section 52 of the act provides "that the entire beneficial interest passes to the purchaser on the making, after the commencement of this chapter, of an enforceable contract for the sale or other disposition of land". By virtue of this, a purchaser is entitled to have any judgment mortgage that was registered in respect of the vendor after the making of a valid and enforceable contract for sale cancelled from the register.

"The range of orders capable of being made by the court in the context of an application by a judgment creditor, on foot of registration of a judgment mortgage, vastly improves the likelihood that a judgment creditor will be afforded a remedy"

In conclusion, it is beyond doubt that the 2009 act has brought welcome changes to this area of law, particularly from the point of view of the judgment creditor. The range of orders capable of being made by the court in the context of an application by a judgment creditor, on foot of registration of a judgment mortgage, vastly improves the likelihood that a judgment creditor will be afforded a remedy.

Furthermore, the act has addressed the lacuna previously present in our law in the context of co-owned land charged only in respect of one of the co-owners. However, the 2009 act, in dealing only in small part with the area of judgment mortgages, cannot possibly be deemed the answer to all of the problems posed by this exceptionally complex area. Until the provisions of the act are tested by the courts, the area will remain somewhat unclear. G

Sarah Cazabon is a trainee barrister. The author is grateful for the advice of senior litigation partner Pat Barriscale and by Jacci Fox, manager of the debt collection department, at Holmes O'Malley Sexton.

Family ties

This edited version of Anne Hickey and Ruth Ní Fhionnáin's essay on cohabiting couples and immigration was this year's winner of the annual Human Rights Essay Prize, sponsored by the Law Society

The treatment of cohabiting couples – both same-sex and opposite-sex – in the context of immigration in Ireland is a matter for concern. According to the latest census, cohabiting couples now make up 11.6% of all family units in Ireland and, between 1996 and 2006, there was almost a fourfold rise in the number of unmarried couples living together. The same period saw a large increase in the number of immigrants coming to Ireland, notwithstanding the recession. For example, in 2008 alone, 83,800 people migrated into Ireland.

At present, the law treats cohabiting couples less favourably than married couples in a range of areas: they have fewer property and succession rights, and are unable to claim certain tax and social welfare benefits. This essay explores the treatment afforded to cohabiting couples in the context of immigration. We will focus on the difference in treatment shown to immigrants whose situations fall within the scope of EU law, compared to those whose situation falls outside EU law.

Internal situation in Ireland

Recognition of de facto *families in family cases:*
Although EU law applies across the 27 EU member states, it will not always be applicable in a given case. EU nationals can rely on EU law where they have moved to or returned from a member state other than their own, and where they have exercised *EU Treaty* rights. As an example, a Swedish chef working in Ireland can be said to be exercising free movement. If he is joined by his non-EU family members, their residency rights will be governed by EU law.

However, purely Irish law and policy applies to Irish nationals, and to non-EU nationals whose residency in Ireland falls outside EU law. This would include, for example, a Brazilian man living in Ireland who is joined by his Brazilian partner. Another example of a wholly intern al situation would be where an Irish woman who has never lived outside of Ireland has a Korean partner who is granted permission to remain in Ireland.

There is no recorded case law in Ireland on the treatment of cohabiting couples in the immigration context. As we lack a tribunal for the review of immigration cases, the only cases that reach the courts are those sent to the High Court for judicial review. Given the absence of case law in the immigration context, the Irish courts' position towards cohabiting couples can be best illustrated by recent judgments from the family law courts. Their current position appears to be that unmarried partners do not enjoy family rights.

Since 1966, in *State (Nicolaou) v An Bord Uchtála*, the Supreme Court has held the view that only marital families enjoy constitutional protection. As recently as December 2009, in *McD v L*, the Supreme Court affirmed its position. The parties to the action were a same-sex couple and a man with whom the couple had conceived a child. The court rejected the group's family status, holding that "there is no institution in Ireland of a *de facto* family". This statement was quoted with approval in the recent High Court judgment in *JMcB v LE*.

The case law of the European Court of Human Rights (ECtHR) and of the Court of Justice of the European Union (CJEU, formerly ECJ) points to a much broader understanding of the scope of family rights.

It is unfortunate that, where the Irish courts apply purely national law, ECtHR and CJEU jurisprudence on cohabitants is usually given only cursory notice. In *McD v L*, Murray CJ reiterated that the Constitution is superior to the *European Convention on Human Rights* (ECHR) due to Ireland's adoption of the convention via secondary law in the *ECHR Act 2003*. He highlighted the difference between "internal" cases and those falling within the scope of EU law. In internal cases such as *McD v L*, national law takes precedence over ECtHR jurisprudence. Fennelly J noted that the courts must only take "judicial notice" of ECtHR decisions. As a result, there was no basis to apply ECHR family rights provisions to the facts of the case. Crucially, in *McD v L*, Murray CJ flagged that the position of the ECHR in Ireland might change as a result of the *Lisbon Treaty* in those areas governed by EU law.

MAIN POINTS

- Immigration and the treatment of cohabiting couples
- Recognition of *de facto* families
- European law

In contrast to the treatment of unmarried partners in the family courts, more openness to the interpretative duty set down in section 2(1) of the *ECHR Act 2003* has been seen in immigration cases involving the protection of family life. For example, in *Oguekwe v MJELR*, the Supreme Court upheld the quashing of deportation orders made against migrant parents of Irish citizen children, on the basis that no consideration had been given to the Irish children's rights under the ECHR and the Constitution.

While no immigration cases concerning cohabitants' rights have yet come before the courts, it is unlikely that permission to rely on traditional family rights would be granted. However, if a case that falls within the scope of EU law comes before the Irish courts, then due regard will have to be paid to the more liberal jurisprudence of the ECtHR and the CJEU.

Recognition of de facto *families in the context of Irish immigration policy:*

Family reunification rights in Ireland are extremely unclear. Indeed, Ireland is the only EU member state without primary legislation on family reunification for immigrants.

The precariousness of Ireland's immigration system is felt most keenly by cohabiting couples, both same-sex and opposite-sex. Their rights do not enjoy constitutional protection, and their success in applying for permission to remain depends on the particular policy in place in the Department of Justice at the relevant time.

Cohabiting partners of EU citizens who are living in Ireland and exercising *EU Treaty* rights are in a better situation than the partners of Irish nationals whose rights are governed by national policy. The residency of partners of Irish nationals is not provided for by legislation, and they may have difficulty in vindicating their family rights under the ECHR and the *Charter of Fundamental Rights*.

According to the Department of Justice website, non-EU nationals who wish to remain in Ireland and are in a *de facto* relationship with an Irish national must prove a durable attested relationship of at least two years. However, there appears to be no clear or consistent policy in relation to the type of permit that will be issued, or its duration, if the partner is permitted to remain. This is in sharp contrast to the position of partners of non-Irish EU nationals, who receive the right to work and a five-year residency permit.

Situations within the scope of EU law

Cohabiting couples whose circumstances fall within the scope of EU law have very different rights to those in a wholly internal situation. When, for

Despite his accent, a Swedish chef's EU passport is a recipe for success

LOOK IT UP

Cases:

- *Eyüp* ([2000] ECR I-4747)
- *JMcB v LE* (28/4/10; [2010] IEHC 123)
- *Kozak v Poland* (2/3/2010; [2010] ECHR 280)
- *McD v L* (10/12/09; [2009] IESC 81)
- *Oguekwe v MJELR* (1/5/2008; [2008] IESC 25)
- *State (Nicolaou) v An Bord Uchtála* ([1966] IR 567)

Legislation:

- *Citizenship Directive* (2004/38/EC)
- *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*
- *Immigration, Residence and Protection Bill 2010*

example, a Swedish chef working in Dingle wishes to be joined by his Australian partner, he can rely on the entitlements conferred by the EU law on free movement of persons. An example of the benefits of this is the *Citizenship Directive*, which allows EU nationals and their family members to remain for three months in any other EU member state, or for longer provided the EU citizen is working or has sufficient resources.

When a case falls within the scope of EU law, the EU treaties have supremacy over Irish law. The *Lisbon Treaty* has now definitively brought the ECHR under the aegis of the EU, and the *Charter of Fundamental Rights* has also become binding.

The CJEU has recognised family rights for couples in situations outside of marriage. In *Eyüp*, it was held that a couple in a cohabiting relationship were family members under the EU's association agreement with Turkey.

The ECtHR, for its part, has held that the family rights that are protected by article 8 of the ECHR are "not confined solely to marriage-based relationships". When deciding whether a relationship amounts to "family life" under the convention, a number of factors are relevant, including whether the couple cohabit and the length of their relationship. The ECtHR has affirmed that this may include *de facto* families. In *Kozak v Poland*, the ECtHR held that "respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues".

As noted above, in *McD v L*, the Chief Justice adverted to the fact that the ECHR and charter may potentially have a larger role in an 'EU-law case'. This is a prescient observation. It highlights that, when cases within the scope of EU law come before the Irish courts, judges will have to give greater weight to the ECHR and the charter. Judges will arguably have to examine individual CJEU rulings and ask whether the findings can be reconciled with Irish case law. This means that the courts may have to recognise cohabitants' family rights in immigration cases that fall within the scope of EU law.

Interestingly, the High Court, in *McD v L*, adopted the perspective of the ECtHR, when Hedigan J opined that same-sex couples should qualify as *de facto* families. The Supreme Court overturned his decision, rejecting both the notion of *de facto* families in Irish law and Hedigan J's understanding of the role of ECHR law in Ireland.

Remaining uncertainty

The Irish courts have found that *de facto* families in wholly internal situations are not protected by the ECHR. This is in contrast to cohabiting couples whose situation is governed by EU law and who may consequently rely on the broader interpretation of family life in the case law of the CJEU. They may also enjoy the protections offered by the ECtHR, given the binding nature of the ECHR and the charter in EU law following the entry into force of the *Lisbon Treaty*.

It has been argued that this difference in treatment gives rise to reverse discrimination. Unfortunately, as has been seen in recent case law, the Irish courts do not appear to consider this difference in treatment to constitute discrimination or to be unjustified or unjust.

The recently enacted *Civil Partnership Act 2010* is disappointing, as the provisions are limited to same-sex couples and no automatic rights are granted to cohabitants. The uncertainty surrounding the family rights of cohabitants should be remedied. The *Immigration, Residence and Protection Bill 2010* published in June, which currently makes no reference to family rights for immigrants, presents an opportunity for this. It is also to be hoped that the position of the ECHR and charter in cases falling outside the scope of EU law will be reviewed by the courts. G

Anna Hickey is a trainee solicitor with Matheson Ormsby Prentice and Ruth Ní Fhionnáin is a trainee solicitor with the Immigrant Council of Ireland.

Are you scared of

Making provision for a private pension, if properly managed, is the most tax-effective way to protect your family's lifestyle in retirement. So don't be afraid of the big bad 'P', says John Lambert

Why is it that the very mention of the 'P' word often brings tears to the eyes of those who have one and yawns from those who don't? The tears can easily be explained by poor performance – so many pension funds have suffered this over the past decade. For those solicitors who have not yet given serious thought to their pensions, the very notion often elicits yawning indifference as they think of the many decades that lie ahead before retirement. Members of the jury, I urge you to reconsider.

