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James MacGuill wins the day in the European Court of Human Rights

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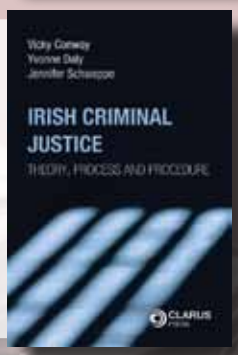

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Dr Michael Doherty

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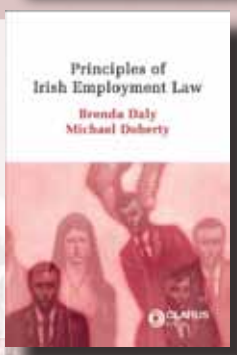

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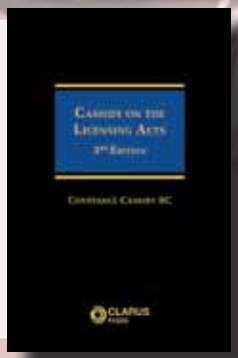

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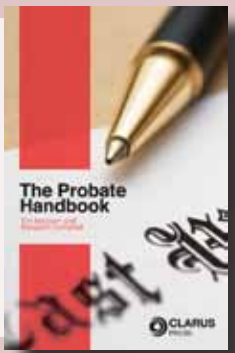

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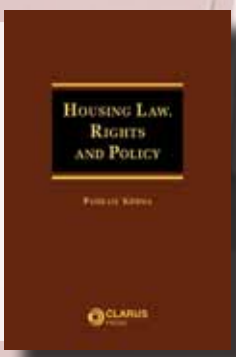

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INSURANCE CRISIS IS MAJOR CONCERN

It is with profound gratitude and great respect for you, my colleagues, that I write my first president's message. The economic tsunami and the horrendously stressful and expensive insurance renewal process, for many colleagues, has caused enormous levels of anxiety, upset and anger, together with huge financial pressure – which I readily acknowledge and with which I empathise.

Some colleagues have told me that they were subjected to totally unacceptable and unreasonable behaviour from insurers in the renewal process – for the last two years especially. The present system has also created great financial, administrative and time pressure on many colleagues. I know the renewal process is also driving some firms out of existence by the high cost of insurance, and many practitioners feel a strong sense of isolation when applying for professional indemnity insurance (PII) renewal.

PII survey

A PII survey has now been sent by the Society to every firm in the country, and I would earnestly request that completed forms, which are confidential, be returned immediately so that they can contribute to major improvements in the PII renewal process for next December. Replies to the survey will be examined at a Council meeting on 18 February 2011. Please be assured that the insurance crisis is the major concern of the Society at present, and the Society is determined to ensure if we possibly can that you, our colleagues, do not face a similar renewal process next December.

On a different note, I wish to organise conferences during the year for sole practitioners and young solicitors to identify ways in which the Society can do more to assist them. I am encouraging the Society's work – which is already underway – to develop a mentoring system for newly qualified solicitors. In addition, I will be examining ways in which the Society can assist colleagues who wish to retire.

LRC reports – guidelines

Last December, the Law Reform Commission published a number of excellent reports and I would like to refer, briefly, to two of these.

The first, reference 97-2010, entitled *Consolidation and Reform of the Courts Acts*, recommends that the monetary jurisdiction limit of the Circuit Court should be increased to €100,000, as intended by section 13 of the *Courts and Court Officers Act 2002*, subject to a lower limit of €50,000 in personal injury claims. The jurisdiction of the District Court would be increased to €20,000. I am asking the Litigation Committee for their views on these recommendations.

The second report, reference 98-2010, entitled *Alternative Dispute Resolution – Mediation and Conciliation*, sets out a statutory framework for ADR applying to individuals, corporate and state bodies. It contains 108 recommendations and attaches a draft bill, which sets out:

a) The general principles applying to mediation (for example, confidentiality, privilege, limitation periods and enforceability),
b) The role of the court,
c) The duty of solicitor, and
d) The obligations on the litigant.

"The PII renewal process is driving some firms out of existence"

I am asking a sub-committee of the Arbitration and Mediation Committee to issue guidelines to the profession on the use of mediation and conciliation in practice.

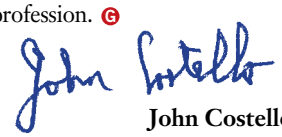
Congratulations to the *Gazette*

This is my first president's message and I am delighted that it is being published in Ireland's 'Business-to-Business Magazine of the Year'. At its December meeting, the Society's Council sent its warmest congratulations to *Gazette* editor Mark McDermott and all his team for their great success in taking the top award in their category, as determined by the Magazines Ireland judges (see p12 of this issue). It reflects well, not only on the *Gazette* team, but on the Society and the profession to have the excellence of our flagship publication nationally recognised in this way. With a determination not to rest on even those impressive laurels, the team has now produced the refreshing new design you see this month.

Contact me

I would encourage any of you with concerns or suggestions to contact me at any time. In particular, in addition to meeting bar associations, I would be delighted to meet any other groups or firms of solicitors who wish to discuss the massive challenges we face as a profession.

Mary McAleese has said: "Ireland's task is to build on all that was good in our success and to make our disappointments a springboard to reimagine ourselves and our society." That should also be the aim of our profession.



John Costello
President

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Protective costs orders – or orders at the outset of litigation that provide a plaintiff with certainty on the costs outcome – may provide the means of overcoming the so-called 'chilling effect' of costs for public interest litigation. Jo Kenny turns up the heat and calls for a more nuanced approach in public interest cases


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In a David versus Goliath confrontation, solicitor James MacGuill took on the might of the State – and three senior counsel – in the Grand Chamber of the European Court of Human Rights. Colin Murphy spoke to him about litigating to win

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The legal approach to residential mortgage default has changed, and the updated *Code of Conduct on Mortgage Arrears* is likely to have a significant effect – at least in the short term – on the number of residential mortgage suits. Cian O'Sullivan drops off the keys

32 Lay-off my case

There is a misconception among many employers that employees who have been placed on lay-off are no longer entitled to be paid. Richard Grogan clocks in and puts in the overtime

36 Defame game

The largest libel award in Irish – and perhaps European – history was made last November in the prominent case of *Kinsella v Kenmare*. However, Emma Keane says that it's regrettable that the assessment of damages was not removed from the responsibility of the jury by the *Defamation Act 2009*


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HAVE YOU MOVED? Members of the profession should send change-of-address details to: IT Section, Blackhall Place, Dublin 7, or to: customerservice@lawsociety.ie

Get more at lawsociety.ie

Gazette readers can access back issues of the magazine as far back as Jan/Feb 1997, right up to the current issue at lawsociety.ie.

You can also check out:

- Current news
- Forthcoming events, including the Law Society's annual conference in Powerscourt, Co Wicklow on Friday 6 and Saturday 7 May 2011
- Employment opportunities
- The latest CPD courses

... as well as lots of other useful information

Nationwide

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

Association president appointed judge

KILDARE

Colleagues throughout the county have welcomed the appointment of their bar association president, Paul Kelly, as a judge of the District Court. Paul has served as a councillor on Kildare County Council for 11 years and on Leixlip Town Council for more than 20 years. He has operated his own legal practice in Leixlip since 1982. His appointment follows the resignation last July of District Court judge John Neilan.

Meanwhile, the work of the association continues, with Andrew Cody continuing to organise excellent CPD offerings.

Sad death of Gordan Holmes

LIMERICK

It was with great sadness that we heard in late January of the passing of one of the biggest legal names in the country, Gordon Holmes – co-founder of the eponymous Limerick City firm, Holmes O'Malley Sexton, that proudly bears his name. The huge funeral attended by the president and director general of the Law Society, and many others from Dublin, was a tribute to the esteem in which he was held in by the legal profession. (The *Gazette* will be publishing an appreciation in the March issue.)

DSBA joins the digital age with a bang

DUBLIN

The DSBA has moved firmly into the 21st century. Pioneered by William Aylmer and his practice management committee, they have set up a LinkedIn group that will operate as a forum for exchanging views, and answering queries, and as a means of interacting with colleagues. It already has 119 members. Says president Stuart Gilhooly: " If you are already on LinkedIn and are a member of the DSBA, then please join. If not, it's the simplest thing in the world. Simply log on to www.linkedin.com and the process is explained. It is not intrusive and you can be active, inactive or simply observe – it's up to you. Those who have joined so far seem to be enjoying it."

In addition, Stuart has become the first DSBA president to join Twitter. His address is www.twitter.com/DSBAPresident and he will be updating, musing and generally tweeting merrily if you want to follow.

On a more serious note, we are all acutely aware of the passing of the recent insurance round, which many of us found to be another harrowing experience. Time goes by and usually the anger and frustration becomes less acute. However, we cannot simply bury our heads in the sand and just hope it gets better, because it won't without asking the hard questions.

Why was it so bad? How can we make it better? What are the alternatives? How can we regain control of the process? These are matters of great concern to the DSBA and the profession generally.

And many more questions need to be answered. With this in mind, the DSBA is delighted to announce a forum that will mirror similar events last year. We are lucky to have insurance guru Ray Brown of Marsh, John Elliot (the Law Society's director of regulation) and Stephen Park (insurance consultant), among others, to give their views on the last period – and how we can improve the process for the next year. It will take place at the Radisson Golden Lane at 6.30pm on 17 February. Admission is free and spaces are limited, so please book now by contacting Maura Smith at maura@dsba.ie or at 01 476 3824.

The DSBA hosted a dinner for the entire Dublin-based judiciary drawn from the District, Circuit, High and Supreme Courts. This unique legal occasion was also attended by many Dublin practitioners.

Christmas dress dance

MAYO

PIC: JOHN O'GRADY

At the Mayo Solicitors' Bar Association annual Christmas dress dance were *(l to r)*: Charlie Gilmartin, Judge Mary Devins and Sandra Murphy

Mayo Solicitors' Bar Association held a very successful annual Christmas dress dance in Lisloughrey Lodge, close to Cong Castle. The food and the accommodation were exquisite. As with Dublin, the roads were extremely icy and dangerous, though that didn't stop the intrepid travellers from Dublin, including Law Society president John Costello, Michael Quinlan and, of course, that veteran traveller Ken Murphy, together with their partners. As one of the president's right-hand men, I was delighted to be present, being a regular attendee at Mayo dinners in any event.

Says James Cahill: "Fine Gael leader Enda Kenny was the guest of honour. He was relaxed, engaging and proved to be an excellent speaker. Mr Kenny and his wife Fionnuala even drove Stuart Gilhooly and his wife Fidelma to Ashford Castle in the early hours on their journey home to Castlebar through the ice and snow."

One day's CPD and a general meeting on regulatory matters has been scheduled for 25 February. These regulatory matters, aspects of which are continuing to cause great distress in this part of the country, are sure to lead to a lively debate. All solicitors' officers in Mayo will close for Easter from 20 April to 26 April, inclusive.

Consumers reject non-legal brands

Two-thirds of consumers would prefer not to buy their legal services through non-legal brands, according to a survey of 2,000 clients by the law-firm referral service Contact Law.

The poll results, published in the England and Wales *Law Society Gazette*, found that 66% of consumers said they would not be happy to buy legal services through non-legal brands, such as the AA or Tesco, while 34% said they would. The vast majority (84%) said that service was more important than price when purchasing legal services.

In News this month...

New president for NI society

Mr Brian Speers is the new President of the Law Society of Northern Ireland, *(l to r)*: Alan Hunter (chief executive), Imelda McMillan (junior vice-president), Brian Speers (president) and Norville Connolly (senior vice-president)

New CCBE president

The new president of the Council of Bars and Law Societies of Europe (CCBE) is Mr Georges-Albert Dal, who took office on 1 January 2011. He is the former president of the Federation of European Bars

Solicitor's Joycean discovery?

"Dear dirty Dublin" is a phrase we associate with James Joyce. He uses it in his set of short stories *Dubliners* (1914) and in *Ulysses* (1922). Scholars acknowledge that the term is not Joyce's, but no one has been able to ascribe the description to any written source with confidence – until now.

Dublin solicitor and librarian Hugh M Fitzpatrick has proposed that credit for the phrase should go to one of Ireland's most eminent Victorian lawyers, James Whiteside (1804-1876). Joyce referred to Whiteside in *Ulysses* as "a master of forensic eloquence".

The evidence for Fitzpatrick's claim is a manuscript letter he has found, signed on headed notepaper by Whiteside on 2 April 1868, in which he expresses interest in a House of Commons' winding-up speech by Prime Minister Benjamin Disraeli on the disestablishment of the Church of Ireland. The final comment in Whiteside's letter reads: "I return to my wife and my duties in dear dirty Dublin."

Fitzpatrick says: "I am not saying that Whiteside created the phrase, but he may well have done. What I am claiming is that Whiteside's written record of the phrase is the earliest known permanent source."

Child Law shortlisted

The Irish Association of Law Teachers' conference has shortlisted *Child Law* by Geoffrey Shannon for their book prize. The award is made to a member who has published a book that is deemed to have made an outstanding contribution to the understanding of law.

Your new-look *Gazette!*

Our readers can't have failed to notice the redesigned *Gazette* this month. It's the fruit of many months' labour by the *Gazette* team, with the full support of deputy director general Mary Keane.

While the *Gazette* has been independently acknowledged as Ireland's best business-to-business magazine (see p12), we have no desire to stand still. It is vital that the *Gazette* now evolves in order to maintain pole position.

The purpose of the redesign is to make the *Gazette* even more readable, relevant and attractive to our members, our subscribers, potential subscribers and advertisers.

The focus of the redesign has been to take the *Gazette's* strongest editorial and design elements – and to introduce new ones.

The good news is that, rather than adding to costs, this redesign will *reduce* our printing and distribution costs – making the *Gazette* even better value.

In addition to everything you already like about the *Gazette*, your new-format magazine contains a fresh, modern design; more practitioner profiles; a new 'Representation' section; a new 'In the media spotlight' column; more concise book reviews; a new 'Reading room' section; and a light-hearted 'Captain's blawg' page.

We look forward to your comments, which can be emailed to gazette@lawsociety.ie. We're sure you'll like the changes!

Mark McDermott
Editor

Budget 2011 brings in sweeping changes to pension rules

Budget 2011 contained sweeping changes to the rules governing pensions, *writes Tom Kennedy*. These changes have implications for anyone contributing to either a personal pension or an employer-sponsored pension arrangement. It also affects those already receiving pension benefits through an approved retirement fund (ARF).

The main changes introduced are as follows:

- *Earnings cap* – the earnings limit for the purposes of tax relief on pension contributions has been reduced from €150,000 to €115,000 with effect from 1 January 2011. This new reduced limit will also apply to contributions paid in 2011, but applied against 2010 earnings. This affects all pension arrangements.
- *Abolition of employee PRSI and health relief* – with effect from 1 January 2011, employee contributions will no longer qualify for any PRSI or health levy relief, though they will continue to benefit from income-tax relief.
- *Reduction of employer PRSI relief* – at present, employers can normally claim 10.75% PRSI relief on any employee contributions to either a company pension scheme, a trust-RAC or an employer-sponsored PRSA. With effect from 1 January, this relief is reduced by 50%.
- *Standard fund threshold* – the standard fund threshold (SFT), which is effectively the lifetime limit on the accumulated value of all of an individual's pension arrangements, is being reduced from €5.4 million to €2.3 million, with immediate effect. An individual can, however, benefit from a higher personal fund threshold if the total value of any pension entitlements in place now, or claimed after 7 December 2005, is already in excess of the new limit. Such individuals have six months from 7 December 2010 to apply for a higher personal fund threshold, which will be based on their total pension entitlements at current values to a maximum of €5.4 million – including the value of any benefits taken from a pension since 7 December 2005. This application must be made within six months of 7 December 2010.
- *Retirement lump sum* – the tax-free lump sum available from pension arrangements is to be capped at €200,000, with any balance up to €575,000 in total, subject to tax at the standard rate (currently 20%). Any amount paid out in excess of this figure will be taxed at the individual's marginal tax rate. Any tax-free retirement lump sums taken on or after 7 December 2005 will count towards this €200,000 cap.
- *ARFs* – the minimum withdrawals of 3% of value, which must, in effect, be taken from ARFs held by those over 60, has been increased to 5% with effect from 31 December 2010.

If you believe you may need to take steps regarding your pension on foot of the budget changes, you may wish to contact Tom Kennedy at Mercer on 01 411 8480.

LAW SOCIETY OF IRELAND RETIREMENT TRUST SCHEME

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

Members of the Law Society who are self-employed, in partnership or in non-pensionable employment can join the scheme. Pension savings within the scheme currently exceed €117,000,000.

For queries or a member booklet, contact Mercer (the registered administrator of the scheme) by email at justask@mercer.com, or by telephone at 1890 275 275.

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

New body for employment lawyers created

A new legal body – the Employment Law Association of Ireland (ELAI) – has been set up. Over 100 employment lawyers and other interested parties were present for ELAI's official launch at Newman House, St Stephen's Green, Dublin on 18 November 2010. The association is intended to be a forum for those who practice in, or have a professional interest in, employment law.

Carol Fawsitt of Hayes Solicitors, who organised the gathering (and whose firm hosted the evening), outlined the reasons for establishing the new association. She said that the demise of the Irish Society for Labour Law, which had been originally formed in 1982 but had become dormant in the past decade, had been the chief inspiration. This was coupled with the growing number of employers and employees seeking advice on a range of complex matters in this field of practice. In addition, there is an essential need for networking supports for employment law practitioners.

Chair of ELAI, Carol Fawsitt

A committee of 13 was chosen, comprising representatives from small and large firms, senior and junior counsel, academia, the Department of Enterprise, Trade and Innovation, IBEC, the trade unions and Northern Ireland.

The first ELAI seminar will be held on 8 February 2011 at 6pm in the offices of A&L Goodbody, IFSC, North Wall Quay, Dublin 1. Director of the National Employment Rights Authority (NERA), Ger Deering, will speak on the topic of 'NERA and compliance with employment regulation orders and registered employment agreements'. Alan Hough will give a presentation on practice in this area.

Enquiries regarding ELAI can be made to Carol Fawsitt at Hayes Solicitors, tel: 01 662 4747. Those interested in joining ELAI should email Rachel McCrossan at rpmccrossan@gmail.com.

CIC Tribunal appointments

The Minister for Justice and Law Reform has appointed members to the Criminal Injuries Compensation Tribunal (up to 30 April 2013). The tribunal considers applications for compensation from those who have suffered personal injury as a result of criminal violence.

The tribunal administers the following schemes:

- The scheme of compensation for personal injuries criminally inflicted,
- The scheme of compensation for personal injuries criminally inflicted on prison officers.

Compensation may be awarded on the basis of any vouched out-of-pocket expenses, including loss of earnings experienced by the victim or, if the victim has died as a result of the incident, by the dependents of the victim. The incident in which the injury was caused must have been reported to the gardaí without delay.

Application must be made to the tribunal no later than three months after the incident. There is no time limit for fatal applications.

For more information, contact: The Secretary, Criminal Injuries Compensation Tribunal, 13 Lower Hatch Street, Dublin 2; tel: 01 661 0604, fax: 01 661 0598, or email: criminalinjuries@justice.ie.

Financial elder abuse seminar

'The legal and policy challenges of financial elder abuse' is the title of a seminar that will be held on Tuesday, 22 February, at 5.30pm. Room B109/10, UCD School of Nursing, Midwifery and Health Systems, Health Sciences Centre, University College Dublin, Belfield, Dublin 4. To book, email ncpop@ucd.ie or phone: 01 716 6467.

MEDIA

In the media spotlight

PIC: WILLIAM FARRELL

LORNA GROARKE
PARTNER, GROARKE AND PARTNERS, MAIN STREET, LONGFORD

Case summary
At a sitting of Longford Circuit Court on 7 December 2010, 24-year-old Mr Martin McDonagh of Mostrim Oaks, Edgeworthstown, Co Longford, was given a five-year jail sentence for assault causing harm to Noel Keegan in Longford on New Year's Eve 2009. Mr Keegan died as a result of a heart attack following the assault. Mr McDonagh was also sentenced to three years for assaulting Marie Keegan.

At the time, Mr McDonagh should have been serving a jail term. While serving a two-year prison term, he had been sentenced to a further four-year jail term for assaulting and stabbing a man in the leg with a pitchfork in 2007. The prison authorities had not been informed, however, of the second four-year sentence and had allowed him temporary release for one week – from 27 November to 4 December 2009. Mr McDonagh did not return to prison at the end of the temporary release, leaving him free to assault Mr Keegan, which led to his death.

The family said that it had been inexcusable to allow a man who should have been in prison to be at large, and therefore free to attack Mr Keegan. The former Minister for Justice Dermot Ahern and the CEO of the Courts Service subsequently apologised to the Keegan family for the failures in procedures.

How you got involved
"Marie Keegan's brother and his family have been good clients of mine for years."

Your background
"I have been practising in Longford since 1980. I am also an accredited civil, commercial and family mediator."

Significance of the case
"In my 30 years of practising as a solicitor, I have never before come across such a catastrophic accumulation of errors."

Unusual elements that emerged
"Mr McDonagh's two- and four-year sentences resulted from prosecutions brought against him by Longford gardaí. The four-year prison sentence imposed on Mr McDonagh on 28 April 2009 was entirely ignored by the various organs of the state whose job it was to ensure that the sentence was served and that society was protected.

"Judge Michael Reilly was appointed to carry out an independent investigation into this specific matter. His report is comprehensive and is relied upon by me. It found, among other things that, between 28 April 2009 and 5 January 2010:

- The warrant relating to that four-year sentence was not issued by the Circuit Court office as it ought to have been on 1 May 2009 – a fact so found by Judge Michael Reilly.
- As a result, the prison (Castlerea) where Mr McDonagh was serving the earlier two-year sentence was not officially informed of the four-year sentence.
- The gardaí did not update Mr McDonagh's record by entering the four-year sentence on the Garda Pulse system (court outcome).
- Castlerea prison granted Mr McDonagh temporary release for one week ending on 4 December 2009 on very specific conditions, including that he was to sign on every day at his local garda station – found by Judge Reilly to be Longford Garda Station. Mr McDonagh failed to sign on, on any day. In addition, Castlerea prison failed to notify the gardaí of:
  a) The fact they were releasing Mr McDonagh.
  b) The fact that Mr McDonagh was required to sign on every day.
- Mr McDonagh did not return to prison on 4 December 2009.
- In the early hours of 27 December 2009, Mr McDonagh was arrested. He was brought to Longford Garda Station, processed, charged with criminal damage and was released on station bail.
- On 31 December 2009, Noel and Marie Keegan were assaulted by Mr McDonagh. Noel died within minutes.
- On 5 January 2010, the Circuit Court office issued the warrant – noting it as a duplicate."

Ramifications
"Checks and balances and accountability are needed. Proper procedures need to be implemented willingly and with diligence."

Lessons learned
"Judge Michael Reilly has made a number of recommendations. I hope they are strictly and rigorously implemented. Can we have faith that the incompetences and indifferences outlined above will never happen again? I sincerely hope so, but, being a pragmatist, I say – let's wait and see."

DATE FOR YOUR DIARY

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Law Society Annual Conference

6th/7th May 2011

FRIDAY 6 MAY

The Smart Economy in Action: Strategies for Growth in the Legal Profession

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- **Smart Practice Management – Reduce Time, Costs and Risk for your Practice**
- **Smart Client Relations – Emphasis on Elderly and Vulnerable Clients**

SATURDAY 7 MAY

Speaker: Peter Sutherland

Ritz-Carlton Hotel, Powerscourt

Co Wicklow

Skillnets
Enterprise-led learning networks

REGISTRATION FORM WITH THIS MONTH'S ISSUE OF THE *GAZETTE*
OR REGISTER ONLINE AT WWW.LAWSOCIETY.IE

Lawyers love their smartphones!

Two-thirds of British lawyers now use a BlackBerry device for work, and three-quarters check their messages either constantly, or at least every hour, research has suggested.

The survey of 100 solicitors from firms of all sizes was carried out for legal publisher LexisNexis by research company Jures. It also found that 11% of respondents already have an Apple iPad, despite the devices having been launched only last May.

A further 10% said they had an e-book reader such as Kindle, which they used for legal work. More than 75% said that they preferred online or digital resources to 'traditional, paper-based libraries'.

Aussie doctors get legal jitters

One-third of Australian doctors have considered giving up medicine due to medico-legal concerns.

According to a study mentioned in the *Medical Journal of Australia*, a clear link was identified between medico-legal concerns and changes in doctors' practice of medicine. The study found that:

- 43% of doctors referred patients to specialists more than normal,
- 55% ordered more tests than usual, and
- 11% prescribed more medications.

A total of 33% of doctors said that they had considered giving up medicine due to heightened fears over medico-legal matters, 32% had considered reducing their working hours, while 40% had considered early retirement.

Conference on emerging human rights issues

The Law Society and the Irish Human Rights Commission (IHRC) held their 8th Annual Human Rights Conference on 20 November at Blackhall Place, *writes Joyce Mortimer*. The conference attracted over 200 people and addressed the broad topic of economic, social and cultural rights.

Law Society President John Costello and IHRC president Dr Maurice Manning opened the conference and introduced the keynote speakers: UN Human Rights Committee member Professor Michael O'Flaherty and Minister for Equality, Integration and Human Rights Mary White.

Professor O'Flaherty gave an insightful address that highlighted the effects of the economic crisis on human wellbeing.

"It has been very difficult historically to get the economic and human rights sectors to engage with each other," he said. "They have existed often in a state of mutual incomprehension. Just to take the economists, they are often bemused by human rights talk of very specific social goods. They glaze over when we try to explain why human-rights-impact indicators have so often to be somewhat 'impressionistic' in nature."

Notwithstanding this dichotomy, Mr O'Flaherty pointed out that there has been some engagement and dialogue. For example, there had been high-level discussions between global human rights leaders and institutions, such as the World Bank and the IMF. He said that these discussions had helped to carve out a vision for economic leadership that had human rights' protection at its core.

He added: "A human rights approach points to the need for decision making to be in pursuit of a society built on the principle of equality and non-discrimination, that insists on the consistent application of the rule of law and, most importantly, sees the most vulnerable in society as those most in need of protection."

Set your satnav for job-seeking workshops

A new schedule of workshops has been organised by the Society's Career Support Service to take place during February and March 2011. These will take place in the evening to facilitate those who are working. All solicitors are welcome to attend – free of charge – provided places are available.

The workshops will start at 6pm and will end at 8.30pm. Matters covered are relevant to all solicitors – regardless of career stage and whether you are employed, in practice or currently not working.

WORKSHOP 1 – CAREER MANAGEMENT THAT WORKS

Best practices in career management will be reviewed. Participants will be introduced to techniques and insights that can dramatically improve how they perform at job seeking. Long-term career management will also be covered.

- Dublin: Thursday 10 February
- Cork: Tuesday 22 February
- Galway: Tuesday 8 March
- Dublin: Tuesday 22 March

WORKSHOP 2 – ACCESS MORE JOB OPPORTUNITIES

Smart ways to interface with the hidden market of unadvertised jobs will be explored. Participants will be guided through strategies that can help them improve their networking skills – including those who find networking daunting.

- Dublin: Wednesday 16 February
- Cork: Wednesday 2 March
- Galway: Wednesday 16 March
- Dublin: Wednesday 30 March

WORKSHOP 3 – SUCCESSFUL INTERVIEWING

Building on our previous interviewing training, participants will learn how to significantly improve preparing for and performing at interviews, and how to negotiate salary and other benefits.

- Dublin: Thursday 24 February
- Cork: Thursday 10 March
- Galway: Thursday 24 March
- Dublin: Thursday 7 April

People attending workshops can qualify for CPD group-study credits. Capacity is limited at most venues. Solicitors who wish to attend any event should book their place by emailing careers@lawsociety.ie.

Government's goal is to reduce legal costs, says Ahern

"Those who need legal services must be able to access them at the best possible price for a quality service," said the then Minister for Justice Dermot Ahern at the Law Society's parchment ceremony for newly qualified solicitors on 9 December 2010. "It is necessary that legal services be available to the public and to business at a cost that is fair and competitive," he added.

