SMDF decision
Members vote in favour of €16m financial support for the SMDF

Caught in a trap
Judgment mortgages are a tortuous experience for many judgment creditors

Australian outback
Law Council of Australia president encourages Irish lawyers to work remotely

LAW SOCIETY
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BLOODGATE:

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THE TIMES THEY ARE A-CHANGIN'

I would, firstly, like to thank all my colleagues who have expressed their condolences or written kind words to me after the recent death of my father. I appreciated this very much. In return, I would like to pass on my sympathy to any colleague who has a relative who is seriously ill at present, or who has suffered a bereavement of a close family member.

Secondly, I would like to thank all colleagues who participated in the SMDF ballot, regardless of how they cast their vote. I hope that the result will now clear the way for a slightly easier professional indemnity insurance (PII) renewal process in December.

I personally believe that a master policy for the profession is, on balance, in the best interest of the profession as a whole. However, it is a complex issue and I believe the profession is divided on the matter. I feel that our task force did not have the time to consult sufficiently with the profession, to complete a full analysis of the issues, to fully test the formula for calculating the premium, to tweak certain aspects of a master policy (where appropriate, for certain situations), and to properly assess the role of risk management for firms. In any event, the task force is continuing to examine all issues connected with a master policy.

In the meantime, the 'freedom-of-choice' model will continue and will include a common proposal form, which is about to be agreed with the insurers. It is also hoped that strict time limits will apply to insurers for giving quotes.

In addition, it is hoped that there will be a special fund established to pay for run-off cover for practitioners who wish to retire. The task force has been informed, having met with insurers and brokers over the last few weeks, that the renewal premiums will probably fall slightly for firms with no claims. It is also anticipated that the same number of insurers will be in the market next December, including the companies who provided reinsurance cover to the SMDF. The Council is meeting on 1 July to agree all the terms and conditions for the next renewal with the insurers.

Legal costs

In early July, we expect to meet Minister for Justice Alan Shatter to discuss, primarily, bills that are expected to issue in the autumn in relation to legal costs and regulation. Recently, there has been a lot of media publicity about legal fees and, in certain instances, of overcharging by solicitors, which can never be condoned. The only slightly good news is that the number of complaints to the Society regarding overcharging by solicitors reduced from 199 in 2009 to 135 in 2010. Regarding the assessment of costs, I believe the present taxation system is archaic, and I would like to see a Legal Costs Assessment Office with remit to cover costs for all courts, which might improve the situation. Legal costs could then be assessed on fixed criteria, from case to case.

In relation to tendering for legal services, I am pleased that Minister Shatter is asking all ministers to examine a tendering policy that should be based on expertise and experience, reputation and adequate PII – and not on a firm's turnover.

"Our walls are being rattled, but a strong and vibrant profession is essential in the public interest"

Regulation of the profession

Finally, in relation to regulation, both the Independent Adjudicator and the lay members on the Complaints and Client Relations Committee have expressed general satisfaction, in their respective 2010 reports, with the manner in which the Society regulates the profession. The Society welcomes the opportunity, however, to discuss regulation of the profession with the minister.

In conclusion, the words of Bob Dylan come to mind:

"There is a battle outside
and it is ragin'
it'll soon shake your windows
and rattle your walls
for the times they are a-changin'."

Dylan was writing about social changes in the US in the 1960s. Our battle is to continue to serve the public while facing enormous financial challenges in the present economic environment, and possible legal changes affecting the profession in the near future. Our walls are being rattled, but a strong and vibrant profession is essential in the public interest.

John Costello
President

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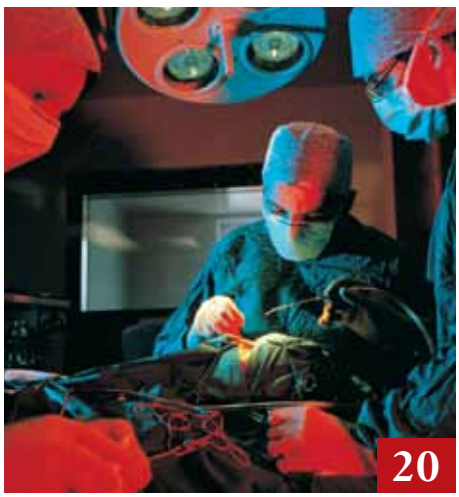

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... as well as lots of other useful information

Nationwide

Compiled by Kevin O'Higgins

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

Conveyancing Act CPD course held

KILDARE

Andrew Cody recently organised an excellent CPD event for colleagues on the *Conveyancing Act 2009*, focusing on easements, profits and covenants, with separate presentations on contracts and title, deeds and their contents, and mortgages and judgment mortgages. Colleagues heard from the two foremost experts in these areas, namely Professor Wylie and barrister Deborah Wheeler.

PIAB and civil litigation seminar

WICKLOW

Barry J Kenny, secretary of the Wicklow Bar Association, tells me that the association held a very successful seminar at the Park View Hotel in Newtownmountkennedy on 2 June. Titled 'PIAB and civil litigation', the seminar was given by Stuart Gilhooly and David Nolan SC.

The association will hold its annual golf outing at Woodenbridge Golf Club on 22 July, followed by dinner in the club house. Colleagues from the Bar are also invited. Those who do not play golf are very welcome to attend the dinner and socialising afterwards.

Strawberries and cream

DUBLIN

It's strawberries-and-cream time again, and the DSBA is holding its second annual tennis tournament on 23 July. Please note the change of venue from Donnybrook LTC to Elm Park Golf Club's tennis facilities. This is a mixed-doubles format but, depending on interest, we may be able to accommodate male or female single entries also. For details, please email me at: kevinoh@indigo.ie.

Following on from Rory McIlroy's US Open exploits, readers might want to dust off their golf clubs to take part in a golf outing at Royal Dublin on 21 July. Guests are very welcome. More details on www.dsba.ie.

The good news is that sufficient numbers have expressed an interest in proceeding with the outing to the Lough Erne Resort on Saturday 3 September 2011. A further reduction in the cost has been negotiated. If you wish to take part, contact Maura Smith in the DSBA office before 29 June 2011.

Monaghan Courthouse refurbished

MONAGHAN

President Daniel Gormley and secretary Lynda Smyth tell me that colleagues are delighted with their newly refurbished courthouse in Monaghan.

Members vote 'yes' on SMDF postal ballot

Scrutineers count ballot papers from the postal ballot

The result of the postal ballot of members on the resolution – the text of which is set out below – was declared by the Law Society scrutineers on 14 June 2011.

To the nearest percentage point, the vote represented 62% 'yes' and 38% 'no'.

There was a total poll of 4,550, of which eight were spoiled, giving a total valid poll of 4,542. There were approximately 9,200 members entitled to vote.

The votes cast 'yes' were 2,804 and those cast 'no' were 1,738.

The full text of the resolution, which was the subject of the postal ballot was: "That this general meeting approves the recommendation of the Society's Council to provide financial support to the Solicitors Mutual Defence Fund up to a maximum of €16 million, to be funded by way of an equal payment from every practising solicitor for a period of ten years and to be collected through the practising certificate fee or as otherwise determined by the Society (currently estimated at €200 per solicitor per year)."

In communicating the result of the ballot to members by e-bulletin immediately following its declaration, the President of the Law Society, John Costello, thanked everyone who participated in the poll, regardless of how they cast their vote.

Free courses from Law Care

Some bar associations have yet to tap into what Law Care has to offer through its agent Mary Jackson – free training, funded by the Law Society.

Mary is available to do presentations on time management, the effective use of email, stress recognition and management.

Find out more by emailing her at mary@lawcare.org.ie. Dates are available in September and October, with a number of dates still possible in July.

Witnesses threat figures revealed

Ninety-nine people have appeared in court over the past three years for attempting to intimidate witnesses in the run-up to criminal cases, according to figures from the Department of Justice.

Of these 99 people, 21 were convicted of the offence of putting pressure on, or threatening witnesses, or tampering with jurors. Under the *Criminal Justice Act 2009*, a person found guilty of tampering with a juror can face between 10-15 years behind bars and an unlimited fine.

Professional negligence crisis?

The ongoing economic crisis is uncovering a large number of new cases of professional negligence. So said senior associate at Augustus Cullen Law, Rachael Liston, at a recent conference on professional negligence and liability, organised by the Professional Negligence Lawyers Association.

Ms Liston said that claims against professionals, including lawyers, accountants, architects, brokers and bankers were now becoming more common as mistakes made during the 'Celtic Tiger' period became apparent. She advised members of the public to be aware that a list of solicitors who specialised in professional negligence cases was freely available from the Law Society.

"Today, lapses in professional standards that occurred during the 'boom' years are now becoming apparent. In many cases, the impact of professional negligence on members of the public has been exceptionally serious, with some complainants reporting very significant financial losses as a result of the negligence involved."

In News this month...

Right of access to lawyers

The European Commission has adopted a proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. The Council of Bars and Law Societies of Europe (CCBE) has welcomed the proposal, which, for the first time, creates an EU enforceable right to have early and continuous access to a lawyer throughout criminal proceedings.

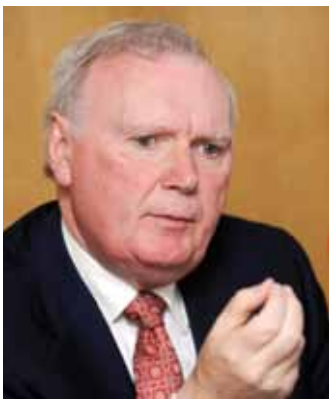
The CCBE has embraced the inclusion and recognition of the importance of guaranteeing the confidentiality of all communications between a lawyer and client. The body says that it is noteworthy that the directive will apply to surrender proceedings based on a European arrest warrant.

New website for lawyers

A new website for Irish legal practitioners, www.irishlawyershub.ie, has been established by an Offaly-based solicitor. Specifically designed for lawyers, it will allow website visitors to:

- **Find common websites with one click,**
- **Surf by legal topics, for example, conveyancing, employment, criminal law, and so on,**
- **Search within each topic for subtopics, with links to relevant websites that have been chosen by the developer,**
- **Enter a discussion forum, organised according to topic,**
- **Use a 'ready-reckoner' programme to calculate when a personal injury case becomes statute barred,**
- **Use an alarm programme to warn solicitors of important dates, and**
- **Search for cases, legislation, CPD courses and books.**

GSOC complaints



GSOC chairman Dermot Gallagher

The Garda Síochána Ombudsman Commission (GSOC) received 2,258 complaints from the public and 103 referrals from the Garda Commissioner, which involved 15 fatalities. The figures are published in the body's 2010 annual report.

Among the allegations received, the four most prominent types were: abuse of authority (34%); neglect of duty (29%); discourtesy (13%); and non-fatal offence (11%). The ranks most complained about were garda (75%) and sergeant (14%).

The Garda Commissioner referred 103 incidents to GSOC under section 102(1) of the *Garda Síochána Act 2005*. Of these, 46% related to road traffic incidents. Referrals under this section involved 15 fatalities, including a fatality to one garda member.

In all, 27 files were referred to the Director of Public Prosecutions (DPP) by GSOC in 2010, relating to 31 gardaí, and seven persons who were not gardaí. The DPP directed prosecution in 11 cases relating to 14 gardaí, and three who were not gardaí. Eleven of these cases were before the courts as of 31 December 2010.

Dublin, not Leitrim

Dr Eamon G Hall has asked the *Gazette* to inform members that, in the listing of 'notaries public' in the *Law Directory 2011*, his details should be listed under Dublin, and not Leitrim.

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Fighting back on issues of costs and competitiveness

Law Society representatives gave two lengthy interviews on RTÉ radio in early June, in which they fought back against claims that legal costs in Ireland are excessive and uncompetitive. The misnomer 'self-regulation', as applied to solicitors in Ireland, was also refuted.

Both interviews were seen by the Society as opportunities to correct seriously misleading and recurring impressions in the media about these issues. The director general, Ken Murphy, spoke on the RTÉ Radio 1 Sunday lunchtime current affairs programme *This Week*, while senior vice-president Donald Binchy spoke on the same station on the *Drivetime* programme, on which senior counsel Gerry Durcan represented the Bar.


Senior vice-president Donald Binchy


Director general Ken Murphy

This Week

Completely rejecting interviewer Anne-Marie Green's argument that legal fees in Ireland have been impervious to the recession, Ken Murphy said: "The grim reality for practising solicitors in Ireland is an ever-increasing number of solicitors chasing a dramatically reduced volume of work and experiencing intense downward pressure on legal fees."

Pressed on whether this was true even for large firms, he responded: "All clients are enormously cost conscious. They seek competitive quotes in advance, including from the large firms. They routinely play one solicitors' firm off against another to get the lowest possible quote. Business clients constantly engage in beauty parades and in competitive tendering to pare legal costs to the bone, and I can say the Law Society itself has used such techniques to achieve significant legal cost savings in recent times."

Making clear to listeners the primacy of market forces, he pointed out that "solicitors' fees are a matter for negotiation and agreement between solicitors and clients, and the level of fees are the product of a highly competitive market between over 2,200 solicitors' firms currently in practice."

He acknowledged on behalf of the Society that "we recognise the Government's, the IMF's and the EU's concern that all costs have to be reduced in the Irish economy so that our international competitiveness can be restored. We support the Government in that objective. However, I want to point out that legal fees have been falling in Ireland. There is no way it can be said that legal fees are what they were in Ireland.

"The legal profession is in the front line of an Arctic economic gale," he continued. "We have, currently, solicitors' firms that are hanging on by their fingernails and we have over 1,000, maybe up to 1,300 solicitors unemployed. In the last three years, we have had more than 700 new solicitors come into the profession each year. The level of competition is cut-throat. This is not a market where people can overcharge."

> ***"Levels of fees are the product of a highly competitive market between over 2,200 solicitors' firms"***

Asked by the interviewer about self-regulation, he said: "I always question the use of the term 'self-regulation'. I think it is actually a misnomer; it's a misleading term when it's applied to the solicitors' profession in Ireland. The apex of the regulatory system in Ireland is not the Law Society. It is the President of the High Court.

"The Solicitors Disciplinary Tribunal is independent of the Law Society and one-third of its members are lay members nominated by the Minister for Justice. The Society's own complaints-handling committee has a non-solicitor majority. Of course, the Society plays a role in the regulation of the profession, but it is one role and is subject to other external powers that can correct us if we go wrong."

Drivetime

In what appeared to many solicitors to be a perfunctory gesture towards 'balance', RTÉ's *Drivetime* radio programme followed almost two weeks of features of clients complaining about lawyers and their fees by inviting Law Society Senior Vice-President Donald Binchy and Bar Council representative Gerry Durcan to be 'cross-examined' by presenter Mary Wilson and a seemingly very angry reporter, Fergal Keane.

Responding to examples of large legal fees in certain cases, Donald Binchy replied: "I would like to correct the impression that may be given to listeners that fees of six figures may be commonplace for solicitors, because nothing is further from the truth in the current environment. That level of fee is exceptional and is reserved for exceptional cases."

'Income wiped out'

"Very many practising solicitors, like the rest of the country, are struggling desperately to stay in practice, while whole sections of income have been wiped out. There have been reductions in fees and difficulty in recovering fees. And we also have more than 1,000 solicitors unemployed, which represents about 11% of the profession."

He went on to describe the taxation-of-costs system as "an utterly independent mechanism for determining fees where there is a dispute. It is quite unique to the legal profession, and I say it's unique because I'm not aware of any other occupation or profession that is subject to it. It frequently does result in reductions, and sometimes very substantial reductions, being applied to bills. So there is a system for challenging bills."

On the general issue of solicitors' charges, he concluded: "We operate in an extraordinarily competitive environment. There are huge variations in charges. Clients should seek different quotes from different solicitors and they will discover the significant variations that are out there. That is demonstrative of competition."

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"For Lawyers Only"

Ireland's crime-fighting

Details have been released of Ireland's role in international cooperation in criminal investigations. The Department of Justice received 361 requests for legal assistance in criminal investigations and proceedings (an increase of 18% compared with 2009). It sought assistance in 83 cases (up 22%). The department acts as Ireland's Central Authority for Mutual Assistance in Criminal Matters.

Ireland provided assistance in relation to investigations and proceedings concerning a wide range of serious offences, including murder, rape, sexual assault, drug trafficking, money laundering and fraud. This included taking evidence, carrying out searches, freezing assets and interviewing witnesses. Britain, the Netherlands and Germany topped the list of countries seeking assistance from Ireland. Ireland sought most assistance in relation to serious offences from Britain, the United States and the Netherlands.

3D images assist jury

3D images derived from post-mortem scans have been used for the first time in a British court to assist the jury in understanding the injuries suffered by an alleged murder victim. Professor Guy Rutty, chief forensic pathologist to the East Midlands Forensic Pathology Unit at the University of Leicester, gave expert testimony at a trial at Nottingham Crown Court on 3 June 2011.

The 3D images were derived from post-mortem computed tomography (PMCT) scans. Professor Rutty showed the jury a black-and-white 3-D computer image of the victim's skeleton to illustrate the injuries he had suffered.

Permission to use the images was secured by both the prosecution and the defence, while the evidence provided to the jury had to be recorded. The defendant in the case was found 'not guilty' by the jury.

MEDIA

In the media spotlight

TONY BURKE
PARTNER (COMMERCIAL DEPARTMENT)
MASON HAYES & CURRAN

Why is he in the news?
Barrister Ciarán Toland won a major victory for transparency in a case involving the European Parliament at the General Court of the EU. The lead solicitor on the case was Tony Burke, supported by colleagues John Kettle and Aisling Fitzsimons.

The General Court ruled on 7 June 2011 that the European Parliament acted unlawfully in the grounds it used to deny Mr Toland access to a report drawn up by the parliament into the operation of the Parliamentary Assistance Allowance (PAA). The report is an annual audit into the PAA in the European Parliament. It examines the operation of the allowance, and contains proposals for its reform. When Mr Toland sought access to the report, the parliament refused him access on a number of stated grounds.

The report is based on an audit of the PAAs of a sample of MEPs from October 2004 to June 2005. It contains details of abuses in expenses paid to certain MEPs, in order to identify flaws in the allowance system. Although these MEPs are not identified within the report, this concrete examination of their allowances forms the background and rationale for the development of the report.

How did he become involved?
We were approached by the applicant, Ciarán Toland, and asked whether we would take the case. He was aware of our EU expertise from having been to Luxembourg previously. He also had counsel who we were quite familiar working with – Eugene Regan SC and Jonathan Newman, junior counsel.

What's his background?
I am a partner in Mason Hayes & Curran's commercial department. I joined the firm as an apprentice in 1970. From 1974 to 1977, I was in Amsterdam, where I did postgraduate studies in the Europa Instituut in the University of Amsterdam. I followed that with a *stage* course with the European Commission Legal Service and came back to Dublin around 1978, when I started practising with the firm. I've been there ever since.

Thoughts on the case?
This decision will have far-reaching consequences for improving accountability and transparency in the rights of European citizens to access reports of European institutions. In this case, Ciarán Toland was the applicant. Interestingly, the Kingdom of Denmark, Republic of Finland and the Kingdom of Sweden all applied, and were granted, the right to intervene in support of his case. Member states receive details of all cases before the European court and can apply to the court to intervene in any case, which explains their involvement here.

I presume it was the Scandinavian principle of openness and transparency – especially in relation to access to documents by members of the public – that encouraged them to support Ciarán in his application. In this instance, the defendant was the European Parliament.

It is to Ciarán's credit that he took the case. He put an awful lot of work and effort into it. It was a very interesting one that will have a major impact on all of the European institutions because it's based on a particular regulation that provides for access by the public to documents of these institutions.

Ciarán had sought certain documentation from the European Parliament. He was given some, but was refused one in particular, dealing with the expenses of MEPs. The court said there were two exceptions in the regulation that permit an institution to refuse access. The court, however, as it has done in other cases, said that where you have exceptions, those exceptions have to be interpreted restrictively.

In the future, where European institutions feel they would like to refuse access to a particular document, their reasoning will have to be very clear. The court will review that reasoning to ensure that it is proper. The institution won't be able to hide behind general kinds of reasons – they will have to be clear and transparent about those reasons. In this instance, the court felt that they didn't come up to that test. That is quite an interesting outcome.

What are the ramifications?
This case raises the bar and puts a greater onus on the European institutions, when faced with a request to which they wish to refuse access, to give reasons for their refusal. Those reasons will need to be quite clear and specific, rather than general in nature.

I should point out that, following the decision, a further request for the contested report was requested by the applicant. We have just been informed that the Bureau of the European Parliament has decided to release the report, and has placed it on their website, www.europarl.europa.eu/register/audit/EP-PE_ADT(2006)0002_EN.pdf.

Thus, this is a full victory that suggests the European Parliament will not be appealing the decision.

The Blueprint Report casts a cold eye on the legal profession

The Blueprint Report – a review of the legal profession and a vision of the future for Irish law firms – was launched by Minister for Justice Alan Shatter at the Shelbourne Hotel on 8 June 2011.

The minister thanked the authors, Anne Neary and Frances O'Toole, for a "very valuable and informative publication". He added that that *The Blueprint Report* was "a very important contribution to discussion as to the future of the legal profession and law firms of the future and how they should operate".

The report gives a deep insight into the difficulties being faced by legal practices and the dangers posed by the underpricing of legal services – "curiously, something the public may not realise", the minister commented.

Minister for Justice Alan Shatter with Frances O'Toole and Anne Neary, co-authors of *The Blueprint Report*

Corners cut

Continuing, he said: "I do not wish to be misinterpreted. I am not saying that all legal services are underpriced. The problem, particularly, arises in the context of the underpricing of conveyancing, which resulted, too frequently, in corners being cut by solicitors under pressure from both clients and financial institutions, and which has resulted in substantial difficulties for financial institutions and NAMA in establishing proper security in respect of impaired loans. This particular difficulty may ultimately prove costly to the taxpayers of this country."

He said that the report's authors had been right to focus the discussion on practice management, business skills, the importance of risk management in solicitors' firms and the use of modern technology in legal firms.

"I think that this is absolutely crucial in the context of the problems we've witnessed in the areas of legal practice where solicitors' firms have got into difficulty. Indeed, some solicitors have rightly been disciplined by the Law Society and some have been struck off.

"Better practice management and better business skills and, I have to say, greater honesty and better regulation may have avoided a substantial number of difficulties which have arisen and considerable losses of insurance funds, and may have saved members of the legal profession who act decently and honourably a great deal of expense in terms of the annual insurance payments that they now have to make."