The facts are pretty stark. When we come to retire, the Irish state pension will pay the equivalent of about €12,000 per annum. What's more, the quaint notion of retiring at the age of 65 has now been replaced with the prospect of an extra three years in the workplace – which would mean that anyone under 50 today wouldn't become eligible for the state pension until they are 68. Could you and your family manage on €230 per week? If not, making provision for a private pension, if properly managed, is the most tax-effective way to protect your family's lifestyle in retirement.

Attractive tax benefits

A pension is simply a long-term savings plan that has attractive tax benefits. The tax benefits arise:

- *Today* – when you make contributions, you do so from gross income, thereby effectively halving the cost of your contributions.
- *Tomorrow* – as the pension grows, the growth accumulates tax free – this has very significant compounding benefits.
- *On retirement* – you are entitled to withdraw a significant amount of your pension, tax free.

Recent taxation and pension developments have given rise to the expectation that the tax benefits associated with pensions may be reduced. Indeed, the pensions industry witnessed a rush of "retirements" in the autumn of 2009 as people feared that a cap might be introduced on retirement tax-free lump sums. As it transpired, the fear was unwarranted in 2009, but this was most likely a stay of execution rather than a striking out. In addition, we are likely to soon see the introduction of limits on the tax relief provided on ongoing pension contributions. Even with reduced tax benefits, however, the tax incentive for pensions will remain attractive.

Consistent, low-risk growth

Warren Buffett put it well: "Rule no 1: Never lose money. Rule no 2: Never forget rule no 1."

The reason is very clearly explained by two simple examples that demonstrate the importance of pursuing consistent, low-risk investment growth:

- *If the value of your investment has halved, by how much must it gain to get back to par?* By 100% - in other words it must double, not an easy task!
- *If your investment grows consistently by about 7% per annum, what will it be worth after ten years?* Double what it started at!

So, if you can combine attractive tax incentives and sensible investment risk, your retirement vista should start to look a lot brighter. Of course, compounding brings huge benefits, so the earlier you start the better the result.

Putting the theory into practice

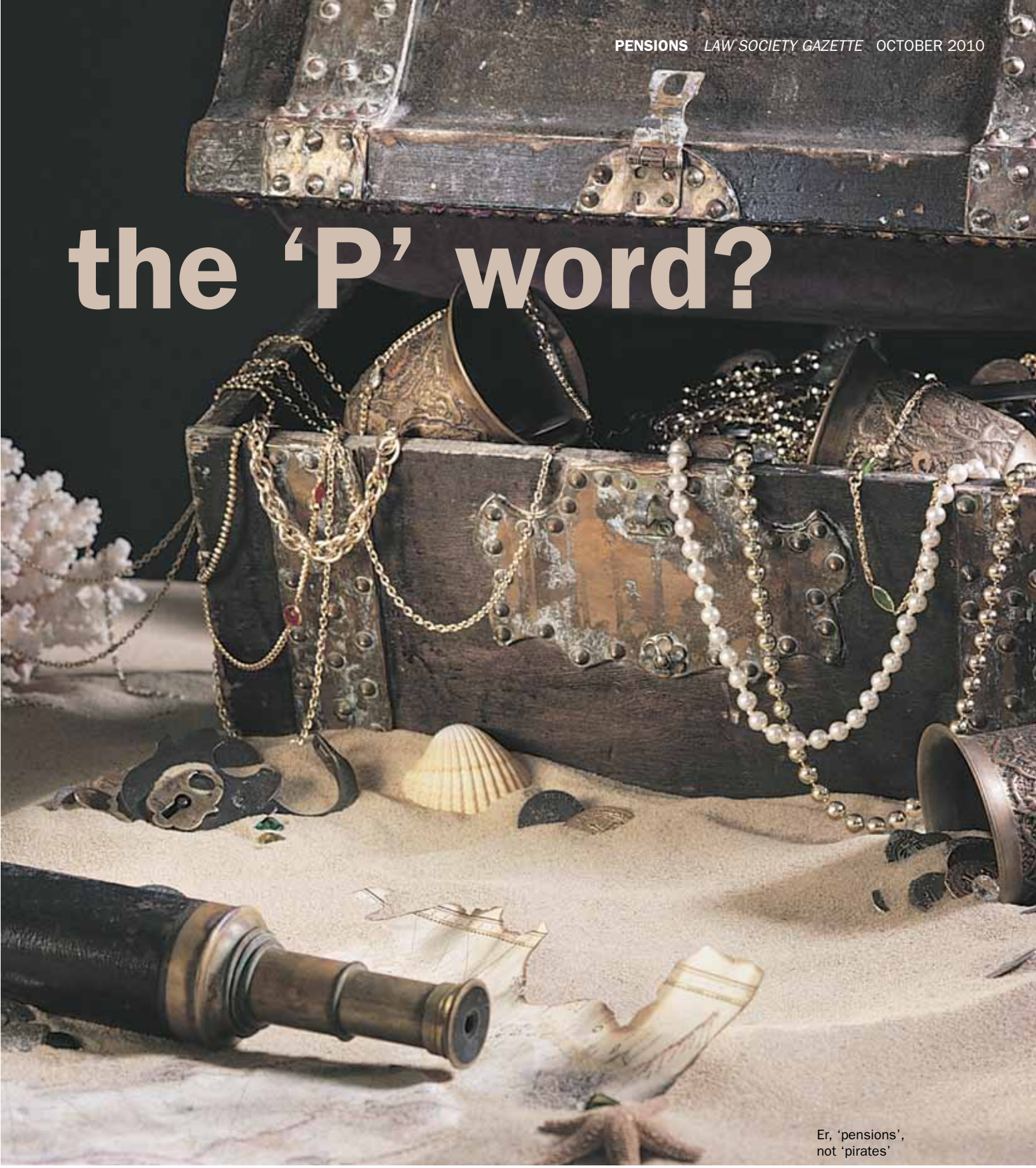
Your pension 'savings plan' should grow at a reasonable and consistent rate without the need to take significant risk. Do you know how your pension fund is invested? The average pension fund carries significantly more risk than most of us realise. For example, 'consensus funds', often considered the default pension option, have large equity weightings that expose them to significant levels of risk.

So ... are there sensible alternatives, or is high risk simply the cost we pay for long-term gains? Thankfully, there are – and the scope extends well beyond the havens of cash and bonds. Investment markets have become much more sophisticated

MAIN POINTS

- **Investment risk management**
- **Investment strategy**
- **Pension planning for solicitors**

the 'P' word?



Er, 'pensions', not 'pirates'

in the past two decades. In some cases, that has resulted in the emergence of innovative but effective investment solutions. For example, the discipline of 'absolute return' investing helps investors to generate steady, low-risk growth in both rising and falling investment markets. However, there are pitfalls too: sometimes with sophistication comes a lack of opacity. Mr Buffett again: "Risk comes from not knowing what you're doing." Therefore, let caution be the watchword (caution, that is, not inaction!) and make sure that you have the benefit of any necessary advice to support your pension investment decisions.

'Absolute return' investing is a relatively new concept for many Irish pension investors. In fact, it's been around for quite some time, having originated in the 1940s. US endowments have traditionally been

This little piggy had roast beef. And that's where BSE came from

significant investors in absolute return strategies. The development of European investment fund legislation over the past number of years has provided low-risk investors with the opportunity to invest in absolute return strategies with all the benefits of transparency, liquidity and strict regulation. Already well established in an international pensions context, it will undoubtedly become an increasingly important element of Irish institutional pension and non-pension investment strategies in the years ahead.

Summing up

Financially planning your retirement will undoubtedly come into sharper focus as the prospect draws closer. However, the smart money starts pension planning early and, as a result, enjoys a much smoother ride. Regardless of when you start thinking about the 'P' word, here are some key questions to consider:

- Take ownership: don't presume that someone else is looking after your pension for you. Do you know how it is invested?
- Set a strategy: don't invest blindly. Have you established a pension strategy that considers quantum, duration, frequency, diversification, risk, liquidity, cost, and so on?
- Know your target: most solicitors take more risk in their pensions than they need to in order to build an adequate pension fund. Have you examined pension cash-flow projections to give you an accurate perspective on things?
- Be active: markets change, and so do your requirements. Do you review your pension regularly and, if necessary, adjust your portfolio to suit your circumstances and market conditions?
- Take advice: you needn't act alone. Have you engaged a suitably-qualified specialist who provides you with high-quality independent advice and who has a demonstrable investment track record?

No further questions, your honour! G

John Lambert is an associate director of Aria Wealth & Investment.

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IRELAND

AUTUMN CONFERENCE 2010

12-14 NOVEMBER 2010 – ARDILAUN HOTEL, GALWAY

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Friday 12 November
8pm – late: Registration for conference, meet and greet drinks in the Ardilaun Hotel, Galway.

Saturday 13 November
10am – 1pm: Conference, speakers include:
- Tom O'Malley, barrister and senior lecturer, NUI Galway - 'Structuring judicial sentencing discretion'
- John Kennedy, barrister – 'NAMA and the law'
- Other speakers to be confirmed and attendance qualifies for CPD.

1.30pm – 7pm: Golf competition/leisure centre facilities available/free time.
7pm – 8pm: Pre dinner drinks reception.
8pm – late: Gala-dinner (black tie) with music, dancing and bar extension until late.

Sunday 14 November
12 noon Checkout

PLEASE GO TO WWW.SYS.IE FOR APPLICATION FORM

1. Persons wishing to attend must apply through SYS.
2. Accommodation is limited and allocated on first-come, first-served basis. Delegates must submit their application forms to reach SYS on or before 29 OCTOBER 2010. Fee is €150 pps for two nights' accommodation (with breakfast), gala dinner (BLACK TIE) and conference materials. Limited single occupancy available subject to a single supplement charge per room per night. Golf participants will be responsible for discharging their own green fee.
3. One application only per room per envelope together with cheque(s) for the conference fee and a stamped self-addressed envelope. Applications may be sent by post or DX ONLY (no email). Successful applications will be confirmed by email. Names of delegates to whom the cheque(s) apply must be written on the back of the cheque(s).
4. Cancellations must be notified to mgrace@mhc.ie on or before 5pm Tuesday 2 November. Cancellations thereafter will not qualify for a refund.
5. There are a limited number of twin rooms and/or double rooms. Please your preferred accommodation above (the SYS cannot guarantee that delegates will be allocated their preferred choice).
6. The SYS reserves the right to make changes to the event (including the identity of the speakers) or cancel the conference and/or any part thereof at its discretion. If there are insufficient members to participate in the golf competition, it will be cancelled.

