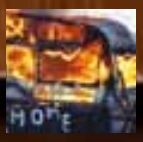
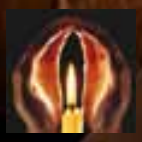


More than ice cream
Can the Irish Government learn the lessons of the Dale Farm debacle?

Presidential policy
The Law Society's new president talks about his challenges for the year



Canada dry
Top Canadian lawyer opposes proposed *Legal Services Regulation Bill*

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Nationwide

Compiled by Kevin O'Higgins

Kevin O'Higgins is junior vice-president of the Law Society and has been a Council member since 1998

DSBA to meet minister about *Legal Services Regulation Bill* issues

DUBLIN

The DSBA has been afforded a meeting with Minister for Justice Alan Shatter relating to the impact and effect of the *Legal Services Regulation Bill*. The Law Society has also been in contact with the minister, and the bill continues to be carefully monitored. The DSBA held a highly successful forum on the bill and has established a task force that will continue to closely monitor its passage through the Oireachtas

As those of us who attended the professional indemnity insurance seminars will know, a much more competitive market was predicted this year. Thankfully, that seems to be what colleagues are experiencing. Although many are still awaiting quotes from various insurance companies, it appears from those that have received quotations that some companies are willing to negotiate the premium payable.

DSBA president Geraldine Kelly encourages practitioners to look for at least two quotations in order to give some bargaining power when negotiating. She says: "It's clearly a much softer market from the point of view of the solicitor, and I strongly advise you to seek as many options as possible as insurers do appear to be eager for the business."

Retirements lead to judicial influx

WEXFORD

Judge Ó Buachalla retired as the judge of District 23 in September. The Wexford Solicitors' Association held a dinner in his honour in the Whitford House Hotel. Many local colleagues attended, as did representatives of the Courts Service and Garda Síochána. The dinner marked the end of 18 years of service by Judge Ó Buachalla, during which time he became known for his courtesy and care in court. We wish him well in his retirement.

The retirement of Judge Olive Buttimer of the Circuit Court saw Wexford representatives travel to Clonmel for her retirement dinner.

These retirements have led to significant changes for Wexford practitioners. Busy Circuit Court sessions have seen visits by Judge Gerry Griffin and Judge Alice Doyle to Wexford town, while, in the District Court, Judges Clyne, Earley, Coghlan and Haughton have been doing the rounds.

Taoiseach to address fellow countymen

MAYO

In what has to be a significant coup for any organisation – and not least a bar association – Mayo has secured the attendance as guest speaker of An Taoiseach at the annual dinner of the Mayo Solicitors' Bar Association.

Mr Kenny attended in a more modest capacity last year, prior to his elevation as Taoiseach. He was happy to accept Evan O'Dwyer's invitation once again. This year's event takes place in the magnificent Mount Falcon Hotel on 3 December. Last year, the snow descended during the evening and a number of colleagues (poor souls!) had to spend the night within the precincts of the hotel until assistance became available at daybreak!

Passing of Tom Kiersey in centenary year

WATERFORD

The *Gazette* was very sad to hear about the passing of Tom Kiersey, retired solicitor, late of Coolroe, Grange Park Crescent, Waterford. Tom passed away on 15 September 2011, just four weeks short of his 100th birthday.

He featured in a special tribute in the 'People and Places' section of the April 2011 issue, which highlighted a party celebrating his centenary year. His daughter Gillian tells us that the *Gazette* was kept permanently open on the relevant page and shown to all callers.

"He was looking forward to the 100th birthday," she says. Sadly, it was not to be.

Ar dheis Dé go raibh a anam dílís.

Prize bond draw results

- **1 x €1,250: bond number 1528 (Laurence K Shields, LK Shields Solicitors, Co Dublin).**
- **2 x €500: bond number 1535 (John Lanigan, John Lanigan & Nolan, Co. Kilkenny); bond number 1638 (Patrick Moran, Michael Moran & Co, Co Mayo).**
- **2 x €275: bond number 1564 (Owen Binchy, James Binchy & Son, Co Cork); bond number 2245 (Laurence Kirwan, Kirwan & Kirwan, Co Wexford).**

In News this month...

Art odyssey brings Dublin alive

Two budding Dublin artists have walked away with prizes worth €14,000 in a Dublin-based city and county art competition. The artistic theme was 'A Day in the Life of Dublin'.

Sarah Louise Donohoe (14) representing Dominican College in Blackrock won in the 'Up to Junior Cert' category, while Sophie Ryan (17) from Santa Sabina College in Sutton took the honours in the 'Up to Leaving Cert' section. The winners claimed the generous cash prizes for themselves and their schools, which was sponsored by the legal firm, Walkers.

The judges comprised contemporary artist Rasher, Dublin artist Frances Coughlan and Walkers' Ireland managing partner Vicki Hazelden. The prize-winning pictures will be framed, attributed to the young artists and hung permanently on the walls of Walkers' Dublin office.

Winning artists Sarah Louise Donohoe *(left)* and Sophie Ryan are congratulated by contemporary artist and competition judge, Rasher

Annual Report now online

The Law Society's *Annual Report 2010/11* was published on 11 November 2011.

It is available for viewing on the Society's website at www.lawsociety.ie/Pages/About-Us.

New death notice service

A new, potentially useful – and very unusual, it would have to be said – web-based service has been launched in Ireland. DeathIreland.ie tracks all death notices in the Republic and emails same-day notifications of deaths to its subscribers, anywhere in the world.

Subscribers pre-select a list of people's names, towns, counties or organisations. They are then notified by email of any death notice in the future that matches their selected criteria. Managing director of DeathIreland.ie, David Laird, says that the service will replace the need for people to monitor the death notices in newspapers and on websites. An annual subscription costs as little as €10.

The website also provides subscribers with road directions from the subscriber's location to the funeral home and church.

Gazette shortlisted for Irish Magazine Awards 2011

The *Law Society Gazette* has been shortlisted for the 2011 'Irish Magazine Awards' on 1 December – the fourth time in five years for the magazine to be so honoured. (We didn't enter in 2009.) The *Gazette* has been selected in three categories:

- **'Business to Business Magazine of the Year (more than 5,000 circulation)',**
- **'Designer of the Year' (nominated: Nuala Redmond)**
- **'Journalist of the Year – Business to Business Magazines' (nominated: Colin Murphy).**

In addition, the *Parchment*, the magazine of the DSBA, has been shortlisted in three categories, with Stuart Gilhooly being nominated for the 'Journalist of the Year' title. We wish him and his colleagues well.

Pension scheme trustees' training

Employers and trustees of occupational pension schemes and retirement trust schemes face new recurring obligations in respect of trustee training, *writes Fiona Thornton (Law Society Pensions Sub-committee).* Trustee training is now mandatory for trustees of occupational pension schemes and retirement benefit trusts.

Some employers may already be liable for failure to arrange for the trustees to receive appropriate training. Equally, trustees may have failed to undertake appropriate training. Employers and trustees in default may face fines of up to €25,000 and imprisonment of up to two years. Fines imposed may not be paid out of the resources of the scheme.

Employers must arrange training for trustees appointed before 1 February 2010 for a date prior to 1 February 2012, and every two years thereafter.

Employers must arrange training for trustees appointed after 1 February 2010 within six months of their appointment, and every two years thereafter.

For more information on free training and approved training courses, see: http://trusteetraining.pensionsboard.ie.

DATE FOR YOUR DIARY

Law Society of Ireland

Law Society Annual Conference

13th/14th April 2012

Castlemartyr Resort Hotel

Co Cork

REGISTER ONLINE AT WWW.LAWSOCIETY.IE

Donald Binchy elected as new Society president 2011/12

Donald Binchy has begun his term as president of the Law Society of Ireland for the year 2011/12, with effect from 11 November 2011. He is joined at senior executive level by senior vice-president James McCourt and junior vice-president Simon Murphy.

Donald (age 48) is a partner at the law firm Binchy Solicitors in Clonmel, Co Tipperary, founded by his grandfather James Binchy in 1918. He is a native of Clonmel, Co Tipperary, and is the third of four children born to Don and Joan Binchy (both deceased). Married to Claire, they have three children. He was educated in Ss Peter and Paul's Primary School, Clonmel, and Clongowes Wood College, Co Kildare. He is a graduate of University College Dublin and holds a BCL law degree.

Apprenticed to his father Don (who served as Law Society president from 1990/91), he qualified as a solicitor at Blackhall Place, Dublin, in 1987. He spent two years, post qualification, engaged in IFSC-related work for the then law firm of Cawley, Sheerin, Wynne in Dublin.

The Law Society's new president for 2011/12, Donald Binchy, with senior vice-president James McCourt (left) and junior vice-president Simon Murphy

Donald became a member of the Council of the Law Society of Ireland in 1994. He has served on many of the Society's most senior committees, including the Business Law Committee, the Education Committee and the Education Policy Review Group, which renovated the education policy and methodology of the education of solicitors. In addition, he has served on the Regulation of Practice Committee, the Complaints and Client Relations Committee, the Finance Committee and the Professional Indemnity Insurance Committee.

The scrutineers' report of the result of the Law Society's annual election 2011 shows that the following candidates were provisionally declared elected. The number of votes received by each candidate appears after their names: John O'Connor (1,849), Kevin O'Higgins (1,671), Stuart Gilhooly (1,633), James Cahill (1,595), Paul Egan (1,542), Valerie Peart (1,508), William Aylmer (1,493), James O'Sullivan (1,333), Bernadette M Cahill (1,294), Michele O'Boyle (1,246), Paul Connellan (1,187), Martin G Lawlor (1,163), Nicola Dunleavy (1,074), Alan Gannon (1,047), Moya Quinlan (1,038), Liam Kennedy (1,010).

Provincial elections

As there was only one candidate nominated for the province of Munster, there was no election. The candidate nominated was returned unopposed: Richard Hammond.

The following candidate was provisionally declared elected in the Connaught provincial election: David Higgins (231).

Legal Services Regulation Bill dominates at AGM

The recently published *Legal Services Regulation Bill 2011* (LSRB) dominated proceedings at the Law Society's annual general meeting, which took place on 10 November 2011 at Blackhall Place. In all, 60 members attended.

New president Donald Binchy informed the meeting that the Council had established two task forces to deal with the bill, namely the LSRB Task Force and the Future of the Law Society Task Force. Chairman of the LSRB Task Force, Michael Quinlan, reported that it had already held its first meeting. The task force, he said, had made a number of preliminary observations in relation to the bill, namely:

- **The impact of the bill on the independence of the legal profession noting, among other matters, that the proposed level of Government interference in regulation of the legal profession was unknown in any Western democracy,**
- **The costs of the new regulator to the profession,**
- **The broadness of the new definition of 'misconduct',**
- **The potential for claims on the compensation fund to substantially increase, and**
- **The manner in which the LSRB would reduce public protection and transparency.**

Members in attendance appealed to their colleagues to discuss their concerns in relation to the bill directly with their local TDs. They called for the Society to emphasise the importance of the legal profession's independence from Government. The overwhelming view was that the bill's proposals in relation to regulation would not reduce consumers' legal costs, but would, instead, add to them.

Mr Quinlan asked that members post or email their views and comments on the bill to the Society as a matter of urgency, to ensure that their views would be included in the Society's review of the LSRB. Submissions should be emailed to lsrb@lawsociety.ie.

He reported that the Society would convene a special general meeting of the profession to discuss all aspects of the LSRB following an appropriate period of reflection – well in advance of the Dáil committee stage. In addition, a seminar on the independence of the profession would be convened in order to engage with other international legal professional bodies and the business community.

With regard to professional indemnity insurance, the chairman of the PII Task Force, Eamon Harrington, reported on the renewals process for the 2011/12 period. He said that no negative feedback had been received from the profession to date, with most enquiries to the Society's PII helpline being of a technical nature.

He noted that the task force would consider the master policy proposal once an assessment of the current renewal process had been undertaken. If the improvements that the task force had negotiated on behalf of the profession for the current renewals period were found to have significantly enhanced the process for practitioners, it would be unlikely that the task force would recommend the introduction of a master policy to the Council.

The meeting appointed the date of the next AGM as Thursday, 1 November 2012.

OUTLAWS

Lives less ordinary

COLIN DALY
Independent law centre
After qualifying, Colin worked in private practice for a year. He then joined the Office of the Director of Consumer Affairs and was involved there on an in-court advice project.

He went on to work for two years as a legal adviser at the European Consumer Centre in Dublin before joining the Northside Community Law Centre (NCLC) as managing solicitor in 2001.

NCLC is an independent law centre. It provides a range of free legal and advocacy services within the local community, as well as conducting research on legal issues and campaigning for law reform.

Colin and his NCLC colleagues have initiated and progressed ground-breaking constitutional and human rights cases during the last few years. Their *McCann* High Court case, for instance, resulted in a significant shift in law relating to the enforcement of debts and to Dáil Éireann passing the *Enforcement of Court Orders (Amendment) Act 2009.*

MARIE DALY
IBEC
On qualifying, Marie joined Dublin City Council and was involved in wide-ranging litigation in her role there.

Interested in employment law, Marie moved to IBEC and worked as an employment law solicitor, advising members and getting involved in litigation in both the Employment Appeals Tribunal and the courts.

As legal advisor to IBEC, Marie provides in-house guidance and advice across wide-ranging matters. Compliance with competition law is of pivotal importance, given the 64 trade associations in IBEC, and Marie needs to stay familiar with all industry sectors and with the individual competition issues facing each sector. IBEC's group structure is complicated, being a combination of a trade union, a number of limited companies, and associations. All of this means that governance is an important skill set. Law reform and lobbying, of course, regularly feature, given IBEC's role.

Marie is involved in the Law Society's Company Law Review Group and she also serves on several boards, including that of the Irish Auditing and Accounting Supervisory Authority and on the Government's High-Level Group on Business Regulation.

FRANCIS FITZPATRICK
Entertainment entrepreneur
Living between Ireland and Cannes with his wife Denise and six children, Francis Fitzpatrick is involved in international motivational speaking, law and business consultancy.

He is a director of the company that produces Ireland's *Dragon's Den* and *The Apprentice*. Through another company, he works with high-profile sports and entertainment stars on a global basis. In 2001, Francis beat Disney Corporation in a European trade-mark court action that Disney took against his wife over a children's character she had created.

Francis went on to organise the production of a 40-episode children's TV show featuring their 'Piggley' character that was aired on the USA PBS television network and won seven Emmy awards and a BAFTA. The story of Francis's legal battle with Disney is told in a best-selling book by Denise Fitzpatrick and Terry Prone called *Cease & Desist*. Francis himself has written an e-book for lawyers entitled *Wealth Creation and 21st Century Skills for Lawyers*.

Solicitors being targeted with fraudulent instructions

The Society would like to warn solicitors that, in recent weeks, a number of solicitors have been targeted with fraudulent instructions to carry out debt-collection work and enforce family home settlements.

Frequently, such instructions are received from a new client based in another jurisdiction seeking to recover funds owed to them from an Irish-based company or ex-partner. It will later transpire that the repayment funds will be transferred from another jurisdiction. Information proving the debt is provided to the solicitor, and the debtor will either courier a cheque for a very large amount to the solicitor, or seek to transfer funds to the solicitor's account. The solicitor is instructed to deduct their fees and pass the remaining funds on to the client without ever having provided a legal service.

This is a type of money-laundering that the Society has highlighted previously. These scams put solicitors at risk of committing the substantive offence of money laundering. In addition, if the solicitor is successful in lodging a cheque and transferring the funds to an account in another jurisdiction, there may be a financial exposure for the solicitor if the cheque they lodge and pay out from is subsequently deemed fraudulent.

Solicitors can learn more about this type of money-laundering scam and access important anti-money-laundering guidance by logging into the members' area of the Society's website and visiting:

1) **The 'Best Practice and Guidance' section of the website,**
2) **The August 2010 e-zine article entitled 'Sham Litigation: an Emerging Money Laundering Typology',**
3) **The news section for new fraud alerts (the most recent was published on 8 November 2011).**

Regularly check the news section in the members' area of the website for fraud alerts and make sure you are subscribed to the Society's e-zine to receive the latest information straight to your mailbox.

CPD – a good career move

Now is a good time to invest in knowledge. In recognition of this, more firms are appointing continuing professional development (CPD) coordinators to identify education and training needs, to plan training and ensure compliance by the firm's solicitors with CPD obligations. This is also a good time to check you are on target to complete the 2011 CPD requirement by 31 December 2011. The 2011 CPD requirement is 12 hours of CPD, including the minimum three hours' requirement in management and professional development skills and the minimum one-hour requirement in regulatory matters.

The current *CPD Scheme Booklet*, regulations and record card are available to download from the CPD Scheme Section on the members' area of the Society's website, www.lawsociety.ie.

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

Three new appointments to the District Court

In one of her final acts before she left office, President Mary McAleese appointed three new District Court judges to office, following nomination by the Government. They are Michael Coghlan, Patrick Durcan and Gráinne Malone. These appointments fill the vacancies that arose from the retirements earlier this year of Judge William Hartnett, Judge Michael Patwell and the appointment of Judge Tom O'Donnell to the Circuit Court.

Judge Michael Coghlan was born in 1950 and is a graduate of Trinity College Dublin (BA 1973, MA 1976). He was admitted as a solicitor in 1978 and has over 30 years of litigation experience, with expertise in employment law, family law, debt collection, arbitration, mediation and conveyancing. Since 1989, he has been the principal of Coghlan & McNally Solicitors (Kimmage, Dublin 12). He also served as vice-chair on the Employment Appeals Tribunal from 1984 to 1989 and was a member of the Valuation Tribunal from 1997 to 2002.

Judge Michael Coghlan

Judge Patrick Durcan

Judge Gráinne Malone

Judge Patrick Durcan was born in 1951 and is a graduate of University College Dublin (BCL 1971, LLM 1974). He was admitted as a solicitor in 1973 and received a Diploma in Canon Law in 2010. Since 1973, Mr Durcan has been a partner in Patrick J Durcan & Co Solicitors (Westport, Co Mayo), engaging in general practice with an emphasis on litigation. He has been an active law agent for the Health Service Executive in Co Mayo, with particular experience in child-care matters. He has worked as an agent of Inland Fisheries Ireland in relation to illegal fishing activities. He was a Fine Gael councillor on Mayo County Council from 1979 to 2004 and a member of Seanad Éireann from 1983 to 1987.

Judge Gráinne Malone was born in 1966 and is a graduate of University College Dublin (BA 1987) and Dublin Institute of Technology (Dip 1989). Ms Malone was admitted as a solicitor in 1993 and called to the Bar in 2011. From 1993 to 2007, she was principal of Gráinne M Malone & Co Solicitors (Tallaght, Dublin 24). From 2007 to 2010, she was a senior partner in Malone Hennessy & Co Solicitors (Tallaght). She also served as chair of the Criminal Law Committee of the Law Society from 2001 to 2003. Grainne's sister Mary is a Labour senator, while her sister Emer is the former mayor of Dublin. Her brother Paddy is president of Dundalk Chamber of Commerce.

MEDIA

In the media spotlight

ROBERT DORE
DORE & COMPANY
BRIDGESTREET, DUBLIN 8

PIC: LENSMEN PHOTOGRAPHIC AGENCY

Why is he in the news?
Robert Dore's client, Fr Kevin Reynolds, was defamed in an RTÉ *Prime Time Investigates* programme called 'Mission to Prey', broadcast in May 2011 and watched by more than 500,000 viewers. The programme alleged that Fr Reynolds (56) had fathered a child with a minor in Kenya in 1982. The programme's reporter said she had a "credible third-party source" to suggest that Fr Reynolds was the father of the child and that he had contributed to her education.

In August, the young girl wrote a letter, apologising to Fr Reynolds and saying he was not her father.

Comments about the case?
"This was an extraordinary case for numerous reasons – the makers were written to on several occasions and warned not to make the programme. Fr Reynolds' offer to take a paternity test was also ignored. Equally worrying was the fact that our warnings were responded to – not by RTÉ's in-house lawyers, nor even by management – but by the reporter making the programme. Nor did that reporter ever produce her "credible third-party source" – despite repeated requests to do so.

"I issued proceedings on 17 June and had a hearing date on Tuesday 15 November, which was remarkable. Cases such as this usually take three or even four years – the speed will give you some indication of the amount of pressure we applied."

Tactics used?
"I attempted a motion to abridge. I was unsuccessful – but it helped put the other side under pressure and proved to be a good tactic."

The case was taken on a *pro bono* basis. Can one presume that RTÉ will be paying?
"Yes – handsomely."

Fr Reynolds' award is rumoured to be seven figures?
"I can't comment on that."

How he became involved?
"I was approached at the beginning of this year by someone who is now a judge and asked to represent Fr Reynolds through the Association of Priests. Frank Callinan SC, with whom I am very friendly, was also initially involved. I then met with Fr Reynolds, listened to his story and indicated I'd be delighted to take on his case."

Ramifications?
"The case has already had a huge impact on RTÉ. They've indicated they will be following the Ombudsman's advice on the issue."

Background?
"I grew up in Newcastlewest, Co Limerick. I attended Templeogue College, then UCD from 1978 to '81. I was not academically brilliant, but I had a very good time! I particularly remember Prof McAuley for criminal law and Prof Bland for land law. Both were great. After graduation, I worked for Ivor Fitzpatrick for a year, then partnered with Aidan Eames before going out on my own."

How do you relax?
"Shooting, fishing, golfing."

Company charges and financial assistance under the spotlight

At the ICLF seminar were *(from l to r)*: Helen Dixon, Kelley Smith BL, William Johnston, Dr Deirdre Ahern, Barbara Cotter, David Mangan and Dr Noel McGrath

The Irish Corporate Law Forum (ICLF) held an evening seminar on 9 November 2011, titled 'Company Charges and Financial Assistance: the Significance of Planned Reforms in Law and Practice' at the Royal Irish Academy. Chaired by Barbara Cotter (A&L Goodbody), speakers included the Registrar of Companies, a security law expert, a banking and finance law specialist, and an academic.

The Registrar of Companies spoke of the Companies Registration Office's advance planning in relation to the introduction of first-to-file priority for the registration of charges.

Security law expert William Johnston (Arthur Cox) noted that the reforms would provide greater certainty for bankers, so that when funds were advanced and security taken, priority would be had over other charges, whether prior or subsequent in time.

Banking and finance law specialist Kelley Smith BL examined the practical ramifications of the introduction of a principal purpose test in relation to the giving of financial assistance.

Dr Noel McGrath (DCU) explored the proposed two-step registration process and highlighted an important issue in relation to the operation of the doctrine of notice.

The well-attended event comprised company law academics, company and securities lawyers, banking lawyers, in-house solicitors in the banking sector, accountancy firms and staff of the Department of Jobs, Enterprise and Innovation and the Companies Registration Office.