In a wide-ranging speech, the justice minister said that, in these challenging economic times, there was a particular demand for new cost efficiencies to be identified. This applied as much in the legal sphere as it did in other sectors of the economy.

"In this regard, the government's National Recovery Plan 2011-2014 includes a package of measures directed at professional services." These measures to reduce legal costs would be implemented, he said, and would include:

- Increased use of tendering by the state,
- Prioritising publication and enactment of the *Legal Costs Bill*,
- Additional proposals for legislation to reduce legal costs, drawing on the recommendations of the Legal Costs Working Group and the Competition Authority, and
- Increased use of arbitration and mediation.

Then Justice Minister Dermot Ahern addresses the parchment ceremony: "Government now committed to 'a better regime' in relation to legal costs"

Minister Ahern said that, under the Programme of Financial Support for the State from the EU and the IMF, the government was now committed to "a better regime in relation to legal costs and better regulation of the legal professions".

Greater transparency

"The *Legal Costs Bill* will replace the Office of Taxing Master and establish new principles for the assessment of all costs. It will modernise the various statutes, some of them of very old vintage, relating to legal costs, while also ensuring greater transparency in relation to how legal costs are agreed with clients and invoiced. The scope of the bill will extend to both solicitors and barristers.

The proposals for the *Legal Costs Bill* are being developed with a view to publication as soon as possible in 2011," he said.

Legal ombudsman

He told the newly qualified solicitors that they would have been made aware during their professional training that adherence to a code of conduct in their work was "absolutely essential".

"It is only right, in the public interest, that breaches of the code are serious matters. To strengthen the systems that are in place, the government has provided in legislation for establishment of the Office of the Legal Services Ombudsman.

"The role of the ombudsman is to oversee the handling by the Law Society and Bar Council of complaints by clients of solicitors and barristers. The ombudsman will be independent in the performance of the functions of the office and will serve to increase public confidence in the complaints systems of the legal professions."

Minister Ahern said that the ombudsman post had been recently advertised and that the appointment would be made "in the near future".

Difficult time

Minister Ahern encouraged the new solicitors to remain optimistic in what was undoubtedly a difficult economic climate. "Those of you receiving your parchments today are well qualified to meet the challenges of a career in law. Having regard to your training and the legal and business environment that you face, I believe that you can look forward with confidence to a demanding and, in time, a rewarding future – whether that be in practice as a solicitor, or in some other position for which training as a solicitor makes you eminently suited.

"While the economic situation has impacted particularly on the solicitors' profession, I am sure that, in time, the recovery we are working towards will open full and rewarding careers for you all."

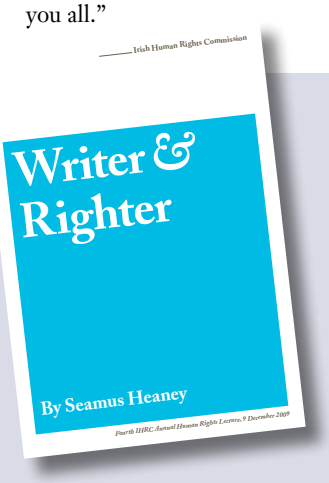
Seamus Heaney lecture with this *Gazette*

One of Ireland's most distinguished poets and prominent advocates for human rights, Seamus Heaney, has kindly agreed to the circulation to all solicitors, with this copy of the redesigned *Law Society Gazette*, of his lecture to the Irish Human Rights Commission entitled *Writer & Righter*.

The lecture commemorates the anniversary of the UN *Universal Declaration of Human Rights*. The theme that the Nobel laureate chose was the relevance of poetry in times of societal upheaval and unrest. He particularly highlighted the differences between the sedentary w-r-i-t-e-r-s and the pro-active r-i-g-h-t-e-r-s, the former whose job is to reflect, and the latter whose role is to take action.

As the president of the Human Rights Commission, Maurice Manning, remarked in his preface to *Writer & Righter*, one of the most inspirational poems in support of human rights ever written was *From the Republic of Conscience*. Heaney wrote this to commemorate the 25th anniversary of Amnesty International in 1985.

Law Society director general Ken Murphy has thanked both the poet and the IHRC for their permission to distribute *Writer & Righter* free of charge to all solicitors. Murphy remarked on the great value for us all to be reminded, in the most inspirational of language, of the obligation that we share as lawyers to uphold the fundamental principle of the UN declaration that "all human beings are born free and equal in dignity and rights".



NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Whistle-blower protections fall short

EMPLOYMENT AND EQUALITY LAW COMMITTEE

There have been a number of significant employment and equality law legislative developments and procedural reviews over the last few months and, as such, committee members have been busy making representations on behalf of practitioners.

In November, committee members made a detailed submission to the Minister for Justice and Law Reform regarding proposed whistle-blower protection legislation. The committee submission extensively reviewed relevant existing whistle-blower protection legislation, highlighting that, where legislation has been enacted, the protections are not consistent for the person making the protected disclosure. Members urged the implementation of legislation to bring consistency to the protections available, regardless of the sector involved.

The committee also made a detailed submission to the Department of Community, Equality and Gaeltacht Affairs on the content of the *Civil Law (Miscellaneous Provisions) Bill 2010*. In particular, members highlighted that some of the amendments contained in part 6 of the 2010 bill propose very far-reaching changes to the quasi-judicial procedures of the Equality Tribunal, which would fundamentally affect the rights of both complainants and respondents in their interaction with the tribunal.

The committee has been in correspondence with the Department of Enterprise, Trade and Innovation regarding an ongoing departmental review of the various employment rights bodies. To that end, a meeting has been arranged between committee members and officials from the department, to discuss how the experience of solicitors might contribute to the review process.

Clarification for solicitors who witness a will

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

The Probate, Administration and Trusts Committee has issued a practice note on the issue of a solicitor witnessing a will for a testator in circumstances where the solicitor is the executor appointed under the will. A member of the committee has reviewed the law in the matter and it is set out below. It appears to be settled in case law since *In Re Pooley* (CA 1888) that a witness who witnesses a will cannot thereafter take any benefit under the will. The provision underpinning the decision is repeated almost exactly in section 82 of the *Succession Act 1965*. It was followed in the case of *In the Matter of Daniel McLaughlin* (1909 43 ILTR 240), which dealt with the same issue.

> **"An executor may be a witness to a will but he loses any legacy given to him"**

As far back as Miller's *Probate Practice* in 1900, it was stated: "An executor may be a witness to a will, but he loses any legacy given to him" (see p101). The modern textbooks have consistently followed this approach.

Given the clear statement of law, the committee has issued a practice note to clarify matters for the benefit of members (see page 48 of this *Gazette*).

The CCBE – what it is and what it does

EU AND INTERNATIONAL AFFAIRS COMMITTEE

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around one million European lawyers through its member bars and law societies.

It acts as the liaison between the EU and Europe's national bars and law societies. The CCBE has regular institutional contacts with those European Commission officials, and members and staff of the European Parliament, who deal with issues affecting the legal profession. In addition, it works closely with legal organisations outside Europe.

Ireland has had a long and active participation in the organisation. The Irish delegation to the CCBE is composed of the Law Society and the Bar Council. The delegation includes solicitors and barristers at the various CCBE committees and working groups. Through regular reports, these representatives keep the delegation informed of recent developments and relevant issues arising in their area of expertise.

The delegation meets before the Society's standing committees (five times a year) and in plenary sessions (twice a year) to discuss the agenda and reach a common position for voting.

For further details on the CCBE and on the Irish delegation, visit www.ccbe.eu and www.lawsociety.ie/Pages/Committees/EU-and-International-Affairs/current-issues.

EU VAT refund directive

TAXATION COMMITTEE

The Taxation Committee reports that the Council of the European Union recently adopted a directive concerning the refund to taxable persons of VAT incurred in another EU member state, where the taxable person is not established. The new directive provides for the extension of the deadline for the submission of refund applications for expenses incurred in 2009 from 30 September 2010 to 31 March 2011. Accordingly, refund claims for 2009 can be processed electronically via the Revenue on-line system until 31 March 2011.

Next phase of e-registration

eCONVEYANCING TASK FORCE

The eConveyancing Task Force welcomes this new forum for communicating with solicitors and looks forward to publishing regular updates on its work and engagement with stakeholders in the development of a modern, electronic, streamlined conveyancing process for Ireland.

The task force has recently met the Property Registration Authority (PRA) to discuss the remit of the next phase of e-registration, and it is proposed to publish a comprehensive joint article on these proposals later in the year. A total of 99 solicitors took part in a survey about boundary mapping late in 2010. The results from that survey are now being analysed and will be published shortly.

The task force can be contacted by emailing the e-conveyancing project manager, Gabriel Brennan, at g.brennan@lawsociety.ie.

GAZETTE SCOOPS TOP GONG

The *Gazette* won a major national magazine award last December, beating off other leading Irish magazines. But – as our brand-new look shows – we are refusing to rest on our laurels

The *Law Society Gazette* received national recognition on 2 December when it was named best 'Business to Business Magazine of the Year' at the Magazines Ireland Awards. The award was presented by RTÉ news anchor Bryan Dobson at a black-tie ceremony at the Four Seasons hotel in Dublin. The ceremony was attended by Ireland's top publishing houses and magazine publishing teams.

The *Gazette* had previously been shortlisted in the 'Business to Business Magazine of the Year' category (for magazines with a circulation of more than 5,000). Among the publications vying for top prize in this category were *Accountancy Ireland*, *Accounting and Business Ireland*, *agendaNI*, the *Engineers Journal* and *EuroTimes*.

The *Gazette's* citation reads: "[It] made a strong submission and showed enterprise and imagination in dealing with the commercial realities that hit the magazine in the last two years. This strong commercial awareness has started to reap benefits in 2010. The title shows a commitment to excellence and is a 'must-read' for those in the profession', [and shows] a clear understanding of the audience's needs and meeting the needs of the people it serves."

The judges for the Magazines Ireland Awards included Ian Locks (former CEO, Periodical Publishers' Association), Chris Redman (former managing editor, *Time* magazine), Fiona Curtin (president, Advertisers' Association of Ireland), Orlaith Blaney (board member, Institute of Advertising Practitioners in Ireland), and Kathleen Ryan (magazine consultant).

PIC: LENSMEN

Simply the best! The *Gazette* team celebrates its national award

The Magazines Ireland Awards are open to all members of the association and "are aimed at rewarding the best Irish magazines and the people behind them". The body represents over 200 Irish magazines – both consumer and business-to-business titles – and a total of 42 Irish publishers. Every year, 125 million magazines are bought in Ireland, 25 million of which are Irish produced. The sector contributes over €400 million to the Irish economy annually. Chief executive of Magazines Ireland, Grace Aungier, says: "The awards are an important step in showcasing the best Irish talent in magazine publishing and in raising the profile of this key sector in Ireland."

> ***"This award is exactly the impetus we need to continue setting the highest publishing standards"***

Commenting on the *Gazette's* win, Law Society director general Ken Murphy said: "I congratulate the *Gazette* team, led by editor Mark McDermott, as well as the *Gazette* Editorial Board chaired by Michael Kealey, on this outstanding success. The *Gazette* team is well deserving of this national recognition for their superb work on the Society's magazine."

Gazette editor Mark McDermott praised his colleagues for delivering the "best possible Christmas present". "This is excellent news and gives us all a well-deserved boost at the end of two difficult years. With the backing of deputy director general Mary Keane, the *Gazette* has been constantly evolving to cope with the loss of advertising revenue due to the economic downturn. This has been achieved with no loss of quality or diminution in the information provided to our members."

"This award is exactly the impetus we need to continue setting the highest publishing standards," he added, "and to press on with our plans for the redesign of the magazine early in the New Year. I am confident that the new changes will nudge the *Gazette's* standards even higher – and our costs lower – and that the redesign will be well received by members."

The *Gazette* team reports to deputy director general Mary Keane and consists of Mark McDermott (editor), Garrett O'Boyle (deputy editor), Nuala Redmond (designer), Seán Ó hOisín (advertising manager), Catherine Kearney and Valerie Farrell (*Gazette* admin). G


Magazines
Ireland
Business to Business
Magazine of the Year
(more than 5,000 circulation)
Law Society Gazette

THE WORLD'S YOUR OYSTER

So you're thinking of leaving to pursue international work opportunities abroad? The Career Support service gives you the up-to-date intel on the most popular jurisdictions for lawyers chasing their dream (of a) job

Keith O'Malley is the Law Society's career development advisor in the Career Support service

Recently, there has been a big increase in enquiries about opportunities for Irish solicitors to work and qualify in other jurisdictions. Work opportunities, immigration rules and the ability to qualify all continually evolve and change in individual locations. This article seeks to outline the up-to-date situation on locations in which Irish solicitors are most interested. More detailed information on each location is available within the Career Support section on the Society's website.

Australia

The only generally available Australian work-permit visa is a working holiday visa. This has a duration of one year and allows the holder to stay with an employer for up to six months. It is available on a once-off basis to people aged between 18 and 30 years of age.

To remain on and to be allowed work, Irish people usually rely on a temporary business visa – subclass 457. To do this, you need to be sponsored by an employer.

Irish solicitors have no innate right to qualify in Australia. Lawyers qualified in other jurisdictions who want to qualify in Australia need to submit to an assessment of their qualifications. This assessment is done on an individual basis and must be paid for. Following on from the assessment, Irish lawyers are now usually required to sit, and pass, about six exams.

You must have a law degree to qualify as a lawyer in Australia. If you do not have at least three months' Irish post-qualification experience (gained while holding a practising cert), you will probably be required to complete the Australian two-year graduate programme.

It is reported that Australia's rural towns and regional centres offer good work opportunities, and also the option of building a long-term life there – with flexibility to balance work, leisure and family at the relaxed pace associated with country living.

The *Trans-Tasman Mutual Recognition Arrangement* allows Australasian-qualified lawyers to register and practise throughout Australasia.

"A good source of latest information and advice for solicitors thinking of travelling to, and living in, Australia is available on LinkedIn in the Law Society of Ireland's sub group 'Working in Australia'"

A good source of latest information and advice for solicitors thinking of travelling to, and living in, Australia is available on LinkedIn in the Law Society of Ireland's sub-group 'Working in Australia'.

New Zealand

Visa regulations in New Zealand are similar to those in place in Australia, with sponsorship by an employer the most common way that people gain the freedom to stay and work there.

Very few Irish lawyers have gone through the New Zealand assessment-of-qualifications process. It is very similar to, but more expensive than, the Australian process. It is likely that Irish lawyers who work in New Zealand tend already to be Australian qualified and can register in New Zealand, based on the *Trans-Tasman Mutual Recognition Arrangement*.

China

Hong Kong has 5,000 practising lawyers and circa 1,000 are originally Irish/British qualified. Foreign qualified lawyers must sit a qualified lawyers' qualification examination to qualify as a Hong Kong solicitor. It has been reported that Hong Kong lawyers and law firms are particularly well placed to exploit the rapidly growing market for law services in mainland China.

Canada

A significant number of Irish solicitors emigrated to Canada in the last three years. Unfortunately, many found it more difficult than expected to get established – especially in relation to qualifying and working as a lawyer there. Many have since returned to Ireland earlier than planned.

Getting there initially is easy enough to organise. There is a one-year work-permit visa that is open to anyone under the age of 35. To stay longer, you need to get an employer to sponsor you.

As in other jurisdictions, foreign-qualified lawyers are required to go through an assessment of qualification process. However, in Canada, the process has proved exceptionally stringent, and people are regularly required to almost completely re-qualify again.

Employers, too, have proved to be conservative and some Irish lawyers have found it difficult to get employment in legal firms or legal departments – even in a support role.

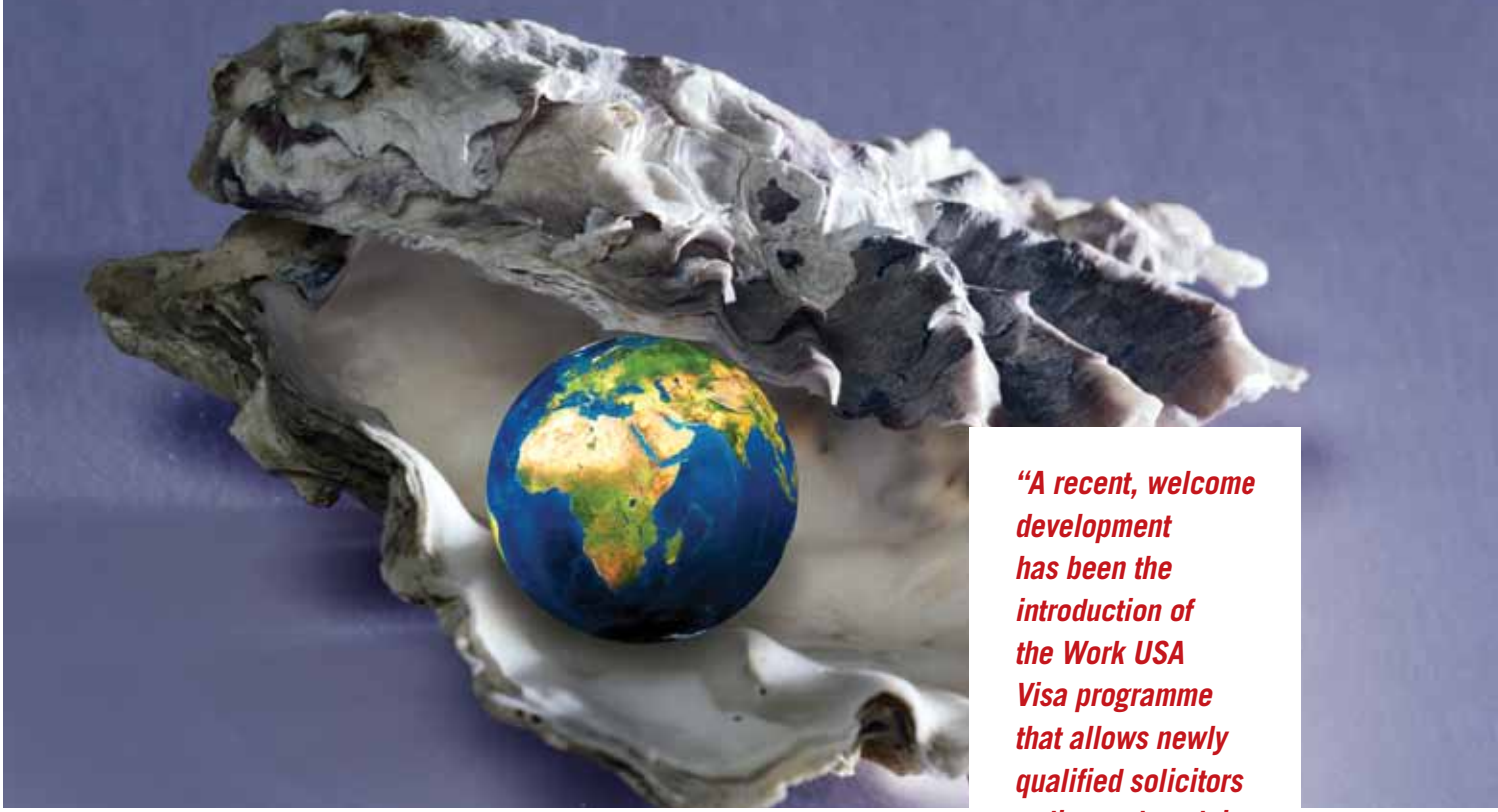
United States

Very few Irish lawyers have moved to work in the USA in the last few years. Up to a few months ago, there was not a facility for people to work short term there after qualifying. The only mainstream way to get a work-permit visa in the USA was to have an employer sponsor you (as an employee who could not be recruited).

The ability to sponsor non-nationals has all but stopped for most US employers, given the significant unemployment currently being experienced there.

To qualify as a lawyer in the USA, people are required to pass bar exams in whatever state they plan to practise. There are well-established tuition providers in place in Ireland where people can prepare for popular bar exams, like New York and California. Most US states also require a law degree. California is the notable exception in this regard.

A recent, welcome development has been the introduction of the



"A recent, welcome development has been the introduction of the Work USA Visa programme that allows newly qualified solicitors to live and work in the US for a period of up to one year"

Work USA Visa programme that allows newly qualified solicitors to live and work in the US for a period of up to one year. Participants need to work in a job related to their new profession.

Caribbean

Opportunities in locations such as the Cayman Islands and Bermuda are not as prevalent as they were in the past. The usual route is for people to land a job offer and then the employer undertakes to organise a visa. Most Irish solicitors who gain work in these locations do so through British recruitment firms. A British or American legal qualification is usually required.

United Arab Emirates

Solicitors are recruited for jobs in the Gulf states and other Middle Eastern locations through British recruitment firms – but also through international law firms and commercial companies who often advertise internationally. Traditionally, there has been particular demand for lawyers with expertise in large-scale construction projects and international trade. Visas are usually organised by employers.

Europe

Irish solicitors are entitled to live and work in any EU country, and also to practise as a lawyer using their Irish qualifications. Also, after practising as an Irish lawyer for three years in any EU jurisdiction, one becomes entitled to practise under local title – provided you have been a registered European lawyer for the three years.

Law and commercial work is now regularly done through the English language throughout Europe, but people working in continental Europe still usually require fluency in a second language – typically the local language used where they are living and working.

EU institutions such as the European Commission, the European Parliament and the European Council all operate *stage* (internship) programmes and recently qualified professionals undertake these to gain experience and make contacts as a foundation for establishing a career in this arena.

In recent years, Irish solicitors have had success in joining international law firms and consultancy firms, in particular in Luxembourg and Brussels. Jobs and internships also become available in the European offices of international organisations, such as the UN and associated organisations.

These jobs in international firms and in European and international institutions are filled primarily after being advertised on the internet and can be applied for from Ireland. Inconveniently, organisations all tend to manage their own recruitment and, as a result, job seekers often have to link up with, and monitor, severed individual organisations that interest them.

Britain

By far the most popular jurisdiction outside of Ireland, and with good reason, is Britain. Getting to and from there is easy, and experience gained working in Britain is generally more relevant to Irish employers than experience gained further away. Britain has, itself, experienced a sharp downturn, but Irish solicitors continue to access good work opportunities there.

Currently, there are problems related to qualifying in Britain. The Solicitors Regulation Authority (SRA) for England and Wales instituted a new procedure last September that has experienced teething problems. We know of no Irish solicitor who has qualified through this new procedure yet.

The Law Society of Ireland is working with the SRA in England and Wales, seeking to simplify how members can qualify in both jurisdictions. However, despite the Society's tenacity in addressing this matter, it is likely to take some further time to progress to finality.

In the meantime, Irish solicitors can use the EU *Establishment Directive* as an alternative. Irish solicitors can register with the SRA as a registered European lawyer, and this provides automatic eligibility to work with an English or Welsh law firm (including eligibility to become a partner). G

CLOSING THE BOOK ON TRAVELLER DISCRIMINATION?

The Equality Tribunal has found that a particular school's admissions policy indirectly discriminated against Travellers – which may have implications for schools with a similar policy

Joyce Mortimer is the Law Society's human rights executive

In a decision that could have implications for all schools with a similar policy, the Equality Tribunal recently found that the admissions policy of a secondary school that prioritised places for the children of past pupils indirectly discriminated against members of the Traveller community. It should be noted that this finding is being appealed by the school's board of management to the Circuit Court.

In a complaint lodged on behalf of Mary Stokes and her son John (by solicitor Siobhan Cummiskey of the Irish Traveller Movement Independent Law Centre), the tribunal found that the complainant, a member of the Traveller community, was disproportionately affected by the 'child of a past pupil' criterion. This was demonstrated by figures showing that his father was statistically much less likely to have progressed to second-level education than the rest of the population at that time. Furthermore, the "blanket priority" given to such school applicants was found not to be "objectively justified by a legitimate aim".

'Father as a past pupil' criterion

The school's admissions policy stated that the following criteria would be taken into account: "The application is on behalf of a boy:

1) Whose parents seek to submit their son to a Roman Catholic education in accordance with the mission statement and Christian ethos of the school,
2) Who already has a brother who attended or is in attendance at the school, or is a child of a past pupil, or has close family ties with the school,
3) Who attended for his primary school education at one of the schools listed in schedule two, being a school within the locality or demographic area of the school."

The complainant met each of the essential criteria, save number two, since no one in his family of his father's generation had progressed to second-level education.

> ***"His father was statistically much less likely to have progressed to second-level education than the rest of the population at that time"***

Following an unsuccessful internal appeal to the school's board in January, and a failed appeal from that to the Department of Education and Skills under section 29 of the *Education Act 1998*, heard in May, the Irish Traveller Movement Independent Law Centre filed proceedings on behalf of Mary and her son John in the Equality Tribunal in July 2010.

Due to the urgent nature of the complaint (the child was due to start secondary school in September 2010), the Equality Tribunal expedited the proceedings, requesting written submissions from both sides in September and hearing the complaint in early November. The director of the Equality Tribunal, Niall McCutcheon, heard the matter.

Indirect discrimination

The complainant argued that the second criterion of the school's admissions policy amounted to indirect discrimination under the *Equality Acts 2000-2008*. This is defined under section 3(1)(c) of the acts as follows: "Where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) [that is, covered by one of the discriminatory grounds] at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

Section 3(3A) of the act provides that statistics are admissible in order to determine if a breach has occurred. According to established case law, it is not necessary in this respect to find that the provision in question does, in

WHAT ARE THE *EQUAL STATUS ACTS 2000-2008*?

The *Equal Status Acts 2000-2008* prohibit discrimination in the provision of goods and services, the disposal of property and access to education, on any of the nine grounds set out below.

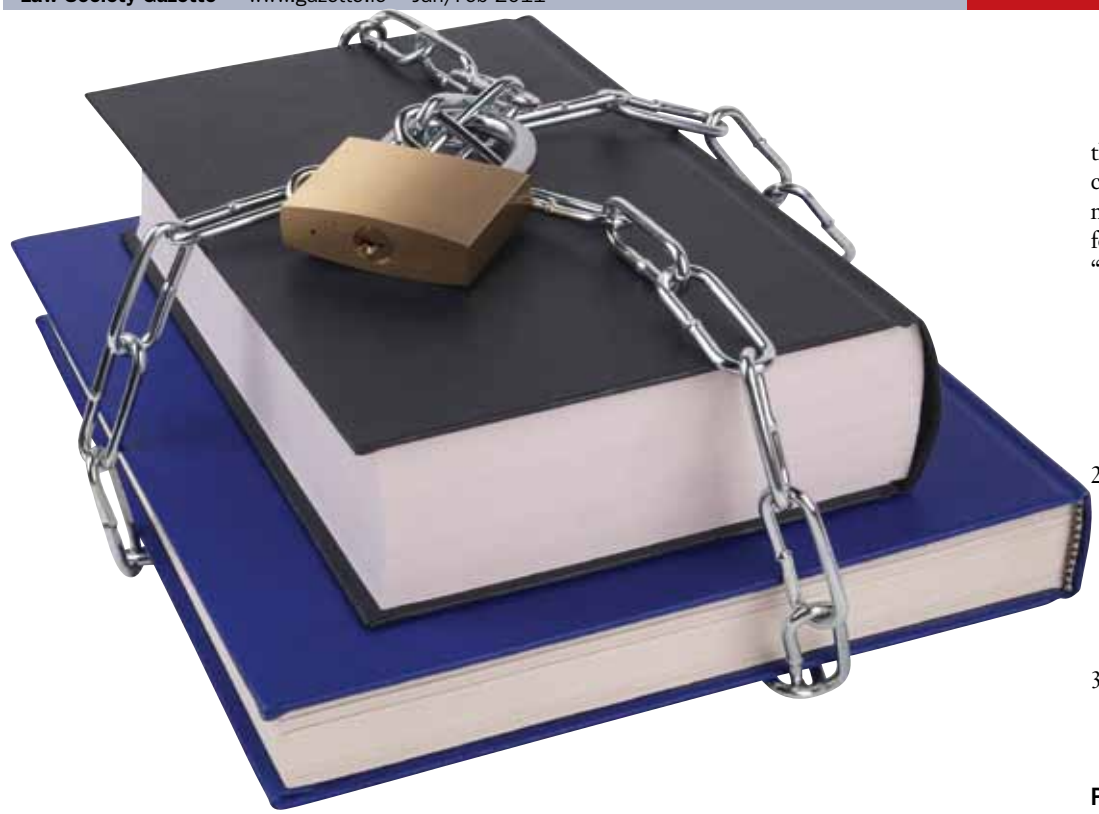
The acts outlaw discrimination in all services that are generally available to the public.