The *Gazette* will be taking a closer look at this report in the August/September issue. Copies of the report can be obtained from Anne Neary, who can be contacted at tel: 01 491 1866 or email: anne@anneneary.ie.

JAAB appointments

Dr Simon Boucher, Karen Dent and Dr Valerie Bresnihan have been appointed by the Minister for Justice, as non-judicial persons to the Judicial Appointments Advisory Board for a term of three years, effective from 7 June 2011.

The three-year term of the previous non-judicial members of the board expired on 8 March 2011.

Society's national radio advertising campaign kicks off

The Law Society has launched its new national radio advertising campaign for 2011. As with the past two campaigns, this year's campaign has been designed to promote the solicitors' profession and its services to the general public.

Adverts will run in two bursts during a five-week period – from 13 June to 3 July and again from 29 August to 11 September. Listeners will hear the adverts being aired on RTÉ Radio 1, Today FM and Newstalk from 6.30am to 7pm each day. Bonus spots have been obtained outside of those times from all three radio stations, making this campaign particularly good value for money.

The total number of adult listeners expected to hear the campaign is 59% of the adult population, with 85% of so-called 'AB' adult listeners being targeted.

Leading advertising agency McConnells has advised the Society's PR Committee on the current campaign and has assisted it in devising some new adverts. The campaign encourages clients to visit their trusted legal advisors before taking any action of a legal nature.

It has two purposes:

- **To raise consciousness in the public mind of the assistance that solicitors can give to clients dealing with real-life problems, and**
- **To boost members' morale during what has been a particularly difficult year.**

The initial feedback from the general public and members of the profession has been extremely positive.

European funding awarded to Society's Exchange Programmes

The Law Society has received European funding to finance its exchange programmes for Irish solicitors in other European countries, *writes Eva Massa (EU and International Affairs Committee).* On the back of the success of its exchange programmes over the past two years, the Society applied for European funding intended to maintain and expand these programmes for solicitors.

The European Commission's Leonardo da Vinci (LdV) mobility programme aims to improve the quality of vocational training by financially supporting a range of transnational partnership projects.

The Society's proposal, under the name 'Promoting European mobility for the legal profession', was approved by Leárgas (the national agency coordinating LdV funding) in May 2011 and was launched at a reception at Blackhall Place on 9 June. Its main objective is to strengthen the competitiveness and employability of Irish solicitors. The programme will allow them to fully participate on the European labour market and to bring home the knowledge and experience of working in different legal systems.

At the launch of the programme 'Promoting European mobility for the legal profession' on 9 June were *(l to r)*: Martin Cooney (EU and International Affairs Committee), Niamh Connery (chairman), Brigid Kelly (Leárgas), Elva Duggan (Leárgas), Ken Murphy (director general), Eva Massa (Law Society), Louise Carpendale (EU and International Affairs Committee) and Diego Hernando (course participant)

The Society is developing the project in partnership with three other European Bars: Madrid (Ilustre Colegio de Abogados de Madrid), Brussels (francophone) (Ordre Français des Avocats du Barreau de Bruxelles) and Cologne (Rechtsanwaltskammer Köln).

Solicitors will have the opportunity of doing a three-month work experience in Madrid, Brussels or Cologne, training in a law firm and attending relevant classes and seminars. Participants will benefit from working in a different language, becoming familiar with practice and procedures in another jurisdiction, and networking.

For further information, check www.lawsociety.ie under the heading 'EU and International Affairs Committee'.

Career support for sole practitioners

Sole practitioners thinking of ceasing self-employment are reminded that one-to-one assistance is available through the Society's Career Support service.

People in this situation usually have concerns around matters such as:

- Will I be able to get a job?
- What options will be open to me?
- How can I best capitalise on the experience I have?

Career Support focuses primarily on solicitors in employment, but the service is increasingly being contacted by self-employed solicitors who are planning to close or leave their firm, and who want support prior to going out into the job market.

The Career Support service has extensive experience in advising and supporting solicitors who want to make a significant change in career direction. A wide range of supports are provided.

A private meeting can be organised with the Society's career advisor Keith O'Malley at Blackhall Place and also at regional locations countrywide. See the Career Support section at www.lawsociety.ie for scheduled regional dates.

Email your CV and/or covering letter into Career Support to get feedback on it and suggestions on how it might be improved. Alternatively, you may not have drafted anything but can be provided with guidelines and sample CVs and covering letters.

Expand programme

Expand is an online career development and job-seeking programme that is specially structured for Irish solicitors who need to make career choices and who want to consider all options open to them.

Updates on opportunities and job-market developments are circulated to people registered with the service twice weekly, and leaflets are sent out as they are published.

Workshops focused on job-seeking skills and other career management matters are delivered on an ongoing basis.

Self-employed practitioners tend to be most interested in one-to-one consultations. Anyone contacting Career Support is assured that meetings and all matters discussed at these meeting are strictly private.

Many people who seek consultations do not necessarily plan to cease in self-employment. Quite often, they just want to check out all the options open to them and to talk to someone experienced in the job market who they can use as an objective sounding board.

Keith O'Malley can be contacted at tel: 01 881 5770, or email: k.omalley@lawsociety.ie.

48 hours to save earth!

48 Hours Process Serving, based in Naas, Co Kildare, has just launched a website for the serving of summonses and legal documents dedicated to the legal sector across Ireland.

The website, www.48hours.ie, carries an interesting promise. It guarantees that if it does not successfully serve any legal documents throughout Ireland within 48 hours, it will not charge the client. The company claims that this is the first time such a service has been offered in Ireland.

Its parent company, the International Bureau of Intelligence, is based in London. Its services include:

- **Locating and assessing missing debtors,**
- **Lifestyle reports,**
- **Property status reports,**
- **Process serving,**
- **Surveillance,**
- **Investigations,**
- **Due diligence,**
- **Counter-electronic surveillance, and**
- **Polygraph testing.**

48 Hours Process Serving can be reached at Devoy Chambers, Osprey Complex, Devoy Road, Naas, Co Kildare; tel: 045 881 030, email: office@48hours.ie.

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Prescriptive easements success

CONVEYANCING COMMITTEE

The Conveyancing Committee is delighted to report that the Government has agreed to introduce amending legislation that will ameliorate some of the more onerous effects of part 8 of the *Land and Conveyancing Law Reform Act 2009* as they relate to the registration of prescriptive easements. This is the culmination of an 18-month course of research undertaken by the committee and subsequent meetings with, and representations made by it to, the Department of Justice and Equality in relation to aspects of part 8 of the act that are problematic for the profession.

While the act provided a three-year period from 1 December 2009, during which application could be made for registration of easements acquired or in the course of acquisition under the old law, it made no provision for applications for registration of such rights after 1 December 2012. Applicants could apply for registration of new easements acquired under the new act on or after 1 December 2021.

The committee felt that many people might miss the short three-year deadline for applying in respect of rights acquired under the old law and, as a result, find themselves in an uncertain legal position, given that the wording of the act is open to interpretation in relation to the status of existing easements in the nine-year lacuna period between 1 December 2012 and 1 December 2021.

The act also provided a system of registration that required applicants to initiate court proceedings against neighbouring landowners to obtain a court order, and then register that court order in the Land Registry or the Registry of Deeds, as appropriate. The committee felt that the requirement to initiate court proceedings against neighbours would have undesired social consequences for applicants and would be too costly and onerous for most of them.

See the extract below relating to a Dáil question raised on 26 May 2011:

"Deputy Mary Mitchell O'Connor asked the Minister for Justice and Equality the position regarding the implementation of provisions of the *Land and Conveyancing Law Reform Act 2009* in respect of the registration of rights of way; if he intends to make any changes to the provisions in view of the expense of registering such rights; if he intends to extend the deadline for registration of such rights; and if he will make a statement on the matter."

Minister for Justice and Equality (Deputy Alan Shatter):

"The position is that part 8 (chapter 1) of the *Land and Conveyancing Law Reform Act 2009* has updated the law concerning the acquisition of easements based on reform recommendations of the Law Reform Commission. Section 35 of the act, which entered into operation on 1 December 2009, provides that easements shall be acquired at law by prescription only on registration in the Land Registry or the Registry of Deeds of a court order under that section.

"Late last year, the Law Society made a submission to my department containing proposals to amend the 2009 act, with a view to simplifying the procedures for registering easements acquired by prescription. During subsequent discussions involving my department, the Law Society and the Property Registration Authority, agreement was reached on the outline of a draft scheme whereby the authority would be empowered to register such easements without a court order under section 35 of the 2009 act on being satisfied that the claim had been substantiated.

"Late last year, the Law Society made a submission to my department containing proposals to amend the 2009 act, with a view to simplifying the procedures for registering easements acquired by prescription"

"In order to give statutory effect to the proposed scheme, amendments to the *Registration of Title Act 1964* and the *Land and Conveyancing Law Reform Act 2009* will be required. I intend, therefore, to include the necessary amendments to both acts in the forthcoming *Civil Law (Miscellaneous Provisions) Bill*, which will be published later this year. I intend also to take advantage of this legislation to extend from three years to 12 years the period referred to in section 38 of the 2009 act, during which easements acquired, or in the course of acquisition, prior to 1 December 2009, may be registered."

This is a very welcome development. The committee is awaiting sight of the draft legislation and the Property Registration Authority draft rules and forms, and will issue appropriate guidance to the profession in due course.

Arbitration Act seminar

ARBITRATION & MEDIATION COMMITTEE

The Arbitration & Mediation Committee, in conjunction with the Chartered Institute of Arbitrators, is holding an arbitration seminar on 26 September 2011. This one-day seminar is aimed at practising arbitrators and will focus on the changes brought about by the *Arbitration Act 2010* and, in particular, how these will affect arbitrators in the conduct of arbitrations. Among other topics, the seminar will give guidance and practical advice on how to structure an award.

This seminar will appeal to arbitrators on the Law Society Panel of Arbitrators, and to those with limited experience of award writing who would like to become a member of the panel. Speakers will include Michael W Carrigan, Ciaran Fahy, Bernard Gogarty, Anthony Hussey and Brian Hutchinson. For more information, email: arbitration@lawsociety.ie.

'Three Pillars of Irish Sport'

IN-HOUSE AND PUBLIC SECTOR COMMITTEE

The In-house and Public Sector Committee aims to hold a two-hour panel discussion on the afternoon of 8 September 2011, in Blackhall Place, entitled *'The Three Women Pillars of Irish Sport'*. Speakers will include Sarah O'Shea (Football Association of Ireland), Sarah Keane (Swim Ireland), and Sarah O'Connor (Federation of Irish Sports).

Previous panel discussions have been a great success and an excellent networking opportunity for in-house and public sector solicitors. Full details will be made available on the committee's section of the website (www.lawsociety.ie) over the coming weeks.

Maintenance Regulation to apply from 18 June 2011

FAMILY LAW COMMITTEE

As and from 18 June 2011, EU Council Regulation no 4/2009 on the jurisdiction, applicable law, recognition and enforcement of maintenance decisions and cooperation in matters relating to maintenance obligations will apply in Ireland. Practitioners are advised to read the Society's recent e-zine briefing note on the regulation.

However, the Family Law Committee would like to draw the particular attention of practitioners to the 'applicable law' provisions of the regulation. The regulation provides that the issue of applicable law will be governed by the 2007 *Hague Protocol* for member states that are bound by that protocol.

Until now, all family law cases in Ireland have been governed by the laws of Ireland. In conjunction with Britain, Ireland has resisted and opted out of EU efforts to have the laws of other EU jurisdictions apply in Ireland. Somewhat strangely, however, Ireland has not opted out of the 2007 *Hague Protocol*.

This protocol provides that maintenance obligations will normally be governed by the law of the state of habitual residence of the creditor. Typically, a person bringing a maintenance application in Ireland will be living here, and Irish law will apply. However, the regulation makes provision in several instances where the laws of another member state may be applied in an Irish court dealing with a maintenance dispute. Examples include:

- In cases involving spousal maintenance, article 5 provides that either party can object to the applicability of local law and ask an Irish court to apply the law of another member state, for example, if a Polish married couple travelled to Ireland and then had a maintenance dispute, either party could object to Irish law being applied on the basis that Polish law had a "closer connection with the marriage".
- In cases not involving child maintenance, a special rule on defence in article 6 gives a maintenance debtor the right to oppose a claim for maintenance by the creditor "on the ground that there is no such obligation under both the law of the state of the habitual residence of the debtor and the law of the state of the common nationality of the parties, if there is one"; for example, a French man living in France and married to a French woman living in Ireland could object to an Irish court providing maintenance to the woman on the basis that French law did not provide for a maintenance obligation between them.
- Articles 7 and 8 make provision for both parties to agree on a choice of law to be applied to their dispute, subject to certain conditions.

> ***"The regulation makes provision in several instances where the laws of another member state may be applied in an Irish court"***

In dealing with all future maintenance disputes involving one or more persons from other EU member states, practitioners must now make themselves aware of the applicable-law provisions in the protocol. Article 2 also provides that the protocol applies even if the 'applicable law' is that of a non-contracting state, for example, the laws of Britain and Denmark, which have both opted out of the protocol.

OUTLAWS

Life outside legal practice

SARAH O'CONNOR
IRISH SPORTS FEDERATION

Sarah O'Connor has always had a real passion for sport and, in late 2006, she was approached about taking on the chief executive role at the Federation of Irish Sports.

At that stage, she was very happy in Arthur Cox, but Sarah took a leap of faith and joined the federation.

One of her first projects was to establish Just Sport Ireland – an independent dispute-resolution service. This quasi-legal task helped her transition from legal practice responsibilities to a more varied commercial role.

Since then, as chief executive, Sarah's responsibilities have extended and include raising sponsorship, organising training, promoting Irish sport and lobbying.

Sarah coordinated and directed the 'Why Irish Sport Matters' campaign on behalf of all Irish sport in the run-up to the last two budgets. This campaign played a significant part in the overall effort to minimise 2011 budget reductions.

SARAH O'SHEA
FOOTBALL ASSOCIATION OF IRELAND

Sarah O'Shea is the legal director at the Football Association of Ireland (FAI) and is part of the management team that reports to CEO John Delaney.

Sarah works on contractual matters, sponsorship, discipline and disputes, rules and regulations, litigation and media. She is also company secretary of the FAI.

She was involved in managing the development of the new Aviva Stadium from an FAI perspective and in bidding to bring the Europa League Final to Dublin.

Sarah worked as a solicitor in general practice in RG Emerson & Co, Galway. She was the first Irish student on the FIFA International Masters programme in 2006. This necessitated spending one year in Italy, Switzerland and Britain.

Sarah actively sought out a new path within the legal field, but also attributes her broad legal-practice training to giving her a solid basis to work as an in-house lawyer.

JOANNA TUFFY
TD

Joanne's parents joined the Labour Party when she was a child and she become involved in the party and in local community initiatives from an early age.

After completing the last of her Law Society exams, Joanne stood for local government elections in 1999. She was elected county councillor for the Lucan electoral area.

She stood in the 2002 general election and came fourth in the then three-seat constituency of Dublin Mid-West. Shortly afterwards, she was elected to the Seanad and was appointed Labour Party spokesperson on justice in the Seanad.

In the 2007 general election, Joanne won a seat for Labour in Dublin Mid-West. She was then re-elected to the Dáil in 2011 – topping the poll in her constituency.

In Dáil Éireann, Joanne serves on the Oireachtas Committee on Justice, Equality and Law Reform, and also on the Oireachtas Committee on the Good Friday Agreement.

JUSTICE MEDIA AWARDS CONTINUE TO SURPRISE

This year's Justice Media Awards threw up some surprises, where the big winners were in the television and radio categories. Mark McDermott reports

Mark McDermott is editor of the Law Society Gazette

Surprises abounded at this year's Justice Media Awards – the 19th in the series. Given the significantly increased number of entries in the categories for 'national radio', 'regional' and 'court reporting', it was no surprise, perhaps, that some of the more notable winners came from those categories. Once again, the standard of 'Sunday newspapers' entries was disappointing, causing the Society's Junior Vice-President Kevin O'Higgins to appeal to the publishers of Sunday newspapers to invest more resources in justice-related journalism.

One of the biggest surprises at the awards ceremony at Blackhall Place on 2 June 2011 was the announcement that a Justice Media Award (JMA) had gone to Irish-language programme *Scannal's* 'Eileen Flynn', in the 'television features and documentaries' category. This engaging programme focused on the notorious 1980s Circuit case and High Court appeal of New Ross teacher, Eileen Flynn, who had been dismissed from her teaching post following an affair with a widower, with whom she subsequently had a child. The judging panel expressed its admiration for the programme's analysis of this case and the high production standards employed. This schismatic case, as seen through the prism of modern eyes, made the programme compelling viewing.

David Looby (*Wexford Echo*), Kevin O'Higgins (junior vice-president), Colette Browne (*Wexford Echo*) and Ken Murphy (director general)

(Front, l to r): Della Kilroy (RTÉ Radio 1), Orla O'Donnell (RTÉ Radio 1), Ann Marie Power (editor, music and entertainment, RTÉ Radio 1), Kevin Cummins and Lucie Farrell (both *Scannal*, RTÉ). *(Back, l to r)*: Kevin O'Higgins (junior vice-president, Law Society), Ken Murphy (director general) and Padraig O'Driscoll (*Scannal*, RTÉ)

Once again, the judges were highly complimentary of the editorial standards of the *Irish Examiner*, which continues to set the standards for daily newspapers in this event. Its journalists, and that of its sister publication, the *Evening Echo*, were prominent winners. Director general Ken Murphy urged other newspapers to follow the *Examiner's* lead in terms of editorial support, and the resources allocated to cover legal issues.

Worthy winners from the broadcast categories included Ann-

This year's winners of the Justice Media Awards celebrate in style on the steps of the Law Society's headquarters

Marie Power for the superb radio documentary 'The Walsh Cassidy's at Lissadell House'; RTÉ's Orla O'Donnell, who earned a JMA for her discerning radio report '*McKillen v NAMA* – A Significant Challenge to Unprecedented Legislation'; and Brian O'Donovan of TV3 for his punchy report, titled 'Bankrupt'.

Taking the gong in the 'Sunday newspapers' category was Sheila Flynn of the *Irish Mail on Sunday* for her feature: 'House of Horrors: The Terrible Truth' – a challenging interview that asked many questions of the response of the State and legal profession to the plight of the children involved in the Roscommon abuse case.

The standout entry in the regional newspapers category came from Colette Browne of the *Wexford Echo* for her excellent opinion piece 'Fast Law Creates Hard Cases' – a hard-hitting, 'pull-no-punches' attack on the *Criminal Justice Amendment Act 2009*, following the collapse of the Rebecca French murder trial.

On behalf of the Law Society, Junior Vice-President Kevin O'Higgins, congratulated all JMA and Merit winners. The Justice Media Awards, sponsored by the Law Society, reward published works or broadcasts that help to inform and educate Irish citizens on the role of law in society. The junior vice-president said that this year's winners had succeeded admirably in accomplishing these aims.

AWARD WINNERS

DAILY NEWSPAPERS
- *Justice Media Award:* Conall Ó Fátharta (*Irish Examiner*) for 'Adoption in Ireland'.
- *Merit Certificates:* Jennifer Hough (*Irish Examiner*) for 'Juvenile Crime – Young Lives Lost'; Cormac O'Keeffe (*Irish Examiner*) for 'Juvenile Offenders – Path Away from Crime'.

SUNDAY NEWSPAPERS
- *Justice Media Award:* Sheila Flynn (*Irish Mail on Sunday*) for her feature 'House of Horrors: The Terrible Truth'.

REGIONAL NEWSPAPERS
- *Justice Media Award:* Colette Browne (*Wexford Echo*) for 'Fast Law Creates Hard Cases'.
- *Merit Certificate:* Ann Murphy (*Evening Echo*, Cork) for her series of articles titled 'Female Offenders – Some Are More Equal Than Others'.

COURT REPORTING – PRINT MEDIA
- *Justice Media Award:* Carol Byrne (*Clare Champion*) for 'Fines for Men Claiming to be Fishing Under Protest'.
- *Merit Certificate:* David Looby (*Wexford Echo*) for 'Sobs Shatter Silence as Impact Report Read Out'.

COURT REPORTING – BROADCAST MEDIA
- *Justice Media Award:* Orla O'Donnell (RTÉ Radio 1's *This Week* programme) for her report '*McKillen v NAMA* – A Significant Challenge to Unprecedented Legislation'.
- *Merit Certificate:* Trudy Waters (*Clare FM News*) for her series of reports on the 'Lying Eyes Appeal'.

NATIONAL RADIO
- *Justice Media Award:* Ann-Marie Power for 'The Walsh Cassidy's at Lissadell House', produced for RTÉ Radio 1's *Documentary on One*.
- *Merit Certificates:* Della Kilroy (RTÉ Radio One's *Drivetime* programme) for 'Repossession – High Court Reporting'; Dil Wickremasinghe, Brian O'Reilly (solicitor) and John O'Donovan (producer) from Newstalk's 106-108 FM for the 'Legal Column' on the *Global Village* programme.

LOCAL RADIO
- *Justice Media Award:* John Cooke (Clare FM presenter) for the *Free Legal Advice* slot.

TELEVISION NEWS
- *Justice Media Award:* Brian O'Donovan (TV3's *News at 5.30*) for his report 'Bankrupt'.
- *Merit Certificate:* Dyane Connor (TV3's *News at 5.30*) for her reports on the 'Westmeath Cold Case Trial'.

TELEVISION FEATURES AND DOCUMENTARIES
- *Justice Media Award:* Kevin Cummins and Padraig O'Driscoll (Cláracha Gaeilge, RTÉ) for 'Scannal – Eileen Flynn'.
- *Merit Certificate:* Sybil Mulcahy and Martin King (TV3's *The Morning Show*) for 'A 13-Year Battle for Legal Recognition as a Woman: Dr Lydia Foy'.

TORTURE AND THE DEATH OF JUSTICE: A REQUIEM

The Law Society's Annual Human Rights Lecture on 10 May was given by the celebrated human rights lawyer Gareth Peirce. Joyce Mortimer reports

Joyce Mortimer is the Law Society's human rights executive

The death of Osama Bin Laden on 2 May was the topic on everyone's lips at the Law Society's annual Human Rights Lecture on 10 May. Over 250 people had gathered to hear human rights lawyer Gareth Peirce speaking on the subject of 'Dispatches from the dark side – on torture and the death of justice'. They wondered what, if anything, she would have to say on the subject of the killing of the Al Qaeda leader by US forces in Pakistan.