Director of the ICLF, Dr Deirdre Ahern (assistant professor at the School of Law, Trinity College Dublin) announced the membership of the ICLF's advisory board. The members are: Ms Justice Mary Finlay Geoghegan, David Barniville SC, Eleanor Daly (in-house solicitor, FEXCO), Helen Dixon (Registrar of Companies), Gordon Duffy BL, David Mangan (Mason Hayes & Curran), Brian Murray SC, Jack O'Farrell (A&L Goodbody), Dr Ailbhe O'Neill BL (Trinity College Dublin) and Conor Verdon (Department of Jobs, Enterprise and Innovation).

Take a New Year dip

The diploma programme has three new courses starting early in the New Year.

The Certificate in Trademark Law will start on Tuesday 10 January and is primarily aimed at those who plan to sit the trademark agent exam set by the Irish Patents Office. However, the certificate will also be of more general interest to solicitors, barristers and those working in the area of intellectual property.

The European Union law diploma starts on Saturday 14 January and has been totally reworked, with areas as diverse as employment, family, environment, planning, criminal, immigration and asylum, competition, consumer protection, intellectual property, social security and taxation. The diploma will assist practitioners to identify, understand and interpret EU law issues arising in the course of their practice, whether in the public or the private sector.

The new Certificate in Public Procurement Law and Practice starts on Monday 6 February. The course will provide a sound understanding of applicable procurement law, while giving detailed advice and insight into best practice so as to minimise risk.

Fees range from €1,160 to €2,150. All courses will take place in the Education Centre in Blackhall Place. However, to facilitate those students unable to attend Dublin on a weekly basis, lectures will also be webcast.

For further information on all courses, visit www.lawsociety.ie/diplomas; email: diplomateam@lawsociety.ie, tel: 01 672 4802.

Lack of clarity over ARF tax liability

It has come to light that there is a lack of clarity as to how an approved retirement fund (ARF) can be split between spouses on separation without incurring a tax liability, *writes Justin Spain (Hayes Solicitors, Dublin).*

Up till now, the general practice has been to use a property adjustment order to split an ARF. The reason for this is that ARFs are generally regarded to be an asset rather than a pension – and that the appropriate order to split an ARF, therefore, is a 'property adjustment order'.

However, the *Revenue Pensions Manual*, at paragraph 22.6, states as follows: "A transfer from an ARF into another ARF in the name of a spouse in exercise of rights under a pension adjustment order will not be regarded as a distribution from the transferring ARF."

The *Revenue Pensions Manual*, therefore, states that a distribution out of an ARF by means of a pension adjustment order will not be regarded as a distribution from the transferring ARF. However, it does not confirm that splitting an ARF by means of a property adjustment order will not give rise to such a liability. If the payment from, or splitting of, an ARF is treated as a distribution by the Revenue, then there could be tax consequences for the original ARF-owning spouse, as the withdrawal of funds from the ARF may be regarded as taxable income.

Revenue is presently considering whether paragraph 22.6 should be extended to explicitly include splitting an ARF by means of a property adjustment order. However, Revenue has indicated that it will not be able to deal with the matter until after the budget.

In the meantime, it is important for solicitors to note that there is no general exemption from the Revenue to allow the splitting of an ARF by means of a property adjustment order. If solicitors are faced with such a situation, they should contact the Revenue on a case-by-case basis until a direction emanates from the Revenue.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Committee responds to employment and equality consultation processes

EMPLOYMENT AND EQUALITY LAW COMMITTEE

In July 2011, the Minister for Jobs, Enterprise and Innovation, Richard Bruton, announced plans to undertake a programme of major reform of the State's employment rights and industrial relations procedures and institutions. In August, the minister launched a consultation process, inviting views on how the reform objectives could be achieved in a manner that best served the users of the State's employment rights and industrial rights services.

In response, the Employment and Equality Law Committee drafted and submitted a substantial review of the current system from both practitioners' and users' perspectives, identifying key principles that ought to be incorporated into any new system. A full copy of the committee submission was published on the department's website and is available at www.djei.ie.

Separately, the Minister for Justice, Equality and Defence, Alan Shatter, has established a working group on the new Human Rights and Equality Commission. In order to inform the consideration of the functions, features and priorities of the new commission, a public consultation process has been undertaken. Again, representing the views of practitioners from the employment and equality law perspectives, committee members are currently drafting a response to the consultation request from the minister.

Family Law Committee's annual conference

FAMILY LAW COMMITTEE

The annual conference of the Family Law Committee is taking place on 9 December 2011 in Clontarf Castle, at which the Family Law Committee will launch its new Precedent Cohabitation Agreement.

The conference will provide members with an opportunity to examine recent developments in core areas of practice relating to family and childcare law. The afternoon session, in workshop format, will allow practitioners to examine the Society's new precedent cohabitation agreement and apply its contents to case-study exercises.

For further information on the conference, and to book your place, log onto www.lawsociety.ie, or contact the Law Society Professional Development team at lspt@lawsociety.ie.

Society's panel for disputes

ARBITRATION AND MEDIATION COMMITTEE

The Law Society's Arbitration and Mediation Committee would like to remind its colleagues that the Society maintains a panel of experienced arbitrators and mediators who are trained to deal with a variety of disputes. The panel consists of skilled solicitors who are available should members require an arbitrator and/or mediator to resolve disputes.

Members wanting to apply to the Law Society arbitration and/or the mediation panel can download the application form and guidelines for membership of the panels from Society's website, www.lawsociety.ie. The committee conducts a rigorous interview process to ensure the quality of its panellists and ensures that all on the panels are kept up to date on developments in legislation in the area.

Should you wish to apply to either of the Society's panels, or nominate a solicitor arbitrator or mediator, please contact the secretary to the committee, Colleen Farrell, by email: c.farrell@lawsociety.ie.

Good news on professional indemnity insurance premiums

There's widespread evidence of significant reductions in professional indemnity insurance premiums being experienced by many firms in this year's renewal period. Director general Ken Murphy was extensively quoted in the *Sunday Business Post* (20 November) as follows:

"At a time of deep economic distress for most firms of solicitors, a rare example of good news is emerging – a shaft of light in the darkness.

"Although it is still too early to draw any firm conclusions about this renewal, for the year beginning 1 December 2011, all of the anecdotal evidence suggests that a degree of competition has returned to the insurance market, resulting in significant reductions over last year's premium rates being experienced by many firms.

"Despite all the trauma in relation to insurance this year, culminating in the vote by a margin of almost two to one of its members authorising the Law Society to commit up to €16 million to bail out the insolvent Solicitors' Mutual Defence Fund, and the absence of any new insurers in the market for this renewal, it seems that a much softer market for insurance renewal is being experienced this year. Reductions of 10% or 20% over last year's rates have been reported, with some experiencing reductions of up to 50%. Among the theories why this is happening are that many of the claims resulting from the collapse of the property bubble have washed through, a much reduced number of new claims have been reported this year, and there has been an enormous increase in the implementation by solicitors' firms of risk management and claims-avoidance systems. Less happily, the level of economic activity in most firms is greatly reduced from what it was up to three years ago and this may also have reduced the premium levels.

"The introduction of a single proposal form – a Law Society initiative with which the insurers eventually complied – has streamlined the renewal process and been widely welcomed by solicitors' firms," he concluded.

IRELAND PROMOTING THE RULE OF LAW IN MALAWI

Three Irish lawyers went to Malawi in August to work on a criminal justice project for the coming year. One of those lawyers, Sonya Donnelly, reports

Sonya Donnelly is a practising barrister

Irish Rule of Law International (IRLI), partially funded by Irish Aid, sent three Irish lawyers – Sonya Donnelly BL, Ruth Dowling BL and Carolann Minnock – to Malawi in August to work on a criminal justice project for the coming year. IRLI is a project-orientated, non-profit charity established by the Law Society and Bar Council and is dedicated to promoting the rule of law in developing countries. In Malawi, IRLI is using the experience and knowledge of Irish lawyers to assist in the alleviation of inhumane conditions in prisons by reducing the numbers held in pre-trial detention. The project intends to tackle overcrowding in the prisons through capacity building, training of police officers and magistrates, running bail clinics, becoming involved in the prosecution-led diversion projects, and representing defendants for minor cases in the magistrate's court.

> ***"The practices of excessive detention and the holding of prisoners on remand have a broad socio-economic impact, in that men and women are held in prison, often for many years, without being brought before a court"***

Pre-trial detention

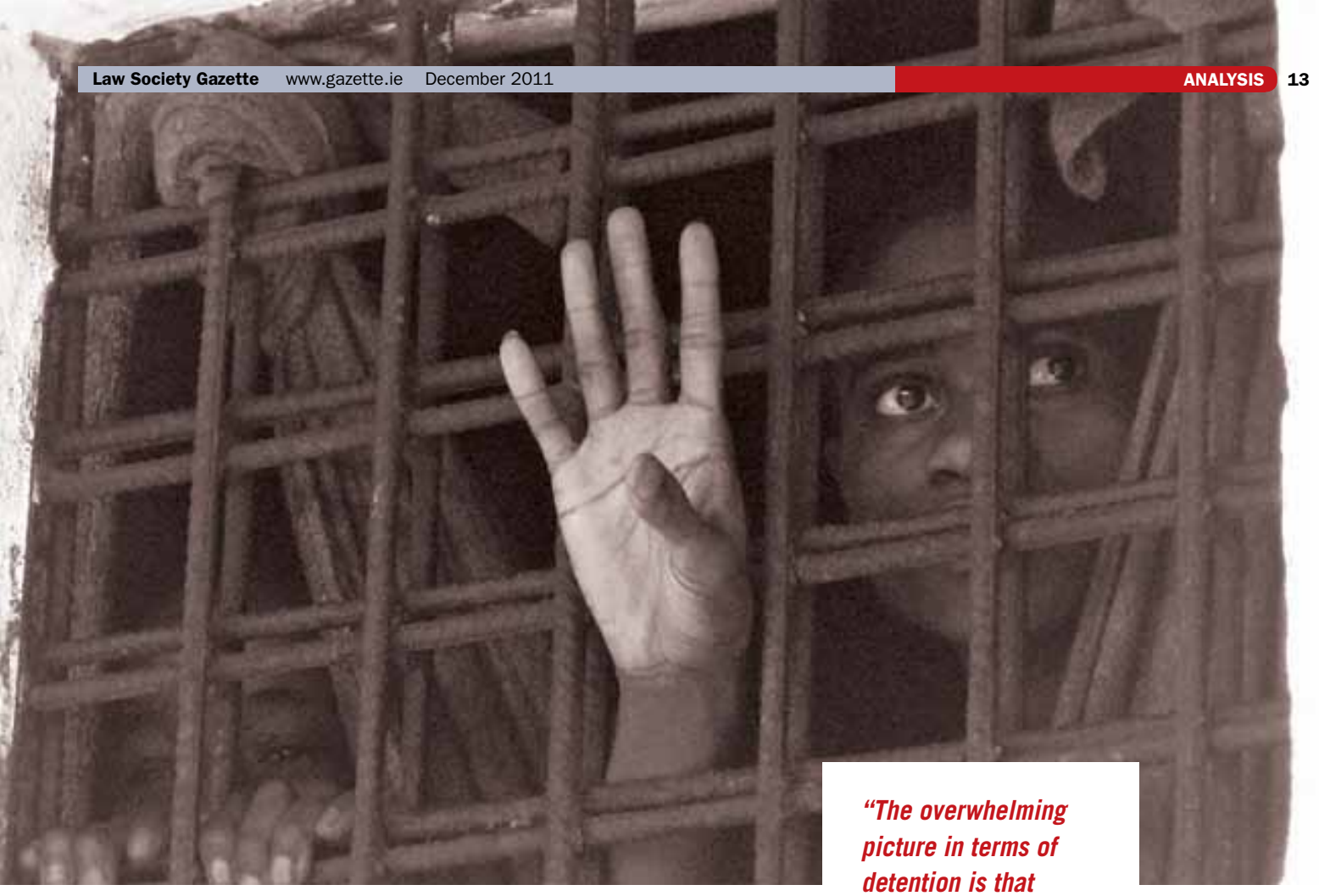
Like elsewhere in Africa, the excessive and extended use of pre-trial detention in Malawi is symptomatic of failings in the criminal justice system. The practices of excessive detention and the holding of prisoners on remand have a broad socio-economic impact, in that men and women are held in prison, often for many years, without being brought before a court. The project has met homicide detainees who have been in prison without attending court once in over seven years. There have been some progressive changes. The Malawian constitution and recent case law provides a solid legal framework for regulating pre-trial detention, in particular, the fair trial rights of accused people, and the recent enactment of pre-trial-detention time limits further strengthen these provisions. However, officials, especially lower-level magistrates (lay judiciary), must receive the necessary training to enable them to exercise firm judicial control over the criminal justice process and enforce custody time limits, which are currently routinely infringed with no consequence.

A recent report, released in August by the Open Society Initiative for Southern Africa (OSISA) found that, of the six adult prisons studied, 8,000 people each year are admitted to pre-trial detention and 6,000 children are admitted to Kachere children's detention centre. This suggests that one in every 250 Malawian men enter these prisons each year. Added to that, given that there are 23 prisons in Malawi and that many are the larger prisons, this report could suggest the actual population entering remand each year may be as high as one in 100 men. On a recent visit to Maula prison, we discovered that there were 1,986 prisoners in the prison, which has space for only 700. Almost 600 of those were remandees, 122 of whom were being held on expired warrants. Of the approximately 15 bail statements on murder charges we took in one morning in September, over 70% had been in custody longer than one year without trial and without access to a lawyer.

Significant challenges

The introduction of a new constitution with a comprehensive bill of rights in 1995, after decades of autocratic rule, brought hope to the country and marked the dawn of a new era for the criminal justice system. Despite this, almost 20 years later, there are significant challenges facing Malawi's quest to accord fair-trial rights to accused persons. The reasons for this are manifold. The criminal justice system has been slow to adapt to the demands and standards set in the 1995 constitution. Institutions such as the Directorate of Public Prosecutions, the Malawi Police Service and even the judiciary have proved inadequate in terms of institutional framework, structure, attitude and capacity. Finally, as in many struggling economies where poverty and deadly diseases are endemic, the strengthening of the justice system is not high on the government's priority list.

The overwhelming picture in terms of detention is that conditions in police cells are poor, violate the rights of detainees in material ways, and frequently exceed the 48-hour rule. The project has come across detainees who have been kept in police custody for a number of months. The ageing state of many Malawian police stations



> *"The overwhelming picture in terms of detention is that conditions in police cells are poor, violate the rights of detainees in material ways, and frequently exceed the 48-hour rule"*

and the insufficient capacity and nature of cell accommodation are the cause of many of the major concerns, and sufficient funds will remain a challenge for the foreseeable future. While conditions in the prisons are also seriously overcrowded, there had been a brief hope for that conditions would improve after the Masangano case ([2009] MWHC 31, 9 November 2009), where the High Court found the applicant had been subjected to torture and cruel, inhuman and degrading treatment, an infringement of his non-derogable rights under section 44 of the Malawian constitution. The court noted that overcrowding had contributed to the death of 259 inmates in a space of about 18 months and, in its final paragraphs, gave the state 18 months to improve conditions. Unfortunately, at the time of writing, the judgment has not been complied with, the deadline being May 2011. As the 'hot season' has just started, it is likely that the number of deaths due to overcrowding will continue to rise.

The project recently started to visit Kachere children's prison for young male offenders. Today, Kachere holds approximately 130 prisoners. The prison is incredibly small and visibly overcrowded. The OSISA report stated that Kachere is currently at 200% capacity. Of the 130 juvenile prisoners at Kachere prison, many are pre-trial detainees. The project has just started to work with organisations already involved in the system to apply for bail or progress the cases of these young men. The *Child Care Protection and Justice Act 2010* was enacted in July 2010 – however, it is not currently operative. That said, the act does indicate a willingness to take a new approach to dealing with young offenders, as the fifth schedule of the act sets out diversion options available to magistrates whereby a young offender may be diverted away from prison.

One other project we are looking to become involved with is representing prisoners at the civil-society-led 'camp courts'. Sometimes the prisons in Malawi lack the transport or the petrol, given the severe shortage the country is currently experiencing, to bring the prisoners to courts – or the courts lack the space to hold the prisoners at court in cells. Accordingly, paralegals invite the magistrates to establish 'camp courts' inside the prison. The paralegals draw up lists of those on remand that have overstayed, are held unlawfully, or have been granted bail but cannot afford the terms set by the court. They discuss the lists in advance with the prosecuting authorities. Magistrates attend court with the court clerk and police prosecutor and work through the list: they grant bail to some, reduce the amount set by an earlier court by way of bond or surety for bail, and dismiss cases where the accused has overstayed, or set a date when the accused must appear for trial. The chief benefit of this mechanism is that prisoners see the law in action. Magistrates see inside the prisons and are able to do something practical to alleviate the situation. As a consequence, tensions in prison are reduced, and the lower judiciary becomes more thoughtful about the utility of alternatives to prison in appropriate cases.

If you would like more information about this project, including a direct link to our fundraising page, you can access our website at www.irishruleoflawmalawi.com, as well as the IRLI website at www.irishruleoflaw.ie.

BRINGING DALE FARM HOME

Now is the time for the Irish Government to consider the question of the preservation of Traveller culture proactively rather than reactively, writes Siobhán Cummiskey

Siobhán Cummiskey is managing solicitor with the Irish Traveller Movement Independent Law Centre

One of the largest-scale evictions of Travellers in Britain took place in Basildon in October 2011, when 83 families were evicted from 49 of the 54 pitches at Dale Farm. The evicted Travellers owned the land at Dale Farm; however, many of them failed in their applications for retention permission to live in caravan-style accommodation on their land. The eviction followed a number of legal challenges, ending with the refusal by the Court of Appeal, on 14 October 2011, to grant leave to the families to appeal a High Court ruling in favour of the clearance.

The issue of the provision of culturally appropriate accommodation and the application of planning laws to the 'gypsy way of life' is increasingly relevant to Ireland. With a decline in the availability of halting site accommodation to Travellers and inflexible planning laws blind to the cultural norms of Travellers, we may be headed for a perfect storm, much like that recently witnessed at Dale Farm.

> ***"The issue of the provision of culturally appropriate accommodation and the application of planning laws to the 'gypsy way of life' is increasingly relevant to Ireland"***

In the wake of the Dale Farm evictions, those on one side attempted to promulgate the argument that 'no one is above the law'. However, in doing so, they failed to note that such planning laws were drafted without any regard to the cultural norms of Travellers. It should also be noted that the strict application of planning laws to Travellers may, in fact, fall foul of another law, namely section 3 of the *ECHR Act 2003* read in light of article 8 of the ECHR.

In practical terms, a Traveller in Ireland who purchases a site with the intention of living there in caravan-style accommodation as the primary form of accommodation (that is, not ancillary to a dwelling) will encounter a number of obstacles. In the first instance, if the land is in a rural area (as opposed to a protected area), it will come within the category of 'one-off rural housing in the countryside'. In order to qualify for this, a number of planning authorities require the applicant to demonstrate a particular connection to the area. In the case of Travellers who come from nomadic families, this can be extremely difficult to demonstrate. Nomadic Travellers would often spend short periods in one place, coming and going from an area on several occasions and staying for just a few months at a time. Such short stays may not be considered sufficient to prove a connection to the area. Furthermore, documentary evidence to support a nomadic Traveller's connection to an area can also be very difficult to find, particularly if they were not enrolled in school and had no permanent address for correspondence. As a consequence, historically nomadic Travellers will find it very difficult to qualify as 'connected' to any area at all for the purposes of planning permission of this type.

One of the reasons put forward by planning authorities for the refusal of planning permission for a mobile home as a primary form of accommodation is that such an object is 'unfit for permanent human occupation'. The basis for this reasoning is unclear, particularly given that local authorities were reported themselves to be landlords to almost 1,000 paying Traveller tenants availing of local authority-run halting sites in 2010. Moreover, the *Housing (Traveller Accommodation) Act 1998* itself refers to the provision of sites for Travellers in section 10 and, in section 25, provides for a caravan loan scheme operated by housing authorities, providing caravans to Travellers as a primary form of accommodation.

If properly prepared, planning laws that support Travellers living in caravan-style accommodation on their own land would not only protect and facilitate the traditional way of life of Travellers, but would operate to alleviate homelessness in the Traveller population and avoid unauthorised encampments. It appears counter-intuitive, at a time when the current Government is drafting initiatives to make citizens less dependent on the State and social welfare, that it would have laws and policies in place that effectively prevent Travellers making provision for themselves, and that allow Travellers to avail of culturally appropriate accommodation only by relying on the State.

The 'gypsy way of life'

While the precise issues raised by Dale Farm have not yet been considered by an Irish court, the European Court of Human Rights has had the opportunity to consider such cases under article 8 of the ECHR (right to private and family life). In the first Traveller case before the court in 1997, *Buckley v UK*, the court ruled that a wide margin of appreciation is afforded to states in matters of planning. The court found that, while special consideration had been given to her individual needs, the balance tipped in favour of the planning needs of the community.

Follow-up cases in the European Court of Human Rights, leading with *Chapman v UK* from 2001, also found in favour of the state. The court, however, opined: "Measures which affect the applicant's stationing of her caravans … affect her ability to maintain her identity as a gypsy and to lead her private and family

PIC: GETTY IMAGES

life in accordance with that tradition" (paragraph 73). The court went on to state that "the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory planning framework and in reaching decisions in particular cases … there is thus a positive obligation imposed on the contracting states by virtue of article 8 to facilitate the gypsy way of life" (paragraph 96). While the court found the legitimate aim pursued by the state in this case – the preservation of the environment in a green belt or special landscape area – outweighed the applicants' rights on the facts, this was a strong statement from the court on the obligation of states to respect and uphold Traveller culture under article 8.

The consequence of these decisions for the Irish planning authorities is governed by section 3 of the *ECHR Act 2003*, which states that organs of the State are obliged to perform their duties in a manner compatible with the *European Convention on Human Rights*. Therefore, a planning authority in Ireland considering an application for planning permission from a member of the Traveller community to live in a caravan on their own land is obliged to give special consideration to the needs and lifestyles of Travellers, and it is incumbent on the State to facilitate this, in accordance with article 8.

The issue of the availability of other culturally appropriate accommodation was at the heart of the stand-off between the Traveller community at Dale Farm and the local council. Some residents indicated their willingness to vacate should the government make alternative, culturally appropriate accommodation available to them (that is, caravan-style accommodation where they could live together with their extended families). The United Nations CERD Committee statement on Dale Farm, issued on 1 September 2011, called on Britain to "suspend the planned eviction … until culturally appropriate accommodation is identified and provided". In *Chapman v UK*, the European Court of Human Rights indicated that such availability was crucial in deciding whether or not there had been a violation of article 8: "If no alternative accommodation is available, the interference is more serious than where such accommodation is available. The more suitable the alternative accommodation is, the less serious is the interference constituted by moving the applicant from his or her existing accommodation" (paragraph 103).