Discrimination in the provision of accommodation, admission or access to educational courses or establishments is also prohibited, subject to some exemptions.

The nine grounds on which discrimination is outlawed by the *Equal Status Acts* are as follows:

- Gender,
- Marital status,
- Family status,
- Sexual orientation,
- Religious belief,
- Age,
- Disability,
- Race colour, nationality, ethnic or national origins,
- Membership of the Traveller community.

Penalising a person for making a complaint of discrimination or for giving evidence in someone else's complaint or lawfully opposing unlawful discrimination is called victimisation, and the *Equal Status Act,* specifically protect a person against such victimisation.



practice, affect a substantially higher proportion of Travellers – it is sufficient that it is liable to have such an effect (ECJ C-237/94, *O'Flynn v Adjudication Officer* [1996] ECR-I-02617, paragraphs 20, 21).

The tribunal found that the criterion that gave priority to children of past pupils did both potentially, and actually, put the complainant at a disadvantage.

The complainant submitted empirical evidence to depict the historical disadvantage to which Travellers had been subjected in the past, focusing on when the complainant's father would have received post-primary education. The *Report of the Travelling People Review Body* in 1983 stated that just 10% of Travellers who attended primary school progressed to second level at that time, compared with 66.4% of the general population in 1982.

Competitive exam

While the school could not produce statistics on how many Travellers were in attendance at the school in the 1980s, it did indicate that entry was by way of a competitive written exam. The tribunal found this application process would likely put Travellers at that time at a disadvantage, given the poor academic standards among Travellers at primary-school level in the 1980s.

Figures supplied by the Department of Education showed that just 100 Travellers were registered in post-primary schools in the entire country in 1988, making the chances of the complainant's father having attended post-primary school "extremely remote". The tribunal found that this proved that the complainant, as a Traveller today, was statistically much less likely to have a father who attended second-level education, and he was, therefore, potentially affected much more by this criterion for admission than his settled counterparts.

> ***"This application process would likely put Travellers at that time at a disadvantage"***

As well as potentially affecting the complainant as a member of the Traveller community, the complainant proved that he was put at a particular disadvantage compared with his settled counterparts by this criterion, in that all 36 applicants who met the 'father-as-a-past-pupil' criterion were awarded places. The tribunal found that having a father who attended the school would have increased the complainant's chances of being awarded a place in the subsequent lottery for places by 70%.

The tribunal found, on the balance of probabilities, that the policy of giving priority to children of past pupils put the complainant, as a member of the Traveller community, at a particular disadvantage compared with non-Travellers.

'Blanket priority'

According to established case law, when determining the scope of any derogation from an individual right, due regard must be had to the principle of proportionality. In other words, the derogation must be appropriate and necessary to achieve its aim (ECJ C-476/99, *Lommers* [2002] ECR I-2891, paragraph 39).

The aim of giving priority to children of past pupils, according to oral evidence presented by the school, was to foster family loyalty to the school and to promote a family ethos within education. While this was considered legitimate, the 'blanket priority' was not considered proportionate or necessary by the tribunal for the following reasons:

"1) The priority applies to the children of all past pupils, irrespective of the actual level of current engagement of the father with the school. In many cases, therefore, the means would not achieve the aim.
2) There are other ways of achieving this aim, which would not disadvantage children whose fathers did not attend the school, such as organising a past pupils' union, by the activities of a parents' association, etc.
3) The impact on Travellers is disproportionate to the benefit of the policy (see page 16)."

Potential consequences

The tribunal upheld the complaint against the school and ordered that the complainant be offered a place immediately, and that the school review its policy to ensure that it does not indirectly discriminate against pupils on any of the grounds covered by section 3(2) of the *Equal Status Act*.

This decision – should it stand – could have far-reaching consequences for all schools that have a similar policy. The board of management of the school at the centre of this case has decided to appeal the Equality Tribunal's determination in the Circuit Court. The school's legal advisers, Mason, Hayes & Curran, confirmed to the *Irish Examiner* on 18 January 2011 that an appeal against the tribunal findings had been lodged at the Circuit Court on 13 January 2011. The newspaper added that it had been confirmed by one of the law firm's partners, Ian O'Herlihy, that John Stokes has not been offered a place at the school.

Subject to the findings of the appeal, it will be interesting to see whether this case will have wider implications for equality law, in general, for schools that accept pupils who fall within any of the nine grounds covered by section 3(2) of the act. G

THE CRIMINALISATION OF FORCED LABOUR IN IRELAND

Despite the *Criminal Law (Human Trafficking) Act 2008*, Nick Henderson argues that no forced labour case has yet been prosecuted in Ireland – and so, forced labour is not considered a crime here

Nick Henderson is legal advocacy worker on trafficking and forced labour at MRCI

In November 2010, the Human Rights Commission stated that the Irish state may have breached international law by not outlawing the Magdalene laundries. Unfortunately, forced labour is neither a historical nor foreign problem. Migrant Rights Centre Ireland (MRCI), an NGO that campaigns for vulnerable migrant workers, assists workers in the domestic, agricultural, restaurant, seafaring and construction sectors who have experienced forced labour. In MRCI's experience, forced labour begins with deception about working and living conditions, followed by low or no pay. Deception, coercion and abuse are also used to control workers. The process can also be gradual: working conditions may be initially decent but deteriorate over time.

Forced labour – a crime or not?

The *Criminal Law (Human Trafficking) Act 2008* states that trafficking for labour or sexual exploitation is a crime with a maximum sentence of life imprisonment. In MRCI's experience, the current interpretation of this act by the authorities is that trafficking into or within Ireland is a required ingredient for there to be an offence. The Irish government is not alone in drafting legislation that criminalises labour or sexual exploitation with the requirement that the person has been trafficked for that purpose. Some observers have criticised the focus on trafficking, as it allows governments to appear active on forced labour without addressing its most prominent manifestations, which are not always as a consequence of trafficking.

The *Criminal Law (Human Trafficking) Act 2008* can, however, be read as criminalising forced labour without the ingredient of cross-border or internal trafficking. (This interpretation was argued by Eilis Barry BL at a conference organised by MRCI in June 2010.) The act contains the standard definitions of trafficking (recruiting, transporting or harbouring a person), but its scope is expanded by including trafficking as "providing the person with accommodation or employment".

An offence of forced labour is therefore committed if a person employs or accommodates a victim for the purpose of labour or sexual exploitation, and if coercion, deception or abuse of vulnerability is used against the victim. This interpretation does not link the offence of forced labour to cross-border or internal trafficking, and the victim can be a foreigner or Irish. MRCI submitted this interpretation to the authorities in June 2010.

> **"An offence of forced labour is therefore committed if a person employs or accommodates a victim for the purpose of labour or sexual exploitation, and if coercion, deception or abuse of vulnerability is used against the victim"**

International law

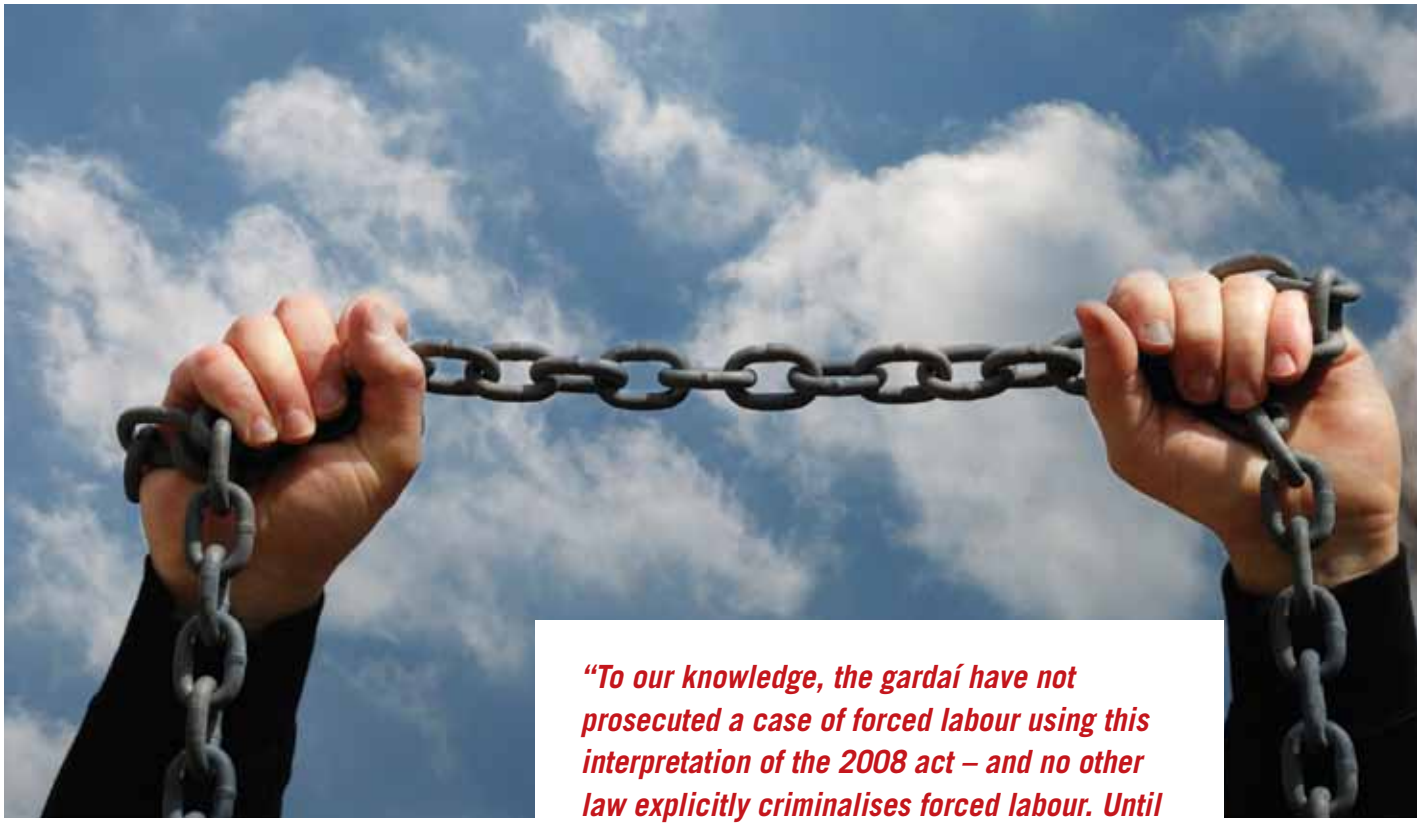
The International Labour Office's *Forced Labour Convention 1930* and the UN's *Supplementary Convention on the Abolition of Slavery*, both ratified by Ireland, require the criminalisation of forced labour. Unfortunately, monitoring and redress procedures for both conventions are limited. Article 4 of the *European Convention on Human Rights* (ECHR) states that no one shall be held in slavery or required to perform forced labour. In *Siliadin v France* (26 July 2005), the European Court of Human Rights concluded that member states' positive obligations under article 4 require the penalisation and effective prosecution of forced labour and that France's failure to do so was a violation of article 4. The *Siliadin* decision has urgent implications for Ireland: it must have legislation that penalises and effectively prosecutes any act aimed at maintaining a person in a situation of forced labour.

Options for victims

To MRCI's knowledge, the gardaí have not prosecuted a case of forced labour using this interpretation of the 2008 act – and no other law explicitly criminalises forced labour. Until this interpretation is accepted or a new law is drafted, forced labour is not considered a crime and a victim has no redress. Victims could be advised to present themselves to the gardaí. If the case were not investigated, there would be no prosecution, on the grounds that there is no law to prosecute the crime or that the gardaí are awaiting the authorities' opinion on the interpretation. A statement confirming this could be sought from An Garda Síochána or the Director of Public Prosecutions. A possible remedy would then be judicial review, on the grounds that the authorities had failed to investigate and prosecute a case of forced labour, thereby breaching article 4 of the ECHR.

If the authorities do not agree that the 2008 act can be interpreted as criminalising forced labour, and unless another law that does so can be identified, Ireland may be violating its positive obligations to penalise the crime.

A victim could make reference to section 3 of the *ECHR Act 2003* and state that failure



"To our knowledge, the gardaí have not prosecuted a case of forced labour using this interpretation of the 2008 act – and no other law explicitly criminalises forced labour. Until this interpretation is accepted or a new law is drafted, forced labour is not considered a crime and a victim has no redress"

to penalise forced labour is incompatible with the ECHR. Mr Justice McKechnie, in his 2007 High Court decision in the *Lydia Foy* case, said that the state was in breach of the ECHR by not having law that met its ECHR obligations – as it would be if it had law that violated its obligations – and made a declaration of incompatibility. A declaration of incompatibility does not necessarily result in a change of law. The European court has stated that a declaration under Britain's *Human Rights Act* is not an effective remedy as protected by article 13 of the ECHR. Considering the similarity of wording between Ireland's *ECHR Act* and Britain's *Human Rights Act*, this finding may apply to Ireland. In these circumstances, the victim could approach the European court directly and state that Ireland's failure to criminalise forced labour violates its obligations under article 4.

In October 2009, as a result of advocacy by NGOs, politicians and trade unions, the British government accepted that existing legislation failed to criminalise forced labour and amended the *Coroners and Justice Act 2009* to include a definition of the crime.

Britain's Ministry of Justice and the Crown Prosecution Service have issued guidance for the courts and police as to how the offence should be interpreted. The 2008 act is sufficient to criminalise forced labour and a new law is not required, but guidance similar to that of the British authorities may be required from the Department of Justice and the DPP, setting out the elements of the offence and evidential considerations.

The future

The European Court of Human Rights will hear a case in due course in which it will be argued that the state has greater obligations to protect migrant domestic workers from forced labour due to their vulnerability. The argument will be that the state must protect them, through workplace inspections, for example – and not simply to penalise the crime of forced labour.

If forced labour is criminalised, protection for foreign victims who have lost their status to remain in the country will also be required, so that the person is secure in the country while they act as a witness and recover from their experiences.

Irrespective of the existence of the offence of forced labour, practitioners will continue to advocate for victims of forced labour using civil employment courts. While not equivalent to a criminal prosecution, the victim may at least receive justice for breaches of employment law. G

LOOK IT UP

Cases:

- *Foy v An t-Ard Chlaraitheoir & Ors* [2002] IEHC 116
- *Siliadin v France*, ECtHR (26 July 2005)

Legislation:

- *Coroners and Justice Act 2009* (Britain)
- *Criminal Law (Human Trafficking) Act 2008*
- *European Convention on Human Rights*
- *European Convention on Human Rights Act 2003*
- *Forced Labour Convention 1930* (International Labour Office)
- *Human Rights Act 1998* (Britain)
- *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1957)

Literature:

- The Crown Prosecution Service's *Guidance on Slavery and Forced or Compulsory Labour*, published 19 March 2010 (see: www.cps.gov.uk/legal/s_to_u/slavery_servitude_and_forced_or_compulsory_labour/)

THE BIG CHILL

Protective costs orders may provide the means of overcoming the so-called 'chilling effect' of costs for public interest litigation. Jo Kenny turns up the heat

Jo Kenny is legal officer at the Public Interest Law Alliance, a project of the Free Legal Advice Centres. She qualified as a barrister in England and worked as a legal advisor to the Department for Work and Pensions for three years, where she advised on domestic and international litigation. She co-authored the pensions chapter in Employment Law *edited by Maeve Regan (Tottel)*

Earlier this year, Britain introduced a policy by which unsuccessful asylum-seekers could be deported with little or no notice. Medical Justice is a non-governmental organisation that helps asylum-seekers in immigration centres. They decided to legally challenge this policy. The English High Court found part of the scheme unlawful on the ground that it infringed access to justice.

One feature of the case that may have gone unnoticed is that, at the early stages of litigation, Medical Justice was granted what is known as a 'protective costs order', which capped its liability for costs at Stg£5,000, whatever the substantive outcome. This meant they could proceed with litigation without fear of an adverse costs order that they could not afford to pay.

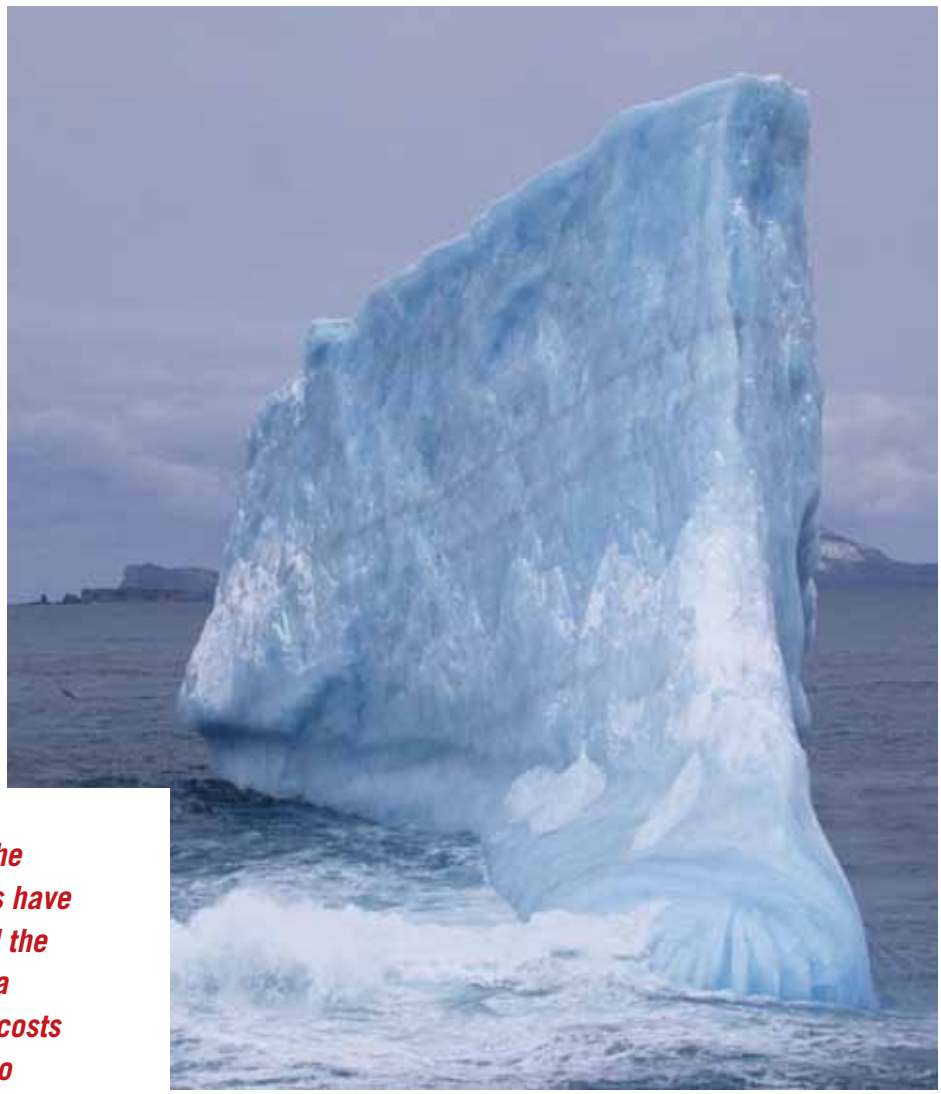
A 'protective costs order' is a costs order made at the outset of litigation, providing a plaintiff with certainty on the costs outcome. The order might provide any of the following:

FAST FACTS

- > 'Protective costs order' – a costs order made at the outset of litigation, providing a plaintiff with certainty on the costs outcome
- > The courts may find merit in relaxing the usual costs rules to enable a public-interest matter to be heard
- > In other jurisdictions, what are the relevant criteria to be satisfied for a protective costs order to be granted?
- > Where Ireland stands on the matter – cases must raise a unique and exceptional issue of public importance

- That there will be no order as to costs,
- That the plaintiff's liability for costs are capped, or
- That the defendant will pay costs, even if the plaintiff is unsuccessful.

This may all sound a little radical! So it is necessary to take a step back to understand why the courts would develop such a jurisdiction.



Leading English authority

It is a fact that not everyone can afford the high-risk game of litigation. But where a case provides an opportunity to clarify or resolve legal issues for a wider public benefit, the courts may find merit in relaxing the usual costs rules to enable a public-interest matter to be heard.

In doing so, they play their role in overcoming the so-called 'chilling effect' of costs for public interest litigation. As Judge Toohey commented in Australia: "There is little point opening the doors of the courts if litigants cannot afford to come in ... the fear, if unsuccessful, of having to pay the costs of the other side ... with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court."

The leading English authority on protective costs orders (PCOs) is the non-governmental organisation, Corner House Research. The Court of Appeal stated that "the general purpose of a PCO is to allow a claimant of limited means access to the court in order to advance his case without the fear of an order for substantial costs."

"To date, the Irish courts have considered the making of a protective costs order in two reported cases. They declined to grant an order in both instances, and this is, perhaps, unsurprising"

The court set out the relevant criteria to be satisfied for a protective costs order to be granted, as follows:

- The issues raised are of general public importance,
- The public interest requires that those issues should be resolved,
- The applicant has no private interest in the outcome of the case,
- Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order,
- If the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

In considering whether a matter raises 'public interest' issues, the English courts attach weight to whether the matter truly requires elucidation on a point of law, raises a novel point of law, or raises a novel interpretation of the law. Where it is more likely to be an exercise in applying familiar principles of law to new facts, the court will be less inclined to grant a PCO.

Examples of issues considered to be of public importance in English case-law include:

- A fast-track pilot scheme to deal with asylum claims (*Refugee Legal Centre*),
- An export credit guarantee consultation process relating to anti-bribery and corruption in international trade (*Corner House Research*),
- Licences granted to a university for animal experimentation (*British Union for the Abolition of Vivisection*),
- Planning permission regarding a site for rare endangered invertebrates (*Buglife*),
- Whether a registered social landlord was a 'public authority' under the Human Rights Act (*Weaver*), and
- Planning permission for a power station on a site used for bird-watching (*McGinty*).

Unsurprisingly, the 'no private interest' requirement has been subject to much criticism. Applicants for judicial review are required to demonstrate 'sufficient interest' to bring the claim in the first place.

To be required also to demonstrate lack of any private interest appears to be a contradiction in terms. Moreover, the suggestion that private interest and public interest are necessarily mutually exclusive has been labelled a "false dichotomy" (Chakrabarti). The Court of Appeal has noted judicial criticisms of the 'no private interest' requirement and recommended that a flexible approach be adopted towards all aspects of the *Corner House Research* guidance (*Morgan*).

Another potential difficulty for applicants of a protective costs order relates to legal representation. In *Corner House Research*, the Court of Appeal commented that recipients of a PCO that permits them to recover costs if successful should incur only "modest costs".

They added that *pro bono* representation would enhance the merits of the application. Yet both costs capping and the need for *pro bono* representation cause difficulties in terms of the legal representation that the applicant will be able to afford.

It also poses something of a quandary. If an issue is of public importance, it may well require lead as well as junior counsel – and yet "modest costs" would seem to preclude this possibility.

"If an issue is of public importance, it may well require lead as well as junior counsel – and yet 'modest costs' would seem to preclude this possibility"

Ireland – 'after-the-event' approach

The Irish courts have occasionally exercised their inherent discretion to disapply the usual costs rule after the event, where they considered the public interest of the case to justify it. Two Supreme Court examples are: *Curtin* and *Roche v Roche*.

Curtin concerned the removal of a judge from office and, accordingly, involved novel and crucial constitutional questions and raised serious issues around the separation of powers. The Supreme Court awarded the unsuccessful applicant half his costs. It is notable that the Supreme Court emphasised that this was an exceptional case and that it was not desirable to stipulate a definite rule on exceptions to the usual costs rules.

Similarly, in *Roche*, the Supreme Court ordered the successful respondent to pay the costs of the unsuccessful parties in relation to the High Court proceedings, on the ground that the case raised a unique and exceptional issue of public importance, which "surpassed, to an exceptional degree, the private interests of the two parties". That a case must be exceptional for deviation from the customary costs rule was confirmed in *Dunne*, where the Supreme Court overturned a High Court costs order on the basis that the case did not raise legal issues of special and general public importance.

Needless to say, the after-the-event approach provides plaintiffs with no certainty as to costs – unlike the protective costs order.

To date, the Irish courts have considered the making of a protective costs order in two reported cases. They declined to grant an order in both instances, and this is, perhaps, unsurprising.

In *Village Residents*, the court considered that the case was no different to many other planning judicial reviews, while in *Friends of the Curragh*, the court found that the matter involved applying familiar principles to new facts.

More developed case law on PCOs has made clear that the threshold for a PCO is higher than this, requiring issues of application beyond the individual, or clarification of issues of legal complexity, or a novel point of law or interpretation. Not every judicial review will satisfy this high threshold.

Further afield

Other common law jurisdictions have developed various means of overcoming the 'chilling effect'. In South Africa, where a constitutional case is taken in good faith, an unsuccessful plaintiff will not be ordered to pay costs (*Gauteng* and *Biowatch*).

Canadian courts have the power to order the state to fund the costs of a public-interest case by way of an 'interim costs order' (*Okanagan*). Australian courts enjoy the power to make 'maximum costs orders' – thereby capping costs which the respondent may recover where the case is brought in the public interest (*Corcoran* and *Haraksin*).

The approaches may differ, but what is interesting is that all these common law jurisdictions recognise the justification for modifying costs rules where a public interest issue is at stake.

This much is clear – there are options available to courts to facilitate hearing a matter which may benefit the wider public. If Medical Justice had not obtained a protective costs order, an important issue of access to justice might have gone unheard. A more nuanced approach is called for in public-interest cases.