Ms Peirce said that, immediately after the reports of his death had emerged, a claim had been made by politicians and the CIA in America that the reason he had been successfully tracked was because information had been obtained from high-value detainees in secret sites around the world, or in Guantanamo Bay, "and the message was intended to be that torture works". Ms Peirce said that the spin was that Khalid Sheikh Mohammed had been water-boarded and the result had been the assassination of Bin Laden. However, the FBI said that he had been tracked by ordinary investigative means and that nothing came from water-boarding Khalid Sheikh Mohammed.

Pierce said, however: "It has revived the debate – should we use torture?"

She went further and asked the audience the 'forbidden question': "If we should use it, does it work? Should people who are termed terrorists have rights?"

"Should people who are termed terrorists have rights?"

Gareth Peirce addressing the audience at Blackhall Place

Saying the unsayable

In response to Bin Laden's killing, President Obama said that the US had succeeded in bringing him to justice. Pierce said: "But Obama was a law professor and Obama should know that *that*, in fact, was not justice, any more than torture of potential informants is justice. But, in these circumstances, where we say the unsayable, where we think the unthinkable – and we have done so for most of the last ten years – what legal certainties do we have and what legal certainties can we cling on to?"

She asked the audience: "What is torture? It is prohibited, entirely prohibited, by the world community. It is the infliction of severe pain – mental or physical – on a human being by a state. It is a public action deemed to be for a public purpose, and the purpose is to obtain information. That is the definition of it, and it is entirely prohibited. There is no defence to torture. If you conduct torture, you cannot say it was on orders from superiors. You cannot say that you didn't know it was torture. There is no hiding place for a torturer, or there should be none."

The human rights lawyer went on to discuss torture from a historical perspective. By the middle of the 19th century, torture had been abolished in Western countries. Victor Hugo, by the middle of the 19th century, could say that this had been his generation's finest achievement.

Peirce continued: "Up until then, torture had been lawful. It had been applied by the judiciary, who could order torture to find the truth." But by the middle of the 19th century, two particular concepts had come to fruition, she said. "One was that hundreds and hundreds of years of torturing individuals had produced evidence that was almost entirely nonsensical. It was unreliable, misleading and it was the product of what the torturer wanted the tortured person to produce. That was one part of it, the pragmatic part. The second part of it was that it was recognised that it degraded and contaminated the moral fibre of the society in which it was conducted."

Short-lived triumph

The initial triumph was short-lived, "because, at the same time, by the end of the 19th century, there were other concepts growing, so that the judicially applied law was no longer regarded as the one source of legal practice that was conducted by states."

New kinds of state agencies were involved in "espionage, military intelligence, police work" and these "growing agencies were somehow not to be bound or trammelled with

ALL PICS: LENSMEN

A cross-section of a packed Presidents' Hall during the annual Human Rights Lecture

"If you conduct torture, you cannot say it was on orders from superiors. You cannot say that you didn't know it was torture. There is no hiding place for a torturer, or there should be none"

the constraints of what was, for the most part, to be denied to everyone else". That was one strand of thinking.

The second strand, "which first came from centuries before, but developed in parallel, was the concept of the 'exceptional' crime – that some crime was so heinous that [the perpetrators] deserved no rights – that deserved another kind of addressing".

She added: "The history of the last century and the first ten years of this century have been, in large part, about the tension, the conflict between these propositions that there are exceptional crimes and there are exceptional organs of the state that can apply what they want in the course of claiming that they are investigating and bringing to book those guilty of exceptional crimes – and, in the process, regarding themselves, whether they be states or their agencies, as liberated to do what on every other front the state regarded as unthinkable."

In this context, the world has struggled with the question of "Is the impermissible permissible?"

Peirce asked: "Can we, in fact, change? We have a new [British] government, but it is inextricably dragged down by the very factors that have caused us to be where we are now. Our government's lawyers continue to fight tooth-and-nail for everything to be secret. The Guantanamo cases were settled. The government was most anxious to negotiate and settle those claims.

"What was being produced in the disclosure process of litigation was too uncomfortable – but the public inquiry that Cameron announced is intended to be entirely in secret. No MI5 or MI6 officer is going to give evidence in public. What they say will not be known, now that is not an investigation that is complying with article 3 of the European convention, which requires, in the absolute prohibition on torture, an open and transparent inquiry. So, almost immediately, we are tumbling down again into the same chasm that the new government condemned the old government for dragging us into."

Pictured at the Human Rights Lecture were *(l to r)*: Colin Daly (chairman of the Human Rights Committee), John Costello (president of the Law Society), Gareth Peirce, Mr Justice Garrett Sheehan, Ken Murphy (director general) and Joyce Mortimer (human rights executive)

Peirce suggested that, when assessing where the Western world has got to in the last ten years, "what we are looking at is wreckage".

"We don't see it very much in England, because we don't know the rights we have. We don't have a constitution. We are not aware when [our rights] are being taken away. We don't see the wreckage, but the wreckage that there has been in our Anglo-American system of jurisprudence has been colossal."

Drawing to a close, Peirce concluded: "I have forgotten what the title of this talk was meant to be, but it was something like 'Torture and the death of justice', so this is, I guess, a requiem."

For the Gazette*'s exclusive interview with Gareth Peirce, see the April 2011 issue, also available at www.gazette.ie.*

Elapsed time negates negligence claim

From: Patrick O'Connor, P O'Connor & Son, Market Street, Swinford, Co Mayo

An England and Wales Court of Appeal has disallowed a professional negligence suit brought by a lay estate administrator against British law firm Cullens, on the grounds that too much time had elapsed since the loss emerged.

The case was brought by John Lane as personal representative of his sister Doris Eason, who died intestate in January 1997. Briefly, Mr Lane distributed Stg£20,000 of the estate's assets to his brother, Frederick (one of the heirs in intestacy) while, at the same time, the deceased's niece, Ann Hannah, was claiming the whole estate on the basis of proprietary estoppel.

When Mrs Hannah won her case, the court ordered Frederick Lane to return the money he had received from the estate. However, Frederick did not do so, and so a further court order was issued against Mr Lane himself.

Mr Lane decided to sue Cullens, the solicitors who had advised him during the estate administration. He alleged professional negligence, in that Cullens should have warned him not to make any distributions until Mrs Hannah's claim against the estate was resolved.

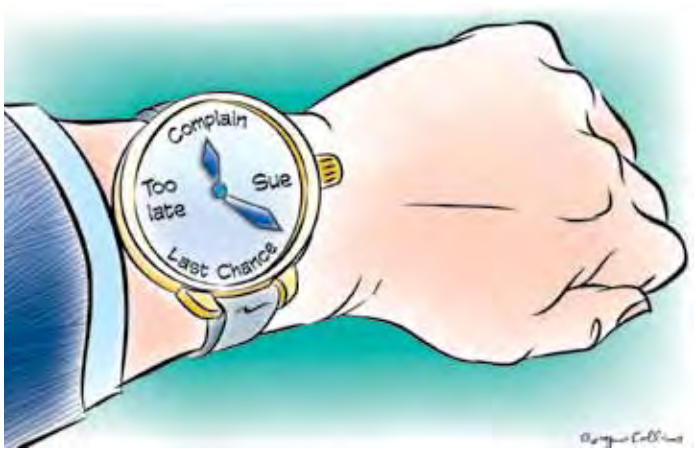
The case for professional negligence was 'convincing', according to the Appeal Court, but Cullens defended it on the grounds that it had not been brought within six years of the cause of action, and was thus barred by the *Limitations Act*.

Many negligence claims relating to estates have been defended this way in recent years. The result depends on the exact moment at which the claimant's loss is thought by the court to have 'accrued'.

In this case, Cullens asserted that Mr Lane's loss accrued when he paid money from the estate to a beneficiary in early 2001, which put his claim out of time. At the first hearing last year, the High Court agreed with Cullens.

Mr Lane appealed, claiming that his loss did not accrue until Mrs Hannah had established her right to the estate and made her claim against him. Until then, he said, her claim was not well founded and he had suffered no loss, since a proprietary estoppel claim is inchoate until adjudicated by a court. If accepted, this argument would have put Mr Lane's negligence action against Cullens within the six-year limit.

But the Appeal Court disagreed with him. Lord Justice Lloyd said that Mrs Hannah could just as well have brought a claim of constructive trust rather than proprietary estoppel. In that case, her claim on the estate would have been 'vested rather than contingent'. So, although she did not in fact bring such an action, the Appeal Court could act as if she had, and thus uphold the earlier ruling in favour of the solicitors.



SMDF info vacuum

From: Jamie Hart, solicitor, Augustus Cullen Law, 7 Wentworth Place, Wicklow

In his message in the June 2011 *Gazette* (page 1), the president states: "No one is happy with the situation we find ourselves in, but it appears to me that to apportion blame for the present financial position of the SMDF is not helpful."

In the context of the momentous decision that faced the profession on how to vote on the motion in favour of the financial support of the SMDF, this statement may well be correct, but I think it important also to point out how understandable it is that members wish to know how we have arrived at such a crisis and who is responsible. Members of the profession are entitled to know how and why the SMDF came to a point where they had to go, cap in hand, to the Society.

If it is simply a question of the sheer volume of claims over recent years, so be it, but if it is something else, such as poor management, then we are fully entitled to know the circumstances, and where responsibility lies. There is an information vacuum that needs to be filled, and I, for one, would like to be told what has occurred. It is simply not good enough to be told "we are where we are". I would be particularly concerned that, now the motion has passed and the support guaranteed, the causes of this disaster are [not] swept under the carpet.

Sale-closing arrangements in danger of grinding to a halt

From: Phil O'Regan, Wolfe & Company, Solicitors, Market Street, Skibbereen, Co Cork

When space next allows, could I possibly ask you consider publishing a practice note on the matter of judgments (of which there has been a huge increase in number), their possible conversion to judgment mortgages against Land Registry and Registry of Deeds title, and the difference in priorities.

It may be no harm, also, to include some recommendation that practitioners – with concerns that judgments thrown up on closing searches might be converted to judgment mortgages before they deposit documents for registration – would consider registering cautions.

It might refresh memory also if the practice note might address or differentiate, *inter alia*, sheriff's search acts as they apply to leasehold title.

Significant difficulty is being experienced by vendor solicitors, I believe (including myself), at closings because some colleagues – concerned that a judgment act might become a judgment mortgage before they get their papers to the Land Registry – don't appear to be aware that one can register a contract or file protective notices pre-closing; where, in the normal course, there should not, in any event, be any delay in the deposit of papers for registration under the present system where documents can be stamped online on the day of closing.

Recently, because of the proliferation of judgments being registered, purchasers' solicitors are seeking to demand clearance of judgments, even though they are not judgment mortgages on freehold title and/or demanding that the purchase money be held in trust until their titles are registered – even in cases where it is perfectly clear that there are existing mortgages on title for sums greater than the sale price.

I imagine that, unless there is some practice note on the subject sooner rather than later, sale-closing arrangements will grind to a halt because the law on priorities is not understood and/or because the idea of registering a contract or a caution seems alien. G

(Editor: see article, p34 of this issue)

MEDICAL INJURIES IDEA IS AN ACCIDENT WAITING TO HAPPEN

The Minister for Jobs, Enterprise and Innovation has proposed the establishment of a medical injuries assessment board along the lines of PIAB. Michael Boylan argues that, rather than driving down costs, the opposite could be the case if the proposal gets the green light

Michael Boylan is a partner in the medical negligence group of Augustus Cullen Law, Solicitors

The front page of *The Irish Times* on 8 June 2011 contained details of a proposal being considered by the Minister for Jobs, Enterprise and Innovation, Richard Bruton, to establish a medical injuries assessment board. According to the story, this board would be modelled on the Personal Injuries Assessment Board (PIAB). This is, apparently, a proposal that is being seriously considered in an attempt to reduce legal costs as part of the drive towards economic competiveness. The article quoted potential savings of €50 million over three years, but this figure appears to have been plucked from thin air.

Details of the proposal are sketchy at present, but if it is modelled on the PIAB scheme, in my view the proposal is ill conceived. It is worth reminding readers that, according to the State Claims Agency, 84,000 medical accidents are reported to the agency each year, and yet, in its latest published annual report for the year ending December 2009, there were only 421 new medical negligence claims 'initiated against it'. Thus, in simple terms, for every 200 medical accidents reported to the agency, only one legal action is commenced. It's little wonder that the agency states in its latest annual report that "the trend in clinical claim volumes is flat."

"Thus, in simple terms, for every 200 medical accidents reported to the State Claims Agency, only one legal action is commenced. It's little wonder that the agency states in its latest annual report that 'the trend in clinical claim volumes is flat'"

It is worth emphasising, also, that the new proposed board would only be assessing *quantum* issues. It would not be a 'no-fault' compensation scheme. The plaintiff would still have to establish that care was below a reasonable standard and that this had caused injury. This will often raise very complex medical and legal issues – far more difficult to resolve than liability in a 'straightforward' road traffic accident case.

Enormous outlays

In my experience, because of the difficulties in proving liability, solicitors will not take on a medical negligence case unless they have strong grounds for believing that they will be able to win it. The massive investment in terms of outlays and the time necessary to successfully bring a medical negligence action can be absolutely enormous. Patients will not be encouraged by their lawyer to commence litigation unless they have been advised that they have a strong case and unless they have suffered a significant injury.

There is also very clear jurisprudence to the effect that it is unprofessional for a solicitor to commence legal proceedings unless he or she has supportive medical expert reports that are critical of the care provided to the patient. Presumably, in any medical injuries application, this requirement would be set aside and, in any event, could not apply to, or impede, members of the public completing an online form.

The whole proposal, it seems to me, puts the focus on the wrong issue. In my experience, injured patients seldom have a significant problem with the value of compensation offered, but the real controversy lies in determining whether the doctor or hospital has been guilty of substandard care in the first place. Patients primarily want:

- To establish what happened and whether there has been substandard care,
- An explanation as to why the care has been poor,
- The hospital or doctor to be held accountable,
- Steps to be taken to avoid its re-occurrence with injury to others, and
- To receive an apology for what has happened.

Finally, when all of these issues are dealt with, the question of financial compensation or damages becomes very easy to resolve in most cases. Usually, this will not trouble the court. I fear that the proposal being considered at present does nothing to address the major causes of claims and puts the cart before the horse.

I also believe that, in circumstances where only such a tiny number of people who suffer medical accidents actually currently pursue litigation, the potential for a massive increase in the number of claims being made will be significant. If one makes the process of bringing a claim for medical negligence as simple as filling out an online form, one could anticipate that many patients with no grounds for alleging negligence or with modest

"The knee bone's connected to the ... red thing"

"The current proposal will achieve no such result and, indeed, is likely to result in a proliferation of claims – which, I am sure, is not what the minister intends in the current economic climate"

or trivial injuries, who do not currently consider making a claim, might pursue a claim.

Many of the thousands of patients who suffer trips, slips or falls on a hospital ward with perhaps trivial injuries could submit a claim. There are thousands of medication errors occurring in hospitals every year that currently do not result in claims, but again, one can see the potential for such claims to be made.

Every single claim that would be made to the proposed board would, presumably, have to be thoroughly investigated by both the proposed board and the State Claims Agency – with the agency in every case having to take up all of the medical records, interview the key nurses and doctors, and so on. All of this would add an enormous administrative burden to an already overworked system for little tangible benefit, given that, ultimately, in the vast majority of claims, liability is disputed either on the grounds of negligence or causation.

Great claims rebutted

One of the great claims made by the supporters of PIAB is that it is self-financing because it is able to charge insurance companies approximately €1,100 for every claim that it assesses. Such a fee could not be levied by the proposed medical injuries assessment board, given that the vast majority of assessed applications would involve the State, which could not (without cost) be charged a fee to do the assessment.

The second great claim made is that it is quicker than the court system for resolving claims. Given that, in the vast majority of medical negligence claims, liability is disputed at least until shortly before trial, it seems that such a scheme could only add significantly to the time it takes to resolve a claim, as the claim would be stuck in limbo for the duration of the assessment. Such further delay would have a negative impact on injured patients who already feel badly let down by the State.

I am fortunate enough to be a member of the President of the High Court's Working Party on Periodic Payments and Medical Negligence Reform, established last year. The group has already produced one report, proposing a scheme for periodic payment orders for dealing with catastrophically injured persons (including birth injury claims). It is currently working on a set of rules for dealing specifically with medical negligence actions. The purpose is to seek to encourage a speedier and more efficient handling of such claims and their earliest possible settlement. I believe that there is great potential for this working group to achieve a far better solution to the issue and bring about rule changes that encourage the early settlement of claims. This would have the potential to save significant amounts of legal costs.

The current proposal by Minister Bruton, in my view, will achieve no such result and, indeed, is likely to result in a proliferation of claims – which, I am sure, is not what he intends in the current economic climate. G

BLOOD SPORTS

FAST FACTS

- A rugby team physiotherapist was struck off for his role in the 'Bloodgate' scandal
- The English High Court quashed this decision and remitted it back to the disciplinary panel with the direction that it reach a decision and clearly explain the reasons for that decision
- Where a disciplinary panel of sporting or non-sporting regulatory bodies does not give adequate reasons for a decision that has seriously detrimental consequences for the person before it, that decision may be open to legal challenge

Chris Connolly is a solicitor in the Sports Law Unit of the Litigation Department of A&L Goodbody. He would like to thank Eoin MacNeill, partner, and Jack O'Farrell, consultant, for their advice

Rugby's 'Bloodgate' scandal has had an impact beyond sport, as it involves the issue of the extent to which the disciplinary panels of regulatory bodies should explain the reasons for their decisions. Chris Connolly draws first blood

Many people will remember the infamous fake blood incident that tarnished the sport of rugby union – which became known as 'Bloodgate'. It is interesting to note that, while Harlequins Rugby Club recently won the Amlin Challenge Cup and Tom Williams has been playing for the team, the consequences for one off-the-field participant have been much more severe.

Former Harlequins physiotherapist Stephen Brennan was struck off for his role in the scandal by a panel of the Conduct and Competence Committee of the Health Professions Council. Following a challenge by Brennan to the decision of the panel on the basis that inadequate reasoning had been provided by them, the English High Court quashed this decision and remitted it to the same panel with the direction that it reach a decision and clearly explain the reasons for that decision.

This decision will be of interest to practitioners who advise disciplinary panels of regulatory bodies in both a sporting and non-sporting context, as it deals with a key issue of the extent to which such panels should explain the reasons for their decision.

"A disciplinary panel should give detailed reasons for its decision, including a clear assessment of the merits or otherwise of the case before it"

Blood brothers

The disciplinary action stemmed from an incident that occurred during a European Rugby (Heineken) Cup quarter-final match between Harlequins and Leinster in April 2009.

Stephen Brennan, who was the Harlequins physiotherapist at the time, was instructed by Dean Richards, the then Harlequins coach, to bring a fake blood capsule onto the pitch and give it to Harlequins player Tom Williams to enable him to fake a blood injury, thus permitting a substitution to be made. Brennan followed the instruction; the ploy was successful, but Harlequins lost the match. Following the incident, there was widespread suspicion that a fake blood injury had occurred, and the organisers of the tournament, European Rugby Cup Limited (ERC), launched an investigation.

At the initial ERC disciplinary hearing in July 2009, Brennan, along with Tom Williams, Dean Richards and Dr Wendy Chapman, the Harlequins match-day doctor, each produced a false account of events. Despite this, Harlequins and Tom Williams were found guilty of misconduct and the others were cleared.

Tom Williams subsequently decided to tell the truth, and an appeal by the ERC followed. At the appeal, Brennan accepted that he had lied at the initial disciplinary hearing and revealed that he had been involved in four previous fake-blood injury incidents. As a result, he was banned from participating in all rugby activities for two years.

Subsequently, the matter became the subject of a fitness-to-practice hearing before the panel, which formed part of the regulator of physiotherapists in Britain. The panel ruled that Brennan's actions were sufficiently serious to justify the imposition of the highest penalty possible – being struck off the register. Brennan subsequently appealed this decision to the English High Court.

In cold blood

The panel had the power to impose sanctions on Brennan, under article 29(5) of the *Health Professions Order 2001*, ranging from a caution up to strike-off.

The imposition of sanctions was guided by the Health Professions Council's *Indicative Sanctions Policy*. Importantly for Brennan, it stated that fitness-to-practice proceedings are not intended to be punitive; rather, the focus for the panel should be to take the most appropriate steps to protect the public from any future risk.

The panel, in choosing the option of strike-off, stated that it arrived at the decision "not only by a process of elimination, but also because it is the sanction the panel considers to be necessary for the public and other

"It will have blood; they say, blood will have blood" (Macbeth)

professionals to understand that this sort of behaviour is unacceptable".

Brennan challenged the decision of the panel on the basis that inadequate reasoning had been provided by them. He did not appeal against the findings of misconduct, nor against the conclusion that his actions impaired his fitness to practice as a physiotherapist.

The High Court ruled that the panel "had gone to the ultimate sanction without explaining why, in light of the evidence, a lesser sanction was not appropriate … Its reasoning is not legally adequate; it does not enable the informed reader to know what view it took of the important planks in Mr Brennan's case."

Essentially, Mr Justice Ouseley was of the view that it was not sufficiently clear from the panel's decision why it believed that it was proportionate to impose the sanction of strike-off rather than a lesser sanction.

While the *Indicative Sanctions Policy* stated that striking off should only be imposed where there is no other way to protect the public, the judge noted that, due to the unique circumstances of the case, no need to protect the public existed.

After all, the panel had acknowledged that Brennan was still recognised as being an excellent physiotherapist, and the misconduct had not occurred in the course of treating a patient, nor was the dishonesty alleged against a patient, nor were his actions against a patient's interests. Rather, Brennan was instructed to engage in the deceptive act by Dean Richards, the Harlequins coach.

Rather than imposing the sanction of strike-off on the basis of a need to protect the public, the panel imposed the sanction in order to deter others from engaging in similar behaviour and also to protect and maintain confidence in the profession of physiotherapy. However, what the panel didn't do was assess Brennan's case in detail, or assess whether another sanction would have been a more proportionate way to achieve the same aim. As a result of the panel's failure to take these steps, their decision was quashed.