This should be of particular interest to local authorities that have a dual function as both a planning authority and housing authority. It is clear that suitable culturally appropriate accommodation is scarce. Only 98 of the 3,100 units of Traveller accommodation recommended by the government-appointed Task Force on the Travelling Community in 1995 had been built by the year 2004, and the number of halting sites provided by local authorities have decreased year-on-year since 2003 (according to a report by the Irish Traveller Movement from 2011). While there is no general statutory obligation to build halting sites under the *Housing (Traveller Accommodation) Act 1998*, nor under article 8, according to the recent case of *Codona v UK* (2006), the inability of a local authority to accommodate – in a culturally appropriate fashion – any Travellers evicted from their own land may leave the eviction open to challenge under the *ECHR Act 2003*. A situation may arise as follows: a local authority as a planning authority rejects a Traveller's application for planning permission and then evicts the Traveller landowner under section 46 of the *Planning and Development Act 2000*, thereby rendering the Traveller homeless. A local authority may then, in its capacity as a housing authority, fail in its duty to provide alternative culturally appropriate accommodation to the homeless Traveller due to the scarcity of halting sites provided in the local authority area. At this point, article 8 rights would certainly be engaged and, on the facts, the local authority may be in violation of article 8.

> ***"Such planning laws were drafted without any regard to the cultural norms of Travellers"***

Positive obligation

The evictions at Dale Farm high-light the importance of approaching the issues facing Travellers in a progressive and proactive manner. Perhaps it is not so much about whether a group is 'above the law', as being alive to the fact that the generality of some of our laws fail to support the preservation of Traveller culture, which the State has a positive obligation to facilitate under article 8. With a State report from 1995 advising that the improvement of Traveller lives in the areas of health and education depends on the provision of culturally appropriate accommodation, and with the neighbouring state dealing with a full-scale human rights crisis in the form of Dale Farm, is now the time for the Irish government to consider the question of the preservation of Traveller culture proactively rather than reactively?

Hell's bells!

From: Anthony Brady, solicitor, Griffith Court, Fairview, Dublin 3

In acting in administrations over the years, I have had many letters threatening my deceased clients with adverse credit ratings – but now, an encouraging letter from an alarm company (I will leave them unnamed), expressing the hope that my deceased client is enjoying the benefits and peace of mind that a certain alarm system is designed to bring. What a comfort for the world to come! I had assumed that, in Heaven, an alarm would be superfluous, and I thought, in Hell, what use would one be?

Sending of title documents through the DX mail service

From: Michael O'Grady, MW Keller & Son, 8 Gladstone Street, Waterford

I am writing to you with a view to making members of the profession aware of the risks involved with sending title documents both to other solicitors and to lending institutions.

We recently sent two sets of title documents to a lending institution through the DX tracked-mail service. On the day in question, the DX van was stolen and most of the documents in the van have not been recovered, including the two sets of title deeds sent by our firm. We were of the view that the DX would compensate us for the cost of reconstituting the title documents to both properties. One set of title documents related to a Land Registry title and the only documents that will need to be reconstituted are planning documents and certificates of compliance. The other set of title documents were Registry of Deeds title, and there would be considerably more work involved and will probably involve a title defects indemnity bond and a first registration application to the Property Registration Authority.

The DX has written to us to say that it does not provide compensation for documents lost or destroyed when in their custody. They have pointed us to the rules of membership of the DX Document Exchange and clause 9, which says that the DX shall not be liable for any loss suffered by a member as a result of documentation being lost or destroyed. Clause 9 specifically states that it is a member's responsibility to insure items against all risks to their full insurable value.

Our own insurance company has confirmed that title documents, if lost or destroyed while within our office, are covered, but the cover does not extend to title documents once they leave our office. We have asked our insurance broker to seek such cover but, to date, he has been unable to procure it.

We think it should be brought to the attention of members of the profession that title documents or other original documents sent in the DX are not covered by the DX for any loss or damage, and the conditions of the DX state that solicitors must arrange their own insurance for any items lost. There may be an assumption that documents sent under the tracked-mail service of the DX, which are subject to an additional charge, have the benefit of some sort of insurance or warranty from the DX, but this is not the case.

DX responds

In response to a query from the Gazette *on this matter, the DX replied as follows: "The DX service is a cost-effective and reliable way for law firms and other organisations to exchange documents, with delivery next day before 9am. The terms and conditions of the service – which are explicitly spelt out – say that it is the members' responsibility to insure items against all risks and to their full value. This is reflected in the fact that DX members are not required to declare the value or contents of an item. DX's customer service team is very pleased to speak with individual members who would like more information.*

"DX's position is not unusual and is similar to other postal operators who do not provide compensation for the loss or reconstruction of documents."

THE PRICE OF CAPITULATION

There has been a significant negative response to the *Legal Services Regulation Bill 2011* – in Ireland and abroad. Canadian lawyer and past-president of the Law Society of British Columbia, Gordon Turriff QC, reacts to the Minister for Justice's defence of the bill, claiming that it rings hollow

Gordon Turriff QC is a Canadian lawyer and past-president of the Law Society of British Columbia, which is a regulatory rather than representative organisation. He is a founding member and chair of the International Society for the Promotion of the Public Interest of Lawyer Independence

On Monday 21November, I read Minister Shatter's *Irish Times* defence of his Government's proposed *Legal Services Regulation Bill 2011*. Forgive me, as an outsider, for saying I wasn't impressed. I suppose it's good to learn the minister thinks he has something he has to defend, especially when that defence rings hollow.

I'm an unapologetic champion of lawyer independence. I have been since I realised, after the publication of the *Clementi Report* in England and Wales in 2004, that nobody was making the counter-Clementi argument. Like everyone else, I had overlooked the significance of government involvement in lawyer regulation when regulatory changes were made in New South Wales in the 1990s. But Clementi got my attention: I realised that his report was not innocuous. Unfortunately, his business analysis of lawyer regulation appealed to ambitious politicians, and their legislative action resulted in fundamentally insupportable and anti-democratic reforms. The reforms are anti-democratic because they emasculate lawyer independence as an essential element of the rule of law, by placing lawyer regulation under effective government control.

> ***"When viewed through the lawyer-independence prism, the Irish proposals are among the most objectionable that have been propounded anywhere"***

I do not hide the fact that I am a lawyer-independence purist. My ideas about independence and governance of lawyers by lawyers are reflected in my speech to Australian regulators in Perth in September 2009, titled 'Self-Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia'; in an address I made to a symposium on lawyer regulation in London in June 2010, which I called 'The Consumption of Lawyer Independence'; and in a presentation I made to a follow-up conference in the College of Law at Michigan State University in September this year, where I spoke on 'The Importance of Being Earnestly Independent'.

The open society and its enemies

Too few people worldwide recognise that lawyer independence is under attack. Too few people realise that lawyer independence will be lost – probably irretrievably – unless urgent action, worldwide, is taken to preserve it. Ireland is the most recent instance of a government announcing its intention of wresting lawyer regulation from lawyers. When viewed through the lawyer-independence prism, the Irish proposals are among the most objectionable that have been propounded anywhere.

What better authority is there than the late Lord Chief Justice Bingham for the proposition that lawyer independence is an ingredient of the rule of law? If lawyer independence is incontestably part of the rule of law – what I have described elsewhere as the great organising and civilising principle, the keystone for order and the key to prosperity in all our communities – then how can people other than lawyers regulate what lawyers do?

Lawyer self-regulation is decidedly not a case of the fox guarding the henhouse. It is decidedly not a case of lawyers maintaining a monopoly of work for their own benefit. It is a matter of lawyers determining for themselves how to discharge the duty of loyalty they owe their clients – not of them having to submit to standards chosen for them by government, or even by someone appointed by, and answerable to, government. How can clients be sure their lawyers will make the best available cases for them, especially in litigation to which government is a party, if someone other than the lawyers have, or particularly government has, the capacity, by formulating rules of conduct, to determine what should be done or how to go about doing it – whether it's the defence of a criminal charge or the enforcement or a broken contract?

And it is not a matter of a monopoly, but of reserving work to lawyers in the public interest when the work can't appropriately be done by other people in the community who don't have the knowledge, technical skill and experience that the working out of difficult legal problems requires.

Law, legislation and liberty

People who make the public interest case for regulation of lawyers by lawyers don't suggest that the regulating lawyers don't need help. There is no reason why there shouldn't be lay participation in lawyer regulation, as long as the lay participants can't control the decision-making. There is no reason why a responsible overseer couldn't monitor lawyers' regulatory work, using publicity and embarrassment, if necessary, to suggest to the regulators how they might better go about their job in the public interest – but the

overseer cannot have the authority to determine how the regulators should discharge their public-interest function. Otherwise, lawyer independence would be illusory.

No one ever suggests that judges shouldn't be independent. But how could judges usefully do their work – rationally resolving disputes, stating the law for the public benefit, and protecting human rights – if there were no truly independent lawyers bringing them cases to decide?

It is no answer to the need for lawyer independence to say that government appoints judges and that the judges are independent despite the government participation. That analogy doesn't hold any water. Government doesn't educate the judges, doesn't tell them how to go about their judicial business, and doesn't discipline them. It would be intolerable if government even made the suggestion that it should.

It is wrong to assume that lawyers can't regulate themselves appropriately in the public interest. In Canada, they have been doing so without government involvement for well over 100 years. The Canadian model is an ideal to which sincere reformers, worldwide, should aspire. It entails a careful separation of lawyer interests and the public interest. That separation is achievable and maintainable.

The road to serfdom

There is no case against lawyer independence unless you want to open the door to tyranny. Don't fool yourself that it can't happen in your country. Every history book is proof that it can. And there is no case against self-regulation unless you are willing to accept something less than true independence. Surely we are not so naïve as to believe that even the best governments will not sometimes cut rule-of-law corners. Government is just a collection of people, well-intentioned we hope, who have goals they want to achieve and limited time in which to achieve them. Benign leaders may persuade themselves that their goals deserve to be implemented, even if rules have to be breached in the implementation.

How can we be sure that government will be kept in check unless we know that, when necessary, there will emerge from our communities lawyers who are lawyers on merit – not as a result of government selection – ready to prosecute or defend cases they believe need attention, and not the cases chosen for them by government edict? Or that there will emerge lawyers who, in the exercise of their best judgement, will make the arguments they think ought to be made to serve their clients' interests – not arguments fed to them by government functionaries or by appointees who owe their powers to government decree?

The case for lawyer independence and self-regulation is sometimes said by critics to be rhetoric. But it isn't. It's a recognition of fundamental values. We should not be fooled by consumerists or competition authorities into thinking that consumerism and market efficiency should overtake fundamental values. Even if it were proved – and it hasn't been – that lawyers can't regulate other lawyers satisfactorily; or even it were proved – and it hasn't been – that, because of self-regulation, they don't honestly and appropriately serve their clients and therefore the public interest, where is the empirical evidence, as contrasted with catchy sound-bites, that regulation by government or its minions would be any better?

There is no reason to suggest that independence and self-regulation cannot coexist with appropriate attention to consumer interests and access to justice. Governments attach themselves to consumerists because it's easy to get consumerism on the front page. What we need to do is convince people in the community that the public cost of exaggerated consumerism is that, very soon, there will be nothing of value to buy. G

"We should not be fooled by consumerists or competition authorities into thinking that consumerism and market efficiency should overtake fundamental values"

NEW SEPTIC TANK CHARGES –

In the wake of the publication of the *Water Services Amendment Bill 2011*, Heather Murphy examines the likely implications of the new bill for septic tank owners, local authorities and conveyancing practitioners

Heather Murphy is a senior trainee with Philip Lee Solicitors. Her master's thesis was entitled The Impact of Waste Law on the use of Biomass as a Source of Renewable Energy. *She would like to thank Philip Lee and Alice Whittaker for their input on this article*

Ireland has a high percentage of households not connected to public waste-water treatment schemes. Some 440,000 Irish households, mainly in rural areas, have septic tanks. This compares with only 300,000 in all of England and Wales.

In 2009, the European Court of Justice (ECJ) ruled that Ireland was in breach of the *Waste Directive* (75/442/EEC) as, with the exception of Co Cavan, existing legislation and policy did not ensure that waste water from septic tanks and other individual waste-water treatment systems are disposed of without harming the environment or human health.

In July 2011, the European Commission submitted a further application to the ECJ, seeking to fine Ireland for its continued failure to comply with the court's ruling. On 3 November 2011, the *Water Services Amendment Bill 2011* was published. The Minister for the Environment stated that he intends to have the legislation enacted as a matter of priority in order to avoid fines from the ECJ. The bill essentially provides for a system of registration and inspection of domestic waste-water treatment systems (the most common being septic tanks) and includes a number of charges to fund the new scheme. It also has a number of important implications for homeowners with such systems, and legal practitioners in general.

> ***"It is hard to estimate the potential exposure of householders to remediation costs, but they are likely to be significant"***

'Stealth taxes'

In the wake of increasing taxation and household charges, the introduction of septic-tank registration fees attracted considerable media attention in recent months. Deputy Eamon Ó Cuív has suggested that the draft legislation contains a raft of 'stealth taxes' on rural dwellers, and that he would rather go to jail than pay the charge.

The bill provides that owners of a premises connected to a domestic waste-water treatment system will be required to register their system with the water services authority (that is, the relevant local authority) within whose functional area the system is located. A registration fee of no more than €50 shall be payable, and owners will be required to re-register every five years. The register will be available for public inspection, and failure to register will be an offence. Scotland and Wales have similar requirements to register septic tanks, and plans to introduce a system of registration in England are currently under review.

Importantly for solicitors, the bill also provides that, where a premises connected to a domestic waste-water treatment system is sold, the vendor must produce a valid certificate of registration on closing. The purchaser must then notify the relevant water-service authority of the change in ownership. The standard form *Law Society Objections and Requisitions on Title*, which are currently being revised, may need to be amended to take account of this new requirement. Furthermore, as the principle of *caveat emptor* applies in respect of the purchase of second-hand properties, solicitors should advise clients to arrange for the inspection of the waste-water treatment system as part of a property survey, and should check the register of domestic waste-water treatment systems in addition to the usual pre-contract planning searches on the property.

Under water pollution legislation, responsibility for protecting water against pollution lies, in the first instance, with any person who carries out an activity that poses a threat to water quality. It is a criminal offence to cause any 'polluting matter' to enter water. In most cases, septic tanks do not pose a threat, but if they are poorly designed, installed or managed, or inappropriately sited, discharges can damage the environment and pose a threat to human health. Section 70(2) of the *Water Services Act 2007* requires homeowners to ensure that waste-water treatment systems are properly maintained so that they do not cause, or risk causing, a threat to human health and the environment or create a nuisance through odour. The Environmental Protection Agency's *Code of Practice on Wastewater Treatment and Disposal Systems Serving Single Houses 2009* recommends that records of maintenance should be kept so that the homeowner can demonstrate they have complied with this requirement.

The bill provides that the EPA will be responsible for developing a national domestic waste-water treatment inspection plan and the appointment of inspectors (see **panel**). Inspections will be prioritised on a risk-based approach, as directed by the EPA or water services authorities, with more frequent rates of inspection in those areas identified in the national inspection plan as having a higher potential risk to the environment and public health.

Remediation

One of the most important aspects of the bill is that homeowners will be required to remediate their system, pursuant to an advisory notice, where it is found that a system constitutes, or is likely to constitute, a risk to human health or the environment. The homeowner may appeal the advisory

WHAT'S THE STINK ABOUT?

"Importantly for solicitors, the bill also provides that, where a premises connected to a domestic waste-water treatment system is sold, the vendor must produce a valid certificate of registration on closing"

notice to the water services authority, including a re-inspection fee not exceeding €200. The re-inspection fee is fully refundable if the advisory notice is cancelled as a result of the re-inspection (there is only provision for one re-inspection and one re-inspection fee).

If the advisory notice is confirmed, the homeowner may appeal to the District Court on the grounds that the notice was served on the incorrect person, or due to substantive or procedural illegality.

It is hard to estimate the potential exposure of householders to remediation costs, but they are likely to be significant. There have been calls for the introduction of a grant or hardship scheme to assist those who cannot afford to make the necessary repairs. The bill does not deal with this issue. In cases where a system has been poorly designed or installed, homeowners may seek to recover the costs of remediation from the builder/system installer or from the person who carried out the survey.

One of the main arguments of those opposed to the registration system is that the registration fee will impact unfairly on rural households. The ECJ did not direct Ireland to charge for registration, and inspection charges are a matter for the government to determine, based on the need to fund inspections. Registration is free in Wales, whereas, in Scotland, registration costs either Stg £77 (online applications) or Stg £104 (written applications).

There is, however, a strong legal basis for charging households with septic tanks – the 'polluter pays' principle, one of the core principles of environmental law. While the registration charge will impact on only those households with individual waste-water treatment systems, it appears likely that urban dwellers connected to the public waste-water system will ultimately be required to pay for their share, once domestic water charges are introduced.

Domestic water charges, when introduced, will need to provide for full cost recovery, in compliance with article 9 of the *Water Framework Directive*, and will be based on a 'water-in/water-out' principle. This would mean that the charge to be paid by each household would reflect not only the cost of providing drinking water, but also the cost of treating the waste water generated by the household.

If households with septic tanks were charged the same rate for water services as those households connected to public waste-water treatment systems, this could infringe article 9 and could be considered inequitable. The European Commission considers that the incorrect application of cost recovery for water services hinders the full and correct application of the directive, which is the core piece of EU water legislation. The European Commission is keeping a close eye on implementation of the cost-recovery principle and, in recent months, has sent reasoned opinions to ten member states on the matter, including Ireland. G

INSPECTORS

- Inspectors appointed by the EPA,
- Applicants applying to the EPA must hold the prescribed professional or technical qualification, have completed a prescribed training course, hold professional indemnity insurance, and comply with any other prescribed requirements,
- It will be an offence to act as an inspector without having been so appointed, or after an appointment has been revoked or lapsed,
- Inspectors will have a wide range of powers including:
  - To enter and inspect premises,
  - To inspect, examine and test treatment systems,
  - To monitor domestic waste water,
  - To take samples and photographs, and
  - To request information and records in respect of the maintenance, servicing and operation of a system.
- The bill expressly provides that an inspector may not enter a private dwelling without the permission of the occupier. However, there is provision under the bill for the District Court to issue a warrant to enter a premises to an authorised person under the principal act (*Water Services Act 2007*), to be accompanied by an inspector.

David Boughton is a practising barrister

LOST *in* TRANSLA

Practitioners instructed by clients who cannot understand English will undoubtedly encounter difficulties when their clients are then called upon to swear affidavits. David Boughton cracks open the dictionary

"In the view of this court, a solicitor or commissioner for oaths administering an oath for the purpose of taking an affidavit owes a duty to the court to be satisfied that the deponent is competent to make the affidavit in English. Such a duty is inherent in the nature of the function being performed and the authority conferred by law on such officers to administer an oath for that purpose" (Cooke J in *Saleem v Minister for Justice*).

Practitioners instructed by clients who either cannot read or speak the English language will undoubtedly encounter difficulty when their clients are then called upon to swear affidavits – an integral part of most litigation. The manner in which sworn affidavit evidence should be adduced from non-English speaking deponents has been the subject of recent judicial comment. The procedure for the swearing and filing of affidavits by litigants who speak little or no English is not provided for either in legislation or in the rules of court. It may be the case that practitioners have proceeded on an *ad hoc* basis when taking instructions from, and drafting affidavits for, non-English speakers.

However, the decision of the High Court in *Saleem v Minister for Justice* has illustrated that affidavits that are not sworn pursuant to certain procedures cannot be relied upon. The implications for practitioners in the area of asylum and immigration law are obvious – however, the problem presented is one that will be seen across the spectrum of litigation.

"It is incumbent upon all practitioners to be familiar with the procedures in relation to illiterate or non-English speaking deponents and to ensure their duty to the court is upheld"

Communication error

In the *Saleem* case, the applicant, a Pakistani national, had applied for long-term residency to the Minister for Justice. No decision had issued some 15 months later, and the applicant sought *mandamus* by way of judicial review. Those proceedings were compromised, with the minister giving a commitment to make a determination on the application. A refusal followed, on the basis that the applicant's work permit had expired shortly after the institution of proceedings. The applicant then sought to quash the refusal, essentially on the ground that his work permit had been valid at the

TION

FAST FACTS

- The procedure for the swearing and filing of affidavits by litigants who speak little or no English is not provided for either in legislation or in the rules of court
- Affidavits that are not sworn pursuant to certain procedures cannot be relied upon
- Where a deponent does not speak English at all, the 'three affidavit' procedure must be adopted, whereby the affidavit is sworn in the language of the deponent, translated, and both the original and certified translation exhibited to the affidavit of the translator

LAW SOCIETY PROFESSIONAL Training

DATE	EVENT	DISCOUNTED FEE*	FULL FEE	CPD HOURS
9 Dec	Law Society Skillnet in partnership with the Family Law Committee present the **Annual Family Law Conference 2011**	€210	€280	3.5 General **plus** 1 Regulatory Matters (by Group Study)
13 Dec	**Practice Management & Regulation Seminar** – Law Society Offices – Washington Street, Cork	€190	€140	3 Management and Professional Development Skills **plus** 1 Regulatory Matters (by Group Study)

2012

DATE	EVENT	DISCOUNTED FEE*	FULL FEE	CPD HOURS
23 Feb	Law Society Professional Training in partnership with the International Bar Association present **Looking to the Future! Practising Law in Ireland**	€180	€135	3 Management and Professional Development Skills (by Group Study)
13 Mar	Law Society Professional Training in partnership with the Law Society Business Law Committee present the **Draft Companies Bill – Are you Prepared and Informed for the Imminent Changes?**	€240	€180	4 General (by Group Study)
Online	Law Society Skillnet in partnership with CIMA present an online **Certificate in Business Accounting**	€670	€895	Full Management & Professional Development Skills requirement for 2011 (by eLearning)
Online	Suite of eLearning courses • How to create an eNewsletter - €90 *(reduced from €150)* • Touch typing - €40 • PowerPoint – all levels – €80 • Microsoft Word – all levels - €80 • Excel for beginners - €80	To register or for further information email: Lspt@lawsociety.ie		Full Management & Professional Development Skills requirement for 2011 (by eLearning)

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*Applicable to Skillnet members/Public sector subscribers

time of application and only expired during a period of allegedly unlawful delay.

At the hearing of the proceedings, the respondent drew attention to an error in the grounding affidavit in the first set of proceedings: the applicant had averred that he was in certain employment at the time of the swearing, whereas he had later admitted to having been made redundant some 12 months earlier. The applicant sought to explain the error by stating that he did not speak English and that there must have been an error in communication between him and a friend who translated his instructions prior to the drafting of the affidavit. In consequence of this, the court considered whether to strike out the applicant's affidavit, on the basis that he could not have understood the contents of it.