I enclose cheque(s) payable to The Society of Young Solicitors, in the sum of €150 (per person sharing) and a self-addressed envelope.
Application to be sent to: Micheál Grace, Mason Hayes+Curran, South Bank House, Barrow Street, Dublin 2 (DX 11)

Mayo solicitors host 'son of Mayo'

(Front, l to r): Jacqueline Durcan, Evan O'Dwyer, John Costello (senior vice-president, Law Society), Gerard Doherty (president, Law Society) Dermot Hewson (president, Mayo Solicitors' Bar Association), Ken Murphy (director general), Patrick O'Connor (past-president, Law Society), Michelle Mulherin and Niamh O'Keeffe. *(Middle, l to r)*: Rosemarie Loftus, Lorraine Gannon, Deirdre Leeman, Mary O'Brien, Myles Gilvarry, Meadhbh McClean, Caroline Barry, Carmel Duggan, Paul Brennan, Samantha Geraghty, Katherine Killalea, John O'Dwyer and Patrick Durcan. *(Back, l to r)*: Michael Browne, Denis Molloy, Neil McCole, Conor O'Dwyer, Edel McCool, James Cahill, Ward McEllin (past-president, Law Society), Adrian P Bourke (past-president, Law Society), Mark Fitzgerald, Paul Cunney, John Deacy, Kevin Bourke, James Hanley, Maria Quinn and Helena Boylan

A general meeting of the Mayo Solicitors' Bar Association was held at the Harlequin Hotel, Castlebar, on 13 September 2010. The meeting was attended by the Law Society President Gerard Doherty (a native of Westport, Co Mayo), director general Ken Murphy and senior vice-president John Costello.

Despite the very poor weather conditions, the meeting was well attended and a lively discussion ensued. Members' principal concerns were in relation to professional indemnity insurance. Much dissatisfaction was expressed with regard to the current conveyancing arrangements, particularly with regard to domestic conveyancing, and a number of alternatives were suggested. The president responded, stating that the view was that the system had worked well and nobody wanted to go back to the old system.

Other topics touched on were the current radio advertising campaign.

The role of the Solicitors' Benevolent Association was also raised. One member expressed gratitude at the speed at which a worthy case was dealt with. The matter was dealt with within a week.

Sligo welcomes new district judge

Tom MacSharry (president, Sligo Bar Association), Judge Kevin Kilraine and Caroline McLaughlin (secretary, Sligo Bar Association)

The Sligo Bar Association recently welcomed Judge Kevin Kilraine as the new presiding judge of District Number 2 at a function held at the Glasshouse Hotel, *writes Caroline McLaughlin*.

Members of the judiciary and legal profession attended, including local practitioners and staff of Sligo Circuit and District Court offices. Members of the judiciary included judges of the High Court, Ms Justice Mary Irvine, Mr Justice Henry Abbott and Ms Justice Mary Laffoy, and retired District Court judges Bernard Brennan and Oliver McGuinness, who were also present to mark the retirement of Sligo county registrar Kieran McDermott at the same function (see *Gazette*, Aug/Sept 2010, p40).

President of the Sligo Bar Association Tom MacSharry extended a warm welcome to Judge Kilraine to District No 2. He also extended congratulations to Maurice Galvin, solicitor, who was introduced to Sligo District Court the same day.

Judge Kilraine addressed the guests and expressed his thanks to the bar association for marking the occasion. A donation was made to the Irish Motor Neuron Disease Association in lieu of a gift.

Law Society of Ireland

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• Diploma in Insolvency & Corporate Restructuring (webcast)	Thurs 14 October 2010
• 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
• Certificate in Criminal Litigation	Sat 09 October 2010
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*Our courses are primarily aimed at the solicitors' profession, however, certain courses are open to non-solicitors.

Parchment ceremony celebs

ALL PICS: JASON CLARKE PHOTOGRAPHY

Attending the presentation of parchments at Blackhall Place on 24 June 2010 were *(l to r)*: Gerard Doherty (president of the Law Society), Kevin O'Higgins (Council member), John Costello (senior vice-president), Enda Kenny TD (leader of Fine Gael), Judge James Paul McDonnell, Judge Gerard F Griffin and Niall Farrell (Council member)

Guest speaker at the parchment ceremony on 24 June, Fine Gael leader Enda Kenny, shares a joke with director general Ken Murphy

The leader of the Labour Party, Eamon Gilmore, was the guest speaker at the parchment ceremony at Blackhall Place on 16 July 2010

At the parchment ceremony for newly-conferred solicitors on 16 July 2010 were *(l to r)*: President of the High Court Mr Justice Nicholas Kearns, leader of the Labour Party, Eamon Gilmore, President of the Law Society Gerard Doherty and director general Ken Murphy

Mr Speaker

In recent months, the Law Society has played host to the minister of state with special responsibility for overseas development, Peter Power, and two political party leaders, namely the leader of Fine Gael, Enda Kenny, and the leader of Labour, Eamon Gilmore.

All three were the main guest speakers at different parchment ceremonies for newly conferred solicitors in June, July and September. Despite the negativity towards politicians of late, all three were warmly received by our newest members of the legal profession. Who knows, several may decide to follow in their political footsteps, sometime in the future?

PICS: CONOR MCCABE/JASON CLARKE PHOTOGRAPHY

Minister of State Peter Power was the guest speaker at the parchment ceremony for newly conferred solicitors on 9 September 2010

President Gerard Doherty welcomed guests of the Society prior to the parchment ceremony on 9 September 2010, who included *(from l to r)*: Minister of State Peter Power, Mr Justice Brian McGovern of the High Court, Gerard Doherty, and Judge Patrick Clyne

LAW SOCIETY PROFESSIONAL Training

Law Society Professional Training Programme • October – December 2010

DATE	EVENT	DISCOUNTED FEE*	FULL FEE	TRAINING HOURS
7 Oct	Time mastery for lawyers – world-renowned time master shares his tips (Dublin)	€168	€224	**3** Management and professional development skills by group study PLUS **1** regulatory matters**
8 Oct	Criminal litigation update 2010 (collaboration with the DSBA) (Dublin)	€136	€168	**3** General by group study
11 Oct	Undertakings – tips and traps (Cork)	€99	€165	**2** General by group study PLUS **1** regulatory matters**
12 Oct	DIT/Law Society Skillnet postgraduate certificate in learning teaching	€896	€1,280	**16.5** Management and professional\ and assessment development by group study
14 Oct	Annual property law conference (Dublin and via video-link to Cork)	€126	€168	**3** General by group study
4 Nov	Contract law update 2010 (Dublin)	€126	€168	**3** General by group study
11 Nov	Undertakings – tips and traps (Ennis)	€99	€165	**2** General by group study PLUS **1** regulatory matters**
25 Nov	Annual family law conference 2010 (Dublin and via video-link to Cork)	€231	€308	**5.5** General by group study
26 Nov	Annual in-house and public sector solicitors' conference (Dublin)	€126	€168	**2** Management and professional development skills by group study PLUS **1** regulatory matters**
2 Dec	Legal issues in wind farm development	€168/€84	€224/€112	**1 – 4** General by group study – depending of number of sessions attended

For full details on all of these events, visit www.lawsociety.ie or contact a member of the Law Society Professional Training team on:
P: 01 672 4802 **F:** 01 672 4890 **E:** professionaltraining@lawsociety.ie **W:** www.lawsociety.ie

Law Society Professional Training was formerly CPD FOCUS *Skillnet members/public sector subscribers **Full regulatory requirement for 2010

LAW SOCIETY FINUAS Network

Law Society Professional Training Programme • October – November 2010

DATE	EVENT (INCLUDING SPEAKERS FEE*)	DISCOUNTED FEE	FULL	TRAINING HOURS
9 Oct	International financial services law – international loan facilities (10am – 12pm)	€298	€397	**2** General by group study
16 Oct	International financial services law – syndicated lending (10am – 12pm)	€298	€397	**2** General by group study
19 Oct	Innovation, entrepreneurship and corporate governance (collaboration with CIMA Ireland) (9.30am – 4.30pm) Speakers: • **Paul Appeleby** – Director of Corporate Enforcement • **Padraig O'Ceidigh** – solicitor, founder and executive chairman, Aer Arann • **Dr Chris Horn** – founder, IONA Technologies • **Andrew Harding** – CIMA executive director • **Eileen Roddy** – head of CIMA Business School	€185	€220	**6** Management and professional development by group study
23 Oct	International financial services law – cross-border offers of securities in the EU. **Professor Eilis Ferran** – Cambridge University (10am – 12pm)	€298	€397	**2** General by group study
30 Oct	International financial services law – developing a pan-EEA securities market – why we need it and how to create it (10am –12pm) **Lachlan Burn** – partner, Linklaters, London	€298	€397	**2** General by group study
6 Nov	International financial services law – regulatory capital requirements and credit institutions – *Basel II* and the capital requirements directive. **Robert Cain** – partner, Arthur Cox (10am – 12pm)	€298	€397	**2** General by group study
13 Nov	International financial services law – what financial services lawyers should know about derivatives. **Ed Murray** – partner, Allen and Overy, London (10am – 12pm)	€298	€397	**2** General by group study

For full details on all of these events, visit www.lawsociety.ie/lspt or contact the Law Society Finuas team on:
P: 01 672 4802 **F:** 01 672 4890 **E:** finuas@lawsociety.ie **W:** www.lawsociety.ie *Law Society Finuas members

The Law Society Finuas Network is funded by member companies and the Finuas Networks Programme. This programme is managed by Skillnets Ltd and funded from the National Training Fund through the Department of Education and Skills

books

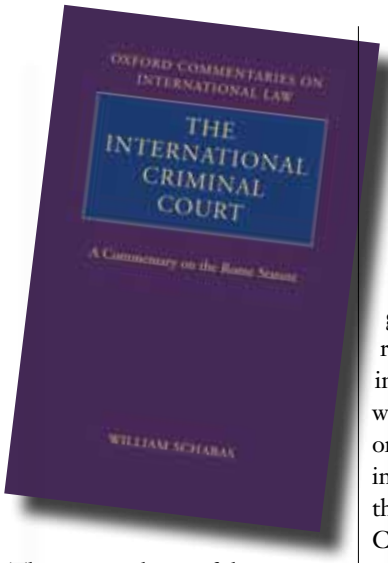
The International Criminal Court – A Commentary on the *Rome Statute*

William A Schabas. Oxford University Press (2010), http://ukcatalogue.oup.com. ISBN: 978-0-19-956073-8. Price: Stg£150 (hardback).

Given his acknowledged pre-eminence in the field, to say nothing of his work in the Irish Centre for Human Rights at NUI Galway, it was always going to be a pleasure to be asked to review this work by Prof Schabas. Not alone is he an internationally regarded legal academic, but he has served as a judge on the Special Court for Sierra Leone, and his obvious practical involvement with international criminal law is apparent from the text.

The *Rome Statute*, which established the International Criminal Court, entered into force on 1 July 2002. The document itself envisaged a review of its operation after seven years, and the review conference was held this year in Kampala, concluding on 11 June 2010, with delegates resolving to expand the court's jurisdiction in due course to deal with the crime of aggression.