"Where a disciplinary panel of sporting or non-sporting regulatory bodies does not give adequate reasons for a decision that has seriously detrimental consequences for the person before it, that decision may be open to legal challenge"

Blood simple

The decision does not represent a departure from the law in England or Ireland in this area. The current law in both jurisdictions is that the reasons given for a decision must be intelligible and adequate and that a challenge based on a failure to provide reasons will only succeed if the party challenging the decision can satisfy a court that he has been substantially prejudiced by the failure to give reasons.

The High Court recognised the substantial prejudice and serious consequences of the panel's decision for Brennan, who had lost the position he had been due to take up as physiotherapist with the English national rugby team and whose private clinic had closed, causing a loss of 75% of his income, and this justified the panel's decision being quashed.

It is interesting that Mr Justice Ouseley then chose to remit the matter to the panel with the direction that it reach a reasoned decision on the chosen sanction, and avoided usurping the function of the panel.

It was stated that remitting the matter to the panel was appropriate because it had heard all the evidence in the initial hearing and it was recognised that the panel was best qualified to judge what the best interests of the profession of physiotherapy were and how these could be best protected. The court also ruled that the second hearing would be in front of the same panel that had made the original ruling.

True blood

On Thursday 19 May 2011, following a two-day hearing, the panel ruled that the decision to strike Brennan off would be replaced with a caution order to be noted on the register of physiotherapists for the maximum period of five years.

The panel stated that its decision stemmed from the belief that Brennan had shown genuine remorse for his actions, which it acknowledged was in contrast to the position adopted by the panel at the first hearing.

The panel also acknowledged that Brennan had both professionally and personally suffered a great deal from the incident for the reasons outlined above. It was also significant that Brennan had taken steps towards remedying his actions, including giving a series of lectures to other physiotherapists and health professionals about professional standards and medical ethics in the context of his unique experience. As a result of all these factors, it was believed that there was a very low risk of such conduct being repeated in the future.

There will be blood

It is worth noting that in Ireland there have been very few cases where the decision of a regulatory body has been struck down for a failure to give sufficient reasons. The current position in Irish law is that the decision of a disciplinary panel of a regulatory body should be intelligible and adequate and that a challenge based on a failure to provide reasons will only succeed if the party challenging the decision can satisfy a court that he has been substantially prejudiced by the failure to give reasons.

Practitioners should be aware that this case demonstrates that, where a disciplinary panel of sporting or non-sporting regulatory bodies does not give adequate reasons for a decision that has seriously detrimental consequences for the person before it, that decision may be open to legal challenge.

In order to avoid such a challenge, such a panel should give detailed reasons for its decision, including a clear assessment of the merits or otherwise of the case before it. It should also clearly state the aim of any sanction and why the particular sanction chosen is believed to be the most proportionate way to achieve that aim. If necessary, legal advice should be taken before its reasons are formulated. Legal advice may also be appropriate when drafting or amending rules of procedure or policies applicable to disciplinary bodies. G

LOOK IT UP

Cases:

- *Brennan v Health Professions Council* [2011] EWHC 41 (Admin)
- *Deerland Construction v Aquatic Licensing Appeals Board* [2009] 1 IR 673
- *Ghosh v General Medical Council* [2001] 1 WLR 1915
- *Giele v General Medical Council* [2005] EWHC 2143 (Admin)
- *Gupta v General Medical Council* [2002] 1 WLR 699
- *Marinovitech v General Medical Council* [2002] ALL ER (D) 187 (Jun)
- *R (Howlett) v Health Professions Council* [2009] EWHC 36617

Legislation:

- *Health Professions Order 2001* (SI 254/2002)

Literature:

- Ruling of the second hearing of the Conduct and Competence Committee of the Health Professions Council with regards to Stephen Brennan: www.hpc-uk.org/complaints/hearings/index.asp?id=1512&month=5&year=2011&EventType=H
- Health Profession Council's *Indicative Sanctions Policy*: www.hpc-uk.org/assets/documents/10000A9CPractice_Note_Sanctions.pdf

BEATING AROUND THE BUSH

Colin Murphy is a journalist and documentary maker in Dublin, specialising in social and cultural affairs. A selection of his work can be found at www.colinmurphy.ie

The President of the Law Council of Australia, Alex Ward, was in Dublin recently to encourage Irish solicitors to consider practising law in 'rural, regional and remote' areas of his country. Colin Murphy goes walkabout

When you're trying to persuade ambitious young lawyers to make a career in the Australian outback, it helps if you can draw on some personal insight. For Alexander Ward, President of the Law Council of Australia, that insight is in his blood. At some point in the distant past, his people came from Ireland. His great-grandfather was a farm labourer of Irish stock. By the next generation, the family had become 'professional'. Ward doesn't know how it happened, but the farm labourer's son, Kevin Ward, became a solicitor in the new town of Berri, in South Australia.

Berri was, almost literally, a one-horse town – Kevin Ward arrived before even the railway, which came in the late 1920s. The business of the townland was fruit production and processing, and the young solicitor was taken on by one of the largest fruit producers in the region, Frederick Alexander James. Fortunately for Ward, James was a serial litigant. The Australian states had imposed a variety of quota and marketing schemes on fruit traders, and James saw these as inimical to his right to free trade – a right he believed was guaranteed under the constitution.

Kevin Ward can hardly have had much experience of constitutional law, but he took on the state of South Australia in the Australian High Court. Later, he took on the Commonwealth of Australia itself, sailing to London to make his case before the Privy Council. *James v The Commonwealth* (1935), which James won, became a classic of Australian constitutional law. And the young solicitor from the outback became a King's Council and, later, President of the Law Society of South Australia.

The point, says his grandson Alexander Ward, is that a young lawyer doesn't have to surrender his ambition and prospects when he (or she) moves to practise law in the outback. As Kevin Ward showed, it could be the launch pad to a great career.

> ***"It's hard to get the importance of it into people's minds," says Ward. "With doctors, it's obvious. People think if there's no doctor, it'll be a disaster. But with lawyers, people don't realise what they'll miss"***

It's a long way to the top

Alex Ward was in Dublin recently to give a talk to the Law Society on what's known as 'RRR law' – the practice of law in 'rural, regional and remote' Australia. Although the Australian cities – like Ireland – produce a surfeit of law graduates, many smaller towns are experiencing, or anticipating, shortages of lawyers. While the notion of the 'bush doctor', flying in to provide services to remote areas in Australia, is well established in both lore and practice, the idea of the 'bush lawyer' doesn't have the same currency. (Readers should not confuse the use of this term with the rather denigrating meaning ascribed to it in the *Oxford Dictionary*, namely: 'a person claiming legal knowledge without qualifications for it'!)

FAST FACTS

- Australian cities produce a surfeit of law graduates, but many smaller towns are experiencing, or anticipating, shortages of lawyers
- A recent survey found that over 40% of principals in law firms in rural Australia believed their practice did not have enough lawyers to serve their client base
- 70% of these cited 'succession planning' as their biggest worry, suggesting that opportunities for Irish lawyers could be long term
- For those interested, the first step is to visit www.rrrlaw.com.au

HELL OR HIGH WATER

The Law Council has recently scored a significant success with the addition of law to the Australian Department of Immigration's 'skilled occupations list', allowing lawyers to join other professions in short supply in Australia and apply for visas.

For information on visas, go directly to the website of the Australian High Commission in London (www.uk.embassy.gov.au), which will direct you to the appropriate page on the Australian Department of Immigration website. The staple visa for Irish people working and travelling in Australia is the working holiday visa (which can be applied for twice). This is for people aged between 18 and 30 (at time of applying) and restricts you to working no more than six months in any one job. This may be a good option for lawyers looking to investigate opportunities in Australia for themselves.

Those with more definite plans will be looking to take advantage of the presence of barristers and solicitors on the skilled occupations list, allowing them to apply for visas under the General Skilled Migration Programme. (See www.immi.gov.au/skilled/general-skilled-migration.)

One initial shortcoming of the RRR law website, from the point of view of overseas visitors (it is also aimed at urban Australian lawyers), is that it does not offer guidance on applying for visas or on other aspects of relocating to rural Australia, or, crucially, on the process of having an overseas law qualification recognised in Australia.

By contrast, a similar service aimed at doctors and run by the Australian Department of Health, 'DoctorConnect', is more comprehensive, offering advice, checklists and links.

Alexander Ward explains that the process of registering as a lawyer varies from state to state and is currently in flux. Irish lawyers may initially have to work as a law clerk, while pursuing courses to qualify in Australian law.

"It's hard to get the importance of it into people's minds," says Ward. "With doctors, it's obvious. People think if there's no doctor, it'll be a disaster. But with lawyers, people don't realise what they'll miss."

Hence, Ward is leading a drive to encourage young and mid-career lawyers to consider relocating to 'RRR' areas – whether in pursuit of work/life balance, legal challenge, diversity, adventure, or simply because that's where the work is. The focus of the drive is a website (www.rrrlaw.com.au) that, as Ward puts it, is "like a dating service", aiming to connect law practices and lawyers.

Recognising the current difficult employment situation for solicitors in Ireland, he believes it could, in general, be "a very good fit for the Irish". (For those to whom talk of the 'outback' and the 'bush' makes it all seem a bit foreign, it may be reassuring to note that the Australian catch-all term for rural,

PILLAR OF THE COMMUNITY

Many of the country jobs on offer are with community legal services (though there are plenty of commercial practices too). One such is in the tiny Western Australia town of Newman, 1,100km (683.5 miles) north of Perth along the Great Northern Highway. Newman is at the heart of an arid desert region known as the Pilbara, and lies just north of the Tropic of Capricorn. The land is rich in mineral deposits, and Newman is a mining town, built in the 1960s. The Pilbara Community Legal Service is recruiting a lawyer on a salary scale of AUS$34,925 to $47,250 (€25,700 to €34,800). A bonus is that shared accommodation is just AUS$500 (€370) per month.

Those with a vocation for community law, along with a desire to see the classical outback, might also be attracted by a legal officer position in the very centre of Australia, in Alice Springs, 1,200km (746 miles) from the nearest ocean and 1,500km (932 miles) from the nearest big cities, Darwin and Adelaide. The position involves work with remote Aboriginal communities, who have apparently been indigenous to the area for more than 50,000 years, addressing issues around family violence. The brief includes casework, policy development and law reform.

'RRR' covers everything from peri-urban to deep outback, so the positions involved don't necessarily involve commutes by small plane – or isolation. One of the more mainstream-sounding opportunities is for a family law lawyer in Wagga Wagga, within easy reach (450km or 280 miles) of both Sydney and Melbourne. The salary range is from AUS$65,000 to $75,000 (€48,000 to €55,000). The job might be of particular interest to sports fans: the 'Wagga Effect' has been coined to describe the huge number of elite sportspeople hailing from the city.

For something a little closer to home, Tasmania might fit the bill: the island is of comparable size and climate to Ireland. The firm Rae & Partners is recruiting solicitors with "higher level" experience in commercial law, family law, and civil and commercial litigation to work in their offices in the towns of Devonport and Launceston.

See www.rrrlaw.com.au for all opportunities.

regional and remote areas is simply 'the country': the prospect of being a 'country lawyer' doesn't sound quite so daunting, somehow!)

Succession planning

A recent survey of legal practices in rural Australia found that over 40% of principals in law firms believed their practice did not have enough lawyers to serve their client base. This is expected to worsen in the next five to ten years, as many of those principals are heading for retirement, without adequate staff to replace them. Seventy percent of these lawyers cited 'succession planning' as their biggest worry, suggesting that opportunities for Irish lawyers could be long term. The survey also found that 'country' lawyers were deeply involved in their communities, with a high rate of legal aid, *pro bono* and other voluntary work being undertaken.

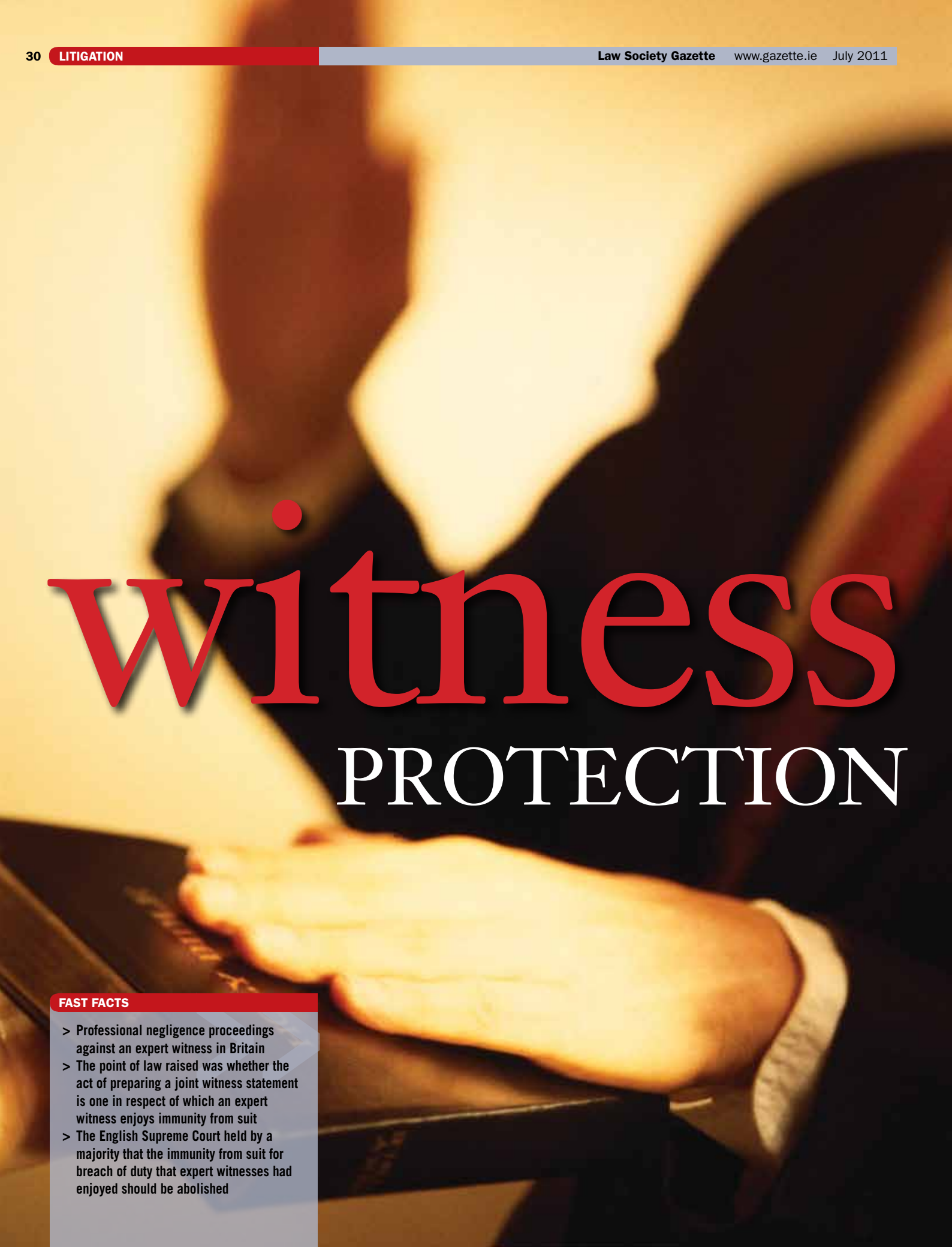
"Lawyers are important people in the local community," says Alex Ward. "You're a large part of the fabric of society." He stresses, however, that the work can be legally challenging as well: "You're dealing with people who have the money to litigate, and they will. It's a lot more for them than having someone to do their will. There are a lot of wealthy clients, with big commercial work. Farmers there aren't walking around with hay stuck out of their mouths: they're big businesses."

And, of course, there are the more simple attractions: the prospect of ending the day "with a G&T on the balcony of a beautiful house on the river, looking out over the orchard", of surfing at lunch, or of taking up hobbies like dirt racing and learning to fly.

For all the potential lifestyle benefits, some of the positions are very remote, and, in any case, Irish people emigrating to Australia will naturally be concerned about isolation – both personal and professional – and loneliness. Ward insists that new arrivals would not be isolated. As well as the status of lawyers in local communities, there is "a strong ethic of mentoring in the country", he says, and he gives an assurance that the Law Council will ensure that lawyers moving to the Australian country are mentored and that they "will be able to ring someone".

"The process of registering as a lawyer varies from state to state and is currently in flux. Irish lawyers may initially have to work as a law clerk, while pursuing courses to qualify in Australian law"

For those interested, or simply intrigued, the first step is to visit the website: www.rrrlaw.com.au. There are testimonies from various country lawyers, general information, and a database of positions currently available. If interested in a position, contact the firm involved directly for more information.



witness PROTECTION

FAST FACTS

- Professional negligence proceedings against an expert witness in Britain
- The point of law raised was whether the act of preparing a joint witness statement is one in respect of which an expert witness enjoys immunity from suit
- The English Supreme Court held by a majority that the immunity from suit for breach of duty that expert witnesses had enjoyed should be abolished

Gail O'Keeffe is a partner in O'Connor Solicitors and practises in litigation, administrative and employment law

The English Supreme Court recently abolished the immunity from suit of expert witnesses, which had been in place for more than 400 years. Gail O'Keefe looks at the background of the decision and its relevance for Ireland

On 30 March 2011, the Supreme Court of England and Wales made a decision, in *Jones v Kaney*, to abolish expert witnesses' immunity from suit. This immunity had been in place in Britain for over 400 years and was established long before the development of the modern law of tort.

The case involved Mr Jones, who was riding his motorcycle in Liverpool on 14 March 2001. He had stopped at a junction and was waiting to turn right when he was hit by a car driven by Mr Bennet. Mr Bennet was drunk and was also uninsured and disqualified from driving. As a result of this, Mr Jones developed post-traumatic stress disorder (PTSD) that far outweighed his physical injuries and was a major part of the personal injuries claim he subsequently brought. Liability was admitted and the only issue for consideration by the court was damages.

The solicitors for Mr Jones referred him to Ms Kaney, a consultant clinical psychologist. She prepared a report dated 29 July 2003, that stated that he had PTSD. The defendant insurers had the plaintiff examined by Dr El-Assra, a consultant psychiatrist, who formed the view that the plaintiff was exaggerating his symptoms. The District Court judge assigned to the case directed that the experts prepare a joint statement setting out the areas of agreement and disagreement on the extent of the injuries. A discussion was had between the experts, and Dr El-Assra prepared a draft joint statement that was faxed to Ms Kaney, who signed it without amendment or further discussion.

Unfortunately, the joint statement was damaging to Mr Jones' claim, as it stated that, rather than PTSD, he had suffered an adjustment reaction only. It also stated that Mr Jones had been deceptive and deceitful in reporting his symptoms and employed "conscious mechanisms" in so doing.

Ms Kaney confirmed that she signed the joint statement without seeing Mr El-Assra's reports and said that it did not reflect their discussion on the telephone. Further, she stated that she felt under pressure to sign it, that Mr Jones had been evasive rather than deceptive, and that his PTSD had resolved.

The solicitors for Mr Jones sought permission to change the psychiatric report; however, the district judge refused the application. Part 35 of the *Civil Procedure Rules* does not permit the parties to instruct an expert without the permission of the court, and only if the expert is reasonably required to dispose of the proceedings. Consequently, Mr Jones was effectively stuck with the report from Ms Kaney and settled his case for less than it would have been worth but for the joint statement.

Mr Jones issued professional negligence proceedings against Ms Kaney. The case came before Mr Justice Blake in the High Court by way of an application by Ms Kaney to strike out proceedings. Mr Justice Blake considered that the point of law raised – namely, whether the act of preparing a joint witness statement is one in respect of which an expert witness enjoys immunity from suit – was a matter of public importance. He referred the matter to the Supreme Court for consideration. It is notable that the point of law was confined to breach of duty in respect of the preparation of a joint statement.

> ***"The Supreme Court found that there was no justification to continue to hold experts as being immune from suit in respect of the views they express before going to court, and the evidence that they give in court"***

The decision

The Supreme Court held by a majority that the immunity from suit for breach of duty that expert witnesses had enjoyed should be abolished. It emphasised that absolute privilege in respect of claims of defamation should remain. The court found that there was no justification to continue to hold experts as being immune from suit in respect of the views they express before going to court, and the evidence that they give in court.

In reaching this decision, the court considered the reasons why witnesses were immune from being sued. The origins of witness immunity can be traced back to the 1585 case of *Cutler v Dixon*, when a defendant in an action brought before a justice of the peace sought to bring a separate lawsuit against the plaintiffs for allegations made in the pleadings of the initial suit. The court held that "if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain for fear of infinite vexation".

Essentially, the immunity was regarded as being necessary to protect witnesses from vexatious claims being brought against them. If such claims were allowed, witnesses would not be free to give evidence in court, given the prospect of being exposed to such actions.

In advance of the decision in *Jones v Kaney*, *Stanton v Callaghan* was considered to be the authority on this point in Britain. This case involved a claim by the plaintiffs against a structural engineer they had engaged to provide assistance in respect of a claim against their insurers

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Certificate in Trust & Estate Planning (STEP) (New)	Saturday 10 September 2011
Certificate in Employment Law Advocacy & Skills (New)	Saturday 24 September 2011
Certificate in Capacity, Mental Health & the Law	Tuesday 27 September 2011
Certificate in Criminal Litigation	Saturday 19 November 2011

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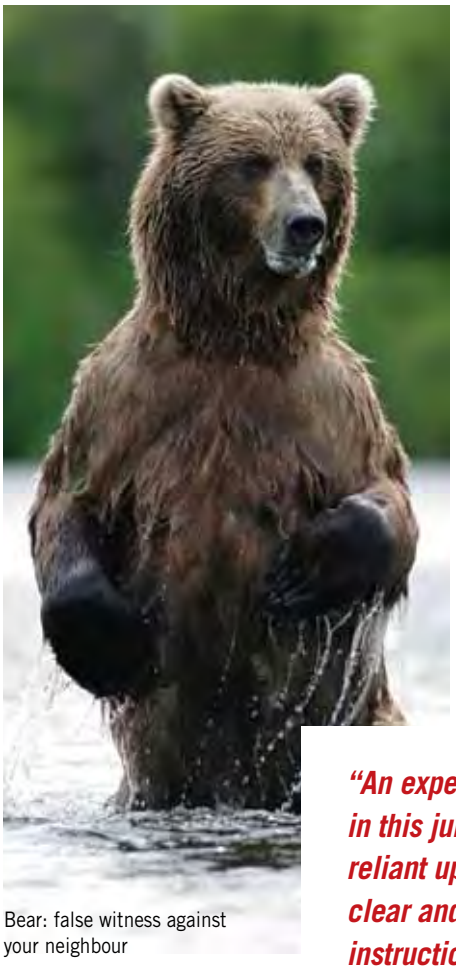
arising from subsidence of their home. The engineer advised that underpinning at a cost of £77,000 was required to remedy the problem, but subsequently agreed that infilling with polystyrene at a cost of £21,000 was sufficient. The Court of Appeal reversed the finding against the engineer and Chadwick LJ concluded: "In my view, the public interest in facilitating full and frank discussion between experts before trial does require that each should be free to make proper concessions without fear that any departure from advice previously given to the party who has retained him will be seen as evidence of negligence. That, as it seems to me, is an area in which public policy justifies immunity. The immunity is needed in order to avoid the tension between a desire to assist the court and fear of the consequences of a departure from previous advice."