Appropriate certification

Cooke J found that, in light of the above, the applicant's affidavits were inadmissible as sources of evidence. He noted that the issue of translation of affidavits had arisen previously in *ANM v Refugee Appeals Tribunal*, but that the "correct procedure for adducing evidence on affidavit from a witness who speaks neither English nor Irish does not appear to have been the subject of direct statutory regulation or provided for in the *Rules of the Superior Courts* and has not been addressed ... in any modern case law".

The starting point in relation to this issue, according to Cooke J, was with order 40, rule 14 of the *Rules of the Superior Courts 1986*, which provides: "Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature or mark in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent."

Having found that the applicant was illiterate as concerned the English language, Cooke J found that rule 14 applied and that the affidavit should have contained the appropriate certification.

The judge then indicated that, even in the absence of certification, the court retained a residual discretion to admit the affidavit if satisfied that it has been "read over and perfectly understood" by the applicant. That not being the case, the affidavit was inadmissible.

The requirement of order 40, rule 14 was further emphasised by Cooke J in the case of *AA v Refugee Appeals Tribunal*, where, again, the applicant's affidavit was ruled inadmissible due to failure to comply with the requirements of the rule.

Correct approach

Cooke J went on to find that, given that the applicant did not speak English at all, a further procedure should be followed for the swearing of affidavits by such persons. The judge stated: "The correct approach is that the affidavit should be sworn originally by the applicant in the language he speaks. This should be translated by an appropriately qualified translator and both the original and the certified translation should be put in evidence as exhibits to an affidavit in English sworn by the translator."

> **"There remains a lack of clarity as to whether the foreign language affidavit may be sworn before a solicitor or commissioner for oaths with the assistance of a translator, or whether the solicitor or commissioner for oaths must speak the language of the deponent"**

This approach is one that was recommended in the commentary on order 41 of the *Rules of the Supreme Court of England and Wales*, and subsequently adopted into the practice directions to the English *Civil Procedure Rules 1998*. Cooke J noted that there may exist "a practice whereby a non-English speaking deponent swears an affidavit in English containing an averment or a certificate in the jurat to the effect that it has been first read over to the deponent in translation and a separate affidavit is filed by the interpreter to that effect". The judge pointed out that such a practice was deprecated by Vaisey J in the 1947 English case of *In re Letters Patent Granted to Sarazin*. It is submitted that this practice would not be greeted favourably in light of the *Saleem* decision, and that the 'three affidavit' procedure outlined by Cooke J should be followed as a matter of best practice.

'Three affidavit' procedure

It is clear, therefore, that where a deponent is able to speak – but not write – English, the requirements of order 40, rule 14 must be complied with by the solicitor or commissioner for oaths taking the evidence. In the absence of the appropriate certification in the jurat, an affidavit will be inadmissible as evidence.

Where a deponent does not speak English at all, the 'three affidavit' procedure must be adopted, whereby the affidavit is sworn in the language of the deponent, translated, and both the original and certified translation exhibited to the affidavit of the translator. This process is an onerous one. No doubt the process will present difficulty to practitioners in terms of the additional time and expense of translation. In most cases, the initial draft will be in English, thereby requiring two bouts of translation. Furthermore, there remains a lack of clarity as to whether the foreign language affidavit may be sworn before a solicitor or commissioner for oaths with the assistance of a translator, or whether the solicitor or commissioner for oaths must speak the language of the deponent. However, there is no doubt that failure to adhere to the procedure will likely result in the inadmissibility of the evidence.

It may be the case that failure to adhere to the procedures outlined above will require that proceedings be adjourned to facilitate the filing of corrective affidavits. This was not the case in *Saleem* or *AA*, as Cooke J rejected the applications on their merits in any event. However, in time, litigants may find themselves fixed with costs orders for such adjournments, as could their legal advisors pursuant to order 99, rule 6. As such, it is incumbent upon all practitioners to be familiar with the procedures in relation to illiterate or non-English speaking deponents and to ensure their duty to the court is upheld. G

LOOK IT UP

Cases:

- *AA v Refugee Appeals Tribunal* [2011] IEHC 240 (unreported, High Court, Cooke J, 8 June 2011)
- *ANM v Refugee Appeals Tribunal* [2009] IEHC 1 (unreported, High Court, Clark J, 16 July 2009)
- *In re Letters Patent Granted to Sarazin* [1947] 64 RPC 51
- *Saleem v Minister for Justice* [2011] IEHC 233 (unreported, High Court, Cooke J, 2 June 2011)

Legislation:

- *Civil Procedure Rules 1998* (Britain)
- *Rules of the Superior Courts 1986*
- *Rules of the Supreme Court of England and Wales*, order 41

CHANGING OF THE GUARD

Mark McDermott is editor of the Law Society Gazette

The Law Society's new president, Donald Binchy, says he is "deeply concerned" about the *Legal Services Regulation Bill 2011*, which he expects will dominate his presidential year. Mark McDermott speaks to him about it – and other matters on his mind

As the rain beat down in Dublin on 11 November 2011, the dull thuds of a 21-gun salute sounded out from Collins's Barracks, marking the inauguration of the nation's newest president, Michael D Higgins. Not 300 metres from the maws of those guns, yet another president – by the name of Donald Binchy – was being installed in the Law Society's Council chamber. The fusillade caused director general Ken Murphy to suggest: "The members are opening up on the Society!"

All comedy has some element of truth, so when the *Gazette* spoke to the Society's new president, it came as no surprise that he would address the perception of the 'them and us' divide that appears to have opened up between certain members of the profession and the Society in recent years.

"I don't believe that most members of the profession have a negative view of the Society, but I think it's fair to say that some members feel a certain degree of 'disconnect', to borrow the term currently in vogue. There are several reasons for that, and what I would like to do is to try and tackle some of those. I would be a very happy person if, at the end of my presidential year, people had begun to stop talking about the Law Society as though it is 'something else'.

"I don't believe that most members of the profession have a negative view of the Society, but I think it's fair to say that some members feel a certain degree of 'disconnect'"

I'm very strongly of the view that the Law Society is all of us – as solicitors. To me, there isn't them; there is only us. There are 8,500 practising solicitors in the country, and 12,000-plus solicitors as a whole. We are – all of us – the Law Society. The Society is not some mysterious third party that simply dishes out punishment to errant solicitors."

How he plans to achieve this change in attitude has, more or less, been handed to him on a plate by Justice

PICS: SIOBHAN BYRNE

FAST FACTS

- The 'them and us' divide and how he plans to deal with it
- Reaction to the *Legal Services Regulation Bill 2011*
- The positives and negatives of the bill
- How the Society is responding
- Preservation of the rule of law

Minister Alan Shatter, as a result of the publication of his *Legal Services Regulation Bill 2011*. Given the adverse reaction to the bill – both at home and abroad – Donald would be the first to admit that he's seeking to make something positive out of an apparently very negative situation.

"The first thing to say is that I wouldn't like the message to go out there that the Law Society is against everything that's in this bill – it's not. The Society is on record as welcoming the provisions, by and large, that relate to costs – insofar as they would bring more predictability and transparency and, hopefully, eliminate or help to reduce problems that arise in relation to costs. It's to be hoped that the new bill will go a long way towards resolving some of these issues. By and large – with the proviso that we're still studying the details – we would welcome that part of the bill."

Significant problems

Binchy predicates these remarks, however, by stating that the Society takes serious issue with significant aspects of the bill. "The most perturbing are those parts of the bill that will

clearly erode the independence of the legal profession. The bill threatens every citizen's right to receive advice from a legal profession that is free of improper interference and the direct control of government. It proposes a model of regulation of the profession that is unknown in any free democratic society.

"This isn't an academic notion. In the bill, the Minister for Justice is taking unto himself very, very significant powers. The new Legal Services Regulatory Authority is going to have the entitlement to make regulations and practice rules for our profession. They will have the entitlement to make rules to be approved by the minister. The minister will have the entitlement to give them directions in relation to such rules. The minister will have control over the appointment of the authority's board, on which there will be only two solicitor representatives, and two from the Bar."

He says that the Law Society will be urging the minister to introduce amendments to guarantee the proper separation of powers between the judicial and executive branches of government by ensuring the maintenance, in the public interest, of an independent legal profession as a necessary support to the independence of the judiciary.

"The general thrust of the bill is that the minister and/or the authority will make the rules for our profession – and that our input into our own rules will be very limited. Now, take, for example, what happened last year with professional indemnity insurance. Our ability to deal with that insurance problem, were that ever to arise again in the future, would appear to be extremely limited. We'd be relying on an external body to deal with such issues, as PII would fall within the remit of the new authority."

The president says that he finds it hard to see why the responsibility for PII needs to be hived off to the new regulatory authority at all – but that's what the current form of the bill dictates. "The new authority would be faced with having to deal, for instance, with the problems that arose from the collapse of the SMDF. Could we rely on the authority to be able to cope with this? If we felt it was necessary, could we rely on them to introduce a master policy? I think it's very unlikely."

> ***"The Legal Services Regulation Bill threatens every citizen's right to receive advice from a legal profession that is free of improper interference and the direct control of Government. It proposes a model of regulation of the profession that is unknown in any free democratic society"***

He cites the Law Society's response to the SMDF crisis. "Due to the expertise of our voluntary committees, we were able to give an awful lot of attention to this matter. We were able, also, to go out to the profession to get our members' views on these matters. We received feedback from the profession on the master policy issue – some of it very strongly against, some of it very strongly in favour.

"The point is that we were able to move these matters along very quickly. It's hard to see how the new LSRA, which is structured to deal principally with complaints-related issues, would suddenly be able to turn around and deal with such matters. It won't have the infrastructure to deal with it – these matters won't be its day-to-day business."

Optimist

The new president got involved with the Law Society with the encouragement of his father, Don, himself a past-president in 1990/91. "He used to say that you learned a lot more on Council than you would ever bring to the table as a Council member. Whatever about that, the work you do on Council and its committees is certainly very interesting. Yes, there's hard work attached to it – it can be difficult getting to Dublin at times from the country. You're very busy and sometimes a day in Blackhall Place is the last thing you need. But once you get here, I find you never regret it. As to what I bring to it, that's best judged by others, but I'd like to think that I bring a practical mind and a very broad legal experience to difficult problems."

Bringing that practical mind and experience to the problems facing the Society in the coming year is going to be extremely important. Aside from the Law Society's perspective, how does he personally feel about the *Legal Services Regulation Bill*?

"Well, the minister appears to have made a decision that everything to do with the regulation of our profession is going to be handed over to another authority. Now, I don't know why that decision has been made. We have to meet with the minister, and I am hoping that he will explain these things to us. I am hoping we will be able to change his mind on some of these issues. The minister was on RTÉ's *Frontline* programme recently, citing the Lynn and Byrne cases as failures of regulation. In fact, they were salutary lessons in how regulation works. Regulation worked in the cases of these individuals, who were caught and struck off the Register, and their clients compensated.

"Since then, the garda investigation has been ongoing, but still no decision has been made as regards the bringing of charges, some four years after the event. This, to me, is incomprehensible. The Society has written to successive garda commissioners to express its concerns in relation to the matter."

He points out that the complaints-handling process and regulation of the profession are, to a significant extent, handled externally rather than internally: "The Complaints and Clients Relations Committee consists of a majority of lay members; there's the independent adjudicator; and the Solicitors' Disciplinary Tribunal that is independent of the Society. I'm not sure that the public, the law makers, or even our colleagues have a full understanding of these independent features within the existing system."

Lack of consultation

Has he been annoyed by the lack of consultation, given that the Minister for Justice has failed to engage with the Society or the Bar in relation to the bill?

"I think it would have been much healthier if the minister had indicated that he had certain objectives that he wanted to achieve, and if he had consulted with us about his

SLICE OF LIFE

Donald Binchy (age 48) is a partner at the law firm Binchy Solicitors in Clonmel, Co Tipperary – founded by his grandfather James Binchy in 1918. He will serve a one-year term as president of the 12,000-strong solicitors' profession until November 2012.

He is a native of Clonmel, Co Tipperary, and is the third of four children born to Don and Joan (both deceased). Married to Claire, they have three children. He was educated in Ss Peter and Paul's Primary School, Clonmel, and Clongowes Wood College, Co Kildare. He graduated with a BCL law degree from University College Dublin.

Apprenticed to his father Don (who served as Law Society president in 1990/91), he qualified in 1987. He spent two years, post qualification, engaged in IFSC-related work for the then law firm of Cawley, Sheerin, Wynne in Dublin.

Donald became a member of the Council of the Law Society in 1994. He has served on many of the Society's most senior committees.

objectives. From our point of view, the parts of the bill that eradicate the independence of the legal profession are simply not acceptable. It's important that our colleagues understand that this is not the Law Society simply saying 'No!' to protect the status quo. This is about the preservation of the rule of law."

Binchy emphasises that he's taking every opportunity to say to members of the profession: 'Please let us have your feedback'. He says: "Please look at the bill – understand it and tell us what you think. But look at it meaningfully – don't gloss over it. There might be a temptation to take the simplistic view, such as: 'I'm delighted that all of this is being taken from the Law Society, because now the Law Society can become my representative body.'

"But what I'm saying to colleagues is: consider the full implications of it and tell us of your concerns. Understand that it means that you won't be making your own rules anymore. Bear in mind, too, that an awful lot of the demand for the Law Society to make rules over the years has come from the profession itself. The profession asks us to make rules for very good reasons. Historically, this was so that we could promote the highest standards in order to ensure that the reputation of our profession was kept in good order. If the minister has his way, in a year or two years' time, we won't have the power to make any rules about the matters that concern us. That will reside with the minister."

"We'll engage with the minister and we'll try and persuade him"

Concrete recommendations

Does the new president think that it will be possible to change the minister's mind on some of the more worrying aspects of the bill? "The minister is a very able man. If he has an open mind on the subject, I think it is possible. If he doesn't have an open mind – well, we can't persuade anybody who hasn't got an open mind. What I really want our colleagues to understand is that the Law Society is not about the business of saying 'no' to all change. That is not the case. What we are going to oppose, tooth and nail, however, is the extent of the changes that this bill seeks to introduce that will effectively damage the independence of the legal profession. Legal representatives of other countries have commented on this and are fully supportive of the Law Society's stance. They're quite shocked by this, because no other country in the Western world has this degree of interference with the independence of the legal profession."

He admits to being very disappointed at the lack of consultation by the minister on the bill. "Look, we are where we are with it. We're going to make our submissions on it and the minister has asked us to meet with him shortly. We want to know what our profession thinks of it – ideally before we formulate our own views. We'll engage with the minister and we'll try and persuade him – and the government if needs be – that there are parts of this bill that are simply unacceptable, and we'll seek to have those changed. Other, more acceptable parts of the bill may need to be fine-tuned. We'll engage on these matters and I think there will be an outcome that we will all be happy to live with. I would be surprised if there isn't."

ELECTRIC AVENUE

A new survey has found that electronic evidence in e-discovery cases is being underutilised. When it is relied upon, it tends to be managed inefficiently – resulting in increased costs. CSI-type advancements in forensic technology are making all the difference. Simon Collins boots up his laptop

Simon Collins is manager of fraud investigation and disputes at Ernst & Young

The EU/IMF has instructed the legal profession to reduce costs. It is widely accepted that discovery accounts for a large proportion of costs in legal matters. With the use of technology so widespread in the modern world, it is rare to have a matter that does not include some form of electronic evidence. Efficient management of this evidence is essential in order to significantly reduce discovery costs.

Electronic evidence is not a recent development and has been used in our courts for many decades. However, experience suggests that the efficiency with which electronic evidence is managed and used could be significantly improved to reduce professional costs. Ernst & Young recently completed its first survey designed to assess the use of electronic evidence throughout the legal process in Ireland. The results of the survey support the view that electronic evidence is becoming more prevalent. However, we also see that electronic evidence is still not being considered or accessed in all legal matters even if it exists; or, on occasions, where it is used, it is largely being managed inefficiently, resulting in increased costs. In our experience, it does not have to be this way, as advancements in forensic technology have demonstrated.

"Explaining to a potential client how you can reduce their risk of not meeting their discovery obligations, while saving them significant costs, can be the winning factor when proposing a piece of legal work"

Inside the box

Two common myths are often heard throughout legal circles in Ireland: first, that e-discovery in relation to electronic evidence is complicated; second, that it is expensive. Neither could be further from the truth – when managed properly. It is just a case of stopping, thinking and engaging an expert – internal or external – who can deploy the right technology and processes to the task at hand, in a proportionate manner, as part of your team. This will dispel these myths and minimise your risk.

But what exactly is 'forensic technology' and how can it be used by the legal profession? Forensic technology covers two main areas: electronic discovery and IT forensics.

Electronic discovery, or 'e-discovery', is the term coined for coping with the electronic element of traditional discovery. The process involves identifying, preserving and collecting electronic documents that may be considered relevant to a matter. These documents are then processed using a technology tool and reviewed for relevance and privilege. Relevant documents are then produced to the opposing party, alongside their hard-copy equivalents. What is key is the technology employed to sort and filter the documents (by criteria, such as keywords, date ranges, and individuals), so that the documents to be reviewed focus on those most likely to be relevant.

In relation to IT forensics, many cases today require IT forensic experts to determine the 'who, what, when, where and how' of activities that have taken place on a computer. Cases of intellectual property theft or inappropriate use are common examples where these services are called upon. IT forensic experts may act either as expert advisors throughout a case, by providing evidence as professional

FAST FACTS

- E-discovery identifies, preserves and collects electronic documents that may be considered relevant to a legal matter
- The efficient management of electronic evidence is essential in reducing discovery costs
- Forensic technology is utilised in both electronic discovery and IT forensics, with the results assessed for both relevance and privilege
- The technology employed is key when sorting and filtering documents by specified criteria, such as keywords, date ranges, and individuals
- Adopting technology and a streamlined process for managing electronic evidence can be a key competitive advantage for law firms

witnesses or, alternatively, they may be engaged as independent expert witnesses to assist the court in understanding technical issues relevant to the matter. In essence, IT forensics is the closest you get to *CSI* in the IT world!

Lost and found

The Ernst & Young survey was conducted during May and June 2011. Respondents comprised solicitors representing a range of practice areas, from 14 of the top law firms in Ireland. The results act as a barometer of the prevalence of electronic evidence within the legal process in Ireland and the impact of SI 93 in 2009.

The findings, in general, suggest that electronic evidence is considered by lawyers in the majority of cases. However, how they handle this evidence varies significantly, both between and within practices. A standard approach or common methodology does not appear to have been adopted. For e-discovery, many practitioners in common law countries have adopted the 'electronic discovery reference model' (www.edrm.net) as a common approach. This helps to ensure that all parties at least understand the high-level processes involved in e-discovery and speak more or less the same language when it comes to managing an e-discovery project.

The results also demonstrate that many lawyers depend on their client and their client's IT team to identify and preserve potentially relevant sources of data. Often, such electronic data is not preserved in a forensic manner, which can risk its admissibility in a variety of legal proceedings. Alternatively, it is often collected in ways that make it difficult to search, thus leading to inefficiency and avoidable cost during legal review.

The challenge is that most lawyers do not have a deep understanding of IT, while most IT professionals do not have an understanding of the legal process. This can result in significant communication issues, often resulting in errors or omissions in the discovery process. Ideally, the two should be working in tandem as a tight team, calling on each other's expertise in order to manage electronic discovery efficiently.

Leave out all the rest

Often, reviews of electronic documents do not use adequate filtering techniques, such as keyword/date filtering, to reduce the number of documents for review and to allow greater focus on key documents. Failure to do this adds considerably to discovery costs. The survey found that 45% of respondents still review duplicate documents (in effect, read one document twice) and do not use basic automated de-duplication technologies to significantly reduce the volume of documents for review. In the days of pure hard copy, it was acceptable to review every document, as the number of documents was relatively small. With the explosion of technology and the volume of electronic documents that has resulted, this is simply no longer possible: neither the budget nor the court's patience would bear it. Indeed, all but the simplest of tasks or matters require some form of filtering technique.

The research also found that 20% of respondents do not consider maintaining the 'family relationship' between documents (as would exist in the case of emails and their attachments), often losing the context of a document. It is difficult to consider an email without its attachments, or an attachment out of context with its parent email. Often the one will inform the other.

Overload

In all, 33% of respondents still print electronic documents to paper and manually review them, incurring significant unnecessary time and cost in the process. Leaving aside the cost of printing documents, it is simply not possible to review paper documents anywhere close to the speed possible with electronic documents. Indeed, the ability to filter and search documents is immediately lost once they are printed.

A total of 44% of respondents still print electronic documents to paper for production, while 11% of those who provided documents in electronic form do so in a format that is not searchable. This increases the burden and resulting costs on the receiving party. It is interesting to note that it actually costs more to print documents, or to convert them to an unsearchable electronic format, than it does to produce them in their native format (that is, as the original *Word* or *Excel* files).

Finally, 45% of respondents never include metadata (information about the documents, such as when a *Word* document was created, or when an email was actually read) in productions, thereby preventing the receiving party from efficiently searching and reviewing the evidence produced. For example, if the date when a *Word* document was created is not included in the production, it is not possible for the receiving party easily to sort the electronic documents chronologically, thus potentially increasing the amount of time taken to review.

Blood drops

The use of IT forensic experts to determine the 'who, what, when, where and how' in a matter also varies widely. Unlike engaging a medical expert, it is often necessary to firstly engage an IT advisor in order to properly

LUCKY STRIKE

E-DISCOVERY

A client received a discovery request in relation to email communications. The e-discovery team worked with the client's legal advisors to identify the staff likely to hold potentially relevant email and worked with the client's IT team to obtain copies of 22 staff members' 'live' and archived emails. Those emails were put through a simple tool that allowed the client's legal advisors to review them on a laptop.

The opposing party had provided search terms that were reviewed, and agreed amendments. The emails were restricted to an agreed period of time. The end result was a reduction from tens of thousands of emails to a set of just 4,000, which were reviewed by the client's legal advisors.

Based on the legal review, a list of the emails (and their attachments) was produced, to be included in the discovery, including copies of the documents themselves in their original (native) electronic format, and a short report outlining the work completed. The process took one week, with only 30 hours of IT expert time.

IT FORENSICS

A key employee left a client's organisation and joined a competitor. The client was concerned that the former employee might have taken a customer database from their system prior to departure. This database was a key piece of intellectual property.

The former employee's computer was forensically copied. Following a short review of his computer, it was clear that a copy of the customer database had been copied to a USB stick prior to his resignation.

A short report was provided in affidavit form, detailing the findings in plain language, including the sequence of events and the serial number of the USB stick that had been used. The client's legal advisors used the report to secure an interim injunction stopping the former employee and his new employer from using the client's customer database. This ensured a speedy resolution to the case.

The whole process took less than a week to complete, and incurred approximately three days of IT forensic time. This case is a simple, but good, example of a low-cost IT forensics exercise that delivers real value to a business.

instruct the independent IT forensic expert.