The publication of Prof Schabas's work, therefore, could not be more timely. At 1,259 pages, it is comprehensive and authoritative, but not unwieldy. In its layout, it reminds me very much of Prof Kelly's *The Irish Constitution*, whose user-friendly format came to the rescue of many a beleaguered student! Prof Schabas reviews each of the 128 articles of the statute, considering each, where appropriate, with rulings and decisions of the International Criminal Court itself and other international bodies, such as the International Court of Justice, the International Criminal Tribunals of the former Yugoslavia and Rwanda and, of course, the Special Court for Sierra Leone.



The jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights and sundry other international bodies are reviewed.

All in all, the book provides the practitioner with a 'one-stop shop' of the workings of the court and of the statute itself. It is to the author's great credit that, without compromising on content, he has adopted a reading style that is engaging and manageable, and achieves its objective of being a practical guide to the court, clarifying rules and procedures that initially appear esoteric. I would warmly commend the text, not only to lawyers who may be interested in doing work before the International Criminal Court – whether as prosecutors or defenders – but to anyone who takes an interest in criminal law generally, and comparative law in particular. G

James MacGuill is principal of MacGuill & Co.

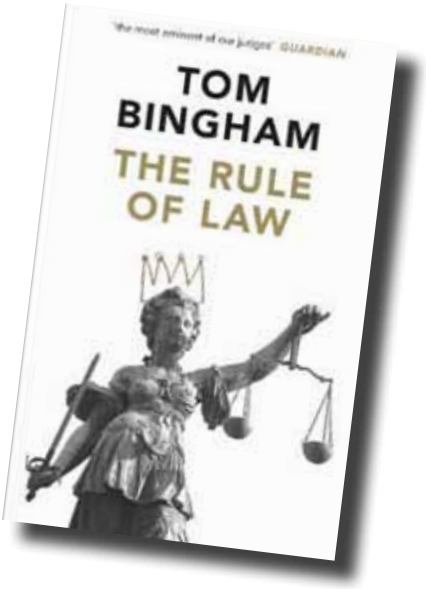
The Rule of Law

Tom Bingham. Penguin (2010), www.penguin.co.uk. ISBN: 978-1-846-14090-7. Price: Stg£16 (hardback).

In a time of economic uncertainty, it is necessary to rethink the rules of society. Tom Bingham in *The Rule of Law* advocates just this and argues that we should strive for an ideal society where the rule of law is upheld. The author brings us back to the meaning of the rule of law. While no clear definition exists, the rule of law goes beyond the discipline of law and stretches across society at large, providing a foundation for a just and fair society that is at peace and that can contribute to a responsible government and economy.

The text is divided into three sections. The first provides a historical account of the rule of law; the second breaks it down into eight constituent parts, while the third discusses two distinct issues: terrorism, and the power of parliament.

The main focus of the author's argument centres on the constituent parts of what the rule of law consists of. These include accessibility and the law, equality before the law, the exercise of power, human rights, dispute resolution, a fair trial, and the rule of law in the international legal order. While the author does state that this text is from an Anglo-centric view at the beginning, this changes as he works through the aforementioned issues. Towards the end, the author is dealing with international issues, all of which have a strong concentration on the individual rather than on institutions or states. It seems that as the world has advanced over the last century, the rights of individuals have been somewhat ignored. This is further highlighted in the final section, which deals with two international issues: terrorism, and the power of parliaments and, in essence, supra-national institutions.



The subtle and central argument emerges that, as society goes forward, it is necessary to consider all our actions and whether they are in the spirit of the law: we should not rely on what principle, precedent or exact legislation exists, but think of law as an evolving process.

Hence, responses to issues such as terrorism or the way the economy functions should permit a more just and fair society. As the world has shown over the last decade, it is its individuals who suffer when the rule of law is not obeyed and economic and terrorist crises occur. The author, while not stating it, proffers the thinking that, with the power of global institutions and laws being set through this top-down mechanism, the individual has to be protected, and one method is to ensure the rule of law in society. The idea is not new, however, and lies behind cosmopolitan philosophy (which emerged in Greece in the fourth century BC and is centred on the idea that all of us are citizens of the world, rather than individual parts/states of it). Hence, we should all see ourselves as subject to the rule of law as we are all citizens of the same world. The author uses the example of his own jurisdiction to support his arguments. but the message is clear: the rule of law and its effect is an international consideration and not just a Western idealistic value.

"This book should be read by those with a serious interest in international law and human rights"

The international undertone that pervades the book is evident in the conclusion, where the author cites eminent figures from the International Bar Association, the Russian Constitutional Court, the International Court of Justice and the Zimbabwean Law Society, who all have advocated the need for the rule of law to be applied so as to deliver clarity in law, an independent judiciary and legal profession, a justiciable and adequate bill of rights, and a general existence of a climate of legality. With the current economic crisis showing no clear finish, this book is a timely call for a return to a legislative basis where the spirit of the law is central to all decision-making processes so as to provide a just, well governed and equitable society. Further, Bingham advocates the need for the protection of the forgotten individual at the expense of international corporations. This is achievable through the rule of law and exemplifies its critical importance. This book should be read by those with a serious interest in international law and human rights, and as well as by international politicians, policy makers, lawyers and interdisciplinary students. G

Raphael Heffron is a PhD student at the University of Cambridge.

practice notes

UNDERTAKINGS GIVEN ON THE TRANSFER OF A FILE IN RESPECT OF THE PAYMENT OF THE FIRST SOLICITOR'S COSTS

When a file is transferred from one solicitor to another, it is quite common for the second solicitor to give an undertaking to the first solicitor in respect of the payment of the first solicitor's costs and outlays.

However, a matter that is often overlooked is that a problem will arise if the client does not stay with the second solicitor. Accordingly, these undertakings should be qualified to allow for this eventuality.

In addition, the undertaking should only be given if it is clear that sufficient monies will be coming into the solicitor's control to pay the first solicitor's costs. The undertaking should be qualified to take account of this.

In summary, the undertaking should be qualified in two ways:

- To say that it is conditional on the second solicitor not being discharged by the client,
- To say that it is conditional on sufficient monies coming into the solicitor's control to pay the costs.

It would also be prudent to ensure that the client's retainer and authority to give the undertaking is comprehensive. The following wording (also used in the Law Society's precedent residential mortgage lending solicitor's undertaking) could be included:

Client(s) retainer and authority

"…and in consideration of your giving the foregoing undertaking, I/we hereby undertake that I/we will not discharge your retainer as my/our solicitor(s) in connection with the foregoing matter unless and until I/we have procured from the recipient of the undertaking your effective release from the obligations imposed by such undertaking and I/we hereby indemnify you and all your partners and your and their executors, administrators and assigns against any loss arising from my/our act or default."

Guidance and Ethics Committee

LONG OUTSTANDING CLIENT LEDGER BALANCES

The Regulation of Practice Committee, which monitors compliance with the *Solicitors' Accounts Regulations*, wishes to draw attention to the issue of long outstanding balances on the client ledger. This is an issue that the Regulation of Practice Committee regularly encounters in the course of discharging its statutory duties. In general, long outstanding client ledger balances relate to monies to which the solicitor is beneficially entitled or monies held for or on behalf of clients.

Monies to which the solicitor is beneficially entitled

Under regulation 5 of the *Solicitors' Accounts Regulations 2001*, solicitors shall not hold monies to which a solicitor is beneficially entitled in a client account for longer than three months. Accordingly, monies held in the client account in respect of fees and disbursed outlays, monies held in the client account in respect of completed matters that would be properly available to be applied in satisfaction of professional fees and outlays if the solicitor had furnished a bill of costs to the client, or monies held in the client account in respect of a client matter to the extent that the solicitor is beneficially entitled to a share of those monies all have to be withdrawn from the client account within a period of three months.

The Regulation of Practice Committee has a concern that some solicitors leave monies to which the solicitor is beneficially entitled in the client account for longer than the three months permitted by the *Solicitors' Accounts Regulations*. This is a breach of the *Solicitors' Accounts Regulations*. When such matters come to the attention of the Regulation of Practice Committee, solicitors are required to immediately withdraw these monies from the client account. Significant breaches of the regulations can lead to a referral to the Solicitors Disciplinary Tribunal.

Clients' monies

However, in addition to monies to which the solicitor is beneficially entitled remaining in client account, the existence of long outstanding balances on the client ledger also gives rise to concern that solicitors are holding clients' monies in the client account in respect of uncompleted client matters. It is often the case that long outstanding balances on the client ledger represent stamp duty, registration fees, counsel's fees, miscellaneous undisbursed outlay, or monies due directly to clients. In probate matters, many of the balances on the client ledger relate to unpaid beneficiaries or unpaid capital acquisitions tax and capital gains taxes. In many cases, the existence of long outstanding balances on the client ledger is indicative of solicitors not completing the work they have been engaged to do by their clients. This inevitably leads to complaints from clients. Delays in stamping deeds are of a particular concern. Not only does the failure to stamp the deed on time harm the interests of consumers of legal services, but it can also increase the financial liabilities of the solicitor. The Regulation of Practice Committee can refer instances of long outstanding balances to the Solicitors Disciplinary Tribunal on the grounds of misconduct disclosed by the accounting records.

The Regulation of Practice Committee requires that solicitors should review the client ledger balances and long outstanding balances should be identified, investigated and cleared as soon as possible. Thereafter, solicitors should to put in place procedures for the regular review of client ledger balances with the objective of identifying, investigating and clearing long outstanding client ledger balances.

Regulation of Practice Committee

BRIEFING

legislation update

1 August – 10 September 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 st atutory instruments are on a link to electronic statutory instruments from www.irishstatutebook.ie.

SELECTED STATUTORY INSTRUMENTS

Criminal Justice (Psychoactive Substances) Act 2010 (Commencement) Order 2010
Number: SI 401/2010
Contents note: Appoints 23/8/2010 as the commencement date for the act.

European Communities (Protection of Consumers in respect of Contracts made by means of Distance Communication) (Amendment) Regulations 2010
Number: SI 370/2010
Contents note: Amends the *European Communities (Protection of Consumers in respect of Contracts made by means of Distance Communication) Regulations* (SI 207/2001) to clarify that certain provisions of directive 97/7 do not apply to certain contracts (that is, supply of foodstuffs or other goods for everyday use and the provision of accommodation, transport or leisure services where these services are provided within a specific date or within a specific period). Clarifies that when a trader initiates a distance selling communication (s)he must make clear at the beginning of the telephone conversation the purpose of the call.
Commencement date: 26/7/2010

Health (Amendment) (No 2) Act 2010 (Commencement) Order 2010
Number: SI 415/2010
Contents note: Appoints 1/10/2010 as the commencement date for the act.

Health (Miscellaneous Provisions) Act 2010 (Commencement) Order 2010
Number: SI 392/2010
Contents note: Appoints 1/8/2010 as the commencement date for parts 1 (insofar as it is not already in operation) and part 2 (dissolution of St Luke's Hospital Board) of the act.