Relevance for Ireland

The principle of witnesses' immunity from suit is long established here. O'Dalaigh CJ stated in *Re Haughey*: "The immunity of witnesses in the High Court does not exist for the benefit of witnesses, but for that of the public and the advancement of the administration of justice and to prevent witnesses from being deterred, by fear of having actions brought against them, from coming forward and testifying to the truth. The interest of the individual is subordinated by the law to the higher interest, namely, that of public justice, for the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences."

It is arguable that the particular issues in *Jones v Kaney* would not arise in similar circumstances here. Currently, the parties to a personal injuries action are not constrained to instructing one expert only. In this jurisdiction, Mr Jones' representatives could have sought a second opinion and presented it to the court. A second opinion could have been admitted by the court on the basis that it was necessary to have it in order to resolve the issue of whether or not he had PTSD.

Currently, an expert witness in this jurisdiction is reliant upon getting clear and accurate instructions from the party engaging him or her, together with a full explanation of their role. This does not always happen in practice. Generally, the expert is required to give an opinion on the strengths and weaknesses of the potential case and to consider the matter from the perspective of the party instructing them. Some professional bodies, such as the Society of Actuaries in Ireland, have devised their own guidelines for their members on giving expert evidence. It is not clear as to whether compliance with the guidelines is monitored by professional bodies. Experts can, on a voluntary basis, attend training courses to prepare themselves for giving evidence in court, but this is not mandatory.



Bear: false witness against your neighbour

Mr Justice Barr observed that expert witnesses are "rarely dishonest or deliberately unfair, but they seem to lack a true understanding of their function, that is, to assist the court in arriving at the truth by providing a skilled expert assessment, which is objective and fair, of matters requiring a specialised appreciation of the particular problem at issue."

The Law Reform Commission published a *Consultation Paper on Expert Evidence* and provisionally recommended that a reliability test be introduced in relation to the admissibility of all expert evidence. Further, the commission provisionally recommended that judicial guidelines be introduced, setting out the factors to be taken into consideration by a trial judge when deciding whether or not the expert witness met the reliability threshold. In addition, the commission provisionally recommended that the court be permitted to refer a witness, who has acted in breach of their duty to the court, to their professional body, so that their conduct may be addressed by that body.

If witness immunity were to be abolished here, this would be an effective way of ensuring that expert witnesses did not breach their duties. In addition, the provisions of section 20 of the *Civil Liability and Courts Act 2004* could be clarified in relation to the method of appointing and remunerating court-appointed experts.

Mr Justice Peter Charleton recently observed in *James Elliott Construction Ltd v Irish Asphalt Ltd* that calling "several experts on one topic" may be an issue requiring trial judges to get involved in "directing appropriate proofs" if delay and expense are not to be allowed to potentially defeat the right of access to court.

If rules were introduced regarding the engagement and conduct of expert witnesses, the length and cost of civil trials could be reduced and it could also help to relieve some of the current pressure on court resources. G

> ***"An expert witness in this jurisdiction is reliant upon getting clear and accurate instructions from the party engaging him or her, together with a full explanation of their role. This does not always happen in practice"***

LOOK IT UP

Cases:

- *Cutler v Dixon* [1585] 4 Co Rep 14b: 76 ER 886
- *James Elliott Construction Ltd v Irish Asphalt Ltd* [2010] IEHC 24
- *Jones v Kaney* [2011] UKSC 13
- *Re Haughey* [1971] IR 217
- *Stanton v Callaghan* [2000] QB 75

Legislation:

- *Civil Liability and Courts Act 2004*, section 20
- *Civil Procedure Rules*, part 35 (55th update, April 2011)

Literature:

- Law Reform Commission, *Consultation Paper on Expert Evidence* (LRC CP 52 – 2008)

CAUGHT IN A TRAP?

Flor McCarthy is managing partner of McCarthy & Co, Solicitors, Clonakilty. He has over ten years of commercial litigation experience. He acted for the second defendant in Irwin v Deasy *(email: flor@mccarthy.ie. Twitter: @flormccarthy)*

The tortuous experience of judgment creditors in cases such as *Irwin v Deasy* confirms that our debt collection system needs to be looked at from scratch. Flor McCarthy steps on our blue suede shoes

"This case is testimony that sufficient wisdom has not yet accumulated to obviate another judgment creditor being impaled on the chevaux de frise *of the regulation of judgment mortgages"* (Laffoy J in *Irwin v Deasy*).

The position of creditors holding judgment mortgages over co-owned land has been fraught with uncertainty since January 2006. The Supreme Court decision in *Irwin v Deasy*, delivered on 13 May 2011, finally provides certainty for all involved. But, in an era in which the laws governing all aspects of debt in our society are under urgent review, should we be persisting with the judgment mortgage model?

Suspicious minds

The plaintiff in the case was the Collector General of the Revenue Commissioners. The plaintiff was owed money in respect of taxes by the first defendant. The first defendant was joint owner with his spouse of freehold land registered in the Land Registry (now the Property Registration Authority). The plaintiff had secured judgments in 2000 and 2002 in respect of the monies owed, which it had registered in the Land Registry as judgment mortgages against the first defendant's interest in the land. The plaintiff initially issued proceedings against the first defendant only, seeking an order that the judgments were well charged on the lands, together with an order for sale in lieu of partition of those lands.

The matter first came before the High Court on 1 March 2004, when Ms Justice Finlay Geoghegan joined the first defendant's spouse to the proceedings and, in doing so, held that, where there were two co-owners of a property that was the subject of an application for an order for sale in lieu of partition, the other owner should, unless unavailable, be joined so as to ensure that the constitutional principles of fair procedures are observed and that the individual circumstances of all the interested parties could be taken into account by the court.

The substantive matter then came before Ms Justice Laffoy on 31 January 2006. The issue identified by counsel for the second defendant in the proceedings was that, in cases involving registered land, a judgment creditor did not have sufficient *locus standi* to seek an order for partition or, by extension, an order for sale in lieu of partition in order to satisfy the judgment debt, and that the court had no jurisdiction to make such an order in cases of co-owned registered land.

The distinction between registered and unregistered land arose from the manner in which a judgment mortgage operates in each title system. In the case of unregistered land, the judgment mortgage operates in the same way as a mortgage created by deed: the relevant legal estate that has been mortgaged vests in the mortgagee (in this case, the judgment creditor), which provides that creditor with sufficient interest in the land to seek partition. However, in the case of registered land under the *Registration of Title Act 1964*, the registration of a judgment mortgage did not give the creditor any interest in the land, and the judgment creditor's rights were limited to those contained in section 71(4) of that act.

The court held that it did not have any jurisdiction to order a sale in lieu of partition other than by the statutory jurisdiction conferred on it by the *Partition Act 1868* and that a judgment mortgagee in cases of registered land did not have sufficient interest in the land to seek the benefit of that act. The court held that it did not have any inherent

FAST FACTS

- *Irwin v Deasy* provides certainty on the position in relation to judgment mortgages registered prior to 1 December 2009
- It creates two clear classes of instrument: those registered in the Land Registry and those registered in the Registry of Deeds
- It is reasonable to assume that there are a large number of other creditors out there with judgment mortgages registered prior to 1 December 2009 with a very real interest in the implications of the outcome of this decision
- There is a need for root-and-branch reform of the means by which legitimate creditors can get paid what they are owed in a timely manner

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jurisdiction to grant a sale in lieu of partition and that the *Registration of Title Act 1964* itself did not provide any such specific remedy to a judgment creditor.

The underlying debt that was the subject of the proceedings was settled following the outcome in the High Court. However, the legal point was a matter of some considerable importance to the plaintiff and had implications for a large number of similar cases. Therefore, the plaintiff wished to appeal the decision to the Supreme Court. The first point that fell to be considered by the Supreme Court was whether such an appeal could proceed where the underlying matters in contention had been resolved. It was submitted on behalf of the plaintiff that the point of law in this instance was not one limited to past events particular to this matter and was a matter of such public importance as to warrant determination in this case. The Supreme Court allowed the appeal to proceed on the basis that the legal representatives for the second defendant would act as legitimate contradictor in the matter.

A little less conversation

The matter was heard before a division of the Supreme Court comprising Macken J, Finnegan J and O'Donnell J on 29 July 2010. Finnegan J delivered judgment in the matter on 13 May 2011.

The Supreme Court found that Laffoy J had been correct in the High Court in holding that she did not have jurisdiction under sections 3 and 4 of the *Partition Act 1868* to make an order for sale in lieu of partition in respect of registered land on the application of a judgment mortgagee. The Supreme Court held that, in cases of registered land, the relief available to a judgment mortgagee was limited to that contained in section 71(4) of the *Registration of Title Act 1964*, which did not go so far as to give the court power to treat a judgment mortgagee of registered land as having the rights of a judgment mortgagee of unregistered land. It found that the 1964 act clearly distinguishes between a charge created by a registered owner, which has the effect of a mortgage, and a judgment mortgage, which does not have that effect.

The Supreme Court found that the reason for not assimilating the position of a judgment mortgagee in unregistered land in cases involving registered land made sense when viewed in the context of the intention of the legislators in enacting the *Registration of Title Act 1964* – that is, the policy of ultimate compulsory registration of all land in the State, which, by coincidence, was finally extended to all counties and cities in the State on 1 June 2011.

The *Land and Conveyancing Law Reform Act 2009* came into force on 1 December 2009 and largely cured this problem.

Section 117(1) of the 2009 act states that registration of a judgment mortgage operates to charge the judgment debtor's estate or interest in the land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under section 117 or section 31 of that act.

Now *that's a chevaux de frise...*

Section 31(1) of the 2009 act states that any person having an estate or interest in land that is co-owned may apply to the court for an order under that section, including an order under section 31(2)(c), for sale of the land and distribution of the proceeds of sale as the court directs. Section 31(4)(a) states that a person having an estate or interest in land includes a judgment mortgagee.

All shook up

The case therefore provides certainty on the position in relation to judgment mortgages registered prior to 1 December 2009 and creates two clear classes of instrument: those registered in the Land Registry (Property Registration Authority) and those registered in the Registry of Deeds. The holders of judgment mortgages registered on land with Registry of Deeds title have rights as mortgagees and have sufficient interest in co-owned land to seek a sale in lieu of partition. The holders of judgment mortgages registered on land with Land Registry title have a charge on the land only and do not have sufficient interest to seek either partition of co-owned land or a sale in lieu of partition.

The clarity on the position for judgment mortgages registered prior to 1 December 2009 is more than of mere academic interest at this stage. It was stated to the court in this case that there were a large number of known cases involving similar circumstances that were directly depending on a determination on this point. It is reasonable to assume that there are a large number of other creditors out there with judgment mortgages registered prior to 1 December 2009 with a very real interest in the implications of the outcome of this decision.

But are judgment mortgages the right way of ensuring that creditors get paid?

The *Land and Conveyancing Law Reform Act 2009* has cured the anomaly in relation to co-owned land that was first given judicial recognition in this case. However, it preserves the system of judgment mortgages, albeit in a much improved and simplified form.

> ***"The case provides certainty on the position in relation to judgment mortgages registered prior to 1 December 2009"***

Heartbreak hotel

The experience of creditors holding judgment mortgages over registered land registered prior to 1 December 2009 is reflective of a general malaise experienced by many of those forced to engage with the Irish legal system in an effort to get paid what is legitimately due and owing to them. All too often, creditors experience a costly and ineffective system fraught with delay, which undermines the credibility of the legal process as a meaningful means of recovery.

Debt reform is a very topical and necessary subject in our society today. But hand-in-hand with reform of the way in which those in debt are treated by the law, there is a need for root-and-branch reform of the means by which legitimate creditors can get paid what they are owed in a timely manner.

In her High Court judgment, Laffoy J quoted Glover, writing 73 years previously on the judgment mortgage in the context of registered land: "Over 50 years ago, a Royal Commission, composed for the most part of leading real property lawyers of the day, described a judgment mortgage as a 'trap rather than a security'. It recommended that the system of registering judgments as mortgages should be discontinued, that a judgment creditor should be at liberty to enforce his judgment by proceeding summarily … for the sale of the lands of his debtor … It is proposed that this simple and effective procedure to get rid of the *chevaux de frise* of tedious, trivial and expensive formalities that the *Judgment Mortgage (Ir) Act 1850* raises between a judgment creditor and his debt."

The tortuous experience of judgment creditors in cases such as this confirms that our debt collection system needs to be looked at from scratch, as has been advocated for over 128 years. G

LOOK IT UP

Cases:

- *Irwin v Deasy* [2006] 2 ILRM 226; [2004] 4 IR 1; [2006] IEHC 25; [2011] IESC 15

Legislation:

- *Land and Conveyancing Law Reform Act 2009*
- *Registration of Title Act 1964*
- *Partition Act 1868*

BREAKING UP IS HARD TO DO

On 1 January 2011, the clock started ticking for cohabiting couples as a result of the commencement of the so-called *Civil Partnership and Cohabitants Act 2010.* What are its effects on family law and what does it mean in practice? Hilary Lennox considers the options

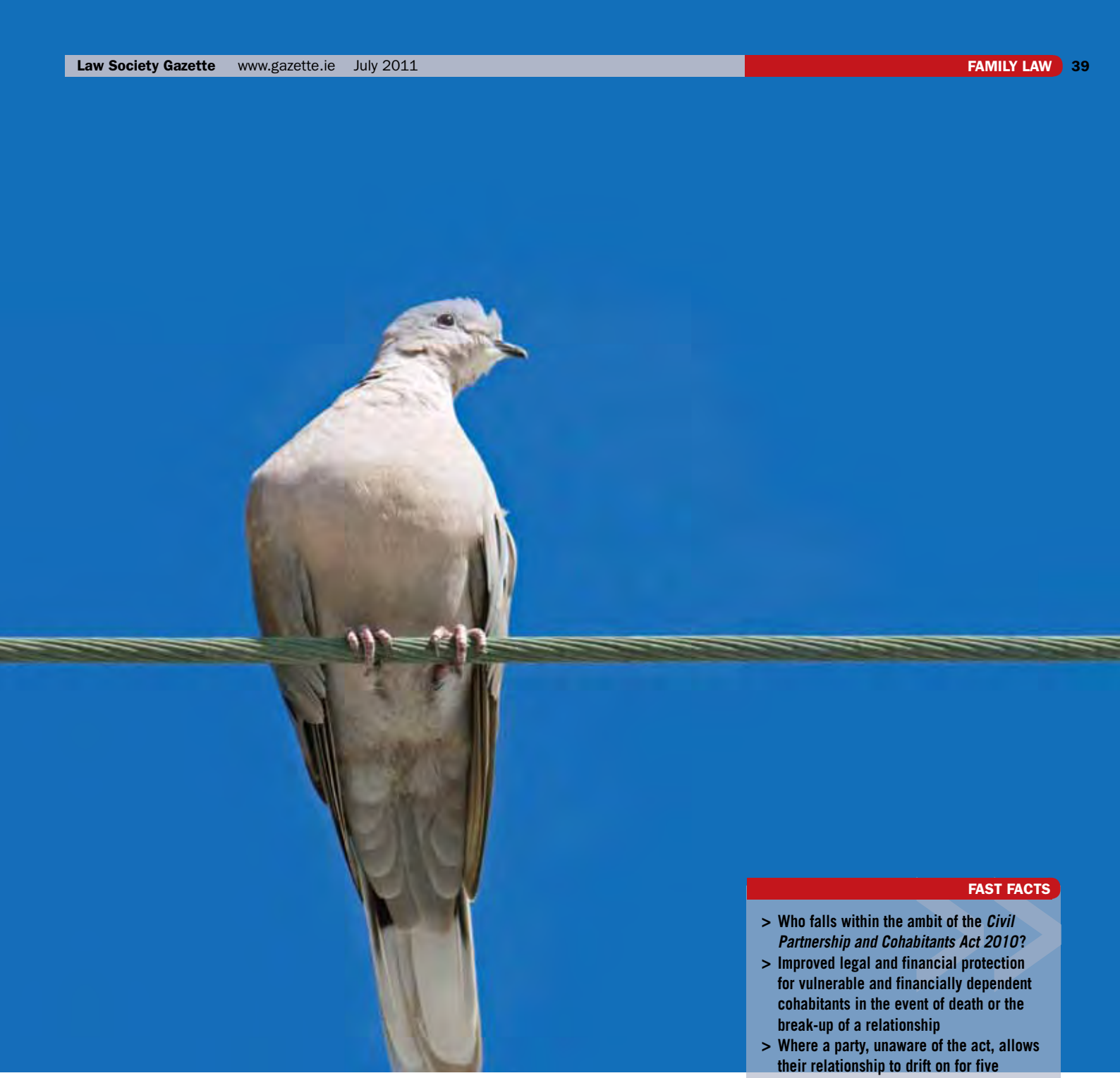
Hilary Lennox is a barrister, practising mainly in Dublin. Thanks to Richard Hammond, solicitor, who assisted with reviewing this article

Be warned! On 1 January 2011, the clock began to tick for cohabiting couples to acquire rights in relation to one another. The then Minister for Justice Dermot Ahern signed the commencement order for the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, with effect from 1 January 2011. If you are one of the 120,000 cohabitants currently in Ireland, the chances are that you should be considering your financial affairs immediately.

Previously, the law treated unmarried cohabiting couples – whether heterosexual or same-sex – as individuals without special rights. An attempt to establish quasi-contractual obligations failed in *Ennis v Butterly*. The new act provides for cohabitees to make applications to court for financial relief analogous to a judicial separation or divorce, provided they come within the ambit of the act.

Part 15 of the act deals with cohabitation, from sections 171 to 207. It is aimed at providing improved legal and financial protection for vulnerable and financially dependent cohabitants in the event of death or the break-up of a relationship.

Previously, if an unmarried cohabiting partner died, regardless of how long the cohabiting partners had lived together, there was no obligation to provide for the surviving financially dependent partner. Cohabitants were considered individuals and would only inherit if



specifically left a bequest by will.

If a cohabitant died intestate, there was no provision order under the *Succession Act* for cohabitants to inherit. The estate would pass under the rules of intestacy to the closest relatives, without any consideration of the cohabiting partner.

In contrast, with a married couple, the property would move to the surviving spouse by operation of law. A surviving cohabitant was taxed as a stranger-in-blood for the purpose of inheritance tax if they received a benefit under the will of their deceased cohabiting partner.

In practice, where a party unaware of the act allows their relationship to drift on for five years, and without considering their financial arrangements, they may find themselves being served with court papers to provide for an ex-cohabitant. As a result of the act, the ex-cohabitant may seek orders for maintenance, pension adjustment orders and an interest in a shared property – once they show a court they are financially dependent arising from the relationship. Ending the relationship is not the hard part anymore.

Two prerequisites must be satisfied to come within the ambit of the act. Firstly, you need

FAST FACTS

- Who falls within the ambit of the *Civil Partnership and Cohabitants Act 2010*?
- Improved legal and financial protection for vulnerable and financially dependent cohabitants in the event of death or the break-up of a relationship
- Where a party, unaware of the act, allows their relationship to drift on for five years without considering their financial arrangements, they may find themselves being served with court papers to provide for an ex-cohabitant
- Who qualifies as a cohabitant, and is he or she financially dependent as a result of the relationship?
- The nature and extent of a 'relationship'
- An application must be brought before the court within two years of the time the relationship ends – whether through death or otherwise
- The act makes provision for the recognition of a cohabitants' agreement between couples to regulate their shared financial affairs

to qualify as a cohabitant. Section 172(1) of the act defines a cohabitant as:

1) One of two adults over 18 years of age (whether same or opposite sex),
2) Living together in an intimate and committed relationship of cohabitation, who are not related within the prohibited degrees of relationship, or married, or civil partners of each other, and are
3) Immediately before the relationship ends, living with each other for five years or more. However, if they are parents of dependent children, the requisite period of cohabitation is reduced to two years or more.

Secondly, if the applicant is a cohabitant, then the question arises whether he or she is financially dependent and whether the financial dependence arises from the relationship. Section 172(2) outlines the circumstances the court considers when determining whether two adults are cohabiting and financially dependent:

1) The basis on which the couple live together and their conduct,
2) The degree of financial dependence of either adult on the other and any agreements in respect of their finances, now and in the future,
3) Any joint purchases or joint acquisition(s) of personal property,
4) Any dependent children – who cares for them and their financial obligations?
5) The rights and entitlements of any former spouse or former civil partner. (If they are still married or registered and receiving payments, the court will not grant an order under section 175),
6) The earning capacity of each of the cohabitants and the responsibilities assumed by each of them during the period they lived together as a couple, and the degree to which a cohabitant may have forgone their career, and
7) Any physical or mental disability of the qualified cohabitant.

"Cohabitants who have chosen not to marry and be bound by the legal implications of marriage will have obligations still forced upon them by way of the redress scheme. They must positively act by way of a cohabitants' agreement"

Section 172(3) provides that a relationship does not cease to be an intimate relationship for the purpose of this section merely because it is no longer sexual in nature.

The act places a heavy emphasis on establishing the nature and extent of a relationship. Due to the statutory considerations, it will not necessarily confine itself to couples who live together on a seven-day basis.

It is clearly not the case that a couple who have regular 'one night stands' with each other over a period of five years could be considered to be cohabitees within the meaning of the section. On the other hand, there may be other situations where one party may not consider the relationship 'intimate and committed', while the other party might – and might find themselves caught within the legislation – for example, a couple who have seen each other every few weeks and who have holidayed together over five years; or a couple who have been in an exclusive relationship, one of whom was, for instance, working on an oil rig for months on end.