In relation to IT forensics, most practitioners consider, and are aware of, the capabilities of IT forensics. However, the respondents often provide technical advice on the preservation of electronic evidence directly to clients and do not engage an IT expert. The survey found that, in the majority of cases where an IT expert is not engaged at the outset, much evidence is either lost or rendered inadmissible.

On a positive note, most practitioners do consider data privacy and data protection when dealing with electronic evidence. This is becoming increasingly important, as many matters now involve electronic evidence in multiple jurisdictions.

There is a perception that e-discovery and IT forensics are complex and expensive processes, relevant to very large matters only. In our experience, this is not the case – the smallest of employment disputes could hinge on the content of a single email buried in someone's mailbox. Effective collaboration between the legal and IT experts could find that email in minimal time and at minimal cost.

Forensic technology is, ironically, the solution to a problem often created by technology itself. Handled properly, e-discovery can be used to reduce discovery costs, while IT forensics can be used to uncover key facts that can often decide a case.

"Most practitioners consider, and are aware of, the capabilities of IT forensics. However, the respondents often provide technical advice on the preservation of electronic evidence directly to clients and do not engage an IT expert. The survey found that, in the majority of cases where an IT expert is not engaged at the outset, much evidence is either lost or rendered inadmissible"

It is clear that there is a need for further education about e-discovery and electronic evidence in Ireland in order to dispel myths. More needs to be done to create awareness of what can and should be done to proportionately manage electronic evidence. Ireland can learn a lot from other common law countries that are ahead in this area and, importantly, avoid the pitfalls experienced by others.

Adopting technology and a streamlined process for managing electronic evidence can be a key competitive advantage for law firms. Explaining to a potential client how you can reduce their risk of not meeting their discovery obligations – while saving them significant costs – can be the winning factor when proposing a piece of legal work.

While very large electronic discovery projects can be expensive, if they are managed correctly, with the right application of technology, they will always result in cost savings compared with applying a more traditional approach to the discovery of electronic documents. Getting it wrong or avoiding dealing with electronic evidence can be very expensive. It is vital to work as a team, to choose the right processes and technologies for the task, and adjust, as necessary, as the case evolves.

Electronic evidence in Ireland – are we there yet? No, but we're on the way!

Come TOGETHER

FAST FACTS

- Partnerships can be beneficial in terms of scale of activity, skills and knowledge, professional regulation, and succession
- Mergers are contemplated defensively – on the one hand to share costs; on the other, to alleviate the difficulties of keeping pace with the complexities and challenges of a very difficult business environment
- These are the good reasons for going into partnership rather than persisting in sole practice
- There can be pitfalls, too, in going into partnership. A partnership that comes about through a merger may not always bring the expected benefits and can be costly if not thought through

Des Peelo is an accountant and tax advisor

Partnerships can be beneficial on many fronts. However, it is wise to be aware of the potential pitfalls of merging with another firm. Des Peelo addresses the possible hazards

All partnerships carry the seeds of self-destruction. As a long-time accounting practitioner, I can think of quite a few well-known firms of solicitors that have disappeared over the years. Some have continued as part of another firm, others have splintered off into sole or smaller practices, but most have simply gone out of business. Over time, in the normal life of a partnership, new partners join and existing partners leave, fall ill, retire or die. Rows and break-ups happen, even in well-run partnerships. Practices expand, shrink, change direction, merge, de-merge, are sold, taken over, or disappear altogether. It is as well never to lose sight of the fact that professional partnerships give the illusion of a life independent of ownership – such as for companies – but, in fact, a partnership has no legal personality and is no more than self-employed individuals earning a living through common means.

Carry that weight

At the moment, it appears true to say that mergers are contemplated defensively – on the one hand to share costs and, on the other, to alleviate the difficulties of keeping pace with the complexities and challenges of a very difficult business environment. However, the benefits of a possible merger/partnership also include:

- Scale of activity: meeting the need to offer a range of services and/or the necessity of scale to attract and hold sizeable clients. This is particularly true in today's hugely competitive environment.
- Skills and knowledge: it is difficult to keep pace with the complexity and pace of the business world, and several partners are better than one or two in this regard.
- Professional regulation: as practitioners will know, regulation of all kinds, both internal and external to the professions, has greatly increased. The professions of solicitors and accountants are increasingly pressured to be some form of policeman (for example, money laundering and Revenue issues) in monitoring the behaviour of others, that is, their clients.
- Succession: retirement, for whatever reason, eventually happens to all. Scale allows a succession of younger partners to be created. It is not unusual, even in some quite large practices, to have the partners clustered around a particular age. This clustering not only eventually creates friction, sometimes suddenly, as individual partners approach retirement, but also may lead to resistance to change within the partnership.

These are the good reasons for partnership as opposed to sole practice. It is as well, then, to hear some of the bad reasons. A partnership that comes about through a merger may not always bring the expected benefits. A merger for ill-defined reasons or with unrealistic expectations (such as an expectation that the merger will solve cash-flow problems) can be costly. It is not likely that the practices will subsequently de-merge (though this has happened), as the integration will likely be only reversed at considerable cost, but there may well be an unpleasant upheaval within the merged entity, probably within 12-18 months.

A hard day's night

What are the possible pitfalls to address before carrying through a merger? Subsequent problems are usually of the human-nature variety and include the following:

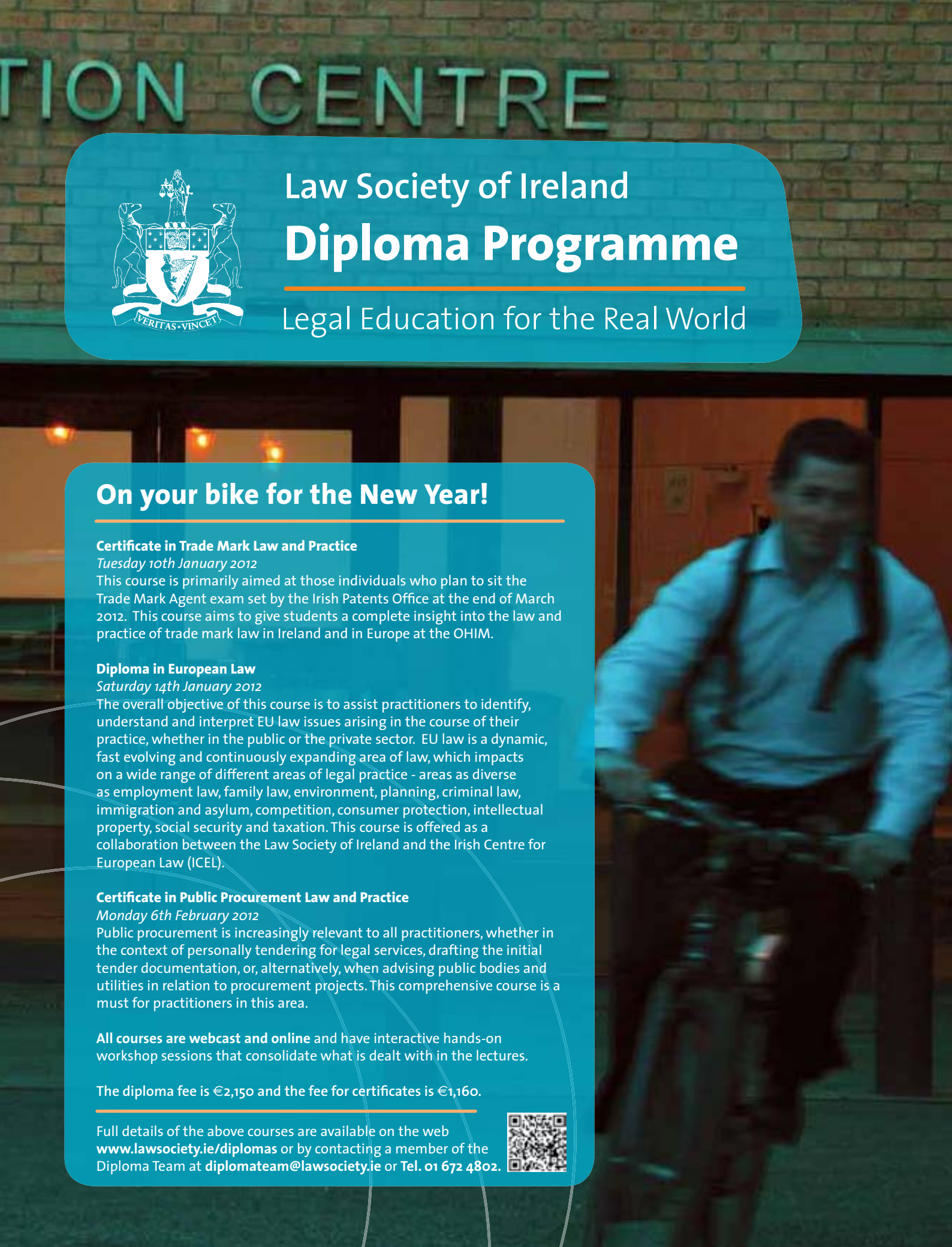
- Culture shock: the philosophy of different practices and individual practitioners can vary widely. For instance, individuals may be resistant to time-recording or billing procedures, be systems illiterate, have poor professional standards, be bad account keepers, do not keep abreast of necessary knowledge, and so on.
- Management of the merger: the post-merger situation will usually require considerable efforts to ensure that the expected benefits are actually achieved. Sometimes there is a sense of relief that the merger has been achieved at all, and matters subsequently drift in an aspirational, but inconclusive, way because nobody takes the responsibility.
- Territory: overlapping skills and areas of responsibility among newly merged individual partners can lead to territorial claims to match anything in the animal kingdom.

"The unspoken primary task of an effective managing partner in a larger practice is to ensure a proper balance between the partners as to 'finders, grinders and minders'"

The scale of the practice will dictate as to whether or not there should be a managing partner. This is often a part-time position and normally rotated in three-year terms, two terms being the maximum service. There is often confusion as to what a managing partner actually does. The panel (p37) sets out the responsibilities and duties of a managing partner as commonly included in partnership agreements.

In my opinion, the unspoken primary task of an effective managing partner in a larger practice is to ensure a proper balance between the partners as to 'finders, grinders and minders'. Translated, that means a balance in the partnership skills as to those partners who can get business, those who are knowledgeable and competent to carry out the business, and those who manage the workings of the practice itself. Sounds simple enough, but it's difficult to achieve in reality.

Professional life has its own characteristics, one of



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which is that we often do not take our own advice. Examples include the doctor who smokes, the accountant with chaotic finances, and the solicitor who does not make a will – or complete a partnership agreement. All professional partnerships, irrespective of profession, carry potential problems. Indeed, as stated at the outset of this article, a partnership is likely to carry the seeds of its own destruction. Many partnerships have no written agreement, and I have witnessed serious distress for otherwise prudent and competent practitioners, sometimes late in their careers, through not taking the time to properly organise a partnership agreement. Do not be your own doctor in drawing up an agreement. Take experienced advice. Most agreements I have seen are poorly drafted, biased and/or inadequate for purpose.

We can work it out

As practitioners will already know, there is no legal requirement for a written agreement, and a verbal agreement evidenced by a course of action over a period of time will usually constitute a valid partnership agreement. The *Partnership Act 1890*, a short and clearly written act, steps in to regulate a partnership where there is no agreement – and even where there is an agreement, the act will generally step in to cover a particular point not included, with some notable exceptions.

It is these exceptions that cause the most problems in partnerships and that need particularly careful attention in a partnership agreement: the act is silent on goodwill, and there is no mechanism in the act to expel a partner, or to force a partner to retire.

"A merger for ill-defined reasons or with unrealistic expectations (such as an expectation that the merger will solve cash-flow problems) can be costly"

'Goodwill', meaning the valuation of a practice, is a feature in many partnership disputes, usually relating to a departing partner. It is not a topic for this article, except to note Lord Eldon's 1810 definition of goodwill in *Crutwell v Lye*: "Nothing more than the probability that the old customers will revert to the old place even though the old trader or shopkeeper has gone."

In that context, practice goodwill exists to the extent that there is a continuing business. A practice is built up over time, and risk undertaken, and an outgoing partner may hold the view that his or her efforts in building up the business should be recognised through a value placed on his or her share of the profits – profits that may accrue in the future to the continuing partners. The same could be said for an incoming partner asked to pay for goodwill. However, translated to monetary terms, goodwill is only the measure of future extra profits, not the total profits previously earned by the outgoing partner.

I am the walrus

Consider the instance of a retiring partner earning profits of X a year. At first glance, it may appear that the remaining partners will gain X a year between them and that therefore a multiple of those profits (that is, a capital value) should be paid to the outgoing partner. It is not that straightforward. The previous work input of the outgoing partner in earning those profits has to be replaced by an increased workload on others. Professional responsibilities are high, and the work may not be easily handled or delegated by the remaining partners. The profits will not accrue passively. It may be reasonable to assume that profits will drop as the particular skills and contacts of the outgoing partner are lost. This aspect is intangible, but experience suggests that such loss may take 12-18 months to become apparent. There is a certain momentum attached to existing business, but which only carries so far into the future unless it is replenished.

Goodwill is only the measure of extra profits and there is no goodwill in an income that is not greater than could be earned by employment elsewhere without the risk of professional responsibilities. The purchase of goodwill, without such extra profits, may be the equivalent of buying a job. G

EIGHT DAYS A WEEK

The responsibilities and duties of a managing partner as commonly included in partnership agreements:

- **Overall responsibility for the promotion and well-being of the practice and its professional standards; in particular, the maintenance of good relations with existing clients and the development of new business,**
- **Ensuring the partnership is fully aware of developments in the profession and liaising with the Law Society,**
- **Financial management of the business, including liaison with individual partners on work in progress, billings and cash collections; in particular, maintaining good relations with the partnership bankers,**
- **Devising and implementing training programmes and ensuring the ready availability to the partners and staff of the knowledge and information necessary for the development and improvement of services to clients,**
- **The hiring and dismissal of employees,**
- **Overall supervision of the administration of the business, including books of account, employee matters, insurance, premises maintenance and office systems,**
- **Being available at the request of a partner to visit or attend a meeting with a client who is either important in the context of the partnership as a whole, or to assist in a situation in which a particular difficulty has arisen.**

Emma Keane and Sam Collins are barristers and practise mainly in Dublin

Orders for attachment and committal are powerful mechanisms of last resort to coerce compliance with judgments and orders. Emma Keane and Sam Collins spend a night in the cells

FAMILIARITY BREEDS CONTE

Orders for attachment and committal in the High Court are provided for under order 44, part I of the *Rules of the Superior Courts* (RSC). Comparable provisions are contained in order 37 of the *Circuit Court Rules* and order 46B of the *District Court Rules*. An order for committal under the *Debtors Act (Ireland) 1872* is a separate procedure and is provided for under order 44, part II RSC.

Zuckerman notes that the jurisdiction to commit for contempt "is used for two distinct purposes: first, to enforce obedience to court orders and, second, to safeguard the court's authority and protect the administration of justice from improper interference and abuse". The jurisdiction is primarily coercive and not punitive.

I fought the law

In *Shell v McGrath & Ors*, the High Court had granted the plaintiff an interlocutory injunction restraining the defendants from interfering with the entry of the plaintiff on to lands on which a gas pipeline was to be constructed by the plaintiff. The first, second and third defendants (the contemnors) failed to comply with that order. The plaintiff applied to have them attached and committed for contempt of court. The High Court granted the order sought. On the 94th day of the contemnors' imprisonment, the plaintiff applied to have the injunction discharged, as the intended works could not be carried out during the winter months and the injunction served no useful purpose. The High Court discharged the injunction.

The contemnors remained unwilling to purge their contempt. The matter was adjourned to allow submissions on whether it was appropriate for the court to exercise its punitive power and order further imprisonment of the contemnors. Finnegan P declined to so order, deciding that the contemnors' 94 days of imprisonment contained a sufficient punitive element.

In his conclusion, after an extensive review of the authorities, Finnegan P dealt with the purpose of committal for contempt: "I am satisfied that committal for contempt is primarily coercive, its object being to ensure that court orders are complied with. However, in cases of serious

FAST FACTS

- The jurisdiction to commit for contempt is used for two purposes: to enforce obedience to court orders, and to safeguard the court's authority and protect the administration of justice
- The jurisdiction is primarily coercive and not punitive
- An order of committal will not be made unless the conduct complained of was intentional or reckless, and will not be made unless there are clearly established facts supporting the motion

MPT

misconduct, the court has jurisdiction to punish the contemnor. If the punishment is to take the form of imprisonment, then that imprisonment should be for a definite term ... When exercising its powers for coercive purposes, the jurisdiction to imprison for an indefinite period for civil contempt is one to be exercised sparingly ... Committal by way of punishment likewise should be the last resort."

Remote control

Zuckerman notes that "committal for contempt is wholly inappropriate for dealing with the great majority of procedural defaults".

Glanville summarises the types of judgments and orders that may be enforced by attachment as those for the payment of money into court, for the recovery of any property other than land or money, requiring any person to do any act other than the payment of money, requiring any person to abstain from doing anything, and those involving wilful disobedience by a company (where directors or other officers may become liable). The types that may be enforced by committal are those requiring any person to do any act other than the payment of money, and requiring any person to abstain from doing anything. It can immediately be seen that the range of defaults capable of being addressed by such orders is quite broad. For example, some recent applications have concerned a failure to swear a statement of assets.

"The range of defaults capable of being addressed by such orders is quite broad"

While the orders are distinct from each other, the court may make an order for attachment where the application is for committal, and vice versa (order 44, rule 6, RSC). Where the interest of the public in general is engaged, or where there is a gross affront to the court, the court may proceed of its own motion to ensure that its orders are not put at nought (*Shell v McGrath & Ors*).

A vital procedural requirement is that the person against whom an order is sought ('the alleged contemnor') must be served with a copy of the court order in respect of which compliance is sought with a 'penal endorsement' thereon. This is explicitly stated in order 37, rules 1 and 2 of the *Circuit Court Rules* and order 46B, rule 6 of the *District Court Rules*, but in practice is also required in the High Court. A penal endorsement contains words to the effect that, if it is disobeyed, the person to whom the judgment or order is directed will be liable to enforcement, including imprisonment, and so puts him on notice to this effect.

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Orders for attachment and committal require leave of the court to be applied for by motion on notice (order 44, rule 3 RSC) grounded on affidavit. No order for attachment or committal can issue without leave of the court, subject to two exceptions: first, committal for contempt in the face of the court and, second, committal in pursuance of an order of attachment under order 44, rule 4 RSC. The notice of motion must state the general grounds of the application (order 52, rule 4 RSC). The order must be served on the alleged contemnor. The requirements of service must be carefully followed. Service need not be personal and may be normally affected in accordance with order 121, rule 1 RSC (*Laois County Council v Scully & Ors*). When an attached person is brought before the court, he or she may be discharged on terms or committed (order 44, rule 4 RSC).

While disobedience of a court order is a civil contempt, the proceedings in which this is determined are regarded as criminal for the purpose of article 6 of the *European Convention on Human Rights*. Contempt must be established beyond a reasonable doubt. Procedural requirements must be strictly followed (*Laois County Council v Scully & Ors*).

The respondents in *Laois County Council* were the subject of a High Court order requiring them to cease operating an illegal landfill and to remediate the lands upon which it was being operated. The matter was listed before the High Court in order to review the progress of the respondents in complying with the order. On that date, the applicant served the respondents' solicitors, who came off record later that day, with a copy of the order with a penal endorsement on it. The court deemed the service good. It transpired, however, that the copy of the order served was incomplete. A complete copy of the order was subsequently served on the respondents by way of registered post.

"I find you in contempt of cat"

"The types of judgments and orders that may be enforced by committal are those requiring any person to do any act, other than the payment of money, and requiring any person to abstain from doing anything"

The applicants alleged that the respondents were in breach of the order requiring them to remediate the lands and sought their attachment and committal. The High Court ordered the committal of the first, second and third respondents for six months, but suspended the committal in the event that the order was complied with within 12 months.

Rock the Casbah

Peart J made a strong statement in relation to the various interests that must be considered in an application for attachment and committal, including the public interest in upholding the authority of the court. The judge stated: "In such situations, the court must look closely at the objections put forward as to non-compliance with rules of procedure, so as to ensure that mere form is not permitted to triumph needlessly over substance. Rules of procedure exist to enable things to be done and steps to be taken, and must not become instruments of obstruction. They must be our servants and not our masters."

Peart J concluded that to allow the respondents to resist the application on the basis of mere technical errors or a mere "infelicity in the manner in which the order of the court has been prepared and perfected, even though these do not cause any prejudice to the respondents" would enable them to escape their responsibilities "on grounds which are specious, disingenuous and amounting to an abuse of process and an affront to the dignity of the court".

Charlie don't surf

An order of committal will not be made unless the conduct complained of was intentional or reckless, and will not be made unless there are clearly established facts supporting the motion. If there is doubt, the court should be able to choose to reject the evidence of the defaulter in favour of that of the applicant. To this end, Glanville states that "it is advisable to apply under RSC order 39 for leave to cross-examine the defaulter".

Orders for attachment and committal are addressed to the commissioner and members of the Garda Síochána. The order must be unambiguous and, in clear terms, direct what is to be done.

Orders for attachment and committal are powerful mechanisms of last resort to coerce compliance with judgments and orders. In light of the potential deprivation of liberty involved in such applications, the courts here and in Europe have insisted on strict procedural safeguards (including penal endorsements and close adherence to service requirements), which must be followed if relief is to be obtained. G

KNOW YOUR RIGHTS

- **The different effects of each order can be gleaned from the form of the orders (provided for respectively at forms 11 and 12, part II, appendix F, RSC).**
- **An order for attachment commands the commissioner "to attach the said CD [that is, the defendant] so as to have him before the High Court at the Four Courts, Dublin, there to answer for the contempt which, by reason of such default, it is alleged he has committed against the High Court, as well as such other matters as shall then and there be charged against him".**
- **An order for committal commands the commissioner "to arrest the said CD and thereupon to lodge him in prison, there to be detained until he purge his said contempt and is discharged pursuant to further order of the High Court".**

LOOK IT UP

Cases:
- *Keegan v de Burca* [1973] IR 223
- *Laois County Council v Scully & Ors* [2009] 4 IR 488
- *Shell v McGrath & Ors* [2007] 1 IR 671

Legislation:
- *Circuit Court Rules*, order 37
- *District Court Rules*, order 46B
- *European Convention on Human Rights*, article 6
- *Rules of the Superior Courts*, order 44, part I

Literature:
- Glanville, Stephen (1999), *The Enforcement of Judgments*, chapter 11, (Round Hall Sweet & Maxwell)
- Law Reform Commission, *Report on Contempt of Court* (LRC 47 – 1994; consultation paper published July 1991)
- Zuckerman, Adrian (2003), *Civil Procedure*, chapter 22 (LexisNexis)

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Law Society team retains Brendan McCann Memorial Cup

The third annual Brendan McCann Memorial Cup 2011 match took place between the Law Society of Ireland and Belfast solicitors recently at Páirc Aodha Dhuibh, Carryduff, Co Down – the home club of the late Brendan McCann. Guests included Law Society President John Costello, Paul O'Connor (Law Society of Northern Ireland), Margaret McCann, former rugby international Trevor Ringland and Lord Mayor of Belfast Niall Ó Donghaile.