LOOK IT UP

Cases:

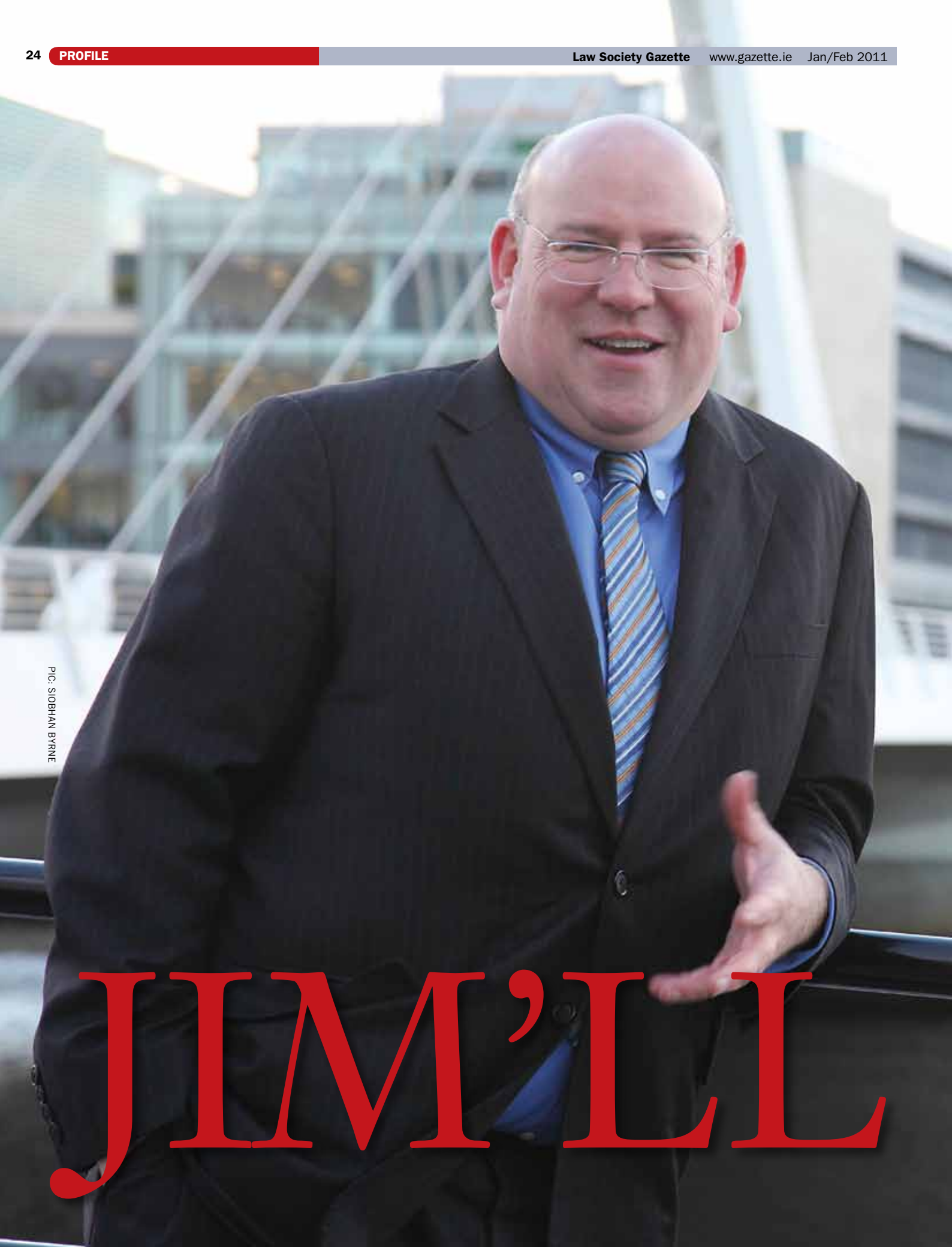
- *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08 [2009] ZACC 14)
- *British Columbia (Minister of Forests) v Okanagan Indian Band* ([2003] 3 SCR 371, 2003 SCC 71)
- *Corcoran v Virgin Blue Airlines Pty Ltd* ([2008] FCA 864)
- *R (ex parte Corner House Research) v Secretary of State for Trade and Industry* ([2005] EWCA Civ 192)
- *Curtin v Clerk of Dáil Eireann & Ors* ([2006] IESC 27)
- *R (on the application of the British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250
- *R (on the application of Buglife – the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation & Rosemound Developments Limited* [2008] EWCA Civ 1209
- *Dunne v Minister for the Environment, the Attorney General and Dun Laoghaire-Rathdown County Council* [2005] IEHC 94; [2007] IESC 60
- *Friends of the Curragh Environment Limited v An Bord Pleanála & Ors* [2006] IEHC 243
- *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* [CCT39/95) (1996) ZACC 4; 1996 (4) BCLR 537; 1996 (3) SA 165 (4 April 1996)]
- *Biowatch Trust v Registrar Genetic Resources and Others* (case CCT 80/08 [2009] ZACC 14)
- *Haraksin v Murrays Australia Ltd* [2010] FCA 1133 (20 October 2010)
- *R (ex parte Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925
- *McGinty, Re Judicial Review* [2010] CSOH 5
- *Morgan v Hinton Organics (Wessex) Ltd & CAJE* [2009] EWCA Civ 107
- *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1239
- *Roche v Roche* [2010] IESC 10
- *Village Residents Association Ltd v An Bord Pleanála and McDonalds* [2000] 4 IR 321
- *Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235

Literature:

- 'The Costs Barrier and Protective Costs Orders at www.pila.ie

References:

- Toohey J's address to the International Conference on Environmental Law (1989) quoted in *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150
- Chakrabarti S, Stephens J, Gallagher C, *Whose Cost the Public Interest?* (2003) *Public Law* 697



PIC: SIOBHAN BYRNE

JIM'LL

FAST FACTS

- Thirteen-year legal journey to obtain justice
- Key items of evidence lost by Garda Síochána
- Judgment in favour of McFarlane appealed to Supreme Court
- Second challenge alleges that "systematic" delays by the prosecution had fatally undermined McFarlane's right to a fair trial
- Substantive case against McFarlane collapses, but a European challenge in relation to delays is pursued on a point of principle

FIX IT

In a David versus Goliath confrontation, solicitor James MacGuill took on the might of the State – and three senior counsel – in the Grand Chamber of the European Court of Human Rights. Colin Murphy spoke to him about litigating to win

Colin Murphy is a journalist and documentary maker in Dublin, specialising in social and cultural affairs. His radio series From Stage to Street *is currently being broadcast on RTÉ Radio 1 on Saturdays at 7.30pm. A selection of his work can be found at www.colinmurphy.ie*

James MacGuill made his final point and sat down. He had just finished the biggest case of his career. In front of him were the 17 judges of the Grand Chamber of the European Court of Human Rights. Across the aisle sat the three senior counsel against him, representing Ireland.

MacGuill had just finished responding to a series of questions posed by the judges, which had followed his presentation of his case. As the judges had asked their questions, MacGuill and his assistant – a young apprentice, Aimée McCummiskey – had noted them, and as he answered them, she ticked them off. But as he sat down, he saw she was pointing urgently to an unticked question.

MacGuill jumped back to his feet and just managed to get in his answer to that last, neglected question. A short time later, he and McCummiskey were standing outside in the Strasbourg spring air again. There were no colleagues to clap them on the back and no one to offer an opinion on how the case had gone. They thought about lunch and checked the time. It was 11.30am. The entire case had taken less than two hours.

MacGuill's client was Brendan McFarlane, a one-time leading member of the IRA, now a community worker in West Belfast. McFarlane had an extraordinary 'career'

with the IRA (see panel). In 1983, he escaped from the Maze Prison, where he was serving a life sentence for his role in a notorious pub attack and, subsequently, was allegedly involved in the kidnapping of supermarket executive Don Tidey, during which a trainee garda and a soldier were killed.

McFarlane was recaptured in 1986 and served out the rest of his sentence without ever being charged with the Don Tidey kidnap. He was due for final release in 1998 – but on the day of his release, he was arrested and charged.

Opportunity knocks

McFarlane hired James MacGuill, a prominent Dundalk solicitor (later to become president of the Law Society), and the two embarked on a legal journey that would become a 13-year odyssey.

MacGuill's first challenge to the charges was based on the fact that the Garda Síochána had lost key items of evidence, which allegedly had McFarlane's fingerprints on them. The High Court found in favour of McFarlane, but the state appealed to the Supreme Court. In 2006, that court found in favour of the state – over six years after McFarlane's first complaint was lodged.

MacGuill then launched a second challenge, alleging that "systemic" delays by the prosecution had fatally undermined McFarlane's right to a fair trial. The delay "appeared to be vindictive", he says. "They should have prosecuted him when he had the fairest chance of defending himself."

The High Court dismissed this complaint, and MacFarlane appealed to the Supreme Court. In 2008, they ruled that the trial could proceed. But when it did, later that year, the case collapsed after the court ruled that garda evidence was inadmissible.

McFarlane was acquitted – but there remained one legal challenge outstanding. James MacGuill had applied to the European Court of Human Rights in the wake of the Supreme Court's rejection of his complaint about unreasonable delays. Now that the substantive case had collapsed, there may have been no pressing need to pursue that European challenge, but McFarlane decided to persist with it on a point of principle.

> *"This was the solicitor's equivalent of getting to play at Lansdowne Road for Ireland. You're not going to get more than one chance of doing this"*

Magic roundabout

The European Court had found against Ireland twice before on issues of delays, in the *Doran* and *Barry* cases, and there were (and are) other cases pending against the state on issues of delay. The state saw an opportunity to overturn these precedents and applied to have the case heard by the court's Grand Chamber of 17 judges.

For MacGuill, this provided a unique challenge and opportunity. Due to a scheduling difficulty for the counsel involved, and with the agreement of McFarlane, it fell to him to take on the advocacy of the case before the Grand Chamber.

"This," he says, "was the solicitor's equivalent of getting to play at Lansdowne Road for Ireland. You're not going to get more than one chance of doing this."

For all that, the task was daunting – but he didn't see it as reckless and argues that, in fact, solicitors should take to their feet more. "I have argued in most of the Irish courts. It's not a given that the barrister is always the best bet, and it's certainly not a given that the solicitor is always inadequate for the job.

"If the case involved an area of law that the solicitor isn't comfortable with, then they shouldn't be reckless and do it, but if it involves facts or law that even a truly expert barrister can't properly master in time, then the barrister shouldn't be asked to do it.

"We had been with the case from day one, so we weren't going to be wrong-footed easily on the details of domestic proceedings or the underlying facts of the case. That meant we were able to concentrate on what the court might be interested in, such as points of broader application from a European perspective.

"In any case, you get a more predictable reception in Strasbourg than in the Four Courts," he jokes. "The Strasbourg courts are not going to make a distinction between a solicitor and a barrister."

Generation game

MacGuill appreciated the rigours of preparing and presenting a case before the European Court, where the scheduling, paperwork and arguing of a case are all far more disciplined than in the Irish system. The initial challenge lay in the paperwork. The court provided him with a precise questionnaire, and he was entitled to submit a 30-page memorial – which he had to distil from the 50 or 60 boxes of files in his office.

He worked on it mostly at weekends – "you can't do this stuff when the phone is ringing" – and focused on making everything as succinct as possible. "You have to decide what are the truly relevant materials. You get no points out there for being lazy and throwing something in as a make-weight."

He found the court procedures supportive and the personnel helpful and responsive.

THIS IS YOUR LIFE

Brendan 'Bik' McFarlane was training to be a priest when the Troubles broke out, and he abandoned his studies and returned home to Belfast to join the Provisional IRA. In 1976, he was sentenced to life imprisonment for his part in an attack on the Bayardo Bar in the Shankill Road area of Belfast, in which five people were killed.

Imprisoned in the Maze, he was the IRA's officer commanding during the hunger strikes of 1981, and later led the mass escape from the Maze of 1983. In December that year, supermarket executive Don Tidey was kidnapped by an IRA gang, McFarlane allegedly among them. Gardaí and the army traced the gang to Derrada Wood in Co Leitrim and, in an ensuing shoot-out, a trainee garda and soldier were killed. Tidey escaped, but so did the gang.

McFarlane was later captured in the Netherlands and extradited to Northern Ireland to complete his sentence. On the day he was released, he was arrested and charged with Tidey's kidnapping. That case was eventually held in June 2008; it collapsed when garda evidence was ruled inadmissible, and McFarlane was acquitted.

SALE OF THE CENTURY

James MacGuill on solicitors arguing before the courts: **"As solicitors, we have had a right of audience in every court since 1961. Colleagues in other common law jurisdictions have had to struggle to win this right, and only get it on limited terms. And yet they use it more than we do – what you get for nothing, you don't appreciate. We shouldn't waste the opportunity we have by not using it. But economics kicks in, in the way the fees are structured: you're almost penalised if you do both the preparation and the advocacy of a case, as you get the same fee, so you may as well bring in a barrister. If I was paid properly to do it, I'd do it all the time.**

"It's easier to do the Supreme Court, where you get a day, and do it on that day. But in the High Court, your case may not get on, and that screws up your day, and possibly your week. We can see changes coming from London, especially on the commercial side. The Americans are not used to the split profession, and increasingly don't want cases handed over."

"The court supervises the work so that you address the issues the court is concerned with, and you don't have an opportunity of dodging the hard questions. The personnel make sure that, by the time a case gets to the judges, the preparatory work has all been done."

Asked what his key piece of advice to a solicitor facing the European Court would be, this is the aspect he focuses in on: "If you don't take time and care to do the paperwork right, you're on the back foot thereafter. Paperwork is a solicitor's friend: we're good at that, we're disciplined."

On the day, the state had 30 minutes to present its case, with MacGuill having 30 minutes to respond; after that, they each faced a series of questions from the judges and were each given ten minutes to respond.

The persuaders

"It was a culture shock. You arrive at the building at 8.30am; at nine, you make a courtesy call to the president of the court; the case starts at 9.30am, and you're walking out of court at 11.30am.

"Forty minutes sounds like it's a short period of time, but that's possibly because our courts are too tolerant of content-free filibustering. You can communicate a lot of information in 40 minutes. If questions are put right up to you and you answer them, it's very efficient.

"Other courts impose strict time limits: the Court of Justice in Luxembourg has a limit of 30 minutes; the US Supreme Court has a limit of 20 minutes. We've a lot to learn from that.

"Giving airtime to bad points can devalue your good points. People should have the discipline of getting their arguments down in writing, and then use the oral presentation to highlight the most critical points, to take issue with developing themes, and to answer questions.

"You shouldn't have to come in and tell professional judges what the case is about. Everyone should be sitting down in a courtroom knowing that the documents have been prepared well and have been studied and taken seriously by everybody there."

The case itself was straightforward – barring the moment when it took his young assistant to point out his omission.

The state's core argument was that McFarlane had not exhausted the domestic remedies available to him by not seeking damages arising from the delays. MacGuill pointed out that nobody had ever successfully sued for damages in such a case, and that, as McFarlane's main objective had been to have his trial stopped, it was unreasonable to expect him to have sought to have the case expedited.

The court found in favour of McFarlane by 12 to five. It concluded that the remedies proposed by the state would not have provided an effective remedy to McFarlane and found that the duration of the criminal proceedings was excessive, violating article 6, section 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which guarantees a fair trial "within a reasonable time". McFarlane was awarded compensation of €15,500.

Are you being served?

The overall experience reinforced MacGuill's conviction that the Irish courts are badly in need of reform.

"We should be hopping out of the 18th century, where we are at the moment, and getting ahead of the game in the 21st century. We should be using technology all the time."

A key development, he says, would be to televise proceedings in the appellate courts (where there are no witnesses). The European Court proceedings are broadcast (with a delay) on the internet (at www.echr.coe.int), and this "possibly has the effect of making people think more carefully about what they're saying," he speculates. "It is an important pro-citizen tool that can make the processes of the courts available to the public. It's the coming thing, and what we should be doing is working out where it's appropriate and where it isn't."

And other reforms?

"I don't understand the reluctance to allow video-links in civil and commercial type cases," he says. "We need longer working hours for the courts. We need to limit the time that's available for argument. We should compel people to reduce their cases to paper and to agree with the other side the areas that are really an issue and those that aren't. And hearing dates have to mean something. You have small businesses involved in a court case, and they're waiting around for a couple of days to get on. It's hugely wasteful."

The key to reform is the judiciary, and he believes there is "every indication that the judges want to be progressive," citing the example of the Commercial Court, which has "made huge strides forward".

"But solicitors have to improve their own professionalism," he notes. A "culture change" is required, that would see solicitors "frontloading the work – doing the work in advance, rather than as you go along. This doesn't require any big legislative change, just a change in approach."

PIC: SIOBHAN BYRNE

"You get a more predictable reception in Strasbourg than in the Four Courts," he jokes. "The Strasbourg courts are not going to make a distinction between a solicitor and a barrister"

SEE THE COURT IN ACTION

The webcast of *McFarlane v Ireland* can be found on www.echr.coe.int in the section 'webcasts of public hearings'.

LEND ME *arrears*

The legal approach to residential mortgage default has changed, and the updated *Code of Conduct on Mortgage Arrears* is likely to have a significant effect – at least in the short term – on the number of residential mortgage suits. Cian O'Sullivan drops off the keys

Cian O'Sullivan is a solicitor and registered tax consultant with Mason Hayes & Curran

On 6 December 2010, the Central Bank published its updated *Code of Conduct on Mortgage Arrears*. The code operates with effect from 1 January 2011 and applies to loans to individuals in respect of their principal private residence. The code implements a number of recommendations issued by the Expert Group on Mortgage Arrears and Personal Debt.

The code supersedes its predecessor – published on 17 February 2010 – and specifies the procedures that lenders must follow where a borrower falls into arrears or where he contacts a lender to inform it that he is in danger of going into financial difficulties and/or is concerned about going into mortgage arrears. Pursuant to section 117(1) of the *Central Bank Act 1989*, all lenders must comply with the code.

In essence, a lender must not seek to repossess a residential property until every reasonable effort has been made to agree alternative repayment arrangements with a borrower. This involves consideration of the borrower's personal circumstances and standard forbearance options, such as converting to interest only, deferring payments for some time, extending the mortgage term or capitalising arrears and related interest.

Lenders are prevented from imposing charges/surcharge interest on mortgage arrears to which the code applies. Also, proceedings seeking to enforce a mortgage cannot issue unless 12 months has expired after arrears first arise. The 12-month period will not start to run while a borrower is complying with any alternative repayment arrangements. The '12-month moratorium' does not apply where a borrower does not cooperate with a lender.

Where a mortgage is unsustainable or where a borrower is not willing to enter into an alternative repayment arrangement, the lender must inform the borrower of other available options, such as voluntary surrender/sale or trading down. Proceedings for repossession must only issue as a last resort.

Where proceedings are already extant, they must be stayed while a borrower complies with any alternative repayment arrangements. Where property is disposed of on foot of a repossession order, the lender must notify the borrower of the balance outstanding, the costs arising out of the disposal that have been added to the loan account, and the interest rate being charged on the remaining balance.

In any proceedings, the lender will have to demonstrate compliance with the code if its application is to succeed.

> ***"Proceedings for repossession must only issue as a last resort"***

Procedures in the High Court

A lender seeking an order for possession and/or sale of a commercial or residential property should commence proceedings by a special summons, which is returnable before the Master of the High Court. The master may transfer the matter to the judge's list if all necessary affidavits have been delivered by the parties. The master does not have jurisdiction to make an order for possession or sale.

Following transfer to the judge's list, the judge may make an order for possession and sale at the hearing of the special summons or may send the matter on for plenary hearing if the borrower satisfies the judge that there is a fair or reasonable probability of a real or *bona fide* defence on the merits. The norm is for an order for possession and sale to be made.

Adjournments will usually be granted if the borrower can convince the court that the arrears owing will

FAST FACTS

- Updated *Code of Conduct on Mortgage Arrears* implements recommendations issued by the Expert Group on Mortgage Arrears and Personal Debt
- Lender must not seek to repossess a residential property until every reasonable effort has been made to agree alternative repayment arrangements
- Proceedings seeking to enforce a mortgage cannot issue unless 12 months have expired after arrears first arise – this period will not start to run while a borrower is complying with any alternative repayment arrangements
- Sale by consent is usually in the borrower's best interests, as more of the indebtedness will likely be paid off
- Enforcement proceedings must issue within a certain time to avoid becoming statute barred

be discharged within a reasonable time. Moreover, orders for possession and sale are usually stayed for a few months, depending on the type of property involved and the circumstances of the case.

If the High Court makes an order for sale, the sale of the property will proceed under the supervision of the Examiner's Office (see order 55 and appendix G of the *Rules of the Superior Courts*). The court order is lodged in the Examiner's Office, and a notice to proceed is served on the borrower with a return date before the examiner.

The examiner must satisfy himself regarding the existence of all mortgages affecting the property and their priorities. When the examiner is so satisfied, the lender issues a motion before the examiner to settle the particulars and conditions of sale and nominates an auctioneer. Once the conditions of sale are settled, the sale can proceed and is typically by way of public auction.

If the property is sold, the sale proceeds are lodged into court (Accountant's Office). The examiner completes a certificate of incumbrances, which forms the basis of a further court application to pay out the funds. Stamp duty totalling 5% of the sale proceeds is payable.

Stamp duty, and additional legal fees, can be avoided if all parties consent to the sale (and possession, if necessary) without a court order. A sale by consent is usually in the borrower's best interests, as more of the indebtedness will likely be paid off, because a voluntary sale usually obtains a better price and the legal and transaction costs of a forced-sale process (which are for the account of the borrower) are thereby avoided.

Where the sale proceeds do not exceed the amount of the indebtedness, a borrower will be liable for the shortfall. This liability will rank equally with other unsecured creditors.

A lender seeking to obtain a money judgment in the High Court for the amount

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outstanding on a commercial/residential mortgage should commence proceedings by a summary summons. A lender is entitled to obtain summary judgment for the amount outstanding if an appearance is not entered to a summary summons within eight days of service. If an appearance is entered, a lender must issue a notice of motion before the master grounded upon affidavit that exhibits any relevant documents.

If the master is satisfied that there is no *bona fide* defence to the claim, he may grant liberty to enter judgment. If so, normal enforcement procedures can follow.

Procedures in the Circuit Court

With effect from 1 December 2009, section 101(5) of the *Land and Conveyancing Law Reform Act 2009* gives the Circuit Court exclusive jurisdiction with regard to all residential mortgages created after that date.

The Circuit Court also has jurisdiction for non-residential mortgages where the property's rateable valuation is less than €252.95. The 2009 act applies to commercial mortgages unless the mortgage deed provides otherwise or unless specifically excluded by the 2009 act.

Section 97 of the act provides that a lender shall not take possession of a residential property without a court order. However, a court order is not required where a borrower consents to a lender taking possession. The section provides that such a consent must be in writing and made seven days prior to the lender taking possession. Section 100 provides that a lender's power of sale becomes exercisable if, among other things, there has been default in making repayments for three months, or some interest or part interest and part capital is in arrears and unpaid for two months, provided in each case that 28 days' notice has been given.

With effect from 8 July 2009, the *Circuit Court Rules (Actions for Possession and Well Charging Relief) 2009* give a county registrar jurisdiction to make an order for possession (but not sale) where either no appearance has been entered or a replying affidavit disclosing a *prima facie* defence has not been filed.

The intention behind the rules is to simplify and speed up the mortgage enforcement process. As of November 2010, leave has been granted by Mr Justice Peart, allowing a borrower to judicially review the exercise of this power on the basis that, among other things, it should only be exercised by a judge, as is the case with the High Court.

Time limits

Enforcement proceedings must issue within a certain time to avoid becoming statute barred. In assessing a case, it is important to consider the definition of 'default' contained in a mortgage or in a facility letter or other terms and conditions. Usually, non-payment coupled with a demand for payment constitutes default. If so, a lender has six years (section 11 of the *Statute of Limitations 1957*) from default to issue proceedings.

The code does not address the issue of whether or not the statute stops running while the '12-month moratorium' is in effect, so one should assume it does not. Therefore, despite the wording of the code, a lender may have to consider issuing 'protective proceedings' in cases where the statute will run out prior to the expiration of the 12-month deadline, but taking no further action until the moratorium expires. (The situation is very different where a borrower passes away and may require an application to court. See 'Night of the living debt', p28 of the Jan/Feb 2010 *Gazette*).

Significant effect

It is likely that the number of commercial mortgage proceedings will continue to rise over the next number of years as a result of the recapitalisation and reorganisation of Irish banks. It is reasonable to assume that the code will have a significant effect on the number of residential mortgage suits, at least in the short term.

It is contended by some commentators that the sale of a large number of repossessed properties will serve to further undermine values, which is neither in lenders' nor borrowers' interests. However, the alternative view is that this is necessary to provide a true market price.

Whichever economic proposition is correct, what is clear is that the legal approach towards residential mortgage default has changed and is well summarised by the introduction to the code, which states: "All [residential mortgage arrears] cases must be handled sympathetically and positively by the lender, with the objective at all times of assisting the borrower to meet his/her mortgage obligations."


Friends, Romans, countrymen...

"It is likely that the number of commercial mortgage proceedings will continue to rise over the next number of years as a result of the recapitalisation and reorganisation of Irish banks"

LOOK IT UP

Legislation:

- *Central Bank Act 1989*, section 117(1)
- *Circuit Court Rules (Actions for Possession and Well Charging Relief) 2009* (SI 264/2009)
- *Land and Conveyancing Law Reform Act 2009*
- *Rules of the Superior Courts*, order 55 and appendix G
- *Statute of Limitations 1957*, section 11

Lay-off MY CASE

There is a misconception among many employers that employees who have been placed on lay-off are no longer entitled to be paid, but, except in limited circumstances, that is not the case. Richard Grogan puts in the overtime

Richard Grogan is principal of Richard Grogan & Associates Solicitors, also registered tax consultants

There is a misconception that when an employee is placed on lay-off, the obligation of an employer to pay the employee ceases. Except in very limited circumstances, that is not the position – as evidenced by the large number of claims being brought before the Rights Commissioner Service under the *Payment of Wages Act*, relating to payment of individuals while on lay-off. The misconception appears to arise by virtue of the provisions of section 11(1) of the *Redundancy Payments Act 1967*. Section 11(2) refers to circumstances where, in any week, an employee's remuneration is:

- Less than half of his normal weekly remuneration, or
- His hours of work are reduced to less than one-half of his normal weekly hours, or
- The reduction in remuneration of hours is caused by the diminution either of the work provided by the employer for his employee, or of a kind that, under his contract, the employee is employed to do.

Some employers seem to be of the opinion that, once employees are placed on lay-off by following the procedures under the *Redundancy Payments Acts*, there is no requirement to pay. However, the provisions of section 5 of the *Payment of Wages Act 1991* provide, in particular: "An employer shall not make a deduction from the wages of an employee (or receive any payment from the employee) unless:

a) The deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute [section 5(1)],
b) The deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or
c) In the case of a deduction, the employee has given his prior consent in writing to it."

Where a contract of employment has a specific provision providing for non-payment of wages during a period of lay-off, then there is no obligation on an employer to pay wages during that period of lay-off. Unless there is such a contract in existence so specifying, then the employer is in a position of having to get the consent of the employee not to pay wages. It is highly unlikely that any employee is going to consent to not being paid during lay-off.

There is an exception to this – namely, where there is a custom or practice of not paying during lay-off. Such a custom or practice must be reasonable, certain and notorious.

Payment during lay-off

The issue of payment during lay-off was considered by Mr Justice White in the case of *John Lawe v Irish Country Meats*. In that case, the court referred to the legal position that is helpfully summarised in *Forde Employment Law* (p81), where it is stated: "Absent a term in the contract to the contrary, the employer's fundamental obligation is to pay the agreed remuneration for the time of work during which the employee is prepared to work (*Hanley v Pearse & Partners*). Ordinarily, an employer is free to lay off workers for any reason, provided he continues to pay them. A lay-off without paying the normal agreed remuneration can be treated by the employee as a dismissal."

The court referred to the case of *Bond v CAV Ltd* and *Neads v CAV Limited*, where this matter was considered by Mr Justice Payne of the High Court, Queen's Bench Division (see p366, paragraph 48): "I begin by referring to several authorities on the proposition at common law. The

FAST FACTS

- Misconception that employers entitled to lay off employees without pay due to lack of available work
- Large of number of claims beginning under the *Payment of Wages Act* for payment of individuals while on lay-off
- Are lay-off procedures being abused as a way of avoiding paying redundancy payments?
- Many employers are not seeking the advice of solicitors in advance of implementing lay-offs until after a claim is made by an employee
- Where redundancies or lay-offs are being considered, legal advice is imperative

first one is *Devonald v Rosser*, which established in common law there is no right to lay off without payment, except in very limited circumstances."

Paragraph 50 continues: "It is therefore plain that there is no general right to lay off without pay at common law, but such a right exists only in very limited circumstances."

It is accepted that where there is a custom of a trade, which is reasonable, certain and notorious, it is possible to provide for a lay-off without pay. In order to succeed, an employer must prove a custom or general usage to be so well known as to be properly read into the contract. It must be, as Lord Denman CJ held in *R v Stoke-Upon-Trent*, "a custom so universal that no workman could be supposed to have entered into this service without looking to it as part of the contract".

The law on this issue would appear to be reasonably clear. There is no right to lay off a worker without paying that worker during the lay-off period, unless there is a custom or practice in the industry or the particular employment that is so well known and notorious that no worker could be other than aware of it.

There is a right to lay off a worker without pay where there is a specific clause in their contract of employment authorising an employer to lay off without pay. Where an employer lays off a worker without pay and there is no notorious custom, nor a clause in a contract allowing for a lay-off without pay, an employee will be entitled to bring a claim under section 5(2) of the *Payment of Wages Act 1991* for wages during the period of the lay-off.

> ***"Lay-off procedures are being abused by certain employers as a method of avoiding paying redundancy payments"***

It would appear that, in the case of an employer who is considering laying off staff, it is important, when obtaining legal advice, to ascertain the position in relation to the employees' contracts. If the contracts do not have a specific clause allowing for lay-off without pay, or if there is no notorious custom within the business itself or the industry for lay-off without pay, in those circumstances it would be important for an employer to consider whether this is a real lay-

APPEALS – GETTING IT ALL WRONG

Claims under the *Payment of Wages Act* in the past five to seven years were invariably dealt with before the Appeals Commissioner or compromised before they came on for hearing. Appeals of payment of wages claims were relatively few in number. An employer received a payment of wages claim, the employer obtained the services of a solicitor, and matters were dealt with. Now, because of the size of claims or because the employer has simply ignored the initial complaint to the Rights Commissioner Service, appeals are having to be considered.