Further, when does the relationship end in order to calculate when the limitation period begins to run? These questions, or similar, may arise for determination by the courts, which will have to decide on the facts in each case. Thus, the act invites litigation.

An application must be brought before the court within two years of the time the relationship ends – whether through death or otherwise (see section 195 of the act). Such proceedings are held *in camera* under the jurisdiction of the Circuit Court.

An order for redress

The new redress scheme in section 173 of the act will give protection for vulnerable, financially dependent people at the end of a long-term cohabiting relationship. They must show financial dependence arising out of the relationship. Cohabitants may apply to the court on notice to the other cohabitant for an interest in shared property (section 197), maintenance (section 175), pension adjustment order (section 187), and to qualify for inheritance (section 194). The redress scheme may only be activated at the end of a relationship, be it by break-up or death after five years – or two years where there are dependent children of the relationship.

If a couple allows their relationship to drift on, the act will affect them. Cohabitants who have chosen not to marry and be bound by the legal implications of marriage will have obligations still forced upon them by way of the redress scheme. They must positively act by way of a cohabitants' agreement.

Cohabitants' agreement

The act makes provision for the recognition of a cohabitants' agreement in section 202, which is a legal agreement reached between

COHABITANTS' AGREEMENTS

Issues a legal practitioner should consider when drawing up a cohabitants' agreement:

- **Mortgage repayments,**
- **Ownership of individual assets, such as cars,**
- **Payments of household bills,**
- **Bank accounts – joint or single,**
- **Ownership of joint property, whether joint tenants or tenants in common,**
- **Children,**
- **Gift and inheritance,**
- **Life insurance and nomination of death-in-service benefits,**
- **Wills,**
- **Enduring and/or general powers of attorney,**
- **The dissolution of the relationship.**

couples to regulate their shared financial affairs. It is aimed to be a form of protection, and enables couples to regularise, in advance, and identify specific assets, including:

- Property rights,
- Debts,
- Bank accounts,
- Custody/access of their children, and
- Mutual financial support.

Drafting a cohabitants' agreement allows couples to opt out of the redress scheme. In the absence of an agreement, or failing to opt out, couples will be affected by the act and will be open to a court determining whether the aforesaid financial orders should be made.

"A relationship does not cease to be an intimate relationship for the purpose of the section merely because it is no longer sexual in nature"

Some difficulties will arise from this. First, a cohabitee will have to be well informed of the law to make an appointment with their solicitor. Second, an appointment may not be within their budget.

Both parties need to obtain independent legal advice. This can be received together, but they will have to waive, in writing, their independent legal advice. The cohabitants' agreement is to be in writing and signed by both parties. Standard contract law applies.

It may well be the case that cohabitants' agreements will most frequently be put in place relatively early in a relationship.

A question may arise as to what happens if a cohabitee becomes unhappy with its contents after a period of time. The agreement could be varied by consent of the parties, but not unilaterally. However, if the parties cannot agree on variation and the relationship terminates, to what degree will a cohabitee be bound by a cohabitants' agreement that has been overtaken by events? Will the act be of avail, even though the parties had exercised their rights under section 202(3) to opt out of the redress framework?

These are questions that will be answered by the courts as cases arise. Practitioners should note that, while it is prudent for cohabiting couples to enter into a cohabitants' agreement, section 202(4) of the act provides that the "court may vary or set aside a cohabitants' agreement in exceptional circumstances, where its enforceability would cause serious injustice". This could arise, for example, if information was withheld at the time when the cohabitants' agreement was put in place or if there had been a substantial change in circumstances, such that either would cause 'serious injustice'. In such circumstances, the court would be entitled to vary or set aside the cohabitants' agreement.

The new act raises questions that will need to be addressed. This may give rise to a substantial increase in litigation for family law practitioners, particularly where applicants are required to declare the nature and extent of their relationships within the ambit of the act.

Solicitors need to be aware of the necessity to advise cohabiting couples of the consequences of this act. G

LOOK IT UP

Cases:

- *Ennis v Butterly* [1996] 1 IR426

Legislation:

- *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*
- *Succession Act 1965* (restatement, updated to 22 November 2010)

Exchange Programmes 2011

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APPLICANTS ARE REQUIRED TO:

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Law Society of Ireland Justice Media Awards 2011

ALL PICS: LENSMEN

Catching up at the awards ceremony were *(l to r)*: Orla O'Donnell (RTÉ), Dyane Connor (TV3) and Conor Tiernan (press office, TV3)

At the awards in Blackhall Place were *(l to r)*: Paul Reynolds (RTÉ), Keith Walsh (PR Committee member) and Laura Hogan (researcher, *The Morning Show*, TV3)

In the frame *(l to r)*: Jerome Hughes (TV3), Ken Murphy (director general), Brian O'Donovan (TV3) and Owen McArdle (TV3)

At the Justice Media Awards were *(l to r)*: Sheila Flynn (*Irish Mail on Sunday*), Sebastian Hamilton (editor, *Irish Mail on Sunday*) and Niall Farrell (chairman, PR Committee)

At the awards ceremony were *(l to r)*: Deirdre Henchy (awards manager, RTÉ), Padraig O'Driscoll and Lucie Farrell (both *Scannal*, RTÉ)

Attending the Justice Media Awards lunch in Blackhall Place on 2 June were *(l to r)*: Dil Wickremasinghe (Newstalk), Brian O'Reilly (solicitor) and Anne-Marie Toole

REUTERS/Jose Manuel Ribeir

SUMMERTIME READS

NEW TITLES FROM ROUND HALL

Employment Law Contracts and Policies

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Criminal Justice (Theft and Fraud Offences) Act 2001 – Annotated and Consolidated – 2nd edition

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Publication date: July 2011

Equity and the Law of Trusts in Ireland – 5th edition

HILARY DELANY

Price: €125
Publication date: Published May 2011

Journalists and the Law – 3rd edition

YVONNE MURPHY AND DONAL MCGUINNESS

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Publication date: July 2011

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Donegal Bar Association

The Donegal Bar Association hosted a dinner for Law Society President John Costello and director general Ken Murphy at Castlegrove House, Letterkenny, on 17 May 2011. Judge Paul Kelly, the newly appointed District Court judge for District No 1, also attended. Items on the agenda included the proposed wind-down of the Solicitors' Mutual Defence Fund and the perennial PII issue. Donegal practitioners raised particular problems related to ongoing Land Registry delays, specifically delays in completing registrations and difficulties with digital maps that do not correspond with subdivision maps, and some delays with e-stamping. *(Front, l to r)*: Eunan Gallagher, Joann Carson, Catherine O'Doherty, Alison Parke, Margaret Mulrine, Jane Lanigan, John Costello (Law Society president), Judge Paul Kelly, Mairin McCartney, Ken Murphy (director general), Niall McWalters, Geraldine Conaghan and Garry Clarke. *(Back, l to r)*: Paddy McMullin, Dominic Brennan, Aine Murray, Philip White, Declan McHugh, Patsy Gallagher, Catherine Boner, Sean Boner, Brendan Twomey, Michael Gillespie and Brian McMullin

PIC: LENSMEN

The Law Society held a dinner to mark the visit of the President of the Law Council of Australia, Alexander Ward, to the Society's headquarters on 30 May. *(Front, l to r)*: Meg Johnson, Mr Bruce Davis (the Australian Ambassador to Ireland), John Costello (president of the Law Society), Alexander Ward (president of the Law Council of Australia), and Amanda Ward. *(Back, l to r)*: Geraldine Clarke (past-president), Ken Murphy (director general), Yvonne Chapman, Sharon O'Malley, Gerard Doherty (past-president), Mary Keane (deputy director general), Keith O'Malley (career development advisor), Margery Nicoll (director – international, at the Law Council of Australia) and Nicholas Ward

Head in the cloud!

Dillon Solicitors in Dublin have implemented an IT cloud solution to allow it to move closer to the concept of the paperless office. The firm is using what's termed a 'fully redundant, virtual, private-cloud infrastructure' based on Microsoft Small Business Server 2011 and a VMware platform. "The private cloud solution allows us to manage our own applications and infrastructure," says office manager Jane O'Brien. *(From l to r)*: Siobhan Griffin (Trilogy Technologies), Brendan Dillon (managing director, Dillon Solicitors) and Jane O'Brien (office manager)

ON THE MOVE

MH&C appoints Niall Collins

Mason Hayes & Curran has appointed Niall Collins as a senior associate in its EU, competition and antitrust practice. Niall joins from the international law firm Latham & Watkins, having previously worked in the highly regarded EU and competition practice at Ashurst LLP in London. Niall has extensive competition and antitrust law experience in the transport and infrastructure, aviation, technology, insurance, mining and sports sectors. In addition, he will head up the new sports group at the firm.

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MR JUSTICE DECLAN COSTELLO

An appreciation

The many tributes paid to the late Mr Justice Declan Costello have tended to dwell on his political career – and understandably so. Few have matched the qualities of idealism, imagination and energy he brought to that career, and it is all the more remarkable that he was never given the opportunity of making use of those talents for the public benefit in ministerial office. But recognition of the outstanding contribution he made in that sphere has tended to overshadow his many achievements in the law – as junior and senior counsel, attorney general, judge of the High Court and, ultimately, president of that court.

His wide-ranging knowledge of the law, his industry and his shrewdness of judgement ensured his success at the Bar, but were also conspicuous in his later career. The expression 'not one to suffer fools gladly' has sometimes been used by way of a compliment, but also as a euphemism for rudeness and even arrogance. Those were qualities totally foreign to Declan Costello, who, throughout his time on the bench, was the epitome of fairness and courtesy. But he also expected others to match his high standards of probity when they were in court, whether as witnesses, solicitors or counsel. He not only expected counsel and solicitors not to mislead the judge – and, in fairness, they rarely did – but he also did not mask his disapproval for ill-prepared work.

PIC: PADDY WHELAN (MAY 1992), COURTESY THE IRISH TIMES

The range of cases he dealt with as a judge was vast and is amply reflected in the number of his judgments that appeared in the law reports and which will continue to form part of our legal heritage for many years to come. At the Bar, he had specialised in intellectual property cases, in addition to other areas of the law, and he was, of course, assigned to hear such cases as a High Court judge. The mastery of the law and rigorous reasoning evident in such judgments led to their frequent citation in Britain and as far afield as Australia. Perhaps the most notable was his decision on the parameters of commercial confidentiality in the *House of Spring Gardens* case. That judgment was unanimously upheld in the Supreme Court, and those in search of authoritative guidance would be well advised not to confine themselves to the judgments on appeal. In an entirely different area, his judgment in the notoriously difficult field of proprietary estoppel in *Re JR* is an admirable example of a just result arrived at, without any sacrifice of legal principle.

His tenure of office as attorney general was notable for the achievement by him of two major reforms in the law. It was perfectly understandable that successive taoisigh, in nominating the attorney general, were concerned to have as the legal adviser to the government someone in general sympathy with their own political outlook. That does not in any way preclude the attorney from exercising his or her functions in a manner independent of political pressure. But it had given rise to the perception that criminal prosecutions might be subject to such pressures, and his establishment of the Office of Director of Public Prosecutions was a long-overdue reform. So, too, was the setting-up of the Law Reform Commission – a recognition that the bringing of the law into harmony with changing social conditions should not be dependent on what might seem popular at any particular time or on sporadic reform at the judicial level.

He will be sadly missed by his wife, Joan, and their children, three of whom followed him into the law. His achievements in the law, along with his uniquely distinctive contribution to political life, will be long remembered. G

Ronan Keane

Newly qualified solicitors at the presentation of their parchments on 9 December 2010

ALL PICS: JASON CLARKE PHOTOGRAPHY

Mr Justice Nicholas Kearns (President of the High Court), John Costello (president of the Law Society), then Justice Minister Dermot Ahern (guest speaker) and Ken Murphy (director general) were guests of honour at the 9 December 2010 parchment ceremony for newly qualified solicitors: Peter Bough, Caroline Brady, Michael Burns, David Canning, Michael Cantwell, Damien Cashell, Emily Chambers, Jonathan Collins, Anne Connolly, Louise Corbett, Diarmuid Curran, Richard Doyle, Sandra Ellard, Avalon Everett, Niamh Gavin, Mary Golden, Patrick Horan, Catherine Hurley, Sarah Kelly, Kevin Kennedy, Graham Lennox, James Mahon, Shona Marry, Sinead McBreen, Claire McCulloch, Jane McCullough, Marian McGee, Ellen McHugh, Claire McNally, Val Moran, Mary Moroney, Brian Morrissey, Thomas Murphy, Paul Nolan, Yvonne O'Byrne, Barry O'Connor, Siubhán O'Connor, Sinead O'Dea, Aoife O'Malley, Aisling O'Sullivan, Paul Pierse, Karen Quigley, Rachel Rafferty, Denise Roche, Donna Ronan, David Sheehan, Suzanne Styles, Jill Vance, Gillian Walsh, Niamh Walsh and Donna Wearen

Newly qualified solicitors at the presentation of their parchments on 1 April 2011

Mr Justice Nicholas Kearns (President of the High Court), John Costello (president of the Law Society), Fr Peter McVerry (guest speaker) and Ken Murphy (director general) were guests of honour at the 1 April 2011 parchment ceremony for newly qualified solicitors: Fintan Bannon, Eva Bashford, Melissa Benedict-Smith, Leah Browne, Marie-Claire Butler, Sean Carr, Eoin Clarke, Patrick Coburn, John Crowe, John Curran, Tanya Egan, Berni Fleming, Marie Gavin, Anna Gabrielle Gibson, Niamh Gogan, Terence Gorry, Barbara Heffernan, Aileen Hendrick, David Henry, Robert Kelly, Maria Lakes, Martina Larkin, Odhran Lloyd, Jonathon Milne, Barry McAlister, Claire McLoughlin, Joseph McNally, Alice Murphy, Maurice Murphy, David O'Brien, William O'Connor, Joseph O'Flaherty, David O'Flanagan, Lisa O'Higgins, Helen O'Shea, Carine Pessers, Jacqueline Rafferty (née Egan), Aoife Treacy, Raymond Tully and Patrick Ward

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

Mr Justice Brian McGovern (High Court), John Costello (president of the Law Society) and Ken Murphy (director general) were guests of honour at the 14 April 2011 parchment ceremony for newly qualified solicitors: Susan Behan, Sheila Booth, Charlie Bourke, Gavin Bourke, Fiona Brady, Emma Carty, Denise Cassidy, Mary Chawke, Julian Cornelius, John Cronin, Kiara Daly, Jennifer Dooley, Anne Doyle, John Dwyer, Lisa Fahy, Jade Farrelly, Kevin Feighery, Elizabeth Fitzgerald, Carole Foley, Sinead Glynn, Francis Halley, William Harnett, Eva Hartnett, Niamh Hayes, Melanie Higgins, Elizabeth Hughes, Janet Keane, David Kelly, William Lee, Eleanor Lindsay, Jessica Loughnane, Shane Lynch, Emily Mahon, Gavin McArdle, Elaine McCormack, Aoife McDonagh, Carol McGovern, Eoin McGuigan, Sarah McKeogh, Ciara McMahon, Bernadette McTiernan, Niall Moran, Deirdre Murphy, Elaine Murphy, Seona Ní Mhurchu, Caroline O'Connell, Rachel O'Connor, Aisling O'Donnell, Sharon Oliver, Michelle Quinn, Thomas Reilly, Zoe Richardson, Lesley Ryan, Lena-Marie Savage, Claire Shaughnessy, Teresa Tighe, Miriam Treacy, Michael Twomey and Emily Woods

Newly qualified solicitors at the presentation of their parchments on 12 May 2011

Mr Justice Michael Peart (High Court), John Costello (president of the Law Society), guest speaker Imelda Reynolds (president of the Dublin Chamber of Commerce) and Ken Murphy (director general) were guests of honour at the 12 May 2011 parchment ceremony for newly qualified solicitors: John Adams, Damien Barnaville, Olwyn Barry, Jennifer Biggs, John Timothy Bird, Rebecca Boland, John Brady, Susie Bregazzi, Yvonne Brogan, Orla Cavanagh, Michael Cocoman, Chris Comerford, Ciara Connaughton, Chris Connolly, Sinead Constant, Nigel Correll, David Curley, Darina De Róiste, Kate Dineen, Sarah Donohue, Catherine Dundon, Barry Fagan, Ita Feeney, Sara Garvey, Suzanna Gilmore, Rachel Gray, Michelle Halton, Orla Hanna, Maureen Harvey, Stephen Heary, Lisa Heffernan, Siobhán Heffernan, Carol Hennessy, Nessa Joyce, Yvonne Keating, Philip Keegan, Clara Kennedy, Caroline Kerr, Aoife Kilrane, Conor Lennon, Elizabeth MacCarthy, Niall MacCarthy, Mairéad McGuinness, Deirdre McIlvenna, Maura McNamara, Alexandra McSweeney, Aisling Muldowney, Colette O'Beirne, Bryan O'Boyle, Ciarán Ó Conluain, Timothy O'Connor, Maura O'Driscoll, Ann-Marie Olden, Orode Moses Oyiki, Andrew Power, Paul Prenty, Conor Robinson, Patrick Robinson, Suzanne Rushe, Matthew Ryan, Anna Slattery, Laura Spellman, Paul Talini, David Walsh and Catherine White

Termination of Employment: A Practical Guide for Employers (2nd edition)

Alistair Purdy. Bloomsbury Professional (2011), www.bloomsburyprofessional.com. ISBN: 978-1-8476-672-05. Price: €140 (paperback, VAT free).

This is a very useful book for employers, employment lawyers and HR practitioners. As a paperback, it's easy to stick in the overnight case when you are off to an Employment Appeals Tribunal hearing the following morning. It is written in concise, easy-to-understand English, which means you might actually read it as you sit dining alone in yet another NAMA-owned hotel.

It comprises 12 chapters. Chapter 1 identifies the numerous statutory bodies that deal with employment claims and their powers. At pages 26 to 31, the author has inserted a table that sets out the various pieces of legislation, time limits for a claim, where the claim can be brought, where it can be appealed, and how orders made can be enforced. The need for this table is, in itself, an argument in favour of radical reform of the dispute resolution fora.

The chapter on redundancy deals simply, but effectively, with those last-minute doubts in the back of your mind, such as how apprentices, seasonal workers, fixed-term workers, persons on maternity leave and career breaks are affected by redundancy. The section on selection criteria is particularly helpful, as is the author's commentary in relation to tailoring voluntary packages to target particular groups, without falling foul of the equality legislation.

Chapter 7 deals with the taxation of lump-sum payments and is a useful summary of how various payments are taxed.

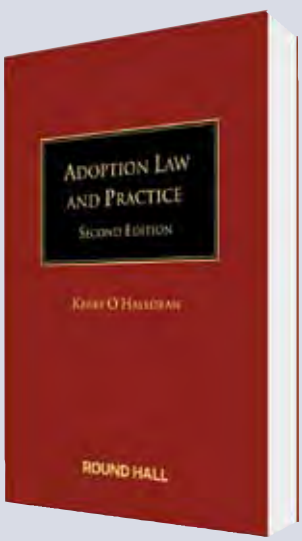
The author devotes a chapter to civil servants, and reviews the disciplinary codes for civil servants, Garda Síochána and the HSE. He also looks at the revised procedures for suspension and dismissal of teachers, and disciplinary procedures for principals.

As the author points out, the book is a practical guide. It serves that function very well.

Jacqui Kelly is a senior associate at A&L Goodbody.

Adoption Law and Practice

Kerry O'Halloran. Round Hall (2010), www.roundhall.ie. ISBN: 978-1-8580-057-75. Price: €245 (hardback, incl VAT).



The core of this volume is contained in part three, which deals with the adoption process. It has comprehensive sections dealing with the role of the Adoption Authority and the High Court in the adoption process. Dr O'Halloran explores both the practical framework and the historical context underpinning adoption.

This book comes at an important time in the context of the implementation of the *Adoption Act 2010* and a greater public and media focus on the rights of children. Dr O'Halloran's book provides invaluable assistance to practitioners seeking to navigate the new act. As well as consolidating the existing legislation, the act deals with the incorporation of the *Hague Convention* into Irish law and the setting up of the new Adoption Authority, which replaces the previous Adoption Board. Both of these issues are dealt with extensively in this book.

Adoption raises many issues – legal, political, social, philosophical and moral. This book will be a useful practice tool for lawyers, social workers and the many others with an interest in adoption.

Brian Horkan is a partner in the administrative law unit of the litigation department in Mason Hayes & Curran.

Data Protection: A Practical Guide to Irish and EU Law

Peter Carey. Round Hall (2010), www.roundhall.ie. ISBN: 978-1-85800-603-1. Price: €185 (hardback)

In this book, Peter Carey provides a thorough account of data protection law in Ireland and Europe in clear, concise and understandable language. Since the enactment of the *Data Protection Acts 1988 and 2003*, companies and individuals have specific duties regarding the manner in which they treat and handle personal data, and Carey provides detailed guidance on the main requirements under the legislation in a well-structured format. The layout of the book makes for an easy read and the numerous text boxes, illustrations and compliance checklists render it very user-friendly.

Carey's book is up-to-date and contains commentary on a number of recent developments in this jurisdiction, including case studies that have been published by the Office of the Data Protection Commissioner, as well as recent case law, such as last year's much-publicised decision in *EMI Records (Ireland) Limited v Eircom Limited*. Also, Carey has allotted one chapter to deal with electronic communications. This chapter clarifies and explains the legislation regulating a number of modern developments in society, including the use of cookies, location data and SMS, and email marketing. The limitations regarding the processing of traffic data are also explained.

Data Protection: A Practical Guide to Irish and EU Law is a helpful reference guide to the law on data protection in Ireland and Europe. It would be a welcome addition to any legal practitioner's bookshelf.

Emma Heffernan is a trainee solicitor at A&L Goodbody.

The A to Z of dictionaries

The Law Society Library has a comprehensive and diverse selection of legal dictionaries and other valuable reference materials, writes Mairead O'Sullivan

Mairead O'Sullivan is executive assistant librarian

The oldest dictionary in our reference library is *Jacob's New Law Dictionary* (1797 edition). First published in 1729, Jacobs was regarded as "a new departure in legal literature". Defining everything from 'Abacot' to 'Zythum', the 1797 edition held by the library is edited by TE Tomlins and remains a prominent and influential legal dictionary and abridgement. The two-volume dictionary provides us with a clear insight into the legal world of the 18th century. Ironically, many of the words defined are as topical today as they were in 1797. *Jacob's* definition of 'bankers', for example, describes how "the monied goldsmiths first got the name of bankers in the reign of King Charles the Second; but bankers now are those private persons in whose hands money is deposited and lodged for safety, to be drawn out again as the owners have occasion for it".