The Law Society team was keen to retain the cup it had won in 2010. In an entertaining contest, the Belfast solicitors got off to a perfect start, registering a goal from full forward Shane Byrne and three points from corner forward Andy Moran before the Law Society registered its first score through Odhran Lloyd. The Law Society gradually fought its way back with fine scores from John Crowe, Conor Treacy and Tommy Canavan, leaving the team trailing by two points at half time on a score line of 1-05 to 0-6.

The Law Society started the second half at a blistering pace, scoring four quick points. In the move of the match, roving half-back Conor Tracy slotted past the Belfast goalkeeper in the 41st minute for a goal.

The victorious Law Society team consisted of Tommy Canavan, Shane Carroll, Vincent Costello, John Crowe, Neil Farragher, Niall Flynn, Aidan Healy, Odhran Lloyd, Jonathan Maher, Padraig Mawe, Conor Minogue, Peter Murphy, Neil Ó Gorman, Paudí Ryan and Conor Tracy

Belfast responded with a number of scores but the Law Society stayed ahead, thanks to the efforts of Jonathan Maher, Shane Carroll, Neil Farragher and Tommy Canavan. The victory was sealed in the game's dying moments with a well-taken goal by Padraig Mawe. Final score: Law Society 2-10, Belfast Solicitors 1-7.

Both teams attended a reception at the Law Society of Northern Ireland's HQ in Belfast, where captain of the Law Society, Shane Carroll, was presented with the Brendan McCann Memorial Cup by Mrs Margaret McCann.

The players wish to thank the president and the Law Society of Ireland for their continuing support of this annual event. They look forward to hosting Belfast next year.

The team congratulates dual star Jonathan Maher, who was part of the London hurling team that won the Nicky Rackard Cup during the summer.

Congratulations, also, to trainee solicitor James Brogan (Gartlan Furey) who was a member of the Dublin backroom team that won the Sam Maguire for the first time since 1995.

Judge Kelly sounds warning on registrar retirements

The *Hibernian Law Journal* held its annual lecture on 2 November at the Law Society's headquarters in Blackhall Place. Speaking on the role of the Commercial Court were Mr Justice Peter Kelly, Ms Justice Mary Finlay-Geoghegan and Mr Justice Michael Peart.

Judge Kelly sounded a warning on the imminent retirement of several experienced registrars, which will inevitably have a knock-on effect on the efficiency of the court system.

The *Hibernian Law Journal* committee *(from l to r)*: Regan O'Driscoll, Cian Moriarty, Carol Eager, Bebhinn Dunne, Emer O'Connor (editor-in-chief), Chris Bollard, Brendan Hayes and Alice Lanigan (secretary)

Newly qualified solicitors at the presentation of their parchments on 23 June 2011

Mr Justice Garrett Sheehan (High Court), Law Society President John Costello, Dr Maurice Manning (president of the Irish Human Rights Commission) and Ken Murphy (director general) were guests of honour at the 23 June 2011 parchment ceremony for newly qualified solicitors: Áine Bambrick, Ciarán Brady, Jennifer Burke, Líadhain Canavan, Laura Cunningham, Caroline Courtney, Avril Daly, Deborah Delahunt, Aileen Dempsey, Maura Dineen, Caitriona Dowling, Jennifer Egan, Colm Farrell, Aisling Fitzsimons, Andrea Flynn, Fergus Flynn, Rachael Gallagher, Noirín Galvin, Aoife Garrett, Robert Gibbons, Paul Gilmer, Sarah Gill, Olivia Gilmore, Luke Gleeson, Roberta Guiry, Luke Hanahoe, Marcus Hanahoe, Sinéad Hennessy, Henry Hewson, David Hickey, Conal Honan, Katie Joyce, Andrew Kane, Conal Keane, Eimear Keane, Sarah Kemple, David Kilty, James Mathews, Mary Liz Mahony, John David Mulcahy, Geraldine Mulhall, Caoimhe Mullins, Olivia Mullooly, Áine Murphy, Siobhan McBean, Ruth McCarthy, Killian McSharry, Niamh McMahon, Raymond McGrath, Orla Ormsby, David Ormsby, Niamh O'Connor, John O'Dea, Jillian O'Donoghue, Amandine O'Leary, John Anthony O'Leary, Nicola O'Leary, Séan Ó Moráin, Catriona O'Neill, Laoise O'Shea, Patrick O'Shea, Rory Eoin O'Sullivan, Críona Ryan, Padraig Ryan, Emer Shelly, Catherine Shivnan, Sinéad Taaffe, Sinéad Travers, Patrick Togher, Fiona Wall, Suzanne Ward, Barry Walsh and Craig Watson

Newly qualified solicitors at the presentation of their parchments on 14 July 2011

Then Chief Justice John Murray, Law Society President John Costello and Ken Murphy (director general) were guests of honour at the parchment ceremony for newly qualified solicitors on 14 July 2011: Cliona Bambury, Sarah Bates, Thomas Brennan, Eimear Burbridge, Laura Butler, James Cahill, Shelley Casserly, Saran Ceillier, Ellen Chesser, Susan Cleary, Maura Coyle, Nicola Daly, Ross Deeny, Brian Doohan, Kate Donegan, Audrey-Maura Ferguson, Ruth Finnerty, Frances Flynn, Conor Folan, Ruth Forman, Michelle Foster, Dylan Gannon, Orla Gannon, Brendan Glynn, Jack Harris, Anne Harte, Sarah Harmon, Michael Hastings, Orlagh Higgins, Maura Holly, Ruth Jordan, Oliver Keenan, Alex Kelly, Brian Kelleher, Stuart Kennedy, Gráinne King, Elaine Long, Aisling Malone, Grainne Mannion, Louise Mooney, Deirdre Munnelly, Roisin Munnelly, Brian Murphy, Gráinne Murphy, Helena Murphy, Rose Alice Murphy, Emma Morrison, Cristín McCoy, Morag McCullagh, Peter McKeown-Walley, Eoin McManus, Muireann Nic Dhonncha, Donal O'Byrne, Fiona O'Connell, Jane O'Connor, Jonathan O'Doherty, Neil O'Donnell, Eoghan O Hargáin, Colm Ó Méalóid, Sarah O'Toole, Julienne Payne, Anne-Marie Power, James Scott, John Shanley, Robert Shannon, Breffni Sheridan, Vahan Tchrakian, Kieran Trant, Gráinne Webb and Mona White

Newly qualified solicitors at the presentation of their parchments on 28 July 2011

Mr Justice Patrick McCarthy (High Court), Law Society President John Costello, Anne Colley (chair, Legal Aid Board) and Ken Murphy (director general) were guests of honour at the parchment ceremony for newly qualified solicitors on 28 July 2011: Con Aherne, Owen Burke, Mary Clarke, Neil Coffey, Ruairi Concannon, Louise Connolly, Mairéad Cusack, Aideen Delaney, Orna Dilworth, Gina Dowling, Nicola Dwyer, Niall Esler, Nessa Foley, Sinead Forde, Bolanle Aina Fowokan, Aisling Glynn, Sarah Grace, Richard Halley, Paul Kearney, Sharon Kearns, Áine Kehoe, Laura Kelly, Aoife Malone, Adrian Mannion, Christine Martin, Niamh Moore, Karen Mulcahy, Catherine Murphy, Patricia Murphy, Sandra Murphy, Mark McCabe, Andrew McGovern, Noreen McGovern, Aoife McGuinness, Mary McLoughlin, Eimear McNamara, Sharon McNamara, Audrey McSweeney, Sarah Nagle, Jacinta Niland, Daryl O'Brien, Brendan Ó Connell, Niamh O'Connor, Mary O'Dwyer, Georgina O'Halloran, Niamh O'Herlihy, Seán O Loingsigh, Eoghan O'Mahony, Natalie Purcell, Natalie Quinlivan, Maurice Regan, Shirley Rocca, Andrew Vallely, Nicola Walsh and Fiona Wood

Newly qualified solicitors at the presentation of their parchments on 29 September 2011

Mr Justice Paul JP Carney (High Court), Law Society President John Costello and Ken Murphy (director general) were guests of honour at the parchment ceremony for newly qualified solicitors on 29 September 2011: Ciara Barnaville, John F Barry, Dervla Boland, Innocent Okey Chukwuezi, Kathrin Coleman, Laura Cremin, Niamh Cullen, Eleanor Cunningham, Louise Corrigan, Mary Deane, Alison Diamond, Nuala Doyle, Cathy Farragher, Michael Flanigan, Jennifer Flannery, Mark Foley, Barry Fox, Stephen Fuller, Elaine Gallagher, Joseph Garvey, Aoife Golden, Daniel Holohan, Glenn Kearney, Sara Kearney, Andrea Kelly, John Lahart, Margaret Leonard, Gillian Lohan, Elizabeth Long, Alison Lynch, Siobhan Marry, Avis Marie Mulvihill, Lydia McCormack, Paul Thomas McGrath, Lorcán McLoughlin, Peter Neligan, Eoghan Nihill, Stephanie O'Brien, Julie O'Donnell, Déaglán O'Dubhda, Philip O'Reilly, Kerrie O'Shea, Niamh Quinn, Frankie Rafferty, Katherine Rainey, Clare Ryan, Linda Sammon, Hayley Tarmey, Jean Tomkin, John Henry Troute, Kim Tully, Rachel Walls and Claire Walsh

Newly qualified solicitors at the presentation of their parchments on 13 October 2011

Mr Justice Frank Clarke (High Court), Law Society President John Costello, Michael E Burke (chair, International Law Section, American Bar Association) and Ken Murphy (director general) were guests of honour at the parchment ceremony for newly qualified solicitors on 13 October 2011: Ruth Barry, Colette Brady, Maureen Bullock, Aoife Burns, Órnagh Burke, Louise Butler, Deirdre Carty, Aoife Candon, Sarah Cloonan, Seán Cosgrove, Nicola Cullen, Enda Cullivan, Sergey Dolomanov, Aisling Dooley, Susan Doyle, Aoife Farrelly, Susan Forristal, Caroline Fogarty, Aoife Garry, Francis Gaughan, Aidan Gleeson, Laura Gleeson, John Glynn, Mary Greaney, Jonathan Groome, Andrew Harding, Marie Louise Heavey, Christina Heffernan, Robert Jacob, Daniel Kelly, Bridie Lally, Conchúr Lavelle, Sinéad Maher, Edward Molloy, Orlaith Molloy, Maeve Moroney, Daniel C Morrissey, Aisling McDermott, Emer McKenna, Louise Ní Ealaithe, Alana Nolan, Barry Noonan, Lisa Oates, Gillian O'Flaherty, Julie O'Regan, Tina O'Reilly, Brendan O'Sullivan, Rachel Prendiville, Cliona Power, Thomas Patrick Reynolds, Orla Shannon, Annette Sheehan, Damien Sheridan, John Tait, Tommy Tuohy, Derek Walsh, Lisa Walsh and Gwen Weir

Newly qualified solicitors at the presentation of their parchments on 20 October 2011

Law Society President John Costello, Mr Justice John MacMenamin (High Court) and Mary Keane (deputy director general) were guests of honour at the parchment ceremony for newly qualified solicitors on 20 October 2011: Sarah Atkins, Niall Best, Philip Boland, Aoife Breslin, Gerald Buckley, Geraldine Carr, Áine Clancy, Paul Clarke, Bree Collins, Cormac Conaghan, Lesley Deane, Yvonne Deane, Graham Dowling, Kevin Feenan, Philip Flaherty, Siobhan Foley, Richard Gill, Ina Harrington, Louise Hodnett, Donal Holohan, Aimee Keane, Valerie Kent, Aoife Kieran, David Larkin, Sarah Lennon, Jonathan Maher, Simon Mahon, William Marshall, Moya Moore, Rachael Mullock, Norma Mullooly, Cliodhna Murphy, Kate McKenna, Seana McManus, Grace McReynolds, Gemma O'Brien, Laura O'Connor, Luke O'Donovan, Aoife O'Gorman, Brid O'Neill, Salma Paryani, Darren Phelan and Laura Treacy

Planning and Environmental Law in Ireland

John Gore-Grimes. Bloomsbury Professional (2011), www.bloomsburyprofessional.com. ISBN: 978-1-84766-365-8. Price: €175.

Now is precisely the time when we need legal structures to ensure a proper balance between economic development, human needs and environmental protection. Anyone looking for a source book about the reality of the last number of years in Ireland, the complexity of the current planning and environmental regime, and the many ways in which we could improve need look no further than this mammoth tome.

Not only does this book give us the benefit of John's extensive and long experience in the area, it also provides comprehensive information across a range of topics that otherwise would require a huge amount of research. In many areas, he quotes the relevant legislation. Some may regard this as contrary to what a legal book should be about, but I find it extremely useful.

I have used the book extensively since its publication. A hardback loose-leaf format might be more durable. There are some typographical errors, perhaps not surprising in a book of this length.

Judge Ronan Keane's foreword should be read by every politician, as it draws attention to the need for court oversight rather than an exclusively administrative approach to planning law.

Every firm should buy this book. Anyone interested in property law should read it. We should all be grateful to John Gore-Grimes for writing it.

Kevin Hoy is head of real estate in Mason Hayes & Curran.

Irish Company Secretary's Handbook

Jacqueline McGowan-Smyth and Eleanor Daly. Bloomsbury Professional (2011), www.bloomsburyprofessional.com. ISBN: 978-1-84766-146-3. Price: €165 (plus VAT).

The first thing you find when you turn the cover of this book is a CD-ROM with the book's precedents in it. For some, these will be reason enough to purchase the book. There then follows a table of cases and table of statutes.

The book's contents are organised into 20 chapters, by subject matter. Each chapter has a legal commentary followed by precedents relevant to the subject matter. There are chapters on the company secretary, directors, members, auditors receivers and examiners, incorporation and re-registration, company name, memorandum and articles of association, accounts, annual return, borrowing and charges, registered office, company registers, share capital, share registration, dividends and distributions, corporate authority, members' resolutions, board resolutions, members voluntary winding up, and strike-off and restoration.

For example, in the case of directors, the commentary describes the role of a director, qualifications of directors, board structures, types of director (actual, chairman, shadow, *de facto*, alternate, executive, non-executive, nominee, assignee), limits on directorships, appointment, rotation and removal of directors, duties and powers of directors, disclosure requirements and procedures for transactions with directors.

There then follows 63 pages containing 46 precedent documents and three checklists – all of which are on the aforementioned CD. The precedents include the mundane (board resolution to approve the appointment of an alternate director) and the complex (a suite of documents to approve a guarantee of directors' borrowings under section 34 of the *Companies Act 1990*).

Let me conclude with some evangelism: solicitors should be providing company secretarial services. We have over 180,000 active companies in Ireland, and each one needs the benefit of company secretarial expertise. Many companies do have in-house expertise, but most do not. Solicitors, therefore, have an opportunity to expand their area of practice – and, if they do, they must have this book in their library.

Paul Egan is a partner in Mason Hayes & Curran and is a member of the Company Law Review Group.

Liquor Licensing Laws of Ireland (4th edition)

James V Woods and Nicola Jane Andrews. James V Woods BL (2011), 12 Elsinore, Castletroy, Co Limerick; jvwoods@eircom.net. Price: €150.

This is an excellent reference text that deals with a subject fraught with complexity. Published in May 2011, it takes into account the *Fines Act 2010* and the *Intoxicating Liquor Licensing Act 2008*, which introduced new requirements for wine retailer's off-licence, amended the trading hours for off-licences, and the closing times for theatres.

Each section of the book describes the licence application to which it refers, together with a summary of the entitlements and restrictions, before setting out the procedure for making an application to the court. It sets out the court fees, identifies the forms required, and explains the meaning of various words and phrases that may be specific to that application. The concise manner in which the material is presented makes the book very practical and user friendly and ensures that the information on any topic may be quickly sourced.

The appendices set out extensive precedents for each application. A section is also devoted to applications that do not require a court certificate and outlines the proofs required for submitting such applications to the Customs and Excise Department of the Revenue Commissioners.

In summary, the material is easily accessible, concisely organised and very reliable. No practitioner working in this area should be without this book.

Joyce A Good Hammond is a partner at Hammond Good in Mallow, Co Cork.

Pre-1922 legislation: what's still in force?

As we move further away from our pre-1922 statutory legacy, the need to check on the status of pre-1922 legislation becomes less frequent, writes Mary Gaynor

Mary Gaynor is head of library and information services at the Law Society of Ireland

Statute law consolidation acts have, in recent years, enacted sweeping repeals to older acts, and a programme of statute law restatement is being energetically pursued by the Law Reform Commission. Restatements are published by the Office of the Attorney General and are updated versions of groups of acts. They do not alter the substance of the law, but can however be cited in court and are accepted as *prima facie* evidence of the legislation set out in them.

The library staff can assist with your queries on old statutes by, firstly, checking the status of an act to a timeline of 31 December 1921. This is done by checking the *Chronological Table and Index of the Statutes* (37th edition), a two-volume set published by HMSO, which tracks amendments and repeals to sections of acts. Post-1922 amendments are found in the legislation directory on the Irish Statute Book website, www.irishstatutebook.ie. This electronic directory contains a number of tables of legislation covering the periods pre-Union (1169-1800), statutes of England (1066-1706), statutes of Great Britain (1707-1800) and statutes of the United Kingdom of Great Britain and Ireland (1801-1922). Each table lists the acts in chronological order, with columns indicating how an act has been affected and the effecting provision, with live links through to the full text. The tables are currently up to date to 19 August 2011.

Practical examples of queries the library receives include:

- What sections of the *Conveyancing Act 1881* are still in force?
- Has a particular section of the *Public Health (Ireland) Act 1878* been repealed?
- What acts have amended the *Acquisition of Land (Assessment of Compensation) Act 1919*?

The full texts of all pre-1922 acts are available from the library and can be scanned and emailed direct to your desktop. If we don't have the act you are looking for, we can source it from another library. Contact us with your queries on tel: 01 672 4843/4 or email: library@lawsociety.ie.

Assault on the Four Courts, April 1922

WIFI IN THE LIBRARY

Wifi is now available in the library. Ask at the desk for log-in details.

LOCAL AND PERSONAL ACTS – PRE-1922

Why is the *Dublin Corporation Act 1890* not included in the volume of acts for 1890? This act is not a public statute but is classified as a local and personal act. The library has a small collection of local and personal acts with application to Ireland. These acts often relate to local government, harbours, canals, fisheries, lighting and other topics of local interest only.

JUST PUBLISHED

New books available to borrow

- Bingham, Tom, *Lives of the Law: Selected Essays and Speeches, 2000-2010*, (Oxford: OUP, 2011)
- De Londras, Fiona, *Principles of Irish Property Law* (2nd ed) (Dublin: Clarus Press, 2011)
- Donnellan, Laura, *Sport and the Law* (Dublin: Blackhall Publishing, 2010)
- Fisher, William, *Fisher & Lightwood's Law of Mortgage* (13th ed) (London: LexisNexis, 2011)
- Grundmann, Stefan, *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges Of Contracting* (London: Kluwer, 2011)
- Laddie, Hugh *et al*, *The Modern Law of Copyright and Designs* (4th ed) (London: LexisNexis, 2011)
- Macdonald, Ian A, *Macdonald's Immigration Law and Practice in the UK* (8th ed) (London: LexisNexis, 2010)
- McDougall, Ian, *Cases that Changed our Lives* (London: LexisNexis, 2010)
- Madden, Deirdre, *Medicine, Ethics and the Law* (2nd ed) (Haywards Heath: Bloomsbury Professional, 2011)
- Mooney Cotter, Anne-Marie, *Pregnant Pause: an International Legal Analysis of Maternity Discrimination* (London: Ashgate, 2010)
- Neate, Francis, *The Rule of Law: Perspectives from around the Globe*, (London: LexisNexis, 2009)
- O'Brien, Conor, *Double Taxation Agreements in Ireland* (6th ed) (Dublin: Institute of Taxation in Ireland, 2011)
- *Round Hall Funds Law Conference 2011* (Dublin: Round Hall, 2011)
- Schweppe, Jennifer *et al*, *How to Think, Write and Cite: Key Skills for Irish Law Students* (Dublin: Round Hall, 2011)
- Walmsley, Keith, *Butterworth's Company Law Handbook 2011* (25th ed) (London: LexisNexis, 2011)

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Law Society of Ireland

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Practice note

Practising certificate 2012: notice to all practising solicitors

It is misconduct and a criminal offence for a solicitor (other than a solicitor in the full-time service of the State) to practise without a practising certificate. Any solicitor found to be practising without a practising certificate is liable to be referred to the Solicitors Disciplinary Tribunal.

Practising certificate application forms

Application forms will be issued during the week commencing 12 December 2011. Application forms for solicitors in private practice will be forwarded to the principal or the managing partner in each practice, rather than to each solicitor.

When you must apply

A practising certificate must be applied for on or before 1 February in each year in order to be dated 1 January of that year and thereby operate as a qualification to practise from the commencement of the year. It is therefore a legal requirement for a practising solicitor to deliver or cause to be delivered to the Registrar of Solicitors, on or before 1 February 2012, an application in the prescribed form, duly completed and signed by the applicant solicitor personally, together with the appropriate fee. The onus is on each solicitor to ensure that his or her application form and fee is delivered by 1 February 2012. Applications should be delivered to: Regulation Department, Law Society of Ireland, George's Court, George's Lane, Dublin 7; DX 1025 Four Courts.

What happens if you apply late?

Any applications for practising certificates that are received after 1 February 2012 will result in the practising certificates being dated the date of actual receipt by the Registrar of Solicitors, rather than 1 January 2012. There is no legal power to allow any period of grace under any circumstances whatsoever.

Please note that, again during 2011, a number of solicitors went to the trouble and expense of making an application to the High Court for their practising certificate to be backdated to 1 January because their practising certificate application was received after 1 February.

The Regulation of Practice Committee is the committee of the Society that has responsibility for supervising compliance with practising certificate requirements. A special meeting of this committee will be held on a date after 1 February 2012, to be decided, to consider any late or unresolved applications for practising certificates. At this meeting, any practising solicitors who have not applied by then for a practising certificate will be considered for referral forthwith to the Solicitors Disciplinary Tribunal and will be informed that the Society reserves the right to take proceedings for an order under section 18 of the *Solicitors (Amendment) Act 2002* to prohibit them from practising illegally.