Planning and Development (Amendment) Act 2010 (Commencement) Order 2010
Number: SI 405/2010
Contents note: Appoints 19/8/2010 as the commencement date for ss1-4, 26, 28-29, 37, 42, 46, 53-56, 58, 64, 66, 68, 70-71, 73 and 81.

Planning and Development Regulations 2010
Number: SI 406/2010
Contents note: Prescribes information to be included in applications under the *Planning and Development Act 2000*, ss42 and 42A, for extending the appropriate period as regards particular permissions.
Commencement date: 19/8/2010 G

Prepared by the Law Society Library

Solicitors Disciplinary Tribunal

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

In the matter of J Finbarr O'Gorman, a solicitor previously practising as Finbarr O'Gorman Solicitors at Mayfield, Hollyfort Road, Gorey, Co Wexford, and in the matter of the *Solicitors Acts 1954 to 2008* [7672/DT60/09 and High Court record no 2010 no 45SA]
Law Society of Ireland (applicant)
J Finbarr O'Gorman (respondent solicitor)

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

a) Failed to comply with an undertaking given to the EBS Building Society on 19 August 2007 in a timely manner or at all,
b) Failed to ensure that the borrower would acquire good marketable title to the property that was the subject matter of the undertaking in a timely manner or at all,
c) Parted with the loan cheque prior to having any executed documentation in relation to the transfer or the mortgage over the property, thereby failing to protect the interests of the EBS Building Society, which was relying on his undertaking.

The Solicitors Disciplinary Tribunal referred the matter forward to the President of the High Court. The President of the High Court on 14 June 2010 made an order as follows:

a) That the respondent solicitor not be permitted to practise as a sole practitioner or in partnership, that he be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Law Society of Ireland,
b) That the Law Society do recover the cost of the proceedings before the High Court and the cost of the proceedings before the Solicitors Disciplinary Tribunal, to include all witnesses' expenses, from the respondent when taxed and ascertained.

In the matter of J Finbarr O'Gorman, a solicitor previously practising as Finbarr O'Gorman Solicitors at Mayfield, Hollyfort Road, Gorey, Co Wexford, and in the matter of the *Solicitors Acts 1954 to 2008* [7672/DT132/09 and High Court record no 2010 no 46SA]
Law Society of Ireland (applicant)
J Finbarr O'Gorman (respondent solicitor)

On 13 April 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor, in that he allowed a deficit of €34,825.20 to arise in the client account of his practice, as of 30 April 2009, which deficit was due to the existence of a number of client ledger debit balances as a result of overpayments to clients in breach of regulation 7(2) of the *Solicitors' Accounts Regulations 2001*.

The Solicitors Disciplinary Tribunal referred the matter forward to the President of the High Court and, on 14 June 2010, the President of the High Court made an order as follows:

a) That the respondent solicitor should not be permitted to practise as a sole practitioner or in partnership, that he be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Law Society of Ireland,
b) That the Law Society do recover the cost of the proceedings in the High Court and the cost of the proceedings before the Solicitors Disciplinary Tribunal, to include all witnesses' expenses, from the respondent, when taxed and ascertained.

In the matter of Keith P Finnan, a solicitor previously practising as Keith Finnan & Company Solicitors, Humbert Mall, Main Street, Castlebar, Co Mayo, and in the matter of the *Solicitors Acts 1954 to 2008* [4346/DT134/09 and High Court 2010 no 49SA]
Law Society of Ireland (applicant)
Keith Finnan (respondent solicitor)

On 13 April 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to ensure there was furnished to the Society an accountant's report for the year ended 31 January 2009 within six months of that date, in breach of regulation 21(1) of the *Solicitors' Accounts Regulations 2001* (SI no 421 of 2001),
b) Through his conduct, showed disregard for his statutory obligation to comply with the *Solicitors' Accounts Regulations*, and showed disregard for the Society's statutory obligation to monitor compliance with the *Solicitors' Accounts Regulations* for the protection of clients and the public.

The tribunal recommended that the matter be sent forward to the President of the High Court and, on 14 June 2010, the President of the High Court ordered:

a) That the respondent solicitor is not permitted to practise as a sole practitioner or in partnership, that he be permitted only to practise as an assistant solicitor in the employment and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Law Society of Ireland,
b) That the Law Society do recover the cost of the proceedings in the High Court and the cost of the proceedings before the Solicitors Disciplinary Tribunal, when taxed and ascertained, from the respondent.

In the matter of Patrick J McGonagle, a solicitor practising as McGonagle Solicitors, 3rd Floor, 13 Parliament Street, Dublin 2, and in the matter of the *Solicitors Acts 1954 to 2008* [5843/DT135/09]
Law Society of Ireland (applicant)
Patrick J McGonagle (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 failed to ensure that 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 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 Niall Sheerin, a solicitor practising as Niall Sheerin & Company, Solicitors, at 40 Arran Quay, Dublin 7, and in the matter of the *Solicitors Acts 1954 to 2008* [5132/DT25/10]
Law Society of Ireland
(applicant)
Niall Sheerin
(respondent solicitor)

On 17 June 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to ensure that there was furnished to the Society an accountant's report for the year ended 31 March 2009 within six months of that date, in breach of regulation 21(1) of the *Solicitors' Accounts Regulations 2001* (SI no 41 of 2001) in a timely manner,
b) Through his conduct, showed disregard for his statutory obligation to comply with the *Solicitors' Accounts Regulations*, and showed disregard for the Society's statutory obligation to monitor compliance with the *Solicitors' Accounts Regulations* for the protection of clients and the public.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay the sum of €2,000 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 Robert Sweeney, a solicitor practising as Robert Sweeney at 2 Crerand House, Larkins Lane, Letterkenny, Co Donegal, and in the matter of the *Solicitors Acts 1954 to 2008* [10658/DT29/10]
Law Society of Ireland
(applicant)
Robert Sweeney
(respondent solicitor)

On 15 July 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor, in that he failed to ensure that there was furnished to the Society an accountant's report for the year ended 31 May 2009 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 advised and admonished,
b) 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. G

justis update

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

Compiled by Bart Daly

COMPANY

Examinership

Scheme of arrangement – property rights – leasehold interest – repudiation of leases – definition of 'creditor' – whether damages arising from repudiation of leases a post-petition liability – whether proposals unfair and inequitable – whether landlords contingent creditors – Companies (Amendment) Act 1990 – Interpretation Act 2005.

The examiner of Linen Supply of Ireland Limited sought to have a scheme of arrangement approved pursuant to section 24 of the *Companies (Amendment) Act 1990*. In the course of the examinership, the High Court had previously held that it did not have the jurisdiction to order the repudiation of the leases, but the Supreme Court had overturned this on appeal. The scheme itself was supported by a number of creditors but was opposed by a number of landlord creditors. The landlord creditors contended that the debts due to them were not subject to impairment under the act and that the proposals were unfair, inequitable and that they were being unfairly prejudiced. It was argued that, at the date of presentation of the petition, there were no arrears of rent due to them. Damages that flow from repudiation could only arise as a matter of law at the effective date of repudiation and not before, and could only be treated as a post-petition liability and therefore must be paid in full. The examiner had described the claims of the landlords as a contingent liability at the date of the presentation of the petition. The landlords submitted that, under the scheme, they would only receive 30% of the figure agreed as the damages that would follow the repudiation of the leases.

McGovern J found against the landlord creditors. Taken as a group, the landlords represented, in value, a significant group of creditors. The intention of the Oireachtas, in enacting the *Companies (Amendment) Act 1990*, was to provide for the repudiation of certain contracts (including leases), and the court could appoint an examiner who could present a scheme of arrangement that impaired the rights of creditors, including prospective creditors. The agreed debts due to the landlord creditors were subject to impairment under the act, and the court had jurisdiction to confirm a scheme that made provision for the impairment of these. The proposals were fair and equitable in relation to the landlord creditors. Before the court would approve the scheme in question, a provision would have to be made for ongoing funding by the investor and a final decision regarding approval would be adjourned for a week to enable discussions to take place.

***In the matter of Linen Supply of Ireland Limited*, High Court, 3/2/2010** [2010] 2 JIC 0301

CONTRACT

Specific performance

Property law – construction – development – planning permission – compliance – inspection – notice of completion – right to rescind – whether completion notice was served and whether house built in accordance with planning permission.

The plaintiff was a builder and the defendant was an experienced property developer. The plaintiff sought an order for specific performance of an agreement for the sale of a property. The defendant counterclaimed, among other things, that he had rescinded the contract by letter. The issue arose as to whether the plaintiff was ready to complete the sale when the completion notice was served, whether the house was built in compliance with planning permission, and whether the attic had been converted to habitable accommodation. The issue further arose as to whether the plaintiff would be denied an order for specific performance by reason of his unwillingness to permit an inspection requested and whether the defendant was entitled to rescind the contract.

Finlay Geoghegan J held that the house was not in compliance with the planning permission at the date of the service of the notice of completion and the plaintiff was not ready, willing and able to complete the contract at that date and was not entitled to an order for specific performance. There was no express right to rescind and, even if there was an implied right to inspect, the implied right could only be to inspect within a reasonable period of time. The defendant had not established that he had validly rescinded the contract, and his claim for the return of the deposit failed. The court would grant orders dismissing the claim of the defendant and the counterclaim of the defendant.

***Mackin (plaintiff) v Deane (defendant)*, High Court, 20/5/2010** [2010] 5 JIC 2003

FAMILY

Wrongful removal

Child in care of HSE – law of Scotland – children hearing – evidence – grandmother – admissibility of report – whether removal of child was wrongful – Child Abduction and Enforcement of Court Orders Act 1991 – Hague Convention.

The child who was the subject of the proceedings was sought to be returned to Scotland. The child was brought to Ireland in 2009 and the child was in the care of the Health Service Executive. A clinical psychologist's report did not indicate that the child objected being returned to Scotland. The grandmother sought the return of the child on the basis that there had been a wrongful removal from Scotland. Counsel for the mother indicated that the children's hearing was not part of the court system in Scotland and, even if it was, that it did not follow that the courts of Scotland had rights of custody. The mother also objected to the admission into evidence of copies of the purported decision of the children's hearing, exhibited in the affidavits sworn on behalf of the grandmother, claiming that they did not meet the criteria of the *Child Abduction and Enforcement of Court Orders Act 1991*.

Finlay Geoghegan J held that, on the date of removal of the child, she remained a child referred to the children's hearing who was the subject of an enforced supervision requirement that she live with her paternal grandmother at her home. The rights that the children's hearing had under the laws of Scotland were rights of custody within the meaning of the convention, which they con-

tinued to exercise in June 2009. It was not necessary to determine whether the grandmother also held rights of custody. The mother had not established that, if the court were to make an order for return to Scotland, this would expose the child to grave risk or an intolerable situation. The mother had not established any defence based on article 13 of the convention. There would be an order for the return of the child to Scotland. An order would be made releasing the report.

***W(E) (applicant) v B(SA) (respondent)*, High Court, 28/4/2010** (2009) [2010] 4 JIC 2802

IMMIGRATION AND ASYLUM

Judicial review

Administration law – certiorari – *fear of persecution – credibility – country of origin information – whether fair procedures carried out – whether conclusions regarding credibility reasonable* – Immigration Act 1999.