Other dictionaries held by the library include *Stroud's Judicial Dictionary of Words and Phrases* edited by Peter Greenberg. First published in 1890, the current three-volume dictionary held by the library is the seventh edition, 2006. *Stroud's* defines words and phrases used in British legislation, while simultaneously outlining statutory definitions and referencing judgments where particular terms have been defined and interpreted.

Words and Phrases Legally Defined, published by LexisNexis Butterworths and edited by David Hay of the Inner Temple, is, by comparison, a more recent legal dictionary. First published almost 65 years ago, the fourth edition from 2007 contains definitions from statutes and case law – not just from Britain, but from Commonwealth countries such as Australia, New Zealand and Canada.

Iconic American dictionary

Black's Law Dictionary is an iconic American legal dictionary first published in 1891 that contains "clear and precise" legal definitions. In the preface to the ninth edition from 2009, the editor, Bryan A Garner, states that every word and phrase defined in the dictionary "should be plausibly a law-related term – and closely related to the law". The result is a comprehensive and accurate set of legally defined terms.

For this jurisdiction, one of the most familiar legal dictionaries in our collection is *Murdoch's Dictionary of Irish Law*, edited by Brian Hunt BL. Now in its fifth edition (2008), the dictionary proves popular with both students and solicitors alike. It provides its readers with exact, authoritative and comprehensive legal definitions, while simultaneously referencing relevant case law. The dictionary can be purchased in book format or, for those willing to subscribe, it can also be accessed online from Lendac Data Enterprises at http://milcnet.lendac.ie/milc.asp. The online version is included in Murdoch's Irish Legal Companion Database, which facilitates searching for words or phrases across a broad spectrum of legal materials.

The *Irish Digests* (1867-1999) contain legal definitions under the heading 'words and phrases' and are a useful source for definitions as interpreted in case law.

Irish language dictionaries

O'Cathain's *Focail sa Chúirt* (2001) is one of the few Irish legal dictionaries available. It translates English legal terms into Irish and vice versa. In the late 1950s, the Stationery Office published *Terma Dlí*, a concise practical dictionary of legal terms useful for practising solicitors. More general Irish/English dictionaries by Ó Dónaill, De Bhaldraithe and McCionnaith are also available to our users.

Other dictionaries held by the library include a selection of foreign language dictionaries and phrase books in Latin, French, German and Italian, as well as a number of medical dictionaries. We also have *The New Shorter Oxford English Dictionary* in two volumes and *The Concise Oxford English Dictionary*, either of which would be a handy tool for any law office. A combined *Oxford Dictionary and Thesaurus* (2007) is also available. G

JUST PUBLISHED

New books available to borrow

- Buck, Trevor et al, *The Ombudsman Enterprise and Administrative Justice* (London: Ashgate, 2011)
- Buck, Trevor, *International Child Law* (2nd ed) (London: Routledge, 2011)
- Cousins, Mel, *Social Security Law in Ireland* (Netherlands: Kluwer, 2010)
- Delany, Hilary, *Equity and the Law of Trusts in Ireland* (5th ed) (Dublin: Thomson Round Hall, 2011)
- Foxton, David, *Revolutionary Lawyers: Sinn Féin and Crown Courts in Ireland and Britain, 1916-1923* (Dublin: Four Courts Press, 2008)
- Gallagher, Brian and Cathy Maguire, *Civil Service Regulation* (Haywards Heath: Bloomsbury Professional, 2011)
- O'Halloran, Kerry, *Child Care and Protection: Law and Practice in Northern Ireland* (Thomson Round Hall, 2003)
- O'Shea, Jim, *Abuse, Domestic Violence, Workplace and School Bullying* (Cork: Atrium, 2011)
- O'Sullivan, Lynn, *Criminal Legislation in Ireland* (Haywards Heath: Bloomsbury Professional, 2011)
- Peirce, Gareth, *Dispatches from the Dark Side: On Torture and the Death of Justice* (London: Verso, 2010)
- Penner, JE (ed), *Mozley & White's Law Student's Dictionary* (13th ed) (Oxford: OUP, 2008)
- Thurston, John, *A Practitioner's Guide to Trusts* (8th ed) (Haywards Heath: Bloomsbury Professional, 2010)
- Thomson Round Hall conference paper – *Employment Law 2011* (Dublin: Round Hall, 2011)
- Tracey, Lisa, A*n Introduction to Business Law in Northern Ireland* (Dublin: Chartered Accountants Ireland, 2010)

BRIEFING

Law Society Council meetings 20 May and 1 June 2011

Professional indemnity insurance

At its meeting on 20 May 2011, the Council considered a draft consultation paper prepared by the PII Task Force in relation to the profession's recent experiences with the existing freedom-of-choice system for professional indemnity insurance (PII) and the possibilities presented by a master policy.

The Council noted that work had commenced on a prototype draft premium calculator, which would enable practitioners to ascertain the likely premium for their practice under a draft master policy. However, further information and feedback was required in order to develop the calculator and to test its effectiveness.

The Council noted correspondence from a number of solicitors' firms expressing concern that a master policy might be introduced for the forthcoming indemnity period and suggesting that further research was required, including an economic assessment. The Council also considered a legal opinion that concluded that counsel "have not been able to identify any serious objection based on EU or Irish competition law to the proposed master policy".

Several Council members expressed their support for, or opposition to, a master policy. Those in favour of a master policy emphasised that it would provide certainty of cover, run-off cover for retiring practitioners and a structured renewal process. Those opposed to a master policy suggested that it would benefit poorly run firms, would result in increased premiums and was anti-competitive. The task force acknowledged that it had supported continuation with the freedom-of-choice model for the current indemnity period, but that the difficult renewal experience for a significant number of firms in November 2010 and the forthcoming exit of the SMDF from the market had meant that a reassessment was required. With a compulsory system of insurance, it was incumbent on the Society to ensure the best system for the profession as a whole. It appeared that the renewal process in November 2011 was likely to be even more dysfunctional, with an even smaller market than previously.

Strenuous suggestions were made that new insurers were interested in entering the market and, in particular, that the reinsurers to the SMDF were interested in writing a 'line' of direct insurance themselves. The Council agreed to adjourn consideration of the matter to 1 June, to allow the task force to explore this new information.

At its meeting on 1 June 2011, the task force reported that the SMDF reinsurers had confirmed that they would write business directly. While no other new insurers had been identified, strong representations had been made by existing insurers that certain adjustments could be made to the existing arrangements, which would meet a number of the Society's concerns. The task force noted that, if a master policy were to be introduced for the next indemnity period, the consultation process with the profession would have to be very truncated, which was not an acceptable proposition.

Accordingly, the task force recommended that a decision should not be made to introduce a master policy this year. Instead, the Society should continue to develop the master policy proposal and should also explore all options open to it to improve the renewal process for the indemnity period commencing on 1 December 2011, including the introduction of amendments to effect improvements in the minimum terms and conditions, the Qualified Insurers Agreement and the *PII Regulations*. It was agreed that a further Council meeting would be held on 1 July to make final decisions on the amendments to the freedom-of-choice system.

Special general meeting

At its meeting on 1 June, the Council discussed a requisition in writing from more than 100 members for a special general meeting to consider motions directing the Society "to enact enabling regulation(s) to immediately abolish the giving of all undertakings by solicitors to financial institutions" and "to enact enabling regulation(s) to immediately abolish the practice of acting on more than one side of any transaction and not exclusively including conveyancing, banking and commercial transactions and ensuring at all times that parties to any transactions are represented by an independent solicitor", both matters to "be determined by postal vote of the full membership of the Society".

The Council agreed that the issues of undertakings and conflicts in conveyancing transactions were of great importance to the profession. However, the Council also agreed that both issues were too complex and nuanced to lend themselves easily to motions of the general nature outlined. It was noted that two task forces were in existence that were already considering both issues and that wished to engage in a consultation process with the profession.

In addition, the Council was in receipt of legal advice that a general meeting and/or postal ballot that would seek to direct the Council to exercise the Society's statutory regulatory functions in any particular manner would be *ultra vires* and of no effect. The Council agreed that it would not wish to engage in the convening of a general meeting that might mislead members as to its authority and effect.

Instead, the Council agreed to convene a special general meeting to obtain feedback from the profession on the issue of undertakings and conflicts in conveyancing transactions, in order to assist the task forces in their consideration of the issues. In this way, the views of the members could be gleaned, but without falling foul of any legal restrictions.

EU/IMF

The Council noted correspondence from the Department of Justice and Law Reform indicating that the minister had decided not to proceed with the nomination of a Legal Services Ombudsman and had advised his Government colleagues accordingly. The letter noted that the Government had given a commitment in the EU/IMF Memorandum of Understanding to introduce legislation to provide for changes in the regulation of the legal professions. The Society had responded that it would have valuable information and insights to offer in the public interest on the very important policy issues addressed in the Memorandum of Understanding. The Society had offered to engage constructively with the minister in relation to these issues.

In this regard, the Council noted the Society's previous engagement with the then Minister for Enterprise, Trade and Innovation, Mr Batt O'Keeffe, in his consideration of costs in the economy generally, when the Society had assured the minister that the solicitors' profession recognised Ireland's dramatically changed economic circumstances and wished to play its part, fully and constructively, in the restoration to health of Ireland's economy.

Education and training grants

Michelle Ní Longáin reported that three Skillnet grants had been secured by the Society's Professional Training team, together with Career Support. As a consequence, over €250,000 had been secured by the Society, which would be used to provide step-up training and work placements for in excess of 100 unemployed solicitors. A further grant of €37,500 had been secured by Eva Massa, secretary to the EU and International Affairs Committee, for the exchange programmes for solicitors between Ireland and other EU locations.

Practice note

Undertaking to pay development contributions

CONVEYANCING COMMITTEE

The Conveyancing Committee has received a number of queries from solicitors asking whether it is appropriate to accept undertakings from developers' solicitors in relation to compliance with financial conditions in planning permissions.

There are two types of financial condition that may appear in a planning permission:

1) Development contributions are payable under section 48 and section 49 of the *Planning and Development Act 2000* pursuant to the development contribution scheme adopted by each planning authority. Payment can be made on a phased basis, by agreement with a planning authority. The practice is well established that confirmation from the planning authority of payment up to the date that a purchaser is completing their purchase may be accepted as compliance with such a financial condition (see practice note, July/August 2002 *Gazette*).

Preferably, the purchaser's solicitor should insist upon evidence from the local authority that the development contributions have been paid or, if payments are being made in instalments, then paid in respect of the unit being purchased.

However, in the current economic environment, there are developments where the funds are not available to discharge the development contributions due in respect of an individual unit, otherwise than out of the proceeds of sale. In those circumstances, and provided the purchaser's solicitor receives confirmation from the planning authority as to the amount of the development contribution payable in respect of the individual unit (taking into account any indexation and possible interest due in respect of late payment), and that there are sufficient funds out of the net proceeds of sale to discharge that amount (which may involve the consent of the bank, specifying the sum it will accept to discharge its security), then the purchaser's solicitor can accept an undertaking from the solicitor for the vendor to:

- Retain the specified amount out of the proceeds of sale, and
- Forthwith, following completion of the sale, pay such sum to the planning authority in exchange for written confirmation from the planning authority that all financial conditions of the planning permission, insofar as they relate to the particular unit, have been complied with, and
- Furnish such confirmation to the purchaser's solicitor immediately upon receipt.

2) Section 34(4)(g) of the *Planning and Development Act 2000* provides for conditions requiring the giving of adequate security for satisfactory completion of the proposed development. Often such a condition is satisfied by way of a cash deposit or a bond. Frequently, the wording of the condition in a planning permission requires that the security be in place prior to commencement of development. In any event, it is an important protection for a purchaser of a unit that such security be in place. The committee recommends that an undertaking with regard to the provision of such security not be accepted, and that solicitors for purchasers require that such security be in place to the satisfaction of the local authority prior to completion of a purchase. However, there may be circumstances where the planning authority has agreed that such security be provided by way of phased payment of a cash deposit, such cash being provided by the developer out of the proceeds of sale of each unit. In such circumstances, the same principles as those relating to development contributions apply. G

BRIEFING

Legislation update 12 May – 9 June 2011

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

SELECTED STATUTORY INSTRUMENTS

Companies (Auditing and Accounting) Act 2003 (Prescribed Persons) Regulations 2011
Number: SI 113/2011
Content: Provides that the Irish Auditing and Accounting Supervisory Authority may disclose information to the Commission of Investigation (Banking Sector) in accordance with s31(3) of the act.
Commencement: 10/3/2011

Health and Social Care Professionals Act 2005 (Commencement) (No 2) Order 2011
Number: SI 252/2011
Content: Appoints 31/5/2011 as the commencement date for s27(3)(b), part 4, part 5, part 7 (other than ss79(4)(5) and 80(1)(a), part 9 (other than s91 subsections 2, 3, 4 and 5), s94 and schedule 3 of the act.

Road Traffic (Traffic and Parking) (Amendment) Regulations 2011
Number: SI 239/2011
Content: Provides for amendments to the *Road Traffic (Traffic and Parking) Regulations 1997* (SI 182/1997) in relation to disabled persons' permit holders. Revises the criteria for eligibility for a disabled person's parking permit from a focus on type of medical condition to a focus on level of mobility impairment. Removes the exemption of permit holders from the rule against parking again in a public space within one hour.
Commencement: 1/6/2011

Social Housing Allocation Regulations 2011
Number: SI 198/2011
Content: Provides that housing authorities must set out in their allocation schemes the manner in which they determine the order of dwelling allocations to households and a common policy in relation to refusals by qualified households of reasonable offers of dwelling allocations and for related matters.
Commencement: 1/5/2011

Stamp Duty (E-Stamping of Instruments) (Amendment) (No 2) Regulations 2011
Number: SI 222/2011
Content: Amends the *Stamp Duty (E-Stamping of Instruments) Regulations 2009* (SI 476/2009) to remove the optional ability to file paper forms in place of electronic returns from 1 June 2011, except in the specific circumstances specified in the regulations 9 and 13. The Revenue Commissioners may, on application, exempt a person from the obligation to pay and file electronically if they are satisfied that the person does not have the capacity to do so and, in this context, 'capacity' is taken to mean sufficient access to the internet and, in the case of an individual, is not prevented by reason of age, physical or mental infirmity from filing and paying electronically. A person aggrieved at a failure by the Revenue Commissioners to exempt them from the requirements may appeal that failure to the Appeal Commissioners.
Commencement: 1/6/2011

Tax Returns and Payments (Mandatory Electronic Filing and Payment of Tax) Regulations 2011
Number: SI 223/2011
Content: Provides for the mandatory electronic filing of certain tax returns and payment of tax liabilities by certain categories of taxpayers, including from 1/6/2011 for all companies, trusts, partnerships, collective investment undertakings and European Economic Interest Groups; individuals subject to the high earners' restriction for the tax year 2009 or any subsequent tax year; self-assessed individuals benefiting from or acquiring foreign life policies, offshore funds, other offshore products or claiming any of the property or area-based incentive reliefs for the tax year 2009 or any subsequent tax year; self-assessed individuals filing a return of payment to third parties; and 1/10/2011 for employers with more than ten employees. Exclusions may apply for persons who do not have the capacity to access the internet by reason of age, physical or mental infirmity.
Commencement: 1/6/2011 G

Prepared by the Law Society Library

ONE TO WATCH

One to watch: new legislation

European Communities (Mediation) Regulations 2011

On 5 May 2011, the Minister for Justice signed the *European Communities (Mediation) Regulations 2011*, for the purpose of giving full effect to Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

Recourse to mediation

According to regulation 3, a court may, on the application of any of the parties or of its own motion, order that the proceedings or any issue therein be adjourned for such time as to allow the parties to consider mediation.

The court may invite the parties to use mediation to settle or determine the relevant dispute or issue or, where the parties so consent, refer the proceedings to mediation. The court may invite the parties to attend an information session on the use of mediation.

Confidentiality

A mediator shall not be compelled to give evidence in civil or commercial proceedings or arbitration, arising out of or connected with a mediation, except where:

a) It is contrary to public policy or,
b) It is necessary for the purposes of implementing or enforcing an agreement resulting from mediation.

The parties may consent in writing to the mediator giving evidence in civil or commercial proceedings, or an arbitration relating to a matter arising out of, or connected to, the mediation.

The regulations stipulate that a mediation commences upon the appointment of a mediator and ends when the mediator decides that the mediation is at an end.

Enforceability of agreements

Following the use of mediation, as per regulation 3, the parties may enter into an agreement and, with the consent of the others, may apply to the court for an order making such agreement a rule of court, which shall then be enforceable against the parties.

If the parties enter into an agreement following the use of mediation otherwise than under regulation 3, either of the parties (with the consent of the other) may apply to the Master of the High Court for an order to make the agreement a rule of court and therefore enforceable against the parties. The Master of the High Court shall grant an application of this type except where:

a) The terms of the agreement are contrary to the law of the State, or
b) The law of the State does not provide for the enforcement of such an agreement.

Where the latter application is made, but relates to an agreement concerning the exercise of parental responsibility in respect of a child, or maintenance, the Master of the High Court may order that the agreement be deemed an order of the District Court and be enforceable against the parties.

Effect of mediation on limitation and prescription periods

According to regulation 6, any period of time for the purposes of any limitation period specified by statute shall be disregarded during the mediation. The regulations state: "In reckoning any period of time for the purpose of any limitation period specified by the *Statute of Limitations 1957* or the *Statute of Limitations (Amendment) Act 1991*, the period beginning on the day on which the relevant dispute is referred to mediation and ending on the day which is 30 days after the mediation process is concluded shall be disregarded." A mediator shall inform the parties in writing of the date on which mediation concludes. 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

COMPETITION

Medical law

Practice and procedure – undertaking – association – advertising – public interest – appeal from High Court – Medical Practitioners Act 1978.

The appellant had advertised his skills as a medical practitioner and was found guilty of professional misconduct by the Medical Council, composed as it was at the time in accordance with the *Medical Practitioners Act 1978*, later amended. The question on appeal to the Supreme Court for resolution was whether the respondent Medical Council was an association of undertakings for the purposes of competition law at the time when it disciplined the appellant for breach of ethical rules. The appellant, in his action against the council, alleged that it was an association of undertakings. The High Court had concluded that the Medical Council was not an association of undertakings.

The Supreme Court (per Fennelly J; Murray CJ, Denham, Hardiman, Geoghegan JJ) held that the application of guidelines here was characteristic of the exercise of power in the public interest rather than an action taken in the economic sphere in protection of the interests of medical practitioners as undertakings. The advertising restrictions imposed by the ethical rules applied were predominantly motivated by considerations of the interests of patients, which is in the public interest. They were only incidentally concerned with economic matters. It was clear that the Medical Council could not be considered to be an association of undertakings. The court would dismiss the appeal and affirm the order of the High Court.

***Hemat (plaintiff/appellant) v Medical Council (defendant/respondent)*, 29/4/2010** [2010] 4 JIC 2901

CRIMINAL

Sentencing

Revenue offences – good character – whether the trial judge erred in imposing a sentence of imprisonment for demonstration purposes only.

The appellant appealed against the sentence imposed by the Circuit Court for his evasion of Revenue responsibilities over a period of nine years. The appellant was a married man with the responsibility of supporting three children and was a person without previous convictions and was also of good character. The appellant pleaded guilty before the Circuit Court, and the Revenue had been assisted in their investigation by the availability of reasonably well-kept records held by the appellant. The trial judge accepted the likelihood that the appellant would not reoffend in the future and, in imposing the sentence, stated that there was no point in imposing a sentence in order to rehabilitate the appellant as he was not at risk of reoffending. The sentence was imposed purely for demonstration purposes.

The Court of Criminal Appeal (Hardiman J; Budd, de Valera JJ) allowed the appeal, holding that the trial judge excluded from his consideration any ground for a custodial sentence other than the purely punitive. That approach was not in accordance with the accepted jurisprudence and certainly was not in accordance with the established jurisprudence for the treatment of first offenders of good character. The trial judge did not appear to consider that the financial penalty of the same amount as the tax owed in this case, namely, in round figures, half a million euro, was in the nature of a punitive consequence. Furthermore, running interest at the rate between 9% and 12% was undoubtedly punitive. In all the circumstances of this case, the trial judge erred in principle by wholly excluding the personal factors of the appellant from what he seemed to think necessary about the demonstration factor in sentencing. The appellant had already served a significant period of time in custody, and so it was appropriate at this juncture to suspend the balance of the sentence for a period of 12 months.

***DPP (applicant) v Colm Perry (respondent)*, Court of Criminal Appeal, 29/7/2009** [2009] 7 JIC 2903

MENTAL HEALTH

Detention

Wardship – jurisdiction of court – detention in Central Mental Hospital – whether court had jurisdiction to make order sought – Mental Health Act 2001 – European Convention on Human Rights – Bunreacht na hÉireann 1937.

In the proceedings, the Health Service Executive sought declarations that Mr J O'B, the respondent, was a person who lacked capacity to make decisions in relation to his treatment, care and welfare. It was contended that the respondent was a person in need of an appropriate and continuous regime of clinical, medical and nursing treatment in an environment of therapeutic security, and thus an order was sought for his detention at the Central Mental Hospital. It was common case that Mr O'B was not suffering from a mental illness or mental disorder as set out in section 3 of the *Mental Health Act 2001*, and therefore the provisions of that act were of no application. It fell to be considered as to whether the court had the inherent jurisdiction to make the order sought. Evidence was given that the respondent had been diagnosed as displaying mild to moderate learning disabilities associated with very challenging behaviour. The respondent had displayed challenging behaviour throughout his life, including extreme violence at pre-school, numerous assaults, setting fire to a school, and physical aggression towards family members, carers, persons known to him and strangers. The respondent was currently in care in Britain, and his family were anxious to have him placed with the health authorities in Ireland.

Birmingham J made the order sought, holding that the members of Mr O'B's family had been very supportive of his needs and that there were very considerable advantages in having him close to home and family. It is also clear that access to a highly skilled forensic nursing team with training and experience in relation to the prevention and management of violence and aggression would be essential. These requirements could be met at the Central Mental Hospital. Where an adult lacked capacity and where there was a legislative lacuna, the court had jurisdiction to intervene. An order of detention would be made, with reviews to be made every two months, which could be readdressed once a routine was established.