One issue that is consistently coming to light in respect of appeals is that the procedures in relation to appeals to the Employment Appeals Tribunal are not being complied with.

Section 7(2)(b) of the *Payment of Wages Act 1991* provides: "An appeal under this section shall be initiated by a party by his giving, within six weeks of the date on which the decision to which it relates was communicated to him

a) A notice in writing to the tribunal containing such particulars (if any) as may be specified in regulations under subsection (3) and stating the intention of the party concerned to appeal against the decision, and

b) A copy of the notice to the other party concerned."

There is a misconception that simply lodging the appeal with the Employment Appeals Tribunal is sufficient. Service on the EAT is not sufficient in itself. (See *Riehn v Royale* and *Tirmova v Vitra Ireland Limited*.)

The provisions of section 7(2), by the use of the word 'shall', contain a mandatory requirement of service on the other party concerned within the six-week period (see *Shahid Sultan v Nasem*) The use of the word 'his' before the word 'giving' indicates that there is a requirement that the party personally serve a copy on the other party. It is not sufficient to believe that service on the EAT is sufficient.

Where the person making the appeal gives uncontested evidence of having effected service by ordinary post, the EAT has held that the onus is on the other party to establish that it did not receive it. (See *Morris v Department of Justice, Equality and Law Reform* (PW 24/205).)

Where the provisions of section 7(2)(a) have not been complied with, the EAT will hold that it does not have jurisdiction to hear the appeal of a Rights Commissioner decision under the *Payment of Wages Act 1991*. The fact that the party against whom the appeal has been taken has entered an appearance, is in attendance, and has been notified of the appeal by the EAT is irrelevant. The party against whom the appeal has been taken simply has to put it to the EAT that no notification has been received by the party against whom the appeal has been taken directly from the party appealing.

It is then a matter for the party appealing to show that he served the proceedings directly upon the other party within the six-week period of time. There is no provision in the legislation to allow for an extension of time. The use of the word 'shall' means it is mandatory.

Because of the importance of appeal documentation being sent and having a record of same, it is important that the appeal documentation is either hand delivered to the other side, against whom you are appealing, or is sent by recorded registered mail. In the alternative, a certificate of posting by ordinary prepaid post would be sufficient.

This is not an academic issue. It is arising weekly before the EAT. I would refer practitioners to two recent cases, PW31/2009 and PW200/2009. In both cases, the party appealing and the party against whom the appeal had been brought were in attendance. In neither case had the respondent claimed that they had not received a copy of the notice of appeal from the tribunal.

In one case, the party appealing appeared in person. In the second, they were represented by a firm of solicitors. In PW31/2009, the respondent was represented by this office. In PW200/2009, the respondent was represented by a citizens' rights centre. In both cases, the defence at the outset was raised under the provisions of section 7(2). In neither case could the appellant show compliance with service directly upon the respondent. In both cases, the appeals were dismissed on the basis that the tribunal had no jurisdiction to hear the appeals. This particular defence is notorious. By this, I mean that it is known by both those of us who practise in the legal profession and by non-legal practitioners.

While this defence is one that the EAT rightly does not like, it is one that we as practitioners must utilise for the purposes of representing our clients. It is a simple matter to get it right. The consequences of not getting it right can be that an employer who has a good defence to a payment of wages claim, or an employee who has a good appeal against a decision by a Rights Commissioner, will effectively be denied an opportunity to do so because of failure to comply with a very simple procedure.

Pending the law on this issue being changed, it is a matter of getting it right or it going horribly wrong.

"Many employers are being advised in respect of redundancies and lay-offs by individuals who are not qualified legal advisors but purport to provide quasi-legal services under the guise of HR consultancy services"

off, with a real potential for re-engagement after a short period of time, or whether the employer should immediately commence the redundancy procedure and make the employees redundant.

There is a worrying trend developing at the present time, in respect of which a number of claims are going to the Rights Commissioners Service under the *Payment of Wages Act*, where employers are placing employees on extended lay-off where there is no real potential for re-engagement. I have a concern that lay-off procedures are being abused by certain employers as a method of avoiding paying redundancy payments by placing employees on long-term lay-off, where there is no real potential for re-engagement, in the hope that the employees will not claim redundancy. Employers who do so run the significant risk of a claim for non-payment of wages during the period of the lay-off.

There is a further risk that an employer runs in these cases. Where an employee is placed on temporary lay-off, it would appear that this does not impact on the entitlement of the employee to holiday pay, nor to payment in respect of public holidays. Again, it is important to ensure that a contract is in place that makes provision for non-payment during lay-off, as otherwise there is a continuing entitlement to these payments, unlike the *Payment of Wages Acts*, where the award can only be the amount of the actual loss. In the case of a claim in respect of annual holidays and public holidays, a Rights Commissioner or the Labour Court is entitled to award, in addition, compensation for failure to pay these sums.

Unfortunately, many employers are not seeking the advice of solicitors in advance of implementing lay-offs until after a claim is made by an employee. The law relating to redundancies and lay-offs is complex. Many employers are being advised in respect of redundancies and lay-offs by individuals who are not qualified legal advisors but purport to provide quasi-legal services under the guise of HR consultancy services.

The Law Society recently ran a series of advertisements on the radio concerning redundancies. This particular problem – which is arising more and more for employers, and potential claims for employees – shows the importance of the Law Society message that, where redundancies or lay-offs are being considered, legal advice is imperative. G

LOOK IT UP

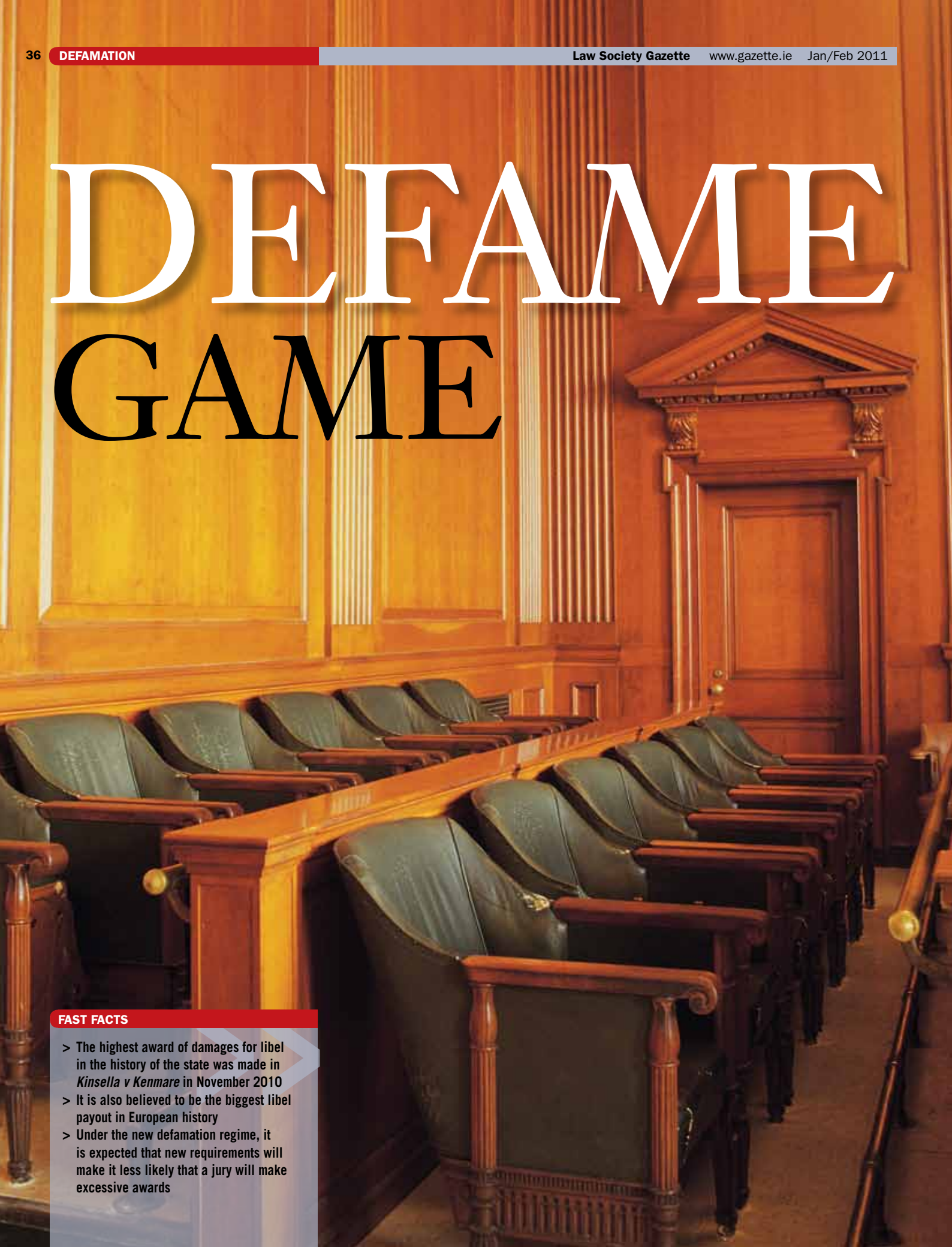
Cases:

- *Bond v CAV Ltd and Neads v CAV Limited* [1983] IRLR 360
- *Devonald v Rosser* [1906] 2KB 728
- *Hanley v Pearse & Partners* [1915] 1 KB 698
- *John Lawe v Irish Country Meats (Pig Meats) Limited* [1998] ELR 266
- *R v Stoke-Upon-Trent Inhabitants* [1843] 5 QB 303
- *Riehn v Royale* PW 21/205
- *Shahid Sultan v Nasem* [2001] ELR 302
- *Tirmova v Vitra Ireland Limited* PW 72/206

Legislation:

- *Payment of Wages Act 1991*
- *Redundancy Payments Act 1967*

DEFAME GAME



FAST FACTS

- The highest award of damages for libel in the history of the state was made in *Kinsella v Kenmare* in November 2010
- It is also believed to be the biggest libel payout in European history
- Under the new defamation regime, it is expected that new requirements will make it less likely that a jury will make excessive awards

The largest libel award in Irish – and perhaps European – history was made last November in the prominent case of *Kinsella v Kenmare*. Emma Keane says that it's regrettable that the assessment of damages was not removed from the responsibility of the jury by the *Defamation Act 2009*

Emma Keane is a barrister and practises mainly in Dublin

The *Defamation Act 2009* introduces a number of changes to Irish defamation law. One such change that is particularly relevant to a recent decision, *Kinsella v Kenmare Resources*, is provided for in section 31 of the act, which deals with damages. The 2009 act came into force on 1 January 2010. It applies only to defamatory statements made after 1 January 2010. The offending press release in *Kinsella* was issued in 2007, so the case was heard using the old rules.

Irish juries were previously given some basic guidance in assessing damages. For example, they were told that an award of damages should represent fair and reasonable compensation for the injury suffered by the plaintiff. However, it was not allowable for actual figures to be mentioned to juries.

Under section 31(1) of the 2009 act, "the parties in a defamation action may make submissions to the court in relation to the matter of damages". (Section 31(8) provides that "in this section 'court' means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury".) Section 31(2) provides that "in a defamation action brought in the High Court, the judge shall give directions to the jury in relation to the matter of damages". Section 31(3) states: "In making an award of general damages in a defamation action, regard shall be had to all of the circumstances of the case."

Section 31(4) provides a list of 11 criteria to which the court is to have regard. These criteria include the gravity of any allegation, the means of publication, the extent to which the statement was circulated, the offering of an apology, the making of an offer to make amends, the importance to the plaintiff of his reputation in the eyes of the recipients of the statement, acquiescence by the plaintiff in the publication of the statement, and evidence given concerning the reputation of the plaintiff.

New requirement

It remains to be seen how the new procedure will operate in practice. It is expected that the new requirement that the judge shall give directions to the jury in relation to the matter of damages will make it less likely that a jury will make such an excessive award as was made in the case of *Kinsella v Kenmare*. The highest award in the history of the state was made to Mr Kinsella on Wednesday 17 November 2010. It is in fact believed to be the biggest libel payout in European history.

Mr Kinsella sued his former employer, Kenmare Resources, claiming he was defamed by a press release it sent out. The release stated that the board of the company was to seek Mr Kinsella's resignation as chairman of the company's audit committee arising out of 'an incident' that occurred in 2007 at the company's mine in Mozambique. On foot of the incident, a complaint was made by the company secretary, Deirdre Corcoran, against Mr Kinsella. The company chairman requested that the company solicitors conduct an investigation and prepare a report on the incident. The report was presented to the chairman, and he then sought and received a written apology from Mr Kinsella to Ms Corcoran.

> ***"After just three hours of deliberations, the jury awarded Mr Kinsella €9 million in compensatory damages and €1 million in aggravated damages"***

Mr Kinsella had appeared naked at the room of Ms Corcoran. She had complained about this. Mr Kinsella claimed to have been sleepwalking. The independent investigation had found that there was no conscious attempt by Mr Kinsella to enter Ms Corcoran's room and no improper motive in opening her door. The jury was asked whether the press release stated or inferred that Mr Kinsella had made inappropriate sexual advances to Deirdre Corcoran. The jury answered this question affirmatively. After just three hours of deliberations, the jury awarded Mr Kinsella €9 million in compensatory damages and €1 million in aggravated damages. Kenmare said it was shocked at the verdict and would "immediately and vigorously" appeal to the Supreme Court in pursuit of a retrial.

Falling short

The previous highest libel award in the history of the state was that awarded to Monica Leech. Ms Leech, a public relations consultant, was awarded €1.87 million against Independent Newspapers over false suggestions that she won contracts because she was having an extra-marital affair with Martin Cullen, the then environment minister. The danger of juries deciding awards of damages in defamation cases is further illustrated in the case of *Denis O'Brien v Mirror Group Newspapers Limited*. An award of €250,000 was made to Mr O'Brien against the newspaper for alleging that Mr O'Brien had paid £30,000 to former minister Ray Burke. The level of the award was appealed to the Supreme Court, which found it disproportionately high and referred the case back to the High Court on the issue of damages only. However, at the retrial, a new jury

COURTS AND COURT OFFICERS ACTS 1995 – 2002

JUDICIAL APPOINTMENTS ADVISORY BOARD

Appointment of Ordinary Judge of: **The High Court**

Appointment of Ordinary Judge of: **The Circuit Court**

Notice is hereby given that applications are invited from practising barristers and solicitors who are eligible for appointment to the Office of Ordinary Judge of the High Court and to the Office of Ordinary Judge of the Circuit Court.

Those eligible for appointment and who wish to be considered should apply in writing to the Secretary, Judicial Appointments Advisory Board, Phoenix House, 15/24 Phoenix Street North, Smithfield, Dublin 7, for a copy of the relevant application form.

The closing date for receipt of completed application forms for the Circuit Court is 5pm on Friday, 18th February 2011.

The closing date for receipt of completed application forms for the High Court is 5pm on Friday, 4th March 2011.

It should be noted that fully completed application forms received by this office may be considered for future vacancies that may arise in the High Court and in the Circuit Court during 2011.

It should also be noted that The Standards in Public Office Act, 2001, as amended, prohibits the Board from recommending a person for judicial office unless the person has furnished to the Board a relevant tax clearance certificate (TC4) that was issued to the person not more than 18 months before the date of a recommendation.

Applicants may, at the discretion of the Board, be required to attend for interview.

Canvassing is prohibited.
Dated the 27th January 2011

Brendan Ryan BL
Secretary
Judicial Appointments Advisory Board

awarded Mr O'Brien €750,000. The case was subsequently settled.

In the case of *De Rossa v Independent Newspapers*, Denham J, in her dissenting opinion, argued that the common law position of leaving damages solely to the jury's discretion was incompatible with article 10 of the *European Convention on Human Rights*. As mentioned above, under the 2009 act, juries in Irish defamation cases are now given guidelines on damages in relation to defamatory statements published after 1 January 2009. Mohan and Murphy state that it seems that this change in law in the 2009 act has provided "a belated statutory blessing" to the dissenting judgment of Denham J in *De Rossa*. However, the 2009 act has been criticised for falling short of its expected reform in the context of damages.

Judge and jury

The role of juries in defamation proceedings has long been the subject of debate in Ireland. The press has for a long time argued for reform of libel laws and, in particular, for the abolition of juries in defamation proceedings. In 1991, the Law Reform Commission (LRC) published a detailed consultation paper and a report on the civil law of defamation. The 2009 act reflects some of the proposals contained in the report. It is unfortunate, however, that the act does not implement the following two LRC proposals:

"1) In the High Court, the parties to defamation actions should continue to have the right to have the issues of fact, other than the assessment of damages, determined by a jury,

2) The damages in such actions should be assessed by the judge, but the jury should be entitled to include in their verdict a finding that the plaintiff is entitled to nominal damages only."

'Look here, you – why I oughta...'

The LRC considered that, while juries should continue to decide the issue as to whether the words complained of were defamatory, and should also determine the level of damages, the actual amount should be determined by a judge. Although the LRC could not be certain that transferring the function of deciding damages in defamation actions to judges would remove the danger of seriously excessive awards, the LRC expressed its opinion that "judges, by their training and experience, are in a better position to arrive at a sum which bears an appropriate proportion to the seriousness of the libel or slander".

The LRC therefore proposed that legislation should provide that the assessment of damages should be a matter for the judge alone. The LRC added one qualification to this: that the jury should be entitled to include in their verdict a finding that the plaintiff is entitled to nominal damages only. This would be the situation in a case where the jury concluded that the plaintiff had indeed been defamed, but that he had no reputation worthy of vindication.

Specific guidelines

These LRC recommendations are to be praised and ought to have been implemented. Other than in relation to an award of nominal damages, it is much more suitable for a judge than for a jury to decide an award of damages. It would significantly reduce, if not completely eradicate, the possibility of grossly disproportionate awards being made in defamation proceedings.

In relation to an appeal against damages, prior to the act, a defendant could appeal an award of damages by a jury in the High Court only if it could be shown that the award was disproportionately high. The Supreme Court could then remit the matter back to the High Court for re-hearing. Section 13(1) of the 2009 act provides that, upon appeal, the Supreme Court can substitute an award of damages granted by a jury in the High Court with such amount "as it considers appropriate". Although this is a helpful development in the law, it unfortunately does not remove the problems with the delay involved in an appeal and the resultant pressure on the defendant to settle.

Although some of the reforms brought about by the 2009 act are to be welcomed, it is disappointing that the reforms do not go further. The requirement that a judge must provide a jury with specific guidelines in order to aid them in assessment of damages is a very helpful development in the law of defamation. Also of assistance is the ability of the Supreme Court, upon appeal, to substitute an award of damages granted by a jury in the High Court with such amount as it considers appropriate.

It is a great pity, however, that the assessment of damages was not removed from the responsibility of the jury, as proposed in the LRC report. Such removal would strengthen the protection against the danger of the making of very excessive awards in damages such as that made in *Kinsella v Kenmare*. G

LOOK IT UP

Cases:

- *De Rossa v Independent Newspapers* [1999] 4 IR 432
- *Denis O'Brien v Mirror Group Newspapers Limited* [2001] 1 IR 1
- *Kinsella v Kenmare Resources Plc and Another* (High Court, 17 November 2010)
- *Leech v Independent Newspapers (Ireland) Ltd* [2007] IEHC 223

Literature:

- Law Reform Commission (1991), *Report on the Civil Law of Defamation*, www.lawreform.ie/_fileupload/Reports/rDefamation.htm
- Hugh I Mohan and Mark William Murphy, "Defamation Reform and the 2009 Act: Part II", *Bar Review*, June 2010

Minister for Justice is parchment ceremony guest of honour

PIC: JASON CLARKE PHOTOGRAPHY

At the parchment ceremony on 9 December 2010 were *(l to r)*: President of the High Court Mr Justice Nicholas Kearns, then Minister for Justice Dermot Ahern, President of the Law Society John Costello, and director general Ken Murphy

PIC: JASON CLARKE PHOTOGRAPHY

Newly qualified solicitors Karen Quigley, Sarah Kelly and Aoife O'Malley are congratulated by then Minister for Justice Dermot Ahern following the presentation of their parchments on 9 December 2010

PIC: LENSMEN

Following the parchment ceremony on 9 December, the Society hosted a dinner to honour the outgoing Minister for Justice. It was attended by a number of fellow Dundalk-based solicitors chosen by him. *(Front, l to r)*: Dermot Lavery, John Woods, then Minister for Justice Dermot Ahern, Law Society President John Costello and president of the Louth Solicitors' Bar Association Tim Ahern. *(Back, l to r)*: Donal O'Hagan, Fergus Mullen, Brian Berrills, deputy director general Mary Keane, James Murphy and director general Ken Murphy

Kilkenny Bar Association

At a recent meeting of Kilkenny Bar Association, held in the Pembroke Hotel, Kilkenny, were *(front, l to r)*: Len Roche, Eugene O'Sullivan, Martin Crotty, Gerard Doherty (then Law Society president), Owen O'Mahony (Kilkenny Bar Association president), Ken Murphy (director general), John Costello (then senior vice-president) and Matthew Kearney. *(Back, l to r)*: Gerry Meaney, Kieran Boland, Michael Lanigan, Hilary Roche, Tom Walsh, Tim Kiely, Sonya Lanigan (Kilkenny Bar Association secretary), Tristan Lynas, Martin O'Carroll and Celine Tierney

Mayo solicitors' annual dinner beats the snow and ice!

ALL PICS: JOHN O'GRADY, BALLINA, CO MAYO

At the MSBA annual dinner on 5 December were *(back, l to r)*: Kevin O'Higgins (Law Society junior vice-president), Yvonne Chapman, Michael Quinlan, Judge Dan O'Keeffe, Fidelma Gilhooly, Stuart Gilhooly (DSBA president), Patricia Ball O'Keeffe, Dr Jimmy Devins, Jane Houlihan and John Costello (Law Society president). *(Front, l to r)*: Dermot Hewson, retired Judge Bernard Brennan, Ken Murphy (director general), Judge Mary Devins, Evan O'Dwyer (MSBA president), Aisling O'Dwyer, leader of Fine Gael Enda Kenny and James Cahill (Law Society Council member)

Catherine Killalea (solicitor, Legal Aid Centre, Castlebar) and Fidelma Gilhooly

The MSBA annual dinner welcomed visitors from far and wide, including *(back, l to r)*: Leader of Fine Gael Enda Kenny, Law Society president John Costello, DSBA president Stuart Gilhooly, John Guerin and Donald Eakin. *Front row*: Patricia Eakin, Evan O'Dwyer (MSBA president), Susan Brennan (Belfast Solicitors' Association president) and Fintan Murphy (county registrar, Mayo)

The Mayo Solicitors' Bar Association (MSBA) held its very popular annual Christmas dinner dance in Lisloughrey Lodge, Cong, on 5 December. The guests of honour were Fine Gael leader Enda Kenny and his wife Fionnuala. Also present were special guests Judge Mary Devins, Judge Bernard Brennan (retired), Law Society President John Costello, Kevin O'Higgins (Law Society junior vice-president), Stuart Gilhooly (DSBA president) and his wife Fidelma, Ken Murphy (director general) and his wife Yvonne Chapman, Fintan Murphy (county registrar, Mayo), Susan Brennan of the Belfast Solicitors' Association, and Evan O'Dwyer (MSBA president), as well as other guests.

Above: At the SYS conference were *(l to r)*: Claire McLoughlin (SYS), Eileen Moloney (from sponsors, Brightwater), Catriona O'Dwyer (Brightwater) and Micheál Grace (SYS chairman)

Right: At the Ardilaun Hotel were *(l to r)*: Lorna Osbourne, Noelle White and Edel Bourke

Members of the SYS committee who organised the conference included *(l to r)*: Stephen Fuller, Claire Walsh, Daniel Mueller, Claire McLoughlin, Micheál Grace (chairman), Joanne Joyce, Michael Keaveney (treasurer), Jane McCluskey (secretary) and Paul Kennedy

Meeting up in Galway were *(l to r)*: Ciara McLoughlin, Darren Nangle, Elaine Caulfield, Daniel Mueller (all Eversheds) and Claire Molloy (A&L Goodbody)

Enjoying the 'City of the Tribes' were *(l to r)*: Elaine Caulfield (Eversheds), Iain McDonald (Philip Lee), Stephen D'Ardis and Ciara McLoughlin (both Eversheds)

Attending the conference in the Ardilaun Hotel were *(l to r)* Lucy O'Reilly, Elizabeth Cass, Catriona Cummins and Emer O'Hora

Young solicitors go tribal

Galway was the venue for the recent conference of the Society of Young Solicitors (SYS). In all, over 200 delegates attended. Useful contacts were established with counterparts from the Northern Ireland Young Solicitors' Association.

Conference speakers included Padraic Brennan (managing partner, RDJ Glynn Solicitors), John Kennedy BL, Dermot Dempsey (DFG Legal Costs Accountants), Tom O'Malley BL (senior lecturer in law, NUI Galway) and Caitriona O'Dwyer (Brightwater Recruitment). Law Society President John Costello was guest speaker at the gala dinner on Saturday night.

SYS is indebted to its sponsors, Bank of Ireland, Brightwater and RDJ Glynn Solicitors. SYS chairman Micheál Grace thanks the SYS committee for its role in organising the event.

Showing their support for SYS were *(l to r)*: Audrey-Maura Ferguson, Ruth Jordan, Deirdre Munnelly and Janet Keane

Conferring ceremonies of the Law Society Diploma Programme

DIPLOMA IN TRUST AND ESTATE PLANNING
Pictured with lecturers and conferees at the conferring ceremony for the Diploma in Trust and Estate Planning on 18 November were Padraic Courtney (law school), Eddie O'Regan (STEP), Nick Jacob (deputy chairman, STEP Worldwide), Mary Condell (MC) and Freda Grealy (diploma manager)

DIPLOMA IN FINANCE LAW
At the conferring ceremony for the Diploma in Finance Law on 18 November were Peter Oakes (assistant director general – enforcement, Central Bank of Ireland), Mary Condell (MC) and Freda Grealy (diploma manager), with diploma conferees

DIPLOMA IN COMMERCIAL LITIGATION
At the Diploma in Commercial Litigation conferring ceremony on 24 November were John O'Connor (vice-chairman, Education Committee), Ms Justice Fidelma Macken and Freda Grealy (diploma manager)

DIPLOMA IN CIVIL LITIGATION
Lecturers and conferees at the conferring ceremony for the Diploma in Civil Litigation on 24 November were John O'Connor (vice-chairman, Education Committee), Ms Justice Fidelma Macken and Freda Grealy (diploma manager)

PRE-CEREMONY DIPLOMA RECEPTION
Pictured at Blackhall Place on 30 November were *(back, l to r)*: Geoffrey Shannon (deputy director of education), Louise Stirling (Alliance Française), Rory O'Boyle (diploma coordinator), Freda Grealy (diploma manager) and Claire Bourgeois (director, Alliance Française). *(Front, l to r)*: Alan Dukes (Comité de l'Alliance Française), Dara Calleary TD (Minister for Labour Affairs), John Costello (Law Society president) and Ms Justice Mary Finlay Geoghegan

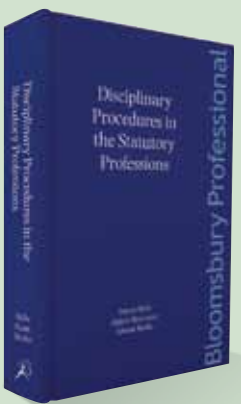
NEW TITLE

Disciplinary Procedures in the Statutory Professions

By Simon Mills, JP McDowell, Aideen Ryan and Eimear Burke

New, fully up-to date and comprehensive

This new book is written by experienced practitioners in the field of professional regulatory law. It deals with both the principles and practice of statutory professional conduct proceedings. As well as dealing with the established regulated professions such as doctors, solicitors, nurses, vets and dentists, the book will also consider those professions which have recently (or are about to) come under statutory regulation, including: architects; surveyors; teachers; pharmacists; health and social care professionals and accountants.