If you are an employed solicitor

Solicitors who are employed should note that it is the statutory obligation of every solicitor who requires a practising certificate to ensure that he or she has a practising certificate in force. Employed solicitors cannot absolve themselves from this responsibility by relying on their employers to procure their practising certificates. However, it is the Society's recommendation that all employers should pay for the practising certificate of solicitors employed by them.

Some of your details are already on the application form

The practising certificate application form will be issued with certain information relating to each solicitor's practice already completed. Such information will include the relevant fees due by each solicitor and, where applicable, provided date of birth has been notified to the Society, will include an adjustment for those solicitors of 70 years or over, to take account of the fact that they will not be covered under the provisions of the Solicitors' Group Life Cover Scheme.

Law Directory 2012

It is intended that the *Law Directory 2012* will note all solicitors who have been issued with a practising certificate by 10 February 2012 (not those who have applied by 10 February 2012). Therefore, in order to ensure that your practising certificate issues by 10 February 2012, you should ensure that the application form you return to the Society is completed correctly. If it is not completed correctly, it will be necessary to return the form, which may result in delaying the issue of your practising certificate, despite the fact that you had applied for it prior to 10 February 2012.

What you can access on the website (www.lawsociety.ie)

Your individual pre-populated application form will also become available on the members' area of the Law Society website during the week commencing 12 December 2011, which you can complete online prior to printing a copy for signing and returning to the Society with the appropriate fee. This area is accessible by using your username and password: for assistance, please visit www.lawsociety.ie/help. Blank forms will also be available for you to download, if required. In addition, you may request a form to be emailed to you by emailing pcrenewals@lawsociety.ie.

If you are ceasing practice

If you have recently ceased practice or are intending to cease practice in the coming year, please notify the Society accordingly.

Acknowledgement of application forms

Please note that it is not the Society's policy to acknowledge receipt of application forms as received.

Duplicate practising certificate

A fee of €50 will be payable in respect of each duplicate practising certificate issued for any purpose. G

John Elliot,
Registrar of Solicitors and
Director of Regulation

BRIEFING

Legislation update 11 October – 9 November 2011

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

ACTS PASSED

Central Bank and Credit Institutions Resolution Act 2011
Number: 27/2011
Content: Makes provision for an effective and expeditious resolution regime for certain credit institutions at the least cost to the State; amends certain enactments and provides for related matters.
Enacted: 20/10/2011
Commencement: 28/10/2011 (per SI 548/2011)

Road Traffic (No 2) Act 2011
Number: 28/2011
Content: Amends the provisions in the *Road Traffic Acts 1961-2011* to (a) allow for mandatory alcohol testing at lower drink-driving limits, in line with the *Road Traffic Act 2010*; (b) clarify provisions associated with the production of a licence and alternative verdicts arising from preliminary and mandatory breath-testing requirements; and (c) provides for a number of minor and technical amendments to the *Road Traffic Acts*.
Enacted: 20/10/2011
Commencement: 27/10/2011 (midnight) (per SI 542/2011)

SELECTED STATUTORY INSTRUMENTS

Central Bank and Credit Institutions (Resolution) Act 2011 (Commencement) Order 2011
Number: SI 548/2011
Content: Appoints 28/10/2011 as the commencement date for all sections of the act.
Commencement: 28/10/2011

Circuit Court Rules (Judges' Robes) 2011
Number: SI 523/2011
Content: Amends order 3 of the *Circuit Court Rules* to dispense with such requirement as existed prior to the coming into operation of these rules that a judge of the Circuit Court must wear a wig of a ceremonial type during the sittings of that court.
Commencement: 14/10/2011

Civil Law (Miscellaneous Provisions) Act 2011 (Commencement) Order 2011
Number: SI 508/2011
Content: Appoints 10/10/2011 as the commencement date for s30(g) of the act. Section 30(g) amends s85 of the *Bankruptcy Act 1988* to provide, subject to conditions, for the reduction of the application period to the court for discharge from bankruptcy from 12 years to five years and to provide for the automatic discharge of bankruptcies on the 12th anniversary of the adjudication order.
Commencement: 10/10/2011

Civil Law (Miscellaneous Provisions) Act 2011 (Commencement) (No 2) Order 2011
Number: SI 539/2011
Content: Appoints 1/11/2011 as the commencement date for ss49-55 of the act. Sections 49-55 pro-

vide for the transfer of responsibility for administration of the Family Mediation Service to the Legal Aid Board, the necessary amendments of the *Family Support Agency Act 2001* and the *Civil Legal Aid Act 1995*, and the transfer of staff and property of the Family Mediation Service to the Legal Aid Board.
Commencement: 1/11/2011

Company Law Enforcement Act 2001 (Section 110) (Commencement) Order 2011
Number: SI 487/2011
Content: Appoints 10/10/2011 as the commencement date for s110 of the act. Section 110 allows for the provision of certain information to juries in a trial on indictment of an offence under the *Companies Acts*.
Commencement: 10/10/2011

Courts Service Act 1998 (Section 29(2)) Order 2011
Number: SI 526/2011
Content: Amends schedule 2 of the act in order to transfer the responsibility for the appointment of temporary district probate registrars from the Minister for Justice and Equality to the Courts Service.
Commencement: 1/11/2011

Road Traffic (No 2) Act 2011 (Commencement) Order 2011
Number: SI 542/2011
Content: Appoints midnight of 27/10/2011 as the commencement date for all sections of the act.
Commencement: 27/10/2011

Rules of the Superior Courts (Robes of Bench) 2011
Number: SI 524/2011
Content: Amends order 119 of the *Rules of the Superior Courts* to dispense with such requirement as existed prior to the coming into operation of these rules that a judge of the Superior Courts must wear a wig of ceremonial type during the sittings of that court.
Commencement: 14/10/2011 G

Prepared by the Law Society Library

ONE TO WATCH

One to watch: new legislation

Multi-Unit Developments Act 2011

The *Multi-Unit Developments Act 2011* came into operation on 1 April 2011. Sections 14 and 32 of the act have immediate effect. Section 14 relates to the structure of certain owners' management companies, and section 32 deals with restricting such companies from entering into certain contracts. The remaining provisions of the act received commencement orders on 2 March 2011.

The date set by the act for the handing over of private residential developments was 1 October. It is therefore timely to now consider the significance of the passing of this date for the unit owner and the developer.

Overview

A 'commercial unit' is defined in section 1 as "a unit in a mixed use multi-unit development which is not a residential unit and is intended for commercial use".

A 'mixed-use multi-unit development' means a "multi-unit development of which a commercial unit (other than a childcare facility) forms part of the development".

A 'multi-unit development' is also defined in section 1 as " a development being land on which there stands erected a building or buildings comprising a unit or units and that:

a) As respects such units, it is intended that amenities, facilities and services are to be shared, and
b) Subject to section 2(1), the development contains not less than five residential units."

Main points:

- It provides, in section 3, for the establishment of an owners' management company, which is to be set up at the expense of the developer of the multi-unit development concerned.
- Where a multi-unit development has been substantially completed by or on behalf of the developer, and the ownership of the relevant parts of the common areas or the reversion in the units concerned has not been transferred to the owners' management company, the developer shall, within six months of the commencement of the act, arrange for the transfer of such ownership to the owners' management company without the reservation of any beneficial interest.
- The obligation to complete a development remains with the developer. The transfer of the ownership of an interest in the relevant parts of the common areas of a multi-unit development shall not relieve the person who would otherwise have been responsible from the duty, obligation or responsibility to ensure completion of the development.
- The developer shall indemnify the owners' management company in respect of all claims against the company of whatever nature or kind in respect of acts or omissions by the developer in the course of works connected with the completion of the multi-unit development.
- The developer shall, at its own expense, effect and keep in force a policy of insurance with an authorised insurer providing adequate insurance in respect of all risks in respect of the developer's use or occupation of the multi-unit development.
- Where, in respect of a multi-unit development, the development stage has ended, the owner of every beneficial interest in the residential units shall, as soon as practicable thereafter, make a statutory declaration for the benefit of the owners' management company that the beneficial interest concerned stands transferred to the owners' management company, and the effect of the making of such declaration is that the beneficial interest and legal interest stand merged.
- The annual service charge in respect of a multi-unit development in relation to a particular period shall not be levied unless it has been considered by a general meeting of the members concerned, called for the purposes that include consideration of an estimate of the expenditure that it is anticipated will be incurred by the company in that period.
- An owners' management company shall establish a building investment fund ('sinking fund') for the purpose of discharging expenditure reasonably incurred on refurbishment, improvement, maintenance of a non-recurring nature or advice from a suitably qualified person. The amount of the contribution to be paid in respect of a unit by each unit owner to the sinking fund in respect of a particular year shall be the amount of €200 or such other amount as may be agreed by a meeting of the members.
- Section 24 deals with dispute resolution. Section 25 gives the list of persons to whom section 24 applies. Under section 24, a person may make, in respect of a multi-unit development, an application to the court (a) for an order to enforce any rights conferred, or obligations imposed, by this act or any rule of law, or (b) for an order relation to any matter to which reference to making an application under this section is made in this act. G

BRIEFING

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 Rosalyn Kelly, a solicitor practising as Rosalyn Kelly, solicitor, The Old Parochial House, Coole, Co Westmeath, and in the matter of the *Solicitors Acts 1954-2008* [7688/DT05/08 and High Court record no 2008/69 SA]
Law Society of Ireland (applicant)
Rosalyn Kelly (respondent solicitor)
On 10 June 2008, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

a) Failed to comply with an undertaking given under cover of letter dated 14 August 2003 to the complainant, whereby she undertook to register her named clients as the registered owners of an absolute and unencumbered freehold title in the Land Registry to property in Co Westmeath and to let the complainant have a dealing number and certified up-to-date copy folio.
b) Failed to reply adequately to the complainant's solicitors' correspondence, dated 9 February 2004, 3 September 2004, 1 February 2006, 16 October 2006, 11 December 2006 and 16 February 2007.
c) Gave certain assurances in a telephone conversation to the complainant, dated 26 July 2006, which she did not carry out.
d) Misled and misrepresented the whereabouts of the file to the complainant and the Society by letter dated 29 July 2007, when she advised that the file was in the possession of named solicitors. The named solicitors had previously advised the complainant by letter dated 23 April 2007 that they did not hold the subject file.
e) Failed to reply to the Society's letters dated 13 June 2007, 2 July 2007, 4 July 2007 and 9 August 2007 respectively.
f) Through her conduct, showed a disregard for the statutory obligations and responsibilities of the Society in dealing with complaints.

The opinion of the Solicitors Disciplinary Tribunal as to the fitness or otherwise of the respondent solicitor to be a member of the solicitors' profession and their recommendations as to the sanctions that, in their opinion, should be imposed on the respondent solicitor, were as follows:

a) The respondent solicitor be suspended from practice for a period of two years on such terms as the High Court thinks fit,
b) After the expiration of the said two-year suspension period, the respondent solicitor should not be permitted to practise as a sole practitioner or in partnership, that she be permitted only to practise as an assistant solicitor under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Society, and
c) The respondent solicitor pay the whole of the costs of the Society, to be taxed in default of agreement.

On 15 December 2008, the President of the High Court ordered that:

1) The respondent solicitor shall be suspended from practising as a solicitor,
2) The Society do recover the costs of the High Court proceedings and the costs of the proceedings before the Solicitors Disciplinary Tribunal as against the respondent solicitor when taxed or ascertained, and that
3) There be liberty to apply to the respondent solicitor under the Law Society rules for readmission.

In the matter of Fergal M Dowling, a solicitor formerly practising with Seamus Maguire & Co, Solicitors, 10 Main Street, Blanchardstown, Dublin 15, and in the matter of the *Solicitors Acts 1954-2008* [8220/DT39/10 and High Court record no 2011/70 SA]
Law Society of Ireland (applicant)
Fergal M Dowling (respondent solicitor)

On 27 January 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Misapplied loan monies that had been transferred to the client account of Seamus Maguire & Co by AIB on or about 7 June 2007 by failing to disburse the monies for the purpose for which they had been advanced by AIB to his named clients, that is, the purchase of a named property by way of redemption of an Anglo Irish Bank mortgage on that property, and by instead applying the said monies to make payments in an unrelated property transaction involving one of the named clients,
b) Misapplied €2,000,000 of the AIB loan monies on or about 8 June 2007 by obtaining a draft drawn on the client account in that amount for payment of a deposit in the unrelated property transaction; misapplied a further sum of the loan monies of €200,000 on or about 22 June 2007 towards the unrelated purchase; and misapplied a further sum of the loan monies of €372,821.92 on or about 23 August 2007 towards the unrelated purchase,
c) Misapplied the said loan monies, knowing this to be a fundamental and egregious breach of an undertaking given by Seamus Maguire & Co to AIB on or about 5 June 2007, which undertaking he had arranged to be signed by a partner in his firm and given to AIB,
d) Failed to disclose to AIB Bank and his employers, Seamus Maguire & Co, the fact that the loan monies had not been used to discharge the Anglo Irish Bank loan and that the undertaking given to AIB Bank on or about 5 June 2007 in respect of that loan had not been complied with,
e) Failed to ensure that the undertaking given by his firm to AIB on or about 5 June 2007 in respect of the said loan monies was complied with and, in particular, failed to ensure that AIB's security for the loan was put in place,
f) By his actions, exposed his employers, Seamus Maguire & Co, to legal proceedings by AIB for the recovery of all the loan monies plus interest, that is, a sum in excess of €3,000,000, arising from the breach of that firm's undertaking, which he had caused, and thereby brought the solicitors' profession into disrepute.

The tribunal ordered that the matter be brought before the High Court and, on 18 July 2011, the President of the High Court ordered that:

1) The respondent solicitor should be permitted to practise as an assistant solicitor in the direct employment and supervision of a supervising solicitor of no less than ten years' standing, to be approved in advance by the Society,
2) The Society do recover the cost of the proceedings before the High Court and the costs of the proceedings before the Solicitors Disciplinary Tribunal, to include witnesses' expenses against the respondent when taxed and ascertained. G

NOTICE: THE HIGH COURT

High Court 2011 no 9SA
In the matter of Katherine MA Ryan, a solicitor of 42 Woodley Park, Kilmacud, Dublin 14, and in the matter of the *Solicitors Acts 1954-2008*
Take notice that, by order of the High Court made on Monday 24 October 2011, it was ordered that the name of Katherine MA Ryan, solicitor, of 42 Woodley Park, Kilmacud, Dublin 14, be struck off the Roll of Solicitors.
John Elliot, Registrar of Solicitors
1 November 2011

BRIEFING

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

Resolutions

Annual general meeting – articles of association – Companies Acts 1963-2010 – *Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders and listed companies – regulations 5 and 7 of the* Shareholders' Rights Directive *(2007/36/EC) – whether the defendant could be compelled to table resolutions, which if passed in a general meeting, could not lawfully be implemented.*

The plaintiff held in excess of 3% of the total share voting rights of all the members of the defendant company who had a right to vote at the annual general meeting, scheduled for 6 May 2011. The plaintiff wrote to the defendant, relying on section 133B of the *Companies Act 1963* (as inserted by regulation 7 of the *Shareholders' Rights Directive*) expressing its wish to table two resolutions at the AGM. The first regulation essentially proposed that the company should declare and pay a dividend of €30 million for the year ended 31 December 2010. The second resolution stated that the shareholders believed that no further payments should be made either to the employee share ownership trust or to any company pension schemes over and above the existing defined contribution rates without prior shareholder approval. The defendant refused to table those two resolutions and, consequently, the plaintiff brought these proceedings seeking various declarations and orders compelling the defendant to take all necessary steps for the purpose of allowing the plaintiff to table the resolutions and place them on the defendant's internet site as soon as possible. The plaintiff claimed that the refusal to table the draft resolutions was unlawful and in breach of the *Companies Acts 1963-2009* and, in particular, sections 132A and 133B of the *Companies Act 1963* as inserted by regulations 5 and 7 of the regulations. The defendant argued that the proceedings raised a net point, namely, whether the defendant could be compelled to table resolutions that, if passed in a general meeting, it could not lawfully implement. The defendant submitted that the resolutions were bad in law in that they attempted to subvert the authority that was expressly conferred upon the directors of the respondent company under the articles of association. Specifically, it was submitted that the directors had already recommended that no dividend be paid for the year ended 31 December 2010 and, further, that the power to determine what pension benefits the defendant would provide and to determine what payments were to be made to the company's pension scheme was entrusted by the articles of association to the directors.

McGovern J refused the reliefs sought, holding that, in light of the wording of the director's report and section 158 of the 1963 act, it was clear that the board of directors had recommended to the AGM that no dividends be paid in respect of the year ended 31 December 2010. Having considered the articles of association, it was clear the first proposed resolution sought to circumvent article 111 and that was not permissible. Consequently, the defendant was entitled to refuse to put that resolution before the AGM. The second proposed resolution was unsatisfactory in that, by reason of its wording, it appeared to be merely aspirational. The defendant was also entitled to refuse to table the second proposed resolution because it sought to usurp the powers of the directors specifically given to them under the articles of association.

***Ryanair Limited (plaintiff) v Aer Lingus Group PLC (defendant)*, High Court, 15/4/2011** [2011] 4 JIC 1506

JUDICIAL REVIEW

Certiorari

Criminal law – conviction imposed in absentia *– fair procedures – whether district judge could have adjourned case or issue bench warrant to compel presence deprived applicant of natural and constitutional justice.*

The applicant had multiple road traffic offences and in these proceedings was before the court for failure to produce a driver's licence and insurance. He was present in court when the case was listed for hearing and a trial date given, but failed to appear in court for the date of trial. Submissions were made to adjourn the hearing or issue a bench warrant but were dismissed. The case proceeded in his absence. As the applicant had 54 previous convictions, the trial judge took a serious view, imposing a 40-year driving ban and five months' imprisonment. Submissions were made to the judge to adjourn the sentencing so the applicant could be heard, but the judge declined this request. The applicant sought an order of *certiorari* on grounds that he was denied fair and natural constitutional justice and the judge was incorrect in refusing an adjournment before imposing sentence.

Kearns P ruled that the trial judge was within his rights to proceed with the case in the absence of the applicant, but that he should have allowed the applicant be present before imposing sentence. In following *Brennan v Windle* ([2003] 3 IR 494), the Supreme Court ruled that where the sentencing judge has in mind to impose a prison sentence of some length, the failure to ascertain if there is a *bona fide* reason for non-attendance does amount to a breach of fair procedures and a breach of the requirements of constitutional justice.

***Jason O'Brien (applicant) v District Judge John Coughlan (respondent)*, High Court, 29/7/2011** [2011] 7 JIC 2901

LAND

Wills and trusts

Probate – conveyancing – property – misrepresentation – improvident transaction – restitutio in integrum *– whether conveyances should be set aside – whether sale of interest in property conditional on factors that had not been fulfilled.*

A dispute had arisen between siblings in relation to a property that had been bequeathed to them in a will. Subsequently, efforts were made by one sibling (the defendant) to purchase the interests of his siblings in a particular property. Two of the siblings disposed of their interests (the plaintiffs) but subsequently contended that they had only done so on the basis that certain events were to occur, which included that their mother was to live in the property in question along with the defendant. A fourth sibling declined to sell her share in the property. The defendant disputed this evidence that the agreement was conditional. In these proceedings, the plaintiffs sought to set aside the conveyances of their shares in the property on the basis that their execution of same was procured by misrepresentation and/or undue influence and/or duress. In the alternative, an order was sought to set aside the conveyances on the basis that they otherwise constituted an unconscionable bargain and/or improvident transaction.

Laffoy J dismissed the claim, holding that it could not be said that the defendant had promised to move his family into the premises in question along with his mother. The court was not satisfied that pressure, either emotional or otherwise, was exerted upon the plaintiffs to complete the transactions. Although a presumption of influence could be shown, it was not possible to conclude that the defendant had obtained a substantial benefit at the expense of the other parties. The consequences of the conveyances were not overreaching or oppressive.

***Mulcahy and Keaton (plaintiffs) v Mulcahy (defendant)*, High Court, 6/5/2011** [2011] 5 JIC 0601

Eurlegal

Edited by TP Kennedy, Director of Education

Ownership and control of Irish and European airlines

Mergers, acquisitions and takeovers of airlines hit the headlines from time to time due to the high profile of many of the firms involved and also the large sums of money at stake. In the normal course of events, the merger, takeover or acquisition of an airline in Ireland is considered through the rubric of the *Competition Act 2002* and Council Regulation (EC) no 139/2004, the EC *Merger Regulation*. It is important to note that, in addition, airlines are subject to Regulation (EC) no 1008/2008 on the common rules on the operation of air services within the community (the *Aviation Regulation*) and, in particular, the ownership and control rules. Failure by parties in a merger, takeover or acquisition to comply with the *Aviation Regulation* as an outcome of their transaction may result in the airline losing its operating licence, despite apparent compliance with the merger rules.

The EU rules on ownership and control of an airline derive from the *Convention on International Civil Aviation* (the *Chicago Convention*), signed on 7 December 1944. This predates the 1957 *Treaty of Rome*, the forerunner of the *Treaty on European Union* and the *Treaty on the Functioning of the European Union* and the resultant EC *Merger Regulation*, which means that the aviation ownership and control regulations are motivated by concerns quite different from the desire to avoid concentrations within the common market. It is worthwhile noting that the institution set up to oversee the implementation of the *Chicago Convention* is the International Civil Aviation Organisation, a specialised agency of the United Nations.

"Look up, it's... er, dunno!"

Air transport agreements

A key feature of the international air transport system foreseen by the *Chicago Convention* is bilateral air transport agreements between states. Under a bilateral air transport agreement, two governments agree that specific designated airlines from each country, owned and controlled by either the state itself or nationals of that state, may fly to and from, and thus trade in, the other country. That system is the foundation of international air transport. The European Union has developed a more integrated approach based on that system. The internal EU aviation market is an agreement by the EU member states, whereby airlines licensed in one member state may fly into and from, and thus trade in, the other member states without the need to be designated in a series of bilateral air transport agreements between member states. The member states have created a multilateral open-skies agreement within the context of the *EU Treaty*. The airline's EU member-state-granted operating licence is a passport to trade within the internal aviation market. As with bilateral air transport agreements, a key feature of this EU agreement is that is that it is restricted to airlines owned and controlled by member states and their nationals. Third-country carriers trading in and flying to and from the EU do so based on separate agreements.

Airline ownership and control is closely monitored, as access to air routes based on agreements of the type described above is designed to exclude those not party to the agreement. Thus, a feature of airline regulation is to continue to exclude third-party countries or nationals from gaining ownership and control of certain airlines and thereby circumnavigating the air transport agreements to which they are neither party, nor designated. In this context, the ownership and control requirements in relation to airlines can be characterised as a barrier to market entry – a simple trade barrier. Clearly, this has profound implications for investment in an airline.