***Health Service Executive (plaintiff) v J O'B (A Person of Unsound Mind Not So Found) (respondent)*, High Court, 3/3/2011**

PROBATE

Testamentary capacity

Succession Act 1965, section 78 – *whether the deceased had testamentary capacity at the date of execution of his will.*

The plaintiff, who was the sole surviving executrix in the will of the deceased, applied to have that will, dated 19 May 2005, proved in solemn form of law as the last will and testament of the deceased. The defendant, who was the widow of the deceased, delivered a defence and counterclaim. By order of the Master made on 5 May 2010 by consent, the issues to be tried were listed. At the hearing, it was agreed by the parties that only the first three issues would be determined by the court at this juncture, namely: (1) whether the will was executed in accordance with the formalities required by section 78 of the *Succession Act 1965*, (2)

whether the deceased knew and approved of the contents of the will, and (3) whether, at the time of executing the will, the deceased was of sound disposing mind and had capacity to make a valid will. At the hearing, it was acknowledged on behalf of the defendant that the will was executed in accordance with section 78. The only evidence given to the court in relation to the deceased's business and his assets at the date of his death was the evidence given by the plaintiff, who acted for the deceased in relation to property investments, conveyancing matters and litigation from 1986 onwards. However, the net value of the deceased's estate was unknown, and the Revenue Commissioners were investigating his affairs. The will of the deceased ran to 23 pages, and bequeathed property to the defendant, the deceased's partner, his children, grandchildren and his siblings. The will also contained complex provisions in respect of trusts. Evidence was given by family members, and by the plaintiff, a witness to the will, and the deceased's secretary regarding the circumstances in which the will was made, and medical evidence was given in relation to the deceased's physical and mental condition in 2004 and 2005 due to motor neurone disease. Evidence was also given of the appropriate practice on the part of a solicitor in addressing the capacity of a person to make a will.

Laffoy J proved the will, holding that, on the basis of sight of the original will and the evidence of two attesting witnesses, the will was executed in accordance with the rules for a will to be valid as set out in section 78 of the 1965 act. The question of whether the deceased was of sound disposing mind when his will was executed was a question of fact, which was to be determined having regard to all of the evidence and by applying the evidential standard of the balance of probabilities. The plaintiff's evidence was accepted as an accurate account of how the deceased's will came into being. The medical evidence in relation to the deceased's condition offered on behalf of the plaintiff was accepted by the court. In applying the test set out in *Banks v Goodfellow* ([1870] LR 5 QB 549), the first question the court had to consider was whether the deceased understood the nature of the act of making a will and its effect. On the evidence before the court, the deceased did understand that, in executing the will, he was executing a document that would take effect on his death and would determine the manner in which assets that he owned, which were in his name, would be distributed on his death. The second question to be considered in accordance with the aforementioned test was whether the deceased understood the extent of the property of which he was disposing. The court was satisfied that he did so understand. The third question under that test was whether the deceased comprehended and appreciated the claims to which he ought to give effect. It was clear that the deceased, when he was making his will, fully appreciated the legal entitlements that the defendant, his partner and each of his children had against him and his estate and his corresponding duty to them. The deceased endeavoured to fulfil his legal and moral duties. Despite the deceased's severe physical disability and cognitive limitations, he did have testamentary capacity at the date of making his will.

***Sharon Scally (plaintiff) v Odilla Rhatigan (defendant)*, High Court, 21/12/2010**

PROPERTY

Judgment mortgage

Practice and procedure – joint tenancy – deceased spouse – Land and Conveyancing Law Reform Act 2009. The appellant issued six special summonses in 2003 relating to one of the judgment mortgages registered by the appellant against the interest of the defendant in certain loans. The defendant then died. The question arose, on appeal to the Supreme Court, as to the impact of the registration of a judgment mortgage against the interest of a joint tenant in registered land and whether this severed the joint tenancy. The second-named respondent contended that the registration of a judgment mortgage against the interest of the deceased who was one of two joint tenants did not sever the joint tenancy. It was argued as a result that the second-named respondent became the sole owner of the lands by right of survivorship, free from the judgment mortgages. The question also arose as to the impact of the *Land and Conveyancing Law Reform Act 2009*.

The Supreme Court (per Finnegan J; Denham, O'Donnell JJ) dismissed the appeal and affirmed the order of the High Court, holding that it was regrettable that the legislature had not attempted to fully clarify the reliefs and remedies available to a judgment creditor for the benefit of both the judgment creditor and the judgment debtor. The respondent's joint tenancy had not been severed. The surviving joint tenant took free of any burden.

***His Honour Judge Alan P Mahon & Others (plaintiff/appellant) v Lawlor, administrator ad litem of the estate of Liam Lawlor, deceased (defendants/respondents)*, Supreme Court, 25/11/2010 [2010] 11 JIC 2504** G

BRIEFING

Eurlegal

Edited by TP Kennedy, Director of Education

Recent developments in European law

DISCRIMINATION

Cases C-47/08, C-50/08, C-53/08, C-51/08, C-52/08, C-54/08, C-61/08 and C-52/08, *Commission v Belgium, France, Luxembourg, Germany, Greece and Portugal*, 24 May 2011

The commission brought proceedings against six member states, as they reserve access to the profession of notary to their own nationals. The commission argued that this was discrimination on grounds of nationality, prohibited by the *EC Treaty*.

The states concerned argued that the profession of notary is connected with the exercise of official authority within the meaning of the *EC Treaty* and is therefore exempted from the treaty rules on freedom of establishment. They argued that the notary is a public office holder.

The CJ held that the action concerned solely the nationality condition imposed for access to the profession of notary and did not relate to the organisation of the notarial profession. The primary function of the notary is to authenticate legal instruments. The instruments authenticated are documents and agreements freely entered into by the parties. The notary's intervention presupposes the prior existence of an agreement or consensus of the parties. The activity of authentication does not involve a direct and specific connection with the exercise of official authority.

The fact that the activity of notaries pursues an objective in the public interest, namely to guarantee the lawfulness and legal certainty of documents entered into by individuals, is not in itself sufficient for that activity to be regarded as directly and specifically connected with the exercise of official authority.

Equally, the other activities of notaries are not connected with the exercise of official authority.

Emissions: an issue in environmental law

Most of those acts are carried out under the supervision of a court or in accordance with the wishes of clients.

Notaries practice their profession in conditions of competition, which is not characteristic of the exercise of official authority. They are also directly and personally liable to their clients for loss arising from any default in the exercise of their activities, unlike public authorities, liability for whose default is assumed by the state. Thus, their activities do not fall within the exercise of the official authority exception, and the nationality condition required for access to the profession is discrimination on grounds of nationality.

Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, 10 May 2011

Mr Römer worked for the city of Hamburg as an administrative employee from 1950 until he became incapacitated for work in May 1990. From 1969, he lived with his partner, with whom he entered into a civil partnership under a German law of 16 February 2001. He informed his former employer of this by letter on 16 October 2001. He then requested a recalculation of his supplementary retirement pension on the basis of the more favourable tax category applicable to married pensioners. In September 2001, his monthly retirement pension would have been €302.11 higher if the more favourable tax category had been taken into consideration in order to determine the amount.

By letter of 10 December 2001, the city of Hamburg refused to apply the more favourable tax category in order to calculate the amount of his supplementary retirement pension, on the basis that only married pensioners and pensioners entitled to claim child benefit or an equivalent benefit are entitled to that advantage.

Mr Römer argued that he was entitled to be treated as a married pensioner. He argued that this right was derived from Directive 2000/78, which establishes a general framework for equal treatment in employment and occupation. He brought proceedings before the Labour Court in Hamburg, which in turn referred questions to the Court of Justice.

The CJ noted that supplementary retirement pensions fell within the scope of the directive. The court found that German law provides for the same obligations for registered life partners as for married spouses. Thus, the two states are comparable. The pension paid to a spouse was greater than that paid to a partner in a registered life partnership. Mr Römer's pension contributions were equal to those of his married colleagues.

The applicant was entitled to assert his right to equal treatment by reason of the primacy of EU law. This right can be claimed by an individual against a local authority, and it is not necessary to wait for that provision to be made consistent with that law by the national legislature. The right to equal treatment can be claimed by an individual only after the time limit for transposing the directive, namely from 3 December 2003.

ENVIRONMENTAL LAW

Joined Cases C-165/09 to C-167/09, *Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten van Groningen* and *College van Gedeputeerde Staten van Zuid-Holland*, 26 May 2011

Directive 2008/1, concerning integrated pollution prevention and control, lays down the principles governing the procedures and conditions for the grant of permits to construct and operate large industrial installations.

Any permit must include emission limit values for the polluting substances likely to be emitted from the installation concerned. Directive 2001/81 introduced a system of national ceilings for emissions of certain pollutants. Member states had to ensure that those ceilings were not exceeded after 2010, by means of programmes for the progressive reduction of emissions of the pollutants covered.

In this case, actions were brought before the Dutch Council of State concerning permits for the construction and opera-

tion of three power stations fuelled by pulverised coal and biomass.

In these actions, environmental organisations and citizens argued that the emission ceilings of the Netherlands would not be complied with by the end of 2010, and thus state authorities should not have granted these permits or should have imposed stricter conditions.

The Dutch court asked the CJ to interpret the two directives. The court held that national authorities are not obliged to include, among the conditions for the grant of that permit, national emission ceilings.

Reviews by member states of their emissions must be conducted on the basis of an overall assessment, taking account of all the policies and measures adopted in their national territory. A specific measure relating to a single source of pollutants, consisting in the decision to grant a permit for the construction and operation of an industrial installation, does not appear liable, in itself, to seriously compromise the results prescribed by the directive.

JURISDICTION

Joined Cases C-509/09 and C-161/10, *eDate Advertising v X Olivier Martinez* and *Robert Martinez v Société MGN Ltd*, 29 March 2011

Advocate General Pedro Cruz Villalón applied article 5(3) of the *Brussels Regulation* to defamation. Article 5(3) provides that, in cases of tort, the court of the place where the harmful event occurred has jurisdiction.

In *Shevill*, the Court of Justice held that the court of the place giving rise to the damage (the place of publication) has jurisdiction to award damages for loss suffered, while the courts of the place where loss is suffered each have jurisdiction to compensate for the loss suffered in that particular jurisdiction.

In the current case, the advocate general proposed adding a new head of jurisdiction for defamation. The court of the place of the "centre of gravity of the conflict" would also have jurisdiction to award damages for the entirety of the loss. The conflict between freedom of information and privacy should be determined where the victim has the centre of his life and activities, if the media could have predicted that the information would be relevant in that jurisdiction.

For determining whether information should be considered as relevant in a given jurisdiction, account should taken of a variety of factors, such as the language used and the content of the information. The point of this exercise is not to determine the intention of the media, as this is not directly relevant for the purposes of article 5(3).

In *eDate*, the German court also asked the CJ about the impact of the *E-Commerce Directive* (2000/31) on choice of law. Article 3(2) of the directive provides that "member states may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another member state".

The advocate general found that there is no 'hidden' choice of law provision in the directive. G

NOTICES

WILLS

Flynn, Michael (deceased), late of Riverview, Cong, Co Mayo. Would any person having knowledge of a will executed by the above named, who died on 4 September 1985, please contact Coughlan White & Partners, Solicitors, Moorefield Road, Newbridge, Co Kildare; tel: 045 433 332, fax: 045 433 096, email: orooney@coughlan solicitors.ie

Graven, Michael (deceased), late of 59 Riverdale Court, Castlebar, Co Mayo, who died on 21 October 2005. Would any person having knowledge of a will made by the above-named deceased please contact Egan, Daughter & Co, Solicitors, Castlebar, Co Mayo; tel: 094 902 1375, fax: 094 902 2136

Gurley, John (otherwise Sean) (deceased), late 130 Le Fanu Road, Ballyfermot, Dublin 10, who died on 20 October 2009. Would any person having knowledge of the whereabouts of any will executed by the above-named deceased please contact Patrick Tallan & Company, Solicitors, New Town Centre, Ashbourne, Co Meath; tel: 01 835 2027, fax: 01 835 2029, email: info@patricktallan.ie

Harford, Kathleen (deceased), late of Knocksedan Cottage, Knocksedan, Swords, Co Dublin, who died on 27 March 2010. Would any person having knowledge of any will executed by the above-named deceased, please contact Jim E Campbell, solicitor, Omega House, Collinstown Cross, Dublin Airport, Co Dublin; tel: 01 844 7400, fax: 01 844 7433

Hearne, Patrick (deceased), late of 15 Woodbury, Ballinakill, Waterford City. Would any person having knowledge of an original will made by the above-named deceased in 2005, who died on 7 June 2010, please contact Purcell Cullen Kennedy, Solicitors, 21 Parnell Street, Waterford; ref: J/P/14653; tel: 051 874 819, fax: 051 855 874, email: info@purcellcullen.ie

McCabe, John (deceased), late of Knocksedan Cottage, Knocksedan, Swords, Co Dublin, who died on 13 December 1986. Would any person having knowledge of any will executed by the above-named deceased please contact Jim E Campbell, solicitor, Omega House, Collinstown Cross, Dublin Airport, Co Dublin; tel: 01 844 7400, fax: 01 844 7433

Meghen, Patrick (deceased), late of 11 Curzon Street, South Circular Road, Dublin 8, who died on 2 March 2011. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Corrigan & Corrigan, Solicitors, 3 St Andrew Street, Dublin 2; tel: 01 677 6108, email: info@corrigan.ie

Wistow, Mary (née Kennedy) (deceased), late of Derrymore, Colimore Road, Dalkey, Co Dublin and Clonskeagh Hospital, Dublin 6. Would any person having knowledge of a will made by the above-named deceased, who died on 27 April 2011 at Clonskeagh Hospital, Dublin 6, please contact Leman Solicitors, 8-34 Percy Place, Dublin 4; DX 93; tel: 01 639 3000, fax: 01 639 3001, email: dkearney@lemansolicitors.com

MISCELLANEOUS

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Notice: EBS Limited
Subject to regulatory approvals, EBS Building Society will demutualise and become a subsidiary of Allied Irish Banks plc on 1 July 2011. With effect from this date, EBS Building Society will cease to be a building society and will be incorporated as a private company limited by shares called **EBS Limited**. Please note the new legal name of EBS and ensure that, from 1 July 2011, **EBS Limited** is used in all correspondence and on all legal documentation, in particular, any mortgage or other security document and on solicitor undertakings

RATES

Professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

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

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ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for Aug/Sept *Gazette*: 17 August 2011. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

NOTICES

TITLE DEEDS

Property: first registration

Property Registration Authority, Chancery Street, Dublin 7.

To whom it may concern – re: property at 39 Dublin Road, Bray, Co Wicklow: application by Thomas Sutton for first registration based on possession; reference: D2011LR052503E.

Take notice that Thomas Sutton, of 39 Dublin Road, Bray, Co Wicklow, has applied to be registered as owner in fee simple of the property at 39 Dublin Road, Bray, Co Wicklow. Would any person having knowledge of the whereabouts of De Butts estate contact the undersigned within 21 days from the date of this publication.

Gerard Collins,
Examiner of Titles

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 Eric Ormiston

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 269 Harold's Cross Road (formerly known as 2 Brooklyn Terrace and 2 Sans Souci) in the city of Dublin, held under lease dated 17 June 1873 from John West Elvery of the one part and William Close of the other part for the term of 859 years from the date of said lease, subject to the yearly rent of £4.

Take notice that Eric Ormiston, 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 (if any) in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the under-mentioned solicitors within 21 days from the date of this notice.

In default of any such notice being received, the said Eric Ormiston 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 unascertainable

Date: 1 July 2011

Signed: Rosemary Ryan & Co (solicitors for the applicant), Roseville, Lavarna Grove, Terenure, Dublin 6W

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 Eric Ormiston

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 271 Harold's Cross Road (formerly known as 1 Brooklyn Terrace and 1 Sans Souci) in the city of Dublin, part of the premises held under lease dated 17 June 1873 from John West Elvery of the one part and William Close of the other part for the term of 859 years from the date of said lease, subject to the yearly rent of £4.

Take notice that Eric Ormiston, 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 (if any) in the said property, and any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property is called upon to furnish evidence of their title thereto to the under-mentioned solicitors within 21 days from the date of this notice.

In default of any such notice being received, the said Eric Ormiston 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 unascertainable.

Date: 1 July 2011

Signed: Rosemary Ryan & Co (solicitors for the applicant), Roseville, Lavarna Grove, Terenure, Dublin 6W

RECRUITMENT

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

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

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

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

Facebook juror sentenced to eight months

A juror who contacted a defendant via Facebook, causing a £6 million drugs trial to collapse, has been jailed for eight months for contempt of court, the BBC reports.

London's High Court heard that Joanne Fraill (40) of Blackley, Greater Manchester, had contacted Jamie Sewart (34), who had already been cleared in the drugs case. Sewart, of Bolton, was given a two-month sentence suspended for two years after she was found guilty of contempt.

Fraill cried uncontrollably in court, and gasped "eight months" – as did her family – as her sentence was handed down on 16 June. Fraill is likely to spend four months in jail, at which point she will be eligible for early release.

Sentencing Fraill, Lord Judge said in a written ruling: "Her conduct in visiting the internet repeatedly was directly contrary to her oath as a juror, and her contact with the acquitted defendant, as well as her repeated searches on the internet, constituted flagrant breaches of the orders made by the judge for the proper conduct of the trial."

Judge: 'Dis me, I'm Irish'

An Orlando-based judge has admitted he violated judicial ethics through rude, loud and angry behaviour that he once said was due to his "Irish temper", reports *law.com*.

Circuit Judge Timothy Shea also expressed remorse and agreed to receive a public reprimand from the Florida Supreme Court in a stipulation filed on 1 June 2011. It also was signed by lawyers for Shea and the Judicial Qualifications Commission, which investigated the judge.

Shea admitted he demeaned a female prosecutor by saying it's best to let a woman talk until she's finished – while holding up his hand and moving it like a mouth talking.

He also once asked the same prosecutor if she was helping another assistant state attorney "by bringing her a sandwich?"

One outburst was so loud that Shea's yelling was heard outside his courtroom.

Possessives are nine-tenths of the law

A Missouri lawyer took aim at his opponent's legal drafting skills in a motion that criticised 'long-winded' allegations and the use of apostrophes.

"This petition is the worst example of pleading that the defendant's attorney has ever witnessed or read," wrote Springfield lawyer Richard Crites.

Crites complained that his opponent's possible problem with possessives when referring to "defendants" and "defendant's" makes it difficult to discern which defendant she is referencing. "Defendant does not know whether plaintiff is just not familiar with the use of possessives or whether plaintiff was referring to merely one of the two defendants.

"Without answers to these questions, and dividing this long-winded allegation into separate paragraphs, there is no way on God's earth that the defendant can reasonably be expected to answer this diatribe," Crites wrote.

Stress out – feel good!

Feeling tired and disillusioned? Then sort out your work/life balance, take a holiday or find a less stressful job – or so the current advice from employment gurus goes. But could stress and long hours be the route to a good life? *BBC News Magazine* cites a controversial new American book, *Rush: Why You Need and Love the Rat Race*, which argues that, far from being ground down by pressure, we need stress to feel alive. It keeps our minds agile, makes us feel good about ourselves and helps us live longer.

Author Todd Buchholz, a former economic adviser at the White House, says he began researching a book about people "chasing success and losing their souls". But when he looked into the subject, he changed his mind. He concluded that, rather than slow down, we need to throw ourselves into the rat race, compete harder and relish the stress.

"You've got the happiness gurus, yoga instructors and occupational psychologists telling us there's too much stress," he says. "We need to run away and unplug. But the fact is, we've evolved to handle stress.

"When we try new tasks, dopamine is released in the frontal cortex of our brains as a reward and we feel good. It's not the reward for winning, it's the reward for being in the game," says Buchholz.

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New Openings

Asset Finance – Associate to Senior Associate: Our client is a leading law firm with a strong asset finance department specialising in in leasing, structured and cross-border financing and securitisations. Candidates will be working in private practice with prior experience in the banking and financial services. You will be advising leading domestic and international financial institutions, lessors, airlines, financial and investments advisers.

Asset Management and Investment Funds – Associate to Senior Associate: Our client is a top tier firm with an excellent Funds practice. The successful candidate will be advising investment managers, custodians, administrators and other service providers of investment funds on establishing operations in Ireland. You will have experience of advising clients on the legal and regulatory issues involved in the structuring, establishment and listing of investment funds.

Banking – Associate to Senior Associate: Our client acts for all the major banks operating in the Irish market. The group has grown significantly in recent years and is now one of the largest banking practices in Ireland. The successful candidate will be experienced in structured finance, project finance and securitisation transactions and be comfortable in providing regulatory advice to banks and other financial services institutions.

Insurance – Associate to Senior Associate: Working within a dedicated team in a first class law firm you will have previous experience of corporate insurance work either in private practice or in-house. You will be dealing with global insurance and reinsurance companies advising on M&A, regulation and corporate governance in the insurance sector.

Employment, Pensions and Benefits – Associate: Working with one of the leading teams in this field, the successful candidate will have experience of pensions regulatory compliance, pensions trusteeship issues and the drafting of trust documentation. You will be working with a range of domestic and international employer companies, state bodies and trustees of pension schemes.

IT/Technology – Senior Associate – Contract: A top Dublin practice is searching for an experienced IT practitioner with strong exposure to commercial contracts to include agency, franchise and distribution agreements. Anticipated duration of the contract will be 12 months.

IT – Associate to Senior Associate: Our client advises on commercial contracts including agency, distribution, franchise and procurement agreements as well as the IT aspects of M&A and other corporate transactions. Clients include major technology and R&D businesses and software companies. We are searching for experienced IT/Outsourcing practitioners seeking a fresh challenge.

Regulatory and Compliance – Associate to Senior Associate: Working with one of Ireland's top flight practices, you will have prior experience in regulatory/compliance matters working either in a law firm or in-house. You will have advised directors, senior management, in-house counsel and compliance officers on their obligations under new and existing regulation and assisted in implementing risk management and compliance systems.

Tax – Senior Associate: Our client is a high calibre law firm with an enviable domestic and international client base covering all major business sectors. Applicants will have the appropriate professional qualifications. We are particularly interested in candidates with significant exposure to the Financial Services sector.

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

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