The applicant and her children had instituted judicial review proceedings seeking to challenge a decision of the respondents to refuse them asylum. Primarily, the challenge was to the respondents' conclusions regarding the applicant's fear of persecution, if she were to return, and the conclusions regarding her country of origin information. Both the commissioner and the tribunal expressed some doubts as to the credibility of some of the evidence tendered by the applicant. It had been concluded that the applicant had failed to demonstrate a well-founded fear of persecution, and doubts had been expressed regarding the applicant's claim to be a member of a particular ethnic people, the Kunama.

Cooke J refused the relief sought. The court could not set the decision aside unless it was demonstrated that the way in which conclusions had been reached was so clearly flawed or irrational as to be unlawful. The assessment of credibility was the exclusive function of the administrative decision makers in the asylum process. That was particularly so where two decision makers had the benefit of direct interview with the asylum seeker. The court was satisfied that no substantial ground was raised that would warrant the grant of leave for a judicial review of the contested decision.

***W(ZW) and Others (applicants) v Refugee Applications Commissioner and Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform (respondents)*, High Court, 16/4/2010** [2010] 4 JIC 1602

SOLICITORS

Practice and procedure

Tribunal – evidence – prima facie *case – whether appeal was justified.*

The appellant was a member of the defence forces in the state, who retained Mr Hussey, a solicitor,

to act for him in an army deafness claim. The appellant took issue with a number of costs deducted by Mr Hussey from settlement monies obtained. The appellant made a complaint to the respondent as a result, which was withdrawn. He complained again some years later. A tribunal determined that an inquiry would be held as to the allegations made. A further complaint was later submitted. He alleged that Mr Hussey had made false and misleading allegations to the tribunal, including perjury. In 2009, the tribunal concluded that there was no *prima facie* case against the solicitor in question, and the appellant sought to appeal that decision.

Kearns P held that there was nothing in the documentation or in the affidavit sworn by Mr White in support of his appeal that would justify allowing an appeal. The appeal would be dismissed.

***White (appellant) v Law Society of Ireland (respondent)*, High Court, 10/5/2010** [2010] 5 JIC 1003 G

eurlegal

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

Ryanair's acquisition of Aer Lingus – Commission's decision upheld

In early July, the EU's General Court (formerly known as the Court of First Instance) rejected Ryanair's appeal against the European Commission's 2007 decision to prohibit its proposed acquisition of Aer Lingus.

With the state retaining a minority equity stake of around 25%, Aer Lingus was floated on the stock exchange on 2 October 2006. Three days later, Ryanair announced its intention to acquire the entire issued share capital of its main Irish-based competitor. The same day, this offer was rejected by Aer Lingus. Ryanair made its formal public bid on 23 October 2006, and the proposed transaction was notified to the commission under the EU *Merger Regulation* a week later. In parallel with the ongoing merger control review by the commission, Ryanair sought to persuade the various shareholders of Aer Lingus to accept its offer.

Prohibition decision

Both Ryanair and Aer Lingus supply scheduled passenger air transport services in Europe. In airline merger cases, the commission tends to define each route between a point of origin and a point of destination as a separate market. The obvious issue is whether the relevant market would be defined in terms of flights between two specific airports or flights between two cities/regions. For example, the commission considered whether flights departing from Dublin to the various airports serving London, including Heathrow, Gatwick and Stansted, were substitutable. Ultimately, the commission decided that the relevant market constituted flights between city pairs, that is, Dublin-London.

In contrast to previous airline mergers, such as Air France/KLM, Ryanair's proposed acquisition of Aer Lingus involved two airlines, each with an important base at the same airport, namely Dublin. The commission examined competition issues on two sets of routes from or to Ireland: the first contained 35 routes served by both Ryanair and Aer Lingus, and the second included 15 routes where only one of the two airlines operates.

Of the 35 city pairs on which both parties overlap, the commission found that the proposed transaction would give rise to a monopoly on 22 routes and would lead to a very significant combined market share on each of the remaining 13 routes. Ryanair argued that it did not compete with Aer Lingus on these routes. However, the commission found that both airlines reacted regularly to each other's fare changes. In addition, Ryanair and Aer Lingus frequently published advertisements in which they compared fares/services offered by the other. Concluding that the two airlines were each other's closest competitor, the commission stated that the transaction would eliminate competition on each of the 35 overlap routes. The commission also decided that the proposed acquisition would eliminate potential competition on the 15 city pairs where only one of the two airlines was active.

Competition concerns

The commission found that, given the combined market strength of both airlines on the relevant routes, the travelling public would have limited or no alternatives. Since there were numerous examples of other airlines withdrawing from routes to and from Ireland, the entry of new competitors or the expansion of existing players would not eliminate the commission's competition concerns. The commission emphasised that Aer Lingus appeared to be the only airline that could effectively compete on any Dublin route already served by Ryanair. The commission rejected Ryanair's argument that the efficiency gains resulting from the proposed transaction would outweigh any anti-competitive impact. During the commission's review process, Ryanair offered a series of proposed remedies aimed at addressing such concerns. The commission found these to be insufficient.

In conclusion, the commission considered that Ryanair's acquisition of Aer Lingus would create a dominant position on the 35 routes from or to Ireland on which both airlines operated. It also found that the planned acquisition would create or strengthen a dominant position by eliminating potential competition on the 15 routes from Dublin or Cork that only one of the two airlines served.

This meant that the merged entity would have a strong incentive to increase Aer Lingus's ticket prices, since most of the lost sales would be captured by Ryanair. The commission found that the proposed acquisition would be likely to lead to lower-quality service and less consumer choice. Accordingly, on 27 June 2007, the commission decided to prohibit the transaction on the basis that it would significantly impede effective competition in the EU.

In the meantime, Ryanair was finding it difficult to gain the necessary approvals from Aer Lingus's shareholders, and its offer lapsed. Separately, Ryanair appealed the commission's decision to the General Court on five grounds.

Grounds of appeal

Both the Court of Justice and the General Court have consistently recognised that the commission has a margin of discretion regarding merger control issues. That said, the courts must establish whether the evidence relied upon by the commission is accurate, robust and comprehensive, as well as being capable of supporting the conclusions drawn from it. In basic terms, an applicant must show that the commission has made a manifest error in order for its appeal to be upheld.

Ryanair put forward five dif-

ferent grounds of appeal. These included challenging the commission's assessment of both the competitive relationship between the two airlines and of barriers to entry. Ryanair also disputed the commission's route-by-route analysis and its assessment of the claimed efficiencies. Finally, Ryanair alleged that the commission erroneously evaluated the proposed remedies.

Whatchoo talkin' 'bout, Willis?
Aer Lingus CEO Christoph Mueller and Ryanair CEO Michael O'Leary

The competitive relationship

Ryanair argued that the commission incorrectly based its finding on the idea that Ryanair and Aer Lingus are 'like-for-like' airlines, such that it could be automatically inferred from their combined high market shares that the proposed acquisition would give rise to significant competition concerns. The court found that, while market shares provide a useful initial indicator of potential competition issues, the commission also properly considered other relevant factors, such as the likely effects of the transaction on competition between Ryanair and Aer Lingus and the potential reaction of customers and competitors. Indeed, the court noted that concentration on the 35 routes served by both airlines would be very high and that, in itself, this was evidence of the existence of a dominant position.

The applicant claimed that, given the different service models of both airlines, the commission failed to establish that Ryanair and Aer Lingus were close competitors. In particular, Ryanair argued that the commission failed to recognise the fundamental differences between the two companies regarding operating costs, prices charged and service levels. The court noted that there was a difference in the operating costs of the two airlines. However, this did not mean that Ryanair and Aer Lingus were not each other's closest competitor, given that the latter's operating costs place it in the group of 'low-cost' airlines like Ryanair and EasyJet, rather than in the group of 'network' carriers such as British Airways and Lufthansa.

The court also stated that, although Ryanair tends to offer cheaper prices than Aer Lingus, the fares charged by both airlines are well below the price level of any of the competitors they face on the relevant routes. The court referred to the quality advantages offered by Aer Lingus, such as serving primary airports. However, the court also found that Aer Lingus had gradually restructured its business model to resemble that of its closest rival, Ryanair.

Findings disputed

Ryanair argued that the commission did not produce sufficient evidence to support its finding that the competition between the two airlines was so intense and the likelihood of market entry by other carriers so low that the proposed acquisition would give rise to consumer harm. Specifically, Ryanair disputed the finding that, since both airlines have an important base at Dublin Airport, they are therefore close rivals.

Rejecting the applicant's argument that the airport where the airline is based is of little significance, the court found that having maintenance and crew based at Dublin Airport rather than at the relevant destination airport gave both Ryanair and Aer Lingus an economic advantage. For example, of the 35 routes on which the parties overlap, the majority of the passengers originate in Ireland. In addition, carriers with a base at an airport other than Dublin have found it very difficult to compete with the two local airlines, since a competing airline had exited at least nine of the 35 overlapping routes.

Ryanair also argued that the commission ignored the potential competitive constraint on certain routes posed by flights offered by charter companies. In rejecting this claim, the court found that charter airlines offer a minimal amount of 'seat-only' fares on the key routes and, thus, they would not present a competitive challenge to Ryanair/Aer Lingus.

The court thus upheld the commission's finding that Ryanair and Aer Lingus were each other's closest business rival. Moreover, the court found that, in the likely absence of competition to the combined entity, the proposed acquisition would be likely to give rise to higher prices and inferior customer choice and service.

Barriers to entry

In order for entry to constitute a sufficient competitive constraint, it must be likely, timely and sufficient to counter any potential anti-competitive effects. Ryanair argued that the commission had overstated the competitive constraints that would be lost as a result of the proposed transaction. Indeed, Ryanair argued that the mere threat of entry would overcome any anti-competitive effects of its planned acquisition of Aer Lingus.

The market investigation undertaken by the commission revealed significant barriers to entry on routes operated by Ryanair and Aer Lingus to and from Ireland and, in particular, Dublin. In contrast to previous airline mergers, these barriers were not related to airport congestion but to other factors, including the strong brand recognition of Ryanair and Aer

Lingus in Ireland. As a result, the court noted that certain airlines indicated that they would never even consider going into direct competition with the merged entity. This view was supported by Ryanair's previous aggressive competition against new entrants. For example, Europe's second-largest 'low-cost' carrier, EasyJet, did not succeed in establishing a foothold in Ireland and had to cease its operations in 2006. As such, the court found that potential new entry was highly unlikely due to the sheer dominance that both airlines already had on the affected routes.

Again, the court alluded to the advantage of having a large base at Dublin Airport. Accordingly, any potential competitors were likely to be unable to compete effectively with the clear cost advantages and flexibility that the merged entity would enjoy on routes to and from Ireland. As such, the court found that no competing airline would be able to replicate the competitive constraint exerted on Ryanair by Aer Lingus as a result of the latter's large base in Dublin. This would lead to Ryanair being able to operate effectively unchallenged on each of the affected routes. Consequently, the court ruled that it was highly unlikely that any third parties would have the incentive or ability to compete with the merged entity on any of the overlap routes concerned.