A second element of airline ownership and control, and thus access to routes via a bilateral air transport agreement, is national security. This was more obvious from legislation pre-dating Irish membership of the EU. For example, under the *Air Navigation and Transport Act 1965*, the Minister for Transport had the authority to authorise or restrict airlines flying in, over or through Irish airspace. The threat aircraft pose to the safety and security of those on the ground has been clear to all from the very early days of flight. Many states, more so than Ireland, are very security conscious about who can fly in their sovereign airspace.

Rules on ownership and control

What do ownership and control mean? That question cannot be considered in isolation. In order to hold an air carrier operating licence in Ireland or another EU member state, an airline must comply, and then continue to comply, with article 4 of the *Aviation Regulation*. Eight criteria must be complied with, and failure to comply may lead to the airline licence being suspended, revoked or simply not granted. An airline must be able to demonstrate

to the Commission for Aviation Regulation that it complies with the following criteria:

a) Its principal place of business is located in that member state,
b) It holds a valid air-operators certificate issued by a national authority of the same member state whose competent licensing authority is responsible for granting, refusing, revoking or suspending the operating licence of the community air carrier,
c) It has one or more aircraft at its disposal through ownership or a dry lease agreement,
d) Its main occupation is to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft,
e) Its company structure allows the competent licensing authority to implement the provisions of chapter III of the regulation,
f) Member states and/or nationals of member states own more than 50% of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the community is a party,
g) It meets the financial conditions specified in article 5 of the regulation,
h) It complies with the insurance requirements specified in article 11 and in Regulation (EC) no 785/2004, and
i) It complies with the provisions on good repute as specified in article 7 of the regulation.

Ownership and effective control is a two-stage criterion. Ownership of 50% plus of an airline is fairly straightforward to demonstrate. Effective control is more difficult. It is specifically defined in the regulation as follows: "a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:

a) The right to use all or part of the assets of an undertaking,
b) Rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking."

Both parts of the test must be satisfied. What is clear from the test is that joint ownership or control is not possible. EU member states or nationals must have majority ownership and effective control. This may be demonstrated via examination of the articles and memorandum of association, shareholdings, voting rights, the shareholders' agreement, and the manner in which the firm's business plan is to be implemented and/or altered as the situation demands. It is important to note that it is ultimate ownership and control that will be taken into consideration, so if the airline is a subsidiary of another undertaking, the ownership and control of the ultimate parent undertaking will also be examined for compliance. Companies and other legal entities may own an airline, but it is clear from the regulation that the member states or actual individuals involved in ownership and control must be identified. Simply stating Company X or Fund Y is a shareholder does not satisfy the regulation; the individuals involved must be identified.

Operation of the market

Although both are concerned with operation of markets, one can contrast the motivation behind ownership and control requirements under the EC *Merger Regulation* and the *Aviation Regulation*. The motivation of the latter is not to avoid concentrations of ownership in order to defend competition in the market, but rather to exclude certain states or individuals from having majority ownership or control in order to maintain and defend barriers to entry to the market. G

David Hodnett is a solicitor and deputy head of legal affairs of the Commission for Aviation Regulation.

Recent developments in European law

COMPETITION

Case C-347/09, criminal proceedings against Jochen Dickinger and Franz Ömer, 15 September 2011

In Austria, legislation reserves the right to organise and operate games of chance to the Austrian state. It grants one concession to organise gaming (inclusive of online gaming) to a company established in Austria and under the supervision of the Austrian authorities. The organisation of games of chance without a concession is a criminal offence. The applicants are Austrian citizens and the founders of the multinational online games group Bet-at-home.com. Members of the group include a number of Maltese subsidiaries, which offer games of chance and sporting bets on the internet and which hold Maltese licences for these activities. The website is accessible in several languages, including German. Until December 2007, the Maltese subsidiaries used a server in Austria made available to them by Bet-at-home Entertainment GmbH, of which the applicants were the directors. This company also maintained the website and the software needed for the games and provided customer support. Criminal proceedings were brought against the applicants in their capacity as directors of the Austrian company, alleging infringements of the Austrian law on games of chance. The Austrian court referred a number of questions to the CJ, as it was uncertain whether the Austrian rules are compatible with EU law. The Court of Justice noted that a monopoly on games of chance is a restriction of the freedom to provide services. Such a restriction can be justified by overriding reasons in the public interest, such as the objective of ensuring a particularly high level of consumer protection. The question of which objectives are being pursued by the national legislation and the proportionality of those measures are matters that fall within the jurisdiction of the referring court. The CJ provides certain criteria to assist it. The objective of maximising public revenue alone by establishing a monopoly on gaming cannot permit a restriction on the freedom to provide services. Only advertising that is moderate and strictly limited to what is necessary to channel consumers towards controlled gaming networks is permissible. An expansionist commercial policy, the aim of which is to expand the overall market for gaming activities, is not consistent with the objective of fighting crime and fraud. Finally, the court considered whether checks on operators of games of chance carried out in other member states should be taken into account by the authorities of another member state. Given the absence of harmonisation at EU level of the legislation, there is no duty of mutual recognition of authorisations issued by other member states. The fact that a member state has opted for a system of protection that differs from that adopted by another member state cannot affect the assessment of the need for and proportionality of the relevant provisions. A member state may legitimately wish to monitor an economic activity that is carried on in its territory, and that would be impossible if it had to rely on checks made by the authorities of another member state using regulatory systems outside its control.

FREE MOVEMENT OF PERSONS

Opinion of Advocate General Bot, joined cases C-424/10, *Ziolkowski*, and case C-425/10, *Szeja and Others*, 14 September 2011

Directive 2004/38 on the free movement of persons determines how and under what conditions EU citizens may exercise their right to freedom of movement and residence within the territory of the member states. A citizen of the EU has the right to reside in another member state for up to three months without other special conditions. To live in another member state for longer than three months, an EU citizen must be a worker or self-employed in the state or have sufficient resources not to become a burden on the social assistance system of that state and comprehensive sickness insurance cover in that state. The directive also establishes a right of permanent residence for EU citizens who have resided legally in that state for a continuous period of five years. The applicants are Polish nationals, who arrived in Germany in 1988 and 1989, before Poland's accession to the EU. Under German law, they acquired the right to reside there on humanitarian grounds. Their right to reside was extended regularly on the same grounds. After Poland's accession to the EU, they applied to the German authorities for the right of permanent residence. This was refused, on the grounds that they had no work and were unable to prove that they had sufficient resources of their own. A German court asked the CJ whether periods of residence in the host member state under national law alone, including before Poland's accession to the EU, should be regarded as periods of legal residence and taken into account in calculating the residence of an EU citizen for the purposes of the acquisition of the right of permanent residence. The advocate general in his opinion noted that the provisions laid down by the directive do not detract from more favourable national provisions. That is particularly the case where a right of residence was granted on humanitarian grounds without the level of the relevant person's resources being taken into account. By not specifying that those more favourable national provisions are excluded from the mechanism for acquiring the right of permanent residence, the directive has perhaps implicitly validated them under the mechanism in question. The directive is based on the principle that, after a sufficiently long period of residence in the host member state, an EU citizen will have developed close ties with that state and been integrated in its society. The degree of integration of EU citizens does not depend on whether their right of residence is derived from the law of the EU or national law. The directive enacts rules that are binding on the member states and that, once satisfied, cannot preclude recognition of the right of permanent residence. It does not prevent states from enacting their own more favourable rules, which are more likely to accelerate the process of integration and social cohesion. Thus, the advocate general suggested that the court should interpret the directive as meaning that periods of residence in a host member state under its national law alone must be taken into account in calculating the length of the residence of a citizen of the EU for the purposes of the acquisition of the right of permanent residence in that state. The court was also invited to hold that periods of residence by EU citizens before their state of origin accedes to the EU must also be taken into account in the calculation for the purposes of the acquisition of the right of permanent residence.

INTELLECTUAL PROPERTY

Case C-428/09, *Budejovický Budvar, národní podnik v Anheuser-Busch Inc*, 22 September 2011

The *Trademark Directive* (89/104) provides that a trademark is not to be registered or is liable to

be declared invalid if it is identical with an earlier trademark and the goods or services covered by the two trademarks are identical. However, if the proprietor of the earlier trademark has acquiesced, for a period of five successive years, in the use of an identical later trademark, while being aware of such use, he is no longer entitled either to apply for a declaration that the later trademark is invalid or to oppose its use. The Czech brewer entered the British market in 1973, and the American brewer Anheuser-Busch did so in 1974. They have each marketed their beers using the sign 'Budweiser' or expressions including that sign. Anheuser-Busch applied to the British Trade Marks Registry to register the word 'Budweiser' as a trademark for the goods "beer, ale and porter". While this application was being examined, Budvar also submitted an application for registration of the word 'Budweiser' as a trademark. In 2000, the British courts decided that both applicants could have the word 'Budweiser' registered as a trademark. British law allows concurrent registration of the same or confusingly similar marks in circumstances where there is honest concurrent use. Almost five years later, Anheuser-Busch lodged, at the British Trade Marks Registry, an application for a declaration that Budvar's registration of that mark was invalid. It argued that it had registered the trademark first. The Court of Appeal asked the CJ whether Anheuser-Busch's application for a declaration of invalidity should be granted although both companies have used the word 'Budweiser' in good faith in Britain for more than 30 years. The court examined its case law on the rules applicable to a period of five years on the expiry of which the proprietor of the earlier mark loses his right to oppose the use of the later mark. The court held that this period starts to run only after the registration of the later mark in the member state concerned. Mere use of the later mark without any steps to have it registered cannot start that period running. Registration of the earlier mark is not a prerequisite for that period to start running. A trademark can be considered to be earlier without having been registered, as in the case of 'applications for trademarks … subject to their registration' and trademarks that are 'well known'. The proprietor of an earlier trademark cannot be held to have acquiesced in the long and honest use by a third party of an identical later trademark if he was not in a position to oppose that use. Thus, the period during which the proprietor of the earlier trademark was not capable of opposing the use of the later mark cannot be taken into account when calculating the expiry of the limitation period. A later registered mark can be declared invalid only if it has or is liable to have an adverse effect on the essential function of the earlier trademark, which is to guarantee to consumers the origin of the goods covered by it. Both companies had marketed their beers in Britain using the sign 'Budweiser' or a trademark including that sign for almost 30 years prior to registration, and they were authorised to register jointly and concurrently their 'Budweiser' marks in Britain. While Anheuser-Busch submitted an application for registration of the word 'Budweiser' as a trademark in Britain earlier than Budvar, both of those companies have from the beginning used the 'Budweiser' trademarks in good faith. The court noted that, although the names are identical, British consumers are well aware of the difference between Budvar's beers and those of Anheuser-Busch, as their tastes, prices and appearance have always been different. It follows from the coexistence of those two trademarks on the British market that, even though the trademarks are identical, the beers of Anheuser-Busch and Budvar are clearly identifiable as being produced by different companies. Consequently, Budvar's registration in Britain of the later trademark need not be declared invalid.

Case C-324/09, *L'Oréal and Others v eBay*, 12 July 2011

L'Oréal owns a wide range of well-known trademarks. It claims that, by purchasing from paid internet referencing services (such as Google's AdWords) keywords corresponding to the names of its trademarks, eBay directed its users towards goods that infringe trademark law, which are offered for sale on its website. The applicant was also of the view that eBay's efforts to prevent the sale of counterfeit goods on its website are inadequate. Various forms of infringement were detected on eBay's website, including parallel importation. The British High Court asked the CJ a number of questions concerning the obligations to which a company operating an internet marketplace may be subject in order to prevent trademark infringements by its users. The court stated that the proprietor of the trademark may rely on his exclusive right as against an individual who sells trademarked goods online only when those sales take place in the context of a commercial activity. It held that EU trademark rules apply to offers for sale and advertisements relating to trademarked goods located in third states as soon as it is clear that those offers for sale and advertisements are targeted at consumers in the EU. It is for the national courts to assess, on a case-by-case basis, whether there are any relevant factors on the basis of which it may be concluded that an offer for sale or an advertisement displayed on an online marketplace is targeted at EU consumers. One of the factors the national courts will consider is the geographic area to which the seller is willing to dispatch the product. The operator of an internet marketplace does not itself 'use' trademarks within the meaning of the EU legislation if it provides a service consisting merely in enabling its customers to display on its website, in the course of their commercial activities, signs corresponding to trademarks. The court considered that the operator of an online marketplace plays an active role as to give it knowledge of, or control over, the data relating to the offers for sale when it provides assistance that entails, in particular, optimising the presentation of the online offers for sale or promoting those offers. When the operator has played an active role of that kind, it cannot rely on the exemption from liability that EU law confers, under certain conditions, on online service providers, such as operators of internet marketplaces. Even in cases in which the operator has not played an active role of that kind, it cannot rely on the exemption if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the online offers for sale were unlawful and, in the event of it being so aware, failed to act promptly to prevent further such infringements occurring. Thus, the operator may be ordered to take measures making it easier to identify the sellers who are its customers. Although it is necessary to respect the protection of personal data, when the perpetrator of the infringement is operating in the course of trade and not in a private matter, that person must be clearly identifiable. The CJ held that EU law requires the member states to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator to take measure that contribute, not only to bringing to an end infringements of those rights by the users, but also to preventing further infringements of that kind. Those injunctions must be effective, proportionate and dissuasive and must not create barriers to legitimate trade. G

NOTICES

WILLS

Delaney, John (deceased), late of 'Heywood', The Bog Road, Kilcock, Co Kildare, who died on 21 May 2011. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Patrick Groarke of Groarke & Partners, Solicitors, Longford; tel: 043 334 1441, email: patrick@groarkeandpartners.ie

Fagan, Eileen (deceased), late of 18 Munster Street, Phibsboro, Dublin 7. Would any person having knowledge of a will made executed by the above-named deceased, who died on 24 November 2010, please contact Cullen & O'Beirne, Solicitors, Suite 338B, The Capel Building, Mary's Abbey. Dublin 7; tel: 01 888 0855, fax: 01 888 0820, email: info@cullenobeirne.ie

Kiernan, Andrew (deceased), late of 50 Claremont Crescent, Glasnevin, Dublin 11, who died on 21 October 2011. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased please contract Eric A Gleeson of Gleeson & Kean, Solicitors, High Street, Tuam, Co Galway; tel: 093 24731, fax: 093 24088, email: EricA.Gleeson@gleesonkean.ie

RATES

Professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

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

**VAT rate is subject to any changes announced in Budget 2012*

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

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for Jan/Feb *Gazette*: 18 January 2012. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

Looby, Joan (deceased), late of Apartment 2, Block A, Coach Horse Lane, Midleton, Co Cork, who was born on 1 May 1966 and died on 15 September 2011. Would any person having any knowledge of the whereabouts of a will executed by the above-named deceased please contact Daragh Feeney, Solicitors, 1st Floor, Merchants Gate, Merchants Road, Galway; tel: 091 500 787, email: info@daraghfeeneysolicitors.com

McArdle, Francis (deceased), late of Tomard, Leighlinbridge, Co Carlow, otherwise known as Tomard, Milford, Co Carlow, and also late of Glen Lodge, Ricketstown, Rathvilly, Co Carlow. Would any person having knowledge of a will made by the above-named deceased please contact O'Flaherty & Brown, Solicitors, 'Greenville', Athy Road, Carlow; tel: 059 913 0500, fax: 059 913 050

Stapleton, Joseph (deceased), late of City Gate Lodge, Phoenix Park, Dublin 8, and formerly of Friar Street, Thurles, Co Tipperary. Would any solicitor holding or having knowledge of a will made by the above-named deceased, who died on 11 January 2010, please contact Joseph Burke, solicitor, McCartan & Burke, Solicitors, Iceland House, Arran Court, Smithfield, Dublin 7; email: jburke@mccartanandburke.ie, tel: 01 872 5944, fax: 01 872 5018

TITLE DEEDS

Gaj, Margaret (deceased), late of 40 Castlewood Park, Rathmines, Dublin 6. Would any person having any knowledge of the whereabouts of title deeds relating to the above-mentioned premises please contact Richard McGuinness & Co, 24 Sundrive Road, Dublin 12; DX 111005 Kimmage; tel: 01 492 1544, fax: 01 492 1820, email: info@richardmcguinness.ie

In the matter of the *Landlord and Tenant (Ground Rents) Act 1967-2005* – notice of intention to acquire fee simple (section 4): an application by James Madigan & Sons ('the applicant')

Notice to any person having any interest in the freehold interest of the following property: all that and those the lands more particularly described in and demised by an indenture of lease dated 20 November 1884 between (1) Louis Riall of the one part and (2) John Newport of the other part and therein described as: "All that and those that part of the 30 acres of land called Luntsland now called Coldblow being part of Donnybrook otherwise Donnybrook Farm known on the ordnance survey as Donnybrook west which is situate on the west side of the road leading from Donnybrook to Dublin and now called Morehampton Road and on the north-west side of the road lately called Coldblow Lane (now Belmont Avenue) which said premises together with other parts of said lands called Luntsland have been lately in the tenancy of the representatives or undertenants of Francis Kenny which parcel of land extended to be hereby demised contains in breadth in the front to Morehampton Road 149 feet in breadth to Belmont Avenue 160 feet in depth on the north-west side 204 feet and in breadth on the south-west side 197 feet and is bounded on the north-east by Morehampton Road aforesaid on the south-east by Belmont Avenue aforesaid and on the north-west and south-west sides, thereof by other parts of the said 30 acres of land called Luntsland aforesaid lately in the tenancy as the same is more particularly described by a map or terchart thereof laid down on these presents with the houses and buildings thereon and all which said demised lands and premises are situate in the parish of St Marys Donnybrook in the barony and County of Dublin all which said premises are now known as numbers 127, 129, 133, 133a and 135 Morehampton Road and number 1a Belmont Avenue and numbers 1, 3, 5 and 7 Belmont Avenue and the premises comprising Belmont Court all situate in the City of Dublin." Now known as 133, 133A, 133B and 135 Morehampton Road and 1A Belmont Avenue.

Take notice that the applicant, being the party entitled to the lessee's interest under the lease, intends to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest and all intermediate

NOTICES

interests in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned property to the solicitors for the applicant, details of which are provided below, within 21 days from the date of this notice.

In default of such notice being received, the applicant intends to proceed with the application before the county registrar for the city of Dublin for directions as may be appropriate on the basis of the person or persons beneficially entitled to the superior interest including the freehold reversion in the above premises are unknown or unascertained.

Date: 2 December 2011

Signed: Eugene F Collins (solicitors for the applicant), Temple Chambers, 3 Burlington Road, Dublin 4

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*; premises: Ballinlough Delivery Office, Church Yard Lane, Ballinlough, Cork City; applicant: An Post

Notice to any person having any interest in the freehold interest and all intermediate interests of the following property: "All that lot of ground situate in the townland of Ballinlough parish of St Nicholas barony of Cork and county of Cork containing in breadth in the front 104 feet and in depth from front to rere 104 feet and bounded on the north and west by James Cotter's holding on the south by John Donovan's holding and on the east by the public road to Blackrock, being the property more particularly described in a lease dated 14 October 1882 and made between William Charles Connell of the first part and the very reverend John Canon Coghlan Daniel Riordan and Simon O'Connor (being the trustees nominated for the then proposed Ballinlough National School) of the second part and the Commissioners for National Education in Ireland of the third part for the term of 99 years."

Take notice that the applicant, An Post, intends to submit an application to the county registrar for the county of Cork for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for the county of Cork for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the above premises are unknown or unascertained.

Date: 2 December 2011

Signed: Hugh O'Reilly (solicitor for the applicant), GPO, O'Connell Street, Dublin 1

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*.

WILD, WEIRD AND WACKY STORIES FROM LEGAL 'BLAWGS' AND MEDIA AROUND THE WORLD

Atlanta lawyer uses his head to get ahead

If you are injured and in need of a lawyer, Chandler Mason is placing all his bets on his bald head, according to *The Matte Pad*. An Atlanta-based personal injuries lawyer, Mason is setting himself apart from the crowd by investing in a billboard campaign that pictures his bald pate and his website, MyBaldLawyer.com.

"Most laypersons, particularly those who have never had the occasion to hire or work with an attorney, are under the misguided impression that all lawyers are 'too uptight' and 'too expensive'," he told *The Matte Pad*. "So, my idea initially seeks to overcome those misplaced notions."

Golden nectar nets elusive criminal catch

The promise of a crate of beer was enough to lure 19 suspects into the arms of English police. The suspects had been evading arrest for offenses that included burglary, robbery and serious sexual assault.

Sky News **reported that police sent letters to dozens of people who had been evading arrest for months. The letters asked the suspects to call a 'marketing company' if they wished to receive a free crate of beer – but the phone number provided secretly went straight to Chesterfield Police Station.**

Ultimately, 19 suspects called the phone number and arranged a specific date and time for their free crate of beer to be delivered to them. Instead of bringing free beer, however, undercover police disguised as delivery men placed the waiting suspects under arrest. As the great poet Homer might say: "D'oh!"

Spanish cemetery plans to evict the dead

'Pay up or face possible eviction' is the message to the relatives and caretakers of grave sites in the municipal graveyard of the northern Zaragoza city of Torrero, Spain. On 1 November, stickers were placed on thousands of burial sites whose leases are up, reported msnbc.com.

Pushed for space, the deputy urban planning manager for Torrero said that remains had been removed from some 420 crypts in recent months to a common

burial ground. Torrero, like many Spanish cemeteries, no longer allows people to buy grave sites, leasing them instead for periods of between five to 49 years.

The planning manager said the cases involved graves whose leases had not been renewed for 15 years or more. Currently, the city has some 7,000 lapsed-lease burial sites out of a total of some 114,000. "If we keep on building spaces for human remains, where are we going to end up?" he asked. "It's a problem that is affecting big-city cemeteries more and more.

Highway to hell

The controversial English solicitor-rating website 'Solicitors from Hell' has been shut down, six years after it was launched.

Since 2005, the site has been slating the (alleged) worst of the legal profession as "shameless, corrupt, money-grabbing, incompetent specimens of humanity".

Site founder Rick Kordowski has given up his battle with the Law Society of England and Wales, which had attempted to have the site removed for the past six months.

Mr Justice Tugendhat granted the Law Society an injunctive relief forcing Kordowski to take down the site or face contempt proceedings. Just last month, the judge threw out a slander claim brought against Law Society CEO Des Hudson by Kordowski, calling the bid "an abuse of the court process".

In May, ruling in a separate defamation case against Kordowski, Mr Justice Henriques recommended that the society move to close down the site, saying: "No doubt the legal profession does, on occasion, fail those who seek its services. However, many conscientious and highly reputable firms and individuals have found themselves as objects of offensive abuse and defamatory publication at the behest of disappointed litigants."

The Law Society then launched a claim against Kordowski on behalf of all 145,381 solicitors practising in England and Wales and, in August, Kordowski was told to take down the site by 2 September or face action for defamation, harassment and breach of the ***Data Protection Act.*** **He failed to do so, and the society finally won injunctive relief in November.**

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