ISBN: 978 184766 6697 **Format:** Hardback
Price: €160.00 **Pub Date:** April 11

CONTENTS

Part 1 - Principles and Practice: The nature and purpose of statutory professional regulation; Grounds for disciplinary action; Making complaints; Investigation of complaints; Pre-hearing issues; The disciplinary hearing; Decisions and sanctions; Appeal and review of decisions

Part 2 - Professional regulatory provisions: Medical Practitioners Act 2007; Solicitors Acts; Nurses and Midwives Bill 2010; Dentists Act 1985; Pharmacy Act 2007; Health and Social Care Professionals Act 2005 (Physiotherapists, Social Workers et al); Veterinary Practice Act 2005; Teaching Council Act 2001; Building Control Act 2007 (Architects and Surveyors); Companies (Auditing and Accounting) Act 2003; Opticians Acts.

ABOUT THE AUTHORS

Simon Mills is a barrister and doctor, who practises in all areas of medical law, including professional regulatory matters. He is the author of Clinical Practice and the Law (2nd Ed).

JP McDowell, **Aideen Ryan** and **Eimear Burke** are solicitors in the firm McDowell Purcell Solicitors which has a dedicated professional regulatory law unit. They specialise, in particular, in advising professional regulatory bodies and registrants in relation to professional conduct inquiries.

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Tax Book 2010

Alan Moore. Tax World (2010), www.taxworld.ie. ISBN: 978-1-902065-40-3. Price: €150.

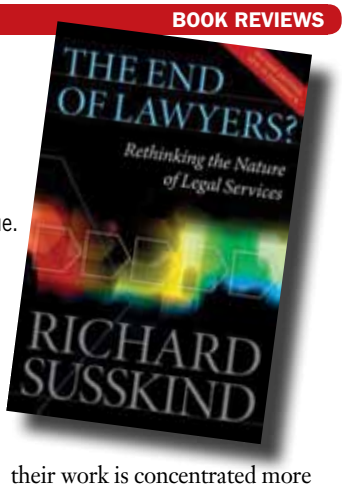
The volume and complexity of Irish tax legislation is increasing on an annual basis. In light of the constant amendment and introduction of new provisions into tax legislation, the interaction between statutory provisions and of the intention behind them becomes essential for anyone seeking to advise their clients on tax matters.

Tax Book 2010 **is an updated comprehensive guide that seeks to give guidance as to the 'what and why' of the main provisions in the tax code. The book comments on every section and subsection of the *Taxes Consolidation Act 1997*, the *Value Added Tax Act 1972*, the *Capital Acquisitions Consolidation Act 2003,* and the *Stamp Duties Consolidation Act 1999*. The approach of taking every section and subsection and, where possible, commenting on relevant guidance or giving examples of how the legislation operates, is something that anyone who has cause to look at tax legislation is likely to find very useful.**

The *Finance Act 2010* saw the introduction of important changes, both to direct and indirect taxes. These changes, such as the NAMA provisions, VAT place-of-supply rules and the mandatory disclosure regime, among others, are covered for the first time in this publication. Unfortunately, as is the case with any publication of this nature, these rules continue to evolve, and certain issues will most likely require substantial updating in the *Tax Book 2011* publication, if and when published. Also, since publication of the book, the *Value Added Tax Act 1972* has been repealed and replaced. One of the main difficulties for many practitioners is to try to find something that is affordable and useful. This publication is perhaps the best tax publication that meets both of these tests across such a wide body of legislation.

Gavin McGuire is a partner in Eversheds O'Donnell Sweeney.

The End of Lawyers?



Richard Susskind. Oxford University Press (revised 2010), http://ukcatalogue.oup.com. ISBN: 978-0-1995-936-13. Price: Stg£12.99.

In *The End of Lawyers?*, Richard Susskind predicts significant pressures on the legal world as we know it today. In this, the sequel to *The Future of Law* (1996), Susskind assesses the legal marketplace and identifies the issues facing law firms, big and small. He explores the cracks in the current system and the forces that will eventually cause them to shatter.

Most importantly, the author provides a panoramic view of a profession undergoing a massive transformation. The book focuses on how the internet, technology, collaboration, globalisation and other factors are reshaping the fundamental rules by which legal services are bought and sold – and observes how these changes will affect the everyday workings of lawyers.

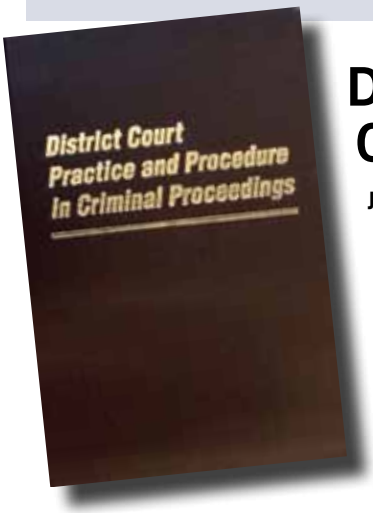
He identifies a spectrum of legal-service categories, moving from the 'left': bespoke, one-off, tailored services – to the 'right': standardised systems, precedents and packaged ones. He argues that, while many lawyers claim their work is concentrated more on the former model, a move to latter is underway and will impact greatly on business models.

Susskind outlines how legal tasks can be decomposed into component parts and delegated. This, of course, includes the imminent arrival of outsourcing, but also 'in-sourcing,' 'de-lawyering', offshoring, sub-contracting and leasing. Systems ensure that these services come together seamlessly for the client. He predicts increased effectiveness and efficiency as the legal world embraces new technologies.

The book paints a scary picture. The threat for traditional-style lawyers is very real. This book should be compulsory reading for all, but especially for those beginning a journey in the field.

Diarmuid Byrne is a trainee solicitor at Arthur Cox.

District Court Practice and Procedure in Criminal Proceedings (3rd edition)



James V Woods. James V Woods BL. 12 Elsinore, Castletroy, Co Limerick. jvwoods@eircom.net. Price: €200 (incl p&p).

The third edition of *District Court Practice and Procedure in Criminal Proceedings* provides an authoritative text that will be especially welcomed by litigation practitioners.

The author begins with an outline of the framework of the District Court, before moving on to the process of the preparation of the prosecution's case and the hearing of proceedings. A detailed discussion on arrest and detention for various offences is provided. A chapter is devoted to summary sanctions of a non-criminal nature, detailing various offences and penalties in a number of fields, including the topical issue of antisocial behaviour orders, as provided under the *Criminal Justice Act 2006*.

There is a comprehensive treatment of appeals from the District Court and a chapter is also devoted to the subject of judicial review by the High Court of a decision made by a District Court judge. The author guides the practitioner through procedures in the conduct of proceedings, tendering of evidence and satisfying the burden of proof. A commentary is also provided on the *Fines Bill 2009*.

The inclusion of an extensive chapter dedicated to the *Children Acts 2001-2007*, which deals with criminal and antisocial behaviour proceedings involving children, is a welcome addition to a text of this nature.

In each chapter, the author is meticulous in examining the issues with recourse to legislation and with reference to reported and unreported cases. The clear and concise manner in which it is written makes the book an excellent reference tool for District Court judges, practitioners and members of An Garda Síochána. It is an invaluable and necessary guide.

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

Smart people use smart libraries

When was the last time you visited the Society's library or its website? The head of library and information services, Mary Gaynor, begins a new series focusing on the superb traditional and electronic services available to practitioners

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

The Library Association of Ireland's annual national event, 'Library Ireland Week', will take place from 7-13 March 2011. The theme for this year's event is 'Smart people use smart libraries'. During this week, there will be library events and media coverage throughout the country, encouraging people to visit their public and institutional libraries and to learn more about how technological developments have made access to library collections easier and more efficient – from your home and office.

The Society's library

The Law Society Library has a collection of over 10,000 monographs, including textbooks, conference papers, and so on, and subscribes to a large number of journals, law reports series and key electronic databases. The online library catalogue now contains almost 30,000 records of books, legislation and judgments.

At the heart of the library service is the textbook collection, from which members and trainees may borrow. In recessionary times, the services of a lending library are a valuable resource for practitioners – loans from the Society's library have increased by 25% over the last two years. The online catalogue is available via the members' area on www.lawsociety.ie, so searching for material can be done easily from wherever you are located.

Obtaining material – the smart way

Book loans can be ordered online via the catalogue by clicking on the 'request loan' button to the left of the book record. Items can also be renewed online. Both of these functions require a library PIN. If you don't have your library PIN, please contact the library. There is no charge for borrowing books.

The library also provides a research/document delivery service if you are interested in sourcing materials on specific topics – for instance, if you need to find out if there is anything written on NAMA or the *Land and Conveyancing Law Reform Act 2009*, you can run a subject or title search that will yield catalogue records of relevant books, lectures, legislation and judgments, with pdf links to the full text of materials, where available.

Non-book material, copies of case law, articles, precedents, and so on, can be ordered by contacting the library with specific requests. The preferred method of document delivery is by email, with pdf attachment. Requests for material that the library holds in-house are dealt with speedily. In addition, the library has arrangements in place with a number of back-up libraries to supply other materials, usually within 24 hours. There is a nominal charge for document delivery. For charges effective from 1 January 2011, see www.lawsociety.ie.

If you haven't used the Law Society library's services in recent times, you might like to visit the library during the National Library Week, or log on to the online catalogue and request a loan.

If you are a regular library user and have any comments or suggestions about how our services might be improved, please email m.gaynor@lawsociety.ie.

JUST PUBLISHED

What's new – and how to use it

During the last few months of 2010, Irish law publishers published a number of new editions of key law textbooks, as well as new first editions of works on important current topics. Keeping up to date on the books and other materials that are available is a very useful exercise in helping to deliver an excellent service to clients.

When was the last time you logged on to the Law Society's website (members' area) to view the online library catalogue? The 'new books' section on the catalogue homepage contains a list of the last three months' publications. Currently, the list contains the following new editions of long-awaited key textbooks:

- Casey, P – *Psychiatry and the Law* (2nd ed, 2010; Blackhall Publishing)
- Cassidy, C – *Licensing Acts* (3rd ed, 2010; Clarus Press)
- Clark, R and Smyth, S – *Intellectual property law in Ireland* (3rd ed, 2010; Bloomsbury Professional)
- Forde, M and Byrne, A – *Industrial Relations Law* (2nd ed, 2010; Round Hall)
- Gallagher, B – *Powers of Attorney* (3rd ed, 2010; Round Hall)
- Hogan & Morgan – *Administrative Law in Ireland* (4th ed, 2010; Round Hall)
- Lyall, Andrew (with Albert Power) – *Land Law in Ireland* (3rd ed, 2010; Round Hall)
- O'Halloran, K – *Adoption Law and Practice* (2nd ed, 2010; Round Hall)
- Sanfey, M and Holohan, B – *Bankruptcy Law and Practice*, (2nd ed, 2010; Round Hall)
- Wylie, JCW – *Land Law*, (4th ed, 2010; Bloomsbury Professional)
- Shannon, G – *Child Law*, (2nd ed, 2010; Round Hall)
- Woods, J – *District Court Practice and Procedure in Criminal Proceedings*, (3rd ed, 2010; Woods).

New first editions of books and seminar papers recently acquired by the library include the following Irish titles, all of which are available to borrow:

- Daly, B and Doherty, M – *Principles of Irish Employment Law* (2010; Clarus Press)
- Hutchinson, B – *Arbitration and ADR in Construction Disputes* (2010; Round Hall)
- Kerr, A (ed) – *The Industrial Relations Act 1990 – 20 Years On* (2010; Round Hall)
- Kilcommins, S and Kilkelly, U – *Regulatory Crime in Ireland* (2010; First Law/Lonsdale)
- Maddox, N – *Housing Authority Law* (2010; Round Hall)
- McDonnell, M – *Misuse of Drugs: Criminal Offences and Penalties* (2010; Bloomsbury Professional)
- Round Hall seminar papers on risk management (September 2010), judicial review (November 2010) and planning and environmental law (November 2010)
- Ryan, D – *Mental Health Acts 2001-2009: Case Law and Commentary* (2010; Blackhall Publishing)
- TCD School of Law seminar papers on *Probate and Succession – Recent Developments* (May 2010); *Schools and the Law – Coping with New Challenges* (May 2010); *Medical Negligence – Developments Impacting on Practice* (May 2010).

Law Society Council meeting 10 December 2010

Motion: training officer regulations

"That this Council approves the Solicitors Acts 1954 to 2008 (Apprenticeship and Education) (Training Officer) Regulations 2010."

Proposed: Michelle Ní Longáin
Seconded: John O'Connor

The Council approved the proposed regulations, which were designed to reduce the administrative burden on training solicitors, particularly in large and medium-sized firms who had numbers of trainee solicitors, by permitting the delegation of certain specified functions to a designated training officer within the firm.

Motion: prescribing fees for certain applications for information

"That this Council approves regulations (1) to amend the sixth schedule to the Solicitors Act 1954, *as provided for by section 66 of the* Solicitors (Amendment) Act 1994, *for the purpose of including additional applications for which fees may be prescribed, and (2) to prescribe fees for certain of the applications included in the sixth schedule."*

Proposed: Michael Quinlan
Seconded: Martin Lawlor

The Council approved the proposed regulations, which enabled the Society to apply certain charges for specified categories of information requested from the Society. In particular, the Council noted that significant volumes of information were regularly being sought by financial institutions within very short time frames.

Professional indemnity insurance

Eamon Harrington briefed the Council with the latest information on renewals for 2011. He noted that there were currently 55 applications to join the Assigned Risks Pool, although this number was expected to reduce as solicitors continued to negotiate with insurers in relation to quotations. In this context, he noted that the Council should take great credit for its determination that the Assigned Risks Pool would be reinstated, albeit on amended terms. He also noted that the insurance market was still active, with a number of insurers continuing to provide quotations. In relation to the PII Helpline, he reported that 606 enquiries had been received to date, 50% of which related to difficulties in obtaining quotations and 50% of which related to more routine enquiries.

The Council discussed the fact that stress levels within the profession had been greatly increased in circumstances where colleagues feared that they might not be able to obtain an insurance quotation. This fear had been exacerbated by the fact that RSA and Quinn had both left the market, and Ireland as a whole was experiencing the 'perfect storm' evidenced by the IMF/EU bailout. The Council confirmed its support for the proposal of the PII Task Force that a professionally organised survey would be conducted by the Society early in the New Year, backed up by insurance expertise. In addition, all of the various options for the provision of professional indemnity insurance that had been examined by the task force during 2010 would be re-examined for 2011 and future years, and PII remained as an item of the highest priority for the Council for 2011.

Practising certificate fees for 2011

On the recommendation of the Finance Committee, the Council approved the practising certificate fees for 2011, on the basis that the total fees would remain unchanged from 2010, although the fee for general Society activities would be reduced by €40 and the amount of the compensation fund contribution would be increased by a corresponding amount of €40.

Report of independent adjudicator

The Council considered the report of the independent adjudicator, who had responsibility for (a) ensuring that the Law Society handled complaints about its members in an effective and efficient manner, (b) reviewing the Law Society's handling of claims made on the compensation fund, and (c) recommending any changes in the Law Society's complaints and claims procedures that were necessary to maintain the highest standards.

The Council noted that she had acknowledged that referral timeframes from the Complaints and Client Relations Committee to the disciplinary tribunal had improved, and she had also noted the appointment of an external firm of solicitors on a pilot basis to deal with referrals to the tribunal. She had also focused on complaints against solicitors who had multiple complaints and her view that such complaints required rigorous attention. The Council expressed its gratitude for the valuable work of the independent adjudicator and for her annual report, which was largely positive and supportive of the Society's complaints-handling process.

Report of lay members of the Complaints and Client Relations Committee

The Council considered the report of the lay members of the Complaints and Client Relations Committee, which focused particularly on the increased activity of the Complaints Section in relation to complaints about breaches of undertaking. The Council noted that the committee was comprised of a majority of lay members and expressed its gratitude to the lay members for their continued commitment to a thorough and transparent complaints-handling system.

Society's Law School in Cork

John O'Connor briefed the Council on the decreasing numbers of students attending the Society's Law School in Cork, which had reduced from a high of 106 in 2007, to 76 in 2008, 66 in 2009 and 44 in 2010. He noted that there were both educational and financial implications arising from the reducing numbers, which were a matter of concern to the Education Committee, and he confirmed that proposals would be brought to the January Council meeting for discussion. G

EXAMINER'S OFFICE OFFICE NOTICE 1/2011

On 12 January 2011, the Minister for Justice and Law Reform signed statutory instrument no 2 of 2011.

The SI amends the current *Rules of the Superior Courts* by removing the requirement to file Examiner's Office documentation in the Central Office of the High Court, in addition to the Examiner's Office itself.

From 1 February 2011, all affidavits, notices of motion, notices to proceed, examiner's certificates and examiner's orders **should be filed in the Examiner's Office only.** There will be no requirement to file these documents or copies of these documents in the Central Office of the High Court.

The introduction of these new rules will eliminate the need to attend in the Central Office of the High Court in respect of matters that lie within the remit of the Examiner's Office. Such matters include court liquidations, mortgage suits (well-charging proceedings), administration suits and any other matter remitted to the Examiner's Office by the court.

John Glennon, Examiner
24 January 2011

Practice notes

Lodgment of title deeds with lenders

CONVEYANCING COMMITTEE

Many practitioners will be aware of the difficulties associated with getting lenders to acknowledge receipt of title deeds. A lender may not acknowledge receipt or may furnish a general letter of acknowledgment, but not a signed schedule confirming receipt of the specific documents listed therein.

The onus is on the lender to ensure that the specific documents listed in the schedule are furnished. However, difficulties may arise subsequently if it is discovered that a particular deed or document is missing. In order to avoid the implication that the solicitor may be responsible for this omission, it is recommended that the following paragraphs be inserted into correspondence lodging title deeds with lenders:

"A duplicate schedule is attached for you to sign and return to us in order to acknowledge receipt of the enclosed title documents.

In default of hearing from you within ten working days, this firm will take it that you have received all the documents on the schedule and that it is released from any undertaking given in relation to this transaction and in relation to the title documents, and thereafter this firm disclaims all responsibility for the title documents.

Our file will be closed and placed in storage and any query from you arising in relation to this matter after that date will incur a charge, details of which will be provided to you at the time of raising the query, and which charge will be payable in advance of replying to such query."

A copy of the correspondence and schedule should be retained on file and may also be copied to the client at the same time. It is also recommended that the title documents be delivered by hand or some form of recorded delivery.

Firms should not act on both sides of property transactions where one party is vulnerable

GUIDANCE AND ETHICS COMMITTEE

There has been concern for some time that some solicitors' firms do not recognise that a special duty of care is owed to vulnerable clients. In order to ensure that the interests of a vulnerable client who is disposing of property are properly protected, that client should be represented by a different firm to the firm representing the purchaser.

There has been negative comment from the judiciary on this issue in many cases over the past number of years. For instance, in the case of *Sean Murray and another v James O'Donnell and others* in 2004, Mr Justice Quirke stated as follows: "I note with some uneasiness that solicitors are permitted by the Law Society to act on behalf of both the vendor and purchaser in transactions of this kind. Conflicting interests are bound to arise in such circumstances, and I have no doubt whatsoever that the duty upon a solicitor who is acting on behalf of both parties in the circumstances which have arisen in this case is particularly onerous … Since the Law Society is apparently prepared to permit this practice (notwithstanding the potentially conflicting interests to which I have referred), I think it would be helpful if the Law Society would draw up and publish strict guidelines to be applied by solicitors who chose to act on behalf of both vendor and purchaser in transactions involving the transfer of property and, indeed, perhaps in other transactions also. It would also be helpful if such guidelines were rigidly enforced by the Law Society."

The Council of the Law Society has now approved the following guidelines:

1) A solicitor or firm of solicitors should not act for both parties to a property transaction where one or both of the parties is a vulnerable person,
2) Practitioners should note that the characteristics of vulnerability are not exhaustive and include a person who, by reason of age, infirmity, mental illness, mental incapacity or physical disability, lacks the ability to make an informed or independent decision regarding the acquisition or disposal of property,
3) A property transaction includes a mortgage, lease, transfer, disclaimer, release, easement and any other disposition of property, otherwise than by will or *donatio mortis causa*, and also includes an enforceable agreement (whether conditional or unconditional) to make any of the foregoing dispositions.

Witnessing wills where the solicitor is the executor

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

The *Law Society Gazette* in recent times has covered the question of the merits of a solicitor acting as an executor in an estate (see *Gazette*, July 2008) and the question of who the client is in circumstances where a solicitor so acts (see *Gazette*, July 2010).

In the event that a solicitor does agree to act as an executor, then in drafting the will it is important that the solicitor includes a charging clause enabling the solicitor to charge in connection with the administration of the estate and, further, it is important that the solicitor (or any partners in the firm) should not witness the will. The matter is governed by section 82 of the *Succession Act 1965*.

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 Margaret (otherwise Mairead) Casey, a solicitor practising as Casey & Company, Solicitors, at North Main Street, Bandon, Co Cork, and in the matter of the *Solicitors Acts 1954-2008* [8372/DT26/09]
Law Society of Ireland (applicant)
Margaret Casey (respondent solicitor)
On 29 September 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:
a) Up to the date of the swearing of the Society's affidavit (on 20 March 2009), failed to comply with the direction of the Complaints and Client Relations Committee given on 1 April 2008, arising from her failure to reply to the Society's correspondence, that she pay the sum of €650 to the Society towards the costs of its investigation,
b) Failed to reply to the Society's letters dated 10 March 2005, 30 March 2005, 10 June 2005, 16 June 2005, 30 March 2006, 8 June 2006, 14 July 2006, 10 January 2008, 11 February 2008, 19 February 2008, 3 March 2008, 12 March 2008, 3 April 2008, 16 April 2008, 24 April 2008 and 20 May 2008,
c) Failed to attend or arrange to be represented at the meeting of the Complaints and Client Relations Committee on 25 June 2008, despite having been notified by letter dated 17 June 2008 that she was required to attend the said meeting,
d) Failed, in her capacity as principal of the firm of Casey & Co, to ensure full compliance in a timely manner or at all, up to the date of the swearing of the Society's affidavit, with an undertaking given to another firm of solicitors by the firm of Casey & Co dated 25 July 1998 and, in particular, up to in or about 25 February 2009, failed to discharge all Land Registry queries arising on the purchaser's application for registration,
e) Repeatedly failed to respond to correspondence from and to communicate with the complainant regarding the matter of the outstanding Land Registry queries.

The tribunal ordered that the respondent solicitor
a) Do stand censured,
b) Pay a sum of €7,500 to the compensation fund,
c) Pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court, in default of agreement.

In the matter of Greg O'Neill, solicitor, of Greg O'Neill, Solicitors, Suite 109, The Capel Building, Mary's Abbey, Dublin 7, and in the matter of the *Solicitors Acts 1954-2008* [3365/DT/73/09]
Named client (applicant)
Greg O'Neill (respondent solicitor)
On 20 October 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he failed to return telephone calls (to his named client) for the past six months.

The tribunal ordered that the respondent solicitor:
a) Do stand admonished and advised,
b) Pay a sum of €750 to the compensation fund.

In the matter of John BK Lindsay, a solicitor formerly practising as Lindsay & Company, Solicitors, at 47 Wellington Quay, Dublin 2, and in the matter of the *Solicitors Acts 1954-2008* [3483/DT32/10]
Law Society of Ireland (applicant)
John BK Lindsay (respondent solicitor)
On 24 November 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
1) Failed to respond to multiple letters from the Society,
2) Through his conduct, showed a disregard for the responsibilities associated with practice as a solicitor.

The tribunal made an order:
a) Admonishing and advising the respondent solicitor,
b) Ordering the respondent solicitor to pay a sum of €1,000 to the compensation fund,
c) Ordering the respondent solicitor to pay the whole of the costs of the Law Society, including witness expenses, as taxed by a taxing master of the High Court in default of agreement.

And the tribunal took into account the following finding(s) of misconduct on the part of the respondent solicitor previously made by them and not rescinded by the High Court, namely:
- Order of the Solicitors Disciplinary Tribunal made on 30 June 2009 (record no 3483/DT66/08),
- Order of the Solicitors Disciplinary Tribunal made on 30 June 2009 (record no 3483/DT116/08). G

NOTICES: THE HIGH COURT

The High Court

Record no 2010 no 27 SA
In the matter of Mary Kennedy, solicitor, practising as Barrington Solicitors at 97 Middle Abbey Street, Dublin 1, and in the matter of the *Solicitors Acts 1954-2008*
Law Society of Ireland (applicant)
Mary Kennedy (respondent)
Take note that, on Monday 12 April 2010, the High Court made an order prohibiting Mary Kennedy from practising as a solicitor in contravention of the professional indemnity insurance regulations.
John Elliot,
Registrar of Solicitors and
Director of Regulation

Record no 2010/38 SA
In the matter of Katherine MA Ryan, solicitor, practising as Ryan & Co at 42 Woodley Park, Dublin 14, and in the matter of the *Solicitors Acts 1954-2008*
Law Society of Ireland (applicant)
Katherine MA Ryan (respondent solicitor)
Take note that, on Monday 17 May 2010, the High Court made an order that Katherine MA Ryan be suspended from practising as a solicitor until further order of the court.
John Elliot,
Registrar of Solicitors and
Director of Regulation

Record no 2010/70 SA
Take note that, on 31 August 2010, the High Court ordered that the practising certificate of Ruairi O'Ceallaigh be suspended.
John Elliot,
Registrar of Solicitors and
Director of Regulation

Legislation update 13 November – 31 December 2010

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

ACTS PASSED

Appropriation Act 2010
Number: 35/2010
Content: Provides for the appropriation to the proper supply services and purposes sums granted by the *Central Fund (Permanent Provisions) Act 1965* and makes provision in relation to deferred surrender to the central fund of certain undischarged appropriations by reference to the capital supply services and purposes as provided for by the *Finance Act 2004*, s91, and to make provision in relation to the financial resolutions passed by Dáil Éireann on 7/12/2010.
Enacted: 17/12/2010
Commencement: 17/12/2010

Chemicals (Amendment) Act 2010
Number: 32/2010
Content: Amends the *Chemicals Act 2008* and the *Safety, Health and Welfare at Work Act 2005* and provides for related matters.
Enacted: 24/11/2010
Commencement: 10/12/2010 (per SI 591/2010)

Credit Institutions Stabilisation Act 2010
Number: 36/2010
Content: Provides, in the context of the National Recovery Plan 2011-2014 and the European Union/International Monetary Fund Programme of Financial Support for Ireland, in relation to the stabilisation and the preservation or restoration of the financial position of certain credit institutions; amends the *Building Societies Act 1989*, the *Central Bank Act 1971* and the *Credit Institutions (Financial Support) Act 2008* for those purposes; amends the *National Pensions Reserve Fund Act 2000* to allow the Minister for Finance to give certain directions in relation to the National Pensions Reserve Fund; provides for related matters.
Enacted: 21/12/2010
Commencement: 21/12 2010 for all sections other than s59(2); 22/12/2010 for s59(2) (per SI 623/2010)

Criminal Law (Insanity) Act 2010
Number: 40/2010
Content: Amends s4 (fitness to be tried) of the *Criminal Law (Insanity) Act 2006*. Inserts new sections 13A, 13B and 13C in the 2006 act, providing for the making of conditional discharge orders by the Mental Health Review Board when reviewing the detention of a patient under s13 of the act. Further amends the 2006 act, amends the *Defence Act 1954* and provides for related matters
Enacted: 22/12/2010
Commencement: Commencement order(s) to be made per s11(2) of the act

Financial Emergency Measures in the Public Interest Act 2010
Number: 38/2010
Content: Provides for the reduction of the amount of the payment of pension or other benefits (other than lump sums) payable to or in respect of certain persons who are or were in the public service (including former holders of certain offices, members and former members of the Houses of the Oireachtas and former members of the judiciary) under an occupational pension scheme or pension arrangement provided under the *Superannuation Acts 1834 to 1963* or any other enactment or administrative measure to like effect, or is required to be made, approved of or consented to (however expressed) by one or more than one minister of the government, to amend the *Financial Emergency Measures in the Public Interest (No 2) Act 2009* and the *National Minimum Wage Act 2000*, and provides for related matters
Enacted: 22/12/2010
Commencement: 22/12/2010