Route-by-route analysis

Ryanair disputed various aspects of the commission's route-by-route analysis. The Dublin-London route accounts for 30% of passenger air travel between Ireland and the other 26 member states of the EU. In total, 80% of passengers flying this route use Ryanair or Aer Lingus, with the remainder using British Airways, BMI and CityJet. The commission found that these three airlines were not capable of exerting sufficient competitive constraint on the merged entity, primarily due to their different business models. In seeking to challenge this finding before the court, Ryanair essentially reproduced the arguments that were rejected by the commission during the administrative procedure.

The commission had also examined the competitive effects of the proposed merger on various routes from Dublin to other cities in Britain, such as Birmingham and Edinburgh. The proposed transaction would eliminate all existing competition on the Dublin-Birmingham route. In addition, the various airlines with a base at either of the two airports serving Birmingham would not seek to compete with the combined Ryanair/Aer Lingus because their business priorities lie outside Ireland. The court noted that this was not disputed by Ryanair. The court found that the planned acquisition would also create a monopoly on the Dublin-Edinburgh route. The court also stated that none of the carriers with a base at Edinburgh were likely to compete with Ryanair/Aer Lingus. Again, this was not challenged by Ryanair.

The court also upheld the commission's findings regarding various other routes, such as Dublin-Hamburg and Dublin-Brussels, where the merged entity would have a monopoly on both routes. In addition, the court supported the commission's view regarding the Dublin-Paris route where, while not quite having a monopoly, Ryanair/Aer Lingus would have an extremely high market share that would lead to a strong dominant position. Finally, on the Dublin-Milan and Dublin-Rome routes, the commission had found that the merged entity would create a monopoly. Ryanair disputed this, claiming that Alitalia could exert a competitive constraint on the merged entity by resuming its flights on the routes in question. However, the court found that Alitalia's business model, coupled with its financial difficulties, rendered this scenario highly unlikely. In sum, the court rejected Ryanair's challenge to the commission's route-by-route analysis.

Efficiency claims

The commission rejected Ryanair's argument that efficiency gains would outweigh the anti-competitive impact of the proposed transaction. To counteract the negative effects of a merger, the resulting efficiencies must be verifiable, must not be achievable by less anti-competitive means (that is, be 'merger-specific'), and should be likely to benefit consumers.

Ryanair claimed that by applying its low-cost business model and management skills to Aer Lingus, it could lower Aer Lingus's operating costs to 'Ryanairesque' levels. The court rejected Ryanair's argument that the commission was wrong to query how such reductions might be achieved without diluting Aer Lingus's quality of service. The court ruled that the potential efficiencies claimed by Ryanair, such as reductions in fuel and staff costs, might be achieved by Aer Lingus independently of the proposed transaction.

Finally, on the issue of ultimate benefit to the consumer, the court upheld the commission's view that it was highly unlikely that any acquisition that would result in a market position approaching that of a monopoly would be of any benefit to the consumer.

Ryanair's proposed commitments

During the administrative review of the proposed transaction, Ryanair submitted a number of remedies aimed at addressing the commission's competition concerns. For example, Ryanair proposed to make slots available at Heathrow Airport and on other overlap routes to and from Dublin. Ryanair also submitted various behavioural commitments to the commission, including an immediate reduction in Aer Lingus's fares by 10% or more, the elimination of fuel surcharges, a proposal not to increase flight frequency on overlap routes, and a plan to maintain two separate brands.

The court found that, in general, Ryanair's proposals lacked clarity and coherence. In terms of substantive content, the court specifically outlined that the offering of slots (referred to as an 'access remedy') to other airlines was unlikely to be an appropriate remedy and would not lead to substantial entry on the overlap routes. The court referred to the commission's 'market testing', which indicated a lack of interest of other airlines in competing with Ryanair and Aer Lingus. The access remedy would, thus, not replace the competitive restraint on Ryanair currently provided by Aer Lingus.

Regarding the Heathrow proposal, the court noted that British Airways and Air France would be interested in obtaining these slots. However, neither airline was likely to offer sufficient price competition to Ryanair to counter the disappearing competitive pressure from Aer Lingus. Regarding the various behavioural commitments submitted by Ryanair, the court upheld the commission's finding that these proposals did not address the relevant competition problems and could, in fact, lessen competition. These commitments also raised questions as to how they would be monitored and enforced. Accordingly, the

court upheld the commission's finding that, since the commitments proposed by Ryanair had both formal and substantive shortcomings, they were insufficient to remedy the anti-competitive effect of the proposed transaction.

Ryanair's minority shareholding

During the administrative review process, Aer Lingus requested the commission on several occasions to order Ryanair to sell its minority shareholding in Aer Lingus. In tandem with its decision to prohibit the proposed acquisition, the commission also found that it did not have the power to compel the sale of Ryanair's shareholding. Aer Lingus challenged this decision before the General Court.

On the same day that it rejected Ryanair's appeal against the commission's prohibition decision, the court also held that Ryanair's shareholding did not give it the capability of exercising decisive influence over Aer Lingus. Since this shareholding did not give Ryanair control, the court agreed that the commission did not have the power to order Ryanair to sell its shares.

Commission's prohibition upheld

Since Ryanair's appeal failed on each of the five grounds, the court upheld the commission's prohibition of the proposed acquisition of Aer Lingus. The rejection of Ryanair's appeal is a significant victory for the commission. Undoubtedly, the revised internal procedures adopted by DG Competition in the wake of the General Court's decision to overturn three of the commission's merger prohibition decisions back in 2002 played a key part in ensuring the factual and economic rigour of the commission's decision in Ryanair/Aer Lingus.

Of course, the court's decision does not prevent Ryanair from making a further bid for Aer Lingus. Such a proposal would be reviewed on the basis of market conditions at the relevant time. However, barring major structural change in the Irish air-transport sector, an acquisition of Aer Lingus by Ryanair is likely to give rise to merger-control issues.

As the court held at paragraph 224 of its judgment: "Aside from the effects on prices, since the entity resulting from the concentration would no longer be subject to the same pressure which previously existed between Ryanair and Aer Lingus, the concentration would also have repercussions on the quality of the offer and choice made available to customers." G

Cormac Little is a partner in the competition and regulation unit of William Fry. *He wishes to thank Fiona O'Donovan and Neil Evans for their invaluable assistance with this article.*

WILLS

Burgess, Elizabeth (otherwise Daisy) (deceased), late of St Mary's Hospital, Phoenix Park, Dublin 20 and the Simon Community, Usher's Island, Dublin 8 and Seán McDermott Street. Would any person who has knowledge of any will executed by the above-named deceased, who died at St Mary's Hospital, Phoenix Park, Dublin 20 on 27 April 2010, please contact Valerie Peart, solicitor, Pearts Solicitors, 24/26 Upper Ormond Quay, Dublin 7; tel: 01 872 2311, fax: 01 872 2852, email: vpeart@pearts.ie

Clarke, Vincent J (deceased), late of St Jude's, Golf Links Road, Haggartstown, Blackrock, Co Louth, who died on 15 April 2001. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased on or after 1 January 1991 please contact Michael Collins & Company, Solicitors, Main Street, Borrisokane, Co Tipperary; tel: 067 27470, fax: 067 27504

Dockery, Mary Elizabeth (Maura) (deceased), late of St Rita's, 50 Morehampton Road, Dublin 4 and Clooneragh, Strokestown, Co Roscommon. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 11 July 2010, please contact McKeever Rowan Solicitors, 5 Harbourmaster Place, IFSC, Dublin; tel: 01 670 2990, email: cohagan@mckr.ie

Gallagher, Joseph (deceased), late of Post Office Terrace, Lifford, Co Donegal. Would any person having knowledge of a will made by the above-named deceased, who died on 26 November 2008 at Letterkenny General Hospital, please contact Callan Tansey Solicitors, Crescent House, Boyle, Co Roscommon; tel: 071 966 2019, fax: 071 966 2869, email: info@callantansey.ie (file ref MCG549/1)

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RATES IN THE PROFESSIONAL NOTICE SECTION ARE AS FOLLOWS:

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Healy, Eileen (deceased), late of 31 Blasket Square, Waterville, Blanchardstown, Dublin 15, who died on 11 April 2009. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Suzanne McDonnell, P Delaney & Co, Solicitors, Parkside House, Main Street, Castleknock, Dublin 15; tel: 01 822 0868, fax 01 821 7006, email: smcdonnell@pdelaneysolrs.com

Hickey, Edward Gerard (deceased), late of 53 McCurtain Villas, off College Road, Cork. Would any person having knowledge of a will executed by the above-named deceased, who died on 31 July 2010, please contact Ellen O'Mahony of O'Flynn Exhams Solicitors, 58 South Mall, Cork; tel: 021 427 7788, fax: 021 427 2117, email: eom@ofx.ie

Howard, Elizabeth (deceased), late of 25 Seafield Court, Malahide, Co Dublin. Would any person having knowledge of a will made by the above-named deceased, who died on 7 March 2008, please contact Gerard Cleary, solicitor, of Lockhart O'Leary Maher, Solicitors, 191 Howth Road, Killester, Dublin 3; tel: 01 833 1900, fax: 01 833 4991, email: gerard@lomlegal.ie

O'Connor, Michael (deceased), late of Woodview House, Shanaway Road, Ennis, Co Clare, formerly of Chapel Hill, Clough, Portlaoise, Co Laois. Would any person having knowledge of a will executed by the above-named deceased, who died on 1 September 2009, please contact Wilkinson & Price Solicitors, Main Street, Naas, Co Kildare; tel: 045 897 551, fax: 045 876 478, email: mkelly@wandp.ie

O'Farrell, Rodger (aka Rodger Farrell) (deceased), late of Glenduff, Mitchelstown, Co Cork. Any solicitor holding/having knowledge of a will made by the above-named deceased, who died on 4 August 2010, please contact William Fitzgibbon, solicitor, Messrs Shinnick Fitzgibbon & Co, Solicitors, Baldwin Street, Mitchelstown, Co Cork; tel: 025 84081, email: billy@shinnickfitzgibbon.ie

O'Neill, Frank (Francis), late of 36 Fardross Rd, Clogher, Co Tyrone BT760HH, and formerly of Newtownbutler Road, Clones, Co Monaghan. Would any person having knowledge of a will made by the above-named deceased, who died on 12 July 2010, please contact Mr Ronan O'Neill, McCurtain St, Clones, Co Monaghan, tel: 087 994 0998, email: rnn_oneill@yahoo.ie

Quinlan, Margaret (deceased), late of 29 Rossaveale Court, Ballyfermot, Dublin 10. Would any person having knowledge of a will made by the above-named deceased, who died on 21 April 2003, please contact Gleeson McGrath Baldwin Solicitors of 12 Lower Kilmacud Road, Stillorgan, Co Dublin; tel: 01 283 2106, fax: 01 288 1111, email: fmurphy@gmgb.ie

Walsh, John Michael (otherwise Jack) (deceased), late of Hamilton Park Care Centre, Balrothery, Balbriggan, Co Dublin and 83 Calderwood Road, Drumcondra, Dublin 9. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 27 May 2010, please contact Shields & Kavanagh Solicitors, 1 An Clarin, Prospect, Athenry, Co Galway; tel: 091 877 288, email: mark@sksolicitors.com

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 Geraldine O'Connell Cusack (otherwise Geraldine Patricia Cusack) and Geraldine Ann Cusack, both of 7 Dartmouth Square, Ranelagh, in the city and county of Dublin

Regarding the property known as 7 Dartmouth Square, Ranelagh, Dublin 6, held for all the residue of the term unexpired of a lease dated 24 January 1952, made between Cyril Gerard Sharpe and Horace Reginald Sharpe of the one part and Thomas Talbot of the other part, for a term of 500 years from 1 May 1951 and subject to the yearly rent of £15.