Prevention of Corruption (Amendment) Act 2010
Number: 33/2010
Content: Amends the *Prevention of Corruption Act 1906* and the *Prevention of Corruption (Amendment) Act 2001* to strengthen the law on corruption and to ensure that the state is fully compliant with the terms of the *Convention on the Bribery of Foreign Public Officials in International Business Transactions* drawn up under the auspices of the OECD on 21/11/1997 and ratified by Ireland on 22/9/2003. Inserts new 'whistleblower' provisions in a new section 8A of the *Prevention of Corruption (Amendment) Act 2001*, providing protection for persons (including employees) reporting offences under the *Prevention of Corruption Acts 1889 to 2008*.
Enacted: 15/12/2010
Commencement: 15/12/2010

Public Health (Tobacco) (Amendment) Act 2010
Number: 39/2010
Content: Provides for the dissolution of the Office of Tobacco Control, repeals part 2 of the *Public Health (Tobacco) Act 2002*, and provides for related matters.
Enacted: 22/12/2010
Commencement: 1/1/2011 as per s15(2) of the act

Social Welfare Act 2010
Number: 34/2010
Content: Gives legislative effect to certain social welfare measures announced in the budget statement of 7/12/2010, which are due to come into effect from 1/1/2011.
Enacted: 17/12/2010
Commencement: Commencement order(s) to be made for ss7, 8, 9 and 10 of the act (per s1(3) of the act); 17/12/2010 for all other sections

Social Welfare and Pensions Act 2010
Number: 37/2010
Content: Amends and extends the *Social Welfare Acts*, confers certain functions relating to employment schemes and related schemes and programmes on the Minister for Social Protection, amends the *Labour Services Act 1987*, and provides for the transfer of certain assets, liabilities, property and employees of An Foras Áiseanna Saothair (FÁS); provides for the continuance of certain schemes provided by FÁS and provides for related matters.
Enacted: 21/12/2010
Commencement: Commencement order(s) to be made for ss4, 11(1), 12,13 and 15-26 and parts 3 and 4; 21/12/2010 for all other sections

Value Added Tax Consolidation Act 2010
Number: 31/2010
Content: Consolidates enactments relating to value added tax.
Enacted: 23/11/2010
Commencement: 1/11/2010 as per s125 of the act

SELECTED STATUTORY INSTRUMENTS

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Commencement) Order 2010
Number: SI 648/2010
Commencement: 1/1/2011 for all sections other than s5; 23/12/2010 for s5 of the act

Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010

Number: SI 649/2010
Content: Declares certain classes of registered foreign relationship to be entitled to be recognised in the state as a civil partnership.
Commencement: 23/12/2010

District Court (Summonses) Rules 2010
Number: SI 557/2010
Content: Substitutes order 15, rule 6, of the *District Court Rules* regarding the procedure for the delivery of summonses.
Commencement: 25/11/2010

Land and Conveyancing Law Reform Act 2009 (Section 100) Regulations 2010
Number: SI 653/2010
Content: Prescribes the form of notice to be used for the purposes of s100(1) of the act.
Commencement: 30/12/2010

Land and Conveyancing Law Reform Act 2009 (Section 103) Regulations 2010
Number: SI 654/2010
Content: Prescribes the form of notice to be used for the purposes of s103(2) of the act.
Commencement: 30/12/2010

Land and Conveyancing Law Reform Act 2009 (Section 108) Regulations 2010
Number: SI 655/2010
Content: Prescribes the rate of commission that may be retained by a receiver out of any money received as remuneration and in satisfaction of all costs.
Commencement: 30/12/2010

Prepared by the Law Society Library

ONE TO WATCH

One to watch: new legislation

Prevention of Corruption (Amendment) Act 2010

The *Prevention of Corruption (Amendment) Act 2010* was signed into law on 15 December 2010. It amends the *Prevention of Corruption (Amendment) Act 2001*, giving fuller effect to the OECD *Convention on the Bribery of Foreign Public Officials in International Business Transactions* (1997). The act broadens the scope of the corruption legislation, including the *Public Bodies Corrupt Practices Act 1889*, the *Prevention of Corruption Acts 1906 and 1916*, the *Ethics in Public Office Act 1995, the Prevention of Corruption (Amendment) Act 2001*, and the *Proceeds of Crime (Amendment) Act 2005.*

Consideration or advantage

The act amends section 2(2) of the *Prevention of Corruption (Amendment) Act 2001*, which states that is an offence to "(a) corruptly give or agree to give, or (b) corruptly offer, whether for the benefit of that agent or another person, any gift or consideration." The new act adds the words "or advantage", thereby extending the scope of the offence.

Definition of 'agent'

Section 2 of the act extends the categories of persons who come within the definition of 'agent', to include:

- Any person employed by or acting on behalf of the public administration of any state (other than the Irish state), including a person under the direct of indirect control of the government of any such state, and
- A member of, or any other person employed by or acting for or on behalf of, any international organisation established by an international agreement between states, to which the Irish state is not a party.

The meaning of 'corruptly'

The new act clarifies the meaning of 'corruptly', stating that it includes "acting with an improper purpose personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or other information, or by any other means."

Extra-territorial jurisdiction

Section 7 of the 2001 act is amended by section 3 of the new act, which extends the categories of persons subject to extra-territorial jurisdiction to include:

a) An Irish citizen,
b) An individual who is ordinarily resident in the state,
c) A company registered under the *Companies Acts*,
d) Any other body corporate established under a law of the state, or
e) A relevant agent in any case where the relevant agent does not fall within any of paragraphs (a) to (d).

Protection of whistleblowers

The 2001 act is amended by inserting a new section 8(A), which provides protection to persons (including employees) reporting offences under the *Prevention of Corruption Acts 1889 to 2010.* Section 8(A) protects persons who make a communication of his or her opinion regarding a suspected corruption offence unless the report is made knowing it to be, or reckless as to whether it was, false, misleading, frivolous or vexatious. According to section 8(A)(5), an employer shall not penalise or threaten to penalise an employee for making a communication in good faith. An employer who contravenes the act by penalising or threatening to penalise a whistleblower shall be liable on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both or, on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding three years or both.

Redress

The new act amends the 2001 act by inserting two schedules, which provide protection and redress for whistleblowers. Schedule 1 provides redress for employees in the event of penalisation by employers for whistleblowing. An employee may present a complaint to a rights commissioner, whose decision may in turn be appealed to the Labour Court. Schedule 2 stipulates the provisions applicable where a communication is made in good faith. G

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

Administrator

Fees – costs – sanction – partner hourly charge-out rate – reduction – increase in fees – Insurance (No 2) Act 1983 *(as amended)*.

Pursuant to section 3(4)(b) of the *Insurance (No 2) Act 1983*, the court was obliged to fix the costs, expenses and remuneration of an administrator of an insurance company, whom it had appointed to that role. The legislature had given no guidance as to how to apply the criteria. The administrator sought remuneration for the first company, ESG, for the sum of €386,646.25 and liberty to pay his solicitors the sum of €35,394.15 and, for the second company, Accent, €222,680 and €25,607.70 to pay his solicitors. The administrator sought to distinguish the function of administrator from a receiver, liquidator or examiner. The businesses of the companies had a combined balance sheet of $85 million. €450 per hour was sought as a standard partner call-out rate.

Kelly J held that the court would allow an hourly charge-out rate of €375 for a partner. The court held that, in the case of ESG, the fees would be reduced from €386,646.25 to €302,238.95. The administrator's fees in the case of Accent would be reduced from €222,680 to €186,786.20. €594.85 would be added in expenses. The grand total for the administrator's fees, expenses and charges was €496,619.99. The legal costs for ESG were reduced to €27,961.38, and in the case of Accent they were reduced to €20,230.09. Credit would be given for payments on account. As to the future, the court was only prepared to sanction further payments without reference to the court at the levels that the court had fixed until 30 September 2011.

***In Re ESG Reinsurance Ireland Ltd*, High Court, 2/11/2010**

CRIMINAL

Drink driving

Criminal procedure – garda demand – police powers – origin – lawful demand – Road Traffic Act 1961, *as amended*.

The case stated posed the question of whether it was necessary to imply into a road traffic power to inspect insurance on a vehicle, vested in the gardaí, a requirement to tell the person against whom it was exercised that the power had a lawful origin and that the consequence of failing to cooperate was the commission of an offence. The defendant had been stopped by a garda while driving, and the garda demanded the production of a certificate of insurance, and further demanded that it be produced at a garda station within two days. The issue arose as to the necessity for the demand of production in respect of a prosecution pursuant to the *Road Traffic Act 1961*, as amended. The defendant argued that people were entitled to know when they were being subjected to police powers.

Charleton J held that the ordinary operation of law, and how notorious parts of it may sometimes generally be common currency, may or may not, depending on the assessment of the district judge, lead to an inference that he had already sufficient knowledge as to the legal origin of a demand and that a failure may result in the commission of a criminal offence. This was a matter for the trial court. The court would answer the questions of the district judge as indicated.

***DPP (Shortt) (prosecutor) v Freeman (defendant)*, High Court, 2/11/2010**

IMMIGRATION AND ASYLUM

Judicial review

Deportation – Immigration Act 1999 – *whether the grounds sought to be raised by the applicant disclosed any arguable case that the refusal to revoke the deportation order was unlawful having regard to the changed circumstances in question.*

The applicant applied *ex parte* for leave to seek judicial review of the respondent's decision to refuse an application made by the applicant under section 3(11) of the *Immigration Act 1999* for the revocation of a deportation order that had been made in respect of him previously. The applicant arrived in the state from Kenya and was refused both asylum status and subsidiary protection. The contested decision was supported by a file note containing an analysis of the application made by the Repatriation Unit of the department for the respondent's recommendation, and on which the decision was based. The essential basis of the application that the respondent had a duty to consider was that the applicant was in a relationship with an Irish citizen for two years, to whom he was engaged and was expecting a child. His partner also had another child by another father, and there was an insurmountable obstacle to her joining the applicant in Kenya on deportation without the permission of that child's father. The grounds for seeking leave were characterised by the common assertion that the decision was *ultra vires*, arbitrary, irrational, unreasonable and disproportionate. The grounds emphasised at the oral hearing were directed particularly at the adequacy of the decision's assessment of the applicant's place in the family unit, the claim that there was an insurmountable obstacle to that unit relocating together in Kenya and, in particular, the rights of the unborn child under the Constitution and the *European Convention on Human Rights*.

Cooke J refused the application for leave, holding that, having considered the grounds proposed to be raised in the light of the oral submissions, no arguable case could be made out that the contested decision, as explained at length in the file note, did not flow from its premise or flew in the face of reason and common sense. Each of the new facts and changed circumstances relied upon by the applicant was set out and commented upon in detail in the file note. Furthermore, the right protected by article 40.3.3 of the Constitution was the right to life of the unborn child only. The application for leave was based on a misconception. The proposed grounds were predicated on an assumption that the respondent was obliged under section 3(11) of the act to reconsider the decision to deport the applicant. However, the only issue that can arise in respect of a decision to refuse revocation under section 3(11) is whether, in the light of the changed circumstances advanced in the application to revoke, the respondent erred in law or made some material mistake of fact in his decision to refuse revocation.

***Kangethe (applicant) v Minister for Justice and Law Reform (respondent)*, High Court, 7/10/2010**

TORT

Damages

Road traffic accident – soft-tissue injuries – post-traumatic stress disorder – whether disc prolapse attributable to accident – whether psychotic episode attributable to accident – quantum – *level of damages recoverable.*

The plaintiff was a 59-year-old lady who received soft-tissue injuries on 1 July 2005 when a car collided head-on with her car at a roundabout. Liability was not in issue. She suffered a fractured sternum and pain in her neck and back, and the symptoms continued for some months. She also became depressed and began to abuse alcohol. She was diagnosed with post-traumatic stress disorder. She also suffered a disc prolapse some years later.

Mr Justice Peart held that the plaintiff had not been consciously and deliberately exaggerating her difficulties in order to mislead the court, and awarded her €75,000 in general damages for past pain and suffering and €20,000 for future pain and suffering. The plaintiff's back pain was clinically established and explained by the evidence of disc protrusion and the degenerative changes in her lumbar spine. However, the plaintiff's disc prolapse was not attributable to the accident. Damages to which the plaintiff was entitled included the whiplash-type injury to her neck, her fractured sternum and recovery period, her depression, anxieties around traffic and post-traumatic stress disorder from which she had substantially recovered, her unwillingness to drive a car, as well as her soft-tissue injury to her back. Excluded from consideration for damages was the onset of alcohol abuse, the psychotic episode and the disc prolapse.

***Donovan (plaintiff) v Farrell (defendant)*, High Court, 4/12/2009**

Practice and procedure

Dismissal for inordinate and inexcusable delay – whether the inordinate and inexcusable delay of the parties rendered it improbable that a fair adjudication of this matter could not take place.

The first defendant applied to have the plaintiff's case against him struck out for inordinate and inexcusable delay. The litigation arose from a collision between a motorcycle and a tractor in 1994, and the plenary summons issued in 1996. The plaintiff was a pillion passenger on the motorcycle being driven by the first-named defendant and, as a result of the accident, he sustained serious injuries, including the loss of his leg. The first defendant was initially convicted of dangerous driving before the District Court but, on appeal in 1995, was convicted of careless driving only. The first defendant never filed a defence to the plaintiff's claim, despite the plaintiff's motion for judgment in default being struck out and time allowed for late filing. The first defendant maintained that, in or around January 2005, it was indicated to him that the case was being withdrawn, and allegations were made that the plaintiff later informed the defendant that he was not pursuing his claim. In November 2006, the first defendant was involved in a serious road traffic accident, resulting in the loss of one of his legs. He suffered reactive depression and was in constant pain. In November 2008, the plaintiff served a notice of intention to proceed. The defendant was later hospitalised in 2009 with severe physical and psychiatric injuries. The defendant also previously discontinued his case against the driver of the tractor involved in the collision.

Charleton J dismissed the application, holding that, although there was inordinate and inexcusable delay in this case, that delay was not one-sided. There was default by both parties. However, the ultimate test with a delay of this magnitude was as to whether a fair adjudication could nonetheless take place. The first defendant had suffered a serious injury since the incident that was the subject matter of these proceedings. However, the clear recording of his instructions at the time of the criminal proceedings and the inferences that the court must make that his solicitors recorded his instructions, made it improbable that a fair adjudication of this matter could not take place. Any memory loss or inability to concentrate was not proved. No costs were awarded arising out of this application, due to the fault of both parties in delaying this action.

***Kelly (plaintiff) v Doyle (defendant)*, High Court, 23/11/2010** G

NOTICE

Solicitors Acts 1954 to 2008 (Sixth Schedule) Regulations 2001 – SI no 604 of 2010

Solicitors Acts 1954 to 2008 (Fees) Regulations 2001 – SI no 605 of 2010

The combined effect of the above-mentioned statutory instruments, which came into operation on 1 February 2011, is to authorise the charging by the Law Society of the fees set out in the schedule below. The Law Society may, at its discretion in any individual instance, waive in whole or in part the fees specified in respect of any one or more of the applications referred to in the schedule.

File A and File B are provided for under section 17 of the *Solicitors (Amendment) Act 1960.* File A contains orders striking the name of a solicitor off the Roll of Solicitors or suspending a solicitor from practice, made by the High Court under specified sections of the *Solicitors Acts.* File B contains certain other orders made under the *Solicitors Acts,* including certain orders made by the High Court.

NATURE OF APPLICATION	SPECIFIED FEE PER APPLICATION
Application for a copy of an entry in File A or File B:	€100
Application for a certificate of good standing or a certificate of standing:	€100
Application for details of any indemnity insurance maintained by a solicitor or firm of solicitors pursuant to section 26 of the *Solicitors (Amendment) Act 1994* and regulations made thereunder:	€100
Application for a duplicate practising certificate:	€50
Application for information relating to a solicitor or firm of solicitors which requires a search in archived records:	€100

EDITED BY TP KENNEDY, DIRECTOR OF EDUCATION

ECJ upholds fine for abuse of dominant position

Last October, the European Court of Justice rejected an appeal against the 2008 decision of the European Court of First Instance (now the General Court) upholding the European Commission's earlier finding that Deutsche Telekom AG (DT) had abused its dominant position contrary to article 82 of the *EC Treaty* (now article 102 of the *Treaty on the Functioning of the European Union*, or TFEU). In its judgment, the ECJ addresses key issues arising from the interplay between EU competition rules and national regulatory frameworks. The court also considers whether a margin squeeze constitutes a stand-alone abuse of a dominant position.

Abuse of a dominant position

Article 102 prohibits the abuse of a dominant position in the EU (or in a substantial part of it) that may affect trade between EU member states. Accordingly, in order to establish that a company has infringed article 102, one must first establish that this undertaking has a dominant position. A dominant position is defined as a position of economic strength that allows a company to hinder effective competition being maintained on the relevant market by allowing it to behave, to an appreciable extent, independently of its competitors, customers and, ultimately, consumers. Dominance *per se* is not illegal. However, dominant companies are under a special responsibility not to hinder effective competition in the marketplace. Article 102 contains a non-exhaustive list of various types of abusive conduct. These include the imposition of unfair purchase prices or other trading conditions and the limitation of markets to the prejudice of consumers.

Factual background

DT is the incumbent telecommunications company in Germany and operates the fixed-line telephone network in that country. DT's local networks consist of various physical circuits connecting a customer's home or premises with its fixed-line network. These circuits are usually referred to as the 'local loop'. As part of the EU-led liberalisation of telecommunications services, DT was required, with effect from the mid '90s, to offer access to the local loop. Such access is essential to any company wishing to compete in downstream markets. The wholesale and retail prices that DT charges for such access are subject to a strict regulatory regime. The then German regulatory authority for telecommunications and postal services, RegTP, was required to set DT's wholesale access charges. RegTP was also obliged to approve DT's retail access prices following authorisation applications by this company.

> *"The ECJ's judgment is also of major importance to participants in any regulated sector, such as gas, transport, electricity and postal services"*

Commission decision

In 1999, 15 of DT's market rivals submitted complaints to the European Commission, claiming that the prices DT was charging for wholesale access were so expensive that, in order to avoid losses, they were forced to charge their own subscribers more than DT charged its own retail customers. Thus, even if its competitors are at least as efficient as DT, it is impossible for them to be profitable in the provision of retail access services. Competitors could theoretically offset their losses on such access services by charging higher prices for telephone calls; however, this was practically impossible against a background of falling call charges.

In its ensuing investigation, the commission found that, given DT's monopoly/virtual monopoly in the German markets for wholesale local loop access services and for retail end-user access services, it had a dominant position in both. Between 1998 and 2001, DT's wholesale prices for accessing the local loop were more expensive than charges to its direct retail customers.

In 2002, notwithstanding an increase in its retail tariffs, the spread between DT's wholesale and retail prices was insufficient to cover the product-specific costs of providing its own retail access services.

In its decision adopted in May 2003, the European Commission considered that DT had abused its dominant position because there was an insufficient margin between its wholesale prices for access to the local loop and its retail prices for end-user access services. This margin squeeze hindered an 'as-efficient' competitor from competing with DT for the provision of end-user access services. The commission found that the spread between DT's prices was abusive if a market rival, assuming it had DT's costs and had to pay DT's wholesale prices, was unable to compete with DT's retail prices without selling below cost.

The commission did not find that DT's wholesale prices were too high; instead, it felt that this company's retail prices were too low (that is, the latter did not cover DT's costs.) Accordingly, DT could have increased its retail charges in order to reduce or eliminate the abusive margin squeeze of its 'as-efficient' competitors. The commission thus found that DT had abused its dominant position and imposed a fine of €12.6 million.

General Court's judgment

DT appealed the commission's decision to the General Court on various grounds. In rejecting the appellant's argument that, since RegTP had approved its prices, article 102 should not apply, the General Court stated that the German regulator's function was not to examine EU competition issues. The General Court also considered that, since the abuse consisted of the unfairness of the spread between wholesale and retail prices, the commission was not required to demonstrate that DT's retail prices were, in themselves, abusive. In essence, the General Court found that, irrespective of the decisions of RegTP, DT had genuine scope to increase its retail prices for access services, thus reducing the margin squeeze. Moreover, DT must have been aware that its pricing policies were anti-competitive. In April 2008, the General Court thus rejected DT's appeal in its entirety.

Grounds of appeal

DT appealed the General Court's decision to the ECJ on two key grounds. Firstly, it challenged the manner in which the regulation of its activities by RegTP was considered. DT felt aggrieved that its pricing strategies, while seen as abusive by the General Court and the commission, had previously been approved by its national regulator. Secondly, DT argued that the General Court and the commission incorrectly applied article 102. More particularly, DT argued that a margin squeeze test is unsuitable to establish abuse in a situation where wholesale access charges are imposed by the relevant national regulator, in this case, RegTP.

DT's first ground of appeal focused on whether it was responsible for infringing article 102 where its pricing practices were approved by RegTP.

According to settled European case law, EU competition rules

will not apply to the behaviour of an undertaking: (i) provided the anti-competitive conduct is required by national legislation, or (ii) if national law creates a legal framework that eliminates any possibility of competition. In such situations, the restriction of competition is not attributable to the independent behaviour of the relevant undertaking. The ECJ has consistently interpreted these exclusions from the scope of EU competition rules very narrowly. If national rules merely encourage or make it easier for dominant undertakings to engage in autonomous anti-competitive conduct, those companies remain subject to article 102.

DT argued that, since its pricing strategies had been approved by RegTP under a legal framework geared towards competition, its duty to preserve the structure of the market is supplanted by the responsibility of the regulator. Rejecting this argument, the court noted that, while RegTP is the German body responsible for the telecommunications sector, it does not have competence for the enforcement of EU competition law. Indeed, DT should be aware that German telecommunications regulation and EU competition law are separate legal instruments. For instance, the former provides for *ex ante* regulation, whereas the latter contains rules for *ex post* review. DT should seek to respect both regimes. Moreover, the ECJ considered that nothing in German telecommunications regulatory rules prevented DT from adjusting its prices for end-user access services by making the appropriate authorisation applications to RegTP. Accordingly, the court found that the fact that RegTP had encouraged DT to maintain potentially abusive pricing practices does not, in itself, exclude the application of article 102.

DT also argued that RegTP's decisions created a legitimate expectation that the relevant pricing practices were lawful. However, the court held that this argument implicitly relies on the hypothesis that the commission should follow RegTP's assessment. However, the European courts have consistently held that the commission is not bound by the decision of a national body pursuant to article 102. Therefore, RegTP's decisions could not create a legitimate expectation that DT's conduct was lawful.


Dominant positions and competition are not always incompatible

Is the margin squeeze abusive?

As mentioned above, the commission found that DT's abuse consisted of the margin squeeze of its 'as-efficient' competitors due to the unfairness of the spread between its wholesale prices for local loop access services and its retail prices for end-user access services. DT challenged the relevance of the margin squeeze test for the purposes of establishing abuse under article 102, since it would have had to increase its retail prices for end-user access services in order to avoid this squeeze.

In general terms, it is abusive for a dominant company to hinder competition or the growth of competition on any market on which it is active. The ECJ recalled that article 102 expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices. Moreover, a dominant company must not adopt pricing practices that are capable of either making market entry very difficult or impossible for its competitors or limiting the choice of supply open to customers.

The ECJ noted that DT did not challenge the possibility that the spread between its wholesale prices for local loop access services and its retail tariffs for end-user access services was capable of having an exclusionary effect. This margin squeeze made the access of competitors to downstream markets more difficult, thus diminishing competition and ultimately reducing the prospect of long-term reductions in retail prices. The ECJ found that the fact that DT would be required to raise its retail prices in order to avoid the margin squeeze did not take its conduct outside the scope of article 102. The ECJ also dismissed DT's argument that, since the relevant wholesale prices were set by RegTP, the margin squeeze test was not appropriate on the basis that DT's abuse arose from the unfairness of the spread between its relevant prices and not the prices themselves. The ECJ thus upheld the General Court's finding that the margin squeeze, resulting from the spread between DT's wholesale and retail prices, was capable of constituting an abuse within the meaning of article 102 in view of the exclusionary effect it could create for competitors who were, at least, as efficient as DT. There was therefore no need to consider whether either DT's wholesale or retail prices were in themselves abusive.

'As-efficient competitor' test

The purpose of the 'as-efficient competitor' test is to ensure that a dominant undertaking cannot drive an undertaking from the market that is 'as efficient' but, because of its inferior financial resources, is incapable of withstanding the competition waged against it. DT argued that this test should be adjusted to take account of the differing regulatory and competitive situations of its market rivals. Referring to the principle of legal certainty, the court responded that, given the special responsibility of dominant companies, they should be in a position to assess the lawfulness of their pricing practices, including whether their conduct is likely to exclude competitors in breach of article 102. This must be done on the basis of their own costs, since they could not be expected to know their respective competitors' costs and charges. The ECJ thus confirmed that the General Court and the commission were entitled to rely on the 'as-efficient competitor' test in order to determine whether the margin squeeze was abusive.

Actual effects must be shown

The ECJ upheld the General Court's rejection of the commission's argument that it was unnecessary to demonstrate any anti-competitive effect of DT's conduct. In this case, the commission was required to show that the margin squeeze of DT's 'as-efficient' competitors created barriers for the growth of products in the retail market for end-user access services. The court found that a margin squeeze is not abusive if it does not make market penetration more difficult. The ECJ approved the General Court's view that the spread between the relevant

wholesale and retail prices hindered the growth of competition in the latter, since an 'as-efficient' competitor could not compete in the retail market for end-user access services without incurring losses. Indeed, the ECJ found that the small shares acquired by DT's competitors in the German market for end-user access services show the anti-competitive effect of the margin squeeze.

Wider implications

The ECJ's judgment is of major significance to the enforcement of abuse of dominance rules by the European Commission and the various national competition authorities. The court's rejection of DT's appeal recognises, for the first time, a margin squeeze as a stand-alone abuse of a dominant position. (This test was also set out in the commission's recent guidance on the enforcement of article 102.) In particular, the ECJ stated that the 'as-efficient competitor' test is the correct method for deciding whether a margin squeeze infringes article 102. This test should allow a dominant company to assess whether its behaviour is lawful, since it obviously knows its own costs. This does not require a dominant company to speculate whether actual or potential competitors with differing cost structures would be excluded by its pricing practices, as would be required under the 'reasonably efficient competitor' test.

The ECJ's judgment is also of major importance not only to telecommunication companies and regulators but also to participants in any regulated sector, such as gas, transport, electricity and postal services. The court's judgment shows that national sectoral regulation does not preclude the application of EU competition rules. In addition, the court left open the issue of whether Germany (through RegTP) may have infringed EU law in authorising DT's unlawful pricing practices. This may have resulted in the commission launching proceedings against Germany for its failure to fulfil its treaty obligations. Accordingly, regulatory bodies must be mindful of the impact of articles 101 and 102 of the TFEU.

Regulated companies should also pay attention to EU competition rules. Indeed, the court held that, even if *ex ante* national regulatory rules encourage a company to act in a particular manner, this will not absolve that company from its responsibilities under articles 101 and 102. Accordingly, regulated companies may be required to act in a manner inconsistent with their national regulatory framework in order to comply with EU competition rules. The need to 'second guess' its respective national regulatory regime is likely to cause significant practical difficulties for any regulated body, particularly a dominant undertaking. On the other hand, it is perhaps welcome that a regulator's view may be challenged by the European Commission or any national competition authority of an EU member state. Finally, companies seeking to obtain access to regulated assets/networks might consider using EU competition law, since these rules may provide access rights that are not obtainable under national regulatory rules.

Cormac Little is a partner in the Competition and Regulation Unit of William Fry, Solicitors.

Recent developments in European law

FAMILY LAW

On 20 December 2010, the council adopted regulation 1259/2010 on enhanced cooperation in the area of divorce and legal separation (*Rome III*). The regulation will apply to the 14 member states that participate in enhanced cooperation (this does not include Britain or Ireland). The new regulation sets out choice-of-law rules to be applied in divorce or legal separation cases.