Take notice that Geraldine O'Connell Cusack (otherwise Geraldine Patricia Cusack) and Geraldine Ann Cusack intend 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 property is called upon to furnish evidence of the title to the aforementioned property to the party named below within 21 days from the date of this notice.

In default of which, the said Geraldine O'Connell Cusack (otherwise Geraldine Patricia Cusack) and Geraldine Ann Cusack intend to proceed with an application before the said county registrar to acquire the freehold and all intermediate interests (if any) in the property 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: 1 October 2010

Signed: Michael E Hanahoe (solicitor for the applicants), Sunlight Chambers, 21 Parliament Street, Dublin 2

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

Take notice that any person having an interest in the fee simple or in any superior estate or interest in the property known as 6 Stamer Street, Dublin 8, in the city of Dublin, being part of the property comprised in a lease dated 6 May 1845 and made between Thomas Rawlins of the one part and Thomas Atkins of the other part for the term of 900 years from 25 March 1845, subject to the yearly rent of one peppercorn up to 29 September 1847 and during the residue of the term the yearly rent of £12.13s.od (€15.40), should give notice of their interest to the undersigned solicitors.

Take notice that the applicant, Patrick McDonagh, intends to submit an application to the county registrar for the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple interest and all intermediate interests in the aforesaid property, and that any party asserting that they hold an interest therein are called upon to furnish evidence of their title to the under-mentioned solicitors within 21 days from the date of this notice.

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

Date: 1 October 2010

Signed: P Delaney & Co (solicitor for the applicant), Parkside House, Main Street, Castleknock, Dublin 15

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

Take notice that any person having an interest in the fee simple or in any superior interest in no 40 Henry Street, Dublin 1, comprised in folio DN162461F, being a portion of the property comprised in a fee farm grant dated 15 August 1859 from Ann Worthington to Fanny Susanna Shury Daniel, Eliza Stanton Daniel and Emily Gould Sams, which reserved a perpetual yearly fee farm rent of £13.16.11, with 6 pence in the pound receiver's fees (all predecimal).

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

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

Date: 1 October 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) Act 1967* and in the matter of an application by Eleanor Ronaghan of Mullaghmore House, Mullaghmore, Tydavnet, in the county of Monaghan

Take notice that Eleanor Ronaghan intends to submit an application to the county registrar for the county of Monaghan for the acquisition of the freehold interest in property described as (a) shop and premises situate at Church Square, town of Monaghan in the county of Monaghan, held under a lease from Lord Rossmore; (b) shop and premises situate at Church Square, town of Monaghan in the county of Monaghan, held under a yearly tenancy from Denis C Rushe.

Any party asserting they hold a superior interest in the aforesaid premises are called upon to furnish evidence of the title to the aforementioned premises to Messrs John J Keenan & Son, solicitors for the said Eleanor Ronaghan, within 21 days of the date of publication of this notice.

In default of any such notice being received, Eleanor Ronaghan intends to proceed with the application before the county registrar for the county of Monaghan at the end of 21 days from the date of publication of this notice and will apply to the county registrar for the county of Monaghan 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: 1 October 2010
Signed: Messrs JJ Keenan & Son (solicitors for the applicant), Hillside, Monaghan, Co Monaghan

In the matter of Gabrielle Tynan, a ward of court. Would any person having knowledge of the whereabouts of the title deeds of 16 Rosemount Road, North Circular Road, Dublin 7 please contact the Office of the General Solicitor for Minors and Wards of Court, 15/24 Phoenix Street North, Smithfield, Dublin 7; tel: 01 888 6231, fax: 01 872 2681, email: gensol@courts.ie. Reference: DS/1874

RECRUITMENT

NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE *LAW SOCIETY GAZETTE*

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

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

Keane McDonald
executive legal recruitment

Head of Legal & Compliance

Our client, part of a highly regarded international banking group, is seeking to hire an exceptional solicitor who will assume executive responsibility for its legal and compliance affairs in Ireland. The successful candidate will join the Dublin-based executive leadership team and will report directly to the CEO.

The Role:

As Head of Legal & Compliance you will have full executive responsibility for the Legal and Compliance function in the organisation. You will be a key member of the executive leadership team and you will lead a large team of qualified solicitors, managers and staff.

You will:

- Hold executive responsibility for all legal, regulatory and compliance aspects of the bank
- Oversee the legal aspects of all credit management and credit recovery work
- Manage any litigation proceedings working closely when required with external counsel
- Ensure all compliance related activities are managed effectively and efficiently, including the bank's regulatory responsibilities
- Work closely with the bank's group headquarters as appropriate

The Person:

The successful applicant will:

- Be a qualified lawyer in Ireland or the UK with at least 10 years experience in a financial services legal environment
- Be a high achiever with experience of working at a senior level in a banking or similar relevant environment
- Be a solid communicator with a business oriented approach
- Have proven ability to lead and manage a legal and compliance team while working comfortably at executive level
- Thoroughly understand banking activities and the markets within which the bank operates
- Have an expert knowledge of the legal, credit, compliance and regulatory environment associated with banking in Ireland

The level of seniority associated with this exceptional opportunity will be reflected in the attractive remuneration package on offer.

Interested applicants should contact Yvonne Kelly of Keane McDonald in strict confidence on 01 8415614 or email your CV to ykelly@keanemcdonald.com

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

Tel: +353 18415614
Fax: +353 16401899

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

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

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

CORPORATE — DUBLIN

Our client is a high profile practice and is now looking to recruit a high calibre corporate lawyer. You will provide legal advice to blue chip companies in the areas of mergers and acquisitions, joint venture agreements, management buy outs, reverse takeovers and shareholder agreements.
Contact: carolmcgrath@makosearch.ie **Ref: C1115**

TAX PARTNER — DUBLIN

Our Client is looking to recruit a tax professional. You will advise on the complexities of international and domestic transactions. You will have an ability to provide leadership on projects requiring tax input and will possess strong commercial focus and business acumen.
Contact: carolmcgrath@makosearch.ie **Ref: C1116**

COMPLIANCE PROFESSIONAL — DUBLIN

This role provides an excellent opportunity to liaise closely with different units of the financial services department. Work to include authorisation of new entities, liaising with the regulator, providing relevant information and keeping up to date with all regulatory developments. FSA experience beneficial.
Contact: carolmcgrath@makosearch.ie **Ref: C1117**

BANKING — DUBLIN

Our Client is a prestigious law firm and is seeking an ambitious banking lawyer with strong acquisition/property/leveraged finance experience. You will be involved in a range of transactions and will act on behalf of international and domestic clients. Experience with a reputable firm is beneficial.
Contact: carolmcgrath@makosearch.ie **Ref: C1118**

TAX ASSOCIATE — DUBLIN

Excellent opportunity for tax adviser to join a dynamic law firm. You will provide tax related advice to support various departments including the corporate and financial services sector thus ensuring that transactions are managed tax efficiently and to promote a high standard of tax compliance throughout the business.
Contact: carolmcgrath@makosearch.ie **Ref: C1119**

FUNDS — DUBLIN

Top ranking law firm requires an excellent funds lawyer. You will advise investment managers, custodians, administrators and other service providers of investments funds on establishing operations in Ireland. You will be commercial minded and ambitious with strong exposure to investment funds.
Contact: carolmcgrath@makosearch.ie **Ref: C1120**

CORPORATE — SYDNEY

Our client is one of Australia's leading law firms. An opportunity exists for a corporate lawyer to join at associate or senior associate level. The role covers mergers and acquisitions, capital markets, joint ventures, procurement, financial services, private equity, corporate recovery, and corporate governance. Relocation and visa assistance will be provided.
Contact: sharonswan@makosearch.ie **Ref: C1121**

CONSTRUCTION — SYDNEY

This leading firm has a construction practice second to none. From concept through to completion they advise on all roles including initial concept, development, contract drafting, documentation, project management and completion. An opportunity exists for a mid-level construction lawyer. Excellent salary and benefits.
Contact: sharonswan@makosearch.ie **Ref: C1122**

BANKING — SYDNEY

This leading firm is seeking to recruit a banking associate. You will have excellent knowledge of all aspects of project financing, property development and corporate financing transactions. Knowledge of corporate lending, including various forms of security is also essential. A very competitive remuneration structure is available.
Contact: sharonswan@makosearch.ie **Ref: C1123**

IP & Technology — SYDNEY

The ideal candidate will have gained experience from a leading firm or in-house. Specifically you will have experience in the drafting and negotiation of IP development and commercial agreements, software development, licence and support agreements. Excellent salary and benefits.
Contact: sharonswan@makosearch.ie **Ref: C1124**

BANKING & FINANCE — SYDNEY

Our client's banking & finance team is looking for a mid-level associate to join their close-knit team. The team is involved in a variety of financing transactions including project finance, debt, capital markets and corporate finance transactions on behalf of banks and sponsors. Experience from a leading Irish firm as well as top academics are essential.
Contact: sharonswan@makosearch.ie **Ref: C1125**

LITIGATION — SYDNEY

The successful candidate will have solid litigation experience. Land court litigation and/or planning and environment litigation experience would also be advantageous, but not essential. The successful candidate will be a good communicator, a dynamic team player and have a natural ability to manage client relationships to ensure seamless client service delivery.
Contact: sharonswan@makosearch.ie **Ref: C1126**

New Openings

Partnership

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

Employment
Funds
Insolvency
Litigation
Regulatory/Compliance
Environmental & Planning

Junior to Senior Associate

We have significant opportunities in the following practice areas:

Banking – Associate
Banking – Senior Associate
Commercial Property – Senior Associate
Corporate/Commercial – Associate to Senior Associate
Insurance (Contentious and Non-Contentious) – Associate to Senior Associate
Information Technology – Associate to Senior Associate
Environmental and Planning – Senior Associate
Funds – Assistant
Funds – Associate
Funds – Senior Associate
Litigation (Professional Indemnity) – Associate to Senior Associate
Litigation – Associate to Senior Associate
Tax – Associate to Senior Associate

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

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