FREE MOVEMENT OF GOODS

Case C-108/09, *Ker-Optika bt v ÁNTSZ Dél-dunántúli Regionális Intézete*, 2 December 2010

Hungarian legislation provides that the selling of contact lenses requires a specialist shop with a minimum area of 18 square metres or premises separated from the workshop. To sell contact lenses, the services of an optometrist or an ophthalmologist qualified in the field of contact lenses must be used. The Hungarian firm Ker-Optika sells contact lenses on its website. The Hungarian health authorities prohibited it from pursuing that activity on the ground that, in Hungary, those products could not be sold via the internet. Ker-Optika brought a court action challenging that prohibition. The Hungarian court asked the Court of Justice whether the Hungarian legislation was in compliance with EU law. The Court of Justice noted that the prohibition in Hungary on selling contact lenses via the internet applied to the supply of contact lenses from other member states to customers in Hungary. It significantly impedes the access of non-Hungarian suppliers to the Hungarian market. Thus, it is an obstacle to free movement of goods in the EU. The court found that a member state may impose a requirement that contact lenses are to be supplied by qualified staff capable of providing the customer with information on the correct use and care of those products and on the risks associated with wearing lenses. Thus, the Hungarian legislation is appropriate to secure the objective of protecting the health of consumers. Those services can also be provided by ophthalmologists in places other than optician's shops. These services are generally only required on the first occasion when contact lenses are supplied. When lenses are supplied subsequently, it is sufficient that the customer advise the seller of the type of lenses that were provided when first supplied and inform the seller of any change in his vision as measured by an ophthalmologist. The additional information and advice required for prolonged use of contact lenses can be given to the customer by using the interactive feature on the supplier's website or by a qualified optician designated by the supplier as able to provide that information at a distance. Thus, the court ruled that the objective of ensuring protection of the health of the users of contact lenses can be achieved by measures that are less restrictive than those provided for under the Hungarian legislation.

INTELLECTUAL PROPERTY

Case C-235/09, *DHL Express (France) SAS v Chronopost SA*, opinion of Advocate General Cruz Villalón, 7 October 2010

The *Trademark Regulation* (40/94) provides for a uniform intellectual property right effective throughout the entire area of the EU. One tier of its system of specialised jurisdiction was the establishment of 'community trademark courts'. These are a limited number of national courts of first and second instance designated by each member state that decide disputes between private parties. In the context of that system, the national courts act as special courts of the EU. Where the community trademark courts find an infringement or a threatened infringement of a community trademark, they are to issue an order prohibiting the infringer from proceeding with the acts that infringed or would infringe the community trademark. They may also take such measures in accordance with their national law as are aimed at ensuring that the prohibition is complied with. Chronopost SA is the proprietor of the French and community trademarks 'Web-

shipping', relating, in particular, to services for the collection and delivery of mail. After the registration of those marks, DHL Express (France) SAS used the same word for an express mail management service accessible principally via the internet. In 2007, a regional court in Paris, acting as a community trademark court, declared that there had been trademark infringement, prohibited DHL from a continuing infringement, and imposed a financial penalty should it fail to comply with the prohibition. DHL appealed the ruling to the Cour de Cassation. Chronopost also appealed, contesting the effects of the ruling being limited to France. The Cour de Cassation made a reference to the Court of Justice for a ruling to ascertain the territorial scope of the prohibition issued by a community trademark court and of the coercive measures adopted in order to ensure that the prohibition is complied with. The advocate general considered that, in principle, a prohibition issued by a national court acting as a community trademark court has effect as a matter of law throughout the entire area of the EU. The purpose of the regulation is to enable a trademark proprietor to apply to a single court in order to bring acts of infringement to an end in several member states. The declaration of infringement relates to a trademark granted by the EU, whose judicial protection is entrusted to special national courts of the EU and therefore, in principle, the declaration has effect throughout the entire area of the EU. Where the infringement or action for infringement is limited to a specific geographical or linguistic area, the court's order is limited territorially. The territorial scope of the prohibition corresponds, in principle, to the scope of the infringement. The advocate general considered that the coercive measures have effect within the territory in which the declaration of infringement was made and the prohibition issued. The quantification and enforcement of those measures take place at a later stage, when, if the prohibition has been infringed, the penalty is applied. The court that has imposed the periodic penalty payment will have jurisdiction as regards its quantification and enforcement only where the prohibition is infringed in the member state of that court. Where the prohibition is infringed in another member state, quantification and enforcement will be a matter for the court of that member state. The court of the member state in which the penalty has been infringed is obliged to recognise the effects of the period penalty payment imposed by the community trademark court of the other member state, in accordance with the rules on recognition laid down by the *Brussels I Regulation*. Such measures must be adjusted to the specific features of each legal system. The court of the member state in which the prohibition has been infringed, if its national law so permits, is simply to recognise the order and apply the period penalty payment to the specific case. By contrast, if its national law does not provide for such a measure, it must achieve enforcement in accordance with its own national provisions.

REFUGEE STATUS

Joined cases C-57/09 and C-101/09, *Germany v B*, *Germany v D*, 9 November 2010

Directive 2004/83 EC lays down minimum standards for conditions to be met by third-country nationals or stateless persons in order to receive international protection. It provides for the exclusion of a person from refugee status where there are serious reasons for considering that he has committed a "serious non-political crime" or has been guilty of "acts contrary to the purposes and principles of the United Nations". B and D are Kurds who hold Turkish nationality. B had supported the armed guerrilla activity of the DHKP/C and D was a guerrilla fighter and senior official in the PKK. Both these organisations were on a list drawn up by the EU of persons, groups and entities involved in terrorism. D had been granted refugee status by Germany and B had applied for asylum. Both stated that they has left these organisations and now feared persecution from both the Turkish authorities and their respective organisations. The German authorities rejected B's application and revoked the refugee status that had been granted to D. A German court asked the Court of Justice to interpret the clauses in the directive under which a person is excluded from refugee status. The CJ held that exclusion from refugee status of a person who has been a member of a terrorist organisation is conditional on an individual assessment of the specific facts. The mere fact that the person concerned has been a member of such an organisation cannot automatically mean that the person must be excluded from refugee status. The circumstances in which an organisation was placed on the list of terrorist organisations cannot be assimilated to the assessment of specific facts in the case of an individual. Participating in the activities of a terrorist group does not, in itself, trigger the automatic application of the exclusion clauses in the directive. To justify a finding that the grounds for exclusion apply, it must be possible for the competent authority to attribute to the person concerned a share of individual responsibility for the acts committed by the organisation in question while that person was a member. The competent authority is required to assess a number of factors: the true role played by the person concerned in the perpetration of terrorist acts; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct. If a competent authority finds that the person concerned has occupied a prominent position within a terrorist organisation, it is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period. It is still necessary to examine all the relevant circumstances before a decision excluding that person from refugee status can be adopted. Exclusion from refugee status pursuant to one of the exclusion clauses concerned is not conditional upon the person concerned representing a present danger to the host member state. The penalty element of the exclusion clause is intended for acts committed in the past. There are other provisions in the directive that allow the competent authorities to take the necessary measures where a person represents a present danger.

NOTICES

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WILLS

Byrne, Bridget (deceased), late of Tara Winthrop Nursing Home, Swords, and 73 Villa Park Gardens, Navan Road, Dublin 7, who died on 11 December 2010. Would any person having knowledge of any will executed by the above-named deceased please contact Brid O'Dwyer, solicitor, Frank Ward & Co, Solicitors, Equity House, Upper Ormond Quay, Dublin 7; tel: 01 873 2499, fax: 01 873 3484, email: brid@frankward.com

Carthy, Frank (deceased), late of Crow Street, Gort, in the county of Galway. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased on 24 October 1997, who subsequently died on 23 July 2001, please contact Twomey Scott & Co, Solicitors, 80 O'Connell Street, Limerick; tel: 061 316 456, fax: 061 316 567, email: dscott@twomeyscott.com

Carty, Patrick (otherwise Carthy) (deceased), late of 98 Ashfield, Mullingar, Co Westmeath, and formerly of Wooddown, The Downs, Mullingar, Co Westmeath, who died on 28 December 2010. Would any person having any knowledge of the whereabouts of a will executed by the above-named deceased please contact John Wallace of NJ Downes & Co, Solicitors, Dominick Street, Mullingar, Co Westmeath; tel: 044 934 8646, fax: 044 934 3447, email: john@njdownes.ie

Conlon, Bridget (deceased), late of 30 Ellesmere Avenue, North Circular Road, Dublin 7, who died on 9 March 1998. Would any person having knowledge of the whereabouts of the original will, dated 25 August 1994, or any other will made by the above-named deceased, please contact Pearse Mehigan & Company, Solicitors, 83/84 Upper Georges Street, Dun Laoghaire, Co Dublin; tel: 01 280 8292, fax: 01 280 8651, email: gregflanagan@pearsemehigan.com

Conlon, Michael (deceased), late of 30 Ellesmere Avenue, North Circular Road, Dublin 7. Would any person having knowledge of a will executed by the above-named deceased, who died on 19 March 2006, please contact Pearse Mehigan & Company, Solicitors, 83/84 Upper Georges Street, Dun Laoghaire, Co Dublin; tel: 01 280 8292, fax: 01 280 8651, email: gregflanagan@pearsemehigan.com

Corish, John Francis (deceased), late of 61 The Way, Hunter's Run, Clonee, Dublin 15, who died on 31 December 2010. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased please contact Mary Morrissey of Morrissey & Co, Solicitors, Lismard House, Bridge Street, Tullow, Co Carlow; tel: 059 915 2910, fax: 059 915 2163, email: postmaster@morrisseycosolicitors.ie

Cummins, Patrick (deceased), late of Farnamanagh, Cashel, Co Tipperary, who died on 2 September 2010. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased please contact John Whelan of Matthew MacNamara & Son, Solicitors, Friar Street, Cashel, Co Tipperary; tel: 062 61110, email: macnamaraandson@eircom.net

Kelly, Emer (deceased), late of 33 Kerrymount Rise, Foxrock, Dublin 18, who died on 6 September 2010. Would any person having any knowledge of the whereabouts of a will executed by the above-named deceased please contact Rochford Gibbons, Solicitors, 16/17 Upper Ormond Quay, Dublin 7; tel: 01 872 1499, fax: 01 872 1654, email: info@johnrochford.ie

Killian, Mary Josephine (deceased), late of The Beeches, Coosan, Athlone, Co Westmeath. Would any person having knowledge of a will executed by the above-named deceased, who died on 9 December 2009, please contact Mark Cooney, Solicitors, 5 Garden Vale, Athlone, Co Westmeath; tel: 090 647 7718, fax: 090 645 0570, email: info@markcooney.ie

Laverty, Frankie (Francis) (deceased), late of Stranorlar, Co Donegal, who died on 21 August 2010. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact MM Mulrine & Co, Solicitors, Ballybofey, Co Donegal; tel: 074 913 1608

McInerney, Monica (deceased), late of Clenagh, Newmarket-on-Fergus, Co Clare, who died on 4 November 2010. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased please contact Lorraine Burke of Desmond J Houlihan & Company, Solicitors, Salthouse Lane, Ennis, Co Clare; tel: 065 684 2244, email: lburke@djhoulihan.ie

McQuillan, Francis (otherwise Frank) (deceased), late of Knockataggart, Stradone, Co Cavan, who died on 5 October 2010. Would any person having any knowledge of a will made by the above-named deceased please contact Joanne Kangley, Solicitors, Anne Street, Bailieborough, Co Cavan; tel: 042 966 6741, fax: 042 966 5988, email: reception@kangley.ie

McQuillan, Annie (otherwise Anna) (deceased), late of Knockataggart, Stradone, Co Cavan, who died on 18 October 1990. Would any person having any knowledge of a will made by the above-named deceased please contact Joanne Kangley, Solicitors, Anne Street, Bailieborough, Co Cavan; tel: 042 966 6741, fax: 042 966 5988, email: reception@kangley.ie

McSwiney, Katryn (deceased), late of 54 Barra Glas, Crobally Upper, Tramore, Co Waterford, who died on 29 October 2010. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Raymond Glynn & Co, Solicitors, 27 O'Brien Street, Mallow, Co Cork; tel: 022 22285, fax: 022 42415

Marnell, Timothy (Tim) (deceased), late of Killough, Templemore, Co Tipperary. Would any person having knowledge of a will made by the above-named deceased, who died on 6 October 2010, please contact James J Kelly & Son, Solicitors, Patrick Street, Co Tipperary; tel: 0504 31278, fax: 0504 31983, email: info@jjkellylaw.ie

Murray, Ciaran (deceased), late of Herbertstown, Naas, Co Kildare, who died on 13 June 2010. Would any person having knowledge of the where-

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abouts of the original will executed by the above-named deceased on 21 March 1986, or any other will, please contact Ivan Feran, Feran & Co, Solicitors, Constitution Hill, Drogheda, Co Louth; DX 23001; tel: 041 983 1055, fax: 041 983 9104, email: ivan-feran@feran.ie

Ryan, Mary Margaret (deceased), late of 70 Ballynetty Road, Ballyfermot, Dublin 10. Would any person having any knowledge of wills made by the above-named deceased, who died on 14 April 1983, please contact Patrick W McGonagle, solicitor, of Patrick W McGonagle & Co, 3 North Street, Swords, Co Dublin; tel: 01 840 4697, fax: 01 840 1161, email: pat@mcgonaglesolicitors.ie

Ward, Michael (deceased), late of 174 East 85 Street, New York, USA, and formerly of Fenagh, Co Leitrim and Castleknock, Dublin 15. If anyone knows of the whereabouts of a will made by the above-named deceased, who died on 1 August 2010, please contact: anitaneville@eircom.net, tel: 086 102 6463

MISCELLANEOUS

MacGowan, Cyrill (otherwise Cyrill Smith) (deceased), late of 82 Abbeyfield, Killester, Dublin 5. Would any person having knowledge of a wife named Molly or a child named Yoko or any other relative or next-of-kin of the above-named deceased, who died on 28 August 2008, please contact Lorna Shannon, Gaffney Halligan & Co, Solicitors, 413 Howth Road, Dublin 5; tel: 01 831 4133, fax: 01 831 4908, email: lshannon@gaffneyhalligan.com

Seven-day liquor licence required. Contact: Rory Deane & Co, Solicitors, Temple House, Templeshannon, Enniscorthy, Co Wexford; tel: 053 913 6622

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Busy established practice, Eastern region, requires purchaser or partner for heavy workload. **Replies to box 01/11/01**

TITLE DEEDS

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

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 59 Moore Street, in the parish of Saint Mary and city of Dublin, being part of the property comprised in folio DN117599L and held under a lease dated 13 July 1802 from Robert Burton to Thomas Trilly for a term of 999 years from 1 May 1802, subject to the yearly rent of £18.20 sterling.

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

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

Date: 4 February 2011

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

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

Any person having any interest in the fee simple estate or any intermediate interest in all that and those the hereditaments and premises known as 55 Moore Street, in the parish of Saint Mary and city of Dublin, comprised in folio DN118022L, held for a term of 999 years, less the last three days thereof, from 1 January 1874 under the leasehold interest created by a mortgage debenture dated 4 September 1990 from Eastdean Limited to Irish Intercontinental Bank Limited, being a sub-demise under a lease dated 3 March 1875 from Robert William Burton to William Brunton for the full term of 999 years from 1 January 1874 aforesaid, which reserved a yearly rent of £35 sterling.

Take notice that Joseph O'Reilly, being the person entitled to the said subleasehold interest, intends to apply to the Dublin County Registrar at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the fee simple

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NOTICES

estate and all intermediate interests in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the undermentioned solicitors within 21 days from the date of this notice.

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

Date: 4 February 2011

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

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

Any person having any interest in the fee simple estate or any intermediate interest in all that and those that portion of 70 Parnell Street, Dublin 1, comprising part of folio DN186723F, the subject of a lease for lives dated 10 March 1774 from James Higgins to Mary Johnston, which reserved a perpetual yearly rent of £30, now €38.09.

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

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

Date: 4 February 2011

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

In the matter of the *Landlord and Tenant Acts 1967-2005* and in matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Ann Taylor of 'Grouville', 70 Monkstown Avenue, Monkstown, Co Dublin

Take notice that any person having any interest in the fee simple or any superior or intermediate interest in the following properties (or either of them): (a) part of the lands of Ashton Park, Monkstown Avenue, in the parish of Monkstown, barony of Rathdown and county of Dublin, with the substation erected thereon, held under an indenture of sublease dated 24 February 1955 and made between Ashton Estates Limited (1) and the Electricity Supply Board (2) for a term of 100 years from 1 February 1955 and subject to the yearly rent of one shilling and the covenants and conditions therein contained; and (b) the lands at Ashton Park, Monkstown Avenue, in the county of Dublin, with the building erected thereon, held under an indenture of sublease dated 17 April 1959 and made between Ashton Estates Limited (1) and Frederick Taylor (2) for a term of 899 years from 1 September 1951 and subject to the yearly rent of one pound and the covenants and conditions therein.

Take notice that the applicant, Ann Taylor, being the person entitled

NOTICES

to the lessee's interest in both of the above-mentioned leases, intends to submit an application to the county registrar for the city of the county of Dublin for the acquisition of the freehold interest and all intermediate interests (if any) in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid properties is called upon to furnish evidence of title to the aforementioned properties to the undermentioned within 21 days from the date of this notice.

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

Date: 4 February 2011

Signed: William J Brennan & Company (solicitors for the applicant), 33 Upper Merrion Street, Dublin 2

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the application by Joseph Power and in the matter of the premises situate at and known as 133 North Strand Road, Dublin 3

Take notice that Joseph Power intends to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold Interest in the property known as 133 North Strand Road, Dublin 3, and any party asserting that they hold the superior interest in the aforesaid property is called upon to furnish evidence of title to the aforementioned property to the below-named solicitors within 21 days from the date of this notice. The said premises are held under an indenture of lease made 13 July 1938 (hereinafter called 'the lease') and made between Jane Nestor of the one part and Patrick O'Neill of the other part for a term of 100 years from 1 June 1938, subject to the yearly rent of 84 pounds and to the covenants and conditions contained, which said property is part of the lands demised by a superior lease dated 12 April 1880, and made between Michael O'Brien of the one part and John Condon of the other part for a term of 500 years from 1 May 1880, subject to the rent of nine pounds, six shillings per annum and to the covenants and conditions contained.

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

Date: 4 February 2011

Signed: Richard Dennehy & Co (solicitors for the applicant), 189a Botanic Road, Glasnevin, Dublin 9

RECRUITMENT

Apprenticeship sought by well-educated and experienced PPCI trainee solicitor, to commence April 2011. Intelligent and reliable individual with a strong work ethic. Significant experience attained in legal practice. CV and references available upon request. Available to attend interview to demonstrate competence. Tel: 087 634 0296

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

Judges in 'top ten' list of jobs with no future!

If you're intent on becoming a judge in the US (and here, you might ask), you might want to think again. *CBS Moneywatch* has compiled a list of the 'top ten' high-paying jobs with no future – and judges are in pole position!

The list is based on the US Bureau of Labor Statistics' (BLS) *Occupational Outlook Handbook*. The bureau predicts that budget cuts will lead to a loss of 700 jobs for judges, magistrate judges, and magistrates by the end of 2018. The agency also notes that turnover is slow, with the average tenure spanning 14 years. BLS researcher Tamara Dillon says: "Years ago, some judges left to become general counsel in the private sector, where they could triple their salary, but since the economic downturn, they're staying longer on the bench."

Also on the list of high-paying jobs with no future are: fashion designers, insurance underwriters, travel agents, newspaper reporters and broadcast announcers. Lawyers didn't make the list.

According to the BLS report, job growth for lawyers is projected to be 13% between 2008 and 2018, about as fast as the average for all occupations. The report notes that lawyers are increasingly finding work outside of law firms in areas where legal training is an asset, rather than a requirement.

Snappy days

Parents should be free to photograph their children in school or nativity plays and challenge schools or councils that try to stop them under data protection laws. That's according to Britain's information commissioner, Christopher Graham, as reported in the *Belfast Telegraph*. Shots for the family album are exempt from the laws, and parents and friends of children in plays should stand ready to challenge any schools or councils on the matter.

"Having a child perform at a school play or a festive concert is a very proud moment for parents and is understandably a memory that many want to capture on camera. It is disappointing to hear that the myth that such photos are forbidden by the *Data Protection Act* still prevails in some schools. Clearly, photographs simply taken for a family album are exempt from data protection laws."

Daniel Hamilton, campaign director of civil liberties campaign group Big Brother Watch, said the information commissioner's statement was "a real victory for common sense".

It's a steal

As many as 76% of employees have stolen from their place of work, according to a recent survey conducted by office design company Maris Interiors. Men are particularly light-fingered, with an astonishing 82% admitting to helping themselves, compared with 71% of women surveyed.

The stationery cupboard was hardest hit, with pens (60%) and printer paper (42%) being the most common items pilfered. Stamps (31%), mugs (28%) and toilet paper (24%) were also frequently taken. The stapler – often thought of as a frequent target of office thieves – was 'only' taken by 6% of those surveyed.

One in 20 employees admitted to having taken more valuable items – ranging from printer toner to laptops. More unusual items declared included chairs and office plants, even filing cabinets, carpet tiles and entire desks.

And yes, we've lifted this story – but just can't remember from where!

Jailhouse rocks

A California lawyer's claim that jailhouse sex was consensual and lasted no more than "an hour's total duration" shows he still doesn't get it and should be disbarred, a Californian state court judge held, and the state supreme court agreed.

The respected *ABA Journal* reports that, according to an order in early December, the State Bar of California would disbar Patrick Earl Marshall (63) from 1 January 2011.

Marshall, who had sex with two incarcerated female clients at the San Benito County Jail while he was working as a contract public defender, failed to recognise that it is impossible for a client in this situation to consent to sex, according to an opinion by State Bar Court Judge Lucy Armendariz. Likewise, "having improper sexual relations with a client breaches the basic notions of trust and integrity and endangers public confidence in the legal profession, irrespective of its duration".

The *Hollister Free Lance* says the incidents at issue date back to 1995. The suspension, followed by a two-year period of probation, was successfully appealed by the prosecution, resulting in Marshall's disbarment.

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FINANCE — €Excellent

Our client is a high profile law firm and is now looking to recruit high calibre finance lawyers. Ideally you will have a background in capital markets and banking and now wish to continue your career in a highly profitable firm with an excellent culture. A firm committed to excellence in the training and development of its lawyers, you will learn rapidly whilst assuming some real responsibility. Clients of the firm are assured of a commercial approach together with the experience and technical excellence necessary to structure and implement their financing transactions on time and within budget. The firm advises both lenders and borrowers on a broad range of finance transactions. Excellent terms on offer for this role.

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CORPORATE — €120+Bonus+Benefits

Our client wishes to recruit an associate or salaried partner to join an already successful corporate team. This firm stands out for its collegiate culture, the strength of its management team and its consistent level of profitability. Here is a unique firm and platform from which you can play a lead role in further shaping and developing the corporate and commercial practice. You will have strong experience in m&a, shareholder agreements and joint venture tranactions. If you are looking for a senior appointment and want to work for a practice with a genuine commitment to its staff and clients this is the firm for you.

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BANKING — €Negotiable

An excellent opportunity has arisen for a senior lawyer to join a leading banking team within a large dynamic law firm. Having worked within the banking and finance sector, you will have particular experience in securitisation, property acquisition and finance. You will be skilled at providing general banking and governance advice and at executing transactional work with attention to detail. You will be ambitious and eager to form part of a team and progress to partnership level. You will benefit from working in a collegiate and proactive environment and will be rewarded by a competitive salary.

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PROFESSIONAL INDEMNITY — €100+Bonus+Benefits

This firm is looking to recruit an ambitious lawyer who has experience in the area of professional indemnity. This firm has an overall reputation of excellence in this area and is looking for a solicitor to take up and assist in the running of high profile, high value cases. You will be familiar with high court practice and procedure and will be comfortable in other arenas of dispute resolution including arbitration and alternative dispute resolution. You will also have sufficient experience to manage your client and provide advices as to the best possible outcome and the potential pitfalls including costs. You will defend professionals in various disciplines including engineers, architects, surveyors and solicitors.

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PPP/PFI — €130+Bonus+Benefits

An outstanding opportunity has arisen within a dynamic mid tier firm to hire a PPP/PFI lawyer. You will have expertise in one of the following sectors, rail, water, waste and/or energy and more specifically dealing with projects and procurement matters. You will be familiar with the preparation, negotiation and review of various documentation including funding and corporate documents and will be able to advise clients in a competent informed way. You will have gained experience within a well established law firm/in house with strong academics and an eagerness to bring your career to the next level. This role offers a varied client portfolio together with a highly competitive remuneration package.

Contact carolmcgrath@makosearch.ie **Ref: C2024**

MEDICAL NEGLIGENCE — €90+Bonus+Benefits

Hugely successful law firm with an impressive client portfolio welcomes applications from accomplished medical negligence lawyers. You can look forward to working on exceptionally good quality cases in a most supportive working environment with real career prospects and professional development. Particular interest will be shown in accomplished lawyers able to handle large scale files and who can deal with cases sensitively while at the same time adopting a pragmatic and efficient solution. This may include being able to provide opinions on the merits or otherwise of a case before it proceeds to trial. The ideal candidate will have strong academics.

Contact carolmcgrath@makosearch.ie **Ref: C2025**

FUNDS — €Negotiable

Easily identified as a leading light in the field of investment funds, our client is actively looking to secure the services of a top tier partner/team with exceptional experience within the investment funds market. Ideally the candidate will have retail, mutual, UCITs, ETF's or hedge fund areas. The successful applicant will be tasked with developing the Irish market. Working closely with their colleagues to capitalise on their blue chip client base, you will demonstrate an ability to work as part of a team and have strong communication and technical skills. Having gained experience from a leading law firm or industry, you will show strong technical expertise and commercial sense. A competitive salary and attractive bonus are on offer to the right candidate.

Contact carolmcgrath@makosearch.ie **Ref: C2026**

PSL — €80+Bonus+Benefits

This firm requires a barrister/solicitor to act as a PSL within the legal education and resources team, dealing with queries and research from across all practice areas and managing documentation and practice notes. You will be aware of developments in relevant areas, regulation and industry practice, collate precedents and co-ordinate group training and education, involvement in other support projects as may arise. You will have a strong academic background, excellent technical ability and a commitment to quality and accuracy of work produced. The successful candidate will interact and communicate well with all team members, thus ensuring that the lawyers are adequately informed on a regular basis. This role offers the right candidate varied work within a collegiate environment.

Contact carolmcgrath@makosearch.ie **Ref: C2027**

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New Openings

Asset Finance – Associate to Senior Associate: Working with a dedicated team at one of Ireland's largest law firms you will specialise in leasing, structured and cross-border financing and securitisations. The successful candidate will be advising financial institutions and investment banks in the domestic and international marketplace. You will have experience in the banking and financial services industry with a background in private practice.

Banking – Senior Associate: A well respected Dublin practice is seeking a strong Banking lawyer to work with a small dedicated team with an established client base. You will be dealing with a range of transactions including acquisition finance, re-structuring and NAMA work for a number of clearing banks. The successful candidate will have experience of acting for both lenders and borrowers and be familiar with facility letters, negotiations, taking security, and security review (ideally with syndicated lending experience). There will also be the possibility of some insolvency work.

Banking – Associate – In house: Major clearing bank requires an experienced banking practitioner to deal with a broad range of matters not limited to NAMA work.

Commercial Property – Partner: Leading Dublin practice is seeking an ambitious practitioner with strong management skills to supervise a dedicated team dealing with a range of commercial property matters including assisting corporate clients with property affairs to include long and short term leases, disposals etc. Also, NAMA enforcement and property issues on support transactions.

Corporate/Commercial – Senior Associate: Our client is a major Dublin City law firm with a first class reputation. You will be dealing with mergers and acquisitions, corporate restructurings and re-organisations of large blue-chip domestic and international organisations.

Funds – Senior Associate: A top flight firm is seeking an experienced asset management and investment funds lawyer. The department is involved in setting up and servicing investment funds in Ireland for international and domestic clients. You will have a strong academic background coupled with first class technical skills and be expected to market the firm's services to existing and potential clients.

For more information on these or other vacancies, please visit our website or contact Michael Benson bcl solr. in strict confidence at: Benson & Associates, Suite 113, The Capel Building, St. Mary's Abbey, Dublin 7.
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